THE BENGAL TENANCY ACT

ACT NO. VIII OF 1885

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 14th March, 1885.)

An Act to amend and consolidate certain enactments relating to the Law of Landlord and Tenant within the territories under the administration of the Lieutenant-Governor of Bengal.

Whereas it is expedient to amend and consolidate certain enactments relating to the Law of Landlord and Tenant within the territories under the administration of the Lieutenant-Governor of Bengal; It is hereby enacted as follows :—

The Bengal Tenancy Act is not a complete code even in respect of the law of landlord and tenant. 6 C. L. J. 273 (see 290) ; 11 C. W. N., 983 (see 996) F. B., *Kripa Sindhu Mukerjee* v. *Annada Soondari Debi.* Per Mookerjee J.

CHAPTER I

PRELIMINARY

Short title.

1. (1) This Act may be called the Bengal Tenancy Act, 1885.

Commencement.

(2) It shall come into force on such date (hereinafter called the commencement of this Act) as the Local Government, with the previous sanction of the Governor-

General in Council, may, by notification in the local official Gazette, appoint in this behalf.

Local extent.

(3) It shall extend by its own operation to all the territories for the time being under the administration of the Lieutenant-Governor of Bengal, except the town of Calcutta, [any area constituted a Municipality under the provisions of the Bengal Municipal Act, 1884, or part thereof, and specified in a notification in this behalf by the Local Government,] the Division of Orissa, and the Scheduled Districts specified in the third Part of the First Schedule of the Scheduled Districts Act, 1874; and the Local Government may, with the previous sanction of the Governor-General in Council, by notification in the local official Gazette, extend the whole or any portion of this Act to the Division of Orissa or any part thereof.

XIV of 1874.

[*Explanation.*—The words "the town of Calcutta" mean, subject to the exclusion or inclusion of any local area by notification under section 637 of the Calcutta Municipal Act, 1899, the area described in Schedule I to that Act.]

Sub-section (1) was extended to Chota Nagpur, except the district of Manbhum (Not., Feby. 9th, 1903). At present however Chota Nagpur has a separate Tenancy Act of its own : Act VI of 1908 B.C. The words within heavy brackets in subsection (3) and the Explanation have been added by s. 3, Act I, B. C., of 1907. For obvious reasons the Explanation has been omitted from the Eastern Bengal and Assam Act I of 1908.

Time of commencement of Act.—The Act came into force on the 1st November, 1885 (see notification of the 4th September, 1885, published in the *Calcutta Gazette* of the 9th September, 1885). By Act XX of 1885, the operation of sections 61 to 64, both inclusive, and of Chapter XII of the Act, except such of their provisions as confer power to make rules, was postponed to the 1st February, 1886. The provisions

of sections 61 to 64 relate to deposit of rent, and those of Chapter XII, to distraint. Act XX of 1885 has been repealed by the Repealing and Amending Act, 1891 (Act XII of 1891.)

Amendments of Act.—The Act has been amended by Act VIII of 1886 (1) which slightly modified sections 12 and 13 of the Act, by Act V, B. C., of 1894, (2) which made certain changes in Chapter X of the Act, by the Bengal Tenancy (Amendment) Act III, B. C., of 1898, (3) which repealed Act V, B. C., of 1894 and completely remodelled Chapter X, as well as altered the provisions of sections 30, 31, 39, 52, and 119 of the Act, and by the Bengal Tenancy (Amendment) Act, 1907, I, B. C., of 1907, which introduced very extensive changes into the Act. (4). These latter provisions have been enacted with certain alterations for Eastern Bengal and Assam by Act I of 1908 which was passed on the 4th May 1908 and received the assent of the Governor-General on the 25th May 1908. The provisions of these amending Acts are noticed in the notes to the sections affected by them.

Rent law of Calcutta.—In the town of Calcutta, the relations of landlord and tenant are governed by the Indian Contract Act (IX of 1872), so far as they are applicable. If they are not applicable, then, by section 17 of 21 Geo. III, c. 70, "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 Gentus, (Hindus) by the laws and usages of Gentus ; and where only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendent." If the provisions of the Contract Act are inapplicable and the parties are English, then, the common law of England will be the law to be applied (*Madhub Chandra Paramanik* v. *Raj Kumar Das*, 14 B. L. R., 76 ; 22 W. R., 370 ; *Rasik Lal Madak* v. *Loknath Karmakar*, 5 Calc., 688 ; 5 C. L. R., 492 ; *Jagat Mohini Dasi* v. *Dwarkanath Basak*, 8 Calc., 582). The explanation to section (1) has been added by Act I, B. C., of 1907 in consequence of the ruling (*Biraj Mohini Dasi* v. *Gopeswar Mallik*, 27 Calc., 202), in which it was held that occupancy rights may accrue in those areas which have been included within the town of Calcutta, subsequent to the passing of the Bengal Tenancy Act, 1885. It was considered undesirable that the Act should have any application to the town of Calcutta, as it is now constituted, or as it may

(1) Received the assent of the Governor-General on the 8th March, 1886.
(2) Received the assent of the Governor-General on the 22nd August, 1894.
(3) Received the assent of the Governor-General on the 3rd May, 1898, and came into force on the 2nd November, 1898, the date of its first publication in the *Calcutta Gazette*.
(4) Received the assent of the Governor-General and came into force on the 11th May, 1907.

hereafter be constituted under any future extension or modification of its boundaries. Existing rights and obligations are saved by sub-section (2) added to section 19 by Act I, B. C., of 1907, and for Eastern Bengal by Act I, E. B. C., of 1908.

Any area constituted a Municipality.—The words "any area constituted a Municipality under the provisions of the Bengal Municipal Act, 1884, or part thereof, and specified in a notification in this behalf by the Local Government" were inserted by Act I, B. C., of 1907, in Western Bengal and by Act I, E. B. C., of 1908 in Eastern Bengal and Assam. In the report of the Select Committee on the Bill it was said "the provisions of the Act are intended to apply to agricultural areas, and are unsuitable to such Municipalities or portions thereof as are mainly urban in character. We think that the Government should have power to withdraw from the operation of the Act such municipal urban areas by notification, when it is satisfied by enquiry that such withdrawal is expedient. We consider that the operation of the Act should not be withdrawn from any area until a record of the rights existing under the Act in such area has been made." Existing rights and obligations are saved by additions made to section 19.

Rent law of Bengal.—The districts which under the Government of India notifications Nos. 2832 and 2833 of the 1st September, 1905, (*see Gazette of India*, September 2nd 1905, Pt. I, p. 636) have since the 16th October, 1905, constituted the province of Bengal are Burdwan, Birbhum, Bankura, Midnapore, Hooghly, Howrah, 24 Parganas, Nadia, Murshidabad, Jessore, Khulna, Patna, Gaya, Shahabad, Saran, Champaran, Mozaffarpur, Darbhanga, Monghyr, Bhagulpur, Purnea, Darjeeling, Sonthal Parganas, Cuttack, Balasore, Angul and Khondmals, Puri, Sambalpur, Hazaribagh, Ranchi, Palamau, Manbhum, and Singhbhum. The Bengal Tenancy Act is in force in all these districts, except as explained below. No part of the Act is in force in Darjeeling, Sambalpur and Angul. Certain portions of the Act have been extended to Cuttack, Puri and Balasore and certain parts of the District of Manbhum. Section 56, section 58, sub-sections (1) and (3) and section 84 only are in force in the Sonthal Parganas.

Rent law of Orissa.—The division of Orissa now consists of the districts of Cuttack, Puri, Balasore, Angul and Sambalpur. The two latter are scheduled districts. In Cuttack, Puri, and Balasore, Act X of 1859 and its amending Acts, VI, B. C., of 1862, and IV, B. C., of 1867 are still current (see *Sadanand Mahanti* v. *Nauratan Mahanti*, 16 W. R., 289 ; 8 B. L. R., 280). But by notification, dated the 10th September, 1891, published in the *Calcutta Gazette* of the 16th September, 1891, Part I, page 839 the Lieutenant-Governor of Bengal with the previous sanction of the

Governor-General in Council extended the following portions of the Bengal Tenancy Act to Orissa :—Chapter X and sections 3 to 5, 19 to 26, 41 to 49, 53 to 75, and 191. Similarly, by a notification No. 2448, L. R., dated the 27th June, 1892, published in the *Calcutta Gazette* of the 29th June, 1892, Part I, page 673, the following sections of the Act were extended to Orissa :—sections 27 to 38 and 80. Again, by a notification No. 115, L. R, dated the 5th January, 1893, published in the *Calcutta Gazette* of the 11th January, 1893, Part I, page 20, sections 189 and 190 were extended to Orissa. By notification, No. 99, L. R., dated the 7th January, 1896, published in the *Calcutta Gazette* of the 8th January, 1896, Part I, page 28, the provisions of section 39 were extended to Orissa. By notification No. 971, T. R, dated 17th October, 1896, published in the *Calcutta Gazette* of the 21st October, 1896, Part I, page 1081, sections 7, 40, 52 and 192 were introduced into Orissa. By notification No. 292, L. R., dated the 18th January, 1893, published in the *Calcutta Gazette* of the 25th January, 1893, Part I, page 59, the rules framed and validated under sections 189 and 190 of the Tenancy Act were declared to be in force in Orissa, so far as they relate to the sections of the Bengal Tenancy Act which have been, or may be, extended to that division.(1) By notification No. 957, T. R., dated 5th November, 1898, published in the *Calcutta Gazette* of Nov. 9th, 1898, Part I, page 1156A, the provisions of the Bengal Tenancy (Amendment) Act, III, B. C., of 1898 were extended to the division of Orissa. By notification No. 620, L. R., dated the 27th January, 1906, published in the *Calcutta Gazette* of the 7th February, 1906, Part I, p. 176, sections 93 to 103 of this Act were extended to the districts of Cuttack, Puri and Balasore in the Orissa division. By notification No. 1816, T. R., dated the 21st August, 1906, published in the *Calcutta Gazette*, dated 29th August, 1906, Part I, p. 1658, the provisions of Chapter XI, and by notification No. 20, L. R., dated the 3rd January, 1907, published in the *Calcutta Gazette* of the 9th January, 1907, Part I, p. 54, the provisions of Chapter XIV of the Act were extended to the districts of Cuttack, Puri and Balasore in the Orissa Division.

Under the provisions of section 2, clause (2), of this Act, so much of Act X and of its amending Acts VI, B. C, of 1862, and IV, B. C., of 1867, as is inconsistent with the sections of the Bengal Tenancy Act that have been extended to Orissa, stands repealed. The other portions of Act X., etc, which are not inconsistent with these sections continue in force.

Angul.

The laws in force in the mahal of Angul which is a scheduled district, are detailed in the schedule to Regulation No. I of 1894, the Angul District Regulation, pub-

(1) See also Board's Settlement Manual, 1908, Part I, Chap. 2, rule 7, p. 3.

lished in the *Govt. of India Gazette*, of the 13th January, 1894, Part I, p. 17. Neither Act X of 1859, nor any rent Act is mentioned in the schedule to this Regulation, and as by section 3, sub-sec. (2), an enactment not comprised in the schedule shall not be deemed to be in force in Angul unless previously or subsequently expressly extended thereto, and as neither Act X of 1859 nor Act VIII of 1885 has been extended to Angul, it follows that there is no rent law in Angul. It is understood that in Angul Government demands and rents are realized according to the procedure prescribed in Chapter V of the Angul District Regulation.

The mahal of Banki was formerly a scheduled district, but since the 1st April, 1882, it has, under the provisions of Act XXV of 1881, been incorporated with the district of Cuttack.

Sambalpur.

The district of Sambalpur formerly belonged to the Central Provinces. Since the 16th October, 1905, with the exception of the Chanderpur-Padampur Zamindari and the Phuljhar Zamindari, it has been transferred to Bengal. The rent law in force there is the Central Provinces Tenancy Act, I of 1898.

Darjeeling.

Act X of 1859 prevails in the district of Darjeeling. (See note to Bengal Code, 3rd edition, Vol. III, p. 182). There is no local extent clause in the Act, but Darjeeling was part of Bengal when Act X of 1859 was passed, having been ceded by the Raja of Sikhim to the British Government in 1835, and as the Act was applicable to the whole of Bengal, (*Sadanand Mahanti* v. *Nauratan Mahanti*, 16 W. R., 290; 8 B. L. R., 280) it was regarded as extending to Darjeeling, and has consequently always been administered there.

Acts VI of 1862 and IV of 1867, B. C., also prevail in Darjeeling (see notes, pp. 183, 236, Bengal Code, 3rd edition).

Sonthal Parganas.

In the Sonthal Parganas, the Sonthal Parganas Settlement Regulation, III of 1872, as amended by Reg. III of 1886 and the Sonthal Parganas Rent Regulation, II of 1886, are in force. In this district there are a few unsettled areas in the Telliaghiree pargana, which have been exempted from settlement by Government notification of the 9th December, 1879, published in the *Calcutta Gazette* of the 10th December, 1879, Part I, p. 1221. There is no rent law in force in these areas, or in certain *dearah* lands in this district. The relations of landlord and tenant in these tracts are accordingly regulated by contract and custom. By a Government notification, No. 771 L. R., dated 20th February, 1897, published in the *Calcutta Gazette* of February 24th, 1897, Part I, p. 281, the provisions of sec. 84 of the Bengal Tenancy Act, and by another notification

No. 1338, L. R., dated 1st March, 1904, published in the *Calcutta Gazette* of the 2nd March 1904, Part I, p. 347, section 56 and clauses (2) and (3) of section 58 were extended to the Sonthal Parganas from the dates of the notifications.

Chota Nagpur.

The provisions of the Chota Nagpur Tenures Act (II of 1869, B. C.) prevail in the districts of the Chota Nagpur Division. The rent law of Hazaribagh, Ranchi, Palamau and Singhbhum was to be found in Act I of 1879, B. C., (the Chota Nagpur Landlord and Tenant Procedure Act) and Act IV, B. C., of 1897, (the Chota Nagpur Commutation Act) as amended by Act V, B. C., of 1903 and Act V of 1905 : but all these acts have now been repealed by Act VI, B. C., of 1908—the Chota Nagpur Tenancy Act. In Manbhum and the Tributary Mahals Acts X of 1859, VI, B. C., of 1862, and IV, B. C., of 1867, are in force. The Chota Nagpur Tenancy Act of 1908 may be extended to the District of Manbhum or any part thereof: sec. 1 (3) Act VI, B. C., of 1908, and by Notification No. 5335 of 1908 certain portions of the said Act have already been extended to Parganas Barabhum and Patkum. See. 13 C. W. N., lx.

Under section 5, Act XIV of 1874 (the Scheduled Districts Act,) the Bengal Tenancy Act may be extended by the Local Government, with the previous sanction of the Governor-General, to any of the scheduled districts or to any part of a scheduled district. And under section 5A, the enactment, or part thereof, so extended may be included or modified, as the Local Government thinks fit. In accordance with these powers, the Local Government has issued the notification No. 721 L. R. dated the 9th February, 1903 (see *Calcutta Gazette*, 1903, Pt. I, p. 172) extending certain sections of this Act to the districts of Hazaribagh, Ranchi, Palamau and Singhbhum, subject to the restrictions and modifications therein specified. The sections so extended and the restrictions they are subject to are noted in this book under each section of the Act, and the Act as applicable to the Chota Nagpur division, except Manbhum, is printed *in extenso* in Appendix V.

Rent Law of Eastern Bengal and Assam. The province of Eastern Bengal and Assam was constituted by Government of India Notification No. 2832 of the 1st September, 1905, (see *Gazette of India*, September 2nd, 1905. Part I, p. 536) with effect from the 16th October, 1905. It comprises the districts of Backergunge, Chittagong, Dacca, Dinajpur, Faridpur, Mymensingh, Noakhali, Pabna, Bogra, Rajshahi, Rangpur, Jalpaiguri, Malda, Tipperah, Sylhet, Cachar and the districts of the Assam Valley, *viz* : Goalpara, Kamrup, Darrang, Nowgang, Sibsagar and Lakhimpur. In all these districts, except Jalpaiguri, the Hill Tracts of Chittagong (which two latter districts are scheduled districts)

Sylhet, Cachar and the districts of the Assam Valley, this Act as amended by the amending Acts, including Act I, E. B. C., of 1908 but excepting Act I, B. C., of 1907, is in force.

Jalpaiguri.

In that part of the district of Jalpaiguri which was formerly a portion of the district of Rungpore, *viz*: thanas Jalpaiguri, Titaliya, Rajgunj and Boda, lying to the west of the Teesta river, and thana Patgram, which is to the east to the Teesta, Act X of 1859 with its above mentioned amending Acts has always prevailed. But in that portion of the district of Jalpaiguri which was ceded by the Bhutan Government to the British Government in 1866, and which is commonly known as the Western Duars, Act XVI of 1869, (The Bhutan Duars Act) was in force up to the 16th October, 1895. This Act excluded the ordinary Civil Courts from the cognizance of suits relating to immoveable property, revenue and rent. In the schedule to this Act there were certain rules for the assessment of the Bhutan Duars with Government revenue and for the preparation of the record-of-rights to form the basis of such assessment. But in this schedule there were no rules laid down for the guidance of the officers engaged in the administration of this tract of country in suits relating to immoveable property or rent. There was, therefore, while this Act was in force, no definite rent law for that portion of the Jalpaiguri district known as the Western Duars. Act XVI of 1869 was, however, repealed by Act VII, B. C., of 1895, which came into force on the 16th October, 1895, on which date it was published in the *Calcutta Gazette*, Part III, p. 62, and on the 25th October, 1895, by a notification published in the *Calcutta Gazette* of the 13th November, 1895, Part I A, p. 139, the Lieutenant-Governor of Bengal with the previous sanction of the Governor-General in exercise of the power conferred upon him by section 5, of the Scheduled Districts Act, extended Act X of 1859, as well as Act VI, B. C., of 1862, to that portion of the Jalpaiguri District known as the Western Duars. Act IV, B. C., of 1867 was, however, not similarly extended. It is an unimportant Act. The only section, of which the force is not spent, is section 5, which gives the Lieutenant-Governor power to appoint revenue officers to exercise the powers of the Collector of a district for the purpose of enabling them to hear appeals under Act X of 1859 and Act VI, B. C., of 1862.

Subsequently, the local Government issued the two following notifications :—

"No. 963 T. R.—*5th November, 1898*—In exercise of the powers conferred by sections 5 and 5A of the Scheduled Districts Act, XIV of 1874, and with the previous sanction of the Governor-General in Council the Lieutenant-Governor] of Bengal is pleased to extend the Bengal Tenancy Act, VIII of

1885, to the whole of the Jalpaiguri district, except the Western Duars, with effect from the 1st of January, 1899, subject to the following restrictions and modifications, namely :—

(I) Sub-sections (2) and (3) of section 1 of the said Act shall be omitted ; and

(II) The words 'in the territories' to which the Act extends by its own operation' in sub-section (*1*) and the whole of sub-section (*2*) of section 2 of the said Act shall be omitted."

"No. 964 T. R.—*5th November, 1898.*—In exercise of the powers conferred by the Scheduled Districts Act, XIV of 1874, section 5 and section 5A (inserted by the Repealing and Amending Act, 1891), and with the previous sanction of the Governor-General in Council, the Lieutenant-Governor of Bengal is pleased to extend the Bengal Tenancy Act, VIII of 1885, to the portion of the Jalpaiguri district, known as the Western Duars, with effect from the 1st January, 1899, subject to the following restrictions and modifications, namely :—

I.—Sub-sections (2) and (3) of section 1 of the said Bengal Tenancy Act shall be omitted.

II.—The words 'in the territories to which this Act extends by its own operation' in sub-section (1), and the whole of sub-section (2), of section 2 of the said Act shall be omitted.

III.—Nothing in the said Bengal Tenancy Act, other than the provisions of sub-section (1) of section (2), as modified by clause II of this notification, 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.

IV.—Where there is anything in the said Bengal Tenancy Act which is inconsistent with any rights or obligations of a *jotedar*, *chukanidar*, *dar-chukanidar*, *adhiar* 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 *jotedar*, *chukanidar*, *dar-chukanidar*, *adhiar*, or other tenant of agricultural land, such rights, obligations, or terms shall be enforceable notwithstanding anything contained in the said Act."

These notifications have the effect of extending the Bengal Tenancy Act, subject to certain modifications, to the whole of the Jalpaiguri district, which is now part of the province of East Bengal and Assam.

It has been held that the repeal of Act XVI of 1896 (the Bhutan Duars Act) has had the effect of making the provisions of the Civil Procedure Code as applicable to the Western Duars as it is to other parts of the district (*Braja Kanta Das* v. *Tufaun Das*, 4 C. W. N., 287).

Chittagong Hill Tracts.

The application of this Act in the Chittagong Hill Tracts is barred by Reg. I of 1900. There is no special rent law in force in these deregulationised tracts, but by s. 18 of the Regulation the Local Government is empowered to make rules to provide for the collection of rents and to prohibit, restrict or regulate the migration of cultivating raiyats in these tracts. For rules made under this section, see the *Calcutta Gazette*, 2nd May, 1900, Part I, p. 429 : also the Bengal Local Statutory Rules and Orders, 1903, vol. II, pp. 92-100.

Sylhet.

In the district of Sylhet, the provisions of Act VIII, B. C., of 1869 are in force, having been extended to it by Government notification of the 24th February, 1870, published in the *Calcutta Gazette* of the 2nd March, 1870, Part I, p. 361. They continued in force in Sylhet on its incorporation with the Chief Commissionership of Assam under Government notification of the 22nd August, 1878, published in the *Government of India Gazette* of the 24th August, 1878, Part I, p. 533, and still prevail there. Act VIII, B. C., of 1869, was extended by the Chief Commissioner of Assam to the district of Goalpara by Notification No. 2050J., dated the 9th May, 1892, and published in the *Government of India Gazette* of the 9th May, 1892, Part I, p. 356. In the other Assam Valley districts, *viz* : Kamrup, Darrang, Nowgong, Sibsagar and Lakhimpur, and in Cachar and the Hill districts, the Rent Law is in an uncertain and unsettled state. (See Gait's Assam Land Revenue Manual, pp. lv and 20). In the case of *Prasidha Narain Koer* v. *Man Koch*, (9 Calc., 330) it was decided that Act X of 1859 is not in force in the Assam Valley districts.

Goalpara.

Assam Valley Districts.

Repeal.

2. (1) The enactments specified in Schedule I hereto annexed are repealed in the territories to which this Act extends by its own operation.

(2) When this Act is extended to the Division of Orissa or any part thereof, such of those enactments as are in force in that Division or part, or, where a portion only of this Act is so extended, so much of them as is inconsistent with that portion, shall be repealed in that Division or part.

(3) Any enactment or document referring to any

enactment hereby repealed shall be construed to refer to this Act or to the corresponding portion thereof.

(4) The repeal of any enactment by this Act shall not revive any right, privilege, matter or thing not in force or existing at the commencement of this Act.

Clause (1). Enactments repealed.—The enactments specified in schedule I as repealed are Regulations VIII of 1793 (sections 51—55, 64 and 65), XII of 1805 (section 7), V of 1812 (sections 2, 3, 4, 26 and 27), XVIII of 1812 (the preamble and sections 2 and 3) and XI of 1825 (the words "nor if annexed to a subordinate tenure" to the end of clause 1 of section 4), Act X of 1859, and Acts VI, B. C., of 1862, IV, B. C., of 1867, VIII, B. C., of 1869 and VIII, B. C., of 1879. Sections 14 and 45 of the Act are repealed by s. 2, Act I, B. C., of 1907, in the province of Bengal, and by sec. 2, Act I, E. B. C., in Eastern Bengal. The provisions of Regulation VII of 1822 are in no way repealed by this Act.

Clause (2). Orissa.—For a complete list of the portions of this Act which prevail in Orissa, see note to section 1, clause (3) pp. 4 and 5. The extension of every section in force in Orissa is also mentioned in a note to the section extended to it.

Sub-section (4). Effect of repeal of enactments.—The provisions of this clause are in accordance with the rule laid down in section 7 (1) of the General Clauses Act (X of 1897), wherein it is provided that "for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed, it shall be necessary expressly to state such purpose," and with the rule of English law which has prevailed since 1850, when it was enacted by section 5, 13 and 14 Vict., c. 21, that "where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repeal, unless words be added reviving such Act or provisions." (See Wilberforce on "Statute Law," p. 310, and Maxwell on the "Interpretation of Statutes," 3rd edition, p. 585). An occupancy right acquired when Bengal Act VIII of 1869 was in force and lost before 1885 is not revived by Act VIII of 1885 which creates no new rights in favour of the tenant. *Saligram Singh* v. *Puluk Pandey*; 6 C. L. J. 149.

Proceedings Commenced under any former Act.—By section 6, Act I of 1868 (the General Clauses Act), now repealed by the General Clauses Act, X of 1897, it was provided that "the repeal of any Statute, Act or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred or *any proceedings commenced* before the Repealing Act shall have come into operation." The effect

of this section, and especially the meaning of the word "proceedings" in it, have been the subject of discussion in many cases. These cases were all reviewed in the Full Bench case of *Deb Narain Datta* v. *Narendra Krishna* (16 Calc., 267). In this case a decree for arrears of rent had been passed under Bengal Act VIII of 1869. Subsequently, after the Bengal Tenancy Act had come into operation, the decree-holder applied for execution, and the tenure, in respect of which the decree for arrears of rent had been made, was attached. The tenure was put up for sale, and a claim was then preferred by a third person, who objected to the execution proceeding. The Munsif rejected the claim without enquiring into it on the ground that under the provisions of section 170 of the Bengal Tenancy Act no such claim could be preferred. An application was then made to a Division Bench of the High Court to set aside the Munsif's order. The Division Bench doubted its correctness and referred the following two questions for the decision of a Full Bench —*viz*: "1. Whether in the present case, the provisions of the Bengal Tenancy Act were applicable to proceedings in execution? 2. Whether the term 'proceedings' in s. 6 of Act I of 1868, does or does not include proceedings in execution after decree?" The Full Bench answered the first of these questions in the affirmative, the second in the negative and discharged the rule. The judgment in this case was delivered by Wilson, J., who pointed out that the cases in which the Courts in this country have had to consider the effect of legislative change in the law upon proceedings instituted before the change was made, fall under one or other of three classes. "The first class consists of those in which the Courts have had to construe enactments which have altered the law, not by the mere repeal of earlier enactments, so as to bring the case under s. 6 of the General Clauses Act, but by new affirmative provisions, and in which the new enactments contain in themselves no special rule for their own interpretation. In such cases the Courts have applied the settled rule of construction ordinarily acted upon in the absence of any statutory rule inconsistent with it; and that rule is that retrospective effect is not given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings. The second class of cases comprises those in which the enactment to be construed provides its own rule of construction by expressly or impliedly declaring that it is or is not to have retrospective operation, or the extent to which it is to affect pending proceedings. The third class of cases consists of those in which the law is changed by a mere repeal of a previously existing law, and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by s. 6 of the General Clauses Act." Wilson, J., then proceeded to consider the

cases in which the meaning of the word "proceedings" in s. 6 of Act I of 1868, has been discussed and decided, and pointed out that they might be arranged in three groups. The first group consists of cases relating to appeals, in all of which, it was said, "there is a completely uniform course of decision to the effect that an appeal is a part of the same proceedings, within the meaning of s. 6 of the General Clauses Act, as the thing appealed against, and that, therefore, if the thing appealed against is a decree in a suit, the appeal is a part of the same proceeding as the earlier steps in the suit." The second group consists of cases relating to proceedings in execution of decrees. Although proceedings in execution are strictly speaking proceedings in the suit, yet, according to Wilson, J., these cases are authorities "for holding that an application for execution initiates proceedings separate from those which resulted in the decree." The third group consists of cases decided with respect to the Civil Procedure Code, and all but one are said to have been based on the terms of the Code itself and not merely on those of the General Clauses Act.

In *Maheswar Prasad Narain Singh* v. *Sheobaran Mahto*, (14 Calc., 621), the plaintiff sued to eject a tenant who had executed a *solehnamah* agreeing to hold the land in suit for a specified time at a specified rent and providing that the landlord was to be at liberty to enter on the lands on the expiry of the period. The suit was instituted on the 6th October, 1885, *i.e.*, before the commencement of the Tenancy Act. It was found that at the date of the *solehnamah*, the tenant had acquired a right of occupancy with respect to some of the lands in suit, and it was held that the tenant was not entitled to the benefit of section 178, (1) (*b*), because at the time the suit was brought there was nothing to prevent his contracting himself out of his rights. The decision in this case, which is of date prior to that of the Full Bench just cited, seems hardly in accordance with the principles laid down in it ; for, from sub-section (1) of section 178, it would seem as if clause (b) affects a matter of substantive right and is intended to have retrospective effect.

In another case, *Uma Sundari Dasi* v. *Brajanath Bhattacharyya*, (16 Calc, 347,) in which a decree for rent had been passed under Act VIII, B. C., of 1869, but execution was not applied for until after the commencement of the operation of the Bengal Tenancy Act, it was held that execution must proceed under the provisions of the Bengal Tenancy Act, the *ratio decidendi* being that the right to execute the decree in the mode applied for, *viz* : by sale of the tenure under sections 59, 60 and 61 of Act VIII, B. C., of 1869, if it existed, was a private right or a mere right of procedure, and that, therefore, the execution proceedings must be governed by Act VIII of 1885. The decision in this case, though not

based on the provisions of section 6, Act I of 1868, is quite in accordance with the principles laid down in the Full Bench case above referred to.

