Tagore Law Lectures. 1895.

THE

LAND LAW OF BENGAL

(WITH BEHAR AND ORISSA).

BY THE LATE

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THE SECOND EDITION

BY HIS SON

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PREFACE

TO THE SECOND EDITION.

This fresh edition of the Tagore Lectures on the Land-laws of Bengal has been compiled from notes mostly made by the lecturer during his life-time. The alterations in the law since the publication of the previous edition were incorporated in the text under his direction. Most of the alterations and additions have been put into square brackets.

Case-notes have been, as far as possible, brought up to-date. But as it has taken well-nigh four years to pass the pages through the press, war-difficulties and strikes being mainly responsible for the delay, a few important cases will be found wanting in the footnotes. Particularly noticeable are :—

Harihar Banerji v. *Ramshashi Roy*, (1918) I. L. R. 46 Calc. 458= L. R. 45 I. A. 222=23 C. W. N. 77=29 C. L. J. 117, on the proper form of notice to quit ;

Paramananda Das Goswami v. *Kripasindhu Roy*, (1918) I. L. R. 46 Calc. 378=L. R. 45 I. A. 246=23 C. W. N. 393=29 C. L. J. 175, on the nature of *sarbarakari* tenures in Orissa ;

Durga Prashad Singh v. *Tribeni Singh*, (1918) I. L. R. 46 Calc. 362 =L. R. 45. I. A. 251, on the nature and incidents of *ghatwali* tenures ;

Juscurn Boid v. *Pirthichand Lal Choudhury*, (1918) I. L. R. 46 Calc. 670=L. R. 46 I. A. 52=23 C. W. N. 721=30 C. L. J. 71, on the question whether the remedy provided in favour of the purchaser by section 14 of the Putni Regulation excludes all other remedies, on the scope of the said section and on limitation in such cases ;

Secretary of State for India in Council v. *Jatindra Nath Choudhury*, *per* Fletcher & Ghose JJ., (1920) 24 C. W. N. 737, on the law applicable to Sundarbund lands and allied points ;

Chandra Binode Kundu v. *Ala Bux Dewan*, (Special Bench), (1920) I. L. R. 48 Calc. 184=24 C. W. N. 818=31 C. L. J. 510, on the right of a sole landlord to sell an occupancy holding in execution of a money decree against his *raiyat* (vide footnote 4 of page 339 of the lectures) :

Amar Chand Roy v. *Prasanna Dasi, per* Mookerjee & Fletcher JJ., (1920) 25 C. W. N. 9, on the right of a *raiyat* at fixed rate to grant a permanent lease :

Chandrakanta Nath v. *Amiad Ali Hazi*, (Full Bench), (1920) 25 C. W. N. 4=32 C. L. J. 296, on the effect of a permanent lease by an occupancy *raiyat*, as between him and his tenant ;

Mohsenuddin v. *Baikuntha Chandra Sutradhar*, (Full Bench), (1920) 25 C. W. N. 29=32 C. L. J. 286, on the right of an occupancy *raiyat* to surrender portion of his non-transferable holding which he has already transferred to another ;

Nilmani Kar v. *Sati Prosad Garga Bahadur*, (Full Bench), (1920) 25 C. W. N. 230=32 C. L. J. 302, on the construction of section 52 (6) of the Bengal Tenancy Act ; and

Khetramoni Dasi v. *Jiban Krishna Kundu*, (1920) 25 C. W. N. 361=L. R. 48 I. A. 39=33 C. L. J. 214, on the scope of section 52 (*1*) (*b*) of the Bengal Tenancy Act.

The abovementioned cases have not materially affected the text of the lectures, except on the question of transferability of occupancy holdings.

The case of *Forbes* v. *Maharaj Bahadur Singh*, (1914) I. L. R. 41 Calc. 926=L. R. 41 I. A. 91=18 C. W. N. 747=25 C. L. J. 434, has not also been incorporated in the lectures at the express wish of the lecturer, in as much as it has, in his opinion, created on anomaly in the law.

The lecture on the Scheduled Districts and Orissa has been greatly amplified, particularly by the addition of a statement of the laws in Sambalpur.

I am grateful to my friend, Mr. Narendrakumar Basu, Vakil, Calcutta High Court, for kindly preparing the General Index.

CALCUTTA,)
5th July, 1921.) S. M.

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ERRATA.

[*Obvious mistakes and mistakes in the footnotes and in the first Table of of Cases have not been included in the Errata. The Nominal Index will be found to be accurate and serve the purpose of errata of footnotes and the other Table of Cases.*]

page 10. l. 9 from top. *read* 'one sixth' in place of 'one six.'

page 41. ll. 13 & 14 from top. *omit* "III. Temporarily... Sunderbunds."

" . l. 15 from top. *read* "III" in place of "IV."

page 44. l. 20 from top. *add* "greater part of" before "Palamow."

page 53. ll. 17 & 18 from top. *omit* "and Act VIII (B. C.) of 1879."

" . ll. 20 & 21 from top. *read* "Act II (B. & O.) of 1913" in place of "Chapter X.....section 189 of the Act."

page 61. l. 4 from bottom. *read* "Commissioner" in place of "Collector."

page 97. l. 1 from top. *read* "given" in place of "proved."

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(Prefixes such as *Babu*, *Bairagi*, *Bibi*, *Chaudhuri*, *Dewan*, *Gosain*, *Hazi*, *Khaja*, *Koer*, *Lala*, *Maharaja*, *Maharani*, *Mir*, *Mirza*, *Mohunt*, *Moulvi*, *Musammat*, *Nawab*, *Raja*, *Rani*, *Sir*, *Sri*, *Srimati*, *Syed*, *Thakur*, &c., are generally omitted).

[Where a case has been reported in more than one book, all references have been given as far as possible. Some references which came to be omitted in the body of the book have been stated in the Tables of Cases.]

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The Land-Law of Bengal.
(with Bihar & Orissa.)

LECTURE I.

INTRODUCTION.

THE Land Tenures of Lower Bengal formed the subject of the Tagore Law Lectures for the year 1874-75. The present course of lectures on the Land Law of Bengal will cover much the same ground and I have the advantage of having the learned lectures on Land Tenures to help and guide me. The subject, however, is one of great importance and high authorities have said that it is incapable of satisfactory treatment. Besides, oriental scholars, both in India and Europe, have, since the year 1875, succeeded in discovering by their indefatigable labours many of the juridical ideas about rights in land that prevailed in ancient India. The texts of our sages and the various commentaries thereon have, almost all of them, been now published and translated into English. The large mass of information collected by the Rent Commission resulted in the enactment of the Bengal Tenancy Act of 1885, which has materially altered the law of Landlord and Tenant in many of the districts in the Lower Provinces of Bengal.[1] Add to all this the judge-made laws and the expositions of codified and customary laws that we find in the twenty-three volumes

The Tagore Law Lectures on Land Tenures (1874-5).

Researches and changes since 1875.

[1] The Bengal Acts VIII of 1886, V of 1894, III of 1895, III of 1898, I of 1903 and I of 1907 and Eastern Bengal and Assam Act I of 1908, as well as the Chotanagpur Tenancy Act (VI of 1908) and the Orissa Tenancy Act (II of 1913) have since further modified the law.

of the Indian Law Reports published since the learned lectures on Land Tenures were delivered.[1]

Archaic notions in India about property in land.

Following the usual practice, I must begin these lectures by saying a few words about the ancient notion in India as to the origin of property in land—a notion which is not quite archaic, as it is still prevalent amongst the people, wherever Mahomedan or British influence has not been much felt. "A field," says Manu,[2] "is his who clears it of jungle, game is his who has first pierced it." The later Roman jurists held the same opinion as regards the origin of property in land. Modern jurists have, by the adoption of the historical method of investigation, come to the conclusion that this notion about origin of proprietary right in land is without foundation. But the illustration given in the Digest [3] is curiously the same as that given in Manu. "Wild beasts, birds, fish, and all animals which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the law of nations, the property of the captor, for natural reason gives to the first occupant that which had no previous owner."[4]

Property arises from first occupation.

Mahomedan Jurists.

The great Prophet of Arabia said,—"Whoever cultivates waste lands does thereby acquire property in them." The Mahomedan jurists differ in their interpretations of this text of the Koran. According to Abu Haneefa, the mere cultivation of waste land is not enough to create a real right in the cultivator; the permission of the chief is necessary for the acquisition of proprietary right. But his disciples Abu Yusoof and Mahammed, both of whom were judges under the celebrated Caliph Harun-al-Rashid, maintain that no permission of the chief is necessary to make the cultivator the proprietor. They

[1] We have now 43 volumes besides Weekly Notes and the Law Journal.

[2] "स्थाणुच्छेदस्य केदारमाहुः शल्यवतोमृगम्"—Manu, Chap. IX, *v.* 44.

[3] Digest, Chap. XLI, 11.

[4] Sandars' Justinian, p. 95 (13th. imp 1910).

say that waste lands are "a sort of common goods and become the property of the cultivator in virtue of his being the first possessor in the same manner as in the case of seizing game or gathering fire wood."[1] It may be said that the Mahomedan Jurists who were familiar with the writings of the Roman Juris-consults, the Digest and the Pandects, borrowed this notion of proprietary right in land from the Eastern Empire and accepted the theory without much consideration. The words of the Prophet, however, are significant, as we have no reason to believe that he himself had access to the theoretical doctrines that prevailed as to juristical right in land in the later days in the Eastern Empire.

Blackstone.

Blackstone's theory is well-known and does not require repetition. It is only an amplification of what the ancient lawyers had accepted as the origin of the idea of proprietary right.

Sir Henry Maine.

Sir Henry Maine, in his well known work on Ancient Law, has discussed at length this theory of the origin of proprietary right, and he comes to the conclusion that though this theory, "in one form or another, is acquiesced in by the great majority of speculative jurists," "the application of the principle of occupancy to land dates from the period when the Jus Gentium was becoming the Code of Nature, and that it is the result of a generalisation effected by the juris-consults of the golden age."[2]

Savigny.

The great German jurist, Von Savigny, has dwelt at length upon the Roman theories about possession and *prehension* and the rights acquired thereunder, and it is stated that he was of opinion that property arose from "adverse possession ripened by prescription." It does not appear that he agreed with the view of the Roman lawyers.

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[1] Hamilton's Hedaya, Book XL. v 3.

[2] Maine's Ancient Law, Chap. VIII, p. 261 (Pollock's Ed. 1909).

Consensus.

It is unnecessary to enter here into the debatable ground as to the origin of property in land, and I would feel extremely diffident in expressing any opinion on a point on which great authorities have not agreed. It is enough for me to say that the juristical conceptions of the Indian sages, who lived and thought at a time when Rome itself was in its infancy, were identical with the notions accepted in other countries in later times. This notion about the origin of proprietary right in land was firmly established in India. Even the great Indian poet Bharavi says :—

वनाश्रयाः कस्य मृगाः परिग्रहाः—
मृगाति यस्तान् प्रसभेन तस्य ते ॥[1]

"To whom do wild animals belong? They are his who first pierces them." It should be remembered that the Indian sages and lawgivers seldom made any distinction between movable and immovable property. Our Aryan fathers, whether the theory of migration from Central Asia be believed or not, had in Aryyavarta a vast quantity of land, uncultivated and not unlikely covered with virgin forests. They were fond of agriculture and called themselves tillers (*ri* to till), in contradistinction to the barbarians inhabiting the forests and hill tracts around, who lived upon the precarious fruits of hunting and the still more precarious natural products of the earth. Premium was necessarily given to agriculture, and he who took possession of land, cleared it and tilled it, was the person considered entitled to hold it on unmolested.

Earth *res communes* according to ancient Indian authorities.

Notions about proprietary right could hardly find place amongst people in the earlier stages of civilisation. They are due to juridicial refinement. The great Indian sages did not turn their attention to theory; they took a practical view of proprietary right. Earth, according to them, was common property just as air or water;—a

[1] Kiratarjunyam, Canto XIV, v. 13.

right to portions of it accrued from occupancy. The right was not to the soil but to the usufruct. They made no distinction in principle between *res nullius* and *res communes*. Jaimini's aphorisms, which, according to European authorities, were composed many centuries before Christ, is—"Earth cannot be given away as it is common to all." [1] Savara discussing the question of the right of the king to give away his kingdom in the sacrifice (Yajna) known as Viswajit, and commenting on the aphorism says—"Earth is the common property of all human beings; though there may be occupiers of particular portions of it, none can be the owner of the whole earth." [2] Sayana also commenting on this aphorism says:—"The soil is the common property of all and they through their own efforts enjoy the fruits thereof. Therefore it follows that though pieces of land belonging to particular individuals may be given away, the earth cannot be given away (even by the king)." [3] To Roman Jurists "things capable by appropriation of becoming the objects of private property," but originally belonging to none, would be *res nullius*, and what belonged to no one would become "the property of the first one that takes possession of it." [4] The Indian idea would seem to indicate that land was communal property. Sir Henry Maine and jurists of his school are

Jaimini.

Savara.

Sayana's commentary.

[1] "न भूमिः स्यात्सर्व्वान् प्रत्याविशिष्टत्वात्"।
VI. 7. 2.

[2] "क्षेत्राणामीशितारो मनुष्या दृश्यन्ते
नतु कृत्स्नस्य पृथिवीगोलस्य"।
Mimansa Bhashya VI. 7. 2.

[3] तस्यां भूमौ स्वकर्म्मफलं भुञ्जानानाम्
सर्व्वेषां प्राणिनां साधारणधनं। अतोऽ
साधारणस्य भुखण्डस्य सत्यपि दाने
महाभूमेर्दानं नास्ति।
Nayamálá Vistara, p. 358.

[4] D. 41, 1, 3; Gaius II. 66; Hunter on Roman Law (4th. Ed. 1903), p. 256.

also of opinion that in India land was considered to be communal property. *Res communes*, according to Roman Law, included property belonging exclusively to the public in which no private right could be created, as the seashore or the right of fishing in the sea. On the other hand, occupation might create right in communal property, and by continual occupation, even underground, right might be acquired by the occupier. [1]

Non-Aryan races of India.

Amongst the non-Aryan races in India, who are thought to be the aboriginal inhabitants, the idea still clings that kings are only entitled to rent;—land whether cultivated or waste belongs to the people. The Mundas of Chotanagpur, who claim as a nation to be the first occupiers of the soil, are so strong in their opinion that they have contested in courts of law the right of the Rajas (the Nag family) to let out on lease the forests which afford timber. The Mundas think that they have exclusive right to the timber which grows in the primeval forests of the hill tracts and the king or zemindar is only entitled to levy tax.[2]

Ownership of the subject to land recognised by early Hindu kings.

From the tenor of deeds, of undoubted antiquity, of sales and alienations of estates, to be found in the Mackenzie Collections, and from the traces of individual proprietary right discovered in Canara, Tanjore and other parts of the country, in which the Mussulman Government was never or only partially established, there is every reason to conclude that this right of the subject to the ownership of land was universally recognised by ancient Hindu kings.[3] Private property in land seems to have been recognised as a sacred right, which even the hand of despotism would rarely violate.

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[1] Hunter on Roman Law, (4th. Ed. 1903), p. 310; Sandars' Justinian, Lib. II, tit. I.

[2] This notion prevails in many other parts of the country not excluding Midnapur and Orissa.

[3] Ricard's India, Vol. I, p. 282.

High Courts recognize the right of the first occupant.

The right, according to Hindu law, of the first person who makes beneficial use of the soil, was recognised by some of the Judges of the Calcutta High Court in the well-known case of *Thakooranee Dossee v. Bisheshur Mookerjee* [1] and by the Madras High Court in two cases from Malabar.[2] Sir Charles Turner, the then Chief Justice of Madras, said—"According to what may be termed the Hindu common law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil. The crown is entitled to assess the occupier with revenue, and if a person who has occupied land omits to use it and the claim of the crown to revenue is consequently affected, the sovereign is entitled to take measures for the protection of the revenue. Whether the practice which has obtained in certain districts of requiring a person who desires to cultivate waste land to apply to the local revenue officer for permission to do so, has abrogated in those districts the Hindu law, or whether it may be justified by the establishment in those districts before British Rule of the analogous doctrine of the Mahomedan law, we consider it unnecessary to determine in this suit, for we have found that the land appertains to the district of Malabar, and we agree with the judge that there is no presumption in that district and in those tracts administered as a part of it that forest lands are the property of the crown."

Sovereign entitled only to a share of the produce.

What, then, was the right which the king or chief had in the land in his kingdom? The Hindu Sages said, and said repeatedly, that the sovereign was not the proprietor of the soil. He was entitled to a share of the usufruct of the land in the occupation of his subjects, not because he was the owner, but because a share was payable to him as the price for the protection afforded

[1] (1865) B. L. R. Sup. Vol. p. 202 *sc.* 3 W. R. (Act X) 29.

[2] Secretary *v.* Vira, I. L. R. 9. Mad. 175; Secretary *v.* Ashtamurti, I. L. R. 13 Mad. 93.

to life, liberty and property. The records of Hindu thought from the earliest times point to this conclusion.

Rig Veda.

In the tenth Mandal of the Rig Veda occurs the passage—"May Indra ordain that your subjects pay only to you tax (Vali)."[1]

Narada.

Narada, commenting on this text, defines *vali* in his Smriti—"Both the other customary receipts of a King and what is called the sixth of the produce of the soil form the royal revenue, the reward (of a king) for the protection of his subjects."[2] European scholars have agreed in asserting that the Rig Veda is the earliest record, we have, of human thought, habits, manners and customs, especially of the Eastern Aryans. They say that the sacred hymns were composed at a time when our Aryan fathers were just leaving a nomadic life and were taking to agriculture as the principal means of subsistence. I do not ask you to accept the theory that these hymns were composed about fourteen hundred years before the birth of Christ or earlier. To me, as to many of you, these hymns are of divine origin, but accepting as true the conclusions of the European scholars, the text and the gloss of Narada show that even at an early stage of civilisation, when the king was really the *dominus*, he had no right to the soil,—he was paid only for the protection he afforded.

The later sages are unanimous in this theory of the king's right. I give you only the references without comment. The texts of Manu are well known.[3]

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[1] अथो त इन्द्रः केवलीर्विशो बलिहृतस्करत्।

VIII. 8. 173.

[2] अन्यप्रकारादुचिताद्भूमेः षड्भागसञ्ज्ञितात्।

बलिः स तस्य विहितः प्रजापालनवेतनम्॥ Narada Smriti, Ch. XVIII, *v.* 48. Sacred Books of the East, Vol. XXXIII, p. 221.

[3] Manu, Ch. VII, *v.* 130; Chap. X, *v.* 120; Chap. X, *v.* 118.

Other ancient texts.

Yajnavalkya repeats the same idea in verses 335 and 337.[1] Apastamba[2] also enunciates the same doctrine of the king's right. Vasishtha, speaking of the king's right, agrees with the opinion of the other sages.[3] The Vishnu *Smriti*, which is said to be an ancient *dharmasutra*, speaking of the king's duties, says:—"He must take from his subjects as tax a sixth part of every ear of the paddy."[4]—"A sixth part of flesh, honey, clarified butter, herbs, perfumes, flowers, roots, fruits, liquids and condiments, wood, leaves (of the palmyra tree and others), skin, earthen pots, stone vessels and anything made of split bamboo."[5]

Baudhayana.

I ought to have mentioned earlier the name of Baudhayana, as his language would show that his *dharmasutra* was of a more ancient date. He says:—"Let the king protect his subjects, receiving a sixth part."[6]

Parasara.

It is needless to quote any further texts on the subject. It is enough to say that even Parasara, who is said to be the latest of the *sutra* writers, agrees in saying:—"He (the king) receives taxes, and therefore

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[1] पुष्यात् षड्भागमभादत्ते न्यायेन परिपालयन् ।
सर्व्वदानाधिकं यस्मात् प्रजानां परिपालनं ॥ 335.
अरक्ष्यमाणाः क्रुर्वन्ति यत् किञ्चित् किल्बिषं प्रजाः ।
तस्मात्तु नृपतेरर्धं यस्माद्रक्षाल्यसौ करान् ॥ 337.

Yajnavalkya, Bombay Edition, pp. 98-99.

[2] Apastamba, Chap. IX, 10 and 26-9.

[3] Chap. XIX 26-27.

[4] प्रजाभ्योबल्यर्थं संवत्सरेण धानात: षष्ठमंशमादद्यात् ।

Vishnu Smriti V. 22.

[5] मांसमधुघृतौषधिगन्धपुष्पफलमूलरसदारुपत्राजिनमृत्भाण्डाश्मभाण्डवैदलेभ्य षष्ठभागम् ।

Vishnu Smriti V. 25.

[6] "षड्भागभृतो राजा रक्षेत् प्रजाम् ।

Hultzsch's Editions, p. 30.

he should protect his subjects from thieves and others." [1] I would only add that the authorities are not unanimous as to the king's share of the grain. The opinion of most of the text writers is that it is the sixth, but you will find when you go through all of them that sometimes an eighth, tenth and even a twelfth is considered as proper. Gautama says:—"Cultivators must pay to the king a tax amounting to one-tenth, one-eighth or one-six of the produce." [2]

Jaimini Mimansa.

Let us now see what later Indian authorities have said on this important subject. I would once more draw your attention to the Mimansa Aphorism of Jaimini, which I have already quoted, and Savara's and Sayana's commentaries thereon. Savara, discussing the question of the king's right in the passage to which I have already referred you, says:—"He (the king) cannot make a gift of his kingdom as it is not his, as he is entitled only to a share of the produce by reason of his affording protection to his subjects"; [3] and Sayana adds—"A king's sovereignty lies only in his punishing the wicked and protecting the good." [4] I need hardly say that Sayana, known better and far more widely for his commentaries of the *Vedas*, is said to have lived about the fourteenth century of the Christian era. The word *bhumipati or bhupati* means the protector of the earth. This was such a well recognised idea that

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[1] अत्राप्यपद्रवं राजा तस्करादिसमुद्भवं ।
संरक्षेत् सर्व्वतो यत्नात् यस्मात् षट्भाग्यसौ करान् ॥
Vrihat Parasara.

[2] Gautama, Ch. X., v. 24.

[3] सार्व्वभौमत्वेऽस्य त्वेतदधिकं यत् असौ पृथिव्यां सम्भूतानां व्रीह्यादीनां रक्षणेन निर्विष्टस्य कस्यचित् भागस्य ईष्टे न भूमेः ।

[4] दुष्टग्रिच्चाग्रिष्टपरिपालनार्थं राज्ञ ईशित्वं स्मृत्यभिप्रेतम् इति । न राज्ञीभूमिधनं किन्तु तस्यां भूमौ स्वकर्म्मफलं भुञ्जानानां सर्व्वेषां प्राणिनां साधारणं धनम् ॥

you will find, in many Sanskrit books, the word 'king' is used as synonymous with the expression, "the appropriator of sixth of the produce." [1] Even so late as the fifteenth century of the Christian era, when the Mahomedan Government was firmly established in Bengal, and Mahomedan ideas about the relationship between the king and the subject, as contained in their books on law, were well known and well recognised, Srikrishna Tarkalankar in his commentary on the Dayabhaga of Jimutavahana says,—"By conquest and other means a king acquiring a kingdom has no other rights over his subjects than that of collecting taxes." [2] You should, however, remember that the Mahomedan conquest of India was never complete. Either from necessity or idleness, the conquerors did not disturb the existing state of things they found in the country. They did not materially interfere with the fiscal system based on the old Brahminical ideas—a system which had prevailed for thousands of years before they planted the crescent on Indian soil. Abu Haneefa and Abu Yusoof and the other great jurists, who thought and wrote under the early Caliphs, made little impression, at all events, no permanent impression, on the Indian fiscal system. The crescent was floating in the air triumphantly marking the conquest by the followers of the Prophet; but they introduced no changes in the conquered country except such as necessarily followed a government headed by men professing a religion almost diametrically opposed to the Brahminical creed.

Sub-letting originally unknown.

The Aryans were essentially agriculturists and cultivators and, as we have seen, they took pride in the art in which they were superior to the aboriginal races

[1] षष्ठांशभाक्।

[2] अतएव राज्यान्तराधिकारिणः सकाशात् अन्यनृपतिना क्रीते राज्यान्तरादौ विक्रेतृस्वत्वसजातीयं करग्रहणोपयोगि स्वत्वमेव तस्य जायते।

Srikrishna on Dayabhaga.

around them. It was not then a disgrace, a cause of shame, as unfortunately it now seems to be, to hold the plough and "break the stubborn glebe." In those early days there must have been many a Cincinnatus in Aryyavarta; but this state of things could not last long. Either from necessity, or from indolence, or from an abundance of Sudra labourers, subletting soon became common. In *Thakooranee Dossee* v. *Bisheshur Mookerjee*,[1] Mr. Justice Campbell, afterwards Sir George Campbell and Lieutenant-Governor of Bengal, is reported to have expressed the same opinion. The primitive state of Society, which gave the first occupier a right to continue in occupation and no more, could not possibly last long. Complications must necessarily arise and did as a matter of fact arise, and Hindu sages had to grapple with the relations which the more developed state of things required them to deal with. Narada and Parasara had copiously to deal with questions on the relationship of landlord and tenant. I propose to deal later on with the rights of cultivators and the share of the produce which they had to give to the owner of the land or tenure-holder.

Intermediate tenures later creation.

Intermediate tenures also were apparently unknown in earlier days. The text books deal only with the right of the owners of land and cultivators. Intermediate tenures must have come into existence in a more developed stage of society. Even the Mahomedan Government and the British Government, in its earlier days, as will be seen later on, were unwilling to recognise as valid the creation of intermediate tenures.

Cultivation insisted on

Cultivation of land in early days was strongly insisted upon and penalties were prescribed for non-cultivation by *raiyats*. This was a matter of necessity when population was small and the extent of uncultivated area very large. Vyasa says—"If a man after

Vyasa.

[1] (1865) B. L. R. Sup., Vol. 202, *sc.* 3 W. R. (Act. x) 29.

taking a field with the object of cultivating it fails to do so, either himself or through the agency of others, he should be made to pay to the owner a proportionate share of the corn which the field could have yielded if it were cultivated and, in addition, a fine to the king." [1]

Narada. Narada also has laid down that "when a field is abandoned by its owner and the same is cultivated by another without opposition, the cultivator is entitled to the whole of the produce and the owner would not get back the land without paying the cost of the clearance and cultivation." [2]

Yajnavalkya. So Yajnavalkya says:—"When a man does not cultivate, either himself or by means of others, he should be made to pay to the owner of the field the amount of grain which the field would have yielded if it had been duly sown with crops." [3]

Village communities. I cannot leave this part of the subject without saying a few words on Village Communities. They have been said to be "little commonwealths, independent, self-acting, organized social groups." Sir Henry Maine, in his well-known work on "Village Communities in the East and the West," has given them such an importance in the history of the growth of ideas about legal rights in land, that no essay on Land Law would be complete without something said on them. The part supposed to have been played by them in the formation and development of society and ideas as to proprietary right

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[1] क्षेत्रं गृहीत्वा यः कश्चित् न कुर्य्यात् न च कारयेत्।
स्वामिने तत्फलं दाप्यो राज्ञे दण्डञ्च तत्समम्॥

Quoted in Vivadaratnakara.

[2] विक्रीयमाणे क्षेत्रे चेत् क्षेत्रिकः पुनराव्रजेत्।
खिलोपचारं तत् सर्व्वं दत्त्वा क्षेत्रमवाप्नुयात्॥

Narada Smriti Chap. XI. 24.

[3] "फालाहृतमपि क्षेत्रं यो न कुर्य्यात् न कारयेत्।
स प्रदाप्यः कृष्टफलं क्षेत्रमन्येन कारयेत्"॥

Yajnavalkya, Bombay Edition, p. 218.

in land is a matter of very great importance, and I would refer you to that admirable book for a fuller study of the nature of Village Communities and their status as political units. Each of these communities or *guilds*, if I may use that word, was governed by a council of elders who were called *mandals*, *pradhans* or *jeyt raiyats*. Each community had its accountant or *patwari*, watchmen, or *chowkidars*, a family of priests, a family of astrologers, a smith, a barber, a potter and a washerman. In the larger of these communities, families of physicians, minstrels and musicians were also to be found. Thus each community could supply to its members the ordinary demands of life, independent of the rest of the world. The headman, assisted by arbitrators or the Council of of Elders, administered criminal justice on petty offenders and decided questions about civil rights amongst the members of the community. The sentences of these village tribunals were enforced as mandates of constituted courts of justice, the force of public opinion and the fear of being cast out of the community having been sufficient motives for obedience. They had also duties which municipal commissioners of the present day have. Each community had a public the temple dedicated to Siva, *Dharma* or Kali, and the meetings of the Council of Elders used to take place in the temple or somewhere near it. But it is a matter of surprise that our *Dharma Sastras*—texts and commentaries—make no reference to these communities. These works, the records of early life and thought, afford us little assistance in tracing the history of the rise and growth of these interesting groups.[1]

Their importance.

In Bengal proper, village communities existed and do still exist in a dismembered condition, but in the North-Western Provinces they are to be found even now in a

[1] It might be that these communities were essentially of non-aryan origin the Brahmins and other superior caste-people of Aryan original having only subordinate place in them.

more or less complete form. It is difficult, however, to say what the importance of these communities was in relation to rights in land. The fact that they were political units, that the headman or the Council of Elders was occasionally responsible to the *raja* or the king for the *king's share* of the produce of the village, would not make the land the common property of the villagers as a body. There is, as far I have been able to gather, no reason to believe that there was any communal idea of common or joint ownership of land current among the members of any Village Community. The different families that occupied or cultivated the fields in a village were not even theoretically the descendants of the same parents and there was no necessary kinship amongst them, as has sometimes been erroneously supposed. These families frequently belonged to different *gotras* and to different castes, and if the members called each other cousins, it was not on account of any relationship by blood or marriage. Nearness of residence and familiarity arising therefrom created a semblance of propinquity; and a stranger, a European, may be led to think from a cursory glance at the outer surface that the members of the community were connected by blood or marriage, generations back. But deeper insight would at once show that there was no reason to believe that there was any other connection amongst the members than the social tie, which must necessarily exist amongst a number of men living close to each other. Of course one community had land and land-marks distinct from those of another, but each family had rights in the land in its occupation well recognised and distinct from that of another. In the settlement of land revenue in Bengal there was not a single instance of settlement with a village community. The number of permanently settled estates in Bengal and Bihar at the end of the official year 1892—93, was 134,789. Not one of these was a settlement with a

village community as such, not even a settlement with a village headman as representing a village corporation.

Each family was proprietor.

The truth seems to be that in Bengal whatever the social and political significance of these village communities might be, whatever the part they played in the progress of civilisation, they had not much to do with legal rights or the conceptions about legal rights, of the owners or occupiers of lands, of individual members or the families. Each of these families had its own piece or pieces of land for homestead and cultivation, and the family was the owner thereof. The common grazing ground and the common water course, the village temple and the village gods were communal property in which the families were interested in common, but beyond this there seems to have been no unity of proprietorship. Each family cultivated its own land, as it had done for years, nay for centuries, and under certain circumstances the interest which they had in land was transferable. The family could sub-let land or get it cultivated by hired labourers. There were restrictions, no doubt, but those imposed were not of a character that would indicate any detraction from proprietary right. The restrictions were for the convenience of the neighbouring holders of land or other members of the community. They were in the nature of the right of pre-emption.

Each village had defined boundaries.

Each village, however, had, as I have already stated, defined limits or landmarks. Yajnavalkya speaking of boundary disputes says, that they are to be decided by old men, chiefs and others.[1] The venerable

[1] सीमां विवादे क्षेत्रस्य सामन्ताः स्थविरादयः ।
गोपाः सीमाकृषाना ये सर्व्वे च वनगोचराः ॥

Yajnavalkya, Bombay Edition, p. 213.

In boundary disputes, the following persons are to ascertain the respective limits of fields and villages as indicated by the natural elevations, trees, dams, mole hills, husks, bones and masses of charcoal buried underneath and edifices of worship, *viz*, old men, peasants, tillers of contiguous fields, rangers in the woods and the inhabitants of the neighbouring villages.

commentator Vijnaneswara adds that these disputes might refer to provinces, villages, fields and homesteads,[1] indicating thereby that each village had its boundary line and each family its fields. Narada[2] has an entire chapter on boundary disputes ; but he deals more largely with disputes amongst the members themselves of the same village community. Vrihaspati similarly devotes a chapter of his *sutras* to this subject, and he begins by saying—"Hear the laws concerning boundaries of villages, fields, houses and so forth."[2] I would not tire your patience with quotations of well known texts from the *Manava Dharmasastra*. Sir Henry Maine when speaking of village communities in the east seems to suppose that these peculiar groups were referred to by Manu, "although," he says, "the English found little to guide them to its great importance in the Brahminical codified laws of the Hindus which they first examined." The fact, however, is that beyond certain statements as to boundary-marks and the procedure as to determining them and certain other matters to which I shall presently draw your attention, I have not been able to find anything in the code of Manu to lead me to believe that the great sage had the idea of the property of village communities being, in any way, communal.

Grazing ground was common property.

Each village had its grazing ground for the cattle of all its residents and cultivators. It was common property and none had the right to appropriate any part of it for purposes of cultivation. Manu[3] has laid down that grazing grounds are the common property of the village, and the people encroaching upon them are liable to punishment. Yajnavalkya also lays down substantially the same rule, and the author of the Mitakshara, commenting on the passage, says—"A

[1] Chap. IX.
[2] Sacred Books of the East, Vol. XXXIII, pp. 155 & 351.
[3] Manu, Ch. VIII.

portion of land should be left uncultivated for the grazing of cows." [1]

Agricultural lands not common property.

These and similar customary rights which village communities had could hardly be construed as shewing that at any stage of the history of these communities the entire land occupied or cultivated by the villagers was considered to be common property. Teutonic or Scandinavian village communities, no doubt, resembled in many respects similar institutions in India, but there were marked differences as regards the rights of individual members. As I have already said, these latter were, at least at their later stages, merely unions for political purposes—protection from outside enemy and peaceful domestic government. As to Bengal proper, Sir Henry Maine says that from causes not yet fully determined the village system has fallen into great decay. For all practical purposes, therefore, a detailed consideration of the history and rights of the village communities is unnecessary in these lectures.

Acquisition of right by adverse possession.

Possession has always played an important part in all systems of jurisprudence in the acquisition of right in land, and the first tiller might lose his right by adverse possession by another. It is quite clear

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[1] ग्रामेच्छया गोप्रचारोभूमौ राजवशेन वा।
द्विजस्तृणेधःपुष्पाणि सर्वतः सर्वदा हरेत् ॥
गवादीनां प्रचारार्थं किंचानपि भूभागोऽक्रष्टः परिकल्पनीय इत्यर्थः।
धनुःशतं परीणाहो ग्रामे क्षेत्रान्तरं भवेत्।
हस्ते शते खर्वटस्य स्यान्न गरस्य चतुःशतम् ॥

Yajnavalkya, Bombay Edition, p. 221.

A certain portion of the land is to be set apart as pasture, according to the will of the villagers or the direction of the king The twice born may glean fuel, flower or grass from any place and at all times.

Fields in a village are to be ordinarily separated from one another by an intervening uncultivated space of a hundred *dhanus* (*i.e.*, 200 yards) on all sides. If the village abounds in thorn the space is to amount to 200 *dhanus* (400 yards). In cases of populous towns the space to be left open shall be 400 *dhanus* or (800 yards). See also Manu, Ch. VIII., 237.

that during the long period in which the *sutras* were composed by the venerable sages with whose names you must be familiar,[1] right by possession and effect of adverse possession as creating prescriptive rights were well understood and recognised. The Vishnu *Smriti* lays down:—"If possession has been held of an estate by three (successive) generations in due course, the fourth in descent shall keep it as his property, even without a written title."[2] Vrihaspati has an entire chapter on title by possession. He says—"When possession undisturbed (by others) has been held by three generations (in succession), it is not necessary to produce a title; possession is decisive in that case."[3] The next three *slokas* repeat the same idea, and in the thirty-first and thirty-second *slokas* uninterrupted and long-standing possession is considered to be necessary to create title by possession, and the sage adds—"A witness prevails over inference; a writing prevails over witness; undisturbed possession which has passed through three lives prevails over both."[4] In another *sloka* the sage seems to imply that a period of thirty years is time enough. "He whose possession has been continuous from the time of occupation, and has never been interrupted for a period of thirty years, cannot be deprived of such property."[5] I cannot here resist the temptation of quoting, though it is out of place, another verse from the same *sutra* in which the doctrine of estoppel by conduct is recognised as creating

Estoppel by conduct.

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[1] Manu, Atri, Vishnu, Harita, Yajnavalkya, Usana, Angira, Jama, Apastamba, Katyayana, Vrihaspati, Satatapa, Vasistha, Narada and Parasara.

[2] त्रिभिरेव तु या भुक्ता पुरुषैर्भूर्यथारीति।
लेख्याभावेऽपि तां तत्र चतुर्थः समवाप्नुयात् ॥
Institutes of Vishnu. Chap. V, 187, Jolly, p. 28.

[3] Chap. IX *v.* 27, Sacred Books of the East, Vol. XXXIII, p. 313.

[4] Chap. IX *v.* 32, Sacred Books of the East, Vol. XXXIII, p. 314.

[5] Chap. IX *v.* 7, Sacred Books of the East Vol. XXXIII, p. 310.

title. "He who does not raise a protest when a stranger is giving away (his) landed property in his sight, cannot again recover that estate, even though he be possessed of a written title to it."[1] Narada also refers to possession for three generations;[2] other authors of the *sutras* have reduced the period to twenty years. "If a man knowingly and without complaint allows another, who is in no way related to him, to be in possession of his land for twenty years and of movable property for ten years, his right to the same becomes extinguished."[3] Vyasa, whose authority in these matters is very high, is also of opinion—"If the land of one is possessed by another for twenty years, his right to sue for possession ceases."[4] Mitra Misra in his Viramitrodaya, a work of great authority in the Benares school, giving his own gloss on these texts, comes to the conclusion—"If a person whose land or movable property is enjoyed by another for more than twenty or ten years respectively, if he is not an idiot or a minor, his right to sue for the recovery of the same becomes barred and the possessor acquires a title."[5]

Period necessary to create title by adverse possession.

Other sages, notably Katyayana, are of opinion that *asmarta kala* (time immemorial) creates title. Raghunandana who was a contemporary and fellow student of Chaitanya and who lived in the fifteenth century

[1] Ch. IX, v. 9, Sacred Books of the East, Vol. XXXIII, p. 310.

[2] आन्वयेन तु यत् &c.

[3] पश्यतोऽव्रवतोर्भूमेर्हानिर्विंशतिवार्षिकी।
परेण भुज्यमानाया धनस्य दशवार्षिकी॥
Yajnavalkya, Bombay Ed., p. 125.

[4] वर्षाणि त्रिंशतिं यस्य भुक्त्वा तु परैर्गृहं।
सति राज्ञि समर्थस्य तस्य सेहं न सिध्यति॥

[5] अजड़स्वेदपोगण्डो विषये चास्य भुज्यते।
भग्नन्तत् व्यवहारेण भोक्ता तद्धनमर्हति॥
Viramitrodaya, Jivananda Vidyasagar's Edition, p. 210.

after Christ in Nadiya has attempted to reconcile the apparently conflicting texts, and has held that according to all authorities, "before the lapse of twenty years the possessor's right accrues only to the things produced by his own labour and after that period his right is perfected."[1]

Extinguishment of right by limitation.

We thus see that though originally the first occupier of land was considered as the true owner and entitled to the usufruct, he or his heirs could lose the right on account of adverse possession by another, that is to say, limitation in the language of Anglo-Indian law.[2] The period of adverse possession creating right or barring remedy was originally considered to be time immemorial or three generations. It was reduced to thirty years, and later on, the most approved authorities considered twenty years as the legitimate time to perfect possession into title by prescription. The law of England as to acquisition of right by prescription passed through similar stages, until the period was reduced to twenty years, and quite recently to twelve years.

Non-alienability of land in ancient times.

The right to enjoy the usufruct by the first occupier or his legal representatives became in course of time alienable. It would seem that originally it was only heritable but not alienable. Vijnaneswara, in his well known commentary on the text of Yajnavalkya, expounded what was in his days the idea as to non-alienability of a land when it was occupied by the members of a joint family and was ancestral. But the rival idea as to alienability was making its way, and Vijnaneswara himself admitted the right as exercisable under certain circumstances. Jimutavahana, however,

[1] "विंशति वर्षात् पूर्वं स्वकृतिसाध्यकर्षणपालनाद्यै कृत्पन्नप्रद्रव्येष्वेवस्वत्वं, तत्तत् कालपरतस्तु भूमौ गवादिधनेच स्वत्वमिति।"

Vyavaharatattwa, Madhusudan Smritiratna's Edition, p. 32.

[2] Act XV of 1877, Sec. 28.

entirely discarded the theory of non-alienability, and according to him every owner of land, if a male, had full right to transfer the same either by gift or sale. The *sutras*—the prime source of Hindu law and best means we have of knowing archaic Indian ideas on any subject—were slow to recognise the right. You will find in them texts in which the sages held that land once acquired was property which was for the benefit of all generations to come.

Mahomedans had their own system of Jurisprudence.

Such or nearly such were the principal juridical theories prevailing in India as regards acquisition and ownership of land. In came the Musalman conquerors about the beginning of the thirteenth century. They had their own system of jurisprudence which differed in many respects from what they found to be in existence in India. Their doctrines, however, of fiscal system were of recent date. Abu Haneefa and his two disciples Abu Yusoof and Mahammad had done much to consolidate and give a turn to the theories and practices of the earlier *Caliphs*; but considerable development was still needed. When the followers of Mahomet established themselves, in India, they found that they were among a nation, just as the Romans had found themselves among the Greeks. The Hindus had a developed system of Jurisprudence and a contest both as to theories and practices between the Hindu and Mahomedan notions was almost inevitable. The result, however, has shewn that in the contest the Hindu principles survived. Akbar's Hindu proclivities are well-known. Yajnavalkya[1] has said that as soon as a country is brought under subjection, the people ought to be governed

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[1] यस्मिन् देशे य आचारो व्यवहारः कुलस्थितिः।
तथैव परिपाल्योऽसौ यदा वश्यमुपागतः॥

Yajnavalkya, Bombay Edition, p. 100.

according to their own laws, manners and customs. This is a well-approved rule of international jurisprudence, and the Musalmans, however much they hated any rules or principles except those laid down in the Koran, were compelled in India to accept, in many instances, the ancient Hindu principles. They respected possession, and the strict rules applicable to infidels, according to their own jurists, were not applied to India. The principle of Musalman government was—"If the Imam conquered a country by force of arms, he was at liberty to divide it among the Musalmans or he might leave it in the hands of the original proprietors, exacting from them a capitation tax called the *zezyat* and imposing a tribute upon their lands known as the *khiraj*. The *oosher* (tithe) should be imposed only upon believers."[1] According to this theory, the conqueror was considered to be the proprietor of the conquered land, and the doctrine of Abu Yusoof is that the *khiraj* should be levied as a punishment, the land being considered as lapsed for infidelity. The *khiraj*, according to the Mahomedan doctrine, varied with the nature of the land, detailed rules being laid down both by Abu Yusoof and Mahammad.[2] In India, however, no land was distributed amongst the Musalmans. Small portions might have been given to soldiers as *jaigirs* and *aymas*, but these were generally waste lands.

Mahomedan rules applicable to infidels not applied in India.

Khiraj.

[1] "Let him establish the laws of the conquered nation as declared in this book." See also—

प्रमाणानिच कुर्वीत तेषां धर्म्यात् यथोदितान् ।
रत्नैश्च पूजयेदेनं प्रधानपुरुषैः सह ॥

Manu, Chap. VII., v. 203.

"पर देशावाप्तौ तद्देशधर्म्मान्नोच्छिन्द्यात्" ॥

Vishnu, Ch. III., v. 42.

[2] Hedaya, Vol. II, Book VIII.

Commuted into money rent.

They levied the *khiraj*, and applied the theory of proprietorship of the king in the soil, but, as I shall presently show, the *khiraj* was soon commuted into money rent. According to another theory of Mahomedan jurisprudence, the commutation of a share of the produce into fixed money rent took away the sovereign's proprietary right. The practical result was the same as if the king was not the proprietor of the soil but was only entitled to rent. When rent was once fixed, there was no doctrine of increase from *unearned increment*, and the sovereign's right was fixed for ever. The customary rent which had prevailed under the Hindu kings was superseded. A new custom of increased proportion was established, but there was nothing like competition rent.

The imposition of the *khiraj* did not take away the proprietorship of the cultivator.

The imposition of the *khiraj* did not deny the existence of property in land and take away the proprietorship of the cultivator. His right was alienable and the lands cultivated continued to be "the property of the inhabitants who might lawfully sell or otherwise dispose of them."[1] The sovereign was entitled only to a share of the produce, which could be even as much as a half. In India the *khiraj* was never formally levied, although an attempt was made to do so by Emperor Allauddin in the beginning of the fourteenth century. When the sovereign's share of the produce was converted into money rent, the liability became personal, the cultivator having higher rights as regards the land itself. In the words of the Fatwa Alumgiri, "by the imposition of the *wazifa khiraj* the sovereign ceased to be a partner of the cultivator."[2] No permission of the sovereign was required to validate alienation. I have already adverted to the original *Musalman* doctrines as to waste lands. The first cultivator was the

[1] Baillie's "Land Tax of India," p. xx; Hedaya, Book IX, Chapter vii.

[2] See also Tagore Law Lectures, 1874-75, p. 46.

proprietor by virtue of his having brought the land into cultivation.[1] He was bound to pay only the tithe, and, under some circumstances, the tribute. Thus, on the whole the Mahomedan principles of fiscal government in India did not practically vary from the Hindu.

Assimilation of the Hindu & Mahomedan systems.

Causes, however, other than the mere introduction of the Hanifite doctrines were at work to bring about the assimilation of the Musalman to the previously existing Hindu systems of fiscal administration. The Musalman conquest of India was never complete. The battle-field on the Caggar, where Prithwiraj and his brave followers sacrificed themselves to the cause of independence, broke down the imperial power of the Hindus, and most of the small principalities, with which northern India was studded, at the time yielded without struggle, and accepted the Mahomedan yoke agreeing to pay tribute. It was not until the days of Akbar that any serious effort was made for the collection of the *khiraj* direct from the cultivators. Even then the hereditary chiefs who had long ancestries to tell were not disturbed. They got *sanads* which provided for payment of nominal sums as rent (*khiraj*). The apathy and carelessness of the Nawabs brought about a system of non-interference with internal management, whether fiscal or judicial, of the various provinces of the empire, and the Hindu *rajas* or *zemindars*, call them by what name you will, took the fullest advantage of their position. Opportunity was afforded for the progress and development of indigenous systems of thought, language, literature and law, unchecked and unfettered by Semitic influence. It is a curious phenomenon in the history of the Indian people, a history which, I regret to say, has not yet been written, that, notwithstanding the alleged misgovernment and tyrannical saway of the followers of the Prophet in India, social and religious

[1] Hedaya, Book IX, Chapter VII.

ideas, legal and philosophical conceptions of the Hindus, and even some of the vernacular languages, made, during the centuries just preceding the rise of the British power in India, an extraordinary progress without any encouragement from the ruling power. The customs, usages and customary laws of the Musalman sovereigns made little or no impression on the people except at the capitals and large cities, where only their influence was most felt. Both in Europe and in India, the fifteenth century was a period of rapid changes and development in religion and literature, not less in legal conceptions. The changes in India were, however, not revolutionary and bloody, as they were in Europe. The Musalmans, intolerant though they might be, did not persecute the Brahminical Hindus or any of the various sects that sprung up in the fifteenth century, to the same extent as the Roman Catholics did the Protestants, or the Protestants the Roman Catholics.[1]

Practical independence of the *zemindars*.

The Hindu *rajas* and *zemindars*, though theoretically merely collectors of land revenue, had to perform almost all the functions of the sovereign. They heard and decided cases, civil and criminal, and enforced obedience to their decrees and sentences, in the same way as sovereigns. They had their own law-officers or *pandits*. The police administration was under them. In fiscal matters, their authority was supreme, the interference by the ruling power being really few and far between. The necessary result was the practical continuation of the old Hindu system. It was at this period that a number of glosses and commentaries on the *sutras* were composed and published, generally for the purpose of facilitating the administration of justice, which gave fresh life to Indian legal conceptions. The

[1] The persecution of the Sikhs took place later on and was exceptional; but good cometh out of evil, and it lead under the guidance of Guru Govind to the military spirit of the sect.

Hindu kingdoms in the Deccan, notably Bijayanagar, did much for the revival and advancement of Sanskrit learning, literature and law.

Revenue settlements under the Mahomedan rulers.

I shall close this lecture with a few words on the history of the revenue settlements made under the Mahomedan rulers and on the advent of the British. Under the vigorous despotism of Allauddin Khiliji,[1] an endeavour was made to increase land tax (*khiraj*) and to exact it more vigorously, and settlement was, in some provinces, made with the cultivators direct. Sher Shah,[2] a prince of consummate prudence and ability, introduced, during his short reign, many improvements in civil government, and the settlement of land revenue was one of them. His son Selim Shah followed him and made some further improvements. Immediately after, followed a period of contest between the Afghan, and the Moghul. The revenue system of Akbar is, however, celebrated for the benefits it conferred on India, though it was not a new invention. Akbar's scheme was to carry out the previous system into effect with greater precision and accuracy. "It was," to use the words of a learned historian of India, "only a continuation of a plan commenced by Sher Shah."[3]

Allauddin Khiliji.

Sher Shah.

Selim Shah

Akbar.

Todar Mal's reform.

I shall not detain you with a description of the revenue system of Akbar, known more generally as Raja Todar Mal's reform. You will find every thing that can be said on this matter elaborately dealt with in the Tagore Lectures for 1874-75, and in almost all the bigger histories of India. I need only add that Raja Todar Mal entirely ignored the distinction made by Abu Haneefa between *oosher* and *khiraj*, between Musalmans and Hindus. Instead of the sixth levied by Hindu *rajas*, the rate was increased to a fourth, and

[1] 1295 to 1316 A. D.

[2] 1540 to 1545 A. D.

[3] Elphinstone's India, 5th Ed., 541.

occasionally a third. An average of ten years was taken, and the cultivators were allowed to pay money rent. The settlement was nominally for ten years. But there are reasons to believe that the settlement was never completed in Bengal. Many of the ancient *rajas* of Bengal held out, and their lands were never measured or assessed. They paid only nominal tribute or revenue to the imperial exchequer. Raja Todar Mal, it is said, ignored the *zemindars*, but those whom he ignored in Bengal were few; and they were soon restored to power by the influence of events and circumstances that followed.

Rights of cultivators.

The rights, under Mahomedan settlement, of the class known as *zemindars* and the rights of the cultivators are matters of great importance, as the principles of the settlement of land revenue under the Anglo-Indian Government, are to a great extent based on them. I propose to say later on a few words on the rights of the *zemindars*. The rights of the cultivators involve questions of considerable difficulty. The distinct revival, in the reign of Akbar, of the old Hindu system under his Hindu minister, would seem to imply a revival of the principle which distinctly recognised the right of cultivators to hold on and enjoy the usufruct, and even to alienate and sub-let. It was, to all intents and purposes, *a proprietary right*, subject to the payment of a definite share of the produce, which, since Raja Todar Mal's settlement, could be called customary rent. Ejectment was unknown except for non-cultivation or continuous non-payment of rent. Competition-rent was never thought of. The very fact that *abwabs* or illegal cesses were now and then levied, shews that the *raiyats* believed that rent was fixed and unalterable except under very peculiar circumstances. To use the words of the framers of the Regulation Code of 1793, "The ruling power is entitled to a

certain proportion of the produce of every *bigha* of land"[1]—not, however, as proprietor of the soil but as responsible for the protection afforded to the subject.

Sovereignty of the East India Company.

The victory of the English army at Plassey in 1757 established in Bengal the nominal viceroyalty of Mir Jáffár and the actual sovereignty of a company of English merchants. This company had, on the last day of the sixteenth century, obtained from Queen Elizabeth the exclusive liberty of trading in the East Indian seas, and were attracted to Surat and the other Malabar cities for the purchase of cloth and calico. In those days, only three hundred years ago, India was, perhaps, the only country that supplied the world with piece-goods: Manchester has now practically taken the place of Indian cotton manufacturing cities. The united company of merchants were bent only upon commercial aggrandisement, and had, until the year 1757, little to do, in Bengal, with the government of a nation, its laws or customs. An accident, however, made them the rulers of a people dissimilar from themselves in almost every respect. On the 12th August, 1765, they were compelled under peculiar circumstances to obtain a formal recognition of their title as *Dewan* of the titular Emperor of Delhi, on an agreement to pay an annual sum of twenty-six lacs as revenue of Bengal, Behar and Orissa. They knew not at the time what to do for the proper administration of justice, and were, therefore, compelled to introduce in India a system of jurisprudence with rules of procedure and notions of proprietary right, which may well be characterised as a parody of what they then had in England. There was also another disturbing influence at work at the time. Having obtained the *Dewany* from the great Moghul, they thought that they should follow the Musalman system. From this system, therefore, they claimed

The Dewany.

Influence of the Mahomedan system.

[1] Preambles to Regulations XIX and XXXVII of 1793.

the inheritance of a right to seize upon an unduly large portion of the gross produce, and coupled the same with their own doctrine of the proprietary right of the sovereign by reason of conquest. The period of nearly seven years from the grant of the *Dewany* was one of "utter darkness," especially on account of the double government—the *Dewany* of the English and the *Nizamat* of the Nawab of Mursidabad. The complications resulting from the operation of dissimilar, I may say inconsistent, fiscal systems brought about a state of things which may be said to be chaotic. The greed of the Board of Directors of the East India Company and the no less greed of their servants in Bengal together with the impoverishment and depopulation caused by the terrible calamity of 1770, made confusion worse confounded. Under such circumstances, the British Parliament interfered ;[1] but even the genius of Warren Hastings was not sufficient to bring order out of chaos.

Proprietary right of the Government.

The English in India started with the assumption that "all the soil belonged in absolute property to the sovereign, and that all private property in land existed by his sufferance."[2] This was, as we have seen, the doctrine of Abu Haneefa, and accorded with the English theory that "the *proprietas*, or actual ownership of the land" always resided "in the sovereign."[3] The existence of private property in land which is the fundamental doctrine of Hindu jurisprudence and which, as we have seen, even the Mahomedan government in India did not put out of sight, was entirely ignored. With this idea, the Government in 1793 transferred in perpetuity a vast, and then unmeasured, quantity of land to a class of men who were known to be *zemindars,* and the property in the soil was formally declared to be vested in them.[4]

[1] The East India Company Act, 1872, 13 Geo. III, c. 63.
[2] Maine's "Village Communities" (7th Ed., 1913), p. 104.
[3] Stephen's Blackstone, Book II, Pt. 1, Ch. II, (Ed. 1890, Vol. I, p. 175).
[4] Preamble to Reg. II. of 1793.

The remaining quantity of land, cultivated or waste, continued to be the property of the State.

Taking this theory of proprietary right as the basis, the subject of these lectures may be broadly divided under the following heads: *viz.*—

1. Khás Maháls.
2. Revenue-free Estates.
3. Permanently and Temporarily-settled Estates.
4. Intermediate Tenures.
5. Raiyati Holdings.

LECTURE II.

KHA'S MAHA'LS.

Khás Mahál defined.

"A *Khás Mahál* is an estate held by Government standing in the place of the proprietor."[1] Waste lands not included within the area of any permanently settled estate, islands thrown up in large navigable rivers, resumed revenue-free lands, and settled estates which has lapsed by sale for arrears or escheat are included within this definition. In the Bengal Tenancy Act of 1885 Government *khás maháls* are "estates",[2] and the Government is a "proprietor" owning estates.[3] The Government is also a "landlord" like other landholders.[4]

Calcutta.

Of the *khás mahals*, Calcutta, the metropolis of India, deserves our first attention. At the date of the *Dewany* (12th August, 1765), the East India Company held by purchase the *taluqdari* right of Calcutta and of the adjoining villages, Sutanati and Gobindapur, subject to an annual payment of Rs. 1,195 as revenue to the Great Moghul. The purchase was made in 1698. The lands of these three villages were partly occupied by the Company, but the major portion was held by tenants who paid rent to the Company as *taluqdar*.

The ground-rent payable to the East India Company is *revenue*[5] within the meaning of 21 George II., c. 70, and the Supreme Court had no power to interfere with its

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[1] Field's "Regulations of the Bengal Code" (1875), p. 41.

[2] Act VIII of 1885, Sec. 3, Sub-sec. (1).

[3] *Ibid*, Sec. 3, Sub-sec. (2).

[4] *Ibid*, Sec. 3, Sub-sec. (4).

[5] Act XXIII of 1850 and Act XVIII of 1856.

assessment and collection,[1] and the High Court in its Ordinary Original Civil jurisdiction has likewise no power in these matters.

Its revenue system.

There were a good many revenue-free tenures in Calcutta. Lands were held exempt from assessment for sixty years and all these were declared by the Act of 1850[2] valid *lakhiraj*. The revenue-paying holdings in Calcutta are called 'estates.' The provisions of Bengal Act VII of 1876—the Land Registration Act—have been applied to all holdings, revenue-paying as well as revenue-free, although most of the other incidents of estates in the districts do not apply to them. There are now about ten thousand holdings or estates in Calcutta. The Government-claim for land-revenue has priority over all other claims on the land,[3] and the amount is leviable by distress, the period of limitation being six years.[4] The Government has no proprietary right in these holdings; the right is simply to receive fixed sums as revenue or quit-rent.[5] The proprietary right is in the holders. The tenure of land is of the nature of free-hold, and though *pattas* are often taken from the Collector of Calcutta, they are not considered as muniments of title.[6]

Rate of assessment.

Such of the lands in Calcutta as were assessable, but had not been assessed before, were declared assessable at the rate of three annas per *cottah*, that is to say, three rupees and twelve annas per *bigha*.[2] This low rate of revenue would seem to be surprising to any one familiar with the assessment of land revenue in other parts of Bengal; but land revenue or land-tax is very low in England, and Calcutta had the advantage of

[1] Act XXIII of 1850, Sec. 12. [2] Act XXIII of 1850, Sec. 2.
[3] Act XXIII 1850, Sec. 6. [4] Act XXIII of 1850, Sec. 7.
[5] *Gunga* v. *Collector*, (1867) 11 M. I. A. 345, *sc*, 7 W. R. P. C. 21.
[6] *Gardiner* v. *Fell*, (1819) 1 M.I.A. 299; *Freeman* v. *Fairlie*, (1828) 1 M.I.A. 305. The judgment of the Lord Chancellor in the later case is not fully reported and is from notes. It is curious the Settlement Regulations of 1793, which do not apply to Calcutta are relied on.

being governed under the rules and principles that prevailed in England before the passing of the Regulating Act of 1772.[1]

Sutanati.

After the battle of Plassey, Mir Jáffár granted a *sanad* for a free tenure of these villages and six hundred yards of land outside the Maharatta ditch. The rents of these *mouzas* were "forgiven." Later on, and in the year 1778, the Company transferred to Maharaja Naba Krishna of Sovabazar, in the town of Calcutta, the *taluqdari* right of Sutanati, fixing the annual rent at *sicca* Rs. 1,237.

Incidents of tenancy.

The holdings in *taluq* Sutanati, which formed nearly two-fifths of the town, are generally rent-free. The rent-paying holdings which have existed from before the year 1778 are all permanent, hereditary and transferable. The rent-charge is so small that it may be said to be nominal. The rent is realisable by suits in the Calcutta Court of Small Causes, provided the amount does not exceed its pecuniary limit. The *taluqdars* of Sutanati have not, by the terms of the grant, the right to demand or receive a larger amount of rent than "what has been customarily received, *viz.*, Rs. 3-12 *as.* per *bigha*." By the terms of the grant the power of enhancing rents beyond this limit was taken away. This restriction, however, to enhancement can only apply to lands held under *taluqdari* right.

Fixtures.

I may here refer to the peculiarities in the law relating to landlord and tenant in Calcutta—I mean the part of the town which is within the Ordinary Original Civil Jurisdiction of the High Court.[2] The rules of law laid down in the Indian Contract Act (IX of 1872) and the Transfer of Property Act (IV of

[1] 13 Geo. III. c. 63. The Statute may apply to Calcutta proper, and not the added area.

[2] For the definition of *Calcutta* see Proclamation of the Governor-General in Council, dated the 10th September, 1794. The Municipal limits of Calcutta were extended by Bengal Act III of 1899: Calcutta Municipal Act.

1882) must now regulate the general incidents of tenancy. The several Tenancy Acts passed for the Bengal Provinces have no application here.[1] In the absence of express contract or any provision in the Contract and Transfer of Property Acts, the High Court has to apply the Hindu law in the case of Hindus, the Mahomedan law in the case of Mahomedans, and the principles of justice, equity and good conscience which, according to the majority of the English Judges who preside over our superior courts and the English lawyers who practise there, are the rules of English law with almost imperceptible variations. Section 17 of 21 Geo. III. c. 70 provided that "* * rents * * and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentû, by the laws and usages of Gentûs."[2] Until the passing of the Indian Contract Act and the Transfer of Property Act, the Supreme Court, and then the High Court in its Ordinary Original Civil Jurisdiction were bound to act in all cases according to the direction given in the statute 21 George III. c. 70; but for causes, which are not far to seek, the law applied was the English law, except in rare cases. In *Russickloll Mudduck* v. *Lokenath Kurmokar*,[3] the plaintiff had been ejected by a decree of the Calcutta Court of Small Causes from the land held by him as a tenant under the defendant, and claimed to be allowed to pull down and remove the buildings erected thereon by himself or his predecessors in title, or in the alternative, to be paid compensation in respect of them. Wilson J. applied to the case the doctrine of Hindu law as expounded in the judgment of the Full Bench in *In re Thakoor*

[1] The town of Calcutta, as defined in Schedule I to the Calcutta Municipal Act, 1899, is expressly excluded. See Bengal Tenancy Act, Sec. 1., sub.-sec. 3. [2] See also Letters Patent of 1865, Sec. 19.

[3] (1880) I. L. R. 5 Cal. 688.

Chunder Paramanick,[1] declining to apply, as amongst Hindus in Calcutta, the English maxim *quic quid plantatur solo solo cedit*. In a later case,[2] however, the Calcutta High Court threw considerable doubt both as to what the true rule of Hindu law is and its applicability to the town of Calcutta. The learned judges who decided the latter case were of opinion that the texts of Hindu law referred to in *In re Thakoor Chunder Paramanick*[1] did not lay down any rule as to substantial structures.

Huts.

'Huts' come within the definition of immovable property.[3] In *Nattu Miah* v. *Nand Rani*[4] a Full Bench of the Calcutta High Court held that they were not saleable in execution of a decree of a Small Cause Court, and in *Kallypersaud Sing* v. *Hoolas Chund*,[5] the High Court, following the Full Bench decision, came to the conclusion that tiled huts were not "goods and chattels" and could not, therefore, be taken in execution of a decree of the Calcutta Court of Small Causes. The right of a tenant to remove tiled huts built by himself was recognized, and in *Parbutty Bewah* v. *Woomatara Dabee*,[6] Macpherson J. was of opinion that a tenant of land in Calcutta was entitled by custom to remove huts. This was rather anomalous; the legislature had to interfere, and section 28 of the Presidency Small Cause Court Act[7] provides that huts which are removable at the termination of the tenancy should be deemed to be movable property. Tiled huts are thus saleable in execution of decrees of the Small Cause Courts at the Presidencies.

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[1] (1866) B. L. R. Sup. Vol. 595, *sc.*, 6 W.R. 228.

[2] *Juggut* v. *Dwarkanath*, (1882) I. L. R. 8 Cal. 582. See also *Madhab* v. *Rajcoomar*, (1874) 14 B. L. R. 76, *sc.*, 22 W. R. 370; *Jeshwada* v. *Ram*, (1893) I. L. R. 18 Bom. 66; *Dunia* v. *Gopi*, (1895) I. L. R. 22 Calc. 820; *Husain* v. *Govardhan*, (1895) I. I. R. 20 Bom. 1; *Ismai* v. *Nasarali*, (1903) I. L. R. 27 Mad. 211 and *Angammal* v *Aslami*, (1903) I. L. R. 38 Mad. 710.

[3] Act I. of 1868.

[4] (1872) 8 B. L. R. 508, *sc.*, 17 W. R. 309.

[5] (1873) 10 B. L. R. 448, *sc.*, 20 W. R. 8.

[6] (1875) 14 B. L. R. 201.

[7] Act XV of 1882.

Presidency Small Cause Court.

The Small Cause Courts, constituted under Act XV of 1882, have other special powers in cases between landlord and tenant which are not possessed by similar courts in the country. Rent of land is recoverable by suit if the amount does not exceed the Court's pecuniary jurisdiction, though such a suit is not cognizable by the Small Cause Courts[1] in the country. Suits for ejectmet of tenants and persons holding land by permission may, under the procedure laid down in chapter VII, be instituted in the Presidency Small Cause Courts, provided the annual value does not exceed one thousand rupees. Distress for rent is also allowed.[2]

The Twenty-four Perganahs.

The district now known as the Twenty-four Perganahs, as it contains twenty-four perganahs or local divisions, came to be held as a *zemindari* granted by Nawab Mir Jaffar; but except the fifty-five villages or Dihi Panchannagram, the district of Twenty-four Perganahs was never dealt with as a *khás mahál*. It was, as we shall presently see, permanently settled in 1793, the tract of jungle-land known as the Sundarbunds being excepted.

Burdwan and Midnapur.

Mir Kasim when made the Nawab, the feeble Mir Jáffár having been deposed, granted in 1760 the three districts of Burdwan, Midnapur and Chittagong to the Company as a cession for the support of the English[3] army; but the Company allowed the *zemindars* to collect the revenue as before, and these districts were permanently settled along with the rest of the province; so that the districts of Twenty-four Perganahs, Burdwan (which in those days included the districts of Hughli and Howrah), Midnapur and the cultivated portions of Chittagong, though acquired earlier than 1765, were dealt with since the date of the *Dewany* as if covered by the Imperial *sanad*.

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[1] Act IX of 1887, Schedule II., cl. (8).
[2] Act XV of 1882, Chapter VIII.
[3] Aitchison's 'Treaties, Engagements, and Sanads,' Vol. I, pp. 45-48.

Dihi Panchannagram.

The Dihi Panchannagram was acquired by the Company in the year 1757 in *taluqdari* right, and has continued to be in the direct possession of the Government without the intervention of a *zemindar*. Readers of Indian history must be familiar with the facts connected with the grant of these fifty-five villages by Nawab Mir Jáffár, the pension to Lord Clive, and the charge subsequently brought against him on the ground of his accepting the pension.

Holdings in Dihi Panchannagram.

The holdings in Dihi Panchannagram are not all rent-paying. A good many of them are rent-free. The right of the Government to these holdings and the relationship between the Government and the land-holders may well be expressed in the words of the Judicial Committee of the Privy Council in the case of *Gunga Gobind Mundul* v. *The Collector of the Twenty-four Perganahs*.[1] Speaking of right to the land in dispute in the case and the word "property" in land as used by the High Court, their Lordships say :— "By the word 'property' here, is evidently meant abso- "lute ownership ; though it may be by a grant from the "East India Company, as the *zemindars* of the Twenty- "four Perganahs. The well-known cases of *Gardner* v. "*Fell*,[2] and *Freeman* v. *Fairlie*,[3] and the observations "of Lord Lyndhurst in the latter case on the subject of "*pattas*, exclude any supposition that such absolute "ownership of lands by private persons could not exist "at that time in that part of India, as against any claim "of the Government to possession of the lands. In the "latter case, his Lordship terms 'the rent' 'a *jama* or "tribute,' and says, 'the *patta*, therefore, proves no part of "the title, it is the conveyance that gives parties a right to "claim the *patta*.' The *patta* is evidence of title. If there

[1] (1867) 11 M. I. A. 345, *sc.*, 7 W. R. P. C. 21.
[2] (1819) 1 M. I. A. 299.
[3] (1828) 1 M. I. A. 305.

"were anything in the nature of the title of the Govern-
"ment to lands in the Twenty-four Perganahs, or any
"usage or custom in force there, which gave a less per-
"manent interest to the possessors of proprietary right,
"some authority for, or some evidence of such a variation
"from, and limitation of the general law, should have
"been adduced to their Lordships. Their Lordships
"themselves are aware of nothing to take these titles
"out of the operation of the principles established by
"the cases above referred to. * * * The interest of the
"person in possession is not a limited but an absolute
"interest; the title to the lands is one inheritance, the
"title, to the *khiraj* or rent is another. Though these
"lands are treated as part of the *khás maháls*, yet there
"is no proof in this case of any relation of landlord and
"tenant ever existing between Johnson and the Govern-
"ment; Johnson appears to have been the absolute
"owner, and no reversion to have existed in the Govern-
"ment. It is not the case of a lease at all, still less of a
"lease of temporary duration; it is the case of an abso-
"lute ownership of the lands; and the title of the Govern-
"ment rather resembles a seignory than that of a lessor
"with a reversion. * * * There is no relation of land-
"lord and tenant in such a case between the Govern-
"ment and the owner of the lands, who is the landlord,
"and not a *raiyat*. The Government has a title to the
"rent or *jama*. By whatever name it be called, the
"right and title is to the rent substantially; it does
"not include a right to the possession of the lands,
"though such a right might arise by forfeiture, or extinc-
"tion of the ownership."[1]

The Dutch settlements.

On the 17th March, 1824, the Dutch settlements of Dacca, Fulta, Patna and Balasore and the town of

[1] The holdings in this *khás máhál* are tenures within the meaning of the expression in Bengal Act VII of 1868 and are saleable under the procedure laid down in it.

Chinsura were acquired from the Dutch government. They were ceded in perpetuity. By Regulation XVIII of 1825, the town of Chinsura was annexed and made a part of *zillah* Hughli, and the other factories were annexed to the districts in which they were situated. Chinsura is also a *khás mahál*. The rent of the holdings is fixed in perpetuity, the rates fixed being those which were prevalent when the Dutch acquired it from the Moghul government. The Government order dated the 21st August, 1828, lays down, "the *sanads* or *pattas* granted by the Dutch government should be maintained, and that long possession should be considered to constitute a good title." The holdings in Chinsura are now permanent except a few unsettled, concealed or waste lands, which however are insignificant.

Serampur and Baranagar acquired from the Danish government.

Serampur and Baranagar were acquired from the Danish government in 1845. These are also *khás máhals*, the holdings being generally permanent, hereditary and transferable like the holdings in Calcutta, Panchannagram and Chinsura. These holdings are tenures within the meaning of Act VII (B.C.) of 1868, and rent is recoverable practically as revenue under the procedure laid down in that Act and Act XI. of 1859, to which I shall draw your more particular attention later on.

Bengal Tenancy Act has no application.

Section 195 of the Bengal Tenancy Act (VIII of 1885) excludes from the operation of the Act the right of the Government to realise rent of *khás máhál* lands under these Acts and the Public Demands Recovery Act (VII of 1880). The holdings are frequently sub-divided and the rent apportioned, so that each of these divisions may become a tenure by itself. It must be remembered that these holdings or tenures are not considered to be permanently settled estates, though in their incidents they very much resemble such estates.

The property of the holders is of the same nature as it is in Calcutta and Dihi Panchannagram.

The *khás maháls* in which the Government claims proprietary right, properly so called, may be divided into the following classes :—

Other *khás máhals.*

I. Waste lands brought under cultivation since 1793, such as *halabad*, *noabad*, *taufir* and *patitabadi* lands, and not included in any permanently settled estate.

II. Lands not permanently or temporarily settled, including resumed revenue-free lands, lapsed and forfeited estates and island *churs*.

III. Temporarily settled estates, including Orissa and the Sundarbunds.

IV. Forest lands.

Resumption Regulations.

In the year 1819, the attention of the Government was particularly drawn to lands which were not included at the period of the Decennial Settlement within the limits of settled estates. The tract of land known as the Sundarbunds and the *churs* or islands formed since the Decennial Settlement and other *halabad* (newly cultivated) lands, *patitabadi* and *jungle-burhi taluqs* were dealt with by section 3 of Regulation II. of 1819, but all waste lands included within the ascertained boundaries of permanently settled estates were left expressly unaffected by clause 1, section 31 of the Regulation. There were lands possessed by *zemindars* over and above what were originally included in the settlements with them and such lands are called *taufir*. Nothing, however, was definitely done until the year 1828 when Regulation III of that year was passed. By the rules framed under that Regulation, *taufir* lands were especially dealt with, and officers were appointed to look after and settle them. New *churs* and *jungle* lands were declared to be the absolute property, and at the disposal, of the Government. Some portions of these lands were,

after settlement of rent under the rules laid down by Regulation VII of 1822, formed into permanently settled estates, but large tracts of land newly reclaimed still continue to be Government property as *khás maháls*.

Noabad lands and *taluqs* in Chittagong.

A large portion of the district of Chittagong was in 1793 covered with jungle, the clearances having been chiefly in the level plains. By the year 1764, all the occupied lands were measured, and when the Permanent Settlement of 1793 was concluded, it covered only the measured lands as they stood in 1764. All lands cultivated subsequent to that period are locally spoken of as *noabad* (newly cultivated). Regulation III of 1828 declared the absolute right of the Government to these *noabad* lands. They were assessed with revenue, and as new lands were gradually brought under cultivation, fresh assessments were made. Between the years 1841 and 1848, all the *noabad* lands were surveyed, whether held by squatters, or taken by encroachment by the original settlers known as *tarafdars*. The lands of the estates formed in 1793 were defined and separated, and the *noabad* lands were made separate *taluqs*; but a large number was placed directly under the Collector and put under *khás* management. The *noabad taluqdars* are tenure-holders entitled to retain possession on the terms of their leases. The settlement made in 1848 was for fifty years for lands fully cultivated, and for twenty-five years for other lands. There was also in Chittagong a large number of small grants called *jungleburhi*. Thus the district of Chittagong contains a very large number of small estates, *taluqs* and *jungleburhi* holdings, each with a kind of proprietary right different from that of the adjoining land, and complications in cases brought before courts of justice are necessarily great. Old permanently settled lands, *noabad taluqs*, resumed *lakhiraj* holdings assessed from

time to time, and lands temporarily settled are so intermixed with each other that lawyers and judges feel the greatest difficulty in solving intricate problems of fact and law as regards them. The repeated measurements and assessments made by the Government have, however, to a certain extent brought things into order. The cases of *raiyats* holding lands under *tarafdars* or new settlement holders or *noabad* lands are rare. These parcels, being small, are generally held and cultivated by hired labourers, but where there are *raiyats*, the resumption and settlement do not affect the right of the cultivators who are protected.[1]

Hill tracts of Chittagong.

The hill tracts of Chittagong were removed from the operation of the general Regulations by Acts XXII of 1860 and IV. (B. C.) of 1863. By the forest laws a large part of these tracts is "reserved" forest. The chiefs of the hills paid originally a tribute known as *kápás* (cotton). Cultivation is still shifting. Some portions are permanently settled, but a large portion is *khás mahál*, in which settlers are being gradually introduced.

Hill lands of Bhagalpur.

Santhal Perganahs.

The hill lands of Bhagalpur are mentioned in Regulation IX of 1825.[2] This tract of country did not form part of any permanently settled estate and was inhabited by the aboriginal inhabitants, mostly Santhals. The Santhal Perganahs now include this tract. A part only of the Santhal Perganahs, the plane, was permanently settled, namely, the part lying by the river-side near Rajmahal, but the hill tracts in the interior were not measured or surveyed, nor was any attempt made to

[1] *Huro* v. *Traheeram*, (1866) 6 W. R. (Act X). 15. *Noabad taluqs* are tenures and not estates as defined in the Bengal Tenancy Act. They are included in Government *khás mahals*. The leading cases as to rights of *noabad* holders and relations between them and Government are *Prosunno* v. *Secretary*, (1899) I. L. R. 26 Calc. 792, *sc.*, 3 C. W. N. 695; *Maqbul* v. *Hara*, (1906) 8 C. L. J. 470; *Ram* v. *Secretary*, (1907) 11 C. W. N. 928; *Haidar* v. *Secretary*, (1908) 13 C. W. N. 235, *sc.*, 9 C. L. J. 265.

[2] Reg. IX of 1825, Sec. 2, cl. 3.

bring the people under regular control until the year 1855, when Act XXXVII was passed. As early as 1780, the tract known as the 'Daman-i-koh' was withdrawn from general settlement. But there was practically no settlement of any kind, the Government having only a theoretical right. The *paharhias* cultivated land by the system known as "jum" or shifting cultivation. By Acts XXXVII of 1855 and X of 1857, the hill lands of Bhagalpur and Birbhoom and the Daman-i-koh were removed from the operation of the Regulations and Acts then in force in the Bengal Presidency, as these were considered to be unsuitable to the Santhals. The permanently settled estates and *patni taluqs* were not touched, and their incidents continued to be the same as before, but other portions of the district, thus formed, began to be dealt with as *khás mahál*. Regulation III of 1872 of the Bengal Code is now the Santhal Perganah Settlement Regulation.[1]

Chhotanagpur & Palamow.

In the Chhotanagpur division there are large Government estates, and the Palamow is a *khás mahál*, temporarily settled. The Government, as usual in all *khás maháls*, claims absolute proprietary right. Lands are never sold for arrears of revenue, and all sales or mortgages of land require the sanction of the Commissioner.[2]

Bhutan Doars.

The Bhutan Doars are parts of Jalpaigurhi and were acquired in 1870. In that year the country was settled for ten years. The settlement was with the occupants called *jotedars*. The *jotes* are saleable for arrears of revenue.[3]

[1] See *Ram* v. *Dhaturi*, (1890) I. L. R. 18 Calc. 146; *Ram* v. *Nanda*, (1895) I. L. R. 22 Calc. 473; *Ram* v. *Satis*, (1910) 17 C. L. J. 599; *Digambar* v. *Jatindra*, (1913) 19 C. L. J. 232; *Sib* v. *S. P. Chatterji*, (1914) 20 C. L. J. 220. Revenue-Settlements are now made under rules given in the Regulations and rent suits are in exclusive cognizance of Revenue Courts. See Appendix for Scheduled Districts.

[2] The Chhotanagpur Tenancy Act (VI, B. C., of 1908) has considerably modified the rules regulating relation of landlord and tenant. See Appendix for Scheduled Districts.

[3] Act X of 1858 with portions of Bengal Tenancy Act apply.

Large tracts of land in Darjiling are dealt with as waste land. There are settlements with *jotedars*, for terms varying from five to thirty years. The clearances, however, are few. The Government has appropriated large tracts for cinchona cultivation. Some parts are held by *mahaldars* who are considered to be proprietors; but they pay revenue. Some portions, generally used for tea-gardens, are held in "fee simple" or as revenue-free holdings, the right of the Government to rent having been sold. Darjiling.

Angul was formerly a Tributary State. The Chief rebelled and was deposed in 1847, and the State was confiscated. The settlement is with the *raiyats* direct, though rent is realised through village headmen. Angul.

Khurda comprises nearly a half of the district of Puri. Until 1837 it was settled *mahalwari* on rough estimates, the persons admitted to engagement being called *sarbarakars*. *Raiyatwari* settlement was made in 1837. The *raiyats* holding under the recent settlement for 15 years are very few. Rent is still collected through *sarbarakars*. Khurda.

The settlement and adjustment of rent of these *khás mahál*s were regulated by the procedure laid down in Regulation VII of 1822. That Regulation was passed for the Ceded and Conquered Provinces in Cuttack and the perganah of Puttaspore, but its operation was extended to the other provinces of the Bengal presidency by Regulation IX of 1825. The main object of the Regulation was to revise, through the agency of the Collectors or Settlement Officers, the *jama* payable to Government after a full enquiry into and careful settlement of the rights and interests of all classes connected with the land. The framers of the Regulation further declared that "a moderate assessment being equally conducive to the true interests of Government and to the well-being of its subjects, it is the wish The Settlement Regulations.

and intention of Government that in revising the existing settlement the efforts of the revenue officers should chiefly be directed not to any general or extensive enhancement of the *jama*, but to the objects of equalizing the public burthens."[1] This was a very laudable desire on the part of the State, but we know how the Regulation has worked. The cases of Khurda, Midnapur, Chittagong and Poosa *raiyats* are not examples of moderation in the assertion of the absolute proprietary right of the sovereign.

Jamabandi. The Settlement Officer under the Regulation, who is either a Deputy Collector or a Sub-Deputy Collector, must give notices[2] to the *raiyats* and all persons interested in the settlement, and then proceed to make the necessary enquiries and prepare *chittas* and *jamabandis* or rent-rolls. Clause 1 of section 9 declares the *jamabandi* to be final for all practical purposes, "until distinctly altered after full investigation in a regular suit." These *chittas* and *jamabandis* and the maps prepared by Settlement Officers are, however, not public documents within the meaning of section 74 of the Indian Evidence Act (I of 1872). They are records prepared by those officers in their executive capacity for the private purposes of the Government.[3] A contrary view was taken by Justice L. S. Jackson in *Taru Patur* v. *Abinash Chunder Dutt*. He said that the "act of a Deputy Collector in making a settlement or enquiry, under Regulation VII of 1822, is that of a public officer, whether it be judicial or executive, probably it partakes of both characters."[4]

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[1] Preamble to Reg VII of 1822.

[2] *Syud Shah* v. *Doorga*, (1874) 22 W. R. 455.

[3] *Junmajoy* v. *Dwarkanath*, (1879) I. L. R. 5 Calc. 287, *sc.*, 4 C. L. R. 574; *Ram* v. *Bunseedhur*, (1883) I. L. R. 9 Calc. 741; *Akshaya* v. *Shama*, (1889) I. L. R. 16 Calc. 586; *Kanto* v. *Jagat*, (1895) I. L. R. 23 Calc. 335; *Girindra* v. *Rajendra* (1897) 1 C. W. N. 530; *Graham* v. *Phanindra*, (1915) 19 C. W. N. 1038.

[4] (1878) I. L. R. 4 Calc. 79. See also *Upendra* v. *Chairman of the Calcutta Corporation*, (1911) 16 C. W. N. 116 and *Prya* v. *Mahendra*, (1911) 16 C. W. N. 317, *sc.*, 14 C. L. J. 578.

But this view was not accepted as correct in the later cases. Garth C. J. went further and held that maps and plans prepared by the Collector for the purposes of settlement of rent would be no evidence[1] under section 83 of the Act.[2]

Binding effect of Settlement.

As regards the holder of a resumed invalid *lakhiraj* land within a *khás mahál* the rent assessed is binding until the assessment is set aside or abated.[3] The *raiyats*, however, are not bound unless they assent, or the provisions of the law as to enhancement of rent are complied with.[4] This is a necessary consequence of the Government being considered as a private proprietor in the districts to which the Bengal Tenancy Act applies.

Principles of assessment.

In the year 1828, Regulation IV was passed for extending the powers exercised by Collectors under Regulation VII of 1822, and for control and revision by the Board of Revenue; but the requirements of the law as laid down by these Regulations were never carried out satisfactorily. Considerable difficulty was felt in ascertaining the amount of the *jama* payable by *raiyats* in any *mahál* under settlement, on an ascertainment of the quantity and value of actual produce, or on a comparison between the cost of production and value of produce.[5] The principle which was laid down in the previous Regulations, and which was then understood to be the only correct theory of rent and was generally accepted by European economists, was declared by this Regulation to be inapplicable, as it certainly was, to the Indian

[1] *Ram* v. *Bunseedhur*, (1883) I. L. R. 9 Calc. 741.

[2] Settlement of land revenue is now generally made under Chapter X of the Bengal Tenancy Act. (Secs. 104 to 104 J.) and practical finality attaches to it.

[3] *Huro* v. *Shama*, (1866) 6 W. R. (Act X) 107.

[4] The *Nawab Nazim* v. *Ram*, (1866) 6 W. R. (Act X) 5; *D'Silva* v. *Raj*, (1871) 16 W. R. 153; *Enayetoolla* v. *Nubo*, (1873) 20 W. R. 207; *Ledli* v. *Doorga*, (1874) 21 W. R. 410; *Reazooddeen* v. *Mc. Alpine*, (1874) 22 W. R. 540; *Akshaya* v. *Shama*, (1889) I. L. R. 16 Calc. 586.

[5] Regulation IX of 1833, Sec. 2.

people.[1] The principle of assessment based on customary rent, if I may use that expression, was adopted. This basis of calculation was the rate of the rent actually paid by a large class of tenants, or the rent paid for land of similar description and under similar circumstances in places adjacent. The principle was not long adhered to, and the value and capabilities of land began again to be taken into consideration since 1837.

Later Settlement Acts.

The powers conferred by the Regulation Laws upon Settlement Officers were considered insufficient, and in the year 1878, an Act was passed by the Bengal Legislature "to define and limit the powers of settlement officers with respect to enhancement of rent."[2] This Act was, however, soon repealed, and in the following year, an Act[3] was passed which is still the law in all the Regulation Provinces not touched upon by the Bengal Tenancy Act of 1885. I shall have to deal later on with the details of the system of enhancement prescribed by this Act and the corresponding Acts. I may notice here one peculiarity as to the power of Settlement Officers, namely, that the *jamabandis* prepared by them are final after publication, unless contested in civil suits instituted within four months, and unless it be proved by the *raiyat* in a suit that the enhancement was not in accordance with the Act.[4] This is a burden which it is always difficult for *raiyats* to discharge. There is no presumption that the rent previously paid was fair and equitable, a presumption that all civilised legislation ought to recognise.[5] The Bengal Act of 1879 has now

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[1] Reg. IX of 1833, Sec. 2. [2] Act III (B.C.) of 1878.

[3] Act VIII (B C.) of 1879. [4] Act VIII (B.C.) of 1879, Secs. 9 & 10.

[5] Act VIII (B.C.) of 1869, Sec. 15; Act VIII of 1885, Sec 27, Sec. 104, with Sec. 104A(1) (*d*); *Hills* v. *Ishore*, (1863) W. R. F. B. Vol., 131; on review, *ibid*, 148; and see 1 Hay 350, *sc.* W. R. F. B. Vol., 48; *Thakooranee* v. *Bisheshur*, (1865) 3 W. R. (Act X) 29, *sc.*, B. L. R. F. B. Vol. 202. But see *Hills* v. *Jendar*, (1864) 1 W. R. 3; *Oomanund* v. *Sreekant*, (1873) 21 W. R., 108; *Ishur* v. *Troylukhya*, (1913) 17 C. W. N. 865.

been repealed in the Regulation provinces, under the Lieutenant-Governor of Bengal, except Orissa.[1] The Local Government may, with the sanction of the Governor-General in Council, extend, by notification in the official Gazette, the whole or any portion of the Bengal Tenancy Act to the division of Orissa or any part thereof, and chapter X of the Act has been extended by a notification. The Settlement Regulations are, however, in force throughout the territory under the Lieutenant-Governor, except the Scheduled Districts as defined in Act XIV of 1874. Section 195, clause (*a*) of the Bengal Tenancy Act lays down that nothing in that "Act shall affect the powers and duties of Settlement Officers as defined by any law not expressly repealed by the Act." Regulation VII of 1822 and the Regulations modifying the same have not been expressly repealed by the Bengal Tenancy Act,[1] though for all practical purposes, and to avoid complexity, the rules of law and procedure laid down in chapter X of that Act about the record of rights and settlement of rent are adopted even in the *khás maháls*. In the Scheduled Districts there are special laws in force for land-revenue administration. You will find them collected in the Survey and Settlement Manual of the Board of Revenue.

Bengal Tenancy Act, sec. 195, cl. (*a*).

I ought here to add that by the terms of section 14 of Regulation VII of 1822, the assessment made by the Collector and confirmed by the Board of Revenue is final as to amount, except as to agricultural *raiyats*. The civil courts have no power to question it; only the right to assess may be questioned.[2]

Assessment final in some cases.

The Commissionership of Assam, including Sylhet, is, since the year 1874, under a separate administration. The whole forms a Scheduled District under Act XIV

Assam.

[1] Act VIII of 1885, Sec. 1.

[2] Reg. VII of 1822, Sec. 12; *Ram Chand* v. *Government*, (1880) 6 C. L. R. 365; *Secretary* v. *Fahamidannissa*, (1889) I. L. R. 17 Calc. 590, *sc.*, L. R. 17 I. A. 40.

of 1874, and the Statute 33 Vic. cap. 3 applies to it. A part of the country, namely, the tract at the north foot of the hills in Goalpara, is regarded as permanently settled, but the rest is Government property. The Settlement Regulations of the Bengal Code, supplemented by rules framed by Government, are now in force in Assam.[1]

Resumed *lakhiraj* lands.

By the operation of the Resumption Regulations, large quantities of land within the ambit of the permanently settled estates of Bengal and Behar came to be in the direct possession of the Government. Many of these were, according to the practice and procedure that prevailed before 1871, permanently settled; but in that year certain general rules were framed by which the revenue officers were required to lease them out on temporary settlements. They are very seldom, if ever, kept under *khás* management. During the period of settlement, these resumed lands are necessarily subjected to the laws in force with respect to such estates, and revenue is settled under Regulations VII of 1822, IX of 1825 and IX of 1833 and Act VIII (B.C.) of 1879. I shall revert to this subject later on, when I deal with the Resumption Regulations.

Purchased and escheated estates.

It not unfrequently happens that there are no purchasers of estates put up for sale for arrears of revenue. If the gross assets of an estate are reduced by diluvion, or depopulation on account of epidemics, famine or inundations in successive years, so that there might be no purchasers, the Collector is authorised to purchase on behalf of Government. In such a case the acquisition is subject to the provisions of Act XI of 1859.[2] Instances of escheated or forfeited estates are not rare. The Khurda estates in the district of Puri, Angul and

[1] Assam Land Regulations will be dealt with later on. There has been considerable changes in later years.

[2] Act XI of 1859, Sec. 58.

Banki have come into the possession of Government by escheat. A few estates in Behar were made *khás* after the Indian mutiny, but most of them were resettled permanently.

Island *churs* are, under Regulation XI of 1825, the property of Government.[1] Some of these have been temporarily settled. Alluvial accretions to an estate by the recession of the sea or of tidal navigable rivers are not the property of the State. They belong to the holder of the lands[2] to which the newly formed lands have gradually accreted. But the Government has, under Act IX of 1847, the right to assess such accreted lands with additional revenue, if it be found that such lands are not reformations in the site of diluviated parts of settled estates, and if the holders of the estates have continued to pay revenue for the same without abatement.[3] Several estates have been formed on account of the separate assessment of such accreted lands. They are seldom, if ever, kept under *khás* management, as

Island *churs*.

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[1] Reg. XI of 1825, Sec. 4, cl. 3. *Khellut* v. *Collector*, W. R. (1864) 73.

[2] Reg. XI of 1825, Sec. 4, cl. 1. *Putheram* v. *Kuthenarain*, (1864) 1 W. R. 124; *Oodit* v. *Ram Govind*, (1867) 2 Agra H. C. R. 406, *sc.*, 5 Ind. Rep. 618; *Lopez* v. *Maddan*, (1870) 5 B. L. R. 521, *sc.*, 13 M. I A. 467, *sc.*, 14 W. R. P. C. 11; *Government* v. *Radhay*, (1870) 20 W. R. 117; *Monee* v. *Collector*, (1870) 14 W. R. 424; *Dwakanath* v. *Dinobundhoo*, (1871) 15 W. R. 461; *Bhuggobut* v. *Doorg*, (1871) 16 W. R. 95; *Puhlwan* v. *Moheshur*, (1871) 16 W. R. P. C. 5; *Ram* v. *Radha*, (1871) 16 W. R. 109; *Nogender* v. *Esoff*, (1872) 18 W. R. 113, *sc.*, 10 B. L. R. 406; *Court of Ward* v. *Radha*, (1874) 22 W. R. 238; *Collector* v. *Shama*, (1874) 22 W. R. 324; *Buddun* v. *Bepin*, (1874) 23 W. R. 110; *Hursuhai* v. *Lootf*, (1874) L. R. 2 I. A. 28, *sc.*, 23 W. R. 8, *sc.*, 14 B. L. R. 268; *Sarat Sundari* v. *Soorjya*, (1876) 25 W. R. 242; *Baban* v. *Nagu*, (1876) I. L. R. 2 Bom. 19 (40); *Secretary* v. *Kadirikutti*, (1890) I. L. R. 13 Mad. 369; *Mazhar* v. *Ramgat*, (1896) I. L. R. 18 All. 290; *Secretary* v. *Krishnamoni*, (1902) I. L. R. 29 Calc. 518; *sc.*, L. R. 29 I. A. 104, *sc.*, 6 C. W. N. 617; *Ritaj* v. *Sarfaraz*, (1905) I. L. R. 27 All. 655, *sc.*, L. R. 32 I A. 165, *sc.*, 2 C. L. J. 185, *sc.*, 9 C. W. N. 889; *Krishan* v. *Saidan*, (1905) I. L. R. 28 All. 256; *Narendra* v. *Achhaibar*, (1906) I. L. R. 28 All. 647; *Ananda* v. *Secretary*, (1906) 3 C. L. J. 316; *Narendra* v. *Nripendra*, (1906) 4 C. L J. 51 *sc.*, 10 C. W. N. 540; *Sarat* v. *Kshitis*, (1910) 12 C. L. J. 216. But see *Jugotbundhoo* v. *Koomoodinee*, (1873) 19 W. R. 89.

[3] Act IX of 1847, Sec. 7. *Secretary* v. *Fahamidannissa*, L. R. 17 I. A. 40, *sc.*, I. L. R. 17. Cal. 590.

under the law, the Government is bound to allow the holder of the adjoining estate to have the settlement. It is only in cases where the holder of the estate declines to accept settlement that the land becomes *khas*;[1] but even then the proprietor is entitled to *malikana*.

Rules for assessment of revenue.

Revenue is assessed on the principles laid down in Regulation VII of 1822 and the Regulations and Acts modifying it, and the proprietor is entitled to have settlement at a *jama* calculated on the gross assets, less collection charges and *malikana*. Such accreted lands are numbered in the revenue roll of the district as separate estates.[2]

Policy of settlement.

The policy of Government was to settle lands permanently after assessment under the Settlement Regulations. In fact, those Regulations were framed in pursuance of that policy. Since 1861, the policy of selling estates outright after settlement was also adopted, a policy which may well be questioned from a financial point of view. In 1871, a change was introduced, since when temporary settlements only have been allowed. In 1875, the Government ruled that there should be *khas* management whenever practicable, if the extent of land and cultivation are sufficient to support *tehsildari* (collection) establishment.

Rules of settlement in temporarily settled estates.

The settlement of land-revenue in temporarily settled estates and *khás mahâls* takes place periodically. The Government is a *landlord* within the meaning of the word as used in the Bengal Tenancy Act, and though the amount payable directly to Government in the *khás mahâls* is *rent*, the paramount title of the State carrying with it the right to receive revenue and the proprietary right to receive rent uniting in the Government, the proprietary interest merges in the paramount title, and rent in such cases is called revenue. The

[1] Reg. VIII of 1793, Sec. 43.

[2] Act XXXI of 1858.

right, however, to settle the revenue is regulated, in the districts to which the Bengal Tenancy Act applies, by the procedure laid down in Chapter X of the Act and the rules framed by the Local Government, and no fresh settlement of revenue can be undertaken until the lapse of fifteen years, though there may be decennial surveys under Act IX of 1847. In the temporarily settled estates the same rules are applicable. The Settlement Officer ascertains the amount justly payable or is actually paid by the *raiyats* which is ordinarily called *rent*, and after such assessment, deduction is made for collection charges and *malikana*, where this is payable, and temporary settlement is then made.

Orissa.

Settlement operations are now going on in the province of Orissa which contains the largest number of temporarily settled estates. Although Regulations VII of 1822, IX of 1825 and IX of 1833 and Act VIII (B. C.) of 1879 apply with full force in this province, the procedure for fresh settlement adopted is that laid down by chapter X of the Bengal Tenancy Act and the rules framed under section 189 of the Act. I propose to deal with this province later on.[1]

Sundarbunds.

In the beginning of this century, the large tract of deltaic land known as the Sundarbunds and covered with dense forest was not included within the permanently settled area of the districts of Twenty-four Perganahs and Jessore. Squatting and encroachment, however, by holders of adjacent permanently settled estates were common, even in those early days. The *zemindars* of Taki in the Twenty-four Perganahs were the most prominent in this practice of encroachment. In the year 1816, the Government thought it necessary to appoint a special officer called the Commissioner of the Sundarbunds for the fiscal management of this tract.[2] Section 3

[1] The settlement was concluded in 1898-99.

[2] Reg. IX of 1816.

of Regulation II of 1819, well-known as the Resumption Regulation, expressly referred to this forest tract,[1] and in 1825, the settlement rules laid down in Regulation VII of 1822 were made applicable to it.[2] Up to this time, however, the attention of Government was directed only to the cleared and occupied portions which were *encroachments* and which were technically *taufir*. In 1828, rules were laid down for the determination of the boundaries of the tract which was formally declared[3] to be the "property of the State, the same not having been alienated or assigned to *zemindars*." The Governor-General in Council was declared competent to "make grants, assignments and leases of any part of it."[4] The claims of persons in possession of cultivated lands in the neighbourhood of settled estates were left to be determined under the rules laid down in Reg. II of 1819. Any objection to the line of delimitation was to be made within three months[5] from the date of the Commissioner's proceeding fixing the same, and on no account later on. This sea-board of the delta of the Ganges was defined by the boundary line laid down in 1829 by Mr. W. Dampier, the then Commissioner of the Sundarbunds. Captain Hodge's map is a well-known map of delimitation. The cultivated portions within the line were formed into permanently settled estates as *patitabadi taluqs*.

Settlement rules of the Sundarbunds.

Jungleburhi leases or leases for reclamation and cultivation of waste lands in the Sundarbunds began to be granted from time to time until the year 1845, when a large number of grants were made, but no definite rules for grants of waste lands were framed until the year 1853.

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[1] Reg. II of 1819, Sec. 3, cl. 3. [2] Reg. IX of 1825, Sec. 2, cl. 3.

[3] Reg. IX of 1828, Sec. 13, cl. 2.

[4] Regulation III of 1828, Sec. 13, cl. 1.

[5] *Burodacant* v. *Commissioner*, (1868) 12 M. I. A. 225, *sc.*, 2 B. L. R. P. C. 33, *sc.*, 11 W. R. P. C. 14.

The Sundarbund grants made under these rules were for 99 years, with conditions for progressive enhancement of revenue and compulsory clearance. There was liability to forfeiture for non-clearance. After the lapse of 99 years, fresh settlement of revenue was to be made. Most of the important lots, thus granted, have now been cleared, and many of the present holders of the grants are rich land-holders. The rules of 1853 were virtually superseded by those laid down in accordance with Lord Canning's Minute of 1861, the *sale-rules* known as the "fee-simple rules." These rules proved inoperative, and a set of revised *lease-rules* was adopted in 1879. The *rent-free period* is, under the new rules, ten years, and there is only one *clearance condition*, *viz.*, that one-eighth of the entire land should be rendered fit for cultivation at the end of the fifth year, the usual term of lease being forty years with condition of resettlement. The tenures are heritable and transferable.

Sundarbund grants are temporarily settled estates.

The lands covered by the grants made under the old or the new rules are temporarily settled estates, and they come within the purview of the Regulations and Acts dealing with them. They are saleable for arrears of land-revenue under Act XI of 1859 and Bengal Act VII of 1868.

Forests.

In the year 1865, the Government of India gave their special attention to the management and preservation of Government forests. The rules in force at the time were, with modifications, incorporated in Act VII of that year. The importance of the preservation of forests was insisted on by high authorities in India, and in 1878 an Act[1] was passed to amend the law relating to them. Forest settlement officers were appointed, as also forest officers for the preservation and protection of forests, and provision was also made for income from forest produce. The settlement officers were vested with

[1] Act VII of 1878.

the powers of a Collector under the Land Acquisition Act of 1870. Penalties were laid down for infringement of the provisions of the Act and subsidiary rules that might be framed thereunder.

Rules for the protection of forests.

The important provisions for the protection of forests required the establishment of a special department of officers. The income of Government may be classed mainly under three heads, *viz.*, sale of timber, catching of wild animals, especially elephants, and produce of trees such as rubber, caoutchouc, gum and cocoons. The working of the Act has occasionally caused hardship upon private owners of forest lands. Convictions under the provisions of the Forest Act are not unfrequent, and you will find in the reports a number of cases on the subject.[1]

Acquisition of land by Government.

A small quantity of land is held by Government as *khás* on acquisition either from settlement holders or holders of revenue-free lands. I leave out of consideration such lands as are still held by Government on payment of rent to *zemindars*. Acquisition of land for public purposes was not common in the beginning of the British rule. The only lands then used were for military purposes and for manufacture of salt. The monopoly of salt-manufacture began since the year 1780. Large quantities of land on the sea-coast fit for the purpose were taken possession of by the Salt Agents of Government in the Twenty-four Perganahs, Jessore, Khulna, Chittagong, Midnapore and Balasore, for which, whenever the lands were included within the ambit of permanently settled estates, Government paid *khalari* rent. In 1824, Regulation I was passed for acquisition of lands for public purposes and the adjustment of the claims of *zemindars* to salt lands. This Regulation continued to be in force until the year 1857, when Act

[1] *Deputy Commissioner* v. *Nothiram*, (1874) 21 W. R. 435; *Queen Empress* v. *Ramji*, (1885) I. L. R. 10 Bom. 124; *Queen Empress* v. *Waman*, (1893) Rat. Un. Cr. 659.

VI was passed, repealing it. In the meantime, two Acts were passed in 1850—Act I, extending the first seven sections of the Regulation to the town of Calcutta, and Act XLII, declaring a railway to be public works within the meaning of the Regulation. Act X of 1870 repealed the Act of 1857, but the Act now in force is Act I of 1894. Under these Acts, acquisitions made by Government are free of all encumbrances.

Jalpai land.

Section 10 and the subsequent sections of Regulation I of 1824 deal with the right of Government as regards *jalpai* or salt lands. The Government gave up the monopoly of salt-manufacture in 1863, and such portions of the lands occupied for salt purposes as were within the area of permanently-settled estates, were assessed and settled as *khás maháls*. Disputes arose between Government and some of the *zemindars* in the district of Midnapur, the latter claiming the right to hold the lands. One of these cases was contested, but the Judicial Committee of the Privy Council decided in favour of Government, holding that Regulation I of 1824 gave Government the absolute right to these lands.[1]

Road-Cess.

Road-Cess, under Act IX (B. C.) of 1880, is payable by Government for the *khás maháls* in the same way as by the owner of private estates. Section 7 of the Act provides for payment of road-cess by the local Government, the sum not exceeding what would be payable by a private person. The Public Works Cess, which is a fund originally levied for famine purposes, but now appropriated to imperial purposes, does not seem to be payable by the local Government.

Public Demands Recovery Act.

The Government dues in *khás maháls* are generally realised by the certificate procedure laid down in the Act known as the Public Demands Recovery Act, 1880.[2]

[1] *Secretary* v. *Anandomoyi*, (1881) I. L. R. 8 Calc. 95, *sc.*, L. R. 8 I. A. 172.

[2] Act VII (B. C.) of 1880.

The principle of the system is that Government is allowed to recover certain demands due to State by a special certificate procedure without resorting to a Civil Court and that execution of the certificate is to be effected by the Revenue authorities. The Act has not been found to work satisfactorily, and it is expected that a new Act will be passed by the local legislature early next year. The Act now in force gives the Collector, or a Deputy Collector duly empowered in that behalf, power to file a certificate[1] in his office, and from the date of the service of notice thereof[2] it has the effect of an attachment on the properties belonging to the debtors.[3] Service of notice was, it was held in *Rakhal Chandra Rai Chowdhuri* v. *Secretary of State for India in Council*,[4] to be effected in strict conformity with section 10. The Collector thereupon issues a notice to the debtor to show cause within 30 days why such certificate should not be enforced. The debtor may then either file a pitition of objections before the Collector denying his liability, or he may, within a year of the notice, bring a civil suit to contest his liability. In the case of demands for certain arrears of land revenue, the debtor can only sue in the Civil Court on the ground of non-indebtedness, and he must have paid the arrears before such suit may be entertained. In the case of other public demands, he must have petitioned the Collector before he can bring a civil suit, and a Civil Court can cancel a certificate on certain specified grounds.[5] After the expiry of thirty days, and if no objection be made or if an objection be made and the same be disallowed,[6] the certificate has the force of a decree of the Civil Court, and the Collector has the

[1] Act VII (B. C.) of 1880, Sec. 5.
[2] *Ibid*, Sec. 10. [3] *Ibid*, Sec. 11.
[4] (1886) I. L. R. 12 Calc. 605
[5] *Ram* v. *Dilwar*, (1901) I. L. R. 29 Calc. 73, *sc.*, 5 C. W. N. 521.
[6] Act VII (B. C.) of 1880, Secs. 18, 19.

right to enforce the same and levy the amount as a civil court. The execution and enforcement are to be according to the Code of Civil Procedure as of decrees for money, but it is the Collector who is to enforce the certificate and not the Civil Court. On the issue of the notice to the debtor all his immovable property is bound, as if attached under the Code of Civil Procedure, and under certain circumstances his movable property may be attached. The proceedings taken are generally loose, and the various steps for bringing the debtors' properties to sale are left without proper supervision to irresponsible agents. Instances of gross violations of private rights by sales under the Act are very frequent. I have been informed that Government dues are not also fully realised by the adoption of the Certificate Procedure. I hope the amending Act will be so framed that not only the interest of Government will be duly protected, but ample protection may be afforded to a poor but a large class of subjects who are now frequently made to suffer from the negligence and occasional stupidity of the subordinate staff in District Collectorates. It very frequently happens that the poor debtors, who cannot afford to retain revenue agents to watch their interests, know nothing of certificates and sales of their properties under the Public Demands Recovery Act, until the fortunate or unfortunate purchasers, as the case may be, come to take actual possession. Litigations follow to the ruin no less of purchasers than that of debtors. The cases are taken through the various stages of the tardy and cumbrous procedure of civil courts. The extension of the provisions of the Cess Act[1] for direct realisation of Government dues from the poor *lakhiraj-holders* has been a source of unmitigated mischief in several districts. The amounts realisable are small, but the means adopted for their recovery are expensive and occasionally bring down ruin.[1]

[1] Act IX (B. C.) of 1880, Sec. 70.

Bengal Act I of 1895.

[The Act of 1895 [1] made no material changes in the main principles of the previous legislation, but modified and altered the procedure to carry out the same principles more efficiently. The new Act clearly distinguished the method of realisation of land revenue from that of other public demands. Formerly the mode of recovery of public demands was supplemental to that of the realisation of land revenue, and the two modes were mixed up. A new definition was added to distinguish the Collector of the district from the officers who were specially appointed to exercise the functions of the Collector under the Act.[2]

The general direction, control and supervision of the Certificate Department (the department for realisation of demands other than land revenue) was left in the hands of the Collector of the district, while the ordinary routine business of applying for certificates and hearing and determining objections, if any, was entrusted to specially appointed Deputy Collectors; but these Deputy Collectors were precluded from exercising appellate powers, unless again specially authorised to do so by Government.[3] Realisation of interest on arrears was provided for.[4] Provision was made that no certificate was to be filed in the case of any demand involving a question of right or title.[5]

Application of the certificate procedure to the case of joint proprietors of an estate, who, to save the entire estate from sale, may have paid up the whole amount in arrear, was provided for.[6] A provision allowing such persons to apply to the Collector to recover the excess payments from their co-sharers by the certificate procedure was added in the Revenue Sale Law of 1859, and the clause which was adopted from the Cess Act was necessary to complete the procedure.

[1] Act I (B. C.) of 1895.
[2] *Ibid*, Sec. 4.
[3] *Ibid*, Sec. 32.
[4] *Ibid*, Secs. 7, 20.
[5] *Ibid*, Sec. 6.
[6] *Ibid*, Sec. 5(1).

Provision was also made for facilitating recovery from a defaulter of the cost of Court-fees required to be paid by a Manager appointed by the Court of Wards.[1]

The most important change for the benefit of defaulters was the right of redemption of the sale on payment of the demand with penalty and interest, analogous to that which is given to judgment-debtors under section 174 of the Bengal Tenancy Act,[2] and the Code of Civil Procedure.[3] By this new right of redemption, the Government suffered no loss, but the judgment-debtors, though they might themselves be blamed for their negligence in many cases, were allowed an opportunity of recovering property sold very much under their real values.[4]

The Board of Revenue was authorised by the Act to frame rules for certificate sales[5] and provision was definitely made for service of notices as under the Code of Civil Procedure.[6]

The jurisdiction of the Civil and Revenue Courts respectively with regard to the cancellation or modification of certificates were differentiated and definitely laid down[7] and minor other changes were introduced in the system of appeals with a view to a clear distinction between the Collector of the district and the Collector under the Act.[8] Provision as regards revision of any order passed by a District Collector, Certificate Officer, Assistant Collector, or Deputy Collector by the Collector was introduced.[9]

The Act of 1895, however, did not secure simplicity. The method of dealing with the executions of certificates and sales by mere reference to the Civil

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[1] Act I (B. C.) of 1895, Sec. 9(3). [2] Act VIII of 1885.
[3] Act XIV of 1882, as amended by Act V of 1894.
[4] Act I (B. C.) of 1895, Sec. 21. [5] *Ibid*, Sec. 22.
[6] *Ibid*, Sec. 31. [7] *Ibid*, Sec. 17.
[8] *Ibid*, Sec. 32. [9] *Ibid*, Sec. 33.

Procedure Code led to unforeseen difficulties, and it soon became apparent[1] that the Act had several defects, prominent amongst these being (*a*) the continuance of the dual system of recovery of rent by certificate procedure and suit, with its attendant inconveniences, (*b*) the uncertainty as regards the powers of the Civil Courts in dealing with proceedings under the Act, and, (*c*) the possibility to assail the title of a purchaser under the Act up to 12 years after the sale, under the ordinary law of limitation, on the ground that before the sale the defaulter was not served with notice of the demand.[2] Certificate Officers were not generally capable of dealing satisfactorily with the intricacies of the Civil Procedure Code, a difficulty which has been now enhanced by the revision of the Code in 1908, by which many important provisions have been relegated to the rules subject to alteration from time to time by a Committee to be presided over by the Chief Justice.

It assimilated to a considerable extent the law governing recovery of rent by the certificate procedure to that under which rent is recovered by suit.

Bengal Act III of 1913.

Act I (B. C.) of 1895 was modified by Act I (B. C.) of 1897; but in 1913 it was thought desirable to consolidate and amend the law relating to the recovery of public demands in Bengal, and Act III (B. C.) of 1913

[1] *Purna* v. *Dinabandhu*, (1907) I. L. R. 34 Calc. 811, *sc.*, 11 C. W. N. 756, *sc.*, 5 C. L. J. 696; *Hari* v *Chandra*, (1907) I. L. R. 35 Calc. 286.

[2] Act I (B C.) of 1895, Secs. 10, 31. See also *Chunder* v. *Secretary of State*, (1900) I. L. R. 27 Calc. 698, *sc.*, 4 C. W. N. 586; *Ambica* v. *Gopal* (1901) 1 C. L. J. 550; *Janki* v. *Ram*, (1901) I. L. R. 28 Calc. 813; *Ramrup* v. *Kushal*, (1905) 3 C. L. J. 280; *Umed* v. *Raj Laksmi*, (1905) I. L. R. 33 Calc. 84, *sc.*, 10 C. W. N. 130, *sc.*, 1 C. L. J. 538; *Srinath* v. *Bishan*, (1905) 2 C. L. J. 504; *Barhamdeo* v. *Rasul*, (1905) J. L. R. 32 Calc. 691, *sc.*, 1 C. L. J. 360; *Syamlal* v. *Nilmony*, (1907) I. L. R. 34 Calc. 241, *sc.*, 5 C. L. J. 385; *Jiwanram* v. *Hari*, (1907) 1 C. L. J. 240; *Purna* v. *Dinabandu*, (1907) I. L. R. 34 Calc. 811, *sc.*, 11 C. W. N. 756, *sc.*, 5 C. L. J. 696; *Jogeswar* v. *Debi*, (1907) 5 C. L. J. 555; *Hari* v. *Chandra*, (1907) J. L. R. 34 Calc. 787, *sc.*, 11 C. W. N. 745; *Hari* v. *Chandra*, (1907) I. L. R. 35 Calc. 286; *Elokeshi* v *Abinash*, (1907) 5 C. L J. 638; *Ramsona* v. *Naba*, (1911) 16 C. W. N. 805, *sc.*, 13 C. L. J. 404; *Nabadip* v. *Dolgobind*, (1911) 15 C. W. N. cclv.; *Bepin* v. *Sasi*, (1913) 18 C. W. N. 766, *sc.*, 18 C. L. J. 628; *Mohiuddin* v. *Pirthichand*, (1914) 19 C. W. N. 1159.

was passed, and it came into force from May 1913. The inclusion of growing crops in the definition of "moveable property" to some extent militates against the case law on the point, but it follows the Code of Civil Procedure.

A Civil Court is, under this Act, entitled to interfere with a Certificate Officer's proceedings in execution only on the ground of fraud.[1] A period of one year from the date of delivery of possession to a purchaser was laid down as the period of limitation, after which a certificate-debtor was debarred from getting the certificate-sale set aside on the ground that he had not been served with notice of demand.[2] The Act also did away with the anomalous state of the law under which only the interest of the judgment-debtor passed at a certificate-sale, whereas at a sale under the Bengal Tenancy Act[3] brought about by a landlord in execution of a rent decree, the actual tenure or holding passed to the purchaser, a provision which places Government or a proprietor who happened to be under the Court of Wards in a far weaker position than other landlords.[4] While, however closely it follows the Code of Civil Procedure as regards procedure, it makes a distinction as to the power it gives to the Certificate Officer to detain the certificate-debtor in civil prison.[5]

Bihar and Orissa Act IV of 1914.

The Bihar and Orissa Public Demands Recovery Act[6] follows closely the Bengal Act. It comprises no new principle which was not already in the spirit of the existing law. The only difference worth mentioning

[1] Act III (B. C.) of 1913, Sec 37. See *Janki* v. *Ram*, (1901) 6 C. W. N. 331; *Ragubans* v. *Phool*, (1905) J. L. R. 32 Calc 1130, *sc.*, 1 C. L. J. 542; *Girish* v. *Golam*, (1906) J. L. R. 33 Calc. 451, *sc*, 10 C. W. N. 347, *sc*, 3 C. L. J. 235.

[2] Act III (B.C.) of 1913, Sec. 36.

[3] Act VIII of 1885.

[4] Act III (B. C.) of 1913, Sec. 20.

[5] Act III (B. C.) of 1913, Sec. 28, 37.

[6] Act IV (B. & O.) of 1914.

between this Act and the Bengal Act is that this Act makes provision for amounts due to a liquidator appointed under the Co-operative Credit Societies Act[1] to be recoverable under the Public Demands Recovery Act in the same way as Government or quasi-Government Demands.[2] In section 8 (*a*) of the Bihar Act which corresponds with section 8 (*a*) of the Bengal Act, the slight anomaly between sections 8 (*a*) and 15 of the Bengal Act as regards the Certificate Officer's power of sale is remedied. Section 15 of the Bengal Act corresponds to section 16 of the Bihar Act. Section 8 (*b*) of the Bihar Act is slightly different from the same section of the Bengal Act. By the Bengal Act, a certificate creates a charge on all immovable property of a certificate-debtor wherever situated. Considerable difficulty is, however, felt in enforcing such a charge in territories in which the Act is not in force, and the Bihar Act omits some words of the sub-section in the Bengal Act restricting the operation of the sub-section to the district in which the certificate is filed. Section 11 of the Bihar Act, however, is new. It expressly confers power on the Certificate Officer, subject to the law of limitation, to substitute, add or omit the name of a certificate-holder or a certificate-debtor and to correct the amount of claim wrongly mentioned in the certificate. The difference between section 13 of the Bengal Act and section 14 of the Bihar Act is nominal, the change in the later Act being consequent on the new sections 11 and 18. Section 14 of the Bengal Act corresponds to section 15 of the other Act. The languages are slightly different, the later one being more explicit and free from redundancy, sub-section (*b*) of the earlier Act being omitted as unnecessary, a decree being included in the term

[1] Act II of 1912.

[2] Act IV (B. & O.) of 1914, Sec. 5 prov. & Schedule I, Clause 14.

"immovable property." Section 16 of the Bihar Act, corresponding to Section 15 of the Bengal Act, has a new proviso to it. Its object is to prevent an anomaly that might arise by the same property being sold by two officers, one independent of the other, in execution of two separate certificates without one officer knowing that the property was sold or was for sale in another district. Sections 18 and 19 of the Bihar Act are new. These Sections practically incorporate Sections 60 and 61 of the Code of Civil Procedure in the Bihar Act, to make the Act self-contained. Section 28 of the Bihar and Orissa Act differs slightly from the corresponding Section [1] of the Bengal Act. The Section in the later Act conforms to the practice in the Civil Courts and alters the computation of interest to be calculated from the date of the certificate at 12½ *per cent.* to computation from date of sale at 6¼ *per cent.* Compensation to a purchaser on the setting aside of a sale has also been altered from 5 *per cent.* to 10 *per cent.* in the Bihar Act. This was done in view of the fact that certificate-debtors "are only too prone to allow sales to take place and then to apply for their being set aside." It is expected the higher compensation would encourage earlier payment. "Moreover, compensation at 5 *per cent.* seems inadequate in view of the risks which a purchaser at a certificate sale must run; it is inexpedient to make such sales less attractive."

Section 29 of the Bihar and Orissa Act slightly differs from the corresponding Section of the Bengal Act [2] to make it consistent with Section 45 of the later Act, which in its turn slightly differs in principle from the corresponding Section in the earlier Act.[3] Section 45 of the Bihar Act is broader and allows a suit to be instituted in the Civil Court to set aside the

[1] Act III (B. C.) of 1913, Sec. 22.

[2] *Ibid*, Sec. 23.

[3] *Ibid*, Sec. 36.

sale on the ground of non-service of notice under Section 7, even if there be no substantial injury. The wording proviso (*b*) of Section 23 of the earlier Act has also been altered, because in some cases it may happen that a certificate-debtor, while admitting that some part of the certificate-debt is due from him, has a complaint that owing to non-service or material irregularity, the property has been sold for a grossly inadequate sum. Under the Bengal Act, such an application will not be entertained unless the applicant deposits the amount of the certificate. Such deposit has, under the Bihar Act, been made a condition attaching to the first orders only.

Section 30 of the Bihar Act allows a purchaser to apply to set aside sale on the ground of substantial injury owing to misdescription in the sale proclamation of the interest of the certificate-debtor in the property sold.[1]

Section 31 of the Bihar Act has some additional words in view of the provisions of clause (2) of Section 29, which allows an application under that clause even after the expiry of sixty days.[2]

Sections 35, 36 and 37 of the Bihar Act are new. These are really rules 100, 101 and 103 of Order XXI of the First Schedule to the Code of Civil Procedure and have been incorporated with this Act to make it self-contained, as the Bengal Act contained no provision for the relief of a third party who is dispossessed by the purchaser after a certificate sale.

Section 38 of the new Act is slightly different from the corresponding section of the older Act.[3] Where after issue of a warrant, but before its execution, a certificate-debtor comes to headquarters and pays the amount due under the certificate, he should, if arrested subsequently, before the warrant can be

[1] See Act III (B. C.) of 1913, Sec. 24.

[2] See *Ibid*, Sec. 25.

[3] *Ibid*, Sec. 29

withdrawn, be entitled to a release on showing to the officer arresting him the receipt granted by the Certificate Officer. A corresponding alteration has been made in Form No. 6 in Schedule II.

The proviso to Section 39[1] of the Bihar Act is new. Without the proviso the Certificate Officer's order to re-arrest would appear to be a revision of the Collector's previous order, which it is not and cannot be.

Section 44 of the Bihar Act does not contain the third clause of the corresponding Section of the Bengal Act.[2] When the Act was passed, there was no separate High Court for Bihar and Orissa and the clause was wholly unnecessary. There is now, however, a High Court there.

Clause (2) of Section 52 is new.[3] It incorporates the provisions of Section 53 of the Code of Civil Procedure "to avoid difficulties in the interpretation of sub-clause (1) and for the sake of completeness."

The proviso to clause (1) of Section 60[4] contains the additional words "setting aside a sale on an application." This was obviously required.

Clause (2) of Section 65 of the Bihar Act is slightly different from the corresponding section of the Bengal Act,[5] as it was thought necessary by the Bihar Council to make special exceptions to cover certain provisions in the Act as to limitation which do not agree with the provisions of the Indian Limitation Act.[6]

The proviso to clause 8 of Schedule I is new.[7]

Certain clauses of Schedule II of the Bengal Act have been transferred from the Schedule and incorporated in the body of the Act. There are some words

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[1] See Act III (B. C.) of 1913, Sec. 30.
[2] *Ibid*, Sec. 35.
[3] See *Ibid*, Sec. 43.
[4] See *Ibid*, Sec. 51.
[5] *Ibid*, Sec. 56.
[6] Act IX of 1908.
[7] Act III (B. C.) of 1913, Sch. I, Cl. 8.

added to sub-rule (1) of clause 1 of the same Schedule which are of a formal nature, but which should have been there in the Bengal Act too. This deals with the signature and verification of requisition for certificate and the proper person to do it. In clause 26 (1) of the same Schedule [1] a provision for the service of a sale proclamation by registered post has been added. This will provide an important safeguard for the certificate-debtor.

There is no third Schedule to the Bengal Act. This has been found necessary for the Bihar Act in view of the Acts in force in that province.]

[1] See Act III (B. C.) of 1913, Schedule II, clause 30.

LECTURE III.

REVENUE-FREE LANDS.

Policy of the East India Company as to *lakhiraj* lands.

When the East India Company took formal charge of the finances of the Bengal Provinces as *Dewan* of the Great Moghul, it was found that large quantities of land were in the possession of private individuals who paid no revenue for them. Starting, as they did, with the theory of the king's or the conqueror's absolute dominion over the soil, the Company was not bound to recognise any rights that detracted from the right to take possession of or assess with revenue every inch of land in the country. Principles of humanity, however, prevailed, and the "Government continued to the grantees or their heirs such of those grants as were hereditary, and were made before the date of the Company's accession to the *Dewani*, provided the grantees or their heirs had obtained possession previous to that date." [1] To use another utterance of the framers of the Regulation Code of 1793, the "lenity of the East India Company induced them to adopt it as a principle, that grants made previous to the date of the *Dewani* should be held valid," [2] though there were certain necessary restrictions.

Origin and history of revenue-free grants.

The origin and history of these grants made by the previous ruling powers in India is a subject of some interest. The Hindu kings, as we have seen, were entitled to a share of the produce of the land for the protection they afforded to life, liberty and property. Manu the great law-giver of ancient India, however, said—"A king, even though dying with want, must not receive

Manu.

[1] Preamble to Regulation XXXVII of 1793.

[2] Preamble to Regulation XIX of 1793.

any tax from a Brahmin learned in the Veda ;"[1] and he added,—"By that religious duty, which such a Brahmin performs each day under the full protection of the sovereign, the life, wealth and dominion of his protector shall be greatly increased."[2] Our great poet Kalidasa in his *Abhijnana-Sakuntalam* was referring to the utterances of Manu and other sages and the universal practice of Hindu kings, in the following conversation between Dushmanta and Madhavya :—

"*Madhavya.*—Say, you have come for the sixth part of the grain which they owe you for tribute.

"*King.*—No, no, foolish man, these hermits pay me a very different kind of tribute which I value more than heaps of gold or jewels ; observe--

The tribute which my other subjects bring,
Must moulder into dust ; but holy men
Present me with a portion of the fruits
Of penitential service and prayer,
A precious and unperishable gift."[3]

(Dr. M. William's Translation.)

Vishnu. Vishnu has also said,—"A sixth part both of the

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[1] Sir W. Jones' Translation.
म्रियमाणोऽप्याददीत न राजा श्रोत्रियात् करम् ।
Manu, Chap. VII, *v.* 133.

[2] Sir W. Jones' Translation.
संरक्ष्यमाणो राज्ञा यं कुरुतेधर्ममन्वहं ।
तेनायुर्वर्धते राज्ञो द्रविणं राष्ट्रमेवच ॥
Manu, Chap. VII. *v.* 136

[3] विदूषकः । कोऽपरोऽपदेशः । ननु भवान् राजा ।
राजा । ततः किं ।
विदूषकः । नीवारषष्ठभागम् अस्माकम् उपहरन्तिति ।
राजा । मूर्ख, अनाम् एव भागधेयम् एते तपस्विनो निर्वपन्ति यो रत्नराशीनपि विहायाभिनन्द्यते । पश्य ।
यदुत्तिष्ठति वर्णेभ्यो नृपाणां क्षयि तत्फलम् ।
तपःषड्भागम अक्षय्यं ददत्यारण्यका हि नः ॥
Abhijnana-Sakunlalam, Act II, 47.

virtuous deeds and of the iniquitous acts committed by his subjects goes to the king."[1] This exemption from tax of a class of men on principles thus enunciated is an instance of, what lawyers call, a "legal fiction." The king is supposed to be entitled to a sixth of the produce from all persons in occupation of land, and the exemption of a class of pious men is ascribed to a fictitious payment —a payment which according to Hindu notions not only counterbalanced, but outweighed by far, from both temporal and spiritual points of view, any benefit that might be conferred by actual payment in kind or specie.

This practice of allowing pious Brahmins, learned in the Vedas, to hold land revenue-free was soon extended to Brahmins, who had a large number of disciples to teach in other branches of learning, and also to other religious and charitable objects. By the time that Vrihaspati composed his *sutras*, who, according to European authorities, wrote long after the days of Manu, the legal fiction was lost sight of, and the sage distinctly speaks of gifts of lands to pious Brahmins learned in the Vedas without reference to it. The extension of the territories of Hindu kings and the subjugation of aboriginal tribes necessitated the immigration and settlement of learned Brahmins in the newly acquired countries. Vrihaspati says,—"The king shall invite Brahmins versed in the Vedas and devoted to the maintenance of the sacred-fire and settle them in the newly acquired land and make provisions for them."[2] Yajnavalkya also says:—"The king shall provide a place for and settle Brahmins, versed in the

Vrihaspati.

Yajnavalkya.

[1] राजा च प्रजाभ्यः सुकृतदुष्कृत-षष्ठांशभाक्।

Vishnu Smriti, III 28.

[2] वेदविद्याविदो विप्रान् श्रोत्रियानग्निहोत्रिणः।

आहूय स्थापयेत् तत्र तेषां वृत्तिं प्रकल्पयेत्॥

Vrihaspati quoted in Viramitrodaya, Jibananda Vidyasagara's Edition, p. 423.

three Vedas, in the town, with provisions for their maintenance, charging them to perform the duties of their callings."[1] There are various pious and religious acts which these Brahmins were expected to perform, and the texts of sages are many that require them to perform duties which, we would say, are necessary even for sanitary and agricultural purposes.

Shásanas.

The grants made by Hindu kings were expressly revenue-free. The deeds which the kings were directed to execute as evidence of such grants were called *shásana* or *rajshásana*, and were required to be, if possible, on copper-plates. Vrihaspati [2] states in detail what these copper-plate grants should contain. Grantees were to hold in perpetuity, or to use the rhetorical language of the sage, "as long as the sun and the moon shine on the horizon." All future kings are enjoined to respect these grants. Many copper-plate grants, almost in the very language of Vrihaspati's texts with immaterial modifications, have been recently discovered. For the purposes of the present lecture, I would draw your attention to only a few specimens covering lands in the Lower Provinces of Bengal. The tide of Aryan migration towards the East was rather slow. Bengal attained importance as an Aryan kingdom during the reign of the Pal Rajas and their successors, the well known kings of the Sen family. It is said that the celebrated Ballal Sen[3] and his worthy descendant Lakshman Sen[4]

Copper-plate grants.

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[1] राजा कृत्वा पुरे स्थानं ब्राह्मण्यं न्यस्य तत्र तु।
त्रैविद्यं वृत्तिमद् ब्रूयात् स्वधर्म्मःपाल्यतामिति ॥
Yajnavalkya quoted in Viramitrodaya, p. 423.

[2] "चन्द्रार्कसमकालीनं पुत्रपौत्रान्वयानुगम्।
अनाच्छेद्यमनाहार्य्यं सर्वभागविवर्ज्जितम् ॥"
Vrihaspati quoted in Viramitrodaya, 192.

[3] 1066 to 1107 A. D.

[4] 1107 to 1129 A. D.

made a large number of grants in favour of learned Brahmins and even of Kayasthas, who, it is said, had been invited by Adisur[1] from the North-Western Provinces[2] to take up permanent abode in the rich and alluvial lands of the Gangetic delta. Several ancient families in these provinces claim their descent from these settlers, whom the policy or liberality of the Hindu *rajas* drew down from the earlier habitations of our Aryan fathers, and they still hold lands under grants made eight or nine centuries ago. The copper-plates that have been discovered are legal documents, complete in every respect, executed evidently for pious and religious purposes. Vigraha Pal was one of the Pal *rajas*, and the Amgachi plate[3] is an instance of alienation of revenue made by him. A copper-plate was discovered near the Sundarbunds some years ago, executed by the celebrated *raja* Lakshman Sen.[4] Another copper-plate was discovered in 1874 in the Tarpandighi in Dinajpur, also executed by Lakshman Sen, by which the grantor granted a share in the land of village Bilahisti.[5] A similar plate executed by Keshab Sen, son of Lakshman Sen, has also been found in *perganah* Idilpur in Bakharganj.[6] Copper-plates have also been discovered, similar in language and import, executed by the Hindu kings of Bihar—the Magadha and the Mithila kings. Grants of lands, made revenue-free for the performance and continuance of the worship of Hindu

[1] 986 to 1006 A. D.

[2] Now known as the United Provinces of Agra and Oudh.

[3] Asiatic Researches, Vol. IX, p. 440.

[4] A Discourse on the Bengali Language and Literature by Pandit Ramgati Nyayaratna, Part II, p. 371.

[5] Journal of the Asiatic Society, Bengal, 1875, p. I.

[6] Journal of the Asiatic Society, Bengal, Vol. VII, p. 40.

gods, were also numerous. They are generally in the names of the priests, the *sebayets*.[1]

Different kinds of grants.

Grants to Brahmins are known in Bengal by the generic name, *brahmottar*, and in Bihar by the name, *brit* (वृत्ति), and lands dedicated to the gods by the name, *devattar* or *bissenprit*, *etc.* These grants are known in the different parts of the country, according to the peculiarities of the terms and conditions, under various names, some of which require specification. *Mahatran* are revenue-free grants to persons or families other than Brahmins. These latter are numerous in Bengal proper, especially in the Presidency districts.

Practice in later days.

As I have already said, the Afgan conquest of Bengal was never complete. Many of the ancient Hindu royal families, which, according to the practice of olden days, had only become tributaries or subordinates of the imperial families, Pals or Sens, continued to hold on, after the Mahomedan conquest, sometimes yielding only nominal allegiance to the Musalman viceroys or kings, and not seldom defying them. The grantees of revenue-free lands in these independent or semi-independent principalities remained in quiet possession, and we have every reason to believe that fresh grants continued to be made even in the days of Afgan rule. The great Moghul could not make much impression on Bengal. The same causes, which had worked in the days of India's freedom from foreign yoke, impelled, with equal force, the class of men latterly called *zemindars*, to occasionally alienate the state share of the produce of lands in favour of the gods and Brahmins and the gentry in these provinces. Hindu kings reigned in Orissa until the middle of the sixteenth century. Thus large

[1] Numerous grants were made in Orissa by its kings of the Keshari and Ganga families, who rehabilitated the Brahminical faith converting people from Buddhism. It is said ten thousand Brahmins were brought from the north and settled with grants of land.

quantities of land in the Bengal Provinces came to be *lakhiraj*, *i. e.*, free from *khiraj* or revenue, and the East India Company, when they accepted the *Dewany* from the great Moghul, had many difficult problems to solve with reference to them.

Wuqfs.

The doctrines of the Musalman faith, as much as the Hindu, favoured grants or "*appropriations*" for religious and charitable purposes. The expression "superstitious uses" could be applied equally to the practices of almost all nations and all creeds. Religious fervour, not merely bigotry, existed in the Afgan and the Moghul kings and emperors in a high degree. Even that extraordinary prince Akbar Shah, with his broad views, which some historians have erroneously characterised as irreligious, was not slow in making gifts of lands to men of great merit, and also for pious and charitable purposes, Hindu as well as Mahomedan. Instances of grants by other Mahomedan potentates, especially the later emperors, to Hindus were not also uncommon.

Jaigirs.

Grants to military officers and servants of the State were called *jaigirs* in the days of Musalman government. In the language of Regulation XXXVII of 1793,[1] "*Jaigirs* are to be considered as life-tenures only, and with all other life-tenures are to expire with the life of the grantee, unless otherwise expressed in the grant." They have often been said to be life-grants. Originally of a feudal character but not hereditary, they were granted on condition of service. In India, however, offices frequently descend from father to son and they were renewed very frequently in favour of the sons of previous holders, but the terms of *jaigir* grants were not uniform. They were occasionally made hereditary and alienable grants. A *jaigir* must be taken *primâ facie* to be an estate for life only, although it might be hereditary.[2] Under the British

[1] Section 15.

[2] *Gulabdas* v. *Collector*, (1878) I.L.R. 3 Bom. 186, *sc.*, L.R. 6 I.A. 54.

administration, many *jaigirs* have become hereditary and alienable.[1] *Jaigirs* are said to be of two kinds—conditional and unconditional.[2] Conditional *jaigirs* could be held as long as the grantee continued to perform the service for which the revenue was alienated in his favour.[3] Unconditional *jaigirs* are personal grants for life.[4] In Bengal there are a few *jaigirs*, but in Behar there were a good many created by the emperor Shah Alum, and they have since been treated as estates of inheritance.[5] It should be remembered that *jaigirs* are not grants of lands, but they merely indicate interception of the *khiraj*. They are not strictly *lakhiraj*.

Milk or *Milik*.

Milk or *Milik* was, in Mahomedan times, a grant of land, and not merely interception of the revenue. The grantee was usually in occupation of the land. Such grants are very common in the North-Western Provinces and Bihar; they are rather rare in Bengal proper. In Bengal they are known by other names. *Miliks* are hereditary and transferable.[6]

Altamgha.

Regulation XXXVII of 1793 refers to *altamgha, ayma* and *madadmash* grants as hereditary and transferable by gift, sale or otherwise.[7] Hereditary *altamghas* were royal grants under the emperor's red seal,

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[1] *Bithal* v. *Raj*, (1867) 2 Agra H. C. R. 284, *sc.*, 5 Ind. Rep. 539; *Nilmoni* v. *Bakranath*, (1882) I. L. R. 9 Calc. 187, *sc*, L. R. 9 I. A. 104; *Dosibai* v. *Ishwardas*, (1885) I. L. R. 9 Bom. 561; *Hemendra* v. *Upendra*, (1914) 18 C. W. N. 1036; *Ram* v. *Ram*, (1914) I. L. R. 42 Calc. 305, *sc.*, 19 C. W. N. 466; *Hemendra* v. *Upendra*, (1915) I. L. R. 43 Calc. 743, *sc.*, 20 C. W. N. 446, *sc*, 22 C. L. J. 419.

[2] *Bhagwat* v. *Sheo*, (1913) 18 C. W. N. 297, *sc.*, 18 C. L. J. 277.

[3] Field's Introduction to the Regulations, p. 53; Tagore Lectures, 1874-75, p. 201. *Nilmoney* v. *Government*, (1872) 18 W. R. 321; *Nam* v. *Ganjhu*, (1889) 12 C. W. N. 178; *Radha* v *Budhu*, (1895) I. L. R. 22 Calc. 938; *Ansar* v. *Grey*, (1905) 2 C. L. J. 403; *Mritunjoy* v. *Kenatullah*, (1906) 11 C. W. N. 46, *sc.*, 5 C L. J. 53; *Manmatha* v. *Rai*, (1913) 17 C. L J. 70*n*.

[4] *Bukronath* v. *Government*, (1879) I. L. R. 5 Calc. 389, affirmed on appeal, (1882) I. L. R. 9 Calc. 187, *sc.*, L. R. 9 I. A. 104.

[5] Field's Introduction to the Regulations, p. 54.

[6] The words *milik* and *milkiat* are used in Bihar districts in the sense of proprietory right.

[7] Section 15.

and related to revenue of land under cultivation. They are now found chiefly in Bihar.

Aymas were grants made to *imams* by the sovereign. In Bengal they are of two descriptions,—revenue-free (*lakhiraj*) and revenue-paying (*malguzari*). We shall deal with revenue-paying *aymas* later on, as they are now regarded as revenue-paying estates. Revenue-free *aymas* are in their incidents the same as *milik* and *madadmash*. *Aymas.*

Madadmash grants are not uncommon in Bengal. They were made for religious purposes and, as such, are inalienable.[1] The grants were in perpetuity. The distinction between *madadmash* and grants of a similar nature known by other names is very little, except as to origin and use of the lands; but whatever the origin, the Regulation of 1793 has done away with all distinctions. *Madadmash.*

Seyurghal grants are not mentioned in the Regulations, but they are found in Bengal. These were grants of lands to learned men and scholars, to *madrasas* or colleges, or to *fakirs* or saints who withdrew themselves from worldly affairs. They were originally for life, but when grants were made to colleges, they were necessarily perpetual. These grants, like *malguzari aymas*, were not free from revenue, and one-fourth of the revenue was payable as the share of the State. *Seyurghal.*

Nazarat lands are held for performance of services and for other religious purposes at *musjids*. They were granted for public purposes for the benefit of the Mahomedan community. Being public endowments, they are inalienable in their nature, like lands granted for other charitable and religious purposes. The succession is regulated according to the directions in the grants, or custom and usage prevalent in the locality or family. *Nazarat.*

[1] *Jewun* v. *Kubeeroodeen*, (1840) 2 M. I. A. 390, *sc.*, 6 W. R. P. C. 3; *Shoojat* v. *Zumeerooddeen*, (1866) 5 W. R. 158. But see *Nimai* v. *Golam*, (1909) I. L. R. 37 Calc. 179, *sc.*, 14 C. W. N. 535, *sc.*, 11 C. L. J. 317.

Revenue-free grants made between 1765 and 1790.

It does not appear that during the period of the Mahomedan government of the Bengal provinces, any serious attempt was ever made to resume revenue-free or rent-free lands, though, as a matter of fact, they were then almost as many as they were in the year 1793. After the assumption of the *Dewany* in 1765, some fresh alienations were undoubtedly made. The distressful visitation of the famine in 1770 and the consequent depopulation, the necessary solicitation of the *zemindars* to have men of the higher classes as well as actual cultivators to occupy and cultivate land and prevent its reverting into the state of primeval forest under the tropical sun and rain, and, not unfrequently the fraudulent desire on the part of some *zemindars* to take advantage of the revolution and disorder, attending the administration by a set of handful men, who were, from their ignorance of the people and their language, merely tools in the hands of crafty subordinates, induced alienations of land as *lakhiraj*, without the authority of the Government. The superior officers in the East India Company's service had reason to believe that land to a considerable extent, exempted from payment of Government revenue, existed in the Bengal provinces, some under proper authority, but a good deal under fraudulent and forged grants. The Directors of the Company in England wanted money. Increase of revenue was urgently needed, and as a means of replenishing the exhausted coffer, plans were early adopted to check further alienations, and for ascertaining the real merits of the alienations already made. Attempts were made from 1771; but the first serious attempt was made by Warren Hastings, the then Governor-General, in 1782, and Regulations were passed for the purpose. These Regulations were modified in the following year. These were, with certain modifications, reproduced in Regulations XIX and XXXVII of 1793.

But the plans thus made for the increase of revenue were ineffectual, and Regulation II of 1819 was passed to carry out effectively the object of the Resumption Regulations of 1793. The Regulation of 1819 is well known in Bengal by the vernacular name, *Doem Quanoon i. e.*, the Second Regulation. Other Regulations were subsequently passed in furtherance of the same object, and Regulations IX and XIV of 1825 and III of 1828 are the most important of them. This last Regulation empowered the appointment of special Commissioners, known in Bengal as *Khás Commissioners*, for the trial of the large number of resumption cases which were filed on behalf of the Government after the passing of Regulation II of 1819. The Government succeeded in resuming some lands, and the holders of Permanently Settled estates derived additional income by having occasional recourse to the resumption laws, but, more frequently, to forcible ouster.

Study of resumption laws now of little practical utility.

The study of the resumption laws and of the numerous rulings interpreting them is now of little practical use. The legal machinery introduced by these laws, with all its intended crushing power, has done only a small portion of the work it was expected to do. The stronger hand of time, with its rules of prescription and limitation, has now almost entirely quieted titles, however disputable at one time. Now and then, a purchaser under a sale for arrears of revenue or rent, obtaining land free of incumbrances, attempts to disturb long possession; now and then, the combination of *raiyats* sets up false and fraudulent *lakhiraj* titles to defeat or delay the realisation of rent by new or oppressive landlords, and occasionally, the forcible ouster of *lakhiraj* holders compels them to seek remedy at law; but these cases are growing rarer with the lapse of time. The cases that are now instituted are decided more on general principles of prescription

and limitation than on the technical rules laid down in the Bengal Regulations. No treatise, however, on the legal incidents of land in Bengal should be without a few words on the once important laws about resumption. laws, which cost immense sums in litigation, and procedure, which brought forward immense learning and legal disquisitions, are matters of curiosity to legal antiquarians and should have their share in a treatise on the Land Law of Bengal.

Scope of the Resumption Regulations.

Broadly speaking, the Resumption Regulations dealt with lands not only within the ambit of Permanently Settled estates, but also lands outside the same. The latter class of lands was not dealt with by the earlier Regulations. Regulations II of 1819, IX of 1825, XIV of 1825, III of 1828 and IX of 1833[1] dealt with lands not included within the limits of any *perganah*, *mouzah* or other division of estates, already settled. They were mostly waste or uncultivated lands at the time of the Permanent Settlement.[2] The proceedings, however, about them were also called resumption proceedings.

Grants, *badshahi* and *non-badshahi*.

At the time of the Decennial Settlement, large quantities of unascertained land were left unassessed, though they were within the settled area. The Government, at the time, classed them under two heads, the one claimed to be held under *badshahi* or Mahomedan Imperial grants, the other *non-badshahi*. The rules passed on the 23rd April, 1788, had dealt with *badshahi* grants, and those passed on the 1st December, 1790, with the other class. In the Code of 1793, passed on the 1st May of that year, the distinction between the two classes of grants was preserved. In the Proclamation announcing the Permanent Settlement, the Governor-General in

[1] Reg. II of 1819, Sec. 3; Reg. IX of 1825, Sec 2; Reg. XIV of 1825, Sec. 3; Reg. III of 1828, Sec. 13.

[2] *Ante*, p. 41, *et seq.*

Council retained the power to "impose such assessment, as he might deem equitable, on all lands at present alienated and paying no public revenue which had been or might be proved to be held under illegal or invalid titles." The Proclamation then went on to say—"the assessment so imposed will belong to Government, and no proprietor of land will be entitled to any part of it."[1] This part of the Proclamation applied to both classes of land claimed as revenue-free.[2] Section 36 of Regulation VIII of 1793 (the Bengal Decennial Settlement Regulation) also referred equally to both the classes and directed exclusion of all revenue free lands from settlements.

Badshahi grants.

Now, what are these *badshahi* grants? It would seem from the expressions, *badshahi, altamgha*, etc., used in Regulation XXXVII of 1793, that its framers intended to denote by the word *badshahi* all sorts of grants made or alleged to have been made by the Mahomedan emperors only. The corresponding Regulation XIX of 1793, refers, in so many words, to numerous grants not only made "by the *zemindars* but by the officers of Government appointed to the temporary superintendence of the collection of the revenue."[3] The Regulation about *badshahi* grants does not refer to grants made by the ante-Mahomedan governments, but it was not necessary to say anything about grants made by the Hindu kings. Forged documents, purporting to be under the authority of the ante-Mahomedan governments, might be produced, but Government either omitted, or did not care, to legislate about them. Regulation XXXVII contemplated cases more of expired grants than grants which might be

[1] Reg. I of 1793, Sec. 8, cl. 3.

[2] Preambles to Regs XIX and XXXVII of 1793.

[3] Preamble.

held to be forged, altered or antedated.[1] All grants of lands, whether *badshahi* or not, made by whatever authority, for holding land exempt from the payment of revenue previous to the 12th August, 1765, were declared to be valid, provided the grantee or his heirs had *bonâ fide* obtained possession previous to the date,[2] and provided that the grants were made in perpetuity. If, however, the land though granted before the 12th August, 1765, and *bonâ fide* possessed by the grantee or his heirs, was assessed with revenue without objection, the liability to pay revenue could not be avoided.[3]

Burden of proof of *badshahi* grants.

The burden of proving the genuineness and validity of these grants was on those who set them up, the presumption being that the Government was entitled to assess with revenue every inch of land.[4] The burden was rather heavy, and it became heavier as years elapsed. Regulation XIV of 1825, therefore, enacted that uninterrupted possession, exempt from assessment from the date of the *Dewany* in Bengal, Bihar and Orissa, and from the 14th October, 1791, in Cuttack, would be sufficient to prove valid *lakhiraj* title,[5] but proof of possession and the hereditary nature of the grant (in the case of persons not being the original grantees) were required to be given by the claimant.

Regulation XXXVII of 1793.

No royal grants could, in the nature of things, be made after the 12th August, 1765, and no grantee could rely upon any imperial firman made after that date. The rules of 1793, therefore, held that, on the expiry

[1] Section 12.

[2] Reg. XIX of 1793, Sec. 2 and Reg. XXXVII of 1793, Sec. 2.

[3] *Brindaban* v. *Bhawani*, (1908) I. L. R. 35 Calc. 931, *sc.*, 9 C. L. J. 119.

[4] Reg XIV of 1825, Sec. 3, cl. 3. *Mahatab* v. *Government*, (1850) 4 M. I. A. 466; *Omesh* v *Dukhina*, (1863) W. R. F. B. Vol. 95; *Radhakisto* v. *Radha* (1863) 2 Sev. 366; *Ellias* v. *Tithraram*, (1864) 1 W. R. 164; *Koylashbashiny* v. *Gocoolmoni*, (1881) I. L. R. 8 Calc. 230, *sc.*, 10 C. L. R. 41; *Kalyani* v. *Braunfield*, (1915) 20 C. W. N. 1028.

[5] Section 3, cls. 2, 3. *Mahatab* v. *Government*, (1850) 4 M. I. A. 466.

of life-grants, and on any propounded document of revenue-free title being found to be forged, the lands covered by them would revert to the State, whatever the quantity might be; and on resumption, expiry or escheat, they would be assessed and settled in perpetuity, agreeably to the rules of settlement contained in Regulation VIII of 1793.[1] The *zemindars*, within the ambit of whose estates the lands lay, were declared entitled only to settlement, as if the lands were separate revenue-paying estates.[2] Any questions as to the nature of the original grants, whether for life or in perpetuity, were to be decided by the terms of the grants, or if they could not be found, according to the ancient usages of the country.[3]

Classification of *non-badshahi* grants as to quantity of land.

The more important class of grants, from a lawyer's point of view, is the *non-badshahi*. Proprietors of settled estates had no title, as I have said, to possession of lands covered by invalid or expired *badshahi* grants though lying within the ambit of their estates, whatever the quantity might be. But the case was different with the other class of grants. Regulation XIX of 1793 laid down different rules for resumption and assessment of lands according to quantities and dates of grant. They were classified as,—

(1) exceeding one hundred *bighas*,

(2) below one hundred and exceeding ten *bighas*, and

(3) not exceeding ten *bighas*.

Classification as to dates of grants.

They may also be classified with reference to time under the following heads:—

(1) from the 12th August, 1765, the date of the *Dewany*, to the 12th April, 1771, the beginning of the Bengal year 1178 or the 26th September, 1771, the beginning of the *Fusli* and *Waliaty* year 1179,

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[1] Reg. XXXVII of 1793, Sec. 6.

[2] *Dabee* v. *Foy*, (1869) 12 W. R 361.

[3] Reg. XXXVII Sec. 2, cl. 3.

(2) from these latter dates, *i. e.*, the 12th April, 1771, or the 26th September, 1771, to the 1st December, 1790, and

(3) the period subsequent to the 1st December, 1790.

Grants of land exceeding one hundred *bighas.*

Regulation XIX declared that all revenue-free grants made since the 12th August, 1765, by any other authority than that of Government and which might not have been confirmed by Government, are invalid.[1] As regards grants of land, exceeding 100 *bighas*, whether lying in one village or two or more villages and alienated by one grant previous to the 1st December, 1790, the Government had the right to resume and assess the lands.[2] The proprietor of the estate within the ambit of which the lands might be situated had no right to the same[3]; but if the grant was posterior to the 1st December, 1790, the date of the Decennial Settlement, the right to resume and assess was in the proprietors of estates or dependent *taluqs*, and they and their managers were enjoined to resume such lands.[4] *Putnidars* and owners of similar permanent tenures, holding estates or parts of estates, being vested with the right which might well be called proprietary within the meaning of section 10 of the Regulation, had the same powers as proprietors. But notwithstanding the grant of a *putni* or any other lease in perpetuity, the proprietor of the estate retains the power of bringing resumption suits, as the resumption would inure to his own benefit as well as to that of the *putnidar*.[5] A

[1] Section 3.

[2] Section 7.

[3] *Gopal* v. *Oodhub*, (1864) W. R. Gap Vol. 156; *Beer* v. *Umakant*, (1864) W. R. Gap Vol. 232; *Ram* v. *Deenonath*, (1865) 2 W. R. 279.

[4] *Mahomed* v. *Umbica*, (1864) W. R. Gap Vol. 132; *Barbara* v. *Mahomed*, (1864) W. R. Gap Vol. 217. See also *Rajkishen* v. *Dhone*, (1862) 1 Hay 42: ; *Aikcowree* v. *Mohur*, (1863) 2 Sev. 115; *Hurryhur* v. *Abbas*, (1863) 2 Sev. 875, *sc.*, 1 R. J. P J. 231.

[5] *Okhoy* v. *Mahomed*, (1864) W. R. Gap Vol. 212.

zemindar is not precluded from resuming *lakhiraj* land situated in a dependent *taluq*, though such dependent *taluqdar* may have no right to resume.[1] When land exceeding one hundred *bighas* was admittedly held by a *lakhirajdar*, the presumption was that it was held under one grant, and that it was resumable by Government and not by the *zemindar*. In order to rebut the presumption, the *zemindar* must shew that the land, though beyond one hundred *bighas* in extent, was held under different *sanads*.[2]

Rules of settlement of such lands.

If the grant of land in excess of one hundred *bighas* was made after the 12th August, 1765, and previous to the 12th April, 1771, in Bengal, or the 26th September, 1771, in Bihar or Orissa, the Government had only the right to assess with revenue called, in vernacular, *nisf-jama*, *i.e.*, equal to one-half of the produce of the land according to *perganah* rate, the grantee being entitled to possession. If any part of the land remained uncultivated, *russudi* or progressive *jama* was to be fixed. If the holder of the grant agreed to pay the revenue so assessed, the *jama* was directed to be fixed for ever. The *taluqs* thus formed were called "independent *taluqs*." If, on the other hand, the grant set up by the holder of the *lakhiraj* land bore a date between the 12th April, 1771, or the 26th September, 1771, as the case might be according to the province in which the land was situated, and the 1st December, 1790, the assessment was to be made as on ordinary revenue-paying lands according to the rules given in Regulation VIII of 1793.[3] If the settlement was accepted by the holder of the land, the estate thus formed would likewise be recognised as an independent *taluq*. If, however, the grantee refused to accept settlement, the land was to be held *khas* and dealt with under the settlement rules as to

[1] *Jugunnath* v. *Togose*, (1865) 4 W. R. 43.

[2] *Jogendronarain* v. *Hurry*, (1864) W. R. Gap. Vol. 145.

[3] Reg. XIX of 1793, Sec. 8, cl. 3.

khas mahals. Lands held under grants made after the 1st December, 1790, were to be considered as parts of the *mal* or rent-paying lands of the holder of the estate within which they might lie, and the proprietors were entitled to eject the holders, whatever the quantity of land might be.[1]

Exceeding ten *bighas* but less than one hundred.

Land not exceeding one hundred *bighas* but exceeding ten *bighas*, whether lying in one village or two or more villages, and alienated by one grant, declared invalid, was to form part of the estate or dependent *taluq* within the ambit of which the land was situated.[2] Although Regulations I and VIII of 1793 had declared the right of the State to all lands unassessed at the date of the Decennial Settlement, Government thought that the revenue payable by holders of Permanently Settled estates would be better secured if the benefit derived from the resumption of small *lakhiraj* lands were conferred upon them, and so it gave up in their favour the right which it undoubtedly had.[3] If the grantee of land exempt from revenue held under a *sanad* bearing a date between the 12th August, 1765, and the 12th April, 1771, in Bengal, and the 26th September, 1771, in Bihar or Orissa, he was entitled to hold the land as a dependent *taluq* subject to the payment of rent to the proprietor of the estate, the amount being fixed in perpetuity by the Collector acting under the revisional powers of the Board of Revenue. The amount assessed was to be, in such a case, *nisf* (one-half).[4] But if the *sanad* propounded bore a date posterior to 1771 and previous to the 1st December, 1790, the amount of rent assessable then was in the discretion of the revenue-officers, revenue at full rate being generally levied. The rent of these dependent

[1] Reg. XIX of 1793, Secs. 10 and 11.

[2] Reg. XIX of 1793, Sec. 6; *Ram* v. *Deeno*, (1865) 2 W. R. 279.

[3] Reg. XIX of 1793, Sec. 6; Reg. II of 1819, Sec. 3, cl. 1.

[4] Reg. XIX of 1793, Secs. 5, 6, 9.

taluqs was assessable under almost the same rules as those for lands of which revenue was payable to Government.

Not exceeding ten *bighas*.

Land not exceeding ten *bighas* in area was not to be subjected to the payment of revenue, if the *sanad* bore a date between the 12th August, 1765, and the 12th April, 1771, in Bengal, and 26th September, 1771, in Bihar or Orissa, provided it was found that the produce was "*bonâ fide* appropriated as an endowment on temples, or to the maintenance of Brahmins, or other religious or charitable purposes."[1] This rule was declared to extend also "to all grants of land whatever, not exceeding ten *bighas*, made previous to the *Dewany*, the produce of which was in 1793 so appropriated.[1]" Lands held under grants subsequent to these dates were declared assessable in the same way as lands exceeding ten *bighas*.

Title by possession declared valid by Regulation XIV of 1825.

These are the substantive provisions of the Resumption Regulations, but legal practitioners, even in those early days when resumption cases were numerous, had seldom to deal with grants made subsequent to the date of the *Dewâny*. No claimant of *lakhiraj* land, whatever its quantity might be, would think of setting up, if he was disposed to set up a false plea, a title by grant posterior to that date. The only practical questions, therefore, that arose, related to grants, which, if proved, would confer absolute proprietary right to the grantees. If the grants were declared invalid under section 17 of Regulation XIX of 1793, or if no grants were proved, *bonâ fide* possession could be relied on as evidence of title. The provisions of section 3 of Regulation XIV of 1825 were applicable to all classes of *lakhiraj* lands, and *bonâ fide* possession could be relied on in proof of title.

Jurisdiction in resumption cases and Regulation II of 1819.

The later Resumption Regulations, of which II of 1819 is the most important, made no alteration in the substantive rules of law laid down in the Regulation Code

[1] Reg. XIX of 1793, Sec. 3, cl. 4.

of 1793. They modified only the procedure and established special courts for adjudication of claims to hold *lakhiraj* lands. Resumption cases were originally triable by civil courts, the assessment of revenue on resumption being left to the fiscal authorities. Section 30 of Regulation II of 1819 gave concurrent jurisdiction to the civil courts and the Collectors. On the passing of Act X of 1859, a question was raised as to whether section 28 of the Act, which made a material alteration in the law of landlord and tenant, took away the right of the civil courts in the country to try resumption cases. In *Gunga Hurry Dhobey* v. *Tripp*,[1] a Division Bench of the Calcutta High Court held that a suit by a landlord for resumption of land, alleged to have been set up as *lakhiraj* since 1790, was exclusively cognizable by the Collector under section 28 of Act X of 1859. The question subsequently came before a Full Bench of the Court, and the majority of the judges held that the Collector and the civil courts had concurrent jurisdiction.[2] The question ceased to be of much practical importance, as Bengal Act VII of 1862 took away the Collector's jurisdiction. In such of the Bengal districts in which Bengal Act VIII of 1869 was in force, and on its repeal, Act VIII of 1885 is now in force, the Collectors have ceased to have any judicial functions in rent cases as well as resumption cases.

Grants made subsequent to the Decennial Settlement.

Questions were also raised as to the court that should try, the procedure that should be adopted and the statements that should be made in the plaint, in cases in which the allegation of the proprietor was that the

[1] (1864) 1 W. R. 31.

[2] *Sonatan* v. *Abdool*, (1865) 2 W. R. 91, *sc.*, B. L. R. F. B. Vol. 109; *Parbati* v. *Rajkrishna*, (1865) B. L. R. F. B. Vol. 162; *Khelalchunder* v. *Poornochunder*, (1865) 2 W R. 258; *Nobbo* v. *Narainee*, (1865) 3 W. R. 5; *Mahomed* v. *Laul*, (1868), 10 W. R 103; *Reazoonnissa* v. *Motee*, (1869) 12 W. R. 135; *Nilmoney* v. *Sharoda*, (1871) 16 W. R. 173; *Ram* v. *Collector*, (1874) 22 W. R. 48. But see *Nil* v. *Ramessur*, (1868) 9 W. R. 605.

lakhirajdar held under grants made subsequent to the 1st December, 1790, or had possession subsequent to that date.[1] Under Act X of 1859, the Collector had concurrent jurisdiction under section 28, and he had exclusive jurisdiction in assessing rent, though he had no jurisdiction in cases for resumption of lands held under grants made previous to the 1st December, 1790.[2]

Who might resume.

If a grant was made by the proprietor of an estate, it is binding upon him, his heirs, legal representatives and assigns, notwithstanding the declaration in the Regulations as to the invalidity of all rent-free grants.[3] A purchaser in execution of a civil court decree, a *putnidar*, or a holder of any permanent tenure created since 1790, is a representative of the proprietor, and he is equally bound by such grant.[4] The invalidity of such a grant is a good plea, if set up by the Government, in case it happens to come into possession under a title paramount or on a sale for arrears of revenue or if it is set up by persons who may claim under the Government or under a sale for arrears of an entire estate. The Government or such a purchaser is entitled to the right as granted by the Government at the date of the Permanent Settlement.[5]

Distinction between rent-free and revenue-free lands.

Grants of land made since 1790 are really *rent-free*. They are not *revenue-free*. The distinction between *revenue-free* and *rent-free* grants is commonly lost sight of, the vernacular words *nishkar*, *lakhiraj* or *brit* being equally applicable to both classes and used indiscriminately. The Bengal Tenancy Act of 1885 has

[1] *Inderjeet* v. *Chokew*, (1863) W. R. F. B. Vol. 81.

[2] *Mooroobbee* v. *Latoo*, (1863) W. R. F. B. Vol. 70; *Ramneedhy* v. *Neamut*, (1863) 2 Hay 437.

[3] *Mahomed* v. *Asadun-nissa*, (1867) 9 W. R. 1 *sc.*, B. L. R. F. B. Vol 774. But see *Peeseerooddeen* v. *Modhoosoodun*, (1865) 2 W. R. 15; *Judoonath* v. *Bonomalee*, (1865) 2 W. R. 295; *Chunder* v. *Bunko*, (1865) 3 W. R. 177; *Waris* v. *Muhammad*, (1886) I. L. R. 8 All 552.

[4] *Mahomed* v. *Asadun-nissa*, (1867) 9 W. R. 1, *sc.*, B L. R F. B. Vol. 774; *Dabee* v. *Joy*, (1869) 12 W. R. 361. But see *Chunder* v. *Bunko*, (1865) 3 W. R. 177.

[5] Act XI of 1859, Sec. 37. *Koylashbashiny* v. *Gocoolmoni*, (1881) I. L. R. 8 Calc. 230, *sc.*, 10 C. L. R. 41; *Dabee* v. *Fuqueer*, (1864) W. R. Gap. Vol. 293; *Nobo* v. *Narain*, (1866) 5 W. R. 191.

defined the words 'tenant' and 'rent,' and they include cases in which grantees of land, situated within the ambit of an estate, hold under grants made by a proprietor subsequent to the Permanent Settlement.[1] The grantee or his heirs would be bound to pay, but for the contract or grant, rent, as holding under permission of the proprietor, for the use and occupation of the land. The relation between the grantor and the grantee is thus really that of landlord and tenant.[2] Such *lakhiraj* holdings are rent-free lands and not revenue-free, and they are resumable by a purchaser on a sale of an estate or tenure free of incumbrances.[3] The distinction, however, between revenue and rent was not so marked in the earlier days of British rule as now.

Limitation of suits or applications for resumption.

Section 28 of Act X of 1859 repealed section 10 of Regulation XIX of 1793 and the corresponding sections of the other Resumption Regulations, and laid down: "Any proprietor or farmer, who may desire to assess any such land or dispossess any such grantee, shall make an application to the Collector, and such application shall be dealt with as a suit" under the Act. The limitation prescribed was twelve years[4] from the accrual of the cause of action, but if the twelve years had already elapsed, the suit might be brought within two years from the date of the passing of the Act.[5] Clause 14 of section 1 of the Limitation Act (XIV of 1859) also prescribed twelve years as the period of limitation.[6]

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[1] Act VIII of 1885, Sec. 3, cls. 3, 5.

[2] *Gokhul* v. *Gobind*, (1890) I. L. R. 17 Calc. 721. See also *Secretary* v. *Nitye*, (1893) I. L. R. 21 Calc. 38.

[3] *Dabee* v. *Fuqueer*, (1864) W. R. Gap. Vol. 293; *Nobo* v *Narain*, (1866) 5 W. R. 191; *Bholanath* v. *Uma*, (1886) I. L. R. 14 Calc. 440.

[4] *Sonaton* v. *Abdool*, (1865) 2 W. R. 205.

[5] Act X. of 1859, Sec. 28.

[6] *Busseerooddeen* v. *Shibpersad*, (1864) W. R. Gap. Vol. 170; *Barodakant* v. *Sookmoy*, (1864) 1 W. R. 29; *Janokee* v. *Nobin*, (1865) 2 W. R. (Act X) 33; *Khelalchunder* v. *Poornochunder*, (1865) 2 W. R. 258; *Krishto* v. *Joy*, (1865)3 W. R. 33; *Dhunput* v. *Boojah*, (1865) 4 W. R. 53; *Furlong* v. *Khusroo* (1867) 7 W. R. 531; *Gunga* v. *Huree*, (1871) 15 W. R. 436.

Under later Acts.

The Limitation Act of 1871[1] re-enacted the same rule, with a proviso that no such suit should be maintained, where the land formed part of a Permanently Settled estate and was held rent-free from the time of the Permanent Settlement. This proviso, however, was unnecessary, the sections dealing with the right of auction-purchasers on revenue-sales of entire estates having laid down the same rule.[2] The proviso to article 130 was accordingly repealed when Act XV of 1877 was passed.[3] The result seems to be that no title to *lakhiraj* land created before the 1st May, 1793, the date of the Permanent Settlement, can now be disturbed.[4] The period of limitation for suits by Government[5] is sixty years, but, in other respects, the same rules of law apply. Purchases made by Government under Act XI of 1859 are subject to the provisions of that Act.[6] It has been held that *lakhiraj* tenures are incumbrances within the meaning of the Sale Laws, and they can be avoided only if they have come into existence since the Permanent Settlement.[7] I presume there can now be no successful cases of resumption of revenue-free lands, as they are, by lapse of time, sufficiently protected.

Registers of *lakhiraj* land.

It is necessary to say a few words on the *registers* of revenue-free lands. From the time that the attention of the Government was drawn to improper and unauthorised alienations of the share of the State in the produce of lands claimed as *lakhiraj*, and a separate

[1] Act IX of 1871, Sch. II, Art. 130. See also *Jodoonath* v. *Pogos*, (1863) 2 Sev. 561; *Ram* v. *Bhoyrub*, (1864) 3 R. J. P. J. 27.

[2] Act XI of 1859, Sec 37; Act VII (B. C.) of 1868, Sec. 12.

[3] Act XV of 1877, Sch. II, Art. 130; *Bir* v. *Raj*, (1889) I. L. R. 16 Calc. 449. See also *Birendra* v. *Akram*, (1912) I. L R. 39 Calc. 439, *sc.*, 16 C. W. N. 304, *sc.*, 15 C. L. J. 194 and *Kali* v. *Birendra*, (1914) 22 C. L. J. 309.

[4] Act XV of 1877, Sch. II, Art. 149.

[5] Act XI of 1859, Sec. 58.

[6] *Koylasbashiny* v. *Gocoolmoni*, (1881) I. L. R. 8 Calc. 230, *sc.*, 10 C. L. R. 41.

[7] Reg. XIX of 1793, Sec. 11; Reg. XXXVII of 1793, Sec. 16.

department of Government office, known as the *baze-zemindufter*, was established, the importance of keeping registers was felt. Regulations XIX and XXXVII of 1793[1] laid down definite rules for the purpose and declared that grantees of *lakhiraj* lands, *badshahi* or otherwise, should, within one year of the issuing of notifications inviting registration,[2] put forward their claims in written applications The Collectors of districts were, however, busy with other important matters, and notifications inviting claims were not issued in most districts, and even where notices were issued the registers were not duly kept. Regulation VIII of 1800 was, accordingly, passed. It made stringent provisions for the issuing of the notifications prescribed by it.[3] The Collectors issued notifications under the Regulation, and in some of the districts numerous applications were filed and registers of claims were prepared. The entries of claims are known as *taidads*, and those of 1802 A. D. (1209 B. S.), are well known. Copies of the entries in the registers kept under Regulation VIII are often put forward as evidence of revenue-free title, and, I believe, they are almost always admitted,[4] although I doubt whether section 13 of the Evidence Act can be invoked as giving these *taidads* any evidentiary value. It should also be remembered that the registers themselves have seldom been kept in the strict way prescribed by the Regulation. Registers of valid *lakhiraj* lands, admitted as such after regular judicial enquiry, used to be kept in the Collectorates and were called (C) registers.

The Land Registration Act.

Under Act VII of 1876 of the Bengal Legislative Council, known as the Bengal Land Registration Act, provision is made for special registers of revenue-free lands.

[1] Reg. XIX of 1793, Secs 11 to 34; Reg. XXXVII of 1793, Secs. 16 to 41.

[2] Reg. XIX of 1793, Sec. 24; Reg. XXXVII of 1793 Sec. 19.

[3] Section 19 *et seq.*

[4] *Boydonath* v. *Neelambur*, (1863) 2 Sev. 733 *fn*; *Omesh* v *Dukhina*, (1863) W. R. F. B. Vol. 95.

Register (B) is the general register of revenue-free lands and part I[1] contains entries of all lands exempt from revenue in perpetuity held under *badshahi*, *hukami* and other revenue-free grants which have been declared to be valid by competent authority according to the Resumption Regulations. Of the intermediate registers, part II refers to revenue-free lands.[2] The Land Registration Act has made registration compulsory,[3] and every proprietor, common manager appointed under the Bengal Tenancy Act, or mortgagee in possession must register his name within six months.[4] Sections 78 and 79 of the Act afford indemnity to *raiyats* paying rent to the registered owner, manager, or mortgagee in possession, and take away from the unregistered owner the right of suing for rent, though the mere registration of name does not entitle the person, whose name has been registered, to get decrees for rent against tenants without any other evidence of title.[5] The Bengal Tenancy Act includes only these revenue-free lands in the definition of "estate," and the owners thereof come within the definition of "proprietors."[6] Section 60 of the Bengal Tenancy Act entitles the registered owner to a decree for rent without any other proof of title.[7] The Land Registration Act does not, however, deal with lands which have not been admitted to be revenue-free by proceedings under the Resumption Laws.[8] Registration of the name of the proprietor being compulsory, and no one being bound

[1] Act VII (B. C.) of 1876, Secs. 4, 9 & 10.

[2] *Ibid.*, Sec. 17. [3] *Ibid.*, Sec. 38.

[4] *Ibid.*, Sec. 42. As to common manager, see *Maqbul* v. *Girish*, (1892) I. L. R. 22 Calc. 634.

[5] *Ramkristo* v. *Harain*, (1882) I. L. R. 9 Calc. 517, *sc.*, 12 C. L. R. 141.

[6] Act. VIII of 1885, Sec. 3

[7] *Hem* v. *Sourindra*, (1898) 5 C. W. N. 482; *Sadhu* v. *Radhika*, (1904) 8 C. W. N. 695, distinguishing *Durga* v. *Samash*, (1895) 4 C. W.N. 606; *Hasan* v. *Matbar*, (1909) 11 C. L. J. 147.

[8] See *Umatul* v. *Kulsum*, (1907) I. L. R. 35 Calc. 120, *sc.*, 12 C.W.N. 16, *sc.*, 8 C. L. J. 245.

to pay rent to any person claiming such rent as proprietor unless his name is registered, it was held that no suit for rent could be maintained, unless the claimant's name was on the register under the Act at the date of suit.[1] Such a rule obviously caused injustice in a great many cases, as the rules of limitation might bar claims before the claimant could obtain a decree for registration. In *Alimuddin Khan* v. *Hira Lall Sen*,[2] the majority of the Full Bench held that the production of the certificate of registration, when the suit came on for trial, was sufficient. Such a rule will abate the rigour of the law.[3]

Redeemed lands.

There is another class of revenue-free lands which comes within the rules laid down in the Registration and Tenancy Acts, namely, lands of which the Government has, in consideration of the payment of a capitalised sum, granted proprietary title free in perpetuity from any demand of land-revenue.

The Cess Act.

The Bengal Cess Act of 1880 has also included within the definition of "estate" [4] the revenue-free lands entered in Register (B), part I, of the Land Registration Act, and the rights and liabilities of the owners of these lands under the Cess Act are the same as those of revenue-paying estates.[5] The annual amount of Road Cess and Public Works Cess is calculated upon the annual value, but no deduction is, of course, allowed as in the case of revenue paying estates.[6] The amount is payable

[1] *Surya* v. *Hemant*, (1889) I. L. R. 16 Calc. 706; *Dhoronidhur* v. *Wajidunnissa*, (1888) I. L. R. 16 Calc. 708 *f.n.*; *Punuk* v. *Thakur*, (1898) I. L. R. 25 Calc. 717.

[2] (1895) I. L. R. 23 Calc. 87.

[3] See also *Belchambers* v. *Hussan*, (1898) 2 C. W. N. 493; *Abul* v. *Meher*, (1899) I. L. R. 26 Calc. 712; *sc.*, 3 C. W. N. 381; *Ugra* v. *Bedeshi*, (1900) 5 C. W. N. 360; *Rabia* v. *Bilashman*, (1906) 8 C.L.J. 299; *Serapat* v. *Tarini*, (1906) 11 C. W. N. 141; *Harekrishna* v. *Brindabun*, (1897) 1 C. W. N. 712.

[4] Act IX (B. C.) of 1880, Sec. 4.

[5] *Gopal* v. *Aftab*, (1884) I. L. R. 10 Calc. 743

[6] Act IX (B. C.) of 1880, Secs. 41, 56.

in two equal instalments, or in one annual payment, on such day or days as the Board of Revenue in Western Bengal, and the Governor in Council of Fort William in Bengal in Eastern Bengal, may appoint.[1] The amount is recoverable under the Public Demands Recovery Act.[2]

The Dawk Cess Act.

The Dawk Cess under Bengal Act VIII of 1862 is not payable by holders of revenue-free estates. It was apparently an oversight. The tax itself, under the present state of things, ought not to be levied, and the Act ought to be repealed.[3]

Estates Partition Act.

Revenue-free lands are, generally speaking, heritable, partible and alienable as 'estates' except lands dedicated to pious and charitable objects, as to which the law is somewhat complicated. They are, however, not partible by the Collector under the Estates Partition Act of 1876. The definition of 'estate' in that Act does not include revenue-free lands.[4] The partition of such lands must be made by civil courts,[5] though the principles[6] of partition may well be taken from the Estates Partition Act.

Patni Sale Law.

Subletting of *lakhiraj* lands is common, but the provisions of the Putni Sale law (Regulation VIII of 1819) are not applicable to permanent tenures created by holders of revenue-free lands. In fact, such subordinate tenures go by other vernacular names, such as *istemrari maurusi*, *mukurrari maurusi*, *&c.*

Onus probandi.

The *lakhiraj* lands, which, at the present day, become the subject of resumption-suits, or more accurately, suits for possession by ejecting the *lakhiraj* holders,

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[1] Act IX (B. C.) of 1880, Sec. 57.

[2] Act III (B.C.) of 1913, Schedule I and Act IV (B. & O.) of 1914, Schedule I.

[3] The Dawk Cess is longer levied from *zemindars*. The Act is not repealed, but it has ceased to be of active operation.

[4] Act V (B. C.) of 1897, Sec. 3, cl. IX.

[5] *Fatteh* v. *Janki*, (1870) 4. B. L. R. App. 55, *sc.*, 13 W. R. 74

[6] *Janokee* v. *Luchmun*, (1872) 17 W. R. 137.

in the Bengal Provinces, are lands alleged to be held without any title from a time posterior to the Permanent Settlement, or held under grants made after the Permanent Settlement by holders of estates or permanent tenures. We have already seen that the grantors, their heirs or assigns only are bound by the terms of the grants.[1] In cases of adverse possession as *lakhiraj* (without payment of rent), the rules of limitation are strong barriers to claims at the present day.[2] If a suit is for possession by the proprietor of an estate or a tenure-holder, on the allegation that the land claimed as *lakhiraj* is not really so, but is a part of the *mal* or *khiraji* lands of the estate or tenure, it is for the plaintiff to make out a *primâ facie* case that, at any time since the Permanent Settlement, the land was dealt with as *mal*, and the holder of the land or some predecessor of his paid rent for it.[3] If the plaintiff is not a purchaser entitled to set aside all incumbrances created since the settlement under which he holds, proof of receipt of rent or possession within twelve years of the suit must be

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[1] See *ante*, p. 89.

[2] *Rungloll* v. *Bhoneshun*, (1864) 1 W. R. 109; *Askur* v. *Wasuck*, (1874) 22 W. R. 413; *Ghogoolee* v. *Muzhur*, (1875) 24 W. R. 389; *Erfanoonnissa* v. *Pearee*, (1876) 25 W. R. 209, *sc.*, I. L. R. 1 Calc. 378; *Abhoy* v. *Kally*, (1880) I. L. R. 5 Calc. 949, *sc.*, 6 C. L. R. 260; *Sunduri* v. *Mudhoo*, (1887) I L. R. 14 Calc. 592.

[3] *Tareeneepersad* v. *Kalleechurn* (1862) Marshall 215, *sc.*, 2 Hay 90; *Collector* v. *Gungagobind*, (1863) 2 Hay 33; *Kedar* v. *Unnoda*, (1864) 1 W. R. 25; *Ellias* v. *Tithraram*, (1864) 1 W. R. 164; *Ram* v. *Deenonath*, (1865) 2 W. R. 279; *Gobind* v. *Koomudnath* (1865) 3 W. R., Act X, 148; *Beharee* v. *Kalee*, (1867) 8 W. R. 451; *Ram* v. *Bistoo*, (1871) 15 W. R 299; *Modhoo* v. *Nepal*, (1871) 15 W. R. 440; *Harihar* v. *Madab*, (1871) 8 B. L. R. 566, *sc.*, 20 W. R. 459, *sc.*, 14 M. I. A. 152; *Huree* v. *Doorga*, (1872) 17 W. R 449; *Bishnath* v. *Radha*, (1873) 20 W. R. 465; *Mahamed* v. *Reily*, (1875) 24 W. R. 447; *Erfanoonnissa* v. *Pearee*, (1876) 25 W. R. 209, *sc.*, I. L. R. 1 Calc. 378; *Newaj* v. *Kali*, (1880) I. L. R. 6 Calc. 543, *sc.*, 8 C. L. R. 7; *Akbur* v. *Bhyea*, (1880) I. L. R. 6 Calc. 666, *sc.*, 7 C. L. R. 497; *Bacharam* v. *Peary*, (1883) I. L. R. 9 Calc. 813, *sc.*, 12 C. L. R. 475; *Narendra* v. *Bishun*, (1885) I. L. R. 12 Calc. 182; *Milan* v. *Mohemed*, (1903) 10 C.W.N. 434; *Halodhar* v. *Ramendra*, (1912) 16 C. W. N. 980; *Kalyani* v. *Braunfield*, (1915) 20 C. W. N. 1028. But see *Heera* v. *Barikunnissa*, (1878) I. L. R. 3 Calc. 501; *Koylashbashiny* v. *Gocoolmoni*, (1881) I. L.R. 8 Calc. 230, *sc.*, 10 C. L. R. 41 and *Ananda* v. *Secretary*, (1906) 3 C. L. J. 316.

proved, to remove the bar of limitation. In the case of a purchaser of an entire estate under Act XI of 1859 or of a tenure under Act VII (B.C.) of 1868 desiring to exercise the powers conferred either by section 37 of the former Act or section 12 of the latter Act, or in the case of a purchaser of a *putni* on a sale under Regulation VIII of 1819, or of any tenure or under-tenure sold for its own arrears under any Tenancy Act and entitled to hold land free of incumbrances created by the defaulter, the suit must be brought within twelve years of the confirmation of sale.[1] Even in the latter case, the suit being within time, the burden of making out a *primâ facie* title to eject a defendant who claims the land as *lakhiraj* is upon the plaintiff.[2] The presumption which the Regulation Laws allowed to be made in favour of the proprietors cannot now be invoked. In the language of their Lordships of the Judicial Committee of the Privy Council in the case of *Harihar Mukhopadya* v. *Madab Chandra Babu*,[3]—"It lies upon the plaintiff to prove a *primâ facie* case. His case is that his *mal* land has, since 1790, been converted into *lakhiraj*. He is surely bound to give some evidence that his land was once *mal*.....He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the *mal* assets of the Decennial Settlement of the estate. His *primâ facie* case once proved, the burthen of proof is shifted on the defendant, who must make out that his tenure existed before December 1790." The presumption arising from long and uninterrupted possession, amply rebuts any presumption of the land being *mal*

[1] Act IX of 1908, Sch. i., Art 121. *Busseerooddeen* v. *Shibpersad*, (1864) W. R. Gap. Vol. 170; *Gunga.* v. *Huree*, (1871) 15 W. R. 436; *Bunnoo.v. Ameerooddeen*, (1874) 23 W. R. 24.

[2] *Forbes* v. *Mean*, (1865) 3 W. R. 69; *Bissambhur* v. *Koylash*, (1875) 23 W. R. 388. But see *Sham* v. *Sekunder*, (1865) 3 W. R. 182.

[3] (1871) 8 B. L. R. 566, *sc.*, 14 M. I. A. 152, *sc.*, 20 W. R. 459.

arising from its being situated within the ambit of an estate. The rule thus laid down by the Privy Council has been followed in the case of auction-purchasers in *Arfunnessa* v. *Peary Mohun Mookerjee*,[1] in which Justice Mitter is reported to have said—"The presumption.....that every *bigha* of land, within the ambit of his (the auction-purchaser's) estate.....was liable to be assessed with Government revenue,.....is not sufficient to start a case for the plaintiff in a suit of the present description, because there is no presumption that every *bigha* of land within the ambit of an estate must be deemed to have been assessed with revenue until the contrary is proved."[2] Circumstances may, however, exist, in particular cases, where the plaintiff may be excused from giving *primâ facie* evidence of the land being *mal* or rent-paying.[3] A purchaser at an auction-sale for arrears, entitled to hold land free of incumbrances, may have to sue the defaulter himself, who may claim the right to hold land as *lakhiraj*, as distinct from the land of which he has been just deprived possession by sale. In such cases, it is the obvious duty of the defaulter to shew that his possession as the holder of *lakhiraj* land was based upon title distinct from that to hold as *mal*.[4] In *Newaj Bundopadhya* v. *Kali Prosonno Ghose*,[5] Garth C. J. and Field J. held that, in a suit for enhancement of rent where the tenant pleaded that a portion of the land, rent of which was sought to be enhanced, was held by him as rent-free, the onus was on the tenant to make out a *primâ facie* case that such portion of the land was

[1] (1876) I. L. R. 1 Calc. 378, *sc.*, 25 W. R. 209.

[2] See *Bishnath* v. *Radha*, (1873) 20 W. R. 465; *Bacharam* v. *Peary*, (1883) I. L. R. 9 Calc. 813, *sc.*, 12 C. L. R. 475.

[3] *Beer* v. *Ram*, (1867) 8 W. R. 209; *Shumdan* v *Mothooranath*, (1870) 14 W. R. 226; *Goonomonee* v. *Burrodakant*, (1872) 18 W. R. 191; *Khorshed* v. *Dhoondharee*, (1873) 20 W. R. 457; *Bishnath* v. *Radha*, (1873) 20 W. R. 465; *Sashi* v. *Mahomed*, (1906) 4 C. L. J. 548.

[4] *Ram* v. *Veryag*, (1876) 25 W. R. 554.

[5] (1880) I. L. R. 6 Calc. 543, *sc.*, 8 C L. R. 6.

so held by him as distinct from *mál* lands. In *Akbur Ali* v. *Bhyea Lal Jha*[1] also, the same judges held that where the defendants admittedly held certain lands within the plaintff's *zemindari*, some at least of which were rent-paying, the defendants, if desirous of proving that any of these lands was rent-free, were bound to give some *primâ facie* evidence of this fact before they could call upon the plaintiff, the *zemindar*, to prove that the whole or any part of the lands was *mal*. But in two later cases, *Bacharam Mundul* v. *Peary Mohun Banerjee*[2] and *Narendra Narain Rai* v. *Bishun Chundra Das*,[3] the High Court doubted and distinguished the above rulings.

Weight of evidence.

Questions about *onus probandi* can only arise in determining which of the parties to a suit ought to begin, and which party should fail, if no evidence be given by either party. Evidence is, in the large majority of civil cases, adduced on both sides, and it is desirable that the conclusions of judges should depend upon findings based upon weight of evidence.[4] Though the burden of proof in any suit in ejectment, on the ground that the land in suit in the possession of the defendant as rent-free was, since the year 1790, a part of the *malguzari* lands of an estate, is generally on the plaintiff, but to say that the plaintiff must discharge the burden by the best and the most satisfactory evidence, and that the defendant need not adduce any evidence until the plaintiff has strictly made out his case, is giving the rules about the burden of proof an importance which they do not deserve. Undue weight to technical rules frequently leads to failure of justice. Scanty evidence on one side may be quite sufficient, if there is no evidence on the other side to rebut it.

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[1] (1880) I. L. R. 6 Calc. 666, *sc.*, 7 C. L. R. 497.

[2] (1883) I. L. R. 9 Calc. 813, *sc.*, 12 C. L. R. 475.

[3] (1885) I. L. R. 12 Calc. 182.

[4] *Kalyani* v. *Braunfield*, (1915) 20 C. W. N. 1028.

LECTURE IV.

PERMANENTLY SETTLED ESTATES.

Discussions as to propriety of the Permanent Settlement.

The history of the Permanent Settlement of Bengal, Bihar and Orissa, and of the origin and gradual rise of the class which was benefited or ruined by it, has been repeatedly told by men whose learning and ability command the highest respect. The discussions about the propriety or impropriety of the act by which Marquis Cornwallis, the then Governor-General, declared, with the approbation of the Court of Directors for the Affairs of the East India Company, the Decennial Settlement to be permanent and unalterable, cover volumes; and nothing more remains to be said even on a matter of so vast an importance and of so great an historical value. The introduction of the Permanent Settlement by that nobleman whose moderation, love of justice and humanity no one ever doubted, which indeed the very code of 1793 displays in almost every part of it, has been repeatedly made the subject of rancorous debates and bitter controversies, both sides being partially right and partially wrong. The *zemindars* were said to have been tax-gatherers and servants of the State, paying into the exchequer amounts fluctuating, arbitrary and unequal. They were, on the other hand, said to have been hereditary landlords, having proprietary right like the feudal lords of European countries. When the government of Mr. Hastings attempted to ignore their right, made temporary settlements of land-revenue, appointed managers of their estates, and ousted many of them, they complained loudly, and their complaint reached the House of Commons. Statute 24 Geo. III, cap. 25, known as Pitt's India Act, was passed in 1784,

the 39th. section of which required the Court of Directors "to give orders for settling and establishing, upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which the tributes, rents, and services of the *rajas*, *zemindars*, *polygars*, *taluqdars* and other native landholders should be in future rendered and paid to the United Company."[1] The claim of the *zemindars* to proprietary right was asserted and denied and discussed hotly even in those early days of the East India Company's government, and you will find the latest dissertation on the subject in Sir William Hunter's *Bengal M.S. Records* published this year (in 1894).[2]

The necessity of the measure.

The policy of Lord Cornwallis, in fixing for ever the land-tax payable by *zemindars* to Government, was, if I may venture to pass an opinion on the point, a matter of necessity, and the despatch of the Court of Directors, dated the 29th September, 1792, indorsing the Governor-General's views, was in accordance with the spirit of the age and the views of the British Parliament as contained in Pitt's India Act. The necessity of paying the great military and civil establishments of the Company and dividends to the proprietors required the punctual realisation of the land-tax, and the amount needed was large. To avoid fluctuations and ensure punctual realisation, some means was absolutely necessary to be adopted, and the Government adopted not only the best, but, as the event showed, the most successful one. The tax was, at the time, so heavy, and the rules adopted for realising it so paralysing, that most of the ancient *rajas* and *zemindars* of Bengal, who had the good fortune of the Permanent Settlement being

[1] United Company of Merchants Trading in the East, *i.e.*, the East India Company.

[2] The discussions and conclusions are collected in the Appendix to the Report known as the Fifth Parliamentary Report. See also the Report itself of the Select Committee.

thrust upon them, succumbed in the course of a few years. The then prevailing feeling in England about its own land-tenures, coupled with the exigencies brought on by the revolutionary war, a feeling which resulted in the passing of the Statute 38 Geo. III, cap. 60, whereby the tax on landed estates in England was perpetually fixed "subject to purchase and redemption by proprietors," led more than any other cause to the introduction in India of the same principle of giving certainty to the demand of Government upon land.

Zemindars.

The error of the Permanent Settlement lay in the application to India of English principles of land-law, and assessment of the tax on insufficient materials. The *zemindars* were the only class of persons whom, in the then existing state of things, the Government could look to for punctual realisation of State-dues. There existed at the time this important body who had widely different sources of origin, but known to the Mahomedan governors by one name only. Some of them had long ancestries to tell, beginning at a period coëval, if not anterior, to the Mahomedan conquest of Bengal. Many of them were hereditary princes, owing only financial allegiance to the authority of the emperors of Delhi or their viceroys. Their law of succession was the law of principalities—*primogeniture.*[1] Even those who were of recent origin were very influential and wielded power not much inferior to those wielded by the very ancient families. The more influential and intelligent among these were, to borrow a modern expression, members of the viceregal council at Murshidabad. They were

[1] Regulation X of 1800. *Beer* v. *Rajender*, (1867) 12 M. I. A. 1, *sc.*, 9 W. R. P. C. 15; *Heeranath* v. *Burm*, (1872) 17 W. R. 316; *Rajkishen* v. *Ramjoy*, (1872) I. L. R. 1 Calc. 186, *sc.*, 19 W. R. 8; *Uddoy* v. *Jadubal*, (1879) I. L. R. 5 Calc. 113, affirmed in (1881) I. L. R. 8 Calc. 199; *Sartaj* v. *Deoraj*, (1888) I. L. R. 10 All. 272, *sc.*, L. R. 15 I. A. 1; *Ram* v. *Janki*, (1902) I. L. R. 29 Calc. 828, *sc.*, L. R. 29 I. A. 178, *sc.*, 7 C. W. N. 57; *Shyamanand* v. *Rama*, (1904) I. L. R. 32 Calc. 6; *Sarabjit* v. *Indarjit*, (1904) I. L. R. 27 All. 203; *Sarat* v. *Akshoy*, (1908) 13 C. L. J. 305.

ministers of State, and the government of the country was, to a considerable extent, entrusted to their hands. If we classify them, the first class would represent the old Hindu *rajas* of the country, whose ancestors had held independent principalities or principalities that admitted only nominal allegiance to the imperial government, either Hindu or Mahomedan. The *rajas* of Assam, Tipperah, Coochbehar, Bishenpur, Beerbhoom, Chhotanagpur, Pachete and Ramgarh may be placed in this class. The second class consisted of the great land-holding families that came into existence during the period of the Mahomedan government through its sufferance or favour. The *rajas* of Rajshahi, Dinajpur, Burdwan, Jessore, Nadiya with many others were *de facto* rulers in their own estates or territories, and used to pay only fixed tribute or land tax. They were like feudatory chiefs.[1] The third and the most numerous class consisted of persons whose families had held offices for collecting land-revenue for two or three generations and who thus claimed a prescritive right to hold on. Then there were the revenue-farmers who, since the grant of the *Dewany* in 1765, had been placed in office and also happened to be called *zemindars*.[2] Thus all the persons or families known as *zemindars* in 1790 were not collectors of land-revenue or *tehsildars* removable at pleasure. The office of *zemindar* had, in fact, in most instances, become hereditary, and they paid fixed sums of money into the Nawab's treasury, more as tribute than as land-revenue. The Nawab sometimes extorted more money than the settled or customary amount, but that was not by right or law, but by might or violation of law. When the Government of India, that is to say,

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Some other estates in Bengal, Bihar and Orissa that have been held or claim to have succession according to the laws of principalities are Narajole, Patya, Dumaron, Gidhour, Bettia, Hutwa, Darbhanga, Ramnagar, Jheria, Patkum and Barabhum in Manbhoom.

[2] Hunter's Manuscript Records, p. 31.

the power in England and the Governor-General's Council in India, agreed in dealing with all these *zemindars* in the same way as if they were feudal lords, some of them were no doubt raised in position and emolument but the status of many of them was lowered.

Settlement made on insufficient materials.

Causes much similar to those that led to the feudalisation of Europe after the fall of the Carlovingian dynasty were in operation in India in the beginning and middle of the eighteenth century, and when the English found themselves masters of the country, they saw a state of things very much similar to the feudal government of the Middle Ages. Consciously or unconsciously, Lord Cornwallis was thus led to introduce an imitation of the English system of landed property.[1] The State assumed to itself and made over to the *zemindars* its own supposed proprietary right to the soil, as if the cultivators had no right to hold land against the will of the Government and its grantees. Deeper and closer observation, however, would have disclosed, underlying the upper layer, conditions of life and ideas of legal rights and obligations dissimilar to any with which Englishmen were then familiar, and they consequently failed to grapple with, far less to appreciate, them. The words of Sir John Shore were of no effect. To repeat the words of the preamble to Regulation II of 1793, "the property in the soil was formally declared to be vested in the landholders," but adequate provision was not then made for the protection of the class of persons who were the real proprietors of the soil and who deserved on account of their weakness the largest amount of protection from the hands of the Government.

The haste with which the land revenue was fixed was another cause of defect in the Permanent Settlement of 1793. The revenue fixed was so high in some

[1] Hunter's Manuscript Records, p. 45. See also Baden-Powell's 'Land Revenue.'

cases that, within the course of fifteen years, the *rajas* of Nadiya, Rajshahi, Bishenpur, Dinajpur, Kasijora and many others almost submerged under its wave. The Beerbhoom *zemindar* was completely ruined. A host of smaller *zemindars* shared the same fate. It is perhaps scarcely too much to say that in a few years a complete revolution took place in the ownership of the estates which formed the subject of the Permanent Settlement: the dismemberment was quick, and the ruin subversive of its very principles. The revenue assessed on some of the other estates did not include the then unknown item of waste land, and many estates situated at a distance from the metropolis escaped rather cheap. Only the Raja of Burdwan, heavily assessed as his estates were, escaped from ruin through an accident.

Opinion of financiers.

Financiers in India now regret the loss to the State from the Permanent Settlement of 1793, because the *zemindars* of the present day make large profits. That some of them do make profits is undoubted. A good many of them, however, derive title by purchase, *i.e*, outlay of capital. These financiers think that it is the State, and not the *zemindars*, who should have profited by the increase of the cultivated area in Bengal and the more manifold increase in the value of the produce. But they forget that the East India Company would have been reduced to bankruptcy, if they had not adopted the principle of the Permanent Settlement; they forget that the vested rights of a large number of *zemindars* required Permanent Settlement, and that, taking all things into consideration, the State has not suffered,—the ancient *rajas* and the cultivators of the soil have suffered. In fact, notwithstanding the Permanent Settlement, the amount of revenue has increased from Rs. 2,85,87,772 in 1790-91 to Rs. 3,70,11,385 in 1892-93, exclusive, in the latter year, of a good many districts.[1]

[1] Bengal Administration Report, 1892-1893, p. 40.

The best authorities, I think, are now agreed that the adoption of the principle of the Permanent Settlement was not a mistake.

Regulation I of 1793.

Regulation I of 1793, passed on the 1st May, 1793, by His Excellency the Governor General in Council, contains the Proclamation making the Decennial Settlement[1] of Bengal, Bihar and Orissa "permanent." Orissa at that time contained only a portion of the district of Hughli and Midnapur—it included only the tract of country lying between the Roopnarayana and the Suvarnarekha. Orissa proper, which was conquered from the Maharattas in 1803, is even now, as you have seen, subject to temporary settlements. The Decennial Settlement was commenced in 1789 and completed in 1791. The temporary settlements made from time to time before that year since 1771 had been found unsuccessful from a financial point of view, and a Proclamation was issued on the 22nd March, 1793, by which the Governor General in Council declared, with the concurrence of the Court of Directors, that the *zemindars*, "independent" *talukdars* and other actual "proprietors" of land, with whom the Decennial Settlement had been concluded, would be allowed to hold their estates at the same assessment for ever, and that the *jama*, which might be hereafter agreed to by the proprietors, whose lands had been held *khas* or let in farm, be fixed for ever.[2] But no claims for remissions or suspensions of rent was to be admitted on any account, and lands of proprietors were to be invariably sold for arrears.[3] Proprietors were also declared to have the privilege of transferring their lands without the sanction of Government, and partition or division of estates was to be freely allowed.[4] These were the main provisions of

[1] The Decennial Settlement is that of 1790. The previous settlements were generally for five years only.

[2] Reg. I of 1793, Sec. 5.

[3] *Ibid*, Sec. 7.

[4] *Ibid*, Secs. 9 and 10.

the Regulation, which had sometimes been said to be the "charter of the landed aristocracy of Bengal." The Government reserved the right to enact such regulations as might be necessary for the protection and welfare of the dependent *taluqdars*, *raiyats* and other cultivators of the soil, without detriment to its right to levy the fixed sum payable by the actual proprietors as revenue.[1] The power, however, was not exercised until very recently.[2]

Regulation VIII of 1793.

Regulation I of 1793 should be read along with Regulation VIII of that year, as it contains the rules of settlement and mode of assessment of land revenue. Section 4 of the latter Regulation enacted—"The settlement, under certain restrictions and exceptions hereafter specified, shall be concluded with the actual proprietors of the soil, of whatever denomination, whether *zemindars*, *taluqdars*, *or chowdhuris*." These *taluqdars* were called, in the Regulations of 1793, "independent," and they were entitled to hold land with all the privileges of *zemindars*, paying revenue direct to Government. Section 5 of Regulation VIII specified who the "independent" *taluqdars* were,[3] while the three following sections

[1] Reg VIII of 1793, Sec. 8, cl. 1.

[2] It appears that the Permanent Settlement Regulation was not extended to Chotanagpur, but the *zemindar* has been dealt with as a Permanent Settlement holder.

[3] "The *taluqdars* to be considered the actual proprietors of the lands composing their *taluqs* are the following:—

First.—Taluqdars who purchased their lands by private or at public sale, or obtained them by gift from the *zemindar* or other actual proprietor of land to whom they now pay the revenue assessed upon their *taluqs*, or from his ancestors, subject to the payment of the established dues of Government, and who received deeds of sale, or gift of such land, from the *zemindar*, or *sanads* from the *khalsa*, making over to them his proprietary rights therein.

Second.—Taluqdars, whose *taluqs* were formed before the *zemindar*, or other actual proprietor of land to whom they now pay their revenue, or his ancestors, succeeded to the *zemindari*.

Third.—Taluqdars, the lands comprised in whose *taluqs* were never the property of the *zemindar*, or other actual proprietor of the soil to whom they now pay their revenue, or his ancestors.

Fourth.—Taluqdars, who have succeeded to *taluqs* of the nature of those described in the preceding clauses, by right of purchase, gift, or inheritance, from the former proprietor of such *taluqs*."

dealt with *taluqdars* who were not called "independent." I have already said [1] that some lands were held under grants made by the Mahomedan government as *malguzari aymas*, *i.e.*, on payment of fixed sums as quit-rent and those granted for the benefit of learned men and colleges were classed as "independent" *taluqs*, while of *malguzari aymas* granted *boná fide* for the purpose of bringing waste lands into cultivation were classed with other *jungleburhi taluqs* as "dependent" *taluqs*.[2] Regulation VIII of 1793 also contained the general rules for subsequent permanent settlements and provisions as to the existing subordinate rights in land, the rights of the settlement-holders in relation to *raiyats*, and rules as to *sayer*[3] compensation and *zemindar's* private *chakran*[4] lands. Many of the sections of this Regulation have either been formally repealed or have become obsolete and with the exception of those that dealt with the substantive rights of the different classes of persons interested in land, the Regulation itself is now of little practical use. The rules of assessment laid down in the Regulation were the basis of further permanent settlements, and they continued to be in force until 1822, when they were considerably modified. Permanent settlements continued to be made until about the year 1871,[5] and thus the Permanently Settled area in the Bengal Provinces is now very large.[6]

[1] *Ante*, p. 65.

[2] Reg. VIII of 1793, Sec. 9.

[3] *Sayer* implies rents collected from markets, *hats*, &c., as also collections from salt or saltpetre monopolies.

[4] *Chakran* or lands granted for performance of services to the State, *zemindars*, or village communities

[5] *Ante*, p. 52.

[6] The Permanent Settlement extends over the following districts—

Bengal—Midnapur, Burdwan, Bankura, Beerbhoom, Hughli, Howrah, 24-Perganahs, Jessore, Nadiya, Murshidabad, Dinajpur, Malda, Rajshahi, Rangpur, Bogra, Pabna, Mymensing Faridpur, Bakharganj, Chittagong, Noakhali, Tipperah, Dacca, Jalpaigurhi and Sylhet.

Bihar—Patna, Gya, Shahabad, Tirhoot, Saran, Champaran, Purnea, Bhagalpur, Monghyr, portions of Chhotanagpur, and part of Sonthalia.

Assam—Part of Goalpara.

Changes made since 1793.

The Regulation Code of 1793 laid down, with sufficient precision, the rules intended to govern the legal relation between the State and the proprietors with whom permanent settlements were concluded, but they occasionally required explanations, modifications and additions, as experience and altered state of things, from lapse of time, demanded. Much of the complications now existing in the law relating to landlord and tenant in the Bengal Provinces is due to modifications and amendments made from time to time since 1793. The exact extent of repeal, and modification made indirectly and by implication, is difficult even for professional lawyers to discover. The Laws' Local Extent Act (Act XV of 1874) and the Repealing Acts of 1873, 1874, 1876, 1891 and subsequent repealing Acts are not sufficient to guide us safely through the labyrinth.

Sicca and Company's Rupee.

The settlement-holders, their heirs, successors and representatives were exempted from any additional demand of revenue. In the words of the Proclamation issued on the 22nd March, 1793, the assessment was irrevocable and unalterable. [1] They were, on the other hand, to pay into the exchequer the assessed amount without any abatement. The original assessment and the mode of payment were by *sicca* Rupees. In 1835, the Rupee, known as the Company's Rupee, was declared to be legal tender for the Calcutta *sicca* Rupee, and the value of the Company's Rupee was declared to be *fifteen-sixteenths* of the *sicca* Rupee.[2] Act XVII of 1835 came into operation on the 1st September, 1835, and since then the amount of revenue, payable by every settlement-holder, was increased by one-fifteenth. This, however, was not an actual alteration in the amount of the revenue.[3]

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[1] Reg. I. of 1793, Sec. 7.

[2] Act XVII of 1835, Sec. 4.

[3] *Kalee v. Shoshee*, (1864) 1 W. R. 248.

Dawk Cess.

The Bengal Legislature passed in 1862 an Act for improving the system of *zemindari dawks*, inasmuch as the mode of conveyance of letters on public service between Police officers and Police stations and the Magisterial offices was defective, irregular and uncertain; and, as fund was required to improve the system,[1] Magistrates of districts were empowered to raise annually the total sum necessary for postal service, known as the *Zemindari Dawk* Service.[2] The apportionment was rateably on the *sudder jama* or land revenue, subject to the approval of, and revision by, the Commissioner of the Division.[3] The payment was required to be made half-yearly in advance, and double the amount was levied on default.[4] The amount was recoverable by the procedure laid down in the Public Demands Recovery Act.[5] The performance, however, of the duties for which the tax was originally imposed is now actually under the control of the Government Postal Department, and, except in isolated tracts, no *Zemindari Dawk* is maintained between any two places;[6] but the *Dawk* Cess continues to be levied as rigorously as in 1862, as an additional impost upon land revenue. It is now a legalised *abwab*.[7] The *Dawk* cess is not recoverable from under-tenants or *raiyats* without special contract, and even where there is a contract it is not realisable as rent.[8]

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[1] Act VIII (B.C.) of 1862, Preamble.

[2] *Ibid*, Sec. 3.

[3] *Ibid*, Sec. 5.

[4] *Ibid*, Sec. 9.

[5] Schedule I to Act III (B.C.) of 1913 and Act IV (B. & O.) of 1914.

[6] Act VIII (B.C.) of 1862, Sec. 4.

[7] *Bissonath* v. *Shurno*, (1865) 4 W. R. 6. See also *Rakhal* v. *Shurno*, (1866) 6 W. R. 100; *Rohinee* v. *Tripoora*, (1867) 8 W R. 45 and *Jillar* v. *Bijoy*, (1900) I. L. R. 28 Calc. 293.

[8] Act VIII (B.C.) of 1862, Sec. 12; *Ruttun* v. *Jotendro*, (1866) 6 W. R. Act X. 31; *Mahtab* v. *Radha*, (1867) 8 W. R. 517; *Erskine* v. *Trilochun*, (1868) 9 W. R. 518; *Assanulla* v. *Tirthabashini*, (1895) I. L. R. 22 Calc. 680.

The Dawk Cess is not now levied but Act VIII (B.C.) of 1862 is still on the Statute Book.

Road and Public Works Cesses.

The Bengal Legislature passed in 1871 an Act for "local rating" for the construction and maintenance of roads (Act X of 1871). The rate was local, and persons interested in land and being in possession,—*zemindars*, tenure-holders and *raiyats*,—all were to contribute to the fund,—*zemindars* being primarily liable to Government. This Act was followed by Act II (B.C.) of 1877, known as the Provincial Public Works Cess Act. The Settlement Proclamation required the *zemindars* to improve their estates, making use of the profits secured to them by the fixity of revenue, and if they failed to execute and maintain works of public utility, the State could interfere and compel them to do so.

But how far the terms of the Proclamation of 1793 would permit the State to levy cesses for the construction and maintenance of roads and for other works of public utility, or for a fund for use at times of scarcity and famine for relief works, is a question which has been a constant topic for discussion.

The Cess Act of 1880.

These Acts were consolidated with amendments in the Bengal Cess Act (IX of 1880), which is now in force. The amount levied under this Act is an addition to the assessed revenue, though it is not realised as such. These cesses are personal debts of the proprietors, and are not charges[1] on the estates or tenure for which they are payable, and cannot be realised by their sale if the debtors' rights have passed to third persons. They are recoverable by the procedure laid down in the Public Demands Recovery Act.[2]

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[1] *Shekaat* v. *Sasi*, (1892) I. L. R. 19 Cal. 783; *Mahomed* v. *Gujraj*, (1893) I. L. R. 20 Calc. 826, *sc.*, L. R. 20 I A. 70, and the same case *Gujraj* v. *Secretary*, (1889) I. L. R. 17 Calc. 414; *Ahsanulla* v *Manjura*, (1903) I. L. R. 30 Calc. 778, *sc.*, 8 C W N. 357.

[2] As to sales under certificates under the Public Demands Recovery Act, see *Sadhusaran* v *Panchdeo*, (1886) I. L. R. 14 Calc. 1; *Ram* v. *Bhawani*, (1886) I. L. R 14 Calc. 9, and *Monindra* v. *Saraswati*, (1890) I. L. R. 18 Calc 125. As to mode of service of notice, see *Rakhal* v. *Secretary*, (1886) I. L. R 12 Calc. 603 and cases cited in foot-note 2 of page 62 of this book.

Rates of cesses and mode of assessment.

Under section 41 of the Cess Act—"Every holder of an estate shall yearly pay to the Collector the entire amount of the road cess and public works cess calculated on the annual value of the lands comprised in such estate, at the rate or rates which may have been determined for such cesses respectively for the year as in this Act provided, less a deduction to be calculated at one-half of the said rates for every rupee of the revenue entered in the valuation-roll of such estate as payable in respect thereof." The Collector is to prepare the valuation-roll of each estate, the annual value of the lands comprised in it being determined either summarily or from materials supplied in accordance with the rules laid down in the various sections of the Act.[1] The maximum rate for every rupee of the annual value is half an anna for each of the cesses, and the maximum is now levied in almost all the districts in the Bengal Provinces. The amount payable to the Collector, if the full rate be levied, is, in the words of section 41, one anna for every rupee, less half an anna for every rupee of the revenue payable to Government. Supposing an estate is valued by the Collector at Rs. 1,000, and the revenue payable is Rs. 700, the amount payable for the two cesses together is 1,000 annas *minus* ½ of 700 annas, that is to say, Rs. 40-10 as. As we shall presently see, a part of this amount paid by him is recoverable by the holder of the estate from subordinate tenure-holders, *raiyats* and holders of rent-free lands, and the amount payable under the law by him from his own profit is 300 half-annas, that is to say, Rs. 9-6 as. The broad principle is that every holder of land—*zemindar*, tenure-holder, or sub-tenure-holder—must pay half an anna per rupee out of his profit, the *raiyat* or actual cultivator

The present Public Demands Recovery Acts of Bengal, Bihar and Orissa are Acts III (B.C.) of 1913 and IV (B. & O.) of 1914. They have modified the law. See *ante* pages 60 to 68.

[1] Act IX (B.C.) of 1880, Chapter II.

paying half an anna per rupee of the rent payable by him. So that the holder of an estate is made to pay an additional sum besides land revenue, and he is primarily liable to Government for the entire amount of cesses payable to the State. The days for payment by the holders of estates to the Collector are the same as those fixed for the payment of instalments of revenue, but the instalments of cesses are equal.[1] In most of the districts in the Bengal Province, cesses are payable in four instalments except in cases of small estates. The instalments of land revenue, however, are generally unequal. [2]

The Income Tax,[3] which, there is every reason to apprehend, will be permanent, is not payable for profits derived by *zemindars* from their estates. But estates or parts of estates situated within municipalities are exempted from the operation of the Cess Act of 1880. Income Tax is payable in respect of such estates.[4]

The Income Tax Act.

The payment of revenue, which is a charge on land, demands our special attention. It is a liability on land as a first charge and is realisable by Government, in the first instance, by the sale[5] of the land for which the arrear is due.

Sale for arrears of Revenue.

The original engagements with the proprietors and farmers of land were for the payment of annual revenue in monthly instalments, the amount of each instalment varying generally with the instalments of rent recoverable from *raiyats*. An arrear of revenue has been defined to be the whole or portion of the *kist* or instalment payable in any month and remaining

History of the Sale Laws.

[1] Act IX (B. C.) 1880, Sec. 42, cl. 1.

[2] The Bengal Cess Act provides penalties for not filing cess returns or filing false returns when called for by the Collector, but the most serious penalty is inability to realise rents by suit. See section 20.

[3] Act II of 1886.

[4] Landholders have, however, to pay income-tax for non-agricultural lands and *julkars* within their estates and cesses as well as income-tax for mines: *Manindra* v. *Secretary*, (1910) I. L. R. 38 Calc. 372, *sc.*, L. R. 38 I. A. 31, *sc.*, 15 C. W. N. 201, *sc.*, 13 C. L. J. 124.

[5] Reg. I of 1793, Sec. 7.

undischarged on the first of the following month.[1] On an arrear of revenue being due, the Collector, under the law as originally framed, was required to serve a notice on the defaulter, and on his failure to pay, notwithstanding the service of the notice, the Collector had the option of confining the proprietor.[2] The Board of Revenue might direct the sale of the whole or a portion of the estate of the defaulter, but the sanction of the Governor-General in Council was in every case necessary.[3] If the proceeds of the sale were not equal to the Government demand, other properties of the defaulter might be sold to make good the deficiency.[4] Before the end of the year 1793, however, the law had to be modified; restrictions were placed on the powers of the Collectors to direct the confinement of proprietors, and sales of estates were directed to be advertised even without the sanction of the Governor-General, but no sale was to take place without such sanction.[5] A material alteration was made by Regulation VII of 1799, the practical effect of which was that the confinement of defaulters for non-payment of revenue was abolished, the personal properties of defaulters and their sureties were rendered liable to attachment,[6] and the Board of Revenue was for the first time authorised to conduct sales.[7] The next Regulation on the subject was I of 1801, but it made no material alterations in the procedure. Regulation V of 1812 made an important alteration as regards payment of interest on arrears.[8] The liabilily to penalty directed to be imposed by the previous Regulations was removed and

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[1] Reg. XIV of 1793, Sec. 2; Act XI of 1859, Sec. 2.

[2] Reg. XIV of 1793, Sec. 4.

[3] Reg. XIV of 1793, Sec. 13; *Kirt* v. *Government*, (1837) 5 W. R. P. C. 41, *sc.*, 1 M. I. A. 383.

[4] Reg. XIV of 1793, Sec. 44.

[5] Reg. III. of 1794.

[6] Section 23.

[7] Section 30.

[8] Reg. V. of 1812, Sec. 28.

interest at twelve per cent. per annum was made chargeable, unless the same was remitted by the Board of Revenue. By Regulation XVIII of 1814, a further modification was made, which dispensed with the previous sanction of the Governor-General in Council for sales of estates and gave to the Collectors of Districts larger powers. In the year 1822, when sales became less frequent and the necessity of superintendence by the superior officers of revenue became less, the Board of Revenue was vested only with the revisional power of annulling sales,[1] and civil courts were empowered under certain circumstances to set aside revenue-sales. In 1841 Act XII was passed, discontinuing the levying of interest and penalty upon arrears, appointing fixed dates for payment of revenue, and providing fixed dates for sales of estates in arrear.

Act I of 1845.

The law as to revenue-sales was considerably modified by Act I of 1845. It is not necessary to go into the details of the rules laid down by this Act, as it was with slight changes reproduced in Act XI of 1859—the SALE LAW, which, with modifications made by Act VII (B. C.) of 1868, is now in force. You will find in the reports several cases under the Act of 1845. I shall advert to them when referring to the corresponding sections of the existing law. There is, however, one leading case on the construction of section 9 of the Act of 1845 which deserves attention, as it is often quoted—*viz.*, *Nugender Chunder Ghose* v. *Kaminee Dossee*: [2]

Nugender Chunder v. *Kaminee Dossee.*

Kaminee Dossee was a Hindu widow in possession of her husband's estate as his heiress. Nugender Chunder had deposited money under section 9 of the Act to protect his interest as mortgagee of a revenue-paying estate in the possession of Kaminee Dossee when the estate was about to be sold for arrears of revenue, she having defaulted to pay. The question that was raised in the suit instituted by Nugender Chunder for the recovery of the money deposited by him

[1] Reg. XI. of 1822. [2] (1867) 8 W. R. P. C. 17, *sc.*, 11 M. I. A. 241.

was whether or not the amount deposited by him for the protection of the estate was a charge on the estate, or whether it was a personal debt of the widow, Kaminee Dossee. The Judicial Committee of the Privy Council held, upon a construction of section 9 of the Act, that the amount of deposit with interest was recoverable from the proprietress and that it was her personal debt. The Judicial Committee, however, was of opinion that "considering that the payment of revenue by the mortgagee will prevent the *taluq* from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the *taluq* as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the *taluq* as against all persons interested therein for the amount of the money so paid." Their Lordships, however, dismissed the suit, as they could not, having the express words of section 9 of the Act before them, apply the general principle stated in the words I have quoted from the judgment. Section 9 of the Act of 1845 was amended by Act XI of 1859, and the holders of liens on estates were reasonably secured.[1]

Act XI of 1859 and VII (B.C.) of 1868.

Act XI of 1859 which, with Bengal Act VII of 1868, regulates at the present day the procedure for recovery of arrears of revenue, is about to be repealed, and a Bill is now under the consideration of the local legislative council. I hope that in amending these Acts our local Legislature would give their serious attention to the imperfections of the present law, which in many instances have been found to work the greatest injustice. Cases are not rare in which sales take place of valuable estates at extremely inadequate prices and for petty arrears, the non-payment of which did not arise from inadvertence, or neglect, or want of means of the proprietors; the Commissioners of Revenue,

[1] Act XI of 1859, Preamble and Sec. 9.

however, do not think it proper to set them aside for reasons which are difficult to appreciate. The sales of estates with revenues of less than Rs. 500, and of which the number is very large and is increasing every year on account of partition and separation of shares, have been found to be still more injurious, as these sales are not advertised in the Official Gazette. The publication of the notices required by the Act are left to ignorant and ill-paid agents, who are often required to serve notices on the lands of estates of which they have no personal knowledge. The punctuality with which the revenue of the permanently settled estates in Bengal is now realised is no doubt due, to a considerable extent, to the stringent provisions of the "sunset laws"; but the time has come for further legislative enactment for the protection of capitalists, who are absolutely needed for the commercial interest of the country, and of those holders of estates who have parted with direct possession in favour of tenure-holders and mortgagees. Stricter rules for the publication of the fact of the non-payment of revenue, for the service of notices of sale and the like, a revival of the law for personal service on defaulters and greater facilities for setting aside sales on payment of penalty, may, to a considerable extent, lessen, the rigour of the present law. Sales for arrears of revenue are not of constant occurrence, as is supposed by the Judicial Committee of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser*.[1] There is now no reason for any apprehension that "any thing which impairs the security of purchasers at those sales tends to lower the price of the estates put up for sale." As a matter of fact, many of the sales for arrears of revenue that are attempted to be set aside are brought about for serving the fraudulent purpose of defeating rightful owners, creditors and incumbrancers. If, on the other hand, an estate is sold at an adequate value, seldom, if ever, is an application made for setting it aside.

[1] (1893) I. L. R. 21 Cal. 70, *sc.*, L. R. 20 I. A. 165.

Instalments of revenue and payment thereof.

But the Bill to amend and consolidate the existing provisions of the Sale Law may, like many others, be shelved, and I think it proper to give here a short summary of Act XI of 1859 and of the Bengal Acts modifying the same, in so far as they bear on the present subject.[1] The *kists*[2] or instalments of revenue are

[1] The bill has been shelved and no amendment of the Acts have been made.

[2] *Table of latest dates fixed for the payment of the revenue of all classes of estates in all districts :—*

	Estates paying an annual revenue not exceeding Rs. 10.	Estates paying an annual revenue exceeding Rs. 10, but not exceeding Rs. 50.	Estates paying an annual revenue exceeding Rs. 50, but not exceeding Rs. 100.	Estates paying an annual revenue exceeding Rs. 100.
In districts where the Bengali or Amli era prevails, except the division of Orissa and the district of Chittagong.	28th March.	12th January. 28th March.	28th June. 12th January. 28th March.	28th June 28th Sept. 12th Jan. 28th March.
In districts where the Fasli era prevails.	28th March.	12th January. 28th March.	7th June. ... 12th January. 28th March.	7th June 28th Sept. 12th January 28th March
In the division of Orissa. *	8th November. ...	28th April for the two-third kist... 8th November for the one-third kist.	28th April for the 4 annas kist. 8th November for the 12 annas kist. ...	28th April for 8 annas kist. 8th November. for 8annas kist.
In the district of Chittagong.	25th June...	25th May ... 25th Feb.	25th May ... 26th Dec. ... 25th Feb ...	25th May. 25th Sept. 26th Dec. 25th Feb
Hazaribagh (except Kharukdiha) ... Ranchi ... Singbhoom ... Manbhoom ...	28th March.	28th January. 28th March.	28th October. 28th January. 28th March.	28th Oct. 28th January 28th March
Kharukdiha in Hazaribagh.	28th March.	28th January. 28th March.	28th May. 28th January. 28th March	28th May. 28th January 28th March.
Darjeeling. ...	12th January 28th June.	All estates.		
Jalpaiguri (Western Duars)	15th Feb. 31st Oct.	All estates.		

Sale Law Manual, 1906.

* As regards Permanently Settled estates, the latest days are 28th April for 9 annas *kist* and 8th November for 7 annas *kist*, whatever the revenue be.

not now payable monthly. Section 3 of the Act of 1859 empowers the Board of Revenue to determine upon what dates arrears of revenue shall be paid in each district under its jurisdiction. If any instalment, fixed by the Board of Revenue, is not paid up before the sunset of the latest day, the estate practically lapses, and the defaulter has no right to bar or interfere with the sale by subsequent payment or tender of payment ;[1] but the Collector has the power at any time before commencement of the sale, and the Commissioner at any time before the final bid is accepted, to exempt the estate from sale, by recording a proceeding, giving reason for granting such exemption.[2] The order of the Commissioner, however, has no effect if it reaches the Collector after sale. The mere receipt by the Collector of the arrears of revenue after the latest day, without an express order for exemption, is not sufficient to prevent the sale, or invalidate a sale that has taken place.[3] If there is no arrear and all sums due as revenue have been paid by the proprietor or any person on his behalf before the sunset of the latest day, no sale can take place, and if by inadvertence or mistake a sale does take place, the sale should be set aside, and the Civil Courts may interfere, the sale not being one under the Act.[4]

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[1] Act XI of 1859, Sec. 6; *Gossain* v. *Ishri*, (1894) I. L. R. 21 Calc. 844. See also *Gobind* v. *Sherajunnissa*, (1882), 13 C. L. R. 1 ; *Azimuddin* v. *Secretary*, (1893) I. L. R. 21 Calc. 360; *Mohammed* v. *Jadunandan*, (1905) 10 C. W. N. 137, *sc.*, 2 C. L. J. 325.

[2] Act XI of 1859, Sec. 18 ; *Mohabeer* v. *Collector*, (1870) 13 W. R. 423.

[3] *Gobind* v. *Sherajunnissa*, (1882) 13 C. L. R. 1 ; *Gauri* v. *Janki*, (1889) I. L. R. 17 Calc. 809, *sc.*, L. R. 17 I. A. 57.

[4] *Byjnath* v. *Seetul*, (1868), 10 W. R. F.B. 66 *sc.*, 2 B. L. R. 1 F. B.; *Sreemunt* v. *Shama Soonduree*, (1869) 12 W. R. 276; *Munjina* v. *Collector*, (1869) 12 W. R. 311, *sc.*, 3 B. L. R. App. 144; *Thakoor* v. *Collector*, (1870) 13 W. R. 336; *Hur* v. *Ram*, (1870) 13 W. R. 381, *sc.*, 5 B. L. R. 135; *Ram* v. *Kushuffudoza*, (1871) 15 W. R. 141; *Gauri* v. *Janki*, (1889) I. L. R. 17 Calc. 809, *sc.*, L. R. 17 I. A. 57. See also *Gobind* v. *Ranjanam*, (1893) I. L. R. 21 Calc. 70 (83), *sc.*, L. R. 20 I. A. 165; *Gossain* v. *Ishri*, (1894) I. L. R. 21 Calc. 844; *Janakdhari* v. *Gossain*, (1909) I. L. R. 37 Calc. 107, *sc.*, 13 C. W. N. 710, *sc.*, 11 C. L. J. 254. As to sales for arrears of cesses where really there are no arrears, see *Gujraj* v. *Secretary*, (1889) I. L. R. 17 Calc. 414 and the same case

Deposit in the Collectorate.

A deposit in the Collectorate to the credit of the proprietor or even of the estate in arrear, sufficient to cover the amount of revenue payable to Government, is not enough to exempt the estate from sale, unless the Collector has been asked by especial petition, on or before the latest day, to appropriate the amount in deposit to the satisfaction of the amount payable as revenue.[1] The existence of such a deposit in the collectorate, or the fact that the arrear was small and that it was not put in owing to inadvertence or mistake, may only be a reason for inducing the Collector or the Commissioner of Revenue to grant exemption from sale, and it may also be a good reason for setting aside the sale, when it has taken place, on the ground of hardship or injuctice.[2] But the deposit of money or Government securities endorsed and made payable to the order of the Collector under the provisions of section 15 of the Act would protect the estate from sale, such deposit being considered as actual payment made before the latest day.[3]

Sale-notifications.

When default has been made in the payment of revenue on the latest day provided therefor, the Collector is required to issue two sets of notices. The first set is to contain a detailed description of the estate or share of the estate in default, the revenue assessed thereon, and the date fixed for sale; and one of these notices is required to be affixed in the court-house of the District

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in P. C., *Mahomed* v. *Gujraj*, (1893) I. L. R. 20 Calc. 826, *sc.*, L. R. 20 I. A. 70; *Troyluckho* v. *Pahar*, (1896) I. L. R. 23 Calc. 641; *Baijnath* v. *Ramgut*, (1896) I. L. R. 23 Calc. 775, *sc.*, L. R. 23 I. A. 45; *Chunder* v. *Secretary*, (1900) I. L. R. 27 Calc. 698, *sc.*, 4 C. W. N. 586; *Janakdhari* v. *Gossain*, (1909) I. L. R. 37 Calc. 107, *sc.*, 13 C. W. N. 710, *sc.*, 11 C. L. J. 254; *Nandan* v. *Harakh*, (1910) 14 C. W. N. 607, *sc.*, 11 C. L. J. 266.

[1] Act XI of 1859, Sec. 8.

[2] Act XI of 1859, Sec. 26; *Womesh* v. *Collector*, (1867) 8 W. R. 439.

[3] Act XI of 1859, Sec. 15. If a payment was actually made but the Collector appropriated the amount towards payment of a different instalment to that intended by the depositor, the sale should be set aside.

Judge and the other in the office of the Collector who is to hold the sale. The day fixed for sale should not be less than thirty days from the date of the affixing of the notification in the Collector's office. If the annual revenue payable for the estate or share of estate in default exceeds the sum of Rs. 500, a notification of the sale should also be published in the Official Gazette.[1] The other set of notices is required to be published for the benefit of under-tenants and *raiyats* who are thereby forbidden from paying rent to the defaulter. They are required to be published and affixed at the Collector's office, at the Munsif's court, at the Subdivisional *cutchery*, at the Police stations within the jurisdiction of which the lands of the *mahál* in arrear lie, and at the principal *cutchery* of the *mahál* or some conspicuous part thereof.[2] The non-publication or any irregularity in the publication of any or all of these notices is, however, not sufficient to vitiate the sale. But even if the date fixed for sale be within thirty days of the affixing of the notification in the Collector's office, the sale that follows will not be a nullity, and Civil Courts cannot set it aside on that ground; but such sale may be annulled on proof of substantial injury by reason of the irregularity complained of.[3] It should, however, be

[1] Act XI of 1859, Sec. 6; Act VII (B.C.) of 1868, Sec. 3.

[2] Act XI of 1859, Sec. 7; Act VII (B. C.) of 1868, Sec. 7. As to what omissions in the sale-notification are not material, see *Zerkalee* v. *Doorga*, (1871) 16 W. R. 149; *Secretary* v. *Rasbehary*, (1882) I. L. R. 9 Calc. 591, *sc.*, 12 C. L. R. 27; *Amirunessa* v. *Secretary*, (1883) I. L. R. 10 Calc. 63, *sc.*, 13 C. L. R. 131; *Ram* v. *Mahabir*, (1886) I. L. R. 13 Calc. 208; *Dilchand* v. *Baijnath*, (1903) 8 C. W. N. 337; *Deonandan* v. *Manbodh*, (1904) I. L. R. 32 Calc. 111, *sc.*, 8 C. W. N. 757; *Ismail* v. *Abdul*, (1905) I. L. R. 32 Calc. 502, *sc.*, 9 C. W. N. 343, *sc.*, 1 C. L. J. 14; *Ismail* v. *Abdul*, (1905) I. L. R. 32 Calc. 509, *sc.*, 9 C. W. N. 348, *sc.*, 1 C. L. J. 91; *Nibaran* v. *Chiranjib*, (1905) I. L. R. 32 Calc. 542, *sc.*, 9 C. W. N. 487; *Baijnath* v. *Ravaneswar*, (1907) 6 C. L. J. 163; *Ram* v. *Pawan*, (1907) 18 C. L. J. 97; *Krishna* v. *Abdul*, (1917) 2 P. L. J. 402. And as to irregularities, see *Cornell* v. *Oodoy*, (1867) 8 W. R. 372.

[3] *Womesh* v. *Collector*, (1867) 8 W. R. 439; *Luleeta* v. *Collector*, (1873) 19 W. R. 283; *Bal* v. *Jirjudhun*, (1882) I. L. R. 9 Calc. 271, *sc.*, 11 C. L. R. 466; *Gobind* v. *Sherajunnissa*, (1882) 13 C. L. R. 1; *Mobaruk* v. *Secretary*, (1885) I. L. R. 11 Calc. 200; *Gobind* v. *Biprodas*, (1889) I. L. R. 17 Calc. 398; *Mahomed* v. *Raj*, (1893) I. L. R. 21 Calc. 354; *Gangadhar* v. *Bhikari*, (1911) 16 C. W. N. 227.

noted that the Court cannot infer, in the absence of direct evidence, that inadequacy of price is due to irregularity;[1] and the non-publication of the notification under section 7, which is intended for the benefit of the purchasers, cannot amount to material irregularity in publishing the sale. The Commissioner of Revenue has the power, on an appeal being presented to him within sixty days from the date of sale or forty-five days, if presented to the Collector for transmission to the Commissioner, to annul the sale, if it appears to him not to have been conducted according to the provisions of the law, and he may also lay down terms for payment of compensation to the purchaser.[2] A sale may also be set aside under section 26 of Act XI of 1859 on the ground of hardship.

Notice under Sec. 5 of Act XI of 1859.

An exception is made in the case of arrears other than those for the current year or for the year immediately preceding, arrears due on account of estates other than that to be sold, and arrears of estates under attachment by order of any civil judicial authority,[3] whether the attachment be of the whole or of a part, and of estates managed by the Collector in accordance with such order.[4] In such cases the law declares that the estates shall not be sold unless after a notification

[1] *Mahashur* v. *Hurruck*, (1862) 9 M. I. A. 268; *Mohabeer* v. *Collector*, (1871) 15 W. R. 137; *Gur* v. *Jawahir*, (1893) I. L. R. 20 Calc. 599; *Mahomed* v. *Raj*, (1893) I. L. R. 21 Calc. 354; *Asimuddin* v. *Secretary*, (1893) I. L. R. 21 Calc. 360; *Sheorutton* v. *Net*, (1902) I. L. R. 30 Calc. 1, *sc.*, 6 C. W. N. 688; *Ismail* v. *Abdul*, (1905) I. L. R. 32 Calc. 502, *sc.*, 9 C. W. N. 343, *sc.*, 1 C. L. J. 14; *Baijnath* v. *Ravaneswar*, (1907) 6 C. L. J. 163; *Gangadhar* v. *Bhikari*, (1911) 16 C. W. N. 227. See also *Mobaruk* v. *Secretary*, (1885) I. L. R. 11 Calc. 200.

[2] Act VII (B. C.) of 1868, Sec 2; *Womesh* v. *Collector*, (1867) 8. W. R. 439; *Gobind* v. *Ramjanam*, (1893) I. L. R. 21 Calc. 70, *sc.*, L. R. 20 I. A. 165; *Chutturbhooj* v. *Ishri*, (1894) I. L. R. 21 Calc. 844 *Wasiruddin* v. *Deoki*, (1907) 6 C. L. J. 472.

[3] Act XI of 1859, Sec. 5. An attachment under Sec. 10 of the Public Demands Recovery Act, 1880, corresponding to section 8 of the Bengal Act of 1913, and Bihar and Orissa Act of 1914, is not a judicial proceeding. *Ram* v. *Mahabir*, (1886) I. L. R. 13 Calc. 208.

[4] Act VII (B. C.) of 1868, Sec. 11; *Bunwari* v. *Mohabir*, (1873) 12 B. L. R. 297, *sc.*, L. R. 1. I. A. 89; *Ram* v. *Mahabir*, (1886) I. L. R. 13 Calc. 208.

shall have been affixed at the courts of the District Judge and the local Munsiff, at the police station, and also at the *cutchery* of the payer of the revenue or at some conspicuous place of the locality for a period of not less than fifteen clear days preceding the date fixed for payment in the office of the Collector. This notification is imperative, and its non-service is a material irregularity, for which the sale for arrears may be set aside. This provision as to special notice, however, applies only where the attachment has been effected at least fifteen days before the last date fixed for the payment of any instalment of revenue for which it is sought to bring the estate to sale.[1]

Notice under Sec. 6 of Act XI of 1859.

Section 6 of Act XI of 1859 does not require that the name or names of the proprietor or proprietors should be specified in the notices and no analogy can be drawn in this respect between a sale by the civil court and that by the Collector.[2]

Suits to set aside revenue sales.

The jurisdiction of civil courts to set aside revenue-sales is of an extremely limited character. A suit to set aside a revenue-sale must be brought within one year from the date when the sale is confirmed and becomes final.[3] The sale becomes final at the noon of the sixtieth day from the date of sale, that day being included, and if an appeal be preferred, from the date of the dismissal of the appeal by the Commissioner, if such date be beyond the sixtieth day. The ground or grounds for setting aside the sale by a civil court must

[1] *Mohabeer* v. *Collector*, (1871) 15 W. R. 137; *Nownit* v. *Radha*, (1895) I. L. R. 22 Calc. 738; *Bageswari* v. *Mahomed*, (1903) I. L. R. 31 Calc. 256, *sc.*, L. R. 31 I. A. 52, *sc.*, 8 C. W. N. 649.

[2] *Gobind* v. *Sherajunnissa*, (1882) 13 C. L. R. 1; *Secretary* v. *Rasbehary*, (1882) I. L. R. 9 Calc. 591, *sc.*, 12 C. L. R. 27; *Amirunessa* v. *Secretary*, (1883) I. L. R. 10 Calc. 63, *sc.*, 13 C. L. R. 131; *Ram* v. *Mahabir*, (1886) I. L. R. 13 Calc. 208; *Dilchand* v. *Baijnath*, (1903) 8 C. W. N. 337; *Deonandan* v. *Manbodh*, (1904) I. L. R. 32 Calc. 111, *sc.*, 8 C. W. N. 757.

[3] Act XI of 1859, Sec. 33; Act IX of 1908, Schedule II, art. 12, cl. (c); *Raj* v. *Kinoo*, (1882) I. L. R. 8 Calc. 329.

be such as has or have been declared and specified in the petition of appeal to the Commissioner, and no sale can be set aside unless such appeal has been preferred and the ground or grounds specifically taken.[1] But if there is illegality and not mere irregularity, or the sale is a nullity, there being no arrears, no appeal to the Commissioner is necessary before suit.[2] No person who has received the purchase-money or any part thereof is entitled to contest the legality of the sale.[3]

Act VII (B. C.) of 1868, Sec. 8.

There is another difficulty as to the exercise of the power of civil courts in setting aside sales on the ground of material irregularity. Under section 8 of Bengal Act VII of 1868, every certificate of sale issued under Act XI of 1859 "shall be conclusive evidence in favour of such purchaser and of every person claiming under him that all notices in or by this Act or by the said Act XI of 1859, required to be served or posted, have been duly served and posted; and the title of any person who may have obtained any such certificate shall not be impeached or affected by reason of any omission, informality, or irregularity as regards the serving or posting of any notice in the proceeding under which the sale was had at which such person may have purchased." The rule of law here laid down confines the inquiry merely to the ground of nullity, *i. e.*, illegality

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[1] *Mohun* v. *Collector*, (1864) 1 W. R. 356; *Womesh* v. *Collector*, (1867) 8 W. R. 439; *Gobind* v. *Sherajunnissa*, (1882) 13 C. L. R. 1; *Gauri* v. *Janki*, (1889) I. L. R. 17 Calc. 809, *sc.*, L. R. 17 I. A. 57; *Gobind* v. *Ramjanam* (1893) I. L. R. 21 Calc. 70, *sc.*, L. R. 20 I. A. 165; *Chutturbhooj* v. *Ishri*, (1894) I. L. R. 21 Calc. 844; *Jahnnovi* v. *Secretary*, (1902) 7 C. W. N. 377; *Mohammed* v. *Jadunandan*, (1905) 10 C. W. N. 137, *sc.*, 2 C. L. J. 325; *Waziruddin* v. *Deoki*, (1907) 6 C. L. J. 472.

[2] *Byjnath* v. *Seetul*, (1868) 10 W. R. F. B. 66, *sc.*, 2 B. L. R. F. B. 1; *Munjina* v. *Collector*, (1869) 12 W. R. 311, *sc.*, 3 B. L. R. App. 144; *Thakoor* v. *Collector*, (1870) 13 W. R 336; *Mobaruk* v. *Secretary*, (1885) I. L. R. 11 Calc. 200; *Sadhusaran* v. *Panchdeo*, (1886) I. L. R. 14 Calc. 1; *Gobind* v. *Biprodas*, (1889) I. L. R. 17 Calc. 398; *Harkhoo* v. *Bunsidhur*, (1898) I. L. R. 25 Calc. 876, *sc.*, 2 C. W. N. 360.

[3] Act XI of 1859, Sec 33.

and not mere irregularity, the sale not being under the provisions of the said Acts. Unless the suit is brought with the utmost expedition, before the issuing of the certificate of sale, and unless the issuing of it by the Collector is stayed by temporary injunction under the provisions of the Code of Civil Procedure, the grounds for interference by civil courts are very narrow. In *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*,[1] the majority of the Full Bench of the Calcutta High Court held that non compliance with the provisions of section 6 of Act XI of 1859 was not a mere irregularity and was not one of those errors in procedure, which was intended to be cured by section 8 of Bengal Act VII of 1868. But the decision of the Privy Council in the case of *Gobind Lal Roy* v. *Ramjanam Misser*[2] has thrown considerable doubt as to the correctness of the view taken by the High Court.

Purchaser's title.

The title of the purchaser dates from the day after that fixed for the last day of payment,[3] and not from the day of the purchase or confirmation of the sale. The purchaser is also liable for instalments of revenue that have fallen due from that day.[4] The notices under section 7 of Act XI of 1859 prohibit payment of rent to the defaulter, the principle being that his right ceases with the default.

Benami purchases.

Provision is made in the Act against *benami* purchases, no suit for possession being maintainable against a certified purchaser on the ground of his being a

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[1] (1885) I. L. R. 11 Calc 200. See also *Bal* v. *Jirjudhun*, (1882) I. L. R. 9 Calc. 271, *sc.*, 11 C. L. R. 466.

[2] (1883) I. L. R. 21 Cal. 70, *sc.*, L. R. 20 I. A. 165.

[3] Act XI of 1859, Sec. 28 and Sch. A.

[4] Act XI of 1859, Sec. 30; *Wozeer* v. *Fuzloonissa*, (1864) W. R. Gap. Vol. 373; *Khema* v. *Nund* (1865) 4 W. R. 75.

benamidar.[1] This provision is very similar to the provision contained in section 66 of the Code of Civil Procedure,[2] but the plea under this section is not allowed unless the case comes strictly within its words.[3] There is, however, no bar to any of the defaulters purchasing the estate, though he himself has failed to pay his share of the revenue;[4] but the purchase does not avoid incumbrances.[5]

Distribution of sale-proceeds.

Section 31 of the Act provides for the distribution of the surplus sale-proceeds. It is made payable to the recorded proprietor or proprietors or his or their heirs or representatives, in shares proportionate to the recorded interests, and if there is no record of shares, the aggregate sum is payable to the whole body of proprietors. The mortgagee has the right to recover his money from the surplus sale-proceeds,[6] when mortgaged

[1] Act XI of 1859, Sec. 36; *Jadub* v. *Ram*, (1866) 5 W. R. 56, the same case on review, (1873) 19 W. R. 189; *Jokhee* v. *Huns*, (1868) 10 W. R. 167; *Johur* v. *Brindabun*, (1870) 14 W. R. 10; *Chundra* v. *Ramruttun*, (1885) I. L. R. 12 Calc. 302. See also *Bissonath* v. *Moran*, (1864) W. R. Gap. Vol. 353. But see *Brindabun* v. *Ram*, (1893) I. L. R. 21 Calc. 375 and *Raj* v. *Dina*, (1898) 2 C. W. N. 433.

[2] Act V of 1908. Compare Act VIII of 1859, Sec. 260 and Act XIV of 1882, Sec 317.

[3] *Buhuns* v *Buhoree*, (1872) 14 M. I. A. 496, *sc.*, 10 B. L. R. 159, *sc.*, 18 W. R. 157; *Lokhee* v. *Kallypuddo*, (1875) 23 W. R. 358, *sc.*, L. R. 2 I. A. 154; *Jan* v. *Ilahi*, (1876) I. L. R. 1 All. 290; *Arjun* v. *Farutulla*, (1881) 9 C. L. R. 295; *Monappa* v. *Surappa*, (1887) I. L. R. 11 Mad. 234; *Karamuddin* v. *Niamut*, (1891) I. L. R. 19 Calc. 199; *Sankunni* v. *Narayanan*, (1893) I. L. R. 17 Mad. 282; *Subha* v. *Hara*, (1894) I. L. R. 21 Calc. 519; *Sasti* v. *Aunopurna*, (1896) I. L. R. 23 Calc. 699; *Uncovenanted Service Bank* v. *Abdul*, (1896) I. L. R. 18 All. 461; *Sibta* v. *Bhagoli*, (1899) I. L. R. 21 All. 196; *Kishan* v. *Garuruddhwaja*, (1899) I. L. R. 21 All. 239; *Dukhada* v. *Srimonto*, (1899) I. L. R. 26 Calc. 950, *sc.*, 3 C. W. N. 657; *Nokori* v. *Sarup*, (1900) 5 C. W. N. 341; *Ghazi-uddin* v *Bishan*, (1905) I. L. R. 27 All. 443; *Muthunaiyan* v. *Sinna*, (1905) I. L. R. 28 Mad. 526; *Narain* v. *Durga*, (1913) I. L. R. 35 All. 138; *Nisakar* v. *Samal*, (1913) 19 C. L. J. 330; *Hanuman* v. *Jadu*, (1915) I. L. R. 43 Calc. 20, *sc.*, 20 C. W. N. 147.

[4] Act XI of 1859, Sec. 53; *Mahomed* v. *Leicester*, (1871) 7 B. L. R. App., 52.

[5] *Mahomed* v. *Pearee*, (1871) 16 W. R. 136; *Alum* v. *Ashad*, (1871) 16 W. R. 138; *Jogessur* v. *Khetter*, (1889) I. L. R. 17 Calc. 148; *Bhawani* v. *Mathura*, (1907) 7 C. L. J. 1.

[6] Act IV of 1882, Sec. 73; *Heera* v. *Janokeenath*, (1871) 16 W. R. 222; *Kristodass* v. *Ramkant*, (1880) I. L. R. 6 Calc. 142; *Debendra* v. *Abdul*, (1909) 10 C. L. J. 150; *Susilabala* v. *Dinabandhu*, (1909) 14 C. W. N. 186; *Gopi* v. *Ram*, (1910) 14 C. W. N. 484; *Gopikrishna* v. *Ram*, (1910) 12 C. L. J. 468.

lands are sold for arrears of Government revenue which remained unpaid not through his default. An assignee of recorded proprietors is not their representative under the Act.[1] The Land Registration Act of 1876 has made registration of the names of proprietors, and their respective shares, compulsory.[2] No difficulty can arise under the present law, unless death or alienation, very shortly before or after the sale or before payment, brings in complications. If the amount is attached under a decree of a civil court or by the Collector himself under the Public Demands Recovery Act, no payment can be made by the Collector himself without compliance with the ordinary procedure.

Limitation in suits for payment of surplus sale-proceeds.

The amount remains in deposit with the Collector until it is paid out, and according to a recent Full Bench decision of the Calcutta High Court,[3] the period of limitation as against the Secretary of State for India, is six years under article 120 of Schedule II of Act XV of 1877. Pigot J. differed from the majority of the Court and was of opinion that the Collector held as trustee, and under section 10 of the Limitation Act he was bound to pay the amount on demand.

Laws of succession and the necessity of registration of name and partition.

The ordinary laws of succession amongst Hindus and Mahomedans[4] are applicable to these Permanently Settled estates, except where long established custom or family usage (*kulachar*), such as is provided for in Regulation X of 1800, is found to exist.[5] There being in India no territorial law, the succession is in all cases governed by the personal law of the holder. Holders of

[1] *Secretary* v. *Marjum*, (1885) I. L. R. 11 Calc. 359.

[2] *Cornell* v. *Oodoy*, (1867) 8 W. R. 372; *Neynum* v. *Muzuffur*, (1869) 11 W. R. 265. See also *Doorga* v. *Sheo*, (1889) I. L. R. 16 Calc. 194.

[3] *Secretary* v. *Guru*, (1892) I. L. R. 20 Calc. 51. See also *Secretary* v. *Marjum*, (1885) I. L. R. 11 Calc. 359.

[4] Reg. XI of 1793.

[5] *Deedar* v. *Zuhoor-oon*, (1841) 2 M. I. A. 441; *Beer* v. *Rajender*, (1867) 12 M. I. A. 1, *sc.*, 9 W. R. P. C. 15. See also *Heeranath* v. *Burm*, (1872) 17 W. R. 316; *Rajkishen* v. *Ramjoy*, (1872) I. L. R. 1 Calc. 186, *sc.*, 19 W. R. 8; *Shyamanand* v. *Rama*, (1904) I. L. R. 32 Calc. 6.

estates have free power of alienation not only of the whole but also of portions and fractional parts. It was, therefore, absolutely necessary to make rules for the recognition of the claims and protection of the interests of persons who have, by inheritance or purchase, right to estates or parts of estates, and also for the partition of estates amongst co-owners. One of the objects of enacting Act XI of 1859 is stated in the preamble to be "the expediency of affording sharers easy means of protecting their shares from sale by reason of the default of their co-sharers."

Registration of names.

Regulation XLVIII of 1793 laid down rules for the registration in the Collectorate of the names of proprietors of estates. This Regulation was followed by Regulation XV of 1797.[1] The registers were called *quinquennial*, as they were required to be prepared every five years. These registers are public documents within the meaning of sections 35 and 74 of the Indian Evidence Act.[2] The Registration Regulation of 1800 made further provisions,[3] but the law as to registration of names in the Collectorate was not strictly enforced until the passing of the Bengal Land Registration Act (VII of 1876). Under this Act, "A" is the general Register kept by Collectors of revenue-paying lands, and the names and addresses of proprietors are required to be kept in it.[4] Intermediate Registers are also required to be kept for noting changes affecting entries, and part I refers to revenue-paying lands. Sections 30, 31 and 42 of the Act make registration of the names of proprietors or joint-proprietors in possession of estates compulsory fines being imposed for

[1] Section 2.

[2] *Kasi* v. *Noor*, S. D A. [1849], p. 113; *Oodoy* v. *Bishonath*, (1867) 7 W. R. 14; *Secretary* v. *Kalika*, (1910) 15 C. L. J. 281. But see *Saraswati* v. *Dhanpat*, (1882) I. L. R. 9 Calc. 431, *sc.*, 12 C. L. R. 12; *Kamal* v. *Kiran*, (1898) 2 C. W. N. 229.

[3] Reg. VIII of 1800, Sec. 21.

[4] Act VII (B. C.) 1876, Secs. 4, 6 to 8.

non-compliance with the provisions of the Act, there being a further penalty under sections 65, 66 and 78 of the Act, as the right to sue under-tenants and *raiyats* for rent is taken away on failure to procure registration.[1] After the registration of the name of a proprietor, under Bengal Act VII of 1876, has been completed, the person whose name is registered may get a mutation of name in the register of *toujies* or revenue-paying estates in the Collectorate, and he thus becomes a recorded proprietor or a recorded sharer of an estate. Copies of these registers are admissible in evidence.[2]

Separation of shares.

A recorded sharer of a joint estate, desiring to pay his share of the Government revenue separately, may get a separate account opened, and the separate liability of such recorded sharer commences from the opening of such separate account.[3] This rule applies also to holders of shares consisting of specific portions of the lands of an estate.[4] The power of the Collector, however, to open a separate account is restricted to cases where no objection is made by any other recorded proprietor. On an objection being made, the Collector is to refer the parties to the Civil Court.[5]

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[1] *Dhoronidhur* v. *Wajidunnissa*, (1888) I. L. R. 16 Calc. 708 (note); *Surya* v. *Hemant*, (1889) I L. R. 16 Calc. 706. See also *Alimuddin* v. *Hira*, (1895) I. L R. 23 Calc. 87; *Kalihur* v. *Umae*, (1896) I. L. R. 24 Calc. 241; *Harekrishna* v. *Brindabun*, (1897) 1 C. W. N. 712; *Punuk* v. *Thakur*, (1898) I L. R. 25 Calc. 717; *Nagendra* v. *Satadal*, (1899) I. L. R. 26 Calc. 536, *sc.*, 3 C. W N. 294; *Abul* v. *Meher*, (1899) I. L. R. 26 Calc. 712, *sc.*, 3 C. W. N. 381; *Rabia* v. *Bilashmani*, (1906) 8 C. L. J. 299. But see *Belchambers* v. *Hussan*, (1898) 2 C. W. N. 493; *Pramada* v. *Kanai*, (1899) I. L. R. 27 Calc. 178 and *Serapat* v. *Tarini*, (1906) 11 C. W. N. 141.

An administrator to the estate of a deceased proprietor is also bound to have his name registered before bringing a suit for rent—*McIntosh* v. *Jharu*, (1894) I. L. R 22 Calc. 454.

[2] *Shoshi* v *Girish*, (1893) I. L. R. 20 Calc. 940. See also *Ram* v. *Jebli*, (1882) I. L. R. 8 Calc. 853; *Shyama* v. *Mahomed*, (1907) 9 C. L. J. 91; *Loke* v. *Dhakeshwar*, (1914) 20 C. W. N 51 *sc.*, 21 C. L J. 253 and cases cited in footnote 2 of previous page. *Saraswati* v. *Dhanpat*, (1882) I. L. R. 9 Calc. 431, *sc.*, 12 C. L R. 12 has been dissented from.

[3] Act XI of 1859, Sec. 10; *Rajendro* v. *Doorga*, (1867) 7 W. R. 154.

[4] Act XI of 1859, Sec. 11; *Gour* v. *Tara*, (1866) 6 W. R. 217.

[5] Act XI of 1859, Sec. 12.

Sales of separated shares.

The rules for the realisation of revenue and for sale on non-payment thereof applicable to entire estates, are also applicable to separated shares, except that if the highest offer for the share exposed to sale be not equal to the amount of arrear due, the Collector is required to give notice to the other sharers, and if the amount due be not paid within ten days from the date of notice, the entire estate may be sold after due publication of such notice. The payment by a sharer, if made within ten days, has the effect of a purchase of the share in arrear, and such sharer may obtain a certificate of sale delivery of possession under the Act. A purchase thus and made by a co-sharer is considered to have all the incidents of a sale under the Act, and it is subject to the same rules as to annulment of the sale and avoidance of encumbrances as ordinary sales of shares under the Act.[1]

Partition of estates.

The partition of estates by the Collector gives the sharers complete security, and the shares carved out by such partition have all the advantages of a parent estate, each partitioned share being recognised as an estate. It is supposed that complete security for the realisation of Government revenue requires that partition should be effected by a revenue-officer or, at least, that he should sanction the same. The civil courts in the country have the power to pass decrees for partition after ascertaining the shares of the parties interested,[2] but actual partition cannot be effected except by the Collector.[3] A private partition may be binding on the parties but not the Government, unless special sanction of the Collector

[1] Act XI of 1859, Secs. 14 and 53; *Chutturbhooj* v. *Ishri*, (1894) I. L. R. 21 Calc. 844. See also *Bahuria* v. *Harihar*, (1914), I. L. R. 41 Calc. 1092, *sc.*, 18 C. W. N. 1071.

[2] Act V (B.C.) of 1897, Sec. 28; Act V of 1908, Sec. 54 and O. xxvi, rr. 13, 14; *Mohsun* v. *Nuzum*, (1866), 6 W. R. 15; *Ramjoy* v. *Ram*, (1881) 8 C. L. R. 367.

[3] *Spencer* v. *Puhul*, (1871) 6 B. L. R. 658, *sc.*, 15 W. R. 471; *Meherban* v. *Behari*, (1896) I. L. R. 23 Calc. 679. But see *Debi* v. *Sheo*, (1889) I. L. R. 16 Calc. 203 and *Jogodishury* v. *Kailash*, (1897), I. L. R. 24 Calc. 725, *sc.*, 1 C. W. N. 374, overruling *Meherban's case* cited above.

is obtained. But if the division of the lands of any estate has been made by private arrangement, and each proprietor is in possession of separate lands in accordance therewith, the Collector has no power to interfere at the instance of any one or more of the co-sharers.[1] A joint application must in such a case be made by all the co-sharers.[2] The jurisdiction of the Collector is not, however, excluded, unless it be shown that separate possession of the lands is due to a special arrangement effecting partition, and unless all the lands are held in severalty and no part is held jointly.[3] The mere possession of specific portions of land is not enough to oust the jurisdiction of the Collector. Of course, a presumption of arrangement may be made from long possession. But as regards lands originally waste, the mere occupation and cultivation by co-sharers separately may rebut the presumption arising from long possession. Extreme inequality of lands, disproportionate to the share in the possession of each co-sharer, may also rebut such presumption.

Persons not entitled to partition.

No person having a proprietary interest in an estate for the term of his life only is entitled to claim a partition by the Collector.[4] It should be remembered that it is optional with the Collector, according to the circumstances of each case, to allow a partition to the holder of a life-estate. A Hindu widow and other Hindu females holding under the same sort of right as that of a Hindu widow are not, however, tenants for life; they are entitled to

[1] Act V (B.C.) of 1897, Sec. 7; *Bujrungee* v. *Velaet*, (1866), 5 W. R. 186.

[2] Act V (B.C.) of 1897, Sec. 76; *Joymonee* v. *Imam*, (1870), 13 W. R. 471.

[3] Act V (B.C.) of 1897, Sec. 13; *Doorga* v. *Radha*, (1867) 7 W.R. 51; *Joynath* v. *Lall*, (1881) I. L. R. 8 Calc. 126, *sc.*, 10 C. L. R. 146; *Kalup* v. *Ramdein*, (1888), I. L. R. 16 Calc. 117. See also *Hridoy* v. *Mohobutnessa*, (1892) I. L. R. 20 Calc. 285; *Abdul* v. *Amanuddi*, (1911) 15 C. W. N. 426; *Lakhi* v. *Akloo*, (1911) 16 C. W. N. 639 and *Nagendra* v. *Pyari*, (1915) I. L. R. 43 Calc. 103, *sc.*, 20 C. W. N. 319, *sc.*, 21 C. L. J. 605.

[4] Act V (B. C.) of 1897, Sec. 8.

claim partition by the Collector.[1] The Civil Courts may exercise their discretion in any suit for partition by a female having only a Hindu widow's estate, though the better rule seems to be that partition should always be allowed.

Estates not partible by Collector.

There can be no partition by the Collector where the separate estate of any of the proprietors would, on partition, be liable for an annual amount of land-revenue not exceeding twenty rupees.[2] This rule prevents, in most cases, the partition of small estates by the Collector; but, perhaps, a Civil Court may decree partition though the apportionment of revenue will not be binding on the Collector.[3]

Jurisdiction of Civil Courts.

If the Revenue officers refuse on insufficient grounds to direct the partition of an estate, any party aggrieved may sue in a Civil Court for a decree for partition.[4] A party may also, before applying to the Collector, ask a Civil Court to declare the rights of the several co-sharers and to direct the Collector to effect a partition.[5] But no Civil Court can direct a partition by the Collector, if the revenue payable by any sharer for his share be less than one rupee. On a decree by the Civil Court for partition, the successful plaintiff may apply to the Collector for actual partition. A Civil Court may also, during the pendency of partition proceedings before the revenue authorities, declare the

[1] *Mohadeay* v. *Haruk*, (1882) I. L. R. 9 Calc. 244, *sc.*, 11 C. L. R. 540.

[2] Act V (B. C.) of 1897, Sec. 11. Compare Act VIII (B. C.) of 1876, Sec. 11.

[3] *Shama* v. *Puresh*, (1873) 20 W. R. 182; *Kalee* v. *Ram*, (1875) 24 W. R. 243; *Chundernath* v. *Hur*, (1881) I. L. R. 7 Calc. 153; *Ajoodhya* v. *Collector*, (1882) I. L. R. 9 Calc. 419; *Zahrun* v. *Gowri*, (1887) I. L. R. 15 Calc. 198; *Debi* v. *Sheo*, (1889) I. L. R. 16 Calc. 203. See also *Doorga* v. *Mohesh*, (1871) 15 W. R. 242; *Spencer* v. *Puhul*, (1871) 6 B L. R. 658, *sc.*, 15 W. R 471; *Ruttun* v. *Brojo*, (1874) 22 W. R. 11 and *Jogodishury* v. *Kailash*, (1897) I. L. R. 24 Calc 725, *sc.*, 1 C. W. N. 374.

[4] Act V (B C.) of 1897, Sec 28; Act XIV of 1882, Sec. 265; *Secretary* v. *Nundun*, (1884) I. L. R. 10 Calc. 435.

[5] Act V (B C.) of 1897, Sec. 25; *Abdool* v. *Jebunnissa*, (1871) 16 W. R. 34; *Khoobun* v. *Wooma*, (1878), 3 C. L. R. 453; *Meherban* v. *Behari*, (1896) I. L R. 23 Calc. 679; *Jogodishury* v *Kailash*, (1897) I. L. R. 24 Calc. 725, *sc*, 1 C. W. N. 374; *Raghunath* v. *Mohamed*, (1905) 2 C. L. J. 351.

shares of the parties,[1] and even after partition declare the respective shares of the parties which may be different from their recorded shares in the partition proceedings, but cannot, after a partition has already been made, modify the allotment made by the revenue authorities.[2]

Conflict of cases.

There is now a conflict of cases as to the jurisdiction of Civil Courts in the matter of the actual partition of estates by metes and bounds. Division of the lands of an estate by metes and bounds, accompanied by a proportionate division of the revenue binding on the Government, is *complete* partition, and the revenue authorities have exclusive jurisdiction to effect such, *complete* partition. But partition may be *incomplete* in two ways,—there may be a division of the lands and a proportionate division of the revenue without the sanction of, and recognition by, the revenue authorities, the liabilities of the sharers being determined as amongst themselves, and there may be a division of the lands only, the liability as to revenue remaining joint. Have civil courts in the country jurisdiction as to either of the latter modes of *incomplete* partition? The question must be settled either by a Full Bench of the High Court or by the Legislature.

Jurisdiction of Collectors.

The first important Regulation as to the procedure to be followed in the partition of estates by the Collector was XIX of 1814.[3] The next was Bengal Act VIII of 1876, by which Regulation XIX was repealed. It was more elaborate than the earlier Regulation and

[1] *Muddun* v. *Kartick*, (1870) 14 W. R. 335; *Sheo* v. *Shunkur*, (1871) 16 W. R. 190; *Oodoy* v. *Paluck*, (1871) 16 W. R. 271.

[2] *Spencer* v. *Puhul*, (1871) 6 B. L. R. 658, *sc.*, 15 W. R. 471; *Sharat* v. *Hurgobindo*, (1878) I. L. R. 4 Calc. 510.

[3] The still earlier Regulations were VIII and XXV of 1793. Regulation VI of 1807 was passed later on enacting that no partition should be allowed which would have the effect of creating a new estate with a *sadar jama* of less than Rs. 500. The restriction imposed by Regulation VI was removed by Regulation V of 1810. All these Regulations and the rules passed thereunder were consolidated in Regulation XIX of 1814.

removed many of the difficulties that must necessarily attend a partition by the Collector. It was, however, soon found to be defective in many respects, and has been amended by Bengal Act V of 1897 with a view to shorten, simplify and cheapen the procedure for effecting partition by the revenue authorities. It seems to me, however, to be an anomaly—a survival—that while the Civil Courts in Bengal have exclusive jurisdiction in the partition of all kinds of immovable properties, there should be special courts and a special procedure for the partition of revenue-paying estates. The existence of the Estates Partition Act in the statute book of Bengal indicates a want of confidence by the State in its Civil Courts, where its own interests are concerned. There is no reason to suppose that the Government would suffer, if the apportionment of revenue be left to be determined by the judicial procedure adopted in Civil Courts. The exclusive jurisdiction of the Collector often requires, as we have seen, to be supplemented by the interference of Civil Courts. Various questions, which can only be determined by Civil Courts, do frequently arise on an application for partition and during the course of partition-proceedings, and litigants in this country are unnecessarily harassed by being compelled to have recourse both to the Revenue officers and Civil judges, when one and the same tribunal may, by the framing of proper rules of law and procedure, be made to perform the same duties. A partition by a Collector is necessarily one which cannot be, and is really not, *equitable* in the sense in which an English lawyer would use the word. If there are four estates belonging jointly to two proprietors, the Collector would require four separate applications, and there must be four separate proceedings, and each estate must be divided into equal moieties. But if the Civil Courts have jurisdiction, they may allot two of these

estates to one of the joint proprietors, two others to another, equalising the partition by payment of owelty ; and all this may be done in a single suit. They may also allot two of these estates to one, a third to another, and divide the fourth between the two. The complications which arise from the existence of subordinate tenures, the holders of which have not the right to be heard by the revenue authorities, may also be avoided by the Civil Courts being allowed jurisdiction. It is now freely admitted, and, in fact, it is pointed out as a gross mistake of the Permanent Settlement of Bengal, that profits of holders of estates are nearly ten times the revenue which the Government realises from them. Financiers have, therefore, no reason to suppose that the realisation of the land-tax to the last copper will be jeopardised by small inequalities in the value and dimension of land, resulting from a partition by a Civil Court. The proverbial delay and cost in *butwara* proceedings, even under the procedure laid down by Bengal Act VIII of 1876, which has repealed the Regulation of 1814, and the still later Act of 1897, may also be avoided to a considerable extent by partition by commissioners appointed under the Code of Civil Procedure.

Procedure in partition.

I would not detain you with a recital of the procedure for partition of estates. Part of the duty to be performed in these proceedings may be done by the Deputy Collectors ; others and the more weighty ones are left to the Collector himself, and only the Collector may declare an estate to be under partition.[1] In most matters an appeal lies to the Commissioner of Revenue, and in some to the Board of Revenue, and the Board may always exercise its revisional powers. Partition by the collector is usually the separation of the share of the applicant by allotting to him a proportionate share of the

[1] Act V (B.C.) of 1897, Sec. 31.

land, and not the separate allotment to all the sharers of their respective shares, unless the other sharers also ask for partition of their shares. The parties may, at any time, cause proceedings to be stayed by consent;[1] and the Commissioner may also stay proceedings, and, if need be, quash them.[2] Confirmation of partition by the Commissioner is necessary to give it validity.[3] But the Lieutenant-Governor[4] may within six years set aside any allotment and direct a fresh allotment, if it appears that, through fraud or error, the land revenue assessed on any share is not in proportion to the lands allotted.[5] Each separate estate formed by partition bears a separate number in the revenue-roll of the district, and is separately liable for the land-revenue assessed upon it.[6]

Estates exempted from sale for arrears.

Estates are exempted from liability to sale under the SALE LAWS in cases of disqualified proprietors, and in cases of attachment by revenue authorities or management by a revenue officer. The properties of minors, idiots, lunatics and disqualified proprietors require particularly the protection of the sovereign. The Hindu law recognised the king as the supreme guardian of the property of all minors.[7] This is in accordance with the law of all civilised countries, it being a prerogative of the Crown, flowing from its general power and duty, as *parens patriæ*, to protect those who have no other lawful protector.[8] The Mahomedan law also enjoined the *quazi* to exercise vigilant supervision over guardians in the management of their wards' properties,[9] as he is the representative of the government of the *sultan*. In

Estates of minors &c. exempted from revenue-sale.

[1] Act V (B.C.) of 1897, Sec. 33. [2] *Ibid.*, Sec. 34. [3] *Ibid.*, Chap. X.

[4] Now the Governor in Council of Fort William in Bengal and the Board of Revenue in Bihar. See Act III (B. & O.) of 1897, Sch., Part II.

[5] Act V (B. C.) of 1897, Sec. 102. [6] *Ibid.*, Sec. 95

[7] Tagore Lectures 1877, p. 37, and the authorities cited therein. See Manu, VIII., 27.;

[8] Story's Equity Jurisprudence, Sec. 1333.

[9] Ameer Ali's Mahomedan Law, Vol. II. 4th Ed., 1917 p. 608

England, this jurisdiction was exercised by the Court of Chancery. Provision was made by the Regulation Code of 1793[1] for the protection of the estates of minors and other disqualified proprietors—idiots, lunatics and others incapable of managing estates on account of natural defects or infirmities. Females incapable of managing their estates were also declared to be disqualified proprietors.[2] Regulation X of 1793 provided for the establishment of the Court of Wards, and made rules relating to disqualified landholders and their estates. The Proclamation declaring the Decennial Settlement permanent exempted the estates of disqualified proprietors from liability to sale for any arrears accruing during the period of their disqualification.[3] The SALE-LAWS, passed from time to time, made similar provisions in favour of minors. The SALE-LAW of 1859 provided—"No estate shall be liable to sale for the recovery of arrears which have accrued during the period of its being under the management of the Court of Wards; and no estate, the sole property of a minor or minors, and descended to him or them by the regular course of inheritance duly notified to the Collector for the information of the Court of Wards, but of which the Court of Wards has not assumed the management under Regulation VI of 1822, shall be sold for arrears of revenue accruing subsequently to his or their succession to the same, until the minor or minors, or one of them, shall have attained the full age of eighteen years."[4] The age of majority of infants under the Court of Wards and of those whose properties are under the management of civil courts is now twenty-one years.[5] The

[1] Reg. VIII. of 1793, Sec. 21.

[2] See Reg. I of 1793, Sec. 8, cl. 5.

[3] Reg. XIV of 1793, Sec. 48; Reg. VI of 1822, Sec. 4.

[4] Act XI of 1859, Sec. 17. The words quoted here were repealed by the Bengal Court of Wards (Amendment) Act, 1881, *i.e.*, Bengal Act III of 1881.

[5] Act IX of 1875, Sec. 3.

present Court of Wards Act is Bengal Act IX of 1879, as amended by Bengal Act III of 1881, and the present law relating to infants who are not under the Court of Wards is Act VIII of 1890. The protection from sale of estates belonging to minors, as contained in section 17 of Act XI of 1859, is now given by section 4 of Bengal Act III of 1881, which has repealed the words of section 17 of Act XI of 1859 I have quoted above. The present law as to the liability of the estates of minors to sale for arrears may be thus summarised:—(*a*) Every estate or a separated share of an estate is exempt from sale for arrears of revenue accrued while it has been in charge of the Court of Wards;[1] but it may at any time be sold for such arrears, if the Court of Wards certifies in writing, with its reasons, that the interest of the ward requires that it should be sold under the sale-laws.[2] (*b*) All unpaid arrears of revenue, accruing during the period of the management by the Court, shall be a first charge upon the sale-proceeds, if the estate or share of an estate be sold for any cause other than for such arrears of revenue; and if any arrears remain due, when the estate ceases to be under the charge of the Court, the Collector may attach[3] it for the arrears and incidental costs. (*c*) In case of minors, not brought under the Court of Wards, no estate, the sole property of a minor or of two or more minors, shall be sold for arrears of revenue accruing subsequent to the succession, until the completion of the age of majority, if the Collector has been served with a written notice of the fact that the estate is the sole property of the minor or minors;[4] but such arrears shall be the first charge on the proceeds of the estate, if it is sold for any other cause during the

[1] Act IX (B.C.) of 1879, Sec. 23, cl. 1.

[2] *Ibid.*, Sec. 23 A.

[3] *Ibid.*, Sec. 23, cl. 2.

[4] *Ibid.*, Secs. 24 and 25.

minority; and the estate is also liable to be attached by the Collector.[1] Under the Court of Wards Act, the Board of Revenue is the Court of Wards,[2] but the Collectors and the Commissioners do the actual work through managers appointed by the Court. The Revenue Officer is thus the payer as well as the receiver of revenue, and I think it is an anomaly for the same individual, who is the receiver as well as the payer of money, to sell the property of an infant under his custody for non-payment of such money.

Estates under management of Revenue Officers.

While on the subject of exemption from sale for arrears of revenue, I may add that, under the unrepealed provisions of section 17 of Act XI of 1859, no estate held under attachment by the Revenue authorities, otherwise than by order of a judicial authority is liable to sale for arrears accruing whilst it is so held under attachment; and similarly an estate held under attachment or managed by a Revenue Officer in pursuance of an order of a judicial authority is not liable to be sold until after the end of the year. But the mere issuing of a certificate of attachment does not operate as an attachment by the Collector.

Liability to supply provisions &c. to the army.

Besides the payment of revenue and cesses by the holders of permanently settled estates, there are duties of minor importance which the Government has imposed on them. The liability to supply provisions to the army is one of these. Regulation XI of 1806 made provision for compelling landholders and farmers of estates to supply, for troops passing through their estates, the required provisions, boats and coolies. Regulation VI of 1825 made further provisions for compelling *zemindars* to provide supplies, boats, &c., the penalty for default being fine not exceeding one thousand *sicca* rupees.[3]

[1] Act IX (B. C.) of 1879, Sec. 24.

[2] *Ibid.*, Sec. 5.

[3] Reg. VI of 1825, Sec. 2.

Liability to give information of certain offences.

The duty of giving information of the commission of certain offences within the ambit of the estate, especially, offences regarding the manufacture of salt, offences with respect to the excise-law and certain serious offences under the Indian Penal Code, has been imposed upon *zemindars* as a matter of necessity. By the Settlement Regulations,[1] the *zemindars* were disburdened of their police and magisterial duties. But the duty of sending reports to police officers and magistrates has continued to be theirs, and the native officers of landholders are also responsible. These provisions are now mainly embodied in section 154 of Act XLV of 1860 and section 45 of Act X of 1882.

Compensation on acquisition of lands for public purposes.

On the acquisition of lands which are revenue-paying, the basis for calculating the amount of compensation is the actual price for which the land, subject to the burden of payment of land-revenue, would sell in the market. In determining the amount of compensation, the Collector has to determine the exact amount of land-revenue payable for the land, the subject of acquisition. The procedure that should be followed by Collectors in ascertaining the amount of revenue payable for lands under acquisition is laid down in the rules promulgated by the Government of Bengal under section 59 of Act X of 1870,[2] and these rules have remained unaltered after the passing of Act I of 1894. The market value being determined after deduction made for Government revenue, no question of apportionment can arise between the Government and the claimant for compensation. None of the Land Acquisition Acts laid down definite rules as to abatement of government-revenue, but the rules made under section 55 of the Act of 1894 (Act of 1870,

[1] Reg. VI of 1810; Reg. I of 1811, Sec. 10; Reg. III of 1812, Sec. 4; Reg. VIII of 1814; Reg. III of 1821, Sec. 7.

[2] Calcutta Gazette, 14th July, 1875, Part I, p. 843.

Sec. 59) have the force of law, if the sanction of the Governor-General in Council be obtained. Under the above rules, the Collector, after the determination of the amount of revenue payable in respect of the land acquired, should grant remission to that extent to the holder of the estate. But if the area of the land acquired does not exceed one-twentieth of the area of the entire estate, and the claimant, the proprietor, declines to accept abatement of revenue, the Collector may pay an additional sum calculated at the same number of years' purchase of the government-revenue as is the basis of calculation of the rest of the amount of compensation paid. When abatement is allowed, it has effect from the date of the possession taken by the Collector of the land acquired.

Malikana.

I shall now say a few words on the right known as *malikana*. It is an allowance for proprietary right to a person who was the owner or proprietor. The rules making the Decennial Settlement permanent directed that the proprietors, who might finally refuse to enter into engagements for the amount of revenue required of them, should be allowed *malikana*, in consideration of their proprietary rights, at the rate of 10 per cent. on the revenue, if the lands were let in farm. The amount of the *malikana* was payable by the farmer to the proprietor, in addition to the amount payable to the Government as revenue, in instalments, according to the instalments of government-revenue. The Collectors were to realise the *malikana* in the same way as Government-revenue, and the Government guaranteed the amount to the proprietors. In the event of the land being held *khas* by the Government, the *malikana* was payable by the Collector at the rate of 10 per cent. on the net collections, after defraying the *malikana* and other charges.[1] In Bengal proper, instances of payment of

[1] Reg. VIII of 1793, Secs. 44 to 47.

malikana by the Government or any farmer are very rare, except in cases of recent temporary settlements, specially of lands gained by accretion and assessed under Act IX of 1847. Grants of *malikana* are largely to be found in Bihar.

Rates of *malikana*.

Regulation VII of 1822, enacted for the Ceded and Conquered Provinces and Cuttack, rescinded "all provisions contained in the existing Regulations regarding the allowance" known as *malikana*.[1] As we have already seen, this Regulation was extended to all the other provinces in Bengal by Regulation IX of 1825. Under these Regulations, the rate of *malikana* was required to be fixed by the Board of Revenue, but the rate was not to be under five nor above ten per cent. unless there was a special sanction by the Government for a higher rate. The highest amount of revenue tendered by a farmer was the basis of calculation, and, when no tender was made, the net realisation of the previous year.[2] But the rules laid down in these Regulations had only prospective effect[3] and did not affect *malkana*-holders who were entitled to *malikana* under Regulation VIII of 1793. Instances of *malikana* lands are frequent in Bihar and occasionally complicated questions arise in Courts.[4]

Malikana is not rent.

Malikana is a distinct proprietary right and is an interest in land. But it is not rent, nor has it the elements which constitute the idea conveyed by the word 'rent.' A suit for *malikana* is a suit for money charged upon immovable property,[5] and the period of limitation

[1] Reg. VII of 1822, Sec. 5, cl. 1.

[2] *Ibid.*, Sec. 5, cls. 2 and 3.

[3] Reg. IX of 1833, Sec. 11.

[4] *Rameshwar* v. *Secretary*, (1907) 11 C. W. N. 448, *sc.*, 5 C. L. J. 349, affirmed in (1911) I. L. R. 39 Calc. 1, *sc.*, L. R. 38 I. A. 189, *sc.*, 15 C. W. N. 1029.

[5] *Ozeerun* v. *Heeranund*, (1867) 7 W. R. 336; *Herranund* v. *Ozeerun*, (1868) 9 W.R. 102; *Budurul* v. *Court of Wards* (1868) 10 W. R. 302; *Bhuli* v. *Nehmu*, (1869) 3 B. L. R. App. 102, *sc.*, 12 W. R. 46, on appeal, 4 B. L. R. 29; *Bhoalee* v. *Neemoo*, (1869) 12 W. R. 498; *Chummun* v. *Koolsoom*, (1870) 13 W. R. 465; *Gobind* v. *Ram*, (1873) 19 W. R. 94;

is twelve years from the time when the money sued for becomes due.[1]

Suits for recovery of *malikana*.

Notwithstanding the direction contained in section 46 of Regulation VIII of 1793 for the realisation of *malikana* allowance by the Collector from the farmers, suits for recovery of *malikana* are maintainable. The High Court of Calcutta at one time doubted whether such a suit would lie, having regard to the provisions of section 46 of the Regulation.[2] But the express provisions in the later Limitation Acts contemplate such suits, and notwithstanding the doubt thrown out, such suits have always been allowed.

Contribution amongst co-owners of estates.

The relative duties and obligations of the joint holders of an estate deserve a few words. I have already given you a summary of the legislative enactments as to the rights of co-sharers of Permanently Settled estates in relation to Government. As between themselves, they have rights and obligations of complicated character, which it will be difficult to narrate in the compass of this lecture. I draw your attention only to what may be said *quasi*-contracts arising out of payment of government-revenue and similar other dues for the protection of the estate. The law is laid down in the Contract Act (IX of 1872).[3] It was at one time understood that a co-sharer, paying into the

Kristo v. *Shama*, (1874) 22 W. R. 520; *Hurmuzi* v. *Hirdaynarain*, (1880), I. L. R. 5 Calc. 921; *Gopi* v. *Bhugwat*, (1884) I. L. R. 10 Calc. 697; *Maheshri* v. *Baij*, (1913) 19 C. W. N. 410. But see *Government* v. *Rhoop*, (1865) 2 W. R. 162; *Heeranund* v. *Oseerun*, (1866) 6 W. R. 151.

[1] Act XV of 1877, Sch. II, Art. 132; Act IX of 1871, Sch. II, Art. 132. See also Act XIV of 1859, Sec. 1, cl. 13, under which limitation was to run from the time the cause of action arose; *Nursingh* v. *Ameerun*, (1874) 22 W. R. 551; *Gopi* v. *Bhugwat*, (1884) I. L. R. 10 Calc. 697; *Jagarnath* v. *Kharach*, (1905) 10 C. W. N. 151; *Hem* v. *Atul*, (1913) 19 C. W. N. 386, *sc.*, 19 C. L. J. 118; *Maheshri* v. *Baij*, (1913) 19 C. W. N. 410. But see *Raoji* v. *Bala*, (1890) I. L. R. 15 Bom. 135; *Sakharam* v. *Laxmipriya*, (1910) I. L. R. 34 Bom. 349 and *Manavikrama* v. *Achutha*, (1914) I. L. R. 38 Mad. 916.

[2] *Bhuli* v. *Nimu*, (1869) 4 B. L. R. A. C. J. 29; *Hurmuzi* v. *Hirdaynarain*, (1880) I. L. R. 5 Calc. 921 and cases cited in note 1 above. See also *Bhuli* v. *Nehmu*, (1869) 3 B. L. R., App. 102, *sc.*, 12 W. R. 46.

[3] Sections 69 and 70

Collectorate the amount of revenue due from another co-sharer for the protection of the estate and consequently of his own share also, was entitled to a charge[1] on the share thus protected by him; and the case of *Nugenderchunder Ghose* v. *Kaminee Dossee*,[2] already cited, was considered as an authority for the proposition. But the earlier decisions,[3] based on the dictum of the Judicial Committee, have been overruled by the Full Bench decision in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha*.[4] The rule laid down in this case by the majority of the Full Bench, that there is no lien created by the advances made by a co-sharer, is in conflict with the decision of some of the other High Courts on the same subject.[5] It seems to be extremely hard, that a co-sharer should have no security for the advances made by him which have saved the property from sale. The case of a mortgagee is distinctly provided for in the Sale Laws[6] and the Transfer of Property Act.[7] The Bengal Tenancy Act,[8] which contains the latest ideas of our lawgivers on the rights of co-sharers, gives to the advances made by a co-sharer priority over every other charge. The attention of the

[1] *Enayet* v. *Muddun*, (1874) 14 B. L. R. 155, *sc*, 22 W. R. 411; *Mohesh* v. *Ram*, (1878) I. L. R. 4 Calc. 539, *sc*., 6 C. L. R. 28; *Ram* v. *Horakh*, (1880) I. L. R. 6 Calc. 549, *sc*., 8 C. L. R. 209; *Nobin* v. *Rup*, (1882) I. L. R. 9 Calc. 377, *sc*., 11 C. L. R. 499.

[2] (1867) 11 M. I. A. 241, *sc*., 8 W. R. P. C. 17.

[3] See footnote 1 above.

[4] (1887) I. L. R. 14 Calc. 809.

[5] For Bombay cases see *Achut* v. *Hari*, (1886) I. L. R. 11 Bom. 313. Some of the Madras cases are *Seshagiri* v. *Pichu*, (1887) I. L. R. 11 Mad. 452; *Srinivasa* v. *Rama*, (1893) I. L. R. 17 Mad. 247; *Raja of Vizianagram* v. *Setrucherla*, (1903) I. L. R. 26 Mad. 686 F. B.; *Alayakammal* v. *Subbaraya*, (1905) I. L. R. 28 Mad. 493; *Vanmikalinga* v. *Chidambara*, (1905) I. L. R. 29 Mad. 37; *Subramania* v. *Mahalingasami*, (1909) I. L. R. 33 Mad. 41; *Amman* v. *Pakran*, (1912) I. L. R. 36 Mad. 493; *Gajapati* v. *Srinivasa*, (1913) I. L. R. 38 Mad. 235; *Jagapatiraju* v. *Sadrusannama*, (1915) I. L. R. 39 Mad. 795. But see *Shivrao* v. *Pundlik*, (1902) I. L. R. 26 Bom. 437.

[6] Act XI of 1859, Sec. 9; *Badaum* v. *Seetul*, (1866) 5 W. R. 126.

[7] Act IV of 1882, Secs. 72 and 73.

[8] Act VIII of 1885, Sec. 171.

Legislative Council has been drawn to the mischief caused by the exposition of the law by the majority of the judges of the Calcutta[1] and the Allahabad[2] High Courts, and I hope remedy will soon be provided for.[3]

Common managers.

Disputes between co-owners very frequently cause inconvenience to the public and injury to private rights. In 1812 provision had to be made to prevent the mischief arising out of such disputes, and the Revenue authorities or any one of the co-owners or other persons interested in an estate could apply to the District Judge having jurisdiction for the appointment of a common manager and to remove such manager when appointed.[4] Regulation V of 1827 empowered the District Judge to direct the Collector to hold an estate under his management through a manager. Frequent disputes amongst co-owners required the passing of definite rules for the appointment and removal of common managers,

[1] For Calcutta cases after the Full Bench of that Court see *Khub* v. *Pudmanund*, (1888) I. L. R. 15 Cal. 542 and *Upendra* v. *Girindra*, (1898) I. L. R. 25 Calc. 565, *sc.*, 2 C. W. N. 425. See also the earlier Sudder Dewany cases and the case: *Kristo* v. *Kaliprosono*, (1882) I. L. R. 8 Calc. 402. But see *Dakhina* v. *Sarado*, (1893) I. L. R. 21 Calc. 142, *sc.*, L. R. 20 I. A. 160; *Upendra* v. *Tara*, (1903) I. L. R. 30 Calc. 794; *Parbhu* v. *Beni*, (1909) 14 C. W. N. 361; *Moti* v. *Bajrang*, (1911) 16 C. L. J. 148.

[2] *Nikka* v. *Sulaiman*, (1879) I. L. R. 2 All. 193; *Lachman* v. *Salig*, (1886) I. L. R. 8 All. 384; *Anandi* v. *Dur*, (1890) I. L. R. 13 All. 195; *Seth* v. *Shib*, (1892) I. L. R. 14 All. 273 F. B.; *Ibn* v. *Brijbhukan*, (1904) I. L. R. 26 All. 407 F. B. But see the dissentient judgments of Mahmood J. and Banerji J. in the last two cases. See also *Girdhar* v. *Bhola*, (1888) I. L. R. 10 All. 611.

[3] The tendency of recent decisions of almost all High Courts seems to recognise a charge. See the latest cases cited in notes 1 and 2 above and *Bhagwan* v. *Karam*, (1911) I. L. R. 33 All. 708. The Calcutta High Court and Jenkins C. J. in *Shivrao* v. *Pundtik*, cited in footnote 4 of previous page have too closely followed the English case-law, where it has been held that the right to contribution is a personal right and creates no lien: *Exparte Young*, (1813) 2 Ves. & Bea. 242, *sc.*, 13 R. R. 73; *Foster* v. *Lev*, (1835) 2 Bing. N. C. 269 *sc.*, 132, E. R. 106; *Brittain* v. *Lloyd*, (1854) 14 M. & W. 762, *sc.*, 69 R. R. 816; *Kay* v. *Johnston*, (1856) 21 Beav. 536, *sc.*, 111 R. R. 192; *Teasdale* v. *Sanderson*, (1864) 33 Beav. 534, *sc.*, 55 E. R. 476; *In re Leslie*, (1883) 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Insurance Co.*, (1886) 34 Ch. D. 234. But see Story's Equity Jurisprudence §§ 1234, 1236 and *Peruvian Guano Co.*, v. *Dreyfus*, [1892] A. C. 166.

[4] Reg. V of 1812, Sec. 26. See *Gooroo* v. *Collector*, (1873) 19 W. R. 170; *Ram* v. *Gooroo*, (1874) 22 W. R. 212.

and the Bengal Tenancy Act accordingly made provision for the appointment of a common manager on the application of the Collector or of any person interested in the estate in case of inconvenience to the public, or on the application of a recorded co-owner in case of injury to private rights.[1] The District Judge is, in such cases, directed to issue notices upon the co-owners to shew cause why a common manager should not be appointed, and on their non-appearance or failure to shew cause, or on their failure to appoint a common manager within the time that may be fixed for the purpose, the District Judge has the power to appoint a common manager or to place the estate in the hands of the Court of Wards, if the Court consents to accept the charge.[2] The District Judge has also the power to restore the management to the co-owners, if he be satisfied that the management will be conducted by them without inconvenience to the public or injury to private rights.[3] The order of a District Judge for the appointment of a common manager is not appealable[4] to the High Court as a decree. But the High Court has the power of revision under section 115 of the Code of Civil Procedure.[5]

Various allied questions.

Various questions may and do constantly arise between the proprietors of different estates, many of which are highly complex. Survey and demarcation of estates are fertile sources of dispute. Alluvial accretions and reformations in site are constant sources of litigation in the alluvial delta of the Ganges. It will be impossible within the limits of these lectures to deal with the various ramifications of the law with reference to these matters.

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[1] Act VIII of 1885, Sec. 93.
[2] *Ibid.*, Secs. 94 to 98.
[3] *Ibid.*, Sec. 99.
[4] *Hossain* v. *Mutookdharee*, (1887) I. L. R. 14 Calc. 312.
[5] Act V of 1908; *Ganoda* v. *Prabhabati*, (1893) I. L. R. 20 Calc. 881.

Taluqs.

I shall close this lecture with a few words on 'independent' *taluqs*. At the time of the Decennial Settlement of the Bengal provinces, there was a large number of land-holders known as *taluqdars*, and their holdings were known as *taluqs*.[1] The word *taluq* is Arabic in origin and means something hanging or dependent.[2] The term is applied to various intermediate holdings differing in their incidents, but in Bengal it is more frequently used with reference to lands held under *zemindars* or lands originally carved out of *zemindaries*.

Independent *taluqs* are estates.

The Settlement and Resumption Regulations of the Bengal Code divided the then existing *taluqs* into two classes, and called them either 'independent' (*hazuri* or *khariji*), or 'dependent' (*mazkuri*, *shikmi* or *shamilat*). We have already seen[3] that the Government recognised the 'independent' *taluqdars*, in the Decennial and Permanent Settlements, as actual proprietors of land, and they were allowed to enter into direct engagements at fixed sums of revenue payable in perpetuity into the Collector's treasury.[4] These *taluqs*, as well as those subsequently created under the rules laid down in the Resumption Regulations, to which I have already referred,[5] have the same incidents of law as *zemindaries*, and the *taluqdars* have the same rights and obligations in relation to the State. Regulation VIII of 1793 laid down distinct rules for the guidance of Collectors for separate settlement with 'independent' *taluqdars*.[6] A large number of *taluqs* was thus separated and recognised as 'estates' before the year 1802. In the year 1801, a Regulation was passed to fix a period for applications

[1] For the origin and history of Bengal *Taluqdars*, see Tagore Lectures for 1874-75, pp. 149-158 and Baden Powell's "A Short Account of the Land Revenue and its Adminstration in British India; with a sketch of the Land Tenures" (2nd Ed., 1907) pp. 106-7.

[2] 'The Regulations of the Bengal Code' by C. D. Field, Ed. 1875, p. 30 (foot-note).

[3] *Ante* p. 107.

[4] Reg. VIII of 1793, Secs. 13, 14.

[5] *Ante* pp. 85-86.

[6] Reg. I. of 1801, Sec. 14.

for separation of *taluqs* as 'independent,' and it was laid down that all *taluqdars* who might deem their lands entitled to be separated from the *zemindaries* which included them must make their applications within one year from the 15th January, 1801, the date of the passing of the Regulation; otherwise the claim to separation would be barred.[1] This law has put a stop to the recognition of 'independent' *taluqs* as 'estates,' except those that have been created under the rules laid down in Regulations XIX and XXXVII of 1793 and II of 1819.

Distinction between the two classes of *taluqs* now of no importance.

The distinction between 'independent' and 'dependent' *taluqs* was at one time of considerable importance, but the sections of Regulation VIII of 1793, dealing with them, have now been repealed as obsolete.[2]

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[1] Reg. I of 1801, Sec. 14.

[2] Repealing Act XVI of 1874.

LECTURE V.

PERMANENT TENURES.

(*Taluqs*).

Dependent *taluqs*.

Between the *zemindars* and persons actually occupying the lands of an estate, there were, at the dates of the Decennial and the Permanent Settlements, a large number of intermediate holders who paid to the former fixed sums in perpetuity, and their number has since largely increased. Most of these tenures are known by the name '*taluqs*.' Those existing at the Decennial Settlement and not recognised as estates are called 'independent' *taluqs* and those created by proprietors of estates after the date of the Settlement, the revenue payable for them not being separated and separately recorded in the Official Registers of Collectors as estates or shares of estates, are said to be 'dependent;' [1] the holders of the *taluqs* are called *taluqdars*.

Taluqs existing at the time of Decennial Settlement.

I propose to deal first with the *taluqs* existing at the time of the Decennial Settlement. They may be classed:—(1) *Taluqs* for which the revenue was paid through *zemindars* and the title deeds in respect of which contained a stipulation that it should be so paid[2]; (2) *Taluqs* held under grants from *zemindars*, which did not expressly transfer the property in the soil, but operated simply as leases on terms of payment of rent and other conditions; (3) *Jungleburhi taluqs* held under permanent leases on conditions of clearance of jungle-lands and payment of fixed amounts of revenue after a fixed rent-free period; and (4) *Taluqs* which might have been recorded as 'independent,' but for

[1] *Ante*, pp. 107, 147.

[2] Reg. VIII of 1793, Sec. 6.

which applications to the Collector were not made within one year from the passing of Regulation I of 1801.

Regulation VIII of 1793, Sec. 49.

Regulation VIII of 1793 speaks of two classes of dependent *taluqs* existing at the date of the Permanent Settlement—those of which the rent was capable of being enhanced, and those of which the rent was not enhanceable. If there was a grant to hold in perpetuity at fixed rent, and payment had been made of such fixed rent for more than twelve years before the Permanent Settlement, neither the grantor nor his heirs, nor even the Government, could enhance the rent. But if the grantee had held on payment of fixed rent for less than twelve years, the Government or any proprietor other than the grantor or his heirs could demand increased assessment.[2] The presumption was generally in favour of the *taluqdars*, as soon as it was proved that the *taluq* had existed from before the Decennial Settlement.[3]

Regulation VIII of 1793, Sections 48 and 51.

Section 51 of Regulation VIII of 1793 declared—"No *zemindar*, or other actual proprietor of land, shall demand an increase from the *taluqdars* dependent on him, although he should himself be subject to the payment of an increase of *jama* to Government, except upon proof that he is entitled so to do, either by the special custom of the district, or by the conditions under which the *taluqdar* holds his tenure; or that the *taluqdar*, by receiving abatements from his *jama*, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."[4] Section 48 of the Regulation required proprietors of estates to enter into engagements with these *taluqdars*, provided the

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[1] Section 24.

[2] Reg. VIII of 1793, Sec. 49.

[3] *Doyamoyee* v. *Nundcoomar*, (1863) 2 Hay 220; *Radheeka* v. *Rammohun*, (1864) 1 W. R. 367; *Panioty* v. *Juggut*, (1868) 9 W. R. 379; *Radhika* v. *Bamasundari*, (1869) 4 B. L. R. P. C. 8, *sc.*, 13 M.I.A. 248, *sc.*, 13 W. R. P. C. 11; *Hurronath* v. *Gobind*, (1875) 23 W. R. 352. See *Sharoda* v. *Bipeen*, (1870) 13 W. R. 71 and *Watson* v. *Radha*, (1905) 1 C. L. J. 572.

[4] See Act VIII of 1885, Sec. 6.

taluqdars agreed to such revenue, progressive or otherwise, as the proprietor might be entitled to demand from them. But this power of demanding increase could only be exercised subject to the provisions of Sections 49 and 51 of the Regulation.[1] Section 7 of Regulation XLIV of 1793 made the matter clearer by enacting that even auction-purchasers at sales for arrears of government-revenue under section 5 of the Regulation had not the "authority to assess increased rent upon the lands of such dependent *taluqdars* as were exempted from any increase of assessment at the date of the Decennial Settlement by virtue of the prohibition contained in clause 1, section 51 of Regulation VIII of 1793. The revenue payable by such dependent *taluqdars* was declared fixed for ever, and their lands were accordingly to be rated at such fixed assessment in all divisions of the estate in which their lands were included." Their position was not to be affected, even if no engagements, such as those contemplated in section 48 of Regulation VIII of 1793, were entered into, and even if no engagements were recorded in the Collectorate.

Rights of auction-purchasers at sales for arrears.

In the leading case of *Radhika Chowdhrain* v. *Bamasundari Dasi*,[2] the Judicial Committee of the Privy Council have thus summarised the effect of the provisions of the Regulations relating to dependent *taluqs*—(*a*) A *zemindar* holding under the Perpetual Settlement has the right, from time to time, to raise the rents of all rent-paying lands within his *zemindari* according to the *perganah* or current rates, unless he is precluded from the exercise of that right either by contract binding on him, or unless the lands in question can be brought within one of the exemptions recognized by Regulation

Radhika Chowdhrain v. *Bamasundari Dasi.*

[1] *Huronath* v. *Bindoo*, (1865) 3 W. R. Act X 26; *Brojo* v. *Kalee*, (1867) 8 W. R. 496; *Tarinee* v. *Koonj*, (1869) 12 W. R. 112; *Kristo* v. *Elahee*, (1873) 20 W. R. 459; *Hurronath* v. *Gobind*, (1875) 23 W. R. 352.

[2] (1869) 4 B. L. R. P. C. 8, *sc.*, 13 M. I. A. 248, *sc.*, 13 W. R. P. C. 11.

VIII of 1793: (*b*) The burden of proving that the lands claimed are within the ambit of a dependent *taluq* and that the *taluq* existed at the Decennial Settlement is upon the *taluqdar*: (*c*) Section 51 of Regulation VIII of 1793 imposes upon the *zemindar* the burden of showing that he is entitled to raise the rate of rent either by special custom or by contract, or by reason of certain specified conduct on the part of the *taluqdar*.

Evidence to prove the existence of a *taluq* at the Decennial Settlement.

The amount of evidence necessary to prove the existence of a dependent *taluq* at the date of the Decennial Settlement varies according to circumstances. Assertions made about its existence shortly before the Decennial Settlement have been considered to be good evidence.[1] Neither does the non-mention in the Decennial or Quinquenial papers afford strong inference against its existence.[2]

Onus probandi.

If, however, in a suit by an auction-purchaser for arrears of revenue, a *taluqdar* pleaded exemption from liability to enhancement on the grounds set forth in section 49 of Regulation VIII of 1793, *viz.*, that the *taluq* had been held at fixed and invariable rent for more than twelve years antecedent to the Permanent Settlement, or if he set up a contract valid under that section, the burden was on the *taluqdar*: the onus of proof varied according as the plea was set up either under section 49 or section 51 of the Regulation.[3]

Notice of enhancement.

The right to enhance the rent of a dependent *taluq* could be exercised only after notice.[4] Regulation V of 1812 laid down that no tenant would be liable to pay

[1] *Romesh* v. *Modhoo*, (1866) 5 W. R. 252; *Radhika* v. *Bamasundari*, (1869) 4 B. L. R. P. C. 8, *sc.*, 13 M.I.A. 248, *sc.*, 13 W. R. P. C. 11.