There are a few other cases, relating to this subject, which it seems desirable to notice. In both *Lal Mohan Mukhurji* v. *Jogendra Chandra Rai*, (14 Calc., 636,) and *Uzir Ali* v. *Ram Kamal Shaha*, (15 Calc., 383,) the effect of the provisions of section 174 of the Bengal Tenancy Act, under which a judgment-debtor, where a tenure or holding has been sold for an arrear of rent, can on certain conditions have the sale set aside, was considered. In the former case not only had the decree been passed, but execution had been applied for before the Bengal Tenancy Act came into force, though the sale was actually held after the operation of the Act had commenced. In the latter case, execution had been applied for after the Bengal Tenancy Act had come into operation. In both cases, it was held that the judgment-debtor could not take advantage of the provisions of section 174 of the Bengal Tenancy Act, as they confer on judgment-debtors a new right, and, therefore, cannot have retrospective effect. In a third case, *Girish Chandra Basu* v. *Apurba Krishna Das*, (21 Calc., 940,) the question was as to whether the provisions of section 310 A, added to the Civil Procedure Code by Act V of 1894, applied to a sale held after the date on which the Act came into operation, when execution had been applied for and the sale proclamation had been issued before that date. The majority of the Bench which decided the case held, following the two above cited cases relating to section 174 of the Bengal Tenancy Act, that they were not applicable, as the provisions of section 310 A, like those of section 174 of Act VIII of 1885, conferred a new right, and did not relate merely to procedure. These three decisions were, however, all reconsidered in the Full Bench case of *Jagadanand Singh* v. *Amrita Lal Sarkar*, (22 Calc., 767,) in which it was held that they had all been wrongly decided, inasmuch as neither section 174 of the Bengal Tenancy Act nor section 310 A of the Civil Procedure Code confers any new right on judgment-debtors. But the Bench expressly refrained from deciding whether the order, in the case of *Lal Mohan Mukhurji* v. *Jogendra Chandra Rai*, (14 Calc., 636,) was or was not right with reference to the provisions of section 6 of Act I of 1868, as the question did not arise in the case of *Jagadanand Singh* v. *Amrita Lal Sarkar*. This case, it may be mentioned, was one under section 310 A, and, as it was pointed out, was consequently not affected by the provisions of section 6 of the General Clauses Act, as the change in the law considered in that case had been brought about, not by the repeal of any Act, but by the addition to the existing Code of Civil Procedure of a new section. But it would seem that under the rule laid down in *Deb Narain Datta* v. *Narendra Krishna* to the effect that an application for execu-

tion initiates a new set of proceedings, the decision in the case of *Lal Mohan Mukhurji* v. *Jogendra Chandra Rai* was right under section 6 of the General Clauses Act. Section 6 of Act X of 1897, which has now taken the place of section 6 of Act I of 1868, lays down that "where this Act, or any Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not.....(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, &c., as aforesaid" (*i. e.*, acquired or accrued under any enactment so repealed), "and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, as if the repealing Act or Regulation had not been passed." This section, though somewhat differently worded from section 6 of Act I of 1868, does not appear to make any change in the law as to the effect of the repeal of an enactment upon pending proceedings. The propositions laid down by Wilson, J., on the point in *Deb Narain Datta* v. *Narendra Krishna* would therefore, seem to hold equally good under the present, as under the former General Clauses Act.

Definitions.

3. In this Act, unless there is something repugnant in the subject or context :—

(I) "Estate" means land included under one entry in any of the general registers of revenue-paying lands and revenue-free lands, prepared and maintained under the law for the time being in force by the Collector of a district, and includes Government khas mahals and revenue-free lands not entered in any register.

The whole of this section has been extended to Orissa, (Not., Sept. 10th, 1891). All the definitions contained in sub-section (1) and the seventeen succeeding sub-sections consequently apply there. This sub-section was also extended to the Chota Nagpur Division, except the district of Manbhum, but for "Collector," "Deputy Commissioner," must be read. (Not., Feb. 9th. 1903). The Chota Nagpur Division however has at present a separate Tenancy Act of its own: Act VI, B. C., of 1908, except the district of Manbhum and Parganas Barabhum and Patkum in which certain portions of the said act have been extended. See 13 C. W. N. lx.

Definitions of "Estate."—Other definitions of "estate" are to be found in sec. I, Act VII, B. C., of 1868 (an Act to amend the law for the

recovery of arrears of land-revenue) and in section 3 (2) of Act VII, B. C. of 1876, (the Land Registration Act, 1876). According to the former Act, "estate" means any land or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the register known as the general register of all revenue-paying estates, or in respect of which a separate account may, in pursuance of section 10 or section 11 of Act XI of 1859, have been opened." According to the Land Registration Act, 1876, as amended by Act II, B. C., of 1906, 'estate' includes (*a*) any land subject to the payment of land-revenue, either immediately or prospectively, for the discharge of which a separate engagement has been entered into with Government ; (*b*) any land which is entered on the revenue-roll as separately assessed with land revenue (whether the amount of such assessment be payable immediately or prospectively) although no engagement has been entered into with Government for the amount of revenue so separately assessed upon it as a whole ; (*c*) any land being the property of Government of which the Board shall have directed the separate entry on the general register hereinafter mentioned, or on any other register prescribed for the purpose by rule made under this Act." The definition of "estate" given in section 3 (1) of this Act differs from those cited above, inasmuch as it includes revenue-free lands which are not "estates" according to either Act VII, B. C., of 1868 or Act VII, B. C., of 1876. In the latter Act revenue-free lands come under the head of "Revenue-free property," which according to section 3, sub-sec. (10), "means any land not subject to the payment of land revenue which is included under one entry in any part of the general register of revenue-free lands." "Estate" in this Act also includes unregistered *lakheraj* lands and Government *khas mahals*. When an estate is recorded under a distinct number on the *tauzih* or revenue roll of the Collectorate with a separate revenue assessed upon it, the mere fact of its comprising undivided shares in certain villages does not prevent its being an entire estate (*Preonath Mitra* v. *Kiran Chandra Rai*, 27 Calc., 290 ; *Kamal Kumari Chaudhurani* v. *Kiran Chandra Rai*, 2 C. W. N., 229).

Estates in Bengal.—A revenue-paying estate in Bengal is generally known as a *zamindari* and may be either permanently or temporarily settled. Many so called "tenures" may come within the definition of "estate" given in this Act, *e.g.*, *aima* (from the plural of *imam*) or *altamgha* (from *al*, red, and *tamgha*, a stamp) grants, *jagirs*, (from *ja*, a place, and *gir*, taking or occupying), *madadmash* grants (from *madad*, assistance, and *mash*, livelihood,) *mukaddami* interest (from *mukaddam*, the headman of a village) and *taluks* (from *alak*, to suspend from.) But they may be "tenures." *Taluks* are of two kinds, *huzuri* (*i. e.*, paying to the

huzur or head-quarter treasury) or *kharija* (*i. e.*, separated) *taluks*, and *shikmi* (from *shikm*, the belly), *mazkuri* (or "specified," because they were specified in the *zamindar's* engagements,) or *shamili* (from *shamil*, extending to) *taluks* The *huzuri* or *kharija taluks* only are estates. *Taluks* of the latter class are tenures. Some *ghatwali* tenures, on which revenue is payable directly to Government are also "estates."

Noabad taluks in Chittagong are not estates.—In years past there was much contention as to whether the Noabad taluks of the Chittagong district came within the definition of "estate" or not. This controversy was set at rest, so far as the executive are concerned, by the orders of the Government of India conveyed in its letter, No. 1792,173 of the 24th July, 1893, to the address of the Secretary to the Government of Bengal, in which it was directed that the Noabad taluks in Chittagong were to be treated as "tenures" and not as "estates" within the meaning of Act VIII of 1885. According to these instructions, then, the Noabad talukdars are "tenure-holders," and the *khas mahals* to which they are subordinate are "estates", of which the Government is "proprietor." In the leading case of *Prasanna Kumar Rai* v. *Secretary of State*, (26 Calc., 792 ; 3 C. W. N., 695,) it was not contended that the Noabad taluk in question was anything but a tenure.

(2) "Proprietor" means a person owning, whether in trust or for his own benefit, an estate or a part of an estate.

Extended to the Chota Nagpur Division, except the district of Manbhum (Not., February 9th, 1903) : but the present law there, is Act VI B. C., 1908, of which certain portions have been extended to Parganas Barabhum and Patkum in the District of Manbhum.

Effect of acquisition by Government of interest of proprietor.—When the paramount title of the State carrying with it the right to receive revenue and the proprietary right to receive rent unite in Government, the proprietary interest becomes merged in the paramount title ; and rent, in such cases, becomes revenue. (The Bengal Settlement Manual, 1908, Part I, Chap. 1, rule 4, p. 1 : see also section 101 (2) Expln. 1).

(3) "Tenant" means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person.

Extended to the Chota Nagpur Division, except the district of Manbhum (Not., February 9th, 1903): but the present law there, is contained in Act VI, B. C., 1908.

"Land" not defined.—There is no definition of the term "land" in this Act. The Rent Commission in their Bill (sec. 3) proposed to define land as follows: "Land includes woods and water thereupon; when applied to land cultivated or held by a raiyat, it means land used or intended to be used for agricultural or horticultural purposes, or the like. In Chap. XVIII" (a chapter relating to procedure in suits for recovery of arrears of rent and certain other suits), "it means *(a)* tenures, under-tenures, and holdings; *(b)* land used or let to be used for agriculture, horticulture, pasture, or other similar purpose, or for dwelling-houses, manufactories, or other similar buildings; and *(c)* rights of pasturage, forest rights, fisheries, and the like. *Explanation—Bastu* or homestead land is land used for agricultural purposes when it is occupied by a raiyat, and together with the land cultivated by such raiyat forms a single holding." This suggestion, which would have obviated all ambiguity, was not adopted, and there is no definition of the term in this or any other legislative enactment, by means of which its meaning in this sub-section can be determined. In the course of the debates in Council on the provisions of the Bill, the Maharaja of Darbhanga proposed that the provisions of the Act should be restricted to "land which is the subject of agricultural or horticultural cultivation, or is used for purposes incidental thereto." But his proposed amendment to this effect was not accepted. The Hon'ble Mr. Reynolds in his remarks on the Maharaja of Darbhanga's amendment observed that, if it were carried, "it would have the effect of excluding from the operation of the Bill not merely all waste lands but all the lands not actually under cultivation at the time the question might be raised. It would leave it open to a landlord to contend that a raiyat's right of occupancy did not extend to those lands of his holding which were not actually under cultivation at the time. It is in my opinion better for the Council to leave the question to be decided by the Courts."(1) The Hon'ble Sir Steuart Bayley said: "The Hon'ble Mr. Reynolds has pointed out that his amendment will have the effect of limiting the raiyat's right of occupancy, as he would thereby lose the right as to all waste lands and lands not used for agricultural and horticultural purposes. I may point out also that the effect would be to remove from the scope of the Bill, which deals with tenures generally, all such parts of a tenure, as may be used momentarily for other purposes than agriculture and horticulture. It is much safer to

(1) Selections from papers relating to the Bengal Tenancy Act, 1885, p 482.

trust to the Courts to apply the law to these cases."(1) It is, therefore, evident that the omission of any definition of "land" in this Act is intentional. The question of determining to what classes of land the Act should be applicable was felt to be a difficult one, and so it was left to the Courts to overcome the difficulties involved in its solution.

The subject of homestead land is, however, dealt with in section 182 of this Act, which provides that this Act applies to homestead land when held by a raiyat, and that even when homestead land is held by a raiyat otherwise than as part of his holding as a raiyat, the provisions of this Act are still applicable, unless there be a custom or usage to the contrary. But the Act does not expressly apply to homestead land not held by a raiyat ; so the position of non-cultivating residents of a village is left uncertain, and it would seem that their relations with their landlords in respect of their homestead lands must be determined by the provisions of the Indian Contract Act (IX of 1872)

Application of the old rent law to non-agricultural land.—On this subject the Rent Law Commission in their report (Vol. I, p. 9, para 11) say : "Certain portions of Acts X of 1859, and VIII, B. C., of 1869, have been construed to apply only to land used for agricultural or horticultural purposes, or the like. Whether the remaining portions are limited in their application is a broad question which has never been settled. While some have contended that the provisions of those Acts as to the recovery of arrears of rent apply to the rent of any land, irrespective of the purpose for which it is used, it has never been doubted that the rents of tenures and under-tenures are recoverable under these Acts, and these commonly include much more than land used for agricultural or horticultural purposes."

Mr. Field in his Rent Law Digest (see p. 3, note) observes : "It has been repeatedly decided, and is now settled law, that the grounds-of-enhancement and right-of-occupancy provisions contained in the present law have no application to land not used for agricultural or horticultural purposes. Though the broader point seems never to have been settled, it is understood that the general provisions of Acts X of 1859 and VIII (B. C.) of 1869 were intended to apply only (so far as concerns the actual occupant) to land used or originally let for these particular purposes. See in favour of this view 3 Agra Rep., 52 ; 8 W. R., 250 ; 9 B. L. R., 105 *note*, 108 *note*, 109 *note*, 120 ; 23 W. R., 61. It has, however, been contended by some authorities that the provisions of these Acts as to the recovery of arrears of rents apply to the rent of any land, irrespective of

(1) Selections from papers relating to the Bengal Tenancy Act, 1885, p. 482.

the purpose for which it is used.—See 9 B. L. R., 111, 116 *note*, 124; 1 *Ind. Jur. N. S.*, 428; *W. R., Sp. No., Jan.—July, 1864*, p. 78 (land used for a *hat*). It has been held in several cases that Act X applies where rent is sought to be recovered merely for the land upon which houses stand—see Board's rulings, 47; 8 W. R., 90; 2 W. R., Act X, 9: but otherwise, where the claim includes the rent of the house as well as of the land, more especially if the former item be the more important—see Board's rulings, 47; 9 B. L. R., 109 *note*, 116 *note*; Marsh., 401."

In the following cases it was held that the grounds-of-enhancement provisions of the old rent Acts were inapplicable to land not used for agricultural or horticultural purposes; *Sarnomayi* v. *Blumhardt*, 9 W. R., 552; *Kali Mohan Chatturji* v. *Kali Krishna Rai*, 11 W. R., 183; 2 B. L. R., App., 39; *Khairudin Ahmad* v. *Abdul Baki*, 11 W. R., 410; 9 B. L. R., 103 *note*; *Church* v. *Ram Tanu Shaha*, 11 W. R., 547; 9 B. L. R., 105 *note*; *Naimudin Joardar* v. *Scott Moncrieff*, 3 B. L. R., 183; *Durga Sundari Dasi* v. *Umdatunnissa*, 17 W. R., 151; *Jai Kishor Chaudhrain* v. *Nabi Baksh*, 17 W. R., 178; *Madan Mohan Biswas* v. *Stalkart*, 17 W. R., 441; 9 B. L. R., 97; *Durga Sundari Dasi* v. *Umdatunnissa*, 18 W. R., 235; 9 B. L. R., 101; and *Purna Chandra Rai* v. *Sadat Ali*, 2 C. L. R., 31; while in *Mahar Ali Khan* v. *Ram Ratan Sen*, 21 W. R., 400, it was said that the words "cultivated or held" in s. 6, Act VIII (B. C.) of 1869 have the effect of excluding lands occupied exclusively by buildings from the right of occupancy there declared. See also *Adaito Charan De* v. *Peter Das*, (17 W. R., 383). The leading cases as to the applicability of the former rent Acts to agricultural or horticultural land only are *Khalat Chandra Ghosh* v. *Minto* (1 Ind. Jur., N. S., 426) and *Kali Krishna Biswas* v. *Janki*, (8 W. R., 250). In the former of these cases, Phear, J., observed that "the subject of tenure throughout Act X of 1859, which is designated as land, is merely that which the ordinary ryots or occupants of the soil possess and hold under their zamindar, *viz.*, the surface of the earth in a condition such that, by the aid of natural agencies, it can be made use of for the purpose of vegetable or animal reproduction." In the latter case, the same learned Judge said:—"In my judgment the occupation intended to be protected by that section (sec. 6, Act X of 1859,) is occupation of land considered as the subject of agricultural or horticultural cultivation and used for purposes incidental thereto, such as for the site of the homestead, the ryot or malli'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." Besides the cases cited by Mr. Field, the following support this view: *Bipra*

Das De v. *Wollen*, 1 W. R., 223; *Mahtab Chand* v. *Makund Ballabh Basu*, 9 B. L. R., App. 13; *Piari* v. *Nakur Karmakar*, 19 W. R., 308; and *Gokhul Chand Chaturji* v. *Mosahru Kandu*, 21 W. R., 5, which are authorities for the proposition that the rent law has no application to land leased and used for building purposes. This was pointed out by Phear, J.; in *Khalat Chandra Ghosh* v. *Minto*, in which he remarked: "I believe it has been held constantly that land covered entirely with houses and buildings not devoted to agricultural objects does not come within the application of the Act." In *Furlong* v. *Johari Lal*, (Hay's Reports, 1862, 453), it was held that the rent law did not apply to land leased for the erection of salt golahs for the use of which the lessee levied a cess upon the persons using them. In *Garland* v. *Rai Mohan Hazrah*, (1 W. R., 15,) it was determined that Act X of 1859 did not apply to a suit to recover rent due under a lease of tolls arising from a canal or river navigation, and in *Harish Chandra Kund* v. *Gopal Barui*, (3 W. R., Act X, 158,) it was similarly decided that a suit did not lie under the Act for rent due for the right to come upon land and vend *pan* there on *hat* days. In *Shalgram* v. *Kabiran*, (3 B. L. R., A. C., 61; 11 W. R., 400,) it was held that a suit for arrears of rent payable for certain land for a right to levy a tax upon persons employed in cutting stone on the land was not cognizable by a Revenue Court. It was pointed out in this case that the rent was indivisible, and that it could not be said how much was reserved on the land, and how much on the right to quarry, and that the small quantity of land leased was not taken for agricultural purposes but for purposes subsidiary and necessary to the main purpose of the lease, namely, quarrying the stone, the land being required for the erection of the huts of the stone-cutters. In *Hari Mohan Sarkar* v. *Scott Moncrieff*, (9 B. L. R., App., 14,) it was decided that a suit for the rent of land, where the rent came from *arhats*, *ghats*, and *bazars* situated upon it, as well as from the land, would not lie in the Revenue Court; while in *Savi* v. *Ishar Chandra Mandal*, (20 W. R., 146,) it was held that a suit for rent derivable by a lessor from tolls collected by the lessee from persons resorting to a *hat* was not cognizable under Act VIII (B. C.) of 1869. The ruling in this case is inconsistent with that in the earlier case of *Gaitri* v. *Thakur Das*, (W. R., Sp. No., Act X., 78), and also with the later case of *Bangshodhar Biswas* v. *Madhu Mahaldar*, (21 W. R., 383.) In *Jadu Nath Ghosh* v. *Schoene Kilburn & Co.*, (9 Calc., 671.) in which certain land had been let under a *dar-maurasi mukarari* lease, it was said that, the lease not being one of agricultural land, the provisions of the rent Act had no application. The case of *Watson & Co*, v. *Govind Chandra Mazumdar*. (W. R., Sp. No., Act X, 46,) was one of the chief authorities for the more extended application

which was sometimes endeavoured to be given to the former rent law. In this case it was said : "The provisions of the Act generally contemplate tenants who cultivate land or gather its natural or artificial products ; but the class of cases which by the 4th clause of section 23 (of Act X of 1859) is made cognizable by a Collector of land revenue is described in terms wide enough to extend his jurisdiction in suits for rent to cases of tenancies which are not strictly agricultural tenancies. He has jurisdiction in all suits for arrears of rent due on account of land, either *kherajee* or *lakheraj*, or on account of rights of pasturage, forest rights, fisheries, or the like. For whatever purposes the surface of the land may be used, if the subject of the lease is land, and rent is due on account of the land, a suit for arrears must be brought in the Collector's Court." See also *Nasur Ali* v. *Sadat Ali*, (W. R., Sp. No., 1864, Act X, 102.) The late Mr. Justice Dwarkanath Mitter strenuously maintained this view in the cases of *In re Bramamayi*, 9 B. L. R., 109 ; *Durga Sundari Dasi* v. *Umdatunnissa*, 17 W. R., 151 ; 9 B. L. R., 101 ; and *Brajanath Kundu* v. *Lowther*, 9 B. L. R., 121 ; 17 W. R., 183 ; but he was overruled in the Letters Patent Appeal in *Durga Sundari Dasi* v. *Umdatunnissa*, (18 W. R., 235 ; 9 B. L. R., 119.)

In *Chandessari* v. *Ghinah Pandey*, (24 W. R., 152,) the rule was laid down that when the principal subject of the entire occupation was *bastu* (homestead) land, the residue, if any, of the holding being merely subordinate, the rent law was not applicable ; but when the principal subject of the entire occupation was agricultural land, the building or buildings being mere accessories thereto, the rent law was applicable. The same principle underlies the decisions in *Tarini Prasad Ghosh* v. *Bengal Indigo Co.*, (2 W. R., Act X, 9,) and *Matangini Dasi* v. *Haradhan Das*, (5 W. R., Act X, 60). In the former case it was ruled that a suit for the rent of land let for the purposes of a factory, including the dwelling-house of the proprietor of the factory, would lie in the Revenue Court, as the rent issued out of, and was reserved in respect of the land alone, and that the case was distinguishable from that of *Aditya Chandra Pal* v. *Kamala Kant Pal*, Marsh, 401, in which it was held that a suit for arrears of rent due on account of an indigo factory would not lie under Act X of 1859, as in that case the rent was reserved not for the land alone, but for the factory and the business and profits of the contracts connected therewith. In *Matangini Dasi* v. *Haradhan Das*, it was said that a suit under Act X of 1859 lay, as the land was the substantial thing let out, and the existence of a hut upon the land as an appendage was a mere matter of accident. A suit does not lie under Act X of 1859 for arrears of rent of land leased for mining purposes and for purposes of building, making roads, and so forth (*Rooke* v. *Bengal Coal Co.*, 28 Calc., 485 ; 5 C. W. N.,

840), or for arrears of rent of a tank not part of an agricultural building, but used for rearing and preserving fish (*Mahananda Chakravartti* v. *Mangala Keotani*, 31 Calc, 937.)

Application of the present Act to non-agricultural land.—So far there have been only two cases under the present Act in which it has been endeavoured to make it applicable to non-agricultural land, and the attempts were not successful. The first case was that of the *Raniganj Coal Association* v. *Jadu Nath Ghosh*, (19 Calc., 489,) which was a suit for arrears of rent due under a *dar-maurasi mukarari* lease, in fact the same lease as sued on in the case of *Jadu Nath Ghosh* v. *Schoene Kilburn & Co.*, (9 Calc., 671.) It was observed with regard to this lease that it had not been granted for agricultural or horicultural purposes, but for building purposes and for the establishment of a coal depôt, and therefore, that the land comprised in the lease did not come within the purview of the Tenancy Act. In the second case, *Umrao Bibi* v. *Mahomed Rojabi*, (27 Calc., 205), the subject of dispute was some plots of land within the limits of the Dacca Municipality, one of which was used as a *san sonda* or place where grass for thatching was grown, and others were cultivated with kitchen vegetables. It was held that, as the land was not let for agricultural or horticultural purposes, the Bengal Tenancy Act did not apply. But see *Hassan Ali* v. *Gobind Lal Basak*, 9 C. W. N., 141. It was held that if land outside the town of Calcutta were used for agricultural or horticultural purposes, the Act would apply, even if it were within its municipal boundaries, as defined by Bengal Act II of 1888 (*Biraj Mohini Dasi* v. *Gopeswar Mallik*, 27 Calc., 202) ; but this ruling has been set aside by the Explanation added to sec. 1 (3) by Act I, B. C., of 1907.

Waste land.—Unsettled and unoccupied waste land, not being the property of any private owner, must be held to belong to the State. (*Prasanno Kumar Rai* v. *Secretary of State*, 26 Calc., 803 ; 3 C. W. N., 725).

How a tenancy is constituted.—According to Mr. Field in his "Rent Law Digest," art 4, p. 5, the relation of landlord and tenant arises : "(1) where it has been created by a contract valid according to the law in force at the time of executing such contract : (2) where it is reasonably implied from the acts of the parties : and (3) where it has been created or continued by operation of law." The most common instance of an implied contract of tenancy in Bengal is when a cultivator occupies the land of a landlord without his express consent or that of his agents and is allowed to remain in occupation of the land. Strictly speaking, such person is in the position of a trespasser, but if he is allowed to remain and cultivate the land, a contract of tenancy may be

implied. If rent is accepted from him, or if he is sued for rent, a tenancy is clearly established. (*Mahomed Azmal* v. *Chandi Lal*, 7 W. R., 259; *Gadadhar Banurji* v. *Khetra Mohun*, 7 W. R., 460; *Chaitan Singh* v. *Sadhari Monim*, 5 C. L. J., 62). In *Nityanand Ghosh* v. *Krishna Kishor*, (W. R, Sp. No. Act X, 82,) it has been said: "We think that though by the law of landlord and tenant, as applied in England, a person who takes and cultivates the land of another (there being no express permission to cultivate on the side of the landlord, nor any express condition to pay rent on the part of the cultivator) would not be allowed to be regarded as a tenant, but treated as a mere trespasser, the peculiar circumstances of this country preclude the applicability of the technical doctrine of the English law of landlord and tenant to such a case. Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many districts in Bengal commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant, and he would be so, although he may never have expressly acknowledged the landlord's right or entered into any express contract with him for the payment of rent. If he chooses to cultivate the *zamindar's* lands and the *zamindar* lets him, there is an implied contract between them, creating a relationship of landlord and tenant." Receipt of premium and rent have been held to create a tenancy which cannot be disturbed by a subsequent registered lease: *Ismail* v. *Ali Mahomed*, 13 C. W. notes CIV. In another case it has been said that parties in possession make themselves tenants by use and occupation of the land (*Lalan Mani* v. *Sonamani Debi*, 22 W. R., 334; see also *Lakhi Kant Das Chaudhuri* v. *Samirudin Laskhar*, 21 W. R., 208; 13 B. L. R., 243); and in *Sarnomoyi* v. *Dinonath Gir*, (9 Calc., 908,) it was held on the authority of these two cases that, though the defendants were trespassers, as the plaintiff was willing to waive the trespass, a decree might be given for use and occupation. In the case of *Azim* v. *Ram Lall Shaha*, (25 Calc., 324) these cases were commented on and followed, and it was observed that the principle of law enunciated in them has now been embodied in section 157 of the present Act. *Utbandi* tenancies, (for an account of which see note to sec. 180) are instances of tenancies arising by implied contract. But a mere demand for rent is not sufficient to create the relation of landlord and tenant. It is at most the offer of a tenancy (*Deo Nandan Prasad* v. *Meghu Mahton*, 11 C. W.

N., 225 ; 34 Calc., 571). And where the plaintiff and the defendants, being some of the co-owners of a *zamindari*, purchased certain holdings under the *zamindar* and were in occupation of separate portions of them, it was held that the defendants, in the absence of any agreement between themselves and the plaintiff to pay him rent, were not the plaintiff's tenants in respect of the lands actually occupied by them, or liable to pay him rent (*Girindra Chandra Pal* v. *Srinath Pal*, 32 Calc., 567 ; 3 C. L. J., 141.)

In many cases it has been held that it is not necessary that the landlord inducing the tenant into the land should have a good title to it, and notwithstanding his ejectment from it the tenancy continues ; the tenant becomes by implication the tenant of the new landlord. (*Ghulam Panja* v. *Harish Chandra Ghosh*, 17 W. R., 552 ; *Amir Hossain* v. *Sheo Sahai*, 19 W. R., 338 ; *Zulfun* v. *Radhika Prasanno Chandra*, 3 Calc., 560 ; 1 C. L. R., 388 ; *Mahima Chandra Shaha* v. *Hazari Paramanik*, 17 Calc., 45 ; *Binad Lal Prakashi* v. *Kalu Paramanik*, 20 Calc., 708). But this rule apparently applies only in the case of raiyats and not in that of tenure-holders or when the provisions of sec. 107 of the Transfer of Property Act (IV of 1882) are applicable, (*Sheo Charan Lal* v. *Prabhu Dayal*, 1 C. W. N., 142). This rule does not apply to *chaukidari chakran* land, which has been resumed and made over to the *zamindar* (*Janabali* v. *Rakibuddin Mallik*, 9 C. W. N., 571 ; 1 C. L. J., 303) ; and only when the tenant has entered upon the land and held under a *de facto* proprietor, who is not the real owner, in good faith (*Piari Mohan Mandal* v. *Radhika Mohan Hazra*, 8 C. W. N., 315 ; 5 C L. J., 9 ; *Narain Upendra Bhattacharya* v. *Protab Chandra Pradhan*, 8 C. W. N., 320).

Tenancies are created by operation of law when in resumption proceedings a decree for resumption is given (*Haro Prasad Chaudhuri* v. *Shama Prasad Rai Chaudhuri*, 6 W. R., Act X, 107, and see *contra*, *Bir Chandra Manikya* v. *Raj Mohan Goswami*, 16 Calc., 449), and when a Civil Court passes a decree declaring the right of a *zamindar* to assess rent on land (*Saudamini Devi* v. *Sarup Chandra Rai*, 8 B. L. R., App. 82 ; 17 W. R., 363 ; *Shama Sundari Devi* v. *Sital Khan*, 8 B. L. R., App. 85 ; 15 W. R., 474 : *Madhusudan Sagori* v. *Nipal Khan*, 8 B. L. R., App. 87 ; 15 W. R., 440 ; *Rohini Nundan Gosain* v. *Ratneswar Kundu*, 8 B. L. R., App. 89 ; 15 W. R., 345), or to obtain rent from the defendants, (*Nobo Krishna Mukhurji* v. *Kalachand Mukhurji*, 15 W. R., 438 ; *Rango Lal Mandal* v. *Abdul Ghafur*, 3 C. L. R., 119 ; 4 Calc., 314). In the case of *Piari Mohan Mukhurj* v. *Kamaris Chandra Sarkar*, (19 Calc., 790), it has been held that the heirs of an occupancy-raiyat dying intestate are liable to pay rent, whether they occupy the land or not, until they surrender the holding in the manner prescribed by

section 86 of the Tenancy Act. This would therefore seem to be another instance of a tenancy being created between parties by operation of the law,—in this instance, by the law of inheritance.

Payment of rent not necessary to establish or maintain a tenancy.—It is the liability to pay rent which establishes the relation of landlord and tenant. The actual payment of rent is not necessary to constitute or maintain that relation, and mere non-payment does not determine it. (*Trailokhya Tarini Dasi* v. *Mohima Chandra Malak*, 7 W. R., 400; *Rango Lal Mandal* v. *Abdul Ghafur*, 4. Calc., 314; 3 C. L. R., 119; *Poresh Narain Rai* v. *Kashi Chandra Talukdar*, 4 Calc, 661; *Masyatulla* v. *Nurzahan*, 9 Calc., 808; 12 C. L. R., 389; *Tiruchurna Perumal* v. *Sanguvien*, 3 Mad., 118; *Premsukh Das* v. *Bhupia*, 2 All., 517; *Dadoba* v. *Krishna*, 7 Bom., 34; *Rambhat* v. *Bababhat*, 18 Bom., 250; *Mazhar Rai* v. *Ramgat Singh*, 18 All., 290). So, the mere discontinuance of payment of rent does not constitute dispossession within the meaning of sec. 9 of the Specific Relief Act, (*Tarini Mohan Mazumdar* v. *Ganga Prasad Chakravartti*, 14 Calc., 649). Nor does it operate to create in favour of the lessee a title by adverse possession during the term of the lease: (*Madan Mohan Gossain* v. *Rameswar Malia*: 7 C. L. J., 651.) But non-payment of rent with abandonment of the subject of the tenancy, or the passing of a decree for ejectment against the tenant, does put an end to the relation of landlord and tenant. See note to sec. 87.

(4) "Landlord" means a person immediately under whom a tenant holds, and includes the Government.

Extended to the Chota Nagpur Division, except the district of Manbhum (Not., February 9th, 1903): but the present law there is Act VI, B. C., 1908.