[2] *Wise* v. *Bhoobun*, (1864) 10 M. I. A. 165, *sc.* 3 W. R. P. C. 5 *Nilmoney* v. *Ram*, (1874) 21 W. R. 439.

[3] *Gopal* v. *Teluck*, (1865) 10 M. I. A. 183, *sc.*, 3 W. R. P. C. 1; *Radhika* v. *Bamasundari*, (1869) 4 B. L. R. P. C. 8, *sc.*, 13 M. I. A. 248, *sc.*, 13 W. R. P. C. 11.

[4] Reg. V. of 1812, Sec. 9; *Nilmonee* v. *Chunder*, (1870) 14 W. R. 251; *Jannoba* v. *Girish*, (1871) 7 B. L. R. App. 44; *Nilmoney* v. *Ram*, (1874) 21 W. R. 439; *Nilmoney* v. *Sagurmonee*, (1874) 21 W. R. 441; *Nil* v. *Chunderkant*, (1876) I. L. R. 2 Calc. 125, *sc.*, 25 W. R. 200.

enhanced rent, though subject to enhancement under the subsisting Regulations, unless a formal written notice had been served on such tenant on or before the month of *Jaisth*, notifying the specific rent to which he would be subject for the ensuing Fasli or the current Bengali year. The notice must specify upon which of the grounds mentioned in section 51 of Regulation VIII of 1793 the enhancement was sought.[1]

Grounds of enhancement.

If the *zemindar* succeeded in showing that a dependent *taluq* lying within the ambit of his estate could not claim exemption from liability to enhancement and that the notice required by law had been duly served, the grounds of enhancement could be taken into consideration. But if the plaintiff failed to prove due service of notice, or if the notice served did not comply with the requirements of section 51 of Regulation VIII of 1793, the court might grant a declaration that the *taluq* was liable to enhancement.[2] The special custom of the district mentioned in section 51 of Regulation VIII of 1793 referred to rents according to *perganah* rates or rates paid by similar *taluqdars* in the district, and not those payable by cultivating raiyats.[3] If the rent paid by a *taluqdar* was less in rate than that paid by other *taluqdars* having the same status, enhancement should be allowed, provided that the lands were capable of affording an increase. It was, however, extremely difficult to prove special custom, and the practical result has been that we have very few instances of enhancement of rent of dependent *taluqs* existing from before

[1] *Nobo* v. *Mazamooddeen*, (1873) 19 W. R. 338; *Nilmoney* v. *Ram*, (1874) 21 W. R. 439; *Nilmoney* v. *Sagurmonee*, (1874) 21 W. R. 441; *Koomodinee* v. *Huree*, (1875) 24 W. R. 190. See Act VIII of 1885, Sec. 6.

[2] *Nuffer* v. *Poulson*, (1873) 19 W. R. 175; *Bissonath* v. *Tara*, (1874) 22 W. R. 482.

[3] *Brojo* v. *Kalee*, (1867) 8 W. R. 496; *Nobo* v. *Mazamooddeen*, (1873) 19 W. R. 338.

the Permanent Settlement.[1] If the *taluqdar* had obtained the benefit of a decrease of rent on the ground of diluvion, increase in area, on account of reformation in site or accretion, would be a very good reason for enhancement.[2]

Taluqs existing from the date of the Permanent Settlement.

The right conferred on these *taluqdars* by Regulation VIII of 1793 is statutory, and, as we have seen, auction-purchasers on sales for arrears of revenue are bound to respect it. Section 37 of Act XI of 1859 and section 12 of Bengal Act VII of 1868 gave permanency to tenures existing at the time of the Permanent Settlement as against auction purchasers for arrears of revenue of entire estates. If the rent has changed since that date, the tenure is only liable to enhancement, but there can be no ejectment. Such tenures are placed in the same category as dependent *taluqs* existing from before the settlement, the rent of which was enhanceable under certain circumstances. But tenures which have been held at fixed rents from the time of the Permanent Settlement were declared valid—both as regards permanency and fixity of rent—as against such auction-purchasers. Act X of 1859 supplemented the provisions in the Regulation-laws by enacting in section 15:—"No dependent *taluqdar* or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and *raiyats*, who, in the Provinces of Bengal, Bihar and Orissa holds his *taluq* (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the Permanent Settlement, shall be liable to any enhancement of such rent, anything in section 51, Regulation VIII of 1793,

[1] *Gouree* v. *Shurno*, (1866) 6 W. R. Act X. 41; *Mohima* v. *Gooroo*, (1867) 7 W. R. 285; *Huro* v. *Anund*, (1867) 7 W. R. 459; *Soorasoonderee* v. *Golam*, (1873) 19 W. R. 141, *sc.*, 15 B. L. R. 125 *f. n.* See also *Hurronath* v. *Gobind*, (1875) 23 W. R. 352.

[2] Compare *Hemnath* v. *Ashgur*, (1879) I. L. R. 4 Calc. 894; *Arun* v. *Kamini*, (1913) I. L. R. 41 Calc. 683, *sc.*, L. R. 41 I. A. 32, *sc*, 18 C. W. N. 369, *sc.*, 19 C. L. J. 274.

or in any other law, to the contrary notwithstanding." Section 16 of the Act enacted that a presumption should be made that the rent was not changed from the Permanent Settlement, if the *taluqdar* succeeded in proving uniform payment for twenty years before the commencement of the suit. The Act made no change in the law as to the rights of *taluqdars* under section 51 of Regulation VIII of 1793 with reference to the grounds of enhancement of rent, but it gave to the *taluqdars* the additional right of exemption from enhancement, the declaration in the statute being that uniform payment of rent from the date of the Permanent Settlement rendered the *taluq* permanent and gave fixity of rent; and, as there is always considerable difficulty in proving uniform payment for such a long period, a rebuttable presumption was directed to be made in favour of the *taluqdar*. This presumption might be rebutted by proof that the tenure came into existence or that the rent was changed after the date of the Permanent Settlement.[1] *Taluqs* are generally, if not always, hereditary and transferable, and they are seldom, if ever, held on terminable leases. The word "taluq" *primâ facie* imports a permanent tenure.[2] The onus of proving the nature of the tenure, its permanency and the fixity of rent, is, however, on the *taluqdar*, and the presumption arising from name and duration is only some evidence in proof of these matters.

Rent not enhanceable if rent has not been changed from Permanent Settlement.

The rules laid down in the Regulations and Act X of 1859 are still in force in some parts of the Bengal Provinces. The Bengal Act VIII of 1869—the Landlord and Tenant Procedure Act—was not enforced in

[1] See *Prahlad* v. *Budhu*, (1869) 2 B. L. R. P. C. 111 (134), *sc.*, 12 M. I. A. 275, *sc.*, 12 W. R. 6 P. C.; *Batai* v. *Bhuggobutty*, (1882) 11 C. L. R. 476; *Narsing* v. *Dharam*, (1904) 9 C. W. N. 144.

[2] *Asanoollah* v. *Kalee*, (1872) 18 W. R. 469; *Krishno* v. *Sufdur* (1874) 22 W. R. 326; *Budayar* v. *Karam*, (1913) 18 C. L. J. 271; *Sarada* v. *Akhil*, (1917) 21 C. W. N 903.

the Scheduled Districts and the province of Orissa, including Cuttack, though it was extended to Sylhet.[1] Besides, the Bengal Act being merely a Procedure Act, changing only the tribunal for the trial of cases, made no alteration in the substantive law as laid down in Act X of 1859. Sections 15 and 16 of Act X of 1859 were reproduced, word for word, in sections 16 and 17 of the Bengal Act VIII of 1869. The Bengal Tenancy Act, VIII of 1885, which has repealed Act VIII (B.C.) of 1869, has made no material alteration in the law as laid down in sections 15 and 16 of Act X of 1859.[2] The words "Permanent Settlement," occurring in the Bengal Tenancy Act, have been defined to mean the Permanent Settlement of Bengal, Bihar and Orissa made in 1793.[3] These words were not defined in the previous Rent Acts, but they referred to the 22nd March, 1793, the date of this Permanent Settlement of 1793.[4] In any locality, where Permanent Settlement has not been effected, the *taluqdar* claiming permanency and fixity of rent must show that rent has not been changed since the 22nd March, 1793. But no presumption can arise under the Bengal Tenancy Act, where the *taluq* is situated within the ambit of a temporarily settled estate, in which the Government has the right to raise its revenue on the occasion of every fresh settlement.[5] The Government is not bound by the acts of the holder of land under a temporary settlement. Express recognition in the settlement proceedings, by a revenue officer, especially empowered by the Local Government to make or confirm settlements may be evidence of the right to hold a *taluq* exempt from enhancement.

[1] Act. VIII (B. C.) of 1869, Sec. 106 and Sch. D.

[2] Act. VIII of 1885, Sec. 50, cls. 1 and 2; *Sudanundo* v. *Nowruttun*, (1871) 16 W. R. 289.

[3] Act VIII of 1885. Sec. 3, cl. 12.

[4] *Dhunput* v. *Gooman*, (1864) W. R. Gap. Vol. Act X 61; *Rajessurree* v. *Shibnath*, (1865) 4 W. R. Act. X. 42.

[5] Act VIII of 1885, Sec. 191.

Alteration of rent on alteration of area.

But supposing that the rent of a *taluq* is fixed in perpetuity, can there be abatement or enhancement of rent on the ground of decrease or increase in area, when there is an absence of express contract? The Bengal Tenancy Act has solved the disputed question of law by adding to the words of the Regulation the clause—"except on the ground of an alteration in the area of the tenure."[1] This clause must be read along with section 52, sub-section 1, clauses (*a*) and (*b*) of the Bengal Tenancy Act, which provide for alteration of rent in respect of alteration in area either by alluvion, diluvion or any other cause. I shall revert to this ground of enhancement and deal with it at length later on.

Changes made by the Bengal Tenancy Act.

Section 51 of Regulation VIII of 1793 has been repealed by the Bengal Tenancy Act,[2] but its provisions are embodied with a slight modification in section 6 of that Act. Sections 48 and 49 of the Regulation are still in force. Section 6 of the Bengal Tenancy Act restricts its operation to tenures existing from the time of the Permanent Settlement, and consequently includes tenures or *taluqs* existing from before the Settlement, while Sections 48, 49 and 51 of the Regulation apply only to those that have existed from before. Practically the distinction is of little consequence, as any claim based on the existence of a dependent *taluq* exactly from the date of the Settlement is seldom made, and, as we have already seen, *taluqs* existing from before that date have generally acquired the status of permanent tenures at fixed rent. Let us, however, see wherein the Bengal Tenancy Act has modified the rules laid down in the Regulation—rules which are still in force in various parts of the Bengal provinces. The Regulation speaks of the "special custom of the district" as one of the grounds of enhancement—the words in the Bengal

[1] Act VIII of 1885, sec. 50, cl. 1.

[2] *Ibid*, Schedule 1.

Tenancy Act are "local custom." I do not think the change is material, though the word "local" is wider in its import. "Local" may include a district, part of a district and even two or more districts. The other alteration is the insertion, in clause (*b*) of section 6 of the Act, of the words, "otherwise than on account of the diminution of the area of the tenure." This seems to imply that an abatement received by a *taluqdar* on account of decrease in area by diluvion or dispossession by title paramount, would not make the tenure liable to enhancement except under section 52 of the Act, which relates to increase in area from alluvion, encroachment by the tenant or other similar causes. The reduction of rent contemplated by section 6 must be one on account of the diminution of the rent-roll due to the productive power of land having decreased by reason of its being covered with sand, or to depopulation or causes of a similar nature.

Notice of enhancement not necessary.

The Bengal Tenancy Act has made a material alteration in procedure, by doing away with the necessity of notice upon *taluqdars* before the institution of a suit for enhancement. Section 154 of the Act now regulates the procedure in those districts in which that Act prevails.

Summary.

Thus you see the rent of dependent *taluqs* existing at the date of the Permanent Settlement is not enhanceable in the following cases:—(*a*) where the *taluqdars* have paid rent at fixed rate for at least twelve years before the Decennial Settlement; (*b*) where the *taluqdars* have paid rent uniformly at fixed rate from the time of the Permanent Settlement. The rent is enhanceable in all other cases, except where the parties are bound by the terms of the grants. The grounds of enhancement are those stated in Regulation VIII of 1793 and section 6 of the Bengal Tenancy Act. Ejectment is not allowed in any case.

Dependent *taluqs* created after the date of Permanent Settlement.

We now come to that class of dependent *taluqs* which have come into existence after the Permanent Settlement. The policy of the earlier Regulations was to prohibit proprietors of estates from "disposing of any dependent *taluq* to be held at the same or at any *jama* for a term exceeding ten years." [1] In those days such a provision was absolutely necessary for the protection of government-revenue, as ejectment was unknown, and cases of enhancement of rent extremely few. Leases for any term exceeding ten years were declared "null and void." This prohibition was repeated in 1795 and 1803[2], and it was declared that on sale for arrears of government revenue, all such leases would be cancelled.[3] But in 1812, it was deemed advisable to change the policy, and proprietors were declared competent to grant leases to dependent *taluqdars* on any terms most convenient to the parties, even in perpetuity, and reserving any amount of rent, provided the interest the proprietors had in their estates authorised them to make such grants.[4] In the year 1819, all leases granted either before or after 1812 were declared valid, notwithstanding that the rules in force before the passing of Regulation V of 1812 had prohibited the creation of such tenures.[5]

Putni taluq.

Most of these *taluqs* created by the proprietors of estates after the Permanent Settlement were, by the terms of the grants, permanent and hereditary with rent fixed for ever. The terms of the grants regulate the relation between the lessors and the lessees. A good many of these are known by the name of *putni taluqs*. A few go by other names. Others again are, by the

[1] Reg. XLIV of 1793, Sec. 2.
[2] Reg. L. of 1795, Sec. 2; Reg. XLVII of 1803, Sec. 2.
[3] Reg. XLVII of 1803, Sec. 5.
[4] Reg. V of 1812, Sec. 2; Reg. XVIII of 1812, Sec 2.
[5] Reg. VIII of 1819, Sec 2.

conditions of the grants, permanent, hereditary and alienable, though the rent is not fixed for ever—a condition being inserted in the leases for enhancement at customary or pergunah rates, or whenever there may be a general enhancement in the *perganah* or district. Some *taluqs* are held without written leases, and custom or usage regulates their incidents. These last also are generally hereditary and alienable, though the rent may be enhanced. I propose to deal with them in the order I have mentioned them.

Their incidents under Regulation VIII of 1819.

Putni taluqs have their origin in the estates of the Maharaja of Burdwan.[1] The original meaning of the word *putni* seems to be, as Mr. Harrington thinks, "settled," and *putni taluq* means a dependent tenure *settled* in perpetuity at fixed rent. The estates of the Maharaja of Burdwan were saved by the creation of these *putni taluqs*, as the system afforded the only means of escape from the ruin of ancient families in Bengal, brought about by the Permanent Settlement. The assessment of land-revenue on the estates settled with the Burdwan Raj was very high. For easy and punctual realisation of rent, leases to middlemen in perpetuity and at fixed rent were granted to a large number of *intermediaries*, who were thus made proprietors in the same way as the Government had made the Maharaja of Burdwan a proprietor. Regulation VIII of 1819 placed on a legislative basis this system of *sub-infeudation*. By degrees, the system extended to other *zemindaries*, and we have now a very large number of *putni taluqs*, especially in the districts of Hooghly, Burdwan, Bankura, Nuddea and Purnea. The general characteristics of these tenures may be summed up in the words of the Regulation :—"The character of which tenure is, that it is a *taluq* created by the *zemindar*, to

[1] Preamble to Reg. VIII of 1819.

be held at a rent fixed in perpetuity, by the lessee and his heirs for ever; the tenant is called upon to furnish collateral security for the rent, and for his conduct generally, or he is excused from this obligation at the *zemindar's* discretion; but even if the original tenant be excused, still, in case of sales for arrears, or other operations leading to the introduction of another tenant, such new incumbent has always in practice been liable to be so called upon at the option of the *zemindar*. * * In case of an arrear occurring, the tenure may be brought to sale by the *zemindar*, and if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be further answerable for the demand."[1] The Regulation admitted these *putni* tenures to be saleable in execution of ordinary money-decrees, and transferable by sale, gift or mortgage, and also admitted the right of the *putnidars* to create similar subordinate tenures called *dur-putnis*.[2] The *putni taluqs* were also declared not liable to be cancelled for arrears of rent. They were saleable for arrears, the surplus sale-proceeds, after deducting the rent due to the *zemindar*, being left to the credit of the defaulting *putnidar*.[3]

Regulation VIII of 1819 not modified by the Rent Acts.

Neither of the Rent Acts—Act X of 1859 or Act VIII of 1885—has touched the provisions of the *Putni* Regulations, *i. e.*, Reg. VIII of 1819, modified, in matters not very material, by Regulation I of 1820, Regulation VII of 1832, Act VIII of 1835, Act XXV of 1850, Act VI of 1853 and Act VIII (B.C.) of 1865. The Bengal Tenancy Act VIII of 1885, has expressly provided:—"Nothing in the Act, shall affect any enactment relating to *putni* tenures in so far as it relates to those tenures."[4] In

[1] Preamble to Reg. VIII of 1819.

[2] Reg. VIII of 1819, Sec. 3, cls. 1 and 2.

[3] Reg. VIII of 1819, Sec. 3, cl. 3.

[4] Act VIII of 1885, Sec. 195, cl. (*e*); *Gyanada* v. *Bromomoyi*, (1889) I. L. R. 17 Calc. 162.

matters in which the Regulation, as it now stands with the amendments, is silent, Act X of 1859 and the other Acts, dealing with the incidents of the relationship of landlord and tenant, furnish rules of substantive law and procedure; but the express provisions of the Regulation have not been, in any way, affected by them.[1] The *zemindar* has, however, the additional right of bringing *putni taluqs* to sale under the ordinary procedure laid down for other kinds of tenures, and the effect of such a sale is the same as to the right of the purchasers to avoid encumbrances and get other reliefs, as in sales under the Regulation.[2]

Summary sales for arrears.

The summary procedure for six-monthly sales for arrears of rent, through the agency of the Collector of the District in which the *putni taluq* is situated, is the chief peculiarity noticeable in the *Putni* Regulations.[3] Summary sales for arrears of revenue or rent are not allowed to any landlords, except the Government and the *zemindars qua putni taluqs*. The reference to months according to the Bengali calendar, and not the Fasli or the Walaity, seems further to indicate that the Regulation itself was intended only for Bengal proper, as it professedly referred to the Burdwan Raj. I am not aware of any instance of the application of the provisions of the Regulation about summary sales in the Bihar and the Orissa districts. The Maghee and Mulki eras correspond exactly in months and days with the Bengal era, and where these eras prevail, instances of sales under this Regulation are common.

The first six-monthly sale, generally known as

[1] *Kristo* v. *Kristo*, (1889) I. L. R. 16 Calc. 642; *Mahomed* v. *Brojo*, (1891) I. L. R. 18 Calc. 360.

[2] *Brindabun* v. *Brindabun*, (1874) 13 B.L.R. 408, *sc.*, 21 W.R. 324, *sc.*, L. R. 1 I. A. 178. See also *Basanta* v. *Khulna Loan Co.*, (1914) 19 C. W. N. 1001, *sc*, 20 C. L J. 1.

[3] *Watson* v. *Collector*, (1869) 3 B. L. R. P. C. 48, *sc.*, 13 M.I.A. 160, *sc*, 12. W. R. P. C. 43.

sashmahi sale, is the one that takes place for the arrears from Baisakh to Aswin. The application for sale may be made to the Collector[1] of the district in which the lands of the *taluq* or the greater part[2] thereof are situated, on the first day of Kartik following, or if that be a close day, on the first open day of the month. *Sashmahi* Sale.

The second six-monthly sale, generally known as the *dwazdomahi* (twelve-monthly) sale, takes place for arrears remaining due at the end of the year (Chaitra), the *zemindar* being entitled to make the application on the first day of Baisakh or the first open day thereafter, the sale taking place in Jaisth following. *Dwazdomahi* Sale.

Only the recorded proprietor, or proprietors jointly, or a common manager whose name is duly registered, may make the application. One of a number of co-proprietors or fractional co-sharers is not entitled to make the application, unless the *putni taluq* is co-extensive with the interest of such fractional sharer or sharers. If *A*, *B* and *C* are joint owners of an estate, and if they have jointly created a *putni taluq*, A alone is not entitled to apply for sale under the Regulation, either for the whole rent due from the *putnidar*, or for his own share, only. But if A had created a *putni* of his own share, he would be entitled alone to apply. Even if after the creation of the *putni* by a number of proprietors jointly, the *putnidar* pays rent separately to each of the proprietors according to his share, such a proprietor has not the right to apply. But if the several fractional proprietors and the *putnidar* enter into separate engagements by executing leases and counter-parts, the right of each proprietor may then be recognised by the Collector. The Regulation itself does not contemplate the case of any but Who may apply for summary sale.

[1] Reg. VII of 1832, Sec. 16, cl. 1 (now repealed); Act VI of 1853, Sec. 1; Act VIII (B.C.) of 1865, Sec. 3.

[2] Act VI of 1853, Sec. 1.

owners of entire estates; but it seems, however, that the general law as to the rights of co-sharers is applicable. Registration of the proprietor's name under Act VII (B.C.) of 1876 is, of course, absolutely necessary to entitle him to any relief under the Regulation. The rule as to who may apply for sale under the Regulation must be taken to be the same as in suits for arrears of rent, where the tenure is sought to be made liable.

Notices of sale.

On the application to the Collector being admitted, three copies of the notice of sale are required to be served, the first by being stuck up in some conspicuous part of the Collector's office or *cutchery*,[1] the second by being stuck up at the *sudder cutchery* of the *zemindar* himself,[2] and the third by publication of a copy, or extract of such part of the notice as may apply to the individual case, at the *cutchery* or at the principal town or village upon the land of the defaulter.[3] This third notice is required to be served in the *mofussil* by a single peon "who shall bring back the receipt of the defaulter or his *mofussil* agent, or in the event of his inability to procure this, the signatures of three substantial persons,[4] residing in the neighbourhood, in attestation of the notice having been brought and published[5] on the spot." In case, however, the people of the village should object

[1] Reg. VIII of 1819, Sec. 8, cl. 2; *Rajnarain* v. *Ananta*, (1892) I. L. R. 19 Calc. 703.

[2] Reg. VIII of 1819, Sec. 8, cl. 2; *Baikantha* v. *Mahatab*, (1872) 9 B. L. R. 87, *sc.*, 17 W. R. 447; *Gobind* v. *Chandhurry*, (1882) I. L. R. 9 Calc. 172. But see *Gouree* v. *Joodhisteer*, (1876) I. L. R. 1 Calc. 359, *sc.*, 25 W. R. 141.

[3] Reg. VIII of 1819, Sec. 8, cl. 2; *Baikantha* v. *Mahatab*, (1872) 9 B. L. R. 87, *sc.*, 17 W. R. 447. But see *Hurry* v. *Motee*, (1870) 14 W. R. 36; *Hunooman*, v *Bipro*, (1873) 20 W. R. 132.

[4] *Ram* v. *Kaminee*, (1874) 14 B. L. R. 394 *sc.*, 23 W. R. 113, *sc.*, L. R. 2 I. A. 71; *Pitambur* v. *Damoodur*, (1875) 24 W. R. 129; *Gouree* v. *Joodhisteer*, (1876) I. L. R. 1 Calc. 359, *sc.*, 25 W. R. 141; *Bhugwan* v. *Sudder*, (1878) I. L. R. 4 Calc. 41; *Maharani* v. *Krishna*, (1887) I. L. R. 14 Calc. 365, *sc.*, L. R. 14 I. A. 30; *Rajnarain* v. *Ananta*, (1892) I. L. R. 19 Calc. 703; *Bejoy* v. *Amrita*, (1899) I. L. R. 27 Calc. 308. See also *Ranjit* v. *Jnanendra*, (1915) 19 C. W. N. 963.

[5] *Raghub* v. *Brojonath*, (1870) 14 W. R. 489.

or refuse to sign their names in attestation, the peon is required to go to the *cutchery* of the nearest *munsif*, or if there should be no *munsif*, to the nearest *thana*, and there make an affidavit of due publication—certificate to which effect shall be signed and sealed by the officers there and delivered to the peon. The non-publication of any one of these notices is sufficient to vitiate any sale that may follow, even if there be no proof of substantial injury to the defaulter.[1] The notice required to be stuck up at the *cutchery* of the defaulter may be published at the *cutchery* of an adjacent *taluq* belonging to him, when he has no *cutchery* on the *taluq* in arrear.[2] A place where the *zemindar's* agent usually transacts business, though it is not a regular *cutchery*, may, in the eye of law, be considered a proper place for the publication of the notice.

Attestation by substantial persons.

The question, as to who are substantial persons competent to attest the notice to be served on the land of the defaulter, was at one time the subject of considerable discussion. But the matter has now been set at rest by the judgment of the Judicial Committee of the Privy Council, in *Ram Sabuk Bose* v. *Kaminee Koomaree Dossee*,[3] in which it has been held that respectable persons of good character, such as *mandals*, *chowkidars* and holders of *lakhiraj* lands are substantial persons. The proof of the service of notice is enough. The observance of special formalities in the mode of service or attestation by witnesses is merely directory.[4]

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[1] *Bhugwan* v. *Sudder*, (1878) I. L. R. 4 Calc. 41; *Maharajah* v. *Tarasundari*, (1882) I. L. R. 9 Calc. 619, *sc.*, L. R. 10 I. A. 19 *sc.*, 13 C. L. R. 34; *Maharni* v. *Krishna*, (1887) I. L. R. 14 Calc. 365, *sc.*, L. R. 14 I. A. 30; *Surnomoyi* v. *Grish*, (1891) I. L. R. 18 Cal. 363. See also *Gobind* v. *Chandhurry*, (1882) I. L. R. 9 Calc. 172.

[2] *Mungasee* v. *Shibo*, (1874) 21 W. R. 369. But see *Maharani* v. *Krishna*, (1887) I. L. R. 14 Calc. 365, *sc.*, L. R. 14 I.A. 30.

[3] (1874) 14 B. L. R. 394, *sc.*, 23 W. R. 113, *sc.*, L. R. 2 I. A. 71. See also *Pitambur* v. *Damoodur*, (1875) 24 W. R. 129.

[4] *Sona* v. *Lall*, (1868) 9 W. R. 242; *Pitambar* v. *Damoodur*, (1875) 24 W. R. 129.

Zemindar responsible for due publication of the notices.

The *zemindar* is, in the words of the Regulation, "exclusively answerable for the observance of the forms prescribed" for the publication of notice.[1] The burden of proving due publication is entirely upon the *zemindar* who, in every suit brought to contest the legality of the sale, has to prove the due observance of all the formalities,[2] even if the plaintiff gives no evidence in support of his plea of non-service. There is no presumption in favour of the *zemindar* of the notices having been duly served. It is not even incumbent upon a plaintiff, who has brought a suit to contest the legality of a summary sale under the Regulation, to set out distinctly the grounds for impeaching the sufficiency and due publication of the notices. The plea of non-service of any particular notice or of any informality in publication may be taken at any stage of the suit, and even for the first time in appeal.[3]

Special notice for the *sashmahi* sale.

The notice of sale at the middle of the year should contain a statement that unless the whole of the advertised balance be paid before the date of sale "or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartik, to less than one-fourth, or a four-anna proportion of the total demand of the *zemindar*, according to the *kistbandi*, calculated from the commencement of the year to the last day of Kartik" it shall take place.[4] This provision is not merely directory; it is mandatory, and the want of such a statement in the notice has been held to vitiate the sale.[5]

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[1] Reg. VIII of 1819, Sec. 8, cl. 2.

[2] *Doorga* v. *Najunooddeen*, (1874) 21 W. R. 397; *Maharajah* v. *Tarasundari*, (1882) I. L. R. 9 Calc. 619 (624), *sc.*, L. R. 10 I. A. 19, *sc.*, 13 C. L. R. 34; *Hurro* v. *Mahomed*, (1891) I. L. R. 19 Calc. 699; *Sheorutton* v. *Net*, (1902) I. L. R. 30 Calc. 1, (12), *sc.*, 6 C. W. N. 688. But see *Rajnarain* v. *Ananta*, (1892) I. L. R. 19 Calc. 703 (713).

[3] *Ahsanulla* v. *Haricharan*, (1892) I. L. R. 20 Calc. 86, *sc.*, L. R. 19 I. A. 191. See the same case in High Court in I. L. R. 17 Calc 474.

[4] Reg. VIII of 1819, Sec. 8, cl. 3.

[5] *Ahsanulla* v. *Hurri*, (1890) I. L. R. 17 Calc. 474. Same case confirmed by P. C., reported in (1892) I. L. R. 20 Calc. 86, *sc.*, L. R. 19 I. A. 191.

Date of sale.

The mid-year sale usually takes place on the first of Aughran and, if that is a close day, on the opening day of the month. But if the application could not be presented on the first day of Kartik, the day fixed for sale is thirty days from the first open day in Kartik. The sale on a proceeding at the end of the year takes place on the first day of Jaisth following, but if it is a Sunday or a holiday, the next subsequent day, not being a holiday, is fixed for the sale, thirty days' time being always allowed.[1]

Collector to hold the sale.

The Collector himself or an officer exercising the full powers of a Collector of the district[2] and having revenue jurisdiction over the tenure is required to conduct the sale, and he must hold the sale, if he finds that the notices have been duly served,[3] at least fifteen days before the day of sale.[4] If the amount of the debt, specified in the notices, be not paid to the *zemindar* before the date of sale, and if from any informality in the service of notice or any other cause, such as the death of the *zemindar*, the application for sale be not struck off by the Collector, the Collector is bound to hold the sale, unless the *zemindar* or his agent asks the Collector to stop it.[5]

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[1] Reg. VIII of 1819, Sec. 8, cl. 2. The practice of holding sales under Regulation VIII of 1819 on any day subsequent to the 1st day of Aughran or the 1st day of Jaisth, the full period of thirty days being allowed to intervene between the date of application and the date of sale, is based upon the authority of a decision of the late Sudder Court: *Woomeshchunder* v. *Essanchunder*, [1859] S. D. A. 1198; S. D. A., Construction No 329, 15th Sep. 1820; *Huronath* v. *Juggunath* (1869) 11 W. R. 87. See also *Pitambur*, v. *Damoodur* (1875) 24 W. R. 129.

[2] Act VI of 1853, Secs. 1 and 9; and Act VIII (B.C.) of 1865, Sec. 3; *Rammohun* v. *Radhanath*, [1850] S. D. A. 320, *sc.*, I. D. 11 O. S. 260.

[3] In order to obviate the difficulty of serving notices in the *mofussil* before the 15th of Kartik, the Collector was required each year, a few days before the office was closed for the Durga *puja* holidays, to fix the day on which the *putni* sales will be held and to put up a notice to that effect in his *cutchery*. This being fixed authoritatively, the *zemindars* might proceed to issue their notices in the *mofussil* at any time after the first day of Kartik—Board's Letter No. 226 A, dated 1st April, 1881.

[4] Reg. VIII of 1819, Sec. 8, cl. 3; *Surnomoyi* v. *Grish*, (1891) I.L.R. 18 Calc. 363, overruling *Matungee* v. *Moorrary*, (1875) I.L.R. 1 Calc. 175.

[5] Reg. VIII of 1819, Sec. 14.

Procedure at the sale.

At the time of the sale, the notice previously stuck up in the Collector's *cutchery* is required to be taken down, and each *putni taluq* is required to be called up for sale by the Collector successively, in the order in which notices have been stuck up. If there is any want of "fairness of publicity" on the part of the person holding the sale or any irregularity as to the procedure at the sale, the Collector is responsible, and the sale should be set aside.[1] A person on behalf of the *zemindar* should be in attendance at the sale to satisfy the Collector as to the actual arrears due up to the date of sale and the due publication of the sale-notice in the *mofussil*, and no sale can take place unless a statement of the payments made by the *putnidar* and the receipt or certificate of due publication of the notice in the *mofussil* are produced before the Collector, who should record a proceeding separately for each lot. If the statement of account produced is incorrect, and there are no arrears of rent at the date of sale, the sale held is void.[2] At the mid-year sale, the *kistbundi* of the defaulter should also be produced, so that the Collector may see that the amount of arrear at the date of sale exceeds a fourth part of the annual rent. The actual defaulter, whether registered or not, cannot bid, but every other person is free to do so. The *zemindar* himself is entitled to bid, or any under-tenant,[3] including the *durputnidar* of the defaulter,[4] if he has not fraudulently withheld payment of his rent. A person, who holds a

[1] *Binoderam* v. *Petumberee*, [1858] S. D. A. 93, *sc.*, I. D. 17 O. S. 70; *Woomeshchunder* v. *Essanchunder*, [1859] S. D. A. 1198.

[2] *Shuroop* v. *Pertab*, (1867) 7 W. R. 218; *Tara* v. *Radha*, (1875) 24 W. R. 63.

[3] Reg. VIII of 1819, Sec. 9; *Bykunthnath* v. *Moneemohun*, [1850] S. D. A. 89, *sc.*, I. D. 11 O. S. 69; *Srinath* v. *Ramdhun*, [1859] S. D. A. 267; *Doorgamonee* v. *Govindchunder*, [1862] S. D. A. 260; *Mahomed* v. *Kishen*, (1863) W. R. F. B. Vol. 92, *sc.*, 2 Hay 356; *Gouree* v. *Raj*, (1866) 5 W. R. 106.

[4] Reg. VIII of 1819, Sec. 9; *Fukeer* v. *Hills*, (1844) 7 Sel. Rep. 79, *sc.*, I. D. 8 O. S. 137.

mortgage of the *putni*, is not a defaulter, and is entitled to make the purchase.

Deposit by purchaser.

Fifteen per cent. of the purchase-money, and not twenty-five per cent., as in execution-sales by a Civil Court, is required to be deposited by the highest bidder, and the balance of the purchase-money must be put in by the noon of the eighth day from the date of sale. If the deposit be not made by the noon of the eighth day, the *putni* is required to be re-sold on the ninth, that is the following day. The first purchaser forfeits on such re-sale the advance of fifteen per cent., and is further liable for any deficiency at the second sale, the Collector being competent to realise the deficiency by the process for the execution of decrees of Civil Courts. The forfeited deposit is applied towards the defrayal of the expenses of the sale, and the surplus is forfeited to Government.[1]

Commissioner to set aside summary sales.

The Commissioner of Revenue has the power to set aside any sale under Regulation VIII of 1819 on the ground of irrelevancy of law or procedure, or on proof of payment of the entire rent before the date of sale.[2] This, however, is a power which the Commissioners are slow to exercise, as any person interested in setting aside a sale may get complete remedy in a Civil Court.

Confirmation of sale.

After the entire amount of purchase-money is deposited on the eighth day, the sale becomes confirmed, and the purchaser is entitled to get a sale-certificate at once[3] and possession of the *taluq*. No formal order of confirmation is required by law, the sale becoming *ipso facto* confirmed on the payment of the full purchase-money.[4] The limitation of suits to set aside a sale

[1] Sec. 9 as amended by Sections 1 and 2 of Act XXV of 1850.

[2] Act VIII (B. C.) of 1865, Sec. 13.

[3] Reg. VIII of 1819, Sec. 15; *Ramsona* v. *Naba*, (1911) 16 C. W. N. 805, *sc.*, 13 C. L. J. 404.

[4] *Bhuban* v. *Gireesh* (Sp. Ap. 405 of 1893) decided on the 28th March, 1894. But see *Brojo* v. *Futick*, (1872) 17 W. R. 407.

under the Regulation begins to run from the date of the payment of the full purchase-money, the period being one year under article 12, clause (*d*) of the first schedule of the Limitation Act (IX of 1908). The sale becomes final and conclusive on payment of the full purchase-money.

How sales may be set aside.

Besides the remedies by a summary investigation before the sale[1] and an appeal to the Commissioner after sale, the defaulter or any party interested in contesting the validity of the sale may sue the *zemindar* and the purchaser in the Civil Court for a decree for the reversal of the same on the ground of the non-publication or irregular publication of any of the notices, or want of arrears.[2] An unregistered defaulter, [3] or an unregistered co-sharer of the defaulter,[4] an under-tenure holder whose tenure is voidable on the sale,[5] or a mortgagee may sue for setting aside the entire sale in the proper forum and on full valuation, and he may be entitled to a decree on a sufficient plea being made out. The *zemindar* as well as the purchaser are necessary parties in such suits.[6] If the sale be set aside by the Civil Court, the *zemindar* is liable to pay full costs and damages, the purchaser also being fully indemnified against all losses.[7]

Any *durputnidar* or any other under-tenure holder, whether his name is registered in the *zemindar's* office

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[1] Reg. VIII of 1819, Sec. 14, cl. 2. [2] *Ibid*, Sec. 14, cl. 1.

[3] *Rajnarain* v. *Ananta*, (1892) I. L. R. 19 Calc. 703.

[4] *Chunder* v. *Shuvadra*, (1886) I. L. R. 12 Calc. 622; *Joykrishna* v. *Sarfannessa*, (1888) I. L. R. 15 Calc. 345; *Gunpat* v. *Moti*, (1912) 18 C. W. N. 103, *sc.*, 16 C. L J. 301.

[5] *Unnoda* v. *Erskine*, (1873) 12 B. L. R. 370, *sc.*, 21 W. R. 68 *Suresh* v. *Akkori*, (1893) I. L. R. 20 Calc. 746.

[6] Reg. VIII. of 1819, Sec. 14, cl. 1; *Preolall* v. *Gyan*, (1870) 13 W. R. 161; *Gangadhar* v. *Abdul*, (1909) 14 C. W. N. 128, *sc.*, 11 C. L. J. 34.

[7] *Baikantha* v. *Mahatab*, (1872) 9 B. L. R. 87, *sc.*, 17 W. R. 447; *Mobaruck* v. *Ameer*, (1873) 21 W. R. 252; *Tara* v. *Nafar*, (1877) 1 C. L. R. 236.

Under-tenure holders protecting the *putni* from sale entitled to be re-imbursed.

or not, may protect the *putni* from sale by paying the amount of arrears;[1] and he is entitled to pay the amount into the Collectorate at any time before the sale. If the under-tenure holder is himself in arrear, the amount deposited by him would go towards the satisfaction of his debt,[2] but if he is not in arrear, and there is nothing due from him on account of rent to the *zemindar*, the amount lodged is considered to be an advance from private funds for which a statutory lien arises in favour of the person making the advance;[3] and he is also entitled, on applying for the same to obtain immediate possession of the defaulting tenure in order to recover the amount so advanced. "If the defaulter shall desire to recover his tenure from the hands of the person or persons, who by making the advance may have acquired such an interest therein and entered into possession in consequence, he shall not be entitled to do so except upon repayment of the entire sum advanced with interest at the rate of twelve per cent. per annum up to the date of possession given as above, or upon exhibiting proof in a regular suit, to be instituted for the purpose, that the full amount so advanced with interest has been realised from the usufruct of the tenure." The under-tenure-holder has also the right, which the ordinary law gives him, of suing for advance and for declaration of his lien.[4]

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[1] Reg. VIII of 1819, Sec. 13. cl. 2; *Rajkisto* v. *Gocoolchunder*, [1857] S. D. A. 920, *sc.*, I. D. 15 O. S. 1172; *Luckhinarain.* v. *Khettro*, (1873) 13 B. L. R. 146, *sc.*, 20 W. R. 380, confirming High Court Judgment reported in 15 W. R. 125; *Okhoy* v. *Mahtab*, (1874) 22 W. R. 299.

[2] Reg. VIII of 1819, Sec. 13, cl. 3; *Lalit* v. *Srinibas*, (1886) I. L. R. 13 Calc. 331.

[3] Reg. VIII of 1819, Sec. 13, cl. 4; *Prem* v. *Kishen*, [1849] S. D. A. 18, *sc.*, I. D. 10 O. S. 648; *Ramshunker* v. *Premsook*, [1849] S. D. A. 473, *sc.*, I. D. 10 O. S. 1015; *Bhuggobuttee* v. *Doorgadass*, [1858] S. D. A. 890, *sc.*, I. D. 17 O. S. 653; *Ambika* v. *Pranhari*, (1869) 4 B. L. R. F. B. 77, *sc.*, 13 W. R. F. B. 1; *Nobo* v. *Srinath*, (1882) I. L. R. 8 Calc. 877, *sc.*, 11 C. L. R. 37.

[4] *Ambika* v. *Pranhari*, (1869) 4 B. L. R. F. B. 77., *sc.*, 13 W. R. F. B. 1.

Limitation of suits for arrears of rent when *putni*-sale is set aside.

If after the sale becoming final, it is set aside, the *zemindar* is entitled to bring a suit for the arrears under the ordinary Rent Law, as if no application was made. If the suit for setting aside the sale remains pending for a long time, limitation does not run as to the arrears of rent, but upon the sale being set aside and upon the restoration of the parties to possession, they take back the *taluq*, subject to the obligation to pay the arrears. Until the sale is finally set aside, the position of the *zemindar* is as if his claim has been satisfied. The sale is not also an act of trespass by the *zemindar* which can be considered as amounting to dispossesion by the landlord. The defaulter is entitled to sue the purchaser, if he has taken possession, for mesne profits; but he is himself liable to the *zemindar* for the arrears of *putni* rent, and limitation does not run in his favour until the suit for the reversal of the sale is finally disposed of.[1]

The right of the purchaser to avoid incumbrances.

On a sale under the Regulation being finally confirmed, either no suit being brought, or when a suit is brought, the sale not being set aside by the Civil Court, the under-tenures such as *durputnis*, *seputnis* or *chahar-putnis* (*taluqs* of the second, third and fourth grades) and all charges created by the defaulter or any person holding under the defaulter, and all charges existing on the *putni* that have accrued through the act of the defaulter, become voidable. The purchaser is entitled to have possession of the *taluq* in the same state as it stood at its creation by the *zemindar*, free of all incumbrances.[2] Adverse possession of any part of the lands either by a neighbouring landlord or by any person

[1] *Swarnamayi* v. *Shashi*, (1868) 2 B. L. R. P. C. 10, *sc.*, 12 M. I. A. 244, *sc.*, 11 W. R. P. C. 5; *Dhunput* v. *Saraswati*, (1891) I. L. R. 19 Calc. 267. See also *Huro* v. *Gopal*, (1882) I. L. R. 9 Calc. 255, *sc.*, L. R. 9 I. A. 82, *sc.*, 12 C. L. R. 129, and *Sheriff* v. *Dina*, (1885) I. L. R. 12 Calc. 258.

[2] Reg. VIII of 1819, Sec. 11; *Bolakee* v. *Luckheemonee*, [1850] S. D. A. 349, *sc.*, I. D. 11 O. S. 284; *Oomanath* v. *Roghoonath*, (1862) W. R., F. B. Vol., 10, *sc.*, 1 Hay 75, *sc.*, Marsh 43; *Brojo* v. *Futick*, (1872) 17 W. R. 407; *Gopendro* v. *Mukaddam*, (1894) I. L. R. 21 Calc. 702.

claiming a *lakhiraj* title is an incumbrance which the purchaser is entitled to get rid of. Any incumbrance created or allowed to remain on the *taluq* by the act or omission of any *taluqdar*, whether the defaulter himself or a previous holder or any person who had previously made default which ended in a sale of the *putni* for arrears, is voidable.[1] But the purchaser must exercise his option within twelve years from the date of his purchase or rather the confirmation thereof, when the cause of action accrues; and he must by some act shew that he has exercised the power vested in him by law to avoid incumbrances. They are not *ipso facto* void, but are only voidable.[2] If, however, he has accepted rent, his acquiescence may bar his right.[3] He cannot sue the *raiyats* for rent, when there is an intermediate holder, before getting a decree for possession against such intermediate holder. I need hardly repeat that the incumbrances which a purchaser is entitled to avoid must be such as have come into existence since the date of the creation of the *putni taluq*.[4] Any incumbrances existing from a previous date are not such as are void or voidable. Any under-tenure or incumbrance created with the permission of the proprietor is also not voidable.[5] Standing as the representative of the *zemindar*, the purchaser is affected by the same rules of limitation and the same rules as to

[1] *Gopendro* v. *Mokaddam*, (1894) I. L. R. 21 Calc. 702. See *Gocool* v. *Debendra*, (1911) 14 C. L. J. 136.

[2] *Madhusudan* v. *Ramdhan*, (1869) 3 B. L. R. 431, *sc.*, 12 W. R. 383; *Unnoda* v. *Mothura*, (1879) I. L. R. 4 Calc. 860, *sc.*, 4 C. L. R. 6; *Mohini* v. *Jotirmoy*, (1879) 4 C. L. R. 422; *Titu* v. *Mohesh*, (1883) I. L. R. 9 Calc. 683, *sc.*, 12 C. L. R. 304; *Satish* v. *Munjamati*, (1912) 17 C. W. N. 340; *Krishna* v. *Dwarka*, (1913) 17 C. W. N. 1092, *sc.*, 19 C. L. J. 360.

[3] *Sristeedhur* v. *Prannath*, [1858] S. D. A. 170, *sc.*, I. D. 17 O. S. 125; *Sreemunt* v. *Kookoor*, (1871) 15 W. R. 481.

[4] *Bishumbhur* v. *Doorgachurn*, [1858] S. D. A. 369, *sc.*, I. D. 17 O. S. 270.

[5] *Peareekomul* v. *Dad*, [1857] S. D. A. 1310, *sc.*, I. D. 16 O. S. 266.

the onus of proof as the *zemindar* himself. The burden of proof is in the first instance upon the purchaser to shew when the incumbrance was created. But as soon as he makes out this *primâ facie* case, the burden is shifted, and the holder of the incumbrance has then to shew that he is protected either on account of the consent given by the *zemindar* or for any other reason valid in law.

Merger.

If the *zemindar* himself is the purchaser, his position is the same as that of a stranger purchasing the property. Limitation which would run against the defaulting *putnidars* would not bar him. Neither does the law of merger—the extinction of the *putni* right in the higher right as *zemindar*—necessarily apply, as the common law about merger, applicable in England, is not applicable in this country. The doctrine of equitable merger which depends upon the intention of the parties ought to be applied to transactions in this country, unless there is express legislative enactment to the contrary. A *zemindar* purchasing a *putni* under him, in a sale either for arrears or under an ordinary decree of a Civil Court, has, *qua* the *putni*, the position of a *putnidar*,[1] unless by his acts and conduct he shews that he intends to deal with his two rights as one, the inferior right merging in the superior.

Protected interests.

There are certain rights in land which are protected notwithstanding a sale under the Regulation. *Khudkast raiyats* or resident hereditary cultivators are not liable to ejectment, and *bonâfide* engagements with them by

[1] *Jibanti* v. *Gokool*, (1891) I. L. R. 19 Calc. 760. But see *Raj* v. *Woomesh*, (1867) 8 W. R. 444; *Joora* v. *Aboo*, (1874) 21 W. R. 427 *Promotho* v. *Kali*, (1901) I. L. R. 28 Calc. 744; *Ulfat* v. *Gayani*, (1909) I. L. 36 Calc. 802 and *Abdul* v. *Wahed*, (1914) 18 C. W. N. ciii. See also *Abdul* v. *Tarakeswari*, (1907) 5 C. L. J. 33*n*; *Lal* v. *Jagir*, (1909) 13 C. W. N. 913; *Pran* v. *Mukta*, (1913) 18 C. L. J. 193; *Hirendra* v. *Hari*, (1914) 18 C. W. N. 860 and *Amatoo* v. *Muksud*, (1914) 19 C. W. N. 435.

the defaulter cannot be interfered with by a purchaser.[1] But if it can be proved in a regular suit that a higher rate was demandable from any *raiyat* at the date of the engagement, the rent of such a *raiyat* may be adjusted. Notwithstanding that the Regulation speaks only of *khudkast raiyats*, I presume occupancy and non-occupancy *raiyats* are also protected. Protection from ejectment ought expressly to be extended to all classes of tenure-holders and *raiyats* included in section 160 of the Bengal Tenancy Act (VIII of 1885.)

Distribution of surplus sale-proceeds.

The distribution of the surplus sale-proceeds on a sale under the Regulation is dealt with in section 17. The Government is entitled to one per cent. upon the net proceeds realised by the sale. Next, the *zemindar* gets the amount due to him with costs incurred by him in bringing the *putni* to sale. The remainder is in the first instance kept in deposit in the Collectorate to answer the claims of subordinate tenure-holders. If a subordinate tenure-holder has paid the rent due by him to the *putnidar*, he is entitled to bring a suit for compensation against the *putnidar* for his loss on account of the *putni*-sale; and a decree may be passed in his favour for compensation which should be directed to be paid out of the surplus sale-proceeds. But if any part of the amount due by the *durputnidar* as rent has remained unpaid, he is not entitled to bring a suit for damages, and has no claim to compensation.[2] The principle seems to be that negligence on the part of a *durputnidar* in not fully paying the amount due by him may have contributed to the non-payment by the *putnidar* of the amount due by him to the *zemindar*.

[1] Reg. VIII of 1819, Sec. 11, cl. 3; *Majoram* v. *Nilmoney*, (1874) 13 B. L. R. 198, *sc.*, 21 W. R. 326.

[2] *Ram* v. *Kishen*, [1845] S. D. A. 154, *sc.*, 7 Sel. Rep. 242, *sc.*, I. D. 8 O. S. 604; *Fukeer* v. *Hills*, [1844] 7 Sel. Rep. 179, *sc.*, I. D. 8 O. S. 137; *Issan* v. *Tareenee*, (1863) 2 Sev. 84; *Surnomoye* v. *Land Mortgage Bank*, (1881) I. L. R. 7 Calc. 173., *sc.*, 8 C. L. R. 341.

Any express contract between a *putnidar* and a *durputnidar*, as to the division of the surplus sale-proceeds, has always to be taken into consideration. Any suit under the Regulation by the *durputnidar*, claiming a part of the surplus sale-proceeds, must be brought within two months from the date of the sale, otherwise the defaulter may claim to have the money paid out to him.[1]

The right of mortgagees to follow the sale-proceeds.

The rights of mortgagees of *putni taluqs* are not dealt with by the Regulation. But the surplus sale-proceeds should be considered to represent the mortgaged property, and a mortgagee will be entitled to be paid out in the first instance therefrom.[2] In the case of a contest between the mortgagee and the *durputnidar*, a question of priority may arise which, I presume, will be answered according to the law as laid down in the Transfer of Property Act, and the principles of equity and good conscience, which the legislature in this country directs to be applied wherever the positive law is silent.

Arrears of rent for the period antecedent to the sale.

Antecedent balances due by the *putnidar* to the *zemindar*, namely, those that are not covered by the summary proceedings under the Regulation, become mere *personal* debts of the individual *taluqdar*, and must be recovered in the same way as other debts, by a regular suit in the Civil Court. Arrears that have accrued subsequent to the application under the Regulation are a charge on the *taluq*, and the purchaser is bound to pay the same. He cannot excuse himself by pleading that he has taken possession after a part of the arrears accrued. Such arrears are realizable by the summary process. If a *putni taluq* is sold for arrears of rent in execution of a Civil Court decree and the sale

[1] This rule of limitation does not apply where there is a special contract between the *putnidar* and the *durputnidar*.—*Judoonath* v. *Nobokisto*, (1865) 3 W. R. S. C. C. Ref. 2.

[2] Act IV of 1882, Sec. 93; *Gosto* v. *Shib*, (1892) I. L. R. 20 Calc. 241. See *Susilabala* v. *Dinabandhu*, (1909) 14 C. W. N. 186 and *Basanta* v. *Khulna Loan Co.*, (1914) 19 C. W. N. 1001.

is confirmed within the first six months of the Bengali year, a question arises as to the right of the *zemindar* to bring the *putni* to sale under the Regulation for the entire arrears of the first six months. The High Court of Calcutta has answered the question in the affirmative.[1]

Registration of the purchaser's name.

A purchaser of a *putni taluq* under the rules laid down in the Regulation is entitled to have his name registered in the proprietor's office and to obtain possession without the payment of any fee, but he is liable to be called upon to give security under the conditions of the tenure purchased.[2] A purchaser at a sale under a decree for arrears of rent held by a Civil Court or by a Collector under Act X of 1859 is also entitled to be registered without fee.[3]

Registration-fee and security.

A purchaser at a sale under an ordinary Civil Court decree, or a voluntary alienee is required to pay to the proprietor a registration-fee at two per cent. on the rent, the maximum sum being Rs. 100.[4] He may also be required to furnish security to the extent of one-half of the annual rent.[5] If no security be given, the *taluq* may be attached by the proprietor and kept in the possession of the *sezawal* or curator. Any question as to sufficiency of the security may be determined by the Civil Court of the district[6] and the judgment of such court is final.[7]

[1] *Makhan Lal Roy and others* v. *Banbehari Kapur*, Sp. App. No. 306 of 1891, decided on the 19th August, 1892.

[2] Reg. VIII of 1819, Sec. 5; *Chunder* v. *Shuvadra*, (1886) I. L. R. 12 Calc. 622; *Gunpat* v. *Moti*, (1912) 18 C. W. N. 103, *sc.*, 16 C. L. J. 301.

[3] Act X of 1859, Sec. 27, Act VIII (B.C.) of 1869, and Act VIII of 1885, Sec. 14. Section 14 of the Bengal Tenancy Act (VIII of 1885) was repealed by Bengal Act I of 1907, as useless, but it was not repealed by E. B. & Assam Act I of 1908.

[4] Reg. VIII of 1819, Sec. 5; Act X of 1859, Sec. 27, Act VIII (B.C.) of 1869, Sec. 26 and Act VIII of 1885, Sec. 12. Sections 13 and 14 of the latter Act make provision in cases of execution sales. But see section 195, cl. (*e*) of Act VIII of 1885 and *Gyanada* v. *Bromomoyi*, (1889) I. L. R. 17 Calc. 162.

[5] Reg. VIII of 1819, Secs. 5 and 6.

[6] *Ibid.*, Sec. 6. Can security be required on a sale held by the Civil Court for arrears?

[7] *Rajah* v. *Bissen*, [1859] S. D. A. 1216; *Huree* v. *Soorja*, (1876) 25 W. R. 222, *sc.*, I. L. R. 1 Calc. 383.

The *zemindar* cannot bring a suit for compelling the purchaser[1] to give security.

Effect of registration.

The registration of name in the landlord's office is one of great importance to the outgoing *putnidar* as well as the purchaser. The outgoing *putnidar* is thereby freed from all personal liability[2] on account of arrears accruing subsequent to the cessation of his possession; and the registration of the purchaser's name entitles him to deal directly with the landlord and to have notices and summonses of all proceedings and suits for recovery of arrears of rent. He thus gets a direct opportunity of protecting the tenure. If the purchaser's name is not registered in the landlord's office, the latter may bring suits against the registered *putnidar* for recovery of arrears of rent, or institute proceedings under the Regulation, and the effect of the sale thereunder will be the same as if the purchaser has himself been sued,[3] unless it can be proved that fraud has vitiated the sale. On a sale in suits or proceedings against the registered *taluqdar*, a *durputnidar* or a mortgagee may be affected in the same way, as if the proceedings were against the actual *putnidar*. The non-registration of name in the landlord's office does not, however, make the alienee a trespasser. He becomes, to all intents and purposes, the *putnidar*, subject only to the disabilities stated above.[4] It should be noted that applications for registration of name may be made, or suits for

[1] *Joy* v. *Jankeenath*, (1872) 17 W. R. 470.

[2] *Watson* v. *Collector*, (1869) 3 B. L. R. P. C. 48, *sc.*, 13 M. I. A. 160, *sc.*, 12 W. R. P. C. 43, *Luckhinarain* v. *Khettro*, (1873) 13 B. L. R. 146, *sc.*, 20 W. R. 380; *Okhoy* v. *Mahtab*, (1874) 22 W. R. 299; *Surendronath* v. *Tincowri*, (1892) I. L. R. 20 Calc. 247; *Aosub* v. *Bisseshuri*, (1905) 8 C. L. J. 555; *Saibesh* v. *Bonowari*, (1909) 10 C. L. J. 453; *Krishna* v. *Dwarka*, (1913) 17 C. W. N. 1092, *sc.*, 19 C. L. J. 350; *Abdul* v. *Ahmadar*, (1915) I. L. R. 43 Calc. 558, *sc.*, 19 C. W. N. 1217, *sc.*, 22 C. L. J. 356.

[3] *Kristo* v. *Mackintosh*, (1864) W. R. Gap. Vol. 53; *Raghub* v. *Brojonath*, (1870) 14 W. R. 489; *Ram* v. *Dropo*, (1872) 17 W. R. 122.

[4] *Ram* v. *Tweedie*, (1869) 12 W. R. 161.

compelling the landlord to register name may be instituted at any time after the purchase, and there is no bar of limitation,[1] the cause of action being a recurring one. The provisions of the Bengal Tenancy Act with respect to the registration of permanent tenures in the *zemindar's* office as contained in sections 12, 13, 14, 15 and 16 of the Act have been held to be supplementary to the provisions contained in the Regulation.[2]

Common and special registry of *taluqs.*

The laws in force for the recovery of government revenue declare that, on a sale of an entire estate for arrears, the purchaser "shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement, and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants," with certain exceptions,[3] one of which is *taluqdari* tenures such as *putnis* and dependent *talugs* duly registered under the provisions of Act XI of 1859.[4] The registration under the Act is either *common* or *special*.[5] Common registry secures such tenures and farms against any auction-purchaser at a sale for arrears of revenue, except the Government. Special registry secures such tenures and farms against any auction-purchaser at a sale for arrears of revenue, including the Government. Applications to the Collector for registration of tenures, created before the passing of Act XI of 1859, were required to be made within three years from the 21st April, 1862.[6] Applications for the registry of tenures, existing on the 21st April, 1862, but created after the passing of Act XI of 1859, were required to be made within three months. An application for the registration

[1] *Govind* v. *Rungunmoney*, (1880) I. L. R. 6 Calc. 60, *sc.*, 6 C. L. R. 345.

[2] *Durga* v. *Brindabun*, (1892) I. L. R. 19 Calc. 504.

[3] Act XI of 1859, Sec. 37. See also Act VII (B. C.) of 1868, Sec. 12.

[4] Act XI of 1859, Sec. 37, cl. 3. [5] *Ibid.*, Sec. 39.

[6] Act III (B.C.) of 1862.

of any tenure, created after the passing of Act III of 1862 (21st April, 1862), must be made within three months from the date of the deed constituting the tenure. Objections to the registration of tenures under Act XI of 1859 may be summarily dealt with by the Collector, and the Collector may also suspend the proceedings pending a decision by the civil court, the decision of such court being final.[1] But no civil court can direct special registration by the Collector, and no special registration can be effected without the sanction of the Revenue Commissioner of the Division.[2]

Sales subject to incumbrances.

The purchaser of a share or shares of an estate, sold for arrears of revenue, purchases subject to incumbrances, and does not acquire any rights which were not possessed by the previous owner or owners.[3] *Benami* purchases by defaulters, even of an entire estate, have also the same effect upon incumbrances.[4] If the purchase be made by one or more of a large number of defaulters, the result is the same as regards holders of incumbrances.[5]

Sales free from incumbrances.

Talugs not registered in the common or special registers are liable to be avoided by a purchaser of an entire estate. An assignee of such a purchaser has also the same right, though the privilege has not been extended to assignees of fractional shares.[6] The burden

[1] Act XI of 1859, Sec. 41. [2] *Ibid*, Sec. 42

[3] Act XI of 1859, Sec. 54. See also Sec. 53. *Alum* v. *Ashad*, (1871) 16 W. R. 138; *Kasinath* v. *Bankubehari*, (1869) 3 B. L. R. A.C. 446; *Madhub* v. *Promothonath*, (1873) 20 W.R. 264.

[4] *Imambandi* v *Kamaleswari*, (1886) I. L. R. 14 Calc. 109, *sc.*, L. R. 13 I. A. 160; (1873) *Rash.* v. *Purna*, (1888) I. L. R. 15 Calc. 350.

[5] Act XI of 1859, Sec. 53. *Mahomed* v. *Pearee*, (1871) 16 W. R. 136; *Abdool* v. *Ramdass*, (1878) I. L. R. 4 Calc. 607; *Bhawani* v. *Mathur*, (1907) 7 C. L. J. 1; *Khobari* v. *Ram*, (1907) 7 C. L. J. 387; *Abdul* v. *Ahmadar*, (1915) I. L. R. 43 Calc. 558, *sc.*, 19 C. W. N. 1217, *sc.*, 22 C. L. J. 356.

[6] *Koylash* v. *Jubur*, (1874) 22 W. R. 29; *Sooharam* v. *Doorga*, (1878) 5 C. L. J. 264; *Jatra* v. *Aukhil*, (1896) I. L. R. 24 Calc. 334; *Narayan* v. *Kasiswar*, (1902) 1 C. L. J. 579; *Shoshi* v. *Kramtudlah*, (1905) 10 C. W. N. 148; *Wahid* v. *Rahat*, (1908) 12 C. W. N. 10 29, See also *Abdul* v. *Ahmadar*, (1915) I. L. R. 43 Calc. 558, *sc.*, 19 C. W. N. 1217, *sc.*, 22 C. L. J. 356.

of proving that the *taluq* came into existence subsequent to the Permanent Settlement is upon the purchaser. But a *primâ facie* case being made out, the onus shifts, and it is then for the defendant to make out a case which would bring the tenure within any of the exceptions to section 37 of Act XI of 1859.[1] The period of limitation of suit to avoid incumbrances is twelve years from the date when the sale becomes final and conclusive.[2]

Road and Public Works cesses.

The amount of Road and Public Works cesses, payable by *taluqdars*, are leviable according to the provisions of section 41, clause 2 of the Cess Act of 1880.[3] The clause runs thus—"Every holder of a tenure shall yearly pay to the holder of the estate or tenure within which the land held by him is included, the entire amount of the road-cess and public-works cess, calculated on the annual value of the land comprised in his tenure at the rate or rates which may have been determined for such cesses respectively for the year as in this Act provided, less a deduction to be calculated at one-half of the said rates for every rupee of the rent payable by him for such tenure." Every *taluqdar* is, under this clause, bound to pay to the *zemindar* for the two kinds of cesses a sum calculated at one anna per rupee on the amount given in the valuation-roll of the *taluq*, less a half-anna for each rupee of the rent payable by him. He is himself entitled to realise one-half of an anna for each rupee of rent payable by the *raiyats*, and he is thus made to pay from his own purse half an anna on each rupee of his profits. But he may, notwithstanding this statutory provision, be bound by any contract with the *zemindar* to pay the entire

[1] *Forbes* v. *Ameeroonissa*, (1865) 10 M. I. A. 340, *sc.*, 5 W. R. P. C. 47; *Prahlad* v. *Budhu*, (1869) 2 B. L. R. P. C. 111, *sc.*, 12 M. I. A. 275, *sc.*, 12 W. R. P. C. 6; *Rash* v. *Hara*, (1888) I. L. R. 15 Calc. 555.

[2] Act IX of 1908, Sch. I, art. 121.

[3] Act IX (B. C.) of 1880.

amount of the cesses realisable by the Collector for the *taluq*. His liability is determined by the terms of the contract. It very frequently happens that, by the terms of the lease, the *zemindar* is entitled only to a net income in the shape of an annuity, the *taluqdar* being bound to pay all items of demand by the Government.[1]

Cesses recoverable as rent.

Cesses are recoverable in the same way, and under the same procedure, and in similar instalments, as *rent*, though they cannot be, strictly speaking, *rent*.[2] They are not charges on the tenure in the same way as *rent*, and a sale, for arrears of cesses only, has not the same effect as to incumbrances as a sale for arrears of rent.

Other kinds of *taluqs*.

There are various other kinds of *taluqs* held directly under the *zemindars* at fixed rent, in perpetuity, known, in Bengal, by different names in different districts. Their incidents are the same as those of dependent and *putni taluqs*. Every district has peculiar names for these tenures and subordinate tenures or under-tenures, with various shades of rights and liabilities. The legal profession and the judges administering law are constantly puzzled with local names and local peculiarities. Sufficient data have not yet been obtained with respect to them, and even if they are available, it will be difficult to lay down rules for the guidance of courts, except by taking the different localities piecemeal. In many instances, the rights and obligations of the holders are regulated by custom.

Construction of *taluqdari* leases.

The holders of permanent *taluqdari* tenures are not liable to ejectment, except for breaches of contract.

[1] *Surnomoyee* v. *Purresh*, (1878) I. L. R. 4 Calc. 576; *Shumbhu* v. *Hurro*, (1882) 11 C. L. R. 140; *Assanulla* v. *Firthabashini*, (1895) I. L. R. 22 Calc. 680; *Ashutosh* v. *Amir*, (1900) 3 C. L. J. 337; *Narendra* v. *Gora*, (1905) I. L. R. 33 Calc. 683, *sc.*, 3. C. L. J. 391.

[2] Act IX (B.C.) of 1880, Sec. 47. For definition of rent—see Sec. 3 of Act VIII of 1885; *Umachurn* v. *Ajadannissa*, (1885) I. L. R. 12 Calc. 430; *Mahanund* v. *Benimadhub*, (1896) I. L. R. 24 Calc. 27.

They are generally heritable and transferable.[1] But exceptions are not unfrequent. *Taluqdari* grants for life only, though at fixed rent, are not uncommon; and it has been held that a lease, at fixed rent, without words creating a heritable or transferable right, is a lease for life only, with reversion to the landlord.[2] But every grant must be construed according to the ordinary rules of interpretation,—custom and usage in the locality, the surrounding circumstances, and the way in which the lands demised have been dealt with by the parties being taken into consideration.[3] If the *zemindar* has allowed sons and grandsons in succession or alienees after alienees to hold a tenure, the presumption will be that it is heritable and transferable, even without express words to that effect in the grant.

King the ultimate heir.

A permanent tenure being heritable and transferable, the king is the ultimate heir in default of any other heir, and not the *zemindar* in whose estate the tenure is situated. The *zemindar* has no reversion.[4]

Partition of *taluqs*.

These *taluqs* are partible as any other property, and civil courts have exclusive jurisdiction in directing and effecting partition. But the *zemindar* is not bound to apportion the rent payable to him on a division of the *taluq*.[5] He is at liberty to hold the entire taluq liable for the entire rent without reference to the division made amongst the co-sharers.

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[1] Act VIII of 1885, Sec. 10.

[2] *Tulshi* v. *Ramnarain*, (1885) I.L.R. 12 Calc. 117, *sc.*, L. R. 12 I. A. 205; *Gaya* v. *Ramjawan*, (1886) I. L. R. 8 All. 559; *Rajaram* v. *Narasinga*, (1891) I. L. R. 15 Mad. 199; *Aziz-un-mila* v. *Tasadduq*, (1901) I. L. R. 23 All. 324; *Agin* v. *Mohan*, (1902) I. L. R. 30 Calc. 20; *Narsingh* v. *Ram*, (1903) I. L. R 30 Calc. 883; *Ram* v. *Chota Nagpur Banking Association*, (1915) I. L. R. 43 Calc. 332.

[3] *Bilasmoni* v. *Sheopersad*, (1882) I. L. R. 8. Calc. 664, *sc.*, L. R. 9. I. A. 33, *sc.*, 11 C. L. R. 215.

[4] *Sonet* v. *Himmut*, (1876) I. L. R. 1 Calc. 391, *sc.*, L. R. 3 I. A. 92 *Nil* v. *Narattam*, (1890) I. L. R. 17 Calc. 825.

[5] Act VIII of 1885, Sec. 88.

Effect of mere declaration of the right to enhance.

We have already seen that if a *taluq* has been in existence either from before or from the exact date of the Permanent Settlement, and the rent has never been varied, it acquires fixity by the operation of Act X of 1859.[1] A mere declaration in a decree that any such tenure was liable to enhancement, if there was actually no enhancement of rent, would not prevent the operation of the statutory provision contained in section 15 of Act X of 1859, or section 50 of the Bengal Tenancy Act.

Ejectment.

A dependent *taluq* of which the rent has varied from the date of the Permanent Settlement, is not liable to be annulled on the sale of an entire estate for arrears of revenue under Act XI of 1859. The exemption, however, with reference to these *taluqs*, existing at the time of the Settlement, but not at fixed rent, is only in respect of ejectment, but not enhancement.[2] The rent is liable to be enhanced at the instance of the purchaser of an entire estate, in the same way and under the same conditions as at the instance of any other holder of the estate.[3] The policy of the earlier sale-laws and the Settlement Regulations was not to eject tenure-holders, but to cancel their leases and to allow them to hold on upon payment of customary rent. This policy was in accordance with the common law and the established usages of the country; but it has been ignored in later days on account of the introduction by English lawyers of English notions of proprietary right and competition-rent. The existence up to this day of a good many dependent *taluqs*, created without any contract of fixity since the 22nd March 1793, is due to the earlier statutory provisions against ejectment. Some of the contracts with dependent *taluqdars* contain stipulation to pay enhanced rent, on general measurement and assessment, at customary rates, and such

[1] *Ante*, pp. 154-5. [2] Act XI of 1859, Sec. 37, cl. 2.

[3] *Ante*, p. 157.

agreements have been enforced; but as regards others, the law made no provision until the Bengal Tenancy Act of 1885 was passed. The rules laid down in section 51 of Regulation VIII of 1793, and the corresponding rules in other Regulations, were consonant with principles of equity and good conscience and the customary law of the country, and courts were guided in all cases by these rules without reference to the date of the creation of a dependent *taluq*. The Bengal Tenancy Act has, as we have already seen, adopted the rule with slight modifications; and I shall now draw your attention to the sections of that Act dealing with the subject.

Enhancement of rent of *taluqs*.

Section 7 of the Act says that the rent of a *tatuq* may be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity. This is also the rule laid down in the Regulation of 1793.[1] The difficulty of finding out the customary rate was long felt, and in some instances when the rate was found out, the enhancement was excessively high, considering the amount paid just before the enhancement. Act X of 1859 made rules for the enhancement of rent of *raiyati* holdings, but there were no rules for *taluqs* and other intermediate permanent tenures. The grounds of enhancement laid down in section 17 of that Act and the corresponding section of Act VIII (B. C.) of 1869 were not applicable to *taluqdari* tenures. Suits for enhancement of rent of such tenures generally failed for want of evidence as to customary or *perganah* rates; and in many cases, courts simply granted decrees declaring the liability of the tenure to enhancement without being able to grant consequential relief. It was, therefore, thought necessary to lay down definite rules in the Bengal Tenancy

[1] Reg. VIII of 1793, Secs. 49 and 51; *Radhika* v. *Bamasundari*, (1869) 4 B. L. R. P. C. 8, *sc.*, 13 M. I. A. 248, *sc.*, 13 W. R. P.C 11; *Sharoda* v. *Bipeen*, (1870) 13 W. R. 71; *Nilmoney* v. *Ram*, (1874) 21 W. R. 439; *Eshan* v. *Hurish*, (1875) 24 W. R. 146; *Ashanvollah* v. *Kisto*, (1878) 2 C. L. R. 592; *Watson* v. *Radha*, (1905) 1 C. L. J. 572.

Act. Though the rates of rents payable by *taluqdars* and those payable by *raiyats* are different, courts in some instances, in the absence of definite rules, decreed suits for enhancement, giving the *taluqdars* reasonable amounts for collection-charges and profit. There was, however, no rule for determining what was reasonable profit. Accordingly, the Bengal Tenancy Act has laid down, that in the absence of evidence as to customary rate, rent may be enhanced up to such limits as the court thinks fair and equitable.[1] The Act also lays down what fair and equitable rent is.[2] In order to avoid the hardship of an excessive and immediate increase of rent, power is given to order gradual enhancement yearly for a number of years, not exceeding five, until the limit of the enhancement allowed has been reached.[3] The Act also provides that when rent of a tenure-holder has been enhanced by the Court or by contract, it shall not again be enhanced by the Court during the fifteen years next following the year in which rent at the enhanced rate is first allowed to be levied.[4]

Remarks.

The protection, which the law has afforded to tenures existing at the date of the Settlement, ought, with modifications to be extended to other tenures of long standing, in consonance with the provisions of the earlier Regulations of the Bengal Code. As the law now stands, such tenures have no permanency, and in the absence of any contract, they are liable to be cancelled and determined by proper notice. The purchaser on a sale for arrears of revenue of an entire estate may deal with the holders of these tenures as trespassers, and may eject them without notice, some overt act indicative of the desire of the purchaser to avail himself of the stringent provisions of section 37 of Act XI of 1859 being sufficient to give a cause of action for the institution of a suit for ejectment.

[1] Act VIII of 1885, Sec. 7, cl. 2.
[2] *Ibid.*, Sec. 7, cl. 3.
[3] *Ibid.*, Sec. 8.
[4] *Ibid.*, Sec. 9.

LECTURE VI.

PERMANENT TENURES AND UNDER-TENURES.

Intermediate tenures unknown in earlier times.

We have already seen[1] that the *smritis*, the recorded utterances of the law-givers of ancient India, afford no indication that intermediate holders were recognised or even known in those days. The owner of the land, whether an individual or a joint family consisting of co-parceners, cultivated it with the occasional assistance of servants and hired labourers—the hire being generally a share of the crops. The system of intermediate holding originated, in all probability, under Mahomedan rule. The financiers of the Afghan and the Moghul emperors attempted, now and then, to put down the growing system, but without success. It made extraordinarily rapid progress about the time of the downfall of the imperial power at Delhi and the first establishment of the British rule. Causes which led to the feudalization of Europe were at work at this time, just as they were about the time of the breaking-up of the Carlovingian Empire. As each satrap under the Great Moghul aspired to independence and hereditary kingship, each subordinate holder was anxious to have a similar kind of permanent and hereditary interest in the land held by him; and the idea being once in, it filtered down to the lowest strata of intermediate holders. Ejectment under legal right and legal procedure was unknown, and was looked upon

Causes that led to the creation of intermediate tenures.

[1] *Ante*, p. 12.

with horror by a people, fond, more than any other on the face of the earth, of holding the same piece of land for generations—'as long as the sun and the moon shine on the horizon.' Each holder of land, if he had any self-respect and status in society, thought that some sort of recognition should be had for holding, in perpetuity, lands occupied by himself, and occupied by the poor peasantry, who hung upon him for protection against illegal eviction. The nomadic life, which, it is said by high authorities, was led by the ancient Aryans, was long forgotten. There was a material change in the thoughts and ideas of the descendants of these Aryan immigrants, if they had really come from a land outside the natural boundaries laid down by the Indus and the snow-clad range. The desire in some landlords of retiring with an annuity from the troubles and difficulties of managing their estates, and, the desire in enterprising men of making profit by enhancing the rent of *raiyats* and bringing waste lands into cultivation, led to subinfeudation in very many cases. Various other causes also operated to bring about the creation and recognition of subordinate rights in land, and thus a large number of tenures and subordinate tenures came into existence. We have already dealt with dependent and *putni taluqs* which fall under the highest class of tenures.

Tenures may, in general, be classed as follows, namely :—

Classification of intermediate tenures.

(*a*) *Maurusi* (heritable), (*b*) *Mokurrari* (at fixed rent), and (*c*) *Maurusi mokurrari* (heritable and at fixed rent). Similar holdings directly under the holders of any of these classes of tenures are known respectively as *durmaurusi* (hereditary of the second degree), *durmokurrari* (at fixed rent of the second class), and *durmaurasi-mokurrari* (hereditary and at fixed rent of the second degree). If, again, grants are made by the

holders of these under-tenures, the under-tenures thus created are respectively called *se-maurusi* (hereditary of the third degree), *se-mokurrari* (at fixed rent of the third degree) and *se-maurusi-mokurrari* (hereditary and at fixed rent of the third degree). Similarly, there may be under-tenures of the fourth grade (*chahar-maurusi*, &c.) and further infeudation. *Putni taluqs*, *durputni taluqs* or *se-putni taluqs* are in reality *mokurrari* and *maurusi*, *durmokurrari* and *dur-maurusi*, and *se-mokurrari* and *se-maurusi* tenures and under-tenures, the distinction being that the *putni* class covers an entire village or villages in revenue-paying estates, while the latter class covers portions of land within defined boundaries, or are demises of land held revenue-free. There is also another distinction—*viz.*, *taluqs* are always grants of intermediate tenures between the *zemindar* and the *raiyat*, while *mokurraries* are not necessarily grants of intermediate tenures. *Istemrari* grants combine the two qualities of the *mokurrari* and the *maurusi*. In their broad features, all grants of tenures *in perpetuity* and *at fixed rent*, or with either of those qualities, by whatever name they are designated, come within the classes I have indicated above.

Rent.

Tenures held at fixed rent and in perpetuity (*istemrari* or *mokurrari* and *maurusi*) are in reality instances of alienations of land, subject only to payment, by the alienees and all persons holding through them, of fixed sums in perpetuity to the alienors and those claiming under them. This sum is called "rent" in the English language, though, in reality, it is an annuity with a charge on the land demised. Under the Mahomedan law as administered in India, the amount payable was not a charge—it was merely a personal obligation in the tenure-holders. Even after the Rent Act of 1859 had come into force, and for a long time afterwards, the judges were not agreed as to whether rent was a charge on

the tenure.[1] The doubt, however, has been set at rest by the legislature in section 65 of the Bengal Tenancy Act which makes rent the first charge.[2] In the view of the framers of the Regulation Laws in Bengal, the transfer of land at fixed rent in perpetuity was a transfer of proprietary right. They did not use the word "rent" with reference to this annuity payable to the transferor, but used the word "revenue." Later on, a distinction was made between revenue and rent[3]—a distinction drawn from a similar use of the words in England. The term "revenue," used with reference to land, is now understood to mean the amount which is paid by the superior landowners to the State, while "rent" is the amount payable to the superior landowners by those who hold under them, whether they are the actual occupants or intermediate holders. The word *rent* has been very broadly defined in the Bengal Tenancy Act, and, I believe, the definition is practically accepted even in districts to which the Act has not been extended, *i.e.*, Orissa and the Scheduled districts. "Whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land, held by the tenant" includes all kinds of rents, even quit-rent.[4] Under that Act, the Government is a landlord with respect to the *khas mahals*,[5] and it follows, therefore, that with respect to the *khas mahals*, the amount payable to the State by a tenant

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[1] *Pran* v. *Surbo*, (1868) 10 W. R. 434; *Ram* v. *Hridoy*, (1868) 10 W. R. 446; *Samiraddi* v. *Harischandra*, (1869) 3 B. L. R. A. C. 49, *sc.*, 13 W. R. 451*n.*; *Dowlut* v. *Munwar*, (1871) 15 W. R. 341; *Wahed* v. *Sadiq*, (1872) 17 W. R. 417.

[2] Act VIII of 1885, Sec. 65.

[3] *Pisiruddin* v. *Madhusudan*, (1865) B. L. R. F. B. Vol. 75, *sc.*, 2 W. R. 15; *Mahomed* v. *Asadunnissa*, (1867) B. L. R. F. B. Vol. 774, *sc.*, 9 W. R. 1. See also *Dabee* v. *Joy*, (1869) 12 W. R. 361; *Waris* v. *Muhammad*, (1886) I. L. R. 8 All. 552 and *Keshwar* v. *Sheo*, (1913) 18 C. W. N. 913, *sc.*, 18 C. L. J. 166.

[4] Act VIII of 1885, Sec. 3, cl. 5.

[5] Act VIII of 1885, sec. 3, cl. 4.

is also rent. The amount payable by a tenant at a fixed rate in perpetuity is thus called "rent," and even if, instead of a fixed sum of money, a fixed amount of corn or any other product, such as a fixed number of mangoes, be agreed to be supplied yearly for the use of the land, it must be called "rent."[1] This use of the word in cases of *maurusi mokurrari* leases is also in consonance with the Transfer of Property Act,[2] which includes permanent tenures at fixed rent within the definition of leases of immovable property. We have, in this use of the word "rent," an instance of an unconscious, though a complete, change of ideas from what the early British rulers in India entertained, as to the legal effect of the transfer of property in the soil by means of grants in perpetuity. The Hindu conception would make the actual occupant the master or lord of the soil; the Afghan and the Moghul sovereigns would ignore the actual occupier and assume proprietorship in themselves; the early British rulers of India, conceiving the right to be in the State, could and did transfer it, reserving only a perpetual sum as land-tax; and the modern legislator would make the rent-receiver or the rent-receivers in succession the owner or owners of land, and according to him, the rent-payer, though directly in occupation, paying only a fixed sum in perpetuity and incapable of being ejected (the rent-receiver having no reversion), pays for the *use* and *occupation* only of the land. This is anomalous—perhaps, an imperfection in language: but the anomaly cannot now be helped. It is the necessary result of the use of foreign words to express Indian conceptions. Such misuse of words is, however, common in sciences other than the science of law, and however much to be regretted, is unavoidable.

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[1] *Nubo* v. *Gray*, (1869) 11 W. R. C. R. 7.

[2] Act IV of 1882, Chap. V.

Written contracts of lease.

Where there are written contracts, the terms thereof regulate the relation between the lessor and the lessee. But legal rules of interpretation have occasionally to be invoked to find out the real intention of the parties, whenever the language and the context are inartificial or difficult to understand and reconcile. The law, not unfrequently, affords protection, notwithstanding the express terms of a contract, when they are too hard and stringent, and when equity or public policy requires that the parties should be released from their operation. Rules of law have also been deemed to be necessary for the protection of the lessors and their heirs or assignees from the effects of alienation by the lessees without the knowledge and consent of the lessors. Instances are also not uncommon of the instruments of lease being silent as to matters of importance in the relationship between the parties; and customary and codified laws, and customs have to be invoked for the judicial determination of the rights of the parties in such cases.

Presumption of permanency.

But written grants are not always available. In most cases, either they never existed or they are lost. In such cases, presumptions of facts and occasionally positive law are availed of to make up for a written instrument. In the provinces in which the Rent Act of 1859 or the Bengal Tenancy Act does not apply, the holding of land for a very long time and by successive generations on uniform payment of rent, may, in the absence of evidence to the contrary, be sufficient for a presumption of a tenure being permanent and at fixed rent by a grant which is lost.[1] It may be asserted

[1] *Dukhina v. Kureemoollah,* (1869) 12 W. R. 243; *Nidhikrishna v. Nistarini,* (1874) 13 B. L. R. 416, *sc.,* 21 W. R. 386; *Ram v. Ram,* (1894) I. L. R. 22 Calc. 533, *sc.,* L. R. 22 I. A. 60; *Gopi* v. *Abdul,* (1905) 22 C. L. J. 74; *Brojanath* v. *Durga,* (1907) I. L. R. 34 Calc. 753, *sc.,* 12 C. W. N. 193, *sc.,* 5 C. L. J. 583; *Prodyot* v. *Sarat,* (1917) 21 C W. N. 809.

that in all such cases, it is reasonable to presume, from the long occupation of land by the first lessee and his sons and grandsons in succession and on uniform payment of rent, that the original lessor intended to create a permanent lease. If, in addition to the mere holding at uniform rent, evidence be forthcoming of transfers by the original grantor or his heirs, acquiesced in by the other party, presumption may also be made of the tenure being transferable. Such presumptions, however, are always rebuttable. The presumption is not based upon any artificial rule of law or legal fiction, but it is an inference that may be drawn from the common course of natural events and human conduct.[1] It is thus competent for a judge of facts to come to the conclusion, from long existence of a tenancy, payment of rent at the same rate, alienations from time to time, erection of substantial works on the land, and similar other matters, that the tenure must have been of a permanent nature by the grant creating it, the use being the best evidence of its nature.[2]

Statutory title.

The Indian legislature has, as we have already seen, laid down positive rules, for making presumptions of fact in such cases. Taking the Permanent Settlement of 1793 as the starting point, it has framed rules for the assumption of a statutory title to permanency in favour of persons holding land from that date on payment of uniform rent. It is difficult, however, to prove possession and payment of rent for such a long time; and possession for twenty years and uniform payment of rent for that period raise a rebuttable presumption, not of a grant which has been lost, but of possession and the payment of rent at the same rate from the time of the Permanent Settlement. In the provinces in which the

[1] Act I of 1872, Sec. 114.

[2] *Optimus interpres rerum usus.*—Broom's Legal Maxims (7th Ed. 1900), p. 698.

Rent Acts of 1859, 1869 or 1885 apply, a person who can shew possession and payment of rent from the time of the Permanent Settlement, has the benefit of a perpetual lease, irrespective of the existence of any original title-deed.

When such title is not created.

But if there be a title-deed of a date posterior to the Permanent Settlement, or if it can be shown that the tenure was held on a terminable lease, the Rent Acts give no relief, notwithstanding possession and uniform payment of rent. But a lease, renewing an old lease, the rental remaining the same and not giving the superior holder a right of re-entry, does not prevent the operation of the statutes.[1] It is, however, for the tenant to shew that the new lease is only confirmatory, and if he cannot do so, he will not be entitled to the presumption. Even if he sets up a written lease which is found to be false, he may in the alternative rely upon a statutory title. The words in section 15 of Act X of 1859, are—"otherwise than on a terminable lease." In the Bengal Tenancy Act these words have been amplified into—"held for a term of years or determinable at the will of the landlord."

Suits for enhancement.

The question, whether any tenure or undertenure is permanent and held at fixed rent, frequently arises in suits for enhancement of rent or for declaration of the right to enhance the rent, or for ejectment. The defendant, claiming to be a permanent tenureholder and relying upon a statutory title, should plead[2] distinctly

[1] *Ram* v. *Romesh*, (1865) 2 W. R. Act X. 47; *Kishen* v. *Eshan*, (1865) 4 W. R. Act X. 36; *Luchmee* v. *Koochil*, (1866) 6 W. R. Act X. 46; *Greesh* v. *Kally*, (1866) 6 W. R Act X. 57; *Jainooddeen* v. *Poorno*, (1867) 8 W. R. 129; *Watson* v. *Anjunna*, (1868) 10 W. R. 107; *Ramchunder* v. *Jugheschunder*, (1873) 12 B. L. R. 229, *sc.*, 19 W. R. 353; *Pearee* v. *Koylas*, (1874) 23 W R. 58; *Soorjomonee* v. *Peareemohun*, (1876) 25 W. R. 331. See *Naba* v. *Behari*, (1907) I. L. R. 34 Calc. 902, *sc.* L. R. 34 I. A. 160, *sc.*, 11 C. W. N 865 *sc.*, 6 C. L. J. 122.

[2] *Ekram* v. *Buhooran*, (1865) 2 W. R. Act X 69; *Ghoora* v. *Otar*, (1865) 4 W. R. 15; *Dhun* v. *Chunder*, (1865) 4 W R. Act X. 43; *Poolin* v. *Neemaye*, (1867) 7 W. R. 472; *Huruck* v. *Toolsee*, (1868. 11 W. R. 84 and (on appeal) 13 W. R. 216 (1870).

that the tenure has been in existence on payment of uniform rent since the date of the Permanent Settlement, and the issue in the case is whether the tenure has been in existence from that date and whether rent has been paid without any variation. Strict rules of pleadings are not applied in this country[1] and if the defendant's written statements contain allegations sufficient for the court to come to a finding of payment of rent at an uniform rate for twenty years, the Court may give relief, as if a plea of a demise from the Permanent Settlement has been raised.[2] Proof of uniform payment of rent for twenty years, preceding the year in which the suit was instituted raises a presumption in favour of the defendant's plea.

Amount of proof necessary for a presumption of uniformity.

As to the amount of proof necessary, it is always a question of fact to be decided from the circumstances of each case. The reported decisions[3] on the point, laying down rules and giving directions for the mode of dealing with the evidence, are not apparently consistent with one another. Each case depends upon its own facts and circumstances, and it is extremely difficult to lay down rules of law applicable to all cases. It has been held that there should be no room for an inference of

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[1] *Bhoyrubnauth* v. *Mutty*, (1864) W. R. Gap. Vol. Act X. 100; *Mun* v. *Husrut*, (1865) 2 W. R. Act X. 39; *Saduck* v. *Mohamaya*, (1866) 5 W. R. Act X. 16; *Rakhal* v. *Kinooram*, (1867) 7 W. R. 242; *Muneekurnicka* v. *Anund*, (1867) 8 W. R 5; *Huruck* v. *Toolsee*, (1868) 11 W. R. 84. See also *Watson* v. *Choto*, (1862) Marsh. 68 and *Mugno* v. *Huro*, (1866) 6 W. R. Act X 27.

[2] *Dhun* v. *Chunder*, (1865) 4 W. R. Act X 43.

[3] *Ramrutno* v. *Chunder*, (1865) 2 W. R. Act X. 74; *Jugmohun* v. *Poornoo*, (1865) 3 W. R. Act X. 133; *Hem* v. *Poorun*, (1865) 3 W. R. Act X. 162; *Raj* v. *Assa*, (1865) 3 W. R. Act X. 170; *Nyamutoollah* v. *Gobind*, (1865) 4 W. R. Act X. 25; *Dhun* v. *Chunder*, (1865) 4 W. R. Act X. 43; *Khoda* v. *Nubo*, (1866) 5 W. R. Act X. 53; *Gooroo* v. *Durbaree*, (1866) 5 W. R. Act X. 86; *Sham* v. *Muddun*, (1866) 6 W. R. Act X. 37; *Rakhal* v. *Kinooram*, (1867) 7 W. R. 242; *Poolin* v. *Neemaye*, (1867) 7 W. R. 472; *Soodishtee* v. *Nuthoo*, (1867) 8 W. R. 487; *Chamarnee* v. *Ayenoollah*, (1863) 9 W. R. 451; *Pearee* v. *Radha*, (1868) 10 W. R. 427; *Huruck* v. *Toolsee*, (1868) 11 W. R. 84; *Mitrajit* v. *Tundan*, (1869) 3 B. L. R. App. 88, *sc.*, 12 W. R. 14; *Kunda* v. *Gunesh*, (1871) 15 W. R. 193; *Nil* v. *Anunt*, (1871) 15 W. R. 393.

payment at fixed rent for twenty successive years,[1] and that strict proof is necessary. Again it has been held that such proof is not necessary,[2] provided the proof of payment extends over twenty years. Payment [3] of the same amount every year need not be proved, but the rate[4] must be the same. Small variations[5] arising from calculation may be dispensed with as immaterial and unexplained. Evidence also may be given of fraudulent conduct[6] on the part of landlords, as an element decreasing the amount of burden on the tenant. If during this period of twenty years, the tenant was out of possession for a short time, on account of illegal eviction by the landlord, and did not, therefore, pay rent, such period will not be taken as a break.[7]

The presumption may be rebutted.

The presumption from twenty years' uniform payment is rebuttable. It may be rebutted by the tenant's own evidence shewing creation of the tenures or the beginning of the lease at any time subsequent to the Permanent Settlement. Proof of material variation of rent at any period before the twenty years will also have the same effect. A decree, in a suit instituted

[1] *Rajnarain* v. *Olivia*, (1864) 1 W. R. 45; *Mahmooda* v. *Hareedhun*, (1866) 5 W. R. Act X. 12; *Ram* v. *Chand*, (1866) 5 W. R. Act X. 84; *Prem* v. *Nyamut*, (1866) 6 W. R. Act X. 89; *Sham* v. *Boistab*, (1867) 7 W. R. 407.

[2] *Rashmonee* v. *Hurronath*, (1864) 1 W. R. 280; *Radhanath* v. *Binodee*, (1865) 3 W. R. Act X. 151; *Surno* v. *Baboo*, (1868) 9 W. R. 270; *Bungo* v. *Ram*, (1868) 10 W. R. 256; *Rashbehary* v. *Ram*, (1874) 22 W. R. 487; *Radha* v. *Aghore*, (1876) 25 W. R. 384.

[3] *Tarinee* v. *Kalee*, (1865) 3 W. R. Act X. 123.

[4] *Kattyani* v. *Soonduree*, (1865) 2 W. R. Act X. 60; *Moran* v. *Anund*, (1866) 6 W. R. Act X. 35; *Munsoor* v. *Bunoo*, (1867) 7 W. R. 282; *Catherine* v. *Huro*, (1867) 8 W. R. 284; *Sham* v. *Dwarkanath*, (1873) 19 W. R. 100.

[5] *Ramrutno* v. *Chunder*, (1865) 2 W. R. Act X. 74; *Gopal* v. *Muthoor*, (1865) 3 W. R. Act X. 132; *Anundloll* v. *Hills*, (1865) 4 W. R. Act X. 33; *Elahee* v. *Roopun*, (1867) 7 W. R. 284; *Ahmed* v. *Golam*, (1869) 11 W. R. 432; *Grant* v. *Har*, (1913) 19 C. W. N. 117, *sc.*, 18 C. L. J. 76.

[6] *Gya* v. *Gooroo*, (1865) 2 W. R. Act X. 58.

[7] *Luteefunnissa* v. *Poolin*, (1863) W. R. F. B. Vol. 91. See also *Horronath* v. *Chittramoney*, (1865) 3 W. R. Act X. 122, and *Radha* v. *Aghore*, (1876) 25 W. R. 384.

after the passing of Act X of 1859, declaring the tenure liable to enhancement, is also sufficient to rebut the presumption.[1] But a decree passed in a suit instituted before the Act came into force, declaring liability to enhancement, has not the same effect.[2]

Effect of partition of a tenure.

The partition of a tenure and the consequent apportionment of rent with the consent and approval of the landlord do not amount, in the eye of law, to a variation of rent.[3] This is only the distribution of the same rent on different parcels of land which were originally considered as one single parcel. Neither would the abatement of rent on account of loss of land by diluvion, or dispossession by title paramount, or acquisition of land for public purposes, be considered as variation of rent, disentitling the tenant from getting the benefit of the statutory provision in his favour. The law, as contained in the Rent Act of 1859, was not distinct in its terms, but courts of law gave effect to the true intention of the legislature, and the Bengal Tenancy Act has given effect to the case-laws by inserting the words "rate of rent"[4] in section 50. According to these cases crystallised into the rule of law laid down in the Bengal Tenancy Act, uniformity in the rate of rent according to the local unit of the measure of land is enough

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[1] *Rakhal* v. *Golam*, (1865) 2 W. R. Act X. 69; *Lauder* v. *Benode*, (1866) 6 W. R. Act X. 37; *Woodoy* v. *Tarinee*, (1869) 11 W. R. 496. See also *Nuffer* v. *Poulson*, (1873) 19 W. R. 175; *Doorga* v. *Doya*, (1873) 20 W. R. 243; *Bissonath* v. *Tara*, (1874) 22 W. R. 482; *Hurronath* v. *Gobind*, (1875) 23 W. R. 352; *Saroda* v. *Shibopooree*, (1875) 24 W. R. 35.

[2] *Gobind* v. *Huronath*, (1866) 5 W. R. Act X. 10; *Kallee* v. *Ruttun*, (1869) 11 W. R. 571. But see *Doorga* v. *Doya*, (1873) 20 W. R. 243.

[3] *Sukhi* v. *Gunga*, (1864) W. R. Gap. Vol. Act X. 126; *Hills* v. *Besharuth*, (1864) 1 W. R. 10. See also *Kenaram* v. *Ramcoomar*, (1865) 2 W. R. Act X. 17; *Hills* v. *Huro*, (1865) 3 W. R. Act X. 135: *Khoda* v. *Nubo*, (1866) 5 W. R. Act X. 53; *Raj* v. *Hureehur*, (1868) 10 W. R. 117; *Soodha* v. *Ram*, (1873) 20 W. R. 419; *Moula* v. *Judoonath*, (1874) 21 W. R. 267; *Adit* v. *Sukhraj*, (1912) 17 C. L. J. 435; *Chandra* v. *Ram*, (1916) 20 C. W. N. 1002, *sc.*, 24 C. L. J. 275; *Jagabandhu* v. *Magnamoyi*, (1916) I. L. R. 44 Calc. 555, *sc.*, 22 C. W. N. 89, *sc.*, 24 C. L. J. 363.

[4] Act VIII of 1885, Sec. 50, cl. I.

Increase of rent on increase of area.

to give rise to the presumption of permanency. But the effect of such a provision in the law necessarily entitled the landlord to raise the rent on account of increase in area. Such increase of rent without[1] an increase in the rate of rent does not prevent the operation of the statutory provision.[2] The increase may be due to alluvial accretion, to encroachment by the tenant on the landlord's adjoining land or the land belonging to a stranger, the tenant dealing with it as a part of the holding, imperfection in the original measurement and causes of a similar nature. In such cases the Bengal Tenancy Act expressly provides for an increase of rent for an increase in area.[3]

Policy of law in contracts of lease.

We have already seen that the existence of a grant, explicit or sufficiently intelligible in its terms, regulates in most cases the legal relations between the parties, and the law seldom interferes except where its general policy or the weakness of one of the parties renders its interference absolutely necessary. I need not repeat what the policy of the authors of the Permanent Settlement of Bengal was, and how that policy was abandoned in 1812,[4] the proprietors being given free permission to enter into contracts of lease on any terms best conducive to their interest. Ignorance, poverty, fear of oppression, absence of independent advice—when these or some of these circumstances are always expected to exist in a class of men, such as the poor peasantry of Bengal in their dealings with their landlords, the law has laid down definite rules declaring certain conditions in leases as unconscionable and void, even without evidence of weakness in the one party or exercise of undue influence

[1] *Gopal* v. *Nobbo*, (1866) 5 W. R. Act X. 83; *Moran* v. *Anund*, (1866) 6 W. R. Act X. 35; *Grant* v. *Har*, (1913) 19 C. W. N. 117, *sc.*, 18 C. L. J. 76.

[2] *Reazoonissa* v. *Tookun*, (1868) 10 W. R. 246; *Radha* v. *Kyamutoollah*, (1874) 21 W. R. 401.

[3] Act VIII of 1885, Sec 52.

[4] *Ante*, p. 101.

on the other.[1] But those who take permanent leases belong generally to a class not very inferior in intelligence, local influence and power to those who grant such leases. The Bengal Tenancy Act has, therefore, provided—"Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mokurrari* lease on any terms agreed on between him and his tenant."[2] We are not, however, to understand from this that any terms or conditions whatsoever will be binding between the parties. The general policy of law, and not merely the policy of the Anglo-Indian legislature, has occasionally to interfere.

Ejectment for non-payment of rent.

Non-liability to be ejected for non-payment of arrears of rent, notwithstanding express words in a contract to the effect, is an incident of permanent tenures. The law, unaffected by the provisions of the Bengal Tenancy Act, lays down that a condition[3] for ejectment for non-payment of rent is enforceable, though the ejectment is capable of being enforced by the land-lord only if the tenant does not pay arrears and costs of suit within fifteen days of the decree.[4] In cases where there is an absence of legislative enactment, courts have always exercised an equitable jurisdiction, in not enforcing such a penal condition as to ejectment.[5] The

[1] *Vide* Act VIII of 1885, Sec. 178; *Fry* v. *Lane*, (1888) 40 Ch. D. 312, 322.

[2] Act VIII of 1885, Sec. 179.

[3] *Lauder* v. *Benode*, (1866) 6 W. R Act X. 37; *Kadir* v. *Mohadebee*, (1866) *Ibid*, p. 47; *Buksh* v. *Ramtunoo*, (1866) *Ibid*, p. 64; *Dulli* v. *Meher*, (1867) 8 W. R. 138.

[4] Act X of 1859, Sec. 78; Act VIII (B.C.) of 1869, Sec. 52. See also Act IV of 1882, Sec. 114; *Saroda* v *Nobin*, (1863) Marsh Rep. 417; *Savi* v. *Mohesh*, (1864) W. R. Gap. Vol. Act X. 29; *Jan* v. *Nittyenund*, (1868) 10 W. R F. B. 12; *Kumla* v *Ram*, (1869) 11 W. R. 201; *Abdoor* v. *Digamburee*, (1872) 18 W R. 477; *Mahomed* v. *Peryag*, (1881) I. L. R. 7 Calc. 566; *Gujadhur* v. *Naik*, (1882) I L. R. 8 Calc. 528. See also *Sreeshteedhur* v. *Doorga*, (1872) 17 W. R. 462; *Inder* v. *Campbell*, (1881) I. L. R. 7 Calc. 474.

[5] *Duli* v. *Meher*, (1872) 12 B. L. R 439; *Mothooramohun* v. *Ram*, (1879) 4 C. L. R. 469; *Mahomed* v. *Peryag*, (1881) I. L. R. 7 Calc. 566.

Bengal Tenancy Act has expressly laid down that "where a tenant is a permanent tenure-holder, he shall not be liable to ejectment for arrears of rent, but his tenure shall be liable to sale in execution of a decree for the rent thereof."[1] This rule applies to all cases whether there is a written lease or not.

Ejectment for branch of covenant.

Conditions for ejectment for breach of any covenant in a lease has always been looked with disfavour, and opportunity has always been given for remedying the breach.[2] If the breach of a covenant is of such a nature that it is easily susceptible of remedy, the penalty of forfeiture is not enforced.[3] The Bengal Tenancy Act has laid down special rules restricting, as much as possible, the right of the landlord to eject on the breach of a covenant.[4] No ejectment can take place except in execution of a decree, and no decree for ejectment can be passed unless the "landlord has served, in the prescribed manner, a notice on the tenant, specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request."[5] The court passing the decree is required to make similar provisions in the decree and to fix a time for the performance and extend the time at its discretion. Sections 111 and 112 of the Transfer of Property Act also lay down strict rules guarding, as much as possible, the interest of tenants, and

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[1] Act VIII of 1885, Sec. 65. See also *Ibid.*, Sec. 10.

[2] Act VIII of 1885, Sec. 155, cl. (*b*); *Duli* v. *Meher*, (1872) 12 B L. R. 439; *Mumtaz* v. *Grish*, (1874) 22 W. R. 376; *Mothooramohun* v. *Ram*, (1879) 4 C. L. R. 469; *Mahomed* v. *Peryag*, (1881) I. L. R. 7 Calc. 566. See also *Golabolee* v. *Kootosloollah*, (1878) I. L. R. 4 Calc. 527; *Brojendro* v. *Bungo*, (1883) 12 C. L. R. 389.

[3] Act VIII of 1885, Sec. 155, cl. 4.

[4] *Ibid*, Sec. 89.

[5] *Ibid*, Sec. 155.

I think, these rules apply to permanent tenures. The period of limitation for a suit based upon a breach of a condition has been limited by the Bengal Tenancy Act to one year from the date of the breach.[1]

Compensation for breach of contract.

In cases where the remedy lies in a grant of compensation, what is the measure of compensation or damages? This is a question very difficult to answer, specially in a country where the judge has to perform the functions of the jury as well. Each case has also its own peculiarities, specially arising from the nature of the tenancy. If there is a condition in a lease that the tenant shall not excavate a tank without the written sanction of the landlord, the grant being permanent, the measure of damages cannot be the cost of restoring the ground to its former condition. It would be giving the landlord too much, if he be paid the whole cost of restoring the state of things which existed before the wrong was done. The true measure of damages in such a case seems to be the extent to which the value of the landlord's interests in the land has diminished.[2] It may happen that the taking away of a part of the soil has improved the land, instead of diminishing its value. In such a case the damages should be nominal, merely for the legal injury, the landlord not having sustained any actual loss. Where the lease is permanent, the landlord's interest lies in the security for his rent, and if the security is not impaired, he loses little by the breach of the covenant. In cases, however, in which the lease is not permanent and there is a reversion to the landlord, the matter requires to be considered in a different light.

Covenant restricting alienation.

The law also looks with disfavour upon a covenant in a lease restricting the tenant's right of alienation. Section 11 of the Transfer of Property Act, which reproduces

[1] Act VIII of 1885, Sch. III, Art I.

[2] *Witham* v. *Kershaw*, (1885) 16 Q. B. D. 613; *Akhoy* v. *Akman*, (1914) 19 C. W. N. 1197, *sc.*, 20 C. L. J. 551.

the English law on the subject, seems to indicate that such a covenant in a lease is valid as between the landlord and the tenant, notwithstanding that the tenure may be permanent. But Section 11 of the Bengal Tenancy Act, on the other hand, lays down without any reservation, that every permanent tenure is capable of being transferred and bequeathed in the same manner and to the same extent as any other immovable property. The section would seem to lay down that a covenant restricting alienation is inconsistent with the chief condition in the grant, and would reject it as incapable of being enforced. But whatever the true intention of the legislature may be, it is now settled law that, notwithstanding a condition in a lease taking away the power of the lessee to alienate his right, and making forfeiture a penalty, the condition is not enforceable against a purchaser, unless there is an express right of re-entry in case of a breach of a covenant against alienation.[1] Such a condition in a lease is also restricted in its operation, and applies only to voluntary alienations, and not to sales in execution of decrees or assignments by operation of law as in the case of bankruptcy. The right of a purchaser in execution cannot be defeated by such a condition in a lease.[2]

Reduction of rent.

Instances have occurred of cases of permanent *mukurrari* tenures being allowed reduction of rent, notwithstanding that the rent has been fixed permanently.

[1] Act VIII of 1885, Sec. 11; *Sonet* v. *Himmut*, (1876) I. L. R. 1 Calc. 391, *sc.*, L. R. 3 I. A. 92; *Subbaraya* v. *Krishna*, (1882) I. L. R 6 Mad. 159; *Vyankatraya* v. *Shivrambhat*, (1883) I. L. R. 7 Bom 256; *Tamaya* v. *Timapa*, (1883) I. L. R. 7 Bom. 262; *Nil* v. *Narattam*, (1890) I. L. R. 17 Calc. 826; *Golak* v. *Mathura*, (1891) I. L. R. 20 Calc. 273; *Nárayan* v. *Ali*, (1893) I. L. R. 18 Bom. 603; *Madar* v. *Sannabawa*, (1895) I. L. R. 21 Bom. 195; *Parameshri* v. *Vittappa*, (1902) I. L. R. 26 Mad. 157; *Netrapal* v. *Kalyan*, (1906) I L. R. 28 All. 400; *Basarat* v. *Manirulla*, (1909) I. L. R. 36 Calc. 745, *sc.*, 10 C. L. J. 49; *Kesav* v. *Harasit*, (1910) 12 C. L. J. 126; *Mahananda* v. *Saratmani*, (1911) 14 C. L. J. 585; *Promode* v. *Aswini*, (1914) 18 C. W. N. 1138; *Keshab* v. *Ajahar*, (1914) 19 C. W. N. 1182, *sc.*, 23 C. L. J. 428; *Dwarika* v. *Mathura*, (1916) 21 C. W. N. 117, *sc.*, 24 C. L. J. 40.

[2] *Nil* v. *Narattam*, (1890) I. L. R. 17 Calc. 826.

But no deduction is allowed if there is an express stipulation to pay at the particular rate inspite of diluvion or decrease of land on any other account. In *Afsurooddeen* v. *Msst. Shorooshee Bula Dabee*,[1] Sir Barnes Peacock, C. J., held that "according to the ordinary rules of law, if a *taluqdar* agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away, or of a portion of the rent, if a portion only be washed away." Even a *putnidar* has been held to be entitled to abatement.[2]

Interpretation of deeds.

The interpretation of instruments of lease is a matter of considerable importance in this country, where the art of conveyancing is almost unknown. Documents in the vernacular languages are generally drawn, even at the present day, by men who have little legal training. The intention of the parties is not unfrequently left in the dark, and left to be gathered from custom or usage, as difficult to ascertain as any other fact depending for proof upon oral evidence of a highly conflicting character. These documents are apparently simple, but their very simplicity is sometimes a source of litigation and a puzzle to lawyers and judges. The difficulty of interpretation is not unfrequently enhanced on account of our ignorance of the language, the manners, customs, habits and usages of the people. Help from legal literature or lexicons is rarely available. There is thus a conflict of authorities as to the interpretation of deeds. It has, however, now been settled that the words—"with your sons and grandsons in succession," "*putra poutradi kromé*," *i.e.*, from generation to generation, or "generations born of your womb successively enjoy the same," and words of similar

[1] (1863) Marsh Rep. 558.

[2] *Ramnarayan* v. *Jayakrishna*, (1864) B. L. R. Sup. Vol. 70; *Brajanath* v. *Hiralal*, (1868) 1 B. L. R. A. C. J. 87, *sc.*, 10 W. R. 120.

import convey a permanent and transferable right. They convey an absolute right subject to payment of rent. If there are no words fixing the rent in perpetuity, the tenure becomes *maurusi*, but not *mokurrari*. It is not, however, essential that words indicating heritable interest or fixing the rent in perpetuity should always be in, in order to create *maurusi mokurrari* right. The intention of the parties may be drawn from surrounding circumstances and from local custom or usage.[1] Not unfrequently, the name given to the tenure created connotes its incidents. A *putni taluq*, as we have seen, imports a permanent hereditary tenure. The word *taluq* raises the presumption of a tenure being permanent.[2] The *howlas* and *nimhowlas* of Bakharganj are instances of names of permanent tenures. The words *mokurrari maurusi* or *mokurrari istemrari* indicate permanent tenures at fixed rent. But their Lordships of the Privy Council have said that the words "*istemrari* and *mokurrari*," do not "of themselves, denote that the estate granted is an estate of inheritance. Not that such an estate cannot be so granted unless, in addition to the above words, such expressions as "*bafarzandan*" or '*naslan bad naslan*' or similar terms are used." The use of the word *mokurrari*, without the word

[1] *Tulshi* v. *Ramnarain*, (1885) I. L. R. 12 Calc. 117, *sc.*, L. R. 12 I. A. 205; *Gaya* v. *Ramjiawan*, (1886) I. L. R. 8 All. 569; *Rajaram* v. *Narasinga*, (1891) I. L. R. 15 Mad. 199; *Asiz-un-nissa* v. *Tasadduq*, (1901) I. L. R. 23 All. 324, *sc.*, 5 C. W. N. 569, *sc.*, 11 M. L. J. 178, *sc.*, 3 Bom. L. R. 298; *Agin* v. *Mohan*, (1902) I. L. R. 30 Calc. 20, *sc.*, 7 C. W. N. 314; *Narsingh* v. *Ram*, (1903) I. L. R. 30 Calc. 883; *Secretary* v. *Rashidul*, (1912) 18 C. L. J. 31; *Ram* v. *Chota Nagpur Banking Association*, (1915) I. L. R. 43 Calc. 332 See also *Tulsinarain* v. *Modnarain*, [1848] S. D. A. 752, *sc.*, 10 I. D. O. S 532; *Ameeroonnissa* v. *Hetnarain*, [1853] S. D. A. 648, *sc.*, 13 I. D. O. S. 490; *Government* v. *Jufur*, (1854) 5 M. I. A. 467; *Sarobur* v. *Mahendernarain*, [1860] S. D. A. 577; *Lilanand* v. *Munorunjun*, (1873) 13 B. L. R. 124, *sc.*, L. R. Sup. Vol. 181; *Sheo* v. *Kally*, (1879) I. L. R. 5 Calc. 543; *Bilasmoni* v. *Sheopersad*, (1882) I. L. R 8 Calc. 664, *sc.*, L. R. 9 I. A. 33, *sc*, 11 C. L. R. 215; *Beni* v. *Dudhnath*, (1899) I. L. R. 27 Calc. 156, *sc.*, L. R. 26 I. A. 216, *sc.*, 4 C. W. N 274.

[2] *Asanoollah* v. *Kalee*, (1872) 18 W. R. 469; *Krishno* v *Sufdar*, (1874) 22 W. R. 326; *Budayar* v. *Karam*, (1913) 18 C. L. J. 271; *Sarada* v. *Akhil*, (1917) 21 C. W. N. 903.

maurusi, has been interpreted as creating tenures, in some instances, for the life of the grantee only, in others of the grantee and his heirs in succession. The intention is drawn, not from the use of any particular words, but from surrounding circumstances. The intention has occasionally to be gathered from the context of the deed, as in leases of jungle lands, the rent of which increases from time to time, until it reaches a fixed maximum.

The law of England occasionally applied.

In the absence of any written instrument of lease or express contract, the incidents of a tenancy are those laid down in the Regulations and the several Rent Acts, supplemented by custom and usage. The law of England, when it accords with the rules of justice and equity, has occasionally been applied to cases where the statute law in India is silent, and where there is no proof of any custom or usage bearing on the question at issue.

Hereditary tenures.

Maurusi tenures, which the Bengal Tenancy Act has called permanent, are, by the definition itself, "heritable and which" are "not held for" any "limited time."[1] They have most of the incidents of *maurusi mokurrari* leases, but the rent is enhanceable. Act X of 1859 made no provision as regards the enhancement of rent of these tenures, and courts of law had, accordingly, to rely upon custom. In dealing with dependent *taluqs*,[2] I have stated the grounds upon which enhancement of rent can be claimed by the proprietor of an estate, and the same rules and principles are applicable, whether the tenure is held directly under a proprietor of a revenue-paying or revenue-free estate, or whether it is a subordinate tenure. Instances of tenures purely *maurusi* are, however, extremely rare. The fact seems to be that where no contracts exist, there have been constant disputes between the holders of such tenures and the

[1] Act VIII of 1885, Sec. 3, cl. 8. [2] *Ante*, p. 184.

superior landlords as to liability to enhancement, and in a large number of cases the tenants have escaped. The rent of dependent *taluqs* in some of the districts, especially Rajshahi and Mymensing, and of under-tenures in some others, has been enhanced, but the enhancement has been so high that new cases of enhancement seldom arise. These heritable tenures were not always transferable.[1] But the Bengal Tenancy Act has, as we have seen, made all permanent tenures capable of being transferred or bequeathed in the same manner and to the same extent as other immovable properties.[2] In districts where that Act is not in force, and when the lease is not for *agricultural purposes*, but is a lease for the collection of rent, as all intermediate tenancies are, the Transfer of Property Act would be applicable, and section 108, clause (*j*) of that Act provides—"The lessee may transfer absolutely or by way of mortgage or sublease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." The words I have quoted from the Transfer of Property Act are prefaced in the section itself by the words—"in the absence of a contract or local usage to the contrary."[3] So that the burden of proving non-transferribility is on those who assert it. The common law of the country, if I may use that expression, seems to be in favour of heritability and tranferribility of all classes of tenures, unless there is express contract legally enforceable or positive law prohibiting succession and transfer. The opposite view has sometimes been taken, though there is no foundation for it. I think, however, the Transfer of Property Act, though

[1] *Lilanand* v. *Munorunjun*, (1873) 13 B. L. R. 124, *sc*, L. R. I. A. Sup. Vol. 181.

[2] Act VIII of 1885, Sec. 11. [3] Act IV of 1882, Sec. 108.

not applicable in Bengal to tenancies for agricultural purposes, should be taken to express the rule of law applicable to all cases where there is no special or local law. The reported cases on the question of the onus of proof are not, however, quite in harmony[1] with one another. Intermediate tenures cannot be said to be leases for agricultural purposes within the meaning of section 117 of the Transfer of Property Act, as the purpose of the creation of such tenures cannot, from the very nature of the thing, be for cultivation of land by the lessees.

Tenures at fixed rent only.

Mokurrari, also known as *kaimi*, tenures are always for the lives of the grantees and are dependent upon written leases. Not that such tenures could not be created by oral demise, but the universal practice was to have written instruments of lease, though registration was not compulsory. The Registration Acts, passed since 1864, practically did away with oral agreements of lease for any term exceeding one year, and the Transfer of Property Act requires that they should be by registered instruments.[2] The question in all cases of grants at fixed rent is, therefore, a question of the interpretation of instruments. Wherever the Transfer of Property Act applies, the law attaches certain incidents when the contract is silent, and when there is no local custom or usage preventing the operation of the law. Generally speaking, these tenures are alienable, and not terminable without the consent of the parties. Leases for a term of years at fixed rent are *temporary*, and I propose to deal with them separately.

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[1] *Doya* v. *Anund*, (1887) I. L. R. 14 Calc. 382; *Kripamoyi* v. *Durga*, (1887) I. L. R. 15 Calc. 89; *Appa* v. *Subbanna*, (1889) I. L. R. 13 Mad. 60; *Venkatacharlu* v. *Kandappa*, (1891) I. L. R. 15 Mad. 95; *Venkatanarasimha* v. *Dandamudi* (1897) I. L. R. 20 Mad. 299; *Nabu* v. *Cholim*, (1898) I. L. R. 25 Calc. 896, *sc.*, 2 C. W. N. 405 and the cases cited therein.

[2] Act IV of 1882, Sec. 107.

Registration in landlord's office.

Registration in the office of the landlord is a peculiar liability attaching to all intermediate transferable tenures. By whatever names they go—*taluqs*, *howlas*, *jotes*, *mokurraris or maurusies*,—if they are transferable by law, custom or local usage, every transfer or succession requires to be registered in the landlord's office, the penalty for non-compliance being in some cases very severe.[1] The transferable interest belonging to A may be sold in execution of a decree against B, if A claims by assignment from B, without giving legal notice of the assignment to the rent-receiver of B. This peculiarity in the Indian law of landlord and tenant was considered in the case of *Shamchand Kundu and others* v. *Brojonath Pal Chowdhry and others*[2] by a Full Bench of the Calcutta High Court. In that case the learned Judges held that the law, as understood before the Act of 1859 came into force, did not, in order to protect an assignee and under-tenants under him by service of notice of suit for arrears of rent, make the registration of the name of the assignee of a saleable tenure compulsory. Registration was certainly known and was always insisted upon, but no penalty was attached to non-registration. Regulation VII of 1799, known as the *Haptam* in Bengal, gave proprietors the right to bring tenures to sale for arrears of rent. The Regulation further provided, as security to the *zemindar*, that dependent *taluqdars* should register in his *sherista* or office, all transfers, as well as successions, of *taluqs* or portions of them.[3] But, in the words of Sir Richard Couch C. J., in the Full Bench case, the Regulation "does not provide, as Act X does in the proviso to section 106, that no transfer which is required to be registered

[1] Act X of 1859, Sec. 27; Act VIII (B.C.) of 1869, Sec. 26; Act VIII of 1885, Secs. 12 to 16.

[2] (1873) 12 B. L. R. 484, *sc.*, 21 W. R. 94.

[3] Reg. VII. of 1799, Sec. 15, cl. 8.

shall be recognised unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. More stringent provisions in favour of *zemindars* are inserted in Act X of 1859 than in the Regulation. It appears to me, taking sections 105 and 106 together with the proviso, that it was intended that the *zemindar* should be at liberty to treat, as the holder of the tenure and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer and sufficient cause for non-registration.[1] In such a case a *zemindar* might find that he had been suing the wrong person. Taking these sections together, I think that the *zemindar*, having obtained a decree for arrears of rent, is entitled to sell the tenure; and that the person who has obtained a transfer which he has not registered, and cannot show a sufficient cause for not registering it, is bound by the sale, and cannot set up a title which he has acquired by a previous sale."[2] This liability of intermediate transferable tenures exists not only on voluntary sales but on sales in execution of Civil Court decrees, and even in the case of an assignee of an insolvent taking under a vesting order.[3]

Effect of non-registration.

This provision about registration in the office of the *zemindar* or superior landlord, contained in section 27 of Act X of 1859 and reproduced in section 26 of Act VIII

[1] See *Nitayi* v. *Hari*, (1899) I. L. R. 26 Calc. 677.

[2] See *Luckhinarain* v. *Khettro*, (1873) 13 B. L. R. 146, *sc.*, 20 W. R. 380, *sc.*, 24 W R. 407*n.*; *Shamchand* v. *Brojonath*, (1873) 12 B. L. R. 484, *sc.*, 21 W. R. 94; *Panye* v *Hurchunder*, (1884) I. L. R. 10 Calc. 496; *Ram* v. *Ram*, (1885) I. L. R. 11 Calc. 562; *Surendronath* v. *Tincowri*, (1892) I. L. R. 20 Calc. 247; *Soshi* v. *Gogan*, (1894) I. L. R. 22 Calc. 364; *Patit* v. *Hari*, (1900) I L. R. 27 Calc 789, *sc.*, 5 C. W. N. 126; *Asgar* v. *Asabaddin*, (1904) 9 C. W. N. 134. See also *Rash* v. *Peary*, (1878) I. L. R. 4 Calc. 346; *Gopi* v. *Sajani*, (1905) 10 C. W. N. 240; *Saibesh* v. *Bonowari*, (1909) 10 C. L. J. 453; *Niladri* v. *Bichitranand*, (1910) I. L. R. 37 Calc. 823, *sc.*, 14 C. W. N 905, *sc.*, 12 C. L. J. 158; *Giris* v. *Khagendra*, (1911) 16 C. W. N. 64, *sc.*, 13 C. L. J. 613.

Chunder v. *Kishen*, (1883) I L. R. 9 Calc. 855.

(B.C.) of 1869, entailed a higher penalty for non-registration than what would be the result upon the application of the law of hypothecation to rent. As we now understand the law and the procedure for foreclosure and sale of hypothecated immovable property, no foreclosure proceeding, whether under Regulation XVII of 1806 or the Transfer of Property Act, nor a decree for sale under that Act, has any effect on a person having an interest in the property, but not made a party to the proceeding or suit, if his interest in such property arose before the institution of the proceeding or the suit. The right of puisne encumbrancers or assignees of mortgaged premises is not in the least affected, if they have no legal notice of the proceeding or suit on the mortgage.[1] But the registration sections of the Rent Acts of 1859 and 1869 would affect, for want of registration, mortgagees of tenures as well as subordinate tenure-holders in a suit against the registered tenant only. The personal liability of the registered tenant for rent continue so long as an assignee from him did not get his name registered in the office of the superior landlord.[2] As regards the assignee himself, he had no legal status, though it was optional with the landlord to accept him as a tenant, and it was even held that he could not sue

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[1] *Gupinath* v. *Sheo*, (1864) B. L. R. F. B. Vol. 72; *Emam* v. *Rajcoomar*, (1875) 14 B. L. R. 408, *sc.*, 23 W. R. 187; *Kokil* v. *Duli*, (1879) 5 C. L. R. 243; *Kasumunnissa* v. *Nilratna*, (1881) I. L. R. 8 Calc. 79, *sc.*, 9 C. L. R. 173; *Cally* v. *Koonjo*, (1883) I. L. R. 9 Calc. 651; *Jugul* v. *Kartic*, (1892) I. L. R. 21 Calc. 116; *Habibullah* v. *Jugdeo*, (1901) 6 C. L. J. 609; *Bunwari* v. *Ramjee*, (1902) 7 C. W. N. 11; *Debendra* v. *Ramtaran*, (1903) I. L. R. 30 Calc. 599, *sc.*, 7 C. W. N. 766; *Ram* v. *Bandi*, (1904) I. L. R. 31 Calc. 737; *Sahadev* v. *Papa*, (1904) I. L. R. 29 Bom. 199; *Girish* v. *Kedar*, (1906) I. L. R. 33 Calc. 590, *sc.*, 10 C. W. N. 592; *Ram* v. *Hurrish*, (1906) 4 C. L. J. 16*n*; *Gangadas* v. *Jogendra*, (1907) 11 C. W. N. 403, *sc.*, 5 C. L. J 315; *Jugdeo* v. *Habibulla*, (1907) 12 C. W. N. 107, *sc.*, 6 C. L. J. 612; *Kedar* v. *Girindra*, (1908) 8 C. L. J. 173; *Bunsee* v. *Gena*, (1911) 14 C. L. J. 530; *Manohar* v. *Ram*, (1912) I. L. R. 34 All. 323; *Shankar* v. *Sadashiv*, (1913) I. L. R. 38 Bom. 24; *Raghunath* v. *Shankar*, (1913) I. L. R. 36 All. 123.

[2] *Kearnes* v. *Bhowani*, (1864) B. L. R. F. B. Vol. 54, *sc.*, W. R. F. B. Vol. 167.

for possession after illegal eviction by the landlord.[1] Non-registration of name did not, however, make the assignee a trespasser—the assignee at once becomes a tenant.[2] Fraud vitiates the most solemn transaction. A fraudulent decree or fraudulent eviction ought always to be a good cause of action against the perpetrators of the fraud. It is impossible to conceive that any humane legislature would impose, for non-registration, the penalty of forfeiture, or the severer one of negativing the existence of the relationship of landlord and tenant.

Suits for registration.

The hardship of this law was early felt by the judges, and every indulgence was shown to the tenants if they had made the slightest attempt to have their names registered in the *zemindar's sherista*. Recognition by receipt of rent, though the receipt was granted in the name of the old tenant, knowledge of the superior landlord of the assignment of the tenure under circumstances that would lead any honest man to recognise the assignee, or a long course of dealings with the assignee, used to be considered tantamount in law to registration.[3] On the other hand, the landlord had the option of ignoring the old tenant and sue his assignee in possession.[4] He could ignore a registered *benamdar* and sue the real tenant for rent. Suits for registration, on the refusal of the landlord to register, have always

[1] *Mookta* v. *Pearee*, (1867) 7 W. R. 158.

[2] *Nobeen* v. *Shib*, (1867) 8 W. R. 96; *Kristo* v. *Raj*, (1885) I. L. R. 12 Calc. 24; *Giris* v. *Khagendra*, (1911) 16 C. W. N. 64, *sc.*, 13 C. L. J. 613. See also *Laidley* v. *Gunness*, (1878) I. L. R. 4 Calc. 438, *sc.*, 3 C. L. R. 240; *Asgar* v *Asaboddin*, (1904) 9 C. W. N. 134; *Niladri* v. *Bichitranand*, (1910) I. L. R. 37 Calc. 823, *sc*, 14 C. W. N. 905, *sc.*, 12 C. L. J. 158; *Kripa* v. *Banchhanidhi*, (1913) 19 C. L. J. 388.

[3] *Bharut* v. *Gunga*, (1870) 14 W. R. 211; *Allender* v. *Dwarkanath*, (1871) 15 W. R. 320; *Ram* v. *Dushoobhoojah*, (1872) 18 W. R. 195; *Ram* v. *Krishno*, (1874) 23 W. R. 106; *Rasamoy* v. *Srinath*, (1902) 7 C. W. N. 133 (at p. 135); *Naba* v. *Behari*, (1907) I. L. R. 34 Calc. 902, *sc.*, L. R. 34 I. A. 160, *sc.*, 11 C. W. N. 865, *sc.*, 6 C. L. J. 122. But see *Debnarain* v. *Baidya*, (1909) 14 C. W. N. 68 and *Probhabati* v. *Taibatunnessa*, (1913) 19 C. L. J. 62. The law as regards non-transferable occupancy-holdings is different.

[4] *Nitayi* v. *Hari*, (1899) I. L. R. 26 Calc. 677.

been allowed, the tenant being made to pay only the usual fee for registration.

Death of the registered tenant.

On the death, however, of the registered tenant, a suit for rent against his legal heirs was considered insufficient in law to bind an assignee of the tenure. The registration-law was not stretched in favour of the landlord, so as to deprive a stranger of his right by proceedings in a suit against a person who was never in possession and who had no connection with the property at the time when the succession opened out. Registration of successions is now required by the law.[1] No suit can lie against a dead man; the landlord must, therefore, seek out the real tenant and sue him for rent. The same principle should apply in cases of survivorship under the Mitakshara law, though a suit against the *karta*, when he is alive, binds the co-parceners.[2]

The Bengal Tenancy Act on registration.

Under the Bengal Tenancy Act, it is no longer the duty of the transferee of an intermediate tenure to ask for registration of his name in the *sherista* of his superior landlord,—it is now the duty of the registering officer, when he registers the assurance conveying a tenure or any interest in it, to send notice to the landlord. Transfer of a permanent tenure either by sale, gift or mortgage, merely by word of mouth or delivery of possession, has now been abolished. A registered instrument is the only means by which a permanent tenure may be transferred.[3] A fee for registration in the office of the landlord and costs of transmission of same to the landlord are now levied by the Registrar himself, and it is the duty of the registering officer, after levying the fee and costs, to send it to the Collector with a notice of the transfer and of the registration of the

[1] Act VIII of 1885, Sec. 15.

[2] *Jeo* v. *Gunga*, (1884) I. L. R. 10 Calc. 996. See also *Doorgadhur* v *Huro*, (1888) 13 C. W. N. 270.

[3] Act VIII of 1885, Sec. 12, sub-sec. 1.

assurance, and it is then the duty of the Collector to cause the fee to be paid to, and the notice to be served upon, the landlord. The fee is two per cent.[1] on the annual rent, provided the total amount of fee shall not exceed one hundred rupees; and where no rent is payable, the fee is two rupees only. The duty of the original tenant and his assignee, which the former law imposed upon them, has now devolved on Government officers, and whether the superior holder receives the fee and the notice or not, the liability of the previous tenant for rent accruing subsequent to the date of the registration ceases, and the landlord is bound to look to the new tenant for the rent for such subsequent period.

Registration on execution-sales.

On a sale in execution of a decree other than a decree for arrears of rent, or on a decree for foreclosure being passed, the Court has to perform a similar duty, *i.e.*, to levy the fee from the purchaser or mortgagee entitled to possession and costs necessary for the transmission of the same and transmit it with a notice through the Collector.[2] But no fee is levied nor any notice sent to the landlord when the sale is brought about by the landlord himself for arrears of rent, or when the landlord himself is the purchaser.

Registration of successions.

Under the law, as it stood under the Rent Acts of 1859 and 1869, the registration of successions was necessary, but there was no penalty for non-registration. A suit for arrears must be brought against the heir or successor of the deceased tenant, whether registration of his name was effected or not. The Bengal Tenancy Act has imposed a penalty, taking away the right of the heir to sue his under-tenants for rent, or get any relief as against them, until he pays to the Collector the landlord's fee, and until the notice of such succession is given to the landlord.[3] But if the succession had opened

[1] Act VIII of 1885, Sec. 12, sub-sec. 3.

[2] *Ibid.*, Sec. 13.

[3] *Ibid.*, Sec. 16.

out before the Act came into force, registration of succession would be unnecessary.[1] The provisions of the law applicable to assignees and heirs apply to transfers of or successions to shares in a permanent tenure. But the landlord is not bound to accept a sharer as his tenant with respect to that share. He becomes only one of the joint tenants liable to be sued along with the others as joint tenants.[2]

Remarks.

If due effect be given to these provisions of the Bengal Tenancy Act, and the officers entrusted with the task of causing notices to be served cause them to be properly served, both the landlord and the tenant are likely to derive considerable benefit. The Act, however, is silent as to any but permanent tenures. As we have seen, there are a good many tenures which are not permanent. The law has also made no provision for involuntary transfers, as on survivorship or insolvency. It has made no provision for unregistered transfers and successions that had taken place before the Act came into force. What is the landlord to do in those cases in which the law is silent? What, also, is the position of the tenant in occupation whom the landlord does not recognise? It would seem that in these cases the landlord must find out the real tenant. He ought not to be allowed any relief by proceedings against the registered tenants—a benefit which the law, as it now stands, does not allow him.

Rights of co-sharers.

One amongst a number of co-sharers, forming joint owners of a superior tenure, has not the same rights as a sole owner or all the co-owners jointly. He cannot now, as he could under the old rent law, sue alone for the rent of his share except under peculiar circumstances.

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[1] *Profullah* v. *Samiruddin*, (1894) I. L. R. 22 Calc. 337.

[2] Act VIII of 1885, Sec. 88

He cannot sue for ejectment, determination[1] or enhancement of rent,[2] nor can he grant abatement,[3] or apply for appraisement or division of crops.[4] Nor can he apply for settlement of rent under sec. 105, sub-sections (1) and (2) of the Bengal Tenancy Act.[5] He labours under various other disabilities. The Bengal Tenancy Act, following numerous rulings on the subject, expressly provides that he cannot singly avail himself of the remedies which that Act gives to land-owners in relation to their tenants.[6] It would, therefore, seem that a suit by a co-sharer

[1] *Ahamudeen* v. *Grish*, (1878) I. L. R. 4 Calc. 350; *Radha* v. *Esuf*, (1881) I. L. R. 7 Calc. 414; *Khondakar* v. *Mohini*, (1900) 4 C. W. N. 508; *Gholam* v. *Khairan*, (1904) I. L. R. 31 Calc. 786, *sc.*, 8 C. W. N. 325; *Simhadri* v. *Prattipati*, (1905) I. L. R. 29 Mad. 29; *Gopal* v. *Dkakeswar*, (1908) I. L. R. 35 Calc. 807, *sc*, 7 C. L. J. 483; *Surendra* v. *Krishna*, (1911) 15 C. W. N. 239, *sc.*, 13 C. L. J. 228. But see *Dwarka* v. *Kali*, (1886) I. L. R. 13 Calc. 75; *Haripria* v. *Ram*, (1892) I. L. R. 19 Calc. 541 and the Madras cases *Korapalu* v. *Narayana*, (1913) I. L. R. 38 Mad. 445; *Ahmed* v. *Magnesite Syndicate*, (1915) I. L. R. 39 Mad. 501 and *Ahmad* v. *Magnesite Syndicate*, (1915) I. L. R. 39 Mad. 1049.

[2] *Guni* v. *Doorga*, (1878) I. L. R. 4 Calc. 96; *Rajendro* v *Mohendor*, (1878) 3 C. L. R. 21; *Bharrut* v. *Kally*, (1879) I. L. R. 5 Calc. 574; *Kasheekishore* v. *Alip*, (1880) I. L. R. 6 Calc. 149; *Jogendro* v. *Nobin*, (1882) I. L. R. 8 Calc. 353, *sc.*, 10 C. L. R. 331; *Kali* v. *Rajkishore*, (1885) I. L. R. 11 Calc. 615; *Gopal* v. *Umesh*, (1890) I. L. R. 17 Calc. 695; *Haladhar* v. *Rhidoy*, (1892) I. L. R. 19 Calc. 593; *Baidya* v. *Ilim*, (1897) I. L. R. 25 Calc. 917, *sc.*, 2 C. W. N. 44; *Satiprosad* v. *Radhanath*, (1912) 16 C. L. J. 427; *Dwarka* v. *Mathur* (1913) 18 C. W. N. 942. But see *Rasbehari* v. *Sakhi*, (1885) I. L. R. 11 Calc. 644; *Ram* v. *Giridhur*, (1891) I. L. R. 19 Calc. 755; *Panchanan* v. *Raj*, (1892) I. L. R 19 Calc. 610; *Tejendro* v. *Bakai*, (1895) I. L. R. 22 Calc. 658; *Bhosai* v. *Amimuddin*, (1916) 21 C. W. N. 371. See also *Matungini* v. *Ram*, (1902) 7 C. W. N. 93; *Gobind* v. *Hamidulla*, (1903) 7 C W. N. 670.

[3] *Syama* v. *Saim*, (1897) 1 C. W. N. 415.

[4] *Nukheda* v. *Ripu*, (1898) 4 C. W. N. 239; *Abdulla* v. *Hurkishen*, (1905) 2 C. L. J. 490

[5] *Krishna* v. *Poresh*, (1909) 10 C. L. J. 458. See however *Sher* v. *Mackenzie*, (1902) 7 C. W. N. 400.

[6] Act VIII of 1885, Sec. 188; *Moheeb* v. *Ameer*, (1890) I. L. R. 17 Calc. 539; *Beni* v. *Jaod*, (1890) I. L. R. 17 Calc. 390; *Haladhar* v. *Rhidoy*, (1892) I. L. R. 19 Calc 593; *Sadagar* v. *Krishna*, (1899) I. L. R. 26 Calc. 937, *sc*, 3 C. W. N. 742; *Narain* v. *Srimanta*, (1901) I. L. R. 29 Calc. 219; *Badrannessa* v. *Alam*, (1915) 19 C. W. N. 814, *sc.*, 21 C. L. J. 650. But, for cases where there has been an arrangement between co-sharer landlord and the tenant, see *Guni* v. *Doorga*, (1878) I. L. R. 4 Calc. 96; *Lootfulhuck* v. *Gopee*, (1880) I. L. R. 5 Calc. 941; *Gobind* v. *Hamidulla*, (1903) 7 C. W. N. 670; *Bhabatarini* v. *Ekabbar*, (1906) 5 C. L. J. 235; *Safarudali* v. *Fazal*, (1914) 21 C. L. J. 592. As regards right of co-sharer to sue for whole rent, see the Privy Council case: *Pramada* v. *Ramani*, (1907) I. L. R. 35 Calc. 331, *sc.*, L. R. 35 I. A. 73, *sc.*, 12 C. W. N. 249, *sc.*, 7 C. L. J. 139.

against a registered tenant ought not to bind any but the person sued.[1] The High Court at Calcutta held in one case that a decree in such a suit has the same effect on a sale in execution of the decree, as if the suit had been brought against the tenant in occupation.[2] But the law of landlord and tenant has now been changed as regards the greater part of the Lower Provinces of Bengal, and it will not be necessary to consider how far that judgment correctly expounded the law.

Special procedure of sales for arrears.

Intimately connected with the law about registration of the tenant's name in the office of the superior landlord is the special procedure of sales for arrears of rent and avoidance of incumbrances. Shortly after the publication of the Proclamation in 1793 announcing the Permanent Settlement, the necessity of a law for the sales of tenures for arrears of rent was felt by the legislature. Punctual realisation of revenue required punctual realisation of rent by those who had to pay the revenue. In 1799, Regulation VII was passed for sales of dependent *taluqs* and other similar transferable tenures for realisation of arrears of rent due in respect thereof. Act X of 1859, which vested in the Collectors the power of entertaining suits for rents and bringing tenures to sale, laid down specific rules of procedure for sales of tenures and undertenures. The Bengal Act of 1869 made no alteration in the procedure or the substantive law. These Acts made two sets of provisions—one for sales at the instance of the sole

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[1] *Doorgadhur* v. *Huro*, (1888) 13 C. W. N. 270; *Ananda* v. *Hari*, (1900) I. L. R. 27 Calc. 545, *sc.*, 4 C. W. N. 608; *Ashok* v. *Karim*, (1905) 9 C. W. N. 843; *Afraz* v. *Kulsumannessa*, (1905) 10 C. W. N. 176, *sc.*, 4 C. L. J. 68; *Bijoy* v. *Rajendra*, (1909) 9 C. L. J. 479.

[2] *Jeo* v. *Gunga*, (1884) I. L. R. 10 Calc. 996; *Radha* v. *Ramkhelawan*, (1895) I. L. R. 23 Calc. 302; *Nitayi* v. *Hari*, (1899) I. L. R. 26 Calc. 677; *Jagattara* v. *Daulati*, (1909) I. L. R. 37 Calc. 75, *sc.*, 13 C. W. N. 1110. See also *Sarat* v. *Ratnbuddin*, (1909) 16 C. L. J. 271; *Gagan* v. *Abejan*, (1911) 14 C. L. J. 180. The last two cases try to reconcile conflict of cases.

landlord or a body of landlords jointly, and the other for sales at the instance of a co-sharer.

Simultaneous execution.

Process of execution could be issued against either the person or the property of a judgment-debtor; but the process could not simultaneously be issued against both the person and the property.[1] Immovable property of the judgment-debtor other than the tenure in arrear could not be sold, till movable property was exhausted. The Bengal Tenancy Act has made a material alteration in the procedure in this respect, and judgment-creditor is not now compelled to sell the tenure in arrear before attempting to enforce the decree against other immovable properties of the judgment-debtor. He is now entitled to realise the amount of the decree by attachment and sale of any property of the judgment-debtor, movable or immovable. If, however, the contract between the parties contains a precise stipulation to the effect that the tenures should be first sold, and if after such sale there should remain a balance due to the landlord, other properties of the tenure-holder might be sold, the decree should contain a direction for the sale of the tenure in arrear before the sale of the other properties of the judgment-debtor. If there is no express contract or no express direction in the decree, it is optional with the decree-holder to proceed to execute the decree in the mode best conducive to his interest.

Sale proclamation.

A proclamation of sale of a transferable tenure for its arrears should contain, amongst other particulars provided for in the Code of Civil Procedure, the name of the village, estate and *perganah* or other local division in which the land comprised in the tenure is situated, the yearly rent payable and the amount

[1] Act VIII (B.C.) of 1869, Sec. 57.

recoverable under the decree.[1] Order for simultaneous attachment and proclamation may be made.[2] The old Acts required five notices of sale to be stuck up: (1) at the Court-house in which the sale is to take place, (2) in the office of the Collector, (3) in the office of the Judge of the district, (4) on some conspicuous place on the land of the tenure and (5) on some conspicuous place in the town or village in or nearest to which the land is situated.[3] The Bengal Tenancy Act, however, has dispensed with the publication of the notice in the office of the Collector and the District Judge, and the Local Government, by Notification dated the 20th February, 1886, has directed that the notice should be published in the *mal kutchery* or rent office of the estate and at the local *thanah*.[4] The non-publication of any of these notices is a material irregularity, but is not in itself sufficient to make the sale a nullity. The proclamations have to be served in the customary mode by beat of drum. Under the procedure laid down in the older Acts,[5] the hanging up of the notice in the court-house, in which the decree is in course of execution, must take place not less than twenty days before the day fixed for sale. The Bengal Tenancy Act has, however, made an alteration in the period, by enacting that no sale shall take place until after the expiration of at least thirty days calculated from the date on which the copy of the proclamation has been fixed up on the land comprised in the tenure or holding ordered to be sold.[6] Under the Code of Civil Procedure, the period is at least thirty

[1] Act VIII (B.C.) of 1865. Secs. 5 and 162; Act VIII (B.C.) of 1869, Sec. 60.

[2] Act X of 1859, Sec. 105; Act VIII (B.C.) of 1865, Sec. 4; Act VIII (B.C.) of 1869, Sec. 59.

[3] Act VIII (B.C.) of 1865, Sec. 4; Act VIII (B.C.) of 1869, Sec. 59.

[4] Act VIII of 1885, Sec. 163, cl. 3. *Calcutta Gazette*, March 3, 1886, Part I, p. 142.

[5] Act VIII (B.C.) of 1865, Sec. 4; Act VIII (B.C.) of 1869, Sec. 59.

[6] Act VIII of 1885, Sec. 163, cl. (4).

days from the date on which the copy of the proclamation has been fixed up in the court-house of the judge ordering the sale,[1] and the Code also requires that the copy of the proclamation should be fixed up in the court-house after the service of the proclamation on the land ordered to be sold. Thus you see the alteration in the period made by the Bengal Tenancy Act has created an anomaly. It agrees in the number of days with that prescribed in the Civil Procedure Code for ordinary sales in execution, but materially differs in the starting point. The infringement of this rule as to the time of the publication of notice is a material irregularity only. The reported cases, however, are not quite in unison. But the Calcutta High Court has been of opinion that this is merely an irregularity; and the judgment of the Privy Council in *Govind Lal Roy* v. *Ramjanam Misser*[2] seems to have overruled all the cases which took a contrary view.

Effect of sales for arrears.

The effect of a sale for arrears at the instance of the sole landlord or a body of landlords jointly, the sale taking place under the procedure stated above, is to set the tenure free of all encumbrances and under-tenures which might have been created by any act of the defaulter, unless the right of creating such encumbrances was expressly vested in the holder by the terms of the grant, or unless expressly assented to by any subsequent written authority of the superior landlord.[3] The power to avoid encumbrances and under-tenures created by the defaulter, is, as we have already seen, a necessary right for the security of the rent for which the tenure is hypothecated. Under the

[1] Act V of 1908, O. XXI r. 68.

[2] (1893) I. L. R. 21 Calc. 70, *sc.*, L. R. 20 I. A. 165, overruling *Mobaruk* v. *Secretary*, (1885) I. L. R. 11 Calc. 200. See also *Kokil* v. *Edal*, (1904) I. L. R. 31 Calc. 385; *Gangadhar* v. *Bhikari*, (1911) 16 C. W. N. 227.

[3] Act VIII (B.C.) of 1865, Sec. 16; Act VIII (B.C.) of 1869, Sec. 66.

law, as it stands in districts where the Bengal Tenancy Act is not in force, the right to avoid encumbrances may be exercised at any time within the period of twelve years from the date of the confirmation of the sale. There are certain interests which are, however, protected, such as the interest of *khodkast raiyats* and occupancy tenants. The sale of a tenure for arrears is, however, not necessarily a sale under the provisions of the Rent Act. The decree holder, even if he is the sole rent-realiser, may proceed to attach and advertise the tenure in arrear under the Code of Civil Procedure, as if he wants to execute a simple money-decree. There is nothing to prevent him from doing so. Their Lordships of the Judicial Committee held in the case of *Doolar Chand Sahoo* v. *Lalla Chabeel Chand*[1] that it is always a question of intention, and the intention is to be gathered from the proceedings and the certificate of sale. What passes, when the sale is under the ordinary procedure prescribed in the Code of Civil Procedure, is the right, title and interest of the judgment-debtor, and not the tenure in arrear. The construction of sale-certificates has given rise to considerable difficulties and consequent litigation.[2] In order to avoid these difficulties the High Court at Calcutta prescribed different printed forms for the proclamation of sale of a tenure and for the sale of the right, title and interest of judgment-debtors in it. The Bengal Tenancy Act has made a material alteration in the law for the avoidance of encumbrances, for the greater protection of holders of encumbrances and under-tenure-holders. The Act makes a distinction in the first place between protected

[1] (1878) L. R. 6 I.A. 47, *sc.*, 3 C. L. R. 561. See also *Kristo* v. *Janokee*, (1881) I. L. R. 7 Calc. 748; *Doorgadhur* v. *Huro*, (1888) 13 C. W. N. 270; *Niladri* v. *Bichitranand*, (1910) I. L. R. 37 Calc. 823, *sc.*, 14 C. W. N. 905, *sc.*, 12 C. L. J. 158.

[2] *Dwarka* v. *Aloke*, (1883) I. L. R. 9 Calc. 641. See also *Doorgadhur* v. *Huro*, (1888) 13 C. W. N. 270; *Goccol* v. *Debendra*, (1911) 14 C. L. J. 136.

and unprotected interests. Protected interests are defined in section 160 of the Act, and these are interests in land which the sale-laws, whether for revenue or rent, have always protected. Unprotected interests, again, are divided into two classes—registered and notified encumbrances, and ordinary encumbrances not so registered and notified. Section 161 of the Act defines registered and notified encumbrances to be "encumbrances created by registered instruments, of which a copy has, not less than three months before the accrual of the arrear, been served" under the provisions of section 176 of the Act and in the manner prescribed by Rule 3 of Chapter I of the rules made by the Local Government.[1] The proclamation of sale of a tenure, when first published, is required to be for the auction-sale of the tenure subject to registered and notified encumbrances.[2] If the final bid at the sale on such a notification is sufficient to liquidate the amount of the decree and costs, the tenure is sold subject to such encumbrances;[3] but the purchaser acquires the right to annul any encumbrances not registered and notified as aforesaid.[4] If, however, the bidding "does not reach a sum sufficient to liquidate the amount of the decree and costs," the decree-holder may require that the final bid be not accepted and a sale free of registered and notified encumbrances do take place. A proclamation should then be issued, fixing a date of sale, not less than fifteen or more than thirty days from the date of the postponement of sale.[5] On such a sale taking place, the purchaser acquires the right to avoid all encumbrances including registered and notified encumbrances.