Any person to whom rent is payable is a "landlord" in relation to the person who pays rent to him, though he may himself be a tenant in relation to some third person. The term "landlord," therefore, presents no difficulty. But great contention has been raised as to the meaning of the expression "joint landlords" used in sec. 188. Do these words apply to co-sharers who are in separate collection of rent from the tenant, or are they only applicable to co-sharers who are in joint collection of the rent? The subject is discussed in the notes to sec. 188.

The person to whom the land for which rent is claimed as well as the arrears due are transferred is a landlord within the meaning of the Bengal Tenancy Act: *Sashi Kumar Mirbahar* v. *Sitanath Banerjee*, 7 C. L. J., 425.

If a tenant while sticking to his character as lessee under one person takes a lease of the same property from a third person to avoid dispute and secure possession, he cannot he said to have renounced his original lease : *Farman Bibi* v. *Tasha Haddal*, 7 C. L. J., 648 ; 12 C. W. N., 587.

(5) "Rent" means 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 :

In sections 53 to 68, both inclusive, sections 72 to 75, both inclusive, Chapter XII, [Chapter XIV] and Schedule III of this Act, "rent" includes also money recoverable under any enactment for the time being in force as if it was rent.

The word and figures "Chapter XIV" in brackets have been inserted in the sub-section by s. 3, Act I, B. C., of 1907, for the province of Bengal and by Sec. 3, Act I, E. B.C., of 1908, for the province of Eastern Bengal and Assam, for the purpose of enabling a tenure or holding to pass at a sale held in execution of a decree for cesses and money legally recoverable as if it was rent.

Rent.—To constitute rent the payment must be (1) either money or produce ; (2) lawful ; (3) on account of the use or occupation of land held by tenant ; and (4) payable to the landlord.

A number of mangoes to be delivered yearly is, therefore, clearly rent: (*Nabo Tarini Dasi* v. *Gray*, 11 W. R., 7), and a suit for the landlord's share of the produce, or its money value, is a suit for rent (*Bhubo Sundari* v. *Jynal Abdin*, 8 W. R., 393 ; *Lachman Prasad* v. *Hulash Mahtun*, 11 W. R., 151 ; 2 B. L. R., App., 17 ; *Jamna Das* v. *Gausi Miah*, 21 W. R., 124 ; *Mallik Amanat Ali* v. *Aklu Pasi*, 25 W. R., 140 ; *Tazudin Khan* v. *Ram Prosad Bhagat*, 1 All., 217 ; *Shoma Mehta* v. *Rajani Biswas*, 1 C. W. N., 55). The money payable in respect of forest rights is not rent within the meaning of sec. 3, cl. 5 of the Act : *Abdulla Sarkar* v. *Asrafali Mandal*, 7 C. L. J , 152. Services rendered for the use and occupation of land are not rent according to the definition in this clause, though a service tenure-holder comes within the definition of "tenant" in sub-sec. (3). The incidents of service tenures are expressly excluded from the operation of this Act (sec. 181).

Profits—realized by ijardars of a *mela* held on agricultural lands, from stall-holders has been held not to be rent : (*The Secretary of Stat* v. *Karunakant Chowdhury*, 35 Cal., 82 F. B ; 11 C. W. N., 1053.)

Abwabs—or impositions on tenants over and above the actual rent, are not rent and cannot be recovered as such, for they are not lawfully payable (see sec. 74.).

Malikana—is not rent and sec. 78 of the Land Registration Act is no bar to a claim for it : (*Syed Shah Najamuddin Hyder* v. *S. Zahid Hossein*, 8 C. L. J., 300.)

Collections of portions of the proceeds of sales from persons exposing their goods for sale in a *hat* and due under a farming lease are rent, because they are payable for the use of the land (*Bangshodhar Biswas* v. *Madho Mahaldar*, 21 W. R., 383 ; cf. *Gaitri Debi* v. *Thakur Das*, W. R., Sp. No., Act X, 78, and *contra*, *Savi* v. *Ishar Chandra Mandal*, 20 W. R., 146.) See also, *The Secretary of State* v. *Karunakant*) 35 Cal., 82 F. B.) For the same reason, a sum payable annually by a mortgagee in possession under a *Zur-i-peshgi* lease executed by him in favour of the mortgagor is rent (*Bissorup Dutta* v. *Binod Ram Sen*, W. R., Sp. No., Act X, 93). But damages for the destruction of trees (*Nabo Tarini Dasi* v. *Gray*, 11 W. R., 7) and *goats*, straw and other articles due under a separate agreement unconnected with the question of rent (*Bhubo Sundari* v. *Jynal Abdin*, 8 W. R., 393) are not rent, because not due for the use and occupation of land. So, also, money payable by a lessee in consideration of a lease granted, whether called *nazar* or *salami*, (*Dinonath Mukhurji* v. *Debnath Mallik*, 13 W. R., 307). Damages for the use and occupation of land are not rent, (*Bluban Mohan Basu* v. *Chandra Nath Banurji*, 17 W. R., 69 ; *Kishen Gopal Mawar* v. *Barnes*, 2 Calc., 374 ; *Kali Krishna Tagore* v. *Izzatunnissa*, 1 C. W. N., Ixxviii), because not payable by a tenant. Similarly, when on the sale of *zamindari*, the conditions of sale stipulated for the payment of a small pittance, styled *dasturat*, by the purchaser as subsistence of the former proprietor, this was held not to be rent, because the relation of landlord and tenant did not exist between the parties (*Ram Charan Banurji* v. *Torita Charan Pal*, 18 W. R., 343).

Payments under varat or assignment :—Finally, a payment to be rent must be payable to the landlord. Accordingly, in *Ratnessar Biswas* v. *Harish Chandra Basu*, (11 Calc., 221), it was decided that a sum of money payable by a tenant, not to his immediate landlord but to a third person, was not rent. But in *Mahabat Ali* v. *Mahomed Faizullah*, (2 C. W. N., 455), it was subsequently ruled that a sum payable by a *patnidar* on behalf of the *zamidar* to the Collector as cesses, and another payable to a third person as expenses for the maintenance of a *masjid*, were sums payable for the use and occupation of land, and were, therefore, rent.

The conflict of decision between these two cases was ultimately settled by a Full Bench in *Basanta Kumari Debia* v. *Asutosh Chakravartti*,

(27 Calc., 67 ; 4 C. W. N., 3) in which it was decided that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent and not for damages. In this case the assignee was not a party to the assignment and had not accepted it, which was regarded as showing that "in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such."

So, where a lease had been executed by the plaintiffs in favour of the defendant at a fixed annual rent, and the defendant under instruction from the plaintiffs paid from time to time Government revenue, cesses expenses of litigation, &c, on their behalf and used to set off those sums against the rent due to them under the lease, it was held that on the expiry of the lease, the plaintiffs could not sue the defendant for an account, but only for rent, if any was still due (*Bhekdhari Lal* v. *Badshingh Duaharia*, 27 Calc, 663.) Again, a lease provided that a certain sum was payable by the tenant direct to the landlord as *malikana*, and certain other sums were payable by the tenant for Government revenue and other demands, which the landlord was himself bound to pay ; *held*, that the latter sums were payable for the use and occupation of the land held by the tenant and might have been made payable to the landlord direct, although for convenience it was arranged that the tenant should pay them for the landlord and came within the definition of rent (*Jnanada Sundari* v. *Atul Chandra Chakravarti*, 32 Calc., 972). A took a lease of certain *mauzas* from *B* in *dar-patni* and *se-patni* and covenanted to pay annually Rs. 3,191, *to the superior landlords of B direct* and Rs. 1,800 to *B*. *A* was to take receipts from the superior landlords, make them over to *B* and take receipts from the latter. The whole amount of Rs. 4,991 was described in the lease as *annual rent fixed* and in certain eventualities arising out of non-payment by *A* to the superior landlords, *B* was authorized to realise the amount from *A* by bringing a suit for *arrears of rent* ; *held*, upon a construction of the lease, that a suit brought by *B* for realisation from *A* of the amount which the latter failed to pay to the superior landlords under the terms of the lease, was, for the purpose of limitation, one not for rent, but for damages for breach of covenant (*Hemendra Nath Mukhurji* v. *Kumar Nath Rai*, 9 C. W. N., 96 ; 32 Calc., 169). Where by a *patni* lease the annual *jama* of the tenure was fixed at Rs. 6000 and besides this rent, the *patnidar* undertook to deposit into the Collectorate the Government revenue fixed for the share of the estate granted in *patni*, and payable by the lessor, *kist* by *kist*, failing which the *patni* lease was to be cancelled, and the landlord was to take *khas* possession ; *held*, by their lordships of the Privy Council that the payment by the *patnidar* of the

Government revenue, though no doubt part of the consideration to be rendered by the lessee for the enjoyment of the tenure, was not money payable to the landlord, and was therefore not rent, or recoverable as such under the provisions of the *Patni* Regulation (*Jotindro Mohan Tagore* v. *Jarao Kumari*, 33 Calc., 140 ; 3 C. L. J., 7 ; 10 C. W. N., 201.)

In *Mansar* v. *Loknath Rai*, (4 C. W. N., 10), it was held that a suit brought for rent by an assignee of a landlord against a tenant was still a suit for rent, and was, therefore, excluded from the jurisdiction of the Small Cause Court. In this case it was said that "the money was due as rent at the time of the assignment, and the assignment did not deprive it of that character, so far at all events as the tenant was concerned." The correctness of this decision was afterwards doubted, but the question was set at rest by a Full Bench, by which it was decided that a suit brought by an assignee of arrears of rent after they fell due for the recovery of the amount due is a suit for rent, and, therefore, excepted from the cognizance of the Court of Small Causes (*Srish Chandra Basu* v. *Nachim Kazi*, 27 Calc., 827 ; 4 C. W. N., 357.) From this decision, however, Banerjee, J., dissented, holding that where the landlord's interest in the land is not assigned along with the arrears of rent after they fell due, a suit by the assignee for the recovery of the same is a suit for ordinary debt. The Full Bench decision was followed in *Mohendra Nath Kalamori* v. *Kailash Chandra Dogra*, (4 C. W. N., 605), in which a second appeal in a suit brought by an assignee of arrears of rent was allowed, being held not to be barred under the provisions of s. 586, C. P. C., but at the same time, as the plaintiff was not the landlord, and the defendant not his tenant, as defined in this Act, it was decided that the period of limitation applicable to the suit was not that laid down in art 2, schedule III of this Act, but three years only under art. 110, schedule II of the Limitation Act. A transferee of the whole interest of a co-sharer landlord including his claim for arrears is a landlord and can maintain a suit for the entire rent if he makes his co-sharers parties defendants : *Sashi Kumar Mirbahar* v. *Sitanath Banerjee* 35 Calc., 744.

Money recoverable as rent.—The following moneys are recoverable as if they were rents, under enactments for the time being in force ; *viz.*, (1) sums payable to *zamindars* and tenure-holders under the Bengal Survey Act (Act V, B. C., of 1875, sec. 38) ; (2) sums payable to Government or to any person who has entered into an agreement to collect water-rates for Government (Act III, B. C., of 1876, sec. 83) ; (3) sums payable to holders of estates or tenures under the provisions of the Cess Act (IX, B. C., of 1880, sec. 47) ; (4) sums payable to holders of estates or tenures in respect of land held rent-free (sec. 64 A of the same Act) ; (5) drainage charges payable by the tenant to the landlordu nder the Bengal Drainage

Act (VI, B. C., of 1880, sec. 44 ; *Mun Mahini Dasi* v. *Priya Nath Besali*, 8 C. W. N., 640 ; *Nafar Chandra* v. *Jyoti Kumar Mukhurji*, 11 C. W. N., 57) ; (6) interest on arrears of rent or other demands recoverable as rent, payable to managers of Courts of Wards Estates (Act III, B. C., of 1881, sec. 10) ; (7) sums payable to *zamindars* or tenure-holders under the Bengal Embankment Act (II, B. C., of 1882, sec. 74), which are recoverable as provided for the recovery of arreas of rent of *patni* tenures in Reg. VIII of 1819 ; and (8) sums payable to holders of estate or tenures by under-tenure holders or cultivating raiyats under ss. 23 and 24 of the Bengal Sanitary Drainage Act, VIII, B. C., of 1895.

Cesses.—Cesses, though recoverable as rent under the provisions of the Cess Act, are yet not rent, as they are not payable for the use and occupation of land, but under a liability incidental to the use and occupation of land. Under the terms of the second paragraph of this clause they are only included under the term "rent" in sections 53 to 68, both inclusive, sections 72 to 75, both inclusive, Chap. XII (relating to distraint), Chapter XIV (relating to sales for arrears under decree, and this in Bengal only), and Schedule III (relating to limitation) of this Act. It has however, been held that cesses are included within the term "rent" for the purposes of sec. 153 of the Act ; so that no second appeal lies, where the amount sued for does not exceed one hundred rupees, unless the case comes within the the terms of the proviso to that section (*Mahesh Chandra Chaturji* v. *Uma Tara Debi*, 16 Calc., 638 ; *Rajani Kant Nag* v. *Jogeshwar Singh*, 20 Calc., 254). In the latter of these cases it was said that the provisions of the second paragraph of clause (5), section 3, are "enabling provisions, passed to extend the meaning of rent, and in no way interfere with the law refusing a right of appeal in suits below a hundred rupees in value." The decisions in these two above cited cases would seem to be hardly in accordance with the strict terms of the clause.

In *Kishori Mohan Rai* v. *Sarodamoni Dasi*, (1 C. W. N., 30) it has been laid down that the provisions of sec. 174 of this Act, which allow of a sale of a tenure or holding being set aside on application within thirty days of the sale, are applicable to a sale in execution of a decree for arrears of road cess due on account of *lakhiraj* land, but the decision in this case proceeds on the terms of sec. 64A of the Road Cess Act, which enacts that arreas of road cess may be recovered by any process by which the amount might be recovered, if it were due on account of rent of a transferable tenure. Cesses, it has been held, are only personal debts and cannot properly be recovered under the Public Demands Recovery Act, 1880, (1) from the property on which it is assessed, when such property belongs to a third person, who has not been recorded as proprietor under Act VII, B. C., of 1876 (*Shekaat Hosain* v. *Sashi Kar*, 19 Calc.,

783). But under sec. 65, arrears of rent are a first charge on the tenure or holding on account of which they may become due, and "rent" in sec. 65 includes cesses; so that the tenure or holding on which they have been assessed may be sold in execution of decree for arreas of cess, provided the suit in which the decree has been obtained has been brought against the proper person. At a sale of a tenure held in execution of a decree the whole tenure will pass and the purchaser will acquire it free from any incumbrance, not being a registered and notified incumbrance under sec. 161 of the Act (*Nobin Chand Laskar* v. *Bansi Nath Paramanik*, 21 Calc., 722.) In a recent case, *Ahsanulla* v. *Manjura Banu*, (30 Calc., 778), in which *Nobin Chand Laskar* v. *Bansi Nath Paramanik* was not referred to, it has been held that the amount of cesses payable to a Collector under the Cess Act is not a charge on the estate in respect of which they are due. But this was not the case under the old law, or at a sale held in execution of a decree for arrears of cesses obtained under Act X of 1859. At such a sale, only the right, title and interest of the particular individual against whom the decree has been obtained will pass (*Mahanand Chakravartti* v. *Beni Madhb Chaturji*, 24 Calc., 27; *Uma Charan Bag* v. *Azadunnissa*, 12 Calc., 430). When property is sold in enforcement of a certificate under Act VII, B. C., of 1880, filed by the Collector to recover an amount due to the government for advance made under the Agriculturists' Loans Act, nothing but the judgment-debtors right, title and interest in the property at the date of service of the notice under s. 10 can pass to the purchaser (*Lachmi Narain Singh* v. *Nand Kishor Lal*, 29 Calc., 537).

Patwaries' dues.—Patwaries' dues are of course not rent, and, therefore, cannot be recovered under the provisions of this Act, but they are recoverable by the same processes as arrears of public revenue under sec. 36 of Reg. XII of 1817.

Dak Cess.—Dak cess is also not rent, and as there is no provision in any enactment that it is recoverable as if it were rent, it cannot be recovered under the provisions of this Act. Under sec. 12 of the Zamindari Dak Act, VIII, B. C., of 1862, contracts or engagements for the payment of dak cess may be made by any *zamindar* with any person holding under him (see *Soroda Sundari Debya* v. *Uma Charan Sarkar*, 3 W. R., S. C. Ref., 17; *Bissonath Sarkar* v. *Sarnamayi*, 4 W. R., 6; *Rakhal Das Mukhurji* v. *Sarnamayi*, 6 W. R., 100); but this would not appear to make dak cess rent, or recoverable as such. In *Watson* v. *Srikrishna Bhumik* (21 Calc., 132), however, it has been held that where dak cess is claimed under the contract by which rent is payable, it must be regarded as rent, because it is claimed practically as part of the rent. This was followed in *Bijai Chand Mahtab* v. *Brohmodas Dutt*, (1 C. L.

J., 101 *n*). In a *patni kabulyat* executed in 1855, the *patnidar* agreed to pay the salary and expenses of the *amlah* of *dak chowki* houses, and to appoint them and superintend their work under the system of *zamindari dak* then in force; *held*, that this stipulation imposed on the *patnidar* the liability of paying *dak* charges recoverable from the *zamindar*, and, although the system had since been changed, the liability of paying such charges must be taken to exist. (*Jillar Rahman* v. *Bijai Chand Mahtab*, 28 Calc., 293). See note to s. 74. Act VIII, B. C., of 1862 (the Zamindari Dak Act) has now been repealed by Act IV of 1907: the Repealing and Amending (Rates and Cesses) Act, 1907.

Chaukidari Tax.—Chaukidari tax, too, would not seem to come within the definition of rent, but in *Ahsanullah* v. *Tirtha Bashini* (22 Calc., 680), which was a suit for arrears of chaukidari tax, payable by a *patnidar* under the *patni* settlement, it was held that the amount for which he was thus liable was rent. It was said that the consideration of the payment was the occupation of the land, or the holding of the *patni* tenure, and the payment was to be made periodically to the *zamindar* by the *patnidar*, and was lawfully payable; it came within the definition of rent. But see note to s. 74.

Interest.—Interest is not rent within the meaning of the term as defined in this Act (*Kailash Chandra De* v. *Tarak Nath Mandal*, 25 Calc., 571 *n*). See also *Rai Charan Ghosh* v. *Kumad Mohan Datta*, (25 Calc., 571; 2 C. W. N., 297), and *Bhagaboti Debya* v. *Basanta Kumari*, 11 C. W. N., 110; 5 C. L. J., 69. But in s. 169 (c) the word "rent" includes interest (per Ghosh J., in *Bijai Chand* v. *S. C. Mukhurji*, 5 C. L. J., 27n), and in s. 161, as amended by sec. 51, Act I, B. C., of 1907, which prevails in Bengal only, the terms "arrears" and "arrear of rent" include interest decreed under sec. 67, or damages awarded in lieu of interest under sec. 68 (1).

Rent is moveable property; the right to collect it may be sold.—It has been held in *Mohesh Chandra Chaturji* v. *Guru Prasad Rai*, (13 W. R., 401) that for the purposes of Acts VIII and X of 1859, rent comes within the terms "property" and "moveable property" and that, therefore, in execution of a decree for arrears of rent the judgment-debtor's right to re-cover rent from an under-tenant may be sold. Whether this can be done under the present law has not yet been determined, but there would seem to be no reason why it should not be done. The right to collect back rents is frequently transferred privately, and there would seem to be no legal obstacle to its being transferred *in vitum*. "Debts" are expressly mentioned in sec. 266 of the Code of Civil Procedure as being liable to attachment and sale in execution of a

decree. But a decree for money cannot be sold under the provisions of sec. 273, C. P. C., and under sec. 148 (*h*) of this Act the assignee of a decree for arrears of rent cannot apply for execution of it, unless the landlord's interest in the land has become and is vested in him. We are, therefore, confronted with this anomaly that the right to collect rent may apparently be transferred privately and sold in execution of a decree, but the same right in its more perfect form of a decree cannot be sold under section 273 of the Civil Procedure Code, and can only be enforced by an assignee, if he further acquires his transferor's interest in the land. A suit by an assignee for rent, the right to collect which has been transferred to him, would be a suit for a debt and not one for rent; because the amount would not be payable to the landlord for the land (*Bhagwan Sahai* v. *Sangessar Chaudhri*, 19 W. R., 431; see *contra*, *Samasundari Dasi* v. *Brindaban Chandra Mazumdar*, Marsh, 199; *Lal Mohan Singh* v. *Trailakhyonath Ghosh*. 14 W. R., 456; *Hridai Mani Barmani* v. *Sibbold*, 15 W. R., 344).

(6) "Pay," "payable" and "payment," used with reference to rent, include "deliver," "deliverable" and "delivery."

(7) "Tenure" means the interest of a tenure-holder or an under-tenure-holder.

Extended to the Chota Nagpur Division, except the district of Manbhum (Not., Feb. 9th 1903). But for "or an under-tenure-holder" read "and includes an under-tenure."

In this Act the word "tenure" is almost invariably used in its strict sense of the interest of a "tenure-holder," but in rulings under the old Acts, and often even now it is loosely used as synonymous with "tenancy." This is of course incorrect in cases to which this Act is applicable. "Tenure-holder" is defined in section 5, sub-sec. (1).

(8) "Permanent tenure" means a tenure which is heritable and which is not held for a limited time.

The subject of permanent tenures is discussed in the notes to Chap. III.

(9) "Holding" means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy.

Holding.—According to this definition the land held by an *under-raiyat* would not seem to be a holding, as in sec. 4 under-raiyats are classified separately from raiyats ; but no doubt it must be a holding, an under-raiyat being neither a proprietor nor a tenure-holder. This is further apparent from the terms of sec. 113, as amended by the Bengal Tenancy (Amendment) Act, III, B. C., of 1898, in which "the *holding* of an under-raiyat" is referred to.

An undivided share in a parcel or parcels of land cannot be a holding.—The definition of "holding" in this sub-section "evidently applies only to an entire parcel or entire parcels, and is not intended to include an undivided share in a parcel or parcels, and the reason seems to be obvious. A raiyati holding, which from the very definition of "raiyat" in section 5, sub-section 2, means land occupied by a raiyat for the purpose of cultivation, can be ordinarily held only in its entirety ; and cultivation of an undivided fractional share of a parcel of land will ordinarily be meaningless. A tenure, on the other hand, which is the "interest of a tenure-holder," who is defined in section 5, sub-section (1), as a person who has acquired a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, may relate only to an undivided fractional share in land without leading to any practical difficulty. And it is for this reason that, while "tenure" is defined as the interest of a tenure-holder or an under-tenure-holder, "holding" is defined, not as the interest of a raiyat, but as a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy. If the definition of "holding" were to include an undivided fractional share in a parcel or parcels of land, the definition would be incompatible with the provisions of sections 121 and 122 of the Act, which relate to the distraint of crops or other products of holdings : (per Banerjee, J., in *Hari Charan Basu* v. *Ranjit Singh*, 1 C. W. N., 521 ; 25 Calc., 917). See also *Baidya Nath De* v. *Ilim*, (25 Calc., 917 ; 2 C. W. N., 44). An undivided share does not fall within the definition of 'holding' given in Bengal Tenancy Act, and sec. 30 of the Act does not apply to the enhancement of rent of such a share (*Haribol Brahma* v. *Tasimuddin Mandal*, 2 C. W. N., 680), and the purchaser of an undivided share of raiyati holding cannot acquire any right to annul incumbrances under s. 167 (*Ahadulla v. Gagan Mollah*, 2 C. L. J., 10 ; 6 C. W. N., lxxxiv). Under Act VIII, B. C., 1869 a right of occupancy could be acquired within the meaning of the proviso to sec. 37 of the Revenue Sale Law in a share of undivided property (*Baidya Nath Manaal* v. *Sudharam Misri*, 8 C. W. N., 751). See also *Uma Charan Baruah* v. *Mani Ram Baruah*, (8 C. W. N., 192). The partition of an estate under Act VIII, B. C., of 1876, by which a holding, formerly appertain-

ing to the joint estate is apportioned between the co-sharers of the estate, has the effect of dividing the holding into two or more holdings (*Pratap Chandra Das* v. *Kamala Kanta Shaha*, 10 C. W. N., 818).

[(10) 'village' means the area defined, surveyed and recorded as a distinct and separate village in—

(*a*) the general land-revenue survey which has been made of the Province of Bengal, or

(*b*) any survey made by the Government which may be adopted by notification in the Calcutta Gazette, as defining villages for the purposes of this clause in any specified area;

and, where a survey has not been made by, or under the authority of, the Government, such area as the Collector may, with the sanction of the Board of Revenue, by general or special order, declare to constitute a village.]

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"(10) 'village' means the area defined, surveyed, and recorded as a distinct and separate village in—

(*a*) the general land-revenue survey of the districts which heretofore formed part of the Province of Bengal, or

(*b*) any survey made by the Government which may be adopted by notification in the Eastern Bengal and Assam Gazette, as defining villages for the purposes of this clause in any specified area; and, where a survey has not been made by, or

This definition of "village" has been substituted for the old one by Act I, B. C., of 1907 for West Bengal, the parallel column shewing that for East Bengal by Act I, E. B.C., of 1908.

In the Select Committee's report on the Bengal Tenancy (Amendment) Bill, 1906, the following reasons for the substitution are given.

"It has been brought to our notice that some practical inconvenience has been caused by the present definition of "village" in sub-section (10) of section 3 of the Act as the area included in a village map of the revenue-survey. In the Cadastral Surveys which are now being made in parts of the province in connection with the preparation of a record-of-rights, it is found in many cases, however, that, owing to the clearance of jungle and other causes, the existing boundary of a village does not agree with that ascertained in the revenue-survey, and rule 4 (c) of the Rules made by the Bengal Government prescribes that, in such cases, the existing boundary ascertained by the Revenue-officer is to be followed for the purpose of map and record. We propose to bring the law into conformity with this rule, for, we consider it advisable that where a Cadastral Survey has been made on a larger scale and with greater care and accuracy than the Revenue Survey, Government should have power to declare that the maps of the Cadastral Survey should supersede those of the Revenue Survey for the purposes of the Tenancy Act. We propose, therefore, that in the Tenancy Act, the

under the authority of, the Government, such area as the Collector may, with the sanction of the Board of Revenue, by general or special order, declare to constitute a village:

Provided that when an order has been made under section 101 directing that a survey be made and a record-of-rights prepared in respect of any local area, estate, tenure or part thereof, the Government may by notification in the Eastern Bengal and Assam Gazette declare that in such local area, estate, tenure or part thereof 'village' shall mean the area which for the purposes of such survey and record-of-rights may be adopted by the Revenue-officer with the sanction of the Board of Revenue as the unit of survey and record."

definition of "village," which was adopted in the Land Registration (Amendment) Act of 1900, should be inserted. We consider, however, that the Revenue Survey map should be preserved as far as possible as the unit of survey and record in the course of the Cadastral Survey, and that no change should be made except with the sanction of the Board of Revenue. We have provided for this by the new clause 27A, which we propose to insert in the Bill."

The proviso is new: the reason for its introduction has been stated as follows.

"The definition of "village" as originally drafted was intended to enable and does enable Government to declare that the maps of surveys made in order to the preparation of record-of-rights should supersede those of the Revenue Survey. It has since been pointed out that the definition does not wholly meet the Revenue officer's practical difficulty. Within a given area the preparation of a record-of rights may be in many different stages in different villages. It would be found impossible or at least extremely difficult in practice to issue the notification contemplated in clause (*b*) of the definition, as each village is measured. Thus in framing the record, in disposing of objections and deciding disputes, with regard for instance to occupancy rights the Revenue officer finds it necessary to treat as a village a unit which has not yet become a village in the eye of the law. The proviso is intended to meet this difficulty and to enable Government to declare that when a certain area has been adopted with the sanction of the Board of Revenue as the unit of survey and record, such area or unit shall *ipso facto* become a "village" for all the purposes of the Act."

(11) "Agricultural year" means, where the Bengali year prevails, the year commencing on the first day of Baisakh, where the Fasli or Amli year pre-

vails, the year commencing on the first day of Asin, and, where any other year prevails for agricultural purposes, that year.

Agricultural years.—The Bengali year prevails generally throughout Bengal, and is current in those districts in which other years are not prevalent. The 1st November, 1885, the date of commencement of this Act, was the 17th Kartik, 1292, according to the Bengali year.

The *Fasli* or "harvest year" prevails in the districts of the Patna division (*viz.*, Champaran, Saran, Muzaffarpur, Darbhanga, Patna, Gaya, and Shahabad), in the districts of Bhagalpur and Monghyr of the Bhagalpur division, in Parganas Dharampur, Harawat, Chhai and Dhaphar in the west of the Purneah district, in the Godda sub-division, Tuppa Harwai of the Dumka sub-division and Taluk Taor of the Deogarh sub-division, all in the district of the Sonthal Parganas, in the Palamau district, in the Kharakdiha sub-division of the Hazaribagh district, in pargana Barabhum in the Manbhum district, and in parts even of Singhbhum of the Chota Nagpur division. The 1st November, 1885, was the 9th Kartik, 1298, according to the Fasli year.

The *Amli* (revenue) or *Wilayati* year prevails in Orissa, in the Tamluk and Contai sub-divisions of the Midnapur district, also in the *sadar* sub-division of the same district, except the thanahs Binpur, Garhbeta and parts of Debra and Keshpur, and in those parts of the Singhbhum district where the Fasli year is not used. That it is in force in parts of the Chota Nagpur division is apparent from secs. 31 and 44, Act I, B. C., of 1879. It commences on a varying date each year. The 1st November, 1885, was the 18th Kartik, 1293, of the Amli or Wilayati year.

The *Maghi* (*i. e.* the full-moon of Magh) year prevails in Chittagong. The 1st November, 1885, was the 17th Kartik, 1247, according to the Maghi year.

The *Mulki* year prevails in those parts of the district of Purneah, *i. e.*, Parganas Haveli, Surjapur, Powakhali, &c., where the Fasli and Bengali years are not in force. The Fasli year prevails in Parganas Dharampur, Harawat, Chhai and Dhaphar, and the Bengali year in the southern and south-eastern parts of the district, *viz.*, Parganas Kakjole, Badour, &c. The Mulki year is a year in advance of the Bengali year.

In the Ranchi district and the adjoining parts of the Hazaribagh district, the *Sambat* year is in force. The *Sambat* year can be readily ascertained by adding 57 to the year of the Christian era.

(12) "Permanent Settlement" means the Permanent Settlement of Bengal, Behar and Orissa, made in the year 1793,

Permanent Settlement.—This clause was framed with the intention of making it clear that the Permanent Settlement referred to in the Act "is in all cases the Permanent Settlement of Bengal, Behar and Orissa, made in 1793, and not, as regards any district or area subsequently settled, the Permanent Settlement of such district or area." (Rent Commission Report, vol. I. p. 14, para 23). This was the rule laid down in *Paran Bibi* v. *Sidi Nazir Ali*, (W. R., Sp. No., Act X, 71). See also *Nagendra Lal Chaudhuri* v. *Nazir Ali*, (10 C. W. N., 503). The date of the Permanent Settlement has been held to be the 22nd March, 1793 (*Dhanput Singh* v. *Guman Singh*, W. R., Sp. No., Act X, 61; *Rajessari Debi* v. *Shibnath Chaturjee*, 4 W. R., Act X, 42). Certain portions of Reg. III of 1828 show that the Sundarbans up to that date continued the property of the State. (*Tamasha* v, *Asutosh Dhar*, 4 C. W. N., 513).

(13) "Succession" includes both intestate and testamentary succession.

(14) "Signed" includes "marked" when the person making the mark is unable to write his name; it also includes "stamped" with the name of the person referred to.

(15) "Prescribed" means prescribed from time to time by the Local Government by notification in the official Gazette.

Extended to the Chota Nagpur Division, except the district of Manbhum (Not., February 9th, 1903): but the present law there is Act VI, B. C., 1908.

(16) "Collector" means the Collector of a district or any other officer appointed by the Local Government to discharge any of the functions of a Collector under this Act.

Notifications under this sub-section.—By a notification, dated 21st April, 1886, published in the *Calcutta Gazette* of the 28th *idem*, Part I, p. 466, all officers in charge of sub-divisions were invested with the powers of a Collector for the purpose of discharging the functions referred to in sections 69 to 71 (relating to produce rents) of the Act. By a notification, dated 28th May, 1886, published in the *Calcutta Gazette* of 2nd June, 1886, Part I, page 652, the Deputy Collector of Howrah, and

by a notification, dated the 4th May, 1893, published in the *Calcutta Gazette* of the 5th *idem*, Part I, p. 274, the Senior Deputy Collector attached to the sadar station of Gaya, were invested with powers of a Collector for the purpose of discharging the functions referred to in these sections. By a notification, dated the 7th October, 1886, published in the *Calcutta Gazette* of the 13th *idem*, Part I, p. 1092, all officers in charge of subdivisions were invested with the powers of a Collector for the purpose of discharging the functions referred to in sections 12, 13 and 15 of the Act.

The appointment of an officer to perform the functions of a Collector under particular sections does not make him a Collector "for all purposes of the Act" (*Mohabat Singh* v. *Umahil Fatima*, 28 Calc., 69).

(17) "Revenue-officer" in any provision of this Act, includes any officer whom the Local Government may appoint by name or by virtue of his office to discharge any of the functions of a Revenue-officer under that provision.

Extended to the Chota Nagpur Division, except the district of Manbhum (Not., February 9th, 1903.) The present law there is Act VI, B.C., of 1908.

"Under sec. 3 (17) of the Tenancy Act, officers cannot be vested with the general powers of a Revenue Officer, but with certain functions only as specified in certain provisions of the Act."(1)

Notifications under this sub-section.—By a notification, dated the 11th February, 1890, published in the *Calcutta Gazette* of the 12th *idem*, Part I, p. 121, all Deputy Collectors in the Lower Provinces of Bengal have been authorized to discharge the functions of Revenue Officers under Chap. X and have been vested with the powers of a Settlement Officer under rule 1, Chap. VI of the rules framed by Government under this Act. By notification No. 1628 L. R., dated the 17th March, 1905, all Deputy Commissioners and all Deputy Collectors now serving, or who may hereafter serve, in the districts of Hazaribagh, Ranchi, Singhbhum and Palamau, are authorized to discharge all the functions of a Revenue Officer under Chapter II of the Chota Nagpur Commutation Act, IV (B. C.) of 1897, as amended by Act V (B. C.) of 1903. The present law in the Chota Nagpur Division will be found in Act VI, B. C., of 1908.

They are also vested with all the powers of a Revenue officer under Rule 3 of the Government Rules under section 13 of the Chota Nagpur Commutation Act, IV (B.C.) of 1897.

(1) Board's Settlement Manual, 1908, Part I, Ch. 5, rule 76 p. 22, dated 8th May, 1876.

(18) "Registered" means registered under any Act for the time being in force for the registration of documents.

Documents executed by landlords or tenants will be found to come within one or other of the following clases :—(1) deeds of sale, mortgage or gift of the interest of the landlord or tenant ; (2) leases ; (3) contracts of enhancement ; and (4) documents creating incumbrances on tenures and holdings.

Registration of deeds of sale, mortgage or gift.—Deeds of sale or mortgage of rights in or of tangible immoveable property of the value of Rs. 100 and upwards, and deeds of gift of immoveable property of any value must be registered (sec. 17, Act XVI of 1908, secs. 54, 59, and 123 of Act IV of 1882). Formerly, the registration of deeds of sale or mortgage of such property of less than Rs. 100 in value was optional (sec. 18, Act III of 1877) ; but since the passing of Act IV of 1882, sales of such property can only be made by registered instrument, or, in the case of immoveable property not coming within the provisions of sections 12 and 18 of this Act (*i. e.* in the case of immoveable property other than permanent tenures and raiyati holdings at fixed rates), by delivery of the property (*Narain Chandra Chakravartti* v. *Dataram Rai*, 8 Calc., 597 ; 10 C. L. R., 241 ; *Makhan Lal Pal* v. *Banko Bihari Ghosh*, 19 Calc., 623), and registration of a deed of sale constitutes a sufficient delivery of the deed to pass the interest in land referred to therein (*Ponnaya Goundan* v. *Muttu Goundan*, 17 Mad., 146). A mortgage of immoveable property of less than Rs. 100 in value, not coming within the provisions of sections of 12 and 18 of this Act, may be effected either by unregistered deed signed by the mortgagor and attested by two witnesses, or, except in the case of a simple mortgage, by delivery of the property (sec. 59, Act IV of 1882). Delivery of possession of property of less than Rs. 100 in value in pursuance of a contract of sale or mortgage, which does not come within the provisions of sections 12 and 18 of this Act, gives (except in the case of a simple mortgage, in which there can be no transfer of possession) a good title and will not be affected by a subsequent registered deed in favour of another ; while delivery of possession of property of above that value will be of no avail as against a subsequent registered deed, notwithstanding the provisions of sec. 48 of the Registration Act, which prescribe that all duly registered non-testamentary documents relating to moveable or immoveable property "shall take effect against any oral agreement or declaration unless where the agreement or declaration has been accompanied or followed by delivery of possession." But it has been held that where a person

purchases with actual notice of a prior oral agreement to sell to another person, he will not be allowed to retain the property, and a suit for specific performance may be successfully maintained by such other person against him and the vendor (*Waman Ram Chandra* v. *Dhondiba Krishnaji*, 4 Bom., 126; *Nemai Charan Dhabal* v. *Kokil Bag*, 6 Calc., 534 ; 7 C. L. R., 487 ; *Chandra Nath Rai* v. *Bhairab Chandra Sarma*, 10 Calc., 250 ; *Chandra Kant Rai* v. *Krishna Sundar Rai*, 10 Calc., 710 ; *Kannan* v. *Krishnan*, 13 Mad., 324.) The provisions of section 48 of the Registration Act are still applicable in the case of sales and mortgages of property of less than Rs. 100 in value to which the terms of sections 12 and 18 of this Act will not apply, and of leases for terms not exceeding one year, or exempted by Government from registration under sec. 17 of the Registration Act.

The provisions of section 12 and 18 of this Act must be read as supplemental to those of the Registration and Transfer of Property Acts, and they make the registration of deeds of transfer by sale, gift or mortgage of permanent tenures and raiyati holdings at fixed rates compulsory ; so that oral agreements or declarations, or unregistered deeds relating to such transfers of such properties, can be of no avail, even if accompanied by possession (*Dharmodas Das* v. *Nistarini Dasi*, 14 Calc., 446). Deeds of sale or of gift of ordinary raiyati hoidings of any value must also be registered under sections 54 and 123 of the Transfer of Property Act. Deeds of mortgage of such holdings must be registered if the amount secured exceeds one hundred rupees (*Nabira Rai* v. *Achampat Rai*, 3 All., 422). If the amount secured is less than one hundred rupees, the deed, if there be one, must be signed by the mortgagor and attested by at least two witnesses.

Leases.—There is no definition of "lease" in this Act. In sec. 2, Act III of 1877, the term "lease" is said to "include a counterpart kabuliyat, an undertaking to cultivate or occupy and an agreement to lease." In sec. 2, cl.' 16, Act II of 1899, it is defined as meaning "a lease of immoveable "property" and as including also "(*a*) a patta (*b*) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for immoveable property, (*c*) any instrument by which tolls of any description are let, and (*d*) any writing on an application for a lease intended to signify that the application is granted." In section 105 of the Transfer of Property Act (IV of 1882) a lease of immoveable property is said to be a "transfer of the right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the trans-

feror by the transferee who accepts the transfer on such terms." It is, therefore, not a mere contract but a conveyance and affects a transfer of property (*Raghunathdas Gopaldas* v. *Morarji Jutha*, 16 Bom., 568). Mr. Field in his Digest, p. 3, suggests the following definition :—" Lease means a contract creating or continuing the relation of landlord and tenant and executed by the landlord in favour of the tenant." " Pattah," he defines, " as a written lease granted to a ryot." A lease granted to a tenant need not in all cases be in writing. Parol leases are in most cases quite valid. In this Act the word " lease " is apparently used sometimes in the sense of a parol contract of letting.

Cultivators' Leases exempted from stamp duty.—Article 35, Schedule I, of the Stamp Act exempts from duty (1) a " lease executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink) without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees (see *In re Bhavan Badhar*, 6 Bom., 691) ; and (2) the counterpart of any lease granted to a cultivator," and art. 16 of the same schedule exempts from duty the surrender of a lease, when such lease is exempted from duty. The Allahabad High Court has said that by the term " cultivator " in this article only those persons are connoted who actually cultivate the soil themselves or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant ; not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease " (5 All., 360 ; Stamp Ref.).

The Board of Revenue ruled in 1896 and again in 1902 (See Board's Circular Order No. 14 of 1902) that a document executed by a raiyat surrendering a verbal lease, evidenced only by the entry of his name in the landlord's register, must be stamped as a " release " under art. 55, Schedule I, and was not exempt from duty as a surrender of a lease under art. 61, Schedule I. This however has been cancelled by a recent circular of March 1909, and the present ruling is that :—a lease that is liable to stamp duty is a lease as defined by sec. 2, (16), of Act II of 1899 and is clearly a written lease. A verbal lease is exempt from duty and a written surrender of such a lease is also exempt from duty under this article. In the case of written leases falling within Article 35, exemption (*a*) and in the case of all verbal leases an instrument whereby a cultivator surrenders his tenant right is exempted under this article. Payment of consideration for the surrender does not make an instrument of surrender

liable to stamp duty, which would otherwise have been exempted under the provisions cited above : Board's Letter No. 1402 B dated the 13th March 1909. See also *Bhairab Chandra Das* v. *Kali Chandra Chakravartti* (16 W. R., 56) ; *Safdar Ali Khan* v. *Lachman Das*, (2 All., 554) ; *Gurdial* v. *Jauhri Mal*, (7 All., 820).

Registration of leases.—Section 17, cl. (*d*), of Act XVI of 1908 makes compulsory the registration of leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent. The Local Government may, however, exempt from the operation of this clause leases executed in a district or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees. Section 18, cl. (c) of the Act makes optional the registration of leases of immoveable property for any term not exceeding one year and leases exempted under section 17. These provisions are repeated in section 107 of the Transfer of Property Act, which prescribes that "a lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument"; while "all other leases of immoveable property may be made either by an instrument or by oral agreement." Section 106 of the same Act further provides that "in the absence of a contract or a local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy." But by section 117 of the Act the provisions of Chap. V, in which both sections 106 and 107 occur, do not apply to leases for agricultural purposes, unless extended to them by the Local Government, which has not yet been done ; so the above cited provisions of the Transfer of Property Act have as yet no practical importance, so far at least as agricultural leases are concerned.

Leases held to require registration.—When the term of a pattah is expressed by the words *san basan*, a year-by-year tenancy is meant, that is, a tenancy which is certain for the period of one year and will continue beyond that period until it is properly put an end to by either party, and such a pattah must be registered (*Ram Kumar Mandal* v. *Brajahari Mirdha*, 2 B. L. R., A. C., 75 ; 10 W. R., 410). A lease for more than a year is none the less a lease, because a condition is attached to the consideration and because its term may be lessened on the payment of a sum of money by the lessor : it must, therefore, be registered and cannot be used in evidence, if not registered (*Baksh Ali* v. *Nabotara*, 13 W. R, 468). The same rule applies in the case of a kabuliat for one year, but containing a provision extending its term to more than one

year (*Kisto Kali* v. *Agemona Bewa*, 15 W. R., 170). A lease for one year but which is to remain in force till another pattah is granted, must be registered (*Venkatachellam Chetti* v. *Audian*, 3 Mad., 358). A *daul darkhast*, or proposal for a lease of seven years, on which the word "granted" has been written by the landlord as a sign of his acceptance of the proposal, requires registration (*Safdar Reza* v. *Amzad Ali*, 7 Calc., 703; 10 C. L. R., 121). But see *Dwarka Nath Saha* v. *Ledu Sikdar*, (33 Calc., 502). A *zar-i-peshgi* lease granted for one year, but with a stipulation that unless the loan were repaid within that time, it should continue in force, is a lease of which the registration is compulsory (*Bhobani Mahto* v. *Shibnath Para*, 13 Calc., 113). An agreement for a lease for four years needs registration, if the parties intend to create a present demise, though the agreement may contemplate the subsequent execution of a formal document (*Parmanandas Jivandas* v. *Dharsey Virji*, 10 Bom., 101). A lease of immoveable property for the life of the lessee is a lease for a term exceeding one year and therefore requires registration (*Parshotam Vishnu* v. *Nana Prayag*, 18 Bom., 109).

Leases held not to require registration.—A lease for one year certain containing an expression on the tenant's part to hold the land longer at the same rent, if the landlord should desire it, is a lease for a term not exceeding one year and does not require to be registered (*Apu Budgavda* v. *Narhari Annaji*, 3 Bom., 21. See also *Jagjivan Das Javherdas* v. *Narayan* 8 Bom., 493; *Jagdesh Chandra Biswas* v. *Abidullah Mandal*, 14 W. R., 68; *Sautho Prosad Das* v. *Parasu Pradhan*, 26 W.R., 98; *Khayali* v. *Hasain Bakhsh*, 8 All., 198; and *Boyd* v. *Krieg*, 17 Calc., 548). Where a lease contained provisions for an "annual rent" and for payment "of rent in advance each year," but also contained a clause whereby the tenancy was absolutely determinable at any moment at the option of the lessor, it was held that such a deed was not compulsorily registrable (*Ratnasabhapathi* v. *Venkatachalam* 14 Mad., 271). Mere preliminaries to a lease, such as a *daul darkhast* or proposal for a lease, unaccepted by the landlord, do not require registration (*Chuni Mandar* v. *Chandi Lal Das*, 14 W. R., 178; *Meherunissa* v. *Abdul Ghani*, 17 W. R., 509; *Lachmessar Singh* v. *Dukho*, 7 Calc., 708; 10 C. L. R., 127; *Lal Jha* v. *Negru*, 7 Calc., 717). Such preliminaries to a lease as a *daul*, or an *amaldari*, also need not be registered (*Golak Kishor Acharji* v. *Nand Mohan De*, 12 W. R., 394). An *amaldastak*, bestowed merely to give possession pending the execution of a formal instrument does not require to be registered (*Banwari Lal* v. *Sangam Lal*, 7 W. R., 280). Neither does an *amalnama* not creating an interest beyond a year (*Radhika Prasad Chandra* v. *Ram Sundar Rai*, 1 B. L. R., A. C., 7; *Abdul Vidona Jones* v. *Harone Esmile*,

7 B. L. R., App., 21). An agreement for a lease does not require registration (*Bhairab Nath Khettri* v. *Kishori Mohan Shaha*, 3 B. L. R., App., 1). Where by an *ekrarnama* tenants conjointly promised that they would sign, and have registered, kabuliyats for rents at rates mentioned, it was held that the document did not come under cl. (h) of sec. 17 of the Registration Act, III of 1877, but come under cl. (h) as a document merely creating a right to obtain another document, which would, when executed, create or declare an interest (*Pratap Chandra Ghosh* v. *Mohendra Nath Parkhait*, 17 Calc., 291 ; L. R., 16 I. A., 233). A *daul fihrist*, containing a list of the holdings and rates of rent of the raiyats with their signatures and specifying seven years as the period for which these holdings were to continue need not be registered (*Kartik Nath Pandey* v. *Khakan Singh*, 1 C. L. R., 328 ; *Ganga Prasad* v. *Gagan Singh*, 3 Calc., 322 ; *Narain Kumari* v. *Ram Krishna Das*, 5 Calc., 864). A document which is not really a lease but an usufructuary mortgage, the consideration of which is less than Rs. 100, is not inadmissible for want of registration (*Ishan Chandra* v. *Sujan Bibi*, 7. B. L. R., 14 ; *Ram Dulari Koer* v. *Thakur Rai*, 4 Calc., 61). A document providing for the payment of a portion of a *salami* on the day when possession was to be given and for the payment of the remainder by instalments is not a lease or an agreement to lease, and is admissible in evidence without registration (*Kedar Nath Mitra* v. *Surendro Deb Rai*, 9 Calc., 865). An agreement varying the terms of a lease need not be reduced to writing or registered (*Satyesh Chandra Sarkar* v. *Dhanpal Singh*, 24 Calc., 20). Leases creating mere tenancies-at-will do not require registration (*Khuda Buksh* v. *Sheodin*, 8 All., 405 ; *Jivraj Gopal* v. *Atmaram Dayaram*, 14 Bom., 319). A document given by the owner of land to his tenant varying the terms of tenancy with reference to the amount of rent to be paid is not an instrument relating to an interest in immoveable property and does not require registration (*Obai Goundan* v. *Ramalinga Ayyar*, 22 Mad., 217).

Registration of under-raiyats' leases.—Besides being subject to the above mentioned provisions, under-raiyats' leases must also be registered, if the rents reserved in them exceed by 25 per cent. the rents payable by their raiyat landlords [sec. 48 (a)] ; and their raiyat landlords cannot recover rents exceeding their own by more than 50 per cent. In case of non-registration, the raiyat landlords cannot recover from the under-raiyats rents exceeding by 25 p. c. the rents payable by them [sec. 48 (b)]. Further, an under-raiyat's lease is only valid against the raiyat's landlord if registered, [sec. 85 (1)] ; and no such lease shall be admitted to registration, if it purports to create a term exceeding nine years [sec. 85 (2)]. In the case of sub-leases executed before the

commencement of the Tenancy Act, they are only valid for nine years after the commencement of the Act [sec. 85 (3)].

Registration of contracts of enhancement.—Contracts for the enhancement of occupancy or non-occupancy raiyat's rent must be registered [secs. 29 (*a*) and 43)], subject, however, to proviso (1) to s. 29, and to the proviso to s. 43, regarding three years' continuous payment. There is no such provision with regard to the enhancement of the rents of tenure-holders, raiyats holding at fixed rates, or under-raiyats, except that in the case of under-raiyats, when the rents payable by them exceed the rents payable by their raiyat landlords by more than 25 per cent., the contract must be registered, and even then they cannot exceed their raiyat landlords' rents by more than 50 per cent

Registration of documents creating incumbrances on tenures or holdings.—Section 161 enacts (1) that the term "incumbrance" used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a "protected interest," as defined in sec. 160; and (2) that the term "registered and notified incumbrance," used with reference to a tenure or holding sold or liable to sale in execution of a decree for an arrear of rent due in respect thereof, means an incumbrance created by a registered instrument of which a copy has, not less than three months before the accrual of the arrear, been served on the landlord in the manner provided in the Act. In the case of the sale of a tenure or holding at fixed rates, it is first put up to sale subject to registered and notified incumbrances (sec. 164), and it is only in the case of the sale proceeds being insufficient to liquidate the amount of the decree with costs, that the tenure or holding at fixed rates can be sold with power to annul all incumbrances (sec. 165). Occupancy holdings are ordinarily sold with power to annul all incumbrances (sec. 166); but the Local Government has power to direct by notification in the official Gazette that occupancy holdings or any specified class of occupancy holdings in any local area, put up for sale in execution of decrees for rent due on them, shall be sold subject to registered and notified incumbrances (sec. 168). So far the Local Government has not issued any such notification.

Effect of non-registration of documents required to be registered.—Section 49 of the Registration Act enacts that no document required by section 17 to be registered shall affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property unless it has been duly registered, and under sec. 91 of the Evidence Act secondary evidence of the contents of such

a document is inadmissible (*Man Mohini Dasi* v. *Bishen Mayi Dasi*, 7 W. R., 112; *Omar* v. *Abdul Ghafur*, 9 W. R., 425; *Rahamatullah* v. *Sariatullah*, 10 W. R., F. B., 51; 1 B. L. R., F. B., 58; *Ram Kumar Mandal* v. *Brajahari Mirdah*, 10 W. R., 410; 2 B. L. R., A. C., 75; *Kabulan* v. *Shamsher Ali*, 11 W. R., 16; *Kala Chand Mandal* v. *Gopal Chandra Bhattacharji*, 12 W. R., 163; *Dinonath Mukhurji* v. *Debnath Mallik*, 5 B. L. R., App., 1; 13 W. R., 307; *Futeh Chand Sahu* v. *Lilambar Singh Das*, 9 B. L. R., 433; 14 Moo. I. A., 129; 16 W. R., P. C., 26; *Crowdie* v. *Kular Chaudhri*, 21 W. R., 307; *Shiba Sundari Debya* v. *Saudamini Debya*, 25 W. R., 78; *Ram Chandra Haldar* v. *Gobinda Chandra Sen*, 1 C. L. R., 542; *Hurjivan Virji* v. *Jamsetji Nowroji*, 9 Bom., 63; *Nangali* v. *Raman*, 7 Mad., 226; *Sambayya* v. *Gangayya*, 13 Mad., 308; *Parashram* v. *Ganpat*, 21 Bom., 533).

A lease which is by law required to be registered cannot, if unregistered, be received in evidence, even of the tenant's personal liability there under (*Martin* v. *Sheo Ram Lal*, 4 All., 232) But when the right of the landlord is admitted, and the rate of the rent is not disputed and the only question is as to payment, a suit for arrears of rent should not be dismissed for want of registration of the defendant's *kabuliat* (*Reza Ali* v. *Bhikan Khan*, 7 W. R., 334; *Dinonath Mukhurji* v. *Debnath Mallik*, 14 W. R., 429. If a contract of letting is for want of registration ineffectual, the landlord is not debarred from giving other evidence of a tenancy and requiring the Court to adjudicate on his right to eject (*Venkatagiri zamindar* v. *Raghava*, 9 Mad., 142). A tenant can prove his tenancy without proving his lease, if he has one, which is inadmissible for want of registration (*Surath Narain Lal* v. *Catherine Sophia*, 1 C. W. N., 248; *Sitanath Pal* v. *Kartik Garui*, 4 C. W. N., lxii; *Fazil* v. *Keramuddin*, 6 C. W. N., 916; see also *Kedarnath Joardar* v. *Sharafunnissa*, 24 W. R., 425). An unregistered document, if followed up by delivery of possession, may be used as evidence of that possession (*Gopi Chand* v. *Liakat Hossein*, 25 W. R., 211). In a suit for a breach of a covenant to register contained in an unregistered mortgage deed, the defendant cannot plead the non-registration of the instrument for the purpose of protecting himself. Such a deed is admissible in evidence for a collateral purpose without being registered (*Sham Narain Lal* v. *Khemajit Malos*, 4 B. L. R., F. B., 1; 12 W. R., F. B., 11; *Manmothonath De* v. *Srinath Ghosh*, 20 W. R., 107; *Nagappa* v. *Devu*, 14 Mad., 55; *Raja of Venkatagiri* v. *Narayana Reddi*, 17 Mad., 456; *Magniram* v. *Gurmukh Rai*, 26 Calc., 334). An unregistered document requiring registration as affecting an interest in land is admissible in evidence for any purpose for which registration is collateral (*Lachmipat Singh Dugar* v. *Khairat Ali*, 4 B. L. R., F. B., 18; 12 W. R., F. B., 11; *Shib Prasad Dass* v. *Annapurna*, 12 W. R., 435; 3 B. L. R.,

A. C., 451 ; *Ulfatunissa* v. *Hossain Khan*, 9 Calc., 520; 12 C. L. R., 209 ; *Khushalo* v. *Bihari Lal*, 3 All., 523 ; *Subramaniam* v. *Perumal Reddi*, 18 Mad., 454 ; *Antaji* v. *Dattaji*, 19 Bom., 36 ; *Vani* v. *Bani*, 20 Bom., 553). But this is only when the transaction is divisible, as when upon a loan of money it is agreed (1) that the loan shall be secured by a bond containing a covenant for repayment of the sum advanced : and also (2) that certain designated property shall be hypothecated as collateral security for the repayment of the loan (*Krishna Lall Ghosh* v. *Bonomali Rai*, 5 Calc., 611 ; 5 C. L. R., 43 ; *Bengal Banking Corporation* v. *Mackertich*, 10 Calc., 315 ; *Sheo Dial* v. *Prag Dat Misr*, 3 All., 229 ; *Gaur Charan Sarma* v. *Jinnat Ali*, 11 C. L. R, 166 ; *Lachman Singh* v. *Kesri* 4 All., 3), and when the transaction is indivisible, the unregistered document is inadmissible in evidence (*Matangini Dasi* v. *Ramnarain Sadkhan*, 4 Calc., 83 ; 2 C. L. R., 428 ; *Raju Balu* v. *Krishnarav Ram Chandra*, 2 Bom., 273 ; *Venkatrayudu* v. *Papi*, 8 Mad., 182 ; *Gurunath Shrinivas Desai* v. *Chenbasappa*, 18 Bom., 745). In two cases it has been held that when the plea as to the inadmissibility of evidence for want of registration has not been taken in the Court below, it cannot be allowed in second appeal (*Girish Chandra Rai Chaudhri* v. *Amina Khatun*, 3 B. L. R., App., 125 ; *Currie* v. *Chatty*, 11 W. R., 520). But these two rulings are of date prior to the passing of sec. 49 of the Registration Act, and would not appear to be now good law. In another case it has been held that a Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below (*Basawa* v. *Kalkapa*, 2 Bom., 489).

Conflict between registered and unregistered deeds :— Section 50 of the Registration Act provides that documents of certain specified kinds, if registered, shall take effect as regards the immoveable property to which they relate against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. The provisions of this section are of much less importance than they were before the passing of the Transfer of Property Act, sec. 54 of which Act " virtually abolishes optional registration " (per Garth, C. J., in *Narain Chakravarti* v. *Dataram Rai*, 8 Calc., 597 ; 10 C. L. R., 241). The only deeds affecting the interests of landlords or tenants in regard to which there can now be a conflict between registered and unregistered deeds are leases of immoveable property for a term not exceeding one year, leases specially exempted by Government under sec. 17 of the Registration Act, and mortgages of immoveable property of less than Rs. 100 in value. Registered deeds of these classes must prevail over

unregistered deeds, whether accompanied by possession or not, except when the lessee or mortgagee under the subsequent deed has taken with notice of the prior deed, in which case the prior deed will prevail (*Abul Hussain* v. *Raghu Nath Sahu*, 13 Calc., 70. See also *Fazladin Khan* v. *Fakir Mahamed Khan*, 5 Calc., 336 ; 4 C. L. R., 257 ; *Narain Chakravarty* v. *Dataram Rai*, 8 Calc., 597 ; 10 C. L. R., 241 ; *Bimaraz* v. *Papaya*, 3 Mad., 46 ; *Kondayya* v. *Guruvappa*, 5 Mad., 139 ; *Muthanna* v. *Alibeg*, 6 Mad., 174 ; *Kadar* v. *Ismail*, 9 Mad., 119 ; *Krishnamma* v. *Suranna*, 16 Mad., 148 ; *Shivram* v. *Genu*, 6 Bom., 515 ; *Hathising Sobhai* v. *Kuvarji Javher*, 10 Bom., 105 ; *Trikam Madhav Shet* v. *Harjivan Shet*, 18 Bom., 332 ; *Dewan Singh* v. *Jadho Singh*, 19 All., 145). In one case, following *Wyatt* v. *Barwell*, (19 Ves., 432), it has been said that it is only when notice of a prior conveyance of which registration is not compulsory is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to to the known title of another that the registered deed will be suffered to be affected (*Bhalu Rai* v. *Jakhu Rai*, 11 Calc., 667. See also *Narasimulu* v. *Somanna*, 8 Mad., 167). In another case it has been ruled that although the mere fact of possession having been taken by a purchaser under an unregistered conveyance is insufficient of itself to establish a good title to a property as against a subsequent registered purchaser, and is not conclusive evidence of notice as against him, yet in the majority of cases such possession is very cogent evidence of notice (*Nani Bibi* v. *Hafizulla*, 10 Calc., 1073. See also *Dino Nath Ghosh* v. *Aulakmani Debi*, 7 Calc., 753 ; 10 C. L. R., 129 ; Lakshman Das v. *Dasrat*, 6 Bom., 168 ; *Dandaya* v. *Chembasapa*, 9 Bom., 427 ; *Moreshwar Balkrishna* v. *Dattu*, 12 Bom., 569 ; *Ram Auter* v. *Dhanauri*, 8 All., 540).

A Registered lease will not however prevail against a lease effected by delivery of possession and payment of premium and rent. (*Ismail* v. *Ali Mahomed*, 13 C. W. N., civ.)

CHAPTER II.

CLASSES OF TENANTS.

Classes of tenants.

4. There shall be, for the purposes of this Act, the following classes of tenants, (namely) :—

(1) tenure-holders, including under-tenure-holders,

(2) raiyats, and

(3) under-raiyats, that is to say, tenants holding, whether immediately or mediately, under raiyats: and the following classes of raiyats, (namely) :—

(*a*) raiyats holding at fixed rates, which expression means raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity,

(*b*) occupancy-raiyats, that is to say, raiyats having a right of occupancy in the land held by them, and

(*c*) non-occupancy-raiyats, that is to say, raiyats not having such a right of occupancy.

Extended to Orissa (Not., Sept., 10th, 1891).

In addition to the classes of raiyats mentioned in sub-section (3), there s also another class viz, settled raiyats, i.e., raiyats who have for a period of twelve years held as raiyats lands situate in any village (vide sec. 20 and note thereto).

Meaning of "tenure-holder" and "raiyat."