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[1] Act VIII of 1885, Sec. 161, cl. (*b*).
[2] *Ibid*, Sec. 163 (2) (*a*).
[3] *Ibid*, Sec. 164 (1).
[4] *Ibid*, Sec. 164 (2).
[5] *Ibid*, Sec. 165 (1).

Avoidance of encumbrances.

The encumbrances which a purchaser is entitled to annul do not become *ipso facto* void by the sale, but are only voidable at the option of the purchaser. In a Full Bench case decided before the Bengal Tenancy Act was passed, the High Court at Calcutta held that on a sale, either for arrears of revenue or for arrears of rent, tenures and under-tenures are not *ipso facto* avoided, but are voidable only at the option of the purchaser.[1] The principle laid down by the Full Bench of the High Court was adopted in the Bengal Tenancy Act, and in section 167 the legislature has provided that in order to enable a purchaser to avoid an encumbrance, whether it is registered and notified or not, he must within one year from the date of the sale, or, if he had no notice of the encumbrance at the date of the sale, within one year from the date on which he first had notice of the encumbrance, present to the Collector an application in writing, requesting him to serve on the encumbrancer a notice declaring that the encumbrance is annulled.[2] The encumbrance becomes annulled from the date of the service of the notice.[3] A suit for possession against the encumbrancer must be brought within the usual period of limitation, namely, twelve years from the time the sale becomes final and conclusive.[4]

Remedies of under-tenure holders, &c.

Such being the consequences of a sale, for arrears of rent, on holders of under-tenures and mortgagees, persons interested in averting the sale have been given not only the power to pay in the amount of the decree

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[1] *Titu* v. *Mohesh*, (1883) I. L. R. 9 Calc. 683, *sc*, 12 C. L. R. 304. See also *Beni* v. *Rewat*, (1897) I. L. R. 24 Calc. 746; *Kamal* v. *Kiran*, (1898) 2 C. W. N. 229; *Wasiruddin* v. *Deoki*, (1907) 6 C. L. J. 472; *Ramratan* v. *Aswini*, (1910) I. L. R. 37 Calc 559, *sc*, 14 C. W. N. 849, *sc*, 11 C. L. J. 503; *Dursan* v. *Bhawani*, (1913) 17 C. W. N. 984; *Sahodar* v. *Nabin*, (1914) I. L. R. 42 Calc. 638, *sc*, 19 C. W. N. 1030, *sc*, 20 C. L. J. 494.

[2] Act VIII. of 1885, Sec. 167, sub-sec. 1.

[3] *Peari* v. *Moheswari*, (1898) I. L. R. 25 Calc. 551.

[4] Act IX of 1908, Art 121.

and thus prevent the sale taking place, but there are also provisions for affording sufficient security for the amount thus paid. Bengal Act VIII of 1865, which supplemented the provisions of Act X of 1859, gave to under-tenure holders and other persons interested in the protection of any tenure or under-tenure from sale the same relief as section 13 of Regulation VIII of 1819 afforded to *durputnidars* and other persons similarly situated. Section 62 of Act VIII (B C.) of 1869 reproduced the provision contained in the Act of 1865. The Bengal Tenancy Act allows any person, having an interest which would be voidable upon a sale for arrears, to pay into Court the amount requisite to prevent the sale. He has a lien on the tenure like a salvage lien—the amount being recoverable, with interest at twelve per cent. per annum, as the first charge on the tenure. He is also entitled to take possession of the tenure and to retain such possession until the debt with interest thereon has been discharged.[1] But besides these remedies, a person paying the money into Court, whether as a person interested or a person making the payment lawfully, but under a mistake as to his interest, is entitled to get back the amount by an ordinary civil action, or he may deduct the amount so paid in satisfaction of his own debt.[2] If he is himself the mortgagee, he may add the amount to the mortgage debt.

Suit by one of joint landlords.

The right of one of a number of joint landlords, as we have seen, is that of an ordinary judgment-creditor. The older Acts, following similar provisions in the laws for sales for arrears of revenue, prescribed the ordinary procedure followed in execution of decrees for money,

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[1] Act VIII of 1885, Sec. 171.

[2] Act VIII of 1885, Sec 172; *Nobo* v. *Srinath*, (1882) I. L. R. 8 Calc. 877, *sc*., 11 C. L. R. 37; *Lalit* v. *Srinibas*, (1886) I L. R. 13 Calc. 331. See also *Luckhinarain* v. *Khettro*, (1873) 13 B. L. R. 146, *sc*., 20 W. R. 380, *sc*., 24 W. R. 407 *n*.

and not the special procedure in execution of decrees for rent, and such sales had the same effect, even if the tenure itself were sold, as the sale of any other immovable property sold in execution of a decree not being a decree for arrears of rent payable in respect thereof.[1] An additional restriction was put upon execution of decrees given in favour of sharers, as the tenure could not be brought to sale before the movable properties of the judgment-debtor lying within the jurisdiction of the Court were exhausted. Act VIII of 1885 contains no special procedure on the point. Section 188 of the Act seems to imply that a co-sharer has not the right to sue for rent in the same way and under the same procedure as the older Acts enabled him to do. The High Court, following the old practice, has, however, allowed suits for rent to be entertained at the instance of one co-sharer only, if he has been separately collecting his share of the rent.[2] But an execution of a decree for arrears of rent due to a co-sharer is an execution under the Code of Civil Procedure only, and not one under Chapter XIV of the Bengal Tenancy Act.[3] A suit for rent by a co-sharer must be treated as a suit upon an ordinary

[1] Act X of 1859, Sec. 108; Act VIII (B.C.) 1869, Sec 64.

[2] *Jadu* v. *Sutherland*, (1878) I. L. R. 4 Calc. 556; *Gunganarain* v. *Sreenath*, (1880) I. L. R. 5 Calc. 905, *sc.*, 6 C. L. R. 16; *Lootfulhuck* v. *Gopee*, (1880) I L. R. 5 Calc 941; *Obhoy* v. *Hurychurn*, (1882) I L R. 8 Calc. 277; *Prem* v. *Mokshoda*, (1887) I. L. R. 14 Calc 201; *Beni* v. *Jaod*, (1890) I. L. R. 17 Calc. 390; *Bhabatarini* v. *Ekabbar*, (1906) 5 C. L. J. 235.

[3] *Beni* v. *Jaod*, (1890) I. L. R. 17 Calc. 390; *Durga v. Kali*, (1899) I. L. R. 26 Calc. 727, *sc.*, 3 C. W. N. 586; *Sadagar* v. *Krishna*, (1899) I. L. R. 26 Calc. 937, *sc*, 3 C. W. N. 742; *Kedar* v. *Ardha*, (1901) I. L. R. 29 Calc. 54, *sc*, 5 C. W. N. 763; *Narain* v. *Srimanta*, (1901) I. L. R. 29 Calc. 219, *sc.*, 6 C. W. N 124; *Afraz* v. *Kulsumannessa*, (1905) 10 C. W. N. 176, *sc.*, 4 C. L. J. 68; *Bijoy* v. *Rajendra*, (1909) 9 C. L. J. 479 But see *Jogendra* v. *Paban*, (1903) 7 C. W. N. 908, which fully discusses the question, but was reversed by (1904) 8 C. W. N. 472; *Bhabatarini* v. *Ekabbar*, (1906) 5 C. L. J. 235; *Thakamani* v. *Mohendra*, (1909) 10 C. L. J. 463; *Mafizuddin* v. *Ashutosh*, (1910) 14 C. W. N. 352, *sc.*, 11 C. L. J. 140 See also Bengal Tenancy Act, Section 148 A, which was incorporated in the original Act in Bengal by Act I (B. C.) of 1907, and in Eastern Bengal and Assam by Act I (E. B. & A.) of 1908, one of the objects being to set aside some rulings of the High Court to the effect that suits by one or more co-sharer landlords for rent are not rent-suits but money suits.

contract based upon the implied consent of parties, the tenant agreeing to pay to one of his landlords a portion of the total amount payable by him. There is no reason why such a suit should not be entertained, it being perfectly immaterial whether you call the amount claimed 'rent,' or register the suit in the 'rent register.'

Relinquishment.

Permanent tenures, whether they are *mokurrari* or not, cannot be relinquished without the consent of the landlord, and the holder of the tenure cannot put an end to the contract at his own option. Notice to the landlord of an intention to relinquish cannot have the effect of determining the contract, which is a contract in perpetuity.

Partition.

Tenures and undertenures are partible by the Civil Court; but the partition does not bind the landlord.[1] On a partition amongst the landlords, the tenure is split up, and each co-sharer is entitled to consider the land allotted to him, on partition, as a distinct tenure. The rent is thus split up, and by such a partition one single tenure may be converted into a number of separate tenures. Thus, you see, a partition amongst the landlords is binding on the tenants, but the converse is not true. The effect of a partition of an estate, under the Estates Partition Act, is also the same.

Acquisition of lands for public purposes

The acquisition of land for public purposes very frequently raises questions of considerable difficulty as to the apportionment of the amount of compensation between the superior and the inferior tenure-holders. Where the quantity of land acquired is appreciably large in proportion to the entire area of the tenure, abatement of rent is, as we have seen, a necessity for the benefit of both the tenure-holder and his rent-receiver. But in

[1] Act VIII of 1885, Sec. 88; Act X of 1859, Sec. 27 (*proviso*): Act VIII (B.C.) of 1869, Sec. 26 (*proviso*); *Judoonath* v. *Jadub*, (1869) 11 W. R. 294. But see *Aosuh* v. *Bisseshuri*, (1905) 8 C. L J. 554.

most cases, especially where the rent is fixed in perpetuity, abatement of rent is not sufficient to compensate the tenant's loss. The fundamental principle, which ought to guide us in all discussions as to the legal relation between the proprietor of the estate or the *taluqdar* or other superior tenure-holder and the subordinate holder at fixed rent in perpetuity, is that the former is an annuitant and the latter is the real proprietor of the land. The security for the annual payment is all that the annuitant may fairly claim, if no abatement is allowed. If, however, abatement is allowed, he is entitled to the capitalized value of the amount of his annual loss. It is difficult to see how he can get anything more, having parted with his proprietary right, reserving only an annual sum. But the reported cases on the subject of the division of the amount of compensation are not quite in harmony with one another. The facts and circumstances of each case have no doubt considerable weight in influencing the decisions of the judges, and inducing them to deviate from apparently well-established and well-recognised principles of law. In one of the oldest cases, a case[1] decided under Act VI of 1857, the Sudder Dewany Adawlut said:—"The *zemindar* and the *putnidar* are entitled to compensation in proportion to the losses they respectively sustain from the appropriation of their lands, and to the remission of the rents which they pay respectively to the Government or the *zemindar*. * * In respect to remission, as the gross rental of the whole *putni* is to the gross rent of the land proposed to be taken, so will the entire *putni* rent be to the particular portion of rent to be remitted, and with regard to compensation, the principle may just conveniently be stated as follows:—As the gross profit of the *putni* is to the profit of the *putnidar*, so

[1] *Sreenath* v. *Mahatap*, [1860] 1 S D. A. 326. See *Gordon Stuart & Co.* v. *Mohatab*, (1863) Marsh. 490.

will the gross compensation be to the portion of the compensation the *putnidar* is entitled to recover." These formulæ are not, however, easy to work out,[1] and if the *zemindar* has received a large bonus for the grant, another element of uncertainty comes in and complicates the question. In *Raye Kissory Dassee* v. *Nilcant Day*,[2] Couch, C. J., after stating that the *zemindar* is only entitled to be compensated for the loss of annual rent he may sustain by an abatement being allowed, but nothing, if there is no abatement, his loss being scarcely appreciable, lays down, "the proper mode of settling the rights of the parties is to give to the *putnidar* an abatement of his rent in proportion to the quantity of land which has been taken from him. The *zemindar* ought to be compensated for the loss of rent which he sustains, and the money ought to be divided between the parties accordingly. The *putnidar's* getting an abatement of his rent is to be taken into account, as partly the way in which he is compensated for the loss of the land." The rule here laid down is in accordance with the rule laid down by the Sudder Dewany Adawlut and agrees with the recognised principles as to the rights of the parties. The rule applies to apportionment as between tenure-holders and under-tenure-holders. The High Court at Calcutta, however, did not in two later cases[3] stick to the rule laid down above. In one of these cases, it was observed that the *zemindar* was entitled to something more than the mere capitalized value of the loss sustained by him in the shape of rent. It is difficult to see, however, why the

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[1] See *Mahatap* v. *Bengal Coal Co.*, (1868) 10 W. R. 391.

[2] (1873) 20 W. R. 370.

[3] *Godadhar* v. *Dhunput*, (1881) I. L. R. 7 Calc. 585; *Bunwari* v. *Burnomoyi*, (1887) I. L. R. 14 Calc. 749. See also *Dunne* v. *Nobo*, (1889) I. L. R. 17 Calc. 144; *Khetter* v. *Dinendra*, (1897) 3 C. W. N. 202 and *Bir* v. *Nobin*, (1897) 2 C. W. N. 453.

zemindar should make a profit by the Government acquiring land. In later cases,[1] however, the High Court held that the under-tenant was entitled to the entire compensation, no abatement of rent having been granted to the superior tenure-holder.

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[1] Regular Appeals, Nos 271 & 272 of 1885 (unreported); *Shama* v. *Brakoda*, (1900) I. L. R. 28 Calc. 146; *Satis* v. *Jatindra*, (1902) 7 C. L. J. 284; *Dinendra* v. *Tituram*, (1903) I. L. R. 30 Calc. 801, *sc.*, 7 C. W. N. 810; *Kanai* v. *Midnapur Zemindary Co.*, (1907) 5 C. L. J. 48*n.*; *Biprodas* v. *Sarat*, (1907) 16 C. L. J. 209; *Bhupati* v. *Secretary*, (1907) 5 C. L. J. 662; *Ram* v. *Bunwari*, (1910) 16 C. L. J. 211; *Manmohan* v. *Collector*, (1912) I. L. R. 40 Calc 64, *sc.*, 17 C. W. N. 1001, *sc.*, 17 C. L. J. 61; *Gunpat* v. *Moti*, (1912) 18 C. W. N. 103, *sc.*, 16 C. L. J 301.

LECTURE VII.

NON-PERMANENT TENURES.

Temporary leases not dealt with in the Regulations.

We have already seen what the policy of the earlier Anglo-Indian legislators was with reference to intermediate tenures[1]—a policy which emanated not only from a desire to have the largest amount of security for the government revenue, but also from an earnest desire to protect the weak peasantry of the country from the rapacity of revenue-farmers and other extortionate intermediate holders. The antipathy of Anglo-Indian statesmen against middlemen could not and did not last long, but apathy took the place of antipathy, and they were extremely slow to legislate for them. No effectual steps were, until very lately, taken to bring, within positive rules of law, questions about the rights and liabilities of farmers and other intermediate holders. Only one class of dependent *taluqdars* and other similar tenure-holders, whose estates had been recognised at the Settlement, were taken within the purview of Act X of 1859.[2] The Bengal Tenancy Act has only a few sections on permanent tenures,[3] but it is practically silent on temporary or non-permanent tenures. That Act is not a complete code of laws dealing with the relationship of landlord and tenant; it only amended and consolidated a portion of the law, leaving the other portion to be drawn by the legal profession and the judges from scattered rulings of the superior courts in India and legislative enactments of doubtful application.

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[1] *Ante*, p. 158 *et seq.*

[2] Section 15.

[3] Act VIII of 1885, Chap. III.

Sources of law.

There are, in the Bengal Provinces, a very large number of temporary lease-holders, intermediate between the actual cultivators of the soil—the *raiyats*—and the proprietors of estates and permanent tenure-holders. The main sources of the law as to temporary leases are now the Indian Contract Act (IX of 1872) and the Transfer of Property Act (IV of 1882), and it is occasionally necessary to look to the law as administered in other countries, and especially in England, to find out, in the words of the Indian legislature, the rules of "justice, equity and good conscience."[1]

Act IV of 1882.

I have already discussed[2] the question of the applicability of the provisions of Chapter V of the Transfer of Property Act to intermediate leases—leases not *for agricultural purposes* but *of agricultural lands*, the object of the lessee being not to cultivate lands and make profit by such cultivation like tea-planters or indigo-planters, but to profit by the collection of rent from *raiyats* on the lands demised or by settlement of new *raiyats*. The settlement of new *raiyats* can hardly be said to be an use of land for *agricultural purposes*.

Vernacular names of temporary leases.

Temporary leases of immovable property are known in the Bengal Provinces by various names, the term *ijara* being the most common, and the term *thika* being generally used in Bihar. A sub-lease granted by an *ijaradar* is called *dur-ijara*. Following the usual nomenclature, a lease taken from a *dur-ijaradar* is called *se-ijara*. *Mostajiri* is a word derived from the word *ijara* and is frequently applied to temporary leases in Bihar instead of the word *thika*. The word *thika* in Bengal has not always the same significance, it being used in some districts, as in the Twenty-Four Perganahs, for permanent *raiyati* interest and in others for temporary *raiyati* leases. A *sub-mostajiri* tenure is

[1] Act XII of 1887, Sec. 37, cl. 2. [2] *Ante*, p. 206.

dur-mostajiri, while the words *katkina* and *dur-katkina* are used for inferior subordinate leases in Bihar. Other terms are also used in connection with temporary leases. *Zuripeshgee* leases in Bihar have the double character of a mortgage and a lease.

Leases how created.

Before the Transfer of Property Act came into operation, leases of immovable property like conveyances of land could be effected by parol.[1] Since the passing of Act XVI of 1864, the first Act that made registration of leases of immovable property for any term exceeding one year or from year to year compulsory,—such a lease of immovable property, when effected by a written instrument, could be valid only if the instrument was registered; but the Registration Acts did not make the execution of written instruments compulsory, and oral evidence could be adduced to prove a lease for any term. The existence of an instrument executed since the passing of Act XVI of 1864, if the instrument was unregistered, would exclude oral evidence under the Evidence Act.[2] So that in those days, a lease for a term of years or from year to year could be valid, if made by parol or by a registered instrument. The anomaly, however, has been, removed by the Transfer of Property Act.[3] Leases from year to year, or for any term exceeding one year, or reserving a yearly rent; can now be made only by a registered instrument.[4] Leases for a term of less than a year only may now be made by any instrument, registered or not, or by parol agreement.[3]

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[1] *Moohummud* v. *Soulut*. (1826) 4 Sel. Rep. 213, *sc.*, 7 I D. (O. S.) 159; *Rahmatulla* v. *Sariutulla*, (1868) 1 B. L. R. F. B. 58, *sc.*, 10 W. R. F. B. 51; *Nemai* v. *Kokil*, (1880) I. L. R. 6 Calc. 534, *sc.*, 7 C. L. R. 487; *Chunder* v. *Krishna*, (1884) I. L. R. 10 Calc. 710. See *Balaram* v. *Appa*, (1872) 9 B. H. C. R. 121.

[2] Act I of 1872, Sec. 91.

[3] Act IV of 1882, Sec. 107.

[4] Act XVI of 1908, Secs. 17, cl. (*d*) and 48; *Surendra* v. *Bhai*, (1895) I. L. R. 22 Calc. 752.

Void leases and possession thereunder.

An unregistered instrument of lease for a term of years or from year to year, executed before July, 1882,[1] when the Transfer of Property Act came into force, is void, and so also a demise by an oral or unregistered lease for a similar period made since that date.[2] But if the tenant enters into possession under such a void lease, he becomes a tenant from year to year upon the terms of the contract, in so far as they are applicable to, and are not inconsistent with, a yearly tenancy.[3] The lessee in possession under a void lease is liable for damages for use and occupation, [4] the rent stipulated in the inadmissible contract of lease being the measure of damages. If the lessee has not entered into possession, he will not be liable for rent or damages, nor can he ask for possession by a suit. The practice of delivering possession to *ijaradars* before the completion of the written instrument of lease was very common, and is not unfrequent even now. This is done by the issuing of a notice by the lessor to the village headmen and the *raiyats*, requiring them to pay rent to the lessee, such a notice being called an *amalnama* or *amaldastak*. An *amaldastak*, given as a preliminary to a formal lease, has never been considered to be equivalent to a lease,[5] and creates no title whatever. It is retained by the lessee as evidence of the contract of lease and of delivery

[1] *Omar* v. *Abdool*, (1868) 9 W. R. 425; *Puroma* v. *Prollad*, (1869) 12 W. R. 289.

[2] *Surendra* v. *Bhai*, (1895) I. L. R. 22 Calc. 752.

[3] Woodfall's Law of Landlord and Tenant, 19th Ed., Ch. IV, Sec. 1, pp. 101, 141, 155, 156, 256, 399, 634 and 712; *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9. See also *Jawahir* v. *Chatterput*, (1905) 2 C. L. J. 343; *Singheeram* v. *Bhagbat*, (1910) 11 C. L. J. 543; *Ajam* v. *Ananthanarayana*, (1910) I. L. R. 35 Mad. 95, at p. 107, per Ayyar J.; *Sarat* v. *Shyam*, (1912) I. L. R. 39 Calc. 663, *sc.*, 16 C. L. J. 71; and *Hemanta* v. *Midnapur Zemindari Co.*, (1914) 19 C. W. N. 347, *sc.*, 22 C. L. J. 44. But see *Ananda* v. *Abdullah*, (1913) I. L. R. 41 Calc. 148.

[4] *Puroma* v. *Prollad*, (1869) 12 W. R. 289; *Lukhee* v. *Sumeeruddi*, (1874) 13 B. L. R. 243, *sc.*, 21 W. R. 208. See also *Surnomoyee* v. *Denonath*, (1883) I. L. R. 9 Calc. 908; *Kali* v. *Bhagwan*, (1912) 17 C. W. N. 348, *sc.*, 17 C. L. J. 431.

[5] *Khadim* v. *Forlong*, (1894) 3. R. J. P. J., 327.

of possession. Under the present law, an *amalnama* cannot be used as evidence of a lease for a term of years, but the delivery of possession evidenced by the instrument may be treated as creating a lease from year to year, terminable upon proper notice to quit.[1]

Agreement for a lease.

An agreement for a lease to be executed in future is not required to be in writing, but if there is a written contract, the registration of it is compulsory.[2] An agreement merely creates a right to obtain another document, which will, when executed, create an interest in immovable property.[3] But an agreement for a lease of immovable property is required to bear the same stamp under the Indian Stamp Act as a lease,[4] and as registration is compulsory, it has no advantage in saving any stamp duty, and is, in most cases, dispensed with. If, however, one is executed, it may be enforced by a decree for specific performance.[5] If the agreement is registered, as it must be, in order to be admissible, the tenant holding under it is not a tenant from year to year only, but a tenant holding under the lease itself.[6] An agreement for a lease, however, does not of itself entitle the lessee to obtain

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[1] See *Sufdar* v. *Amzad*, (1881) I. L. R. 7 Calc. 703, *sc.*, 10 C. L. R. 121; *Dwarka* v. *Ledu*, (1906) I. L. R. 33 Calc. 502; *Ambica* v. *Galstaun*, (1909) 13 C. W. N. 326; *Elahi* v. *Hukum*, (1913) 18 C. W. N. 38, *sc.*, 19 C. L. J. 464; *Hemanta* v. *Midnapur Zemindari Co.*, (1914) 19 C. W. N. 347, *sc.*, 22 C. L. J. 44.

[2] Act XVI of 1908, Sec. 2 (7); *Bunwaree* v. *Sungum*, (1867) 7 W. R. 280; *Bhairabnath* v. *Kishori*, (1869) 3 B. L. R. App. 1; *Goluck* v. *Nund*, (1869) 12 W. R. 394; *Meheroonnissa* v. *Abdool*, (1872) 17 W. R. 509.

[3] *Sufdar* v. *Amzad*, (1881) I. L. R. 7 Calc. 703, *sc.*, 10 C. L. R. 121.

[4] Act II of 1899, Sch. I, Art. 35.

[5] *Parker* v. *Taswell*, (1858) 27 L. J. Ch. 812.

[6] *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9; *Allhusen* v. *Brooking*, (1884) 26 Ch. D. 559, 565; In re *Maughan*, (1885) 14 Q. B. D. 956; *Coatsworth* v. *Johnson*, (1886) 55 L. J. Q. B. 220 See also *Jawahir* v. *Chatterput*, (1905) 2 C. L. J. 343 and *Singheeram* v. *Bhagbat*, (1910) 11 C. L. J. 543.

possession. Relief on an agreement may be had under the rules and in the manner prescribed in the Specific Relief Act (I of 1877).

Who may grant leases.

Every person competent to contract and entitled to transfer immovable property is also competent to grant a lease for any term of years co-extensive with his own dominion over it ;[1] and every agent of such person, duly authorised in that behalf, may also do the same.[2] A lease is a mode of transferring property for a term, and is nothing but a conveyance of the property let out for the term mentioned in it, subject to the payment of rent and the other conditions and covenants contained therein. A person, having full power of alienation, may grant a permanent lease or a lease for any number of years, and for any premium, and at any rate of rent that he chooses.

Managers of joint families.

A *karta* or manager of a joint family, governed by the Mitakshara law of inheritance, is competent to grant a lease on any reasonable conditions, best conducive to the interest of the joint family, the restrictions being almost the same as those on his power of alienation. He is in the position of an agent of the corporate body of which he himself is a member.[3] Under the Bengal school of Hindu law, a *karta* of a joint family has much the same powers, and though the shares of the different members are, in the eye of law, ascertained or always ascertainable, authority in him is generally presumed, though he is bound to exercise that authority as a prudent owner.[4] Under the Mitakshara law, a lease granted by one member, even though he may be the *karta*, may be absolutely void, even as regards the

[1] Act IV of 1882, Sec. 7.

[2] Act IX of 1872, Sec 226; *Hamilton* v. *Earl*, (1762) 1 Bro. P. C. 341, *sc.*, 1 E. R. 608; *Ridgway* v. *Wharton*, (1853) 3 De. Gex M. & G. 677 affirmed in 6 H. L. C. 238, *sc.*, 108 R. R. 88 (1857).

[3] Mayne's Hindu Law, Sec. 346, 8th Ed., pp. 466—468.

[4] *Brojo* v. *Luchmun*, (1864) W. R. Gap. Vol. 83.

grantor, if the conditions are such as a prudent owner would not agree to; but in Bengal, a lease under similar circumstances may be valid to the extent of the share of the grantor himself.[1]

Sebayets and *mutwallies.*

Permanent leases of endowed properties, both under the Hindu and Mahomedan laws, are void, except under very peculiar circumstances; but a *sebayet* or a *mutwalli* may grant temporary leases on reasonable conditions and for reasonable terms of years, and his successor in office will be bound by his acts, the question really being one of necessity and prudence.[2] The power of a *mohunt* of a public *muth* is also similarly restricted. Trustees of charities have similar powers to grant leases for the due administration of the trusts.

Guardians of infants.

The power of a *de facto* guardian of an infant to grant leases is, necessarily, of a limited character. He can act only for the benefit of the infant, but if he exceeds his power, the lease granted by him may be avoided in the same way as any other contract made by him.[3] If it is not for the infant's benefit the lease is voidable, but it is not absolutely void. The infant on attaining majority, or if he dies under age, his heir, may avoid the same. If the *de facto* guardian be removed, the person who succeeds him may also avoid the lease. The authority of a guardian appointed by a Civil

[1] 1 Macnaghten's Principles and Precedents of Hindu Law (Ed. 1829), p. 5; *Ram* v. *Mitterjeet*, (1872) 17 W. R. 420; *Macdonald* v. *Shib*, (1873) 21 W. R. 17. See also *Hunoomanpersaud* v. *Munraj*, (1856) 6 M. I. A. 393, *sc.*, 18 W. R. 81*n*.

[2] *Radha* v. *Juggut*, (1826) 4 Mac. Sel. Rep. 192, *sc.*, I. D. 7 O. S. 143; *Juggessur* v. *Roodro*, (1869) 12 W. R. 299; *Shibessouree* v. *Mothooranath*, (1869) 13 M. I. A. 270, *sc.*, 13 W. R. P. C. 18; *Tayubunnissa* v. *Sham*, (1871) 7. B. L. R. 621, *sc.*, 15 W. R. 228; *Arruth* v. *Juggurnath*, (1872) 18 W. R. 439; *Bunwaree* v. *Mudden*, (1873) 21 W. R. 41; *Ram* v. *Protap*, (1886) 2 C. L. J 448; *Abhiram* v. *Shyama*, (1909) I. L. R. 36 Calc. 1003, *sc.*, L. R. 36 I. A. 148. *sc*, 14 C. W. N. 1, *sc.*, 10 C. L. J. 284; *Devasikamoney* v. *Palaniappa*, (1910) I. L. R. 34 Mad. 535; *Balaswamy* v. *Venkataswamy*, (1916) I. L. R. 40 Mad. 745.

[3] *Nubokishen* v. *Kalcepersad*, [1859] S. D. A. 607; *Gopeenath* v. *Ramjeewun*, *Ibid* 913; *Sowlutoonissa* v. *Savi*, *Ibid* 1575; *Oddoyto* v. *Prosunno*, (1865) 2 W. R. 325; *Bunseedhur* v. *Bindeseree*, (1866) 10 M. I. A. 454.

Court under Act XL of 1858 or the Guardian and Wards Act is limited to grants of temporary leases for any period not exceeding five years, unless the grant is made under sanction of the court appointing him.[1] The power of a manager under the Court of Wards is also similarly restricted. The Court of Wards (the Board of Revenue) may, however, direct the grant of leases for any term, under the rules laid down in the Court of Wards Act.[2] Whether the infant on attaining the age of majority is bound by a grant made by his guardian or the Court of Wards is a question, the answer to which depends upon the circumstances of each particular case. If the guardian or the manager under the Court of Wards has acted within the powers given to him by the law, the infant, when he attains majority, can set aside the lease on proof of fraud, the onus of proof being upon him.[3] Even if the sanction of the court were obtained in the manner prescribed by law, the infant may shew that the sanction was obtained by misrepresentation or fraud.

Hindu widows.

Hindu widows and females enjoying what is known to be the "widow's estate," have the same limited powers in granting temporary leases as in dealing with their properties in other ways. The test is necessity. A lease granted by a Hindu widow terminates with her death, even if her death takes place at the middle of a year of the lease. The after-taker is entitled to take possession at once; but the lessee may protect himself by showing that the lease was for necessary purposes,

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[1] Act VIII of 1890, Sec. 29, cl. (*b*); Act XL of 1858, Sec. 18; *Debi* v. *Subodra*, (1876) I. L. R. 2 Calc. 283, *sc.*, 25 W. R. 449; *Ram* v. *Brojonath*, (1879) I L R. 4 Calc. 929; *Chimman* v. *Subran*, (1880) I. L. R. 2 All. 902; *Buchraj* v. *Ram*, (1882) 11 C. L. R. 345; *Harendra* v. *Moran*, (1887) I. L. R. 15 Calc. 40.

[2] Act IX (B C.) of 1879, Sec. 18; *Uma* v. *Narendra*, (1905) I. L. R. 33 Calc. 273, *sc.*, 10 C. W. N. 126.

[3] *Sikher* v. *Dulputty*, (1879) I. L. R. 5 Calc. 363, *sc.*, 5 C. L. R. 574; In re *Shrish*, (1880) I. L. R. 6 Calc. 161.

granted for the protection of the estase or improvement of the property demised, and he may then be allowed to hold on till the end of the term. If, however, the lease is such that prudential considerations only induced the widow to grant it without actual necessity, and if it be not a burden on the estate, the lessee ought to be allowed to hold on till the end of a year of the lease.[1]

Mortgagors.

The case of mortgagors granting leases is very common in this country notwithstanding the covenant, generally to be found in mortgages, prohibiting such grants. A covenant in a mortgage, restraining alienations by a mortgagor, merely creates a personal liability, but does not render a lease granted by him void and inoperative.[2] A temporary lessee from the mortgagor is a necessary party in a suit upon the mortgage, and if the decree is not passed in a suit properly framed, the decree does not bind him. The purchaser on a sale under the mortgage is not entitled to possession, evicting the lessee,[3] if the lessee has not been made a party to the suit.

Interpretation of leases

Difficulties occasionally arise in the interpretation of deeds. The intention of parties must be gathered from the written instrument taken as a whole. Ambiguities and omission of material and necessary covenants are frequent sources of litigation. Parol evidence, evidence of circumstances existing at the time of the execution of the lease and evidence of custom and usage may be given to explain ambiguities and supply the absence of material covenants. The description of the property demised is occasionally a source of litigation, but well known local divisions, such as villages

[1] *Loll* v. *Hurry*, (1862) 1 Marsh. 113.

[2] *Radha* v. *Monohur*, (1880) I. L. R. 6 Calc. 317, *sc.*, 7 C. L. R. 293; *Venkata* v *Kannam*, (1882) I. L. R. 5 Mad. 184; *Ali* v. *Dhirja*, (1882) I. L. R. 4 All. 518. See *Madan* v. *Raj*, (1912) 21 C. W. N. 88, *sc.*, 17 C. L. J. 384.

[3] *Kokil* v. *Duli*, (1879) 5 C. L. R. 243; *Dirgopal* v. *Bolakee*, (1879) I. L. R. 5 Calc. 269; *Jugul* v. *Kartic*, (1892) I. L. R. 21 Calc. 116.

and *perganahs*, defined by thak and Survey maps, and *mouzawar* registers generally help us in finding out with sufficient exactness the property demised. Where the lease is of land lying within specified boundaries, the estimated area is not the test of what is really conveyed.[1] Evidence may be given of the names used generally by the people and the names used during a long course of years by the lessor himself in his *zemindari* books and *zemindari* papers previous to the lease. When any technical word is used, evidence may be given to show its meaning.[2]

When leases begin to operate.

A lease, like most other grants, begins to operate from the date of its execution, entitling the lessee to have possession and the lessor to have rent,[3] unless a contrary intention appears from the words used in the instrument. The inartistic way, however, in which leases in the vernacular languages are generally drawn, leaves out, in many instances, the dates of the commencement of the leases. The beginning of the agricultural year or of the year according to the local calendar is considered, in such cases, to be the time from which the lease begins to operate and is calculated to supply the omission in the written instruments. The custom in each locality and the convenience of the parties in the collection of rent from the *raiyats* on the land, are, also, to be taken into consideration.[4] If the lessor has not collected from the *raiyats* rent from the beginning of the month of Baisakh in districts in which the Bengali year prevails, where the lease was executed in one of the earlier months, a presumption arises that it was the intention of the parties that the lease should operate from the first day of

[1] *Sheeb* v. *Brojonath*, (1870) 14 W. R. 301; *Abdool* v. *Buroda*, (1871) 15 W. R. 394

[2] Woodfall on Landlord and Tenant (19th Ed.), p. 159.

[3] *Underwood* v. *Horwood*, (1804) 10 Ves. Jun. 209, *sc.*, 32 E. R. 824.

[4] *Wigglesworth* v. *Dallison*, 1 Doug 201, *sc.*, 99 E. R. 132, *sc.*, 1 Smith's L. C. (12th Ed. 1915) Vol. I. p. 513.

Baisakh of the current year. If the lease has been executed at the middle of the year or later, and the landlord has received from the lessee rent from the beginning of the year at the time of the execution of the instrument, the lease should be considered to have retrospective effect. So in the province of Bihar, the presumption, in similar circumstances, will be, that the lease has begun to run from the beginning of the month of Aswin. But the express covenants in a lease cannot be controlled by custom. Evidence of the custom of the country or locality may be given to fix the time, only if the lease is entirely silent.[1]

Present possession not necessary.

It is not necessary, in order to give validity to a lease, that the lessor should be in possession at the date of its execution or be capable of giving possession to the tenant at once. A lease to commence upon the expiration of a previous lease, or on the happening of a contingency is good in law and may be enforced.[2] An agreement to grant a lease or a lease itself, executed by a person who is out of possession and who is litigating or intends to litigate for possession, with the help of the person who has taken or has agreed to take the lease, though the transaction is champertous, is not illegal in India and may be enforced.[3] A covenant in a lease to grant a new lease on the same terms on the expiration of a subsisting lease, is good, and covers all the covenants except the covenant for renewal.[4] But if the stipulation to renew the lease is coupled with conditions to be performed by the lessee, and the lessee fails to perform

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[1] *Webb* v. *Plummer*, (1819) 2 Barn. & Ald. 746, *sc.*, 21 R. R. 479.

[2] *Pitchakutti* v. *Kamala*, (1863) 1 Mad. H. C. 153.

[3] *Chedambara* v. *Renja*, (1874) 13 B. L. R. 509, *sc.*, 22 W. R. 148, *sc.*, L. R. 1 I. A. 241; *Lokenath* v. *Jugobundhoo*, (1876) I. L. R. 1 Calc. 297; *Ram* v. *Chunder*, (1876) I. L. R. 2 Calc. 233, *sc.*, L. R 4 I. A. 23; *Abdool* v. *Doorga*, (1879) I. L. R. 5 Calc. 4.

[4] *P. & O. S. N. Co.* v. *Konnoylall*, (1864) 2 Hyde 217.

the same, the fact of the landlord allowing the tenant to hold over does not affect the landlord's right to resume possession after due notice.[1]

Delivery of possession.

The lessor is bound at the lessee's request to put him in possession of the property.[2] If the lessor fails to deliver possession, the tenant is not bound to pay rent, as rent is payable only for the use and occupation of the land.[3] The failure of the lessor to point out the land or to give proper notice of attornment to the *raiyats*, or any defect in the lease which incapacitates the lessee from recovering rent from the *raiyats* in occupation, is a good ground for absolving the lessee from liability to pay the rent reserved in the contract of lease.

Rate of rent

The omission of words fixing the rate of rent or the insertion of words for the ascertainment of rent on measurement, raises questions of construction. If the rate of rent is not mentioned, the rent previously paid for the land or the total amount of collection, less a reasonable percentage for collection-charges, should be considered as the annual amount agreed to be paid. In a suit for provisional rent, there being a condition in the lease for measurement or ascertainment of the rent-roll by local investigation, the defendant may plead that he is not bound to pay the provisional rent and may ask that the rent may be ascertained. But until ascertainment, the landlord is entitled to receive the provisional rent.[4] Assessment for excess land according to a contract of lease, need not necessarily be made in a suit

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[1] *Fukeeroonissa* v. *Chunder*, (1869) 12 W. R. 538.

[2] Act IV of 1882, Sec. 108, cl. (*b*); *Munee* v. *Campbell*, (1869) 11 W. R. 278 and on review (1869) 12 W. R. 149; *Radhanath* v. *Joy*, (1878) 2 C. L. R. 302.

[3] Act VIII of 1885, Sec. 3, sub-sec. 5; *Hurish* v. *Mohinee*, (1868) 9 W. R. 582; *Bullen* v. *Lalit*, (1869) 3 B. L. R App. 119 But see *Narayanaswami v. Yerramilli*, (1910) I. L. R. 33 Mad. 499.

[4] *Bharuth* v. *Bepin*, (1868) 9 W. R. 495.

for the purpose; it may be made in a suit for arrears of rent.[1]

Eviction of lessee by title paramount.

The landlord is not only bound to deliver possession, but to do every thing in his power to keep the tenant in quiet possession during the continuance of the tenancy.[2] Eviction by title paramount causes suspension of rent.[3] But if the eviction be the effect of a mere trespass, the lessee is not excused from the payment of rent, as in such a case the lessee is entitled to recover possession and damages from the trespasser.[4] If the lessor has no title, the lessee has no remedy against eviction by title paramount, and the landlord's right to rent ceases with the cessation of the tenants' possession. "According to English law," as expressed by Peacock C. J., in *Gopanund Jha* v. *Lalla Gobind Pershad*,[5] "if the lands demised be evicted from the tenant or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time

[1] *Ram* v. *Gumbeer*, (1873) 19 W. R. 108; *Dwarkanath* v. *Baburam*, (1882) I. L. R. 9 Calc. 72; *Ramjan* v. *Amjad*, (1893) I. L. R. 20 Calc. 903.

[2] Act IV of 1882, Sec. 108, cls. (*b*) and (*c*).

[3] *Brajanath* v. *Hiralal*, (1868) 1 B. L. R. A. C. 87, *sc.*, 10 W. R. 120; *Bullen* v. *Lalit*, (1869) 3 B. L. R. App. 119; *Gobind* v *Mun*, (1870) 14 W. R. 43; *Hoymobutty* v. *Sreekishen*, (1870) 14 W. R. 58; *Gobind* v. *Kristo*, (1870) 14 W. R. 273; *Kristo* v. *Chunder*, (1871) 15 W. R. 230; *Douselle* v. *Girdharee*, (1874) 23 W. R. 121; *Dhunput* v. *Mahomed*, (1896) I. L. R. 24 Calc. 296; *Tayawa* v. *Gurshidappa*, (1900) I. L. R. 25 Bom. 269; *Lalita* v. *Surnomoyee*, (1900) 5 C. W. N. 353; *Kali* v. *Mathura*, (1907) I. L. R. 34 Calc. 191; *Annada* v. *Mathura*, (1909) 13 C. W. N. 702, *sc.*, 9 C. L. J. 585; *Rasheswari* v. *Saurendra*, (1909) 11 C. L. J. 601; *Mahomed* v. *Sukheannessa*, (1910) 14 C. W. N. 446, *sc.*, 11 C. L. J. 606; *Rani* v. *Asutosh*, (1910) 15 C. L. J. 310; *Chandrakant* v. *Rama*, (1910) 11 C. L. J. 591; *Purna* v. *Rasik*, (1910) 13 C. L. J. 119; *Sarip* v. *Aftabuddin*, (1910) 13 C. L. J. 115; *Kamalanand* v. *Jarao*, (1912) 17 C. L. J. 96; *Mukhtar* v. *Sunder*, (1913) 17 C. W. N. 960; *Godai* v. *Aminuddi*, (1913) 18 C. L. J. 509.

[4] Woodfall's Landlord and Tenant (19th Ed.), p. 487. *Hunt* v. *Cope*, (1775) Cowp. 242, *sc.*, 98 E. R. 1065; *Rung* v. *Roodur*, (1872) 17 W. R. 386; *Chunder* v. *Juggut*, (1874) 22 W. R. 337; *Kali* v. *Mathura*, (1907) I. L. R. 34 Calc. 191.

[5] (1869) 12 W. R. 109. See also *Kadumbinee* v. *Kasheenath*, (1870) 13 W. R. 338; *Gobind* v. *Mun*, (1870) 14 W. R. 43; *Hoymobutty* v. *Sreekishen*, (1870) 14 W. R. 58; *Dhunput* v. *Saraswati*, (1891) I. L. R. 19 Calc. 267; *Surendra* v. *Dina*, (1915) I. L. R. 43 Calc. 554.

of such eviction." Complete eviction by a landlord himself, it is needless to add, causes total suspension of rent.[1]

Eviction from a part.

Where the lessee is evicted from a part of the lands by a stranger who has a title superior to that of the lessor, he has to pay to his landlord only a ratable proportion of his rent for the land that remains in his possession.[2] If a part of the lands be destroyed by an act of God, as by the action of a river, the same effect would follow, and the tenant will be bound to pay only a ratable proportion of the rent.[3] But if the tenant be evicted from a part of his lands by the landlord himself, his assignee or any person claiming through him, the question of abatement is one of a little difficulty. In the case of *Gopanud Jha and others* v. *Lalla Govinda Pershad* already cited,[4] the tenant defendant had been evicted under a title paramount from two out of a number of *mouzas* held by him under a lease, and Peacock C. J. gave a decree to the plaintiff landlord, for a proportionate amount of rent according to the quantity of land in the possession of the lessee. His Lordship, in the course of the judgment, quoted, as apparently applicable to this country, the following passage from Bacon's Abridgment—" Where the lessor .....enters wrongfully into part, there are variety of opinions, whether the entire rent shall not be

[1] *Morrison* v. *Chadwick*, (1849) 7 C. B. 266. *sc.*, 18 L. J. C. P. 189, *sc.*, 13 Jur. 638, *sc.*, 6 D. & L. 567, *sc.*, 78 R. R. 627. See *Dhunput* v. *Mahomed*, (1896) I. L. R. 24 Calc. 296; *Harro* v. *Purna*, (1900) I. L. R. 28 Calc. 188; *Dwijendra* v. *Aftabuddi*, (1916) 21 C. W. N. 492.

[2] *Gopanund* v. *Gobind*, (1869) 12 W. R. 109; *Imambandi* v. *Kamleswari*, (1894) I. L. R. 21 Calc. 1005; *Tayawa* v. *Gurshidappa*, (1900) I. L. R. 25 Bom. 269; *Rani* v. *Asutosh*, (1910) 15 C. L. J. 310; *Sarip* v. *Aftabuddin*, (1910) 13 C. L. J. 115; *Mukhtar* v. *Sunder*, (1913) 17 C. W. N. 960; *Surendra* v. *Dina*, (1915) I. L. R. 43 Calc. 554.

[3] See *Rai* v. *Administrator*, (1909) I. L. R. 36 Calc. 856, *sc.*, 13 C. W. N. 853, *sc.*, 9 C. L. J. 578.

[4] Bacon's Abridgment Tit. Rent (M.) (Ed. 1832) Vol. VII p. 621. See also Smith's Law of L. L. T., p. 287, Edition II; *Morrison* v. *Chadwick*, (1849) 7 C. B., 266, *sc.*, 18 L. J. C. P. 189, *sc.*, 13 Jur. 638, *sc.*, 6 Dowl. & L. 567, *sc.*, 78 R. R. 627 and *ante*, p 241, note 5.

suspended during the continuance of such.....tortious entry;.....and it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole possession, that no man may be encouraged to injure or disturb his tenant in his possession, whom by the policy of the feudal law he ought to protect and defend." This suspension of the whole rent is a sort of punishment, as a dispossession of a proportionately small parcel of land, from a mistake or misapprehension, may make the landlord lose the entire rent. In a country like India, where land is plenty, waste and unoccupied lands lying on the border between adjoining estates are common enough, and where demarcation by fences and pillars is little known, this stringent rule may cause serious injury, and it would appear to be inequitable and unjust to deprive the landlord of the entire rent. The judges in this country are not bound to adopt the rules of Common Law, prevailing in England, and I hope that in any future case that may arise the dictum of Sir Barnes Peacock, which is an *obiter*, will be reconsidered. In England, the rule of law as to the suspension of the whole rent is guarded by conditions, and is allowed to operate under peculiar circumstances only. It is doubtful, whether, even in England, the rule would be applied to cases of permanent leases at fixed rent, which partake more of the nature of out and out sales of land and less of ordinary leases, though according to the definition of 'lease' given in the Transfer of Property Act permanent tenures are leases.[1]

Eviction for wrongful action of lessee.

There is no suspension of rent, if the eviction by the landlord has followed upon some wrongful action of the lessee. If the lessor enters by virtue of a power reserved,[2] there is no suspension of rent. Even

[1] Act IV of 1882, Sec. 105. See *Annada* v. *Mathura*, (1909) 13 C. W. N. 702 (per Chitty J. at p. 707), *sc.*, 9 C. L. J. 585.

[2] Woodfall's Land. and Ten. (19th Ed.), p. 487.

if the power to enter reserved to the landlord be exercised in a way not strictly regular, there will not be entire suspension of rent. In the case of *Rani Swarnamayi* v. *Shashi Mukhi Barmani*,[1] a *putni* sale, under which a purchaser under Regulation VIII of 1819 had evicted the defendant and taken possession of the *taluq*, was set aside for irregularity in the service of notice of sale proclamation. In a subsequent action for rent for the period including the period of dispossession, the Privy Council held that the *zemindar* could not be said to have committed an act of trespass, because she had pursued the remedy which the law allowed. The mere inadvertence resulting in the omission of one of the formalities prescribed by the Regulation was considered sufficient to deprive her of her remedy for rent—and it could not be said that the plaintiff was taking advantage of her own wrong. The principle laid down in this case may well be followed in cases, where the dispossession of a part of the lease-hold property is the result of mere inadvertence or mistake.

Disturbance of lessee's possession.

If the lessor enter as a mere trespasser, but the lessee be not actually evicted, there will be no suspension of rent.[2] It is only on actual eviction that suspension of rent may take place. But if there is substantial interference with the tenant's enjoyment of the property though there may not be actual eviction, the trespass by the landlord may cause suspension of rent.[3] An

[1] (1868) 2 B. L. R. P. C. 10 *sc.*, 12 M. I. A. 244, *sc.*, 11 W. R., P. C. 5. See also *Dhunput* v. *Saraswati*, (1891) I. L. R. 19 Calc. 267.

[2] *Hunt* v. *Cope*, (1775) 1 Cowp. 243, *sc.*, 98 E. R. 1065; *Newton* v. *Allin*, (1841) 1 Q. B. 517, *sc.*, 113 E. R. 1231. See *Douselle* v. *Girdharee*, (1874) 23 W. R. 121 and *Mukhtar* v. *Sunder*, (1913) 17 C. W. N. 960.

[3] *Neale* v. *Mackenzie*, (1837) 1 Keen 474, *sc.*, 44 R. R. 105; *Upton* v. *Townsend*, (1855), 17 C. B. 30, *sc.*, 25 L. J. C. P. 44, *sc.*, 1 Jur. N. S. 1089, *sc.*, 104 R. R. 562; *Kadumbinee* v. *Kasheenath*, (1870) 13 W. R. 338; *Kristo* v. *Chunder*, (1871) 15 W. R. 230; *Edge* v. *Boileau*, (1885), L. R. 16 Q. B. D. 117; *Dhunput* v. *Mahomed*, (1896) I. L. R. 24 Calc. 296; *Mahomed* v *Sukheannessa*, (1910) 14 C. W. N. 446, *sc.*, 11 C. L. J. 606; See also *Tayawa* v. *Gurushidappa*, (1900) I. L. R. 25 Bom. 269; *Sarip* v. *Aftabuddin*, (1910) 13 C. L. J. 115 and *Dwijendra* v. *Aftabuddi*, (1916) 21 C. W. N. 492.

action for damages may lie in case of trespass, as also in the case of partial eviction. Where possession by an *ijardar* or lessee is by collection of rent, and if he is once properly in possession, the *raiyats* having attorned to him, eviction is not an easy matter. Payment of rent to a trespasser does not amount in law, as administered in this country, to dispossession of an *ijardar* during the term of his lease. He may sue the tenants for rent, even if they have voluntarily paid rent to a trespasser.[1] Otherwise it will rest with the tenants in actual occupation of the land to select their landlord, and change the landlord as often as they like.

Encroachment by tenant on lessor's land.

Encroachments made by a tenant during his tenancy upon the adjoining land of his landlord are *primâ facie* for the benefit of the tenant during the term, and afterwards for the benefit of his landlord, unless it clearly appears by some evidence that at the time they were made, the tenant intended to use the lands for his own exclusive benefit, and not to hold them as a part of the property leased.[2] Strong evidence is necessary to rebut the presumption in favour of the landlord. Speaking of this presumption in favour of the landlord, Markby J. says—"In India where there is a great deal of waste land and where quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule. * * * If an act is capable of being treated as either rightful or wrongful, it shall be

[1] *Tarini* v. *Gunga*, (1887) I. L. R. 14 Calc. 649; *Sarbananda* v. *Pran*, (1888) I. L. R. 15 Calc. 527; *Abhayessari* v. *Shidhessari*, (1889) I. L. R. 16 Calc. 513.

[2] *Andrews* v *Hailes*, (1853) 2 E. & B. 349, *sc.*, 22 L. J. Q. B. 409, *sc.*, 17 Jur. 621, *sc.*, 21 L. T. O. S. 151, *sc.*, 95 R. R. 593; *Kingsmill* v. *Millard* (1855) 11 Exch. 313, *sc.* 105 R. R. 538; *Earl of Lisburne* v. *Davies*, (1866) L. R. 1 C. P. 259, *sc.*, 35 L. J. C. P. 193; *Whitmore* v. *Humphries*, (1871) L. R. 7 C. P. 1, *sc.*, 41 L. J. C. P. 43; *Gooroo* v. *Issur*, (1874) 22 W. R. 246; *Nuddyarchand* v. *Meajan*, (1884) I. L. R. 10 Calc. 820; *Ishan* v. *Ramranjan*, (1905) 2 C. L. J. 125; *Krishna* v. *Banka*, (1908) 13 C. W. N. 698; *Taran* v. *Ganendra*, (1911) 16 C. W. N. 235; *Birendra* v. *Laksmi*, (1913) 22 C. L. J. 129; *Sarada* v. *Akhil.* (1917) 21 C. W. N. 903; *Midnapore Zamindary Company* v. *Panday*, (1917) 2 P. L. J. 506.

treated as rightful," and his Lordship adds that in "practice encroachments made by the tenant are not considered as held by him absolutely for his own benefit against his landlord."[1] Encroachments being thus for the benefit of the landlord, the landlord may, after the determination of the lease, recover the encroached lands together with and as part of, the land let out.[2] A separate suit may lie for the recovery of the encroached lands within twelve years from the expiration of the term. Even during the term of the lease, however, the landlord may sue for separate possession, if the encroachments are without the landlord's permission, and no limitation would run against the landlord merely because the lessee is in possession for twelve years.[3] We have also seen that for the increase of area of land under such circumstances, the landlord may demand an increase of rent.[4]

Encroachment on stranger's land.

Encroachments by a lessee upon the land of a third person enures to the benefit of the landlord, if the tenant holds the lands as a part of the tenure, as he is considered to have made the encroachments not for his own benefit but for that of his landlord; and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself.[5] But if it can be distinctly proved that the encroachments have been made adversely even to

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[1] *Gooroo* v. *Issur*, (1874) 22 W. R. 246.

[2] *Andrews* v. *Hailes*, (1853) 2 E. & B. 349, *sc.*, 22 L. J. Q. B. 409, *sc.*, 17 Jur. 621, *sc.*, 21 L. T. O. S. 151, *sc.*, 95 R. R. 593. See also other cases cited in footnote 2 of previous page.

[3] *Gooroo* v. *Issur*, (1874) 22 W. R. 246; *Nuddyarchand* v *Meajan*, (1884) I. L. R 10 Calc. 820; *Ishan* v. *Ramranjan*, (1905) 2 C. L. J. 125; *Krishna* v. *Banka*, (1908) 13 C. W. N. 698; *Gopal* v. *Lakhiram*, (1912) 16 C. W. N. 634; *Birendra* v. *Laksmi*, (1913) 22 C. L. J. 129; *Sarada* v. *Akhil*, (1917) 21 C. W. N. 903; *Midnapore Zemindary Company* v. *Panday*, (1917) 2 P. L. J. 506.

[4] *Ante*, p. 157.

[5] *Andrews* v. *Hailes*, (1853) 2 E. and B. 349, *sc.*, 95 R. R. 593 *Kingsmill* v. *Millard*, (1855) 11 Ex. 313, *sc.*, 105 R. R. 538; *Nuddyarchand* v. *Meajan*, (1884) I. L. R. 10 Calc. 820. See also other cases cited in footnote 2 of previous page.

his landlord, twelve years' possession may give the tenant a separate title.[1] Land encroached upon by a tenant before the commencement of his tenancy of the adjoining land cannot, however, be recovered by the landlord.[2]

Lessees cannot acquire any right against lessor during lease.

During the continuance of the lease, the lessee cannot acquire any right in the lands demised, that may be set up against the lessor after the determination of the lease. He cannot acquire a right of occupancy[3] by cultivating land, whatever the length of time may be. Neither can he acquire the right to hold on any land by erecting substantial structures on it[4] or excavating tanks. On the expiry of the lease, he is bound to deliver possession of the lands demised, without the slightest abatement of the right which the landlord had at the date of the demise.[5] He is entitled to remove the structures,[6] but if his actions have, in any respect, deteriorated the value of the land or any part of it, he is bound to pay compensation for the loss that may be sustained by the lessor on re-entry. If a lessee ejects *raiyats* and takes *khas* possession of any land, he is not entitled to retain possession of such land after expiry of the lease, if he takes away earth from the land for the purpose of making bricks, the landlord may restrain him by injunction and may, at his option, sue for damages.[7]

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[1] See *Wali* v. *Tota*, (1903) I L. R. 31 Calc. 397; *Ishan* v. *Ramranjan*, (1905) 2 C. L. J. 125; *Muthurakkoo* v. *Orr*, (1911) I. L. R. 35 Mad. 618 and *Birendra* v. *Laksmi*, (1913) 22 C. L. J. 129.

[2] *Rees* v. *Perrot*, (1830) 4 C. & P. 230, *sc.*, 34 R. R. 790; *Doe d. Lloyd* v. *Jones*, (1846) 15 M. & W. 580, *sc.*, 16 L. J. Ex. 58, *sc.*, 71 R. R. 772; *Dixon* v. *Baty*, (1866) L. R 1 Ex 259; *sc.*, 14 Wee. Rep. 836.

[3] Act VIII of 1885, Sec. 22, sub-sec. 3; *Gilmore* v. *Sreemunt*, (1864) W. R. Gap. Vol. Act X 77; *Woomanath* v. *Koodun*, (1873) 19 W. R. 177; *Shoorut* v. *Binny*, (1876) 25 W. R. 347; *Rai* v. *Laidley*, (1879) I. L. R. 4 Calc. 957.

[4] Act IV of 1882, Sec. 108, cl. (*p*).

[5] *Ibid*, Sec. 108, cls. (*m*) and (*q*).

[6] *Ibid*, Sec. 108, cl. (*h*).

[7] *Kadumbenee* v. *Nobeen*, (1865) 2 W. R. 157; *Tarini* v. *Debnarayan*, (1871) 8 B. L. R. App. 69; *Anund* v. *Bissonath*, (1872) 17 W. R. 416; *Nicholl* v. *Turinee*, (1875) 23 W. R. 298.

He is also not entiled to cut down and appropriate timber or fruit trees, unless he himself has planted them. He cannot also appropriate any land as his rent-free holding. If, after the expiration of the lease and delivery of possession to the landlord, he claims to hold possession of any land comprised in the demised premises, under any title independent of the lease, the burden of proof is heavily upon him to show that such title exists, the presumption being against his having any independent right to any parcel of land.[1]

Limitation against landlord.

Limitation which bars the tenant does not bar the landlord. If the lessee negligently allows a third person to take possession of the lease-hold property or any part of it, and if such person acquires, by adverse possession for more than twelve years, a title, such title is good against the lessee only or his assignees or legal representatives, but cannot be pleaded against the landlord.[2] The landlord may bring a suit for declaration of his right during the continuance of his lease, but his having the right to ask for declaration does not prevent his suing for possession, at any time within twelve years after the determination of the lease.

Payments made by lessee for lessor's benefit.

"If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor."[3] This is in accordance with the well known principle of law, that a person is entitled to be reimbursed for payments made by him for the protection

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[1] *Ram* v. *Veryag*, (1876) 25 W. R. 554.

[2] *Womesh* v. *Raj*, (1868) 10 W. R. 15; *Krishna* v. *Hari*, (1832) I. L. R. 9 Calc. 367, *sc.*, 12 C. L. R. 19; *Bissesuri* v. *Baroda*, (1884) I. L. R. 10 Calc. 1076; *Sharat* v. *Bhobo*, (1886) I. L. R. 13 Calc 101; *Kishwar* v. *Kali*, (1905) 10 C. W. N. 343; *Thamman* v. *Maharaja of Vizianagram*, (1907) I. L. R. 29 All. 593; *Hajra* v *Kunja*, (1917) 21 C. W. N. 1001.

[3] Act IV of 1882, Sec. 108, cl. (*g*).

of his own interest, when the payment ought lawfully to have been made by another person.[1]

Assignment of lessor's right.

On the assignment of the interest of the lessor or of any part of his interest therein, the transferee has all the rights of the transferor and all his liabilities.[2] A notice ought, on such transfer, to be given to the lessee; otherwise the lessee shall not be liable to pay rent to the transferee, and any payment made *bonâ fide* by the lessee to the original lessor would be considered as good.[3] Rent is considered as accruing due from day to day, and it is apportionable, between the original lessor and his transferee on the principle that it has so accrued.[4] If the assignment is made at the middle of a month, the apportionment should be made like interest on money and as accruing from day to day; but the tenant is not bound to pay the original lessor and his transferee separately and he may claim to pay the rent in one lump sum as the instalment falls due.[5] When a part only of the property or a part only of the lessor's interest is assigned, the apportionment of rent may be made by consent of all the parties concerned. But if they disagree, any court, having jurisdiction to entertain a suit for possession of the land, may determine the question.[6]

Assignee's liability.

In the absence of a contract or local usage to the contrary, a lessee has power to transfer during his term, either absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and

[1] Act IX of 1872, Sec. 69.

[2] Act IV of 1882, Sec. 109.

[3] *Ibid.*, Secs. 50 and 109; Act VIII of 1885, Sec 72.

[4] Act IV of 1882, Sec. 36.

[5] *Chatrapat* v. *Grindra*, (1880) I. L. R. 6 Calc. 389; *Jogemaya* v. *Girindra*, (1900) 4 C. W. N. 590; *Chandradaya* v. *Bhagaban*, (1915) 20 C. W. N. xl; *Rangiah* v. *Vajravelu*, (1917) I. L. R. 41 Mad. 370. But see *Satyendra* v. *Nilkanta*, (1893) I. L. R. 21 Calc. 383.

[6] Act IV of 1882, Sec. 109, cl. (3); *Bliss* v. *Collings*, (1822) 5 B. and Ald. 876, *sc.*, 1 Dowl. & Ry. 291, *sc.*, 24 R. R. 601.

any transferee of such interest or part may again transfer it.[1] As a matter of fact, express prohibition against assignment and creation of subleases is generally found in contracts of tenancy. The custom or usage of non-transferability has to be proved in each case. The burden is always difficult to discharge, and it being on the landlord, the lessee's right is generally held to be transferable. The reported cases, however, are not quite in harmony.[2] The case of a farmer of a revenue-paying estate, in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, is an exception as to the right of assignment.[3] A lessee, however, continues liable upon the covenants in the lease notwithstanding the assignment. An action for breach of covenant will be against a lessee for a term of years on the covenants notwithstanding that he has assigned his term and the lessor has accepted rent from the assignee.[4] The liabilities attaching to the lease must, however, be express. The liability of the assignee begins with the assignment, and so of the assignee of an assignee. The lessor may sue both the original lessee and his assignee for breach of any covenant, but he can have execution against one only. A deed of assignment is necessary to be registered under the law for the registration of deeds.

Covenants running with the land.

The assignee, however, is bound only by the covenants which *run with the land*, and not the personal covenants of the original lessee.[5] Covenants that run with the

[1] Act IV of 1882, Sec. 108, cl. (*j*); *Ram* v. *Salig*, (1880) I. L. R. 2 All. 896.

[2] *Doya* v. *Anund*, (1887) I. L. R. 14 Calc. 382; *Kripamoyi* v. *Durga*, (1887) I. L. R. 15 Calc. 89; *Appa* v. *Subbanna*, (1889) I. L. R. 13 Mad. 60.

[3] Act IV of 1882, Sec., 108, cl. (*j*) proviso.

[4] Act IV of 1882, Sec. 108, cl. (*j*). *Barnard* v. *Goodscall*, Cro. Jac. 309, *sc.*, 79 E. R. 264; *Thursby* v. *Plant*, 1 Wms. Saund. 237, *sc.*, 85 E. R. 268.

[5] *See Spencer's case*, (1583) 5 Coke 16, *sc.*, 77 E. R. 72, *sc.*, 1 Smith's Leading Cases and Woodfall's Land. and Ten., (19th edition) p. 194.

land are *real*, *i.e.*, annexed to an estate. Such covenants bind all persons who come into possession of the real property, either by operation of law or by act of parties.[1] In countries where conveyancing is a science and an art, the word "assigns" is almost invariably mentioned in leases, whether a covenant is implied by law to be real or expressly made so by contract. But in this country instruments in the vernacular languages do not, as a rule, contain the word "assigns," and questions, therefore, may arise here as to what covenants in a lease run with the land. All covenants implied by law run with the land, and both the lessor and the lessee and their respective assignees are bound by them. A covenant to pay rent[2] or taxes is essential to the existence of the lease and must run with the land. A covenant to maintain an embankment in use for protection against inundation is also an important one and is real.[3] Conditions as to paying rent to the superior landlord of the lessor, to renew a lease, and to pay damages for not giving information to the police of the commission of an offence or for not supplying provisions to an army passing through the estate, are other instances of covenants that run with the land. An express condition for re-entry on the breach of a covenant is also an instance of a *real* covenant. The rights and liabilities of the lessor and the lessee, as indicated in section 108 of the Transfer of Property Act, are all instances of covenants running with the land.

Duration of lease.

The duration of a lease depends upon the term fixed in it, and where that is uncertain, it may be

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[1] Esp. N. P. 290, Woodfall's Land. and Ten., (19th edition) pp. 189, 190.

[2] *Parker* v. *Webb*, 3 Salk. 5, *sc.*, 91 E. R. 656.

[3] *Morland* v. *Cook*, (1868) L. R., 6 Eq., pp. 252, 267, *sc.*, 37 L. J., Ch. 825.

ascertained with reference to collateral circumstances. "Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences."[1]

Option of determining lease.

An option to determine a lease before the end of the term mentioned in the contract is sometimes given by the instrument itself. The option may be in the lessor or in the lessee, in either of which cases previous notice in writing is generally stipulated for in the contract. If the lease omits to mention at whose instance it is to terminate, the lessee, and not the lessor, shall have the option.[2]

Covenants to renew leases.

Covenants to renew leases occasionally raise nice questions of law. These are, as I have already said, covenants that run with the land.[3] The right may be forfeited by not applying in time.[4] If the tenant, however, is allowed to hold on, a renewal may be presumed, though the presumption may be rebutted.[5] The non-performance by the lessee of any covenant causes forfeiture of the right to renew, as such covenants are strictly construed.[6] Where there is a condition for renewal at an enhanced rate of rent, according to the rate prevailing in the neighbourhood at the date of the expiration of the existing lease, the lessee must apply in time for assessment of rent; otherwise he forfeits his

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[1] Act IV of 1882, Sec. 110, cl. 2.

[2] Act IV of 1882, Sec. 110, cl. 3. *Dann* v. *Spurrier*, (1802) 7 Ves. 231, *sc.*, 6 R. R. 119; *Doe* v. *Dixon*, (1807) 9 East, 15, *sc.*, 9 R. R. 501; *Fallon* v. *Robins*, (1865) 16 Ir. Ch. R. 422.

[3] *Isteed* v. *Stoneley*, 1 Anderson 82, *sc.*, 123 E. R. 365; *Brook* v. *Bulkeley*, (1754) 2 Ves. Sen. 498, *sc.*, 28 E. R. 319; *Roe* v. *Hayley*, (1810) 12 East 464, *sc.*, 11 R. R. 455.

[4] Woodfall's Land, and Ten., (19th edition), p. 439.

[5] *Moss* v. *Barton*, (1866) 35 Beav. 197, *sc.*, L. R. 1 Eq 474, *sc.*, 55 E. R. 870; *Bogg* v. *Midland* Ry. Co., (1867) L. R., 4 Eq., 310; *Fukeeroonissa* v. *Chunder*, (1869) 12 W. R. 538.

[6] *Finch* v. *Underwood*, (1876) 2 Ch. D. 310; *Bastin* v. *Bidwell*, (1881) 18 Ch. D. 238.

right of renewal. If he does not agree to pay as much as is paid for neighbouring lands, he loses his right.

Determination of leases.

Section 111 of the Transfer of Property Act enumerates the conditions for the determination of leases. Of these, cases of *merger* and *forfeiture* for breach of covenant referred to in clauses (*d*) and (*g*) require special attention. The determination of a lease by notice to quit is also an important matter for consideration.

Merger.

In *Womesh Chunder Goopto* v. *Raj Narain Roy*,[1] Peacock, C. J., is reported to have said:—"My own impression is that the doctrine of merger does not apply to lands in the *mofussil* in this country," and L. S. Jackson, J., concurring with the Chief Justice added in the same case—"I am not aware of any solid foundation for the opinion that that doctrine is any part of our *mofussil* law." But the decision of the appeal was based upon another ground, and the opinion expressed by Peacock C. J., and Jackson J., was merely an *obiter*. In a later case[2] the question of the applicability of the English law of *merger* in the *mofussil* of this country was raised, but was not decided, although the judges were inclined to hold that it did not; but Markby, J., said that, assuming the English law of merger was applicable, the dry rule of *merger* according to the Common Law of England should not be applied, but that rule should be modified by all the equities which an English Court of Chancery would import into the consideration of the case. There can be no doubt that the rule of Common Law, which is highly technical, ought not to be applied to the dealings of parties in the *mofussil* of this country. It is not only opposed to the well-known practice of landlords and tenants, but it does not rest on any broad intelligible

[1] (1868) 10 W. R. 15.

[2] *Rushton* v. *Atkinson*, (1869) 11 W. R. 485.

principle of justice, and ought not to be applied to Indian transactions. At all events, its operation ought to be excluded or defeated, wherever there are clear declarations of intention and unequivocal evidence of conduct of the person who has become the owner of the superior as well as the inferior right.[1] In *Thomas Savi* v. *Punchanun Roy*,[2] the High Court at Calcutta declined to follow the technical rule of English law, and ever since it has been taken to be established, that the rule does not apply in India. The decision in *Prosunno Nath Roy* v. *Jogut Chunder Pandit*[3] turns upon the facts of the particular case and not upon the application of the maxim "*Nemo potest esse tenens et dominus.*" In England too, this strict rule of Common Law was found to work injustice, and required to be modified in equity, and at last the Judicature Act of 1873 distinctly laid down—"There shall not, after the commencement of the Act,[4] be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."[5] Our legislature, however, has laid down broadly, in the Transfer of Property Act, the rule that a lease of immovable property determines, "in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same

[1] See *Adams* v. *Angell*, (1877) 5 Ch. D. 631 dissenting from *Toulmin* v. *Steere*, (1817) 3 Mer. 210, *sc.*, 17 R. R. 67; *Mohesh* v. *Bawan*, (1883) I. L. R. 9 Calc. 961, *sc.*, L. R. 10 I. R. 62, *sc.*, 13 C. L. R. 221; *Gokaldas* v. *Puranmal*, (1884) I. L. R. 10 Calc. 1035, *sc.*, L. R. 11 I. A. 126 *Dinobundhu* v. *Jogmaya*, (1901) I. L. R. 29 Calc. 154, *sc.*, L. R. 29 I. A. 9; *Chama* v. *Padala*, (1908) I. L. R. 31 Mad. 439; *Lal* v. *Jagir*, (1909) 13 C. W. N. 913; *Mahalakshmammal* v. *Madheva*, (1911) I. L. R. 35 Mad. 642; *Shankar* v. *Sadashiv*, (1913) I. L. R. 38 Bom. 24; *Hirendra* v. *Hari*, (1914) 18 C. W. N. 869; *Amatoo* v. *Muksud*, (1914) 19 C W. N. 435.

[2] (1876) 25 W. R. 503.

[3] (1878) 3 C. L. R. 159. (The reporter's note is erroneous.)

[4] 1st of Nov., 1875. See Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 2.

[5] Judicature Act, 1873, (36 & 37 Vict. c. 66). Sec. 25, sub-sec. (4).

right."[1] This rule applies to all kinds of leases—temporary or permanent, and there is no express reservation for the application of any equitable doctrine, such as the Judicature Act would require in England. The framers of the Act adopted the rule from the old Common Law cases, apparently forgetting that in India the art of conveyancing has been and is of a very simple character, that formal conveyances to trustees expressly to prevent merger[2] are almost unknown to the people and the lawyers practising in the *mofussil*, and that *benami* conveyances, which are looked upon with disfavour by the judges, are not sufficient to mitigate the rigidity of the rule thus laid down. Evidence of intention to keep both the rights alive would, I apprehend, be now excluded. If a *zemindar* lets out a village, included in his estate, in *putni*, and afterwards purchases the *putni* himself, the interests of the lessor and the lessee in the whole of the village would vest undoubtedly in one person at the same time. It is difficult, however, to understand the exact intention of the Legislature in the use of the expression "in the same right," and these words may afford some means of escape from the rigidity of the rule. If it implies that the purchase by the *zemindar* of the *putni* and the consequent vesting may be in a right different from that of his *zemindari* right, and not in the same right, we may, perhaps, escape from the difficulty. But such a distinction is inappreciable and too fine for the judges and lawyers for whom the Anglo-Indian Codes have been professedly framed.

Forfeiture.

Determination of a lease by forfeiture may take place—(*a*) in case the lessee breaks any express covenant which provides for re-entry on breach thereof[3] or

[1] Act IV of 1882, Sec. 111, cl. (*d*).

[2] *Belaney* v. *Belaney*, (1867) L. R. 2 Ch. Ap. 138. See also *Gokaldas* v. *Puranmal*, (1884) I. L. R. 10 Calc. 1035, *sc.*, L. R. 11 I A. 126.

[3] Loke on Littleton, s. 325; *Doe d. Willson* v. *Phillips*, (1824) 2 Bing 13, *sc.*, 9 Moore 46, *sc.*, 2 L. J. C. P. 103, *sc*, 27 R. R. 539.

renders the lease void, or (*b*) the lessee denies the landlord's title.[1] The landlord's right to eject the tenant and re-enter on a forfeiture under the first head cannot accrue, unless there is a breach of a condition, and the penalty for the breach is expressly re-entry[2] and avoidance of the lease, and the landlord does some act showing his intention to take advantage of the conduct of the lessee. The breach of an implied condition cannot cause forfeiture. Even non-payment of rent cannot in itself be a cause of incurring the penalty of forfeiture, unless there is an express covenant to that effect.[3]

Disclaimer.

Forfeiture by disclaimer or denial of the landlord's right cannot happen as to permanent tenure-holders and occupancy-raiyats under the Bengal Tenancy Act.[4] But the law, as understood before and as enunciated in the Transfer of Property Act, and which is applicable to all classes of tenants except *raiyats* with rights of occupancy, is broader than the English Law on the subject. The rule of English law is, that where, by matter of record, a tenant disclaims his landlord's title, and sets up an adverse title either in himself or in some third party, he thereby forfeits his tenancy; but denial by parol does not cause the forfeiture of a lease for a term certain. In Bengal, however, denial by parol is admissible. In order to make a disclaimer sufficient, it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession upon a ground wholly inconsistent with that relationship, so that there is by necessary implication

[1] Act IV of 1882, Sec. 111, cl. (*g*).

[2] Act IV of 1882, Sec. 111, cl. (*g*). *Musyatulla* v. *Noorzahan*, (1883) I. L. R. 9 Calc. 808; *Timaya* v. *Timapa*, (1883) I. L. R. 7 Bom. 262 *Narayana* v. *Narayana*, (1883) I. L. R. 6 Mad. 327. See *Promode* v. *Aswini*, (1914) 18 C. W. N. 1138; *Shibnarain* v *Bhutnath*, (1917) I. L. R. 45 Calc. 475, *sc.*, 22 C. W. N. 422.

[3] *Jamsedji* v. *Lakshmiram*, (1888) I. L. R. 13 Bom. 323.

[4] Act VIII of 1885, Secs. 10 and 25.

a repudiation of it.[1] As to what is a disclaimer is a question of fact.

Notice of ejectment.

The right to eject a tenant on disclaimer which has caused forfeiture arises on the tenant's action, and no notice to quit is, therefore, necessary to entitle the landlord to sue. It is enough, if the landlord shows by any overt act, his intention to re-enter. The law, as understood before Act IV of 1882 came into force, did not require the landlord to do any act showing his intention to determine the lease.

What constitutes disclaimer.

The mere assertion by the tenant that he holds under a right superior to that of a temporary lessee, when the relationship of landlord and tenant is admitted, does not amount to a disclaimer of the title of the landlord.[2] The principle of the decision in *Vivian* v. *Moat*[3] and *Baba* v. *Vishvanath Joshi*[4] has been held to be wholly inapplicable in Bengal, where there are numerous tenures held by persons at fixed rents. It has never been understood in this part of the country, that the assertion of such a right is a denial of the landlord's title as such. Courts in this country are reluctant, for obvious reasons, to give the landlord the right to cancel a lease for conduct on the part of a lessee, which is easy of explanation or arises out of confusion of facts.

[1] *Sutyabhama* v. *Krishna*, (1880) I. L. R. 6 Calc. 55, *sc.*, 6 C. L. R. 375; *Baba* v. *Vishvanath*, (1883) I. L. R. 8 Bom. 228; *Prannath* v. *Madhu*, (1886) I. L. R. 13 Calc. 96; *Debiruddi* v. *Abdur*, (1888) I. L. R. 17 Calc. 196; *Dhora* v. *Ram*, (1890) I. L. R. 20 Calc. 101; *Kabil* v. *Chunder*, (1892) *ibid* 590; *Nilmadhab* v. *Ananta*, (1898) 2 C. W. N. 755; *Ananda* v. *Abrahim*, (1899) 4 C. W. N. 42; *Nizamuddin* v. *Mamtazuddin*, (1900) I. L. R. 28 Calc. 135, *sc.*, 5 C. W. N. 263; *Fayj* v. *Aftabuddin*, (1902) 6 C. W. N. 575; *Mallika* v. *Makham*, (1905) 9 C. W. N. 928, *sc*, 2 C. L. J 389; *Kamaleswari* v. *Harbullabh*, (1905) 2 C. L. J. 369; *Ramgati* v. *Pran*, (1905) 3 C. L. J. 201; *Mathewson* v. *Jadu*, (1908) 12 C. W. N. 525; *Gopal* v. *Dhakeswar*, (1908) I. L. R. 35 Calc. 807, *sc.*, 7 C. L. J. 483; *Pratap* v. *Harihar*, (1909) I. L. R. 36 Calc. 927, *sc.*, 13 C. W. N. 949; *Miadhar* v. *Rajani*, (1909) 14 C. W. N. 339; *Ekabbar* v. *Hara*, (1910) 15 C. W. N. 335; *Bhupendra* v. *Bansi*, (1913) I. L. R. 40 Calc. 870.

[2] *Doma* v. *Melon*, (1873) 20 W. R. 416; *Kali* v. *Golam*, (1886) I. L. R. 13 Calc. 3; *Pratap* v. *Harihar*, (1909) I. L. R. 36 Calc. 927, *sc.*, 13 C. W. N. 949. But see *Baba* v. *Vishvanath*, (1883) I. L. R. 8 Bom 228.

[3] (1881) 16 Ch. D. 730.

[4] (1883) I. L. R. 8 Bom. 228.

The frequent disputes between rival landlords and uncertainty of title common in this country are fertile causes of confusion in ignorant and illiterate people, and it will be inequitable to take advantage of their weakness and credulity.[1]

Disclaimer of the title of an assignee of the landlord.

The denial of the title of an assignee or other legal representative of the landlord may also, under certain circumstances, cause forfeiture. The rule, that a tenant may not dispute his landlord's title, applies only to the title of the original landlord, who let him in and not to the assignee of such landlord or any other person claiming through him.[2] The tenant may dispute the title of the assignee and put him to the strict proof thereof. If, however, the lessee or tenant has paid rent to the assignee, he can defeat the title of the assignee only by showing that he paid rent in ignorance of the true state of things and that some third person is entitled to it. The burden is on the tenant to make out a case of fraud, misrepresentation or mistake.[3] The Land Registration Act, compelling the registration of the names of the proprietors of estates, and the Bengal Tenancy Act, of assignments and succession to permanent tenures, will, it is hoped, materially diminish, in future, litigation with reference to such questions.

Limitation of suits.

The period of limitation for a suit by the landlord to eject a tenant on the determination of a lease is, under the general law, twelve years.[4] The tenancy may be

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[1] See *Kishakkekath* v. *Pulikkalakath*, (1917) I. L. R. 41 Mad. 629.

[2] *Doorga* v. *Janoo*, (1872) 18 W. R. 465.

[3] Act I of 1872, Sec. 116; *Banee* v. *Thakoor*, (1866) B. L. R. F. B. Vol. 588, *sc.*, 6 W. R. (Act X) 71; *Bhaiganta* v. *Himmat*, (1916) 20 C. W. N. 1335, *sc.*, 24 C. L. J. 103.

[4] Act IX of 1908, Sch. II, Art. 139; *Kedarnath* v. *Khetturpaul*, (1880) I. L. R. 6 Calc. 34, *sc.*, 6 C. L. R. 569; *Gunesh* v. *Gondour*, (1882) I. L. R. 9 Calc. 147; *Musharaf* v. *Iftkhar*, (1888) I. L. R. 10 All. 634 But see *Gangadhar* v. *Zahurriya*, (1886) I. L. R. 8 All. 446; *Soman* v. *Raghubir*, (1896) I. L. R. 24 Calc. 160; *Jai* v. *Ram*, (1898) I. L. R. 20 All. 519; *Sharoop* v. *Joggessur*, (1899) I. L. R 26 Calc. 564, *sc.*, 3 C. W. N. 464; *Taher* v. *Tarafdi*, (1915) 20 C. W. N. 661.

determined on the happening of any of the events contemplated by section 111 of the Transfer of Property Act, and that section includes the case of the determination by forfeiture,[1] either on account of a breach of a covenant or disclaimer of the landlord's title. Under the Bengal Tenancy Act, however, the rights of permanent tenure-holders[2] and of *raiyats* holding at a rent, or rate of rent, fixed in perpetuity,[3] or having occupancy-rights,[4] cannot be terminated on account of disclaimer of landlord's right,[5] and the period of limitation, for a suit for the ejectment of a tenure-holder or a *raiyat* on account of any breach of condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach, is only one year.[6] The rule of twelve years applies to all non-agricultural leases and leases of agricultural lands in districts to which the Bengal Tenancy Act has not been extended. The divergence as to the periods of limitation, with reference to similar kinds of interests in land, is rather wide, and I hope there will be early interference by the legislature.

Waiver of forfeiture.

Courts are always reluctant to allow a landlord to take advantage of a breach of covenant entitling him to re-enter. Any act, on the part of the landlord, showing an intention to treat the lease as subsisting, has been held to operate as a waiver of the forfeiture.[7] But the mere lying by and witnessing the breach is no waiver; there must be some positive act.[8] Neither will an act done, acknowledging the continuance of the tenancy, operate as waiver, if the act be done by the

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[1] Act IV of 1882, Sec. 111, cl. (*g*).
[2] Act VIII of 1885, Sec. 10.
[3] *Ibid*, Sec. 18.
[4] *Ibid*, Sec. 25.
[5] *Debiruddi* v. *Abdur*, (1888) I. L. R. 17 Calc. 196; *Dhora* v. *Ram*, (1890) I. L. R. 20 Calc. 101.
[6] Act VIII of 1885, Sch. III, Art. 1.
[7] Act IV of 1882, Sec. 112.
[8] *Doe d. Sheppard* v. *Allen*, (1810) 3 Taunt. 78, *sc.*, 12 R. R. 597.

landlord without knowledge of the tenant having committed a breach which would cause forfeiture.[1] Notice or knowledge of the forfeiture, at the time of the supposed waiver, affords evidence of intention in the landlord to accept the lessee as a tenant, notwithstanding the breach.

Acceptance of rent as waiver of forfeiture.

Acceptance of rent accruing, due after the forfeiture operates as waiver of forfeiture.[2] But if it is accepted after the institution of a suit for ejectment on the ground of forfeiture, there is no waiver. Forfeiture may also be waived by distress for rent,[3] as distress can be levied only on a tenant. Forfeiture may also be waived by pleading.[4] But the waiver of one breach does not bar the cancelment of the lease for a subsequent breach.[5] Receipt of rent or distress can only be an acknowledgment of the tenancy up to the date of the receipt of rent or distress, and the waiver of any forfeiture up to a certain day cannot be pleaded in defence to an ejectment for a subsequent breach, even where the breach is of a continuing nature.[6]

Relief against forfeiture.

As regards non-permanent tenures, it is doubtful whether the remedial provision, such as is provided by section 155 of the Bengal Tenancy Act, apply to them. It would seem from the definition of the word 'tenant,' as given in the Act, that the section does apply to non-permanent leases as well to permanent leases and *raiyati* interests. If so, the sections of

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[1] Act IV of 1882, Sec. 112.

[2] *Ibid*, Sec. 112; *Kali* v. *Fusle*, (1883) I. L. R. 9. Calc. 843; *Jogeshuri* v. *Mahomed*, (1886) I. L. R. 14 Calc. 33; *Sitanath* v. *Basudeb*, (1900) 2 C. L. J. 540.

[3] *Cotesworth* v. *Spokes*, (1861) 30 L. J. C. P. 220; *Ward* v. *Day*, (1863) 33 L. J., Q. B. 3; *Grimwood* v. *Moss*, (1872) L. R. 7 C. P. 360. See also *Raj* v. *Mati*, (1915) 22 C. L. J. 546.

[4] *Evans* v. *Davis*, (1878) 10 Ch. D. 747.

[5] *Dulli* v. *Meher*, (1867) 8 W. R. 138; *Chunder* v. *Sirdar*, (1872) 18 W. R. 218.

[6] *Doe d. Muston* v. *Gladwin*, (1845) 6 Q. B. 953, *sc.*, 115 E. R. 359.

the two Acts have to be read together, and the restrictions put upon the right of the landlord by section 155 of the Bengal Tenancy Act should be attended to. The Conveyancing and Law of Property Act, 1881, 44 and 45 Victoria, Cap. 41, which came into operation from the 1st January, 1882, restricts in England the landlord's right of forfeiture, and the main provisions in this respect have been embodied in section 155 of the Bengal Tenancy Act, but attention was not paid to these provisions when the Transfer of Property Act was passed in the beginning of the year 1882, and the reason seems to be that the Act had been drafted before the Conveyancing and Law of Property Act, 1881, was passed.

Relief against forfeiture for non-payment of rent.

Special provision has been made for relief against forfeiture for non-payment of rent.[1] Before the Transfer of Property Act came into force, Courts in Bengal following the analogy of section 78 of Act X of 1859 and section 52 of Act VIII (B.C.) of 1869, granted, in similar cases, equitable relief against forfeiture, by allowing the judgment-debtor to pay in the amount of debt and costs within fifteen days of the date of the judgment.[2] The Bengal Tenancy Act has made a provision similar to that laid down in the old Rent Acts, in the case of tenants other than permanent tenure-holders, *raiyats* holding at fixed rates and occupancy *raiyats*,[3] who connot be ejected for non-payment of rent.[4] Under that Act, the landlord is entitled to institute a suit for ejectment of a tenant, other than tenants specified above, for non-payment of rent, when an arrear of rent remains due after the end of the Bengali year, where that year prevails, or at the end of the month of

[1] Act IV of 1882, Sec. 114.

[2] *Mothooramohun* v. *Ram*, (1879) 4 C. L. R. 469; *Mahomed* v. *Peryag*, (1881) I. L. R. 7 Cal. 566.

[3] Act VIII of 1885, Sec. 66.

[4] *Ibid*, Sec. 65.

Jaisth where the Fasli or Amli year prevails. This right may be exercised whenever arrears are due at the end of the year, whether a decree for rent has been passed or not. The right does not depend upon any covenant for ejectment on failure to pay rent, as it does not arise out of contract, but is given to the landlord by the statute. When the right is given by a contract, the provisions of section 114 of the Transfer of Property Act apply. But do they apply to temporary leases of agricultural lands in the *mofussil*? The same legislature has, in the course of three years, passed two enactments, many of the provisions of which interlap each other, while some of them are not quite consistent. The earlier enactment[1] is broader in application, both as to its local extent and the class of cases to which it applies, the later one[2] applies only to agricultural lands in Bengal and is merely the reproduction of the law enunciated in Act X of 1859 with slight modifications. You will observe that a tenant, the incidents of whose relationship with the landlord are governed by the Transfer of Property Act, must, before he can ask for relief against forfeiture for non-payment of rent, at the hearing of the suit, pay or tender, to the lessor, the rent in arrear with interest and full costs, or give such security within fifteen days as the court thinks sufficient for making such payment. There is no such restriction in the Bengal Tenancy Act.

Remedial provisions in the Rent Acts.

We must take it, therefore, that in the *mofussil* of these provinces, where either Act X 1859, Act VIII (B.C.) of 1869 or Act VIII of 1885 applies, the remedial provisions contained in these enactments apply to temporary leases. The reported cases, bearing on the construction of section 78 of Act X of 1859 and section 52 of Act VIII (B.C.) of 1869, seem to indicate that the rule

[1] Act IV of 1882. [2] Act VIII of 1885.

applies to all leases, temporary or perpetual, whenever there is a condition for ejectment for non-payment of rent.[1] The Bengal Tenancy Act has, as we have already seen, practically, made the condition for ejectment for non-payment of rent, in cases of permanent leases, void and incapable of being enforced by judicial process.[2] The condition is enforceable only in cases of non-permanent or temporary tenures.

Act VIII of 1885, Sec. 66.

The remedial provision in section 66 of the Bengal Tenancy Act, which is applicable even when there is no covenant for ejectment on non-payment of rent, gives fifteen days' time from the date of the decree to pay in the arrears of rent, interest and costs, and if the Court be closed on the fifteenth day, the time is extended to the day on which the Court re-opens.[3] The time may also be extended by the Court for special reasons. The liability to ejectment may thus be avoided, and thus the tenant may save himself from forfeiture, notwithstanding his agreement.[4] The fifteen days' time runs from the date of the final decree, if there be an appeal,[5] and the Appellate Court has also the power to extend the period. Payment under protest may be sufficient.[6]

Holding over.

Ijara or *thika* leases are generally, at the creation, for a term exceeding one year. The lessee or under-lessee remains in possession after the end of the term,

[1] *Jan* v. *Nittyenund*, (1868) 10 W. R., F. B., 12; *Abdoor* v. *Digamburee*, (1872) 18 W. R. 477; *Duli* v. *Meher*, (1872) 12 B. L. R. 439, affirming (1867) 8 W. R. 138; *Mothooramohan* v. *Ram*, (1879) 4 C. L. R. 469; *Mahomed* v. *Peryag*, (1881) I. L. R. 7 Calc. 566, overruling *Mumtaz* v. *Grish*, (1874) 22 W. R 376; *Duli* v. *Rajkissore*, (1882) I.L.R. 9 Calc. 88.

[2] *Ante*, p. 200.

[3] Act VIII of 1885, Sec. 66, cl. (2). See *Hossein* v. *Donzelle*, (1880) I. L. R. 5 Calc. 906, *sc.*, 6 C. L. R. 239; *Shooshee* v. *Gobind*, (1890) I. L. R. 18 Calc. 231.

[4] *Jan* v. *Nittyenund*, (1868) 10 W. R. F. B. 12; *Madhub* v. *Ram*, (1871) 16 W. R. 151; *Duli* v. *Rajkissore*, (1882) I. L. R. 9 Calc. 88.

[5] *Noor* v. *Koni*, (1886) I. L. R. 13 Calc. 13; *Nam* v. *Roghunath*, (1895) I. L. R. 22 Calc. 467; *Thamal* v. *Abhoyessuri*, (1909) 13 C. W. N. 1060.

[6] *Sreeshteedhur* v. *Doorga*, (1872) 17 W. R. 462.

and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to the continuance of the lease.[1] The tenancy thus becomes one from year to year, and is terminable by notice to quit.[2] The notice may be waived on the part of the person giving it by any act showing an intention to treat the lease as subsisting.[3]

Notice to quit.

A notice sufficient in law to determine the tenancy must, however, be given to one party by the other, and must be duly served. The Bengal Tenancy Act contains provisions for service of notices to quit on non-occupancy *raiyats*[4] and under-*raiyats*,[5] but it has made no provision for service of notice for determination of other kinds of tenancies terminable at the option of either of the parties. We are not, however, to understand from this omission that notice to quit is unnecessary in other cases. The Transfer of Property Act says —"In the absence of contract or local usage to the contrary, a lease of immovable property granted for purposes other than agricultural or manufacturing, shall be deemed to be a lease from month to month, terminable, on the part of either the lessor or the leasee by fifteen days' notice, expiring with the end of a month of the tenancy."[6] The notice must be given in writing by the party or his authorised agent, and served generally as summons in a suit in a Civil Court. Proof of the posting of a letter containing the notice has been considered sufficient, there being a general presumption in favour of the delivery of letters properly addressed

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[1] Act IV of 1882, Sec. 116.

[2] *Ibid*, Sec. 111 (*h*); *Ram* v. *Soodra*, (1867) 7 W. R. 152; *Jumaut* v. *Chutturdharee*, (1871) 16 W. R. 185; *Betts* v. *Jamie*, (1875) 23 W. R. 271; *Chaturi* v. *Makund*, (1881) I. L. R. 7 Calc. 710. See *Paramanda* v. *Syjou*, (1915) 24 C. L. J. 30 and the cases cited there.

[3] Act IV of 1882, Sec. 113.

[4] Act VIII of 1885, Sec. 45.

[5] *Ibid*, Sec. 49.

[6] Act IV of 1882, Sec. 106.

and posted, and the endorsement on the cover, purporting to be by an officer of the post office to the effect that the addressee refused to accept the letter, has also been considered sufficient service. If personal service cannot be had, the delivery or tender to a member of the family or servant or authorised agent at his residence, and not on the demised premises, has also been considered sufficient. There may be substituted service by the notice being affixed on a conspicuous part of the property.

Notice must be proper.

The Act is, however, silent as to what would be considered proper notice, when by contract, express or implied, or by local usage, the tenancy is one from year to year. It has been held in some cases, that the notice to quit is required to be reasonable only.[1] The notice must, however, be to quit at the end of a year of the tenancy. A notice to quit at the middle of the year or at the end of any one but the last month of a year appears to me to be bad.[2] The notice, however, need not mention the particular day on which the tenant is required to quit. The words —"at the expiration of the current year's tenancy"— are sufficient. In some of the Calcutta cases it has been held that it is not necessary that the notice should be to quit at the end of a year of the tenancy, if the notice is otherwise reasonable.[3] But whatever the law might

[1] *Prosunno* v. *Rutton*, (1878) I. L. R. 3 Calc. 696, *sc.*, 1 C. L. R. 577; *Ram* v. *Netro*, (1878) I. L. R. 4 Calc. 339; *Jubraj* v. *Mackenzie*, (1879) 5 C. L. R. 231; *Jagut* v. *Rup*, (1882) I. L. R. 9 Calc. 48, *sc.*, 11 C. L. R. 143; *Radha* v. *Rakhal*, (1885) I. L. R. 12 Calc. 82; *Bidhumukhi* v. *Kefyutullah*, (1885) I. L. R. 12 Calc. 93; *Kali* v. *Golam*, (1886) I. L. R. 13 Calc. 3; *Abu* v. *Venkatramana*, (1893) I. L. R. 18 Bom. 107; *Ram* v. *Dina*, (1895) I. L. R. 23 Calc. 200; *Digambar* v. *Jhari*, (1899) I. L. R. 26 Calc. 761; *Sulatu* v *Jadu*, (1904) 8 C. W. N. 774; *Peria* v. *Subramanian*, (1908) I. L. R. 31 Mad. 261; *Pratap* v. *Harihar*, (1909) I. L. R. 36 Calc. 927, *sc.*, 13 C. W. N. 949; *Sukh* v. *Bhudran*, (1910) 14 C. W. N. ccc.; *Narpat* v. *Hangra*, (1911) 16 C. L. J. 30; *Durga* v. *Rajendra*, (1913) 17 C. W. N 1073.

[2] *Mahomed* v. *Jadoo* (1873) 20 W. R. 401.

[3] See *Hemangini* v. *Srigobinda*, (1901) I. L. R. 29 Calc. 203, *sc.*, 6 C. W. N. 69, and footnote 1 above But see *Betts* v. *Jamie*, (1875) 23 W. R. 271 and *Hem* v. *Radha*, (1875) 23 W. R. 440.

have been, the Transfer of Property Act and the Bengal Tenancy Act have practically settled the question. A notice to quit at the end of ten days, terminating on the 25th Jaisth,[1] or within thirty days[2] from the date of service or the date of notice, is equally bad.

Six months' notice.

The notice to quit at the end of a year of the tenancy must be served in reasonable time.[3] In all cases six months' time is sufficient, unless there is a special contract. But a notice to quit must be served before the beginning of the agricultural season or the season for making settlement with *raiyats*. If a year of the tenancy in Bengal ends in Chaitra, as it almost always does, the notice must be served at least in Phalgun. What is a reasonable notice is a question of fact and should be determined from the evidence and circumstances of each case.[4] It was at one time contended, and contended with success, in the Calcutta High Court that the service of a notice to quit was not absolutely necessary to entitle the landlord to maintain a suit for possession of the demised land, and that the suit itself might be considered as a notice.[5] But this view was not upheld by the Full Bench of the Court which held that previous service of a reasonable notice to quit was absolutely necessary to entitle the plaintiff to maintain a suit for possession against

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[1] *Ram* v. *Netro*, (1878) I. L. R. 4 Calc. 339.

[2] *Jubraj* v. *Mackenzie*, (1879) 5 C. L. R. 231; *Ram* v. *Dina*, (1895) I. L. R. 23 Calc. 200.

[3] *Bakranath* v. *Binodram*, (1868) 1 B. L. R. F. B. Vol. 25, *sc.*, 10 W. R. F. B 33; *Fanoo* v. *Brijo*, (1874) 22 W. R. 548.

[4] *Jagut* v. *Rup*, (1882) I. L. R. 9 Calc. 48, *sc.*, 11 C. L. R. 143; *Radha* v. *Rakhal*, (1885) I. L. R. 12 Calc. 82; *Bidhumukhi* v. *Kefyutullah*, (1885) I. L. R. 12 Calc. 93; *Ambabai* v. *Bhau*, (1885) I. L. R. 20 Bom. 759; *Digambar* v. *Jhari*, (1899) I. L. R. 26 Calc. 761; *Sulatu* v. *Jadu*, (1904) 8 C. W. N. 774; *Deo* v. *Meghu*, (1906) I. L. R. 34 Calc. 57, *sc.*, 11 C. W. N. 225, *sc.*, 5 C. L. J. 181; *Sukh* v. *Bhudran*, (1910) 14 C. W. N. ccc.; *Narpat* v. *Hangra*, (1911) 16 C. L. J. 30; *Durga* v. *Rajendra*, (1913) 17 C. W. N. 1073.

[5] *Hem* v. *Radha*, (1875) 23 W. R. 440.

the tenant,[1] and the Transfer of Property Act has apparently adopted the principle of this decision. It seems to me that the safest course for the landlord is to adopt the English rule, *i.e.*, six months' rule. If there is an annual rent reserved, the tenancy is one from year to year and is not terminable except at the end of a year of the tenancy. This rule of English law is consonant with justice and equity and consistent with the principle laid down in section 106 of the Transfer of Property Act.

Form of notice.

A notice in the alternative form to quit or pay additional rent is very common in this country. In one case,[2] Garth C. J. was of opinion that such a notice was bad, but the opinion of the Calcutta High Court, as also the practice of the country, are against the view expressed by the learned Chief Justice.[3] No particular form of words is necessary in this country,—it is sufficient if the notice is explicit enough as to the meaning conveyed.

Determination of sub-leases &c.

The determination of a lease of immovable property also determines sub-leases and interests created by the lessee.[4] As I have already said, the interest created by a lessee cannot be more extensive than his own interest, and as soon as the lease terminates, the landlord is entitled to have possession of the leasehold property in the same condition as it was at the date of its letting. But there is an exception in the case of a surrender of a lease, either express or

[1] *Rajendronath* v. *Bassidar*, (1876) I. L. R. 2 Calc. 146, *sc.*, 25 W. R. 329, overruling *Hem* v. *Radha*, (1875) 23 W. R. 440; *Ram* v. *Netro*, (1878) I. L. R. 4 Calc. 339; *Deo* v. *Meghu*, (1906) I. L. R. 34 Calc. 57, *sc.*, 11 C. W. N. 225, *sc.*, 5 C. L. J. 181; *Thag* v. *Karu*, (1907) 11 C. W. N. 107n.; *Nowrang* v. *Janardan*, (1917) I. L. R. 45 Calc. 469, *sc.*, 22 C. W. N. 312. But see *Ram* v. *Dina*, (1895) I. L. R. 23 Cal. 200.

[2] *Mohamaya* v. *Nilmadhab*, (1885) I. L. R. 11. Calc. 533.

[3] *Janoo* v. *Brijo*, (1874) 22 W. R. 548; *Hem* v. *Radha*, (1875) 23 W. R. 440; *Budun* v. *Khettur*, (1875) 24 W. R. 441.

[4] Act IV of 1882, Sec. 115.

implied. The landlord ought not to be allowed, to the prejudice of an underlessee or a mortgagee, to take advantage of a relinquishment, which, by law, he is not bound to accept, and which can be valid only with the consent of parties.[1] The landlord ought not also to take the same advantage as regards limitation in suits to avoid encumbrances, as he would be entitled to do on the determination of the tenancy upon the terms of the original contract or by operation of law.[2] To allow the lessor to take advantage over third persons by an action depending on the will of himself and his lessee, after such third persons have acquired rights either through acts or omissions of the lessee, may give a premium to fraud.[3]

Effect of forfeiture on sub-leases.

Forfeiture for a breach of covenant, unless it is brought about by fraud, has the same effect as the determination of the lease by efflux of time. It annuls all underleases and charges created by the lessee.[4]

Rights acquired by lessees.

The expiry of a lease does not entitle the lessor to put an end to rights acquired by the lessee by purchase of subordinate rights in the lands leased to him, whether the purchases are made on voluntary conveyances or on forced sales in execution of decrees, even if the sales are for arrears of rent. We have already seen[5] that the doctrine of merger ought not to be applied in its entirety to the dealings of people in this country. If a lessee for a term of

[1] *Venkataramanier* v. *Ananda*, (1869) 5 Mad. H. C. 120; *Heera* v. *Neel*, (1873) 20 W. R. 383; *Mellor* v. *Watkins*, (1874) L. R. 9 Q. B. 400; *Great Western Railway Co.* v. *Smith*, (1876) 2 Ch. D. 235, 253; *Judoonath* v. *Schoene Kilburn Co.*, (1883) I. L. R. 9 Calc. 671.

[2] *Brindabun* v. *Bhoopal*, (1872) 17 W. R. 377.

[3] Act IV of 1882, Sec. 115. *Heeramonee* v. *Ganganarain*, (1868) 10 W. R. 384. See also *Badri* v. *Sheodhian*, (1896) I. L. R. 18 All. 354; *Rannu* v. *Rafi-ud-din*, (1904) I. L. R. 27 All. 82; *Chhoti* v. *Sheopal*, (1910) I. L. R. 33 All. 335; *Chhiddu* v. *Sheo*, (1916) I. L. R. 39 Calc. 186.

[4] Act IV of 1882, Sec. 115. *Great Western Railway Co.* v. *Smith*, (1876) 2 Ch. D. 235, 253.

[5] *Ante*, p. 253.

years purchases a transferable subordinate right or a right of occupancy on a sale in execution for arrears due to him, there is no reason, in the law as administered in this country or in equity, why he should lose the benefit of the purchase and lose also the money which he is legitimately entitled to have, and which, perhaps, he has himself paid to his own lessor. The interest of an *ijaradar* or farmer of rent is only temporary, while that of a proprietor or a permanent tenure-holder is such that the merger of a right of occupancy, under the provisions of section 22 of the Bengal Tenancy Act, cannot, in the great majority of cases, prejudicially affect his right. The section itself contemplates the case of a proprietor or a permanent tenure-holder, and not that of an *ijaradar* or farmer of rents.

Right of occupancy.

But rights acquired by a lessee as such in the nature of increments to the demised premises pass to the lessor. If a lessee for a term of years gets the renewal of a temporary lease from Government, in his own name, the landlord will be entitled to claim the right so acquired from Government as one acquired on his behalf. The determination of a lease cannot affect any right of occupancy acquired by the lessee before the creation of the lease. The reported cases go further, and it has been held that in the course of acquisition, a lease only keeps the right in abeyance.[1] A person ought not to be made to lose a right for ever, simply because he acquires a superior right of a temporary character, and the landlord ought not to be allowed to take, from the creation of a lease, the advantage of extinguishing rights, which he would not otherwise be entitled to do.

[1] *Mokoondy* v. *Crowdy*, (1872) 17 W. R. 274 ; *Jasimuddin* v. *Beni*, (1913) 17 C. W. N. 881.

LECTURE VIII.

SERVICE TENURES.

Assignment of land for service.

In ancient societies, payments even in grain, in lieu of services rendered to the State or communities, were rare, if not quite unknown. Assignment of definite pieces of land was the usual mode for requiting public officers—the village headman (*mandal*), the accountant (*patwari*), and other important functionaries in the villages. The village watchman, the *chowkidar*, has, even now, his land—land held in his family for countless generations. The appropriation of land for the discharge of duties to the State was, in fact, the normal condition of things in almost all countries, in the earlier stages of civilisation. Military service was peculiarly within this rule.

Conversion of service into rent.

The progress of time brought on necessary changes. The tendency in all offices to become hereditary, and the hereditary possession of land for the discharge of the same duties for generations, became the source of considerable inconvenience, and the system, of allotting land for services to the State, became rarer and rarer. Where hereditary employments and consequent possession of land had become inseparably connected, the conversion of service into rent was found to be advantageous both to the holders of the land and to the State. Service was commuted into rent by mutual consent, and what were originally service-tenures became revenue-paying or rent-paying tenures.[1] Some service-tenures, however, have existed as such, up to this day, and the creation of such tenures, even in modern days, in India at least, is not very uncommon.

[1] *Ante*, p. 100.

Jaigirs.

During the five hundred and fifty-four years of Mahomedan rule in India, all traces of land-holding for military purposes, by means of grants made by Hindu kings, must have been obliterated except in the border countries such as Chhotanagpur, where Mahomedan influence was least felt, and where the necessity of protection from the ravages and attacks of wild and hilly tribes kept up the *ghatwals* and *tekaits* in hereditary succession. Semetic instinct was opposed to hereditary possession of land for military services and hereditary succession in public offices. Mr. Shore, afterwards Lord Teignmouth, after that careful and elaborate investigation which was so characteristic of that eminent Anglo-Indian statesman, said in his Minute dated the 2nd April, 1788:—"In the Moghul Empire there are no hereditary dignities. The rank of the nobles was conferred by special appointment from the Emperor for life only, and revocable at pleasure; and it was estimated by the number of horse they were supposed to command. This command was denominated *musnub*, and a *jaigir* was an appendage to it."[1] These *jaigirs* or military fiefs, granted for the support of the dignity of the officers and the troops kept up by them, were few in Bengal proper, but they were numerous in Bihar. At the time of the Decennial Settlement many of these *jaigirdars* put forth claims to hereditary title. But such claims were against the constitution of the empire. It was accordingly declared that *jaigirs* were not heritable and permanent properties, and that, upon the demise of their present possessors, they should revert to the State. This declaration was embodied later on in Regulation XXXVII of 1793.[2]

Thanadari lands.

But there is a class of service-tenures, partly military in character, which existed during the days of the

[1] Harrington's Analysis, Vol. III, 405.

[2] *Ante*, p. 81.

Moghul rule and which survived the revolution brought on by the Battle of Plassey—I mean, the tenures granted for police purposes. The origin of some of these tenures may be traced to the Hindu period. At the time of the grant of the Dewany by the Emperor Shah Alum, many of the *zemindars* were, within their respective *zemindaries*, entrusted with the rights, and charged with the duties, which properly belonged to the Sovereign. They were bound to maintain peace and order and administer justice, and for these purposes they had to retain police forces and to employ judges or *quazis*. The police was under the control of *thanadars* appointed by the *zemindars*, and lands were generally appropriated to the maintenance of these officers.

Village *chowkidars.*

In addition to the police-forces thus kept, there were, in every village, watchmen for the protection of the person and property of the villagers. These were known as *chowkidars*, *paiks*, *gorayets*, &c.[1] These village-watchmen also were remunerated by appropriation of land, and, it would seem that this practice had continued from time immemorial. In Bengal proper these lands are known as *chowkidari chakran* lands, and have recently been the subject of legislation.[2]

Ghatwals.

There was a third and a superior class of police officers, who protected the districts lying near the hills, which were exposed to the ravages of the lawless tribes who inhabited them, and who asserted a wild independence from the jungles with which they abounded. To prevent the incursions of these turbulent savages, it was necessary to guard and watch the *ghats* or the hill-passes through which the marauders used to make their hostile descent on the peaceful inhabitants of the plains.

[1] Mhar, Tillari, Paggi, Paik, Pasban, Gorayet.

[2] Act VI (B. C.) of 1870, as amended by Bengal Acts I of 1871, V of 1876, III of 1884, I of 1886 and I of 1892. See also Reg. XX of 1817, Sec. 21.

The persons who were employed to protect the *ghats* were known as *ghatwals*, and the lands held by them were known as *ghatwali lands*. The *ghatwali* tenures play an important part in the history of litigation in Bengal. In some of the districts, specially in the Chhota Nagpur Division, these *ghatwals* are known as *tekaits*.[1]

Village *chakran* lands.

The *chakran* or service lands, held for purposes other than military or police, are small in extent and not of much importance. These are lands held in the so-called village communities, by watchmen and others, or else lands held under private individuals and families for the performance of services, generally relating to religious worship. Commutation of service into rent has, of late, been very common in the latter class of lands, and, perhaps, in the course of a few years, we shall cease to hear of lands held for the performance of services to individuals or families or even deities. In Bengal proper, lands held by officers, except the watchmen in the villages, can now hardly be said to be *chakran* lands, for village communities as corporations have admittedly ceased to exist. And with their decay and dismemberment, and the want of recognition of their legal existence by the State, the power of enforcing services, from the holders of service lands, passed away, and is no longer enforceable. The descendants of the original holders now possess these lands without payment of rent or performance of service; and, in most instances, the *zemindar* or the person who represents him in the collection of rents, is capable of enforcing only occasional service. The *chowkidar* alone, having to perform a duty, which is necessary for the preservation of life and property, and which is enforced by the Government itself, has survived the ravages of time.

[1] *Lelanund* v. *Government of Bengal*, (1855) 6 M. I. A. 101.

Appropriation of *thanadari* lands by Government.

The few years that followed the Battle of Plassey, the years of the double government and the uninformed government of the civil officers of the East India Company, have been counted as the most miserable period in the history of the British rule in India. In this transition stage, the state of these provinces was most deplorable. Famine with its attendant evils, murder and rapine, cast a gloom over the whole country. The Mahomedan Nawab was weak, and his police administration was weaker than ever. The position of the *zemindars* was uncertain. They had no inducement to improve the condition of the people, and were busy with schemes for self-preservation. The freebooters and *dacoits* became the scourge of the country, whom even the strong hand of Warren Hastings could not sufficiently repress. When Marquis Cornwallis determined to assess land-revenue, for a period of ten years in the first instance, with a view to the same being made ultimately permanent, and to convert the *zemindars* into land-owners, it was proposed to make the landholders responsible for the peace of these districts, as they had been under the Mahomedan government. Regulation LXXII of 1791 declared the *zemindars* responsible for the peace of the country, and the *thanadars* and the *chowkidars* were allowed to remain under their control. But within the course of a year, the Government found that the *thanadars* and other police officers appointed by the *zemindars* were very inefficient, and incompetent to repress *thugs* and *dacoits*, and it had to appoint its own officers to assist in keeping peace and order. This was extremely inconvenient, and in 1792, Regulations XLIX and L were promulgated, by which the police establishments maintained by landholders were abolished, and the Government took upon itself exclusively the duty of preserving peace and preventing crime, by means of a police force of

its own. As a necessary consequence, the Government declared its intention of resuming all police-lands and discontinuing any allowances to *zemindars* for the expenses of the police establishment. Regulation XLIX of 1792 made provision for the appointment by Government of police forces, in different stations throughout the provinces, each under the charge of a *daroga* or Superintendent, the Magistrate of the district having the direct control over them. The village *chowkidars* or watchmen were declared to be subject to the control of the *darogas*, and they had to apprehend and send offenders, as well as to bring informations to the *darogas* and not to the *zemindars*.

Regulation L of 1792.

Regulation L of 1792 made provisions for the levying of a police tax, and for obtaining information as to the nature of allowances made to the *zemindars* and of the lands held by them for maintaining *thanadars* and other police officers, and the Magistrates of districts were required to report on these matters. The Regulation and the circulars issued under it referred only to *thanadars* and superior police officers, and not to *chowkidars* or village watchmen.[1]

Regulation I of 1793, Sec. 8, cl. 4.

The enquiries directed to be made by Regulation L of 1792 were not completed, when the Decennial Settlement was declared to be permanent. In the amended Code of the Regulations of 1793, provision had, therefore, to be made for the resumption and assessment of *thanadari* lands. Regulation I of 1793, Section 8, clause 4 enacted that the *jama* declared permanent was exclusive of, and unconnected with, the lands or allowances for keeping up *thanas* or police establishments, and that the Governor-General in Council had the power to resume the whole or any part of such allowances or lands according as he thought proper.

[1] *Lelanund* v. *Government of Bengal*, (1855) 6 M. I. A. 101.

The clause further declared that the allowances or the produce of the lands, which might be resumed, would be applied exclusively to the defrayal of the expense of the police. The amount that was to be thus collected was not to be added to the permanent *jama*, but was to be assessed and collected separately. The amounts thus separately collected were known in Bengal as 'police *jama*' or simply 'police,' though they are collected in the same way as land-revenue.

Other Police Regulations.

Regulation XXII of 1793 re-enacted, with alterations and amendments, the Police Regulations of 1792, whereby the Government had discharged the landholders from the superintendence of the police establishment. Regulation XXIII of 1793 re-enacted the provision of Regulation L. of 1792. Provision was made in this Regulation for the assessment and collection of a police tax by the Collectors of land-revenue, and section 36 of the Regulation provided—"The Collectors are to report all allowances that may have been made to the proprietors of land for keeping up police establishments, either by deductions from their *jama*, or permitting them to appropriate the produce of lands for that purpose, or in any other mode, which may not have been already resumed, with their opinion how far the whole or any portion of such allowances can with equity be resumed, in consequence of the proprietors of land being exonerated from the charge of keeping the peace, as declared in Regulation XXII of 1793." This Regulation was repealed by Regulation VI of 1797, as any further provisions with respect to *thanadari* lands were considered to be unnecessary. The *thanadari* lands were by this time converted into revenue-paying estates or were amalgamated with estates within which they lay, the additional revenue called 'Police-tax' having been imposed as additional burden upon them. Though some of these lands were formed into estates, subsequent

experience has shewn that they have been so intermixed with the lands of parent estates that they are almost incapable of identification.

Village *chowkidari* lands.

The next class of police lands were those appropriated for the maintenance and support of village *chowkidars*. Previous to the passing of Regulations XLIX and L of 1792, the *zemindars*, having the duty of maintaining peace and order, had to appoint not only the *thanadars*, but also a large number of other officers under the names of *chowkidars*, *paiks*, *pasbans and gorayets*, for the maintenance of order in particular villages, for the protection of themselves and their properties, and also for collecting rents and enforcing services personal to themselves. The village functionaries, including the *chowkidar*, became, to a certain extent, the servants of the *zemindars*, and, though the services of the other village functionaries ceased in course of time, those of the *chowkidars* could not be dispensed with. The two classes of *chowkidars*, those appointed by the *zemindar* himself and to whom he granted *chakran* lands for service, and those who held lands for generations as village watchmen, became almost undistinguishable in character. They agreed in this, that they had lands known as *chakran* lands, that they acted under the orders of the same class of masters, and that they were performing the same sort of duties, but they differed materially in origin. Regulation I of 1793 (section 8, cl. 4), and the previous Regulations passed before that year did not distinctly refer to *chowkidars* or village watchmen. Section 41 of Regulation VIII of 1793 enacted—"The *chakran* lands, or lands held by public officers and private servants in lieu of wages, are also not meant to be included in the exception contained in section 36. The whole of these lands, in each province, are to be annexed to the *malguzari* lands, and declared

responsible for the public revenue assessed on the *zemindaries*, independent *taluqs*, or other estates in which they are included, in common with all other *malguzari* lands therein." Section 36 of the Regulation excepted only *lakhiraj* lands, though *thanadari* lands were also excluded from settlement.

Regulation XX of 1817, Sec. 21.

While the Government made over absolutely, to the landholders, its supposed proprietary right, in all lands lying within the ambit of an estate, excepting only *thanadari* and *lakhiraj* lands, and included *chakran* lands in the assessment of land revenue, the question necessarily arose, and arose very shortly after the Settlement, as to whether the lands held by village *chowkidars* were so included within the estate, as to make them the servants of the *zemindar*, removable at his pleasure, or whether these *chowkidars* should be under the direct control of the Government and the superior police officers. The distinction between *chakran* lands held by public officers and those held by private servants in lieu of wages, was easily lost sight of. The Government, having taken the responsibility of the police administration of the country, was, to a certain extent, entitled to have superintendence over village *chowkidars*, and rules were passed from time to time for enforcing strict control over them. Regulation XX of 1817, which repealed all the previous Police Regulations, enacted that *darogas* of police should prepare and keep at the police stations (*thanas*) "a complete register of village watchmen employed within the limits of the authority of the said *darogas*," and these watchmen were declared subject to their orders. The Regulation further enacted—"Upon the death or removal of any of the watchmen, the landholders and other persons to whom the right of nomination to such vacancies shall belong, shall send the names of the persons whom they may appoint to the *daroga* of the

jurisdiction, that they may be registered by him as above directed."[1]

Jay Krishna Mukerji v. *Collector of Burdwan.*

In 1855, the late Babu Jay Krishna Mukherji, a *zemindar* of Utterpara, in the district of Hughli, raised, with reference to a piece of land in *putni taluq* Govindapur, in the district of Burdwan, an important question as to the relative rights of the State and the *zemindar* with respect to *chowkidari* lands. It was contended on his behalf, as he had recently purchased the *taluq* at a sale under Regulation VIII of 1819, that the land held by the *chowkidar* was for performance of services *personal* to the *zemindar*, and that the *chowkidar* was removable at his pleasure. The Collector of the district, on behalf of the Government, contended, on the other hand, that the land was *chakran*, reserved for the performance of police or *chowkidari* duties, and that the *zemindar* had no power to interfere with the possession of the land, as long as the policemen carried out their various duties. The Collector further contended that *chowkidars* were not bound to attend to duties personal to the *zemindar*. Lord Kingsdown, in delivering the judgment of the Judicial Committee, said, "We can find nothing in these Regulations (referring to Regulation XX of 1817 and the previous Regulations) which takes from the *zemindar* the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the *chowkidar* such services as he was bound by law or usage to render to the *zemindar*. It might well happen that, either by long usage or by the original contract, when the lands were granted, the village watchman might become liable, in addition to his police duties, to the performance of other services personal to the *zemindar*, as the collection of his revenue and the like.

[1] Reg. XX of 1817, Sec. 21.

Indeed, the rules laid down for the Decennial Settlement appear to us to recognise the interests both of the *zemindars* and the public in lands of this description. They were not to be included in the *malguzari* lands for the purpose of increasing the *jama*, because the *zemindars* had not the full benefit of them; but they were to be included in the *malguzari* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person, whose duty would in part be to attend to public interests would vest."[1] The lands in suit were not held as *thanadari* lands, in the strict sense of the term, but as *chowkidari* lands appropriated to the maintenance of an officer whose duty it was to act as village watchman. It was further held that the *chowkidars* in the district of Burdwan had always been accustomed to perform services personal to the *zemindars* as well as to the Police. Their Lordships of the Judicial Committee accordingly held, that the lands in question were at the time of the Decennial Settlement appropriated, and still are liable, to the maintenance of such an officer, and that the *taluqdar* has no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they were subject. The decree passed by Her Majesty declared "that the lands in question" were "to be considered as appropriated to the maintenance of a *chowkidar* or village watchman," "and that the right of appointing such an officer belonged to the *taluqdar*, and that such officer" was "liable to the performance of such services to the *taluqdar* as, by usage in the *zemindari* of Burdwan, *chowkidars* have been accustomed to render to the *zemindar*."[1]

[1] (1864) 10 M. I. A. 16, *sc.*, 1 W. R. P. C. 26. See also *Ranjit* v. *Kali*, (1917) I. L. R. 44 Calc. 841, *sc.*, L. R. 44 I. A. 117, *sc.*, 21 C. W. N. 609, *sc.*, 25 C. L. J. 660.

Remarks.

The case of *Joykishen Mookerjee* versus *The Collector of East Burdwan and Brijo Roy, Phareedar*[1] set at rest the disputes arising out of a confusion between the ancient *chowkidari chakran* lands and lands granted by the *zemindars* for the performance of private duties. In each case, it is now a question of fact to be decided from the evidence of usage, as to whether the *chowkidar* is bound to render to the *zemindar* services other than what are strictly *chowkidari*.[2] If the person in occupation of *chowkidari* lands in a village has been accustomed to perform private duties, in addition to his *chowkidari* duties, he must continue to do so, as if, in the words of section 41 of Regulation VIII of 1793, "the *chakran* lands" are lands held by a private servant performing both public and private duties.[3] The Government, however, was always unwilling to allow the *zemindars* the right of enforcing private services from the *chowkidars*, and in many districts, it has been held that such private duties to the *zemindars* are not performable by village watchmen. But whether the service was strictly police or not, the power of appointment of a new *chowkidar*, in cases of vacancy from death, and of removal for negligence and misconduct or for inability to perform *chowkidari* duties, was always with the landholder.[3] The *zemindar* had no right to take possession of the *chowkidari* lands and hold them discharged from the obligation of maintaining *chowkidars*. As regards strictly police duties, the

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[1] (1864) 10 M. I. A. 16, *sc.*, 1 W. R. P. C. 26.

[2] (1865) *Mooktakesiee* v. *Collector*, (1865) 4 W. R. 30; *Baidya* v. *Kaminikant*, (1907) 6 C. L. J. 572; *Ranjit* v. *Kali*, (1917) I. L. R. 44 Calc 841, *sc*, L. R. 44 I. A. 117, *sc*, 21 C. W. N. 609, *sc.*, 25 C. L. J. 499. See also *Ram* v. *Secretary*, (1916) I. L. R. 43 Calc. 1104, *sc.*, L. R. 43 I. A. 172, *sc.*, 20 C. W. N. 1245, *sc.*, 24 C. L. J. 296.

[3] *Joykishen* v. *Collector*, (1864) 10 M. I. A. 16, *sc.*, 1 W. R. P. C. 26; *Ranjit* v. *Kali*, (1917) I. L. R. 44 Calc. 841, *sc.*, 44 I. A. 117, *sc.*, 21 C. W. N. 609, *sc.*, 25 C. L. J. 499.

chowkidar was under the superintendence of the higher police officers and the magistrates of the districts, and in cases of misconduct, such police officers might require the landholder to nominate other *chowkidars*.

Incidents of *chowkidari* lands.

Chowkidari lands were heritable, only in this sense, that if the son or other heir of the *chowkidar* was competent to perform the duties his predecessor used to do, he was always elected, but it is difficult to say whether the *zemindar* was bound to elect him. It would seem, however, from analogy to the case of *ghatwals*, that the succession was hereditary, if the heir was competent to perform the duties attached to the lands. The lands, however, were inalienable and impartible, and the acts of one *chowkidar* with reference to them would not bind his successor. They were not saleable in execution of decrees. Non-performance of service, or refusal to serve, worked forfeiture.[1]

Act VI of 1870 and the amending Acts.

The decision of the Privy Council in *Joy Kishen Mookerjee* v. *The Collector of East Burdwan* was followed, within six years, by the passing of Bengal Act VI of 1870 and the amending Act I of 1871. The police administration in most districts in Bengal required strict control and vigilant supervision over village watchmen, and the interference of landholders was a frequent source of trouble and consequent maladministration. The Village *Chowkidari* Act of 1870,[2] after making provisions for the appointment of *panchayets*, enacted—"All *chowkidari chakran* lands before the passing of this Act assigned for the benefit of any village in which a *panchayet* shall be appointed shall be transferred in manner and subject as hereinafter mentioned to the *zemindar* of the estate or tenure

[1] *Hurrogobind* v. *Ramrutno*, (1878) I. L. R. 4 Calc. 67; *Ansar* v. *Grey*, (1905) 2 C. L. J. 403; *Mritunjoy* v. *Kenatullah*, (1906) 11 C. W. N. 46, *sc.*, 5 C. L. J. 53.

[2] Act VI (B.C.) of 1870.

within which may be situate such lands."[1] The assessment was to be fixed at one-half of the annual value of the land, and the Collector of the district was, after the approval of the assessment, to transfer such land to the *zemindar*, subject to the assessment as a permanent charge.[2] The assessed amount is realizable under the provisions of the Sale-laws,[3] and is subject to the same rules regarding the avoidance of encumbrances. The amount thus assessed becomes a part of the police-fund of the locality, the land itself ceasing to be *chowkidari* land. The appointment and dismissal of *chowkidars* rest, under the Act, with the *panchayet*, subject to the sanction of the Magistrate of the district.[4] Section 57 of the Act declared—"That the right to the performance of any services to any person by the occupier of *chowkidari* lands transferred to any *zemindar* shall wholly cease and determine." The Act has been further amended by Acts V of 1871, 1886 and 1892.

Commission for determination of *chowkidari chakran* lands.

Questions as to whether any and what lands are *chowkidari chakran* lands occasionally cause difficulties and disputes.[5] [It is now settled that *chowkidari chakran* lands within the meaning of the Village *Chowkidari* Act of 1870 are lands which having been assigned by Government have not been taken into account in the assessment of land revenue.[6]]. The Act of 1870 made provision for the appointment of a Commission in any district or part of a district for the determination of such lands, and every order of the

[1] Act VI (B.C.) of 1870, Sec. 48. [2] *Ibid*, Sec. 49.

[3] Act XI of 1859, Sec. 55; Act VII (B.C.) of 1868; Act VI (B. C.) of 1870, Secs. 50 to 56.

[4] Act VI (B C.) of 1870, Sec. 35.

[5] *Secretary* v. *Kirtibas*, (1914) I. L. R., 42 Calc. 710, *sc.*, L. R. 42 I. A 30, *sc.*, 19 C. W. N. 65, *sc.*, 21 C. L. J. 31; *Satis* v. *Natabar*, (1918) 28 C. L. J. 281.

[6] *Kirtibash* v. *Secretary*, (1910) 15 C. W. N. 300; *Birbar* v. *Secretary* (1910) 14 C. L. J. 151.

Commissioners, made under the provisions of section 61 of the Act, was declared to be final and conclusive, respecting all matters which the Act authorized the Commission to determine.[1] The words "final and conclusive" in section 61 of the Act are used in their ordinary and literal sense, and where a Commission has been appointed under section 58 of the Act for the purpose therein mentioned, and the Commissioners have ascertained and determined that certain lands are *chowkidari chakran* lands, their decision, in the absence of fraud or non-compliance by the Commissioners with the provisions of the Act, is conclusive evidence in any subsequent civil suit, that the lands are what the Commissioners have found them to be.[2]

Regulation XX of 1817, section 21.

The Village *Chowkidari* Act of 1870 has not been extended to all villages in the Bengal Provinces, and section 21, of Regulation XX of 1817, is still in force in the villages to which the Act has not been extended.[3] It has, however, been held that section 41 of Regulation VIII of 1793 has been, by implication, repealed in parts of districts to which the Act of 1870 has been made applicable.[4]

Resumption of *chowkidari chakran* lands.

[The resumption of *chowkidari chakran* lands and settlement with landholders at half of the assessed *jama* have raised important legal questions. The questions may be classified thus:—

(*a*) The character of resumed lands;

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[1] Act VI (B.C.) of 1870, secs. 58, 60 and 61.

[2] *Nobokrista* v. *Secretary*, (1885) I. L. R., 11 Calc. 632; *Bejoy* v. *Kristo*, (1894) I. L. R. 21 Calc. 626; *Hiralal* v *Premamoyee*, (1905) 2 C. L. J. 306; *Baijnath* v. *Nand*, (1907) I. L. R. 34 Calc. 677, *sc.*, 11 C. W. N. 803, *sc.*, 6 C. L. J. 84; *Saradindu* v. *Benode*, (1913) 18 C. W. N. 143; *Sarat* v. *Secretary*, (1916) 21 C. W. N. 238. See also *Madhu* v. *Girish*, (1905) 2 C. L. J. 302 and *Narendra* v. *Jogi*, (1905) I. L. R. 32 Calc. 1107, *sc.*, 2 C. L. J. 107.

[3] Act I (B.C.) of 1871, section 1. See also *Secretary* v. *Kirtibas*, (1914) I. L. R. 42 Calc. 710, *sc.*, L. R. 42 I. A. 30, *sc*, 19 C. W. N. 65, *sc.*, 21 C. L. J. 31.

[4] *Kashim* v. *Prasanna*, (1906) I. L. R. 33 Calc. 596, *sc.*, 10 C. W. N. 598, *sc.*, 5 C. L. J. 299.

(*b*) To which *zemindar* resumed lands are to be transferred;

(*c*) Right of settlement-holder under Government and subordinate tenure-holders;

(*d*) Rights of *chowkidars*;

(*e*) Acquisition of rights of occupancy in resumed lands; and

(*f*) Nature of suits for recovery of possession of *chakran* lands and period of limitation.

Character of resumed lands.

Resumed *chowkidari chakran* lands when transferred to the *zemindar* have not the character of an estate impressed upon them for all purposes.[1] It is now well-established that *chowkidari chakran* lands form part of the parent estate, though there are a few scattered decisions to the contrary or of doubtful import.[2] These resumed lands do not become part of the *mal* lands of the *zemindari*.[3]

Resumed land to whom to be transferred.

Under section 48 of the Act of 1870, the resumed lands are to be transferred not to the *zemindar* of the village in which they are situated geographically, but to the *zemindar* of the estate to which the lands appertain and of which they form part and parcel.[4]

Rights of *zemindar* and of Government on resumption.

Consistent with what has been held to be the character of resumed lands generally, it has been held that the estate taken by the *zemindar* is in confirmation and by way of continuance of his existing estate.[5]

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[1] *Tincowri* v. *Satya*, (1913) 19 C. L. J. 236.

[2] *Rakhal* v. *Madhab*, (1910) 15 C. W. N. 61, *sc*, 13 C. L. J. 109; *Harak* v. *Charu*, (1910) 15 C. W. N. 5, *sc.*, 13 C. L. J. 102; *Brojendra* v. *Deb*, (1917) I. L. R. 45 Calc. 465, *sc.*, 27 C. L. J. 491; *Sourendra* v. *Rajendra*, (1917) 22 C. W. N. 660. But see *Kashim* v. *Prasanna*, (1906) I. L. R. 33 Calc. 596, *sc.*, 10 C. W. N. 598, *sc.*, 5 C. L. J. 299; *Kazi* v. *Ram*, (1906) I. L. R. 34 Calc. 109, *sc.*, 11 C. W. N. 201, *sc.*, 5 C. L. J. 33 and *Hasari* v. *Kshaunish*, (1915) 22 C. L. J. 290.

[3] *Jonab* v. *Rakibuddin*, (1905) 9 C. W. N. 571, *sc.*, 1 C. L. J. 303.

[4] *Bejoy* v. *Kristo*, (1894) I. L. R. 21 Calc. 626; *Pratap* v. *Secretary*, (1906) I. L. R. 33 Calc. 390, *sc.*, 10 C. W. N. 637, *sc.*, 3 C. L. J. 530.

[5] *Ranjit* v. *Kali*, (1917) I. L. R. 44 Calc. 841, *sc.*, L. R. 44 I. A. 117, *sc.*, 21 C. W. N. 609, *sc.*, 25 C. L. J. 499; *Sib* v. *Surendra*, (1917) 22 C. W. N. 997, *sc.*, 27 C. L. J. 560; *Sourendra* v. *Rajendra*, (1917) 22 C. W. N. 499.

Rights of settlement-holder and subordinate tenure-holders.

Whatever doubts might have been thrown on this point by some earlier decisions, it has been consistently held for the last few years that the effect of a transfer of resumed *chowkidari chakran* lands to the *zemindar* is to make the *zemindar* hold the property subject to the rights previously created by him in favour of subordinate holders.[1] The provisions of the Act of 1870 also support this view.[2] The rights of the *zemindar* and the *putnidar* as between themselves are regulated by the conditions under which the *putni* was originally created,[3] and even where definite information is not available as to the rights of the *zemindar* and *putnidar*, the *putnidar* has the right to the *chowkidari chakran* lands.[4] It naturally follows from the above that the *zemindar* is not entitled to make settlement with third parties after resumption and such third parties do not acquire any right by such settlement against *putnidars*.[5] Even a clause in a *putni* lease which reserves to or confers on the *zemindar* the right to appoint or dismiss *chowkidars* has not the effect of reserving to the *zemindar* and excluding from the *putni* the *chowkidari chakran* land.[6] Nor can the *zemindar*, by allowing the old *chowkidar* to remain on the land and accepting rent from him, protect the latter from ejectment at the instance of the *putnidar*.[7]

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[1] *Krishna* v. *Bhagwan*, (1907) I. L. R. 35 Calc. 185, *sc.*, 12 C. W. N. 161, *sc.*, 7 C. L. J. 85; *Harak* v. *Charu*, (1910) 15 C. W. N. 5, *sc.*, 13 C. L. J. 102; *Ranjit* v. *Kali*, (1917) I. L. R. 44 Calc. 841, *sc.*, L. R. 44 I. A. 117, *sc*, 21 C. W. N. 609, *sc.*, 25 C. L. J. 499; *Radha* v. *Ranjit*, (1917) 27 C. L J. 532.

[2] Act VI (B.C.) of 1870, Sec. 51.

[3] *Upendra* v. *Pratap*, (1903) I. L. R. 31 Calc. 703, *sc.*, 8 C. W. N. 320; *Girish* v. *Hem*, (1905) 5 C. L. J. 28; *Harak* v. *Charu*, (1910) 15 C. W. N. 5, *sc.*, 13 C. L. J. 102; *Radha* v. *Ranjit*, (1917) 27 C. L. J. 532.

[4] *Nafar* v. *Bejoy*, (1917) 22 C. W. N. 487. But see *Nitya* v. *Bejoy*, (1908) 7 C. L. J. 593.

[5] *Sourendra* v. *Rajendra*, (1917) 22 C. W. N. 660.

[6] *Nafar* v. *Bejoy*, (1917) 22 C. W. N. 487.

[7] *Upendra* v. *Pratap*, (1903) I. L. R. 31 Calc. 703, *sc.*, 8 C. W. N. 320.

When resumed *chowkidari chakran* lands are sold for non-payment of Government assessment, the *zemindar* and the *putnidar* are both entitled to share in the surplus sale-proceeds.[1]

A *putnidar* is not bound to take a fresh settlement from the *zemindar* after resumption.[2] The *zemindar* is, however, equitably entitled to refuse settlement asked for by the *putnidar* unless the *putnidar* agrees to pay a fair and equitable rent.[3] As to what is fair and equitable rent, there has been some conflict of decisions. In the oldest case on the point it was held that the *putnidar* was bound to pay to the *zemindar* such rents for these lands as corresponded to the proportion between the gross collections and the *putni* rent formerly payable by him.[4] In a later case it was held that the *zemindar* is entitled to impose on the *putnidar* "a proportionate share in the profits," and it was further held "it is not correct to hold that the *putnidar* is not bound to pay to the *zemindar* more than the assessment made by the Collector."[5] In a still later case it was held that the right of a landlord to claim rent on settlement with a *putnidar* of resumed lands "is not restricted to the amount of assessment made by the Collector under section 49 of the Village *Chowkidari* Act."[6] In a very recent case, it was held, "where definite information is not available as to the exact mode in which the *putni* rent was originally settled, the same basis of calculation in making assessment is adopted, as between the State and the *zemindar*

[1] *Hari* v. *Nistarini*, (1905) 5 C. L. J. 30.

[2] *Sourendra* v. *Rajendra*, (1917) 22 C. W. N. 660.

[3] *Harak* v. *Charu*, (1910) 15 C. W. N. 5, *sc.*, 13 C. L. J. 102.

[4] *Hari* v. *Mukund*, (1900) 4 C. W. N. 814.

[5] *Rajendra* v. *Hira*, (1910) 14 C. W. N. 995. See also *Kazi* v. *Ram*, (1906) I. L. R. 34 Calc. 109, *sc.*, 11 C. W. N. 201, *sc*, 5 C. L. J. 33.

[6] *Gopendra* v. *Taraprasanna*, (1910) I. L. R. 37 Calc. 598, *sc.*, 14 C. W. N 1049.

on the one hand the *zemindar* and *putnidar* on the other hand. The assessment is to be made on the basis of the annual value calculated according to the average rates of letting land similar in quality in the neighbourhood."[1] It has also been held in a very recent case, "If, in assessing the *putni* rent, the profits of all the lands including the *chowkidari chakran* lands were fully taken into account, the *putnidar* will not be liable to pay additional rent for the *chakran* lands when they come into his possession; but otherwise, the *putnidar* is bound to pay to the *zemindar*, in addition to the first amount assessed on resumption, a fair share of the profits derivable from the land."[2] It may be generally deduced from the abovementioned decisions that the assessment is to be based on the original contract between the *zemindar* and the *putnidar*, if it touches the matter; but where the original contract is silent, the *putnidar* is bound to pay fair and equitable rent according to the particular conditions of each case.[3]

It has also been held that as between the *putnidar* and *durputnidar*, the original contract between them must affect *chowkidari chakran* lands on resumption and settlement.[3]

Rights of *chowkidars*.

A *chowkidar* is entitled to remain on the *chowkidari chakran* land so long he performs the services that may be legally demanded of him.[4] Where, however, no services are required of *chowkidars* on resumption, the *chowkidari chakran* lands cease to be *chakran* lands as soon as they are enfranchised,[5] and a *chowkidar* can have no right to continue in such lands. The transferee

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[1] *Radha* v. *Ranjit*, (1917) 27 C. L. J. 532.

[2] *Khondkar* v. *Umes*, (1917) 27 C. L. J. 494.

[3] *Pursottum* v. *Khetra*, (1906) 5 C. L. J. 143.

[4] *Hurrogobind* v. *Ramrutno*, (1878) I. L. R. 4 Calc. 67.

[5] *Jonab* v. *Rakibuddin*, (1905) 9 C. W. N. 571, *sc.*, 1 C. L. J. 303. See also *Raj* v. *Phakir*, (1913) 19 C. W. N. 478.

of a *zemindar*,[1] however, cannot regard the tenant of the old *chowkidar* as a trespasser, where, upon the *chowkidar's* vacating the lands, the *zemindar* took possession and allowed the *chowkidar's* tenants to occupy the lands as his tenants.

Occupancy rights in resumed lands.

Rights of occupancy do not as a rule accrue in lands held under a service-tenure.[2] But it has been held that such rights may be acquired by tenants holding under a *chowkidar* from before the introduction of the Village *Chowkidari* Act of 1870.[3]

Nature of suits for recovery of possession of *chakran* lands by *putnidar*. Limitation.

A suit by a *putnidar* or a *darputnidar* to recover possession of *chakran* lands found to be part of the *putni* is not an action for specific performance of contract, but for possession of *chakran* lands included in the *putni*,[4] and is governed by Art. 144 of the Limitation Act.[5]]

Ghatwali tenures.

The services, which the *ghatwals* were required to perform, have under the strong hand of British administration, ceased to be of much importance. In many districts, they may be dispensed with; in others, the emoluments of the *ghatwals* are, at the present day, disproportionately high. The Government, on the one hand, and the *zemindar* on the other, claimed to take advantage of the want of necessity of further retaining their services, while the *ghatwals* themselves claimed to have hereditary title to hold the *ghatwali* lands, whether their services were required or not. This

[1] *Sib* v. *Surendra*, (1917) 27 C. L. J. 560.

[2] *Hurrogobind* v. *Ramrutno*, (1878) I. L. R. 4 Calc. 67; *Mritunjoy* v. *Kenatullah*, (1906) 11 C. W. N. 46 *sc*, 5 C. L. J. 53. See also Bengal Tenancy Act (VIII of 1885), s. 181.

[3] *Ram* v *Ram*, (1904) 8 C. W. N. 860; *Rakhal* v. *Madhab*, (1910) 15 C. W. N. 61, *sc.*, 13 C. L. J. 109; *Bepin* v. *Tincouri*, (1911) 15 C. W. N. 976, *sc.*, 13 C. L. J. 271.

[4] *Banwari* v. *Bidhu*, (1908) I. L. R. 35 Calc. 346, *sc*, 12 C. W. N. 459, *sc*, 7 C. L. J. 439; *Harak* v. *Charu*, (1910) 15 C. W. N. 5, *sc*, 13 C. L. J. 102. But see *Ranjit* v. *Radha*, (1907) I. L. R. 34 Calc. 564 and *Rajendra* v. *Hira*, (1910) 14 C. W. N. 995.

[5] *Ranjit* v. *Maharaj*, (1918) 23 C. W. N. 198.

triangular contest was, a few years ago, a source of constant litigation. The Banaili Raj, as owning the large estate known as Kharakpur in Bhagalpur, was tempted or compelled to enter the law-courts as a litigant rather too constantly; and you will find in the Law Reports a good many conflicting judgments of the highest court, sometimes of different judges, and sometimes of the same judges in review. But the law as to the rights of the parties has, at last, been settled, partly by the Privy Council, and in some instances by the good sense of the contending parties, by amicable settlement. The study of this branch of the law is still, however, one of great importance. [The nature and incident of *ghatwali* tenures not being the same everywhere,[1] it would be convenient to deal with the districts separately.]

Burdwan.

The *ghatwali* tenures, with which the legal profession in this country is most familiar, are those of Beerbhoom, Bishenpur and Bhagalpur. But almost all the hilly districts in the west of Bengal have 'police service' tenures which go by that name. In the district of Burdwan there were *ghatwals*, whose nominal duty was to protect the hill passes and travellers. Some of these, though they go by the name of *ghatwals*, hold their lands rent-free, some pay quit-rent to Government known as *panchaki*, while others pay a similar quit-rent to the *zemindars*.[2] [Where the *zemindar's* claim as the rightful recipient of quit-rents paid by *ghatwals* is established by evidence, the plea that the *ghatwals* perform police duties also, as a ground of the exemption of rent, cannot be any ground for an abatement of *zemindar's* claim.[3] If such lands are, however, proved to be excluded from the Decennial Settlement and that they are rent-free, as excluded from the *zemindar's*

[1] *Leelamund* v *Kunhya*, (1872) 17 W. R. 315

[2] Hunter's Statistical Account of Bengal, Vol IV, p. 85.

[3] *Government* v. *Mahtabchund*, (1863) 2 Sev. 96.

settlement, they are exempt from the *zemindar's* demand.[1]] The latter tenures are sometimes called *panchaki* tenures. [The rights and interest of each *ghatwal* in his tenure last for his life.][2]

Bankura.

The *ghatwali* tenures of Bankura were originally *jaigirs* granted by the Raj of Bishenpore, which was at one time an independent Hindu principality. It is said that the Raj came into existence more than eleven hundred years ago. The conditions, on which the *ghatwali* lands were held under the Raj, were that the mountain passes should be protected and the roads kept open for travellers. Some of these *ghatwals* paid no rent, and others paid a small quit-rent called *panchaki*. Originally, there were forty-three rent-paying service-tenures, the rent being payable to the Raja of Bishenpore. In 1802, these *ghatwali* tenures were separated from the *zemindari*, and the *ghatwals* were placed immediately under the English officer in charge of the district. The *ghatwals* were placed under direct Government supervision, and the *mahals* were entered in the District Register of estates. These *ghatwali* tenures are neither transferable nor heritable,[3] as similar tenures in Bhagalpur and Beerbhoom are. But the male heirs of the *ghatwals* are appointed to succeed to their posts, unless there are very strong objections to the contrary.[4] "The heir usually gets a new *sanad* of office; and if he is a minor, a servant or his guardian officiates for him, until he comes of age."[3] [The dismissal of a *ghatwal* carries with it the forfeiture of his tenure.[5] In the absence of special circumstances, a *ghatwal* is, as a

[1] *Government* v. *Mahtabchund*, (1863) 2 Sev. 96.

[2] *Jogeswar* v. *Nimai*, (1868) 1 B. L. R. vii.

[3] Hunter's Statistical Account of Bengal, Vol. IV. pp. 254-5.

[4] *Secretary* v. *Poran*, (1878) I. L. R. 5 Calc. 740.

[5] *Secretary* v. *Poran*, (1878) I. L. R. 5 Calc. 740. But see *Jogendra* v. *Kali*, (1905) 9 C. W. N. 663 and *Hemendra* v. *Upendra*, (1915) I. L. R. 43 Calc. 743, *sc*, 20 C. W. N. 446, *sc.*, 22 C. L. J. 419.

general rule, not competent to grant a lease of the tenure in perpetuity, and his successors are not bound to recognise such an encumbrance.[1]] "Although the *ghatwali* lands are not alienable by right, the *ghatwals* contrive to encumber them by deeds of all descriptions, short of out-and-out sales. They mortgage them and grant *mokurrari* and *maurusi* leases, but inasmuch as a *ghatwali* tenure only endures during the personal exercise of his functions by the *ghatwal*, such encumbrances are easily avoidable, and are the source of much oppression and fraud."[2] In Harington's Analysis, published shortly after the promulgation of the Regulation about the Beerbhoom *ghatwals*, the Bishenpur *ghatwali* tenures are described to be small, specific portions of land, in different villages, assigned for the maintenance of the *ghatwals* and their subordinate officers, such as *paiks* and *chowkidars*. The distinction between these *ghatwali* tenures and the common *chowkidari chakrans* is thus expressed—"*first*, that" these tenures "being expressly granted for purposes of police, at a low assessment, which has been allowed for, in adjusting the revenue payable by landholders to Government, at the formation of the Permanent Settlement, the land is not liable to resumption, nor the assessment" liable "to be raised beyond the established rate, at the discretion of the landholders: *secondly* that although the grant is not expressly hereditary, and the *ghatwal* is removable from his office, and the lands attached to it" liable to be taken away "for misconduct, it is the general usage, on the death of a *ghatwal*, who has faithfully executed the trust committed to him, to appoint his son, if competent, or some other fit person in his family to succeed to the office."[3] [The occupation

[1] *Narain* v. *Badi*, (1901) I. L. R. 29 Calc., 227, *sc.*, 6 C. W. N. 94.