5. (1) "Tenure-holder" means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing

tenants on it, and includes also the successors in interest of persons who have acquired such a right.

(2) "Raiyat" means 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.

Explanation.—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(3) A person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder.

(4) In determining whether a tenant is a tenure-holder or a raiyat, the Court shall have regard to—

(*a*) local custom ; and

(*b*) the purpose for which the right of tenancy was originally acquired.

(5) Where the area held by a tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shewn.

Extended to Orissa (Not., September 10th, 1891.) Sub-section (1) was extended to the Chota Nagpur division, except the district of Manbhum (Not., Feb. 9th, 1903); but the present law there is Act VI, B. C., 1908.

Meaning of "tenure-holder" and "raiyat."—The Select Committee in their report on the Bengal Tenancy Bill, 1883, explained that in this section they had "endeavoured to describe, rather than to define, each class," as in their opinion "any attempt to frame a rigid definition of either class would tend to create rather than to remove difficulties." (Selections from papers relating to the Bengal Tenancy Act, 1885, p.

231). The description given is, however, in accord with the rulings of the High Court on the subject under the former rent law. See *Dhanpat Singh* v. *Guman Singh*, W. R., Sp. No., 1864, Act X, 61 ; *Gopi Mohan Rai* v. *Shib Chandra Sen*, 1 W. R., 68 ; *Ram Mangal Ghosh* v. *Lakhi Narain Saha*, 1 W. R., 71 ; *Karu Lal Thakur* v. *Lachmipat Dugar*, 7 W. R., 15 ; *Uma Charan Datta* v. *Uma Tara Debi*, 8 W. R., 181 ; *Kali Charan Singh* v. *Amiruddin*, 9 W. R., 579 ; and *Durga Prasanno Ghosh* v. *Kali Das Datta*, 9 C. L. R., 449. In the last mentioned case it was pointed out by Field J., that "the only test of a raiyati interest which can be applied in the present state of the law is to see in what condition the land was when the tenancy was created. If raiyats were already in possession of the land, and the interest created was a right, not to the actual physical possession of the land, but to collect the rents from those raiyats, that is not a raiyati interest. If, on the other hand, the land was jungle or uncultivated or unoccupied, and the tenant was let into physical possession of the land, that would be a raiyati interest ; and the nature of this interest so created would not, according to a number of decisions of this Court, be altered by the subsequent fact of the tenant sub-letting to under-tenants."

The mere fact that a person has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent is not sufficient to prove that he is a tenure-holder within the meaning of the Bengal Tenancy Act. It must be proved that the land was let for agricultural or horticultural purposes (*Umrao* v. *Mahomed Rajobi*, 27 Calc., 205 ; 4 C. W. N., 76). The description of a property as a "jote" does not necessarily show that it is not a tenure, and that it is simply a cultivating "jote" or holding (*Nawab Ali* v. *Hemanto Kumari*, 8 C. W. N., 117). A tenancy which was originally created for the purpose of cultivation and not collection of rent was held partly *nij-jote* and partly let out to tenants ; held, that this did not change the original character of the grant which was raiyati, even in respect of the portion let out (*Baidya Nath Mandal* v. *Sudharam Misri*, 8 C. W. N., 751.) A tenant holding land and paying as rent therefor a sum of money exceeding one hundred rupees per annum is, *for the purposes of assessment under the Cess Act*, a tenure-holder and not a cultivating-raiyat (*Caspersz* v. *Kumar Singh*, 5 C. W. N., 535). A *zar-i-peshgi lease* is not a mere contract for the cultivation of the land at a rent, but is a security to the tenant for his money advanced (*Bengal Indigo Co.* v. *Raghubar Das*, 24 Calc., 272 ; L. R., 23 I. A , 158 ; 1 C. W. N., 83). It is only in cases of mere contracts for the cultivation of land let that the deed, which might be called a *zar-i-peshgi*, would create a raiyati interest (*Ram Khelawan Rai* v. *Sumbhu Rai*, 2 C. W. N., 758). But a raiyat by taking

a *zar-i-peshgi* lease of land of which he was previously or was then put in possession as a raiyat, does not lose his raiyati status or divest himself of his right to acquire an occupancy right in land (*Ramdhari Singh* v. *Mackenzie*, 10 C. W. N., 351). A person may have originally acquired a large tract of land ostensibly with the object of cultivating it himself, or by his servants or members of his family, but may convert himself, so far, as third persons are concerned, into a rent receiver, and give those persons the right of remaining on the land as occupancy raiyats (*Mohesh Jha* v. *Manbharan Mia*, 5 C. L. J., 522). The definition of a tenure-holder and a raiyat in this section is not exhaustive, *ibid*; it was held by Rampini, C. J., in the case of *The Secretary of State* v. *Karuna Kant Chowdhuri*, 35 Calc., 82: 11 C. W. N., 1053, F. B., that the definition of a tenure-holder is wide enough to include an *ijardar* of the profits of a *mela*. There is nothing in the policy of the law to prevent the creation of an intermediate tenure between a *Putnidar* and a *Darputnidar* (*Madhusudan Saha Chowdhuri* v. *Debendra Nath Sarkar* 7 C. L. J., 23n.)

Farmers of Government estates when tenure-holders:—"The farmer of an estate, which is the property of Government is a tenure-holder under the Bengal Tenancy Act, the payment which he makes being rent, as defined in section 3 (5), and not revenue. His lease cannot therefore be cancelled. It can only be determined by his ejectment decreed in a regular suit, and a condition in his lease permitting cancelment without a suit could not be enforced [sections 66, 89, and 178 (1) (*c*)]. The farmer of an estate belonging to a recusant proprietor, on the other hand, takes the place of the proprietor in entering into an engagement with the Government, and thus pays land revenue instead of rent. He is not therefore a tenure-holder and his lease may be put an end to by cancelment on default, if it contains a stipulation to that effect (Bd. of Revenue's C. O., No. 9 of Sept., 1893).(1)

Sub-section (4), clause (b). Purpose for which tenancy was acquired.—The definition of "raiyat" given in this section is not exhaustive, and there is nothing in it to exclude a person who has taken land for horticultural purposes (*Hari Ram* v. *Narsingh Lal*, 21 Calc., 129). A raiyat does not become a middleman simply because, instead of cultivating the land, he erects shops on it and takes profits from the shop-keepers (*Khajurunnissa* v. *Ahmed Rezah*, 11 W. R., 88). Where land has with the consent of the landlord ceased to be agricultural and the tenant has since built a homestead or used part of it for tanks or gardens, the nature of the tenure (*i.e.*, tenancy) is not thereby changed

(1) See also Board of Revenue's Settlement Manual, of 1908, Part III, Chap. IX, pp. 762, 763 and pp. 199-200.

(*Prasanno Kumar Chaturji* v. *Jagarnath Basakh*, 10 C. L. R., 25). But see *Mohesh Jha* v. *Manbharan Mia*, 5 C. L. J., 522. But the lessees of land leased for building proposes and for the establishment of a coal depot are neither tenure-holders, raiyats, nor under-raiyats, and lands demised for such purposes do not come within the purview of this Act (*Raniguni Coal Association* v. *Jadunath Ghosh*, 19 Calc., 489).

Rights as a raiyat can be acquired under a trespasser.—Rights as a raiyat can be acquired, though the raiyat has been let into the land by a person who is found to have no title, and, therefore, to be a trespasser. It is immaterial whether the raiyat was let into the land before or after the passing of this Act (*Mohima Chandra Saha* v. *Hazari Paramanik*, 17 Calc., 45 ; *Binad Lal Prakashi* v. *Kalu Paramanik*, 20 Calc., 708). But the tenant must have entered on the land under the *de facto* proprietor, who is not the real owner, in good faith (*Piari Mohan Mandal* v. *Radhika Mohan Hazra*, 8 C. W. N., 315) ; *Upendra Chandra Bhattacharya* v. *Pratap Chandra Pradhan*, 8 C. W. N., 320). See note to sec. 3 (3), p. 25.

Sub-section (5). Area of tenancy.—The owners of an indigo factory who have held land considerably in excess of the limit prescribed in sub-section (5) of this section, under successive leases for more than twelve years, are not raiyats, either "occupancy" or "non-occupancy," within the meaning of the Act (*Bengal Indigo Company* v. *Raghubar Das*, 24 Calc., 272 ; L. R., 23 I. A., 158 : 1 C. W. N., 83). The presumption arising under sub-section (5) is a rebuttable one and may be rebutted by the terms of the document creating the lease (*Surendra Nath Sen* v. *Baroda Kanto Sircar*, 10 C. W. N., clxiv). But it is not sufficiently rebutted by the fact that the kabulyat executed by the tenant is on a printed form intended for cultivators, or that in a receipt for rent given by the landlord to the tenant, the latter is described as a raiyat (*Gokul Mandar* v. *Padmanand Singh*, 29 Calc., 707 ; 6 C. W. N., 825).

The presumption arising under this section is a rebuttable one (*H. B. Dalgleish* v. *Damodar Narain*, 8 C. L. J., 533).

CHAPTER III.

TENURE-HOLDERS.

Enhancement of rent.

Enhancement of rent. Tenure held since Permanent Settlement liable to enhancement only in certain cases.

6. Where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof—

(*a*) that the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held, or

(*b*) that the tenure-holder, by receiving reductions of his rent, otherwise than on account of a diminution of the area of the tenure, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it.

Tenure-holders' rents may also be increased on the ground of increase in area—This section is founded on the provisions of cl 1, sec. 51 of Reg. VIII of 1793, which is repealed by this Act (see Sch. I). It must be read along with sec. 52 of this Act, which lays down that every tenant shall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has previously been paid by him, and shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him ; so that the tenure-holders to whom this section applies, *viz.*, tenure-holders holding from the time of the Permanent Settlement, but not at a fixed rent, or fixed rate of rent, are liable to have their rents increased on the ground of an increase of area, as well as on

the grounds mentioned in this section. Tenure-holders and raiyats holding at fixed rents or fixed rates of rent from the time of the Permanent Settlement are liable to have their rents increased only on the ground of an alteration in the area of their tenures or holdings (section 50).

No notices of enhancement required.—The section does not require the issue of notices of enhancement, as the former law did. This is the result of the recommendation of the Rent Commission, who said : " It will be important to mention that we have dispensed with the notice of enhancement which is required by the present law and which was also required by the old Regulations in force before 1859. Such a large percentage of enhancement cases have failed, because it was not found that the notice had beed served, or because the notice was defective in form, that it has appeared to be highly expedient to do away with a detail, the practical result of which has been to delay and impede a decision of the real question at issue between the parties. We have accordingly made the institution of the enhancement suit to be notice to the tenant." (Rent Commission Report, vol. I, p. 34, para 63).

Clause (b). Reductions of rent entitling landlord to enhance.—The third ground of enhancement mentioned in section 51 of Reg. VIII of 1793 was that the *talukdar*, by receiving abatements of his *jama*, had subjected himself to the payment of the increase demanded. It was held that a plaintiff was not entitled to enhancement under this clause, merely because the rent had become less by degrees (*Nabo Krishna Mazumdar* v. *Tara Mani*, 12 W. R., 320), and that it was necessary for the *zamindar* expressly to state when and for what reason the *talukdar* had received an abatement of his *jama*, and had thereby subjected himself to the payment of the increase demanded (*Nabo Krishna Basu* v. *Mazamuddin Ahmad*, 19 W. R., 338).

Proof of existence of tenure at the time of the Permanent Settlement.—In a suit for arrears of rent at an enhanced rate, even if the defendants can show that they are dependent *talukdars*, sec. 51 of Reg. VIII of 1793 will not apply to them, unless they can distinctly prove that their tenure existed and was capable of being registered at the date of the decennial settlement (*Eshan Chandra Banurji* v. *Harish Chandra Saha*, 24 W. R., 146). But it is not neccessary to show that it was "registered" at the time of the decennial settlement: it is sufficient to show that the tenure existed and was capable of being registered at that time (*Bama Sundari Dasi* v. *Radhika Chaudhrain*, 13 W. R., P. C., 11 ; 4 B. L. R., P. C., 8 ; 13 Moo. I. A., 248 ; *Nil Mani Singh* v. *Ram Chakravartti*, 21 W. R., 439). The fact of the mention of a tenure in a *jamabandi* paper prepared seven years before the decennial

settlement is presumtive evidence of its existence twelve years before the decennial settlement (*Romesh Chandra Datta* v. *Madhu Sudan Chakravartti*, 5 W. R, 252). It is not necessary that direct evidence should be given to prove the existence of a tenure before the permanent settlement; a presumption in favour of its existence arises from the proof of the existence of a tenure for a very long time, say from 1824 (*Ananda Chandra* v. *Kunja Behari Pal* 8 C. L. J., 171). On the other hand, the fact that a *taluk* is not mentioned in the decennial or quinquennial settlement as such, and that the lands are included in the decennial settlement as part of the *zamindari* does not afford any strong evidence against the existence of the *taluk*, for, being only a *shikmi taluk*, paying rent to the *zamindar*, the *talukdars* were not required to mention it, nor was it necessary for the *zamindar* to do so (*Wise* v. *Bhubanmayi Debi*, 10 Moo I. A., 174; 3 W. R., P. C., 5).

A decree of the Sudder Dewani Adalat in 1805 declared that a *taluk* was fit to be separated from the *zamindari*, of which it had orginally been part, according to the provisions of section 5, Regulation VIII of 1793. The decree directed that until separation rent should be paid by the *talukdar* to the *zamindar* according to the *jama* already assessed upon the *taluk*, and that this revenue to be, on the separation being effected, deducted from that assessed upon the *zamindari*. Proceedings with a view to separation then continued, but litigation and delays ensued with the result that no seperation had been effected when suits were instituted in 1882 and 1885, in which the holders of shares into which the *zamindari* had been partitioned claimed to enhance the rent of the *taluk*. It was held that the decree of 1805, acted upon for many years, was conclusive that the *taluk* was not dependent on the *zamindari*, but was an independent one within section 5, Regulation VIII of 1793 and that, therefore, the *zamindars* had no right of enhancement (*Hemanta Kumari Debi* v. *Jagadendra Nath Rai*, 22 Calc., 214; L. R., 21 I. A., 131).

Burden of proof.—A dependent *talukdar* has to establish his title by the strictest proof against one coming in by purchase at a sale for arrears of revenue (*Gopal Lal Thakur* v. *Tilak Chandra Rai*, 3 W. R., P. C., 1; 10 Moo. I. A., 183). Proof of existence of the tenure from the time of the decennial settlement is sufficient to bar a suit for enhancement, when the plaintiff is not an auction-purchaser: when the plaintiff is an auction-purchaser, he must show when he purchased, before he can insist upon direct proof of the existence of the tenure twelve years before the decennial settlement (*Romesh Chandra Datta* v. *Madhu Sudan Chakravartti*, 5 W. R., 252). In a suit for enhanced rent of a *taluk*, the existence of which as an ancient *taluk* is undoubted, and in which the only question is whether the rent is fixed or variable, the *onus* is first on

the defendant to prove that he has held at an uniform rent for 20 years, and (if the defendant prove so much), then, on the plaintiff to prove that the rent has varied since the Permanent Settlement (*Rashmoni Debya* v. *Haranath Rai*, 1. W. R., 280). When a tenure-holder has proved that his tenure is a dependent *taluk* within the meaning of the 51st section of Reg. VIII of 1793, the burden is cast upon the plaintiff *zamindar* to show that the rent is variable (*Bama Sundari Dasi* v. *Radhika Chaudhrain*, 13 Moo. I. A., 248 ; 4 B. L. R., P. C., 8 ; 13 W. R., P. C., 11). In a suit for enhancement of rent in respect of land which the defendant claims to hold as a dependent *taluk*, the *onus* is upon the *zamindar* to show that the land was included in the *zamindari* at the time of the Permanent Settlement (*Ahsanullah* v. *Bassarat Ali Chaudhri* 10 Calc., 920). A defendant having admitted that he is a tenant, the *onus* is upon him to show that his tenancy is such as he sets up, namely, a permanent tenancy at a rate which cannot be enhanced (*Kheltra Krishna Mitra* v. *Dinendra Narain Rai*, 3 C. W. N., 202).

Tenures not held from the time of the Permanent Settlement.—The Act is silent as to the grounds on which the rent of tenures not held from the time of the Permanent Settlement and not held at a fixed rent or rate of rent can be enhanced. There would seem to be no legal restrictions on the enhancement of the rent of such tenures, except such as are imposed by the terms and conditions of the deeds under which the tenures are held. (See *Bama Sundari Dasi* v. *Radhika Chaudhrain*, 1 W. R., 339; *Kalidhan Banurji* v. *Romesh Chandra Datta*, 3 W. R., 172; *Bharat Chandra Aich* v. *Gour Mani Dasi* 11 W. R., 31 ; *Kasimuddee Khondkhar* v. *Nadi Ali Tarafdar*, 11 W. R., 164; *Satyanand Ghosal* v. *Haro Kishor Datta*, 15 W. R., 474).

A fractional co-sharer cannot enhance.—This section is subject to the provisions of sec. 188 of this Act, which provide that joint landlords in doing anything which the landlord is under the Act required or authorized to do, must act collectively or by a common agent. Compare *Syama Charan Mandal* v. *Saim Mollah*, (1 C. W. N., 415).

Limits of enhancement of rent of tenures.

7. (1) Where the rent of a tenure-holder is liable to enhancement, it may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payble by persons holding similar tenures in the vicinity.

(2) Where no such customary rate exists, it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable.

(3) In determining what is fair and equitable, the Court shall not leave to the tenure-holder as profit less than ten *per centum* of the balance which remains after deducting from the gross rents payable to him the expenses of collecting them, and shall have regard to—

(*a*) the circumstances under which the tenure was created, for instance, whether the land comprised in the tenure, or a great portion of it, was first brought under cultivation by the agency or at the expense of the tenure-holder or his predecessors in interest, whether any fine or premium was paid on the creation of the tenure, and whether the tenure was originally created at a specially low rent for the purpose of reclamation; and

(*b*) the improvements, if any, made by the tenure-holder or his predecessors in interest.

(4) If the tenure-holder himself occupies any portion of the land included in the area of his tenure, or has made a grant of any portion of the land either rent-free or at a beneficial rent, a fair and equitable rent shall be calculated for that portion and included in the gross rents aforesaid.

Extended to Orissa (Not., Oct. 17th, 1896).

Onus of proof.—In a suit for enhancement of rent of a tenure under sec. 7, it is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding

similar tenures in the vicinity, or that if was not fair and equitable, before the *onus* can be shifted to the defendant, to prove that the existing rent was fair and equitable (*Hem Chandra Chaudhuri* v. *Kali Prosanna Bhaduri*, 26 Calc., 832 ; 8 C. W. N., 1).

Limits of enhancement of rent of tenures.—The expression "customary rate" is substituted in this section for that of "pargana rate," to be met with in the decisions under the Regulations, and which appears to be founded on the provisions of cl. 2., sec. 60 of Reg. VIII of 1793 and of sec. 5, Reg. XLIV of 1793. The Rent Commission proposed that the tenure-holders' profits should in no case exceed thirty per cent, but that the enhanced rent should not be more than double the previous rent. These proposals were not accepted by the Legislature, and under the provisions of this section a tenure-holder is now entitled to a profit of at least 10 p. c., after deducting the expenses of collection, but he may get as much more as the Court thinks fair and equitable. As pointed out by the Rent Commission, the rule that a profit of 10 p. c. should be left to the tenure-holder is founded on the provisions of section 8 of Reg. V of 1812. "This section was repealed by Act X of 1859, but by some oversight no provision was substituted by this Act, though the principle, as being fair and equitable in itself and usual by reason of the provisions of the Regulation, was on occasions acted upon by the Courts after that Act was passed." (Rent Commission Report, Vol. I, p. 27, para. 51). In *Ram Kumar Singh* v. *Watson & Co.*, 9 C. W. N., 334, it was held on a construction of the kabulyat executed by the defendants that their liability to pay an enhanced rent was not restricted by its terms. The rent assessed by the lower Court in this case amounted to 70 per cent. on the net assets after deducting collection charges, and, therefore, 30 per cent. was left as the tenure-holder's net profits: but the rent was trebled. It was held that the rent thus settled was larger than what was fair and equitable.

Power to order gradual enhancement.

8. The Court may, if it thinks that an immediate increase of rent would produce hardship, direct that the enhancement shall be gradual; that is to say, that the rent shall increase yearly by degrees, for any number of years not exceeding five, until the limit of the enhancement allowed has been reached.

A similar provision is made in sec. 36 with regard to the enhancement of occupancy raiyats' rents.

9. When the rent of a tenure-holder has been enhanced by the Court or by contract, it shall not be again enhanced by the Court during the fifteen years next following the date on which it has been so enhanced.

Rent once enhanced may not be altered for fifteen years.

Compare ss. 29 (*c*) and 37 (1) relating to enhancement of occupancy raiyats' rents.

Other incidents of tenures.

10. A holder of a permanent tenure shall not be ejected by his landlord except on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected:

Other incidents of tenures. Permanent tenure-holder not liable to ejectment.

Provided that where the contract is made after the commencement of this Act, the condition is consistent with the provisions of this Act.

Permanent tenures how created.—Tenures become permanent (1) by express provision of law, as in the case *patni* and other similar *taluks*; (2) by contract; and (3) by custom or the course of dealing therewith (Field's Rent law Digest, p. 25, art. 18).

Tenures permanent by contract.—A grant containing the words "from generation to generation" clearly creates an absolute and hereditary *mukarari* grant (*Himmat* v. *Sonit Koer*, 15 W. R., 549; 1 Calc., 391). The term "*patni taluk*" *prima facie* imports a hereditary tenure (*Tarini Charan Ganguli* v. *Watson & Co.*, 3 B. L. R., A. C., 437; 12 W. R., 413). The word "*taluk*" by itself in the absence of evidence to the contrary implies a permanent interest (*Krishna Chandra Gupta* v. *Safdar Ali*, 22 W.R., 326). *A mukarari istimrari* tenure is a permanent tenure (*Monoranjan Singh* v. *Lilanand Singh*, 3 W. R., 84; *Lakho Koer* v. *Hari Krishna Rai*, 3 B. L. R., A. C., 226; 12 W. R., 3). The use of the word "*istimrari*" by itself shows an intention that a lease shall be perpetual and implies its hereditary character (*Kuranakar Mahanti* v. *Niladhro Chaudhuri*, 5 B. L. R., 652; 14 W. R., 107). The word *mukarari* in a *sanad* does not necessarily imply perpetuity (*Government of Bengal* v. *Jafir Hussain Khan*, 5 Moo. I. A., 467; *Parmeswar Pratab Singh* v. *Padmanand Singh*, 15 Calc., 342); but it may do so (*Bilash Mani Dasi* v. *Sheo Prasad Singh*, 8 Calc., 664; 11 C. L. R., 215; L. R.,

9 I. A., 33); and in order to decide whether a *mukarari* lease is hereditary or not, the Court must consider the other terms of the instrument under which it was granted, the circumstances under which it was made, and the intention of the parties (*Sheo Prasad Singh* v. *Kali Das Singh*, 5 Calc., 543). It may, however, be doubted whether the words "*mukarari istimrari*" mean permanent during the life of the person to whom the tenure is granted or permanent as regards hereditary descent (*Lilanand Singh* v. *Manoranjan Singh*, 13 B. L. R., 124). The words "*istimarari mukarari*" in a pattah granting land do not of themselves denote that the estate granted is an estate of inheritance (*Tulsi Prasad Singh* v. *Ram Narain Singh*, 12 Calc., 117; L. R., 12 I. A., 205), or a perpetual hereditary estate (*Beni Prasad Koeri* v. *Dudh Nath Rai*, 4 C. W. N., 274; 27 Calc., 156; L. R., 26 I. A., 216). The words do not *per se* corvey an estate of inheritance, but such an estate can be created without the addition of any other words, the circumstances under which the lease was granted and the subsequent conduct of the parties being capable of showing the intention with sufficient certainty to enable the Court to hold that the grant was perpetual. (*Narsingh Dayal Sahu* v. *Ram Narain Singh*, 30 Calc., 883). See also *Agin Bind Upadhya* v. *Mohan Bikram Saha*, (30 Calc., 20; 7 C. W. N., 314). The absense of words importing the hereditary character of a tenure may be supplied by the evidence of long and uninterrupted enjoyment and descent from father to son. *Ismail Khan Mahomed* v. *Nani Gopal Mukerji* 8 C. L. J., 513; 7 C. W. N., 734. The words "*tikka mohto*" are not tantamount to *maurasi* or *istimrari* and do not confer a permanent or hereditary lease at a fixed rate (*Nafar Chandra Shaha* v. *Jai Singh Bharati*, 3 W. R., Act X, 144). If a grant be made to a man for an indefinite period, it enures generally speaking for his life-time and passes no interest to his heirs, unless there are some words showing an intention to grant a hereditary interest. That rule of construction does not apply, if the term for which the grant is made is fixed or can be definitely ascertained (*Lekhraj Rai* v. *Kanhya Singh*, 3 Calc., 210; L. R., 4 I. A., 223). A grant of a village for maintenance is *prima facie* resumable on the death of the grantee (*Beni Prasad Koeri* v. *Dudh Nath Rai*, 4. C. W. N., 274; 27 Calc., 156; L. R., 26 I. A., 216; *Rameshar Baksh Singh* v. *Arjun Singh*, L. R., 28 I. A., 1).

Tenures permanent by custom or course of dealing.—The *howlas* and *nim-howlas* of Bakarganj and the *jotes* of Rangpur are (by custom) hereditary tenures (*Haro Mohan Mukhurji* v. *Lalan Moni Dasi*, 1 W. R., 5; *Jagat Chandra Rai* v. *Ram Narain Bhattacharji*, 1 W. R., 126). So are the *surbarakari* tenures of Cuttack (*Sadanand Mahanti* v. *Nauratan Mahanti*, 16 W. R., 289; 8 B. L. R., 280).

In order to determine whether a pattah granted by a *zamindar* conveys an estate for life only, or an estate of inheritance, it is necessary to arrive, as well as can be done, at the real intention of the parties, to be collected chiefly no doubt from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further, from the conduct of the parties since its execution (*Watson & Co.* v. *Mohesh Narain Rai*, 24 W. R., 176). It may be shown, by evidence as to the nature of the enjoyment, what a grant in its origin it really was. This is in fact only an application of the more general maxim, *optimus interpres rerum usus*. Accordingly, the frequent transfer of an interest in a tank without any change in the terms of the holding or in the amount of rent paid, extending over more than 60 years, was held to prove that the interest was a permanent and transferable one (*Nidhi Krishna Basu* v. *Nistarini Dasi*, 21 W. R., 386). See also *Hari Das* v. *Upendra Narain Shaha*, (10 C. W. N., cxxviii.) Evidence of possession at a fixed and invariable rent anterior to the decennial settlement and that for upwards of a century the *taluk* has been treated as hereditary and as such has descended from father to son and been the subject of purchase is sufficient to justify the inference that it is of a permanent nature (*Gopal Lal Thakur* v. *Tilak Chandra Rai*, 10 Moo. I. A., 191; 3 W. R., P. C., 1). Such possession even for 60 years is sufficient and justifies the presumption, which is not rebutted merely by a provision in the kabulyat that on a transfer by assignment, one-fourth of the purchase money should be paid to the landlord (*Nemai Chandra Bose and others* v. *Mohamed Basir and others*, 9 C. L. J., 475). If a pattah does not contain the term *mukarari*, or equivalent terms of limitation, as "from generation to generation," it is not *prima facie* to be assumed to grant a *mukarari istimrari* or perpetual tenure, but evidence of long and uninterrupted enjoyment at a fixed unvarying rent will supply the want of words of limitation in such pattah (*Dhanpat Singh* v. *Guman Singh*, 11 Moo. I. A., 433, see p. 466). The absence of words of limitation in a pattah which creates an *istimrari* tenure may be supplied by evidence (1) of long and uninterrupted enjoyment at a fixed rent; and (2) of the descent of the tenure from father to son, whence its hereditary character may legally be presumed (*Sattosaran Ghosal* v. *Mahesh Chandra Mitra*, 12 Moo. I. A., 263: 2 B. L. R., P. C., 23: 11 W. R., P. C., 10). See also *Din Dyal Singh* v. *Hira Singh*, (2 N. W. P., H. C. Rep., 338). The omission of words of inheritance in a *sanad* is not a sufficient proof *per se* that such grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from father to son for more than a hundred years (*Kuldip Narain Singh* v. *The Government*, 14 Moo. I. A., 247: 11 B. L.

R., 71). The absence of the words "*maurasi mukarari*" do not necessarily indicate that it was not the lessor's intention to grant a permanent lease (*Promoda Nath Rai* v. *Srigobind Chaudhuri*, 32 Calc., 648). When a pattah is void as against a person and not voidable only, the mere receipt of rent by him, though of the same amount as that fixed by the pattah, would not have the effect of confirming the pattah in its entirety (*Beni Prasad Koeri* v. *Dhud Nath Rai*, 4 C. W. N., 274 : 27 Calc., 156 : L. R., 26 I. A., 216.)