[2] Hunter's Statistical Account of Bengal, Vol. IV, p. 255.

[3] Harington's Analysis, Vol. III, p. 511. *Erskine* v. *Government*, (1867) 8 W. R. 232; *Farquharson* v. *Dwarkanath*, (1871) 8 B. L. R. 504, *sc.*, 14 M. I. A. 259.

of land which is included in a *ghatwali* tenure and which has been held under a *ghatwal* for more than 12 years by a *raiyat* does not necessarily confer on him a right of occupancy.[1] The Bengal Tenancy Act does[2] not expressly lay down any rule of law with respect to acquisition of either occupancy or non-occupancy right in land held by *ghatwals* as service tenures, and the incidents of a *ghatwali* tenure, which are declared by section 181 of that Act not to be affected by the provisions of the Act, are nowhere specified.[1] The growth of such rights would, however, seem to be inconsistent with the nature of service tenures, but a custom or local usage might grow up in any local area as to recognition of occupancy rights and such a custom might be binding on successive *ghatwals*.[1] It has been also held that there is nothing in the nature of a *ghatwali* tenure to show that as long as such a tenure existed, the presumption under section 50 of the Bengal Tenancy Act[2] could not by reason of section 181 of the Act,[2] arise.[3] Occupancy rights can be acquired under section 6 of Act X of 1859 and section 6 of Act VIII (B. C.) of 1869, and such rights have not been taken away by section 181 of the Bengal Tenancy Act.][4]

Beerbhoom Regulation XXIX of 1814.

The *ghatwali* tenures of Surhut and Deoghur, called, in Bengal Regulation XXIX of 1814, '*ghatwalis* in the *zemindari* of Beerbhoom,' have their main incidents defined by that Regulation. *Perganah* Surhut lies in the north-western part of the Beerbhoom District, and Deoghur is now a part of the Sonthal *Perganahs*. These *ghatwalis* consist of entire villages, and some of them contain extensive tracts of land. The preamble to Regulation XXIX of 1814, passed for the settlement of these

[1] *Mohesh* v. *Pran*, (1904) 1 C. L. J. 138.

[2] Act VIII of 1885.

[3] *Gouri* v. *Ram*, (1905) 2 C. L. J. 379.

[4] *Upendra* v. *Ram*, (1906) I. L. R. 33 Calc. 630; *Sitikanta* v. *Bipra*, (1918) 22 C. W. N. 763.

ghatwali mahals, states—" Every ground exists to believe that, according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, in perpetuity, subject nevertheless to the payment of a fixed and established rent to the *zemindar* of Beerbhoom and to the performance of certain duties for the maintenance of the public peace and support of the police." The rent payable by the *ghatwals* to the *zemindar* of Beerbhoom is made payable directly to a Government officer, and the amount is credited to the revenue account of the *zemindari*.[1] [When a *ghatwal* becomes a defaulter, it is in the power of the authorities, to transfer his tenure, and that power is not put an end to by the money being offered before the tenure is actually made over to another person.][2] The *mahals* are saleable for arrears of rent.[3] But the most important provision in the Regulation is that contained in section 2—" The *ghatwals*.....and their descendants in perpetuity shall be maintained in possession of the lands so long as they shall respectively pay the revenue assessed upon them, and they shall not be liable to any enhancement of rent, so long as they shall punctually discharge the same and fulfil the other obligations of their tenure."[4] [The word " descendants" in section 2 just quoted is not to be construed in its restricted meaning, and includes the widow of a deceased *ghatwal*, who may therefore be one of his heirs.][4] Succession to *ghatwali* is regulated by no rule of *kulachar* or family custom, nor by the Mitakshara law, but solely by the nature of *ghatwali* tenure, which descends undivided to the party which succeeds

[1] Reg. XXIX of 1814, Secs. 3 & 4. See *Chandra* v. *Asutosh*, (1914) I. L. R. 41 Calc. 812, *sc.*, 18 C. W. N. 659, *sc.*, 19 C. L. J. 342.

[2] *Chittro* v. *Assistant Commissioner*, (1870) 14 W. R. 203.

[3] Reg. XXIX of 1814, Sec. 5.

[4] See *Kustoora* v. *Monohur*, (1864) W. R. Gap. Vol. 39 and *Chhatradhari* v. *Saraswati*, (1894) I. L. R. 22 Calc. 156 for rules as to succession.

to and holds the tenure as *ghatwal*, and a female is not incapable of holding a *ghatwali* tenure.][1] Though nominally included in the Beerbhoom estate, they have no connection with the *zemindar*, the Government being the sole director.[2] [But though the tenure is hereditary, the Government has the power of dismissing the *ghatwal* for misconduct.[3] When a *ghatwal* is so dismissed and has no male member of the family fit to be appointed at the time of his dismissal, there is a forfeiture of the tenure so far as his family is concerned, and where in such a case a stranger to the family is permanently appointed in his place, a subsequently born son of the dismissed *ghatwal* on the death of the latter and after the tenure has passed to another family, cannot claim it on the ground that it is his hereditary tenure.[4] It is for the Government to say whether the heir is a fit and proper person, and so far as that question is concerned, the Government is the sole judge, and Civil Courts cannot go into that question[5]; but the Government cannot disapprove of the heir or withhold its sanction upon any ground it likes, and apart from the question whether he is a fit and proper person.[4] Where land forming part of a *ghatwali* tenure in the District of Beerbhoom is taken up for public purposes, neither the *zemindar*, nor the under-tenants of the *ghatwal* can claim a proportionate share in the compensation money payable for such land.[4] The money so obtained carries with it all the incidents of the original *ghatwali* tenure, and the *ghatwal* for the time being is entitled only to the interest accruing therefrom during his life time.][6] The *ghatwali* lands are not partible,

[1] See footnote 4 of previous page. [2] Reg. XXIX of 1814, Sec 5.

[3] *Lall* v. *Brojo*, (1868) 10 W R. 401.

[4] *Hemendra* v. *Upendra*, (1914) 18 C W. N. 1036, on appeal (1915) I. L. R. 43 Calc. 743, *sc.*, 20 C. W. N. 446, *sc.*, 22 C. L. J. 417. See *Bukronath* v. *Nilmoni*, (1878) I L R. 5 Calc. 389, *sc.*, 4 C L. R. 583, on appeal (1882) I. L. R. 9 Calc. 187, *sc.*, L. R. 9 I. A. 104.

[5] *Debee* v. *Sree*, (1864) 1 W. R. 321.

[6] *Ram* v. *Joher*, (1875) 14 B. L. R. App. 7.

and not divisible into small portions amongst the heirs of the *ghatwals*, as the very end for which the grants were made would be defeated by the lands being frittered away into small portions.[1] The tenure usually descends to the eldest son; and though the estates of these *ghatwals* are estates of inheritance according to the terms of the Regulation, no *ghatwal* has the power of alienation, nor are the lands attachable in execution of a decree for personal debts.[2] The holder of a *ghatwali* tenure is entitled to the whole income of the estate, and its rents are not liable, in the hands of the heir in possession, to attachment for the debts of his ancestor or of the deceased holder.[3] A *ghatwal* has not ordinarily the power to grant a lease of the whole or any portion of his *ghatwali* tenure in perpetuity.[4] He cannot create any encumbrance, so as to bind his successor.[5] [But it has been held that permanent leases granted by the *ghatwals* of Beerbhoom prior to the Decennial settlement, for the due performance of the Police duties for which the lands were originally granted to the *ghatwals* and have been held from generation to generation, can not be set aside at the instance of the present *sardar ghatwals* and that the creation of such under-tenures is not beyond the powers of the *ghatwals*.][6]

[1] *Hurlall* v. *Jorawun*, (1837) 6 Sel. Rep. 204, *sc.*, I. D. 7 O. S. 820.

[2] *Sartukchunder* v. *Bhugut*, [1853] S. D. A. 900, *sc.*, I. D. 13 O. S. 682; *Bally* v. *Ganei*, (1882) I. L. R. 9 Calc. 388. See also *Kustoora* v. *Benoderam*, (1865) 4 W. R. Misc. 5; *Rajkeshwar* v *Bunshidhur*, (1896) I. L. R. 23 Calc. 873; *Kesobati* v. *Mohan*, (1912) I. L. R. 39 Calc. 1010, *sc.*, 16 C. W. N. 802. See also *Midnapore Zemindari Co.* v. *Appayasami*, (1918) I. L. R. 41 Mad. 749. See also *Udoy* v. *Hari*, (1901) I. L. R. 28 Calc. 483 as to Sonthalia.

[3] *Binode* v. *Deputy*, (1866) 6 W. R. 129 and in review (1867) 7 W. R. 178; *Nilmani* v. *Madhab*, (1868) 1 B. L. R. A. C. J. 195, *sc.*, 10 W. R. 255; *Grant* v. *Bangsi*, (1871) 6 B. L. R. 652, *sc.*, 15 W. R. 38.

[4] *Rungololl* v. *Deputy*, (1862) Marsh 117, *sc.*, W. R. F. B. Vol. 34, *sc.*, Ind. Jur. O. S. 34, *sc.*, 1 Hay 200; *Grant* v. *Bangsi*, (1871) 6 B. L. R. 652, *sc.*, 15 W. R. 38; *Narain* v. *Badi*, (1901) I. L. R. 29 Calc. 227, *sc.*, 6 C. W. N. 94. But see *Mukurbhano* v. *Kostoora*, (1866) 5 W. R. 215.

[5] *Grant* v. *Bangsi*, (1871) 6 B. L. R. 652, *sc.*, 15 W. R. 38; *Kesobati* v. *Mohan*, (1912) I. L. R. 39 Calc. 1010, *sc.*, 16 C. W. N. 802.

[6] *Mukurbhanoo* v. *Kostoora*, (1866) 5 W. R. 215.

Act V of 1859.

The power to grant leases by holders of *ghatwali* lands in the district of Beerbhoom, for terms extending beyond the term of their own possession, is, however, exercisable under certain restrictions contained in Act V of 1859. The development of the mineral resources of the country, discovered only a few years before, the clearance of jungles, and the erection of dwelling houses and manufactories, required that leases for long periods should be granted, and that the Government should be able to give good title to the grantees. It was, accordingly, enacted that the *ghatwals* should have the power of granting leases for any period, provided, however, that the Commissioner of the Division approved of the grants and certified the approval by an endorsement on the leases, with his own signature.[1] If the *ghatwali* lands are under the superintendence of the Court of Wards, the Court of Wards or the Commissioner of the Division has the power to grant such leases. [The *digwari* tenures in Manbhoom, though similar in some respects to the *ghatwali* tenures in Beerbhoom, are not analogous, and as to minerals and the incidents of the *digwars* are different.[2]] This Act has finally settled all questions about the right of alienation and creation of encumbrances and under-tenures by the Beerbhoom *ghatwals*. The grants made to persons who have of late erected buildings in and near Deoghur are valid, being under the provisions of Act V of 1859, and approved by the Commissioner of the Division. Leases, not for the special purposes mentioned in the Act, are now no more valid than they were before the passing of the Act.

Manbhoom.

[Some Manbhoom tenures, known as *Digwari* tenures, are hereditary and inalienable. The *digwars* are

[1] Act V. of 1859, Sec. 1.

[2] *Durga* v. *Braja*, (1912) I. L. R. 39 Calc. 696, *sc.*, L. R. 39 I. A. 133, *sc.*, 16 C. W. N. 482, *sc.* 15 C. L. J. 461.

appointed by Government and liable to be dismissed by Government for misconduct. On dismissal, the next male heir, if fit for office, is appointed.][1] A holder of a *ghatwali* service-tenure, in Manbhoom, subject to the payment of quit-rent to the *zemindar*, died, leaving his rent for the last three years unpaid. The *zemindar* was held not entitled to sue his son and successor in the tenure for such arrears, as it was a service-tenure, which could not be made liable for the debts of the person, who had ceased to hold the same.[2] The dismissal of a *ghatwal* carries with it the forfeiture of his tenure.[3] The dismissal itself is an executive act of the Government, and the Civil Courts cannot direct that he should be reinstated.[4]

Lohardagga.

In the district of Lohardagga, the *ghatwals* hold under the *zemindar* of Chhotanagpur, and the Government has nothing whatever to do with them. Many of these *ghatwals* are holders of hereditary *ghatwali* lands. It appears that the *zemindar* has the right of resuming these lands, if the *ghatwals* do not perform the services required of them.[5]

Chhotanagpur.

In Chhotanagpur, the *ghatwali* tenures are much of the same nature as *ghatwali jaigirs* in the districts of Beerbhoom and Bhagalpur, where the Government is interested in the performance of police duties by the *ghatwals*.[6] [The *digwari* tenures of Chhotanagpur correspond closely with what in other cases have been

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[1] *Brojanath* v. *Durga*, (1907) I. L. R. 34 Calc. 753, *sc.*, 12 C. W. N. 193, *sc.*, 5 C L. J. 583; on appeal, *Durga* v. *Braja*, (1912) I. L. R. 39 Calc. 696, *sc.*, L. R. 39 I. A. 133, *sc.*, 16 C. W N. 482, *sc.*, 15 C. L. J. 461.

[2] *Nilmani* v. *Madhab*, (1868) 1 B. L R. A. C. 195, *sc.*, 10 W. R. 255.

[3] *Secretary* v. *Poran*, (1878) I. L. R. 5 Calc. 740.

[4] *Hemendra* v. *Upendra*, (1914) 18 C. W. N. 1036; on appeal (1915 I. L. R. 43 Calc. 743, *sc.*, 20 C. W. N. 446, *sc.*, 22 C. L. J. 419.

[5] Hunter's Statistical Account of Bengal, Vol. XVI., p. 374.

[6] *Ibid*, Vol. XVI, p. 366-376.

termed *ghatwali*. The *digwars* are not personal servants of the *zemindar*.[1] The power of Government, although exercised through the *zemindar*, is always recognised as supreme with respect to the supervision over the *digwars* in regard to the discharge by them of their police duties and their dismissal or fresh appointment.[1] The dismissal of a *digwar* and the substitution of a new system of rural police supposed to be of superior quality does not entitle the *zemindar* to resume the lands of the *digwar*.[1] Where the right to nominate the *ghatwal* rests with the Government a *ghatwali* tenure is not saleable in execution of a decree for arrears of rent.[2]]

Hazaribagh.

In Hazaribagh, there were thirty-eight *ghatwali* tenures,[3] and each of those tenures was held by a head *ghatwal* called *tekait*. They were semi-independent, but paid a small annual sum as rent. Of these thirty-eight, twenty-six have, since 1780, became *mokurrari*. tenure-holders. Ten others also subsequently obtained *mokurrari* leases. These *tekaits* have now no services to perform, but are merely holders of permanent tenures. The remaining two tenures were confiscated. [The Kharakdiha *ghatwalis* are known locally as "*gadis*." These *ghatwals* now pay rent to the Government. The law of succession prevailing in these *ghatwalis* is yet in a chaotic condition. It may be noted, however, that in a recent case, regarding succession to *gadi* Serampore, the Patna High Court has held that a female is not debarred from succession.[4]]

Kharakpur.

The *ghatwali* tenures, in *mahal* Kharakpur in Bhagalpur, have a history of their own. The tenures in Beerbhoom and Bankura came under the direct superintendence of the Government in the early part of the

[1] *Nam* v. *Ganjhu*, (1889) 12 C. W. N. 178.

[2] *Midnapur Zamindari Co.* v. *Ajambar*, (1916) 1 P. L. J. 601.

[3] Hunter's Statistical Account of Bengal, Vol. XVI., p. 129.

[4] *Jagadamba* v. *Wazir*, (1917) 2 P. L. J. 239.

British rule, and the Government compelled the tenure-holders to perform the police duties which they had been performing from ancient times. But the Government did not find it necessary to exact these services from the Kharakpur *ghatwals* for a good many years. Their duties had fallen into abeyance, and the Government, accordingly, determined, in the year 1836, to subject the *ghatwali* lands to resumption proceedings under Regulations II of 1819 and III of 1828. This was the beginning of a series of cases. In *Raja Lelanund Sing Bahadoor* v. *The Government of Bengal*,[1] their Lordships of the Judicial Committee, after reviewing the whole law with reference to *thanadari* lands and other police-service lands, say,—"They (the *ghatwali* tenures) were held by a tenure created long before the East India Company acquired any dominion over the country, and though the nature and extent of the right of the *ghatwals* in the *ghatwali* villages may be doubtful, and probably differed in different districts and in different families, there clearly was some ancient law or usage by which these lands were appropriated to reward the services of the *ghatwals*; services which, although they would include the performance of duties of police, were quite as much in their origin of a military as of a civil character, and would require the appointment of a very different class of persons from ordinary police officers. We find accordingly that the office of *ghatwal* in this *zemindari* was frequently held by persons of high rank." Lands of this description could not properly be considered as lands of which the *zemindars* had been, before the year 1792, permitted by the government to appropriate the produce to the maintenance of *thana* or police establishments. Their Lordships accordingly held, after reviewing the facts of the particular case, that the *ghatwali* lands of Kharakpur were a part of the

[1] (1855) 6 M. I. A. 101, (125), *sc.*, 4 W. R. P. C. 77.

zemindari of Kharakpur and were included within the settlement of that *zemindari*. The claim of the Government to resume these lands was dismissed. The Government, however, was entitled to enforce police duties, though it had not done so for many years, and though the performance of these services was no longer necessary. After the decision of the Privy Council in 1855, the Government entered into an arrangement with Raja Lelanund Sing. The *ghatwals* were absolved from the performance of the services required of them, as in fact such services were unnecessary, and the Government accepted from the Raja the sum of Rs. 10,000 in lieu of these services. The retirement of the Government from the field of litigation limited the contest to the grounds of dispute between the Raja and the *ghatwals*.

Conflict of authorities.

In the course of litigation between the *zemindar* and the *ghatwali* tenure-holders of Bhagalpur, it was, at one time, gravely doubted whether these *ghatwalis* were ordinarily descendible in the regular line of succession. The late Sudder Court[1] was inclined to hold that they were not, though the Beerbhoom *ghatwalis* were so, and were declared so to be by the Legislature. It was also thought that the *zemindar* had the right to resume the lands, whenever the services were not required. In 1857, the Sudder Court stated,—"When that service ceases or is no longer required to be performed, the title of the *ghatwal* ceases also, and the *zemindar*...has the right to resume possession of them." In 1866, a Division Bench of the High Court at Calcutta[2] expressed the same opinion, saying that, notwithstanding possession for a long period and payment of quit-rent, a *ghatwal*, not holding under a *sanad* conveying a hereditary

[1] *Jugmohun* v. *Neelanund*, [1857] S. D. A. 1812.

[2] *Neelanund* v. *Surwan*, (1866) 5 W. R. 292. See also *Sona* v. *Leelanund*, (1865) 5 W. R. 290, in which the Court relied on the terms of the grant, and *Neelanund* v. *Nusseeb*, (1866) 6 W. R. 80.

indefeasible right, would not be entitled to retain possession, after the performance of the duties imposed upon him was no longer required, as he had been allowed to enjoy the profits of the land in lieu of wages only. The tenures, it was said, lapsed when the services were no longer required and could not be rendered. But in a previous case, another Division Bench of that Court had taken a different view, the learned Judges being of opinion that the *ghatwals* of Kharakpur held a perpetual hereditary tenure, at a fixed *jama*, payable in money and service, could not be evicted by the *zemindar* except for misconduct.[1]

Koolodeep Narain v. *Mohadeo Singh.*

The question came before a Full Bench of the High Court at Calcutta in *Baboo Koolodeep Narain Singh* v. *Mohadeo Singh and others*,[2] and the learned Chief Justice, Sir Barnes Peacock, in an elaborate judgment, which was affirmed by the Privy Council,[3] discussed fully the law as regards service-tenures of the character of the ancient *ghatwalis*, which had, as held by the Privy Council in the case to which I have already referred, existed from before the Decennial Settlement. These tenures were held to be hereditary from long possession, from their descent from ancestor to heir without objection for several generations, and from the recognition on the part of the legislature of the hereditary nature of similar tenures in Beerbhoom, notwithstanding that the *sanads* did not contain words of inheritance. The Full Bench case[2] and the judgment of the Judicial Committee[3] above referred to, further decided that the *zemindar* was incompetent to resume the lands at his option and put an end to the *ghatwalis*. Neither had the *zemindar* the power to put an end to the tenures

[1] *Munrunjun* v. *Lelanund*, (1865) 3 W. R. 84. See also *Manoraj* v. *Lilanand*, (1865) 2 B. L. R. A. C. J. 125, note.

[2] (1866) B. L. R. F. B. Vol. 559, *sc.*, 6 W. R. 199.

[3] (1871) 11 B. L. R. 71, *sc.*, 14 M. I. A. 247.

on the ground that the services were no longer required. The learned Chief Justice is reported to have said—"Some cases were cited to show that, even assuming these lands to be subject to a *ghatwali* tenure, the *zemindar* has a right, whenever he pleases, to dispense with the *ghatwali* services and to take back the lands. Now, I must say that this is the first time I have ever heard such a contention as that a landlord can dispense with the services upon which lands are held, whenever he pleases, and take back the estate. It is not because the services are released or dispensed with, or become unnecessary, that the estate can be resumed. If a grantor release the services or portion of the services, upon which lands are holden, the tenant may hold the land free from the services; but the landlord cannot put an end to the tenure and resume the lands. Many services upon which very valuable estates are held are of little value now. The estates may be very valuable, and the services almost valueless. But some large landed proprietors would be somewhat astonished if they were told that the services have been dispensed with, and their estates are liable to be resumed. It might as well be contended that, if lands were granted at a small quit rent, the landlord might relinquish or dispense with the payment of the rent and take back the lands." His Lordship added,—"Clearly the *zemindar* had no right to dispense with those services which had been reserved by the former Government for the public benefit. Suppose the former Government had granted land for services of a religious nature to be performed, the British Government would not require those services, but that would be no reason for determining the tenure of the person who held the land upon these services, as long as he is willing to perform them. The tenure is not to be determined merely at the will or caprice of the landlord, when the land has become

valuable probably by the exertions and the expenditure of capital by the tenant."

Forbes v. *Taki.*

These principles of universal application, enunciated by the Full Bench of the Calcutta High Court, were affirmed by the Privy Council in the case of *Alexander John Forbes* v. *Mir Mahomed Taki*, decided in 1870.[1] That was a case from the District of Purnea, for the resumption, not of *ghatwali* lands, but of lands granted by a rent-free *sanad*, in 1775, to keep off wild elephants, and to maintain a body of men for the purpose of protecting the *raiyats* and cultivating the lands. The necessity of supporting a body of men for keeping off wild elephants having long ceased to exist, the *zemindar* instituted a suit to resume the lands. The Judicial Committee expressed their concurrence in the principles laid down by Sir Barnes Peacock in *Baboo Kooladeep Narain Sing* v. *Mohadeo Sing.*[2] The judgment in the latter case came up before the Privy Council in the following year [3] and was affirmed with a remark by their Lordships that is was entirely consistent with the well-recognised principles of justice and equity. The cases of the Kharakpur *ghatwals*, in which Raja Leelanand Sing was the plaintiff, and which were suits for resumption of *ghatwali* lands on the ground that the services were no longer required and that the Government had not only dispensed with them, but had itself undertaken to perform them, receiving from the Raja an additional sum of Rs. 10,000, were heard by the Judicial Committee of the Privy Council in the year 1873. Their Lordships said that the *sanads*, under which the *ghalwals* held, did not merely give certain lands in lieu of wages to hired servants, but were grants of land upon the condition of

[1] (1870) 5 B. L. R. 529, *sc.*, 13 M. I. A. 238, *sc.*, 14 W. R., 438.

[2] (1866) B. L. R. F. B. Vol. 559, *sc.*, 6 W. R. 199.

[3] (1871) 11 B. L. R. 71, *sc*, 14 M. I. A. 247.

certain services. The *zemindar* had not the power to dismiss them, merely because he did not require their services, but he had the power to dismiss them for incompetence or for not performing the services required of them. It is now settled law that neither the Government nor the *zemindar* has the right to disturb these *ghatwals* in their respective possessions.

Enhancement of rent of *ghatwali* lands.

Some expressions in the judgment of the Privy Council in *Raja Lilanand Singh Bahadur and others* v. *Thakur Munorunjun Singh and others*[1] led to another litigation for the enhancement of rent of certain *ghatwali* tenures. The Privy Council, in the case just mentioned, had expressed a doubt as to whether the *zemindar* was entitled to enhance the rent, supposing the tenures had been created subsequent to the Permanent Settlement. All the other Kharakpur *ghatwali* cases had been compromised. In this case, the High Court at Calcutta held that the grants had been made prior to the Decennial Settlement at fixed rent, and that as long as the *ghatwals* were able and willing to perform the services for which the grants had been made, the *zemindar* had no right to enforce payment of enhanced rent, on the ground that the services were no longer required. Neither by the general law, nor by any custom of the district, nor by any terms of the defendant's tenures, could there be any enhancement of rent.[2]

Incidents of *ghatwalis* in Kharakpur.

Ghatwali tenures in Kharakpur are not transferable, either by voluntary sale, or in execution of decrees against the *ghatwals*. But if such alienation is assented to by the *zemindar*, the transferee may have a good title.[3]

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[1] (1873) 13 B. L. R. 124 (135), *sc.*, L R. I. A. Sup. Vol. 181.

[2] See *Leelanund* v. *Munrunjun*, (1877) I. L. R. 3 Calc. 251.

[3] *Leelanund* v. *Doorgabutty*, [1864] W. R. 249; *Gooman* v. *Grant*, (1869) 11 W. R. 292; *Kali* v. *Anand*, (1887) I. L. R. 15 Calc. 471, *sc.*, L. R. 15 I. A. 18, affirming H. C. decision in the case reported in (1884) I. L. R. 10 Calc. 677.

The assent of the *zemindar* may be presumed from circumstances, such as acquiescence for more than twelve years.[1] In this and in other respects, such as impartibility, and the succession of the eldest son to the exclusion of his brothers, the Bhagalpur *ghatwalis* resemble the *ghatwalis* of Bishenpur and Beerbhoom.[2] Having regard to the origin and nature of the *ghatwali* tenures, they cannot be governed by the ordinary rules of the Hindu law of inheritance.[1] It has been held in a Kharakpur case[3] that a *ghatwali* estate is not necessarily held by males to the exclusion of females.

Monghyr.

In the district of Monghyr, the *ghatwalis* were originally revenue-free service-tenures granted to petty hill chieftains, and the holders thereof were required to prevent the inroads of hillmen of Ramgarh and Western Sonthalia. These tenures are now found chiefly in *perganah* Chakai. The tenure-holders now pay revenue after resumption, though they still go by the name of *ghatwals* and *tekaits*. In *Tekaet Doorga Pershad Singh* v. *Tekaetnee Doorga Kooeree*,[4] which was a case of one of these *tekaits of perganah* Chakai, the dispute was as to *kulachar*, and the main question was whether females could succeed, the tenure having originally been *ghatwali*. Pontifex J. in delivering the judgment of the High Court at Calcutta said—"It would be difficult to hold that a *ghatwali* estate must necessarily be held by male to the exclusion of females." But the property in dispute in that case had long ceased to be a true *ghatwali* tenure. It was an ordinary revenue-paying estate, and the descent was regulated by the ordinary law of inheritance, and the plaintiff's suit

[1] *Kali* v. *Anand*, (1887) I. L. R. 15 Calc. 471, *sc.*, L. R. 15 I. A. 18, affirming H. C. decision in the case reported in (1884) I. L. R. 10 Calc. 677.

[2] *Mahbub* v. *Patasu*, (1868) 1 B. L. R. A. C. J. 120, *sc.*, 10 W. R. 179.

[3] *Doorga* v. *Doorga*, (1873) 20 W. R. 154.

[4] (1873) 20 W. R. 154.

against the female heir of the last male owner was accordingly dismissed.[1]

Apportionment of compensation-money.

In the case of an apportionment of compensation-money, payable on an acquisition of the *ghatwali* land for public purposes, it has been held that neither the *zemindar* nor the under-tenants of the *ghatwal* can claim any share, and that the compensation-money carrying with it all the incidents of the original *ghatwali* tenure, the *ghatwal*, for the time being, is entitled alone to the interest accruing therefrom during his life-time. This was a Beerboom case, and the *ghatwal* was considered to be a life tenant, without power of alienation, and the *zemindar* was held to have suffered nothing by the acquisition.[2] A different view, however, had been taken in another Beerbhoom case, in which the *zemindar* had been allowed one-fourth of the compensation-money.[3]

Village headmen, &c.

After what has been said of the service-tenures created for the performance of police duties, the consideration of service-tenures of other kinds cannot detain us long. Section 41 of Regulation VIII of 1793 included these latter tenures in the assessment of estates for the purposes of the Settlement, whether the services were of a public or private nature. The State was interested only in the preservation of peace and protection of the life, liberty and property of the subject, and it did not interest itself in the performance of other public duties. The introduction of the *zemindar* and the vesting of absolute proprietary right in him, in all the villages in his estate, made all services for which lands had been granted or held, other than police services, ***private***, in the sense that they were to be rendered to the *zemindar* himself or other landholders and farmers

[1] *Doorga* v. *Doorga*, (1878) I. L. R. 4 Calc. 190, *sc.*, L. R. 5 I. A. 149. See also *Doorga* v. *Doorga*, (1870) 13 W. R. 10.

[2] *Ram* v. *Joher*, (1875) 14 B. L. R. App 7.

[3] *Bhageeruth* v. *Jabur*, (1872) 18 W. R. 91. See *Ram* v. *Mahomed* (1875) 23 W. R. 376.

who claimed under assignment from him. The village headman, *patel*, *mokuddum* or *mandal*, became, in many instances, the person chiefly responsible to the *zemindar* for rents realisable from the *raiyats*, and he became also their representative in their disputes with the *zemindar*. The village accountant (*karnam* or *patwari*) became the servant of the landholder and began to keep the accounts for him. The post of *patwari* was attempted by various Regulations[1] to be kept up by the Government, in the interest of the tenantry, but in Bengal proper, the village *patwaris* had long ceased to exist as village accountants. In Bihar, where they still exist as a class, they have not, in many districts, service-lands, and where they have, they enjoy the lands at the will and pleasure of the landholders, and the Collectors seldom interfere with their work.

Kanungoes. Revenue-free lands, held by *kanungoes* in the province of Bihar in virtue of their office, were directed to be resumed under Regulation II of 1816, and the office of *kanungo* was abolished. In 1825, the Government directed, by Regulation XIII of that year, that the lands held by *kanungoes* should be settled at half the rent with their possessors, the *kanungoes* or their representatives, who were called *Kanungo Minhaidars*. The service-tenures held by them have thus ceased to exist.

Village priest &c. The village priests or astrologers and other Brahmins who have or had to perform religious duties for village corporations hold *lakhiraj* lands, and they are now entitled to hold them irrespective of the services for which the lands are supposed to have been originally granted. These services are no longer enforceable by process of law. Such is also the case with barbers and other village functionaries.

Conclusion. The grant of land, burdened with any service, is distinguishable from the grant of an office, the

[1] Reg. VIII of 1793; Reg. XII of 1817; Reg. I of 1819.

performance of the duties annexed to which are remunerated by the use of land.[1] In the former case, the grant is made to the grantee, upon the condition of his performing certain services as a burden. In the latter case there is no grant of land, properly so called, but the produce of the land is used as wages. A grant of the former kind may be so expressed as to make the continued performance of the service a condition to the continuance of the tenure, so that, the service ceasing, the tenure may determine. Again the grants of land, partly as reward for past services and partly for the performance of future service, *pro servitiis impensis et impendendis*, are not uncommon. The instances we have given of *ghatwali* tenures fall under either the first or the third class; and whether the services are performable for the benefit of private individuals, or for the public or for both, the services cannot be dispensed with, at the option of the grantor or his heirs. In most cases of grants for private services, made many years ago, written instruments are not available, and occupation of land and performance of services from generation to generation are often the only material from which we have to infer an original grant for particular purposes. The presumption, in such cases, is in favour of the continuity of possession in future, and the grants would naturally be supposed to come under the first or the third head and should not be taken to

[1] *Koolodeep* v. *Mohadeo*, (1866) B. L. R. F. B. Vol. 559, *sc.*, 6 W. R. 199 per Jackson J.; *Forbes* v. *Taki*, (1870) 5 B. L. R. 529, *sc.*, 13 M. I. A. 438, *sc.*, 14 W. R. P. C. 28; *Lilanand* v. *Munorunjun*, (1873) 13 B. L. R. 124, *sc.*, L. R. I. A. Sup. Vol. 181; *Savitriava* v. *Anandrav*, (1875) 12 Bom. H. C. Rep. 224; *Keval* v. *Talukdari Settlement Officer*, (1877) I. L. R. 1 Bom. 586; *Naro* v. *Collector*, (1877) I. L. R. 6 Bom. 209; *Jagjivan* v. *Imdad*, (1882) I. L. R. 6 Bom. 211; *Radhabai* v. *Anantrav*, (1885) I. L. R. 9 Bom. 198; *Radha* v. *Budhu*, (1895) I. L. R. 22 Calc. 938; *Bhimapaiya* v. *Ramchandra*, (1896) I. L. R. 22 Bom. 422; *Lakhamgavda* v. *Keshav*, (1901) I. L. R. 28 Bom. 305; *Sobhanadri* v. *Venkatanarasimha*, (1902) I. L. R. 26 Mad. 403, affirmed by P. C. in (1905) I. L. R. 29 Mad. 52, *sc*, L. R. 33 I. A. 46, *sc.*, 10 C. W. N. 161, *sc.*, 3 C. L. J. 1; *Brojanath* v. *Durga*, (1907) I. L. R. 34 Calc. 753, *sc.*, 12 C. W. N. 193, *sc.*, 5 C. L. J. 583; *Mahadeo* v. *Kalanand*, (1913) 19 C. L. J. 241.

be grants in lieu of wages for hiring servants. It is to the interest of the receiver of the services to bring the original grant within the second head. The receiver of the services may, in such a case, determine the tenure at any time by notice—the notice being reasonable.[1] The holding of land for service, though the service may be called rent in the broad sense of the word, creates no right of occupancy or any other statutory right recognised by the law.[2] The Bengal Tenancy Act expressly declares—"Nothing in this Act shall affect any incident of *ghatwali* or other service tenure, or in particular, shall confer a right to transfer or bequeath a service-tenure, which before the passing of this Act was not capable of being transferred or bequeathed."[3] If the services are no longer required or have necessarily ceased, the land is resumable at the option of the grantor,[4] and the grantee has not the law in his side to resist the resumption. The grantee may also, after due notice, surrender the land declining to serve in future. The grantor cannot insist upon the performance of the services; non-performance of services only works forfeiture.[5]

Use of land as wages.

Lands granted in lieu of wages are incapable of being assigned or alienated, the grant being for personal services, and assignment being inconsistent with its nature. Vicarious performance may, however, be allowed.[6] The beneficial interest of the grantees may,

[1] *Lakshmi* v. *Chendri*, (1884) I. L. R. 8 Mad. 72; *Radha* v. *Budhu*, (1895) I. L. R. 22 Calc. 938; *Narasayya* v. *Venkatagiri*, (1899) I. L. R. 23 Mad. 262; *Ansar* v. *Grey*, (1905) 2 C. L. J. 403; *Anandamoyee* v. *Lakhi*, (1906) I. L. R. 33 Calc. 339, *sc.*, 3 C. L. J. 274; *Yellava* v. *Bhimappa*, (1914) I. L. R. 39 Bom. 68.

[2] *Hurrogobind* v. *Ramrutno*, (1878) I. L. R. 4 Calc. 67; *Upendra* v. *Ram*, (1906) I. L. R. 33 Calc. 630.

[3] Act VIII of 1885, Sec. 181; *Mohesh* v. *Pran*, (1904) 1 C. L. J. 138.

[4] *Chunder* v. *Bheem*, [1864] W. R. (Act X) 37; *Nilmoney* v. *Sheo*, [1864] W. R. 324.

[5] *Hurrogobind* v. *Ramrutno*, (1878) I. L. R. 4 Calc. 67.

[6] *Shib* v. *Moorad*, (1868) 9 W. R. 126.

by custom or usage, be alienated or sold in execution of decrees.[1] But the grantor having always the power to put an end to the services, the purchaser or alienee is left to his mercy. When a small rent is reserved, a service-tenure may, however, be sold in execution for its own arrears.[2]

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[1] *Ramessur* v. *Golamee*, (1875) 24 W. R. 309.

[2] *Nilmonee* v. *Kashee*, (1876) 25 W. R. 206.

LECTURE IX.

Raiyats.

Marquis Cornwallis on the rights of the Indian *raiyats.*

The enquiries made and the discussions evoked on the proposal to make the Decennial Settlement permanent are highly interesting, and they afford materials for defining, with sufficient accuracy, the rights and liabilities of all classes of the Indian people at the time, either as owners or occupiers of land. The interest of the dumb millions who cultivated the land, and whose labour without capital was in truth the proverbial gold of India, was uppermost in the mind of the generous and truly noble Marquis, the Governor-General. His Lordship, while recommending concession of proprietary right to the *zemindars,* thus expressed his views in a Minute:—"The privilege which the *raiyats* in many parts of Bengal enjoy, of holding possession of the spots of land which they cultivate, so long as they pay the revenue assessed upon them, is not by any means incompatible with the proprietary rights of the *zemindars.* Whoever cultivates the land, the *zemindar* can receive no more than the established rent, which, in most places, is fully equal to what the cultivator can afford to pay. To permit him to dispossess one cultivator for the sole purpose of giving the land to another, would be vesting him with a power to commit a wanton act of oppression, from which be could derive no benefit."[1] His Lordship added:—"With the fixity of the demand of the Government a spirit of improvement would be diffused throughout the country and the *raiyats* would find further security;" and he hoped that "withont any further and detailed rules of law regulating

[1] Appendix to the Fifth Report, No. 5.

the rights and obligations of the parties, the relations between the *zemindars* and the actual occupiers of land would be smooth and that things would adjust themselves as of necessity with the fixity of Government demand."

Views of Sir John Shore.

Sir John Shore, with greater experience of Indian thoughts and habits, was of a different opinion and he expressed himself strongly against the Governor-General's views. He observed :—" The rules by which the rents are demanded from the *raiyats* are numerous, arbitrary, and indefinite ; that the officers of Government, possessing local control, are imperfectly acquainted with them, whilst their superiors, further removed from the detail, have still less information ; that the rights of the *taluqdars* dependent on the *zemindars*, as well as of the *raiyats,* are imperfectly understood and defined ; that, in common cases, we often want sufficient data and experience, to enable us to decide with justice and policy, upon claims to exemption from taxes ; and that a decision erroneously made may be followed by one or other of these consequences : a diminution of the revenues of Government, or a confirmation of oppressive exactions.....The necessity of some interposition, between the *zemindars* and their tenants, is absolute ; and Government interferes by establishing regulations for the conduct of the *zemindars*, which they are to execute ; and by delegating authority to the Collectors to enforce their execution. If the assessment of the *zemindaries* were unalterably fixed, and the proprietors were left to make their own arrangements with the *raiyats*, without any restrictions, injunctions or limitations, which indeed is a result of the fundamental principle, the present confusion would never be adjusted. The interference, though so much modified, is in fact an invasion of proprietary right, and an assumption of the character of landlord, which belongs

to the *zemindar*; for it is equally a contradiction in terms, to say that the property in the soil is vested in the *zemindar*, and that we have a right to regulate the terms by which he is to let his lands to the *raiyats*, as it is to connect that avowal with discretionary and arbitrary claims. If the land is the *zemindar's*, it will only be partially his property, whilst we prescribe the quantum which he is to collect, or the mode by which the adjustment of it is to take place between the parties concerned.....The most cursory observation shows the situation of things in this country to be singularly confused. The relation of a *zemindar* to Government, and of a *raiyat* to a *zemindar*, is neither that of a proprietor, nor a vassal; but a compound of both. The former performs acts of authority, unconnected with proprietary right: the latter has rights, without real property; and the property of the one, and rights of the other, are in a great measure held at discretion. Such was the system which we found, and which we have been under the necessity of adopting. Much time will, I fear, lapse before we can establish a system, perfectly consistent in all its parts; and before we can reduce the compound relation of a *zemindar* to Government, and of a *raiyat* to a *zemindar*, to the simple principles of landlord and tenant."[1]

Regulation I of 1793.

The opinion of the Governor-General, as you have already seen, prevailed with the Court of Directors of the East India Company. In the Proclamation announcing the Permanent Settlement and in section 8 of Regulation I of 1793 which reproduced the words of Art. VII of the Proclamation, the Governor-General in Council declared: "It being the duty of the ruling power to protect all classes of people and more particularly those who from their situation are most helpless,

[1] Harington's Analysis, Vol III, p. 397. See also Appendix to the Fifth Report, No. 6.

the Governor General in Council will, whenever he may deem it proper, enact such Regulations as he may think necessary for the protection and welfare of the dependent *taluqdars*, *raiyats* and other cultivators of the soil."

Regulation VIII of 1793.

Regulation VIII of 1793 imposed restrictions on the levying of any new *abwab* or *mathot*, *i.e.* illegal cesses, from the *raiyats*, and laid down that every exaction of this nature should be punished by a penalty equal to three times the amount imposed.[1] This Regulation also made provisions for the enforcement of *pattas* or leases obtained *bonâ fide* from landlord, and directed that they should not be cancelled except upon general measurement of the *perganah* for the purpose of equalising and correcting the assessment, or upon proof that the *pattas* had been obtained in collusion, or that the rents paid within the last three years had been reduced below the rate of the *nirikbund* of the *perganah* (*perganah* rate.)

English theory of rent.

But beyond these vague and general rules, there was nothing laid down to regulate the relation between the *zemindar* and the *raiyat*. The adoption of the theory of the existence in the Sovereign of proprietary right in land and its transfer to the *zemindars*, and the strict measures adopted by the Government for the realization of its own dues, acted most prejudicially on the actual cultivators. The English Governors of the country and the judges who administered the law, being unable to find out any distinct rules for the protection of the interest of the poor tenantry, attempted to introduce, in India, the theory of rent which prevailed in England, —the only theory with which they were familiar. In England customary rent had long been superseded by competition rent. To use the words of a learned author—

[1] Reg. VIII of 1793, Sec. 55.

"From the peculiar course of progress in England, and from that state of affairs under which the absolute ownership of the land was, from the close of the seventeenth century, in the hands, not of the cultivators, but of a limited class of proprietors, who were all powerful in the Legislature to regulate its measures with a view to their own interests above all others, there has been evolved a theory of Rent, which, although it may be scientifically correct with reference to the peculiar circumstances of England is not equally correct when applied, and is, in many instances, not at all applicable, to other countries and other communities whose past history and present condition are in many respects, if not altogether, different. The basis of this theory is the application of Capital to land. It postulates the remuneration of the cultivator at no higher rate than the bare wages of unskilled labour. The Capital employed must yield the ordinary rate of profit, not less than the average rate of profit derived from capital employed in other investments. The labourers who do the work of cultivation are paid the ordinary rate of wages, not more than the rate to which an overcrowded labour market renders it possible to reduce them, and this, too, often means but the very barest sustenance. All the profit which the land yields after discharging these two items is Rent."[1] This theory of rent was practically accepted as law in India by the judges who administered it, until Act X of 1859 was passed. The late Sudder Court, so late as the year 1849, held—"The connection between landlord and tenant in this country commences on a similar understanding, the under-tenant in Bengal, whether holding by a *patta*, or as a tenant-at-will, occupies land with the consent of the *zemindar*, and the rent, however, determinable is only a consequence of

[1] Field's Landholding and the Relation of Landlord and Tenant, pp. 41-42.

the arrangement."[1] Even after the passing of the Act of 1859, the question as to the principle of the assessment of rent, was discussed by able advocates, and Sir Barnes Peacock, the then Chief Justice, referring to the definition of Rent, as given by Malthus in his Principles of Political Economy, applied it, in the well-known case of *Ishore Ghose* v. *James Hills*,[2] to the state of things in this country. Later on, the learned Chief Justice expressed the same opinion in the case of *Thakooranee Dossee* v. *Bisheshur Mookerjee*,[3] and referred to the case of *Queen* v. *The Grand Junction Railway Co.*,[4] in support of his view of the law. The truth is that as long as the country did not recover from the shocks of the deadly visitation of 1770, and as long as land was plenty and *raiyats* had to be induced to cultivate the land, no question arose, but legislation was urgently needed before the middle of the last century.

Distinction between *khudkast* and *paikast raiyats*.

The Regulations of the Bengal Code dealt with only two classes of *raiyats*, the *khudkast* and the *paikast*. The infinite varieties of soil in Bengal and the different uses to which they are put, the variations in value from local circumstances, and the difference in periods of occupations, creating difference in the status of tenants, made the framing of comprehensive rules as to their rights and liabilities almost impracticable. The Hindu system was extremely simple, and not only was it not well-known and well understood at the time of the Permanent Settlement, but it would afford little help to a modern legislator dealing with an extremely complex state of things. The conversion of rent in kind into one in specie was in itself a cause of great complexity. The

[1] *Durpnurain* v. *Sreemunt*, [1849] S. D. A. 188, *sc.*, I. D. 10 O. S. 781.

[2] (1862) W. R. F. B. Vol. p. 48, and on review (1864) *Ibid*, p. 148.

[3] (1865) B. L. R. F. B. Vol. 202, *sc.*, 3 W. R. Act X. 29.

[4] (1844) 4 Q. B. 18, *sc.*, 114 E. R. 804, *sc.*, 62 R. R. 275.

sage Manu had to deal with payments by delivery of shares of the actual produce, which varied according to specified circumstances. All that the landlord had in those early days to insist upon was cultivation, which would be beneficial to the king's treasury, to the community, by the clearance of forests, and to the cultivator himself, by affording means of easy livelihood. The sage said—"If land be injured, by the fault of the farmer himself, as if he fails to sow it in proper time, he shall be fined ten times the king's share of the crop that might otherwise have been raised; but only five times as much, if it was the fault of his servants without his knowledge."[1] Vyasa also lays down—"If a person after taking a field with the object of cultivating the same fails to do so either himself or through the agency of others, he should be made to pay to the owner a certain portion of the produce which the field would yield if it were cultivated and a fine to the king equal to the portion."[2] The fiscal system introduced by the Mahomedan rulers was never fully enforced in Bengal and, as we have already seen, Todar Mal's scheme was never completely carried out, and it was also impracticable to revert to the Hindu system. But further changes were needed with the progress of time and the altered state of things. The Permanent Settlement and the rigidity of the rules for the realisation of Government dues were prolific of consequences which were sufficient to disturb the equilibrium of existing state of things.

The *khudkast raiyats.*

The ***khudkast raiyat***,[3] of the Regulation laws, was the cultivator who held lands as an agriculturist in the village in which he had his fixed residence. Authorities of great eminence have differed as to the origin of these

[1] Manu, Ch, VIII 243.

[2] Vyasa, quoted in the Vivadaratnakara. The same directions have been given by other sages.

[3] The word *khudkast* comes form *khud*=own and *kast*=cultivation.

raiyats, but the most approved interpretation seems to be that he was a member of the community composing the group called the village, cultivating the land of the village, having his homestead in it and yielding obedience to the rules and mandates of the body of elders *i. e.*, the village *mandals* or *pradhans*. It mattered little whether he was holding for a short period or from time immemorial. The rate of rent payable by him might vary according to the period of occupation. The status was acquired from residence and recognition by the community, and not from length of possession, though length of possession might be an element leading to recognition. He was not necessarily a hereditary cultivator, as he has generally been thought to be.[1]

The *pahikast* or *paikast*[2] *raiyat*, on the other hand was a tenant who held land in one village residing in another. He had no political status in the village in which he held the land and was considered to be a foreigner. He generally held lands which the people of the village could not conveniently hold. In the days

The *paikast raiyats.*

[1] "From *khud*=own, and *kast*=cultivation, sometimes erroneously interpreted 'cultivating their *own land*,' and so leading to the mistaken notion that they had hereditary proprietary rights.—See Elphinstone's History of India, p 248; Mr. Shore's Minute of 18th June, 1789 § 225; Mr. Holt Mackenzie's Minute of 1st July, 1819, §§ 328, 399, 431, &c; and Carnegy's Land Tenures, p. 40, on this and other points connected with their status. They are also called *chhapperband raiyats*, from which and the antithesis of *paikast*, the meaning is plain. At 252 and following pages of Selections from the Revenue Records of the North-West Provinces published in 1866, will be found a number of opinions on this point. The best authorities are pretty well agreed that these tenants could not transfer their rights, *i.e.*, sell their land—this privilege belonging to the *zemindar* class alone. The *khudkast raiyat's* interest or the right of occupancy, into which modern legislation has turned it, has of late years become not uncommonly saleable in the Lower Provinces. The Courts indeed hold that it is not saleable as of right, though it may become so by custom The evidence offered in disputed cases very often consists of instances in which the landlord has brought the *raiyats'* interests to sale in execution of a decree for rent. This is a mode of obtaining through the intervention of the Courts a fine which goes in payment of the arrears of rent due from the late tenant That the *raiyat's* interest finds purchasers is an indication of a change having for its ultimate result the substitution of *competition* for *customary* rents"—*Field's Regulations, Introduction, pp.* 24-25.

[2] From *pahi*=near and *kast*=cultivation.

of *zemindars'* influence, he might occupy lands as a rival of the permanent or *khudkast* cultivators. The Regulation laws did not attempt to afford protection to these tenants, though their number must have been very large in 1793. They thus became tenants liable to be ejected at the end of any agricultural year. The determination of tenancy by service of notice to quit was unknown, until very recently; and as a matter of fact, suits for ejectment were unnecessary; and these poor holders of land were at the mercy of the landlords.[1]

Protection from eviction.

The earlier sale-laws for arrears of Government revenue following the spirit of the second clause of section 60 of Regulation VIII of 1793 exempted all *bonâ fide* engagements of *khudkast raiyats* from liability to cancellation on sale for arrears,[2] and Regulation VIII of 1819, also laid down in distinct terms the non-liability of *khudkast raiyats* or resident hereditary cultivators from ejectment or cancellation of *bonâ fide* engagements made with such tenants by the late incumbent or his representative.[3] But *paikast raiyats* had no protection from eviction until Act X of 1859 made certain necessary provisions as to the status of the vast agricultural population of the Bengal Provinces.

Act X of 1859.

Act X of 1859 practically abolished the distinction between the status of *khudkast* and *paikast raiyats*, a distinction based upon circumstances no longer applicable to the altered state of things brought on by peace, good government and improvements in commerce. The interest of the *zemindars* and the intermediate landholders would be best served, if the number of protected *raiyats* was minimised and the number of

[1] "From *pai* (corruption of *pahi* from *pah*=*pas* near), 'living near,' 'non-resident,' and *kast* (cultivation)." Field's Regulations, pp. 24-25.

[2] Regulation XI of 1822; Act XII of 1841 and repealed Act I of 1845.

[3] Reg. VIII of 1819, Sec. 11, cl. 3.

unprotected *raiyats* increased ; and every effort was made in this direction. But the Government was bound to afford protection to those, who, though not *khudkast*, had long been cultivating the same pieces of land, who got an attachment for them and who improved them by their labour, if not by their capital, as they had none. Legislation was urgently needed. This Act introduced a new classification of the agricultural population of the Bengal Provinces, *i.e.*, into three classes—(1) *raiyats* holding at fixed rent from the time of the Permanent Settlement, (2) *raiyats* holding lands for periods exceeding twelve years, whether rent was paid at uniform rate or not, and (3) *raiyats* holding for periods of less than twelve years, *raiyats* holding under *raiyats* of the first two classes and *raiyats* holding the *private* lands of the landlord. The *khudkast raiyats* fell within either the first or the second class indicated above, but a few who might acquire such a status in recent years would not get the benefit of it until after the lapse of twelve years, while the *paikast raiyats* were most of them considerably raised in status.

Act VIII (B.C.) of 1869.

Act X of 1859 was in force throughout the Bengal Provinces and with the modifications made by Act VI (B.C.) of 1862 and Act VIII (B.C.) of 1865 continued to be in force until Bengal Act VIII of 1869 was passed. This latter Act was merely, as I have said, a procedure Act, the substantive law laid down in Act X of 1859 having been reproduced almost *verbatim*. But the Non-Regulation Provinces and Assam except Sylhet were not affected by it. The Bengal Tenancy Act (VIII of 1885), however, made material alterations in the law, especially in favour of the rights of the third class of *raiyats* who were overlooked by Act X of 1859. I now propose to deal with *raiyats* at fixed rates.

Definition of *raiyat*.

The word *raiyat* was not defined in Act X of 1859 and Bengal Act VIII of 1869. The High Court at

Calcutta, however, had in several cases to define the status of a *raiyat* and distinguish it from those of a tenure-holder and of a middleman, as the incidents of an ordinary *raiyati* tenure under the law differed in several material respects from those of the other classes of tenants. In *Baboo Dhunput Singh* v. *Baboo Gooman Singh*,[1] Seton-Karr and Jackson JJ. said: "It is very difficult to lay down any general interpretation of the word *raiyats*. As a general rule, they are the cultivating tenants but they may not be cultivators at all themselves; they may cultivate their land by hired labour or by under-tenants. In this case, the amount of land included in the tenure is, we think, sufficient evidence that the tenants are not *raiyats*." It was held that a *raiyat* was not necessarily a cultivator, but no middleman could be a *raiyat*.[2] He must hold land under cultivation either by himself or others who must take from him under his supervision as a superior cultivator.[3] Mere subletting does not take away the character of a *raiyat*.[4] He might not till the soil himself, but still he would be a *bonafide raiyat* if he derived the profits directly.[5] The origin of the tenancy and the purposes for which the land was taken regulate to a considerable extent the status of the tenant.[6] If

[1] [1864] W. R. Gap Vol. Act X. 61. See also *Karoo* v. *Luchmeeput*, (1867) 7 W. R. C. R. 15; *Uma* v *Uma*, (1867) 8 W. R. 181; *Secretary of State* v. *Jadav*, (1916) 21 C. W. N. 452.

[2] *Gopee* v. *Sibchunder*, (1864) 1 W. R. 68.

[3] *Ram* v *Lukhee*, (1864) 1 W. R. 71; *Karoo* v *Luchmeeput*, (1867) 7 W. R. C. R. 15.

[4] *Karoo* v. *Luchmeeput*, (1867) 7 W. R. C. R. 15; *Kalee* v *Ram*, (1868) 9 W. R. 344.

[5] *Kalee* v. *Ameerooddeen*, (1868) 9 W. R. 579.

[6] *Karoo* v. *Luchmeeput*, (1867) 7 W. R. C. R. 15; *Uma* v. *Uma*, (1867. 8 W. R. 181; *Durga* v. *Kalidas*. (1881) 9 C. L. R. 449; *Khatajan* v. *Aswini*, (1909) 9 C. L. J 82 *n*; *Midnapur Zemindary Co.* v. *Sham*, (1910) 15 C. W. N. 218; *Promotho* v. *Nilmani*, (1911) 14 C. L. J. 38; *Jagabandhu* v. *Magnamoyi*, (1916) I. L. R. 44 Calc. 555, *sc.*, 22 C. W. N. 89, *sc.*, 24 C. L. J. 363; *Manmoth* v. *Anath*, (1918) 23 C. W. N. 201.

the land was taken for the purposes of cultivation and clearance of jungles, notwithstanding that part of the land was cleared and cultivated by the tenant himself and the rest by *raiyats* settled thereon, the terms of a lease, if any, and, if that is silent, the circumstances attending its grant—would generally show the original purposes, for which the land was acquired.[1] The *raiyat* would not lose his status or become a middleman merely by converting the land to a different use sometime after the acquisition.[2]

Act VIII of 1885.

In this state of the judicial decisions as to the status of a *raiyat*, the framers of the Bengal Tenancy Act thought it proper to classify tenants under three broad heads namely, tenure-holders, *raiyats*, and under-*raiyats*,[2] and introduced sub-divisions defining the status of each. The case law as to the status of a *raiyat* was crystallised in the definition given in section 5, sub-section 2 of the Bengal Tenancy Act, which defines a *raiyat* to be "primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right."[3] The explanation to the sub-section adds that the right to bring land under cultivation is to be looked to,

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[1] *Khujoorunissa* v. *Ahmed*, (1869) 11 W R 88; *Sheo* v. *Ram*, (1871) 8 B. L. R. 165, *sc.*, 17 W. R. 62; *Midnapur Zemindary Co.* v. *Sham*, (1910) 15 C. W. N. 218; *Promotho* v. *Nilmani*, (1911) 14 C. L. J. 38, *sc*, 15 C. W. N. 902 (footnote); *Promoda* v. *Asiruddin*, (1911) 15 C. W. N. 896; *Radha* v. *Milan*, (1912) 18 C. L. J 23; *Bamapada* v. *Midnapore Zemindary Co.*, (1912) 16 C. L. J 322; *Bibhudendra* v. *Debendra*, (1913) 20 C. L. J. 140; *Kumeda* v. *Secretary*, (1914) 19 C. W. N. 1017; *Brojobasi* v. *Ram*, (1915) 23 C. L. J. 638; *Rajani* v. *Yusuf*, (1916) 21 C. W. N. 188; *Secretary* v. *Jadav*, (1916) 21 C. W. N. 452; *Secretary* v. *Gobind*, (1916) 21 C. W. N. 505; *Secretary* v. *Digambar*, (1917) I. L. R. 46 Calc. 160.

[2] Act VIII of 1885, Sec. 4.

[3] *Jagabandhu* v. *Magnamoyi*, (1916) I. L. R. 44 Calc. 555, *sc.*, 22 C. W. N. 89, *sc.*, 24 C. L. J. 363.

notwithstanding the land is used for the purpose of gathering the produce of it or of grazing cattle on it. The explanation itself, however, is not exhaustive; it only illustrates the principle laid down in the cases already cited. Sub-section 4 still further defines a *raiyat* by laying down that in determining whether a tenant is a tenure-holder or a *raiyat*, the Court shall have regard to local custom and the purpose for which the right of tenancy was originally acquired. Ordinarily a *raiyat* or cultivator in Bengal holds no more than a few acres of land, and the Bengal Tenancy Act has, therefore, laid down, as a rebuttable presumption of law, that a tenant holding more than one hundred *bighas* of the standard measure of land shall be presumed to be a tenure-holder and not a *raiyat*.[1] We have now very little difficulty in determinig the status of any tenant, a tenure holder or a *raiyat*.[2] An indigo-planter or a tea-planter holding land for the purpose of causing the cultivation of indigo or tea, whatever the quantity of land may be, is a *raiyat*. A partner of an indigo concern is as much in the eye of law a person capable of enjoying the statutory rights in land as any other individual.[3]

Raiyats holding at unchanged rate of rent.

The superior class of *raiyats* are those who have held land from the date of the Permanent Settlement of 1793 at an unchanged rate of rent.[4] The several

[1] Act VIII of 1885. Sec. 5, Sub-sec. 5

[2] See the Privy Council cases of *Gokul* v. *Pudmanund*, (1902) I. L. R. 29 Calc. 707, *sc.*, L. R. 29 I. A. 196, *sc.*, 6 C. W. N. 825; *Naba* v. *Behari*, (1907) I. L. R. 34 Calc. 902, *sc.*, L. R. 34 I. A. 160, *sc.*, 11 C. W. N 865 *sc.*, 6 C L. J. 122; *Damodar* v. *Dalgliesh*, (1911) I. L. R. 38 Calc. 432, *sc.*, L. R. 38 I A. 65, *sc.*, 15 C. W. N. 345 *sc.*, 13 C. L. J. 512; *Debendra* v. *Bibudhendra*, (1918) I. L. R. 45 Calc. 805, *sc*, L. R. 45 I. A. 67, *sc.*, 22 C. W. N. 674. See also *Moharam* v. *Telamuddin*, (1911) 16 C. W. N. 567, *sc.*, 15 C. L J. 220.

[3] *Laidley* v. *Gour*, (1885) I. L. R. 11 Calc. 501; *Bujrangi* v. *Mackenzie*, (1901) 7 C. L. J. 475; *Raghubar* v. *Manners*, (1911) 13 C. L J. 568. But see *Cannan* v. *Kylash*, (1876) 25 W. R. 117; *Rai* v. *Laidley*, (1879) I. L. R 4 Calc 957.

[4] Act X of 1859, Sec. 3; Act VIII (B. C.) of 1869, Sec. 3, and Act VIII of 1885, Sec. 6.

Rent Acts have given them a status of permanency, fixity of rent, heritability and transferability, and as it is difficult to give direct evidence of the existence of the holding and uniform payment of rent since 1793, the Legislature has provided for a rebuttable presumption arising from proof of occupation and uniform payment of rent for twenty years next preceding the institution of the suit.[1] With respect to succession and transfer either *inter vivos* or by will, the incidents of these holdings agree with those of permanent tenures, existing from the date of the Permanent Settlement.[2] Sales for arrears of revenue or rent cannot affect them. Section 37 of Act XI of 1859 expressly provides that the purchaser of an entire estate, notwithstanding his power to avoid and annul all under-tenures and eject all under-tenants, is not entitled to "eject any *raiyat* having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force." Regulation VIII of 1819 (Section 11, cl. 3) and the various Rent Acts also lay down that a purchaser at a sale under that Regulation shall not be entitled "to eject any *khudkast raiyat* or resident hereditary cultivator." The Bengal Tenancy Act calls the interest of such *raiyats* "protected";[3] and under no circumstances except on the breach of an express covenant can such *raiyats* be ejected.[4] But in one respect they have superiority to permanent tenures, namely, that persons holding lands under the holders of such lands cannot acquire rights of occupancy; they are merely *under-raiyats*.[5]

Ejectment of permanent *raiyats*.

Ejectment of permanent *raiyats* is almost unknown. Their right is statutory, and seldom if ever, they hold under written leases. The conditions of holding land

[1] Act X of 1859, Sec. 4; Act VIII (B. C.) of 1869, Sec. 4 and Act VIII of 1885, Sec. 50.

[2] Act VIII of 1885, Sec. 18.

[3] *Ibid*, Sec. 160.

[4] *Ibid*, Sec. 18.

[5] *Ibid*, Sec. 4.

are simple in their character and breach thereof can rarely occur. Any express condition for ejectment on breach of a covenant, if there be a written lease, must always be consistent with the provisions of the law relating to landlord and tenant.[1] If there be no written contract, there can be little likelihood of the existence of any express condition for re-entry on a breach of covenant; at all events such covenants are very difficult to prove. Further the covenants must be consistent with the provisions of the Bengal Tenancy Act, if the contract of lease be one entered into after the passing of that Act. [The Bengal Tenancy Act lays down the procedure to be adopted for ejectment for the breach of the conditions of the contract.[2] The landlord should serve a notice on the tenant specifying the precise nature of the breach under clause (b) of section 155, and if the breach be capable of being remedied, requiring him to remedy the same; and, in any case, asking him to pay reasonable compensation for the Act under clause (b). The object of a notice to quit given under section 155 being to give the tenant an opportunity of remedying the breach (if it is capable of being remedied), a notice requiring the tenant to quit the land even if he remedied the breach is not a valid notice under the section.[3] If the tenant fails to comply with the demand within a reasonable time, *viz.*, with the requisition asking him to remedy the breach or to pay compensation, the landlord would be entitled to bring a suit, the procedure for which is laid down in sub-sections (2), (3) and (4). Upon such a suit being brought, if the conditions precedent have been complied with, the Court has the power to make a decree in the following way, *viz.*, it may make a decree declaring the amount of compensation reasonably payable to the

[1] Act VIII of 1885, Secs. 18, 155.
[2] *Ibid*, Sec. 155.
[3] *Kali* v. *Kali*, (1916) 23 C. W. N. 569.

landlord, and declaring whether, in the opinion of the Court, the breach is capable of being remedied. If it is capable of being remedied, the Court is to declare and direct that the defendant should remedy the same. In the other case, the landlord would be entitled only to compensation. If the defendant pays, within the period or extended period (as the case may be) fixed by the Court under this section, the compensation mentioned in the decree, and where the breach is declared by the Court to be capable of remedy, remedies the breach to the satisfaction of the Court, the decree cannot be executed. If the tenant, therefore, pays the compensation for which he has been declared liable, he cannot be ejected; if the breach is capable of being remedied, and he does not comply with the injunction of the Court to remedy it, he is liable to be ejected, and if he fails to pay the compensation awarded, he is liable to ejectment; but, where he pays the compensation, or where the Act is capable of being remedied, and he has remedied it, there is no ejectment.[1] There is a verbal similarity between a portion of section 155 of the Bengal Tenancy Act and a portion of Section 14 of the Conveyancing and Law of Property Act of 1881 (44 & 45 Vic. c. 41), but the Indian and English statutes are not *in pari materia*, and the English cases decided under the English statute do not apply to cases under section 155 of the Indian Act.[1]] Suits on the ground of breach of contract under the Bengal Tenancy Act must be brought within one year of the breach.[2] Under the old Acts, such suits could be brought within twelve years of the breach. [The right to institute a suit under section 155 of the Bengal Tenancy Act may be lost under many circumstances. The Courts of Law, in England, lean

[1] *Pershad* v. *Ram*, (1894) I. L. R. 22 Calc. 77. See also Rule 38 in Chapter V of the Rules framed under the Bengal Tenancy Act, 1885, by the Government of Bengal, as modified by subsequent legislation

[2] Act VIII of 1885, Sch. III, Art. I.

against forfeitures.[1] The law, in India, on the subject of waiver of forfeitures has already been dealt with as regards non-permanent tenures.[2] The law is practically the same as regards permanent *raiyats*. There may be some doubt as to the right of one co-sharer landlord to eject a tenant on the ground of forfeiture. It was held in *Haripria Debi* v. *Ram Churan Myti*,[3] that such an action is maintainable. But the more reasonable view seems to be that the proper remedy in such a case is a suit for partition.[4]]

Raiyats at fixed rates of rent.

Who are tenants at fixed rates of rent? The words "at fixed rates of rent" used in section 3 of the older Acts and the words, "rent, or rate of rent, fixed in perpetuity" used in section 18 of Act VIII of 1885 mean substantially the same thing. In *Thakooranee Dossee* v. *Bisheshur Mookerjee*[5], Peacock C. J., said—"By the term, 'fixed rates of rent,' I understand not merely fixed and definite sums payable as rent, but also rates regulated by certain fixed principles—such, for instance, as a certain proportion of the gross or of the net produce of every *bigha*, or such a sum of money as would be equal to such a proportion of the produce, or such a sum as would give to the *raiyat* any fixed rate of profit after payment of all expenses of cultivation. *Id certum est quod certum reddi potest* is a maxim of law." This wide interpretation of the words of the law, including as it does, the cases of payment of rent by fixed shares of the gross produce, such as a half, or by

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[1] Woodfall's Landlord and Tenant, 19th Ed., p. 382.

[2] *Ante* pp. 259 to 262.

[3] (1892) I. L. R. 19 Calc. 541.

[4] *Madan* v. *Rajab*, (1900) I. L. R. 28 Calc. 223. See also *Watson* v. *Ramchund*, (1890) I. L. R. 18 Calc. 10, *sc.*, L. R. 17 I. A. 110; *Lachmeswar* v. *Monowar*, (1891) I. L. R. 19 Calc. 253, *sc.*, L. R. 19 I. A. 48.

[5] (1865) B. L. R. F. B. Vol. 202, at p. 326, *sc.*, 3 W. R. Act X 29.

bhaoli or *battai*, was followed in some cases.[1] But in *Mahomed Yacoob Hossein* v. *Sheik Chowdhry Wahed Ali*,[2] Trevor and Jackson JJ. held "that no rate of *bhaoli* rent varying yearly in amount with the varying amount of the gross produce of the land, though fixed as to the proportion which it is to bear to such produce, is a fixed unchangeable rent of the nature alluded to in section 4 of Act X of 1859." Bayley J. dissented from Trevor and Jackson JJ. and was of opinion that a contract to pay half in kind did not involve a varying rate.[3] Thus the weight of authority seems to be in favour of the views expressed by the late Chief Justice. There cannot be any reasonable doubt that no court ought to allow the landlord to enhance the rate of rent of a tenant paying a fixed share of the produce from the time of the Permanent Settlement. If a *raiyat* has been paying a half of the gross produce of his land as rent since the Permanent Settlement, he cannot be called upon to pay a higher share of the produce, *e.g.*, a five-eighths or even nine-sixteenths, notwithstanding that he is an ordinary occupancy *raiyat*. No principle except that of competition-rent, can be invoked to entitle the landlord to demand a higher share of the produce. Notwithstanding that such tenants should have the status of permanency both as to time and rate of rent, it has been doubted whether their holdings have all the incidents of permanent *raiyati* ones. The question is one of great difficulty, as, in practice, the holders of such *bhaoli* or *bhagdari* holdings are considered to be much inferior in position to

[1] *Mitrajit* v. *Tundan*, (1869) 3 B. L. R. App. 88, *sc.*, 12 W. R. C. R. 14; *Ram* v. *Latchmi*, (1870) 6 B. L. R. App. 25, *sc.*, 14 W. R. 388; *Jutto* v. *Basmuttee*, (1871) 15 W. R. 479; *Hanuman* v. *Kaulesar*, (1876) I. L. R. 1 All. 301.

[2] (1865) 4 W. R. Act X. 23, *sc.*, 1 Ind. Jur. 29.

[3] See also *Thakoor* v. *Mahomed*, (1867) 8 W. R. 170; *Hanuman* v. *Ramjug*, (1874) 6 N. W. P. H. C. R. 371, *sc.*, L. R. 2 All. 610.

those paying uniform money-rent from the time of the Permanent Settlement. The Select Committee dealing with the bill about Bengal Tenancies took the view entertained by Trevor and Jackson JJ. in *Mahomed Yacoob Hossein* v. *Sheik Chowdhry Wahed Ali.*[1] One of the rules for the interpretation of statutes is that the judges in interpreting and administering law should not have recourse to the discussions in the Legislative Council or the statement of the object and reasons of an Act of Legislature.[2] But we may refer to the observations of the Select Committee to discover the true intention of the framers of sections 18 and 50 of Act VIII of 1885.

Change of rent.

Changes in rent or rate of rent, sufficient to take away permanency, must be substantial. Change from *sicca* Rupees into Company's Rupees (in accordance to the provisions of Act XIII of 1836) is not an alteration of rent—it is merely a difference in currency.[3] Slight and occasional differences in rent have been ascribed to inadvertence or mistake and not to intentional variation such as to prevent the operation of the statute.[4] The payment of *abwabs* or illegal cesses to the landlord are payments in addition to rent and cannot be construed into a variation of it.[5] *Abwabs* are levied and paid with the express object of keeping the *jama* intact. Abatement of rent on the ground of diluvion, the rate of rent remaining the same throughout, falls within the

[1] (1865) 4 W. R. Act X 23, *sc.*, 1 Ind. Jur. 29.

[2] *Administrator General* v. *Premlal*, (1895) I. L. R. 22 Calc. 788, *sc.*, L. R. 22 I. A. 107; *Ram* v. *Hari*, (1905) 2 C. L. J. 546. See Maxwell on the Interpretation of Statutes, 5th Ed., 1912, pp 42 & 45.

[3] *Kalee* v. *Shoshee*, (1864) 1 W. R. 248; *Kattyani* v. *Soonduree*, (1865) 2 W. R. Act X 60; *Tara* v. *Shibeshur*, (1866, 6 W. R. Act X 51.

[4] *Huro* v. *Ameer*, (1864) 1 W. R. 230; *Ramrutno* v *Chunder*, (1865) 2 W. R. Act X. 74; *Anundloll* v. *Hills*, (1865) 4 W. R. Act X. 33; *Munsoor* v. *Bunoo*, (1867) 7 W. R. 282; *Elahee* v. *Roopun*, (1867) 7 W. R 284; *Watson* v. *Nund*, (1874) 21 W. R. 420; *Grant* v. *Har*, (1913) 19 C. W. N. 117, *sc.*, 18 C. L. J. 76. See also *Bissessur* v. *Wooma*, (1867) 7 W. R. C. R. 44.

[5] *Sumeeroodeen* v. *Huronath*, (1865) 2 W. R Act X. 93.

words of the Act and entitles the tenant to plead uniformity of the rate.[1]

Permanent Settlement.

In order to give the status of complete permanency, the *raiyat* must have paid at a fixed rate since the Permanent Settlement. The Bengal Tenancy Act defines Permanent Settlement to mean "the Permanent Settlement of Bengal, Bihar and Orissa made in the year 1793."[2] In the old Rent Acts, the words were not defined, but they evidently meant that well-known date.[3]

Presumption.

The presumption of fixity of rent, arising from uniform payment for twenty years, is the same as that in the case of intermediate tenure-holders.[4] The pleadings must sufficiently raise the question, and the proof of payment must be strict.[5] But alterations arising from division[6] or consolidation[7] of holdings, or on taking away a part of the land,[8] would not deprive the tenant of the right conferred on him by the Legislature.

How rebutted

The presumption may be rebutted by proof of substantial variation of rent at anytime before twenty years, or by proof of the tenancy having originated subsequent to the Permanent Settlement.[9] A break in the holding also rebuts the presumption, but not if the tenant be

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[1] *Radha* v. *Kyamutoollah*, (1874) 21 W. R. 401.

[2] Act VIII of 1885, Sec. 3, cl. 12.

[3] *Sheoburn* v. *Ram*, (1865) 3 W. R. Act X. 20.

[4] *Ante* pp. 192-3.

[5] *Rakhal* v. *Kinooram*, (1867) 7 W. R. 242; *Pearee* v. *Anund*, (1868) 9 W. R. 158.

[6] Act VIII of 1885, Sec. 50, Sub-sec. 3; *Hills* v. *Besharuth*, (1864) 1 W. R. C. R. 10; *Hills* v. *Huro*, (1865) 3 W. R. Act X. 135; *Chandra* v. *Ram*, (1916) 20 C. W. N. 1002, *sc.*, 24 C. L. J. 275.

[7] *Sukhi* v. *Gunga*, (1864) W. R. Gap. Vol. Act X. 126; *Kazee* v. *Nubo*, (1866) 5 W. R. Act X 53; *Raj* v. *Hureehur*, (1868) 10 W. R. 117; *Kasheenath* v. *Bamasoonduree*, (1868) 10 W. R. 429; *Adit* v. *Sukhraj*, (1912) 17 C. L. J. 435. See also *Moula* v. *Judoonath*, (1874) 21 W. R. 267; *Manmoth* v. *Anath*, (1918) 23 C. W. N. 201.

[8] *Kenaram* v. *Ramcoomar*, (1865) 2 W. R. Act X. 17; *Soodha* v. *Ram*, (1873) 20 W. R. 419. See also Act VIII of 1885, Sec. 88.

[9] Act X of 1859, Sec. 4.

illegally evicted. In *Lutteefun-nissa Bebee* v. *Poolin Beharee Sein*,[1] the High Court remarked:—"Eviction, though it would put an end to the *raiyat's* possession, would not destroy his holding,.....if that holding would not have ceased to exist but for the eviction."[2] Eviction by the landlord, even if partial, causes suspension of rent,[3] and even if the tenant did not pay rent during the period of dispossession, he would be entitled to count the period and the landlord would not be entitled to plead non-payment of rent as a bar to the presumption of the continuity of the tenancy.

Alteration of rent on alteration of area.

Notwithstanding fixity, the rent of a *raiyat* holding at a fixed rate of rent may be enhanced on the ground of increase in area of the holding; there may also be abatement for decrease in area. Alteration of rent on alteration of area is provided for in section 52 of the Bengal Tenancy Act,—additional rent for land found by measurement to be in excess of the area for which rent has been previously paid, and reduction of rent for deficiency in the area. Sections 17 and 18 of Act X of 1859 corresponding with sections 18 and 19 of the Bengal Act VIII of 1869 made provisions for enhancement or abatement of the rent of *raiyats* having right of occupancy. The Bengal Tenancy Act deals with all classes of *raiyats*. The rate of rent being once determined, the area can be found out easily by measurement.

Accretion.

The area of the holding of a permanent *raiyat* may increase by accretion, or by the tenant encroaching on the adjoining land of his landlord or the adjoining land belonging to a third person. It may decrease by diluvion or encroachment by a neighbouring holder. Cases of increase or decrease in area by alluvion or diluvion

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[1] (1863) W. R. F. B. Vol. 91.

[2] See also *Mahomed* v. *Noor*, (1875) 24 W. R. 324; *Radha* v *Rakhal*, (1885) I. L. R. 12 Calc. 82.

[3] *Ante* p. 241.

were formerly dealt with under the Bengal Regulation XI of 1825, Sec. 4, cl. 1, and in the absence of express rules,[1] the principles of equity and good conscience were applied. Section 52 of Act VIII of 1885, has now laid down detailed rules on the subject.

Encroachment on landlord's land.

Encroachment on the adjoining land belonging to the landlord does not make the tenant a trespasser with respect to such land, and the tenant cannot set up an adverse right with respect to it against the landlord.[2] In *Rashum Beebee* v. *Bissonath Sircar*,[3] Peacock C. J. held that no suit for enhancement could lie with respect to such lands, and the *raiyat* must be treated as a trespasser. In *Richard Decourcy* v. *Meghnath Jha*,[4] Mitter J. held that the *raiyat* could not be sued for enhancement for the excess land thus brought under his possession. This view, however, is not in accordance with the English law, and the weight of Indian authorities is in favour of the proposition that the landlord is entitled to treat the encroachment either as a trespass and sue for *khas* possession, or he may treat the *raiyat* as a tenant with respect to the encroachment, and demand additional rent.[5] In *Gooroo Doss Roy* v. *Issur Chunder Bose*, Markby J. said.—"We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to

[1] *Zuheeroodeen* v. *Campbell*, (1865) 4 W. R. C. R. 57. See *Amjad* v. *Kaderjan*, (1908) 13 C. W. N. 269, *sc.*, 8 C. L. J. 537.

[2] *Ante* p. 245.

[3] (1866) 6 W. R. Act X. 57.

[4] (1871) 15 W. R. 157. See also *Prankissen* v. *Monmohinee*, (1871) 17 W. R. C. R. 33.

[5] *David* v. *Ram*, (1866) 6 W. R. Act X. 97; *Rajmohun* v. *Gooroo*, (1866) 6 W. R. Act X. 106; *Sham* v. *Doorga*, (1867) 7 W. R. 122; *Golam* v. *Gopal*, (1868) 9 W. R. 65; *Muktakeshi* v. *Sajed*, (1868) 2 B L. R. App. 5; *Nuddyarchand* v. *Meajan*, (1884) I. L. R. 10 Calc. 820; *Prohlad* v. *Kedar*, (1897) I L. R. 25 Calc. 302; *Khondakar* v. *Mohini*, (1900) 4 C. W. N. 508; *Ishan* v. *Ramranjan*, (1905) 2 C. L. J. 125; Act VIII of 1885, Sec. 157. See also *Ahmed* v. *Bandee*, (1871) 15 W. R. 91; *Binode* v. *Masseyk*, (1871) 15 W. R. 493; *Gooroo* v. *Issur*, (1874) 22 W. R. 246; *Moti* v. *Kalu*, (1913) 19 C. L. J. 321.

the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law, and it is a rule which is supported by reason and principle. In India where there is a great deal of waste land and where quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application, namely, that if an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful. Now in the case put, the act of the tenant in taking possession of more land than was let to him, though it may possibly have been a trespass and wrongful, may in most cases equally well have been done with the assent, express or implied, of the landlord, and so have been rightful, and in the absence of any proof to the contrary it is treated as the latter. We know of no case in which the principle has been expressly recognized by judicial decision in India, but it is in accordance with the principle laid down by section 4 of Regulation XI of 1825 as to the increase of land by alluvion. In practice also encroachments made by the tenant are not considered as held by him absolutely for his own benefit against his landlord. If it were so, the tenant would in twelve years necessarily gain an absolute title under the statute of limitations; but we do not know of any case in which a title has been thus established."[1]

Regulation law.

[Section 51 of Regulation VIII of 1793 also contemplated this class of cases. That section and the part of section 4 of Regulation XI of 1825 relating to exemption from payment of rent for addition to area by alluvion

[1] (1874) 22 W. R. 246.

have been repealed by section 52 of the Bengal Tenancy Act, which now governs all such cases irrespective of the nature of the tenancy.]

Encroachment on stranger's land.

With respect to encroachments made upon the land of a third person by a tenant, he is considered to have made the encroachment, not for his own benefit, but that of his landlord, and a title acquired by the tenant by adverse possession against such third person inures to the benefit of the landlord. The tenant cannot treat the land as his own apart from the holding.[1] It would seem that a suit for additional rent would lie for excess land thus brought into the *raiyat's* occupation.[2]

Diluvion.

Decrease in area due to diluvion has always been held to be a good ground for abatement of rent.[3] It would be inequitable and unjust to make the *raiyat* pay rent for the land which is lost by the action of a river. Abatement was also allowed for land taken for public purposes.[4]

Dispossession.

Decrease of area on encroachment or dispossession by a title paramount always entitles the tenant to an abatement of rent *pro tanto*,[5] but if a person without title dispossesses the tenant, it is the tenant's duty to protect himself. It would seem that no abatement could be allowed in such a case.[6]

Registration of transfers, &c.

Registration of transfers and successions was not compulsory under the old laws, and section 27 of Act

[1] *Nuddyarchand* v. *Meajan*, (1884) I. L. R. 10 Calc. 820; *Birendra* v. *Laksmi*, (1913) 22 C. L. J. 129.

[2] *Ante* p 246.

[3] *Afsurooddeen* v. *Shorooshee*, (1863) Marsh 558; *Kristo* v. *Chunder*, (1871) 15 W. R. 230; *Rajendra* v. *Manindra*, (1916) 24 C. L. J. 162.

[4] *Mohesh* v. *Gungamoney*, (1863) 2 Hay 495; *Gordon* v. *Mahatab*, (1863) *Ibid.* 565; *Prosunomoyee* v. *Soondur*, (1865) 2 W. R. Act X. 30; *Deen* v. *Thukroo*, (1866) 6 W. R. Act X. 24; *Mahtab* v. *Chittro*, (1871) 16 W. R. 201; *Watson* v. *Nistarini*, (1884) I. L. R. 10 Calc. 544; *Asutosh* v. *Harinarain*, (1905) 3 C. L. J. 143.

[5] *Ante* p. 241.

[6] *Tripp* v. *Kalee*, (1864) W. R. Gap Vol. Act X. 122; *Chandmoni* v. *Lokenath*, (1880) 6 C. L. R. 494.

X of 1859 and section 26 of Act VIII (B C.) of 1869 did not apply to these *raiyati* holdings. The interest of these *raiyats* is not "intermediate between the *zemindar* and the cultivator." So that no such *raiyati* holding would pass to an auction-purchaser on sale for arrears of rent merely because the decree is against the registered tenant. Section 18 of the Bengal Tenancy Act lays down that such a *raiyat* shall be "subject to the same provisions with respect to the transfer of, and succession to, to his holding, as the holder of a permanent tenure." This seems to imply that the provisions of sections 12, 13, 14, 15 and 16 of the Act apply to these holdings.

Fixity by contract.

A *raiyat*, though settled later than the Permanent Settlement, may acquire permanency and fixity of rent by contract with the landlord, subject to the provisions of the law. The incidents are regulated by the contract. The protection, which the sale-laws for arrears of revenue and rent afford to a *raiyat* who has acquired a statutory right, is not available to the fullest extent to a *raiyat* who holds under a contract of fixity; but he acquires as against the purchaser on such a sale, the right of occupancy or the right of a non-occupancy *raiyat* as the case may be, which the statutes afford to *raiyats* occupying and paying rent, and he cannot be ejected.

LECTURE X.

RAIYATS.

(OCCUPANCY AND NON-OCCUPANCY).

Status of occupancy.

Section 6 of Act X of 1859[1] laid down—"Every *raiyat*, who has cultivated or held land for a period of twelve years, has a right of occupancy in the land so cultivated or held by him, * * * * * so long as he pays the rent payable on account of the same." There were certain exceptions to this rule, to which I shall presently draw your attention. The expression 'right of occupancy' was used for the first time by the Legislature in 1859, and instead of the classification of *raiyats* into the *khudkast* and the *paikast*, a new one was introduced, less complex in character and with incidents more favourable to the cultivating classes. Possession and cultivation of land and payment of rent were all that were necessary to confer on the *raiyat* this right of occupancy. Residence in the village in which he held land or his recognition as a member of the so-called political unit—the village community,—would not improve or affect this statutory right in relation to the landlord, except perhaps in matters of enhancement or abatement of rent. A non-resident *raiyat* or an alien to the community of the village might thus have, in the eye of the law as laid down in 1859, almost the same privileges and immunities as the *khudkast raiyats*. He might still be a *paikast raiyat*, but if he could fulfil the conditions laid down in section 6 of the Act, he would cease to be a tenant holding land at the pleasure of the landlord,

[1] See also Act VIII (B. C.) of 1869, Sec. 6.

liable to be ejected at the end of any agricultural year, and he would not be bound to pay rent at the rate which the landlord might dictate. The same levelling hand of the Legislature that had brought down at the Permanent Settlement the ancient *rajas*, and had elevated the farmers of revenue to the position of *zemindars*, created, in the year 1859, a right for the mass of the agricultural population, which raised them from the position to which they had been reduced on account of the want of any definite rules for the guidance of Courts of justice and the consequent introduction of rules of law with which English lawyers were familiar. On the other hand, many *raiyats* who could be called *khudkast* were deprived of some of their privileges.

Settled *raiyats.*

The Bengal Tenancy Act of 1885 has made no material alteration in the law as laid down in section 6 of Act X of 1859. It has, however, partially revived and brought under definite rules the rights of *khudkast raiyats*. The "settled *raiyat*"[1] has enlarged means of acquiring occupancy right, while at the same time there has been a curtailment in cases of holdings in *churs* or *dearah* lands and lands held under the *utbandi* system.[2]

Incidents of occupancy right.

The privileges attached to this 'right of occupancy' are considerably inferior to those of owners of property.[3] It is heritable, according to the ordinary rules of inheritance to which the *raiyat* is subject,—Hindu or Mahomedan or any other personal law, as the case may be. But

Devolution on death.

in default of heirs the right is extinguished, and the landlord is then entitled to possession and to settle the land with other *raiyats*.[4] The crown is not the ultimate

[1] Act VIII of 1885, Sec. 20.

[2] *Ibid*, Sec. 180.

[3] *Ishur* v. *Hills*, (1864) W. R. F. B Vol. 148; *Sohodwa* v. *Smith*, (1873) 12 B. L. R. 82, *sc*, 20 W. R. 139; *Lal* v. *Deo*, (1878) I. L. R. 3 Calc. 781. See *Deoki* v. *Dhian*, (1886) I L. R. 8 All. 467.

[4] Act VIII of 1885, Sec. 26 See *Jatee* v. *Mungloo*, (1867) 8 W. R. 60 and *Mukta* v. *Pulin*, (1908) 13 C. W. N. 12.

heir and cannot claim to have possession of the land as the ultimate heir of the deceased holder of a right of occupancy. Ordinarily the right is not capable of being bequeathed by will, but local usage or custom may give the *raiyat* the power to do so.[1]

Transferability.

This right acquired by a *raiyat*, in so far as it is merely statutory, is not transferable.[2] [The right is a personal one,[3] and is not saleable in execution of a money-decree either by the tenant or the landlord or with the consent of the landlord when the tenant objects[4]]. The *raiyat* cannot transfer it by mortgage, sale, gift, or exchange[5] nor is the right saleable in

[1] Act VIII of 1885, Sec. 178, Sub-Sec. (3), cl. (d). *Ajoodhia* v. *Emambandee*, (1867) B. L. R. F. B. Vol. 725, *sc.*, 7 W. R. 528; *Amulya* v. *Tarini*, (1914) I. L. R. 42 Calc. 254, *sc.*, 18 C. W. N. 1290, *sc.*, 21 C. L. J. 187; *Kunja* v. *Umesh*, (1914) 18 C. W. N. 1294; *Umesh* v. *Joy*, (1917) 22 C. W. N. 474.

[2] *Ajoodhia* v. *Emambandee*, (1867) B. L. R. F. B. Vol. 725, *sc.*, 7 W. R. 528, overruling *Taramonee* v. *Birressur*, (1864) 1 W. R. 86; *Durga* v. *Brindaban*, (1869) 2 B. L R. App. 37, *sc.*, 11 W. R. 162; *Tara* v. *Soorjo*, (1871) 15 W. R. 152; *Sohodwa* v. *Smith*, (1873) 12 B. L. R. 82, *sc.*, 20 W. R. 139; *Bootee* v. *Moorut*, (1873) 20 W. R. 478; *Narendra* v. *Ishan*, (1874) 13 B. L. R. 274, *sc.*, 22 W. R. 22; *Kripa* v. *Dyal*, (1874) 22 W. R. 169; *Ram* v. *Bholanath*, (1874) 22 W. R. 200; *Hyes* v. *Moneerooddeen*, (1875) 24 W. R. C. R. 6; *Srishteedhur* v. *Mudan*, (1883) I. L. R. 9 Calc. 648; *Chandrabati* v. *Harrington*, (1891) I. L. R. 18 Calc. 349, *sc.*, L. R. 18 I. A. 27; *Kabil* v. *Chunder*, (1892) I. L. R. 20 Calc. 590; *Kallinath* v. *Upendra*, (1896) I. L. R. 24 Calc. 212, *sc.*, 1 C. W. N. 163.

[3] *Hyat* v *Akbar*, [1855] S. D. A. 20; *Narendra* v. *Ishan*, (1874) 13 B. L. R. 274, *sc.*, 22 W. R. 22; *Ram* v. *Kachu*, (1905) I. L. R. 32 Calc. 386, *sc.*, 9 C. W. N. 249, *sc.*, 1 C. L J. 1; *Agarjan* v. *Panaulla*, (1910) I. L. R. 37 Calc. 687, *sc.*, 14 C. W. N. 779, *sc.*, 12 C. L. J. 169. But see *Jawadul* v. *Ram*, (1896) I. L. R. 24 Calc. 143. See also *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J 52.

[4] *Narayani* v *Nabin*, (1916) I. L. R. 44 Calc. 720, *sc.*, 21 C. W. N. 400, *sc*, 25 C. L. J. 351; *Macpherson* v. *Debibhusan*, (1917) 2 P. L. J. 530; *Bepin* v. *Jagat*, (1919) 23 C. W. N. lxxxiv. See also *Tara* v. *Soorjo*, (1871) 15 W. R. 152. But see *Ananda* v. *Rutnakar*, (1903) 7 C. W. N. 572 and *Shakaruddin* v. *Hemangini*, (1911) 16 C. W. N. 420. As to the right of a sole landlord to sell, a Reference to the Full Bench of the Calcutta High Court (in M. A. 242 of 1918 by Mookerjee and Panton JJ.) is pending for disposal.

[5] *Dwarka* v. *Hurrish*, (1879) I. L. R. 4 Calc. 925, *sc.*, 4 C. L. R. 130; *Ram* v. *Jawahir*, (1907) 12 C. W. N. 899, *sc.*, 7 C. L. J. 72; *Agarjan* v *Panaulla*, (1910) I. L. R. 37 Calc. 687, *sc.*, 14 C. W. N. 779, *sc.*, 12 C. L. J. 169; *Sheikh* v. *Romoni*, (1912) 17 C. W. N. 1105; *Behari* v. *Sindhubala*, (1917) I. L. R. 45 Calc. 434, *sc.*, 22 C. W. N. 210, *sc.*, 27 C. L. J. 497. See also *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52.

execution of a decree[1] for money against him. The transferee acquires no title against the landlord by the transfer[2] and if he succeeds in obtaining possession, he is liable to be evicted as a trespasser[3] by the landlord, who is not bound to recognise him[4] as his tenant. [A transfer is, however, not void. It is binding between the transferor and transferee, and is voidable only by the landlord[5]]. On assignment by the voluntary action of the *raiyat*, he is considered to have abandoned the land[6] and forfeited his right, the landlord being entitled to immediate possession.[7] [Cases on the subject are many and have not all been uniform. It seems,

[1] *Kripa* v. *Dyal*, (1874) 22 W. R. 169; *Bhiram* v. *Gopi*, (1897) I. L. R. 24 Calc 355, *sc.*, 1 C. W. N. 396; *Durga* v. *Kali*, (1899) I. L. R. 26 Calc 727, *sc.*, 3 C. W. N. 586; *Sadagar* v. *Krishna*, (1899) I. L. R. 26 Calc. 937, *sc.*, 3 C. W. N. 742; *Majed* v. *Raghubur*, (1899) I. L. R. 27 Calc. 187; *Gahar* v. *Kasi*, (1899) I L. R. 27 Calc. 415; *Sita* v. *Atmaram*, (1900) 4 C. W. N 571; *Peary* v. *Jote*, (1906) 11 C. W. N. 83; *Khoda* v. *Sadu*, (1910) 14 C. L J. 620; *Baidya* v. *Kailas*, (1914) 18 C. W. N. ccvi; *Kanchan* v. *Kamala*, (1914) 21 C. L. J. 441; *Badrannessa* v. *Alam*, (1915) 19 C. W. N. 814, *sc.*, 21 C. L. J. 650; *Sadavi* v. *Palknath*, (1916) 1 P. L. J. 257; *Narayani* v. *Nabin*, (1916) I. L. R. 44 Calc. 720, *sc.*, 21 C. W. N. 400, *sc.*, 25 C. L. J. 351.

[2] *Durga* v. *Brindaban*, (1869) 2 B. L. R. App. 37, *sc.*, 11 W. R. 162.

[3] *Sohodwa* v. *Smith*, (1873) 12 B. L. R. 82, *sc.*, 20 W. R. 139; *Ram* v. *Bholanath*, (1874) 22 W. R. 200; *Ram* v. *Jawahir*, (1907) 12 C. W. N. 899, *sc.*, 7 C. L. J. 72. See the cases cited above and *Deoki* v. *Dhian*, (1886) I. L. R. 8 All. 467.

[4] *Joy* v. *Raj*, (1866) 5 W. R 147; *Suddye* v. *Boistub*, (1870) 12 B. L. R. 84 *f.n.*, *sc.*, 15 W. R. 261; *Sohodwa* v. *Smith*, (1873) 12 B. L. R. 82, *sc.*, 20 W. R. 139.

[5] *Basarat* v. *Sabulla*, (1898) 2 C. W. N. cclxxix; *Bhagirath* v. *Hafizuddin*, (1900) 4 C. W. N. 679; *Ram* v. *Jawahir*, (1907) 12 C. W. N. 899, *sc.*, 7 C. L. J. 72; *Hari* v. *Udoy*, (1908) 12 C. W. N. 1086, *sc.*, 8 C. L. J. 261; *Samiruddin* v. *Benga*, (1909) 13 C. W. N. 630; *Narain* v. *Dinabandhu*, (1909) 9 C. L. J. 82n.; *Shyama* v. *Mokhuda*, (1911) 15 C. W. N. 703, *sc.*, 13 C. L. J. 481; *Radha* v. *Ramananda*, (1912) I. L. R. 39 Calc. 513, *sc.*, 16 C. W. N. 475, *sc.*, 15 C. L. J. 369; *Dayamayi* v. *Ananda*, (1914) I L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52; *Deosaran* v. *Bateswar*, (1916) 23 C. L. J. 559. See also *Gadadhar* v. *Midnapur Zemindari Co.*, (1908) 16 C. L. J. 141. But see *Bhiram* v. *Gopi*, (1897) I. L. R. 24 Calc. 355, *sc.*, 1 C. W. N. 396; *Durga* v. *Kali*, (1899) I. L. R. 26 Calc. 727, *sc.*, 3 C. W. N. 586; *Sadagar* v. *Krishna*, (1899) I. L. R. 26 Calc.937, *sc.*, 3 C. W. N. 742; *Peary* v. *Jote*, (1906) 11 C. W. N. 83 and *Ram* v. *Rajan*, (1907) 6 C. L. J. 43.

[6] *Hureehur* v. *Jodoonath*, (1867) 7 W. R. 114; *Narendra* v. *Ishan*, (1874) 13 B. L. R. 274, *sc.*, 22 W. R. 22; *Kallinath* v. *Upendra*, (1896) I. L. R. 24 Calc 212, *sc.*, 1 C. W. N. 163. But see *Mohadeo* v. *Panchkari*, (1911) 16 C. W. N. 322.

[7] *Ram* v. *Bholanath*, (1874) 22 W. R. 200.

Judges have, with the idea of protecting the tenants, stretched the law rather far. The result has been that landlords are practically in a helpless position so far as occupancy *raiyats* are concerned. It has been held that landlords cannot eject *raiyats* unless there has been surrender[1] or abandonment,[2] and that surrender or abandonment is a question of evidence.[3] A tenant continuing in the land after transfer, in whatever right it may be, has been held not to have the effect of abandonment.[4] The transfer of a non-transferable occupancy holding does not effect forfeiture of the right.[5] Nor is a

[1] *Shristeedhur* v. *Mudan*, (1883) I. L. R. 9 Calc. 648; *Ramoni* v. *Kalimuddi*, (1912) 17 C. W. N. 1101; *Tamij* v. *Brojendra*, (1918) 22 C. W. N. 967.

[2] *Wilson* v. *Radha*, (1897) 2 C. W. N. 63; *Madar* v. *Mahima*, (1906) I. L. R. 33 Calc. 531, *sc.*, 3 C. L. J. 343; *Mathura* v. *Ganga*, (1906) I. L. R. 33 Calc. 1219, *sc.*, 10 C. W. N. 1033; *Sailabala* v. *Sriram*, (1907) 11 C. W. N. 873, *sc.*, 7 C. L. J 303; *Ram* v. *Jawahir*, (1907) 12 C. W. N. 899, *sc.*, 7 C. L. J. 72; *Jogendra* v *Tincowri*, (1909) 10 C. L. J. 147; *Suresh* v. *Nesa*, (1910) 11 C. L. J. 433; *Mohadeo* v. *Panchkari*, (1911) 16 C. W. N. 322; *Sheikh* v. *Romoni*, (1912) 17 C. W N. 1105; *Bhupendra* v. *Bansi*, (1913) I. L. R. 40 Calc. 870; *Pran* v. *Mukta*, (1913) 18 C. L. J. 193; *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52; *Kalim* v. *Mocham*, (1915) 24 C. L. J. 113. See also *Yesa* v. *Sakharam*, (1905) I. L. R. 30 Bom. 290.

[3] *Samujan* v. *Mahaton*, (1900) 4 C. W. N. 493; *Ram* v. *Jawahir*, (1907) 12 C. W. N. 899, *sc.*, 7 C. L. J. 72; *Sheikh* v. *Romoni*, (1912) 17 C. W. N. 1105; *Suraj* v. *Panchh*, (1917) 2 P. L J. 225; *Swarnamoyi* v. *Gayaratulla*, (1917) 21 C. W. N. ciii. See also *Sailabala* v. *Sriram*, (1907) 11 C. W. N. 873, *sc.*, 7 C. L. J. 303; *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52; *Matookdhari* v. *Jugdip*, (1914) 19 C. W. N. 1319, *sc.*, 21 C. L J. 261 and *Tamij* v. *Brojendra*, (1918) 22 C. W. N. 967. See Act VIII of 1885, Secs. 86, 87.

[4] *Ram* v. *Bholanath*, (1874) 22 W. R. 200; *Tumeezooddeen* v. *Lukhee*, (1876) 25 W. R. 104; *Shrishteedhur* v. *Mudan*, (1883) I. L. R. 9 Calc. 648; *Kallinath* v. *Upendra*, (1896) I. L. R. 24 Calc. 212, *sc.*, 1 C. W. N. 163; *Nadhu* v. *Kartick*, (1903) 9 C. W. N. 56; *Dina* v. *Krishna*, (1904) 9 C. W. N. 379; *Kamaleswari* v. *Harbullabh*, (1905) 2 C. L. J. 369; *Madar* v. *Mahima*, (1906) I. L. R. 33 Calc. 531, *sc.*, 3 C. L. J. 343; *Mathura* v. *Ganga*, (1906) I. L. R. 33 Calc. 1219, *sc.*, 10 C. W. N. 1033; *Jogendra* v. *Tincowri*, (1909) 10 C. L. J. 147; *Baroda* v. *Hemlata*, (1909) 13 C. W. N. 833; *Mohadeo* v. *Paehkari*, (1911) 16 C. W. N. 322; *Askar* v. *Goupee*, (1913) 18 C. W. N. 601, *sc.*, 18 C. L. J. 257; *Kalim* v. *Mocham*, (1915) 24 C. L. J. 113; *Nobo* v. *Dhananjoy*, (1916) 20 C. W. N. 610. But see *Kali* v. *Arman*, (1908) 13 C. W. N. 220; *Rajani* v. *Ekkowri*, (1907) I. L. R. 34 Calc. 689, *sc.*, 11 C. W. N. 811, *sc.*, 7 C. L. J. 78. See also *Yesa* v *Sakharam*, (1905) I. L. R. 30 Bom. 290.

[5] *Gorachand* v *Buroda*, (1869) 11 W. R. 94; *Dwarkanath* v. *Kanaye*, (1871) 16 W. R. 111; *Narain* v. *Opnit*, (1882) I. L. R. 9 Calc. 304; *Kabil* v. *Chunder*, (1892) I. L. R. 20 Calc. 590; *Durga* v. *Doula*, (1894) 1 C. W. N.

right of occupancy determined by subletting.[1] A co-sharer landlord is not entitled to sell the whole or part of non-transferable occupancy holding in execution of a decree obtained for his share of the rent, when the *raiyat* objects to the sale.[2] It has also been held that the landlord cannot eject the tenant where there has been transfer of a part of the holding.[3] The transferee of a portion of a non-transferable occupancy holding can recover by suit possession from the landlord who has forcibly dispossessed him.[4] But such a transferee is not entitled to have joint possession of the *jote*, and it is open to tenants in occupation of a portion of the *jote* to question the validity of the transfer.[5] Consistently to the above principle, it has been held that a transferee of a part of *jote* has a subsisting right,[6] and can invoke to his aid the provisions of section 47 and Order xxi, rule 90 of the Code of Civil Procedure or the corresponding sections of the old Code.[7] There are a few decisions, which

160; *Gosaffur* v. *Dablish*, (1896) 1 C. W. N. 162; *Nadhu* v *Kartick*, (1903) 9 C. W. N. 56; *Kamaleswari* v. *Harbullabh*, (1905) 2 C. L. J. 369; *Gagan* v. *Alak*, (1913) 17 C. W. N. 698; *Bhupendra* v. *Bansi*, (1913) I. L. R. 40 Calc 870; *Kalim* v *Mocham*, (1915) 24 C. L. J. 113. See also cases on abandonment (footnote 2 of page 341).

[1] The matter is dealt with fully later on in this lecture.

[2] *Hossein* v. *Fakir*, (1909) 10 C. L. J. 618; *Khoda* v. *Sadu*, (1910) 14 C. L. J. 620; *Shakaruddin* v. *Hemangini*, (1911) 16 C. W. N. 420; *Badrannessa* v. *Alam*, (1915) 19 C. W. N. 814, *sc.*, 21 C. L. J. 650. See also *Suraj* v. *Panch*, (1917) 2 P. L. J. 225.

[3] *Kabil* v *Chunder*, (1892) I. L. R. 20 Calc. 590; *Durga* v. *Doula*, (1894) 1 C. W. N. 160; *Gosaffur* v. *Dablish*, (1896) 1 C. W. N. 162; *Brahamdeo* v. *Ramdown*, (1908) 16 C. L. J 139; *Askar* v. *Goupee*, (1913) 18 C. W. N. 601, *sc.*, 18 C. L. J. 257; *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C L J. 52; *Purna* v. *Chandra*, (1916) 20 C. W. N. 586, *sc.*, 23 C. L J. 304; *Asarfi* v. *Ramkhelawan*, (1918) 4 P. L J. 115.

[4] *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52, overrulling *Kuldip* v. *Gillanders*, (1899) I. L. R. 26 Calc. 615 and *Agarjan* v. *Panaulla*, (1910) I. L. R. 37 Calc. 687, *sc.*, 14 C. W. N. 779, *sc.*, 12 C. L. J. 169.

[5] *Agarjan* v. *Panaulla*, (1910) I. L. R. 37 Calc. 687, *sc.*, 14 C. W. N. 779, *s.c.*, 12 C. L. J. 169.

[6] *Brahamdeo* v. *Ramdown*, (1908) 16 C. L. J. 139; *Asarfi* v. *Ramkhelawan*, (1918) 4 P. L. J. 115.

[7] *Asgar* v. *Asaboddin*, (1904) 9 C. W. N. 134; *Gopi* v. *Sajani*, (1905) 10 C. W. N. 240; *Shamsuddin* v. *Bakaullah*, (1906) 10 C. W. N.

even go to the length of holding that transfer of a portion is an incumbrance within sections 86 (6) and 161 of the Bengal Tenancy Act.[1] Whether a transferee of an occupancy holding not transferable by custom has an interest in his holding so as to entitle him to make a deposit under section 170 (3) of the Bengal Tenancy Act to avoid a sale of the holding in execution of the landlord's decree for rent is also doubtful.[2] The landlord may, however, validate the transfer by recognition.[3] But, as to what amounts to recognition, there is again divergence of opinion.[4] The landlord may be estopped by conduct from

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ccxxxv; *Bacchu* v. *Bishu*, (1907) 11 C. W. N. cxii; *Omar* v. *Basirudeen*, (1908) 7 C. L. J. 282; *Gour* v. *Tarajan*, (1908) 8 C. L. J. 161; *Bhupendra* v. *Upendra*, (1909) 13 C. W. N. cclxiii; *Abdul* v. *Tafazuddin*, (1914) 19 C. W. N. 326; *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc, 172, *sc.*, 18 C. W. N 971, *sc.*, 20 C. L. J. 52; *Panch ratan* v. *Ram*, (1918) 3 P. L. J. 579. But see *Nissa* v. *Radha*, (1916) 11 C W. N. 312; *Prosunno* v. *Bama*, (1909) 13 C. W. N. 652 and *Joy* v. *Pran*, (1910) 15 C. W. N. 512, *sc.*, 13 C. L. J. 257. See also *Badrannessa* v. *Alam*, (1915) 19 C. W. N. 814, *sc.* 21 C. L. J. 650.

[1] *Pran* v. *Atul*, (1917) 22 C. W. N. 662; *Dastur* v. *Ram*, (1918) 22 C. W. N. 972 (Richardson J contra). But see *Ramoni* v *Kalimuddi*, (1912) 17 C. W. N. 1101; *Zamir* v. *Bisseswari*, (1917) 25 C. L. J. 480.

[2] *Nalini* v. *Fulmani*, (1912) 16 C. W. N. 421, *sc.*, 15 C. L. J. 388; *Tarak* v. *Harish*, (1912) 17 C W. N. 163, *sc.*, 16 C. L. J. 548; *Ahamadullah* v *Prayag*, (1914) 20 C. W. N. 39, *sc.*, 22 C. L J. 106; *Surendra* v. *Jugal*, (1916) 20 C. W. N. 849; *Rameshwar* v. *Raghunandan* (1916) 1 P. L. J. 403; *Mahadeo* v. *Langat*, (1917) 2 P. L. J. 457; *Kali* v. *Gopal*, (1918) 23 C. W. N 132. See also *Asarfi* v. *Ramkhelawan*, (1918) 4 P. L. J. 115

[3] *Prosonnokoomar* v. *Rammohun*, [1855] S D. A. 14, *sc.*, 14 I. D. O. S. 11; *Ananda* v *Rutnakar*, (1903) 7 C. W. N. 572; *Dwarkanath* v. *Tarini*, (1907) I. L. R. 34 Calc. 199, *sc.*, 11 C. W. N. 513, *sc.*, 5 C. L. J. 294; *Dayamaji* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L J. 52.

[4] *Abdool* v. *Munsoor*, (1869) 12 W. R. 396; *Gaur* v. *Rameswar*, (1870) 6 B. L. R. App. 92; *Khoodeeram* v. *Rookhinee*, (1871) 15 W. R. 197; *Rasamoy* v. *Srinath*, (1502) 7 C. W. N. 132; *Barclay* v. *Hossein*, (1907) 6 C. L. J. 601; *Kurani* v. *Sajoni*, (1908) 12 C. W. N. 539; *Baroda* v. *Hemlata*, (1909) 13 C. W. N. 833, *sc*, 10 C L. J. 60, reversing *Baroda* v. *Hemlata*, (1908) 13 C. W. N. 242; *Debnarain* v. *Baidya*, (1909) 14 C. W N. 68; *Suduman* v. *Behari*, (1911) 15 C. W. N. 953; *Digbijoy* v. *Ata*, (1911) 17 C W. N. 156; *Harish* v. *Moharaj*, (1913) 17 C. W. N. ccxxxii; *Prabhabati* v. *Taibatunnessa*, (1913) 17 C. W. N. 1088, *sc.*, 19 C. L. J. 62; *Matookdhari* v. *Jugdip*, (1914) 19 C. W. N. 1319, *sc.*, 21 C. J. L 261; *Surendra* v. *Jugal*, (1916) 20 C. W. N 849. But see *Nubo* v. *Kishen*, [1864] W. R Gap Vol. Act X. 112; *Mahomed* v. *Chundee*, (1867) 7 W. R. 250; *Mritanjai* v. *Gopal*, (1868) 10 W. R.

disputing the transfer.[1] The Full Bench decision of the Calcutta High Court in *Dayamayi* v. *Ananda Mohan Roy Chowdhury* has settled many[2] of these disputed questions, and a later Full Bench decision of the Patna High Court in *Asarfi Singh* v. *Ramkhelawan Sinha*[3] has summarised the principles governing the transfer of non-transferable occupancy holdings as follows :—

" (1) Where the transfer is a *sale* of the *whole* holding, the landlord is ordinarily entitled to enter on the holding.

(2) (*a*) Where the transfer is *otherwise than by sale* of the *whole* holding, and (*b*) Where the transfer is of a *part* only of the holding, whether *by sale or otherwise*, the landlord is not ordinarily entitled to recover possession unless there has been an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or a repudiation of the tenancy.

(3) The transferee of a portion of a non-transferable occupancy holding has certain interests and legal rights which for certain purposes are limited by the provisions of the Bengal Tenancy Act, read with the provisions of the Code of Civil Procedure, 1908.

(4) All such transferees have, irrespective of the Bengal Tenancy Act, and altogether *dehors* that Act, certain legal rights which if infringed, the common law of the land will not be powerless to protect in appropriate cases.

(5) One of such rights is the right to possession which the transferee has even against the landlord

466; *Bharut* v. *Gunga*, (1870) 14 W. R. 211; *Allender* v. *Dwarkanath*, (1871) 15 W. R. 320; *Ram* v. *Dushoobhoojah*, (1872) 18 W. R. 195; *Ameen* v. *Bhyro*, (1874) 22 W. R 493; *Ram* v. *Krishno*, (1874) 23 W. R. 106. See also *Janki* v. *Run*, (1917) 2 P. L. J. 231.

[1] *Banee* v. *Joy*, (1869) 11 W. R. 354; *Ameen* v. *Bhyro*, (1874) 22 W. R. 493; *Asmatunnessa* v. *Harendra*, (1908) I. L. R. 35 Calc 904, *sc.*, 12 C. W. N. 721; *Lal* v. *Jagir*, (1909) 13 C. W. N. 913.

[2] (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52.

[3] (1918) 4 P. L. J. 115.

until abandonment, relinquishment or repudiation takes place.

(6) The common law imposes an obligation on the landlord to refrain from extinguishing the rights of the transferee by committing a tortious Act in conspiracy with a third person. If this obligation is not observed, and damage to the transferee results, the common law may be invoked to vindicate the latter's rights.

(7) The period at which damage accrues may vary in different cases, but as soon as it does accrue, the transferee may immediately institute a suit to attack all fraudulent proceedings between the landlord and the recorded tenant."

It was once in the contemplation of the Legislature to amend the law as to transferability of occupancy *raiyats*, as suggested by a Full Bench decision of the Calcutta High Court,[1] and, as notwithstanding the established usage of non-transferability and the current of decisions, transfers were very common. A bill was drafted, but never introduced in the Bengal Legislative Council. The Bihar and Orissa Legislative Council, however, recently passed an Act for Orissa giving occupancy *raiyats* the power to transfer their holdings subject to certain conditions.[2]]

Custom or local usage.

Custom or local usage may, however, make the right transferable,[3] and when it is so, the transfer may take place by the voluntary action of the *raiyat*,

[1] *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L J. 52.

[2] B. & O. Act II of 1913.

[3] Act VIII of 1885, Sec. 178. *Joy* v. *Raj*, (1864) 1 W. R. 153; *Sreeram* v *Bissonath*, (1865) 3 W. R. Act X 2; *Chunder* v *Kadermonee*, (1867) 7 W. R. 247; *Nunkoo* v. *Mohabeer*, (1869) 11 W. R. 405; *Unnopoorna* v. *Ooma*, (1872) 18 W. R 55; *Shunkurputtee* v. *Saifoollah*, (1872) 18 W. R. 507; *Jugut* v. *Eshan*, (1875) 24 W. R. 220; *Dwarka* v. *Hurrish*, (1879) I. L R 4 Calc. 925, *sc.*, 4 C. L. R. 130; *Durga* v. *Doula*, (1894) 1 C. W. N. 160; *Palakdhari* v. *Manners*, (1895) I. L. R. 23 Calc. 179; *Bhiram* v. *Gopi*, (1897) I. L. R. 24 Calc. 355, *sc.*, 1 C. W. N. 396; *Dayamayi* v. *Ananda*, (1914) I. L. R. 42 Calc. 172, *sc.*, 18 C. W. N. 971, *sc.*, 20 C. L. J. 52.

or may be effected by the various modes of involuntary alienation. [The question whether there is a custom or usage is a question of fact, but the question whether a given state of facts establishes a binding custom or usage is a question of law.][1] The onus of proof of the usage or custom of transferability is on the *raiyat* or his assignee, even if he is defendant in a suit for ejectment.[2] [It is necessary to prove that such transfers have been made to the knowledge and without the consent of the landlord and that they have been recognized by him either without the payment of *nazar* or upon payment of a *nazar* also fixed by custom.[3] It is not sufficient to show simply that such holdings are sold in the village or neighbouring villages.[4] The usage to be effective must not be a growing usage, but one which has already grown up.[5]] But wherever the custom or usage of transferability is proved to exist, the landlord is bound to recognise the transferee on his obtaining possession, and, wherever the Bengal Tenancy Act prevails, as soon as notice of the transfer is given to the landlord.[5] The transfer must, of course, be effected according to the means prescribed by the Transfer of Property Act,[6] but it should be remembered that registration in the landlord's office is not necessary

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[1] *Kailash* v. *Padmakishore*, (1917) I. L. R. 45 Calc. 285, *sc.*, 21 C. W. N. 972, *sc.*, 25 C. L. J. 613.

[2] *Kripamoyi* v. *Durga*, (1887) I. L. R. 15 Calc. 89, and the cases cited therein. But see *Doya* v. *Anund*, (1887) I. L. R. 14 Calc. 382; *Palakdhari* v. *Manners*, (1895) I. L. R. 23 Calc. 179 and *Dalglish* v. *Gusuffer*, (1896) I. L. R. 23 Calc. 427.

[3] *Sibo* v. *Raj*, (1903) 8 C. W. N. 214; *Jagun*, v. *Posun*, (1903) 8 C. W. N. 172 ; *Buslul* v *Satis*, (1911) 15 C. W N. 752, *sc.*, 13 C. L. J. 418; *Chand* v. *Romoni*, (1912) 17 C. W. N. 1105; *Mina* v. *Ichhamoyee*, (1918) 22 C. W. N. 929, *sc.*, 27 C. L. J. 587. See also *Radha* v. *Ananda*, (1903) 8 C. W. N. 235; *Kurani* v. *Sajoni*, (1908) 12 C. W. N. 539; *Kailash* v. *Hari*, (1909) 13 C. W. N. 541.

[4] *Peary* v. *Jote*, (1906) 11 C. W. N. 83.

[5] Act VIII of 1885, Sec. 73. But see *Ambika* v. *Keshri*, (1897) I. L. R. 24 Calc. 642.

[6] Act IV of 1882, Sec. 54.

in the same way as in case of transferable intermediate tenures, nor are the same penalties prescribed for non-registration.[1] The landlord's recognition of the sale must follow the alienation and consequent possession, without the payment of any 'fee' or any other action on the part of the *raiyat* or his alienee, except an application for service of a notice under section 73 of the Bengal Tenancy Act.

Mode of using land.

The *raiyat* may use the land in any manner which does not materially impair the value of the land, or render it unfit for the purpose of the tenancy.[2] If the tenancy has been created for ordinary agricultural purposes, *e. g.*, for cultivating paddy or other crops, the *raiyat* will not be allowed to convert the land or any part of it into a tank or to erect substantial structures on it.[3] Neither will he be allowed to dig earth for making bricks.[4] It would seem from the decided cases that the conversion of paddy land into a garden for horticultural purposes is a misuse of the land. In cases of such improper use of the land, the landlord is entitled to ask for an injunction for restraining the conversion and also for damages to the extent of the actual loss sustained by him, provided he has not acquiesced in such use of the land by the tenant, and the conditions necessary for the issuing of a perpetual injunction or for awarding damages are present.[5] It is inequitable and

[1] *Taramonee* v. *Birressur*, (1864) 1 W. R. 86; *Karoo* v. *Luchmeeput*, (1867) 7 W. R. 15; *Wooma* v. *Huree*, (1868) 10 W. R. 101; *Joy* v. *Doorga*, (1869) 11 W. R. 348. For service of notice under section 73 of Act VIII of 1885, see rules 34 and 35 (Ch. V) of Government Rules. See also *Mritunjoy* v. *Jagannath*, (1917) 3 P. L. J. 351, and *Gobind* v. *Debendrabala*, (1919) 4 P. L. J. 387.

[2] Act VIII of 1885, Sec. 23, Sec. 178, Sub-Sec. 3(*b*).

[3] *Jugut* v. *Eshan*, (1875) 24 W. R. 220, not following *Nyamutoollah* v. *Gobind*, (1866) 6 W. R. Act. X 40; *Lal* v. *Deo*, (1878) I. L. R. 3 Calc. 781, *sc.*, 2 C. L. R. 294; *Prossunno* v. *Jagun*, (1881) 10 C. L. R. 25. But see *Hari* v. *Barada*, (1904) I. L. R. 31 Calc. 1014, *sc*, 8 C. W. N. 754.

[4] *Kadumbenee* v. *Nobeen*, (1865) 2 W. R. 157; *Anund* v. *Bissonath*, (1872) 17 W. R. 416. But see *Nicholl* v. *Tarinee*, (1875) 23 W. R. 298.

[5] *Whitham* v. *Kershaw*, (1885) 16 Q. B. D. 613. See *Akhoy* v. *Akman*, (1914) 19 C. W. N. 1197, *sc.*, 20 C. L. J. 551.

unjust to compel the *raiyat* to fill up the tank or remove the structures or the fruit trees he might have planted. It is also inequitable to award as damages an amount that may be necessary for filling up the tank or other excavation. The measure of damages should be regulated by a calculation of the probable loss that may in future be sustained by the landlord. Estimate the letting value of the *raiyati* land before the conversion and that subsequent to it, and the actual loss of the landlord will be so many years' purchase of the annual loss.[1] Under the Bengal Tenancy Act, however, the tenant may make the improvements specified in chapter IX.

Cutting down trees.

Under Act X of 1859, the *raiyat* had not the right to cut down trees, except those planted by himself.[2] But he could prove custom or usage to the contrary. Ordinarily, the custom of paying *chout* or a fourth part of the price of trees so cut down, even if planted by the *raiyat* himself, prevails in many districts. The Bengal Tenancy Act has, in this respect, improved the status of occupancy-*raiyats* by laying down,—"He shall not be entitled to cut down trees in contravention of any local custom."[3] The words of the law seem to imply that there is a presumption in favour of the *raiyat* as to the existence of the right of cutting down trees, whether the trees have been planted by him or not. Custom or local usage to the contrary may be invoked by the landlord to take away the right of the *raiyat*.[4] Neither can the *raiyat*, by any contract with the landlord, deprive himself of the right. Section 178 of the Act, sub-sec. 3, cl. (b), makes

[1] *Nyamutoollah* v. *Gobind*, (1866) 6 W. R. Act X 40. Specific Relief Act, Sec. 54.

[2] *Abdool* v. *Dataram*, [1864] W. R. Gap Vol. 367; *Goluck* v. *Nubo*, (1874) 21 W. R. 344.

[3] Act VIII of 1885, Sec. 23.

[4] *Grija* v. *Mia*, (1889) I. L. R. 22 Calc. 744 f. n.; *Nafar* v. *Ram*, (1894) I. L. R. 22 Calc. 742; *Samsar* v. *Lochin*, (1896) I. L. R. 23 Calc. 854. See also *Sital* v. *Dubal*, (1907) 6 C. L. J. 218 and *Mohamed* v. *Ali*, (1909) 10 C. L. J. 25.

such a contract nugatory, if it be not consonant with established usage or custom.

Payment of rent at fair and equitable rates.

The rent payable by an occupancy *raiyat* is to be at a fair and equitable rate.[1] The landlord is not entitled to claim more,[2] and the tenant is not entitled to tender less than what is payable at such a rate. Ordinarily the *raiyat* is bound to pay at the customary or *perganah* rate for the quantity of land actually held by him,[3] but in the absence of any evidence as to any other rate being fair and proper, there is a presumption as to the fairness of the rate at which rent has been previously paid.[4]

Ejectment.

Immunity from ejectment by the landlord, except under very peculiar circumstances, is the greatest boon conferred on occupancy *raiyats* by the Rent Acts of 1859 and 1869[5] and the Bengal Tenancy Act of 1885. Ejectment was unknown in olden days, but as demand for land increased, ejectment or forcible ouster became common. Act X of 1859 put an end to the landlord's right to eject occupancy-*raiyats*, except for non-payment of rent[6] and breach of any condition in the contract or for misuse of the land. Ejectment could be enforced only under a decree of Court.[7] On non-payment of rent, the landlord had the right to get a decree for ejectment on default of payment of the amount of the decree within fifteen days from the date of the decree. If the tenure was transferable by custom or local usage, the landlord could

For non-payment of rent.

[1] Act X of 1859, Sec. 5; Act VIII of 1885, Sec. 24. See also *Golam* v. *Asmut*, (1868) 10 W. R. F.B. 14; *Suroop* v. *Bonomalee*, (1871) 15 W. R 240; *Gopeenath* v. *Jetoo*, (1872) 18 W. R. 272.

[2] *Noor* v. *Hurriprosonno*, [1864] W. R. Gap Vol. Act X 75.

[3] *Thakooranee* v. *Bisheshur*, (1865) B. L. R. F. B. Vol. 202, *sc.*, 3 W. R. Act X. 29.

[4] Act VIII of 1885, Sec. 27. Compare Acts X of 1859, Sec. 5 and VIII (B.C.) of 1869, Sec. 5.

[5] Act X of 1859, Sec. 21. See also Act VIII (B.C.) of 1869, Secs. 22, 23.

[6] Act VIII (B.C.) of 1869, Sec. 52; Act X of 1859, Sec. 78.

[7] *Musyatulla* v. *Noorsahan*, (1883) I. L. R. 9 Calc. 808, *sc.*, 12 C. L. R. 389.

not get a decree for ejectment[1]; he could only put up to sale the tenant's interest. Section 78 of Act X of 1859 and section 52 of Act VIII (B. C.) of 1869 afforded an equitable relief, even if the lease stipulated for immediate ejectment for non-payment of arrears. The Court might extend the period of fifteen days on reasonable grounds. The Bengal Tenancy Act has, however, taken away from the landlord this right to eject a *raiyat* for non payment of rent. Whether the occupancy-right is transferable by custom or not, the tenant is not liable to ejectment for arrears of rent, but his holding is liable to be sold in execution of a decree for the rent thereof, and the rent is a first charge thereon.[2] The landlord has now the right of selling the land as property belonging to the *raiyat*, or if he does not choose to do so, he can follow in execution of his decree any other property of the *raiyat*, movable or immovable,[3] but he cannot eject him from his holding. The Act of 1859 recognised only a right to hold and cultivate, the Act of 1885 has recognised, in addition, a limited proprietary right in the *raiyat*.

For misuse of land or breach of condition.

Ejectment for misuse of land or for breach of any express covenant in the contract of lease, for which liability to ejectment is expressly provided, is an ordinary incident of a lease of immovable property, even if the lease is permanent.[4] But all civilized systems of jurisprudence have safe-guarded the rights of lessees by rules necessary for the protection of the weak and the imprudent.[5] [In a suit instituted by a landlord under section 155 of the Bengal Tenancy Act for ejectment

[1] *Tirbhobun* v. *Jhono*, (1872) 18 W. R. 206; *Krishtendra* v. *Aena*, (1882) I. L. R. 8 Calc. 675, *sc.*, 10 C. L. R. 399; *Fakir* v. *Fouzdar*, (1884) I. L. R. 10 Calc. 547.

[2] Act VIII of 1885, Sec. 65.

[3] *Lalit* v. *Binodai*, (1886) I. L. R. 14 Calc. 14; *Fotick* v. *Foley*, (1887) I. L. R. 15 Calc. 492.

[4] Act VIII of 1885, Sec. 10.

[5] Act VIII of 1885, Secs. 155, 156; 44 & 45 Vict. Cap 41, Sec. 14.

on the ground that the occupancy *raiyat* has used the land in a manner which has rendered it unfit for the purposes of the tenancy within the meaning of section 25 of the Act, the claim must include all the lands comprised in the tenancy. If the claim is limited to a portion of the land, *e.g.*, the portion covered by a building, the erection of which is complained of, the suit is badly framed and must fail.[1]] The period of limitation for a suit for ejectment for breach of an express covenant is only one year from the date of the breach, if the contract expressly provide[2] that ejectment shall be the penalty for such a breach.

On sale of an estate for arrears of revenue.

The purchaser under a sale for arrears of revenue under the Sale Laws or under a sale for arrears of rent, when he acquires a title free of incumbrances, cannot evict a *raiyat* with a right of occupancy,[3] even though he may hold under a lease granted by the defaulting proprietor or tenure-holder. The right of such a *raiyat* being statutory, he is expressly protected notwithstanding that his occupation was originally based on a grant by the defaulter. Section 37 of Act XI or 1859, in its proviso states—"A purchaser shall not be entitled to eject any *raiyat* having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force or to enhance the rent of any such *raiyat*, otherwise than in the manner prescribed by the laws in force therefor or otherwise than the former proprietor may have been entitled to do." Section 14 of Act VII (B. C.) of 1868 reproduces the law as laid down in section 37 of Act XI of 1859.

On sale under Regulation VIII of 1819 and the Rent Acts.

The Putni-Sale Law[4] also protects from ejectment "*khudkast raiyats* or resident hereditary cultivators."

[1] *Kamaleswari* v. *Harbullabh*, (1905) 2 C. L. J. 369.

[2] Act VIII of 1885, Schedule iii, Art 1.

[3] Act XI of 1859, Sec. 37: Act VIII of 1885, Secs. 159 and 160.

[4] Regulation VIII of 1819, Sec. 11, cl. 3.

I need not remind you that in the year 1819, the expression "right of occupancy" was not used in the language of the Legislature, and the words used in the Putni Regulation ought now to apply to occupancy-*raiyats* as well, especially as under the Bengal Tenancy Act, "settled *raiyats*" necessarily acquire occupancy-right in all lands held by them in the same village, and there is not much difference between "settled" and *khudkast raiyats*. The language used in the Regulation—"resident and hereditary cultivators"—requires, however, to be modified, as all occupancy-*raiyats* are not necessarily resident and hereditary. If the words are strictly construed, a good many occupancy-*raiyats* may suffer. Section 16 of Act VIII (B. C.) of 1865, re-enacted in section 66 of Act VIII (B. C.) of 1869, contains a similar proviso, though apparently by an oversight the Local Legislature, instead of adopting the language of the Revenue Sale Laws, retained the time-honoured expression used in Regulation VIII of 1819. Section 160 of the Bengal Tenancy Act includes, in the category of "protected interests" any right of occupancy, and any right conferred on an occupancy *raiyat* to hold at a rent which was fair and reasonable at the time the right was conferred. Section 159 of the Act lays down that a purchaser on a sale for an arrear of rent shall always take subject to "protected interests."

Subletting.

The right to sublet is an important incident of occupancy-holdings and requires special attention. In one sense, the right is inconsistent with the original purpose of cultivation which as we have seen, lies at the inception of occupancy-right. The Legislature, however, has very wisely provided for the *raiyat* occasionally letting out his land or portions of it to under *raiyats*. A *raiyat* with a right of occupancy may, for various reasons, be prevented from cultivating all his lands, and it would be extremely hard,

if the privilege of subletting be denied to him. The Bengal Tenancy Act devotes a small chapter[1] on under-*raiyats*, and section 178, sub-section 3, cl. (*e*) makes any contract between the landlord and his *raiyat*, which takes away his right to sub-let subject to and in accordance with the provisions of the Act, null and void. This right to sub-let, which is very frequently exercised by *raiyats*, occasionally causes difficulties in distinguishing an occupancy-*raiyat* from an under-*raiyat*. The position of a *raiyat* with a right of occupancy becomes to all appearance that of a middleman or a tenure-holder, if he ceases to cultivate and is satisfied with receiving rent from the under-*raiyat*. If, in addition, his interest is transferable by custom, and if, for a long time, he has held land through under-*raiyats* only, he becomes, in fact, a middleman, though in the eye of law, he continues to be an occupancy-*raiyat*,[2] the under-*raiyat* not being allowed, except under very peculiar circumstances, to acquire the status of an occupancy-*raiyat*. I have already drawn your attention to the observations of the Calcutta High Court in *Baboo Dhunput Singh* v. *Baboo Gooman Singh*.[3] Acquisition of land for the purpose of cultivation is all that is required to make a lessee a *raiyat*.[4] It has been held that 'whatever may be the true definition of the word *raiyat*, it is by no means necessary that he should be an actual cultivator.' Section 6 of Act X of 1859 says distinctly that a *raiyat*, who has *held* land for twelve years consecutively, is entitled to have a right of occupancy in

[1] Act VIII of 1885, Ch. VII. See also *Jumeer* v. *Goneye*, (1869) 12 W. R. 110; *Khoshal* v. *Joynooddeen*, (1869) 12 W. R. 451; *Dumree* v. *Bissessur*, (1870) 13 W. R. 291.

[2] *Karoo* v. *Luchmeeput*, (1867) 7 W. R. 15; *Hureehur* v. *Jodoonath*, (1867) 7 W. R. 114; *Uma* v. *Uma*, (1867) 8 W. R. 181; *Durga* v. *Kalidas*, (1881) 9 C. L. R. 449.

[3] [1864] W. R. Gap Vol. Act X 61 Vide *ante* p. 322.

[4] Act VIII of 1885, Sec. 5, Sub.-Sec. (2), Explanation. *Ram* v. *Lukhee*, (1864) 1 W. R. 71; *Uma* v. *Uma*, (1867) 8 W. R. 181; *Kalee* v. *Ameerooddeen*, (1868) 9 W. R. 579.

the same way as a *raiyat* who has cultivated land for the same period. But though an under-*raiyat* is admitted to the occupation of land for the purpose of cultivation, his holding under a *raiyat* and not a tenure-holder is generally a bar to his acquisition of the same right which his lessor has under the law. A *raiyat* does not become a middleman, simply because, instead of cultivating the land, he erects shops on it, lets them out, and receives profits from the shopkeepers.[1]

Surrender and abandonment.

The right to surrender the holding is another incident of occupancy-right [as much as he has the right to occupy his field so long he pays rent.[2]] We have already seen[3] that permanent tenure-holders cannot relinquish their tenures without the permission of the superior holder. But the law has especially protected the right of an occupancy *raiyat* to surrender his holding, and any contract, taking away the right is invalid in law.[4] If, however, a *raiyat* is bound by a lease or other agreement for a fixed period, he is not entitled to relinquish his holding before the expiry of such period.[5] There cannot be a surrender of a part of a holding, nor can a sharer surrender his share.[6] [The landlord may, however, accept surrender of a part of the holding and re-enter.[7]] Abandonment by the tenant may in some cases amount to surrender.[8]

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[1] *Khujoorunissa* v. *Ahmed*, (1869) 11 W. R. 88.

[2] Act VIII (B.C.) of 1869, Sec. 20; Act VIII of 1885, Sec. 86.

[3] *Ante* p 225. *Heera* v. *Neel*, (1873) 20 W. R. 383; *Judoonath* v. *Schoene*, (1883) I. L. R. 9 Calc. 671.

[4] Act VIII of 1885, Sec. 178, Sub-Sec. (3), cl (c). *Gopal* v. *Tarinee*, (1868) 9 W. R. 89.

[5] Act VIII of 1885, Sec. 86, Sub-Sec. (1). *Kashee* v. *Onraet*, (1866) 5 W. R. Act X 81; *Tiluck* v *Mohabeer*, (1871) 15 W. R. 454 But see *Gopal* v. *Tarinee*, (1868) 9 W. R. 89.

[6] *Saroda* v. *Mahomed*, (1866) 5 W. R. Act X 78; *Mohima* v. *Pitambur*, (1868) 9 W. R. 147.

[7] Act VIII of 1885, Sec. 87. *Badan* v. *Rajeswari*, (1905) 2 C. L. J. 570; *Ramoni* v. *Kalimuddi*. (1912) 17 C. W. N. 1101; *Gagan* v. *Alak*, (1913) 17 C. W. N. 698; *Dastur* v. *Ram*, (1918) 22 C. W. N. 972. See also *Zamir* v. *Bisseswari*, (1917) 25 C. L. J. 480.

[8] Act VIII of 1885, Sec 87. *Ram* v *Gora*, (1875) 24 W. R. 344; *Golam* v. *Golap*, (1882) I. L. R. 8 Calc. 612; *Obhoya* v. *Obhoya*, (1887) I. L. R. 14 Calc. 751.

I propose now to deal with the following matters with respect to occupancy-right—(1) Who may acquire the right? (2) With respect to what class of land may the right be acquired? (3) How may the right be acquired? (4)What are the respective duties and liabilities of the landlord and the tenant during the period of the existence of the right in the tenant? (5) How may the right be lost or determined?

Raiyats only may acquire occupancy-right.

Under section 6 of Act X of 1859 and Bengal Act VIII of 1869, as well as under sections 19 and 21 of the Bengal Tenancy Act, a *raiyat* only may acquire occupancy-right. But all *raiyats* are not entitled to have the privilege, which the Regulation Code of 1793 practically took away from the cultivators of the soil and which the Act of 1859 restored to them, though partially, after the lapse of nearly sixty years. Broadly speaking—"Every *raiyat* may have a right of occupancy in the land cultivated or held by him"; but there are the exceptions which we have to note. As regards the actual cultivators, the Rent Acts of 1859 and 1869 made an exception as to persons holding or cultivating land under sub-leases from *raiyats* having rights of occupancy, if they held for fixed periods only or from year to year.[1] These sub-lessees are known by various local names in different parts of the country, such as *korfadars*, *durjotedars* &c., and are called under-*raiyats* in the Bengal Tenancy Act. An under-*raiyat* could, under the old law, acquire a right of occupancy in lands sub-let to him, otherwise than for a term or from year to year;[2] but ordinarily he could not acquire the right, as he generally held for a term or from year to year.[3] But cases might occur in which

[1] *Ketal* v. *Nadur*, (1866) 6 W. R. 168; *Abdool* v. *Kalee*, (1867) 7 W. R. 81; *Kalee* v. *Râm*, (1868) 9 W. R. 344; *Haran* v. *Mookta*, (1868) 10 W. R. 113; *Ramdhun* v. *Haradun*, (1869) 12 W. R. 404, *sc.*, 9 B. L. R. 107 (footnote); *Nil* v. *Danesh*, (1871) 15 W. R. 469; *Unnopoorna* v. *Radha*, (1873) 19 W. R. 95.

[2] Act X of 1859, Sec. 6.

[3] See *Domunoollah* v. *Mahmoudie*, (1869) 11 W. R. 556.

the terms of their sub-leases would entitle the under-*raiyats* to acquire the same sort of statutory right as the superior holders themselves. The Bengal Tenancy Act, however, does not favour the acquisition of the right by under-*raiyats*, as it manifestly tends to take away from the *raiyat* with a right of occupancy his power of cultivating his lands himself or by hired labourers. The existence of the same sort of right in two persons, holding the same piece of land, one claiming under the other, is in itself an anomaly, and whatever conflict of opinions there might be under Act X of 1859, it may safely be said that under the Bengal Tenancy Act an under-*raiyat* cannot acquire a right of occupancy, unless custom or usage favours him.[1]

Settled *raiyats.*

A "settled *raiyat*" acquires, under the Bengal Tenancy Act, a right of occupancy in all lands held by him for the time being as a *raiyat*.[2] The idea of the *right* of a "settled *raiyat*" owes its origin to the right which was known to belong to *khudkast raiyats* who were creatures of custom; but a *khudkast raiyat* might acquire his peculiar status by residence in a village for a much shorter period than twelve years, though he is not necessarily, a "settled *raiyat*" by holding land for a period of twelve years or longer. Recognition by the village political unit was all that was needed to make a new comer into the village a *khudkast raiyat*, the period of residence being perfectly immaterial;[3] but residence in the village was absolutely necessary to give the status. The nearest cognate relation of a village *mandal*, unless he happened to be the heir-at-law, would not be a member of the political unit, if he happened to be a

[1] Act VIII of 1885, Sec. 183, Illustration (2). For the incidents of an under-*raiyat's* holding, see Act VIII of 1885, Ch. VII. See *Akhil* v. *Hassan*, (1913) 19 C. W. N. 246, *sc.*, 18 C. L. J 262; *Yakub* v. *Meajan*, (1915) I. L. R. 43 Calc. 164; *Gopal* v. *Tapai*, (1918) I. L. R. 46 Calc. 43, *sc.*, 22 C. W. N. 618.

[2] Act VIII of 1885, Sec. 21, cl. (1).

[3] *Ante* p. 317.

non-resident, even though he might hold land in it for a long period. He would still be a *paikast*[1] *raiyat*, having none of the burdens and the privileges of a *khudkast* cultivator. The "settled *raiyat*" is a creature of the Legislature and not of custom or customary law. The Bengal Tenancy Act, in section 20, makes every *raiyat* having a right of occupancy, *i.e.*, holding land as *raiyat* continuously for more than twelve years in any village, a 'settled *raiyat*' of that village. Whether the *raiyat* be *khudkast* or *paikast*, whether he be recognized by the residents of the village as a member of their body or not, he becomes a 'settled *raiyat*' as soon as he has acquired a right of occupancy in any land in the village. The acquisition of the right is dependent upon codified law and not upon the voice of the peasantry in a village. Again a person is a 'settled *raiyat*' of a village, within the meaning of the Bengal Tenancy Act, if he has continuously held land in a village, though the particular land may be different at different times.[2] A person is deemed to have held as a *raiyat* land held by his predecessor, and lands held by co-sharers as a *raiyati*-holding are regarded as held by each separately.[3] A person is also considered to be a 'settled *raiyat*, of a village, so long as he holds any land as a *raiyat* in that village and for one year thereafter.[4] If a *raiyat* recovers possession of his holding under section 87 of the Act, he continues to be a 'settled *raiyat*' of the village, notwithstanding the previous dispossession.[5] There is a considerable difference between the right of occupancy under the Rent Acts of 1859 and 1869 and the right of a 'settled *raiyat*' under the Bengal Tenancy Act. A

[1] *Ante* p. 318.
[2] Act VIII of 1885, Sec. 20. cl. (2).
[3] *Ibid*, Sec. 20, clauses (3) and (4).
[4] *Ibid*, Sec. 20, cl. (5).
[5] *Ibid*, Sec. 20, cl. (6).

'settled *raiyat*' acquires a right of occupancy in any land he holds, however short the period of occupation may be, not by occupation of, and payment of rent for, the same piece of land for a continuous period of twelve years.

Bhagdari raiyats.

Tenants holding land under the *bhagdari*[1] or *bhaoli* system may acquire the right in the same way as *raiyats* paying rent in specie. The law makes no distinction between rent in kind and rent in specie. Thousands of *raiyats*, specially in the province of Bihar, hold land under the system known as the *bhaoli*, *battai*, or *bhagdari*, and many of them have done so for generations.

Indigo concerns.

It was at one time doubted whether an indigo concern or a firm, which has no corporate or legal existence as an individual or individuals, could acquire a right of occupancy.[2] It was contended, on the one hand, that the right could be acquired only by *raiyats* and that members of an indigo concern could not come within the ordinary meaning given to that word; and that an association of persons constituting a firm, who had a large capital and who devoted their energy to the improvement of the soil for the benefit of the country as also for their own benefit, could not be said to be a *raiyat*. On the other hand, it was contended that there was nothing in the law to prevent the acquisition of the right by such an association. There was, in fact, no reason why a firm, cultivating indigo or tea by hired labourers, should not have the privileges of *raiyats* in the sense the word has been used in the Tenancy Acts.[3] No doubt the word *raiyat* ordinarily carries with it

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[1] *Hureehur* v. *Biressur*, (1866) 6 W. R. Act X 17; *Jutto* v. *Basmuttee*, (1871) 15 W. R. 479.

[2] *Cannan* v. *Kylash*, (1876) 25 W. R. 117; *Rai* v. *Laidley*, (1879) I. L. R. 4 Calc 957.

[3] *Laidley* v. *Gour*, (1885) I. L. R. 11 Calc. 501. See *Bujrangi* v. *Mackenzie*, (1901) 7 C. L. J. 475.

the idea of poverty, ragged clothes, and miserable hovels; but I suppose the law never intended that the privileges of occupancy-right should be attached only to want and destitution, and not to wealth and palatial buildings. If a firm cultivating indigo or tea continues to have the same members and to occupy the same piece or pieces of land or hold land in the same village for more than twelve years, it should have the right which the law has created for the benefit of cultivators. The Bengal Tenancy Act, in section 5, read along with section 3, clause (39) of the General Clauses Act (X of 1897), clearly indicates that an association of persons or a firm is as much capable of acquiring the right as the poorest cultivator of the soil.

The landlord himself.

The landlord himself cannot, by cultivating his own land, even if he were to use the name of a stranger as holding the land, acquire a right of occupancy in the land so cultivated by him.[1] The system of holding land in this country *benami* in the names of servants and relations, is common, though no presumption ought to be made in every case in favour of *benami* holding. Evidence may be given to show that the landlord himself has been cultivating and taking the profits of the land, and such evidence may be sufficient to prove the *benami* character of the holding. Cases about *benami* holding occasionally arise, especially when the landlord's interest is sold, and he, the outgoing landlord, attempts to resist the purchaser by putting forward nominal holders under him.

Co-share landlords.

A co-sharer out of a body of landlords cannot acquire the right by holding and cultivating land and paying a proportionate share of the rent to the other

[1] *Reed* v. *Sreekishen*, (1871) 15 W. R. 430; *Radha* v. *Rakhal*, (1885) I. L. R. 12 Calc. 82. See Bengal Tenancy Act, Sec. 22, cl. (1) and *Mitturjeet* v. *Fitzpatrick*, (1869) 11 W. R. 206; *Bool* v. *Luthoo*, (1875) 23 W. R. 387; *Lal* v. *Solano*, (1883) I. L. R. 10 Calc. 45, *sc*, 12 C. L. R. 559.

co-sharers. Neither can he do so by holding land with the permission of the other joint owners, the latter holding other lands by arrangement.[1] It is wrong in principle to allow a landlord to have the benefits of the right, which the law intended to confer only upon *raiyats*, and if a co-sharer landlord were entitled to acquire the right of a *raiyat*, opportunities of committing fraud upon strangers and diminishing the actual quantity of *raiyati* land in a village would be great. At one time it was doubted by the High Court at Calcutta whether such a co-sharer could acquire the right, and in one case[2] it was thrown out that the question was one of fact and not of law. It was held that the conduct of the co-sharers might be evidence for proving the existence of a right of occupancy in any one of them. But the Legislature has, in section 22 of the Bengal Tenancy Act, indicated that such an acquisition of the right cannot be recognized. The union of two inconsistent rights—of the landlord and an occupancy-holder, has been deemed improper and against the policy of law,[3] and as soon as they unite in the same person, the inferior right is extinguished.[4]

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[1] *Roghoobun* v. *Bishen*, (1865) 2 W. R. Act X 92.

[2] Per Jackson, J., in *Kalee* v. *Shah*, (1869) 12 W. R. 418. See *Alladinee* v. *Sreenath*, (1873) 20 W. R. 258.

[3] *Ram* v. *Bhela*, (1910) I. L. R. 37 Calc. 709, *sc.*, 14 C. W. N. 814.

[4] See *Ram* v. *Mahomed*, (1898) 3 C. W. N. 62. But see *Sitanath* v. *Pelaram*, (1894) I. L. R. 21 Calc. 869; *Jawadul* v. *Ram*, (1896) I. L. R. 24 Calc. 143, and *Miajan* v. *Minnat*, (1896) I. L. R. 24 Calc. 521. In *Jawadul's* case, a division Bench of the High Court, consisting of five Judges, held that the effect of a purchase, by one co-owner of land, of an occupancy right is not that the holding ceases to exist, but only the occupancy right, which is an incident of the holding, is extinguished. The correctness of the decision in *Jawadul's* case was affirmed by the Full Bench in *Ram* v. *Kachu*, (1905) I. L. R. 32 Calc. 386, *sc.*, 9 C. W. N. 249, *sc.*, 1 C. L. J. 1. The result is that the purchasing co-sharer becomes a *raiyat*. What is his status? If he becomes a non-occupancy *raiyat*, he will be entitled to acquire the status of an occupancy *raiyat* by twelve years' occupation. He cannot be an under-*raiyat*. The land being *raiyati*, the incidents of a landlord's private land cannot attach to it. Such a tenancy will certainly be of an anomalous character and one not recognized in the Act. See also *Akhil* v. *Hasan*, (1913) 19 C. W. N. 246, *sc.*, 18 C. L. J. 262. *Jawadul Huqs* case was distinguished from in *Girish* v. *Kedar*, (1899) I. L. R. 27 Calc. 473, *sc.*, 4 C. W. N. 569, and it has been held that section 22, cl. (2) does not apply to holdings that are

Lessees.