These cases seem to establish that to justify a Court in presuming in the absence of direct evidence of a tenure being of a permanent nature, that it is of such a character, there must be evidence (1) of long and uninterrupted enjoyment, (2) of fixity of rent, and (3) of the lands having descended from father to son, or having been transferred by purchase. In some cases it has been expressly laid down that mere long possession by itself is not sufficient to justify a Court in making such a presumption. Thus, in *Sheo Dyal Puri* v. *Mahabir Prasad*, (10 W. R. 477 : 2 B. L. R., App., 8), it was said that possession by a tenant does not in itself lead to any inference as to his character. The fact of his having occupied the land and paid rent for twelve or even twenty years is equally consistent with his being a tenant-at-will, farmer, or a *mukararidar*. A Court is not bound, as a matter of law, to presume that a tenure is a permanent one merely from the fact of long possession of the land (*Nobin Chandra Datta* v. *Madan Mohan Pal*, 7 Calc., 697). See also *Bai Ganga* v. *Dullabh Parag*, (5 Bom. H. C. Rep., 179) ; and *Endar Lala* v. *Lala Hari*, (7 Bom. H. C. Rep., A. C., 111). When there is no evidence of a grant of perpetuity, time and undisturbed enjoyment cannot ripen the holding into a species of ownership, and when the origin of the tenancy is shewn at a rent twice increased, and paid down to the commencement of the suit, length of enjoyment coupled with the payment of rent can give no greater force to the tenant's right than it originally possessed. A holding for a long period of years and a payment of rent to the *zamindar* merely establish a tenancy from year to year (*Vasudev Patrudu* v. *Sanyasiraz Peddabaliyara Simhulu*, 3 Mad. H. C. Rep., 1). Long and continued possession at a low and unvaried rent is not sufficient to suggest the inference that an agreement had been made between the parties that the tenant should hold a permanent tenure (*Secretary of State* v. *Lachmessar Singh*, 16 Calc., 223 : L R., 16 I. A., 6). A tenure in perpetuity cannot be established merely by evidence of long possession at an invariable rent, unless it appears that such tenancy may be so acquired by local usage (*Narayanbhat* v. *Davlata*, 15 Bom., 647 : *Babaji* v. *Narayan*, 3 Bom., 340). On the other hand, continuous payment of rent for a hundred years has been held to give rise to

a presumption that the tenant held under a *maurasi* title (*Brajo Nath Kundu* v. *Lakhi Narayan Addi*, 7 B. L. R., 211), and possession for nearly a hundred years at presumably a fixed rent, to justify the conclusion that the tenant had a permanent and transferable interest in his tenure (*Dunne* v. *Nabo Krishna Mukhurji*, 17 Calc., 144.) See also *Naba Kumari Debi* v. *Behari Lal Sen*, (34 Cal., 902, P. C.,) where an uninterrupted possession at an uniform rent with intermediate successions and sales was held to lead to an inference of permanence. In *Watson & Co.*, v. *Radha Nath Singh*, (1 C. L. J., 572), which was a suit for enhancement of the rent of a tenure, it was proved that (1) the tenancy was created for purposes of reclamation, but when it originated could not be determined; (2) the tenancy was not limited in duration and had descended from father to son, and from son to grandson; (3) that the rent had never been altered; (4) that excess lands reclaimed from time to time had been included in the tenancy, and rent had been assessed thereon, but at each settlement the rent assessed at the previous settlement had been left untouched; (5) that the rent was progressive, the full amount being reached in the fourth year and the parties agreeing that the lessee should thenceforth continue to pay the full amount; and (6) that the lessee was entitled to hold excess lands at a rate fixed in the contract. *Held*, that from these circumstances the inference might legitimately be drawn that the tenure was permanent, the rent had been fixed in perpetuity, and was not liable to be enhanced. A farmer may acquire by prescription the right of a permanent tenant by setting up such higher right adversely to the zemindar, without acquiring any permanent rights to the sub-soil (*Bagdu Manjhi* v. *Durga Prasad Singh*, 9 C. W. N., 292). See note to section 182—"*Ejectment of tenant from homestead land.*"

Onus of proof.—When a tenant has admitted that he is a tenant, the *onus* is upon him to show that his tenancy is such as he sets up, namely, a permanent tenancy at a rate which cannot be enhanced (*Khetra Krishna Mitra* v. *Dinendra Narain Ray*, 3 C. W. N., 202). In a suit for ejectment by a purchaser at a revenue sale, the defendants claimed to hold the land as a subordinate *taluk*, which had been in existence and in the possession of themselves and their predecessors since the time of the permanent settlement. It was found as a fact that the tenure was in existence in 1798-99. *Held*, that, although in the first instance the burden of proof was on the defendants, yet it had been discharged by the proof of the defendants' long possession and of the fact that the *taluk* was in existence one hundred years ago (*Nityanand Rai* v. *Banshi Chandra Bhuiyan*, 3 C. W. N., 341). When a defendant alleges that he holds a permanent tenure, the burden of proving that

fact lies on him, and it is not for the plaintiff to show that he is not a tenure-holder but only a raiyat (*Nilmani Maitra* v. *Mathura Nath Joardar*, 4 C. W. N., clix : 5 C. L. J., 413). If a person sets up as against Government a permanent *talukdari* right, it is incumbent on him to make out that case (*Prasanna Kumar Rai* v. *Secretary of State*, 26 Calc., 792 : 3 C. W. N., 695).

Ejectment of permanent and temporary tenure-holders.—In addition to the provisions of this section, which limit the grounds on which a permanent tenure-holder can be ejected, sec. 65 provides that no permanent tenure-holder can be ejected for arrears of rent. Section 89 lays down that no tenant can be ejected except in execution of a decree. Section 155 grants every tenant liable to ejectment relief against it by requiring the landlord, before bringing a suit to eject him, to give the tenant notice of the misuse of the land or breach of contract complained of and an opportunity of remedying or paying compensation for the same. Under sec. 178, sub-sec. (1), cl, (c), no contract made either before or after the passing of this Act shall entitle a landlord to eject his tenant otherwise than in accordance with its provisions. A tenant holding under a lease of a permanent character has no power to make excavations of such a character as to cause substantial damage to the property demised, although by the terms of the lease he has power to make excavation. (*Girish Chandra Chando* v. *Sirish Chandra Das*, 9 C. W. N., 255).

When a landlord grants a permanent and heritable tenure in land, he has no estate left in him, unless he reserves to himself a right of re-entry or reversion, and even when the lease contains a clause restraining the lessee from alienation, the landlord cannot eject the tenant on a breach of this clause, unless the lease contains a clause giving him a right of re-entry, or provides that the lease shall be void in case of such breach (*Nil Madhab Shikdar* v. *Narattam Shikdar*, 17 Calc., 826 ; *Narayan Dassappa* v. *Ali Saiba*, 18 Bom., 693 ; *Madar Saheb* v. *Sannabawa*, 21 Bom., 195 *Srigobind Prosad* v. *Musst. Laljhari*, 13 C. W. N., ccxii). A stipulation in a *patni* lease that by reason of non-payment of rent by the *patnidar* he would forfeit his tenancy, is not valid (*Mahabat Ali* v. *Mahomed Faizullah*, 2 C. W. N., 455). But see note to s. 179.

Mineral rights.—The permanent tenure-holder is entitled to all under-ground rights unless there is a reservation to the contrary (*Sriram Chakrabarty* v. *Hari Narain Singh Deo*, 33 Cal., 54 ; *Shama Charan* v. *Abhiram*, 33 Cal., 511 : 10 C. W. N., 738 ; *Meghlal Panday* v. *Raj Kumar Thacoor*, 34 Cal., 358 : 11 C. W. N., 527).

Life tenants or Khorposhdars are not entitled to work mines which are not already open (*Prince Mohomed Buktyar Sha* v. *Rani Dhajamani*, 2. C. L. J., 20 : *Tituram Mukerji* v. *Cohen*, 33 Cal., 203: 9 C. W. N., 1073 : 2 C. L. J., 408).

Reservation of mineral rights implies reservation of the right to go upon the land and work the minerals (*Rameswar Malia* v. *Ram Nath*, 33 Cal., 462).

Limitation.—The period of limitation, within which a suit for the ejectment of a tenure-holder on account of the breach of a condition of his contract for which he is liable to be ejected may be brought, is one year from the date of the breach (art. 1, Sched. III of this Act.)

Transfer and transmission of permanent tenure.

11. Every permanent tenure shall, subject to the provisions of this Act, be capable of being transfered and bequeathed in the same manner and to the same extent as other immoveable property.

Transferability of permanent tenures.—Among the provisions of this Act to which those of this section are subject is no doubt sec. 181, which provides that the incidents of *ghatwali* and other service tenures shall remain unaffected by it, and expressly prescribes that nothing in this Act shall confer a right to transfer or bequeath a service tenure, which could not before its passing be transferred or bequeathed. "Custom, usage and customary right" are also under sec. 183 unaffected by anything in this Act. Tenures, therefore, which before the passing of the Act were by custom non-transferable, as, for instance, *Surbarakari* tenures in Orissa, which, though hereditary, are not transferable without the consent of the *zamindar*, will continue to be so (see *Durjodhan Dass* v. *Chuya Dai*, I. W. R. 322 ; *Kashi Nath Pani* v. *Lakhmani Prasad Patnaik*, 19 W. R., 99 ; *Dashorathi Mahapatra* v. *Rama Krishna Jana*, 9 Calc., 526 ; *Bhuban Pari* v. *Shama Nand De*, 11 Calc., 699 ; and *contra*, *Sudanando Mahanti* v. *Nauratan Mahanti*, 8 B. L. R., 280 : 16 W. R., 289).

Permanent tenures are under this section clearly transferable. A provision in a lease of a permanent tenure for forfeiture or re-entry in case of an assignment in violation of its terms would, therefore, be of no effect. In any case, such a provision would not have the effect of invalidating a sale in execution ; for, it is clear law in India, as in England, that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution (*Golak Nath Rai* v. *Mathura Nath Rai*, 20 Calc., 273).

Non-permanent tenures.—This section seems to import that non-permanent tenures were not to be regarded as transferable (*Hiramati Dassya* v. *Annada Prosad Ghose*; per Maclean C. J.—7 C. L. J., 553).

Onus of proof of transferability.—As regards tenures which are not permanent, there is a ruling in the case of *Daya Chand Saha* v. *Anand Chandra Sen* (14 Calc., 382), in which it has been said that there is no presumption that any tenure held is not a transferable tenure, and a landlord who sues for *khas* possession on the ground that a tenure sold was not transferable must establish his case as an ordinary plaintiff. The subject matter of this suit appears, however, not to have been a "tenure" in the strict sense of the term, but a "holding," and the rule laid down in this case was subsequently dissented from in respect to a raiyat's holding in the case of *Kripamayi Debi* v. *Durga Govind Sarkar*, (15 Calc., 89). See note to sec. 26.

Sub-letting of permanent tenures.—Section 179 prescribes that nothing in this Act shall be deemed to prevent a holder of a permanent tenure in a permanently settled area from granting a permanent *mukarari* lease on any terms agreed on between him and his tenant.

Voluntary transfer of permanent tenure.

12. (1) A transfer of a permanent tenure by sale, gift or mortgage (other than a transfer by sale in execution of a decree or by summary sale under any law relating to patni or other tenures) can be made only by a registered instrument.

(2) A registering officer shall not register any instrument purporting or operating to transfer by sale, gift or [usufructuary] mortgage a permanent tenure unless there is paid to him, in addition to any fees payable under the Act for the time being in force for the registration of documents, a process-fee of the prescribed amount and a fee (hereinafter called "the landlord's fee") of the following amount, namely :—

(*a*) when rent is payable in respect of the tenure, a fee of two *per centum* on the annual rent of the tenure : provided that no such fee

shall be less than one rupee or more than one hundred rupees; and

(*b*) when rent is not payable in respect of the tenure, a fee of two rupees,

[together with the costs necessary for the transmission of the landlord's fee to the landlord.]

(3) When the registration of any such instrument is complete, the registering officer shall send to the Collector the landlord's fee, [the costs necessary for the transmission of the same] and a notice of the transfer and registration in the prescribed form, and the Collector shall cause the fee to be [transmitted] to, and the notice to be served on, the landlord [named in the notice] in the prescribed manner.

The word "usufructuary" before "mortgage" in sub-section (2) has been inserted by Act VIII of 1886. The words in heavy brackets have been added to and inserted in this section and the word "transmitted" has been substituted for "paid" by s. 5, Act I, B. C., of 1907, and Act I, E. B. C., 1908. The reasons for these changes and the corresponding changes in secs. 13 and 15 are explained in the report of the Select Committee on the Bill of 1906 as follows:

"It is essential that the landlord should receive notice of transfers under sections 12, 13, and 15 at the earliest possible opportunity. The present practice is that the landlord's fee is deposited with the Collector, by whom a notice is served on the landlord to come and claim the fee. This practice is not altogether in accordance with the terms of the law, which lays down that the Collector must cause the amount to be paid to the landlord. There is at present no provision for the costs of transmitting the fee. Time will, we think, be saved if the amount necessary for the transmission of the landlord's fee is paid by the transferee in the first instance, and sent with the fee to the Collector, who can thereupon send the fee by money order, or in such way as the Government by rule directs, to the landlord. We would protect the Collector from being held liable for paying the fee to the wrong person, by authorising him in all cases to pay it to the landlord named in the notice."

An addition has also been made to sec. 189, by s. 59, Act I, B. C., of 1907 and Act I, E. B. C., of 1908 empowering the Local Government to make rules to prescribe the manner in which landlord's fees shall be transmitted to the landlord.

Mortgage of pernament tenure.—The provisions of sec 59 of the Transfer of Property Act must be read subject to the provisions of this section and a mortgage of a permanent tenure can only be effected by a registered instrument (*Sashi Bhushan Basu* v. *Sahadeb Shaha*, 3 C. W. N., 499.)

Transfer of permanent tenure when complete.—The transfer of a permanent tenure is complete as soon as the deed of transfer is registered under the provisions of this section (*Krishna Ballabh Ghosh* v. *Krishna Lall Singh*, 16 Calc., 642). Although it certainly was the case before the Tenancy Act was passed that the Court always held that the landlord was entitled to look to his recorded tenant for all rent until he received due notice of the transfer, the present law, as explained by the decision in *Krishna Ballabh Ghosh* v. *Krishna Lal Singh*, appears to have altered that state of things ; for that decision lays down that the transferor is no longer liable for any rent accruing after his transfer is duly registered (*Chintamoni Datta* v. *Rash Bihari Mandal*, 19 Calc., 17) But when the parties have contracted that no transfer shall be valid unless the transferee shall furnish security to the satisfaction of the landlord, and a transfer has been made, but no security, as stipulated for, has been furnished, then the landlord will not be bound to recognize the transferee, and the transferor is still liable for the rent (*Dinubandhu Rai.* v *W. C. Bonerjee*, 19 Calc., 774). And when a transfer of a tenure is only colourable and *benami*, such a transfer cannot discharge a transferor from liability to pay rent, even if the tenure was transferable and the transfer was made by a registered kobala (*Jai Govind Laha* v. *Manmotha Nath Banurji*, 33 Calc., 580).

Sub-divisional Officer.—By a notification, dated the 7th October, 1886, published in the *Calcutta Gazette* of the 13th *idem*, Part I, p. 1192, all officers in charge of sub-divisions were vested with powers of a Collector for the purpose of discharging the functions referred to in secs. 12, 13, and 15 of the Act.

Mode of service of notice of transfer and succession.—The mode of service of notices of transfer and succession under ss. 12, 13, 15 and 18 is prescribed in rule 1, Chapter V of the Government Rules under the Tenancy Act. (See Appendix I).

The object of sub-sections (2) and (3), sec. 12 is to give notice of a transfer to the landlord and this object may be fulfilled *aliunde* for instance by a suit against the landlord on the basis of the transfer (*Bandez Khan* v. *Kedar Nath*, 11 C. W. N., cxliv).

Rules of the Registration Department.—The rules of the Registration Department for the registration of documents under this section, as revised by Govt. Not. No. 949P., dated March 21st, 1898 will be found in Appendix IV.

Act I, B. C., of 1903.—The collection of the landlord's fee by the Registering officer is under the terms of the section imperative. In certain instances owing to a misconception, the landlord's fees were not collected. Hence, Act I, B. C, of 1903 was passed to validate such transfers. The portion of the Act intended to effect this object will be found printed after sec. 18 at pp. 82-84. A decree made before the passing of Bengal Act I of 1903, but pending in appeal at the commencement of that Act is governed by sec. 1 of that Act as not being final (*Piari Mohan Pal* v. *Arshid Ali*, 8 C. W. N., 239.) A transfer by a registered release was complete as soon as the document was registered and the non-payment of landlord's fee was cured by Section 1, Act 1 of 1903 B. C., (*Hemendra Nath Mukherji* v. *Kumar Nath Ray*, 12 C. W. N., 478).

Transfer of permanent tenure by sale in execution of decree other than decree for rent.

13. (1) When a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, [or when a mortgage of a permanent tenure, other than a usufructuary mortgage thereof, is foreclosed,] the Court shall, before confirming the sale under section 312 of the Code of Civil Procedure, * (order XXI r. 92, Act V of 1908) [or making a decree or order absolute for the foreclosure,] require the purchaser [or mortgagee] to pay into Court the landlord's fee prescribed by the last foregoing section, [together with the costs necessary for its transmission to the landlord], and such further fee for service of notice of the sale [or final foreclosure] on the landlord as may be prescribed.

*XIV of 1882.

(2) When the sale has been confirmed, [or the decree or order absolute for the foreclosure has been made,] the Court shall send to the Collector the landlord's fee, [the costs necessary for the transmission of the same] and a notice of the sale [or final foreclosure] in the prescribed form, and the Collector shall cause the fee to be [transmitted] to, and the notice to be

served on, the landlord [named in the notice] in the prescribed manner.

The words in light brackets in this section have been inserted by Act VIII of 1886. The words in heavy brackets have been inserted and added by Act I, B. C., of 1907, and Act I, E. B. C., of 1908.

Effect of non-payment of landlord's fee.—Before the passing of Act I, B. C., of 1903, printed at pp. 82-84, it was held that when a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof and the landlord's fee prescribed by section 12 is not paid before the confirmation of the sale, the sale is invalid (*Babar Ali* v. *Krishna Manini Dasi*, 26 Calc., 603 : 3 C. W. N, 531). One of the principal objects of Act I, B. C., of 1903 was to supersede this ruling.

In another case, also decided before the passing of Act I, B. C., of 1903, in which the landlord's fee had not been paid, and the sale had been confirmed, and in which the decree-holder who had purchased the property subsequently applied to be allowed to pay in the landlord's fee and to have a fresh certificate of sale given to him, and this application was acceded to, it was held on appeal to the High Court, that the order of the Court below was correct (*Mohesh Chandra Das* v. *Hari Mohan Chakravarti*, 7 C. W. N., 388). In *Mohim Chandra Bhattacharji* v. *Ram Lochan De*, (7 C. W. N., 591), it was pointed out that it was only the landlord who could object on the ground of the non-payment of the fee, and that its non-payment could not affect the judgment-debtor's position, who had no right to raise such an objection. It was also held that the question was one under s. 244, C. P. C., so an appeal lay against an order passed on such a question.

Transfer of patni and dar-patni taluks.—*Patni taluks* are not affected by the provisions of the section, being specially saved from its operation by section 195, clause (e), of this Act. A *zamindar* or other superior of a *patni taluk* is therefore entitled to refuse to recognise the transfer of a *patni taluk* until the rules laid down in ss. 5 and 6 of Reg. VIII of 1819 have been complied with (*Gyanada Kantho Rai* v. *Bramomoyi Dasi*, 17 Calc., 162). But the purchase of a share of a *patni* without the landlord's consent is not void (*Aosab Ali* v. *Bissessari Dasya*, 1 C. L J., 18 *n*). The *patni* right over a specific area lying within a *patni taluk* is transferable (*Madhab Ram* v. *Doyal Chand Ghosh*, 25 Calc., 445 ; 2 C. W. N., 108). But the provisions of section 13 of the Tenancy Act apply to the sales of *dar-patni taluks* in execution of decrees, as the provisions of section 195, clause (e), apply only to enactments relating to *patnis* properly and strictly so called, and must be treated as

excluding those which relate to tenures, which though resembling *patnis*, as *dar-patnis*, &c., are not strictly *patnis*, not possessing all the qualities of them (*Mahomed Abbas Mandal* v. *Brajo Sundari Debia*, 18 Calc., 360). A suit to compel the registration of the names of *sepatnidars* in the *sherista* of their landlords the *darpatnidars*, is not maintainable either under ss. 5 and 6 of the Reg. VIII of 1819 or under the Bengal Tenancy Act (*Moti Lal singh* v. *Omar Ali*, 2 C. W. N., clxxxi). A *patni* interest created after the passing of the Transfer of Property Act is determined on the purchase of the same by the zaminder, even at a sale held in execution of a decree (*Promotho Nath Mitra* v. *Kali Prasanna Chaudhuri*, 28 Calc., 744).

When the sale of a *patni* under Reg. VIII of 1819 is subsequently set aside, the zamindar is entitled to rent from the *patnidar* for the period intervening between the sale and its reversal. If the *patnidar* has been dispossessed by the auction-purchaser during the period, he will be entitled to mesne profits from the latter (*Amrita Sikhar Banurji* v. *Bijai Chand Mahtab*, 4 C. L. J., 547).

Limitation.—There is no limitation for an application to deposit the landlord's fee and for the confirmation of the sale and the granting of the sale certificate (*Krishna Chandra Datta* v. *Anukul Chandra Chakravartti*, 5 C. W. N., 190).

Section 14 has been repealed by Act I, B. C., of 1907 and Act I, E. B. C., of 1908. The object of the framers of the Bengal Tenancy Act, in inserting section 14, was to facilitate the registration of tenures by the Collector. Since all idea of such registration has been abandoned, the retention of the section is unnecessary.

Succession to permanent tenure.

15. When a succession to a permanent tenure takes place, the person succeeding shall give notice of the succession to the Collector in the prescribed form, and shall pay to the Collector the prescribed fee for the service of the notice on the landlord and the landlord's fee prescribed by the section 12, [together with the costs necessary for its transmission to the landlord], and the Collector shall cause the landlord's fee to be [transmitted] to, and the notice to be served on, the landlord [named in the notice] in the prescribed manner.

The words in brackets have been inserted in the section by Act I, B. C., of 1907 and Act I, E. B. C., of 1908.

It is the duty of persons succeeding by inheritance to a permanent tenure to notify the succession and it is not the duty of the superior landlord to find out who all the heirs of the deceased tenure-holder are. Accordingly, when a person is admittedly one of the heirs and as such in possession and liable for the rent, he cannot defeat a landlord's suit for rent by showing that there are other heirs equally liable, unless possibly he goes further and shows that their names have been notified to the landlord as successors of the original holders or that they have been paying the rent and getting receipts as successors (*Khettro Mohan Pal* v. *Pran Krishna Kabiraj*, 3 C. W. N., 371).

In a suit brought by *patnidars* on the death of the last owner for arrears of rent which accrued due before his death, the defence of the *dar-patnidar* was that, as the plaintiffs had not complied with the terms of this section, the suit was not maintainable. *Held*, that as the plaintiffs did not claim the rent as the holders of the tenure, but as the representatives of the holder or of their father, the rent became an increment to the estate of the father and therefore the suit was maintainable (*Sheriff* v. *Jogemaya Dasi*, 27 Calc., 535).

Payment of landlord's fees—Notice-givers under this section should pay the landlord's fees direct into the Treasury (Bd. Cir., No. 4, June, 1898).

Bar to recovery of rent pending notice of succession.

16. A person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit, distraint or other proceeding any rent payable to him as the holder of the tenure, until the Collector has received the notice, [fees and costs] referred to in the last foregoing section.

The words in brackets have been substituted for the words "and fees" in this section, by Act I, B. C., of 1907 and Act I, E. B. C., of 1908.

Sections 15 and 16 apply to patni tenures.—Sections 15 and 16 apply to *patni* tenures, notwithstanding the provisions of sec. 195 (e). The object of section 195 (e) is that nothing in the Bengal Tenancy Act shall interfere with the *patni* law in respect of *patni* tenures, but that in other respects the Bengal Tenancy Act shall be held to apply as supplementing the *patni* law (*Durga Prasad Bandopadhya* v. *Brindabun Rai*, 19 Calc., 504).

Sections 15 and 16 do not have retrospective effect.—Sections 15 and 16 do not have retrospective effect and do not apply in a case in which the succession opened out before the Tenancy Act came into effect (*Profullah Chandra Basu* v. *Samirudin Mandal*, 22 Calc., 337).

Section 16 bars recovery of rent, but not institution of suit.—Section 16 does not preclude a party from instituting a suit for rent, notwithstanding that the Collector has not received the notice and the fees referred to therein, but it is a bar to the plaintiff's obtaining a decree before the notice and the fees are received by the Collector. The words "recover by suit" do not, however, mean "realise by suit," and the section is not intended to bar merely the actual realization of the money by the plaintiff. They bar his obtaining the decree (*Kalihar Ghosh* v. *Umai Patwari*, 24 Calc., 241 : 1 C. W. N., 98). When on the death of one *shebait*, another *shebait* succeeds to a permanent tenure and does not give a notice of succession to the landlord, and does not ask for an opportunity to comply with the requirements of sec. 15, sec. 16 is an effective bar to the recovery of a decree for rent (*Mabatulla Nasya* v. *Nalini Sundari Gupta*, 10 C. W. N., 42 : 2 C. L. J., 377).

No certificate required for collection of arrears of rent due to estate of deceased.—Under sub-section 2, section 4, of Act VII of 1889, (The Succession Certificate Act), the word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes. Arrears of rent due to the estate of a deceased person can, therefore, be collected without the production of a certificate under the Act (*Nogendro Nath Basu* v. *Satadulbashini Basu*, 3 C. W. N., 294 ; *Ranchordas* v. *Bhagubhai*, 8 Bom., 394).

Transfer of and succession to, share in permanent tenure.

17. Subject to the provisions of section 88, the foregoing sections shall apply to the transfer of, or succession to, a share in a permanent tenure.

Rights and liabilities of transferee of part of tenure.—Section 88 provides that a division of a tenure or holding, or distribution of the rent payable in respect thereof, shall not be binding on a landlord, unless it is made with his consent in writing. Subject to these provisions, an heir, as well as a transferee, even of a part of a permanent tenure, is entitled to compel the landlord to recognise him under secs. 15 and 17 of this Act (*Ananda Kumar Naskar* v. *Haridas Haldar*, 27 Calc., 549). A landlord is not bound to recognize any sub-division of a tenure, unless the provisions of ss. 12 and 17 have been strictly

complied with (*Ram Mayi Dasi* v. *Rupai Paramanik*, 1 C. L. J., 41*n*). Although the transferee of a fractional share of a *patni* cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void, and he is liable for the rent jointly and severally with the registered tenant, if the landlord chooses to recognize him as one of the joint holders of the *patni*, and he is also liable for the entire rent of the *patni* estate (*Saurendro Mohan Tagore* v. *Sarnamoyi*, 26 Calc., 103). A purchaser of a part of a tenture is not personally liable for rent which fell due before the date of his purchase; yet a suit for the rent of the whole tenure is not bad, merely because he was joined as a defendant. The transferee of a part of a tenure is jointly liable with his co-sharer for the rent; for, though the privity between the parties may be one of estate only, it is in respect of the whole of the tenure by reason of the indivisibility of the tenure without the landlord's consent (*Jagmaya Dasi* v. *Girindra Nath Mukhurji*, 4 C. W. N., 590). When the holder of a permanent tenure transferred a portion of it, and the transferee held that portion separately and was allowed to pay proportionate rent for the same to the landlord for a great many years; *held*, that upon sale by the transferee of that portion of the tenure, his liability for rent to the landlord ceased. This Act did not have the effect of subdividing the tenure (*Kali Sundari debia* v. *Dharani Kanta Lahiri*, 10 C. W. N., 172: 33 Calc., 279).

When raiyats having permanent interests in a holding sold a portion of it and the transferees again sold a portion of their purchased interest to R, and R obtained settlement from the landlord; *held*, that, although the transferees did not register their names in the landlord's *serishta* and paid no rent from the date of their purchase, yet, as the landlord had notice of this purchase, he was bound under sec. 17 to sue the transferors and the transferees jointly, and a sale of the holding in execution of a decree for rent obtained against the transferors only did not affect the transferees' interest, (*Baistab Charan Chaudhuri* v. *Akhil Chandra Chaudhuri*, 11 C. W. N., 217).

Relinquishment of permanent tenures.—Permanent tenures once created cannot ordinarily be relinquished at the option of the holders. It is not open to a *patnidar* to throw up the *patni*, and so escape from the liability to pay rent. The contract, though not indissoluble, can be dissolved only by act of Court and after inquiry (*Hira Lal Pal* v. *Nilmani Pal*, 20 W. R., 383). The principle laid down in this case is applicable to all intermediate tenures (*Jadu Nath Ghosh* v. *Schoene Kilburn & Co.*, 9 Calc., 671). But if a permanent tenure is relinquished, and the *zamindar* accepts the relinquishment, neither the

tenure-holder nor any one under him can reclaim it. A voluntary abandonment for a long period without any inevitable force major or other cause beyond the power of the holder must be considered to be equal to an express relinquishment (*Chandramani Nyabhushan* v. *Sambhu Chandra Chakravartti*, W. R., Sp. No., 1864, 270). Where a *mukarari* pattah reserved liberty to the tenants to relinquish the whole or any portion of the land demised and entitled them to a proportionate reduction of the rent at the specified rate for the extent of land that might be found on measurement to have been relinquished, and the lessees professed to relinquish a certain portion of the land, but were found to have retained 35 bighas out of the portion of the land alleged to have been surrendered, it was found that the possession by the lessees of a part of the land professed to be relinquished made the relinquishment and surrender invalid in law (*Ram Charan Singh* v. *Raniganj Coal Association*, 2 C. W. N., 697 : 26 Calc., 29 : L. R., 25 I. A., 210). A formal deed of re-conveyance of *dar-mukarari* interest is not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what has become of the *dar-mukarari* interest (*Imambandi* v. *Kamlesswari*, 14 Calc., 109 : L. R., 13 I. A., 160).

On failure of heirs permanent tenures escheat to the Crown.—In the case of a grant of an absolute hereditary *mukarari* tenure, on failure of heirs of the lessee, it escheats to the Crown, and does not revert to the original grantor or his heirs (*Sonnit Koer* v. *Himmat*, 1 Calc., 391 : 15 W. R., 549).

CHAPTER IV.

RAIYATS HOLDING AT FIXED RATES.

Incidents of holding at fixed rates.

18. A raiyat holding at a rent, or rate of rent, fixed in perpetuity—

(*a*) shall be subject to the same provisions with respect to the transfer of, and succession to, his holding as the holder of a permanent tenure, and

(*b*) shall not be ejected by his landlord, except on the ground that he has broken a condition consistent with this Act, and on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected.

Raiyats holding at fixed rates.—Section 18 of the Tenancy Act does not make all the incidents of a permanent tenure applicable to a raiyat holding at fixed rates, but makes only the provisions with respect to transfer and succession applicable (*Nilmani Maitra* v. *Mathura Nath Joardar*, 4 C. W. N., clix : 5 C. L. J., 413). Raiyats holding at fixed rates are also in the same position as tenure-holders as regards ejectment, except that, if a raiyat holding at a fixed rate of rent is liable to ejectment for a breach of a condition of his contract, that condition must be consistent with the provisions of this Act; whereas, in the case of a tenure-holder similarly liable to ejectment, the condition, the breach of which renders him liable to ejectment, need only be consistent with the provisions of this Act, if made after its commencement (*vide* sec. 10). Unless, then, it be otherwise provided in his contract, a raiyat holding at a fixed rate cannot be ejected for arrears of rent (sec. 65), though his crops may be distrained (sec. 121). He cannot be ejected except in execution of a decree : secs. 89 and 178 (1) (c). He has the same relief against forfeiture as a

tenure-holder (sec. 155), and a suit for his ejectment must also be brought within one year (art I, Sched. III).

E held 50 bighas of land for more than 12 years under a *jangalburi* lease, which provided for a progressive rate of rent and did not expressly provide that the interest of E was to be heritable or perpetual. It did not expressly exclude enhancement on any ground, but provided for enhancement on the ground of increase in the productiveness of the soil effected at the expense of the landlord ; *held*, that E was not a raiyat holding at fixed rates (*Raj Kumar Sarkar* v. *Naya Chatu Bibi*, 31 Calc., 960). The world *kaimi* does not import fixity of rent (*Fazil* v. *Keramuddin*, 6 C. W. N., 916).

Onus of proof.—In a suit for enhancement of rent, the onus is on the defendant to prove that he is a raiyat at fixed rate (*Gudar Tewari* v. *Brij Nandan Prasad*, 5 C. W. N., 880).

Produce rents are not fixed rents.—In several rulings it has been held that a produce rent, which, though varying yearly with the varying amount of the yearly produce, is yet fixed as to the proportion it is to bear to such produce, is a fixed rent (see *Thakurani Dasi* v. *Bisheshar Mukhurji*, B. L. R., F. B., 326 : 3 W. R., Act X, 29 ; *Mitrajit Singh* v. *Tundan Singh*, 12 W. R., 14 : 3 B. L. R, App., 88 ; *Ram Dayal Singh* v. *Lachmi Narain*, 6 B. L. R., App., 25 : 14 W. R., 388 ; *Jatto Moar* v. *Basmati Koer*, 15 W. R., 479 ; and *Hanuman Prasad* v. *Kaulesar Pandey*, 1 All., 301). On the other hand, the contrary was held in *Yakub Hussain* v. *Wahid Ali* (4 W. R., Act X, 23) and *Thakur Prasad* v. *Mahomed Bakir* (8 W. R., 170). The framers of this Act were of opinion that produce rents were not fixed rents ; for they omitted from the Act a sub-section to section 50, which it was at first proposed to introduce, providing that, when a raiyat paid a fixed produce rent, the rent or rate of rent should not be deemed to have varied merely by reason of the amount paid having varied from year to year. Sir Steuart Bayley in explaining the omission of the proposed sub-section, said :—"It seemed clear to us, that where the rent is paid in kind, although the proportion of the gross produce remains the same, yet, by a self-acting machinery this very fact discounts the rise in prices, and rents are thus of necessity enhanced or reduced as prices rise or fall. There is here no room, therefore, for the presumption." (Selection from papers relating to the Bengal Tenancy Act, 1885, p. 421).

Transferee of share of holding at fixed rates entitled to be recognised as a tenant.—A person who has purchased a share in a *mukarari* holding and has given notice of the transfer to the landlord and has paid the landlord's fee is entitled, notwithstanding the provisions

of sec. 88 of this Act, which provide that the division of a tenure or holding shall not be binding on a landlord without his consent in writing, to be regarded as one of the persons who own and possess the holding in question. Sections 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding and entitle the transferee to claim to be regarded as one of the tenants in respect of the holding. In these circumstances a decree in a rent suit, brought only against the former tenant of a *mukarari* holding after he had transferred a share in the holding, cannot be regarded as a valid and binding decree against the transferee, and a sale held in execution of such a decree cannot affect his rights (*Mohesh Chandra Ghose* v. *Sorada Prasad Singh*, 21 Calc., 433).

Guzastha and Gorabandi holdings.—*Guzastha* holdings are referred to in the following rulings :—*Jatto Moar* v. *Basmati Koer*, 15 W. R., 479 ; *Tetra Koer* v. *Bhanjan Rai*, 21 W. R., 268 ; *Lal Sahu* v. *Deo Narain Singh*, 3 Calc., 781 ; 2 C. L. R., 294. According to these rulings they may be either occupancy rights or holdings at fixed rates. According to the report of the Patna conference, however, *guzasthadars* are raiyats holding at fixed rates (Govt. of Bengal Report, 1884, Vol. II., P. 81). *Gorabandi* holdings are spoken of in the following cases :— *Lilanand Singh* v. *Nirpat Mahtan*. 17 W. R., 306 ; *Buti Singh* v. *Murat Singh*, 20 W. R., 478 : 13 B. L. R., 284, note ; and *Chattarbhuj Bharti* v. *Janki Prasad Singh*, 4 C. L. R., 298. In this last cited case it was said that there are no decided cases to show that *gorabandi* rights are more extensive than occupancy rights, or that they are transferable. The Bhagalpur conference, however, reported that the term *gorabandi* is now used and understood by the raiyats to mean a raiyati holding at fixed rates (Govt. of Bengal Report, 1884, Vol II, P. 113).

Bengal Tenancy (Validation) Act, 1903.—The first portion of this Act (I, B. C., of 1903) which is closely connected with the preceding sections 12, 13, 17 and 18 is printed below.

BENGAL ACT NO. I OF 1903.

[PUBLISHED IN THE CALCUTTA GAZETTE OF THE 25TH FEBRUARY, 1903.]

An Act to validate certain transfers, made under the
VIII of 1885. *Bengal Tenancy Act, 1885, of permanent tenures and holdings at fixed rents or fixed*

rates and of shares in the same; and to amend section 106 of that Act.

WHEREAS doubts and difficulties have arisen respecting the meaning and effect of sections 12, 13, 17, and 18 of the Bengal Tenancy Act, 1885, as regards the payment of the prescribed landlord's fee, and the effect of the non-payment of such fee;

VIII of 1885.

And whereas it is expedient to declare that registered transfers and sales and decrees or orders for foreclosure of mortgage, confirmed and made absolute by the Civil Courts, of permanent tenures and holdings at fixed rates and fixed rents, and of shares in such tenures and holdings, shall not be deemed to be invalid merely on the ground that the landlord's prescribed fee has not been paid;

And whereas it is also expedient to amend section 106 of the said Act in manner hereinafter appearing;

And whereas the said Act having been passed by the Governor General of India in Council, the sanction of the Governor General has been obtained under section 5 of the Indian Councils Act, 1892, to the passing of this Act;

55 & 56 Vict., c. 14.

It is hereby enacted as follows:—

Validation of transfers of tenures and holdings and shares in the same.

1. No transfer which has heretofore been made or which may hereafter be made under section 12, section 13, section 17 or section 18 of the Bengal Tenancy Act, 1885, of a permanent tenure, or of a holding at a rent or rate of rent fixed in perpetuity or of a share in such tenure or holding, shall be deemed to be invalid merely on the ground that the landlord's fee prescribed by the said sections 12 or 13 has not been paid:

VIII of 1885.

Provided always that, subject to the *Explanation* following, nothing in this section shall be held to affect the decision of a Court of competent jurisdiction which has become final before the commencement of this Act.

Explanation.—A decree in a suit for rent which has become final disallowing a claim for rent on the ground that the relationship of landlord and tenant does not exist between the parties to the suit by reason of the non-payment of the landlord's fee, shall not bar a suit for rent which became payable subsequently to such claim.

Realization of fee when left unpaid.

2. In any case where the prescribed fee has been or may hereafter be left unpaid, the landlord may, within two years of the commencement of this Act,

or within two years of the date of registration of the document effecting the transfer,

or within two years of the date of confirmation of the sale by the Civil Court,

or within two years of the date upon which a decree or order absolute for the foreclosure of a mortgage has been or may hereafter be made by the Civil Court,

apply to the Collector for realization of such fee from the transferee, or from the auction-purchaser or from the person who has obtained an order absolute for foreclosure of mortgage in the Civil Court, and on such application being presented, the Collector shall realize such fee, if still unpaid, together with costs of realization, from such person as if it were an arrear of revenue.

Saving of section 88.

3. Nothing in section 1 shall be deemed to affect the provisions of section 88 of the said Bengal Tenancy Act, 1885.

Object of the Bengal Tenancy (Validation) Act, 1903. The objects of the above Act, which received the assent of the Governor General of India in Council on the 19th February, 1903, are fully explained in the Statement of Objects and Reasons, which is as follows :—

"The first object of this Bill is to validate transfers of shares in tenures and holdings, at fixed rates, made in past years by registered documents and by sales in execution of decrees of Courts without the payment in either case of the landlord's fees prescribed by section 12 of the Bengal Tenancy Act VIII of 1885,

Section 12 of the Bengal Tenancy Act prohibits Registering Officers from registering any instrument purporting or operating to transfer a permanent tenure, unless the prescribed landlord's fee is paid to them for transmission to the landlord. Section 17 of the Act declares that the said section 12, among other sections, shall apply also to the transfer of a share in a permanent tenure. In the year 1888, in consequence of the provisions of section 17 having been overlooked, Registering Officers were instructed not to receive the prescribed fee in the case of instruments transferring a share in a permanent tenure. These erroneous instructions extended also to the case of instruments transferring a share in the holding of a raiyat enjoyed at a rent or rate of rent fixed in perpetuity. The instructions were not withdrawn till the 19th of September, 1899. Meanwhile numerous transfers of shares in such tenures and holdings were registered without payment of the prescribed landlord's fee.

Section 13 of the Act directs the Civil Courts, before confirming the sale of a permanent tenure in execution of a decree, other than a decree for arrears of rent, and before making a decree or order absolute for the foreclosure of a mortgage of a permanent tenure, to require the purchaser or mortgagee to pay the prescribed landlord's fee for transmission to the landlord. The fact that section 17 makes section 13, among other sections, applicable to shares in a permanent tenure, has frequently been overlooked, and it is believed that numerous sales and foreclosures of shares in permanent tenures and shares in holdings at fixed rates have been effected under the Act without payment of the fee in question.

To obviate the oversights both of the executive authorities and of the Civil Courts above explained, it is considered expedient to legislate on the subject, by declaring that the transfers, sales and foreclosures mentioned above shall not be deemed to be invalid merely on the ground that the landlord's fee was not paid at or before the date of the transaction.

Section 18 of the Tenancy Act deals with the transfer of and the succession to raiyats' holdings held at a rent, or rate of rent, fixed in perpetuity. There is no provision in this section, or in succeeding sections, expressly placing the transfer of, or succession to, a share of such a holding on the same footing as the transfer of a share in a tenure is placed by section 17."

CHAPTER IVA.

PROVISIONS AS TO TRANSFERS OF TENURES AND HOLDINGS AND LANDLORD'S FEES.

This chapter has been introduced by s. 8, Act I, B. C., of 1907, and applies only to the province of Bengal

Saving as to statements in instruments of transfer, where landlord no party.

18A. Nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, amount or fixity of rent, area, transferability or any incident of any tenure or holding referred to in such instrument.

Saving as to acceptance of landlord's fees.

18B. The acceptance by a landlord of any landlord's fee payable under Chapter III or Chapter IV in respect of any tenure or holding shall not operate—

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SEC. 8, ACT I, E. B. C., OF 1908.

Saving as to statements in instruments of transfer, where landlord no party.

"**18A.** Notwithstanding anything contained in section 13 of the Indian Evidence Act, nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, the amount or fixity of rent, the area, the transferability or any incident of any tenure or holding referred to in such instrument."

The words inserted before "nothing contained" are inserted in the new section 18A in order to make it more clear that the intention is to bar the operation of sec. 13 of the Evidence Act in such cases. Rep. Sel. Com.

(*a*) as an admission as to the permanence, amount or fixity of rent, area, transferability or any incident of such tenure or holding, or

(*b*) as an express consent under section 88 to the division of such tenure or holding, or to the distribution of the rent payable in respect thereof.

The object of these new sections is thus explained in the Notes on Clauses to the Bengal Tenancy (Amendment) Bill, 1906.

"The working of sections 12 to 17 of the present Act, relating to the transfer of permanent tenures, is not satisfactory. They induce tenants to register transfers of tenures which are not really permanent, in the hope that the acceptance of the fee by the landlord will operate as an admission of the permanence and transferability of the tenure. The landlords, on the other hand, are reluctant to accept the fees, and the result is that a very large amount of unclaimed fees has accumulated in different districts in the province. This state of things is not only

"**18B.** The acceptance by a landlord of any landlord's fee payable under Chapter III or Chapter IV in respect of any tenure or holding shall not operate—

Saving as to acceptance of landlord's fees.

(*a*) as an admission of the permanence, the amount or fixity of rent, the area, the transferability or any incident of such tenure or holding, or

The changes are verbal: "as to" changed for "of": The definite article "the" is introduced before the words "amount," "area" and "transferability" to make the intention clearer.

(*b*) as an express consent under section 88 to the division of such tenure or holding, or to the distribution of the rent payable in respect thereof."

a source of embarrassment to Government, but also creates doubts and difficulties in regard to the position of the transferees of tenures. It is hoped that the amendments now proposed will overcome the reluctance of landlords to accept the fees in the case of tenures which are really permanent, and that tenants will be deterred thereby from registering transfers of tenures which are not of this character.

The same considerations apply to the transfer of, and succession to, holdings at fixed rents or rates of rent, and under section 18 (a) of the Act, these are governed by the same conditions. Clauses 5 and 6 have been so framed as to make the proposed amendments applicable to the case of holdings at fixed rents or rates of rent. A clause has also been added to sec. 189, empowering the Local Government to *prescribe the authority by whom the fees deposited under sections 12, 13, 15, 17* and 18 clause (a), may be declared to be forfeited, and the mode in which such fees when so forfeited shall be dealt with."

Forfeiture of unclaimed landlord's fees.

18C. All landlord's fees paid under Chapter III or Chapter IV which are held in deposit on or after the commencement of the Bengal Tenancy (Amendment) Act, 1907, may, unless accepted or claimed by the landlord within

Forfeiture of unclaimed landlord's fees.

"**18C.** All landlord's fees paid under Chapter III or Chapter IV, which are held in deposit on or after the commencement of the Eastern Bengal and Assam Tenancy (Amendment) Act, (I of 1908), may, unless accepted or claimed by the

three years from such commencement or from the date of the service of the notice prescribed in section 12, section 13 or section 15 (as the case may be), whichever is later, be forfeited to the Government.

There is no provision in the Act for the disposal of unclaimed fees. As these have accumulated, and in order to expedite claims to fees due, thus freeing the district establishments from much extra work, Government is now given power to deal with them in such manner as it thinks fit.

landlord within three years from such commencement or from the date of the service of the notice prescribed in section 12, section 13 or section 15 (as the case may be), whichever is later, be forfeited to the Government."

CHAPTER V.

OCCUPANCY-RAIYATS.

General.

General.
Continuance of existing occupancy-rights.

19. (1) Every raiyat who immediately before the commencement of this Act [or the Bengal Tenancy (Amendment) Act, 1907,] has, by the operation of any enactment, by custom or otherwise, a right of occupancy in any land shall, when this Act, [or the Bengal Tenancy (Amendment) Act, 1907,] comes into force, have a right of occupancy in that land.

[(2) The exclusion from the operation of this Act, by a notification under sub-section (3) of section 1, of any area constituted a Municipality under the provision of the Bengal Municipal Act, 1884, or

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"**19.** (*1*) Every raiyat who immediately before the commencement of this Act has, by the operation of any enactment, by custom or otherwise, a right of occupancy in any land shall, when this Act comes into force, have a right of occupancy in that land.

(2) The exclusion from the operation of this Act by a notification under sub-section (3) of section (1) of any area constituted a Municipality under the provisions of the Bengal Municipal Act, (III of 1884), or of any part of such area, shall not affect any right, obligation or liability previously acquir-

of any part of such area, or the inclusion of any area in the town of Calcutta by notification under section 637 of the Calcutta Municipal Act, 1899, shall not affect any right, obligation or liability previously acquired, incurred or accrued in reference to such area.]

ed, incurred or accrued in referrence to such area."

In clause 1 the words "or the Bengal Tenancy (Amendment) Act, 1907," and in clause 2 the reference to the Calcutta Municipal Act, 1899, as in the Bengal section, have been omitted for obvious reasons.

Extended to Orissa, (Not., Sept., 10th, 1891).

The words in brackets have been inserted and added by Act I, B. C., 1907. They are intended to preserve existing rights and obligations in areas which under the amended provisions of section 1 may be excluded from the operation of the Bengal Tenancy Act by the Local Government or may be excluded from or included, in the limits of the town of Calcutta.

Acquisition of occupancy-rights under the former rent law.—Under sec. 6 of Act X of 1859, and sec. 6 of Act VIII, B. C., of 1869, every raiyat who had cultivated or held land for twelve years had a right of occupancy in the land so cultivated or held by him, whether it was held under a pattah or not, so long as he paid the rent payable on account of the same, but this rule did not apply to *khamar*, *nij-jote* or *sir* land belonging to the proprietor of the estate or tenure and let by him on lease for a term, or year by year, nor, as regards the actual cultivator, to land sub-let for a term, or year by year, by a raiyat having a right of occupancy. The holding of the father or other person from whom a raiyat inherited was to be deemed the holding of the raiyat within the meaning of the section. Section 7 of both Acts further provided that nothing in section 6 should be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a raiyat, when it contained an express stipulation contrary thereto. A raiyat could, therefore, under the former law contract himself out of his status. Under the former law, it was held that a raiyat holding land under a **bhagdari** or **bhaoli** tenure (*i. e.*, upon a rent consisting of a portion of the produce) could acquire a right of occupancy (*Harihar Mukhurji* v. *Biressar Banurji*, 6 W. R., Act

X, 17 ; *Jatto Moar* v. *Basmati Koer*, 15 W. R., 479). So also, could a raiyat holding a **nuksan utbandi jote**, (see sec. 180) and who by the custom of the locality paid rent when the land could be cultivated, and no rent, when he could not cultivate it (*Premananda Ghosh* v. *Surendra Nath Rai*, 20 W. R., 329). A right of occupancy could be acquired by a cultivator in that portion of the land used for his **habitation** as well as in that which was cultivated (*Mohes Chandra Gangapadhaya* v. *Bishonath Das*, 24 W. R., 402), even if instead of cultivating the land he set up **shops** on it and received profits from the shop-keepers (*Khajurunnisa* v. *Ahmed Reza*, 11 W. R., 88), in **bastu** land, if the tenure of the *bastu* land was *raiyatwari* (*Pogose* v. *Raju Dhopi*, 22 W. R., 511), in a **tank** appurtenant to land let for cultivation (*Nidhi Krishna Basu* v. *Ram Das Sen*, 20 W. R., 341 ; *Uma Charan Baruah* v. *Mani Ram Baruah* 8 C. W. N. 192), and in land let for **grazing** horses (*Fitzpatrick* v. *Wallace*, 2 B. L. R., A. C., 317 : 11 W. R., 231). **A firm** owning an indigo concern and taking a cultivating lease of land could acquire a right of occupancy in it, provided the lease was granted to the original members of the firm, and by the custom of the locality the rights of occupancy in the lands could be transmitted to persons subsequently admitted as members of the firm (*Laidley* v. *Gaur Gobinda Sarkar*, 11 Calc., 501). A raiyat could acquire a right of occupancy, even though he let out his land to others to cultivate (*Brindabon Chandra Chaudhri* v. *Issar Chandra Biswas*, W. R., Sp. No., 1864, Act X, 1 ; *Ram Mangal Ghosh* v. *Lakhi Narain Shaha*, 1 W. R., 71) ; provided he was a **bona fide cultivator** in the sense of deriving the profits from the produce directly (*Kali Charan Singh* v. *Amirudin*, 9 W. R., 579). A raiyat who had held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pattahs, each for a specific term of years, was entitled to a right of occupancy, and neither the mere fact of his taking a lease for a term of years, nor the existence of a right of re-entry on the part of the landlord amounted to an express stipulation under sec. 7, so as to prevent the right of occupancy being acquired under sec. 6 of Act X of 1859 (*Sheo Prakash Misra* v. *Ram Sahai Singh*, 17 W. R., 62 : 8 B. L. R., 165 ; *Mukhtar* v. *Brajraj Singh*, 9 C. L. R., 144 ; *Chandrabati Koer* v. *Harrington*, 18 Calc., 349 : L. R., 18 I. A., 27). Similarly, a raiyat allowed to continue in occupation of the land on the expiry of a lease, which gave the landlord a right of re-entry at the end of its term, but which the landlord did not choose to avail himself of, and whose total period of occupation amounted to twenty years, was held to have acquired a right of occupancy (*Ibatullah* v. *Mahomed Ali*, 25 W. R., 114). Raiyats were entitled to add the time during which their fathers or other persons from whom they had inherited had been in possession, to the tim of

their own possession in computing the period of twelve years required for the acquisition of a right of occupancy (*Watson* v. *Sarat Sundari Debi*, 7 W. R., 395 ; *Nim Chand Baruah* v. *Murari Mandal*, 8 W. R., 127 ; *Lal Bahadur Singh* v. *Solano*, 10 Calc., 45 : 12 C. L. R., 559). They could count both the time when they had been in sole possession of the land and the time they had been in possession of it jointly with others (*Forbes* v. *Ram Lal Biswas*, 22 W. R., 51 ; but see *contra*, *Mahomed Chaman* v. *Ram Prasad Bhakut*, 8 B. L. R., 388 : 22 W. R., 52 note). They could acquire rights of occupancy, even although the persons under whom they held the land had no title to it (*Amir Hussain* v. *Sheo Sahai*, 19 W. R., 338 ; *Zulfan* v. *Radhika Prasonno Chandra*, 3 Calc., 560 : 1 C. L. R., 388), and the expiration of the lease of an *ijaradar* under whom a raiyat's possession under a *jotedari* right had commenced, could not affect the application of section 6 of Act X (*Ghulam Panja* v. *Harish Chandra Ghosh*, 17 W. R., 552). Wrongful eviction is not such an interruption of possession as would prevent a raiyat acquiring a right of occupancy (*Mahomed Ghazi Chaudhuri* v. *Nur Mahomed*, 24 W. R., 324 ; *Lutifunnissa* v. *Pulin Bihari Sen*, W. R., Sp. No., F. B., 91 ; *Radha Govinda Koer* v. *Rakhaldas Mukhurji*, 12 Calc., 82). A right of occupancy might be acquired in respect of an undivided share of an estate (*Muktakeshi Dasi* v. *Kailas Chandra Mitra*, 7 W. R., 493 ; *Jardine Skinner & Co.*, v. *Sarat Sundari Debi*, 3 C. L. R., 140 : L. R., 5 I. A., 164 ; *Baidya Nath Mandal* v. *Shudharam Misri*, 8 C. W. N., 751 ; *Uma Charan Baruah* v. *Mani Ram Baruah*, 8 C. W. N., 192). Rights of occupancy could be acquired in *khamar*, *nij-jote* or *sir* land, if let otherwise than for a term, or year by year (*Gour Hari Singh* v. *Bihari Raut*, 12 W. R., 278 : 3 B. L. R., App., 138 ; *Bhagwan Bhagat* v. *Jag Mohan Rai*, 20 W. R., 308 ; *Ashraf* v. *Ram Kishor Ghosh*, 23 W. R, 288). Compare sec. 116 of this Act.

Non-acquisition of occupancy-rights under the former law.—Rights of occupancy could not be acquired by trespassers (*Pir Baksh* v. *Miajan*, W. R., Sp. No., F. B., 164 ; *Gulam Haidar* v. *Purno Chandra Rai*, 3 W. R., Act X, 147 ; *Ishan Chandra Ghosh* v. *Harish Chandra Banurji*, 18 W. R., 19 : 10 B. L. R., App., 5). A raiyat who secretly possesses himself of land and pays no rent for it has no right of occupancy in that land (*Gharib Mandal* v. *Bhuban Mohan Sen*, 2 W. R., Act X, 85). Possession obtained and continued by fraud can give no right of occupancy (*Bhubanjai Acharji* v. *Ram Narain Chaudhri*, 9 W. R., 449). Mere possession of a permissive character without any right cannot confer a right of occupancy (*Mohar Ali Khan* v. *Ram Rattan* Sen, 21 W. R., 400 ; *Adaito Charan De* v. *Peter Das*, 17 W. R., 383). Mere possession as a servant for 12 years does not give rise to right of

occupancy (*Umamayi Barmanya* v. *Boko Behra*, 13 W. R., 333). A person occupying land as an assignee of the *zamindar* and cultivating because of the opportunity thus afforded cannot claim the benefit of sec. 6 of Act X of 1859 (*Uma Nath Tewari* v. *Kundan Tewari*, 19 W. R., 177). Rights of occupancy could not be acquired by a middleman (*Gopi Mohan Rai* v. *Sib Chandra Sen*, 1 W. R., 68); or by a *tikhadar*, (*Ram Saran Sahu* v. *Veryag Mahton*, 25 W. R., 554); or by a tenant holding under a *zar-i-peshgi* constituting a security for money advanced (*Bengal Indigo Co.* v. *Raghubar Das*, 24 Calc., 272: L. R., 23 I. A., 158: 1 C. W. N., 83). Rights of occupancy could not be acquired in land occupied exclusively by buildings (*Sarnomayi* v. *Blumhardt*, 9 W. R., 552; *Mohar Ali Khan* v. *Ram Ratan Sen*, 21 W. R., 400), or in land the main object of the occupation of which was the dwelling-house, and when the cultivation of the soil, if any, was entirely subordinate thereto (*Kali Krishna Biswas* v. *Janki*, 8 W. R., 250; *Ram Dhan Khan* v. *Hara Dhan Paramanik*, 12 W. R., 404: 9 B. L. R., 107 note). No right of occupancy could be acquired in a tank used only for the preservation and rearing of fish and not forming a part of any grant of land or an appurtenance to any land (*Shibu Jelya* v. *Gopal Chandra Chaudhri*, 19 W. R., 200); and a grant of a right of fishery in such a tank gives no interest in the sub-soil (*Mahanand Chakravartti* v. *Mangala Kootani*, 31 Calc., 937: 8 C. W. N., 804); or in a tank with only so much land as is necessary for its banks (*Nidhi Krishna Basu* v. *Ram Das Sen*, 20 W. R., 341; or in a *jalkar* (*Uma Kanth Sarkar* v. *Gopal Singh*, 2 W. R., Act X, 19; *Sham Narain Chaudhri* v. *Court of Wards*, 23 W. R., 432; *Jaggabandhu Saha* v. *Promotho Nath Rai*, 4 Calc., 767; *Bollai Sati* v. *Akram Ali*, 4 Calc., 961); or by an indigo concern or firm, having no corporate existence (*Cannan* v. *Kailash Chandra Rai*, 25 W. R., 117); or by a firm of capitalists (*Rai Kamal Dasi* v. *Laidley*, 4 Calc, 957). In computing the period of twelve years necessary for the acquisition of occupancy rights, raiyats are not entitled to add the period of their predecessors' possession to their own, except when they have inherited the lands from their predecessors or the *jotes* are transferable (*Watson* v. *Sarat Sundari Debi*, 7 W. R., 395; *Dinobandhu De* v. *Ram Dhan Rai*, 9 W. R., 522; *Durga Sundari* v. *Brindabun Chandra Sarkar*, 11 W. R., 162; *Narendra Narain Rai* v. *Ishan Chandra Sen*, 22 W. R., 22: 13 B. L. R., 274; *Khirod Chandra Rai* v. *Gordon*, 23 W. R., 237: *Lal Bahadur Singh* v. *Solano*, 10 Calc., 45: 12 C. L. R. 559); not even with the consent of the *zamindar* (*Tara Prasad Rai* v. *Surjo Kanth Acharji*, 15 W. R., 152; *Haidar Baksh* v. *Bhubendra Deb Kunwar*, 17 W. R., 179; but see *contra* on this point, *Haro Chandra Guha* v. *Dunne*, 5 W. R., Act X, 55). Rights of occupancy could not be acquired in

lands sub-let for a term, or year by year by raiyats having occupancy rights (*Gilmore* v. *Sarbessari Dasi*, W. R., Sp. No., 1864, Act X, 72; *Jamaitunnissa Bibi* v. *Nur Mahomed*, *ibid*, 77; *Ketal Gain* v. *Nadir Mistri*, 6 W. R., 168; *Abdul Jabar* v. *Kali Charan Datta*, 7 W. R., 81; *Kali Kishor Chaturji* v. *Ram Chandra Shah*, 9 W. R., 344; *Haran Chandra Pal* v. *Mukta Sundari*, 10 W. R., 113: 1 B. L. R., A. C., 81; *Ram Dhan Khan* v. *Haradhan Paramanik*, 12 W. R., 404: 9 B. L. R., 107 note; *Nil Kamal Sen* v. *Danesh*, 15 W. R., 469; *Ishan Chandra Ghosh* v. *Harish Chandra Banurji*, 18 W. R., 19; *Annapurna Dasi* v. *Radha Mohan Patro*, 19 W. R., 95). Rights of occupancy could not be gained in *khamar*, *nij-jote* or *sir* land, if let on a lease for a term or year by year (*Gaur Hari Singh* v. *Bihari Raut*, 12 W. R., 278: 3 B. L. R, App., 138; *Bhagwan Bhagat* v. *Jogmohan Rai*, 20 W. R., 308: *Ashraf* v. *Ram Kiskor Ghosh*, 23 W. R., 288). See sec. 116. In *Haro Govindo Raha* v. *Ram Ratno De*, (4 Calc., 67), it was doubted whether rights of occupancy could accrue in land held under a service tenure, but in *Ram Kumar Bhurttacharji* v. *Ram Niwaz Rajguru*, (31 Calc., 1021), it has been decided that such rights can be acquired in *chaukidari chakran* lands. But not by the under-tenants of such lands (*Mritanjai* v. *Kenatullah*, 11 C. W. N., 46).

Acquisition of occupancy-rights by custom.—According to Peacock, C. J., in *Thakurani Dasi* v. *Bisheshar Mukhurji*, (B. L. R., F. B., 326: 3 W. R., Act X, 29), Act X "did not take away the right of any raiyat, who had a right by grant, contract, prescription or other valid title to hold at a fixed rate of rent." In *Hills* v. *Ishwar Ghosh* (W. R., Sp. No. F. B., 148), it was also said by the same learned Judge that "if there are any ancient or hereditary rights to which a raiyat is entitled, he is not precluded by Act X of 1859 from claiming and proving such rights in due course of law." See also *Lilanund Singh* v. *Nirpat Mathun* (17 W. R., 306.) All customs, usages and customary rights are now saved by the provisions of sec. 183, from illustration 2 to which section it is evident that there may be a valid custom or usage of the acquisition of rights of occupancy by under-raiyats. This is further apparent from sec. 113, as amended by the Bengal Tenancy (Amendment) Act, III, B. C., of 1898, in which reference is made to the holding of an under-raiyat having occupancy rights.

An occupancy-right acquired under former law continues under present law.—In a case under the present Act, in which certain land had been used as an orchard, and had been held by he plaintiff for about fifty years, it was argued that the land, being horticultural land, a right of occupancy could not be acquired in it under the present Act. But it was held that a right of occupancy had been

acquired in the land under the former law, and that, whether or not the present Act applies to horticultural land, when a right of occupancy had been acquired under the old law, it was not forfeited by the repeal of that Act, there being nothing in the new enactment to deprive any person of a statutory right which had been acquired (*Hari Ram* v. *Narsingh Lal*, 21 Calc., 129). See also *Hassan Ali* v. *Govind Lal Basak*, (9 C. W. N., 141). There is nothing in the Bengal Tenancy Act to take away a right of occupancy acquired under leases granted at a time when Act VIII, B. C., of 1869 was in force, (*Baidya Nath Mandol* v. *Sadhuram Misri*, 8 C. W. N., 751.)