A lessee, such as an *ijaradar* or farmer of rent, whether he is known as a *thikadar*, *katkinadar*, *mostajir* or *chukanidar*, cannot acquire the right in any land comprised in his *ijara*, or farm.[1] A man cannot occupy the double character of a landlord and a *raiyat*, and acquire a statutory right on the pretence of paying rent to himself.[2] If a person is already in occupation of

non-transferable. See also *Peary* v. *Badul*, (1900) I. L. R. 28 Calc. 205, *sc.*, 5 C. W. N. 310; *Amirullah* v. *Nasir*, (1904) I. L. R. 31 Calc. 932; *Badan* v. *Rajeswari*, (1905) 2 C. L. J. 570; *Amirullah* v. *Nasir*, (1905) I. L. R 34 Calc. 104, *sc.*, 3 C. L. J. 155; *Ashu* v. *Banomali*, (1913) 19 C. W. N. 412, *sc.*, 18 C. L. J. 252; *Gangadhar* v. *Rajendra*, (1913) 17 C. W. N. 860; *Pran* v. *Mukta*, (1913) 18 C. L. J. 193; *Lakhi* v. *Balabhadra*, (1913) 19 C. L. J. 400; *Biprodas* v. *Surendra*, (1917) 22 C. W. N. xxiv; *Joynal* v. *Kajem*, (1918) 22 C. W. N. lxviii; *Bhuban* v. *Badan*, (1919) I. L. R. 46 Calc. 766 See *Gur* v. *Jeolal*, (1888) I. L. R. 16 Calc. 127 under the old Bengal Act VIII of 1869. [The amending Acts of 1907, 1908 and 1913 of Bengal, Eastern Bengal & Assam and Bihar & Orissa, Councils respectively (I, B. C., of 1907, I, E. B. & A., of 1908 and II, B. & O., of 1913) have set at rest the confusion created by the case-law noted above. The amendments made by the Bengal Act of 1907 provide that where a sole landlord acquires an occupancy holding of his *raiyat*, the interests of such landlord and tenant merge into a landlord's interest; and that where one of several co-sharer landlords or joint tenure-holders acquires an occupancy right of a tenant of all the co-sharers or joint tenure holders, such landlord cannot thereby acquire an occupancy right, or by subletting, bar the acquisition of *raiyat's* rights by the sub-lessees. The landlord, moreover, will not be prevented from cultivating the land himself, though the holding will not thereby become proprietor's private land. The E. B. & A. Act of 1908 and B. & O. Act of 1913 go further. The Bengal Act as amended does not extinguish the tenancy or holding and leaves the status and position of the purchasing co-sharer landlord uncertain. The later Acts of the other Councils make it clear that a purchasing landlord's possession shall be the exclusive possession of a co-sharer proprietor or tenure-holder as it may be, and remove the difficulty that may be caused by the use of the word 'rent' by creating an ambiguity as to the status of the purchasing co-sharer. The E. & B. & A. Act also substitutes the word '*raiyat*' in subsections (1) & (2), as a tenure-holder is also a 'tenant.']

[1] Act VIII of 1885, Sec. 22, Sub-Sec. (3). *Gilmore* v. *Bhoomick*, [1864] W. R. Gap Vol. Act X 77; *Watson* v. *Jogendronarain*, (1864) 1 W. R. C. R. 76; *Ishur* v. *Bhaka*, (1872) 17 W. R. 242; *Woomanath* v. *Koondun*, (1873) 19 W. R. 177; *Savi* v. *Punchanun*, (1876) 25 W. R. 503; *Ram* v. *Veryag*, (1876) 25 W. R. 554; *Jardine Skinner & Co.* v. *Surut*, (1878) L. R. 5 I. A. 164, *sc.*, 3 C. L. R. 140; *Lal* v. *Soluno*, (1883) I. L. R. 10 Calc. 45, *sc.*, 12 C. L. R. 559. But see *Maseyk* v. *Bhagabati*, (1890) I. L. R. 18 Calc. 121 and *Ramrup* v. *Manners*, (1905) 4 C. L. J. 209, which have been explained in *Raghubar* v. *Manners*, (1911) 13 C. L. J. 568 and *Sheonandan* v. *Ramhit*, (1911) 15 C. L. J. 647. See also *Mehdi* v. *Grant*, (1912) 16 C. W. N. lxxii and *Jasimuddi* v. *Beni*, (1913) 17 C. W. N. 881.

[2] The unreported case *Kishen* v. *Radha*, (1879) cited in *Lal* v. *Solano*, (1883) I. L. R. 10 Calc. 45, *sc.*, 12 C. L. R. 559. But see cases cited in the last footnote of the previous page.

land as a *raiyat* and obtains a lease of the landlord's right before the completion of the period of twelve years of his possession as a *raiyat*, his possession of the land during the period of the lease cannot be counted as that of a *raiyat* and the acquisition of the right remains in abeyance during this period.[1] If the right was already perfected before the beginning of the lease, the right would not be lost. To use the words of Mitter J. in *Lal Bahadoor Singh* v. *E. Solano*,[2]— "During the time of the *ijara*, the *raiyat*, remains in possession of the land in a double capacity, and the operation of the acquisition of the right of tenancy remains in abeyance."

Trespasser.

A person possessing or cultivating land as a trespasser cannot acquire a right of occupancy.[3] If he declined to have the position of a *raiyat* paying rent, and held the land either stealthily or by setting the landlord at defiance, his wrongful possession would give him no right as a *raiyat*. If he set up a *lakhiraj* title, he would not be permitted to claim the benefit, which only a *raiyat*, paying rent is entitled to have.[4] The setting up of a title hostile to the landlord amounts to a disclaimer, which prevents the acquisition of the right.[5]

Permissive possession.

Permissive possession, or possession by a servant as such, is not that of a *raiyat*, and cannot confer the right.[6]

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[1] *Gur* v. *Jeolal*, (1888) I. L. R. 16 Calc. 127; *Jasimuddi* v *Bari*, (1913) 17 C. W. N. 881.

[2] (1883) I. L. R 10 Calc. 45. But see *Gur* v *Jeolal*, (1838) I. L. R. 16 Calc. 127 and *Maseyk* v. *Bhagabati*, (1890) I. L. R 18 Calc 121.

[3] *Peer* v. *Meahjan*, (1864) W. R. F. B. Vol. 146; *Gureeb* v. *Bhoobun*, (1865) 2 W. R Act X. 85; *Gholam* v. *Poorno*, (1865) 3 W. R. Act X. 147; *Bhoobunjoy* v. *Ram*, (1868) 9 W. R. 449.

[4] *Wooma* v. *Kishoree*, (1867) 8 W. R. 238; *Ishen* v. *Hurish*, (1872) 18 W. R. C. R 19; *Kalee* v. *Shashonee*, (1875) 25 W. R. C. R. 42.

[5] *Dabee* v *Mungur*, (1878) 2 C. L. R. 208; *Sutyabhama* v. *Krishna*, (1880) I. L. R. 6 Calc. 55. *sc.*, 6 C. L. R. 375; *Ishan* v. *Shama*, (1883) I. L. R. 10 Calc. 41.

[6] *Wooma* v. *Bokoo*, (1870) 13 W. R. 333; *Mohur* v. *Ram*, (1874) 21 W. R. 400.

Possession under a trespasser.

I may here add that the acquisition of the right does not depend upon holding under, and payment of rent to, the rightful owner.[1] The right is not acquired by the *raiyat* by virtue of any grant, but it grows from the mere circumstance of his holding and cultivating land and paying the rent due in respect thereof.[2] If a *raiyat* has been inducted into the land by one of several co-owners or the holder of a life-estate or a mortgagee in possession, or even by a trespasser, he is entitled to claim a right of occupancy in the same way, as if he has come into possession at the instance of the absolute and rightful owner.[3] It is quite immaterial as to whose tenant he has been, provided he has held the land *bonafide* as a *raiyat* and has paid rent therefor.[4]

Agricultural or horticultural land.

Land must be taken or used for agricultural or horticultural purposes, otherwise no right of occupancy can be acquired.[5] In *Kalee Kishen Biswas* v. *Sreemutty Jankee and others*[6], Phear J. is reported to have said —"The occupation intended to be protected by that section (section 6, Act X of 1859) is occupation of land considered as the subject of agricultural or horticultural cultivation and used for the purposes incidental thereto,

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[1] *Ameer* v. *Sheo*, (1873) 19 W. R. 338; *Zoolfun* v. *Radhica*, (1878) I. L. R. 3 Calc. 560, *sc.*, 1 C. L. R. 388; *Binad* v. *Kalu*, (1893) I. L. R. 20 Cal. 708; *Asim* v. *Ramlall*, (1897) I. L. R. 25 Calc. 324; *Upendra* v. *Pratap*, (1903) I. L. R. 31 Calc. 703, *sc.*, 8 C. W. N. 320; *Peary* v. *Radhika*, (1903) 8 C. W. N. 315, *sc.*, 5 C. L. J. 9; *Jonab* v *Rakibuddin*, (1905) 9 C. W. N. 571, *sc.*, 1 C. L. J. 303; *Madhu* v. *Sabar*, (1910) 14 C. W. N. 681; *Radha* v *Milan*, (1912) 18 C. L. J. 23; *Tepu* v. *Tefayet*, (1915) 19 C. W. N. 772; *Krishna* v. *Mahomed*, (1915) 21 C. W. N. 93, *sc.*, 23 C. L. J. 563.

[2] *Zoolfun* v. *Radhica*, (1878) I. L. R. 3 Calc. 560, *sc.*, 1. C. L. R. 388; *Kali* v. *Bhagwan*, (1912) 17 C. W. N. 348, *sc.*, 17 C. L. J. 431; *Brojobasi* v. *Ram*, (1915) 23 C. L. J. 638.

[3] *Radha*, v. *Milan*, (1912) 18 C. L. J. 23; *Dakhyani* v. *Mono*, (1913) 19 C. W. N. 407, *sc.*, 19 C. L. J. 113.

[4] *Sheo* v. *Ram*, (1871) 8 B. L. R. 165, *sc.*, 17 W. R. 62; *Zoolfun* v. *Radhika*, (1878) I. L. R. 3 Calc. 560.

[5] *Ramdhun* v. *Haradun*, (1869) 12 W. R. 404, *sc.*, 9 B. L. R. 107 *f. n.*

[6] (1867) 8 W. R. 250.

such as for the site of the homestead, the *raiyat's* or the *mali's* dwelling house and so on. I do not think that it includes occupation, the main object of which is the dwelling house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that. I had occasion in the case of *Khellut Chunder* v. *Umirto*[1] to consider the matter very fully, and I see no reason now to alter the opinion which I then expressed." The late Justice Dwarkanath Mitter, however, was of a different opinion.[2] His view of the law was the same as that expressed in some of the older cases, but it has been held in almost all the later cases on the subject, that there can be no right of occupancy in land used mainly for any but agricultural or horticultural purposes. In *Mohesh Chunder Gungopadhya* v. *Bisho Nath Doss*[3], the question was discussed by Markby J. and he came to the conclusion that it was settled law that the provisions of section 6 of the Rent Acts[4] could apply only to lands used for agricultural or horticultural purposes.[5]

Homestead lands.

No right of occupancy can be acquired in land used for building purposes.[6] Neither can the right be acquired in land used for the erection of a school or a church[7] and no suit for enhancement of rent or even for the recovery of arrears of rent of such lands could be maintained in the Collector's Court under

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[1] Ind. Jur. N. S 426.

[2] *In re Bramamayi*, (1870) 9 B. L. R. 109 *f. n.*; *Durga* v. *Umdatannissa*, (1872) 9 B. L. R. 101; *Brojanath* v. *Lowther*, (1872) 9 B L. R. 121.

[3] (1875) 24 W. R. 402.

[4] Act X of 1859; Act VIII (B. C.) of 1869.

[5] See *Hassan* v. *Gobinda*, (1904) 9 C. W. N. 141; *Midnapore Zemindari Co.* v. *Muktakeshi*, (1912) I. L. R. 40 Calc. 402, *sc.*, 17 C. W. N. 615. As to the meaning of the term 'horticulture,' see *Hedayet* v. *Kamalanand*, (1912) 17 C. L. J. 411.

[6] *Kali* v. *Kali*, (1869) 2 B. L. R. App. 39, *sc.*, 11 W. R. 183; *Church* v. *Ram*, (1869) 11 W. R. 547; *Doorga* v. *Omadoonissa*, (1872) 17 W. R. 151; *Muddun* v. *Stalkart*, (1872) 17 W. R. 441; *Mohur* v. *Ram*, (1874) 21 W. R. 400; *Rakhal* v. *Dinomoyi*, (1889) I. L. R 16 Calc. 652.

[7] *Shurno* v. *Blumhardt*, (1868) 9 W. R. 552.

the Rent Act of 1859.[1] Similarly, land used for *arhats*, *ghats*, *bazars*, indigo-factories or manufactories cannot come within the purview of the Rent Acts.[2] But if a piece of land has been used by a cultivator for his own habitation, and it is a part of an entire agricultural holding, he acquires a right of occupancy in it with the rest of the land in the holding.[3] If a *raiyat* holds his homestead land otherwise than as a part of his agricultural holding, the incidents of his tenancy of the homestead land are regulated by local custom or usage, and subject to such local custom or usage, the *raiyat* may, under the provisions of the Bengal Tenancy Act,[4] acquire a right of occupancy in it. It seems that if a *raiyat* holding land for agricultural purposes holds his homestead land as a different holding in the same village, and not as a part of his agricultural holding, he has ordinarily the same sort of right in the homestead land as in the agricultural holding.[5] The two holdings, in such a case, are inseparably connected with each other. The mere fact of the tenant holding his homestead land and his agricultural holding as separate *jamas*, though under the same landlord, can be no reason for applying different rules of law to them.[6] In a good many districts in Bengal, tenants are allowed to hold homestead land without payment of any rent, as

[1] See *Kali* v. *Kali*, (1869) 2 B. L. R. App. 39; *Kailas* v. *Durgadas*, (1869) 3 B. L. R. A. C. J. 284 *f. n.*; *Abdul* v. *Dongaram*, (1869) 3 B. L. R. App 133.

[2] *Hari* v. *Scott*, (1870) 9 B. L. R. App. 14; *Rachhea* v. *Upendra*, (1899) I. L. R. 27 Calc. 239.

[3] *Pogose* v. *Rajoo*, (1874) 22 W. R. 511; *Mohesh* v. *Bisho*, (1875) 24 W. R. 402.

[4] Act VIII of 1885, Sec. 182.

[5] See *Kalee* v. *Jankee*, (1867) 8 W. R. 250; *Nymooddee* v. *Moncrieff*, (1869) 12 W. R. 140; *Pogose* v. *Rajoo*, (1874) 22 W. R. 511; *Mohesh* v. *Bisho*, (1875) 24 W. R. 402.

[6] See *Golam* v. *Abdul*, (1893) 13 C. L. J. 255; *Pratap* v. *Bisweswar*, (1904) 9 C. W. N. 416; *Kripanath* v. *Amir*, (1906) 10 C. W. N. 944, *sc.*, 4 C. L. J. 332; *Harihar* v. *Dinu*, (1911) 14 C. L. J. 170; *Dina* v. *Sasi*, (1915) 20 C. W. N. 550, *sc.*, 22 C. L. J. 220.

in these districts it is a privilege of the cultivating classes to have land rent-free for habitation. In other districts, local custom or usage entitles the *raiyat* to pay merely a nominal sum as rent for his *bastu* and *udbastu* lands. Section 182 of the Bengal Tenancy Act intends to protect the *raiyats* who hold such homestead lands, but the rule laid down therein has nothing to do with other kinds of homestead lands. Under the Hindu system, and, it would seem, even under the Mahomedan system, no rent was levied with respect to the homestead lands of the agricultural population, when they were held as inseparable appurtenances to agricultural holdings.

Utbandi lands.

In some of the districts in Bengal, it is necessary to keep land fallow for a year or two, in order that fertility may be restored. Cultivation for successive years takes away the productive power of the land to such an extent that the *raiyat* is obliged to have recourse to other pieces of land. Manuring is unknown or is disproportionately costly. In the district of Nadiya such lands are known as *utbandi* or *nucksan*.[1] In *Dwarkanath Misree* v. *Foboo Sirdar*,[2] an *utbandi* tenure is defined to be one "by which the *raiyat* holds a certain area of land, but for which he pays rent according to the quantity of that land which year by year he cultivates. The rent will, therefore, vary according to the actual cultivated area." Under the Acts of 1859 and 1869, if the *raiyat* paid rent for the period he could cultivate, and did not pay when he could not cultivate, or paid only for as much land as he could cultivate in any year, the holding and cultivation for more than twelve years, though discontinuous, gave

[1] *Premanund* v. *Soorendronath*, (1873) 20 W. R. 329. See also *Kenny* v. *Issur*, [1864] W. R. Gap Vol. Act. X. 9, and *Mirzan* v. *Hills*; (1865) 3 W. R. Act. X. 159.

[2] (1870) 14 W. R. 193.

him a right of occupancy.[1] Section 180 of the Bengal Tenancy Act has made a material alteration in the status of *utbandi raiyats*. No occupancy right is now capable of being acquired in *utbandi* lands, unless the same piece of land has been held for twelve continuous years.[2] Section 19 of the Act, however, makes an exception in favour of rights acquired before the commencement of the Act, by operation of any enactment, custom or otherwise.

Fisheries.

The right cannot be acquired in *julkars* or tanks when such *julkars* or tanks are not appurtenant to land acquired or held for cultivation.[3] If a *raiyat* holds a tank as a part of an agricultural holding, the water of the tank being used for domestic purposes or for irrigation or preparation of jute or similar other crops, he acquires a right of occupancy in it.[4] But he cannot acquire the right in a tank used only for the rearing and preservation of fish, when it is not a part of an agricultural holding.

Pasture land.

Pasture land has been held to come within the purview of section 6 of the Rent Acts. The right may be acquired in land used for grazing horses.[5] But a tenant cannot acquire a right of occupancy merely by the user of pasture land of his landlord, if he does not pay rent for the same, though he may acquire a right in the nature of an easement.

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[1] *Dwarkanath* v. *Nobin*, (1870) 14 W. R. 193; *Premanund* v. *Soorendronath*, (1873) 20 W. R. 329.

[2] *Beni* v *Bhubun*, (1890) I. L. R. 17 Calc. 393. See *Amrita* v. *Giridhar*, (1907) 11 C. W. N. 581, *sc.*, 5 C. L. J. 398.

[3] *Woomakant* v. *Gopal*, (1865) 2 W. R. Act X. 19; *Siboo* v. *Gopal*, (1873) 19 W. R. 200; *Nidhi* v. *Ram*, (1873) 20 W. R. 341; *Mahananda* v. *Mongala*, (1909) I L. R. 31 Calc. 937 *sc.*, 8 C. W. N. 804.

[4] *Woomakant* v. *Gopal*, (1865) 2 W. R. Act X. 19; *Siboo* v. *Gopal*, (1873) 19 W. R. 200; *Nidhi* v. *Ram*, (1873) 20 W. R. 341; *Sham* v. *Court of Wards*, (1875) 23 W. R. 432; *Juggobundhoo* v. *Promothonath*, (1879) I. L. R. 4 Calc 767; *Bollye* v *Akram*, (1879) I. L. R. 4 Calc. 961.

[5] Act VIII of 1885, Sec. 193. *Fitzpatrick* v. *Wallace*, (1869) 11 W. R. 231; *Latifar* v. *Forbes*, (1909) 14 C. W. N. 372. But see *Goor* v. *Ramdut*, (1866) 1 Agra F. B. 15, *sc.*, L. R. 1 All. 9; *Hedayet* v. *Kamalanand*, (1912) 17 C. L. J. 411 and *Brojobasi* v. *Ram*, (1915) 23 C. L. J. 638.

Proprietor's private lands.

The right cannot, except under some special arrangement, be acquired in land held by the proprietor of an estate or a tenure-holder as his *private land*, known in Bengal as *khamar*, *nij* or *nij-jote*, and in Bihar as *zirat*, *nij*, *sir* or *kamat*.[1] The distinction between tenemental lands and the 'lord's domain' is well-known. The lord's domain of feudal Europe resembles in many respects the lands known as *nij-jote* &c., in the Bengal Provinces. In ancient times, the chiefs in India as elsewhere, had lands held and cultivated by themselves, by members of their families or hired labourers, and at the same time, they collected a share of the produce of ordinary *raiyati* lands as land-tax. In course of time, the chiefs ceased to cultivate the lands themselves or through members of their families; but cultivation by means of hired labour, principally through the aid of the *sudras*, continued for a long time. When the Mahomedan government reduced the native chiefs to the position of *zemindars*, it allowed the lands which they held as *nij-jote* or *khamar* to remain in their possession, but did not exact any land tax for them. The land-tax that was levied through the *zemindars* was for lands held by *raiyats*, artisans and persons following trades and professions. The quantity of land held by each *zemindar* as *nij-jote* or *khamar* was limited, and the fiscal authorities very seldom permitted him to extend it. The farmers of revenue, who ultimately acquired the rank of *zemindars*, were also allowed to hold lands of a similar description. The extension of the quantity of *nij-jote* or *khamar* land was, however, not unfrequent, but there is every reason to believe that such extension was surreptitious. Encroach-

[1] Act X of 1859, Sec. 6; Act VIII (B. C.) of 1869, Sec. 6; Act VIII of 1885, Sec. 116. *Gour* v. *Beharee*, (1869) 12 W. R. 277; *Bhugwan* v. *Jug*, (1873) 20 W. R. 308; *Hurish* v. *Gunga*, (1876) 25 W. R. 181; *Obhoy* v. *Kanye*, (1878) 1 C. L. R. 394; *Masudan* v. *Goodar*, (1905) 1 C. L. J. 456; *Khalilur* v. *Rupan*, (1908) 12 C. W. N. 436; *Janki* v. *Jagannath*, (1918) 3 P. L. J. 1.

ments on waste lands and occupation of lands abandoned by *raiyats*, were the principal means adopted by *zemíndars* for increasing the quantity of private lands.

Proprietary right in waste lands.

The proprietary right of the Government in waste lands is a matter of controversy, and high authorities have said that waste lands in India theoretically belonged to the various village communities, and were capable of being brought under cultivation as soon as there were opportunities for it. There were waste lands and virgin forests, lying at a distance from inhabited villages, and these would not come within the definition of 'the common mark.' In ancient times, temporarily uncultivated lands used to form parts of village-domains, but they would, sometime or other, be cultivated and thus merge in the 'arable mark.'[1] Encroachments on such waste lands by the landlord himself would decrease the quantity of land available for the use of *raiyats*, and prevent an increase in the land-tax which should have come into the imperial exchequer. The *raiyats* themselves would, for obvious reasons, resent such encroachments. The Mahomedan government necessarily discountenanced the extension of *zemindar's* private lands by means of gradual inclusion of parts of the uncultivated waste lands which were reserved by the common law of the country for the use of the peasantry and the increase of revenue. The Bengal Tenancy Act, though it lays down rules for the determination of the character of any land, as *raiyati* or 'private,' distinctly contemplates that there should be no extension of the quantity of proprietor's private lands in any village. It excludes uncultivated or waste lands,[2] which, according to the established usage of the country, have always been reserved for supplying the necessaries of life of an ever-growing population. It makes rules

[1] Mayne's Village Communities, p. 108, (7th Edition, New Impression, 1913).

[2] Cf. Lecture I, p. 7.

for the record of proprietor's private lands, and such records will effectually prevent land-owners from extending them.[1]

Lands abandoned by *raiyats.*

When a tenant abandoned his holding or was compelled to abandon by the tyranny of the landlord, the land thus left vacant might be cultivated by the landlord himself for his own profit, until another tenant would come in and occupy it. In theory, the land, notwithstanding cultivation by the landlord himself, would not be a part of his private lands, but would continue to be a part of the *raiyati* lands of the village. It was the duty of the landlord to let out the land to a tenant as soon as one was to be had, and he would commit fraud on the state if he did not do so. As I have already said, surreptitious occupation must have been common, but the land law and the fiscal system of the country required that such lands should be let out at the first opportunity. They could not in olden days, and cannot now be *nij-jote* or *sir*.

Tenants' right in private lands.

The private lands of the *zemindars* and persons having a similar relation to the peasantry were thus limited in extent, and theoretically incapable of extension. They were not always cultivated or caused to be cultivated by the land-owner himself; they were let out occasionally on rent in specie, but more generally at half the produce or even a smaller share. The letting out, in fact, did not, according to ancient theory, create the relationship of landlord and tenant between the owner of the land and the cultivator, neither did it create in favour of the cultivator any interest in the land so let out. It was really cultivation by hired labour, a share of the produce being taken by the labourer as remuneration or wages. Vrihaspati, as quoted in Parásaramádhava, says—"The cultivator is entitled to a third or a fifth share of the

[1] Act VIII of 1885, Secs. 116-120.

produce."[1] The text occurs in the chapter on 'Wages' in 'Parásaramádhava,' and the commentator explains that "a fifth share is due to the cultivator, if he receives food and raiment from the owner of the land, a third if he does not."[2] In later days, the share became generally a half instead of a third, and hence these cultivators used to be called *árdhasiri*. Half the produce was deliverable to the land-owner by the cultivator not as 'rent,' but the land-owner who was entitled to cultivate the land himself or by hired labour allowed him to retain a half as the price of his labour. The theory of law, at the present day, is that payment to the landlord in kind is as much 'rent' as payment in specie; but the prevalent notion amongst the people and the general practice with reference to *nij-jote* lands are more in harmony with the rule laid down by the sage Vrihaspati. Wherever the Rent Acts have not made much impression, a cultivator holding land on terms of payment in kind, has not, in practice, that amount of stability as an occupancy-*raiyat* ought to have, but is liable to be ejected at the end of any agricultural year. The principle that underlies the rules laid down in the Acts of 1859, 1869 and 1885 is that the proprietor is entitled to hold and cultivate *nij-jote*, *sir*, or *zirat* land by hired labour in any year he pleases. The mere occupation for a number of years by a *raiyat* does not make the land *raiyati*, and deprive the landlord of the right of re-entry at the end of any agricultural year. The *raiyat* cannot acquire a right of occupancy or even the status of a non-occupancy *raiyat* simply by occupation and

[1] त्रिभागं पञ्चभागं वा गृह्णीयात् सीरवाहकः ।—Parasara Smriti (Parasara Mádhava), Calcutta A. S. Publication, Vol. III, p. 231.

[2] भक्ताच्छादमतः सीराद्भागं गृह्णीतपञ्चकम् ।
जातश्रमे त्रिभागन्तु प्रगृह्णीयात् तथाऽभृतः ॥ Parasara Smriti (Parasara Mádhava), Calcutta A. S. Publication, Vol. III, p. 231.

payment of rent, as he may with respect to ordinary *raiyati* lands.[1]

An exception.

But notwithstanding that a piece of land was originally the private land of the proprietor, he may by his conduct waive his right to hold it as *non-raiyati* and may make it *raiyati*. The Settlement Regulation[2] included in the assessment of land-revenue the profits of *nankar*, *khamar*, *nij-jote* and other private lands as of ordinary *malguzari* or *raiyati* lands. This Regulation did not lay down any rules as to the rights of the landlord with respect to these lands in relation to the *raiyats*. The words of the Regulation, however, are clear, as indicating a distinction between *malguzari* or *raiyati* lands and non-*malguzari* or non-*raiyati* lands. The Rent Acts provide that if any land, being *nij-jote*, *khamar* or *sir*, has been held under a lease for a term of years or under a lease from year to year, the *raiyat* does not acquire therein a right of occupancy or the right of a non-occupancy *raiyat*.[3] But if the holding of the land by the tenant be for other than for a term of years or from year to year, it is impressed with the character of ordinary *raiyati* land, and the tenant may acquire a right of occupancy therein.[4]

Distinction between *raiyati* and *non-raiyati* lands.

Questions of difficulty frequently arise in determining whether any particular piece of land in a village is *raiyati* or non-*raiyati*. It is always to the benefit of the *raiyats* that it should be declared to be a part of the *raiyati* lands of the village, while the proprietor would have as much non-*raiyati* land as is possible. The burden of proof is on the landlord, the presumption of law being that no land is *khamar*,

[1] Act VIII of 1885, Sec. 116. [2] Reg. VIII of 1793, Sec. 39.

[3] Act X of 1859, Sec. 6; Act VIII (B. C.) of 1869; Act VIII of 1885, Sec. 116. See *Bhugwan* v. *Jug*, (1873) 20 W. R. 308; *Ashruf* v. *Ram*, (1875) 23 W. R. 288; *Khalilur* v. *Rupan*, (1908) 12 C. W. N. 436; *Janki* v. *Jagannath*, (1918) 3 P. L. J. 1.

[4] *Gaurhari* v. *Bihari*, (1869) 3 B. L. R. App. 138, *sc.*, 12 W. R. 277; *Masudan* v. *Goodar*, (1905) 1 C. L. J. 456.

sir or *nij-jote*, until the contrary is proved.[1] It is not easy, however, to give evidence as to the character the land had at the date of the Permanent Settlement; and the Bengal Tenancy Act has accordingly laid down, in section 120, rules for determining what lands should be considered to be private. Under that section, cultivation by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of the Act, if cultivated as *khamar &c.*, is sufficient evidence for proving any piece of land to be private. [As to the effect of an admission by the tenant as to the character of the land in the *kabuliyat*, there has been divergence of opinion].[2] Recognition by village usage, even if the land is ordinarily let out to tenants, is also sufficient to make any piece of cultivated land *khamar*, *nij-jote*, or *sir*. Local custom or village usage is undoubtedly very good evidence as to the character of any land, in the absence of other direct and reliable evidence.

Private lands belonging to tenure-holders.

The Bengal Tenancy Act, you will notice, speaks only of the private lands of 'proprietors,' *i.e.*, persons owning an estate or part of an estate.[3] The Rent Acts of 1859 and 1869 spoke of "the 'proprietor' of an estate or tenure," and they evidently meant tenure-holders, who succeeded in obtaining leases of entire villages including *raiyati* as well as *non-raiyati* lands. The character of any piece of land should not change by the mere transfer by the proprietor of his right by way of a *putni* or leases of a similar nature. An *ijaradar* or a *thikadar* holding a village, would, by virtue of his lease, have the same sort of right in the private land of

[1] Act VIII of 1885, Sec. 120, Sub-Sec. (2). *Ajodhya* v. *Ram*, (1908) 13 C. W. N. 661.

[2] *Bhagtu* v. *Raghunath*, (1908) 13 C. W. N. 135, *sc.*, 9 C. L. J. 15; *Gobind* v. *Mackenzie*, (1910) 12 C. L. J. 5*n.*; *Ganpat* v. *Rishal*, (1914) 20 C. W. N. 14.

[3] Act VIII of 1885, Sec. 3, cl. (2).

the proprietor as the proprietor himself. By the expression, "proprietor's private lands," used in the Bengal Tenancy Act, we are not to understand that only persons who are 'proprietors' within the meaning of the Act are capable of having 'private' lands; the expression refers only to the origin, *i.e.*, the nature of the land as held at the time of the Permanent Settlement,—*nij*, *nij-jote*, *sir*, *zirat*, *khamar*, *kamat*, as distinguished from *malguzari* or *raiyati* lands.

Chur and *dearah* lands.

The Bengal Tenancy Act has also made an exception to the acquisition, in the ordinary mode, of occupancy right in *chur* and *dearah* lands.[1] *Chur* or *dearah* is a piece of new-formed land by the action of the sea or a river. The Bengal rivers frequently shift their courses, and the formation of islands in the midst of rivers is not unfrequent. Under the provisions of Regulation XI of 1825 and Act IX of 1847, the Government officers are required to survey and measure these new-formed lands to enable them to ascertain what rights the Government has in them, and to assess them when necessary. Such surveys are technically known as *dearah*. These lands are under the frequent risk of being diluviated, and they are also temporarily unculturable by reason of their being low or sandy. The Legislature has, therefore, provided that the mere fact of occupation of such lands as a *raiyat* by a settled *raiyat* is not sufficient to create any right of occupancy in them. *Chur* or *dearah* lands may, however, in due course of time be so permanent in character that the Collector of a district may deem it proper to declare that they have ceased to be *chur* or *dearah*, and then a cultivator may acquire a right of occupancy in them in the same way as in any other land.[2] [In *chur* or *dearah* lands, the person who

[1] Act VIII of 1885, Sec. 180.

[2] Act VIII of 1885, Sec. 180, Sub-Sec. (3).

alleges that he has been in possession for twelve continuous years, must prove the allegation].[1]

Right acquired by occupation for twelve years.

Under section 6 of Act X of 1859 and Act VIII (B.C.) of 1869, the acquisition of the right depended upon possession for a period of at least twelve years and payment of rent, the material words used being—"in the land so cultivated or held." The right could be acquired only in the particular piece or pieces of land held and cultivated by a *raiyat* for the required number of years. The Bengal Tenancy Act has made a material addition as to the means of the acquisition of the right, except as to *utbandi*, *chur* or *dearah* lands. A settled *raiyat* may now acquire the right in any land held by him in the village in which he is such a *raiyat*, even if the period of occupation be much shorter than twelve years.[2] For him, occupation for twelve years is not necessary. As soon as he touches a piece of land as a *raiyat*, he acquires an occupancy right in it.

Pundit Sheo Prokash v *Ram Sahoy Singh.*

Section 6 of Act X of 1859 and Act VIII (B.C.) of 1869 laid down that a *raiyat* could acquire a right of occupancy by twelve years' occupation, whether he held under a *patta* or not, and section 7 made an exception that the provisions of section 6 of the said Acts would not affect "the terms of any written contract for the cultivation of land when it contains any express stipulation contrary thereto." The question as to the effect of occupation under successive written leases for terms of years aggregating to more than twelve years, or under a single lease for a period of more than twelve years was raised in several cases, and there were conflicting judgments. The matter ultimately came before a Full Bench of the Calcutta High Court in *Pandit Sheo Prokash Misser* v. *Ram Sahoy Sing.*[3] "The whole

[1] See *Beni* v *Chaturi*, (1906) I. L. R., 33 Calc. 444, *sc.*, 4 C.L. J 63; *Jasimuddin* v *Beni*, (1913) 17 C. W. N. 881.

[2] Act VIII of 1885, Secs 20 & 21. *Ante* p. 305.

[3] (1871) 8 B L. R. 165, *sc.*, 17 W. R. 62

question," said Couch C. J., "turns upon what is the meaning of an express stipulation contrary to the *raiyat* acquiring the right of occupancy. Now where there is a *patta* for a fixed term, no doubt, at the expiration of that term, the landlord has a right of re-entry upon the land; and if the *raiyat* does not give up possession, the landlord may recover the land from him. The landlord need not re-enter upon the land, if he does not think fit; he may and often does.....allow the tenant to remain in possession of the land. I cannot consider that the right of re-entry which arises by reason of the expiration of the term named in the *patta* can be regarded as an express stipulation that the *raiyat* shall not, if he occupies the land for more than twelve years, acquire the right of occupancy given by section 6." The law, as interpreted in this decision and the other decisions[1] that follow it, seems to be, that whether a *raiyat* held under a single lease or under different leases following one after the other, he acquired a right of occupancy in the land so held by him, provided the entire period of occupation exceeded twelve years, and provided there was no express covenant for re-entry by the landlord at the expiration of any one of them. An implied covenant for re-entry was not sufficient to defeat the statutory right which could be acquired by a *raiyat* by twelve years' occupation. An express covenant for re-entry, however, entitled the land-lord to eject the *raiyat* at the end of the term, butif the landlord allowed the *raiyat* to hold on after the expiration of the term of of the lease, he was entitled to add the period of his occupation under the lease to the subsequent period, and if the total period exceeded twelve years, the *raiyat* acquired a right of occupancy.[2] Where the landlord show-

Covenant for re-entry.

[1] *Golam* v. *Hurish*, (1872) 17 W. R. 552; *Narain* v. *Munsur*, (1876) 25 W. R. 155.

[2] *Ebaádutoollah* v. *Mahomed*, (1876) 25 W. R. 114; *Mukhtar* v. *Brojraj*, 1881) 9 C. L. R, 143.

ed, by his acts and conduct and specially by receipt of rent for any period subsequent to the expiry of the lease, an intention to allow the *raiyat* to hold over, the tenancy became one from year to year, and as regards *raiyati* lands, this was enough to give him the status of an occupancy-*raiyat*, as soon as possession for the statutory period of twelve years was completed. But if the landlord showed by some overt act his intention of taking possession on the expiry of the written lease, and merely delayed in bringing his suit for ejectment, and did not accept rent from him for any subsequent period, the landlord's right to re-enter was not gone, and he could bring his suit within twelve years of the date of the termination of the tenancy, when his cause of action arose.[1] The Bengal Tenancy Act has, however, laid down that a *raiyat* acquires the right by occupation for twelve years, whether he holds "under a lease or otherwise." So that he acquires the status of a 'settled *raiyat*' after the continuous holding of land in a village for the period of twelve years, whether there is a covenant for re-entry or not. He may hold one piece of land for five years, another for four and a third for three, and he then becomes a 'settled *raiyat*,' and has a right of occupancy in any piece or pieces of land so held by him either at the end of or subsequent to the twelve years. As we have seen, the Legislature has imported the idea of a *khudkast raiyat* and has given his status to any person holding any land in the village for a continuous period of twelve years, notwithstanding that the particular pieces of land held by him have been different at different times. Section 178 of the Bengal Tenancy Act, subsection 1, clauses (*a*) and (*b*), has laid down a rigid rule as to contracts made before or after the passing

[1] *Kaheel* v. *Radha*, (1871) 16 W. R. 146.

of the Act, and occupation, as provided for in sections 20 and 21, creates a right of occupancy, and nothing in any contract shall bar the acquisition of, or take away, the right. A covenant for re-entry will not entitle the landlord to eject a tenant from the land held by him, and there is no provision in the Act for the ejectment of a 'settled *raiyat*' on the expiry of the term of his lease, the law limiting the grounds of ejectment to those contained in section 25 of the Act only. Such a covenant for re-entry is now invalid and is not enforceable. A tenant acquires the status of a non-occupancy *raiyat* as soon as he is admitted to the occupation of any piece of land, and a right of re-entry is not easily enforceable by the landlord.

Holding partly before and partly after the passing of the Rent Act.

In *Thakooranee Dossee* v. *Bisheshur Mookerjee*,[1] the High Court held that the holding of land for twelve years, whether wholly before or wholly after, or partly before and partly after the passing of Act X of 1859, entitled a *raiyat* to a right of occupancy, and the Bengal Tenancy Act has expressly laid down the same rule of law in the words, "wholly or partly before or after the commencement of this Act."[2] A *raiyat* is also entitled to the benefit of the occupation by his father or other person from whom he has inherited. "A person shall be deemed.....to have held as a *raiyat* any land held as a *raiyat* by a person whose heir he is."[3]

Dispossession by landlord.

The continuity of a *raiyat's* occupation may, however, be broken by wrongful action on the part of the landlord, such as forcible ouster. In such a case the landlord, after the tenant has recovered possession by a suit or other-

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[1] (1865) B. L. R. F. B. Vol. 202, *sc.*, 3 W. R. Act X. 29.

[2] Act VIII of 1885, Sec. 20, Sub-Sec. (1).

[3] Act VIII of 1885, Sec. 20, Sub-Sec. (3). And see Act X of 1859, Sec. 6 and Act VIII (B. C.) of 1869, Sec. 6. *Watson* v. *Shurut*, (1867) 7 W. R. 395; *Nim* v. *Mooraree*, (1867) 8 W. R. 127; *Lal* v. *Solano*, (1883) I. L. R. 10 Calc 45, *sc.*, 12 C. L. R. 559.

wise, ought not to be allowed to take advantage of his own wrongful act, and say that the continuity has been broken and no right of occupancy has been acquired.[1] So, also, if the landlord enters into the land after alleged abandonment by the tenant, and the tenant afterwards succeeds in recovering possession by a suit under section 87 of the Bengal Tenancy Act, the latter shall not lose his right of pleading continuity of possession, notwithstanding that he has intermediately been out of possession for more than a year.

Holding by co-sharers.

When land is held by two or more co-sharers as a *raiyati* holding, each of them holds as a *raiyat* and acquires a right of occupancy.[2] The mere fact of joint-holding by a number of persons does not prevent the right as to the entire land growing in any one of the joint tenants or tenants in common. The decisions under Acts X of 1859 and VIII (B. C.) of 1869, however, are not uniform, as indeed they do not expressly lay down any rule as to the right of one out of a number of tenants holding jointly.[3]

Holding of private lands.

As regards the private lands of proprietors when held by *raiyats*, the acquisition of the right does not depend merely upon occupation and payment of rent for twelve years as in the case of ordinary *raiyati* lands. The right cannot be acquired, when such lands are held "under a lease for a term of years or under a lease from year to year."[4] It would seem, specially having regard to the

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[1] Act VIII of 1885, Sec 20, Sub-Sec. (6). *Lutteefunnissa* v. *Poolin*, (1863) W. R. F. B. Vol. 91; *Mahomed* v. *Noor*, (1875) 24 W. R. 324.

[2] Act VIII of 1885, Sec. 20, cl. (4).

[3] *Mahomed* v. *Ramprasad*, (1872) 8 B. L. R. 338, *sc.*, 22 W. R. C. R. 52 *f. n.*; *Forbes* v. *Ram*, (1874) 22 W. R. C. R. 51.

[4] Act X of 1859, Sec. 6; Act VIII (B. C.) of 1869, Sec. 6 and Act VIII of 1885, Sec. 116. *Gaurhari* v. *Bihari*, (1869) 3 B. L. R. App. 138, *sc.*, 12 W. R. 277; *Hurish* v. *Gunga*, (1876) 25 W. R. 181; *Masudan* v *Goodar*, (1905) 1 C. L. J. 456; *Khalilur* v. *Rupan*, (1908) 12 C. W. N. 436; *Janki* v. *Jagannath*, (1918) 3 P. L. J. 1.

provisions of section 178 of the Bengal Tenancy Act, that the Legislature has not thought proper to impose any restrictions on contracts of leases of non-*raiyati* lands. A lease for a term of years, whether there is any express covenant for re-entry or not, entitles the landlord to re-enter his private lands; and whether the *raiyat* holds under one lease or successive leases, possession for twelve years gives him no right to hold on. No right of occupancy accrues, if the holding is under leases renewed year after year, whether they are verbal or written.[1]

Effect of non-payment of rent.

Non-payment of rent does not bar the acquisition of the right,[2] neither does it involve the forfeiture of the right when once acquired.[3] Under Act X of 1859, the High Court held that when a tenant had held for a period of twelve years as a *raiyat*, non-payment of rent for some years did not extinguish the right. In *Narain Roy* v. *Opnit Misser*[4], it was held that for the acquisition of a right of occupancy, only two conditions were necessary—(1) the cultivation or holding of land for a period of twelve years, and (2) that the person holding or cultivating land should be a *raiyat*. Non-payment of rent might be a valid ground for holding that the land was held not by a *raiyat* but by a trespasser. The maintenance of the right is dependent upon payment of rent but not the acquisition of it. But the failure of a tenant to pay rent only entitled the landlord to re-enter by ejectment under the provisions of section 78 of Act X of 1859 and section 52 of the Bengal Act VIII of 1869, the tenant having under them the right to protect himself by the payment of the arrears and costs

[1] *Gaurhari* v. *Bihari*, (1869) 3 B. L. R. App. 138, *sc.*, 12 W. R. 277; *Bhugwan* v. *Jug*, (1873) 20 W. R. 308; *Ashruf* v. *Ram*, (1875) 23 W. R. 288.

[2] *Narain* v. *Opnit*, (1882) I. L. R. 9 Calc. 304, *sc.*, 11 C. L. R. 417.

[3] *Musyatulla* v. *Noorzahan*, (1883) I. L. R. 9 Calc. 808, *sc*, 12 C. L. R. 389; *Nilmony* v. *Sonatun*, (1887) I. L. R. 15 Calc. 17.

[4] (1882) I. L. R. 9 Calc. 304, *sc.*, 11 C. L. R. 417.

within fifteen days of the date of the decree. Non-payment of rent before suit did not by itself cause a forfeiture of the right of occupancy already acquired by a *raiyat*.

Raiyat's duty to pay rent.

During the continuance of the relationship of landlord and tenant, the main duty of an occupancy-*raiyat* is to pay his rent regularly, as indeed it is the primary duty of all tenants to their landlords. The rate of rent is generally determined by contract, and in the absence of a written contract, oral evidence is always admitted. If a written lease exists, it is provable in the ordinary way. Unless the contract has been entered into subsequent to the passing of the Bengal Tenancy Act, rent is payable at the contract rate, if the contract is otherwise valid.[1] But if the contract is one executed after the Bengal Tenancy Act came into force, and, in districts where that Act prevails, the contract rate must be evidenced by a written instrument duly registered by the tenant, if the rent payable is higher than that paid before, The enhanced rate must not also exceed the rent previously payable by more than two annas in the rupee, *i.e.*, one-eighth. No rent at enhanced rate is also allowable for fifteen years from the date of the previous enhancement,[2] [whether the enhancement is in money or by addition of or converted to rent in kind].[3] A contract in contravention of any of the special provisions as to occupancy-*raiyats* is invalid in law,[4]

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[1] See *Tejendro* v. *Bakai*, (1895) I. L. R. 22 Calc. 658; *Ganpat* v. *Jasodhur*, (1895) 17 C. L. J. 590. But see *Mir* v. *Karu*, (1913) 18 C.L.J. 95. See also *Mothura* v. *Mati*, (1898) I. L. R. 25 Calc. 781.

[2] Act VIII of 1885, Sec. 29, cls. (*b*) and (*c*). [This section, however, has no application to increase in the amount of rent for increase of area. The matter is dealt with fully in the next Lecture.]

[3] *Kishori* v. *Ujir*, (1910) I. L. R. 37 Calc. 610, *sc.*, 14 C. W. N. 693; *Tarap* v. *Kalipada*, (1916) 23 C. L. J. 635.

[4] *Kristodhone* v. *Brojo*, (1897) I. L. R. 24 Calc. 895, *sc.*, 1 C. W. N. 442; *Probat* v. *Chirag*, (1906) I. L. R. 33 Calc. 607, *sc.*, 11 C. W. N. 62, *sc.*, 4 C. L. J. 320; *Manindra* v. *Upendra*, (1908) I. L. R. 36 Calc. 604, *sc.*, 9 C. L. J. 343.

and a suit for rent on such a contract is liable to be dismissed, [and a decree for enhanced rent even up to the extent allowed by law cannot be given. It was once thought that a contract for a rate of rent in excess of the maximum rate prescribed is not wholly void, but nothing in excess of the prescribed rate can be recovered.[1] A *kabuliyat* is also bad in law, if the rent agreed to be paid is partly enhanced and partly increased rent.[2] So also is a *kabuliyat* consolidating several *jamas* and enforcing in contravention of section 29.[3] Where, however, rent is assessed for excess land as also for new lands taken by the tenant, and one consolidated rent is assessed for all the lands, there is in essence a new holding created, and no question arises as to the enhancement of rent payable by the tenant.[4] Nor is section 29 applicable where the original holding is split up into several new tenancies.[5] A landlord is also debarred from recovering rent at an enhanced rate, even when it has been actually paid for a continuous period of not less than three years immediately preceding the period for which rent is claimed by the landlord, for it has been held that proviso (1) to section 29 of the Bengal Tenancy Act does not control clause (b) of the section.[6] This provision of the Bengal Tenancy Act is quite as much applicable to contracts for enhancement of rent by co-sharer landlords as to those of sole landlords.[7]] Any arrangement in settlement of a dispute as to amount and character of the rent is,

[1] *Sitanath* v. *Basudeb*, (1900) 2 C. L. J. 540.

[2] *Mothura* v. *Mati*, (1898) I. L. R. 25 Calc. 781.

[3] *Ajuhunnessa* v. *Hakim*, (1909) 13 C. W. N. cciii.

[4] *Raj* v. *Faizuddi*, (1914) 22 C. L. J. 81. But see *Suresh* v. *Brojendra*, (1919) 23 C. W. N. lxxii.

[5] *Nazir* v. *Jyatendra*, (1915) 22 C. L. J. 88.

[6] *Bipin* v. *Krishnadhan*, (1905) I. L. R. 32 Calc. 395, *sc.*, 9 C. W. N. 265; *sc.*, 1 C. L. J. 10; *Asraf* v. *Sarada*, (1906) 10 C. W. N. civ; *Mulluk* v. *Satish*, (1909) 14 C. W. N. 335, *sc.*, 11 C. L. J. 56; *Nafar* v. *Rahaman*, (1916) 23 C. L. J. 580.

[7] *Ram* v. *Ekadashi*, (1909) 10 C. L. J. 87.

however, not rendered invalid by the operation of the Act.[1] [But the landlord must prove by independent evidence that there was a *bona fide* dispute.[2] This provision of law against enhancement[3] is not retrospective].[4] The contract is not also invalid, if the enhanced rent is payable on account of an improvement effected at the expense of the landlord and the improvement exists and substantially produces the estimated effect.[5] [It is for the landlord to prove improvement and its effect].[6] If the productive power of any piece of land has been increased by any work carried out under the provisions of the Bengal Drainage Act of 1880,[7] the landlord is entitled to enhanced rent in accordance with the valuation under the Act, and the restriction imposed by the Bengal Tenancy Act does not apply. It is valid, when the land has been held at a specially low rate of rent, in consideration of the cultivation of any particular crop [for the convenience of the landlord], such as indigo, for the convenience of the landlord.[8] [But an agreement to pay an enhanced rent in case the tenant raises a particular crop is not protected by the proviso.[9]]

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[1] *Sheo* v. *Ram*, (1891) I. L. R. 18 Calc. 333; *Nath* v. *Damri*, (1900) I. L. R. 28 Calc. 90; *Manindra* v. *Upendra*, (1908) I. L. R. 36 Calc. 604, *sc.*, 9 C. L. J. 343; *Kedar* v. *Manindra*, (1909) 11 C. L. J. 106; *Jahandar* v. *Ram*, (1910) I. L. R. 37 Calc. 449, *sc.*, 14 C. W. N. 470, *sc.*, 11 C. L. J. 364; *Bata* v. *Manindra* (1914) 19 C. W. N. 321, *sc.*, 21 C. L. J. 325. See also *Mudhoo* v. *Nil*, (1872) 18 W. R. 533. But see *Sarjugsharan* v. *Dukhit*, (1913) 17 C. W. N. 496.

[2] *Manindra* v. *Upendra*, (1908) I. L. R. 36 Calc. 604, *sc.*, 9 C. L. J. 343.

[3] Act VIII. of 1885, Sec. 29, cl. (*b*).

[4] See *Tejendro* v. *Bakai*, (1895) I. L. R. 22 Calc 658; *Ganpat* v. *Jasodhur*, (1895) 17 C. L. J. 590; *Mothura* v. *Mati*, (1898) I. L. R. 25 Calc. 781 (not overruled by the Full Bench on this point.)

[5] Act VIII of 1885, Sec. 29, proviso (2). *Probat* v. *Chirag*, (1906) I. L R. 33 Calc. 607 *sc.*, 11 C. W. N. 62, *sc.*, 4 C. L. J. 320; *Rama* v. *Jote*, (1909) 11 C. L. J. 1.

[6] *Rama* v. *Jote*, (1909) 11 C. L. J. 1.

[7] Act VI (B.C.) of 1880, Sec. 42(a).

[8] Act VIII of 1885, Sec. 29, proviso (3).

[9] *Probat* v. *Chirag*, (1906) I. L. R. 33 Calc. 607, *sc.*, 11 C. W. N. 62, *sc.*, 4 C. L. J. 320.

These provisions in the Bengal Tenancy Act restraining the right of free contract are intended for the wisest purpose—the protection of the weak and the unlettered from the strong hand of the landlord. [But to get the benefit of the provisions of section 29 of the Bengal Tenancy Act, it must be established that the tenants were occupancy *raiyats* on the dates when the agreement was made.[1] The onus of proving that a *kabuliyat* contravenes the provisions of section 29(*b*) of the Bengal Tenancy Act is upon the tenant.[2] When, however, it is shown what the previous rent of the tenant defendant was, the onus shifts on the plaintiff landlord.[3] The defence under this section must be pleaded at the earliest opportunity, and it cannot be allowed to be pleaded for the first time in appeal.[4] The section does not apply to enhancement of rent in kind.[5] Conversion of cash rent into rent in kind cannot also be regarded as enhancement under the section.[6] It has also been held that if the total rent remains unaltered, its distribution, by agreement of parties, over different parcels of land, does not constitute enhancement within the meaning of the Bengal Tenancy Act.[7] Where a portion of the rent is, at the will of the landlords held in suspense for a number of years, the provisions of the section does not apply.[8]

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[1] *Jahandar* v. *Ram*, (1910) I L. R. 37 Calc. 449, *sc.*, 14 C. W. N. 470, *sc.*, 11 C. L. J. 364; *Rasul* v. *Abdul*, (1914) 19 C. W. N. xl.

[2] *Luchmi* v. *Ekdeshwar*, (1908) 13 C. W. N. 181.

[3] *Manindra* v. *Upendra*, (1908) I. L. R. 36 Calc. 604, *sc.*, 9 C.L.J. 343.

[4] *Kunji* v. *Raj*, (1911) 11 Ind. Cas. 940.

[5] *Fazl* v. *Sukor*, (1913) 19 C. L. J. 333.

[6] *Gobind* v. *Banarsi*, (1913) 18 C. L. J. 74. But see *Tarap* v. *Kalipada*, (1916) 23 C. L. J. 635.

[7] *Rowshan* v. *Shyama*, (1913) 20 C. L. J. 331.

[8] *Romes* v. *Golam*, (1898) 19 C. W. N. 867; *Kailash* v. *Darbaria*, (1915) 20 C. W. N. 347; *Manindra* v. *Durga*, (1915) 20 C. W. N 680. But see *Jotindra* v. *Moharshey*, (1909) 3 Ind. Cas. 430; *Khitish* v. *Gerpa*, (1912) 15 Ind. Cas. 878 and *Mahamaya* v. *Kishore*, (1913) 18 C. W. N. 738, *sc.*, 18 C. L. J. 502.

The tenant must be an occupancy *raiyat* so that this section can apply.[1] A transferee of a non-transferable occupancy holding cannot therefore get the benefit of the section,[2] nor where the lease is in the nature of a usufructuary mortgage[3]].

Amount of rent.

If no written contract exists, the amount of the tenant's annual rent payable in any particular year is generally the rent paid in the last preceding agricultural year.[4] Oral evidence of enhancement of rent, even when it is admissible, is seldom believed. The landlord generally attempts to prove that rent has been in previous years paid at the rate claimed. Oral evidence is usually supplemented by *zemindari* papers known under various names :—*jamabandis*, *jamawasils*, *thokas*, *karchas*, *shehas*, *&c.*, and now-a-days, check counterfoils. The question of the admissibility of these papers, their use as corroborative evidence and the mode of proving them properly fall within the scope of the law of evidence.

Instalments.

Rent is usually payable in instalments, though payment in one lump sum at the harvest time or at the end of the agricultural year is not uncommon. The instalments are regulated by agreement or established usage.[5] An agreement as to instalments need not be evidenced by a written instrument. Where no agreement is proved or is provable, established usage of the *perganah* or the local area in which the holding lies, and not the practice of payment by the *raiyat* for a long series of years in

[1] *Bijoy* v. *Gendu*, (1913) 17 C. W. N. clix.

[2] *Sarat* v. *Shyam*, (1912) I. L. R. 39 Calc. 663, *sc.*, 16 C. L. J. 71.

[3] *Mohon* v. *Radhey*, (1903) 7 C. W. N. ccxv.

[4] Act VIII of 1885, Sec. 51. *Enayutoollah* v. *Elaheebuksh*, [1864] W. R. Gap Vol. Act X. 42; *Jumaut* v. *Chutturdharee*, (1871) 16 W. R. 185; *Tara* v. *Ameer*, (1874) 22 W. R. 394; *Kishore* v. *Administrator-General*, (1898) 2 C. W. N. 303; *Baijnath* v. *Raghunath*, (1911) 16 C W. N. 496.

[5] Act X of 1859, Sec. 20; Act VIII (B. C.) of 1869, Sec. 21 and Act. VIII of 1885, Sec. 53.

proof of local usage, may be proved.[1] If there be an agreement or local usage for payment in monthly instalments, rent is recoverable monthly, notwithstanding that the practice with reference to a long period or any particular person has been different.[2] The Bengal Tenancy Act has made rent payable in quarterly instalments with reference to the agricultural year, if there be no proof of an agreement or established usage.[3] A decree for rent at any previous period, in which the question of instalments as based upon an agreement or established usage was decided, is very good evidence, and may be used between the parties, but if the decree directed payment at the end of the year, without any finding as to intermediate instalments based on any agreement or established usage, it is not sufficient evidence to override the law as laid down in the Bengal Tenancy Act.[3] Under the Acts of 1859 and 1869, rent, in the absence of any contract or established usage to the contrary, was payable annually at the end of the agricultural year.

Where is rent payable ?

Rent becomes due at the last moment of the time which is allowed to the tenant for payment, which is the sunset of the day on which an instalment falls due.[4] It is ordinarily the duty of the tenant to tender payment at the *malcutchery* or village office of the landlord.[5] [A tenants' liability to pay rent remains notwithstanding that the landlord has no village office and that he has not appointed a convenient place for payment, and

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[1] *Chytunno* v. *Kedarnath*, (1870) 14 W. R. 99; *Hira* v. *Mothura*, (1888) I. L. R. 15 Calc 714; *Watson* v. *Sreekristo*, (1893) I. L. R 21 Calc. 132.

[2] *Pearee* v. *Brojo* (1873) 21 W. R. 36; (1874) 22 W. R. 428; *Nadia* v *Girindra*, (1908) 7 C. L. J. 24 *n*; *Monohar* v. *Khettra*, (1913) 17 C. W. N. 820, *sc.*, 18 C. L. J. 175.

[3] Act VIII of 1885, Sec. 53.

[4] Act VIII of 1885, Sec. 54 (1). *Kashikant* v. *Rohinikant*, (1880) I. L. R. 6 Calc. 325. See *Iswardhari* v. *Ram*, (1906) 7 C. L. J. 106.

[5] Act VIII of 1885, Sec. 54 (2).

where there is no controlling agreement, the tenant must go to his landlord and pay the rent as it falls due, failing which he will be liable to pay interest.[1] A deposit in court is, however, permissible,[2] as also payment by postal money order in certain cases.[3]] If no payment is made at or before the time, the amount payable becomes an arrear of rent.[4] [A tender of rent in proper time saves the tenant from liability to pay interest.[5] Payment of rent to one of several joint proprietors is payment to all.[6] Payment by tenant under the landlord's directions to anything or for a specified purpose of a sum equivalent to the amount claimed as rent is tantamount to a payment to the landlord himself, and is a sufficient answer to the landlord's suit for rent.[7] The period of limitation in suits for arrears of rent is three years from the last day of the year in which the arrear fell due.[8] Applications for execution of decrees under this Act, if for sums not exceeding Rs. 500, are barred, if not presented within three years of the date of final decree.[9]]

Interest.

Interest is payable on arrears of rent. The rate of interest is generally regulated by contract, which may be either written or verbal. If there be no con-

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[1] *Fakir* v. *Bonnerji*, (1900) 4 C. W. N. 324; *Jatadhari* v. *Shamsul*, (1912) 16 C. L J. 552.

[2] Act VIII of 1885, Sec. 61. *Sati* v. *Monmotha*, (1913) 18 C. W. N. 84; *Sasibhusan* v. *Umakanta*, (1914) 19 C. W. N. 1143, *sc.*, 20 C. L. J. 153. But see *Kripa* v. *Annada*, (1907) I. L. R. 35 Calc. 34, *sc.*, 11 C. W. N. 983, *sc.*, 6 C. L. J. 273.

[3] Act VIII of 1885, Sec. 54 (2), proviso.

[4] Act VIII of 1885, Sec. 54 (3).

[5] *Kripa* v. *Annada*, (1907) I. L. R. 35 Calc. 34, *sc.*, 11 C. W. N. 983, *sc.*, 6 C. L. J. 273, and the cases cited in that case. But see Rampini and Mitra JJ. in that case.

[6] *Oodit* v. *Hudson*, (1865) 2 W. R. Act X. 15; *Mookta* v. *Koylash*, (1867) 7 W. R. 493.

[7] *Joykooer* v. *Furlong*, [1864] W. R. Gap. Vol. Act X. 112. See also *Hills* v. *Wooma*, (1871) 15 W. R. 545.

[8] Act VIII of 1885, Sch. III, Art. 2(*b*).

[9] *Ibid*, Sch. III, Art. 6.

tract, evidence may be given of local usage or the practice for a long series of years. But wherever the Bengal Tenancy Act prevails, no contract, entered into subsequent to the passing of the Act (14th March, 1884), for payment of simple interest at a rate higher than twelve and half per centum per annum is valid.[1] If the contract was entered into before that date, interest is payable according to the contract, [by the lessee or his transferee[2] during the pendency of the lease; but such a tenant is liable to pay interest on arrears at the rate allowed by the present law, when he holds over after the expiry of the terms of the lease,[3] and the lease expires after the Act of 1885 came into operation.] In the absence of evidence as to contract or local usage, interest at twelve per centum per annum was payable under Act X of 1859, though it was discretionary with the Court in any case to allow it or not.[4] The Bengal Tenancy Act has taken away the discretion, and interest at twelve and half per centum per annum is always leviable, if there is no contract or local usage to the contrary. If no contract or local usage be proved, interest is payable from the expiration of each quarter of the agricultural year in which the instalment falls due[5] [to the date of payment or the institution of the suit, whichever date is earlier]. But the rule is subject

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[1] Act VIII of 1885, Secs. 67 and 178, Sub-Sec. (3), cl. (*h*). See *Madhumala* v. *Alfuzaddi*, (1909) 10 C. L. J. 45; *Harihar* v. *Dinu*, (1911) 16 C. W. N. 536, *sc.*, 14 C. L. J. 170; *Ashutosh* v. *Joy*, (1912) 17 C. L. J. 50.

[2] *Alim* v. *Satis*, (1896) I. L. R. 24 Calc 37; *Lal* v. *Manmatha*, (1904) I. L. R. 32 Calc. 258, *sc.*, 9 C. W. N. 175. See also *Raj* v. *Panna*, (1902) I. L. R. 30 Calc. 213, *sc.*, 7 C. W. N. 203;

[3] *Ali* v. *Bhagabati*, (1898) 2 C. W. N. 525; *Administrator-General* v. *Asraf*, (1900) I. L. R. 28 Calc. 227; *Dinanath* v. *Abhooram* (1904) 1 C. L. J. 8*n*. See also *Kali* v. *Trailokhya*, (1899) I. L. R. 26 Calc. 315, *sc.*, 3 C. W. N. 194. But see *Kishore* v. *Administrator-General*, (1898) 2 C. W. N. 303 and *Baijnath* v. *Raghunath*, (1911) 16 C. W. N. 496.

[4] *Beckwith* v. *Kishto*, (1863) Marsh 278; *Kashee* v. *Mynuddeen*, (1864) 1 W. R. 154; *Mahtab* v. *Debkumari*, (1871) 7 B. L. R. App. 26; *Radhika* v. *Urjoon*, (1873) 20 W. R. 128. See also *Tiluk* v. *Jasoda*, (1906) 11 C. W. N. 215.

[5] Act VIII of 1885, Sec. 67.

to the proviso to section 53 of the Bengal Tenancy Act, [and interest is due only at the end of each quarter, where the lease is of a date later than the passing of the Bengal Tenancy Act,[1] though the rent may be payable in monthly instalments by the contract.[2] The mere non-enforcement by a landlord, even for a series of years, of his right to interest upon arrears of rent, does not amount to a waiver of such right.[3] Waiver of claim to interest is a question of fact.[4] No interest is payable, however, on arrears of produce-rent.[5] Nor is money, reserved in a lease merely conferring a right of fishing, 'rent' within the meaning of the Bengal Tenancy Act, and interest as provided in section 67 of the Act cannot be allowed in respect of arrears of such money.[6] A valid tender of rent also stops the running of interest.[7] The onus of proof of the tender is on the tenant.[8] In Orissa, a contract modifying the provisions of section 67 with regard to payment of interest on arrears of rent may be made.[9] The provisions of this seetion are inapplicable to permanent *mokurrari* leases by section 179 of the Bengal Tenancy Act.[10]]

[1] See *Hemanta* v. *Jagadindra*, (1894) I. L. R. 22 Calc. 214, *sc.*, L. R. 21 I. A. 131; *Nadia* v. *Girindra*, (1908) 7 C. L. J. 24 *n*. See also *Johoory* v. *Bullab*, (1879) I. L. R. 5 Calc. 102, *sc.*, 4 C. L. R. 349.

[2] *Narendra* v. *Gora*, (1906) I. L. R. 33 Calc. 683, *sc.*, 3 C. L. J. 391; *Monohar* v. *Khettra*, (1913) 17 C. W. N. 820, *sc.*, 18 C. L. J. 175.

[3] *Ruttykant* v. *Gungadhur*, (1862) W. R. F. B. Vol. 13, *sc*, Marsh. 40; *Jahoory* v. *Bullab*, (1879) I. L. R. 5 Calc. 102, *sc.*, 4 C. L. R. 349; *Shyama* v. *Heras*, (1898) I. L. R. 26 Calc. 160.

[4] *Dindoyal* v. *Prankishen*, (1863) Marsh. 394.

[5] See *Kishen* v. *Barnes*, (1877) I. L. R. 2 Calc. 374; *Rangayya* v. *Bobba*, (1903) I. L. R. 27 Mad. 143, *sc.*, L. R. 31 I. A. 17, *sc.*, 8 C. W. N. 162; *Bisheshar* v. *Husani*, (1919) 4 P. L. J. 282.

[6] *Krishna* v. *Salim*, (1914) 19 C. W. N. 514.

[7] *Kripa* v. *Annada*, (1907) I. L. R. 35 Calc. 34, *sc.*, 11 C. W. N. 983, *sc.*, 6 C. L. J. 273.

[8] *Shurut* v. *Collector*, (1866) 5 W. R. Act. X. 69.

[9] *Gobinda* v. *Ram*, (1908) 13 C. W. N. 95.

[10] *Atulya* v. *Tulsi*, (1895) 2 C. W. N. 543, affirmed in *Matangini* v. *Mokrura*, (1901) I. L. R. 29 Calc. 674, *sc.*, 5 C. W. N. 438. But see *Basanta* v. *Pramotha*, (1898) I. L. R. 26 Calc. 130, *sc.*, 3 C. W. N. 36.

Damages

The Court may, in substitution of interest, award damages not exceeding twenty-five per centum on the amount of the principal rent decreed. [Road and Public Works Cesses being 'rent' under the present law,[1] tenants are liable to pay damages for neglect to pay these cesses.[2] Damages are allowable under this section in suits for rent in kind also[3]] But there can be no decree for both interest and damages.[4] [Damages, however, represent the sum which the plaintiff is allowed in lieu of interest only up to the date of the suit; the award does not, therefore, interfere with the interest which under section 68 may be allowed subsequent to that date, and the Court is entitled to allow interest from the date of the decree.[5] The Court may, in its discretion, refuse to award damages, and give only interest.[6]]

Who is the rent receiver?

The rent and interest or damages are payable to the landlord, but the question frequently arises—Who is the landlord? You have already seen that a tenant, holding even under a trespasser, acquires a right of occupancy, and the true owner of the land cannot eject him, but he is entitled only to rent.[7] Succession and transfer, and devolution of interest in the various ways recognised by law are frequent; forcible ouster of the true landlord is also not unfrequent. Boundary disputes between adjoining landlords are also very common. Thus the difficulty of finding out the true landlord is

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[1] Act VIII of 1885, Sec. 3 (5).

[2] See also as to old law, *Saroda* v. *Prosunno*, (1882) I. L. R. 8 Calc. 290.

[3] *Apurba* v. *Ashutosh*, (1904) 9 C. W. N. 122. See also *Bisheshar* v. *Husani*, (1919) 4 P. L. J. 282.

[4] Act VI (B. C.) of 1862, Secs. 2 and 3; Act VIII (B. C.) of 1869, Secs. 44 and 45; Act VIII of 1835, Sec. 68. *Nobokanth* v. *Boradakanth*, (1864) 1 W. R. 100.

[5] *Watson* v. *Sreekristo*, (1893) I. L. R. 21 Calc. 132.

[6] *Bharath* v. *Rameshwar*, (1903) 8 C. W. N. 118.

[7] Ante p. 363

sometimes very great. You will frequently meet with cases, especially of *chur* lands, in which you will find the *raiyats* choosing their own landlords and changing them as often as they please.

Registered owner under Act VII (B.C.) of 1876.

Where the holding of a *raiyat* is directly under a 'proprietor' (as the word is defined in the Bengal Tenancy Act), and is a part of an 'estate,' rent is payable to the person whose name is registered under the Land Registration Act of 1876.[1] Not only is an unregistered proprietor not entitled to sue for rent,[2] but the Bengal Tenancy Act lays down that a person liable for the rent is not entitled to plead, in defence to a claim by the person so registered, that the rent is due to any third person.[3] The *raiyat* has only to go to the collectorate of the district and enquire who the person is whose name is registered in the Collector's Register, and he is bound to pay him rent, and is by such payment fully indemnified against the claim of any other person. No question of title can, therefore, arise in a rent suit by the registered proprietor. [Registration of name of proprietor is equally necessary even when rent is sought to be realized on the basis of a contractual obligation.[4] Section 60 of the Bengal Tenancy Act, however, does not preclude a tenant from proving that the title under which the registered landlord claims has been held by a competent court to be void.[5] Where, however, a receiver appointed by a court and sues as such to realise arrears which accrued during the life-time of a deceased registered proprietor, his name is not required to be

[1] Act VII (B. C.) of 1876, Sec. 78.

[2] See *ante* p. 129.

[3] See *ante*, pp. 92-4. Act VIII of 1885, Sec. 60. *Hanuman* v. *Gobinda*, (1895) 1 C. W. N. 318; *Hem* v. *Sourindra*, (1898) 5 C. W. N. 482; *Sadhu* v. *Radhika*, (1904) 8 C. W. N. 695; *Hasan* v. *Matbar*, (1909) 11 C. L. J. 147. But see *Durga* v. *Samash*, (1895) 4 C. W. N. 606.

[4] *Abdul* v. *Kanthu*, (1910) I. L. R. 38 Calc. 512, *sc.*, 13 C L. J. 693.

[5] *Girish* v. *Satish*, (1908) 12 C. W. N. 622.

registered before being entitled to sue.[1] So, a mortgagee in possession can sue as such for rent and a receipt granted by the mortgagor proprietor does not operate as a valid discharge under section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act.[2] A suit for declaration of enhanced rates payable in future is not also affected by the aforesaid sections.[3] Section 78 of the Land Registration Act is also not a bar to the realization of rent accruing due during the lifetime of the registered proprietor, but a suit for rent accruing due after the death of the registered proprietor is not maintainable by his representatives, without having their names registered under the Land Registration Act.[4] It is also not necessary for a *putnidar*[5] or lessee of a registered proprietor,[6] assignee[7] of a proprietor whose name has not been registered to register his name to entitle him to sue for rent. Section 78 of the Land Registration Act has, it has also been held, no application to cases where the lands in possession of the tenants are comprised in a number of estates in one or more of which alone the landlord is interested, the 'proprietor' mentioned in the section being the proprietor of the estate within the ambit of which the lands in-possession of the tenants are comprised.[8] Where, moreover, by amicable arrangement among the owners of several estates,[8] the plaintiff, who is interested in one

[1] *Belchambers* v. *Hussan*, (1898) 2 C. W. N. 493.

[2] *Sundar* v. *Charitter*, (1897) 1 C. W. N. clxiii.

[3] *Maugni* v. *Seo*, (1897) 1 C. W. N. clxxix.

[4] *Nagendra* v. *Satadal*, (1899) I. L. R. 26 Calc. 536, *sc.*, 3 C. W. N. 294. See also *Pramada* v. *Kanai*, (1899) I. L. R. 27 Calc. 178.

[5] *Jibanti* v. *Gokool*, (1891) I. L. R. 19 Calc. 760; *Sukurullah* v. *Bama*, (1897) I. L. R. 24 Calc. 404

[6] *Mahammed* v. *Alia*, (1906) 3 C L. J. 93*n*.

[7] *Serapat* v. *Tarini*, (1906) 11 C. W. N. 141. But see *Hem* v. *Sourindra*, (1898) 5 C. W. N. 482.

[8] *Parashmoni* v. *Nabokishore*, (1903) I. L. R. 30 Calc. 773, *sc.*, 8 C. W. N. 193; *Deoki* v. *Lakshman*, (1903) I. L. R. 30 Calc. 880; *Rakhal* v. *Prodyat*, (1910) 15 C. L. J. 308.

of them, has, for many years past, collected a share of the rent in respect of the lands comprised in that estate, he is not debarred by section 78 of the Land Registration Act from realizing from the defendants tenants, the said share of the rent payable in respect of the holdings occupied by them, and the plaintiff cannot be made to realise from them a share of rent precisely proportionate to the share of the lands comprised in the estate of which he is the proprietor.] Registration under Act VII (B. C.) of 1876 was not sufficient to give a title to claim or recover rent under the Act of 1859. It was necessary to prove the relationship of landlord and tenant by other evidence.[1]

Intermediate tenure-holders.

Intermediate tenure-holders are not under any disability with respect to the realization of rent from *raiyats* on account of the non-registration of their names in the books of their superior landlords. But in districts in which the Bengal Tenancy Act has operation, and the person suing for rent is an heir of the last recorded permanent intermediate holder or a transferee from him, registration in the landlord's office is necessary. The person succeeding to a permanent tenure is not entitled to recover rent by suit or any other proceeding under the Act, until the Collector of the district has received the notice [of succession,] and fees [for service of notice on the landlord and landlord's fee] prescribed in the Act, [as also costs necessary for transmission of the notice to the landlord.[2] Section 16 of the Bengal Tenancy Act, however, only bars recovery of rent and not institution of suit.[3] A

[1] *Ramkristo* v. *Harain*, (1882) I. L. R. 9 Calc. 517, *sc.*, 12 C. L. R. 141. See also *Ram* v. *Jebli*, (1882) I. L. R. 8 Calc. 853; *Saraswati* v. *Dhanpat*, (1882) I. L. R. 9 Calc. 431, *sc.*, 12 C. L. R. 12 and *Shyama* v. *Mahomed*, (1907) 9 C. L. J. 91.

[2] Act VIII of 1885, Secs. 15 and 16. See *ante* pp. 178-9, 213.

[3] *Kalihur* v. *Umae*, (1896) I. L. R. 24 Calc. 241, *sc.*, 1 C. W. N. 98. See also *Mofisuddin* v. *Lakhan*, (1912) 18 Ind. Cas. 254.

co-sharer landlord, who has complied with the provisions of section 15 of the Bengal Tenancy Act is not debarred from getting a decree for his share of the rent, even though the other co-sharers have not so complied.[1]] But the rule as to registration under sections 15 and 16 of the Bengal Tenancy Act does not apply when the succession opened out before the Act came into force.[2] [It does not also apply to cases of representation, and suits for arrears of rent by the surviving administratrix of an estate[3] or by a receiver appointed in a partition suit[4] are competent. A *sebayet* stands in a different position, and section 16 is an effective bar to his obtaining a decree for rent for non-compliance with the provisions of that section.[5]]

As the law at present stands, the following rules may be laid down for determining whether the relationship of landlord and tenant exists:—

Rules for determining the relationship of landlord and tenant.

Written lease.

(*a*) If the *raiyat* holds under a duly registered lease, or a written lease admissible without registration, the lease itself, *prima facie*, proves the relationship, and the *raiyat* is bound to pay rent to the lessor.[6] On the death of the lessor, his legal representative is entitled to the rent, as soon as his name is registered in the superior landlord's office under the provisions of sections 15 and 16 of the Bengal Tenancy Act. In a case of transfer, voluntary or involuntary, or sublease by the tenure-holder, proof of transfer or sublease entitles the transferee or the lessee to receive

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[1] *Tarini* v. *Chandra*, (1910) 14 C. W. N. 788, *sc.*, 12 C. L. J. 1.

[2] *Profullah* v. *Samiruddin*, (1894) I. L. R. 22 Calc. 337.

[3] *Bipro* v. *Pachi* (1910) 5 Ind. Cas 434.

[4] *Harendra* v. *Abinash*, (1910) 7 Ind. Cas. 761.

[5] *Mabatullah* v. *Nalini*, (1905) 10 C. W. N. 42, *sc.*, 2 C. L. J. 377.

[6] See *Bhaiganta* v. *Himmat*, (1916) 20 C. W. N. 1335, *sc.*, 24 C. L. J. 103 and *Bamandas* v. *Nilmadhab*, (1916) I. L. R. 44 Calc. 771, *sc.*, 20 C. W. N. 1340, *sc.*, 24 C. L. J. 541 and cases cited in them.

rent. But the *raiyat*, if he has not been induced into the land by the lessor mentioned in the written contract, is always entitled to show that the lessor had no title at the date of the execution of the lease and that another person is entitled to realise rent.[1] A *raiyat* claiming a right of occupancy, even if he has been induced into the land by the lessor, is entitled to show that he took the lease from a wrong person, and that the rent is really payable to another. He is not estopped by the provisions of section 116 of the Indian Evidence Act. The burden of proof, however, in such a case is upon the *raiyat*.[2]

Proof of payment of rent

(b) Where there is no written lease and no direct evidence of a verbal contract of lease, proof of payment of rent in previous years and the conduct of parties may afford very good evidence of the existence of the relationship of landlord and tenant. Payment of rent is the most cogent evidence of an admission of the relationship of landlord and tenant. But the *raiyat* is always entitled to show that he has been paying the rent of his holding to a wrong person. Payment of rent is generally proved by the production and proof of *zemindari* papers, such as *jama-wasil-baki* papers, *thokas*, *karchas*, *shehas* and counterfoils of *dakhilas—checkmuries*. As to the probative force of these papers, which are the private papers of the landlord, opinions vary.[3]

Proof of title.

(c) The relationship may also be proved by proof of title, as the true owner is entitled to rent unless he is out of possession. A *raiyat* setting up the title of a third person and depositing the rent of his holding

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[1] *Banee* v. *Thakoor*, (1866) B. L. R. F. B. Vol. 588, *sc.*, 6 W. R. Act X. 71; *Kedarnath* v. *Donzelle*, (1873) 20 W. R. 352; *Tillessuree* v. *Asmedh*, (1875) 24 W. R. 101; *Lal* v. *Kallanus*, (1885) I. L. R. 11 Calc. 519; *Rahimannessa* v. *Mahadeb*, (1910) 12 C. L. J. 428. See also *Ketu* v. *Surendra*, (1903) 7 C. W. N. 596.

[2] *Lodai* v. *Kally*, (1881) I. L. R. 8 Calc. 238, *sc.*, 10 C. L. R. 581.

[3] See *Aktowli* v. *Tarak*, (1912) 17 C. W. N. 774, *sc.*, 16 C. L. J. 328; *Charitar* v. *Kailash*, (1918) 3 P. L. J. 306.

in Court is in the position of a plaintiff in an interpleader suit, though no tenant is himself entitled to bring such a suit.[1] In the case of a deposit after suit, the Bengal Tenancy Act has provided that a notice should be served upon the person who is represented to be the true landlord,[2] and a title suit between the plaintiff in the rent suit and such third person decides who the true rent-receiver is.[3] If there is no deposit of rent by the *raiyat*, the third person whose title is set up by him, receives no notice, and the rent suit has to be fought out between the plaintiff and the *raiyat*. Proof of title is some evidence of the relationship of landlord and tenant. But such proof alone is not sufficient to entitle a plaintiff to get a decree for rent.

Possession

(d) It has sometimes been said that proof of present possession is sufficient to entitle a plaintiff to realise rent. This to me is unintelligible, unless present possession and previous receipt of rent are in law synonymous expressions. General evidence of possession by receipt of rent from other *raiyats* is not relevant in an enquiry as to the relationship of landlord and tenant.

Use of land.

During the existence of the relationship of landlord and tenant, the tenant is entitled to make such use of the land as is consistent with the original purpose of the tenancy.[4] He is not entitled to change the character of the land, so as to make it unfit for the purpose for which the tenancy was created. [As to what renders a land unfit for the purpose of the tenancy, the circums-

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[1] Cf. Act V of 1908, O. XXXV. r. 5.

[2] Act VIII of 1885, Sec. 149.

[3] *Ibid*, Sec. 149. See *Jagadamba* v. *Protap*, (1887) I. L. R. 14 Calc. 537. But see *Rubiunnessa* v. *Gooljan*, (1890) I. L. R. 17 Calc. 829; *Jadub* v. *Khemankari*, (1903) 8 C. W. N. 248; *Horananda* v. *Ananta*, (1904) 9 C. W. N. 492; *Trailokya* v. *Kali*, (1907) 11 C. W. N. 380; *Maxhar* v. *Kadir*, (1907) 11 C. W. N. cxxviii; *Guru* v. *Kumud*, (1908) 7 C. L. J. 40*n*. See also *Tirthabasi* v. *Purna*, (1912) 16 C. W. N. 558, *sc.*, 15 C. L. J. 501;

[4] Cf. Act VIII of 1885, Secs. 23 and 178.

tances of each case must decide it.][1] But a *raiyat* is entitled to make improvements under the rules laid down in the Bengal Tenancy Act, Chapter IX.[2] [Where, however, a landlord stands by and allows his tenant to convert agricultural land to other uses, he cannot turn the tenant out of possession.][3]

Modes of realising rent.

Rent may be realized by distraint or by suit instituted under Chapter XIII of the Bengal Tenancy Act. The provisions about distraint are applicable only to recovery of arrears of rent due for the preceding agricultural year,[4] [together with interest thereon at the rate of 12 per cent per annum, but not for the recovery of damages; nor can the landlord by one application apply for distraint for the rent of more than one holding.[5] The property distrained must be in the possession of the cultivator, and produce belonging to a sub-lessee cannot be distrained.[6] It is doubtful whether trees from which crops, if fruit-crops, are gathered can be distrained.[7] Joint landlords cannot distrain except collectively through common agent.[8]] A suit for rent is entertainable for the arrears of the current year and

[1] *Hari* v. *Surendra*, (1907) I. L. R. 34 Calc. 718, *sc.*, L. R. 34 I. A. 133, *sc.*, 11 C. W. N. 794, *sc.*, 6 C. L. J. 19.

[2] *Vide* pp. 247-8, 347-8.

[3] *Beni* v. *Jai*, (1869) 7 B. L. R. 152, *sc.*, 12 W. R. 495; *Durgaprasad* v. *Brindaban*, (1871) 7 B. L. R. 159, *sc.*, 15 W. R. 274; *Shibdas* v. *Bamandas*, (1871) 8 B. L. R. 242, *sc.*, 15 W. R. 360; *Nicholl* v. *Tarinee*, (1875) 23 W. R. 298; *Gopee* v. *Liakut*, (1876) 25 W. R. 211; *Kedarnath* v. *Khetturpaul*, (1880) I. L. R. 6 Calc. 34, *sc.*, 6 C. L. R 569; *Prosunno* v. *Jagun*, (1881) 10 C. L R. 25; *Noyna* v. *Rupikun*, (1882) I. L. R. 9 Calc. 609. See also *Krishna* v. *Mir*, (1899) 3 C. W. N. 255; *Ismail* v. *Jaigun*, (1900) I. L. R. 27 Calc. 570, *sc.*, 4 C. W. N. 210; *Caspersz* v. *Kader*, (1901) I. L. R. 28 Calc. 738, *sc.*, 5 C. W. N. 858; *Ismail* v. *Broughton*, (1901) 5 C. W. N. 846; *Ambica* v. *Baldeolal*, (1916) 20 C. W. N. 1113, *sc.*, 1 P. L. J. 253.

[4] Act VIII of 1885, Sec. 121.

[5] *Sheobarat* v. *Nawrangdeo*, (1901) I. L. R. 28 Calc. 364.

[6] Act VIII of 1885, Sec. 121, prov. (3). See also *Mohinee* v. *Ram*, [1864] W. R. Gap Vol. Act X. 77.

[7] Selwyn's Law of Nisi Prius, Vol. I, p. 671. Act X of 1859, Sec. 115.

[8] Act VIII of 1885, Sec. 188; Act X of 1859, Sec. 112; Act VIII (B. C.) of 1869, Sec. 68.

those of back years, the rule of limitation being three years from the last day of the [agricultural year in which the arrear falls due].[1] [This rule of limitation is the same irrespective of the form of the lease,[2] and whether the lease is registered or not, provided that the lease is in respect of land subject to the provisions of the Bengal Tenancy Act,[3] *e.g.* suit to recover drainage charges,[4] money payable in respect of the right to cut jungle for a certain time[5] or money payable under a lease merely conferring a right of fishing.[6] The article also applies to a suit for recovery of rent of a holding by one whose interest as landlord had ceased to exist before the institution of suit, provided that the arrears accrued due to him when he was the landlord of the defendant.[7] The Article does not apply to a suit brought by an assignee of arrears from the landlord,[8] unless the whole interest of the landlord is transferred.[9] As beween the landlord and tenant, where the Bengal Tenancy Act applies, this special law of limitation is applicable, and the landlord cannot fall back upon the general law.[10]]

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[1] Act VIII of 1885, Sch. III Art. 2(*b*.) *Kashikant* v. *Rohinikant*, (1880) I.L.R. 6 Calc. 325. See also *Doorga* v. *Nobin*, (1866) 6 W. R. Act X. 63; *Umur* v. *Arurut*, (1867) 7 W. R. 301; *Bykunt* v. *Shurfoonissa*, (1871) 15 W. R. 523; *Hurro* v. *Kali*, (1889) I. L. R. 17 Calc. 251; *Burna* v. *Burma*, (1895) I. L. R. 23 Calc. 191. But see *Iswardhari* v. *Ram*, (1906) 7 C. L. J. 106. As to payment in kind, see *Krishto* v. *Rotish*, (1876) 25 W. R. 307. As to inapplicability of the rule to date of instalments, see *Gobind* v. *Huro*, (1869) 11 W. R. 537.

[2] *Iswari* v. *Crowdy*, (1890) I. L. R. 17 Calc. 469; *Gajadhur* v. *Thakur*, (1916) 1 P. L. J. 506.

[3] *Mackenzie* v. *Mahomed*, (1891) I. L. R. 19 Calc. 1; *Raniganj Coal Association* v. *Judoonath*, (1892) I. L. R. 19 Calc. 489; *Kali* v. *Harendra*, (1906) 4 C. L. J. 553; *Rash* v. *Tiluckdhari*, (1915) 20 C. W. N. 485, *sc.*, 23 C. L. J. 111; *Mackenzie* v. *Rameswar*, (1916) 1 P. L J. 37; *Sarajubala* v. *Sarada*, (1918) 23 C. W. N. 336. See also *Watson* v. *Ram*, (1896) I. L. R. 23 Calc. 799.

[4] *Naffer* v. *Jyoti*, (1906) 11 C. W. N. 57, *sc.*, 5 C. L. J. 19. See also as to mode of computation of period, *Mon* v. *Priya*, (1904) 8 C. W. N. 640

[5] *Abdulullah* v. *Asraf*, (1907) 7 C. L. J. 152.

[6] *Krishna* v. *Salim*, (1914) 19 C. W. N. 514.

[7] *Balmukund* v. *Tarini*, (1912) 16 C. L. J. 360.

[8] *Mohendra* v. *Koilash*, (1900) 4 C. W. N. 605.

[9] *Shashi* v. *Seeta*, (1908) I. L. R. 35 Calc. 744, *sc.*, 7 C. L. J. 425.

[10] *Kali* v. *Harendra*, (1906) 4 C. L. J. 553.

How may occupancy-right be extinguished.

Under the Rent Acts of 1859 and 1869, the right of an occupancy-*raiyat* could be determined for non-payment of rent, for the breach of any condition of the contract of lease express or implied, by denial of the landlord's title, by surrender, by abandonment and by merger.

Non-payment of rent &c.

I have already dealt with cases of non-payment of rent and breaches of conditions, as well as disclaimer.[1]

Surrender and abandonment.

Surrender and abandonment are extremely rare. To avoid the difficulties which frequently arise on pleas of relinquishment and abandonment by tenant, the Bengal Tenancy Act has made special provisions in sections 86 and 87.[2]

Effect of transfer.

The effect of transfer of non-transferable occupancy right has been dealt with already.[3]

Registration of transfers and notice.

Where a transfer without the landlord's consent is valid according to custom or local usage, the registration in the landlord's office of the name of the transferee is necessary for the benefit of all parties concerned. The landlord ought to know who is the person in actual occupation as *raiyat;* the *raiyat* who has sold his holding ought to be freed from liability for rent after the cessation of his interest, and the transferee should have the advantage of having notices of suits for arrears of rent. The Rent Acts of 1859 and 1869 required the registration of the names of intermediate holders between the *zemindar* and the *raiyat*, but not of *raiyats*,[4] though it was held in some cases that the registration of the names of *raiyats* was necessary. The law as to tenure holders was frequently misapplied to the cases of *raiyati* holdings. The Bengal Tenancy Act has now provided—"When an occupancy-*raiyat* transfers his holding without the consent of the landlord, the trans-

[1] *Vide* p. 354. [2] *Ante* pp. 341, 354. [3] See *ante* pp. 339 to 345.
[4] Act VIII (B. C.) of 1869, Sec. 26. *Sutteeschunder* v. *Modhoosoodun*, [1864] W. R. Gap Vol. Act X. 91; *Umacharan* v. *Hariprosad*, (1868) 1 B. L. R. vii, *sc.*, 10 W. R. 101

feror and transferee shall be jointly and severally liable to the landlord for arrears of rent accruing due after the transfer, unless and until notice of the transfer is given to the landlord in the prescribed manner."[1] [It seems, the provisions of this section apply only to occupancy rights that are transferable by custom or local usage]. The notice of transfer is thus essentially necessary to relieve the outgoing tenant, and it would seem that, until such notice is served in accordance with the rules prescribed by the Local Government in that behalf,[2] the landlord is not bound to recognise the purchaser as his tenant, and any action against the original tenant will bind the purchaser notwithstanding that he is not a party to it. [The landlord cannot, however, make the tenant prsonally liable for rent which accrued due before such tenant became the owner of the tenure,[3] except where the purchaser expressly agreed to pay back-rents up to date.[4]] The due service of notice on the landlord operates as registration in the landlord's office, and no suit for registration is, therefore, necessary.[5]

Merger.

Extinguishment of the right of occupancy by merger is provided for in section 22 of the Bengal Tenancy Act.[6] Under the Rent Acts of 1859 and 1869, there was no legal bar to the two rights, the right of a tenure-holder and occupancy-right—being in the same individual. But section 22 of the Bengal Tenancy Act provides that when the immediate landlord of an occu-

[1] See *ante* pp. 346-7. Act VIII of 1885, Sec. 73.

[2] Bengal Government Rules under the Bengal Tenancy Act of 1885, Chapter V, rules 34 and 35.

[3] *Rash* v. *Peary*, (1878) I. L. R. 4 Calc. 346; *Jogemaya* v. *Girindra*, (1900) 4 C. W. N. 590.

[4] *Kutab* v. *Azibulla*, (1903) 7 C. W. N. 905.

[5] But see *Ambika* v. *Keshri*, (1897) I. L. R. 24 Calc. 642; *Motilal* v. *Omar*, (1898) 3 C. W. N. 19. See also *Abdul* v. *Ahmed*, (1887) I. L. R. 14 Calc. 795.

[6] See *ante* pp. 174, 253-5, 360-1. *Akhil* v. *Hasan*, (1913) 19 C. W. N 246, *sc.*, 18 C. L. J. 262; *Yakub* v. *Meajan*, (1915) I. L. R. 43 Calc. 164 *Gopal* v. *Tapai*, (1918) I. L. R. 46 Calc. 43, *sc.*, 22 C. W. N. 618.

pancy holding is a proprietor or permanent tenure-holder, and the entire interests of the landlord and the *raiyat* in the holding become united in the same person by transfer, succession or otherwise, the occupancy-right shall cease to exist. If the right is transferred to a person jointly interested as proprietor or permanent tenure-holder, it shall also cease to exist. An *ijaradar* or farmer of rents shall also not acquire a right of occupancy in any land comprised in his *ijara* or farm. [The incidents of occupancy right in the Central Provinces (so far as we are concerned), Sambalpur, Orissa and Chhotanagpur will be dealt with in the last lecture].

Who is a non-occupancy *raiyat*.

Under the law, unaffected by the provisions contained in the Bengal Tenancy Act, *raiyats* holding lands at unchanged rates of rent from the time of the Permanent Settlement, enjoy the privileges of fixity of rent and freedom from liability to ejectment, and *raiyats* having rights of occupancy are entitled to hold on from generation to generation as long as they pay rent at fair and equitable rates; but those who have cultivated or held lands for periods shorter than twelve years are liable to be ejected at the end of any agricultural year, on proper and reasonable notice to quit, unless they are protected by express conditions contained in their leases. Under the Bengal Tenancy Act, however, every *raiyat*, whatever the class to which he belongs, enjoys protection from eviction, except under certain specified conditions,[1] as soon as he is admitted to the occupation of *raiyati* land in any village; and even when he holds for a term of years under a contract in writing duly registered, he cannot, under any circumstances, be ejected at the end of the term, unless a suit for ejectment is instituted within

[1] Act VIII of 1885, Sec. 44. [It was held in *Chandra* v. *Bissesswar*, (1892) 1 C. W. N. 158, that parting with the possession of a portion of the holding or denying the title of the person under whom the non-occupancy *raiyat* held was no ground of forfeiture. See also *Nundo* v. *Kali*, (1898) 3 C. W. N. xlvii and *Atal* v. *Lakhi*, (1909) 10 C. L. J. 55 as to the effect of the section].

six months from the expiration of the term,[1] [and that, notwithstanding the fact that on account of agricultural exigencies the land may have to be occupied for a further period.[2]] If he has held for a shorter period than twelve years, the Bengal Tenancy Act calls him "a non-occupancy *raiyat*," and he is defined to be—"a *raiyat* not having a right of occupancy in the land held by him".[3] Neither is the expression "non-occupancy *raiyat*" a happy one, nor is the definition strictly logical. As I understand the expression, it means and includes that large class of *raiyats* holding *raiyati* lands, who neither hold at fixed rates from the time of the Permanent Settlement nor are occupancy *raiyats*. The Act has not defined the incidents of such a tenancy, except as to protection from eviction by the landlord and the rate at which rent is payable. It should, however, be remembered that the Act does not pretend to define exhaustively all the incidents of the various kinds of tenancies known in this country. Questions must and do frequently arise, which cannot be answered from the text of the Bengal Tenancy Act, and lawyers and judges are obliged to have recourse to well-known customs or local usages or customary laws and rules of equity and good conscience.[4] Section 183 of the Act saves the operation of "any custom, usage or cus-

Incidents.

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[1] Act VIII of 1885, Sch III., Art. 1 (*a*). [The notice to quit provided for in the original Act has been dispensed with by Act I (B. C.) of 1907 and Act I (E. B. & A.) of 1908. Act II (B. & O.) of 1913 for Orissa has also done away with the notice. As to effect of non-service of notice in due time under the old law, see *Goburdhone* v. *Karuna*, (1897) I. L. R. 25 Calc. 75; *Harihar* v. *Dinu*, (1911) 16 C. W. N. 536, *sc.*, 14 C. L. J. 170.

[2] *Durbijoy* v. *Dawan*, (1913) 18 C. L. J. 597.

[3] Act VIII of 1885, Sec. 4, Sub-Sec. 3, cl. (*c*).

[4] See *Kripa* v *Annada*, (1907) I. L. R. 35 Calc. 34, *sc.*, 11 C. W. N 983, *sc.*, 6 C. L J. 273; *Krishna* v. *Satish*, (1915) 20 C. W. N. 872; *Bamandas* v. *Nilmadhab*, (1916) I. L. R. 44 Calc. 771, *sc.*, 20 C. W. N. 1340, *sc.*, 24 C. L. J. 541; *Janki* v. *Jagannath*, (1918) 3 P. L. J. 1. See also *Kala* v. *Jankee*, (1867) 8 W. R. 250; *Umrao* v. *Mahomed*, (1899) I. L. R. 27 Calc. 205, *sc.*, 4 C. W. N. 76; *Hedayet* v. *Kamalanand*, (1912) 17 C. L. J. 411 and *Rash* v. *Tiluckdhari*, (1915) 20 C. W. N. 485, *sc.*, 23 C. L. J. 111

tomary right not inconsistent with or not expressly or by necessary implication modified or abolished by, its provisions." The rules of law prevalent in other countries, especially when they have been adopted in cognate Acts by the Indian Legislature and the earlier decisions of our Superior Courts, very often supply omissions in codified laws.

Heritability.

The right of a non-occupancy *raiyat* is heritable, *i.e.*, it descends in the same manner as other immovable property, subject to any custom or local usage to the contrary.[1] But there is a well-recognised rule that if a *raiyat* dies without any heirs except the Crown, the landlord takes possession. Tenancies-at-will are very rare in this country, though they are not unknown, and the customary law or the "common law" of the country (if I may borrow the expression) makes all other classes of tenancies heritable. The Transfer of Property Act, though it does not apply to agricultural holdings[2] in Bengal, recognises the heritability of the interest of tenants, when there is no contract or local usage to the contrary.[3] There is nothing in the Bengal Tenancy Act which takes away heritability from the status of a non-occupancy *raiyat*.[4]

Transferability.

We have already seen that an occupancy *raiyat* cannot, in the absence of custom or usage, transfer his right

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[1] *Midnapore Zemindary Company Ld.* v. *Hrishikesh*, (1914) I. L. R. 41 Calc. 1108, *sc.*, 18 C. W. N. 828, *sc.*, 19 C. L. J. 505; *Abjan.* v. *Raham*, (1915) 20 C. W. N. 756, *sc.*, 22 C. L. J. 232; *Kalru* v. *Jangli*, (1916) 1 P. L. J. 273. For earlier conflicting decisions see *Karim* v. *Sundar*, (1896) I. L. R. 24 Calc. 207, *sc.*, 1 C. W. N. 89; *Lakhan* v. *Jainath*, (1907) I. L. R. 34 Calc. 516, *sc.*, 11 C. W. N. 626, *sc.*, 5 C. L. J. 457; *Uday* v. *Hari*, (1909) 13 C. W. N. 937, *sc.*, 10 C. L. J. 608; *Kishorilal* v. *Krishnakamini*, (1910) I. L. R. 37 Calc. 377, *sc.*, 11 C. L. J. 401.

[2] Act IV of 1882, Sec. 117.

[3] *Ibid*, Sec. 108.

[4] But see *Karim* v. *Sundar*, (1896) I. L. R. 24 Calc. 207 which was decided after the lecture was delivered.—With the greatest deference to the learned judges who decided the case, it seems to me that the judgment is not in accordance with the spirit of the Bengal Tenancy Act. See footnote 1 above.

inter vivos or bequeath it by a testamentary instrument.[1] It is only reasonable to hold that the right of a non-occupancy *raiyat* is not also transferable, and I believe the general custom of the country is also to that effect. But local usage may be proved to show that the right of a non-occupancy *raiyat* is transferable. Section 178, sub-section 3, cl. (*d*) uses the word "*raiyat*" and not "occupancy *raiyat*," indicating thereby that the right to transfer may exist in all classes of *raiyats*.

Ejectment.

A non-occupancy *raiyat* is liable to be ejected on the ground "that he has used the land in a manner which renders it unfit for the purposes of the tenancy," [by a suit brought within two years of the landlord's knowledge[2]], "or that he has broken a condition consistent with" the Bengal Tenancy Act "and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected"[3] [by a suit brought within one year of the breach.[4]] This is also the law as regards occupancy *raiyats*.[5] The only material difference that seems to exist is that by section 178, sub-section (3), cl. (*e*), an occupancy *raiyat* cannot contract himself out of his right to sublet according to the provisions of Chapter VII of the Act, but such a contract of a non-occupancy *raiyat* with his landlord is not invalid. It seems to me that a non-occupancy *raiyat* has the right to sublet, subject to the restrictions contained in section 85, but he may be restricted from doing so by the contract of lease.

How far a protected interest.

The right of a non-occupancy *raiyat* is not "protected" on a sale for arrears of revenue of an entire

[1] *Ante* p. 339.

[2] Act IX of 1908 Sch. II. Art. 32; *Soman* v. *Raghubir*, (1896) I. L. R. 24 Calc. 160, *sc.*, 1 C. W. N. 223; *Sharoop* v. *Joggessur*, (1899) I.L.R. 26 Calc. 564, *sc.*, 3 C. W. N. 464.

[3] Act VII of 1885, See 44, also (*b*). See also *ante* pp. 200-1. 260-1.

[4] Act VIII of 1885, Sch. III, Art. 1.

[5] *Ante* p. 350. Act VIII of 1885, Sec. 25.

estate under Act XI of 1859 or Act VII (B. C.) of 1868. It is an encumbrance within the meaning of these Acts and the purchaser may avoid it.[1] Neither is it a "protected interest" on a sale under Regulation VIII of 1819[2] or the Rent Acts of 1859 and 1869 But the Bengal Tenancy Act, of which it is a creation, calls "the right of a non-occupancy *raiyat* to hold for five years at a rent fixed under Chapter VI by a Court, or under Chapter X by a Revenue-officer"[3] a "protected interest" not liable to be avoided on a sale for arrears of rent. The right is statutory and does not depend upon a grant by the rent-receiver, and like the right of occupancy it may be acquired by holding under a trespasser, and the true owner cannot eject the *raiyat* on the ground that he has been induced into the land by a wrong-doer.[4]

Surrender.

As regards the right to surrender, the rule is the same as that applicable to occupancy *raiyats*. He cannot, of course, surrender during the term specified in a duly written and registered contract of lease.[5]

Non-payment of rent

A non-occupancy *raiyat* can be ejected "on the ground that he has failed to pay an arrear of rent."[6] The law applicable is nearly the same as that laid down in Act X of 1859[7] and Act VIII (B.C.) of 1869[8] as regards occupancy *raiyats*. Under section 65 of the Bengal Tenancy Act, an occupancy *raiyat* is not liable to ejectment for arrears of rent, but his holding is liable

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[1] Act XI of 1859, Sec. 37; Act VII (B.C.) of 1868, Sec. 14.

[2] Regulation VIII of 1819, Sec. 11, cl. 3.

[3] Act VIII of 1885, Sec. 160, cl. (*e*)

[4] *Mohima* v. *Hazari*, (1889) I. L. R. 17 Calc. 45; *Binad* v. *Kalu*, (1893) I. L. R. 20 Cal. 708; *Madhu* v. *Zabar*, (1910) 14 C. W. N. 681. See also *Kali* v. *Bhagwan*, (1912) 17 C. W. N. 348, *sc.*, 17 C. L. J. 431. See *ante* p. 363, footnotes 1 to 3.

[5] *Ante* p. 354. Act VIII of 1885, Sec. 178, Sub-Sec. (3), cl. (*c*).

[6] Act VIII of 1885, Sec. 44, cl. (*a*).

[7] Act X of 1859, Sec. 78.

[8] Act VIII (B. C.) of 1869, Sec. 52.

to sale in execution of a decree for such arrears.[1] But under section 66 and section 44, cl. (*a*) of the Act, the landlord is entitled to a decree for the ejectment of a non-occupancy *raiyat* for an arrear of rent that remains unpaid at the end of any agricultural year, if the amount of the decree including costs and subsequent interest is not paid within fifteen days from the date of the decree, or when the court is closed on the fifteenth day, on the day on which the court re-opens.

Expiration of term of lease.

The expiry of the term of a registered lease may be a ground for the ejectment of a non-occupancy *raiyat*, provided his occupation of the land began under the particular lease.[2]

In any case the suit must be instituted within six months from the expiration of the term.[3] If, however, the *raiyat* was on the land from before the execution of a registered lease, the expiration of the term mentioned therein does not entitle the landlord to re-enter the land, whether the right to re-enter is expressly reserved or not. If the landlord delays in bringing a suit and allows six months to expire from the end of the term, there is an absolute bar to the institution of a suit for ejectment. Thus you see, the grounds of ejectment of a non-occupancy *raiyat* are extremely limited, and unless the landlord is always wide awake and there is a scrambling for land, so that he may change the *raiyat* after the expiration of the term of a registered lease under which the tenant holds, non-occupancy *raiyats* have always fair chances of acquiring the status of occupancy *raiyats*. [A non-occupancy *raiyat* admitted into occupation by a verbal or unregistered written lease seems to be in a better position

[1] *Ante* p. 349.

[2] Act VIII of 1885 Sec. 47. *Kamini* v. *Khodadad*, (1905) 9 C. W. N. cclxxxvii.

[3] Act VIII of 1885, Sch. III, Art. 1 (*a*). The rule is applicable where the expiration of the term is indicated in the lease itself and the fact that an agricultural year ends at some later date will not extend the date of cause of action: *Durbijoy* v. *Daman*, (1913) 18 C. L. J. 597.

than one admitted under a registered one. So is one who is allowed to hold on for six months after the expiry of the term of a registered lease. The provisions of section 44, clause (*c*) do not seem to be applicable to such cases.]

Refusal to pay fair and equitable rent.

Refusal to agree to pay a fair and equitable rent may also be a ground for the ejectment of a non-occupancy *raiyat*. When he first enters into the land, he is bound to pay rent at the rate agreed upon between himself and his landlord.[1] But if at the end of the term of the first lease, the landlord, instead of determining the right of the *raiyat* according to the provisions of the Act, chooses to retain him as a tenant and asks the court to compel the tenant to enter into an agreement to pay rent at a higher rate, the court ought not to enforce the payment of any rates but such as are just and equitable. He is not entitled to the full market rate or the highest rack-rent. Whatever the initial rent might have been, the court has a right to interfere on a fresh settlement. In *Bakranath Mandal* v. *Binodram Sen*,[2] a Full Bench of the Calcutta High Court held that a landlord cannot recover rent at an enhanced rate from a *raiyat* who has not a right of occupancy, unless he proves the existence and the reasonableness of the grounds stated in his notice served under section 13 of Act X of 1859. Section 13 is applicable not merely to *raiyats* having a right of occupancy, but to all under-tenants and *raiyats*. Peacock C. J. observed in the same case "It was contended in argument that the landlord may enhance the rent of a *raiyat* not having a right of occupancy to any amount he pleases, and may specify any grounds that he pleases for such enhancement; and that he is not bound to prove that any of such grounds exist, and that it is for the *raiyat* to prove that no such ground exists. If such an argument

Bakranath Mandal v. *Binodram Sen.*

[1] Act VIII of 1885, Sec. 42; Act X of 1859, Sec. 8. *Moheem* v. *Ruheemotollah*, (1863) 2 Hay 433; *Nubudeep* v. *Sheeb*, (1863) Marsh 325; *Ahmed* v. *Aghori*, (1868) 2 B. L. R. S. N. 15.

[2] (1868) 1. B. L. R. F. B. 25, *sc.*, 10 W. R. F. B. 33.

were tenable, a landlord might give notice that he intends to enhance to some exorbitant amount, upon the ground that he is a grasping oppressive landlord, having no regard for justice or fair dealing, or for the interests of any one except himself. It might be difficult, if not impossible, in many cases, for a *raiyat* to disprove the grounds alleged, by showing that the landlord was not a person of that description. This shows that the grounds must be reasonable, and such as to justify the enhancement claimed. The *onus* of proving the existence of the grounds alleged is upon the land-owner. It appears to me that the judges who referred this case came to a right conclusion that a landlord cannot enhance the rent unless he states the grounds on which he seeks to enhance; and that if those grounds are disputed, it will be for the Court to determine whether they exist, and whether they are such as to justify the enhancement."[1] The Bengal Tenancy Act has amplified the rule and has prescribed further rules for determining what is fair and equitable rent and the procedure which should be observed. [A non-occupancy *raiyat* who has been dispossessed from his holding can bring a suit for recovery of possession within two years of dispossession.[2]]

Settlement of rent.

I propose to deal with the question of the settlement of rent in the next lecture.

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[1] See also *Janoo* v. *Brijo*, (1874) 22 W. R. 548; *Jubraj* v. *Mackenzie*, (1879) 5 C. L. R. 231; *Ramnidhee* v. *Parbutty*, (1880) I. L. R. 5 Calc. 823, *sc.*, 6 C. L. R. 362; *Brojendra* v. *Woopendra*, (1882) I. L. R. 8 Calc. 706; *Jagut* v. *Rup*, (1882) I. L. R. 9 Calc. 48, *sc.*, 11 C. L. R. 143; *Mohamaya* v. *Nilmadhab*, (1885) I. L. R. 11 Calc. 533; *Hurro* v. *Gopee*, (1882) 10 C. L. R 559; *Radha* v. *Rakhal*, (1885) I. L. R. 12 Calc. 82; *Bidhumukhi* v. *Kefyutullah*, (1885) I. L. R. 12 Calc. 93.

[2] Act VIII of 1885, Sch. III, Art. 3. The law was different in Bengal before the introduction of Act I (B. C.) of 1907, Sec. 61.

LECTURE XI.

RAIYATS

(RATE OF RENT).

Customary rent.

In dealing with occupancy right in the last lecture, I omitted to deal with an important matter as to the rate of rent—its enhancement and abatement. The question of the rate of rent is one of vital importance. The first problem is—how was money-rent originally fixed? Rent in India was never 'competitive,'—it was 'customary.' The origin of any custom is always difficult to trace, but in this particular instance we have some data to go upon. There can be no doubt that the essence of customary rent was the price of a definite share of the produce,—an average of the quantity of the produce and its average selling value. An average of ten years' produce was the basis of Raja Todar Mal's settlement. Similar bases were also adopted in later times, whenever the Mahomedan government attempted directly to enhance the rent of *raiyats* in any locality,—a *zilla* or a *perganah*—whenever it desired to have a permanent increase in land-revenue and wished to avoid the indirect method—the levying of *abwabs*. Each given locality or a *perganah* had thus its average rates for the various kinds of lands, and every new settlement, whether of abandoned land or waste land brought under cultivation, was based upon the customary rates of assessment. There was another principle underlying the assessment of rent, which caused differences in rates amongst the different classes of *raiyats*. There were the village elders,

It is based on an average of produce and its value.

Variation in the different classes of *raiyats*.

the *mandals;* there were the ordinary *khudkast* or resident hereditary cultivators, and there were the *pahi* or non-resident cultivators. There was a fourth class too,—those who had not, until very recently, much importance as cultivators,—the lowest sub-castes amongst the *sudras* themselves, who generally worked as labourers, but occasionally held land as *raiyats,* though more generally as *under-raiyats.* Each of these different classes of *raiyats* paid at varying rates of rent, the elders paying less than the other classes and the labouring *sudras* paying at the highest rate. The *sudra* labourers as *raiyats* seem to have occupied the least productive lands, and paid as rent the entire value of the crop, less the cost of labour and the value of the seed. These were the leading principles that underlay customary rent in India—principles which are and ought to be the bases of enhancement or abatement of rent at the present day. In India, more than in any other country, every thing has a tendency to unchangeableness, and when once the rates in any locality are fixed on these principles, they become 'customary' or *perganah* rates. Rent of land is, over the greater portion of the world, controlled by custom, and, even in England, where land is held by tenants at competitive rent, custom is not entirely overlooked.[1]

Ricardo and Malthus.

Ricardo's theory of rent is well-known. According to him the rent of any particular piece of land is the estimated difference between the amount which it produces and the amount of produce raised from the worst land in cultivation. The net produce is that which remains after every expense connected with the farm has been paid, and after an adequate remuneration has been given as the price of labour employed and the use of capital. A rise in the rate of profit or in the rate of wages, unless accompanied by some counteracting

[1] J. D. Hewell's Fragmentary Tracts on Political Economy.

circumstances, causes the rate of rent to decline. This theory of rent may be true when there is free competition for land and when there is no interference by law or custom causing disturbance to free competition. Increase of population and consequent demand for land and the rise in the value of produce and decrease in the wages of labourers may increase the rate of rent in other countries, but in India, custom controls the theories of Ricardo and Malthus and the political economists who have followed them.

J. S Mill.

According to J S. Mill, the principle of competition gives to the theories of rent, as enunciated by Ricardo and Malthus, a scientific character, but competition has never been the exclusive regulator in any country—the causes of aberration being various and indefinite. In fact, competition never exercised unlimited sway in any country, until a comparatively modern period. He says—"The farther we look back into history, the more we see all transactions and engagements under the influence of fixed custom. The reason is evident. Custom is the most powerful protector of the weak against the strong; their sole protector where there are no laws or government adequate to the purpose....But though the law of the strongest decides, it is not the interest nor in general the practice of the strongest to strain that law to the utmost, and every relaxation of it has a tendency to become a custom, and every custom to become a right. Rights thus originating, and not competition in any shape, determine, in a rude state of society, the share of the produce enjoyed by those who produce it. The relations, more specially, between the landowner and the cultivator, and the payment made by the latter to the former, are, in all states of society, but the most modern, determined by the usage of the country. Never until late times have the conditions of the occupancy of land been (as a general rule) an

affair of competition. The occupier for the time has very commonly been considered to have a right to retain his holding, while he fulfils the customary requirements; and has thus become, in a certain sense, a co-proprietor in the soil."[1]

Mill's theory accepted in India.

The majority of the judges in the case of *Thakooranee Dossee* v. *Bisheshur Mookerjee*[2] accepted Mill's view of rent in India, and agreed in holding that whatever the theory of rent applicable to England might be, the customary or *perganah* rate should be the true basis of ascertainment of rent in India. The custom of the country, and not the theory of English political economists, should be applied to this country. All that is not comprehended in the wages of labour, and profit of the *raiyat's* stock, is *not* the landholder's rent.

Analysis of the idea of customary rent.

An analysis of the idea of customary rent in India resolves it into the following elements:—

1. Quantity of land.
2. Productive power of land.
3. The average value of the produce in or near the locality.
4. The class to which the *raiyat* belongs.

The rent of any piece of land is ordinarily fixed on a consideration of these elements, and the tenant is bound to pay the same as fair and equitable. Thus the contract-rate and the customary rate should coincide.

Causes of variation from customary rate.

The customary or *perganah* rate having originally been based on these elements, variations due to accidental causes may entitle the rent-receiver to demand rent at a higher rate or the rent-payer to ask for an abatement. But according to another well-established custom, variation could not be attempted with respect to any particular *raiyat* or any particular holding, but

[1] Principles of Political Economy, Bk. II, Ch. IV. 2.

[2] (1865) B. L. R. F. B. Vol. 202 (225), *sc.*, 3 W. R. Act X 29.

could only be attempted with respect to a local area—an entire village or a *perganah*. In particular instances, the rate of rent might, for some cause or other, have been lower than that at which rent was paid by the majority of *raiyats*, and in such cases the landlord might increase the rent to the ordinary customary rate of the locality. Such instances were, however, rare, and unless there was a wholesale enhancement, no *raiyat* could be compelled to pay at a higher rate.

Act X of 1859 Sec. 17 and Act VIII (B. C.) of 1869, Sec. 18.

When Act X of 1859 was passed, it was provided by section 17 of the Act[1]—"No *raiyat* having a right of occupancy shall be liable to an enhancement of the rent previously paid by him except on some one of the following grounds, namely:—

that the rate of rent paid by such *raiyat* is below the prevailing rate payable by the same class of *raiyats* for land of a similar description and with similar advantages in the places adjacent;

that the value of the produce or the productive powers of the land have been increased otherwise than by the agency or at the expense of the *raiyat*;

that the quantity of land held by the *raiyat* has been proved by measurement to be greater than the quantity for which rent has been previously paid by him."

What is fair and equitable rent.

The section did not expressly refer to customary or *perganah* rates, neither did the Act lay down any especial procedure for enhancement of rent of all the *raiyats* in any local area. The *Patta* Regulations in the Bengal Code contemplated equalization and fair and equitable rent of *raiyats* in a local area, but the provisions made were imperfect, and no effectual steps were ever taken to properly enforce them. The first ground of enhancement,—that the rate at which rent is paid by the *raiyat* is below that prevailing in adjacent places,—relates to the *perganah* or customary rate. It assumes that the

[1] See Act VIII (B. C.) of 1869, Sec. 18.

rate of rent paid by the majority of *raiyats* in any locality is fair and equitable, and that, if there are no special causes affecting any particular *raiyat* which entitle him to pay at a lower rate, his rate of rent should be equalised to that of his neighbours. The Act does not provide for reduction of rent, if the *raiyat* has been paying at a higher rate than his neighbours, the assumption apparently being that the rate of rent previously paid by him is, for some especial cause, fair and equitable. Section 30, clause (*a*) of the Bengal Tenancy Act covers almost the same ground as the first clause of section 17 of Act X of 1859. Section 38 of the Bengal Tenancy Act, while laying down rules about reduction of rent, does not contemplate reduction on the ground that the rate at which rent is paid by a particular *raiyat* is higher than the prevailing rate.

Prevailing rate.

The prevailing rate of rent paid for lands of a similar description with similar advantages in the places adjacent is, in the present state of things, extremely difficult to determine. Various causes, the principal of which are the landlord's caprice or tyranny and the tenant's weakness, have in many localities nearly destroyed what one would call "the customary rate." The *raiyats* generally pay at varying rates, varying with the power of resistance which each of them possesses. In many instances colourable *kabuliyats* at rates higher than the really prevailing rates come forward in abundance in support of the landlord's cause, and courts of law feel the greatest difficulty in finding out the truth, even if there be a prevailing rate. The determination of the question as to what is the prevailing rate has necessarily induced rulings not quite consistent with each other. In one of the leading cases[1] on the subject, the late Justice Dwarkanath Mitter observed that "prevailing rate" means "the rate paid by the *majority* of the *raiyats* in the

ShadhooSingh v. Ramanoograha Lall.

[1] *Shadhoo* v. *Ramanoograha* (1868), 9 W. R. 83.

neighbourhood." It must be paid generally and not by a number of witnesses only. In *Priag Lall* v. *Brockman*,[1] the evidence of three *patwaries*, who put in their *jamabandies* showing the rates payable by almost all the *raiyats*, was held sufficient to prove the prevailing rate. The duty of a judge, when dealing with a case based on this ground of enhancement, is not to determine the fair or equitable rate, nor to strike an average and thereby determine the prevailing rate, but to find out strictly the rate which has adjusted itself and is actually paid as *nirik* or rate by a very large majority of *raiyats*.[2] But though the customary and *perganah* rate is generally the prevailing rate, it is not always so. The established rate might have been changed with respect to many *raiyats*, and the customary rate might have ceased to be the prevailing rate at the date of the institution of a suit for enhancement.[3]

The Bengal Tenancy Act has provided[4] that, in determining the prevailing rate, the rates generally paid for not less than three years before the institution of the suit should be taken into consideration, and for ascertaining the rates satisfactorily, such revenue-officer as the Local Government may authorize on that behalf may be appointed a commissioner under order XXVI, rule 9 of the Civil Procedure Code [by the Civil Court. The Civil Court in directing a local investigation under this

Act VIII of 1885, Sec. 31

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[1] (1870) 13 W. R. 346.

[2] *Sreeram* v. *Lakhun*, (1863) Marsh 379; *Sumeera* v. *Gopal*, (1864) 1 W. R. C. R. 58; *Pelaram* v. *Nund*, (1866) 6 W. R. Act X 45; *Jaun* v. *Jun*, (1868) 9 W. R. 149; *Surahutoonissa* v. *Gyanee*, (1869) 11 W. R. 142; *Ganga* v. *Saroda*, (1869) 3 B. L. R. 230, *sc.*, 12 W. R. C. R. 30; *Priag* v. *Brockman*, (1870) 13 W. R. 346; *Rowshun* v. *Chunder*, (1871) 16 W. R. 177; *Audh* v. *Dost*, (1874) 22 W. R. 185; *Tikaram* v. *Sandes*, (1874) 22 W. R. 335; *Akul* v. *Ameenooddeen*, (1879) 5 C. L. R 41. *Per contra*, *Dena* v. *Mohinee*, (1874) 21 W. R. 157. See also *Shital* v. *Prossonnomayi*, (1894) I. L. R. 21 Calc. 986.

[3] *Kallee* v. *Ruttun*, (1869) 11 W. R, 571.

[4] Act VIII of 1885, Sec. 31. See Calcutta Gazette, July 22, 1890, Part, 1, p. 756 and Circular No 4 of Board of Revenue for August 1894.

section should indicate to the officer holding the investigation what it is that the Court precisely requires.[1]]

Same class of *raiyats.*

Under Act X of 1859, the prevailing rate for the purposes of enhancement must be payable by the same class of *raiyats*. There was a conflict of cases as to the meaning of the expression—"same class." It was held that the words referred exclusively to occupancy *raiyats*; but there might be separate classes in the general body of occupancy *raiyats*.[2] Amongst the occupancy *raiyats* in the same village, there are *jeyt raiyats* or *mandals* who generally pay at a lower rate, and then there are the *khudkast* and *pahi raiyats*. The Bengal Tenancy Act has attempted to clear the difficulty by laying down that 'whenever it is found that by local custom any description of *raiyats* holds land at favourable rate of rent, the rate shall be determined in accordance with that custom.'[3] But ordinarily the rate paid by occupancy *raiyats*, without reference to caste or class, should be taken into consideration.

Places adjacent.

"Places adjacent" include in its range a very wide circle and not merely a village or a *perganah*.[4] The *perganah* rate of the Mahomedan times has, however, long ceased to exist, and each village under a *zemindar* or a subordinate tenure-holder has its customary or local rate. Lands lying in a different village or in a different *perganah* may yield better harvest than lands in the village in which enhancement is claimed by the landlord. *Raiyats* in one village under one landlord may hold lands

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[1] *Nabin* v. *Kalo*, (1910) I. L. R. 37 Calc. 742, *sc.*, 14 C. W. N. 914.

[2] *Sreeram* v. *Lakhun*, (1863) Marsh 379; *Thakooranee* v. *Bisheshur*, (1865) B. L. R. F. B. Vol. 202, *sc.*, 3 W. R. Act X. 29; *Ram* v. *Bhoyrub*, (1866) 6 W. R. Act X 33; *Purmanund* v. *Puddo*, (1868) 9 W. R. 349; *Goureenath* v. *Ramgutty*, (1869) 12 W. R. 102; *Woomanath* v. *Ashumburee* (1869) 12 W. R. 475; *Mothooranath* v. *Nil*, (1870) 13 W. R. 297.

[3] Act VIII of 1885, Sec. 31.

[4] *Kallee* v. *Ruttun*, (1869) 11 W. R. 571; *Tweedie* v. *Poorno*, (1869 12 W. R. 138; *Gabind* v. *Haro*, (1870) 4 B. L. R. App. 61; *Dena* v. *Mohinee*, (1874) 21 W. R. 157; *Shital* v *Prossonnamoyi*, (1894) I. L. R. 21 Calc. 986,

at more favourable rates than *raiyats* holding lands in a neighbouring village under another landlord. To apply the prevailing rate in one village to another would in many instances be unfair and inequitable. The Bengal Tenancy Act has now laid down that in determining the prevailing rate, only the village in which the land lies or in the neighbouring villages should be taken into consideration.[1]

Description of land.

"Description of land" includes the productive power as well as the nature of the crop capable of being produced on it. In most of the Bengal districts lands in agricultural holdings are divided into various classes, of which the principal are the following :—

Sali, jal or *dhanhar.*

1. *Sali* or *jal* or *dhanhar, i. e.*,—lands producing *aman* (winter) paddy. These lands are generally low, and are divided into four sub-classes according to their productive powers, *viz.*, *awal* (first), *doem* (second), *syem* (third) and *chaharam* (fourth).

Suna or *bhit.*

(2) *Suna* or *bhit* producing two crops—the autumn paddy or jute or crops known as *bhadoi*, and the winter crops—potato, seeds, wheat, barley and others known as *rabi*. Sugar-cane is also produced on such lands. These also are divided into four classes as above.

Bastu and *udbastu.*

(3) *Bastu* or homestead lands and *udbastu* or land near the homestead used by the *raiyat* for his cattle.

Covered by water.

(4) Land covered by water.

These last two kinds of land, when they appertain to a tenant's agricultural holding must come within the purview of section 17 of Act X of 1859 and section 30 of the Bengal Tenancy Act.

Horticultural lands.

(5) Garden land being horticultural also comes within the purview of the Rent Acts.

Ghaskar and *kharkar.*

(6) Pasture *(ghaskar)* lands and *kharkar* lands which yield thatching grasses.

[1] Act VIII of 1885, Secs 30, cl. *(a)* and 31 A (1). See *Alep* v. *Raghu*, (1896) 1 C. W. N. 310; *Maugni* v. *Seo*, (1897) 1 C. W. N. clxxix; *Nabin* v. *Kula*, (1910) I L R 37 Calc. 742, *sc.*, 14 C. W. N. 914.

Similar advantage.

The value of land producing grains depends, in any village, upon proximity to tanks or water-courses which afford means of irrigation. In this country, distance from the nearest market or place of sale is seldom taken into consideration, unless it leads to a material difference in the market value of the produce. Villages are generally not very large, and the transit of goods costs almost the same amount, the distances of the fields from one another and the market being inappreciable. The rent of lands no doubt varies considerably according to their distances from a town, or a railway station, or a trade-centre, or a navigable river; but such variations affect only the lands of one village as compared with those of another at a distance. The advantages of one piece of land over another in the same village, if it is not grain-producing, consist not only in its proximity to reservoirs of water and streams, but also in easy access from the homes of the village people who generally live close to one another in clusters of huts. There may also be an advantage of one piece of land over another by its distance from homestead lands and fields appertaining to other villages.

Value of produce and productive power of land.

The second ground of enhancement is the increase in the *value of the produce* or the *productive power of land*. Clauses *(b)*, *(c)* and *(d)* of section 30, of the Bengal Tenancy Act, cover almost the same ground as clause *(b)* of section 17 of Act X of 1859. This ground involves quantities not easy to determine and requires solution of problems of great difficulty.[1]

[The Legislature intervened in 1898 and amended the substantive provisions of the law relating to the enhancement of rent, so as to make them workable on certain points on which they were then practically inoperative. The statute, was vague, and the case-law conflicting or

[1] See *Kristo* v. *Huree*, (1867 7 W. R 235; *Abdool* v. *Bhuttoo*, (1874) 22 W. R. 350; *Rama* v. *Jote*, (1909) 11 C. L. J. 1; *Annada* v. *Nibarani*, (1909) 11 C. L. J. 380

unworkable.[1] The Amending Act of 1898[2] introduced into the Act sections 31A and 31B, and amended sections 30 and 31, thus abandoning the principle laid down in the rulings of the High Court.[1] The "prevailing rate" is, under the amended law, fixed with reference to the quantity of land for which rent is payable, rather than with reference to the number of *raiyats* paying rents. The amendment also renders it possible to level all the lower rates up to the average rate, while maintaining all the higher rates, however much in excess they may be of the average rate under the amended law. It is now quite easy to find out the "prevailing rate," where rates exist at all, and to enhance rents, but as rents are already too high in certain districts, power is reserved by Government to withhold the operation of the new provisions from any district or part of a district. In order to guard against all rates being levelled up to the maximum rate, by manipulation of new prevailing rates from time to time, it is provided in section 31B that a prevailing rate once determined shall not be liable to enhancement except on the ground of rise in prices. But the provisions of section 31A (1) does not apply to all districts, and in such areas the old case law would apply.[3]]

Rise in average prices.

The vagueness of the expression "the value of the produce" in section 17 of Act X of 1859 has been attempted to be avoided in the Bengal Tenancy Act, by the words "rise in the average local prices of staple food crops" and sections 32, 33 and 34 of the latter Act have laid down certain rules with reference to this ground of enhancement of rent; but still the difficulty in ascertaining the exact rise in the prices of staple food crops is as great as ever.

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[1] See *ante* p. 416.

[2] Act III (B. C.) of 1898.

[3] *Ram* v. *Moheshwar*, (1915) 21 C. L. J. 483.

Rule of proportion.

Increased demand of staple food crops from an increase of the non-agricultural population of a country and of its commercial industry leading to larger exports into foreign countries, necessarily brings about a general rise in the value of produce, if there is no proportional increase in the area of agricultural lands. Decrease in the value of money as a medium of exchange also leads to a general rise in the value of food crops. The landlords begin to demand rent at enhanced rates, and the rise in the value of grains naturally accommodates itself to the landlords' demand. The *raiyats* gradually pay at a fair rate of rent; but if as a class they decline to do so, it becomes necessary to determine, for the purposes of enhancement, the average rise in local prices of staple food crops and to find out what the proportionate increase in the rate of rent should be. In *Thakooranee Dossee* v *Bisheshur Mookerjee*[1] the majority of the Judges held—"In all cases in which an adjustment of rent is requisite in consequence of a rise in the value of the produce caused simply by a rise of price, the method of proportion should be adopted—the former rent should bear to the enhanced rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value, bears to its present value." If the landlord was originally entitled only to a share of the produce, and the money rent paid in modern days is roughly an equivalent of the money-value of that share at the time when rent in kind was commuted into rent in specie, this rule of proportion may work out the fair and equitable rent which an occupancy-*raiyat* ought to pay. Increase in the value of labour and increase in the cost of living of the *raiyat* and his family consequent upon an increase in the price of grains and the other necessaries of life are disturbing

[1] (1865) B. L. R. Sup. Vol. 202, *sc.*, 3 W. R. Act X. 29.

elements, but are not sufficiently important to vary such a rule of proportion unless the increase is abnormally high. The increase, as a ground of enhancement of rent, must, however, be in the price of staple food crops and not of particular crops grown by *raiyats* in recent years at considerable cost in manuring and hired labour. Jute, indigo, tobacco, opium and *ganja* are particular crops which ought not to be taken into consideration.[1]

Not easy of application.

But after all, the rule of proportion is not very easy of application to actual facts. The terms necessary to work out a proportion are difficult to find out. The value of staple food crops at the time of the previous settlement of rent is in most cases impossible to find out.[2] Price lists may now be of use, but they were not generally prepared in former days. The causes of aberration are also many, and the very simplicity of the rule of proportion makes it inapplicable to a complex state of facts.

Rule of proportion not applicable where *perganah* rate is equitable.

The rule of proportion laid down in *Thakooranee Dosse's* case[3] is inapplicable where in particular instances fair and equitable rent may be determined by the prevailing *perganah* rate.[4] It would seem from the provisions of the Bengal Tenancy Act as to enhancement and settlement of rent that the rule of proportion is applicable only when enhancement is sought for in any local area involving the holdings of a large number of tenants. Re-adjustment of rent ought only to be allowed when a change of customary rent is necessary on account of the altered state of things in a large area. Macpherson J. in his judgment in the Full Bench case above referred to[3] observed "In my opinion, the rule of proportion,—as the old value of produce is to the old rent, so is the present

[1] *Bhagruth* v. *Mohasoop*, (1866) 6 W. R. Act X. 34.

[2] *Jadub* v. *Etburry*, (1865) 3 W. R. Act X. 160.

[3] (1865) B. L. R. Sup. Vol. 202, *sc.*, 3 W. R. Act X. 29. *Sreesh* v. *Assimonissa*, (1867) 7 W. R. 234.

value of produce to the rent which ought now to be paid,—is the rule which should be adopted in the absence of any recently adjusted *perganah* customary rates. In so ascertaining the rate, we shall be ascertaining it on a principle similar to that on which the old *perganah* or customary rates were fixed. We shall be doing what was deemed fair and equitable in the case of *raiyats* having a right of occupancy prior to Act X, and what is not less fair and equitable, in the case of *raiyats* having a right of occupancy under that Act. Let the *zemindar* seeking to enhance the rent go back to any year he chooses;...and let him prove that the proportion was then more favourable to him than it has subsequently become. Either party should be at liberty, in each case, to prove any special circumstances tending to show that the application of the rule of proportion to that particular case would work injustice."

Average of prices in decennial periods.

The increase in the price of staple food-crops must be in its natural and usual course in ordinary years. In *Bhagruth Doss and others* v. *Mohasoop Roy and another*,[1] the High Court observed that accidental or exceptional high prices in any particular year or even successively for two or three years ought not to be taken as a measure for adjustment of rent. Various causes might affect the value of the produce for a year or two, but that would be no ground for enhancement. The Bengal Tenancy Act requires the calculation of average prices during a decennial period.[2] The proportion is to be worked out with reference to average prices during two decennial periods, the one immediately preceding the institution of the suit and the other any decennial period as may appear equitable and practicable to be taken for comparison.[3] In order to avoid the hardship that may arise from an average of high prices in the later

[1] (1866) 6 W. R. Act X. 34.
[2] Act VIII of 1885, Sec. 32, cl. (*a*).
[3] *Ibid*, Sec. 32, cl. (*a*).

period, the Act has also provided that the average prices during the later period should be reduced by one-third of their excess over the average prices during the earlier period.[1] To make enhancement on this ground practicable, it has also given the court discretion to substitute any shorter periods instead of decennial periods.[2]

Reduction of rent on fall in prices.

Reduction of rent may be had on the ground that there has been a fall in prices not due to any temporary cause.[3] The same rule of proportion, as in a case of enhancement of rent, has to be worked out. The Court may, in any case, direct such reduction of rent as it thinks fair and equitable. But suits for abatement of rent are very rare, as a steady rise in prices has been the normal state of things under the British rule in India.

Deduction of one-third.

The rule of proportion does not apply, where the increase or decrease in the price of staple food-crops is accompanied by either a decrease or an increase in the productive power of land or in the cost of cultivation. Land is liable to deterioration by crops being raised successively for many years. The deterioration can only be checked by a judicious system of manuring which, as a matter of fact, is little understood in this country. Manuring implies an increase in the cost of cultivation. Rise in the price of staple food-crops and increase in the demand of labourers lead to a rise in the price of labour, and when hired labour is necessary for the purposes of cultivation, an additional cause of aberration disturbs the operation of the rule of proportion. The rule in such a case requires to be modified, and as there is a steady rise in the price of labour, a deduction of something like one-third, as is contemplated by the Bengal Tenancy Act, is necessary to be made,—a deduction which prevents also any

[1] Act VIII of 1885, Sec. 32, cl. (*b*). [2] *Ibid* Sec. 32, cl. (*c*).

[3] Act X of 1859, Sec. 18; Act VIII of 1885, Sec. 38, Sub Sec. (1), cl. (*b*).

mischief that may arise from exceptionally high prices in the later period.[1] In *Showdaminee Dassee* v. *Shookool Mahomed*,[2] Trevor J. thus stated the terms of the proportion—"The average value of the produce before the decrease in the productive powers of the land, will be to the average value of the present decreased produce, *minus* the increased cost of production, as the rent previously paid will be to that which the land ought now to pay."

Increase in the productive power of land.

Increase in the productive power of land, otherwise than through the agency or at the expense of the *raiyat*, can take place only on account of an improvement effected by or at the expense of the landlord or by fluvial action.[3] Land has a tendency to deteriorate from want of conservation of plant-food, but improved means of irrigation, embankments preventing inundations or flow of salt water, and improved methods of drainage, may and actually do increase the productive power of land. Silt deposits in the deltaic provinces are frequent, and a piece of sandy land this year may, by the action of a river, become very fine arable land in the following year. The drainage schemes have improved considerable areas in Bengal. The *zemindar* who has to pay a large portion of the cost of improvement may very well demand increased rent. The Bengal Drainage Act expressly empowers him to do so.[4]

Burden of proof.

Instances of improvents made by *raiyats* themselves are not uncommon in this country, and in every suit for enhancement of rent on the ground of an increase in the productive power of the land held by the *raiyat*, the burden is on the landlord to show that it is not due to the agency of the *raiyat*.[5] Under the Bengal Tenancy

[1] *Ante* p 422.
[2] (1857) 7 W. R. 94.
[3] Act X of 1859, Sec. 17; Act VIII of 1885, Secs. 30 and 34.
[4] Act VI (B C.) of 1880, Secs. 42 and 43.
[5] *Poolin* v. *Watson*, (1868) 9 W. R. 190.

Act, the burden is decidedly on the landlord. If the *raiyat* converts at his own cost and labour arable land into a garden, which yields a larger income, or if he improves ordinary arable land by manuring, thereby making it yield crops like tobacoo or potato, the landlord is entitled only to the rent of the land as it existed before the improvement.[1] When a *raiyat* brings waste land into cultivation, he is liable, after the *russadi* period is over, to pay at the full *perganah* rate for the cultivated land. But if the land which he originally obtained required special cost to make it culturable, and the *raiyat* had to spend more than ordinary labour and capital to make it good arable land, the landlord is not entitled to any benefit from the improvement.[1] If the *raiyat* has impressed upon the land a character it would not naturally have, the landlord is not entitled to ask for enhancement.[1] Where a *raiyat* has dug a tank, planted an orchard at his cost or erected a distillery, it is the *raiyat's* agency and not the landlord's that has improved the land.[2]

Orchards.

But in *Obhoy Chunder Sirdar* v. *Radha Bullubh Sen*,[3] Garth C. J. observed—"It is, in point of fact, untrue that the increased productiveness of an orchard, by reason of the growth of fruit trees, is due to the agency of the person who planted them. After the first expense of preparing the land, and planting and nurturing the young trees has been incurred, the increase in the productiveness of an orchard depends probably

[1] *Noor* v. *Hurriprosonno*, [1864] W. R. Gap. Vol. Act X. 75; *Chowdhry* v. *Gour*, (1865) 2 W. R. Act X. 40; *Golam* v. *Gopal*, (1868) 9 W. R. C. R. 65; *Purmanund* v. *Puddo*, (1868) 9 W. R. 349; *Huro* v. *Chundee*, (1883) I. L. R. 9 Calc. 505, *sc.*, 12 C. L. R. 251; *Robert Watson & Co.* v. *Radha*, (1905) 1 C. L. J. 572; *Katyayani* v. *Port Canning and Land Improvement Co.*, (1914) 19 C. W. N. 56.

[2] *Lukhun* v. *Sreeram*, (1863) 2 Hay 427; *Showdaminee* v. *Haran*, (1866) 6 W. R. Act X. 103; *Braja* v. *Stewart*, (1871) 8 B. L. R. App. 51, *sc.*, 16 W. R. 216.

[3] (1878) 1 C. L. R. 549.

far less upon the labour and outlay of the tenant than land used for the ordinary purposes of agriculture. The trees may require a certain amount of care and attention for time to time, but their growth and productiveness depend far more upon the quality of the soil, and the fertilizing influence of the seasons, than upon the labour of man. It is quite right of course that, in settling the rent of land which is let for the purposes of an orchard, a due allowance should be made to the tenant to cover the cost of his original outlay in the way both of labour and capital; but, after such allowance has been made, there is no reason why the rent of the lands used for orchards should not be liable to enhancement or abatement from time to time, in the same way as lands used for other kinds of culture." With the greatest deference to the opinion of the learned Chief Justice, it seems to me that it is questionable in any case in which arable land is taken by the tenant at the usual rate of rent and improvement is afterwards effected by the tenant planting fruit trees.

Improvements made by landlord.

The Bengal Tenancy Act has a rigid rule that only improvements effected by or at the expense of the landlord may be the basis of enhancement. Section 33 of the Act requires the registration of an improvement under the provisions of the Act as a necessary preliminary to a suit for enhancement on this ground; and sections 80 and 81 lay down rules for the registration of improvements.[1]

Improvement by fluvial action.

Improvement by fluvial action must not merely be temporary or casual..[2] It must last or is likely to last for a considerable time. An enhancement of rent on this ground should always be fair and equitable, but

[1] For Bengal Government Rules framed under these sections, see Calcutta Gazette of 9th Dec., 1914, Part I, pp. 2205 to 2226, Rules 12 to 17.

[2] Act VIII of 1885, Sec. 34 cl. (*a*). *Kristo* v. *Huree*, (1867) 7 W. R. 235; *Abdool* v. *Bhuttoo*, (1874) 22 W. R. 350.

not so as to give the landlord more than one half of the value of the net increase in the produce of the land.[1]

Reduction of rent on deterioration of land.

Reduction of [money]-rent may be claimed on the ground that the productive power of the land held by the *raiyat* has decreased for any cause beyond his control. Permanent deterioration by deposit of sand or such other specific causes, sudden or gradual, entitles the tenant to ask for abatement. Principles of natural justice and equity require that if, during the period of the *raiyat's* occupation, permanent deterioration takes place of any portion of the land held by him by the act of God, and not through the fault of the *raiyat*, he should not be made to pay the same rent as before.[2] Under the Acts of 1859 and 1869, the tenant might either sue for abatement or claim abatement as a set-off in a suit for rent brought by the landlord.[3] But in either case the burden of proof is upon the tenant.[4] The Bengal Tenancy Act contemplates abatement by a suit, and the Court may direct in such a suit such a reduction of rent as it thinks fair and equitable. [An occupancy *raiyat* can sue for abatement of rent only on one of the grounds specified under section 38 of the Bengal Tenancy Act. [5]]

Alteration of rent on alteration of area.

Alteration of rent on alteration of area is an important incident of tenancy in this country. [The provisions of section 29 of the Bengal Tenancy Act do not apply

[1] Act VIII of 1885, Sec. 34, cl. (*b*).

[2] Act X of 1859, Sec. 18; Act VIII of 1885, Sec. 38; *Enayutoollah* v. *Elaheebuksh*, [1864] W. R. Gap. Vol. Act X. 42; *Munsoor* v. *Harvey*, (1869) 11 W. R. 291. For the meaning of the word 'permanent,' see *Gouri* v. *Reily*, (1892) I. L. R. 20 Calc. 579 and *Krishna* v. *Palakdhari*, (1915) 20 C. W. N. 1157, *sc.*, 22 C. L. J. 42.

[3] *Mohesh* v. *Gungamoney*, (1863) 2 Hay 495; *Afsurooddeen* v. *Shoroosheе*, (1833) Marsh. 558, *sc.*, 2 Hay 664; *Barry* v. *Abdool*, [1864] W. R. Gap Vol. Act X. 64; *Boikunto* v. *Soorendranath*, (1864) 1 W. R. 84; *Deen* v. *Thukroo*, (1866) 6 W. R. Act X. 24; *Gour* v. *Bonomalee*, (1874) 22 W. R. 117.

[4] Act VIII of 1885, Sec. 38. *Savi* v. *Obhoy*, (1865) 2 W. R. Act X. 27.

[5] See *Shokoor* v. *Umola*, (1867) 8 W. R. 504; *Goluck* v. *Parbutty*, (1871) 15 W. R. 167; *Babun* v. *Shib*, (1874) 21 W. R. 404 and *Darimbya* v. *Nil*, (1879) 5 C. L. R. 465.

to cases of alteration of rent on alteration of area.[1]] It is not confined to occupancy holdings only. The rent of a permanent tenure or a permanent agricultural holding may be altered on alteration of the quantity of land in the tenure or holding.[2] We have seen[3] that the law, as it stood before the Bengal Tenancy Act came into force, enabled every tenant to claim an abatement of rent for diminution of the area of the land held by him, caused by circumstances beyond his control, unless there is a clear stipulation to the contrary. The question of the increase of rent in respect of any additional land gained by fluvial action in a permanent tenure was, however, more difficult to answer. If abatement was allowed at any time on the ground of a diminution of area by diluvion, enhancement must be allowed on accretion or reformation. But if abatement was never claimed and allowed, the landlord was entitled to assess only accretions, if he could show that he was entitled to do so by established usage or agreement.[4] In *Juggut Chunder Dutt and others* v. *Panioty and others*, which came before the High Court three times in appeal and once on review, it was held that the *zemindar* was precluded from assessing accretion though there were considerable differences in the opinions of the judges.[5]

Increase of area by fluvial action.

[1] *Satish* v. *Kabiraddin*, (1899) I. L. R. 26 Calc. 233; *Nilmadhab* v. *Kadam*, (1906) 3 C. L. J. 74*n*. See also *Raj* v. *Faizuddi*, (1914) 22 C. L. J. 81.

[2] *Afsurooddeen* v. *Shorooshee*, (1863) Marsh. 558, *sc.*, 2 Hay 664; *Uma* v. *Tarini*, (1882) I. L. R. 9 Calc. 571. See also *Horo* v. *Joy*, (1864) 1 W. R. 299; *Prosunomoyee* v. *Soondur*, (1865) 2 W. R. Act X. 30; *Komolakant* v. *Pogose*, (1865) 2 W. R. Act X. 65; *Shokoor* v. *Umola*, (1867) 8 W. R. 504; *Watson & Co.* v. *Nistarini*, (1884) I. L. R. 10 Calc. 544; *Salimullah* v. *Kaliprosonno*, (1915) 22 C. L. J. 569 and *Rajendra* v. *Manindra*, (1916) 24 C. L. J. 162. But see *Ram* v. *Poolin*, (1878) 2 C. L. R. 5.

[3] *Ante* pp. 202-3, 335.

[4] *Ramnidhee* v. *Parbutty*, (1880) I. L. R. 5 Calc. 823, *sc.*, 6 C. L. R. 362; *Golam* v. *Kali*, (1881) I. L. R. 7 Calc. 479, *sc.*, 8 C. L. R. 517; *Brojendra* v. *Woopendra*, (1882) I. L. R. 8 Calc. 706; *Hurro* v. *Gopee*, (1882) 10 C. L. R. 559.

[5] (1866) 6 W. R. Act X. 48, (1867) 8 W. R. 427, and (1868) 9 W. R. 379.

Raiyati holdings.

The law as regards *raiyati* holdings was, however, well settled. Section 17 of Act X of 1859[1] provided for assessment of additional rent for additional land found by measurement in the *raiyat's* holding, and section 18 provided for abatement of rent, if the quantity of land held by the *raiyat* could be proved by measurement to be less than the quantity for which rent was payable by the *raiyat*. [But where the tenant came to be in possession of a less quantity of land by his own default, he could not get an abatement, even if the *patta* provided for it.[2]] The Act made no provision for any class of tenants excepting *raiyats* with rights of occupancy. I need hardly add that either as regards enhancement or abatement of rent on alteration of area, the rate per *bigha* must be taken to be fixed.

Act VIII of 1885, Sect. 52.

The Bengal Tenancy Act applies the provisions of sections 17 and 18 of Act X of 1859 to all classes of tenants.[3] If the increase in area is due to the action of a river, and if there was no previous diluvion reducing the area of the tenant's original holding, or if abatement was allowed on diluvion, the tenant is bound to pay additional rent for excess land. So also abatement is allowed on diluvion. [But it has been held that in the case of the holder of a temporary tenure, section 52 must be read subject to the terms of the contract between him and his landlord.[4]]

Difficulty of finding out area at the origin of tenancy.

The present area of a tenure or holding may easily be determined by measurement, but the difficulty in finding out the original quantity of land and the rate per unit of measurement is, however, great.[5] Dismissal of

[1] Act VIII (B. C.) of 1869, Sec. 18.

[2] *Tripp* v. *Kalee*, [1864] W. R. Gap. Vol. Act X. 122; *Seetanath* v. *Sham*, (1872) 17 W. R. 418.

[3] Act VIII of 1885, Sec. 52, sub-sec. (1), cls. (*a*) and (*b*).

[4] *Secretary* v. *Kamal*, (1918) 22 C. W. N. lvi.

[5] Act VIII of 1885, Sec. 52, sub-sec. (2). See *Janokee* v. *Nobin*, (1865) 2 W. R. Act X. 33; *Indro* v. *Goluck*, (1869) 12 W. R. 350 and *Farquharson* v. *Dwarkanath*, (1871) 8 B. L. R. 504, *sc.*, 14 M. I. A. 259, *sc.*, 16 W. R. P. C. 29.

suits for enhancement or abatement of rent on account of increase or decrease in area is mainly due to this difficulty.[1] The length of the measure used at the time of the origin of the tenancy, *i. e.*, the standard pole of measurement, is also very often disputed and is not easy to find out.[1] [Where two or more persons are joint landlords, they must all join in bringing a suit for enhancement of rent or for additional rent,[2] nor can one such grant abatement of rent. To entitle a landlord to a decree for enhancement of rent on the ground of increase in area of the tenant's holding, it must be shown by the landlord that the tenant is holding land in excess of what he is paying rent for, and in order to do that, he must show for what quantity of land the defendant is paying rent.[3] In such a suit, it may be necessary for the landlord to prove the standard of measurement,[4] or facts and circumstances showing that there was some reason not within the control of the landlord for additional lands being included in the

Standard pole.

[1] Act VIII of 1885, Sec. 52, sub-sec. (2), cl (*d*). *Gouri* v. *Reily*, (1892) I. L. R. 20 Calc. 579; *Ishan* v. *Ramranjan*, (1905) 2 C. L. J. 125; *Ratan* v *Jadu*, (1905) 10 C. W. N. 46; *Rajkumar* v. *Ram*, (1907) 5 C. L. J. 538; *Lukhi* v. *Ram*, (1911) 15 C. W. N. 921, *sc.*, 14 C. L. J. 146; *Akbar* v. *Hira*, (1912) 16 C. L. J. 182; *Lachmi* v. *Jag*, (1913) 18 C. L. J. 633; *Dhrupad* v. *Hari*, (1918) 22 C. W. N. 826, *sc.*, 27 C. L. J. 563. As regards immaterial difference in length, see *Babun* v. *Shib*, (1874) 21 W. R. 404. As regards intention of parties as an element in determining the question of enhancement, see *Rajendra* v. *Chunder*, (1901) 6 C. W. N. 318 and *Dhrupad* v. *Hari*, (1918) 22 C. W. N. 826, *sc.*, 27 C. L. J. 563.

[2] *Gopal* v. *Umesh*, (1890) I. L. R. 17 Calc. 695; *Haladhar* v. *Rhidoy*, (1892) I. L. R. 19 Calc. 593; *Hari* v. *Runjit*, (1896) I. L. R. 25 Calc. 917, *sc.*, 1 C. W. N. 521; *Syama* v. *Saim*, (1897) 1 C. W. N. 415; *Baidya* v. *Ilim*, (1897) I. L R. 25 Calc. 917, *sc.*, 2 C. W. N. 44; *Bhoopendra* v. *Romon*, (1899) I. L. R. 27 Calc. 417, *sc.*, 4 C. W. N. 107; *Satiprosad* v. *Radhanath*, (1912) 16 C. L. J. 427; *Dwarka* v. *Mathur*, (1913) 18 C. W. N. 942; *Khettramani* v. *Jiban*, (1914) 19 C. W. N. 546, *sc.*, 21 C. L. J. 315; *Harnandan* v. *Kesho*, (1917) 2 P. L. J. 553. For cases where there is separate contract of tenancy with one of several joint landlords, see *Ram* v. *Giridhur*, (1891) I. L. R. 19 Calc. 755. See also *Dintarini* v. *Broughton*, (1896) 3 C. W. N. 225 and *Bhosai* v. *Aminuddin*, (1916) 21 C. W. N. 371, *sc.*, 25 C. L. J. 469.

[3] *Surya* v. *Baneswar*, (1896) I. L. R. 24 Calc. 251.

[4] *Alep* v. *Raghu*, (1896) 1 C. W. N. 310; *Ishan* v. *Ramranjan*, (1905) 2 C. L. J. 125; *Lukhi* v. *Ram*, (1911) 15 C. W. N. 921, *sc.*, 14 C. L. J. 146. See also *Dhrupad* v. *Hari*, (1918) 22 C. W. N. 826, *sc.*, 27 C. L. J. 563.

holding.[1] The boundaries given in a deed are generally the true criterion of the amount of land, and where boundaries are definite, the question of area may in some cases be of minor importance, or the intention of parties and surrounding circumstances may decide the point.[2] Where, however, the tenant agreed to pay rent at certain rates on account of excess area, it is for him to show that the areas were actually less than those contracted to be paid for.[3] Oral evidence as to area of land held by the tenant is inadmissible under section 91 of the Evidence Act,[4] where the contract of tenancy was inadmissible for want of registration.[5] It should be remembered in this connection that the right to recover additional rent for increased area is a recurring one and a landlord is entitled to exercise it whenever he finds it necessary to do so,[6] and that there is nothing in the Bengal Tenancy Act to prevent the landlord from claiming back rents for any additional area under-section 52 of the Act, if such additional area was in the use and occupation of the tenant, provided the period for which the claim is made is within that prescribed by the law of limitation.[7]]

How may area increase.

As we have said before,[8] increase in area may take place,—(*a*) by the tenant's encroaching on the adjacent land of his landlord, and (*b*) on the adjacent land of a third person and used by the tenant as a part

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[1] *Ratan* v. *Jadu*, (1905) 10 C. W. N. 46.

[2] *Annada* v. *Mathura*, (1900) 13 C. W. N. 702, *sc.*, 9 C. L. J. 585; *Durga* v. *Rajendra*, (1909) I. L. R. 37 Calc. 293, *sc.* 10 C. L. J. 570.

[3] *Nilmadhab* v. *Kadam*, (1906) 3 C. L. J. 74 *n.*

[4] Act I of 1872.

[5] *Gobinda* v. *Jogeswar*, (1896) 1 C. W. N. xxiv.

[6] *Jotindra* v. *Chandra*, (1902) 6 C. W. N. 360. See also *Durga* v. *Rajendra* (1909) I. L. R. 37 Calc. 293, *sc.*, 10 C. L. J. 570 and *Manindra* v. *Durga*, (1915) 20 C. W. N. 680.

[7] *Jagannath* v. *Jumman*, (1901) I. L. R. 29 Calc. 247; *Ejel* v. *Felai* (1914) 21 C. L. J. 309.

[8] *Ante* pp. 332-336.

of his holding, and (*c*) by accretion. Reformation *in situ* only makes up the land lost and may, at present, be left out of consideration.[1]

Alluvion.

On increase by alluvion, 'the tenant has the right to continue in occupation of the land and is only liable to pay additional rent, though at one time the law was supposed to be that no *raiyat* was entitled to possession of land added to his holding by accretion.[2] Under the Bengal Tenancy Act, no doubt can arise, and it seems to me that section 17 of Act X also contemplated additional rent for land gained by accretion.

How may area decrease.

Decrease in area may take place,—(*a*) on account of encroachment by a neighbouring holder, (*b*) encroachment by the landlord himself, (*c*) by diluvion, and (*d*) by acquisition of land by Government for public purposes.

Encroachment by a third person.

Encroachment by a neighbouring holder ought not to be a ground of abatement of rent, if the encroachment be due to an act of trespass. The tenant can resist such encroachment, and if he does not do so, he is guilty of latches and ought not to be allowed to make the landlord suffer for his negligence. But if the encroachment be under a title paramount, the rent ought to abate proportionately.[3]

Encroachment by landlord.

Encroachment by the landlord himself on any part of a *raiyat's* holding causes a suspension of the entire rent.[4] But as a matter of fact, the *raiyat* seldom claims suspension of rent; he is contented with abatement. He thinks himself fortunate, if he is allowed to hold the rest of the land in his original holding submitting to the encroachment by the landlord, and can get an abatement *pro-*

[1] For the law as to landlord's right on encroachment by tenant, see pp. 245-246.

[2] *Finlay, Muir & Co.* v. *Gopee*, (1875) 24 W. R. 404, overruled by *Gourhari* v. *Bhola*, (1894) I. L. R. 21 Calc. 233. See also *Assanullah* v. *Mohini*, (1899) I. L. R. 26 Calc. 739; *Jagannath* v. *Jumman*, (1901) I. L. R. 29 Calc. 247; *Muktakeshi* v. *Srinath*, (1914) 19 C. L. J. 614; *Baidya* v. *Nanda*, (1914) 18 C. W. N. 1206, *sc.*, 19 C. L. J. 595 and *Ejel* v. *Felai*, (1914) 21 C. L. J. 309.

[3] *Ante* pp. 242, 335-6.

[4] *Ante* pp. 242-43.

tanto. I have already said that the rule of English law as to suspension of the entire rent cannot be applied in this country except under very peculiar circumstances.[1]

Diluvion.

In cases of diluvion, section 18 of Act X of 1859, section 19 of Act VIII (B C.) of 1869 and section 52 of Act VIII of 1885 leave no room for doubt as to the right of an occupancy *raiyat.* [The Bengal Tenancy Act deals with the matter in detail and expressly provides that "the amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof, or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding"[2] This rule is in accordance with the decision in *Brajanath Pal Chowdhry* v. *Hiralal Pal*[3] under the old law]. Section 178 of the Act of 1885 makes any contract taking away the right of a *raiyat* to apply for a reduction of rent under section 52 of the Act[4] invalid, if it is entered into after the passing of the Act. This provision of the Act is applicable to all classes of *raiyats*, and not merely to *raiyats* with rights of occupancy[5] [and such right to claim abatement passes to a purchaser on a sale of a tenure.][6] An express agreement not to claim abatement

[1] But see ***Manindra*** v. *Narendra*, (1919) I. L. R. 46 Calc. 956, *sc.*, 23 C. W. N. 585.

[2] Act VIII of 1885, sec. 52, sub-sec. (4).

[3] (1868) 1 B. L. R. A. C. J. 87, *sc.*, 10 W. R. 120. As to procedure, see *Kanai* v. *Midnapur Zemindary Co.*, (1907) 5 C. L. J. 48*n*.

[4] Act VIII of 1885, Sec. 178, Sub-Sec. (3), cl. (*f*). [But see *Prosunno* v. *Doya*, (1874) 22 W. R. 275 and *Satyendra* v. *Nilkantha*, (1893) I. L. R. 21 Calc. 383, as to effect of compromise, and ***Manindra*** v. *Kashi*, (1909) 15 C. L. J. 507, as to effect of tenant's inability to produce *patta*.]

[5] *Afsurooddeen* v. *Shorooshee*, (1863) Marsh. 558, *sc*, 2 Hay 664; *Enayutoollah* v. *Elaheebuksh*, [1864] W. R. Gap. Vol. Act X 42; *Salimullah* v. *Kaliprosonno*, (1915) 22 C. L. J. 569; *Rajendra* v. ***Manindra***, (1916) 24 C. L. J. 162.

[6] *Kali* v. *Dhananjai*, (1885) I. L. R. 11 Calc. 625.

entered into before the passing of the Act, is good.[1] Section 179 of the Act declares the validity of such a contract between a proprietor or a holder of a permanent tenure in a permanently settled area and a holder of a permanent *mokurrari* lease.[2]

Acquisition of and for public purposes.

Acquisition of land for public purposes necessarily causes abatement of rent in respect of the land acquired.[3] The *raiyat* may, however, at the time of the acquisition, take such a portion of the compensation as may disentitle him to claim abatement.[4]

[The question of abatement of rent for dispossession by title paramount has already been dealt with.[5] Claim for abatement may be established otherwise than under section 52 of the Bengal Tenancy Act.[6]]

Standard pole.

The standard pole of measurement generally varies in the different localities of the Bengal provinces. Section 41 of Act VIII (B.C.) of 1869, which repealed section 11 of Bengal Act VI of 1862, provided that all measurement should be made according to the standard pole of the *perganah* in which the land was situated. The Collector was competent to determine the standard.[7] In one case it was observed that it was exclusively within the province of the Collector, as the depository of the standard pole of each *perganah*, to declare what the

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[1] *Enayutoollah* v. *Elaheebuksh*, [1864] W. R. Gap. Vol. Act X. 42.

[2] See *Nunda* v. *Kymuddin*, (1905) 9 C. W. N. 886. But see *Imambandi* v. *Kamleswari*, (1894) I. L. R. 21 Calc. 1005. *sc.*, L. R. 21 I. A. 118 and *Salimullah* v. *Kaliprosonno*, (1915) 22 C. L. J. 569.

[3] *Prosunomoyee* v. *Soondur*. (1865) 2 W. R. Act X. 30; *Deen* v. *Thukroo*, (1866) 6 W. R. Act X. 24; *Mahtab* v. *Chittro*, (1871) 16 W. R. 201; *Ram* v. *Poolin*, (1878) 2 C. L. R. 5; *Uma* v. *Tarini*, (1882) I. L. R. 9 Calc. 571; *Watson & Co.* v. *Nistarini*, (1884) I. L. R. 10 Calc. 544. See also *Horo* v. *Joy*, (1864) 1 W. R 299; *Komolakant* v. *Pogose*, (1865) 2 W. R. Act X. 65 and *Ashutosh* v. *Harinarain*, (1905) 3 C. L. J. 143

[4] *Peari* v. *Aftab*, (1882) 10 C. L. R. 526 See *Bhobani* v. *Land Acquisition Deputy Collector*, (1902) 7 C. W. N. 130 as to the general principle and *Jyoti* v *Jogendra*, (1906) 11 C. W. N. lii.

[5] *Ante*, pp. 241-44, 335.

[6] *Rani* v. *Asutosh*, (1910) 15 C. L J. 310.

[7] *Manmohini* v. *Premchand*, (1870) 6 B. L. R. 1., *sc.*, 14 W. R. F. B. 4.

measure of the pole used was in each *perganah* in his district.[1] There existed considerable difference of opinion as to the value of any measurement-paper, if the measurement was not made according to the standard pole. The correctness of the measurement itself could be called in question.[2] An appeal lay as regards the standard pole.[3] The Bengal Tenancy Act,[4] however, requires every measurement to be made by the acre, unless the court or revenue-officer ordering it specially directs that it shall be made by any other specified standard.[5] But the rights of the parties are regulated by the conversion of the acre into the local measure. The Local Government is also empowered to make rules declaring the standard or standards of measurement locally in use in any local area; and every declaration so made shall be presumed to be correct, until the contrary is shewn.[6] At the present day, the landlord generally claims the standard to be eighteen inches a *hath* or cubit, while the tenant claims 20 inches or more. In some localities, the standard used is the *elahigaj*.[7]

Bengal Act VI of 1862.

Act VI (B.C.) of 1862[8] gave the landlord the right of making, at any time, a general survey or measurement of the lands comprised in his estate or tenure or any part thereof, unless restrained from doing so by any express engagement with the occupants of the lands. The power could be exercised with respect to any land in the

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[1] *Tarucknath* v. *Meydee*, (1866) 5 W. R. Act X. 17.

[2] *Romanath* v. *Dhookhee*, (1869) 11 W. R. 510; *Brojo* v. *Kassim*, (1869) 11 W. R. 562. *Per contra*, *Rakhal* v. *Tunoo*, (1867) 7 W. R. 239.

[3] *Bhuggobutty* v. *Tameeruddeen*, (1864) 1 W. R. 224; *Nund* v. *Tara*, (1865) 2 W. R. Act X. 13; *Surôanund* v. *Ruchia*, (1865) 4 W. R. Act X. 32.

[4] Act VIII of 1865, Sec. 92.

[5] *Ibid*, Sec. 92, Sub-Sec. (1).

[6] *Ibid*, Sec. 92, Sub-Sec. (3).

[7] *Guj ilahi* = 33 inches (Land-measure of N.-W. Provinces.)

[8] Act VI (B.C.) of 1862, Sec. 9.

occupation of an under-tenant or *raiyat*. If any opposition was made, the landlord could seek the assistance of the Collector, who might order the tenant to attend and point out the boundaries of the land held by him. Sections 25 and 37 of Bengal Act VIII of 1869 and sections 90 and 91 of the Bengal Tenancy Act have conferred the same power on landlords. [The Court, however, has no power to deal with the standard of measurement in a proceeding under sections 90 and 91 of the Bengal Tenancy Act.[1]] But under the latter Act the right cannot be exercised more than once in ten years except under the circumstances specified in section 90. This right to measure is a necessary incident of proprietary right, as it enables the landlord to ascertain the boundaries and the area of any tenure or holding and whether there has been any encroachment or increase by alluvion and consequent alteration in area, and then if necessary to demand an increase of rent on the ground of an increase in area.

Only proprietors in possession can measure.

The right to measure, like the right to enhance rent can be exercised only by a proprietor in possession and actual receipt of rent. A proprietor who is not in possession is not entitled to measure any land within the ambit of his estate.[2] If any question arises as to the right to measure, the dispute being raised on the ground of possession by a third person as proprietor or tenure-holder, the Court has only to look to actual possession by receipt of rent. Under Act VIII of 1885 (Sec. 60) a proprietor whose name is registered under Act VII (B.C.) of 1876 is presumed to be in possession, having the right to receive rent; and so he also is

[1] *Ashutosh* v. *Joy*, (1912) 17 C. L. J. 50; *Ashutosh* v. *Basanta*, (1915) 19 C. W. N. clx. See also *Dya* v. *Ram*, (1897) 2 C. W. N 351.

[2] *Kalee* v. *Ramguttee*, (1866) 6 W. R. Act X. 10; *Pureejan* v. *Bykunt*, (1867) 7 W. R. 96; *Krishto* v *Ram*, (1868) 9 W. R. 331. *Per contra*, *Nundun* v. *Smith*, (1867) 7 W. R. 188; *Wise* v. *Ram*, (1867) 7 W. R. 415; *Doorga* v. *Mahomed*, (1870) 14 W. R. 121, 399.

entitled to measure. His right is not affected by the lands having been let out on permanent leases.[1]

A part proprietor of an estate or tenure cannot apply for measurement.[2] Section 188 of the Bengal Tenancy Act prevents any one or more of the co-sharers, unless all of them join, from asking the assistance of a Court to enable him or them to measure the lands. [Where, however, there is a separate contract of tenancy in favour of one or one set of landlords, section 188 has no application, and such a landlord is entitled to make an application for measurement of the land comprised in his estate.[3]] Notice of an intended measurement must also be given by all the joint proprietors. A part proprietor of an estate, however, was held to be competent to apply for measurement under section 38 of Act VIII (B. C.) of 1869, (Bengal Act VI. of 1862, Sec. 10), if he made his co-proprietors parties to the proceedings.[4] It seems to me, however, to be doubtful whether the legislature ever intended to give a co-proprietor such a power.

A part proprietor cannot apply for measurement.

Under the Acts of 1862 and 1869, a question was raised as to the right of a proprietor or tenure holder to measure *lakhiraj* lands. The word *lakhiraj* means, in ordinary parlance, lands revenue-free as well as rent-free. The *zemindar's* right to have a measurement made, it was held, extended only to lands actually rent-paying

Lakhiraj lands.

[1] *Raj* v. *Kishen*, (1865) 4 W. R. Act X. 16; *Dwarkanath* v. *Bhowanee*, (1867) 8 W. R. C. R. 11; *Run* v. *Muloorum*, (1867) 8 W. R. 149; *Tweedie* v. *Ram*, (1868) 9 W. R. 151; *Krishto* v. *Ram*, (1868) 9 W. R. 331; *Brojendro* v. *Krishna*, (1881) I. L. R. 7 Calc. 684; *Matungini* v. *Ram*, (1902) 7 C. W. N. 93. See the last case cited, on the point of the applicability of section 52 in suits for measurement.

[2] *Mahomed* v. *Raj*, (1871) 15 W. R. 522; *Moolook* v. *Modhoosoodun*, (1871) 16 W. R. 126; *Shoorender* v. *Bhuggobut*, (1872) 18 W. R. 332; *Santee* v. *Bykunt*, (1873) 19 W. R. 280; *Pearee* v. *Raj*, (1873) 20 W. R. 385; *Ishan* v. *Busaruddin* (1879) 5 C. L. R. 132. *Per contra*, *Abdool* v. *Lall*, (1883) I. L. R. 10 Calc. 36, *sc.*, 13 C. L. R. 323

[3] *Jognesh* v. *Maniraddi*, (1908) I. L. R. 35 Calc. 417. See also *Matungini* v. *Ram*, (1902) 7 C. W. N. 93.

[4] *Abdool* v. *Lall*, (1883) I. L. R. 10 Calc. 36 *sc*, 13 C. L. R. 323.

and not to rent-free or revenue-free lands.[1] The Bengal Tenancy Act makes the holders of RENT-FREE lands, claiming under titles created since the Permanent Settlement, tenants within the meaning of section 3, sub-section 3; and it is only reasonable that a landlord should have the right to enter on and measure all lands comprised in his estate or tenure, other than lands exempt from payment of REVENUE. Holders of revenue-free lands are proprietors, and such lands, though lying within the ambit of a revenue-paying estate, can not be measured by the holder of the latter.[2]

Value of measurement-papers.

If a tenant, on being called upon to attend and point out his land and the boundaries thereof, refused or neglected to do so, it was not competent for him to contest the correctness of the measurement made in his absence, provided the Court acting under section 9 of Act VI (B.C.) of 1862 or section 37 of Act VIII (B.C.) of 1869, had local as well as pecuniary jurisdiction, and the person making the application had the right to do so.[3] If the person applying to the Court for measurement was only a part-owner or was not in possession, a measurement made at his instance in the absence of the tenant would not be binding. So also, if the tenant had no notice of the measurement, he would not be bound by it.[3] The Bengal Tenancy Act, however, lays down that if the tenant refuses or neglects to attend, in accordance with an order duly made and served under section 91, sub-section 1, the measurement made in his absence shall be presumed to be correct, until the contrary is shewn.[4] [The landlord can, however, in one

[1] *Ranglal* v. *Siali*, (1869) 3 B. L. R. App. 27, *sc.*, 11 W. R. 293; *Golam* v. *Erskine & Co.*, (1869) 11 W. R. 445; *Khugendronath* v. *Kantee*, (1870) 14 W. R. 368.

[2] *Prasannamayi* v. *Chandra*, (1868) 2 B. L. R. v, *sc.*, 10 W. R. 361.

[3] See *Alimuddi* v. *Kali*, (1884) I. L. R. 10 Calc. 895.

[4] Act VIII of 1885, Sec. 91, Sub-Sec. (2).

application under section 91 of the Bengal Tenancy Act, include the lands of more than one tenant and apply for an order from the Civil Court against several tenants under that section [1]]

Notice of enhancement.

Regulation V of 1812 made the issue of a notice a necessary preliminary to the institution of a suit for an increase of rent. This provision was re-enacted in section 13 of Act X of 1859 and section 14 of Act VIII (B.C.) of 1869. A large percentage of enhancement-suits failed for defects in the form of notices or their non-service. In most instances, the suits were dismissed; in others decrees were made declaring the right of the landlords to enhance, the prayers for decrees at enhanced rates being dismissed. A notice of enhancement was required to be served in districts or parts of districts, where the Fasli year prevailed, in or before the month of Jaisth, and in districts or parts of districts where the Bengali year prevailed, in or before the month of Pous. Under the Bengal Tenancy Act, the landlord is empowered to institute a suit for enhancement, without the previous service of any notice, and the decree in such a suit should contain a direction as to time when it is to take effect. [Section 52 of the Act as amended in 1898 provides that in a suit for enhancement, where the landlord is unable to indicate any particular land as held in excess, the rent to be added on account of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area. This provision removes the difficulty felt for want of an express rule where there are no rates for lands of a similar description in the vicinity. The landlord need not now indicate the precise plots or pieces of land acquired by the tenant in excess of the original holding, which may be impossible, but was supposed in some cases to be the rule, from a

[1] *Jadub* v. *Etwaree*, (1863) Marsh 498; *Momtaz* v. *Raghu*, (1909) 14 C. W. N. 231. See also *Shushee* v. *Nubo*, (1867) 8 W. R. 94.

mistaken reading of the judgment in *Gouri Pattra* v. *H. R. Reily*.[1] When in a suit under section 52 of the Bengal Tenancy Act, the landlord or tenant proves that, at the time the measurement on which the claim is based was made, there existed in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situate, a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area of the tenure or holding specified in any *patta* or *kabuliyat*, or (where there is an entry of area in a counterfoil receipt corresponding to the entry in the rent-roll) in any rent-roll relating to it, has been entered in such *patta*, *kabuliyat* or rent-roll after measurement.[2] If it is found that the Court is entitled to make such a presumption, rent is to be determined by reference to the area and the rent is not a consolidated one.[3]] Section 154 of the Bengal Tenancy Act provides that a decree for enhancement of rent, if passed in a suit instituted in the first eight months of an agricultural year, shall ordinarily take effect on the commencement of the next agricultural year, and in a suit instituted in the last four months of an agricultural year, on the commencement of the agricultural year next but one following. But the Court may for special reasons fix a later date for the operation of any decree for enhanced rent.

Gradual e an

Under the Bengal Tenancy Act, enhancement of rent may be directed to be gradual for any number of years not exceeding five.[4] No suit for enhancement on the ground that the rate of rent paid is below the prevailing rate, or on the ground of a rise in prices, is maintainable, if within the fifteen years next preceding

[1] (1892) I. L. R. 20 Calc. 579.

[2] Act VIII of 1885, sec. 52, sub-sec. (6).

[3] *Uma* v. *Tarini*, (1913) 19 C. L. J. 451. See *Dhrupad* v. *Hari*, (1918) 22 C. W. N. 826, *sc.*, 27 C. L. J. 563.

[4] Act VIII of 1885, Sec. 36.

its institution, the rent has been enhanced by contract made after the 2nd March, 1883, or commuted under section 40, or if a decree enhancing the rent has been passed on either of the grounds aforesaid or a suit for enhancement dismissed on its merits.[1] [A suit for both enhancement and arrears of rent at an enhanced rate is maintainable.[2]]

Form and effect of decree in suit for reduction

A suit for reduction of rent is, as we have seen, the only means by which a tenant may, under Act VIII of 1885, claim an abatement. [It is doubtful whether under the Bengal Tenancy Act, abatement can be claimed as a set-off in a suit for arrears of rent, as he could under the Act of 1859.[3] A reduction of rent on the grounds contemplated in section 38 of the Act of 1885 can be obtained only by a suit instituted for the purpose, as it seems from the language of the section. A co-sharer tenant cannot claim abatement under the provisions of section 52 of the Bengal Tenancy Act.][4] But the Bengal Tenancy Act has made no provision as to the form of a decree in such a suit and the time of its operation. It is obviously left to the discretion of the Court. [When an issue as regards abatement or measurement has been framed and decided in a suit for rent or measurement, it binds the parties afterwards.[5]]

[1] Act VIII of 1885, Sec. 37, Sub.-Sec. (1). See *Mitter* v. *Dwarka*, decided by Prinsep and Banerjee JJ. on May 28, 1891, where it was held that where the contract was made before 2nd March, 1883, the provision was inapplicable.

[2] *Gudar* v. *Brij*, (1901) 5 C. W. N. 880

[3] *Afsurooddeen* v. *Shorooshee*, (1863) Marsh. 558, *sc.*, 2 Hay 664; *Barry* v. *Abdool*, [1864] W. R. Gap Vol. Act X. 64; *Deen* v. *Thukroo*, (1866) 6 W. R. Act X. 24; *Gour* v. *Bonomalee*, (1874) 22 W. R. 117. On the question of limitation for such claims, see *Mahtab* v. *Chittro*, (1871) 16 W. R. 201 and *Ram* v. *Lucas*, (1871) 16 W. R. 279; *per contra*, *Ram* v. *Poolin*, (1878) 2 C. L. R. 5.

[4] *Bhoopendra* v. *Romon*, (1899) I. L. R. 27 Calc. 417, *sc.*, 4 C.W.N. 107.

[5] *Nobo* v. *Foyzbux*, (1875) I. L. R. 1 Calc. 202, *sc.*, 24 W. R. 403; *Bussun* v. *Chundee*, (1879) I. L. R. 4 Calc. 686; *Roghoonath* v. *Juggut*, (1881) I. L. R. 7 Calc. 214, *sc.*, 8 C. L. R. 393; *Nil* v. *Brojo*, (1893) I. L. R.

Determination of the incidents of tenancy and delivery of *pattas*.

If any dispute arises as to the terms and conditions under which a tenant holds or as to other incidents of the tenancy, the Court having jurisdiction may decide it. In the districts where Act X of 1859 in still is force, the incidents are determined by the Collector's courts.[1] Sections 8 and 9 of the Act corresponding with sections 9 and 10 of Act VIII (B.C.) of 1869 prescribed a rough procedure for the delivery of *pattas* and *kabuliyats*. Section 2 of these Acts, following the old Regulations as to the delivery of *pattas* to tenants, declared the right of every *raiyat* to receive a *patta*. The instrument had to specify the quantity of land, with boundaries, the amount of annual rent, the instalments of rent and any special conditions of the lease. The intention of the Legislature was that there should be a written record of the exact terms and incidents of the tenancy, so that future disputes might be avoided. If the tenant desired to have a *patta* he could institute a suit for the purpose, and the Court was to take evidence and determine the questions as to which the parties differed.

Pattas at fair and equitable rates under Act X of 1859.

A *raiyat* with a right of occupancy was entitled, when there were disputes and differences between the parties and the terms of the contract were difficult to ascertain, to a *patta* on such terms as to the Court might seem fair and equitable under the circumstances of the case. *Raiyats* with rights of occupancy were the only class of persons who were interested in suing for *pattas*. But no suit could be entertained, unless the

21 Calc. 236. But see *Jotindra* v. *Shumbhu*, (1897) 4 C. W. N. 43; *Beni* v. *Raj*, (1902) 6 C. W. N 589, *sc.*, 16 C. L. J. 124; *Kali* v. *Pratap*, (1906) 5 C. L. J. 92 and *Upendra* v. *Sham*, (1907) I. L. R. 34 Calc. 1020, *sc.*, 11 C. W. N. 1100, *sc.*, 6 C. L. J 715. See generally on the point, *Mahabir* v. *Macnaghton*, (1889) I. L. R. 16 Calc. 682, *sc.*, L. R. 16 I. A. 107; *Kameswar* v. *Rajkumari*, (1892) I. L. R. 20 Calc. 79, *sc.*, L. R. 19 I. A. 234; *Rajendra* v. *Tarangini*, (1904) 1 C. L. J. 248; *Kali* v. *Bidhu* (1911) 16 C. L. J. 89; *Prabhu* v. *Sundar*, (1911) 16 C. L. J. 41 and *Mane* v. *Dhani*, (1912) 17 C. W. N. 76, *sc.*, 17 C. L. J. 71.

[1] See footnote 2 of page 428.

relationship of landlord and tenant existed, and the tenant was in possession of the land. [The non-production of *patta* has been sometimes fatal for a suit.][1] Questions of title or the right of the tenant to hold the land could not be determined in suits for *pattas*.[2]

Suits for *kabuliyats* under Act X of 1859.

When the landlord desired to have a *kabuliyat* or a counter-part engagement from a *raiyat*, he was bound to tender a *patta* to the *raiyat*, such as the *raiyat* was entitled to get, and he was not entitled to a *kabuliyat* by a suit, if he had not, previous to its institution, tendered to the *raiyat* a *patta* specifying the terms and incidents of the tenancy. Suits for *kabuliyats* became generally unsuccessful for non-tender of *pattas* or erroneous statements therein.[3] A suit for a *kabuliyat* was not intended to be a suit for enhancement. Its principal object was to record the incidents of the tenancy. Neither could a landlord convert a suit for a *kabuliyat* into one for establishing the relationship of landlord and tenant, or indirectly get the trial of the question of the validity of a lease already granted or any question as to title to land. It is unnecessary to add that one of a number of co-proprietors could not, under the Acts of 1859 and 1869, sue a tenant for a *kabuliyat* for a proportionate part of a holding, nor could he sue a tenant for a separate *kabuliyat* for his own share of the rent.[4] [But it has been held that the proprietor of a fractional share of an undivided estate has a right to sue for a

[1] *Manindra* v. *Kashi*, (1909) 15 C. L. J. 507.

[2] *Campbell* v. *Kishen*, (1862) Marsh. 67; *Hurree* v. *Koonjo*, (1862) Marsh 99, *sc.*, W. R. F. B. Vol. 29, *sc.*, 1 Hay 238, *sc.*, Ind. Jur. O. S. 20; *Jeshan* v. *Bakur*, (1865) 3 W. R. Act X. 3; *Bharut* v. *Oseemooddeen*, (1866) 6 W. R. Act X. 56.

[3] *Golam* v. *Asmut*, (1868) 10 W. R. F. B. 14; *Ukhoy* v. *Indro*, (1869) 12 W. R. F. B. 27; *Imdad* v. *Stack*, (1869) 12 W. R. 454; *Shib* v. *Pran*, (1870) 13 W. R. 280; *Gogon* v. *Kashishwary*, (1877) I. L. R. 3 Calc. 498, *sc.*, 1 C. L. R. 241. See also *Ramnath* v. *Huro*, (1867) 8 W. R. 188; *Gopeenath* v. *Jetoo*, (1872) 18 W. R. 272 and *Mahomed* v. *Pogose*, (1878) 2 C. L. R. 8.

[4] *Abdool* v. *Yar*, (1867) 8 W. R. 467.

kabuliyat for such share, if he can prove that the defendants have heretofore recognised him as the proprietor of a particular share and paid him separately a certain proportion of rent.][1]

Determination of the incidents of tenancy under the Bengal Tenancy Act.

The provision made in section 158 of the Bengal Tenancy Act is simpler and easier to work out. Either the landlord or the tenant, whether he is an occupancy-*raiyat* or not, may sue for the determination of the incidents of the tenancy, *i.e.*, the terms and conditions thereof and all or any of the matters specified in the section. [But applications under section 158 of the Bengal Tenancy Act to determine the incidents of a tenancy cannot be made by the same person and in respect of the same land against persons who had only a portion of the proprietary interest in the land of the tenancy.][2] The Court having jurisdiction to determine a suit for possession of the land has power to entertain an application under the section, and an order passed thereon has the effect of a decree, and is subject to the like appeal as a decree. But an application under the section cannot be converted into a suit to determine rights to land or the existence of the relationship of landlord and tenant. In *Bhupendro Narayan Dutt and others* v. *Nemye Chánd Mondul*,[3] the High Court held that a Court acting under the section was bound to go into and decide the question of the validity of the lease under which the defendant held. This ruling was not in accordance with the rulings under the sections of the Acts of 1859 and 1869, dealing with *pattas* and *kabuliyats*. The question was referred to a Full Bench,[4] and the decision in *Bhupendro Narayan Dutt and others* v. *Nemye Chand Mondul*[3] was practi-

[1] *Romanath* v. *Chand*, (1870) 14 W. R. 432.

[2] *Hari* v. *Sri*, (1913) 18 C. W. N. 168.

[3] (1888) I. L. R. 15 Calc. 627.

[4] *Debendro* v. *Bhupendro*, (1891) I. L. R. 19 Calc. 182.

cally overruled, and it was held that a Court dealing with a case under section 158 of the Bengal Tenancy Act had the same limited powers as the Collector under sections 8 and 9 of Act X of 1859. [The Court dealing with an application under this section cannot, therefore, pass a decree for enhancement of rent.[1] Nor can the question whether a holding is transferable or not be gone into under this section,[2] or the question of rent in the vicinity.[2] The Court is also not authorized to decide conclusively disputes as to the *right* to possession of land;[3] and an issue regarding a dispute as to the existence of the relation of landlord and tenant between the parties, in a proceeding under this section, can only be decided callaterally and does not arise between the parties in such a manner as to make the decision upon it *res judicata* between them in a subsequent regular suit.[3] But the question of the standard of measurement may arise in a proceeding under this section, and evidence on this point may be properly admitted and acted upon, though the section does not expressly refer to it.[4] An application cannot be made, under this section, by one of several joint landlords,[5] nor does this section authorize one application being made against a number of separate and distinct tenures,[6] except where one tenant holds several holdings.[7] Applications under this section are not governed by Article 181 of schedule I of the Limitation Act.][8]

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[1] *Rajeshwar* v. *Burta*, (1894) I. L. R. 21 Calc. 807; *Sri* v. *Luchmeshwar*, (1901) 6 C. W. N. 592.

[2] *Purna* v. *Bunshidhur*, (1898) 3 C. W. N. 15.

[3] *Peary* v. *Ali*, (1892) I. L. R. 20 Calc. 249.

[4] *Deoki* v. *Seogobind*, (1889) I. L. R. 17 Calc. 277.

[5] *Moheeb* v. *Ameer*, (1890) I. L. R. 17 Calc. 538; *Hari* v. *Sri*, (1913) 18 C. W. N. 168.

[6] *Golap* v. *Ashutosh*, (1894) I. L. R. 21 Calc. 602.

[7] *Dijendra* v. *Soylendra*, (1896) I. L. R. 24 Calc. 197, *sc.*, 1 C. W. N. 236.

[8] *Berhamdut* v. *Ramji*, (1913) 18 C. W. N. 466.

Record-of-rights and settlement of rent.

Chapter X of the Bengal Tenancy Act contains rules of procedure for the record-of rights and settlement of rents of tenants in an estate or tenure, [or any part thereof,][1] or of any local area.[1] The law as to enhancement or abatement of rent and the determination of the incidents of tenancy, applicable to an individual tenure-holder or *raiyat* is also applicable to proceedings under Chapter X.[2] The cadastral survey under the Act deals with a large and cultivated tract, inhabited by number of *raiyats*, the main objects of a proceeding before a revenue-officer being, [as stated in the dispatch of the Government of India to the Secretary of State for India, to put an end to the uncertainty that promotes rent disputes, the efficient protection of the *raiyats*, and the improvement of local knowledge, which would enable revenue-officers and Civil Courts more effectively to examine and deal with the various interests and difficulties arising out of the relations of landlord and tenant, and lastly to secure that officers of Government should understand the rural economy of their districts in order that they may be properly equipped for their frequent contests with calamity or wrong.][3] If rent is settled, the enhancement or abatement, as the case may be, is intended to be uniform throughout, the equalisation of rent being disturbed only where a

[1] Act VIII of 1885, Sec. 101. See *Brojendro* v. *Khalil*, (1914) 21 C. L. J. 489. The words "estate or tenure or part there of" were added to the original section by Act III (B. C.) of 1898 to clear the meaning of the words "local area." It is now clear that the Local Government can, under certain conditions, order a survey to be prepared of any area, however large, or of any estate or tenure or part thereof, however small.

[2] *Gouri* v. *Reily*, (1892) I. L. R. 20 Calc. 579. See also *Pirthi* v. *Basarat*, (1909) I. L. R. 37 Calc. 30, *sc.*, 13 C. W. N. 149, *sc.*, 10 C. L. J. 343; *Lukhi* v. *Sri*, (1911) 15 C. W. N. 921, *sc.*, 14 C. L. J. 146; *Akbar* v. *Hira*, (1912) 16 C. L. J. 182; *Jnanada* v. *Amudi*, (1916) I. L. R. 43 Calc. 603, *sc.*, 20 C. W. N. 428, *sc.*, 23 C. L. J. 281; *Paltoo* v. *Newas*, (1913) 18 C. W. N. 165; *Uma* v. *Tarini*, (1913) 19 C. L. J. 451; *Upendra* v. *Gopi*, (1916) 22 C. W. N. 321 and *Abhoya* v. *Rajani*, (1918) 22 C. W. N. 904. See as to fractional landlords, *Krishna* v. *Poresh*, (1909) 10 C. L. J. 458, and *Behari* v. *Priya*, (1914) 21 C. L. J. 305. But see *Safaruddi* v. *Fazal*, (1914) 21 C. L. J. 592.

[3] Despatch No. 6, dated 21st March, 1882, paras. 100 to 104.

raiyat or a class of *raiyats* is entitled to hold for some special causes at favourable rates.

Powers and duties of a revenue officer in preparing record-of-rights.

What the delivery of a *patta* and the taking of a *kabuliyat*, or the determination of the incidents of the tenancy, is to an individual *raiyat* or a particular holding, the record-of- rights is to all *raiyats* in a local area. A revenue officer, acting under Chapter X of the Bengal Tenancy Act and preparing merely a record-of-rights, has to find out the existing state of things, [unless a dispute arises before him], and his duties are similar to those of a Collector or a Court under section 10 of Act VI (B. C.) of 1862 and section 38 of Act VIII (B. C.) of 1869. Under the Acts of 1862 and 1869, the powers of a Collector or a Court were limited to recording what was, and not what ought to have been. The [powers and] duties of a revenue-officer are prescribed in sections 102 [and the few following sections] of the Act of 1885 and in the Rules made by the Local Government as to cadastral surveys.[1] [Under section 101, the Local Government may, in any case, with the previous sanction of the Governor-General in Council, order a survey to be made, and a record of rights to be prepared of any local area, estate, tenure or part thereof. By the words "in any case" are meant—whether the landlords or tenants apply for survey and record-of-rights or not. The local Government may also order a survey to be made and a record-of-rights to be prepared, without the previous sanction of the Governor-General in Council: (*a*) where the landlords or tenants or a large proportion of them, apply for such an order; (*b*) where the preparation of such a record is calculated to settle or avert a serious dispute existing or likely to arise between the tenants and their landlords generally; (*c*)

[1] See Calcutta Gazette of December 9, 1914, Part I, pp. 2205 to 2226 for Bengal, and of August, 7, 1907, Part I, pp. 1371 to 1398 for districts in Bihar governed by Act VIII of 1885.

where the local area, estate or tenure, or the part thereof, belongs to, or is managed by, the Government or the Court of Wards, or a manager appointed by the District Judge under section 95; and (*d*) where a settlement of land revenue is being, or is about to be, made in respect of the local area, estate, or tenure, or the part thereof.[1] Under section 103, one or more of the proprietors or tenure-holders or a large proportion of the *raiyats* of an estate or tenure may apply for ascertaining and recording all or some of the particulars specified in section 102, and in such a case, no previous sanction of the Local Government even is required before the grant of the application. In all cases in which a settlement of land-revenue *is not being* made or *is not about to be made*, revenue officers can settle rents only when landlords or tenants apply, under section 105, for settlement of fair rents.[3] But when a settlement of land-revenue is *being made* or *is about to be made*, revenue officers must settle fair rents for all classes of tenants, whether landlords and tenants apply for it or not.[4]] A revenue officer has the same powers as a Civil Court in determining the particulars given in section 102.[5] [But the function of the revenue-officer, under Chapter X as

[1] As to what the expression "a large proportion of landlords" in section 101 means, see *Secretary* v. *Purnendu*, (1912) 17 C. W. N. 1151. But see Government of Bengal's No. 2461-931 L. R., dated Dec., 6, 1886, to Secretary to Board of Revenue, where it is laid down that half the *number* of landlords is a large proportion. The alternative clause (*a*) to subsection (2) of section 101, which is in force in Bengal is clear on the point. A proprietor who has leased his estate temporarily can apply: Act VIII of 1885, Sec. 101, Sub-section (2), Expl. 2.

[2] See *Dharani* v. *Gaber*, (1902) I. L. R. 30 Calc. 339, *sc.*, 7 C. W. N. 33. In cases where all particulars mentioned in section 102 are not recorded, whether it would be a record-of-rights or not, there is a conflict of decisions: *Sudhendu* v. *Gobinda*, (1905) I. L. R. 32 Calc. 518, *sc.*, 9 C. W. N. 504, *sc.*, 1 C. L. J. 239; *Sheodhyayan* v. *Beni*, (1909) 9 C. L. J. 67*n*. See also Bengal Government Rules, Chapter VI, rules 91 to 100.

[3] Act VIII of 1885, Chapter X, Part III, *i.e.*, Secs. 105 to 109 A.

[4] *Ibid*, Part II, *i.e.*, Secs. 104 to 104J.

[5] A revenue-officer has inherent power to correct clerical or arithmetical errors in the record as finally published: *Raj* v. *Alam* (1912) 17 C. W. N. 625, *sc.*, 16 C. L. J. 339.

it originally stood, was restricted to ascertaining the name of the landlord of a tenant and settlement of rent in certain cases.] He could not determine questions involving [title],[1] boundary disputes,[2] the validity of a rent-free grant set up by a person in actual occupation of any piece of land,[3] [the right of one of two persons to be declared the tenant[4] or a right of way.[5] The Chapter as amended subsequently gives the revenue officer jurisdiction to decide all disputes relating to all such matters, and his decision has the force and effect of a decree of a Civil Court in a suit between the parties[6] and, subject to revision under section 108 or section 108A, and appeal under section 109A, the decision is final,[7] and is not liable to be set aside by a suit in a Civil Court.[8] But the revenue-officer has not even now jurisdiction to deal with matters alien to record-of-rights.[9] A purchaser of a non-transferable occupancy

[1] *Norendro* v. *Srinath*, (1891) I. L. R. 19 Calc. 641; *Donay* v. *Keshub*, (1904) 8 C. W. N. 741; *Aswini* v. *Saroda*, (1916) 24 C. L. J. 79. See also *Ram* v. *Nandanandananda*, (1913) 18 C. W. N. 938, *sc.*, 19 C. L. J. 197.

[2] *Bidhu* v. *Bhugwam*, (1891) I. L. R. 19 Calc. 643.

[3] *Padmanand* v. *Bajo*, (1892) I. L. R. 20 Calc. 577; *Secretary* v. *Nitye*, (1893) I. L. R. 21 Calc. 38; *Karmi* v. *Brojo*, (1894) I. L. R. 22 Calc. 244; *Joypal* v. *Palukdhari*, (1898) 2 C. W. N. 491; *Radha* v. *Durganath*, (1904) I. L. R. 32 Calc. 162; *Pran* v. *Trailokhya*, (1915) 19 C. W. N. 911; *Birendra* v. *Kalitara*, (1915) I. L. R. 43 Calc. 547, *sc.*, 20 C. W. N. 275, *sc.*, 22 C. L. J. 155. But see Act VIII of 1885, Sec. 102, Cl. (*j*) inserted by the amending Act III (B. C.) of 1898 and *Gokhul* v. *Jodu*, (1890) I. L. R. 17 Calc. 721; *Nikunja* v. *Radha*, (1903) 22 C. L. J. 148.

[4] *Pandit* v. *Meajan*, (1893) I. L. R. 21 Calc. 378; *Haro* v. *Pran*, (1899) I. L. R. 27 Calc. 364, *sc.*, 4 C. W. N. 127; *Jagannath* v. *Chandra*, (1900) 5 C. W. N. 421

[5] *Haro* v. *Pran*, (1899) I. L. R. 27 Calc. 364, *sc.*, 4 C. W. N. 127. See Act VIII of 1885, Sec. 102, cl. (*i*) inserted by Acts I (B. C.) of 1907 and I (E. B. and A) of 1908.

[6] Act VIII of 1885, Sec. 107.

[7] Act VIII of 1885, Sec. 106, as amended by Act I (B. C.) of 1903. *Berhamdut* v. *Ramji*, (1913) 18 C. W. N 466; *Aswini* v. *Saroda*, (1916) 24 C. L. J. 79. See also *Mahendra* v. *Girish*, (1917) 3 P. L. J. 379.

[8] *Tapanidhi* v. *Pitambar*, (1906) 5 C. L. J. 67; *Nabin* v. *Radha*, (1907) 11 C. W. N. 859; *Apurba* v. *Shyama*, (1919), 24 C. W. N. 223.

[9] See *Gokul* v. *Pudmanund*, (1902) I. L. R. 29 Calc. 707, *sc.*, L. R. 29 I. A. 196, *sc.*, 6 C. W. N. 825 and *Abhin* v. *Balunki*, (1907) 11 C. W. N. ccxix.

holding is a trespasser and he is not entitled to have his name entered in the record-of-rights under clauses(*a*) and(*b*) of section 102. Where, however, such a person's name is recorded, it is proper to add a note that he is a trespasser.[1] An order of the Special Judge as to the length of the standard of measurement to be used in measuring certain lands is not a decision in a case under section 106.][2] The sections of the Act dealing with the powers and duties of a revenue-officer,[3] and the powers of Special Judges appointed under the Act[4] and of the High Court[5] are not free from ambiquity[6] and the rulings thereon are consequently not quite in harmony. The jurisdiction of the ordinary Civil Courts to modify the awards of a revenue officer in matters, which come within his powers and duties, is also very doubtful.[7]

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[1] *Umedulla* v. *Ram*, (1910) 14 C. W. N. 812.

[2] *Narohary* v. *Hari*, (1899) I. L. R. 26 Calc. 556.

[3] Act VIII of 1885, Secs. 103, 104 to 104F, 105, 105A, 106 and 107.

[4] *Ibid*, Secs. 104G 108 and 109A.

[5] *Ibid*, Sec 109A.

[6] In *Gopi* v. *Adoita*, (1894) I. L. R. 21 Calc. 776 (at p. 780), the judges remarked that the provisions of Chapter X were somewhat obscure as regards the procedure to be followed in cases under the Chapter; and Jenkins C. J. remarked in *Pirthi* v. *Basarat*, (1909) I. L. R. 37 Calc. 30 (at p. 37), *sc.*, 13 C. W. N. 1149, *sc.*, 10 C. L. J. 343, "Chapter X has undergone several amendments and it cannot be said that the successive amendments have made the law clearer of comprehension or easier of practical application." Later on, Jenkins C. J. in *Umedulla* v. *Ram*, (1910) 14 C. W. N. 812, remarks ' of the careless drafting which mars this very important Act."

[7] Act VIII of 1885, Secs. 104H, 109. See *Traylokhyanath* v. *Macleod*, (1900) I. L. R. 28 Calc. 28; *Ramgulam* v *Bishnu*, (1906) 11 C. W. N. 48; *Padmalav* v. *Lukmi*, (1907) 12 C. W. N. 8; *Ram* v. *Bachu*, (1907) 6 C. L. J. 670; *Jogendra* v. *Krishna*, (1908) I. L R. 35 Calc. 1013, *sc.*, 12 C. W. N. 1032, *sc.*, 8 C. L. J. 322; *Gulab* v. *Kalanand*, (1910) 14 C. W. N. 884, *sc.*, 12 C. L. J. 107; *Sheodhani* v. *Beni*, (1910) 16 C. L. J. 67; *Pandab* v. *Ananda*, (1910) 14 C. W. N. 897, *sc.*, 12 C. L. J. 195; *Mukti* v. *Rameswar*, (1910) 15 C. W. N. 57; *Altaf* v. *Mahatap*, (1910) 15 C. W. N xlviii; *Kali* v. *Girija*, (1911) 15 C. W. N. 974; *Ram* v. *Nandanandanananda*, (1913) 18 C. W. N. 938, *sc.*, 19 C. L J. 197; *Ramdas* v. *Biprodas*, (1913) 19 C. W. N. 35; *Berhamdut* v. *Ramji*, (1913) 18 C. W. N. 466; *Pran* v. *Trailakhya*, (1915) 19 C. W. N. 911; *Shashi* v. *Eshabar*, (1915) 19 C. W. N. 636; *Pirthi* v. *Mohamed*, (1916) 1 P. L J. 67; *Amiruddin* v. *Saidur*, (1916) 1 P. L. J. 73; *Aswini* v. *Saroda*, (1916) 24 C. L. J. 79; *Nawab Bahadur* v. *Ahmad*, (1916) I. L. R. 44 Calc. 783, *sc.*, 21 C. W. N. 1004, *sc.*, 25 C. L. J. 556;

Remarks.

The revenue-officers entrusted with the duties of recording the rights of the tenantry in large areas and revising their rents may be excellent executive officers, but are not generally persons who have proper judicial training. The procedure adopted by them is practically summary, and the people have not much confidence in their decisions. The circumstances, which induced the Government of Bengal to repeal Act X of 1859 in the Regulation districts and to transfer in 1869 the jurisdiction in the trial of cases between landlord and tenant to the ordinary Civil Court, exist even at the present day; and although in theory the Collectors of districts and their subordinates may be supposed to be more conversant with questions about land—its produce and productive power—in any particular locality than the local Munsiffs and Subordinate Judges, the truth seems to be that they are far inferior to the latter in judicial power and acumen. All that can be said in favour of the executive officers is that they have a rough and ready way of cutting gordian knots. However that may be, Chapter X of the Bengal Tenancy Act requires considerable modifications.[1] The experience of ten years since the passing of the Act should be utilized without any bias for either the executive or the judicial officers of the crown.[2] All necessary powers for the

Bepin v. *Hari*, (1916) 27 C. L. J. 210; *Ramdayal* v. *Genda*, (1916) 1 P. L. J. 479; *Brij* v. *Sheo*, (1916) 2 P. L. J. 124; *Latafat* v. *Ganganand* (1918) 3 P. L. J. 361; *Apurba* v *Shyama*, (1919) 24 C. W. N. 223. See also *Shambhu* v. *Purna*, (1907) I. L. R. 35 Calc. 176, *sc.*, 12 C. W. N. 122, *sc.*, 7 C. L. J. 103.

[1] Since the lectures were delivered, this has been done to a great extent by the amending Acts III (B. C.) of 1898, V. (B. C.) of 1894 (now repealed), I (B. C.) of 1903, I (B. C.) of 1907 and I (E. B. and A.) of 1908; and Orissa has now its own Act, II (B. and O.) of 1913. But the law is yet as imperfect and obscure as ever, and these remarks, as also those in the earlier paragraph, apply with equal force now. See footnote 6 of previous page.

[2] The system applicable to settlement of rents in Government estates and other temporarily settled estates after the amendment in 1898 is now embodied in Part II of Chapter X of the Bengal Tenancy Act. It is different from the system for settlement of rents in permanently settled areas, as in Part III of the Chapter. Revenue officers have now a fairly

satisfactory and final adjustment of the various kinds of disputes that may and do frequently arise in recording or settling rents and determining the relationship of landlord and tenant—in finally determining all the particulars noted in section 102,—should be given to competent officers, and appeals to the highest tribunal in the country should be allowed on all questions of vital importance, so that there may be complete finality and no conflict of jurisdictions after trial by one set of judges.[1] Summary decisions based on present possession and references to or revision by Civil Courts lead-

free hand in settling rents of Government estates and temporarily settled estates and have not to comply with the formality of the Code of Civil Procedure and to treat the case of each individual *raiyat* whose rent is altered as a separate suit, but Civil Courts have got the ultimate jurisdiction in all matters of *status*, right and title. See in this connection Act VIII of 1885, Secs. 191 and 192. The Settlement Law in Bengal, where the Bengal Tenancy Act is in force, is to be found in Regulation VII of 1822 (as amended by Regulation IX of 1833), Regulation IX of 1825, Act VIII of 1885, Chapter X, parts I, II and IV and rules framed by the Local Government and instructions issued by the Board of Revenue (vide Act VIII of 1885, Secs. 189 and 190). The rules made by the Local Government have practically the force of law and the instructions of the Board of Revenue are supplementary to the rules and have not the force of law, but Revenue officers are bound to have regard to them, so far as they are consistent with the Act and the Government Rules. See Government Rules, Chap. I, rule 1. Regulation VII of 1882 (as amended by Regulation IX of 1833) was formerly the principal law under which settlements of land revenue of temporarily settled areas used to be made. That Regulation, however, contained no express provisions defining the powers of Settlement Officers. After the introduction of the Bengal Rent Act (X of 1859), the High Court held in a number of cases that a revenue officer was not competent to enhance rent of an occupancy *raiyat* without previously serving him with a notice under section 17 of the Act: *Nawab* v. *Ram*, (1866) 6 W. R. Act X. 5; *D'Silva* v. *Raj*, (1871) 16 W. R. 153; *Enayetoollah* v. *Nubo*, (1873) 20 W. R. 207 and *Ledlie* v. *Doorga*, (1874) 21 W. R 410. Difficulties having arisen in carrying out large settlements in Midnapur, the attention of the Bengal Government was drawn to the unsatisfactory state of things and Act VIII (B. C.) of 1879 was passed, which gave effect to the aforesaid High Court decisions, enlarged the scope of Civil Courts and provided for settlement of rent according to general rates. But the Act of 1879 was found to be unworkable and was repealed by Act VIII of 1885. Regulation VII of 1822 has not yet been repealed and settlement of land revenue may yet be made under that Regulation, where alteration of existing rents is not contemplated. Where, however, it is thought necessary to alter existing rents for ascertaining the assests on which the amount of Government revenue is to be based, or when an authoritative record-of-rights has to be made, Chapter X of the Act of 1885 has to be resorted to.

[1] The amending Acts of 1898, 1907 and 1908 have, on the contrary, expressly taken away the right of appeal to the High Court in many cases.

ing to suspension of proceedings are anomalous and productive of mischief.[1]

Objections to particular entries.

After making the necessary enquiries by survey and measurement[2] and taking evidence as to rates of rent &c., a revenue officer is required by section 103A of Act VIII of 1885 to publish locally a draft record[3]—in the prescribed manner[4] consisting of the *khewat* (or abstract record of rights of proprietors and tenure-holders) and the *khatian* (or detailed record for each person interested or each group of persons, jointly interested, in the land,

[1] The amended Act has attempted to prevent the clashing of jurisdictions between Revenue Courts and Civil Courts. When an order has been passed directing the preparation of a record-of-rights, Civil Courts have now no jurisdiction to entertain any suit or application for the alteration of any rent or for determing the status of any tenants until after the final publication of the record-of-rights in cases where a settlement of land revenue is being or is about to be made; or until three months after the final publication of the record-of-rights, in cases where settlement of land revenue is not being made (s 111). In the latter case, no suit can be filed in the Civil Court within three months of the certificate of final publication for the decision of questions as to whether the land in question is or is not liable to payment of rent, whether the relation of landlord and tenant exists, whether the land is part of a particular estate or tenancy, or whether any special condition or incident of tenancy exists or whether any right of way or other easement is attached to the land (s. 111B). But if a suit regarding any of the aforesaid matters has been filed before final publication, a suit cannot be filed under section 106, and proceedings for settlement of fair rent under section 105, must be stayed pending the decision of the Civil Court. A revenue officer cannot also try an issue under section 105A which has previously been raised under section 106, and proceedings for settlement of fair rents must be stayed pending the disposal of the case under section 106. Where, however, an issue as to rents has been raised under section 105A in the course of settlement proceedings, a suit cannot be filed regarding the same under section 106 (see section 109). A Civil Court has, moreover, no jurisdiction to entertain any suit or application for the settlement of fair rent or for the decision of any matter which is or was the subject matter of dispute before a revenue officer. In short, parties may either wait until the jurisdiction of the revenue officer ceases, when they may bring a suit in the Civil Court, or they may, in some cases, raise their claim under section 111B before the Civil Court before the final publication, and oust the jurisdiction of the revenue officer after final publication. But no one can raise the same issue in one Court after raising it, in due course, in another.

[2] Act VIII of 1885, Sec. 101, Sub-Sec. (4). See Bengal Government Rules under this Act, Chapter VI and Bengal Settlement Manual, Ed. 1908, Part I, Chapter I, r. 5.

[3] Act VIII of 1885, Sec. 103 A.

[4] "Prescribed" means prescribed by the Local Government from time to time. See Act VIII of 1885, Sec. 3, cl. (15); Bengal Government Rules, Chapter VI, rules 62, 79 and 80 and Bengal Settlement Manual, Ed. 1908, Chapters IV and VIII.

whether as proprietor, tenure-holder, *raiyat*, under-*raiyat*, or occupant).[1] Each *khatian* shall show the rights and liabilities of each person or group of persons according to the particulars which have been specified in the notification under section 101. At this stage all such particulars shall find entry, with the exception that no entry shall be made as to the revenue, rent or cess, the class to which the tenant belongs, or the special conditions and incidents of the tenancy. At this stage there shall also be prepared a field index or *khasra* arranged according to the serial numbers of the fields of the village, but this field index shall not form part of the draft record.][2] If objections[3] are made within a fixed time as to particular entries [or to any omission], he should decide them [in a summary manner under such rules as prescribed by Government.[4] Up to the stage of publication of the draft record, the procedure, at present, is the same both in cases where a settlement of land revenue *is* being made, and where a settlement of land-revenue *is not* being made; but, in later stages,

[1] The word "occupant" was introduced in Act VIII of 1885, Sec. 102, by the amending Act of 1898 to cover the case of persons holding lands rent free, without authority, who are not tenants and that of squatters or trespassers who are in unauthorized occupation of land without paying rent for it. The names of such persons also have to be recorded, though they are not "tenants," with a note that they are trespassers, if they be really so. See *ante* p. 449—450.

[2] For details, see Bengal Government Rules, rules 49 to 57.

[3] "An objection" is different from a "dispute." "Objections" are either to entries in or omissions from the record or to settlement of rent-roll (see section 104E), which can only be preferred when a settlement of revenue is being or is about to be made, which may be preferred and are to be disposed of before the final publication of the record (see section 103A). A revenue officer's decision on these will not be open to appeal or second appeal, nor will such decision have the effect of *res judicata*: *Kurban* v. *Jafar*, (1901) I. L. R. 28 Calc. 471; *Nasarulla* v. *Amiruddi*, (1905) 3 C. L. J. 133. "Disputes" can be raised only under section 106 where no settlement of land revenue is being or is about to be made and they cannot arise until after the final publication of the record. See *Dengu* v. *Nobin*, (1895) I. L. R. 24 Calc. 462, *sc.*, 1 C. W. N. 294, overruling *Gopi* v. *Adoito*, (1894) I. L. R. 21 Calc. 776 and *Anand* v. *Shib*, (1895) I. L. R. 22 Calc. 477 on this point, under the unamended Act of 1885. See also *Durga* v. *Hari*, (1894) I. L. R. 21 Calc. 521 and *Secretary* v. *Kajimuddy*, (1895) I. L. R. 23 Calc. 257.

[4] Bengal Government Rules, rule 58.

the procedure and methods for final publication of records, decision of disputes and settlement of rents are different. Where a settlement of land-revenue *is not* being made, the revenue-officer, after having summarily disposed of objections to any entry in, or omission from, the draft record, finally publishes the record, and hears and decides disputes on the application of parties after the final publication, and notes his decisions on the record as finally published. Such a decision has the force and effect of a decree of a Civil Court in a suit between the parties, subject to appeal to the Special Judge. Where a settlement of land-revenue *is* being made, the procedure is the same up to the stage of final publication, but proceedings terminate with it so far as the jurisdiction of the revenue-officer is concerned, and he cannot hear or decide disputes. The remedy of any one dissatisfied with the entries in the record (other than those concerning rents, which are dealt with specially) is to institute a suit under section 111A or to apply to the Board of Revenue for a revision of the record under section 104, Cl. (2). He may also institute a suit in the Civil Court. As regards the difference in procedure and principles for settlement of fair rents in the two classes of cases we have already noted.[1] When a revenue-officer disposes of an objection summarily under section 103A without adopting the procedure laid down in the Code of Civil Procedure for the trial of suits, his order will not be open to appeal or second appeal, nor will it have the effect of *res judicata*,[2] the revenue-officer performing rather an executive function. The provision of this section that the publication of the record of rights shall be conclusive

[1] *Ante*, p. 448 and footnote 2 of p. 451.

[2] *Kurban v Jafar*, (1901) I. L. R. 28 Calc. 471, *sc.*, 5 C. W. N. 798; *Nasarulla v. Amiruddi*, (1905) 3 C. L. J. 133. See also *Secretary of State v. Kajimuddy*, (1895) I. L. R. 23 Calc. 257 and *Pandab v. Ananda*, (1910) 14 C. W. N. 897, *sc.*, 12 C. L. J. 195 under the unamended Act.

evidence that it has been duly made under the Chapter does not preclude a Court from enquiring as to the correctness of the result and entry; it only precludes the Court from going into the question whether the procedure under the chapter has been followed.[1] Entries in a draft record of rights published under this section are not admissible in evidence in a suit for rent, and it is not until the record-of-rights is finally published that the presumption of correctness arises.[2] Where there is no settlement of rent under section 104, the entries in the record-of-rights can only be regarded as presumptive evidence in favour of the landlord, which can rebutted by the tenant.[3] The presumption in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate.[4] When there has been no settlement of rent and no final publication of the record-of-rights, but a mere preparation of a record-of-rights, an order made under section 103A, disallowing an objection under section 103 is not a final order or an order having judicial effect, and a suit brought to obtain a declaration that certain entries in such record were incorrect is not, therefore, barred either under Article 14 of the Limitation Act nor under section 104H read with section 111 of the Bengal Tenancy Act.[5] A record-of-rights is

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[1] *Ramdas* v *Biprodas*, (1913) 19 C. W. N. 35. See also Act VIII of 1885, Sec. 103B.

[2] *Gulab* v. *Ramratan*, (1913) 18 C. W. N. 896; *Ambar* v. *Lutfe*, (1917) I. L. R. 45 Calc. 159, *sc.*, 21 C. W. N. 996, *sc.*, 25 C. L. J. 619

[3] *Asutosh* v. *Ishan*, (1905) 9 C. W N. cclxxix. See *Brij* v. *Sheo*, (1916) 2 P. L. J. 124.

[4] *Ghaneshyam* v. *Padmanand*, (1903) I. L. R. 32 Calc. 336, *sc.*, 9 C. W. N 610, *sc.*, 1 C. L. J. 134; *Rajnarain* v. *Anant*, (1906) 10 C. W. N. 908. But see *Kali* v. *Pratap* (1906) 5 C. L. J. 92 and *Srinarain* v. *Sundarbati*, (1910) 13 C. L. J 653. See also *Prabhu* v. *Sundar*, (1911) 16 C. L J. 41.

[5] *Mahabir* v. *Kewal*, (1905) 2 C. L. J. 22*n*; *Ramgulam* v. *Bishnu*, (1906) 11 C. W. N. 48; *Ram* v *Bachu*, (1907) 6 C. L J. 670. See also *Abdur* v. *Jogesh*, (1906), 10 C. W. N. cxxviii, *sc.*, 3 C. L. J. 94*n*. It has been

to be presumed to have been finally published, unless this is expressly denied; and a certificate signed by the revenue-officer or by the Collector of the district, stating that the record-of-rights has been finally published is conclusive evidence of such publication.[1] This provision is applicable to all suits and proceedings in which the record-of-rights may be produced, and this is so whether the publication of the record-of-rights had or had not been made until after the suit had been instituted.[2] The presumption under section 103B of the Bengal Tenancy Act is a presumption that the entries were correct at the time of the preparation of the record.[3] Evidence of facts, documentary and oral, of a date prior to that of the publication of the record-of-rights, is admissible and should be taken into consideration in determining whether the presumption under section 103B of the Bengal Tenancy Act as amended has been rebutted or not.[4] When a conflict arises as to the rate of rent between that allowed by a previous decree and that entered in the record-of-rights subsequently prepared, both are to be considered together and weighed against each other.[5] The presumption

held that suits for alteration of entries are not maintainable: *Jogendra* v. *Krishna*, (1908) I. L. R. 35 Calc. 1013, *sc.*, 12 C. W. N. 1032, *sc.*, 8 C. L. J. 322. But declaratory suits are maintainable: *Gulab* v. *Kalanand*, (1910) 14 C. W. N. 884.

[1] Act VIII of 1885, Sec. 103B. *Tokhi* v. *Tosi*, (1908) 13 C. W. N. 111, *sc.*, 9 C. L. J. 83; *Dula* v. *Jolekha*, (1912) 16 C. W. N. xci. It has been the practice now to publish regularly in the official gazettes the notifications contemplated by clause (3) of section 103B. This obviates the difficulty of proving the final publication of the record-of-rights. See Bengal Government Rules, Chapter VI, rule 80. See also Act VIII of 1885, Sec. 147B.

[2] *Macdonald* v. *Babu*, (1904) 4 C. L. J. 519; *Chander* v. *Raghunath*, (1908) 12 C W. N. cxlviii; *Kamaleshwari* v. *Kanhari*, (1913) 17 C. W. N. 1159, *sc.*, 19 C. L. J. 348.

[3] *Luchmi* v. *Ekdeshwar*, (1908) 13 C. W. N. 181.

[4] *Sheonandan* v. *Bacha*, (1908) 9 C. L. J. 284; *Birendra* v. *Kailas*, (1914) 22 C. L. J. 141; *Abdul* v. *Makbul*, (1914), 20 C. W. N. 185, *sc.*, 22 C. L. J. 223; *Gour* v. *Birendra*, (1917) 22 C. W. N. 449.

[5] *Kali* v. *Pratap*, (1906) 5 C. L. J. 92; *Srinarain* v. *Sundarbati*, (1910) 13 C. L. J. 653.

under section 103B continues so long it is not set aside.[1] It does not operate to modify the effect of section 104J, as the entries under the latter section are conclusive,[2] unless altered by means of a suit as contemplated under section 104H. Nor does section 103B control section 113.[3]]

Settlement of rent in cases where land revenue is being or is about to be made.

[Where a settlement of land revenue is being or is about to be made, the revenue officer, after disposing of the objections raised to the draft record is required to settle fair and equitable rents for tenants of every class.[4] He is required to do the same, where the estate or tenure for which the record is being prepared belongs to Government, unless it appears to the Local Government expedient that rents should not be settled for tenants of every class in the particular estate or tenure. If should be noted that the revenue officer is not bound to consider the existing rent to be fair and equitable in proceedings under part II of Chapter X of the Act.[5] Under section 192 of the Act, a revenue officer can set aside leases to hold land rent free or at a particular rent, when land-revenue is being assessed for the first time on such land or a fresh settlement of land revenue is being made of a temporarily settled area, and he is required to fix a fair and equitable rent according to the provisions of this Act. In consideration of the endless varieties of local conditions and of forms of tenancies in Bengal, the system of settling rents has been made

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[1] *Sarifunnessa* v. *Sasadhar*, (1909) 14 C. W. N. 364. See also *Ghaneshyam* v. *Padmanand*, (1903) I. L. R. 32 Calc. 336. *sc.*, 9 C. W. N. 610, *sc.*, 1 C. L. J. 134; *Abdul* v. *Jogesh*, (1906) 11 C. W. N. 153; *Kali* v. *Pratap*, (1906) 5 C. L. J. 92.

[2] *Ambica* v *Joy*, (1908) 13 C. W. N. 210; *Prasanno* v. *Rachimuddin*, (1912) 17 C. W. N 153. See Act VIII of 1885, Secs. 147B and 148. But see *Fazl* v. *Sukor*, (1913) 19 C. L. J. 333.

[3] *Miyajan* v. *Srimari*, (1916) 21 C. W. N 546.

[4] Act VIII of 1885, Sec 104 See also, *ibid*, Sec 3 cl. (3). For rules, see Bengal Government Rules, Chapter VI, rules 36 to 41.

[5] Act VIII of 1885, Sec. 104A, Sub-Sec. (1), cl. (*d*).

more elastic by the amendments of Chapter X. Revenue officers can also settle rents by compromise, with the assent of the parties, when satisfied that the rents agreed upon are fair and equitable.[1] Where the rent agreed upon is in the opinion of the revenue officer too low, he is entitled to reject it, as rent is the basis of land revenue, and parties may fraudulently or collectively agree to a rent that is too low. He can at the same time disallow rent agreed upon, if it is too high in his opinion.[2] The revenue officer may propose rents himself, which, if accepted by the landlord and tenant, may be settled as fair.[3] He may also frame a table of rates, where the conditions are such as to make it practicable, and apply the rates to areas resulting from survey, or maintain the existing rents, or enhance or reduce them on the grounds specified in the Act.[4] A Civil Court cannot reduce the rent of a holding on the ground that the rate paid is above the prevailing rate.[5] The table of rates is to show the rates fairly and equitably payable for each class of land in the area under settlement.[6] The table is then published,[7] and objections, if any, are considered.[8] When the

[1] Act VIII of 1885, Sec. 104A, Sub-Sec. (1), cl. (*a*). See also Sec. 109C.

[2] *Ibid*, Sec. 35.

[3] *Ibid*, Sec. 104A, Sub-Sec. (1), cl. (*b*).

[4] *Ibid*, Sec. 104A, Sub-Sec. (1), cl. (*c*); Bengal Government Rules 64 to 77 in Chapter VI and Chapter VI of Part II of the Bengal Settlement Manual, Ed 1908, pages 110 to 120. See also *Gouri* v. *Reily*, (1892) I. L. R. 20 Calc. 579. As regards boundary disputes, see *Irshad* v. *Kanta*, (1894) I. L. R. 21 Calc. 935. As to standard of measurement, see *Mathura* v. *Uma*, (1897) I. L. R. 25 Calc. 34 and *Akbar* v. *Hira*, (1912) 16 C. L. J. 182, which conflict with *Rameswar* v. *Bhubaneshwar*, (1906) I. L. R. 33 Calc. 837, *sc*, 4 C. L. J. 138 and *Grant* v. *Ram*, (1910) 14 C. L. J. 110. The Full Bench in *Jnanada* v. *Amudi*, (1916) I. L. R. 43 Calc 603, *sc*., 20 C. W. N 428, *sc*., 23 C. L. J. 281 seems to have settled the question. Where there has been no measurement, see *Narohary* v. *Hari*, (1899) I. L. R. 26 Calc 556.

[5] Act VIII of 1885, Sec. 38.

[6] *Ibid*, Sec. 104B, Sub-Sec. (1), cls. (*a*) and (*b*).

[7] *Ibid*, Sec. 104B, Sub-Sec. (2).

[8] *Ibid*, Sec. 104 B, Sub-Sec. (3). The objection must be made within a period of one month after publication of the table.

objections have been disposed of, the table is submitted to the superior revenue authority with the petitions of objections, called "the confirming authority," to confirm the tables and rent rolls.[1] The confirming authority may confirm, disallow or amend the table[2] wholly or partly. The revenue-officer is not bound to settle rents in all, or any case, according to such a table confirmed under section 104B (5),[3] as we have already noted. When the settlement rent-roll has been prepared, it is published for the prescribed period and objections if any, are disposed of according to rules prescribed by the Local Government.[4] The corrected settlement rent-roll is then submitted to the confirming authority, which may sanction it with or without amendment, or may return it for revision.[5] After sanction by the confirming authority, the settlement rent-roll is finally framed and incorporated with the record of rights prepared under section 103A. An appeal, if presented within two months from the date of the order appealed against lies against every order passed by a revenue-officer prior to the final publication of the record of rights on any objections made under section 104B, sub-section (3) or section 104E.[6] The appeal lies to such superior revenue authority as the Local Government may prescribe.[6] The Board of Revenue also, on application or of its own motion, at any time within two years from the date of certificate of final publication

[1] Act VIII of 1885, Sec. 104 B, Sub-Sec. (4).

[2] *Ibid*, Sec. 104 B, Sub-Sec. (5).

[3] *Ibid*, Secs. 104C and 104D. Rules for preparation of tables of rates and settlement rent-rolls are to be found in Bengal Government Rules, Chapter VI. Tables of rates are not usually prepared where no rates actually exist and tenants hold lands at lump rentals, or where rates are so varied and not based on the nature of the soil that no table of existing rates can be prepared on definite bases.

[4] Act VIII of 1885, Sec. 104 E.

[5] *Ibid*, Sec. 104 F.

[6] Act VIII of 1885, Sec. 104G, Sub-Sec. (1). The "superior revenue authority" is not the Board of Revenue.

may direct the revision of any record of right or any portion of it,[1] after giving notice to the parties concerned.[2] The Board cannot, however, affect any order passed by a Civil Court under section 104H.[3] In the Chhotanagpur division also, except in the district of Manbhoom, the Board may direct revision.[4] Any person aggrieved by an entry of a rent settled in a settlement rent-roll or by an omission to settle a rent for entry in such rent-roll may, within six months from the date of the certificate of final publication, or from the date of the disposal of any appeal presented to the revenue authority under section 104G, institute a suit in the Civil Court on any of the following grounds and on no others :—

(*a*) that the land is not liable to the payment of rent ;

(*b*) that the land although entered in the record-of-rights as being held rent free is liable to the payment of rent ;

(*c*) that the relation of landlord and tenant does not exist ;

(*d*) that land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy ;

(*e*) that the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging ;

(*f*) that the revenue-officer has not postponed the operation of the settled rent under the provisions of section 110, clause(a), or has

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[1] Act VIII of 1885, Sec. 104G, Sub-Sec. (2).

[2] *Ibid*, Sec. 104G, proviso.

[3] *Ibid*, Sec. 104G, Sub-Sec. (2).

[4] By notification, dated February 9, 1903.

wrongly fixed the date from which it is to take effect; and

(*g*) that the special conditions and incidents of the tenancy, or any right of way or other easement attaching to the land which is the subject of the tenancy have not, or has not, been recorded or have or has been wrongly recorded.[1]]

Suits in Civil Courts under Section 104H.

[If the Civil Court finds that any entry is incorrect, it shall itself specify what correction is to be made, and shall not refer the matter back to the revenue-officer.[2] A suit under this section should have as defendant only the person benefitted by the rent entry or by the omission to make a rent entry as the case may be.[3] A prayer as to the nature of the tenancy is foreign to such a suit.[4] This section is designed mainly to safeguard the Government revenue and to attach reasonable finality to the fixation of the rental assests upon which the assessment of revenue is fixed and it does not bar a suit against the recorded tenant for rent due.[5] Subject to an order of the Civil Court passed on the aforesaid specified grounds, rents settled by the revenue-authorities are final,[6] and no suit is afterwards maintainable for enhancement of rent on the ground of

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[1] Act VIII of 1885, Sec. 104H, cls. (1), (2), (3) and (8). See *Abhin* v. *Balunki*, (190-) 11 C. W. N. ccxix and *Pahalwan* v. *Secretary*, (1908) 12 C. W. N. cvii on the point of limitation in such cases. See on the general question: *Prosanno* v. *Rachimuddin*, (1912) 17 C. W. N. 153. As to scope of section 111A and Specific Relief Act in such cases, see *Promoda* v. *Asiruddin*, (1911) 15 C. W. N. 896; *Kumeda* v. *Secretary*, (1914) 19 C. W. N. 1017; *Rajani* v. *Secretary*, (1917) I. L. R. 45 Calc. 645.

[2] Act VIII of 1885, Sec. 104H, cls. (4) to (7). *Secretary* v. *Digambar*, (1917) I. L. R. 46 Calc. 160, *sc.*, 27 C. L. J. 334. As to court fees, see *Pajiruddin* v. *Secretary*, (1911) 16 C. L. J. 383 and *Trailakya* v. *Secretary*, (1912) 17 C. L. J. 426.

[3] Act VIII of 1885, Sec. 104H, cl. (3), last para. *Hari* v. *Secretary*, (1913) 18 C. L. J. 566 is no longer good law on this point. See also *Jagendra* v. *Secretary*, (1912) 17 C. W. N. 835, *sc.*, 16 C. L. J. 385 and *Seontary* v. *Gobind*, (1916) 21 C. W. N. 505.

[4] But see *Pajiruddin* v. *Secretary*, (1911) 16 C. L. J. 383.

[5] *Nasarulla* v. *Amiruddi*, (1905) 3 C. L. J. 133.

[6] Act VIII of 1885, Sec. 104 J.

an excess in area, in spite of there having been a stipulation to that effect in the *kabuliyat* executed by the tenant prior to the settlement proceedings.[1] When settlement of rent has been made under Part II of Chapter X of the Bengal Tenancy Act, no evidence is admissible to prove that a different rate of rent is payable from that entered in the rent-roll, such entries being conclusive under section 104J of the Act.[2] Section 103B of the Act, we have already seen, does not operate to modify the effect of section 104J.[2]]

Settlement of rent in cases where land revenue is not being or is not about to be made.

[Where settlement of land-revenue is not being or is not about to be made, fair rents are settled only on applications made to the revenue-officer, and only after final publication of the record under section 103A[2] of the Act. Part III of Chapter X of the Act deals with this class of cases. The procedure laid down in Part III ordinarily applies to permanently-settled estates of which a survey and record-of-rights has been ordered under section 101 or section 103. It may, however, be applied in temporarily settled estates also, if a survey and record-of-rights of them be ordered under clauses (*a*), (*b*) or (*c*) of section 101 of the Act. In this class of cases, the record-of-rights is finally published immediately after the decision of the objections filed on its publication in draft. The application for settlement of rent can be made by the landlord,[3] or all the landlords jointly,[4] as the case may be, or by the

[1] *Prosanno* v. *Rachimuddin*, (1912) 17 C. W. N. 153.

[2] *Ambica* v. *Joy*, (1908) 13 C. W. N. 210. See also *Miyajan* v. *Srimari*, (1916) 21 C. W. N. 546 and *Makbul* v. *Yogesh*, (1919) 23 C. W. N. 545.

[3] A proprietor who has leased his estate or tenure temporarily may apply. See Act VIII of 1885, Sec. 105, Sub-Section (1) Explanation. See, as to scope of Sec. 105, as distinguished from Sec. 106, *Manindra* v. *Upendra*, S A. 1724 of 1918, decided by Chaudhuri and Ghosh JJ. on 23rd April, 1920.

[4] *Krishna* v. *Poresh*, (1909) 10 C. L. J. 458; *Behari* v. *Priya*, (1914) 21 C. L. J. 305. But see the latter case and *Safaruddi* v. *Fasal*, (1914) 21 C. L. J. 592, where the tenant has entered into a separate contract with a cosharer landlord in respect of his share of the lands in his holding.

tenant.[1] Such application must be made within two months from the date of the certificate of the final publication of the record-of-rights under section 105, Sub-section (2).[2] In settling rents, the revenue-officer is required to presume until the contrary is proved, that the existing rent is fair and equitable and to have regard to the rules laid down in the Act for the guidance of the Civil Court in increasing or reducing rents.[3] The decision of the revenue officer in settling rents has the force and effect of a decree of a Civil Court and seems to be final and conclusive,[4] subject to an appeal to a Special Judge appointed by the Local Government under section 109A. Such an order cannot be questioned by a Civil Court[5]. Where in any such "proceedings for the settlement of rents, any of the following issues arise:—

(*a*) whether the land is, or is not liable to the payment of rent;

(*b*) whether the land, although entered in the

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[1] See *Dakhyani* v *Mono*, (1913) 19 C. W. N. 407, *sc.*, 19 C. L. J. 113, as to right of tenant inducted into land by a person not authorized to settle the land.

[2] Act VIII of 1885, Sec. 105, Sub-Sec (1)

[3] *Ibid*, Sec. 105, Sub-Sec. (4). In settlement of rents in Government and temporarily settled estates, the revenue-officer has greater freedom and he is not bound to adhere strictly to the provisions of this Act. See Act VIII of 1885, Sec. 104A. See also *Sheodhayan* v. *Beni*, (1909) 9 C. L. J. 67*n*.

[4] Act VIII of 1885, Sec. 107, Sub-Sec. (1).

[5] *Ram* v. *Sanoman*, (1899) I. L. R. 27 Calc. 167. But see *Dharani* v. *Gaber*, (1902) I. L. R. 30 Calc. 339, *sc.*, 7 C. W. N. 33. See, on the question of *res judicata*, in cases under the unamended Act: *Gokhul* v. *Jodu*, (1890) I. L. R. 17 Calc 721; *Joypal* v. *Palukdhari*, (1898) 2 C. W. N. 491; *Durga* v. *Hateen*, (1901) I. L. R. 29 Calc. 252, *sc.*, 6 C. W. N. 238 and *Brahmanpinda* v. *Arjun*, (1903) 1 C. L. J. 310 and *Mohim* v. *Kali*, (1907) 11 C. W. N. 1028. Where, however, the previous decision of the Special Judge is not a decision between the tenant and the landlord, it cannot operate as *res judicata*: *Jagannath* v. *Chandra*, (1900) 5 C. W. N. 421, nor where the order of the settlement officer is *ultra vires*: *Gakul* v. *Padmanund*, (1902) I. L. R. 29 Calc. 707, *sc.* L. R. 29 I. A. 196, *sc.*, 6 C. W. N. 825 and *Abhin* v. *Balunki*, (1907) 11 C. W. N ccxix. Where there has been no adjudication, it is no 'decision' and it cannot operate as *res judicata*: *Cheodditti* v. *Tulsi*, (1912) I. L. R. 40 Calc. 428, *sc.*, 17 C. W. N. 467; *Parbati* v. *Toolshi*, (1913) 18 C. W. N. 604, *sc.*, 18 C. L. J. 128; *Aswini* v. *Saroda*, (1916) 24 C. L. J. 79.

record-of-rights as being held rent-free, is liable to the payment of rent;

(*c*) whether the relation of landlord and tenant exists;

(*d*) whether the land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy;

(*e*) whether the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging;

(*f*) whether the special conditions and incidents of the tenancy or any right-of-way or other easement attaching to the land have not, or has not, been recorded or have, or has, been wrongly recorded,

the revenue officer has to try and decide such issue and settle the rent under section 105 accordingly."[1] But where any of the aforesaid "issues has been, or is already, directly or substantially in issue between the same parties, or between parties under whom they or any of them claim, and has been tried and decided, or is already being tried" in a suit under section 106, the revenue-officer cannot decide it.[2] The decision of the revenue-officer under section 105A has the force and effect of a decree of a Civil Court *inter partes* and is final, subject to appeal to the special Judge.[3] The suit under section 106 referred to above, "may be instituted before a revenue-officer at any time within three months from the date of the certificate of the final publication of

[1] Act VIII of 1885, Sec. 105A. *Upendra* v. *Jamini*, (1913) 18 C. W. N. 268. See also *Shashi* v. *Eshabar*, (1915) 19 C. W. N. 636; *Nawab Bahadur* v. *Ahmad*, (1916) I. L. R. 44 Calc. 783 *sc.*, 21 C. W. N. 1004, *sc*, 25 C. L. J. 556; *Bepin* v. *Hari*, (1916) 27 C. L. J. 210 and *Mahendra* v. *Girish*, (1917) 3 P. L. J. 379, as to scope of section 105A.

[2] Act VIII of 1885, Sec. 105A, proviso and Sec. 111B. See Sec. 109B. as to power of revenue officer to give effect to agreement or compromise.

[3] *Ibid*, Sec. 109A.

the record-of-rights under' subsection (2) of section 103A," but issues which have been tried and decided, or is already being tried under section 105A cannot be tried under section 106.[1] The Act provides for revision or review of any decision under sections 105, 105A, 106 and 107 on the merits[2] on the application or of his own motion or for obvious errors, unless there is an appeal pending under section 109A.[3] The orders of the revenue-officers under sections 108 and 108A are final, subject to appeal to the Special Judge.[4] A second appeal from the Special Judge's order lies to the High Court,[5] in some cases.] No second appeal, however, lies to the High Court in a case of settlement of rent, the decision of the Special Judge being final.[6]

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[1] Act VIII of 1815, Sec 106. *Ante*, p. 449. See *Petu* v. *Ram*, (1891) I. L. R. 18 Calc. 667 overruled by Full Bench in *Upadhya* v. *Persidh*,' (1896) I. L. R. 23 Calc. 723 as to Court fees. See, as to scope of Sec. 106, as distinguished from Sec. 105, *Manindra* v. *Upendra*, S. A. 1724 of 1918, decided by Chaudhuri and Ghosh JJ. on 23rd April, 1920

[2] Act VIII of 1885, Secs., 108 and 108A. The addition of Sec. 108A. has enlarged the power of revenue officers, as prior to the addition they had no power to alter entries as to status etc., when once finally published, unless after a suit under Sec 106. But settlement officer cannot revise entires as to *mal* lands; *Shambhu* v. *Purna*, (1907) I. L. R 35 Calc. 176, *sc*, 12 C. W. N 122, *sc.*, 7 C. L J. 103 As to power to correct arithmetical errors, see *Raj* v. *Alam*, (1912) 17 C. W. N. 625 *sc*, 16 C. L J 339; *Baulchand* v *Siris* (1913) 19 C. L. J. 251.

[3] *Parbati* v *Tulsi*, (1913) 18 C. L. J 125; *Dhakeshwar* v. *Iswardhari*, (1914) 22 C. L. J. 57.

[4] Act VIII of 1885, Sec. 109A, Sub-sec (2). *Parbati* v *Tulsi*, (1913) 18 C. L J 125 It is doubtful whether there is an appeal against an "objection" *e.g*, order as to length of standard of measurement: *Narohary* v. *Hari*, (1899) I. L. R 26 Calc 556

[5] Act VIII of 1885, Sec. 109A, Sub-sec. (3) and proviso An appeal does not lie to the High Court from an order of remand passd by a Special Judge: *Mothur* v *Tara*, (1903) 7 C W. N 440. But an appeal lies from an order refusing to re-hear an appeal dismissed for default: *Manmatha* v *Gadadhar*, (1917) I. L. R. 45 Calc. 638. See generally as to scope of s. 109 (3): *Mothur* v *Tara* (1903) 7 C. W. N. 440; *Rajkumar* v. *Ram*, (1907) 5 C. L. J. 538; *Mathura* v. *Basanta*, (1908) I. L. R. 36 Calc. 500 and *Grant* v. *Ram*, (1910) 14 C. L. J. 110, which are not all consiste.t. See also *Akbar* v. *Hira*, (1912) 16 C. L. J. 182 and *Jnanada* v. *Amudi*, (1916) I. L. R. 43 Calc., 603, *sc.*, 20 C. W. N. 428, *sc.*, 23 C. L. J. 281.

[6] For cases before amendment, see *Shewbarat* v. *Nirpat*, (1889) I. L. R. 16 Calc. 596; *Kirut* v. *Palukdhari*, (1889) I. L. R. 17 Calc. 326; *Gopi v. Adoita*, (1894) I. L. R. 21 Calc. 776; *Anand* v. *Shib*, (1895) I. L. R. 22 Calc. 477: *Achha v. Durga*, (1897) I L. R. 25 Calc. 146, *sc.*,

When and for what period rent settled has operation.

When rent is settled under chapter X, it takes effect from the beginning of the agricultural year next after the [date of the decision fixing the rent, or (if a settlement of land revenue is being or is about to be made) the date of final publication of the settlement rent-roll,[1] but where the existing rent of particular tenant was settled by contract legally binding on the parties, the terms of which has to run for a few years, the fair rent settled will take effect from the expiration of the term, or from a later date fixed by the revenue officer.[2] There is a similar exception in the case of settlement of rents for purposes of settlement of revenue in some cases.][2] Except on the ground of landlord's improvement or subsequent alteration in the area of a tenure or holding, the rent so "settled" is not liable to any alteration for a period of fifteen years from the date of the final publication of the record in the case of an occupancy-*raiyat* [or an under-*raiyat* having occupancy right], or five years in the case of a non-occupancy-*raiyat*, [or an under-*raiyat* not having occupancy right.[3] It has been held that the expression "settled" as occuring in section 113 of the Act refers to "settled" occuring

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2 C. W. N. 137. For cases after amendment, see *Ram* v. *Rajaram*, (1906) I. L. R 33 Calc. 832; *Rameswar* v. *Bhubaneshwar*, (1906) I. L. R. 33 Calc. 837 *sc*, 4 C. L. J. 138; *Shambhu* v. *Purna*, (1907) I. L. R. 35 Calc. 176, *sc.*, 12 C. W. N. 122, *sc.*, 7 C. L. J. 103; *Naimuddin* v. *Ram*, (1909) 13 C. W. N. ccxx; *Grant* v. *Ram*, (1910) 14 C. L. J. 110 and *Sajiwan* v. *Gulab*, (1916) 1 P. L. J. 409 But see *Ramani* v *Mahanth*, (1903) I. L. R. 31 Calc. 380; *Kali* v. *Gopi*, (1907) 9 C L. J. 574; *Preobast* v. *Murat*, (1909) 13 C. W N. cciv; *Lukhi* v *Ram* (1911) 15 C. W. N. 921 *sc.*, 14 C. L J. 146; *Baul* v. *Siris*, (1913) 19 C. L J. 251; *Bisheshur* v. *Rajendra*, (1914) 18 C. W. N. 949 and *Akbar* v. *Abbas*, (1915) 19 C. W. N. 1328. See also *Upadhya* v. *Persidh*, (1896) I. L. R. 23 Calc. 723; *Dengu* v. *Nobin*, (1897) I. L. R 24 Calc 462, *sc.*, 1 C. W. N. 294; *Pandab* v. *Ananda*, (1910) 14 C. W. N. 897, *sc.*, 12 C. L J. 195.

[1] As to validity of publication of past records and effect of settlements of rent and decisions by revenue officers made before commencement of Act VIII of 1885, see Act III (B. C.) of 1898, Secs. 8 and 9.

[2] Act VIII of 1885, Sec. 110.

[3] *Ibid*, Sec. 113. This section is no bar to the maintainability of a suit for rent at a higher rate than that recorded in the record-of-rights under sections 104 A to 104 F of the Act: *Prosanno* v. *Rachimuddin*, (1912) 17 C. W. N. 153.

in section 105 and does not mean "decision of points of dispute" as contemplated under section 106, as "rent settled" is quite a different thing from the decision of a dispute with regard to entries made in the record under section 106.[1]]

Agrarian Disputes Act.

The agrarian disturbances in the district of Pabna and parts of the districts adjoining it had induced the Government of Bengal to pass a short Act[2] known as the Agrarian Disputes Act of 1876. The special procedure laid down in that Act was applicable only in exceptional cases, where the relation between the landlord and the tenants as a class was very much strained. Section 112 of the Bengal Tenancy Act has conferred upon the Local Government the same powers as the Agrarian Disputes Act. These powers have not been exercised in recent years. The Local Government may exercise its powers only with the previous sanction of the Governor-General in Council.

Expenses of proceedings forpreparation of record-of-rights.

[The Bengal Tenancy Act lays down the principles for the apportionment of costs of settlement operations, and the maintenance of boundary marks, as also the procedure for recovery of the expenses.][3]

Presumption as to fixity of rent not to apply where record-of-right has been prepared.

[The importance and value of record-of-rights is apparent from the provisions of sections 103B and 115 of the Bengal Tenancy Act. We have already seen what the presumption is under section 103B.[4] Section 115 lays down that "when the particulars mentioned in section 102, clause (*b*) have been recorded under"

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[1] *Manindra* v. *Upendra*, being S. A. 1724 of 1918, decided by Chaudhuri and Ghosh JJ. on the 23rd April, 1920.

[2] Act VI (B. C.) of 1876 (now repealed).

[3] Act VIII of 1885, Sec. 114. See *Lukhi* v. *Ram*, (1911) 15 C. W. N. 921, *sc.*, 14 C. L. J. 146 and *Secretary* v. *Purnendu*, (1912) 17 C. W. N. 1151 For detailed rules relating to apportionment of costs, see Board's Settlement Manual, Ed. 1908, Part I, Chapter VI and Part II, Chapter XIV, pp. 146 to 150 Also Act III (B. C.) of 1895, Part III, Secs 28 to 32 and 36. See Act VIII of 1885, Sec. 115A as to village boundaries in some cases.

[4] *Ante*, p. 457.

chapter X of the Act in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy].[1]

Enhancement of the rent of a non-occupancy *raiyat*.

The rent of a non-occupancy-*raiyat* may be enhanced under the procedure laid down in section 46 of the Bengal Tenancy Act. The Court is required to find out what rent is fair and equitable, which, in the words of the Bengal Tenancy Act, should be determined by reference to rents generally paid by *raiyats* for lands of similar description and with like advantages in the same village. If the *raiyat* agrees to pay the rent so determined, he is entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement. But on the expiration of that term, his rent may be again varied, and he may be called upon to pay what the Court may consider fair and equitable at the time. The rules as to enhancement of rent are necessarily much the same as those with respect to occupancy-*raiyats*, though non-occupancy *raiyats* have not many of the privileges of occupancy *raiyats*. A revenue-officer may, in a proceeding under chapter X, settle the rents payable by non-occupancy *raiyats* in any local area in accordance with the rules laid down in section 46, and the rent of a holding so settled cannot also be varied within five years, except for alteration of area or improvement by landlord.

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[1] See *Secretary* v. *Kajimuddi*, (1899) I. L. R. 26 Calc. 617; *Pirthi* v. *Basarat*, (1909) I. L. R. 37 Calc. 30, *sc.*, 13 C. W. N. 1149, *sc.*, 10 C. L. J. 343; *Harihar* v. *Ajub*, (1913) I. L. R. 45 Calc. 930; *Muralidhar* v. *Radha*, (1919) 23 C. W. N. 1042 *f. n.*; *Guru* v. *Sarab*, (1919) 23 C. W. N. 1041. But see *Radha* v. *Umed*, (1908) 12 C. W. N. 904 and *Pirthi* v. *Mohamed*, (1916) 1 P. L. J. 67.

LECTURE XII.

NON-AGRICULTURAL LANDS.

Sources of revenue in Ancient India.

In ancient times, the three principal sources of a king's revenue in India were his share in the produce of agricultural lands (*vali*), taxes levied upon homestead lands, either in villages or towns, (*kara*) and taxes realised from persons carrying on trades and industries (*sulka*). The great lawgiver says—".The king, who receiving *vali*, *kara* and *sulka* does not afford protection to his subjects, goes into hell."[1]

Vali.

Of these three sources of royal revenue, the most important was *vali*, and reference was frequently made to it by the text-writers.[2] The Anglo-Indian Government has, like the Mahomedan Government, devoted its best attention to this important branch of royal revenue and to the protection of the agricultural population by whom it is payable.

Kara.

In ancient days and throughout the Hindu period, the word *kara* was used for money-rent payable for land, as distinguished from a share of the produce of agricultural lands. The money-rent payable for homestead lands by artisans, tradesmen and labourers, quit-rent paid by persons who were favoured by the king and who held under royal grants, and all other taxes paid for the use and occupation of land or water came within this branch of revenue. In agricultural villages, a shop-keeper supplying articles to the agricultural population was required to pay the tax known as *kara* for his homestead land. The income from this source, however, was small, and very little importance was

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[1] योऽरक्षन् बलिमादत्ते करं शुल्कञ्च पार्थिवः ।
प्रतिभागञ्च दण्डञ्च स सद्योनरकं व्रजेत् ॥—Manu, Chap. VIII, 307.

[2] *Ante* p. 8.

attached to it, though the freak of language has transmitted the word to the present day, and it has now a much wider significance, and the word *vali* has dropped down in the course of time.

Sulka (duties) which included various items of income, such as market-dues, duties on articles imported and exported and the fees realised from mechanics and artisans, became more and more an increasing source of income with the progress of society. In the later Hindu period and during the Mahomedan period, it played a very important part in the finances of the Indian government. *Sulka.*

The homestead lands occupied by the higher classes of people in Indian society were generally revenue-free, the exemption being due to causes which I have already attempted to explain.[1] The homestead lands of the agricultural population and their *udbastu*, *i.e.*, lands outside the homestead, but necessary for other than agricultural purposes, went along with their arable fields, and even when rent was separately payable for them, the incidents were generally the same as those of arable lands.[2] If a *raiyat* holds a piece of land as a part of an agricultural holding, all the incidents of occupancy-right attach to it, as to the rest of the lands in the holding, If it is not a part of an agricultural holding, but is land in the same village, held under the same landlord and necessary for the habitation of the *raiyat* and his family, local custom and usage regulates its incidents; and, subject to such local custom or usage, the provisions of the Bengal Tenancy Act are applicable.[3] Homestead lands.

[1] *Ante* p. 364.

[2] *Ante* p. 366. See Act VIII of 1885, Sec. 182. *Mohesh* v. *Bisho*, (1875) 24 W. R. 402.

[3] Act VIII of 1885, Sec. 182 *Nyamutoollah* v. *Govind*, (1866) 6 W. R. Act X. 40; *Pogose* v. *Rajoo*, (1874) 22 W. R. 511; *Prosunno* v. *Jagun*, (1881) 10 C. L. R. 25; *Hari* v. *Barada*, (1904) I. L. R. 31 Calc. 1014, *sc.*, 8 C. W. N. 754; *Harihar* v. *Dinu*, (1911) 16 C. W. N 536, *sc.*, 14 C. L. J. 170.

But as regards homestead lands of a character different from either of the above, the Rent Acts of 1859 and 1869 and the Bengal Tenancy Act have no application to them.[1] If a *raiyat* holds agricultural land under one landlord and homestead-land under another, he cannot acquire a right of occupancy in the latter.[2] A person who has acquired a piece of land for residence and not for cultivation is not a *raiyat* with respect to it, if it is not a part of an agricultural holding.[3] The holding of agricultural land in one village does not entitle a person to be a "settled *raiyat*" with respect to homestead-land held in another village or under a different landlord.[2] The mere fact that a person, cultivates land himself or by hired labour does not make him a *raiyat* with respect to land held by him for a shop in an adjoining town. An indigo planter, who has acquired a right of ocupancy with respect to indigo lands, may have his residence in the civil station of the district in which he has his factory, or a tea planter may have similar residence within the municipal

[1] *Kalee* v. *Jankee*, (1867) 8 W. R. 250; *Kali* v. *Kali*, (1869) 2 B. L. R. App. 39, *sc.*, 11 W. R. 183; *Nymoodee* v. *Moncrieff*, (1869) 12 W. R. 140; *Kailas* v. *Durgadas*, (1869) 3 B. L R. 284 (footnote); *Ramdhan* v. *Haradhan*, (1869) 9 B. L. R. 107 (footnote), *sc.*, 12 W. R. 404; *Doorga* v. *Omdadoonissa*, (1872) 17 W. R. 151; *Muddun* v. *Stalkart* (1872) 17 W. R. 441; *Kylash* v. *Woomanund*, (1875) 24 W. R. 412; *Collector* v. *Hakim*, (1876) 25 W. R 136; *Purno* v. *Sadut*, (1878) 2 C. L. R. 31; *Rakhal* v *Dinomoyi*, (1889) I. L R. 16 Calc. 652. See also *Prosunno* v. *Rutton*, (1878) I. L. R. 3 Calc. 696 *sc.*, 1 C. L. R. 577; *Poresh* v. *Watson*, (1878) 3 C. L. R. 543; *Hassan* v. *Gobinda*, (1904) 9 C. W. N. 141; *Monindro* v. *Jagannath*, (1913) 18 C. L. J 324. See also *Shurno* v. *Blumhardt*, (1868) 9 W. R. 552; *Mohur* v. *Ram*, (1874) 21 W. R. 400 and *Raniganj Coal Association* v. *Judoonath*, (1892) I. L. R. 19 Calc. 489.

[2] See *Kuldip* v. *Chhatur*, (1898) 3 C. L. J. 285. But see *Protap* v. *Biseswar*, (1904) 9 C. W. N. 416; *Kripa* v. *Anu*, (1906) 10 C. W. N. 944, *sc*, 4 C. L. J. 332; *Harihar* v *Dinu*, (1910) 16 C. W. N. 536, *sc.*, 14 C. L. J. 170; *Krishna* v *Jadu*, (1915) 19 C. W. N. 914, *sc.*, 21 C. L. J. 475; *Dina* v. *Sasi*, (1915) 20 C. W. N. 550 *sc.*, 22 C. L. J. 219 and *Bhikariram* v. *Maharaj*, (1915) I. L. R. 43 Calc. 195, *sc.*, 25 C. L. J 357.

[3] See *Midnapore Zemindari Co. Ltd* v *Muktakeshi*, (1912) I. L. R. 40 Calc. 402, *sc.*, 17 C. W. N. 615 See also *Gopee* v. *Kedar*, (1875) 23 W. R. 426; *Sahodora* v. *Nabin*, (1914) I. L. R. 42 Calc 638, *sc.*, 19 C. W. N. 1030, *sc.*, 20 C L. J. 494; *Safer* v. *Golam*, (1915) 19 C. W. N. 1236, *sc.*, 22 C. L. J. 249 and the cases cited therein and in footnote 1 above.

limits of the town of Darjeeling, but he is not entitled to claim a right of occupancy with respect to the land held by him for such residence.

The law applicable to non-agricultural lands.

There are no legislative provisions as to non-agricultural lands, except such as are contained in the Transfer of Property Act, the Indian Contract Act and stray sections in the Revenue and Rent laws. Act X of 1859 and Act VIII (B. C.) of 1869, as I have said, did not touch the question of the rights and liabilities of tenants of homestead and other non-agricultural lands, though the ever-increasing population, agricultural as well as non-agricultural, demanded legislation. When Act VIII of 1885 was in course of preparation, an unsuccessful attempt was made to have a comprehensive code for lands agricultural as well as non-agricultural. The rules of justice, equity and good conscience are not always easy of access, and mistakes are common. Custom and local usage are generally difficult to prove. The invocation of the principles of the law of landlord and tenant, as it prevails in England, without reference to the instincts and conditions of life of the people of this country, is occasionally a source of great mischief. Trained in England, trained in thoughts peculiar to the English people, many of the judges and lawyers in this country believe the English rules of land-law to be the most equitable and just, and they are tempted to apply them to tenancy in this country, whenever they have to decide cases according to justice, equity and good conscience. Even the Legislature is not entirely free from this vice of adopting exotic principles, without regard to the customs and habits of thought of the people to be governed by them. To a nation which has the most sacred regard for the land where its ancestors lived, to persons who have extraordinarily deep affection for ancestral homesteads—dearer than heaven itself, the idea that no right can be acquired in homestead land,

however long the period of occupation may be, is repugnant in the extreme. People have generally a notion that the holder of a piece of homestead land acquires by long occupation the right to continue in possession of it, and the legal profession and the judges have very frequently to undeceive them. The hardship of the law, as it is at present administered, is well known. An abortive attempt was made to remedy the evil by legislative enactment, but the opposition was strong. There is now no chance of the legislature interfering in the matter, at least for some time to come.

The Transfer of Property Act not applicable to contracts made before it came into force.

The chapter on Leases in the Transfer of Property Act is short, and the interpretation of the few sections is not always easy. For the sake of convenience, however, I shall adopt the arrangement given in the Act. Much of what has already been said as to the incidents of temporary leases applies to leases of non-agricultural lands. The relationship between the landlord and tenant may, however, be complicated by substantial structures being raised on the land. But it is doubtful how far the rules laid down in the Transfer of Property Act may regulate the incidents of tenancies created before it came into operation. Substantive laws do not, unless retrospective effect be clearly intended to be given, affect the vested rights of parties,[1] and the Transfer of Property Act has also expressly provided in section 2 that "nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability." If, according to the law, as understood before the passing of the Act, a tenant of homestead land, who had been allowed by the landlord to erect buildings on it, had the right to erect further buildings, for the accommodation of himself and his family, section 108, cl. (*p*)

[1] Maxwell on the Interpretation of Statutes, 5th Ed., p. 348.

ought not to affect that right. The Act itself is not exhaustive. It defines and amends certain parts only of the law relating to voluntary transfers *inter vivos*,[1] and does not affect the terms of any contract not inconsistent with the provisions of the Act.[2]

No right can be acquired by mere occupation by a tenant.

As in the case of agricultural lands, the notion that now underlies all tenancies of homestead lands, as also other non-agricultural lands, is that the absolute proprietary right is in the landlord. He may, by creating a subordinate tenure, have his right curtailed to the extent indicated by the contract, but the tenant in actual occupation has ordinarily no other right than what is given expressly or by necessary implication by it. Custom and local usage may import rights and liabilities not inconsistent with the express covenants in the contract. In the absence of any unambiguous condition as to the duration of a lease, a tenant holds from month to month or from year to year,[3] and is liable to be ejected after the service of a proper notice to quit. The tenant acquires no right by mere occupation. He has no statutory right as his agricultural neighbours have. Rent may be enhanced at the option of the landlord after the expiration of the term of the lease, and ordinarily the law places no limit to his demand.

The Revenue Sale Laws as to homestead lands.

Regulation XLIV of 1793, the first law passed for the sale of estates for arrears of revenue, encouraged the erection of buildings or dwelling houses by enacting that a purchaser on a sale for arrears was not entitled to eject tenants who had erected dwelling houses on the lands leased to them by the defaulter.[4] This provision was repeated in the Sale Laws passed from time to time, and has still a place in the existing laws

[1] Act IV of 1882, Preamble.

[2] *Ibid.*, Sec. 2, cl. (*b*).

[3] *Ibid.*, Sec. 106. See *Sulatu* v. *Jadu*, (1904) 8 C. W. N. 774.

[4] Reg. XLIV of 1793, Sec. 9.

for the sales for arrears of revenue[1] or rent.[2] This protection from eviction extends to leases of land whereon manufactories and other permanent buildings[3] have been erected and lands whereon tanks, permanent gardens, plantations, canals, places of worship and burning and burial grounds have been made. [The protection afforded is irrespective of whether the lease was or was not given for the purpose of the work in question, but is of no avail if the work is not in existence.][4] A sale free of encumbrances vests in the purchaser the right to cancel all perpetual leases granted by the defaulter; but though a permanent lease at fixed rent of land made for the erection of buildings or manufactories may be cancelled on a sale for arrears, the tenant must be allowed to remain on the land on payment of fair and eqitable rent, the land being liable to be assessed at a higher prevailing rate, without reference to the original contract. Ejectment does not necessarily follow the cancellation of a lease.

Suits for enhancement of rent of homestead-lands.

A suit for the enhancement of rent of non-agricultural land, when the law does not allow the ejectment of the tenant on the expiry or cancellation of his lease, is maintainable in the ordinary Civil Courts.[5]

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[1] Act XI of 1859, Sec. 37, cl. (4); Act VII (B. C.) of 1868, Sec. 12, cl. (4). *Kiron* v. *Naimuddi*, (1903) I. L. R. 30 Calc. 498; *Wahid* v. *Rahat*, (1908) 12 C. W. N. 1029.

[2] Act VIII of 1885, Sec. 160, cl. (*c*).

[3] Act XI of 1859, Sec. 37; Act VIII of 1885, Sec. 160, cl. (*c*). *Bhago* v. *Ram*, (1877) I L. R. 3 Calc 293; *Ajgur* v. *Asmut*, (1881) I. L. R. 8 Calc. 110; *Gobind* v. *Joy*, (1885) I. L. R. 12 Calc. 327; *Najemoddeen* v. *Hassan*, (1905) 9 C. W. N. 852; *Bisweshwar* v. *Fatteh*, (1905) 10 C. W. N. xxiv; *Sahodora* v. *Nabin*, (1914) I. L. R. 42 Calc. 638, *sc.*, 19 C. W. N. 1030, *sc.*, 20 C. L. J. 494; *Jogendra* v. *Kiran*, (1918) I. L. R. 46 Calc. 730, *sc.*, 23 C. W. N. 315. But see *Makar* v. *Shyama*, (1898) 3 C. W. N lxiii and *Kiron* v *Naimuddi*, (1903) I. L. R. 30 Calc. 498.

[4] *Sahodora* v. *Nabin*, (1914) I. L. R. 42 Calc. 638, *sc.*, 19 C. W. N. 1030, *sc.*, 20 C. L. J. 494.

[5] *Kenny* v. *Greedhur*, [1864] W. R. Gap. Vol. Act X. 9. As regards Sonthal Perganahs, see Commissioner's Civil Appeal No. 83 of 1902 and No. 18 of 1912 and Dy. Commissioner's Rent Appeal No 6 of 1912. But see *Satis* v. *Jatindra*, (1902) 7 C. L. J. 284, which, however, does not give the facts of the case.

There were many instances of enhancement of rent through the medium of the Revenue Courts, when Act X of 1859 was in force and the Act was supposed to apply to all kinds of tenancies, but according to the view taken by most of the judges of the High Court,[1] the Revenue Courts had no jurisdiction to entertain suits with respect to homestead-lands, and the decrees passed by them were *ultra vires*. If a tenant, however, has paid at the enhanced rate according to any decree passed by a Revenue Court, that fact will go against the permanency of the tenure, but the judgment and decree are inadmissible for any other purpose, having been passed by an incompetent court. There is no codified law for a suit for enhancement of rent of non-agricultural lands. Section 9 of the Code of Civil Procedure (Act V of 1908) empowers the Civil Courts to entertain and try all suits of a civil nature; and in trying a suit for the enhancement of rent of non-agricultural land, a Court must act according to principles of justice, equity and good conscience.

Notice of enhancement.

It has been held that a proper notice of enhancement is a necessary preliminary to a suit for the enhancement of rent of non-agricultural land, just as it was in suits for enhancement under Act X of 1859 and Bengal Act VIII of 1869.[2] But with the repeal of the procedure laid down in those Acts and the substitution of the procedure in Act VIII of 1885 dispensing with the previous service of any notice, the procedure in suits for enhancement of rent of non-agricultural lands ought to be changed as an unnecessary preamble. I think no notice will now be deemed necessary, and our Courts must determine what rent is fair and equitable, whenever rent is enhanceable by suit and the landlord wants an increase. A decree for enhancement may be

[1] *Ante* pp. 364-5.

[2] *Ante* pp. 439-40.

directed to come into operation at a reasonable time subsequent to the institution of the suit.

Plantations and gardens.

Tenants holding permanent gardens and plantations are protected, if the occupation of the tenant has been long enough for the acquisition of occupancy-right; but the protection afforded by the Sale-Laws extends to all leases without reference to the period of occupation by the tenant. The general incidents of the tenancy of land used for purposes other than agricultural are the same in all cases.[1] *Jalkars* or fisheries, as also lands used for *hats*, *bazars* and shops come within the same category.

Duration of leases.

A lease is a transfer of the lease-hold premises to be held by the lessee under the covenants and conditions expressed in the contract or implied by law, and the lessor may create any interest in the lessee, sanctioned by the policy of law, within the limit of his own interest in the property.[2] A full owner in possession may demise land on any terms and conditions, consistent with the policy of law. A contract of lease binds the heirs, representatives and assigns, of the lessor as well as the lessee with respect to covenants that run with the lands.[3] Even if the lessor is not in possession and has merely a right to possession, he may grant a lease which is to come into operation as soon as he is entitled to actual possession. A mere right of entry, whether immediate or future, may be demised by a lease; but a lessor who has a right to re-enter only on a breach of condition by a lessee cannot give the right to a new lessee to sue upon the breach

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[1] *Gobind* v. *Joy* (1885) I. L. R. 12 Calc. 327. See also *Mafiuddin* v. *Korbad*, (1903) I. L. R. 31 Calc. 393; *Najemoddeen* v. *Hassan*, (1905) 9 C. W. N. 852; *Bisweshwar* v. *Fatteh*, (1905) 10 C. W. N. xxiv and *Jogendra* v. *Kiran*, (1918) I. L. R. 46 Calc. 730, *sc.*, 23 C. W. N. 315.

[2] Act IV of 1882, Secs. 105 and 108, cl. (*j.*)

[3] *Ante* pp. 250-1.

of the condition.[1] Neither can a person, entitled to the possession of immovable property on the death of a Hindu female, bind himself by a lease executed by him during the life-time of such a female, his right being a mere possibility; but he may give a valid title to a lessee, which may enure after her death, by assenting to the lease. The holder of an estate for life or a person holding an estate for a term of years may grant leases, but they cannot enure beyond the life or the term of the lease of the grantor himself. On the determination of the lease, the true owner is entitled to the possession of the land in the same state in which it was at the date of the demise.

Tenancies from year to year.

In the absence of a contract or distinct proof of custom or local usage, a tenancy for manufacturing purposes is deemed, according to the Transfer of Property Act, to be a lease from year to year, and a tenancy of ordinary homestead land to be a lease from month to month.[2] Leases of land in the *mofussil* are, however, with rare exceptions, *annual*, the rent being payable according the Bengali calendar, where the Bengali year prevails, or the Fusli or Wilaity calendar. In Bengal proper, a year of tenancy generally ends on the last day of Chaitra, and in Bihar and Orissa on the last day of the lunar month of Bhadra.[3] Notwithstanding what is contained in section 106 of the Transfer of Property Act, the vast majority of leases of non-agricultural lands are thus from year to year, terminable only at the end of the year. Tenancies from month to month are only found to exist in very populous cities and within municipal limits. In fact, having regard to the well known practice in the *mofussil* of the

[1] *Hunt* v. *Bishop*, (1853) 22 L. J. Ex. 337; *Hunt* v. *Remnant*, (1854) 23 L. J. Ex. 135.

[2] Act IV of 1882, Sec. 106.

[3] See *Gopi* v. *Abdul*, (1905) 22 C.L.J. 74; *Jebendra* v. *Syama*, (1906) 11 C. W. N. 1124; *Haridas* v. *Upendra*, (1906) 16 C. L. J. 74.

country, leases of immovable property ought to be held, from very slight evidence, to be from year to year, in the absence of well-proved contract or local custom or usage to the contrary, notwithstanding that the Transfer of Property Act has laid down a contrary rule.[1] A tenancy from year to year can be determined only by a six-months' notice to end with the last day of the year.[2] [The tendency of later judges is to take a broader view and it has been repeatedly held that only reasonable notice is necessary.[2] The ruling in *Kishorimohun Roy Choudhury* v. *Nundkumar Bhowmick*, has been distinguished from in several later cases.[2] Moreover, there may be yearly non-agricultural tenancies to which the Transfer of Property Act may not apply.[2]]

Transferability.

These leases are transferable absolutely or by way of mortgage, though, notwithstanding the transfer, the original lessee does not cease to be subject to any of the liabilities attaching to the lease,[3] [unless the lessor consents to treat the assignee on the footing of the original lessee.[4]] The transferee of such interest may again transfer it.[3] But the express terms of a contract[5] or any local usage, which must be distinctly proved in each case, may make a lease of non-agricultural land non-transferable. The fact that in an ordinary

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[1] *Kishori* v. *Nund*, (1897) I. L. R. 24 Calc. 720.

[2] *Kishori* v. *Nund*, (1897) I. L. R. 24 Calc, 720; *Hemanginee* v. *Srigobinda*, (1901) I. L. R. 29 Calc. 203, *sc.*, 6 C. W. N. 69; *Raj* v. *Kailas*, (1915) 22 C. L. J. 78. But see *Digambar* v. *Jhari*, (1899) I. L. R. 26 Calc. 761; *Ismail* v. *Jaigun*, (1900) I. L. R. 27 Calc. 570, *sc.*, 4 C. W. N. 210; *Ram* v. *Maangru*, (1900) 4 C. W. N. 792; *Durga* v. *Rakhal*, (1901), 5 C. W. N. 801; *Sulatu* v. *Jadu*, (1904) 8 C. W. N. 774; *Pratap* v. *Harihar*, (1909) I. L. R. 36 Calc. 927, *sc.*, 13 C. W. N. 949; *Narpat* v. *Hangra*, (1911) 16 C. L. J. 30; *Durga* v. *Rajendra*, (1913) 17 C. W. N. 1073. See also *Radha* v. *Rakhal*, (1885) I. L. R. 12 Calc, 82 and *Charu* v. *Satya*, (1918) 23 C. W. N. 641.

[3] Act IV of 1882, Sec. 108, cl. (*j*). *Habul* v. *Kashimani*, (1900) 5 C. L. J. 205; *Hem* v. *Bhobo*, (1905) 2 C. L. J. 69*n*.

[4] *Smith* v. *Gronow*, [1891] 2 Q. B. 394; *Sasi* v. *Tara*, (1895) I. L. R. 22 Calc. 494.

[5] Act IV of 1882, Secs. 10, 111 (9) (1). *Williams* v. *Earle*, (1868) L. R. 3 Q. B. 739; *Lepla* v. *Rogers*, [1893] 1 Q. B. 31 (37).

lease of agricultural land, the right of an occupancy or non-occupancy *raiyat* is not transferable by law, leads people to think that leases of homestead lands are also non-transferable. Before the Transfer of Property Act came into force, the law was supposed to be that without an express contract and in the absence of local usage, tenures of non-agricultural land were not transferable.[1] In *Narendra Narayan Roy Chowdhry* v. *Ishan Chandra Sen*,[2] it was held that on the transfer of a right of occupancy, the transferee, in the absence of custom or established local usage, became a trespasser; and the same rule was applied to leases of non-agricultural lands. But in *Benimadhab Banerjee* v. *Jai Krishna Mookerjee*,[3] Peacock C. J., said,—"Speaking for myself, I should say that, if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest, he does not necessarily get rid of his liability to pay the rent reserved. A tenant, who assigns his interest does not in my opinion commit such forfeiture of his rights as to entitle the lessor to treat such rights as altogether non-existent, and to turn him out of possession."

Heritability

In the absence of a contract or local usage to the contrary, the right of a lessee is heritable and is capable

[1] *Kripamoyi* v. *Durga*, (1887) I. L. R. 15 Cak. 89. See *Hari* v. *Raj*, (1897) 2 C. W. N. 122; *Madhab* v. *Bejoy*, (1900) 4 C. W. N. 574; *Hanuman* v. *Deo*, (1903) 7 C. L. J. 309; *Madhu* v. *Kamini*, (1905) I. L. R. 32 Calc. 1023, *sc.*, 9 C. W. N. 895; *Ram* v. *Hari*, (1906) 7 C. L. J. 107; *Hiramoti* v. *Annoda*, (1908) 7 C. L. J. 553; *Ananda* v. *Gobinda*, (1915) 20 C. W. N. 322; *Ambica* v. *Baldeolal*, (1916) 20 C. W. N. 1113, *sc.*, 1 P. L. J. 253 and *Manmoth* v. *Anath*, (1918) 23 C. W. N. 201. See also *Bani* v. *Jai*, (1869) 7 B. L. R. 152, *sc.*, 12 W. R. 495.

[2] (1874) 13 B. L. R. 274, *sc.*, 22 W. R. 22. See *ante* pp. 339-40.

[3] (1869) 7 B. L. R. 152, *sc.*, 12 W. R. 495.

of being bequeathed according to the laws of testamentary and intestate succession.[1]

Misuse of land during lease.

During the continuance of the lease, the lessee is bound to use the land as a person of ordinary prudence would do.[2] He must not use or permit another to use it for a purpose other than that for which the lease has been granted.[3] Land let out for use as homestead ought not to be used for digging a tank,[4] nor has the tenant the right to dig earth for the purpose of making bricks. Such a use of the land is opposed to the original purpose of the tenancy and is supposed to deteriorate its value.[5] [But every use of land opposed to the original purpose of the tenancy does not amount to waste, and it has been held that planting of trees is not always so.][6]

Working mines or quarries.

In the absence of an express contract, a temporary lessee is also not entitled to work mines or quarries, not open when the lease was granted, or to commit any other act which is permanently injurious to the land demised.[7] But I think a person, holding under a permanent lease in which there is no reversion to the landlord, has the right to open mines, and if he does so,

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[1] *Kishorilal* v. *Krishnakamini*, (1910) I. L. R. 37 Calc. 377, *sc.*, 11 C. L. J. 401; *Harilal* v. *Rupa*, (1912) 17 C. L. J. 459 and cases cited in those cases.

[2] Act VIII of 1885, Sec. 108, cl. (*o*); *Ramandhan* v. *Zamindar* of *Ramnad*, (1893) I. L. R. 16 Mad. 407; *Orr* v. *Mrithyunjaya*, (1900) I. L. R. 24 Mad. 65. See also *Meux* v. *Cobley*, [1892] 2 Ch. 253.

[3] *Bholai* v. *Rajah of Bansi*, (1881) I. L. R. 4 All. 174: *Noyna* v. *Rupikun*, (1882) I. L. R. 9. Calc. 609; *Harak* v. *Kirat*, (1909) 10 C. L. J. 595. But see *Madho* v. *Sheo*, (1889) I. L. R. 12 All. 419; *Venkayya* v. *Ramasami*, (1898) I. L. R. 22 Mad. 39 and *Krisna* v. *Venkatappa*, (1899) 9 M. L. J. 146.

[4] But see *Joy* v. *Bipro*, (1886) I. L. R. 14 Calc. 236; and *Atarjan* v. *Ashak*. (900) 4 C. W. N. 788.

[5] *Tarini* v *Debnarayan*, (1871) 8 B. L. R. App. 69; *Monindro* v. *Moneeruddeen*, (1873) 11 B.L.R. App. 40; *Nicholl* v. *Tarinee*, (1875) 23 W. R. 298: *Lakshmana* v. *Ramachandra*, (1887) I. L. R 10 Mad. 351. See also *Girish* v. *Sirish*, (1904) 9 C. W. N. 255.

[6] *Vasudevan* v. *Valia*, (1900) I. L. R. 24 Mad. 47 (57); *Raja of Cochin* v. *Kizhayil*, (1916) I. L. R. 40 Mad. 603.

[7] In re *Purmananandas*, (1882) I. L. R. 7 Bom 109.

his act, unless there is an express covenant to the contrary, does not amount to legal waste. When the lease is granted by a proprietor not for any specified purpose, and he reserves only the right to receive quit-rent in perpetuity, such a use of the land cannot affect him. Permanent leases are practically conveyances of land, and it seems to me that the lessees have full right to use the lands demised as they please, provided there is ample security for the proprietors' dues. *Prima facie*, the owner of the surface is entitled *ex jure naturæ* to every thing beneath or within it.[1] The working of mines does not, as a rule, permanently injure the land or destroy it to the detriment of the landlord's interest. The same thing may be said as to the working of quarries. The evident intention of the framers of the Transfer of Property Act, in inserting clause (*o*) in section 108, is to prevent temporary lessees from doing such acts as may affect the value of the demised premises, and to secure, on the termination of a lease, the restoration of the property, in as good a condition as it was at the time when the tenant was first put into possession. In cases of permanent leases, their termination is never in the contemplation of the parties. It is no doubt the duty of a tenant to keep the property, as much as possible, in the same condition as it was at the beginning of the lease, but the duty is imperative

[1] *Smith* v. *Darby*, (1872) L. R. 7 Q. B. 716 (722); *Newcomen* v. *Coulson*, (1877) 5 Ch. D. 133 (142); *Egremont Burial Board* v. *Egremont, Iron Ore Co.*, (1880) 14 Ch. D. 158 (162); *Sriram* v. *Hari*, (1905) I. L. R. 33 Calc. 54, *sc.*, 10 C. W. N. 425, *sc.*, 3 C. L. J. 59; *Shama* v. *Abhiram*, (1906) I. L. R. 33 Calc. 511, *sc.*, 10 C. W. N. 738, *sc.*, 3 C. L. J. 306; *Megh v. Rajkumar*, (1906) I. L. R. 34 Calc. 358, *sc.*, 11 C. W. N. 527, *sc.*, 5 C. L. J. 208; *Brojanath* v. *Durga*, (1907) I. L. R. 34 Calc. 753, *sc.*, 12 C. W. N. 193, *sc.*, 5 C. L. J. 583. All the last four decisions were overruled by the Judicial Committee in *Hari* v. *Sriram*, (1910) I. L. R. 37 Calc. 723, *sc.*, L. R. 37 I. A. 136, *sc.*, 14 C. W. N. 746, *sc.*, 11 C. L. J. 653; *Abhiram* v. *Shyama*, (1909) I. L. R. 36 Calc. 1003, *sc.*, L. R. 36 I. A. 148, *sc.*, 14 C. W. N. 1, *sc.*, 10 C. L. J. 284; *Giridhari* v. *Megh*, (1917) I. L. R. 45 Calc. 87, *sc.*, L. R. 44 I. A. 246, *sc.*, 22 C. W. N. 201, *sc.*, 26 C. L. J. 584 and *Durga* v. *Braja*, (1912) I. L. R. 39 Calc. 696, *sc.*, L. R. 39 I. A. 133, *sc.*, 16 C. W. N. 482, *sc.*, 15 C. L. J. 461 respectively.

only where the landlord has any thing to lose by a change inconsistent with the original purposes of the tenancy. A lessee or a tenant for life or for years has, as between himself and his lessor or the reversioner, the right to work open mines and quarries.[1] But he is not entitled, it seems, to open or work a new mine or quarry. Such an act on his part amounts to legal waste.[2] The words of section 108, cl. (*o*) are, however, very broad, and apparently includes leases of all kinds, irrespective of their duration and nature. You should remember that the law does not import any distinction between the surface and the underground, when the contract of lease does not convey it in express terms.

Right to minerals according to Hindu Law.

According to the law as laid down by the great law-giver of ancient India, the king is entitled to a half share of hidden treasures underneath the earth and of minerals, as his share for the protection afforded by him to his subjects.[3] Medhatithi, in commenting on the word 'mineral' (*dhatu*), includes in it gold, silver, iron, vermillion, collyrium and all other minerals to be worked out of the earth or found in hills and other

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[1] *Clegg* v. *Rowland*, (1866)) 2 Eq. 160; *Elias* v. *Snowdon Slate Quarries Co*, (1879) 4 App. Cases 454; *Tucker* v. *Linger*, (1883) 8 App. Cases 508; *Campbell* v. *Wardlaw*, (1883) 8 App. Cases 641.

[2] Act IV. of 1882, Sec. 108, cl. (*o*). As regards *ghatwali* lands, see p. 297. See also *Gordon Stuart & Co. v. Seobas*, [1864] W. R. Gap. Vol. 370 and foot note 2 of previous page. See also *Tituram* v. *Cohen*, (1901) 1 C. L. J. 517; *Mahomed* v. *Dhojamani*, (1905) 2 C. L. J. 20; *Tituram* v. *Cohen*, (1905) I. L. R. 33 Calc. 203, *sc.*, L. R. 32 I. A. 185, *sc.*, 9 C. W. N. 1073, *sc.*, 2 C. L. J. 408; *Jyoti* v. *Lachipur Coal Co*, (1911) I. L. R. 38 Calc. 845, *sc.*, 16 C. W. N. 241, *sc*, 14 C. L. J. 361; *Kunja* v. *Durga*, (1914) I. L. R. 42 Calc. 346, *sc.*, 19 C. W. N. 203, *sc.*, 20 C. L. J. 304; *Christian* v. *Narbada*, (1914) 19 C. W. N. 796, *sc.*, 20 C. L. J. 527; *Nowaghur Coal Co. Ld.* v. *Sashi*, (1914) 19 C. W. N. 375; *Nawagarh Coal Co.* v. *Behari*, (1916) 1 P. L. J. 275 and *Sashi* v, *Jyoti*, (1916) I. L. R. 44 Calc. 585, *sc.*, L. R. 44 I. A. 46, *sc.*, 21 C. W. N. 377, *sc.*, 25 C. L. J. 265.

[3] निधीनां तु पुराणानां धातूनामेव च क्षितौ।
अर्द्धभाग्रक्षणाद्राजा भूमेरधिपतिर्हि सः॥

Manu, Chap. VIII., *v.* 39

places.[1] He adds that the king's share is not necessarily a half, the word 'half' (*ardha*) being illustrative only, the king being entitled to a sixth or any other share according to custom. The text and the gloss, however, refer to a state of things quite different from what we have at the present day. The anglo-Indian Government has, by the Permanent Settlement, accepted fixed sums as revenue in lieu of all the rights it had either as proprietor of the soil or as the protector of its subjects. It reserved no right whatsoever, except as to treasures under the Treasure Trove Act.[2] Minerals must necessarily pass with the right to the surface. The present theory of the proprietary right of the Government is not consistent with the Hindu theory of the king's right to a share of the produce or of hidden treasures and minerals, and the Anglo-Indian Government, having accepted and acted upon the theory of the proprietorship of the soil, cannot now claim a share of the minerals on the latter theory. The transfer to permanent tenure-holders of the right which the *zemindars* derived from the government necessarily conveys the right to the minerals underneath.[3]

Erection or permanent structures.

The lessee must not, without the lessor's consent, erect on the property any permanent structures.[4] If land is let out for use as homestead by raising structures, such as are ordinarily used in this country—the structures being easily removable,—the erection by the tenant of brick-houses, not easily removable is an use of the land to which the landlord may object. If, however, the

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[1] सुवर्णरूप्यादिबीजमिदं सिन्दूरकालाञ्जनाद्याश्च धातवः। सुवर्णाद्याकरभूमीर्यः खनति योवा पर्वतादिषु गैरिकादिकादिधातूनुपजीवति * * *। अर्धभागिति अर्धशब्दो शमात्रवचनः—Medhatithi's Commentary. See also Nandan's Commentary—धातूनां हेमरूप्यादिलोहगणानां मृत्तिकाविशेषाणाम्।

[2] Act VI of 1878.

[3] See foot note 2 of page 482 and foot note 1 of page 483.

[4] Act IV of 1882, Sec. 108, cl. (*p*).

landlord, instead of objecting to the erection of a brick-house, remains passive and allows it to be built, knowing that his security for rent would be enormously increased by it, he should not afterwards be allowed to sue the tenant for misuse of the land.[1] The landlord may restrain his tenant from erecting without his consent substantial buildings by getting an injunction issued in time;[2] but it is contrary to all principles of equity and good conscience to allow him to insist upon the removal of a building at the termination of the lease. It is, therefore, an obligation in the tenant not to erect such building as would throw obstacles to the landlord's undoubted right of re-entry at the termination of the lease. The right of the tenant to remove, during the continuance of the lease, all things he has attached to the earth[3] is one for his own benefit, which he may or may not avail himself of. If he wishes to continue on the land having without objection raised during the term of the lease substantial structures, the landlord cannot eject him. No Court will permit a man knowingly though passively to encourage another to lay out money in improving his property, and then to assert his legal right against him, without, at least, making him pay full compensation for the money that has been

Waiver.

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[1] *Noyna* v. *Rupikun*, (1882) I. L. R. 9 Calc. 609. See also *Beni* v. *Jai*, (1869) 7 B. L. R. 152, *sc.*, 12 W. R. 495; *Gopee* v. *Liakut*, (1876) 25 W. R. 211 and *Ambica* v. *Baldeolal*, (1916) 20 C. W. N. 1113, *sc.*, 1 P. L. J. 253. But silence does not always create estoppel: Bigelow on Fraud, (Ed. 1888), Vol. I, p 597 and *Joy v. Sreenath*, (1904) I. L. R. 32 Calc. 357, *sc.*, 1 C L. J. 23; *Jakhomull* v. *Saroda*, (1908) 7 C. L. J. 604. The onus is heavy on the tenant: *Secretary* v. *Lachmeswar*, (1888) I. L R. 16 Calc. 223, *sc*, 16 I. A. 6; *Beni* v. *Kundan*, (1899) I. L. R. 21 All. 496, *sc.*, L. R. 26 I. A. 58, *sc.*, 3 C. W. N. 502; *Ismail* v. *Jaigun*, (1900) I. L. R. 27 Calc. 570, *sc.*, 4 C. W. N. 210; *Ismail* v. *Broughton*, (1901) 5 C. W. N. 846.

[2] *Jagganath* v. *Prosonno*, (1881) 9 C. L. R. 221: See also *Prosunno* v. *Jagun*, (1881) 10 C. L. R. 25.

[3] Act IV of 1882, Sec. 108, cl. (*h*). *Angammal* v. *Aslami*, (1913) I. L. R. 38 Mad. 710; *Kanai* v. *Rasik*, (1914) 19 C. W. N. 361.

expended.[1] Equity intervenes and prevents the landlord from turning out a tenant who has erected substantial structures on the land,[2] to his knowledge or with his consent, which may be presumed from his previous non-action. If he waits till the building is completed, and then asks a Court of justice to eject the tenant or have the building removed during the pendency of the lease, a mandatory injunction will not generally be granted. It is always in the discretion of the Court to grant injunctions or not. But Courts of law are always reluctant to help a man, though he may have an undoubted right, if he is guilty of laches.[3] The circumstances of each case must be taken into consideration,[4] and if the injured man comes into Court at the first opportunity after the building has been commenced, an injunction may be granted. But if the plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted. A mere notice not to continue

Injunction.

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[1] *Kinoo* v. *Nusseerooddeen*, (1872) 17 W. R. 97; *Yeshwadabai* v. *Ramchandra*, (1893) I. L. R. 18 Bom. 66; *Dattaji* v. *Kalba*, (1896) I. L. R. 21 Bom. 749; *Angammal* v. *Aslami*, (1913) I. L. R. 38 Mad. 710. See also *Dunia* v. *Gopi*, (1895) I. L. R. 22 Calc. 820 for compensation on acquisition by municipality.

[2] *Dann* v. *Spurrier*, (1802) 7 Ves. Jn. 131, *sc.*, 6 R R. 119; *Rochdale Canal Co.* v. *King*, (1853) 16 Beav. 630, *sc.*, 22 L. J. Ch. 604, *sc.*, 17 Jur. 1001, *sc.*, 96 R. R. 288; *Somerset Coal Canal Co.* v. *Harcourt*, (1857) 24 Beav. 571, *sc.*, 53 E R. 478; *Ramsden* v. *Dyson*, (1865) L R. 1 E. & I. A. C. 129; *Rama* v. *Jan*, (1869) 3 B. L. R. A. C. 18; *Beni* v. *Jai*, (1869) 7 B. L. R. 152, *sc.*, 12 W. R. 495; *Durgaprasad* v *Brindaban*, (1871) 7 B. L. R. 159, *sc.*, 15 W. R. 275; *Shibdas* v. *Bamandas*, (1871) 8 B. L. R. 237, *sc.*, 15 W. R. 360; *Braja* v. *Stewart*, (1871) 8 B. L. R. App 51, *sc.*, 16 W. R. 216. See also *Gopee* v. *Liakut*, (1876) 25 W. R. 211; *Krishna* v. *Mahomed*, (1899) 3 C. W. N. 255 and *Ismail* v. *Broughton*, (1901) 5 C. W. N. 846. See Act IV of 1882, Sec. 15.

[3] See *Shamnugger Jute Factory Co.* v. *Ram*, (1886) I. L. R. 14 Calc. 189.

[4] Acquiescence is a matter of legal inference: *Beni* v. *Kundan*, (1899) I. L. R. 21 All. 496, *sc.*, L. R. 26 I. A. 58, *sc.*, 3 C. W. N 502; *Ananda* v. *Parbati*, (1906) 4 C. L. J. 198; *Narasayya* v. *Raja of Venkatagiri*, (1910) I. L. R. 37 Mad. 1; *Angammal* v. *Aslami*, (1913) I. L. R. 38 Mad. 710.

the erection of a building, when not followed by legal proceedings, is not a sufficiently special circumstance for granting such a relief.[1] It has, however, been held in some cases that a tenant's *bona fides* should be taken into consideration, and if he knowingly did an act to the prejudice of his landlord, equity would not help him.[2]

Presumption of permanency from long occupation.

You have seen that under the law, as is now administered, occupation of homestead-land, whatever the period may be, does not create in the tenant any right to continue on the land after the determination of the lease, which may be effected by a legal notice to quit.[3] A presumption of permanency may, however, arise from long occupation at uniform rent, if the original grant is lost and is not provable. The conduct of the parties may raise an inference that the *lost grant* created a permanent tenure. It has been held that where land is let out for the tenant's residence, and he has, with the knowledge of the landlord, laid out large sums upon the land in buildings or other substantial improvements, that fact coupled with long continued enjoyment of the property may justify the presumption of a permanent grant, if the original conditions of the tenancy are incapable of

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[1] *Benode* v. *Soudaminey*, (1889) I. L. R. 16 Calc. 252 and the cases therein cited; *Ulagappan* v. *Chidambram*, (1906) I. L. R. 29 Mad. 497.

[2] *Furzund* v. *Aka*, (1878) 3 C. L. R. 194. See also *Naunihal* v. *Rameshar*, (1894) I. L. R. 16 All. 328; *Premji* v. *Cassum*, (1895) I. L. R. 20 Bom. 298; *Husain* v. *Gavardhandas*, (1895) I. L. R. 20 Bom. 1; *Jugmohandas* v. *Pallonjee*, (1896) I. L. R. 22 Bom. 1; *Krishna* v. *Mahomed*, (1899) 3 C. W. N. 255; *Beni* v. *Kundan*, (1899) I. L. R. 21 All. 496, *sc.*, L. R. 26 I. A. 58, *sc.*, 3 C. W. N. 502; *Ismail* v. *Jaigun*, (1900) I. L. R. 27 Calc. 570, *sc.*, 4 C. W. N. 210 and *Narasayya* v. *Raja of Venkatagiri*, (1910) I. L. R. 37 Mad. 1. See also *Stocking* v. *Tata Iron and Steel Co.*, (1917) 2 P. L. J. 600.

[3] *Master etc. of Clare Hall* v. *Harding*, (1848) 6 Hare 273, *sc.*, 17 L. J. Ch. 301, *sc.*, 12 Jur. 511, *sc.*, 77 R. R. 115; *Addaito* v. *Peter*, (1872) 13 B. L. R. 417 (note), *sc.*, 17 W. R. 383; *Mohur* v. *Ram*, (1874) 21 W. R. 400; *Prosunno* v. *Rutton*, (1878) I. L. R. 3 Calc. 696, *sc.*, 1 C. L. R. 577; *Tarukpodo* v. *Shyama*, (1881) 8 C. L. R. 50; *Prosunno* v. *Jagun*, (1881) 10 C. L. R. 25; *Arut* v. *Prandhone*, (1884) I. L. R. 10 Calc. 502.

being ascertained.[1] If a tenant, holding under a temporary lease, of which the origin is known or is easily provable, erects buildings on his land, it may be said, that he does it at his own risk, and, as held in some cases, the tenant may not be entitled to plead the landlord's acquiescence in a suit for ejectment.[2] A Court of Justice may also, in such a case, require the landlord to pay compensation to the tenant before granting a decree for ejectment,[3] or may direct a removal of the buildings.[3] But if the origin of the tenancy is unknown, and the exact terms are difficult to ascertain on account of unavoidable loss of evidence, and the tenant's occupation is not sufficiently long, the landlord should should have no other right than to obtain fair and equitable rent, there being a presumption of the existence of a covenant between the parties that there should be no ejectment of the tenant, though the rent may be enhanced.

Subleases

In the absence of any contract express or implied, a lessee holding non-agricultural land either for a term of years, or year by year, may transfer, by way of sublease, the whole or any part of his interest in the property.

[1] *Prosunno* v. *Jagun*, (1881)10 C. L. R. 25; *Gungadhur* v. *Ayimuddin*, (1882) I. L. R. 8 Calc. 960, *sc.*, 11 C. L. R 281. See also *Nabu* v. *Cholim*, (1898) I. L. R. 25 Calc. 896, *sc.*, 2 C. W. N. 405; *Krishna* v. *Mahomed*, (1899), 3 C. W. N. 255; *Durga* v. *Rakhal*, (1901) 5 C. W. N. 801; *Caspersz* v. *Kader*, (1901) I. L. R. 28 Calc. 738, *sc.* 5 C. W. N. 858; *Ismail* v. *Broughton*, (1901) 5 C. W. N 846; *Upendra* v. *Ismail*, (1904) I. L. R 32 Calc. 41, *sc.*, L. R. 31 I. A. 144, *sc*, 8 C. W. N. 889; *Nilratan* v. *Ismail*, (1904) I. L. R. 32 Calc 51, *sc.*, L. R. 31 I. A. 149, *sc.*, 8 C. W. N. 895; *Promada* v. *Srigobind*, (1905) I. L. R. 32 Calc. 648, *sc.*, 9 C. W. N. 463; *Grant* v. *Robinson*, (1906) 11 C. W. N. 242, *sc.*, 5 C. L. J. 178; *Surja* v. *Bhaba*, (1908) 12 C. W. N. ccxxxvi; *Moharam* v. *Talamuddin*, (1911) 16 C. W. N. 567, *sc.*, 15 C. L. J. 220 and *Barada* v. *Prasanno*, (1912) 16 C. W. N. 564.

[2] See *Ismail* v. *Kali*, (1901) 6 C. W. N. 134; *Kandarpa* v. *Jogendra*, (1910) 12 C. L. J. 391; *Narasayya* v. *Raja of Venkatagiri*, (1910) I. L R. 37 Mad. 1; *Barada* v. *Prasanno*, (1912) 16 C. W. N. 564 and *Angammal* v. *Aslami*, (1913) I. L. R. 38 Mad. 710.

[3] See *Kunhammed* v. *Narayanan*, (1889) I. L. R. 12 Mad. 320; *Dattatraya* v. *Shridhar*, (1892) I. L. R. 17 Bom. 736; *Yeshwadabai* v. *Ramchandra*, (1893) I. L. R. 18 Bom. 66 and *Dattaji* v. *Kalba*, (1896) I.L.R. 21 Bom. 749. See also *Shibdas* v. *Bamandas*, (1871) 8 B. L. R. 237, *sc.*, 15 W. R. 360, a case before Act IV of 1882.

But the sub-lessee can have no right higher than that of the lessee, and is liable to be evicted on the determination of the lessee's interest, except in cases of surrender by the lessee.[1]

Leases by Hindu widows.

Instances of leases for building purposes, granted by Hindu widows, are frequent in this country.[2] Such a lease is good during the life-time of the widow; and in cases of proved legal necessity, the after-taker may also be bound by the conditions of the lease. But supposing the after-taker, on the death of a Hindu widow, is not so bound, a question has arisen as to the right of the lessee to the buildings or substantial structures erected on the land demised to him. Is he entitled to remove materials of the buildings? There can be no question as to unsubstantial structures erected by a tenant,—structures easily removable. Narada speaking of the right of a tenant holding under a terminable lease says —"If a man builds a hut on land belonging to another and pays rent for it, he should be permitted to take with him the materials such as grass, wood, and bricks when leaving the land."[3] But a reservation was made by the sage, if the person in occupation, by erecting structures, was paying no rent for the land; and in such a case, he should not be permitted to take away the materials, and, on his leaving the land, they became the property of the land-owner.[4] Jagannatha,[5] comment-

Fixtures.

[1] Act IV. of 1882, Sec. 108, cl. (*j*) and Sec. 115. *Ante* p 267-8.

[2] See *Dattaji v. Kalba* (1896) I. L. R. 21 Bom. 749.

[3] परभूमौ गृहं कृत्वा क्षौमं दत्त्वा वसेत्तु यः।
स तद्गृहीत्वा निर्गच्छेत् तृणकाष्ठादि चेष्टकाम् ॥—Narada, as quoted in 'Parasaramadhava,' Bibliotheca Indica, Parasarasmriti, Vol. III, p. 236.

[4] क्षौमादिना वसित्वा तु परभूमावनिश्चित।
निर्गच्छंस्तृणकाष्ठादि न गृह्णीयात् कथञ्चन ॥
यानीह तृणकाष्ठानि त्विष्टकाविनिवेशिताः।
विनिर्गच्छंस्तु तत्सर्वं भूमिस्वामिनि वेदयेत् ॥
Bibliotheca Indica, Parasarasmriti, Vol. III, p. 236.

[5] Digest, Book 3, Ch. I, Sec. 3, Sxcix (see Colebrookis Translation.)

ing on the above texts, would extend the rule to all classes of tenants. It would seem from the texts of Narada and the comments by Jagannatha, that if a tenant quitted his homestead-land, whatever his status was, after paying all that was due to the land-owner for rent, he was entitled to take away the materials, but he was not entitled to do so, until he discharged the landlord's dues. The materials of the tenant's structures became the landowner's property, the price of the same, on the tenant's abandonment, being set off against unpaid rent. Thus according to the ancient sages and the Hindu law as understood at the early period of the British rule in India, the technical rule of English law *quidquid plantatur solo solo cedit*[1] was not applicable. The Hidayah also says :—"If a person hire unoccupied land, for the purpose of building or planting,.... it is incumbent on the lessee to remove the buildings or trees, &c."[2] No distinction was made between substantial and unsubstantial structures. The question arose early, as to the applicability in India of the English law as to fixtures, and the Sudder Dewany Adawlut held that it did not prevail in this country.[3] The custom and usages of the country and the law as laid down by the sages were given effect to, even where the relationship of landlord and tenant did not exist between the parties.[3] *In the matter of the petition of Thakoor Chunder Paramánick*

[1] The maxim is not now strictly observed even in England: *Elliott* v. *Bishop*, (1854) 10 Exch. 496 (507), *sc.*, 3 C. L. R. 272, *sc.*, 24 L. J. Ex. 33, *sc.*, 1 Jur. N. S. 46, *sc.*, 10 5 R. R. 421. See also *Minshall* v. *Lyayd*, (1837) 1 M. & W. 450, *sc.*, 1 M. & H. 125, *sc.*, 1 Jur. 336, *sc.*, 6 L. J. N. S. Ex. 115, *sc.*, 46 R. R. 638 (644) and *Exparte Barclay*, (1855) 5D. M. & G. 403, *sc.*, 25 L. J. Bk. 1, *sc.*, 1 Jur. N. S. 1145, *sc.*, 104 R. R. 164 (167-8).

[2] Hamilton's Hidayah, Vol. III, p. 404 2nd. Ed., Grady, 1870. See *Secretary of State* v. *Charlesworth, Pilling & Co*, (1901) I. L. R. 26 Bom. 1, *sc.*, L. R. 28 I. A. 121, *sc.*, [1901] A. C. 373.

[3] *Jankee* v. *Bukhooree*, [1856] S. D. A. 761, *sc.*, I. D. 15 O. S. 204; *Pogose* v. *Nyamutoollah*, [1858] S. D. A. 1517: *Kalee* v. *Gouree*, (1866) 5 W. R. 108. See also *Venkatavargappa* v. *Thirumalai*, (1886) I. L. R 10 Mad. 112; *Ismai* v. *Nasarali*, (1903) I. L. R. 27 Mad. 211; *Mofis* v. *Rasik*, (1910) I. L. R. 37 Calc. 815, *sc.*, 14 C. W. N. 952, *sc.*, 12 C. L. J. 246 and *Sitabai* v *Sambhu*, (1914) I. L. R. 38 Bom. 716.

In re *Thakoor Chunder Paramanick and others*

and others[1], the question raised was whether an assignee from a Hindu widow, whose title terminated with her death, was entitled to remove the buildings erected by him during her life-time with her consent. Sir Barnes Peacock C. J., in delivering the judgment of the Full Bench, said:—"We think it clear that, according to the usages and customs of the country, buildings and other such improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the materials, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."[2]

Materials of huts.

The inapplicability in India of the technical rule as to fixtures is further illustrated by the practice in all the large towns, where tenants are allowed to remove not only the materials of huts,[3] but substantial structures and buildings. In the Presidency towns, as you have seen, materials of huts erected on the lands held by

[1] (1866) B. L. R. (F. B.) 595, *sc.*; 6 W. R. 228. *Ante* pp. 34-6.

[2] See also *Narayan* v. *Bholagir*, (1869) 6 B. H. C. R. A. C. J. 80; *Shibdas* v. *Bamandas*, (1871) 8 B. L. R. 237, *sc.*, 15 W. R. 360; *Mahalatchmi* v. *Palani*, (1871) 6 M. H. C. R. 245: *Russickloll* v. *Lokenath*, (1880) I. L. R. 5 Calc. 688 and *Juggut* v. *Dwarka*, (1882) I. L. R. 8 Calc. 582.

[3] *Parbutty* v. *Woomatara*, (1875) 14 B. L R. 201, See *Mahalatchmi* v. *Palani*, (1871) 6 M. H. C. R. .245. But see *Rajchandra* v. *Dharamochandra*, (1868) 8 B. L. R. 510 (footnote), *sc.*, 10 W. R. 416; *Nattu* v *Nand*, (1872) 8 B. L. R. 508, *sc.*, 17 W. R. 309 and *Kallypersaud* v. *Hoolas*, (1873) 10 B. L. R. 448, *sc.*, 20 W. R. 8 which are explained in *Miller* v. *Brindabun*, (1879) I. L. R. 4 Calc. 946.

tenants are saleable as movable property, and the Small Cause Courts have jurisdiction to cause such sales. Where there is an express contract as to substantial structures erected by the tenant, the parties are bound by it, but the general law in India does not impose any disability on the tenant to remove, at or before the termination of the tenancy,[1] the materials of buildings erected by him. The Transfer of Property Act lays down—"The lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth : provided he leaves the property in the state in which he received it."[2] But doubts have been thrown as to the justness of the rule and its applicability.[3]

Fisheries.

The profits derivable from land covered with water are from fish and plants and fruits which grow in it. The right is incorporeal.[4] No right of occupancy can be acquired by a tenant from long occupation of a fishery.[5] If a tank used for the preservation and rearing of fish forms a part of an agricultural holding, it goes with the rest of the land[5]. But the incidents of tenancies in other tanks and fisheries are the same as those of immovable properties other than agricultural. It has, however, been held[6] that long occupation of a tank on payment of uniform rent, coupled with occasional transfers of the tenant-right not objected to by the landlord, may raise a presumption of the fixity of the tenure, notwithstanding that no right of occupancy can be acquired by the tenant by occupation for more than

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[1] *Ante* pp. 34-6. See also footnote 3 of page 486.

[2] Act IV of 1882, Sec. 108, cl. (*h*)

[3] *Ante* pp. 35-36. *Ram* v. *Salig*, (1880) I. L. R. 2 All, 896; *Angammal* v. *Aslami*, (1913) I. L. R. 38 Mad. 710.

[4] See *Forbes* v. *Mahomed*, (1873) 12 B. L. R. 210, *sc.*, 20 W. R. 44 and *Fadu* v. *Gour*, (1892) I. L. R. 19 Calc. 544.

[5] See *ante* p. 367, and footnotes 3 and 4 of that page.

[6] *Nidhikrishna* v. *Nistarini*, (1874) 13 B. L. R. 416, *sc.*, 21 W. R. 386.

twelve years. The doctrine—*optimus interpres rerum usus*—has been applied in these cases as in other cases of lost or ambiguous grants.

Their incidents.

The word *jalkar* is occasionally used in the sense of land covered with water, as long as there is water on it and it is capable of being used for rearing and catching fish.[1] A settlement of a *jalkar*, however, does not necessarily involve a right to the soil.[2] Evidence of facts and circumstances may, however, be given to show that the settlement of a *jalkar* includes the right to the soil underneath the water, the word being used in a double sense.[3] [The grantee of a fishery right in a river is entitled to fish in all waters comprised within the banks of the river, and the circumstance that a particular sheet of water may, during part of the year, be disconnected from the flowing stream or permanent current does not affect the right of the grantee.[4] A *jalkar* is not affected by reason of the river changing its course.][5] Road-cess and Public-works-cess are not levied on *jalkars*.[6] The income derived from *jalkars* in the *mofussil* are taxed under the Income-Tax Act. The rent of a fishery is recoverable under the procedure laid down in the Bengal Tenancy Act.[7]

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[1] *Radha* v. *Neel*, (1875) 24 W. R. 200; *David* v. *Grish*, (1882) I. L. R. 9 Calc. 183.

[2] *Mahananda* v. *Mangala*, (1904) I. L. R. 31 Calc. 937, *sc.*, 8 C. W. N. 804; *Abdulullah* v. *Asraf*, (1907) 7 C. L. J. 152; *Krishna* v. *Salim*, (1914) 19 C. W. N. 514; *Sasi* v. *Kunja*, (1917) 22 C. W N. 63.

[3] *Rakhal* v. *Watson*, (1883) I. L. R. 10 Calc. 50.

[4] *Ahmodi* v. *Taraknath*, (1913) 17 C. W. N. 1172, *sc.*, 18 C. L. J. 399. As to how far a right of fishery is affected by change in the course of a river, see *Sarat* v. *Kshitis*, (1910) 12 C. L. J. 216 and the cases cited therein. See also *Sasi* v. *Kunja*, (1917) 22 C. W. N. 63.

[5] *Tarini* v. *Watson*, (1890) I. L. R. 17 Calc. 963; *Bhaba* v. *Jagadindra*, (1905) I. L. R. 33 Calc. 15, *sc.*, 9 C. W. N. 934.

[6] *David* v. *Grish*, (1882) I. L. R. 9 Calc. 183

[7] Act VIII of 1885, Sec. 193; Act X of 1859, Sec. 23, cl. (4). *Shibu* v. *Gopi*, (1897) 1 C. W. N. lxxxvii. But see *Krishna* v. *Salim*, (1914) 19 C. W. N. 514. See also *Gour* v. *Chandi*, (1910) 14 C. W. N. clix, *sc.*, 11 C. L. J. 63*n*. and *Annada* v. *Nagendra*, (1911) 15 C. L. J. 52

Determination of leases of fisheries.

The lease-hold right in a fishery may be determined in the same way as other leases of non-agricultural lands,[1] and the right of a tenant necessarily ceases on the water drying up. Unless the lease covers also the land on which the water lay, the land, as soon as it ceases to be covered with water, comes into the possession of its owner, discharged of any right which the tenant might have to the fish and the plants and fruits that grew in water.[2] There are numerous instances of land belonging to one person and the right to fish to another.[3]

Forest right.

[Grants of the right to fell timber of a particular class and for a specified period are sometimes made. Such grants are governed by section 193 of the Bengal Tenancy Act and does not necessarily create an interest in the land.][4]

Customary rights.

Pasturage, burning-grounds, burial-grounds and places of public worship are, in the large majority of cases in this country, public, in the sense that they belong to or are capable of being used by a community or classes of individuals in a village Such rights are necessary for the preservation of society. In the Permanent Settlement of 1793, these public or *customary* rights were not sufficiently protected, though their existence must be traced to a very early stage of civilization. 'Customary' rights belong to no individual in particular, but may be enjoyed by any person who for the time being inhabits the locality to which these rights are appurtenant, or who belongs to the particular class entitled to their benefit.[5] Any resident of the locality

[1] See *Chandra* v. *Ram*, (1913) 17 C. W. N. lxxx.

[2] *Suroopchunder* v. *Jardine Skinner & Co.*, (1863) 2 Hay 468; *Bissen* v. *Khyrunnissa*, (1864) 1 W. R. 78; *Kalee* v. *Dwarkanath*, (1872) 18 W. R 460; *Mahananda* v *Mongala*, (1904) I. L. R. 31 Calc. 937, *sc.*, 8 C. W. N. 804.

[3] *Grey* v. *Anund*, [1864] W. R. Gap Vol. 108.

[4] *Abdulullah* v. *Asraf*, (1907) 7 C L. J. 152; *Bande* v. *Amud*, (1914) 19 C. W N. 415 *sc.*, 20 C. L J.. 227; *Sarajubala* v. *Sarada*, (1918) 23 C. W. N. 336

[5] Goddard on Easements, (7th Ed., 1910) p. 27.

may assert the right in a Court of law. In order to give validity to these customary rights, all that is required is that they should be reasonable and certain.[1] The proprietor of an estate or the holder of a subordinate tenure under him may claim to have proprietary right with respect to the lands which are subject to such customary rights, but the use is in the inhabitants of the locality or a particular section of it.

Pasture lands.

To an agricultural population, pasture-land is of the utmost importance, and there is seldom a village in Bengal which has not a large piece of land attached to it for the grazing of cattle belonging to its inhabitants.[3] Manu speaks of such pasture-lands in Chapter VIII, verse 237—"On all sides of a village or small town, let a space be left for pasture, in breadth either four hundred cubits, or three casts of a large stick; and thrice that space round a city or considerable town."[3] Yajnavalkya also says—"There shall be set aside in every village a piece of pasture-land, the quantity of the land to be set aside being determined by the villagers themselves (where the land to be set aside is of small area), or by the king (where a large tract of land is intended to be set aside). A Brahmin has the right to collect grass (for his cows), twigs (for *homa*) and flowers (for worship), wherever and

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[1] *Broadbent* v. *Wilks*, (1742) Willes 360; *Hilton* v. *Earl Granville*, (1844) 5 Q. B. 701, *sc.*, 13 L. J. Q. B 193, *sc.*, D. & M. 614, *sc.*, 8 Jur. 310, *sc.*, 64 R. R 604; *Carlyon* v *Lovering*, (1857) 1 H. & N. 784, *sc.*, 26 L. J. Exch 251, *sc.*, 28 L. T. O. S 356, *sc.*, 5 W. R. 347, *sc.*, 108 R. R. 822, *sc.*, 156 E R. 1417; *Rogers* v. *Taylor*, (1857) 1 H & N. 706, *sc.*, 26 L. J. Exch. 203, *sc.*, 156 E. R. 1385; *Blackett* v. *Bradley*, (1862) 1 B. & S. 940, *sc.*, 31 L J. Q. B. 65, *sc.*, 8 Jur. N. S. 588, *sc.*, 5 L. T. N. S. 832, *sc.*, 124 R. R. 815; *Wakefield* v. *Duke of Buccleuch*, (1867) L. R. 4 Eq. 613, *sc.*, 36 L J. Ch. 763; *Luchmiput* v. *Sadatulla*, (1882) 12 C. L. R. 382.

[2] *Ante* pp. 17, 367.

[3] धनुःशतं परीहारो ग्रामस्य स्यात् समन्ततः।
शम्यापातास्त्रयोवापि त्रिगुणो नगरस्य तु॥

Manu, Chap VIII., v. 237.

whenever he finds them."[1] The custom as to the use by the community of such pasture lands is also reasonable, and there is nothing uncertain in it. Pasture-lands, in the occupation of particular individuals or families, rent being paid for the same, have the same incidents as other agricultural lands.[2] Suits for the recovery of the rents of pasture-lands are cognizable by the same tribunals as other ordinary rent-suits for agricultural lands.[3]

Grounds for burning and burying dead bodies.

There is also nothing unreasonable or uncertain in the custom of the members of a community in a village using, as of right, portions of land in it, for burning or burying the dead. The Hindu population urgently require burning places. The Mahomedan population require burial grounds. If these particular classes have used certain pieces of land for a good number of years, for the purposes of burning or burying the dead, they acquire rights in them which ought not to be easily defeated. On the abandonment of the use, the landlord may take possession of such lands.

Right to take wood from jungles.

The right to take wood from a forest adjoining a village is also claimed in some localities, specially in the Non-regulation Provinces. But such a *custom* will hardly find support from Courts of justice at the present day. With the increase of population and demand of wood, forest-lands would be denuded, and as held

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[1] ग्रामेच्छया गोप्रचारो भूमौ राजवशेन वा।
द्विजकृष्यैधःपुष्पाणि सर्वतः सर्वदा हरेत्॥
Yajnavalkya-Smriti, Vyavaharadhyaya, Sloka 166.

[2] *Ante* p. 495—6.

[3] Act X of 1859, Sec. 23, cl. 4; Act VIII of 1885, Sec. 193.

in the case of *Luchmiput Singh* v. *Sadatulla Nusso*,[1] such a custom would be deemed uncertain and unreasonable. If a forest is reserved, the taking of wood without permission is punishable.[2]

[1] (1882) 12 C. L. R. 382.

[2] *Ante* pp. 55-6.

LECTURE XIII.

THE SCHEDULED DISTRICTS, ORISSA, [AND SAMBALPUR].

Necessity of different laws for different districts.

The peculiarities of the incidents of landed properties in the different localities of the Lower Provinces of Bengal, involving, as they do, peculiarities in their modes of devolution and disposition, cannot make the same set of rules of law, especially as to procedure, suitable to all of them. This is due partly to the varieties in physical features and partly to differences in the habits and customs of the peoples and in their stages of civilization. The law of landlord and tenant, suitable to the people inhabiting the rich deltaic plains, cannot be suitable to the aboriginal inhabitants of Sonthalia or the Jungle *Mahals* or to the leaf-wearers of the Hill Tracts of Orissa. What are good laws for the permanently settled area of the Lower Provinces are not necessarily so for the *khas mahals* or the temporarily settled districts. Strict adherence to the laws of procedure conduces to the good government of the major part of these vast provinces, while the rigidity of those rules would be a source of unmitigated evil in tracts inhabited by peoples who are yet in the lowest stages of civilization.

Rent Acts in force in the different districts.

It has thus happened that Act X of 1859 with its amendments and Act VIII (B.C.) of 1869 are still retained in some parts of the country, notwithstanding their repeal by Act VIII of 1885 in the major part of the Bengal provinces. Act X of 1859 and the amending Acts VI (B.C.) of 1862 and IV (B.C.) of 1867 and the portions of the Regulations of the Bengal Code [were in operation in the division of Orissa until portions of these Acts and Regulations were repealed by the Bengal Tenancy Act.[1]

[1] Act VIII. of 1885, Appendix, Schedule I. See *Saddananda* v. *Nowrattam*, (1871) 8 B. L. R. 280, *sc.*, 16 W. R. 289.

These were in force until Bihar and Orissa were separated from Bengal and Act II of 1913 passed for parts of Orissa.] Bengal Act VIII of 1869 remains unrepealed in Sylhet, which was once a part of the Regulation Provinces and is now included within the Chief Commissionership of Assam. [The Act of 1869 is also in force in the district of Goalpara, one of the Assam Valley Districts. The other Assam Valley Districts, Cachar and Hill Districts, have no settled rent-law.[1]] The other Assam districts have their own special rules.[2] The Chhotanagpur division, at one time known as the Jungle *Mahals*, [have "The Chhotanagpur Tenures Act" and "the Chhotanagpur Tenancy Act,"[3]] while Sonthalia has its own Regulations.[4] The rest of the Scheduled Districts[5] in Bengal, [Bihar or Orissa] are of very little importance.

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[1] See Gait's Assam Land Revenue Manual, pp. lv. and 20, and *Prasidha* v. *Man*, (1882) I. L. R. 9 Calc. 330.

[2] Assam Land and Revenue Regulations I of 1886 and II of 1889 and 1905 and Act V. of 1897.

[3] Act II (B. C.) of 1869 and Act V. (B.C.) of 1908. See also Acts XIV of 1874 (Scheduled Districts Act), Sch. I; Act XV of 1874 (Local Laws Extent Act), Sch. VI and Sec. 6; India Gazette, Extra-ordinary of 14th November, 1877 and of 22nd October, 1881.

[4] Regulations III. of 1872 and II. of 1886. See also Regulations V of 1893, III of 1899, II of 1904, III of 1907, III of 1908 and IV of 1912 and Acts XIV of 1874 (Sec. 1 and Schedule 1) and I of 1903 and notifications in India Gazette of 16th March, 1872 and of 14th December, 1872. Sec. 56, Clauses (2) and (3) of Sec. 58 and Sec. 84 of the Bengal Tenancy Act were extended to the Sonthal Perganahs in 1904 and 1897.

[5] Jalpaiguri and Darjiling Districts, the Hill Tracts of Chittagong in Bengal and the *Mahal* of Angul in Orissa. (Act XIV. of 1874, Sch. I). Act X 1859, Act VI (B.C.) of 1862 and Act IV (B.C.) of 1867 constitute the rent law of Darjiling. See also Act XV of 1874 (Laws Local Extent Act), Sec. 6 and Sch VI; Act X of 1897, Sec. 3; India Gazette of 25th September, 1875 (for Western Doars), of 14th November, 1877 (Extra-ordinary), of 16th March, 1872 and 14th December, 1872. Parts III to VIII of Vol. IV of Bengal Code, 4th Ed., are very useful in this connection. Angul has no rent-law so to speak. Government demands and rents are realized according to procedure laid down in Chapter V of Reg. I of 1894 (Angul District Regulation). See in this connection Reg. III of 1913, Sec. 3, *Mahal* of Banki is not a Scheduled District from April, 1882, see Act XXV of 1881

Chittagong Hill Tracts have no special rent law. See Reg. I of 1900. Rules for collection of rent and regulating migration of cultivating *raiyats* have been framed by the Bengal Government. See Calcutta Gazette of 2nd May, 1900, Part I, p. 429 and Bengal Local Statutory Rules and Orders, 1903, Vol. II, pp. 92—100.

ORISSA.

Orissa division.

The present Orissa division includes a large tract of country, but, except on the level plains on the sea-shore, the people are either still in a very rude state or are just emerging from barbarism. At the date of the grant of the *Dewany* in 1765 and until the year 1803, Orissa included only the district of Midnapur and a part of Hughli,—the tract of country between the Suvarnarekha and the Roopnarayana. Orissa proper was a part of the territory of the Bhonsla family, who had their capital at Nagpur in Central India. By the treaty of Deogaum, signed on the 17th December, 1803, the Province of Cuttack including the port and district of Balasore and all the territories west of the river Warda and south of the Suvarnarekha were ceded to the East India Company. The tract consisting of Balasore, Cuttack and Puri and the hilly country known as the Tributary *Mahals* (Rajwara), held by the Chiefs called *khandaits*, was Orissa proper, and has since 1804 been named Orissa, while Midnapur, now included within the Commissionership of Burdwan, became a part of Bengal proper.

Tributary *mahals.*

Under the Maharattas, the *khandaits* used to pay for their territories (*killas*) fixed quit-rent or tribute called *tanki*. Of these, the *killadars* in the inland and hilly tracts continued to pay fixed tribute to the East India Company as semi-independent chiefs, under the Commissioner of the Orissa division. The territory of Mayurbhanj is one of the *killas* which are now known as the tributary *mahals*. In *Hursee Mahapatro* v. *Dinobundo Patro*,[1] these tributary *mahals* of Orissa were held to be within the limits of British India, but were excluded from the operation of all the laws in force in British

[1] (1881) I. L. R. 7 Calc 523, *sc.*, 9 C. L. R. 89.

India not specially extended to them. The question came before a Full Bench of the Calcutta High Court in *Empress* v. *Keshub Mohajan and others and Empress* v. *Udit Prasad*,[1] and the majority of the Judges held that the Maharattas probably exacted only tribute from these estates, and the East India Company could, under the cession, gain no higher rights, and that no direct civil jurisdiction having ever been exercised in the territory of Mayurbhanj by the Executive Government of India, this territory was not within the limits of British India. Prinsep and Mitter J. J., however, were of a different opinion. For all practical purposes, however, the tributary *mahals*, may, in the present course of lectures, be considered as not included within British India.[2]

Moghulbandi.

The *killas* nearer the level country became permanently settled estates and are governed by the same rules[3] as permanently settled estates in other districts. Regulation XII of 1805, which incorporated the Proclamation relative to the settlement of land-revenue in the *Moghul-bundi*[4] territory of Cuttack, and which was published on the 15th September, 1804, by the Board of Commissioners, legalized the previous settlement of

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[1] (1882) I. L. R. 8 Calc. 985, *sc.*, 11 C. L. R. 241.

[2] See *Empress* v. *Huro*, (1882) I. L. R. 9 Calc. 288; *Bichitranund* v. *Bhugbut*, (1889) I. L. R. 16 Calc. 667; *Kirtibash* v. *Secretary of State*, (1910) 15 C. W. N. 300 and *Bhuta* v. *Dama*, (1915) 20 C. W. N. 62. See also Regulation XII of 1805, Sec. 36 (repealed portion) and Sec. 37 (wholly repealed now) and Hunter's Statistical Account, volumes on Orissa.

[3] List of estates of which the *jama* was declared to be fixed in perpetuity by Secs. 33, 34 and 35 of Reg. XII of 1805: (1) Darpan, (2) Sukinda, (3) Madhupur, (4) *Jaigir* of Malud, (5) Aull, (6) Kujan, (7) Puttra, (8) Hamishpore, (9) Marichpur, (10) Vishnupur and (11) Kanka. The estate Khurda became a *khas mahal* in 1804, having been forfeited for rebellion. These estates are altogether fifty in number.

[4] Orissa was conquered by the Moghuls about the year 1580, and from that time the long strip of cultivated land which lies between the western mountain tracts and the sea-board marshes and from which the conquerors derived their revenue, became known as the *Moghulbandi*.

the province. The rules laid down in this Regulation and Regulation VII of 1822 have been the bases of all the subsequent settlements.

Regulation XII of 1805.

Sections 4 to 7 (now repealed) of Regulation XII of 1805 dealt with the remainder of the province, which was not permanently settled. A series of ten short temporary settlements followed, the last of which expired in 1837. In 1838, thirty years' settlement was concluded under the provisions of Regulation VII of 1822, and that settlement expiring in 1867 was renewed without any alteration, on account of the famine, which had impoverished the province in 1865, for a further period of thirty years.[1] This continued in force till it was revised in 1897. Then there was another settlement, which expired in 1906.

Charges in the rent-law of Orissa.

By the Government notification of the 10th September 1891,[2] chapter X and sections 3 to 5, 10 to 26, 41 to 49, 53 to 75 and 191 of the Bengal Tenancy Act were extended to the districts of Cuttack, Puri and Balasore of Orissa, and by the notification of the 27th June, 1892,[3] sections 27 to 38 and section 80 of the Act, were also extended. [Sections 189 and 190 were extended in 1893,[4] section 39 in 1896,[5] sections 7, 40, 52 and 192 also that year[6] and sections 93 to 103 were extended to the districts of Cuttack, Puri and Balasore

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[1] Act X (B. C.) of 1867 (now repealed).

[2] See Calcutta Gazette of 16th September, 1891, Part I, p. 839.

[3] See Calcutta Gazette of 29th June, 1892, Part I, p. 673 notification No. 2448. On the effect of the extension of sections 20 and 21, see *Rafiuddin* v. *Iswar*, (1912) 17 C. L. J. 585 and *Sitanath* v *Hara*, (1913) 21 C. L. J. 644.

[4] See Calcutta Gazette of 11th January, 1893, Part I, p. 20, notification No. 115 L. R. dated the 5th January, 1893.

[5] See Calcutta Gazette of 8th January, 1896, Part I, p. 28, notification No. 99 L. R. dated 7th January 1896.

[6] See Calcutta Gazette of 21st October, 1896, Part I, p. 1081, notification No 971 T. R. dated 17th October 1896.

in 1906,[1] and chapters XI and XIV to those districts in 1907.[2] The provisions of the Bengal Tenancy Amendment Act (III, B. C. of 1898)[3] were extended to Orissa the same year.[4] Rules framed under sections 189 and 190 of the Bengal Tenancy Act were also extended in 1893.[5]] In other respects, the provisions of Act X of 1859 and its amending Acts were in force in the whole province and regulated the relationship of landlord and tenant.[6] The powers of settlement-officers used to be regulated by the Bengal Tenancy Act, the Government dealing with the *raiyats* of the temporarily settled estates as a proprietor is entitled to do under the Bengal Tenancy Act. The holders of the estates were entitled to re-settlement under the provisions of Regulation VII of 1792. [The districts of Cuttack, Puri and Balasore in the Orissa division have, as already stated, now an Act for those districts, and the Acts of 1859 or 1885 are no longer applicable there.][7]

Act II (B. & O.) of 1913.

When Orissa Revision Settlements again began in 1906, it became apparent that the agrarian law in Orissa, composed partly of Act X of 1859 and partly of the Bengal Tenancy Act was unworkable. Some of the provisions of the law overlapped each other; others were obscure and there were serious omissions in some

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[1] See Calcutta Gazette of 7th February 1906, Part I, p. 176 notification No. 620 L. R. dated 27th January 1906.

[2] See Calcutta Gazette of 29th August 1906, Part I, p. 1658, notification No. 1816 T. R. dated 21st August 1906.

[3] See Calcutta Gazette of 9th January 1907, Part I, p. 54, notification No. 20 L. R. dated 3rd January 1907.

[4] See Calcutta Gazette of 9th Nov. 1898, Part I, p. 1156 A. notification No. 957 T. R. dated 5th Nov. 1898.

[5] See Calcutta Gazette of 25th Jan. 1893, Part I, p. 59, notification No. 292 L. R. dated 18th Jan. 1893. See also Board's Settlement Mannual, Ed. 1908, Part I, Chap. 2, rules 7, p. 3.

[6] But see Act VIII of 1885, Sec. 2, clause 2. See *Saddanando or Nowrattam*, (1871) 8 B. L. R. 280, *sc.*, 16 W. R. 289.

[7] Act II (B. & O.) of 1913.

points. The Government further found that no final solution for the difficulties of Orissa could be had by the extension of further instalments of the Bengal Tenancy Act, and that, to place the relations between landlord and tenants in Orissa on a stable and satisfactory basis, the enactment of a self-contained agrarian code, taking into consideration the peculiar conditions of Orissa, was a *sine qua non*. The greater portion of Orissa is temporarily settled, *i.e.*, about 6000 square miles out of 8000. Bihar and Bengal proper are permanently-settled. Temporary settlement necessarily brings about closer contact between the administration and the agricultural population than is possible, or at least essential, in a permanently-settled area, and it was found desirable that the trial of rent-suits in Orissa should he retained in the hands of its revenue staff[1] and not made over to the ordinary Civil Courts as in the permanently-settled portions of Bengal. The Bengal Tenancy Act could not, therefore, be extended to Orissa as a whole. The new Act of 1913 has retained the system of trial of of rent suits by Revenue Courts, which has a simpler and a more expeditious procedure, and is less expensive, and is more suitable to temporarily-settled areas. Except in this matter, the judicial procedure sections of the Bengal Tenancy Act have been adopted in the new Act. The law of distraint, which is closely allied to the subject of rent-suits, has always been different from that of Bengal, and the new Act retains the law prevalent in Orissa. Distraint is allowed in Bengal only through the medium of Civil Courts. In Orissa, landlords have always exercised the right of private distraint, under Act X of 1859, without recourse to Civil Court, without any serious or general abuse. It is said that the system of private distraint facilitates the collection of rent and it is recognised that temporarily-settled

[1] See *Gopi* v. *Ram*, (1916) 2 P. L. J. 46.

zemindars need more assistance for rent-recovery than their permanently-settled brethren of Bengal, who have a much larger margin of profit. Another important feature of the new Act, arising out of the temporary character of the land revenue settlement, is the special place assigned in it to the class described as 'sub-proprietors', which was, prior to the passing of the new Act, dealt with in a semi-direct fashion, *viz. shikmi zemindars*, *padhans*, *mokuddums*, *sarbarakars*[1] and others.[2] They possess quasi-proprietory rights and are "something much superior" to the ordinary tenure-holders of the Bengal Tenancy Act. Special provisions for the definition and protection of their rights have been included in this Act. They have been practically placed on the same footing as proprietors in respect of their private lands, while they are protected from ejectment in terms of section 89 of the Bengal Tenancy Act.[3] There is another very large and important class of Orissa land-holders called *bajiaptidars*, who own about one-sixth of the total cultivated area. The *bajiaptidars* are the owners of the invalid revenue-free tenures which were resumed in the earlier settlements. They owe their numbers and their present position partly to the special provisions of the Cuttack Land Revenue Regulation, 1805,[4] which created them, and partly to their peculiar treatment in the Revenue Settlements of Orissa. Their interests also are of a semi-proprietory nature and it was genuine grievance with them that, under the Bengal ideas, their status had been gradually obscured, and they ran the risk of the being treated as ordinary tenants of *zemindars*. The Act contains special pro-

[1] *Poste* pp. 512-3. As to status of *sarbarakars*, see *Kripasindhu* v. *Parmanand*, (1913) 18 C. W. N. 74.

[2] For an account of these, see Maddox's Orissa Settlement Report.

[3] Act II (B. & O.) of 1913, Secs. 3 (21) and 6.

[4] Reg. XII of 1805.

visions for the preservation of their rights of freedom of transfer[1] and subletting without the consent of their landlord.[2] They have been lifted out of the category of ordinary tenure-holders and *raiyats*.[3] Another distinguishing feature of the Act is the altered definition of the privileged or private lands of proprietors and sub-proprietors. This again is due to the temporary nature of Orissa's land revenue settlement. In Bengal proper and Bihar, the landlords' privileged land is comparatively inconsiderable, as might be expected to be the result of the permanent settlement, which secured to *zemindars*. the bulk of the *raiyati* assets of the province. In Orissa, circumstances are different. The *zemindars* have a much smaller margin of profit than in Bengal and the government expects from them the punctual discharge of their dues. It is therefore only proper that land-owners of *zemindaries* within temporarily-settled estates should have larger privileges, and this the Act has recognized. Such lands are divided into two categories. The first, called *nij-jote* or privileged, include the lands which came down to them as demesne lands from the previous settlement of 1906 and such other lands as by the custom of the country had a right to be placed on the same footing. The second, called *nij-chas* or non-privileged, include all lands which do not fall under the first category, such as lands which were abandoned by *raiyats* in the great Orissa famine of 1866, or had been acquired by purchase from *raiyats*. As there is no provision in the Bengal Tenancy Act securing the privilege of private lands for tenure-holders, through its influence, the distinction between *nij-jote* and *nij-chas* was not drawn in the case of lands held by the

[1] Act II (B. & O) of 1913, Sec. 95 (3).

[2] *Ibid*, Sec. 95 (4).

[3] *Ibid*, Secs. 3 (2) and 6 As regards liability to sale in execution of a decree for rent of such tenures, see Sec. 74.

proprietory tenure-holders of Orissa now defined as sub-proprietors. All their lands were classed as *nij-chas*. The total area in the immediate possession of proprietors and sub-proprietors had gone on increasing, and whatever might have been the provisions of the law on the subject, the proprietors and sub-proprietors of Orissa were able to maintain direct control over an increasing share of the cultivated area, whether classed as *nij-jote* or *nij-chas*.[1] The distinction, however, was a perennial source of dispute and the cause of bitterness between landlord and tenant. The proprietory classes could not themselves cultivate all the land that was recorded as theirs, and their arrangements for its cultivation through *raiyats* were hampered by the provision of the old law on the subject. To remove this fertile cause of dispute and strife, the new Act converted all that portion of the *nij-chas* of the last Revenue settlement which the landlords were found to retain in their possession to *nij-jote* or privileged lands. This concession has been extended to sub-proprietors as well. This has resulted in the transfer of about one *lakh* of acres from the non-privileged to the privileged area, and the privileged area is now about a twelfth of the total cultivated area of the temporarily-settled estates. Over this large area, the landlords have complete freedom of cultivation and contract. No future addition to the privileged stock can be made in future, and the rest of the cultivated area which is to be in the possession of *raiyats* is to be available for their enjoyment on payment of a fair and equitable rent. This new provision applies only to temporarily-settled estates and gives legal sanction to the continuance of existing usages, which were really illegal under the old law. This concession to the proprietors and sub-proprietors,

[1] See Act II (B &O.) of 1913, Sec. 154 and *Akbar* v. *Gopal*, (1918) 3 P. L. J. 475.

it may be supposed, ignored the interests of the *raiyats*. It is not exactly so, as, in practice, they got little out the *nij-chas* or non-privileged lands, because the provisions of the old law were never attended to. Moreover, the new law gives some added privileges to the *raiyats* in return. The first is the incorporation of section 178 of the Bengal Tenancy Act,[1] which bars contracts in violation or diminution of the rights secured to *raiyats* by other provisions of the law, into the new Act.[2] The second is the statutory recognition of the tenants' right of transfer of *raiyati* or occupancy holdings. The general custom for a long time, in Orissa, was that transfers were recognised by landlords on receipt from the transferees of a sum equal to one-fourth of the consideration-money stated in the deed of transfer, or six times the anunal rent of the holding transferred[3] and this custom applied equally to transfers of entire holdings and transfers of part-holdings. There were, however, no rule of law on the subject and exceptional landlords of a grasping disposition took advantage of this want to demand exorbitant price of their consent. The landlord has been given power to apply to the Collector to set aside the transfer on the ground that it would result in the creation of unreasonably small holdings or that the transferee was a non-resident cultivator, a non-agriculturist, a habitual defaulter of rent, or for any other reasonable cause likely to prove an objectionable tenant.[4]

[1] See *Brahmanunda* v. *Arjun*, (1903) 1 C. L. J. 310.

[2] As to the effect of section 178 not being extended to Orissa, see *Gobinda* v. *Ram*, (1908) 13 C. W. N. 95 with regard to payment of interest on arrears of rent, before the introduction of Act II (B. & O.) of 1913.

[3] It has been held in *Balmakund* v. *Mritunjov*, (1920) 5 P. L. J. 357: "Whenever an occupancy holding in Orissa is transferred, whether the transfer be with or without the consent of the landlords, the transferee must apply for registration of the transfer and is bound to pay a fee for such registration" But see *Gobind* v. *Debendrabala*, (1919) 4 P. L. J. 387. See also *Mritunjoy* v. *Jagannath*, (1917) 3 P.L.J 351.

[4] See *Giridhari* v. *Kashi*, (1917) 2 P. L. J. 476 and *Macpherson* v. *Debibhusan*, (1917) 2 P. L. J. 530. As regards tenant's right to object to

The new Act contains a few other provisions that are not to be found in the Bengal Tenancy Act or materially differ from the provisions of that Act. The important ones are the provisions as to produce rent contained in section 78 of the Act and the transference of the controlling jurisdiction on the subject of common managers from the District Judge to the Collector. The provisions of the Bengal Tenancy Act on this head have been altered so as to extend the provisions to sub-properietors and to strengthen the hands of the common manager and prevent mischievous interference by co-sharers with the object of management,[1] and the later Act also provides for new appointments and defines duties of managers. The other minor differences are the explanation added to the definition of *raiyat* in the Orissa Act,[2] the law of transfer of tenures,[3] the alterations in the definition of "settled *raiyat*,"[4] the added provision for acquisition of occupancy *raiyats* in an area not included in a village,[5] the reduction of the amount of notice for ejectment of under-*raiyats*,[6] the added provision in the Orissa Act about reclamation of waste

sale in execution of money-decree without consent of landlord, see *Madhu* v. *Jagu*, (1918) 4 P. L. J. 294.

[1] Compare Act II (B. & O.) of 1913, Secs. 104 to 111 with Act VIII of 1885, Secs 93 to 100, particularly Secs. 104, 109 and 110 of the later Act. See also *Amar* v. *Shoshi*, (1903) I. L. R. 31 Calc. 305, *sc.*, 8 C. W. N. 225.

[2] This is based on *Midnapur Zemindary Co.* v. *Sham*, (1910) 15 C. W. N. 218 and *Promoda* v. *Asiruddin*, (1911) 15 C. W. N. 896. Compare section 5 of the two Acts.

[3] Compare Act VIII of 1885, Secs. 11 to 17 with Act II (B. & O.) of 1913, Secs. 12 to 20.

[4] Compare Act VIII of 1885, Sec. 20, cl. (7) with Act II (B. & O.) of 1913, Sec. 23, cl. (7). This makes it clear that the presumption applies to all suits affecting *raiyats* in their relations with the landlords. A confusion was created by *Mulluk* v. *Satish*, (1909) 14 C. W. N. 335, *sc.*, 11 C. L. J. 56 and *Jahandar* v. *Ram*, (1910) I. L. R. 37 Calc. 449, *sc.*, 14 C. W. N. 470, *sc.*, 11 C. L. J. 364. There is a similar addition in Act II (B. & O.) of 1913, Sec 52, with which compare Act VIII of 1885, Sec 50.

[5] Act II (B. & O.) of 1913, Sec. 25.

[6] Compare Act II (B. & O.) of 1913, Sec. 57 with Act VIII of 1885, Sec. 49. As to whether an under-*raiyat* is an encumbrancer, see *Shiba* v. *Gajendra*, (1917) 3 P. L. J. 112.

lands as in the Chhotanagpur Tenancy Act,[1] the new provision in Orissa as regards half-yearly instalments of rent by agreement or based on usage,[2] the provision as regards abandonment[3], the express statement in the Orissa Act that questions of title can be raised in suits instituted before a Revenue-officer[4] and the addition of the clause prescribing the period of limitation for suits by landlord and others in receipt of the rent of land against their agents or sureties of the agents for money received or accounts kept by such agents in the course of such employment, or for papers in their possession.[5]]

[We have now dealt with the main points of difference of the Orissa Tenancy Act, 1913, with the Bengal Tenancy Act, on which the new rent-law of Orissa is mainly based. Several provisions of the old Rent Act,[6] the Punjab Land-revenue Act, 1887,[7] the Central Provinces Tenancy Act, 1898[8] and the Chhotanagpur Tenancy Act, 1908[9] have also been adopted partly. A glance at the Appendix attached to the Orissa Tenancy Bill will show how the Bengal Tenancy Act has been affected and other Acts adopted.][10]

Classification of landed interests in Orissa.

Leaving out of our consideration the military fiefs or the tributary estates, which had evidently been granted like Mayurbhanj, Neelgiri and Keunyjhar for the protection of the level country from the inroads and ravages of the aboriginal tribes who dwelt further in

[1] Compare Act II (B. & O.) of 1913, Sec. 61 with Chhotanagpur Tenancy Act, Sec 64, sub-sec (3).

[2] Compare Act II (B & O.) of 1913, Secs. 62 and 76 with Act VIII of 1885, Secs. 53 and 67. Clause (2) of the Orissa Act is new.

[3] Compare Act II (B. & O.) of 1913, Sec. 58 (1) with Act. VIII of 1885, Sec. 87 (1).

[4] This is to overcome the effect of *Padmalav* v. *Lukmi*, (1907) 12 C. W.N. 8 and *Kali* v *Girija*, (1911) 15 C. W. N. 974.

[5] See Act II (B. & O.) of 1913, Sch. III, 4. Compare Act VIII of 1885, Sch. III.

[6] Act X of 1859. [7] Act XVII of 1887. [8] Act XI of 1898.

[9] Act VI (B. C.) of 1908.

[10] Calcutta Gazette, 1911, Part IV, pp. 317-330.

the interior, the level country which is the more valuable portion of the Orissa division—Balasore, Cuttack, and Puri,—may be called the Crown-Land, being directly under British administration. As in Bengal proper, the holders of land may be broadly classified into—(1) *zemindars* paying revenue direct to Government; (2) intermediate tenure-holders paying revenue through the *zemindars;* (3) holders of resumed revenue-free tenures; (4) tenure-holders paying quit-rent, and (5) the last and the most important—the *raiyats.*

Zemindaries.

I do not propose to tire you with the various names, according to the various shades of difference, in origin and status, of the estates paying revenue direct to Government. These names are numerous and should find a place in a glossary. The differences in meaning are not always easy to catch. *Shreechandan* (mild as white sandalwood), *harichandan* (sweet as yellow sandal wood), *sudhakar* (receptacle of nectar), with the numerous other names given by the Gajapati kings and names derived from *kanungoes* and *chowdhuries* have attractions for the lower orders of people in these provinces, but to a student of law they must be very dry.

Patna and *kharija* estates.

The *patna* and the *kharija* estates being held by *bhuiyas* or owners of the land deserve particular mention, in as much as they are instances of the recognition by the older governments of the country, of the proprietorship of the soil being vested in the actual occupiers. The word *bhuiya* itself implies property in the soil as distinguished from mere right to collect rent.

Mokuddami tenures.

The names of the intermediate tenures are almost as numerous as those of the estates, but only two of these deserve particular mention—*mokuddami* and *sarbarkari* tenures. The *mokuddams* have no proprietory right in the lands composing their villages, but they have the entire management and control of them including waste

lands. The *zemindar* only receives a fixed percentage, though the revenue is paid through him. The tenure is hereditary, and the *mokuddum* can alienate it or any portion of it at will. Babu Rangalal Banerji, who was a Deputy-Collector in these provinces and who is better known to many of you as a Bengali poet, remarks—"They had formerly powers for the apprehension of offenders, the settlement of village lands, and the management of village expenses. They were the heads of villages, the *zemindar* receiving rent through their intervention." At the settlement of Orissa in 1804, they were considered to be intermediate tenure-holders.

Sarbarakari tenures.

The *sarbarakari* tenures have their origin in the village accountants. From being managers of revenue affairs, remunerated by a percentage on the collections from the *raiyats*, they are now recognised as subordinate tenure-holders, either hereditary or non-hereditaty. It has been held that the *sarbarakari* tenure is a recognised under-tenure in Cuttack, that the *sarbarakar* has almost the same sort of right as the *mokuddum*, that in a case of the existence of several joint *sarbarakars*, the Collector has the power to select one or more of the body to be the recorded manager of the *sarbarakari*, and that ordinarily the tenure is not heritable or divisible. Neither hereditary nor non-hereditary *sarbarkars* had any power of alienation or right to partition without the consent of the *zemindar*, and both classes of tenures are liable to cancelment or resumption by the *zemindar* on their falling into arrears. *Sarbarakari sanads* are almost exactly the same in their terms and conditions as those creating the *mokuddumi* tenures. Temporary *sarbarakars*, however, have now disappeared. Some of the *maurusi sarbarakars* are still recognised.

Nankars and *jaigirs*.

At the time of the settlement of this province, considerable portions of land were claimed as *lakhiraj*,

but were resumed under the Resumption Regulations, and assessed with revenue. *Nankars* and *jaigirs* were very numerous, but they were almost all resumed and assessed at half rates. Most of them pay revenue through the *zemindars*. Only the holders of more than seventy-five *bighas* of *lakhiraj* resumed lands were raised to the rank of *zemindars*.

Ayma and *tanki* estates.

Quit-rent tenures consist of *ayma* and *tanki* estates. *Ayma* lands are those granted by the Moghul governors to learned or pious Musalmans, for religious or charitable uses in connection with Mahomedanism, subject, as in Bengal proper, to the payment of small quit-rent. The British Government has recognised these *ayma* grants as hereditary and transferable. *Tanki* land is held at quit-rent, being one of the perquisites attached to the office of *sudder kanungo* during the Moghul period. There are various other kinds of similar quit-rent-tenures which do not deserve particular mention.

Thani raiyats

The *raiyats* of the Cuttack provinces were divided into two classes—the *thani* or resident, and the *pahi* or non-resident. The fixed cultivator has lived in the village and cultivated its lands from time immemorial. His homestead land is rent-free, and he pays at customary rates rent for the rest of his holding. Occasionally he has to pay for his homestead land, but the rate of rent is very low. He has a right-of-occupancy, but it is not transferable. The rent though levied according to well-established rates is, however, higher than that paid by *pahi* or migratory husbandmen. He has a home of his own where his ancestors dwelt for ages; he sits under the shade of the trees which they planted; he has a local habitation and a name, and a degree of credit which *pahi* cultivators do not possess. But this strong love of home enabled the superior holders to exact higher rents from the *thani* or resident cultivators besides

abwabs and extra-collections. During the settlement of 1835, many of these *thani raiyats* obtained palm-leave leases (*talpattas*) at lower rates, and these *talpattas* gave them a position of importance which the pressure of increasing population has since enhanced.

Pahi raiyats.

The *pahi raiyat*, who was free to pick and choose and to abandon the land whenever he liked, having neither the privileges nor the burdens of the *thani raiyat*, used to hold his arable lands at a sensibly lower rate of rent. He had no position in the village. He was not subjected to the payment of *abwabs*, as the superior holders were afraid that such impositions would lead them to go over to other villages.

Chandnia raiyats.

There is a third class of *raiyats* who live in the villages but do not cultivate rice-lands like the *thani raiyats*, nor have they any other lands besides the homesteads on which rent could be assessed. The industrial population, artisans and tradesmen belonging to the lower castes have only homestead lands, for which they pay rent. They are known as *chandnia raiyats*, but their number is not considerable.[1] Act X of 1859 had nothing to do with *chandnia raiyats*, but the Act gave the *pahi* or husbandmen, who were mere tanants-at-will, the status of occupancy-*raiyats*.

CHHOTANAGPUR.

Primogeniture.

The *zemindars* of the Chhotanagpur division go by the names of *rajas*, *tekaets*, *thakurs* &c., and their law of succession, as in some other ancient *zemindar* families in the Regulation districts, is the law of principalities—primogeniture. The Government recognised in Regulation X of 1800 their impartibility and the exceptional rule of succession to the eldest son only.[2]

Khorposh babuana.

The other sons of the last proprietor are entitled to

[1] Act II (B. & O.) of 1913, Sec. 3, sub-sec. (3) and Sec. 236, sub-sec. (2).

[2] This system prevails in the following estates of Chhotanagpur :—Maharaja of Chhotanagpur's Estate, Silli, Rahe, Baranda, Bundu,

maintenance only, for which grants of land are generally made by the eldest son after the succession to him opens out.[1] These grants are known as *khorposh* or *babuana*. Thus, the laws relating to partition of estates and separation of shares have practically no application in this division It has also been held that the *kulachar* or rule of succession is generally lineal, females being excluded,[2] and until an elder line is exhausted, none in the next line is entitled to succeed, notwithstanding proximity of *sapinda* relationship and superiority in age.[3] Such a rule of succession is not in conformity with either the old patriarchal system which made the eldest male member of a family its chief or head, or the text of *Manu*.—"To the nearest *sapinda* the inheritance belongs,"[4] which is the basis of Hindu law in all the schools. The question has been finally decided by the Privy Council,[5] and the custom must be proved in the case of each family by cogent evidence.

Tamar and Borway in district Ranchi; Sonepura, Bisrampur, Chainpur, Ranka, Garhina and a few others in Palamow district; Ramgarh, locally known as Padma, Dhanwar and Kunda in district Hazaribagh; Pachete, Jheria, Patkum, Barabhum and some others in district Manbhoom; Dalbhoom in district Singbhoom. See Hunter's Statistical Account of Bengal, Vol. XVI, pp. 117-18 and Dalton's Ethnology of Bengal, p. 169. See also *Heeranath* v. *Burm*, (1871) 15 W. R. 375 and *Gajendra* v. *Mathura* (1916) 20 C. W. N. 876, *sc.*, 1 P. L. J. 109.

[1] *Mahranee* v. *Benee*, (1825) 4 Mac. Sel Rep 79, *sc.*, I.D. 7. O.S. 59; *Punchum* v. *Gurunarain*, (1837) 6 Mac. Sel. Rep. 166, *sc.*, I. D. 7. O. S. 791; *Anund* v. *Gurrood*, (1850) 5 M. I. A. 82; *Jeetnath* v. *Lokenath*, (1873) 19 W. R. 239; *Woodoyaditto* v. *Mukoond*, (1874) 22 W. R. 225; *Uddoy* v. *Jadublal*, (1879) I. L. R. 5 Cal. 113 and (1881) I. L. R. 8 Cal, 199, *sc.*, L. R. 8 I. A. 248.

[2] The status of these estates is involved in obscurity, but it is almost certain that the Maharaja of Chhotanagpur cannot exercise in regard to them his ordinary right of resumption on failure of male heirs of the original grantee, as these were not created by him at all. Vide Cuthbert's 'Tenure Report,' 1827, para 20, and Reid's 'Settlement Report,' p. 111.

[3] *Periag* v. *Madhu*, A. O. D. Nos 84 and 97 of 1837, decided 25th June, 1889.

[4] अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत्।
अतऊर्ध्वं सकुल्यः स्मादाचार्यः शिष्य एव वा॥
Manu, Ch. IX, v. 187.

[5] *Mohesh* v. *Satrughan*, (1902) I. L. R. 29 Calc. 343, *sc.*, L. R. 29 I. A. 62.

Notwithstanding the impartibility of these estates, most of them are highly encumbered, and were it not for the very beneficial intervention of the Government under the Chhotanagpur Encumbered Estates Act[1]—many of them would, by this time, have been swallowed up by money-lenders.[2] The application of the Act to any estate deprives the proprietor of his power of management and of disposing of his estates[3] and the Civil Courts also lose their power to pass decrees for debts and realise them by execution.[4] The Act has been extended to the Deo Estate in the District of Gya[5]. Encumbered Estates Act.

The impartibility of these estates is no bar to an alienation by a holder, if such alienation be otherwise valid. The holders may also create subordinate tenures such as *putnis* and *mokurraris*, and the next-taker has no right to question their validity on the ground of impartibility. In *Anund Lal Sing Deo* v. *Maharaja Dheraj Gurrood Narayun Deo Bahadur*,[6] the Privy Council left the question open. But in *Uddoy Adittya Deb* v. *Jadublal Adittya Deb*,[7] the validity of alienations either by way of sales or leases has been expressly recognized. As a necessary corollary, limitation which bars a holder of an estate will also bar the next-taker. Under-tenures.

[1] Act VI of 1876.

[2] *Kameshar* v *Bhikhan*, (1893) I. L. R. 20 Calc. 609.

[3] *Jagadis* v. *Satrughan*, (1906) I. L. R. 33 Calc. 1065 *sc.*, 4 C. L. J. 238; *Satrughan* v. *Jagadish*, (1908) 7 C. L. J. 578; *Biswanath* v. *Surendro*, (1913) 19 C. W. N. 102.

[4] See *Pratap* v. *Madan*, (1910) I. L. R. 38 Calc. 288, *sc.*, 15 C. W. N. 155; *Hanuman* v. *Ganesh*, (1918) 4 P. L. J. 1 and *Prasad* v. *Manager*, (1919) 4 P. L. J. 321. See also *Hukum* v. *Ran*, (1919) 4 P. L. J. 580.

[5] Act IX of 1886.

[6] (1850) 5 M. I. A. 82.

[7] (1879) I. L. R. 5 Calc. 113, affirmed by the Privy Council in (1881), I. L. R. 8 Calc. 199, *sc.*, L. R. 8 I. A. 248. See also *Sartaj* v. *Deoraj*, (1888) I. L. R. 10 All. 272, *sc.*, L. R. 15 I. A. 51; *Beresford* v. *Ramasubba*, (1889) I. L. R. 13 Mad. 197; *Court of Wards* v. *Venkata*, (1896) I. L. R. 20 Mad. 167; *Rup* v. *Pirbhu*, (1898) I. L. R. 20 All. 537; *Venkata* v. *Court of Wards*, (1899) I. L. R. 22 Mad. 383, *sc.*, L. R. 26 I. A. 83, *sc.*, 3 C. W. N. 415; *Abdul* v. *Appayasami*, (1903) I. L. R. 27 Mad. 131, *sc.*, L. R. 31 I. A. 1, *sc.*, 8 C. W. N. 186; *Gopal* v. *Raghunath*, (1904) I. L. R. 32 Calc. 158, *sc.*, 9 C. W. N. 330; *Jagat* v. *Brinda*, (1905) 1 C. L. J. 557; *Krishun* v. *Romesh*, (1908) 13 C. W. N. 163, *sc.*, 8 C. L. J. 274 and *Avalappa* v. *Murugappa*, (1912) I. L. R. 36 Mad. 325.

Maintenance grants.

There is an important class of tenures in the Chhotanagpur division—the maintenance (*khorposh*) tenures. Grants of land made for the maintenance of the junior members of a *zemindar*-family governed by the law of primogeniture are generally rent-free, but occasionally quit-rents are payable. Their incidents are various, depending upon the custom and usage of each family and the terms of the written grants.[1] But it seems that no grant is valid, if the grantor encroaches on the power of the next-taker by making one not authorized by family custom or usage. A grant may be a simple assignment of rent revokable at the will of the grantor. In other cases, it may be valid during the life-time of the grantor, being resumable by the next-taker of the parent estate. A grant in perpetuity for the maintenance of the grantee and his heirs has been held in the Pachete Estate to be invalid.[2] Again a grant for maintenance may enure to the benefit of the grantee only,[3] being resumable on his death, [unless there are words in the grant which connote a permanent tenure.[4]] In some families, grants have been held to be good as regards the grantees and their heirs male,[5] and the *khorposh* tenures do not revert to and merge in the parent estates as long as there are male heirs of the grantees.[6] [In the district of Ranchi, the word '*putra-*

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[1] *Dirguj* v. *Fateh*, (1905) 3 C. L. J. 521.

[2] *Anund* v. *Gurrood*, (1850) 5 M. I. A. 82.

[3] *Woodoyaditto* v. *Mukoond*, (1874) 22 W. R. 225.

[4] Vide *Beni* v. *Dudhnath*, (1899) I. L. R. 27 Calc. 156, *sc.*, L. R. 26 I. A. 216, *sc.*, 4 C. W. N. 274; *Tituram* v. *Cohen*, (1901) 1 C. L. J. 517; *Ram* v. *Jogendra*, (1905) 4 C. L. J. 399; *Mahomed* v. *Dhojamani*, (1905) 2 C. L. J. 20; *Rameshar* v. *Gobardhan*, (1907) 7 C. L. J. 202 and *Cheta* v. *Purna*, (1914) 19 C. W. N. 1272, *sc.*, 21 C. L. J. 144.

[5] *Kopilnauth* v. *Government*, (1874) 22 W. R. 17 C. R; *Perkash* v. *Rameshwar*, (1904) I. L. R. 31 Calc. 561.

[6] See *Ram* v. *Jogendra*, (1905) 4 C. L. J. 399; *Mahomed* v. *Dhojamani*, (1905) 2 C. L. J. 20; *Dirguj* v. *Fateh*, (1905) 3 C. L. J. 521; *Rameshar* v. *Gobardhan*, (1907) 7 C. L. J. 202; *Secretary of State* v. *Rashidul*, (1912) 18 C. L. J. 31 and *Cheta* v. *Purna*, (1914) 19 C. W. N 1272, *sc.*, 21 C. L. J. 144.

putradik,' which is very commonly used, has acquired the fixed meaning of male descendants of the body of the grantee.[1] In view of this settled custom, it has been held that words which connote permanancy and heritability by the general body of heirs in other parts of the country, such as *putrapoutradik*, *al-aulad*[2] *naslan bad naslan*,[3] and *zandfarzandan*[4] have in Chhotanagpur the limited customary meaning of heirs male of the body of the grantee. Mr. John Reid considers that even *kushbrit*, *mokurrari*, *brahmottar* and other similar kinds of tenures revert to the grantor on the failure of male heirs of the body of the grantee.[5] But this latter proposition still remains open to doubt, as there has been no judicial pronouncement upon it. It may be noted here that the *kushbrit* tenure is a tenure granted to a Brahmin for performing *pujas* and is in the nature of a *brahmottar* grant, but is generally not free from rent like the latter. *Devattar* and *brahmottar* grants are not uncommon in the Chhotanagpur division. *Mahatran* or grants of land made to men in position are very infrequent in Ranchi, but can be met with frequently in Manbhoom and some times in Singbhoom. These are rent-free tenures and whether they would revert to the parent estate on failure of male heirs of the grantee is a question which is not yet free from doubt. The maintenance grants of Palamow, locally known as *jagir babuana* are not transferable without the consent of the grantor and are resumable on unauthorised transfers.[6] There are some twelve important grants under the Ramgarh estate in Hazaribagh in which the law of primogeniture prevails. In the other maintenance grants in

[1] *Gajendra* v. *Mathura*, (1916) 20 C. W. N. 876, *sc.*, 1 P. L. J. 109.

[2] Literally means—progeny, descendants.

[3] Literally means—In regular descent or succession.

[4] *Toolsee* v. *Modnurain*, [1848] S. D. A. 752, *sc.*, 10 I. D. O. S. 532.

[5] Reid's Settlement Report, 110; Ranchi District Gazetter, p. 191.

[6] *Dirguj* v. *Fateh*, (1905) 3 C. L. J. 521, 529.

Hazaribagh, the law of succession is regulated by the ordinary Hindu law. At the inception, these grants were resumable at the pleasure of the grantor on the death of the grantee, but from the want of the exercise of the right of resumption, these tenures have now assumed a hereditary character liable to be resumed on failure of male heirs.[1] On the question of heritability to maintenance grants and *jaigirs,* opinions are divided so far as the district of Ranchi is concerned. The next brother of the Maharaja of Chhotanagpur is called the *kumar,* and his third brother is called the *thakur* and his other brothers are called *lals.* By a well-defined custom, the estates given to the *kumar*, and the *thakur*, locally known as the *kumarkari gadi* and the *thakurai gadi* respectively, are impartible, and the law of primogeniture prevails in these two estates. But it is not yet a settled custom, inspite of the opinions of Mr. John Reid[2] and Justices Atkinson and Chapman of the Patna High Court[3] that the *lals* cannot divide their properties, or that primogeniture is the *lex loci* of this division. One custom, however, is well recognized in the Maharaja's family the exclusion of females from succession[4] The *kushbrit* and other miscellaneous tenure-holders, however, do partition their properties,[5] and it cannot be said that it is the custom to exclude females from succession in these tenures. It is a settled custom amongst the Mundas and the Oraons of Ranchi that all the sons make equal partition amongst themselves, giving to the eldest brother some property in

[1] *Kopilnauth* v. *Government*, (1874) 22 W. R. 17 C. R.; *Perkash* v. *Rameshwar*, (1904) I L. L. 31 Calc. 561.

[2] Vide Settlement Report, pp. 110, 112.

[3] Vide *Gajendra* v. *Mathura*, (19 6) 20 C. W. N. 876 *sc*, 1 P. L. J 109.

[4] Vide *Jeetnath* v. *Lokenath*, (1873) 19 W. R. 239.

[5] Mr. Hallett in the Ranchi District Gazetteer expresses the opinion that all *jagirdars* and maintenance holders, and even tenureholders under them, have adopted the custom of impartibility (Vide p. 191). But this opinion does not appear to be based on facts.

excess as his "*jethangi.*" The females are, however, not allowed to inherit.[1] It cannot be asserted authoritatively therefore that primogeniture is the *lex loci* of this district. It may be stated here that the *mankis* and some bigger Mundas, and even some other castes such as Kurmis of Sifli have adopted the rule of primogeniture, and so have the Rautias. The holders of the Basia Estate, which is a Rautia Estate, and of the Biru Estate follow this rule of succession. In Manbhoom, there is a class of *khorposh* grants called *hakimali* or *hikimali*. These are grants assigned for the maintenance of the *hakim* or second brother, and the *kunwars* or the third brother of the *zemindar* for the time being. On the death of the *zemindar*, the brothers of his successor take up the lands attached to the office of *hakim* or *kunwar*, and perform the services in consideration of which those lands are held. A *hakimali* tenure is thus dependent on the life of the *zemindar* and not on that of the tenure-holder himself. But each *zemindar*, when he succeeds to the estate, is bound to make suitable provision in the form of ordinary *khorposh* or maintenance grants for the *hakims* who have vacated the *hakimali* grants derived from their relationship to his predecessor. Such maintenance grants are held during the life of the grantee and are liable to lapse at their death to the parent estate.[2] In Dalbhoom, which is an impartible *raj*, the grantees have the same rights as the grantors of the maintenance grants.][3]

[Life grants are made generally in the district of Ranchi to ladies, either of the Maharaja's family for

Life grants.

[1] Vide S. C. Roy's "The Munda," pp. 430—31 and "The Oraon," p. 374.

[2] Hunter's Statistical Account of Bengal, Vol. XVII, p. 336. See *Radha* v. *Milan*, (1912) 18 C. L. J. 23.

[3] Vide Hunter's Statistical Account of Bengal, Vol. XVII, p. 90. But see *Mahomed* v. *Dhojamani*, (1905) 2 C. L. J. 20, though it was a case where the grant was in the nature of a *deori* grant.

their maintenance, or to the widow of a person on whose death without male heirs a *jaigir* or other similar grant has been resumed. The expression used to connote a life-grant is "*hinhayet*" of "*taheyat*". Grants made to the grantor's wife at the time of marriage, locally called the "*sindurtari*" grant in Ranchi and "*deori*" grants in Hazaribagh are also generally life grants. The *deori* grants of Hazaribagh are made to the wives of the *rajas* and are resumable of the death of the grantee].

Act VI (B.C.) of 1908.

In the districts comprising Chhotanagpur division,[1] with the exception of the Tributary *Mahals*, the Rent-Law in force is [Bengal Act VI of 1908—the Chhotanagpur Tenancy Act. This Act repealed Act I (B. C.) of 1879 which was the law of landlord and tenant in the division except Manbhoom before the Act of 1908. The older Act I (B. C.) of 1879 was] a procedure Act, the modifications in the portion dealing with substantive law being very slight. The law as to landlord and tenant, as laid down in Act X of 1859, had been practically retained, except as to certain peculiar kinds of tenure-holders. Section 19 of the Act dealt with *bhuinhari* and *khudkati* tenures, and laid down that no tenant of such lands were to be held liable to the enhancement of rent previously paid by him for such lands, unless it be shown that the tenure had been created within twenty years before the institution of the suit to enhance the rent of such lands. The section further provided that where the enhancement of rent of such tenures was decreed, the rent assessed must not exceed one-half of the rent paid by an ordinary *raiyat* with a right of occupancy on the same class of land with similar advantages. [The Act of 1908 is very similar to the Bengal Tenancy Act, but differs as regards the forum and procedure for execution of

[1] Ranchi, Hazaribagh, Palamow, Manbhoom, Singbhoom.

decrees and orders and provides for local peculiarities. The law relating to tenures is contained in Chapter III of the Act of 1908, which is now the law of landlord and tenant in the whole of the Chhotanagpur division. *Jaigirs*, *khorposh* grants and *kushbrit* tenures are in the nature of permanent tenures and their rent cannot be enhanced, but the tenure-holder can be ejected for non-payment of rent.[1] These tenures are also transferable without the consent of the landlords, and on such a transfer taking place, the landlord is required to register the name of the transferee in his *sherista*, on receipt of the landlord's fee.[2] This registration, however, does not affect the landlord's right to resume the tenure on failure of the male heirs of the body of the grantee. If a tenure is resumed on the happening of the said contingency, it passes to the landlord free from all incrumbrances created by the tenure-holder without the consent of the landlord except certain specified items.[3] The same result follows if a tenure is sold for its own arrears, under section 208 of the Act, which makes section 16 of Act VIII (B.C.) of 1865 applicable to such sales. Consequently it has been held, when a sale takes place, the entire tenure must be sold, and a decree obtained against some of the registered tenants cannot be executed as a rent-decree, and if a portion of tenure is exempted from the decree, the decree-holder is not entitled to execute the decree as a rent-decree under the provisions of section 208 of the Act of 1908, but it is open to the decree-holder to execute the decree as a deeree for money in ordinary Civil Courts.[4] If the Commissioner, however, exempts any portion of a tenure

[1] Act VI (B.C.) of 1908, Sec. 9. Vide *Nayan* v. *Ajit*, (1913) 17 C. W. N., 1068.

[2] Act VI (B.C.) of 1908, Secs. 11, 12.

[3] Act VI (B.C.) of 1908, Sec. 14.

[4] *Chandra* v. *Protap*, (1913) 18 C. W. N. 170. See also *Madan* v. *Pratap*, (1915) 20 C. W. N. 111.

from sale under the powers vested in him under section 208, the landlord is entitled to sell the remaining portion as an entire tenure and the consequences of a sale under the Bengal Rent Recovery Act VIII (B.C.) of 1865 will follow].[1]

Bhuinhars. The *bhuinhars* are an important class of tenure-holders in these districts, and they are supposed to be the descendants of those who originally settled and were the first tillers of the soil in the villages. The Mundas of Chhotanagpur claim to be the original settlers, but as a matter of fact we scarcely find any Munda or *bhuinhar* in this district. The truth seems to be that the *bhuinhars* are the descendants of men who were in the villages when Hindu authority was first asserted. The Hindu landlords put down the influence of the Mundas, if they had any at that time, and extorted services from the settled inhabitants. These services were originally feudal, such as attendance at marriages, following the chiefs in war &c. [or the collection of rent and general management;][2] but gradually half rent was imposed. For causes well known in the history of civilization, the *bhuinhars* became gradually reduced in number. The Hindu *rajas* of Nag family, who claimed to be the descendants of the Solar-kshetriyas, and their friends and relations gradually absorbed the *bhuinhari* lands. Shortly before 1869, Christian missionaries, specially the Lutherans, were making converts of the Non-Hindu tribes. The Christian *bhuinhars* learned of secular things more than the sacerdotal, and waking from a long sleep of apathy and submission, they took forcible

[1] *Madanmohan* v. *Protap*, (1912) I. L. R. 40 Calc. 623, *sc.*, 16 C. W. N. 1024. See also *Madan* v. *Pratap*, (1914) 19 C. W. N. 200.

[2] Lands allotted to the *munda khunt* or that branch of the original Munda family which was in charge of the collection of rents and general management are called *mundai* lands. Where this division of *bhuinhari* lands can be found, it has to be borne in mind that the Oraon is a later settler than the Munda in Chhotanagpur and this state indicates that the Oraon village still retains the remnant of the old order of things. Vide Webster's Report, Part III, para 44.

possession of large quantities of land, to which they had not the remotest title. Riots followed, and the Chhotanagpur Tenures Act, II (B. C.) of 1869, was passed for the settlement of the district.[1] Sir William Hunter in his Statistical Accounts of the Lohardagga district thus sums up the characteristic provisions of the Chhotanagpur Tenures Act: "*Bhuinhari*, as defined in the Act, includes the four cognate privileged tenures known as *bhutkheta*,[2] *dalikatari*,[2] *pahni*,[3] and *mahtoai*,[4] while *manjhas* or *manjhihas*[5] includes *bhutkheta*.[5] The jurisdiction of the regular courts is barred; and Special Commissioners are appointed to demarcate and register the tenures[6] which come under the Act, subject to appeal to the Commissioner of the Division.[7] Pleaders (*vakils*) and law agents (*mukhtars*) are not allowed to be heard without special permission.[8] The term of limitation is fixed at twenty years,[9] and the service conditions of the *bhuinhari* tenures are allowed to be com-

[1] As to scope of the Act, see *Sham* v. *Sobin*, (1882) I L. R. 8 Calc. 397, *sc.*, 10 C. L. R. 419.

[2] These are grants for propitiating evil spirits.

[3] These an grants to *pahans* (or *pradhans*) as remuneration for priestly offices. These lands also include the *panbhara* lands allotted to the *pahan's* assistant or one who carries water for his priestly duties. In Oraon countries, the post of *pahan* is generally changed trienially. These lands are thus not hereditary, but are held in rotation by the *pahan* for the time being. See S. C. Roy's "The Oraon", p. 112 and Reid's Act VI (B. C.) of 1908, notes appended to it. The most interesting item of *bhuinhari* property entirely controlled by the *pahan* is the *sarna* or the sacred grove, which no one is permitted to destroy or descerate, lest the spiritual inhabitants be displeased and bring misery and death in the village.

[4] These are lands allotted to the *mahto* (old Sanskrit *mahatma*), whose function is to supervise the landlord's collections and to do general service for him. Originally of course these duties were rendered by him to the Munda or *pahan*. See Webster's Report, Part iii, para. 45 and Ranchi District Gazetteer, 148.

[5] *Post*, p. 534.

[6] Act II (B. C.) of 1869, Secs. 2, 3, 4, 5.

[7] *Ibid*, Sec. 14. See also sec. 6.

[8] *Ibid*, Sec. 21.

[9] Under the Act of 1908 (sec. 10) there can be no enhancement of rent in respect of the tenures entered in the Registers prepared under the Act of 1869.

muted for a money payment.[1] At the same time, no date is fixed within which such claims to hold land on a privileged tenure must be put in. In consequence of this omission, and the impossibility of commencing the work of demarcation in all parts of the district at once, it is feared, that when some of the more remote *perganahs* are visited by the Special Commissioners, serious difficulties may arise." [It has been held that a register prepared under section 5 and confirmed by sections 25 and 26 of the Act of 1869 is conclusive evidence of the facts recorded therein.[2]] The Bhuinhari Act, instead of improving the condition of the *bhuinhari* population, had the effect of eliminating them. Section 19 of the Act of 1879 placed the *bhuinhars* in a securer position on favourable terms. Section 20 of the Act of 1879 provided that no tenant of lands known as *korkor*, *baibala, khandwat*, *sajhwat*, *jalsasan* and *ariat*, shall be liable to any enhance ment of rent except under the terms of written contracts, or in accordance with the general custom prevailing with respect to such lands in the village in which they are situated.[3] [The Act of 1908 gives the further privilege to the *bhuinhars*. They can convert any upland into lowland, which can be done by an ordinary *raiyat* only with the consent of the landlord.[4] The *bhuinhari* lands have also been declared by the Act of 1908 not saleable or transferable, except by way of *bhugutbandha* for 7 years or *zurïpehsgee* for 5 years[5] or for any useful purpose connected with building, religion or education.[6] The *garrahi* holdings

[1] Act II (B. C.) of 1869, Secs. 9 to 21. Act IV of 1897 amended the provisions as regards voluntary commutation of conditions and services and provided for compulsory record, with or without commutation. The Act of 1897 has been repealed by Act VI (B. C.) of 1908, which now provides for *bhuinhari* tenures (Chapter XIII).

[2] *Pertap* v. *Masi*, (1894) I. L. R. 22 Calc. 112. See also *Kirpal* v. *Sukurmoni*, (1891) I. L. R. 19 Calc. 91.

[3] The Act of 1879 has been repealed by Act VI (B. C.) of 1908.

[4] Act VI (B. C.) of 1908, Sec. 64.

[5] *Ibid*, Sec. 48. [6] *Ibid*, Sec. 49.

also properly come under the *bhuinhari* lands, although either by mistake or some other reason unknown, these are exempted from the operations of the *bhuinhari* survey. Tenants hold these lands, but the *pahan* and the *mahto* retain entire control over them.]

Service tenures.

There is an important class of tenures in the Chhotanagpur division—*jaigirs* and *chakrans*. The holders render services of various kinds to the *rajas* and the village communities and pay either no rent or nominal rent.[1] Considering the altered state of things under the British Government, commutation of service into rent is very necessary, [and has been done by the Maharaja of Chhotanagpur and in Hazaribagh. In recent times *jaigirs* are granted in Chhotanagpur with rent and *rakumals* attached to the grant. The invariable custom with regard to these *jaigirs* is that these are resumable by the grantor on failure of heirs male of the body of the grantee.[2] The subordinate *jaigirdars* also grant *jaigirs* which partake of the incidents of the original *jaigir*, *viz.*, resumability on failure of male heirs of the body of the grantee. It has been held in a case from Palamow that a *jaigir* is not necessarily conditional, nor *per se* inalienable.[3] There are various types of *jaigirs* in Palamow which are different in character from each other, but are all grants in lieu of service of some sort.[4] In Hazaribagh, the Government and the Raja mutually arranged to commute services to rent in a certain proportion.[5] The Raja of Ramgarh, by the abovementioned arrangement, retained the power to resume the *jaigirs* on the death of

[1] See *ante* p. 271 and Cuthbert's Tenure Report, paras 22-23.

[2] See Reid's Settlement Report, p. 110; Act I (B. C.) of 1879, Sec. 124 repealed by Act VI (B. C.) of 1908, Sec. 14; *Kopilnauth* v. *Government*, (1874) 22 W. R. 17 C. R.; *Gajendra* v. *Mathura*, (1916) 20 C. W. N. 876, *sc.*, 1 P. L. J. 109.

[3] *Bhagwat* v. *Sheo*, (1913) 18 C. W. N. 297, *sc.*, 18 C. L. J. 277.

[4] See Hunter's Statistical Account of Bengal, Vol. XVI, p. 393.

[5] See Boddam's Tenure Report.

the holders, but never exercised the power. On the other hand, the original grants used to be confirmed in favour of the heirs and successors of the grantees sometimes on receipt of a *nazarana* and more frequently without any consideration, and thus by efflux of time the power of resumption was lost, and these tenures have become permanent and liable to resumption only on failure of heirs of the original grantee. In confirming these grants, the *rajas* recognised, however, only the eldest son or eldest branch of the original holder,—by which it means, I presume, the heirs male of the body of the grantee. Among the *jaigirdars*, the ordinary Hindu law of equal division prevails, with this exception that in some families the eldest representative of the family obtains a share one-tenth larger than the rest of the family, called *dasahs* or *jethans*. In Manbhoom *jaigirs*, there is no right of resumption, when the *jaigirs* are for services of a public nature.[1] There is a class of service tenure in Dalbhoom known as *sadchakran*. These tenures depend entirely on the pleasure of the *zemindar*. The *pradhani* tenures of Dalbhoom are granted to *pradhans* or headmen of villages who collect rent. They get a certain percentage of the collections as commission or are remunerated by grant of lands. These are of three kinds: (1) enhanceable with terminable lease, (2) enhanceable with permanent lease and (3) not enhanceable with permanent lease. The *pradhans* are recognized as village officials. Besides collecting rent, they assist in bringing the village offenders to justice.[2] *Ghatwalis* have been already dealt with].[3]

[1] See *Nilmoney* v. *Government*, (1865) 6 W. R. 121 C. R.; *Bukronath* v. *Government*, (1879) I. L. R. 5 Calc. 389, *sc.*, 4 C. L. R. 583 and *Nilmoni* v. *Bakranath*, (1832) I. L. R. 9 Calc 187, *sc.*, L. R. 9 I. A. 104.

[2] For a detailed description of *pradhani* tenures in the now revenue-paying estate of Porahat, see T. S. Macpherson's Porahat Settlement Report, pp. 28, 32—44.

[3] *Ante* pp. 297 to 307.

[There are a number of rent-free tenures in Chhotanagpur which have special characteristics and have special names. I shall mention here the important ones. There are two curious varieties in the Ranchi district mentioned by Webster in his 'Tenure Report' and which have now become obsolete: (1) *Tangor*: "If a Brahmin failed in his attempt to get a village from the Maharaja by fair means and was willing to sacrifice himself for the benefit of his heirs, all he was to do was to betake himself to a village, taking care to select a good one and deliberately hang himself therein. The only method of avoiding the onus of the guilt of possessing a village in which a Brahmin had hung himself was by getting rid of the accursed spot and giving it away in *jaigir* to the heirs of the deceased." (2) *Chiba-brit*. "The Maharaja having finished his *pan*, threw it away. Some great admirer picked up the choice morsel and put it in his mouth, whereupon the Maharaja, as a recompense of his great devotion gave him a village or two in *chiba brit*,—and well-earned they were. They follow the usual conditions of *brit* tenures"[1] The rent-free tenures of Palamow may be divided into two parts: (1) religious grants, such as *khuskhairat*, *bishnubrit*, *kushbrit* etc., and (2) grants made in reward of service, such as *khairat-inam*, *jagir-lakhiraj*, *jagir-basarat-khidmat* &c. Many of the tenures comprised in the above heading contain revenue or rent-free estates of considerable extent, the most important of which is the *utari* estate consisting of 301 villages. The proprietors hold the title of *bhaia* and are a branch of the Sonepura family. The title of *bhaia* sprang from the fact that on one occasion the elder wife had a son after the younger wife and the question of title was settled by calling this son *bhaia* or brother. In *perganah* Belunja

Rent-free tenures.

[1] See Webster's Tenure Report, Part II, clauses 59 and 60; Hunter's Statistical Account of Bengal, Vol. XVI, p. 375, and Ranchi District Gazetteer, pp. 190-1.

and Japla there are some Mahomedan rent-free tenures, such as *mussajia* (guardianship of mosques), *mukabir* (guardianship of ceremonies), *wakaf* (charitable bequests) and *niaz-i-dargah* (grants to particular shrines). Most of the rent-free tenures in Palamow are hereditary, either by express terms or by long established custom. Succession in some of them, such as *utari*, is regulated by the rule of primogeniture. In Hazaribagh district, the *rajas* created some new grants which go by the name of *khairat-byswan*, if made on condition of the performance of religious ceremonies, and *jagir-byswan*, if made on condition of performing other than religious services. The *brahmottar* and *devattar* grants in this district possess the same characteristics as such tenures in other parts of the country. The *brahmottar* and *devattar* grants of Dalbhoom were originally held rent-free and have since 1837 been charged with a quit-rent. *Brahmottar* tenures may be transferred by the holder, but the original owner has no power of resumption. *Devattar* tenures are grants made to priests for offering sacrifices to the *zemindar's* family-deities &c. Unlike the *brahmottars*, they are resumable by the proprietor when the offerings cease and the grantee has no power to alienate them.]

Mundari Khunt-attidars.

[The northern part of Chhotanagpur proper and some parts of Singbhoom in the Government *mahal* Kolhan or Hodesam and Manbhoom are still inhabited by that interesting group of aborigines now called the Mundas. As we have said, they claim to be the original settlers of the soil. They used to make their habitations by clearing the jungle. The places which they then established would naturally be their *khuntkatti* property. The word *khuntkatti* signifies clearing the forests.[1] A *mundari khunt-kattidar* is "a *mundari*

[1] For a fuller account of the Mundas, see S. C. Roy's "The Mundas" and Father Hoffman and E. Lister's Note appended to Reid's Chhotanagpur Tenancy Act.

who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family, and includes: (*a*) the heirs male in the male line of any such *mundari*, when they are in possession of such land or have any subsisting title thereto, and (*b*) as regards any portions of such land which have remained continuously in the possession of any such *mundari* and his descendants in the male line, such descendants."[1] *Mundari Khuntkattidari* tenancies are neither tenures properly so called, nor are they *raiyati* holdings. The incidents of these tenancies are different from both, and the Act of 1908 has a separate chapter regulating their incidents.[2] These tenancies are no longer transferable, nor are they saleable except in special cases.[3] The provisions of the rent Act regarding suits for rent and sale for arrears of rent do not apply to these tenancies. There are special provisions for realization of arrears of rent[4] and for enhancement of rent][5]

The *Manki pattis.*

[The ancient form of Government amongst the aboriginal people, especially the Mundas, was that the *munda* was the head of a village, whereas a group of villages, called a *parha* (in Sanskrit *pallee*) would be presided over by a *manki*, to whom each village *munda* would pay the rent for his village. "The *manki* is the chief of a *pati*, and his duties now consist mainly in realising the quit-rent due by the villages of his *pati* to the superior landlord, as well as other dues, such as road-cess or *rakumats*. Formerly he used to settle land and other disputes arising in the villages of his *pati* and also to exercise general police powers, he having in conjunction with a *panchayet* of village authorities (*mundas*

[1] Act VI (B. C.) of 1908, Sec. 8.
[2] *Ibid*, Chapter XVIII.
[3] *Ibid*, Secs. 240, 241.
[4] *Ibid*, Sec. 244.
[5] *Ibid*, Sec. 243. For detailed description of incidents of these tenancies, see Macpherson's Settlement Report, 46 to 50 and Webster's Report, Part III, para, 44.

and *pahans* generally) the acknowledged right of inflicting fines and other punishments for all kinds of offences reported to him. Of the quit-rents levied by him, ustually one-half is handed to the superior landlord and the other half retained as his own share."[1] The *mankipatti* system is an integral part of the Munda system of Government and can be found in all places where remnants of the old system still continue. In some parts of the country, the village headmen are also called *manjhis* and *pradhans*. It seems, the superior landlords have no right to resume *mankipattis*, as these existed from before the introduction of the system of middlemen. But it is said that in Porahat a *manki* can be dismissed for misconduct and a new *manki* selected from his family by the *zemindar* subject to confirmation by the Deputy Commissioner.[2] Generally speaking, the *mankis* are *ghatwals*, and their tenures correspond to the *ghatwali* tenures of Manbhoom and Singhboom.[3] The Act of 1908 directs a preparation of record-of-rights in respect of these tenures, and when this is done, the entrees made therein will be conclusive evidence of the particulars entered therein].[4]

Shikmi taluqs.

[There are some *shikmi taluqs* in Ramgarh, and unlike the tenures of the same class in Bengal, the law of primogeniture prevails in them; in other respects, the incidents of these *taluqs* are the same as those of the same class in Bengal.[5] The *shikmi taluqs* of Manbhoom are similar in all respects to such *taluqs* in the permanently-settled estates in the Regulation districts].

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[1] Hoffman and Lister's Note on the Land System of the Munda Country. See also Hunter's Statistical Account of Bengal, Volume XVI, page 328.

[2] Vide T. S. Macpherson's Porahat Settlement Report, pp. 30-31.

[3] See opinion of Colonel Dalton and Mr. Hewit quoted in Mr. Reid's Chhotanagpur Tenancy Act, page 91.

[4] Act VI (B. C.) of 1908, section 132.

[5] *Ante* p. 147.

[*Putni* tenures are found in the Pachete estate in the district of Manbhoom, and nowhere else in Chhotanagpur. They have all the incidents of such tenures in Bengal and are governed by the *Putni* Regulations.] *Putni* tenures

[The *ihtimdari* tenure is a tenure granted to persons in charge of the realization of the *zemindar's* revenue. These tenures are mostly hereditary, *Mundi idara* is another variety of this class of tenures, but rent is enhanceable in the ordinary *ihtimdari* tenures, but not in the latter class. These tenures are found in Manbhoom.] *Ihtimdari* tenures.

These tenures are like the tenures held by the Mundas in Chhotanagpur proper and are held by the Bhumij inhabitants of Manbhoom, who are ethnically alike to the Mundas of the Ranchi district. Their incidents partake of the same characteristics as those of the *mankipattis* and *mundari khunt-kattidari* tenures described above. These tenures are found in Manbhoom. *Manki* tenures are also found in the Kolhan or Hodesam in Singbhoom, of which the Government is the proprietor.] *Manki* and *mundari* tenures.

[*Jotpatta* tenure is a lease only of a portion of a village. *Jamipatta* is a lease of an entire village. These tenures are found in Manbhoom.] *Jotpatta* and *jamipatta*.

[Most of the *mandali* tenures consist of entire villages. "The holders have an hereditary right of occupancy, and claim also not to be liable to an enhancement of their rents. But in the deeds creating *mandali* tenures, the *zemindar* does not expressly waive the right of enhancement".[1] Most *mandali* tenants have under them subtenants with permanent occupancy rights.] *Mandali* tenures.

[The "*nayabadi* tenure is founded, in the first instance, on a *sanad* or grant by the *zemindar* to a person *Nayabadi*.

[1] Hunter's Statistical Account of Bengal, Vol. XVII, p. 329.

intending to clear and settle on waste land. By a peculiar local custom, such *sanads* are granted in Pachete by the heir apparent to the *raj*."[1] The tenant is renumerated either by a gift of specific portions of land rent free or by deducting a regular proportion from the rent of the entire village. These tenures are found in Manbhoom.]

Jungleburhi.

["A *jungleburhi* tenure is a lease of a specific area of land at a fixed rent, given in consideration of the grantee clearing the jungle and bringing the land into a productive state. These Manbhoom tenures differ from the *jungleburhi* tenures of Bengal, as described in Regulation VIII of 1793, in not being held on a *russudi* or progressively increasing rent."[1] These are ancient tenures as distinguished from the *nayabadi* tenures, which are new creations.[2]]

Cultivating tenures of Chhotanagpur.

[The cultivating tenures of Chhotanagpur may be classified into four classes, *viz.*, landlord's private lands, tenant's holdings, homestead lands and service holdings.]

Landlord's privileged lands.

[The landlord's privileged lands have been defined in the Act of 1908 as "(*a*) lands which are cultivated by the landlord himself with his own stock or by his own servants or by hired labour, or are held by a tenant on lease for a term of years or year by year, and which are, by custom, recognized as privileged land in which occupancy rights cannot accrue, and (*b*) lands which are entered as *manjhihas* or *bethketha* in any register prepared and confirmed under the Chota Nagpur Tenures Act.'[3]]

Manjhihas or *bethkheta.*

[Lands mentioned in clause (*b*) of the above definition cannot be found anywhere else, except in the district of Ranchi, where *bhuinhari* operations took place.

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[1] Hunter's Statistical Account of Bengal, Vol. XVII, p. 330.

[2] *Ante* pp. 42, 54, 55 and 149.

[3] Act II (B. C.) of 1869. See Act VI (B.C.) of 1908, Sec. 118.

It will be remembered that these operations were undertaken with a view to settle the disputes existing between the landlords and *bhuinhars* regarding the extent of the former's privileged lands and the latter's *bhuinhari* tenures. To do this, not only were the *bhuinhari* lands, but also the landlord's privileged lands, locally known *as manjhihas*, which included *bethkhetha* or land allotted to the landlord's servant for cultivating the *manjhihas* were demarcated. In this class of landlord's privileged land, no right of occupancy can accrue however long the servant's possession may be.[1] Mr. Reid says: "They are at the absolute disposal of the landlord, and no right of occupancy or even of non-occupancy can accrue in them in any circumstances. The *bethkhetha* lands are, as the name implies, lands set apart for the purpose of service. The villagers who cultivate them render special services to the landlords; or they are cultivated by the whole body of villagers, who enjoy the produce in common and render the fixed number of days' service to the landlords in return. The term *manjhihas* means literally the headman's share. The word appears to be an interesting survival of the time when the villages were ruled by headmen, and landlords had no jurisdiction in the village community".[2] In Hazaribagh, the name *manjhihas* is given to landlord's privileged lands, whereas in Manbhoom and Singhbhoom, the name is "*man*" or lands of honour. All these lands would now come under the definition of privileged lands given in the Act of 1908. If the occupation of a tenant is not for a term of years or from year to year, and such occupation is continued for more than 12 years, he acquires a right of occupancy in such a land.[3]]

[1] Act VI (B C) of 1908, Sec. 43.

[2] Vide Reid's Settlement Report, p. 108. See also Webster's Tenure Report, Part III, cl. 8.

[3] See *Masudan* v. *Goodar* (1905) I. C. L. J. 456.

Zirait

[Landlord's privileged lands, except *manjhihas* and *bethkhetha* already demarcated under Act II (B. C.) of 1869, have in such parts of Chhotanagpur where settlement proceedings have been completed, been recorded under the one common name of *zirait* under Chapter XIV of the Act.]

Remarks.

[" Landlords in Singbhoom and Manbhoom districts sometimes claim the *man* or *khas* lands of the village as privileged; when these lands have been reclaimed by a *khuntkatti* headman or other *raiyat*, they cannot be recorded as privileged though they may have been in the landlord's possession for a considerable period. In proceedings regarding landlord's privileged lands, the most essential fact in issue is who reclaimed the land * * *. If however the *khem* or *man* lands were originally reclaimed by the landlord or his servants and were subsequently set aside as the service *jote* of the headman of the village or other functionary, they are clearly landlord's privileged lands, though they may be in the possession of the headman or other service-holder".[1]]

Tenant's holdings.

[The following classes of cultivating tenants have been enumerated in Act VI (B. C.) of 1908 :—

(*a*) occupancy *raiyats*,

(*b*) non-occupancy *raiyats*,

(*c*) raiyats having *khuntkatti* rights,

(*d*) Under-*raiyats*.]

Khunt-katti rights.

[A "*raiyat* having *khuntkatti* rights means a *raiyat* in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of the village or their descendants in the male line, when such *raiyat* is a member of the family which founded the village or a descendant in the male line of any member

[1] Reid's notes under Sec. 122 of Act VI (B. C.) of 1908.

of such family: Provided that no *raiyat* shall be deemed to have *khuntkatti* rights in any land unless he and all his predecessors in title have held such land or obtained title thereto by virtue of inheritance from the original founders of the village".[1] A record-of-rights has been directed to be prepared under Chapter XV of Act VI (B. C.) of 1908 of *raiyats* having *khantkatti* rights, and when this record has been prepared, any entry made therein is conclusive evidence of the facts recorded[2]; and any land not recorded as *khuntkatti* cannot be claimed as such, by any *raiyat*.[3]]

Korkar.

[Next to *raiyats* having *khuntkatti* rights, the most important class of tenants are the tenants having *korkar* rights.]

["*Korkar* means land, by whatever name locally known, such as *bahbala*, *khandwat*, *jalsasan* or *ariat*, which has been artificially levelled or embanked primarily for the cultivation of rice, and—

(a) which previously was jungle, waste or uncultivated, or was cultivated upland, or which, though previously cultivated, has become unfit for the cultivation of transplanted rice, and

(b) which has been prepared for cultivation by a cultivator (other than the landlord), or by his predecessor-in-interest (other than the landlord), with or without the consent of the landlord according as such consent is required or not by section 64."[4]]

[In *korkar* lands, which are also called *sajhwat* and *bahbala* in Ranchi, *khandwat* in Hazaribagh and

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[1] Act VI (B. C.) of 1908, Sec. 7 (1). [2] *Ibid*, Sec. 132.

[3] *Ibid*, Sec. 134. As to the power of Board of Revenue to revise, see *ante* p. 461.

[4] Act VI (B. C.) of 1908, Sec. 3 (xiii).

Palamow, and *jalsasan* [1] and *ariat* in Manbhoom, a tenant acquires occupancy right before the fixed period of 12 years. A tenat of *korkar* lands is thus in a better position than an ordinary *raiyat*.[2]]

[An ordinary *raiyat* has to take the consent of the landlord for preparing *korkar* lands. If a landlord, however, does not object for two years, it will be presumed that he had given his consent.[3]]

[Consent is not required in some cases, and the Act provides that "it shall be presumed, unless and until the contrary is proved, that the said consent is not required :—

(i) Where any land in a village, other than land known as *manjhihas* or *bethkhetha*, is entered in any register prepared and confirmed under the Chhotanagpur Tenures Act, 1869, by a member of a *bhuinhari* family, or

(ii) where any land in a village is entered as a *mundari-khunt-kattidari* tenancy, or any tenant of land in a village is entered as a *mundari khunt-kattidar*, in any record-of-rights finally published nnder this Act or under any other law in force before the commencement of this Act, by a member of a *mundari khunt-katti* family, who holds land in such village."[4]

A tenant is not entitled to convert orchard or cultivated or homestead land into *korkar*.[5]]

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[1] The physical features of Manbhoom have enhanced the value and utility of banks (*bandhs*). Large pieces of land are granted for the excavation of tanks, on the condition that water should be allowed to be used for purposes of drinking and irrigation of the neighbouring lands of other *raiyats*, and the grantees should have the right of holding the lands by the sides of tanks, either at small quit-rents, or variable rents, portions of the lands being held rent-free, permanent remissions being allowed as remuneration for labour and expenditure incurred by the tenants.

[2] Act VI (B. C.) of 1938, Sec. 67.

[3] *Ibid*, Sec. 64 (3).

[4] *Ibid*. Sec. 64(2).

[5] *Ibid*. Sec. 66.

[A *korkar* tenant generally pays half of the rent which an occupancy *raiyat* pays for his land.[1]]

[The ordinary tenant's holdings are known in Ranchi as "*rajhas*," which is a corruption of the word *rajaugs* or the *rajha's* share. In Manbhoom and Singbhoom, it is called *prajali*, and in Hazaribagh and Palamow *raiyati*. The following varieties of *raiyati* holdings are common in Ranchi—(1) *Chatisa* which is the best kind of holding, which generally consists of paddy lands (low land), with a complementary upland (locally called *tanr*) attached to it. This is also called *lekha*. There is often a subsidiary *done* (the local variant of low paddy lands) attached to the principal *done*, and in such a case, the principal one is called the *matha* and the subsidiary one *latha* (the foot). Besides the rent which is assessed upon the produce, the tenant has to pay the customary *rakumats* and render "*bethbegar*" or the customary feudal service to the landlord. As already noted these two together formed the praedial conditions which have been recognised as payable by the custom of landholding prevailing in the country. *Rakumats* consist of various payments in kind, and miscellaneous dues or *abwabs*. Their incidence varies from village to village. They are found to be per unit of land, or per tenancy, and were sometimes leviable on the entire village. The most common kind of *rakumats* payable in kind were—*urid*, *surguja*, *kapas*, *gundli*, *dhan*, straw and *khar*. They were in reality a kind of produce-rent consisting of a fixed quota of the produce of the upland included in cash tenancy; but as they were by local custom regarded as praedial conditions they were commuted as such. The other kind of *rakumats* consisted of miscellaneous, and sometimes irregular, dues which may be called *abwabs*. The most common items in Ranchi were *dasai*, *batta*, *bhatta*, *rasid-likhai*, *daka mush-ara*, *neg*, *bardosh*,

Rajhas.

Prajali.

Raiyati. holdings. Ranchi (1) *Chatisa.*

Rakumats.

[1] *Vide* Reid's Settlement Report, p. 95.

saraichaul or *nowa khani*, *dana-pancha* rafters, bamboos, and *ghee*.[1]]

Bethbegari.

[The same learned author writes thus about *beth-begari* or the services above referred to :—" the services were utilized for the cultivation of the landlord's *khas* lands, and the harvesting of the crops. In addition, the *raiyat* assisted him by carrying loads (*bhars*) for him on journeys. The incidence was per tenancy and not per unit of land. Certain privileged classes were ordinarily exempted and the Hindu *raiyats* generally rendered smaller number of days' service than the aboriginal *raiyats*. The landlord supplied food or drink to the *raiyats* whenever they worked for him on his journeys and the period of labour was generally limited to half a day, so the cash value of a day's service rarely exceeded one anna".[2] These praedial conditions have now been commuted to their money value and the amounts so obtained have been consolidated with the rent payable by the tenant for his holding.[3] Chapter XIII of the present Act also contains directions for the record of these praedial conditions and the method of calculating the present value of these conditions, as well as for the issues to be tried in a suit for rent, which includes a claim for the value of such conditions.[4]]

[It may be noted here that *rakumats* and *begaris* were found to be prevalent in the other districts in a much lighter condition than in Ranchi. All customary *rakumats* and *begaris* would now come under the definition of praedial conditions given in the Chhotanagpur Tenancy Act.[5]]

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[1] Reid's Settlement Report, pp. 87-88. [2] *Ibid.* p. 89.

[3] Act VI (B.C.) of 1908, Sec. 61. See also Act I (B.C.) of 1879, Secs. 25 and 26, which were repealed by Act IV (B.C.) of 1897, which again has been repealed now by Act VI (B.C.) of 1908.

[4] Act VI (B.C.) of 1908, Secs. 104 and 105.

[5] Act VI (B.C.) of 1908, Sec. 3. See also Reid's Chhotanagpur Tenancy Act, Sec. 102 and T. S. Macpherson's Settlement Report of Porahat, pp. 79-81.

[(2) *Moorli Chatisa* or *chatisa* shorn of its complementary upland. The tenant of this land does not pay any *rakumat*, and the rent payable is much lower than that for *chatisa*.] (2) *Moorli Chatisa.*

[(3) *Utakhar* or *balkat* are temporary holdings and generally consist of inferior class of *done* lands. These are tenancies similar to *utbandi* tenancies of Nadiya.] (3) *Utakhar* or *Balkat.*

[(4) *Maswar* is upland held in excess of the complementary upland linked with a *chatisa* holding. From the nature of the tenancy no right of occupancy can be acquired, as the cultivator pays rent for the year he cultivates and no rent is payable for the years in which the land is not cultivated. Rent is payable in the kind of crop cultivated.[1]] (4) *Maswar.*

[(5) *Damgat tanr*—is upland cultivated on cash rent.] (5) *Damgat tanr.*

[In the district of Hazaribagh the lands in which the *raiyats* have occupancy rights are called "*jibun*" and in those in which the *raiyats* can have no occupancy rights are called *utakhar* lands. The method of settling these lands is thus described. "The settlement of a village, therefore, is carried out in the following manner. Say that a village consists of (after deducting the *munjhus* and *sajwat* lands) 20 *dhakies*, and that it contains 30 *raiyats* of whom 10 have rights of occupancy, over 12½ *dhakies*. These 12½ *dhakies* will be called *jibun*, and the rest of the village *utakkar* lands. The 10 *raiyats* having occupancy rights would choose their lands, and then the tenants-at-will would have the rest of the village divided out to them, according to their capability to cultivate the land, and as they come to terms with their landlord. Till very lately, ere the introduction of Act X of 1859 and Act VI (B. C.) of 1862, a *raiyat* having the right of occupancy did not, as a matter Hazaribagh. (1) *Jibun.* (2) *Utakhar.*

[1] See Webster's Tenure Report, Part III, para. 35.

of course, always occupy the same land. Perhaps the term 'right of occupancy' is incorrect; it should be called 'right of cultivation.' A hereditary cultivator obtained a right to cultivate a certain portion of land. He seldom cared where the land was situated, whether to the north, east, south or west of the village; but he insisted upon having the number of lots which he had a right to cultivate made over to him."[1]]

Palamow.

[In the district of Palamow the cultivating tenancies are of four classes.]

(1) *Pureadhari.*

[(1) *Pureadhari.*—"The *pureah* system of holding is a creation of the aboriginal tribes, and has arisen out of unwritten custom. It consists in dividing off certain of the village cultivated lands into *pureahs* or annas, the general number being 16. The gross rent of the village being then ascertained, the total is distributed equally among the *pureahs*. The lands generally chosen to be the basis of the *pureah* are the rice lands; but where there are no such lands, what are called the *dih* lands, *i.e.*, the permanently cleared high lands immediately surrounding the village homestead, are chosen, or sometimes the *bari* or homestead land, and even in some cases I have known the *mahua* trees to form the basis of a *pureah*. Each holder of a *pureah* has the right to occupy as much upland as he can afford to cultivate, without being called upon for any further payment of rent."]

(2) *Uttakar.*

[(2) *Uttakar.*—In the *uttakkar* or *bigha* system, rent is paid for each *bigha* of land held. No further explanation is necessary.]

(3) *Kunwadari.*

[(3) The *kunwadari* system, strictly speaking, is the division of the entire village area into 16 annas or *kunwas*, each holder of a *kunwa* having a right to a sixteenth of the village area, including cultivation and

[1] Boddam's Tenure Report.

waste. This is the theory, but in practice this is never found it to be so, except where the holders of the *kunwas* are not only *raiyats*, but also share-holders; otherwise it is found as a rule, that, the *kunwa* division extends only to the lands actually under cultivation, the landlord, or farmer, or whoever he may be, assuming to himself the right to lease lands to *paikast* or non-resident *raiyats*, charging them rent for the same, and to settle new cultivators without any claim being set up by his co-partners, the *kunwadars*.]

[(4) *Bhaoli* system prevails only in those *mahals* bordering on Bihar and in *perganahs* Belounjeh and Jupla. The system is peculiar, only in respect of the mode of assessment and not to the distribution of land which is the simple *bigha* system. Under the *bhaoli* system the rent is payable in kind—that is to say, there is a division of crops, There are two methods of ascertaining the amount of grain or rent payable by the *raiyats*: (i) *danabandi*, (ii) *battaya*. No *pattas* are given for lands held under this system. Where the rent is assessed on the *danabandi* system, an estimator or *shudkar* is sent to the land to value or estimate the crop when it ripens. The person chosen for this work is supposed to be a disinterested person, whose opinion may be relied upon. After the *shudkar* has delivered his estimate, the *dhunbhaka* or village *punchayet* is appointed partly by the landlord and partly by the *raiyats*. The members of the *dhunbhaka* visit the land accompanied by a *katmara* or measurer, or by the *patwari* or some other village-accountant or writer. They pass regularly from field to field measuring and estimating the crops, the *patwari* recording opposite each *raiyat's* name the amount or weight of grain estimated: half of this amount belongs to the landlord or person entitled to the rent and half to the *raiyats*. After the whole has been completed, each *raiyat* is furnished with an abstract

(4) *Bhaoli.*

Danabandi.

of the estimate showing him exactly how much grain he has to deliver. This abstract is called an *utere*, and is the only proof the *raiyat* possesses of his occupancy and his payment of rent. All village titles, which by custom are payable by both parties, are deducted from the quantity estimated before making the division. The amount entered in the *utere* is unalterable, whatever the actual outturn may eventually prove to be. Where there is no collusion the estimates are generally pretty accurate; but very frequently the *dhunbhaka* have a private understanding with the cultivators, and sometimes they are the paid creatures of the landlord. Under the *danabundi* system, after the estimates have been made and the *utere* distributed, the landlord has nothing more to do. Each *raiyat* brings his proper quantity of grain or its equivalent in money, according to market rates, as may be agreed upon.]

Occupancy rights in Palamow.

[The Palamow landlords have never admitted a right of occupancy (as defined in Act X of 1859) on the part of their *raiyats*, but have always assumed to themselves the right to enhance at will at the end of the year,—and it may be fairly argued that, with long-established usage as their guide, they have a perfect right to do so.[1]]

Customary rights in Palamow.

[It will be seen from the foregoing that the Palamow peasant has no rights beyond those accruing to him in common with others under the civil law, and those which are his by ancient custom. The rights accorded to *raiyats* under the law of landlord and tenant cannot be claimed by him unless supported by a plea of local usage and custom; and even were that law extended to Palamow, I doubt whether it would be altogether applicable. The most common form of peasant holding is the *pureah* holding, and it is a question whether a right of occupancy, as defined in Act X of 1859, could be

[1] Hunter's Statistical Account of Bengal, Vol. XVI, pp. 398-401.

accorded to a tenant under that system, as the tenure is composed of two distinct parts, the smaller portion, or what may be called the basis, which is fixed, while the remainder is fluctuating. Before a right of occupancy could be accorded to such a tenant, therefore, it would be necessary to have a legal definition of a *pureah*—a standard, in fact, on somewhat the same plan as was followed in the Government farms. It remains to be seen, however, what effect the changes in the present law and the settlement proceedings, now about to be completed, make in the customary holdings of Palamow, and how far the tenacity of the Palamow landlord in preventing the tenant from acquiring occupancy rights has gradually to be relaxed.]

Manbhoom.

[The classes of lands in the district of Manbhoom are *bahal*, *kanali* and *baid*, besides *bari* which will be noticed later on. It is difficult in this district to separate cultivating tenancies from some of the tenures mentioned already, as some of the tenures, such as *nayabandi*, *jungleburhi*, etc., are cultivating tenures.]

Singbhoom.

[In the district of Singbhoom, the two classes of cultivating tenancies are (1) *khuntkatti*, which has all the incidents of a *khuntkatti* tenancy described above[1] and (2) *thikadari* which comprise occupancy and non-occupancy holdings of new-settlers.[2]]

Homestead lands.

[In the district of Ranchi, purely homestead lands are practically unknown, the *raiyati* homestead being included in his holding.[3] Homestead lands have a common name in all the districts of Chhotanagpur. These are called *bari* lands, except in Manbhoom, where

[1] *Anti* pp. 530, 536-7. This includes *mundari khuntkatti* which is very common in the Kolhan and Porahat. Their incidents have been fully described by Mr. T. S. Macpherson in his Porahat Settlement Report, pp. 45-50.

[2] See Hunter's Statistical Account of Bengal, Vol. XVII, p. 92.

[3] See Act VI (B.C.) of 1908, Sec. 78.

the name *bastu* is also attached to some classes of *bari* lands. The incidents of homestead lands are now governed by section 78, which reproduces section 181 of the Bengal Tenancy Act. Consequently local custom and usage where they exist will prevail. Mr. Reid observes that "the provisions of this section apply to *raiyats* only and not to merchants, *mahajans*, and others holding homestead lands in villages, towns and cities. It is clearly intended that the homestead should be ancillary to the agricultural tenancy. If this were not the case, a *raiyat* holding lands in the interior of a district could claim occupancy rights in homestead lands held by him in a large town or city." In the town of Ranchi, the homestead lands are known as *chapperbandi* holdings, which are by custom heritable and transferable. In *perganah* Dalbhoom, *bari* lands are sometimes assessed to heavy rents. In the rest of Singbhoom, the homestead is generally included, as in Ranchi, with the *raiyat's* cultivating holding.[1] In the districts of Hazaribagh [2] and Palamow,[3] *bari* lands are sometimes assessed to rent.]

Service holdings.

[There are, besides *ghatwali* tenures, a number of service tenancies and holdings in Chhotanagpur, such as the *gorniti*, *loharai &c.* As a rule, all village craftsmen are remunerated by grants of land, which necessarily come to an end on the completion of the service required of the holders. They do not acquire right of occupancy in such lands.[4]]

Settled *raiyat.*

[The status of a "settled *raiyat*" has for the first time been introduced in Chhotanagpur by the Act of 1908[5] and its provisions have been extended to *bhuinhars* and *mundari khuntkattidars* holding lands other than

[1] *Vide* Reid's Chhotanagpur Tenancy Act, Sec. 78, note.
[2] *Vide* Bodham's Report, para. 151.
[3] *Vide* Forbe's Report, para. 26.
[4] Act VI (B.C.) of 1908, Sec. 77.
[5] *Ibid.*, Sec. 17.

their own *bhuinhari* and *mundari khuntkattidari* lands, who will be considered settled *raiyats* in respect of such lands.[1]

Occupancy rights

[An occupancy right was by custom heritable. Provisions regarding heritability have now, however, been expressly introduced by the Act.[2] By a peculiar custom prevailing among the oxogamous Mundas and Uraons, females are never allowed to inherit except the widow, who has a life interest amongst the Oraons. Testamentary disposition of property is quite unknown amongst the aboriginal, or for that matter, amongst the non-aboriginal *raiyats* also. It is besides doubtful whether, under the law as it now stands, such a power exists. In a case decided under the analogous provision of the Bengal Tenancy Act, it was held that such a power can not be implied.[3] It has also to be borne in mind that *raiyati* holdings are now incapable of being transferred except by way of *bhugutbandha* for 7 years and *zuripeshgi* for 5 years[4] and that no court can pass an order for sale of a *raiyati* holding,[5] unless the encumbrance has been created before January, 1903,[6] and unless it be for its own arrears of rent, in which case the holding may be brought to sale under section 208[7]—and in that case the holding shall pass to the purchaser free from all encumbrances created by the defaulting tenant, unless made with the landlord's consent. Provisions for the enhancement of an occupancy *raiyat's* rent, which ordinarily will be presumed to be fair and equit-

[1] Act VI (B. C.) of 1908, Sec. 18.

[2] *Ibid.*, Sec. 23. Compare Act VIII of 1885, Sec. 26.

[3] *Midnapore Zemindary Co* v. *Hrishikesh*, (1914), I. L. R. 41 Calc. 1108, *sc.*, 18 C. W. N. 828, *sc.*, 19 C. L. J. 505.

[4] Act VI (B.C.) of 1908, Sec. 46.

[5] See *Jadhu* v. *Kali*, (1916) 1 P. L. J. 33.

[6] Act VI (B. C.) of 1908, Sec. 47. But see *Braja* v. *Kenaram*, (1919) P. L. J. 411.

[7] See *Nilmani* v. *Baldeo*, (1920) 5 P. L. J. 101.

able,[1] have now been amplified.[2] The procedure is by an application to the Deputy Commissioner, but it has been held that such an application and the steps taken thereunder are judicial proceedings and the High Court has a right to interfere.[3] The provisions as regards enhancement, reduction or commutation of rent are practically the same as under the Bengal Tenancy Act, except as to the forum. But commutation is allowed only under the provisions of the Act.[4]]

Prevailing rate.

[The expression "prevailing rate" has not been defined in the Act. Mr. Reid considers that "before rents can be settled on a large scale, it is essential to survey and classify the lands comprised within each tenancy. The local standards of measure in use in most parts of Chhotanagpur are quite indefinite. They are known as *rekhs*, *hals*, *pawas*, *annas*, *kats*, etc. The areas of these units are not constant even for the same village. A *hal* of land in parts of Singbhoom varies from 12 to 60 *bighas*, and an *anna* of land in Ranchi district varies from 1 to 10 acres. According to the locality variations are not so marked, but are often considerable. Before fair rents can be settled, therefore, a preliminary survey would appear to be essential, in order that the area of each tenancy may be recorded in acres and *bighas*. Another very important factor in rent-settlement is the classification of the land. In an undulating country like Chhotanagpur, the values of rice land vary considerably with the relative position of the fields. In order to settle fair rents equitably, it is essential to consider the relative productivity of the

[1] Act VI (B.C.) of 1908, Sec. 25.

[2] *Ibid.*, Secs. 26, 27, 29, 30, 35, 243. It has been held that section 26 does not invalidate an agreement to pay enhanced rent validly made when Act X of 1859 was in force: *Sajor* v. *Cooke*, (1912) 17 C. W. N. 430, *sc.*, 16 C. L. J. 422.

[3] *Kartik* v. *Gora*, (1913) I. L. R. 40 Calc. 518, *sc*, 17 C. L. J. 593.

[4] Act VI (B.C.) of 1908, Secs. 61, 62. See also Sec. 79, cl. 3 (iv), (v).

different classes of land comprised in each tenancy. The incidents of the rents must be regulated accordingly."]

Non-occupancy *raiyats.*

[The rent of a non-occupancy *raiyat* can be enhanced by registered agreement or by agreement under section 42, which lays down that an agreement may be tendered to the Deputy Commissioner for service on the non-occupancy tenant, and, on his refusing to accept the agreement, after notice from the Deputy Commissioner, he may be ejected. The other conditions for the ejectment of a non-occupancy *raiyat* are mentioned in section 41. It may be noted here that the present Act has considerably elaborated the provisions relating to non-occupancy *raiyats.*[1] It has been decided by a Full Bench of the Calcutta High Court in a case brought under the Bengal Tenancy Act, which in no way differs from the provisions of the present Chhotanagpur Tenancy Act in this respect, that a non-occupancy holding is heritable.[2] In practice the same rule was followed in the district, whereas Mr. Reid rightly says[3] that the difference between an occupancy and a non-occupancy *raiyat* was hardly understood. Once a *raiyat* was let into a land he was considered to be a *raiyat* for good. In the same way right of occupancy could not be acquired by custom in lands let out on produce rent, such as *sajha* (half produce), *saika* and *maswar*. But now by the operation of statute this custom must give way to positive provisions made for acquisition of occupancy rights.]

Ejectment.

[No tenant either occupancy or non-occupancy, can now be ejected without a decree of court passed under section 68 of the Act. Whether a notice would be

[1] Act VI (B.C.) of 1908, Chapter VI.

[2] *Midnapore Zemindary Co.* v. *Hrishikesh*, (1914), I. L. R. 41 Calc. 1108, *sc.*, 18 C. W. N. 828, *sc.*, 19 C. L. J. 505. See also *Kalru* v. *Jangli*, (1916) 1 P. L. J. 273.

[3] *Vide* Reid's Chhotanagpur Tenancy Act, Sec. 16, notes.

necessary is yet a vexed question, but the tendency of recent rulings is that reasonable notice would be necessary before a tenant could be ejected.[1]]

Merger.

[The present Act has grafted the law of merger in the Chhotanagpur districts for the first time, and has, except as to certain provisions regarding village headmen, entirely reproduced section 22 of the Bengal Tenancy Act.[2]]

Rent-receipts.

[The provisions regarding granting of regular receipst in due form was first inserted by the Act of 1879, when for the first time, withholding of receipt or granting of false receipts was penalized.[3] The present Act continues the same provisions, which are salutary, but which were not a little abused when these were first introduced.[4] The exaction of illegal cesses, rent and praedial conditions are also expressly penalized.[5]]

Interest.

[The present Act has fixed the maximum of interest chargeable on arrears of rent at Rs. 12-8 per cent. per annum,[6] and it has been further enacted that nothing in a contract made between a landlord and a tenant after the passing of the Act will affect the provisions of section 58 regarding interest.[7] This is a very useful addition to the law of landlord and tenant in Chhotanagpur, as it removes the power which landlords claimed of taking away occupancy rights by private contract.]

Custom and usage.

[Section 76 lays down :—"Nothing in this Act shall affect any custom, usage or customary right not inconsistent with or not expressly or by necessary implication, modified or abolished by its provisions."[8]]

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[1] *Vide Narpat* v. *Hangra*, (1911) 16 C. L. J. 30. See also *Guru* v. *Suklal*, (1913) 17 C. W. N. 810.

[2] Act VI (B.C.) of 1908, Sec. 20.

[3] Act I (B.C.) of 1879, Sec. 12, as amended by Act V (B.C.) of 1905.

[4] Act VI (B.C.) of 1908, Sec. 54.

[5] *Ibid*. Sec. 63. [6] *Ibid*, Sec. 58.

[7] *Ibid*. Sec. 79.

[8] Cf Act VIII of 1885, Sec. 183.

[This brings us to the question of the status of under-*raiyats*. Besides including under-*raiyats* in the definition of tenants, and adding an illustration in section 76, regarding an under-*raiyat* acquiring right of occupancy by custom, no other provision exists in the Act in respect to under-*raiyats*.[1] Lately questions relating to the ejectment of under-*raiyats* came into prominence and two cases were decided under the present Act by the High Court of Calcutta, in which it was held that a mere demand for possession was sufficient notice,[1] and that after notice, the Civil Courts have jurisdiction to eject an under-*ratyat*.[2] In the district of Ranchi. the under-*raiyats* rarely acquire occupancy-rights by custom, whereas in the district of Hazaribagh, this is a frequent occurrence.[3] When a *raiyat* is ejected for non-payment of rent, an under-*raiyat* has no right to object or resist the landlord from taking possession.[4]] Under-*raiyat*.

The Tributary estates[5] in this division have their chiefs as the Tributary *mahals* in Orissa, and the laws in force in British India have no application to them. Tributary *mahals*.

JALPAIGURHI.

Jalpaigurhi is within the permanently settled area of the Bengal Provinces and is to a considerable extent inhabited and cultivated by people who have migrated from the adjoining settled districts. There are, however, masses of non-aryan population, who have not yet fully adopted the habits, customs and languages of their aryan neighbours. The Privy Council has declared them to be non-aryan and non-Hindu.[6] Jalpaigurhi.

[1] *Vide Guru* v. *Suklal*, (1913) 17 C. W. N. 810. See also *Bishun* v. *Chandra*, (1916) 1 P. L. J. 543.

[2] *Vide Bhola* v. *Chota Gunaram*, (1914) 23 I. C. 407.

[3] See Reid's Chota Nagpur Tenancy Act, Sec. 4, note (App. 4).

[4] *Bishun* v. *Chandra*, (1916) 1 P. L. J. 543.

[5] Bonai, Jaspur, Udoypur, Kharsoa, Charbabar, Korca, Ganghen. See Hunter's Statistical Account of Bengal, Vol. XVII

[6] *Fanindra* v. *Rajeswar*, (1885) I. L. R. 11 Calc. 463, *sc.*, L. R. 12 I. A. 72.

Tenures in Jalpaigurhi.

The Raja or Raikut of Baikunthpur and the Maharaja of the Coochbehar State own large parts of Jalpaigurhi as *zemindars*. The Government itself is the *zemindar* in the Westsrn Doars. The tenure-holders directly under the *zemindars* are known as *jotedars*. These *jotes* are generally permanent and are transferable by custom. The first *jotedars* were apparently occupiers of the soil, cultivators and peasant proprietors, as the word *jote* implies. But in course of time, subletting became common. Usufructuary mortgages of the *jotes* are frequent. On failure of heirs and on abandonment, the *jotes* revert to the parent estates.

Raiyati holdings.

Chukanidars or *mulanidars* are an important class of subordinate-holders in Jalpaigurhi. They are temporary lessees or under-*raiyats* under the *zemindars* or *jotedars*. They hold for terms of years, and their rights are not transferable by custom. The *dur-chukanidars* or *dur-mulanidars* are sub-lessees with still inferior rights. The *raiyats* (*prajas*) hold from year to year only.

Rent-lnw in Jalpaigurhi.

[Act X of 1859, with its amending Acts were in force up to 1869, in the part of the district of Jalpaigurhi which lies to the west of river Teesta and in *thana* Patgram lying to the east of Teesta. Until recently Act XVI of 1869 (Bhutan Duars Act) was in force in Western Duars in Jalpaigurhi district. That Act was repealed in 1895, by Act VII (B.C., of 1895, which again was repealed by Act I of 1903. Act VII (B.C.) of 1895 came into force on the 16th October 1895. Acts X of 1859 and VI (B.C.) of 1862 were extended to Western Duars after the repeal of Act XVI of 1869. The Act of 1869 excluded the jurisdiction of ordinary Civil Courts in suits relating to immovable property, revenue and rent. There was indeed no definite rent law in Western Duars until the introduction of Act X of 1859 there. The Bengal

Tenancy Act was extended to Jalpaigurhi, with certain exceptions, from 1899.[1]]

Jurisdiction of Collectors and Commissioner.

The trial of Rent cases under Act X of 1859 [was] in the hands of the executive officers of the Crown, the Collectors, and Deputy Collectors, with the right of appeal to the District Judges and Collectors, and in some cases second appeal to the High Court. In suits of the value of over Rs. 5,000, an appeal [lay] directly to the High Court. In some instances, the Collectors and Commissioners of Revenue [had] powers of revision. In the Regulation Districts of Bengal proper and Bihar, this was found inconvenient, and within ten years of the passing of Act X of 1859, the jurisdiction in rent suits was taken away from the executive officers and was given to the regular Civil Courts. But the conflict of jurisdiction, which was pre-eminently a source of litigation, still [existed] in these districts. The people, however, [were] simple and litigations [were] few.[2]

Enhancement of rent.

In suits for the enhancement of rent of *raiyats*, the main peculiarity, as you have seen, is the necessity of

[1] The exceptions are Sec. 1, Sub-Secs. (2) and (3); the words "in the territories to which this Act extends by its own operation" in Sec. 2, Sub-Sec. (1), and Sec. 2, Sub-Sec. (2). In Western Duars in Jalpaigurhi, it is further provided by notification that nothing in the Act of 1885 "other than the provisions of Sub-Sec. (1) of sec. 2 shall apply to any lands heretofore or hereafter granted or leased by Government to any person or company under an instrument in writing for the cultivation of tea or for the reclamation of land under the Arable Waste Land Rules" and "where there is anything in the Act which is inconsistent with any rights or obligations of a *jote-dar, chukanidar, dar-chukanidar, adhair*, or other tenant of agricultural land as defined in settlement proceedings heretofore approved by Government, or with the terms of a lease heretofore granted by Government to a *jote-dar, chukanidar, dar-chukanidar, adhair*, or other tenant of agricultural land, such rights, obligations or terms shall be enforciable notwithstanding anything contained in the Act" of 1885. See notifications Nos. 963 T.-R. and 964 T.-R. of 5th November, 1898, quoted in Bengal Code, 4th Edn., Vol. IV, pp. 49-50. For laws in force in Jalpaigurhi, see Bengal Code, 4th Ed., Vol. IV, pp. 26 to 55 (Part IV).

See in this connection *Brojo* v. *Tufaun*, (1899) 4 C. W. N. 287 as to applicability of the Civil Procedure Code in Bhutan Duars.

[2] Act X of 1859 was repealed in Jalpaiguri from 1899, as we have seen.

the previous service of notice.[1] No suit for enhancement of rent can succeed under Act X of 1859, unless a notice in proper form has been previously served on the *raiyat* through the proper channel.

Measurement.

The sections of Act VI (B.C.) of 1862 about measurement through the Collectors were replaced in Act VIII (B.C.) of 1869 by sections 37 and 38. They are, with slight modifications, incorporated in sections 90, 91 and 92 of the Bengal Tenancy Act, [and sections 97, 98 and 99 of the Orissa Tenancy Act, and the Act of 1862 has been wholly repealed as regards Bengal and Orissa]. Act VI (B.C.) of 1862 with its imperfect provisions as to record-of-rights [was] retained in these provinces [quite long]. I have already dealt with these and the other provisions of the Acts of 1859 and 1869 and the Acts modifying them.

Sonthal Perganahs.

Sonthal *Perganahs*.

The provisions of Act X of 1859 were originally applied [by mistake] in the Sonthal *Perganahs* in questions between landlord and tenant. [This brought the district to the brink of rebellion, and the situation was only saved by the passing of a special Settlement Regulation in 1872.] Regulation III of 1872 (Sonthal *Perganahs* Settlement Regulation), and Regulation II of 1886 (Sonthal *Perganahs* Rent Regulation) made Act X of 1859 inapplicable.[2] The *manjhis* or village headmen were selected as farmers of the villages, specially in the *Damanikoh*,[3] and thus *mostajir* and *manjhi* have become convertible terms. Regulation III of 1872 laid

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[1] *Ante* pp. 439-40.

[2] Reg. III of 1872, has been modified by Regs. V of 1893, III of 1899, and III of 1907, and Acts I of 1903 and IV of 1907. See also next footnote.

[3] *Ante*, pp. 43—4.

down rules as to record-of-rights and the adjustment of rents by Settlement Officers.[1] The District Officers are vested with the power of deciding disputes as to record-of-rights. An appeal lies in some instances to the Deputy Commissioner and in others to the Commissioner of the Bhagalpur Division. The proceedings are generally simple in their character, litigations being confined to the permanently-settled estates outside the *Damanikoh*. [An entry in a settlement record has the force of a decree of Court.[2] The jurisdiction of Civil Courts in these matters is very limited.[3] When the record-of-rights has been published as provided in section 24, it becomes conclusive proof of the customs and rights recorded thereto.[4]] The right-of-occupancy of the *raiyats* is much of the same nature as in the Regulation districts, the power of re-settling rents by the Settlement Officers being wider, agricultural skill and habits of life of tenants being taken into consideration. A *raiyat* may acquire an occupancy-right not only by occupation for more than 12 years, but he may have an *equitable claim to occupancy* under section 18 of Regulation III of 1872. Exchanges of land between *raiyats* do not affect the acquisition of the right. A *raiyat*, whether possessing a right-of-occupancy or not, cannot

[1] Reg. II of 1904 (Sonthal *Perganahs* Settlement Regulation) has supplemented section 9 of Regulation III of 1872. Regulation III of 1908 (Sonthal *Perganahs* Settlement Amendment Regulation) has considerably altered Reg. III of 1872.

[2] Reg. III of 1872, Sec. 11. *Nadiar* v. *Chunder*, (1888) I. L. R. 15 Calc 765; ***Mozaffer*** v. *Kali*, (1913) 18 C. W. N. 271, *sc.*, 19 C. L. J. 29.

[3] Reg. III of 1872, Sec. 25. *Ram* v. *Dhaturi*, (1890) I. L. R. 18 Calc. 146; *Ramranjan* v. *Nanda*, (1895) I. L. R. 22 Calc. 473; *Ram* v. *Satis*, (1910) 17 C. L. J. 599; *Digambar* v. *Jatindra*, (1913) 19 C. L. J. 232; ***Mozaffer*** v. *Kali*, (1913) 18 C. W N. 271, *sc.*, 19 C. L. J. 29; *Digambar* v. *Harendra*, (1914) 20 C. L. J. 112; *Nemo* v. *Parbati*, (1914) 19 C. W. N. 549, *sc.*, 20 C. L. J. 103; *Januki* v. *Babu*, (1914) 19 C. W. N. 499. See, however, *Doman* v. *Panchu*, (1900) 5 C. W. N. 185 See also *Ram* v. *Ram*, (1886) I. L. R. 13 Calc. 245.

[4] ***Kangal*** v. *Madhu*, (1905) 17 C. L. J. 587; *Sib* v. *S. P. Chatterjee*, (1914) 20 C. L. J. 220. See also *Baski* v. *Suphal*, (1913) 18 C. W. N. 333.

be ejected from his holding otherwise than in execution of an order of the Deputy Commissioner.[1] [Suits for ejectment, are, however, unknown, and the question is of little practical utility. The sale of a tenant's right is subject to the consent of the Deputy Commissioner, the landlord being given an opportunity to object.[2] But, in the sub-division of Deoghur, there is a class of tenancies, known as *mulraiyatis*, which are transferable without such consent. The law as to suits for enhancement of rent of homestead lands is the same as in the regulation districts.[3] There is practically no rent law in some areas of the Sonthal *Perganahs*, and custom or contract guides the relations of landlord and tenant in such areas. The record-of-rights is the basis of title in most cases. This is so in the unsettled areas of the Teliaghiri *Perganah* and in certain *dearâh* lands.[4] The jurisdiction of Civil Courts and of the High Court to interfere in civil suits generally is also limited.[5] Sections 56 and 58, Cls. (2) and (3) and Sec. 84 of Bengal Tenancy Act have been extended to Sonthal *Perganahs*.][6]

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[1] Reg. II of 1886, Sec. 25. *Darbari* v. *Bhoti*, (1914) I. L. R. 41 Calc. 915, *sc.*, 18 C. W. N. 575 *sc.*, 19 C. L. J. 294.

[2] See *Sardhari* v. *Hukum*, (1914) I. L. R. 41 Calc. 876, *sc.*, 18 C. W. N. 662. See Rules for the Guidance of Civil Courts in the Sonthal *Perganahs* issued on 18th August, 1905, Rule 29.

[3] See *ante* pp. 476-7, particularly footnote 5 of p. 476.

[4] See Government Notification, dated 9th December, 1879, published in the Calcutta Gazette of 10th December, 1879 Part I, page 1221.

[5] *Surdharee* v. *Mansoor*, (1877) I. L. R. 3 Calc. 298; *Tarini* v. *Mahammad*, (1880) 6 C. L. R. 555; *Sorbojit* v. *Gonesh*, (1884) I. L. R. 10 Calc. 761; *Sardhari* v. *Hukum*, (1914) I. L. R. 41 Calc. 876, *sc.*, 18 C. W. N. 662; *Darbari* v. *Bhoti*, (1914) I. L. R 41 Calc. 915, *sc.*, 18 C. W. N. 575, *sc.*, 19 C. L. J. 294; *Maha* v. *Ramani*, (1914) I. L. R. 42 Calc. 116, *sc.*, L. R. 41 I. A. 197, *sc.*, 18 C. W. N. 994, *sc.*, 20 C L. J. 231. See also *Tarini* v. *Mahamud*, (1881) I. L. R. 7 Calc. 376, *sc*, 8 C. L. R. 548 and *Sonamani* v. *Lilanund*, (1882) 11 C. L. R. 30.

[6] Government Notification, No. 1338 L. R., dated 1st March, 1904, published in the Calcutta Gazette of 3rd March, 1904, Part I, p. 347, and No. 771 L. R., dated 20th February, 1897, published in the Calcutta Gazette of February 24, 1897, Part I. p. 281.

SAMBALPUR.

Sambalpur.

[Sambalpur was formerly part of the Central Provinces. The Governor-General in Council, on the 1st September, 1905, declared and appointed "that the district of Sambalpur shall cease to form part of the Central Provinces and shall be subject to and included within the limits of the Bengal Division of the Presidency of Fort William."[1] It is now part of Orissa and is under the Governor of Bihar and Orissa. The rent law of Sambalpur was the Central Provinces Tenancy Act (IX of 1883). It was repealed by Act XI of 1898. The law as regards survey and settlement and as regards revenue administration is contained in Act XVIII of 1881, as modified by Act XVI of 1889, Act XII of 1891, Act XII of 1898, Act I (B.C.) 1911, and Act XIII of 1908. Broadly speaking, there is very little difference in the principle guiding the relationship of landlord and tenant between the Bengal Tenancy Act, as explained by the case-law, and the Central Provinces Tenancy Act. The procedure, however, is different to some extent. Revenue Courts have wider jurisdiction and larger powers in adjusting rents. The transferability of occupancy rights is recognised to some extent and the law of succession in tenancies is restricted to direct lineal descendants to the exclusion of collateral relatives, except in certain cases.

Occupancy rights

Occupancy *raiyats* are divided by the Central Provinces Tenancy Act into two classes, *viz.*, absolute occupancy-tenants and other such tenants.[2] There are, however, no absolute occupancy tenants in Sambalpur. Occupancy rights were regarded as personal property of the tenants for the time being by

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[1] *Baleshwar* v. *Bhagirathi*, (1908) I. L. R. 35 Calc. 701, *sc.*, 12 C. W. N. 657, *sc.*, 7 C. L. J. 563.

[2] Act XI of 1898, Chs. III and IV.

the Central Provinces Courts.[1] It has been recently held, however, by the Patna High Court that an occupancy right in the Central Provinces is not in any way different from an occupancy right in Bihar, and that it is a personal right, but only in this sense that what has been done by one person towards the acquisition of an occupancy right cannot be continued and completed by another.[2] It has also been held in the same case "It is also true to say that an occupancy right may be acquired by a contract between the landlord and the person; but in considering this point of the view it is necessary to recognise that a person need not necessarily be an individual. It may be a firm or body corporate[3] or a joint family, and a landlord in contracting with an individual may be dealing with a whole family represented by that individual. An occupancy right may be, and frequently is, a part of an ancestral estate." The devolution is not restricted to direct lineal heirs, but extends to collaterals also.[4] The acquisition of occupancy right in *sir* land (excluding *bhogra* lands) takes place when proprietory rights therein are transferred permanently or for a term.[5] Under Act IX of 1883, the landlords had a vested interest and they could avoid transfers of occupancy rights, if they had been effected without their consent.[6] Act XI of 1898 has practically taken away the right, and now[7] not only the landlords, but also the heirs of the transferring tenants

[1] See *Anant* v. *Takatsing*, (1884) 4 C. P. L. R. 57; *Gulabrao* v. *Sitaram*, (1893) 8 C. P. L. R. 11; *Vithal* v. *Ganpat*, (1896) 10 C. P. L. R. 65; *Ghanya* v. *Ukund*, (1907) 4 N. L. R. 9 and *Tekchand* v. *Tulai*, (1909) 5 N. L. R. 103.

[2] *Sukuru* v. *Brahmapura*, (1919) 4 P. L. J. 354, Per Roe J.

[3] *Ante*, pp 358-9.

[4] Act XI of 1898, Sec. 46, prov.

[5] Act XI of 1898, Sec. 45, Cl. (1). *Narayan* v. *Baliram*, (1918) I. L. R. 46 Calc. 76, *sc.*, L. R. 45 I. A. 179, *sc.*, 23 C. W. N. 297, *sc.*, 28 C. L. J. 447. See also *ante* pp. 359, 368, 370-72.

[6] Act IX of 1883, Sec. 43.

[7] Act XI of 1898, Sec. 47.

may apply to avoid transfers. The landlords' chances of getting the holding are extremely slender, when there are heirs of the tenant, however, remote. Under section 46 of the Central Provinces Tenancy Act (XI of 1898), the transfer of an occupancy holding either, in whole or in part, is voidable at the instance of the landlord,[1] who, in order to recover possession of the holding on the ground of such transfer must follow the procedure as laid down in section 47 of the Act.[2] But under section 43 of the Central Provinces Tenancy Act of 1883, a transfer of a portion only of an occupancy holding was not void, and it did not entitle the landlord to exercise his right of re-entry, either as regards the entire holding, or as regards the portion transferred.[3]

Jurisdiction of Civil Courts.

Under the Act of 1898, Civil Courts have ordinarily no jurisdiction to entertain applications under section 47[4] or suits for ejectment.[5] Civil Courts having powers of a revenue officer can, however, try such suits.[6] But it has been held that where the claim is based on trespass, the Central Provinces Tenancy Act has no application and Civil Courts may entertain such suits.[7] The Act provides for compensation to tenant for improvement, and the provisions are similar in Bengal.[8] As regards proprietor's

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[1] *Icharan* v. *Nilmoney* (1908) I. L. R. 35 Calc 470, *sc.*, 12 C. W. N. 636, *sc*, 7 C. L. J. 499; *Sadasiv* v. *Jala*, (1908) 8 C. L. J. 156. See *ante* p 339.

[2] *Icharan* v. *Nilmoney*, (1908) I. L. R 35 Calc. 470, *sc.*, 12 C. W. N., 636, *sc.*, 7 C. L. J. 499; *Baikantha* v. *Laboo*, (1912) 17 C. W. N. 621, *sc.*, 17 C L. J. 646

[3] *Anti* p. 342. *Icharan* v. *Nilmoney*, (1908) I. L. R. 35 Calc. 470, *sc*, 12 C. W. N. 636, *sc.*, 7 C. L. J. 499.

[4] Act XI of 1898, Sec. 95.

[5] *Icharan* v. *Nilmoney*, (1908) I. L. R 35 Calc. 470, *sc.*, 12 C. W. N 636, *sc.*, 7 C. L. J. 499; *Baikantha* v. *Laboo*, (1912) 17 C. W. N. 621, *sc*, 17 C. L. J. 646. See also *Harabati* v. *Satyabadi*, (1907) I. L. R 34 Calc. 636 and *Balbhadra* v. *Bhowani*, (1907) I. L. R. 34 Calc. 853.

[6] Act XI of 1898, Sec. 97.

[7] *Chamru* v. *Dirba*, (1916) 1 P. L. J. 525.

[8] *Sardhakar* v. *Biseswar*, (1914) 18, C. W. N. ccxxxv.

private lands (known as *sir*, *bhogra*, *&c.*), it has been held, as in Bengal, that a tenant holding such land is not an occupancy tenant and that such a tenant can be ejected by the landlord under clause (*e*) of section 69, in execution of a decree for ejectment, on the ground that his holding consists entirely of *sir* lands which include *bhogra* lands, but that there is nothing in the Act to prevent a proprietor himself from granting a permanent right in such lands.[1] The right of suit in Civil Courts to contest settlement decisions is restricted to decisions under section 78 of the Central Provinces Land Revenue Act[2] and entries made in the record-of-rights as to matters mentioned in that section. Where, therefore, the sole question was whether the plaintiff, a plot proprietor, was entitled to hold wholly or partially free from revenue as against the other *malguzar* of the *mahal*, it was held that it was a case under section 74 and not under section 68 and an investigation under section 74 is not within the scope of section 78, and therefore section 83 would not avail, and further that under section 152 a suit like this is not maintainable in the Civil Court [3] But it has been held that clause (12) of sub-section (*b*) of section 152 means only that the entry cannot be corrected except by the revenue authorities, but it does not preclude a suit by the person affected by the entry to establish his title in the Civil Court, and that the remedy provided by section 83 is cumulative and not exclusive.[4] It was held in the same case that under section 82 of the Act, an entry in the

[1] *Gangadhar* v. *Pitambar*, (1912) 16 C. L. J. 66*n*. See also *Aditya* v. *Parmananda*, (1919) 4 P. L. J. 505.

[2] Act XVIII of 1881, Sec. 83. *Dibakar* v. *Chatto*, (1908) 14 C. W. N. 686; *Baniram* v. *Mahomed*, (1909) 9 C. L. J. 85*n*. See also *Baktawar* v. *Bhuban*, (1912) 17 C. L. J. 468 and *Nabaghan* v. *Raghunath*, (1915) 19 C. W. N. 1303, *sc.*, 21 C. L. J. 646.

[3] *Baniram* v. *Mahomed*, (1909) 9 C. L. J. 85*n*.

[4] *Dibakar* v. *Chhatto*, (1908) 14 C. W. N. 686. See also *Lal* v. *Mohon*, (1918) 3 P. L. J. 229.

record-of-rights is presumed to be correct until the contrary is shown and that the "contrary" referred to in section 22 can be proved either in a suit under section 83, or otherwise.[1] On the question whether the Government is a necessary party in a suit under section 83, there is difference of opinion.[2]]

Lambardars.

[The Central Provinces Land Revenue Act provides for the appointment of *lambardars* and *sub-lambardars* to represent the proprietory body of a *mahal* in its relation with the Government.[3] These *lambardars* and *sub-lambardars* are the statutory agents and representatives of the landlords and have certain rights and duties.[4] The *lambardars* cannot, however, represent the proprietory body in every matter, *e.g.*, in suits to eject trespassers. It has been held that the institution of a suit for ejectment against a purchaser of occupancy right is not one of the duties which a *lambardar* can perform as representing the co-sharers in their relation with Government.[5] A *lambardar* has no statutory, but may have customary authority to make a settlement, with tenants, of land vacated by the original tenant.[6] All co-sharers have a right to share in the benefit acquired by a *lambardar* co-sharer in the way of recovery of possession of a derelict holding, if they contribute their proper proportion of the expenses incurred in the acquisition of the property.[7] The

[1] *Dibakar* v. *Chhatto*, (1908) 14 C. W. N. 686. See also *Nriparaj* v. *Mohen*, (1918) 3 P. L. J. 229.

[2] *Ujal* v. *Dibya*, (1911) 16 C. L. J. 28; *Baktawar* v. *Bhuban*, (1912) 17 C. L. J. 468.

[3] Act XVIII of 1881, Sec. 4, cls. (11) and (12); Secs. 137, 148.

[4] Act XVIII of 1881, Secs. 138, 149. *Ram* v. *Hira*, (1891) 5 C. P. L. R. 47.

[5] *Gopal* v. *Govind*, (1900) 13 C. P. L. R. 113; *Nilmani* v. *Jogendra*, (1910) I. L. R. 37 Calc. 694, *sc.*, 12 C. L. J. 104; *Trilochan* v. *Dinabandhu*, (1917) 3 P. L. J. 88.

[6] *Dasarath* v. *Brojo*, (1913) 18 C. L. J. 621.

[7] *Ganpat* v. *Keshav*, (1896) 10 C. P. L. R. 37; *Pemram* v. *Tarachand*, (1896) 10 C. P. L. R. 40; *Wasudeo* v. *Sakharam*, (1899) 13 C. P. L. R. 153; *Balka* v. *Lochan*, (1913) 19 C. L. J. 202.

expenses incurred in the acquisition are to be borne equally between the *lambardar* and the co-sharers, although the *lambardar* receives an extra share of the profit.[1] The *lambardar's* remuneration is provided for in the Act.[2]]

Gaontias.

[There is a peculiar class of tenures in Sambalpur known as *gaontia* tenures. The term *gaontia* is not defined in the Central Provinces Land Revenue Act and is very loosely used throughout. In Government villages *gaontia* means a proprietor.[3] In villages in the *zemindaries*, the term means a *thikadar* or a farmer. In *malguzari* villages, it means a full proprietor.[4] The provisions of section 65A of the Land Revenue Act which deals with the powers to inquire into the claims of *thikadars*, *gaontias* and farmers applies only to *thikadars* in the *zemindaries* (where, except the *zemindars*, the other holders have no proprietory interest of any sort) and also to *thikadars* in the *malguzari* and *gaontia* villages. Prior to the lapse of the district to the British Government, there were no proprietory rights of the holders of the villages under the Raja.[5] The British Government gave to such holders certain rights.[6] Dawson Miller C. J. said of the history of these tenures :—"The question of resettling the land revenue of Sambalpur was taken up by Mr. (afterwards Sir Richard) Temple in 1862, when settlement operations were commenced throughout the provinces, and orders were issued by him for making a settlement on precisely the same principles as those followed in other districts, the characteristic of which was that the village headmen or *gaontias* were to be made

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[1] *Balka* v. *Lochan*, (1913) 19 C. L. J. 202.

[2] Act XVIII of 1881, Sec. 139. See also *Balka* v. *Lochan*, (1913) 19 C. L. J. 202.

[3] Act XVIII of 1881, Sec. 4, cl. (8*a*).

[4] See Dewar's Settlement Report, p. 48.

[5] See Russell's Settlement Report, Introduction and Ch. III.

[6] *Ibid*, p. 77, para. 202.

proprietors of their villages and given rights of transfer. An open declaration of this policy was made to the *gaontias* by proclamation at Sambalpur in 1862, and settlement operations were then set on foot, but owing to the death of Major Impey, the Deputy Commissioner, in 1864, little progress was made. His successor questioned the principles on which the settlement was to be made, and a voluminous correspondence ensued which did not close until 1872, and ended in the making of a settlement on a basis different from that of any other in the provinces. In the result it would appear that the principle followed in the settlement was that the proprietory rights which were conferred upon *gaontias* were limited to their *bhogra* lands."[1] Holders of villages under the *zemindaries* did not, however, get heritable or transferable rights.[2] Of course, even before the settlement, *gaontias* had permanent transferable rights in *bhogra* lands, but prior to the passing of the Central Provinces Land Revenue Act, there was some uncertainty as to the nature of *gaontia* tenures. The *gaontias* have now a statutory position. Their rights and duties are laid down in the Central Provinces Land Revenue Act.[3] They are proprietors and not mere farmers under the Government,[4] and a lease of *bhogra* land may be validly granted by a *gaontia* which is permanent and heritable.[5] The Act provides for the protection of certain selected *gaontias*.[6] The tenure of a protected *gaontia* is heritable, but not transferable by sale, gift, mortgage or dower.[7] When a *gaontia* dies, the interest

[1] *Aditya* v. *Parmananda*, (1919) 4 P. L. J. 505, at pp. 505-10.

[2] Russel's Settlement Report, p. 44.

[3] See Act XVIII of 1881, Secs. 4(14), Expl. II, 65A, 132(*i*), 137.

[4] *Purkhit* v. *Ananda*, (1908) 12 C. W. N. 1036, *sc.*, 8 C. L. J. 116.

Aditya v. *Parmananda*, (1919) 4 P. L. J. 505.

[5] Act XVIII of 1881, Sec. 65A.

[6] *Nriparaj* v. *Mohen*, (1918) 3 P. L. J. 229.

devolves on the eldest of the heirs, but the eldest brother may, at the time of succession, resign or release his rights in favour of another heir bearing the same degree of relationship to the deceased *gaontia* as he himself does.[1] Where two or more villages form the protected tenure of a *gaontia*, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation in respect of all or none of such villages. There can be no splitting up of the estate or tenure into different parts having distinct entities.[2] A *gaontia* is not entitled to surrender his estate in favour of the *zemindar* even.[3] A suit for recovery of *gaontship* is maintainable in the Civil Courts.[2] A *gaontia* cannot confer on others rights of a permanent character which would be binding upon the *zemindar* after the *gaontia's* tenure ceases to exist.[4] For the purposes of a suit in ejectment brought by a *gaontia*, he must be taken to be a "proprietor" of the same as defined in section 4, clause (8*a*) of Act XVIII of 1881, and as such he is entitled to bring the suit.[5]]

Gochar lands.

[The pasture lands of Sambalpur, known as *gochar* lands, are somewhat different in nature from those of Bengal. These *gochar* lands are lands reserved for the proprietor of a Government village and cannot be classed in the same category as common lands which are the property of the general body of villagers.[5]]

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[1] *Nriparaj* v. *Mohen*, (1918) 3 P. L. J. 229.

[2] *Nriparaj* v. *Mohen*, (1918) 3 P. L. J. 229. But see Imam J. in the same case on the point.

[3] *Nriparaj* v. *Mohen*, (1918) 3 P. L. J. 229. But see *Narupraja* v. *Bhabani*, (1916) 1 P. L. J. 293.

[4] *Narupraja* v. *Bhabani*, (1916) 1 P. L. J. 293.

[5] *Purkhit* v. *Ananda*, (1908) 12 C. W. N. 1036, *sc.*, 8 C. L. J. 116.

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