Under sec. 178 (1) (b) nothing in any contract between a landlord and a tenant made before or after the passing of this Act shall take away an occupancy right in existence at the date of the contract.

Definition of "settled raiyat."

20. (1) Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village.

(2) A person shall be deemed, for the purposes of this section, to have continuously held land in a village notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed, for the purposes of this section, to have held as a raiyat any land held as a raiyat by a person whose heir he is.

(4) Land held by two or more co-sharers as a raiyati holding shall be deemed, for the purposes of this section, to have been held as a raiyat by each such co-sharer.

(5) A person shall continue to be a settled raiyat of a village as long as he holds any land as a raiyat in that village and for one year thereafter.

(6) If a raiyat recovers possession of land under section 87, he shall be deemed to have continued to be a settled raiyat notwithstanding his having been out of possession more than a year.

(7) If, in any proceeding under this Act, it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land, be presumed, for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a raiyat.

Extended to Orissa (Not., September 10th, 1891).

Sub-sections (1) and (2). Settled raiyats.—These sub-sections, which are the result of an attempt to rehabilitate the "*khudkasht*' or 'resident raiyat" of the old regulations, made a great change in the rent law. Under Act X of 1859 and Act VIII, B. C., of 1869, it was necessary for the acquisition of a right of occupancy in land that a raiyat should have held the same land for twelve years, and if he took up fresh land in the village, he had no right of occupancy in it until the lapse of a period of twelve years (*Amar Chand Lahatta* v. *Bakshi Paikar*, 22 W. R., 228). Now, a raiyat is a settled raiyat of the village and has (sec. 21) an occupancy-right in all land in the village in which he, or the person whose heir he is, has held any land for twelve years. When the holdings of the defendants consisted of land held by them partly for more than twelve years, and partly for less than twelve years, and the two classes of land were undistinguishable ; *held*, that the defendants were settled raiyats, and had under s. 21 occupancy rights in all the lands held by them (*Sarat Chandra Rai* v. *Asiman*, 31 Calc., 725 : 8 C. W. N., 601). But this rule does not apply to *chur* or *diarah* land or to land held under the custom of *utbandi*, which must still be held for twelve years before a right of occupancy accrues (sec. 180.)

The provisions of sub-section (1) were introduced to prevent landlords barring the acquisition by their raiyats of rights of occupancy by shifting them, or changing the lands of their holdings before the expiry of twelve years. It was at one time proposed to insert the word "estate" in this section in place of the word "village" ; but it was ultimately determined not to do do so. Landlords can, therefore, still prevent their raiyats acquiring occupancy rights by shifting them from one village to another within their estates before the completion of the statutory period.

There is one point which the provisions of sub-section (2) leave somewhat uncertain, *viz.*, whether a raiyat can become a "settled raiyat" by holding during twelve years different plots of land in the same village under different landlords, or whether he must hold his land under one and the same landlord. See *Kuldip Singh* v. *Chatur Singh Rai*, (3 C. L. J., 285 : 2 C. W. N., cccii).

Distinction between occupancy raiyats and settled raiyats. - The term "occupancy-raiyats" used in the Act does not cover "settled raiyats." "An occupancy right may be acquired by a new-comer by purchase," (*i. e.*, provided it be transferable by custom), "while the status of settled raiyat, is acquired by cultivating any land in the village as a raiyat for twelve years, or by inheritance from a raiyat who has done so." (Statement of Objects and Reasons of Bill, No. III of 1897, to amend the Bengal Tenancy Act, para 24 and *Kuldip Singh* v. *Chatur Singh Rai*, 2 C. W. N., cccii : 3 C. L. J., 285). The status of a settled raiyat as defined in sec. 20 cannot be transferred and consequently though every settled raiyat has a right of occupancy, every occupancy-raiyat is not necessarily a settled raiyat (*Kuldip Singh* v. *Chatur Singh Rai*, 2 C. W. N., cccii : 3 C. L. J. 285).

The Board of Revenue have issued the following instructions to settlement officers on this point.

"A raiyat who has held any land in a village for 12 years by himself or partly through the person from whom he has inherited, is a settled raiyat of that village. He has the occupancy-right not only in that land but also in all other land in that village forming part of his holding or which he may at any time add to his holding. His status as a settled-raiyat passes to his heir, but it cannot be sold. Thus, all occupancy-raiyats who have acquired the occupancy-right through the occupation of land for 12 years, or by inheritance from one who held for that period, should be recorded as settled raiyats. The only remaining class of occupancy-raiyats are those who have purchased the occupancy-right, but have not held the land to which it is attached for 12 years, or who have inherited from such purchasers, the term of 12 years from the purchase being still unexpired. These alone should be recorded as occupancy-raiyats" (Board's Settlement Manual Part II, Chap. III, p. 346 p. 98).

Sub-section (3).—The provisions of this sub-section are similar to those of sec. 6 of Act X of 1859 and of Act VIII, B. C., of 1869, according to which "the holding of the father or other person from whom a raiyat inherits shall be deemed to be the holding of the raiyat within the meaning of this section." Under the former law, a raiyat was always entitled to add the occupation of his father or other person from whom he had inherited his land to his own in computing the period necessary for his acquisition of an occupancy-right, but not that of a person

from whom he might have purchased the land, unless the holding was of a transferable nature. See notes to sec. 19 *ante*, pp. 92-94. Occupancy-rights are now expressly made heritable by sec. 26. As to the liability of occupancy raiyats for rent which accrued in the lifetime of their predecessors, see the notes to that section. An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant (*Ananda Kumar Naskar* v. *Hari Das Haldar*, 27 Calc., 545 ; 4 C. W. N., 608).

Sub-section (4).—The sub-section follows the rule laid down by the High Court in *Forbes* v. *Ram Lal Biswas* (22 W. R., 51), setting aside *Mahomed Chaman* v. *Ram Prasad Bhagat* (8 B. L. R., 338 ; 22 W. R., 52 note).

When some lands were held by several occupancy raiyats jointly and some of them relinquished in favour of the landlord ; *held*, that the relinquishment did not operate by way of enlarging the rights of the raiyats who remained on the land by giving them an interest over the whole holding (*Piari Mohan Mandal* v. *Radhika Mohan Hazra*, 5 C. L. J., 9)

Sub-section (5).—Under this sub-section a raiyat may apparently abandon his holding and leave the village and may still retain his rights as a settled raiyat, provided he returns within one year's time and takes another holding in the same village, it may be under a different landlord.

Sub-section (6).—The sub-section follows the rule laid down by the High Court in *Mahomed Ghazi Chaudhri* v. *Nur Mahomed* (24 W. R., 324), in which a *zamindar* sued a raiyat for ejectment and the raiyat pleaded continuous occupancy for twelve years, and it was found he had been ejected during that period, but had got back into possession. It was held that if the eviction were wrongful, it would not be such an interruption as would prevent the raiyat from acquiring a right of occupancy, but it was for the raiyat to show that the eviction was wrongful. See also *Lutifunnissa* v. *Pulin Bihari Sen*, (W. R., Sp. No., F. B. 91) and *Radha Govind Koer* v. *Rakhal Das Mukhurji*, (12 Calc., 82).

Sub-section (7). Onus of proof.—This sub-section made a great change as to the onus of proof in rent cases. It was introduced in the interests of the raiyats, who had always experienced difficulty in producing legal proof of their acquisition of occupancy rights. Now, the onus is on the landlord to disprove the assertion on the part of their raiyats of their having held land continuously for twelve years. This presumption can only arise in the case of a raiyat who has other occupancy holdings in the same village when those other occupancy holdings are held under the same landlord (*Kuldip Singh* v. *Chatur Singh Rai*, 3 C. L. J., 285 : 2 C. W. N., cccii). And this presumption does not apply to the occupants

of *chur* or *dearah* land, who, if they allege that they have been for twelve continuous years in possession, must prove that allegation (*Beni Prasad Koeri* v. *Chaturi Tewari*, 33 Calc., 444 ; 4 C. L. J., 63).

In a suit brought by a purchaser of an estate at a sale for arrears of Government revenue, it is for the defendant who claims to be a raiyat with a right of occupancy to start a *prima facie* case by showing that he held the lands as a raiyat within the meaning of the proviso to sec. 37, Act XI of 1859 (*Ambica Charan Chakravartti* v. *Daya Gazi*, 3 C. L. J., 511 : 10 C. W. N., 497).

Settled raiyats to have occupancy-rights.

21. (1) Every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village.

(2) Every person who, being a settled raiyat of a village within the meaning of the last foregoing section, held land as a raiyat in that village at any time between the second day of March, 1883, and the commencement of this Act, shall be deemed to have acquired a right of occupancy in that land under the law then in force ; but nothing in this sub-section shall affect any decree or order passed by a Court before the commencement of this Act.

Extended to Orissa (Not., Sept. 10th, 1891).

Restrictions on the acquisition of occupancy-rights.—Notwithstanding the provisions of this section, occupancy-rights cannot be acquired in proprietors' private lands, known in Bengal as *khamar*, *nij* or *nij-Jote* and in Behar as *zirat*, *sir* or *kamat*, if let under a lease for a term of years or under a lease from year to year (sec. 116). As already pointed out settled raiyats do not acquire occupancy-rights in *chur*, *dearah* or *utbandi* lands, until they have held the same land for twelve continuous years (sec. 180). Occupancy-rights cannot be acquired in *ghatwali* lands (*Upendra Nath Hazra* v. *Ram Nath Chaudhri*, 33 Calc., 630 : *Mohesh Manjhi* v. *Pran Krishna Mandol*, 1 C. L. J , 138).

When a lessee of lands in the occupation of raiyats who had jote rights obtained *khas* possession with the consent of the raiyats for the purpose of indigo cultivation ; *held*, that the lessee being merely a land-

lord in occupation did not acquire occupancy-rights in the land, and the lessor became entitled to *khas* possession on the expiry of the lease (*Ram Lochan Koeri* v. *Collingridge*, 11 C. W. N., 397).

If a tenant is an occupancy or settled raiyat of some lands in a village he is entitled to right of occupancy in respect of other lands held by him in the same village if he holds them as a raiyat and not in any other capacity. (*Bujrangi Raut* v. *M. H. Mackenzie*, 7 C. L. J., 475).

Accreted lands.—A raiyat who has a right of occupancy has the same right in land accreted to his *jote* as he has in his *jote* (*Gaur Hari Kaibartto* v. *Bhola Kaibartto*, 21 Calc., 233) ; but not if he is a yearly raiyat of *chur* or *dearah* land (*Beni Prasad Koeri* v. *Chaturi Tewari*, 33 Calc., 444).

Urban and suburban lands.—The use of the word "village" in this section shows that no right of occupancy can be acquired under the Act in towns and suburban lands, and it has been held that "there is no authority for the proposition that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants" (*Rakhaldas Addi* v. *Dinomayi Debi*, 16 Calc., 652.) The original Act did not expressly exclude from its operation urban areas except the town of Calcutta (*Hassan Ali* v. *Govinda Lal Basak*, 9 C. W. N., 141.) But see the addition to s. 1 (3), made by s. 3, Act I, B. C., of 1907, p. 2. and Act I, E. B. C., of 1908.

Sub-section (2).—The 2nd March, 1883, is the date on which leave was obtained to introduce into the Council the Bill to amend the Tenancy Act. The object of this sub-section was to prevent raiyats being induced to contract themselves out of their rights during the passing of the Bill through the Council. This object is given further effect to in sec. 178. The provisions of sub-section (2) of section 21 are expressly retrospective and apply to suits pending at the commencement of the Act (*Jogeshar Das* v. *Aisani Koibartto*, 14 Calc., 553 ; *Tapsi Singh* v. *Ram Saran Koeri* 15 Calc., 376).

Veto on contracts barring acquisition of occupancy-rights.—Under sec. 178 (1) (*a*) nothing in any contract between a landlord and tenant made before or after the passing of this Act shall bar in perpetuity the acquisition of an occupancy-right in land. Under sub-sec. (2) nothing in any contract made between a landlord and a tenant since the 15th July, 1880, (the date of the publication of the Rent Commission's Report) and before the passing of this Act shall prevent a raiyat from acquiring in accordance with this Act, an occupancy-right in land ; and under sub-sec. (3) (*a*) nothing in any contract between a landlord and a tenant after

the passing of this Act shall prevent a raiyat from acquiring in accordance with this Act an occupancy right in land.

Effect of acquisition of occupancy-right by landlord.

22. (1) When the immediate landlord of an occupancy-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, such person shall have no right to hold the land as a tenant, but shall hold it as a proprietor or permanent tenure-holder (as the case may be ;) but nothing in this sub-section shall prejudicially affect the rights of any third person.

(2) If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders of the

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"**22.** (1) When the immediate landlord of an occupancy-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, such person shall have no right to hold the land as a raiyat, but shall hold it as a proprietor or permanent tenure-holder (as the case may be ;) but nothing in this sub-section shall prejudicially affect the rights of any third person."

"(2) If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder such person shall have no right to hold the land as a raiyat, but shall hold it as a proprietor or permanent tenure-holder as the case may be, and shall pay to his co-

shares of the rent which may be from time to time payable to them ; and if such transferee sub-lets the land to a third person, such third person shall be deemed to be a tenure-holder or a raiyat, as the case may be, in respect of the land.

Illustration.—*A*, a co-sharer landlord, purchases the occupancy holding of a raiyat *X*. *A* is entitled himself to hold the land on payment to his co-sharers of the shares of the rent payable to them in respect of the holding. *A* sub-lets the land to *Y*, who takes it for the purpose of establishing tenants on it ; *Y* becomes a tenure-holder in respect of the land. Or *A* sub-lets it to *Z*, who takes it for the purpose of cultivating it himself ; *Z* becomes a raiyat in respect of the land.

(3) A person holding land as an ijaradar or farmer of rents shall not, while so holding, acquire [by purchase, or otherwise,] a right of occupancy in any land comprised in his ijara or farm.

Explanation.—A person having a right of occupancy in land does not lose it by subsequently becoming jointly interested sharers a fair and equitable sum for the use and occupation of the same."

"(3) In determining from time to time what is a fair and equitable sum under sub-section (2) regard shall be had to the rent payable by the occupancy raiyat at the time of the transfer and to the principles of this Act regulating the enhancement or reduction of the rents of occupancy raiyats."

"(4) A person holding land as an ijardar or farmer of rents shall not, while so holding, acquire by purchase or otherwise, a right of occupancy in any land comprised in his ijara or farm."

The intention of this section is to carry out the policy of the framers of Act VIII of 1885 and to prevent or discourage the acquisition of occupancy rights by landlords.

Sub-section 2) in the Bengal Act does not clearly extinguish the tenancy or holding and leaves the status and position of the purchasing co-sharer landlord uncertain. The amendment while providing that in respect of his exclusive possession,

ed in the land as proprietor or permanent tenure-holder, or by subsequently holding the land in ijara or farm.

the purchasing landlord shall pay to his co-sharers, the sum which would have been payable from time to time by the occupancy raiyat, is intended to make it clear, that his possession shall be the exclusive possession of a co-sharer proprietor or tenure-holder as the case may be.

As a tenure-holder is a tenant the word raiyat has been substituted for the word tenant in both the sub-sections (1) and (2).

In the Bengal Act the word rent is used for the sum payable by the purchasing co-sharer to the other co-sharers and might lead to an ambiguity as to the status of the former: the present section is so framed as to obviate that difficulty.

Extended to Orissa, (Not., Sep. 10th, 1891].

The words in heavy brackets in this section were added by s. 10, Act I, B. C., 1907. The section as altered for Eastern Bengal will be found in the opposite column.

Sub-section (1).—The rule laid down in this section is analogous to the provisions of section 111, cl. (d), of Act IV of 1882, under which a lease of immoveable 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 right. It is in accordance with the rulings of the High Court in the cases of *Mitrajit Singh* v. *Fitzpatrick*, 11 W. R., 206 ; *Reed* v. *Srikrishna Singh*, 15 W. R., 430 ; *Bul Chand Jha* v. *Lathu Mudi*, 23 W. R., 387 ; *Lal Bahadur Singh* v. *Solano*, 10 Calc., 45 : 12 C. L. R., 559 ; and *Ratha Govind Koer* v. *Rakhal Das Mukhurji*, 12 Calc., 82. But see *contra*, *Umesh Chandra* v. *Raj Narain*, 10 W. R., 15 ; *Rushton* v. *Atkinson*, 11 W. R., 485 and *Savi* v. *Panchanan*, 25 W. R., 503. In *Lal Bahadur Singh* v. *Solano*, it was said that a right of occupancy must be acquired against somebody, and if a raiyat is in possession of the land in a double capacity, both as a raiyat and as a *malik*, it is almost impossible to conceive how he can under these circumstances acquire a right of occupancy against himself. In *Radha Govind Koer* v. *Rakhal Das Mukhurji*, (12 Calc., 82), it was decided that even if the proprietor purchased an occupancy raiyat's land *benami* in the name of a third person, the right was gone ; and in *Piari*

Mohan Mukhurji v. *Badal Chandra Bagdi*, (28 Calc., 205 : 5 C. W. N., 310), it was held that an under-raiyat's lease which was without the landlord's consent and unregistered was invalid, and a landlord purchasing the holding of the raiyat in execution of a decree for arrears of rent was entitled to eject the under-raiyat, who was not protected by this clause. But the contrary was laid down in *Amirulla* v. *Nazir Mahomed*, (31 Calc., 932). This judgment was subsequently withdrawn, as it was discovered that no notice had been served on the heirs of the deceased respondent. But the principles of the judgment were affirmed in *Amirulla* v. *Nazir Mahomed*, (3 C. L. J., 155 : 34 Calc., 104). It was, however, distinguished from in *Badan Chandra Das* v. *Rajeswari Debya*, (2 C. L. J., 570); in which case the plaintiff, a *jotedar* under Government, let out a portion of his jote to a raiyat as *chukanidar*, who again sublet a portion of his holding to the defendant, without the consent of the plaintiff, and otherwise than by a registered instrument. Subsequently, the raiyat having surrendered a portion of his holding, which, he had sublet to the defendant, plaintiff brought this suit for recovery of possession; *held*, sec., 22 did not apply, and the landlord was entitled to *khas* possession and no notice to quit was necessary.

There is no merger in the case of a *patni* interest coming into the same hands as the *zamindari* interest (*Jibanti Nath Khan* v. *Gokul Chandra Chaudhuri*, 19 Calc., 760). The contrary was held in the case of a *patni* interest created after the passing of the Transfer of Property Act (*Promotho Nath Mittra* v. *Kali Chaudhuri*, 28 Calc., 744; see, too, *Prasanna Nath Rai* v. *Jagat Chandra*, 3 C. L. R., 159). When *shikmi* and *mukarari* interests become vested at one time in the same persons, then, whether the *mukarari* lease was a lease for agricultural purposes or not, the *mukarari* interest merges in the superior tenure (*Surja Narain Mandal* v. *Nanda Lal Sinha*, 33 Calc., 1212).

The rights of third persons referred to in this sub-section and in sub-section (2) must be valid rights (*Piari mohan Mukhurji* v. *Badal Chandra Bagdi*, 28 Calc., 205 : 5 C. W. N., 312), and cannot therefore save the rights of a mortgagee from the raiyat who has died without heirs; "otherwise" means, in a similar way (*Mukta Keshi Dasi* v. *Pulin Behari Singh* 13 C. W. N., 12).

Sub-section (2).—In *Gur Baksh Rai* v. *Jeolal Rai*, (16 Calc., 127), in which a tenant had commenced to occupy his holding in 1871 and had purchased a fractional share of the proprietary interest in 1878, it was held on his suing for possession after being dispossessed in May, 1886, that there was nothing in Act VIII, B. C., of 1869 to prevent his acquiring such right, if after his purchase he continued to hold the land as a raiyat, and the relation of landlord and tenant existed between himself and

his co-sharer proprietor, and if the period for which he so held extended for twelve years from the commencement of his holding. In *Sitanath Panda* v. *Palaram Tripati*, (21 Calc, 869), the plaintiff sued for a share of the rent of a *jote*, alleging that it had been purchased by the defendants, who were his co-sharers in the landlord's interest. It was held that the plaintiff was entitled to a decree and it was said that, though the section provides that on the transfer of an occupancy right in land to a person jointly interested in the land as proprietor or permanent tenure-holder, the occupancy right shall cease to exist, "it does not follow that the tenancy will be altogether extinguished. The third person mentioned in the clause must be held to include every person interested other than the transferor and transferee. So that the acquisition of an occupancy right by a proprietor would not affect the right of a co-sharer landlord to receive his share of the rent of the tenancy." In another case, *Jawadul Hak* v. *Ram Das Saha*, (24 Calc., 143 : 1 C. W. N., 166), the plaintiff, who was a co-sharer in a *taluk*, sued for *khas* possession to the extent of his share in a *jote*, in which the defendant had put up to sale and purchased the occupancy right of a tenant, the defendant being the plaintiff's co-sharer in the *taluk* in which the *jote* was situated. The Munshiff before whom the suit first came dismissed the suit, holding that the defendant who had purchased the *jote*, was entitled to hold it as a tenant, and that the plaintiff was accordingly not entitled to *khas* possession of his share. His decision was reversed by the Subordinate Judge, who held that the principal defendant had purchased nothing, the effect of his purchase being to extinguish the entire tenancy. On appeal to the High Court the Subordinate Judge's decision was reversed by Beverly, J., and on appeal under the Letters Patent to a Bench of five Judges the decision of Beverley J., was affirmed. In the judgment of the Bench it was said :—"Sub-section (2) of section 22 of the Tenancy Act provides that if an occupancy-right is transferred to a person jointly interested in the land as a proprietor, the occupancy-right shall cease to exist. It is not said, and the sub-section cannot be understood to mean, that the holding shall cease to exist, but that the occupancy-right which is an incident to the holding shall cease to exist, and there is nothing in the sub-section inconsistent with the continuance of the holding, divested of this right of occupancy which attached to it. The saving clause in the sub-section 'that nothing in it shall prejudicially affect the rights of any third person,' indicates also that the holding would for some purposes at all events, continue to exist."

The ruling in the case of *Jawadul Hak* v. *Ram das Saha*, (24 Calc., 143) was followed in *Miajan* v. *Minnat Ali*, (24 Calc., 521). But in *Ram Saran Poddar* v. *Mahomed Latif*, (3 C. W. N., 62) it was held that,

when a landlord had brought an occupancy holding to sale, had purchased it himself, and settled it with a new raiyat, he could not sell the same occupancy holding again in execution of a decree for arrears of rent of past years. It was said that there was no subsisting right in the old raiyat, which could be sold, and the plaintiff, who purchased at the second sale, had acquired nothing.

In *Girish Chandra Chaudhri* v. *Kedar Chandra Rai*, (27 Calc., 473 ; 4 C. W. N., 569), the case of *Jawadul Hak* v. *Ram Das Saha* was again distinguished from. In this case the plaintiffs and the defendants were the joint owners of a *taluk*, appertaining to which there was a non-transferable occupancy holding. The defendants brought to sale and purchased that holding in execution of a money decree and took possession of the land. The plaintiffs sued to obtain joint possession with the defendants of the land. They were successful in the lower Courts. In second appeal it was argued on the authority *Jawadul Hak* v. *Ram Das Saha* that the occupancy-right was severable from the tenancy right, and that although the occupancy-right could not be sold, the sale and purchase of the tenancy right were good, and that the plaintiff had consequently no right to interfere with the possession of the purchasing defendants. But the appeal was disallowed. "Section 27," it was said, "does not make a non-transferable occupancy holding transferable, when the purchaser happens to be one of the proprietors. That section, read in connection with the other sections of the Act, must be taken to refer to occupancy holdings which are of a transferable character, and the section enacts that when such a holding is transferred to one of the co-proprietors the occupancy-right in the land so transferred shall cease to exist. The decision to which we have been referred merely held that although by the operation of that section the occupancy-right ceased to exist, there might be a good transfer of the holding. Although under the provisions of sec. 22, an occupancy-right may be severable, it is only severable in cases to which that section applies, and cannot be made severable in all cases. Apart from any special provision of law such as is contained in section 22, and is applicable only to the cases referred to in that section, it does not seem possible on any principle to hold that in the case of a non-transferable occupancy holding, the holding can be sold without the right of occupancy, so as to give the transferee a right to retain possession of it." See also *Dilbar Sardar* v. *Husain Ali*, (26 Calc., 553), and *Ramrup Mahto* v. *Manners*, (4 C. L. J., 209). The correctness of the decision in *Jawadul Hak's* case was subsequently affirmed by a Full Bench in *Ram Mohan Pal* v. *Kachu*, (32 Calc., 386 ; 1 C. L. J., 1 ; 9 C. W. N., 249).

Sub-section (3).—Sub-section (3) and the explanation to the section follow the rulings of the High Court in the following cases : (*Gilmore*

v. *Srimant Bhumik*, W. R., Sp. No., 1864, Act X, 77 ; *Watson & Co.* v. *Jogendro Narain Rai.*, 1 W. R., 76 ; *Mokundo Lal Dhobi* v. *Crowdy*, 17 W. R., 274 ; 8 B. L. R., App., 95 ; *Umanath Tewari* v. *Kundan Tewari*, 19 W. R., 177 ; *Savi* v. *Panchanan Rai*, 25 W. R., 503 ; *Ram Saran Sahu* v. *Veryag Mahton*, 25 W. R., 554 ; *Jardine Skinner & Co.* v. *Sarat Sundari Debi*, 3 C. L. R., 140 ; L. R., 5 I. A., 164 ; *Rai Kamal Dasi* v. *Laidley*, 4 Calc., 957).

In a case decided under the Tenancy Act, (*Maseyk* v. *Bhagabati Burmania*, 18 Calc., 121), the question was whether certain persons who had occupied land as raiyats were debarred from acquiring occupancy-rights in it owing to their being *jointly* interested in the land as *ijaradars* or farmers. It was held that they were not.

Alterations made in this section by Act I, B. C., of 1907.—In the Notes on Clauses of the Bengal Tenancy (Amendment) Bill 1906, it was explained that the object of the amendment of section 22 was to counteract the ruling of the High Court in *Jawadul Hak's* case and the Full Bench ruling in *Ram Mohan Pal* v. *Kachu*. "These decisions" it was said, "lay down a rule opposed to the policy of the authors of Act VIII of 1885, which was to discourage the acquisition of occupancy holdings by landlords."

The provisions of sub-section (2) were greatly modified by the Select Committee on the Bill who in their report observe that "the amendments made by them in the section will give effect to the intention of the framers of the Act, by providing 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 sub-letting, bar the acquisition of raiyati rights by the sub-lessees. At the same time, under the section as modified by us, the landlord will not be prevented from cultivating the land himself, though the holding will not become proprietor's private land. We have inserted an illustration to make the meaning of the section quite clear. Our attention has been called to a ruling of the High Court (*Ramrup Mahto* v. *Manners*, 4 C. L. J., 209) to the effect that the word 'acquire,' in sub-section (3) of section 22, does not include 'purchase.' In order to prevent the acquisition of a right of occupancy by an *ijaradar* during the period of his lease through a purchase behind the back of the landlord, we have inserted the words 'by purchase or otherwise' after the word 'acquire.'"

Incidents of occupancy-right.

Incidents of occupancy-right.
Rights of raiyat in respect of use of land.

23. When a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy; but shall not be entitled to cut down trees in contravention of any local custom.

Extended to Orissa, (Not., Sept. 10th, 1891).

Nothing in a contract made after the passing of this Act shall take away or limit the right of an occupancy raiyat to use land as provided by this section [sec. 178 (3) (b)].

Use of land by occupancy raiyats.—In an early case under Act X of 1859 it was said that a raiyat with a right of occupancy might erect a *pukka* house on his land and do what he liked with it so long as he did not injure it to the *zamindar's* detriment (*Nyamatullah* v. *Govind Chandra Dutta*, 6 W. R., Act X, 40). In later cases, however, it was held that a *zamindar* might object to the erection of brick houses on land let for purposes of cultivation, and might by injunction restrain his raiyat from doing anything which would substantially alter the character of the tenure (*Shib Das Bandopadhaya* v. *Baman Das Mukhopadhaya*, 8 B. L. R., 242 : 15 W. R., 360 ; *Jagat Chandra Rai* v. *Ishan Chandra Banurji*, 24 W. R., 220 ; *Lal Sahu* v. *Deo Narayan Singh*, 3 Calc., 781 ; 2 C. L. R., 294). An occupancy raiyat had also no right to excavate a tank on his land (*Tarini Charan Basu* v. *Deb Narain*, 8 B. L. R., App, 69), in contravention of the terms of his lease (*Monindro Chandro Sarcar* v. *Manirudin Biswas*, 11 B. L. R., App., 40 ; 20 W. R., 230), or to dig earth for the purpose of making bricks (*Kadambini Debi* v. *Nabin Chandra Adukh*, 2 W. R., 157 ; *Anand Kumar Mukhurji* v. *Bissonath Banurji*, 17 W. R., 416). If he had a *mukarari* interest in the land, he might build a well or do anything else which did not entirely destroy the land so as to endanger the *zamindar's* ground rent (*Dhipat Singh* v. *Halalkhuri Chaudri*, W. R., Sp. No., 1864, 279). It cannot be laid down as a broad proposition of law that the building of an indigo factory on land let out for agricultural purpose must generally render it unfit for the purpose of the tenancy. It is a question of fact and must depend upon the circumstances of each case. *Hari Mohan Misser* v. *Surendra Narain Singa*, 34 I. A., 133 : 34 Calc., 718 : 11 C. W. N., 794 : 6 C. L. J., 19.

But if a landlord stood by and allowed his tenant to erect *pukka* buildings on the land, he could not turn him out of possession (*Beni Madhab Banurji* v. *Jai Krishna Mukhurji*, 12 W. R., 495 : 7 B. L. R., 152 ; *Sib Das Bandopadhaya* v. *Baman Das Mukhopadhaya*, 8 B. L. R, 242 : 15 W. R., 360). Similarly, if he allowed him to excavate a tank without making any attempt to restrain him (*Kedar Nath Nag* v. *Khettro Pal Sritiratna*, 6 Calc., 34 ; 6 C. L. R, 569), or to build a homestead or use part of the land for tanks or gardens (*Prasanna Kumar Chaturji* v. *Jagan Nath Basak*, 10 C. L. R., 25), or to excavate earth for brick-making (*Nicholl* v. *Tarini Charan Basu*, 23 W. R., 298), or to convert his land into a mango grove (*Naina Misra* v. *Rupikun*, 9 Calc., 609 : 12 C. L. R., 300), he would not be allowed to eject or interfere with him.

Now, an occupancy raiyat's rights in this respect are regulated by secs. 76 and 77 of this Act. Under sec. 77 (1) a raiyat at fixed rates and an occupancy raiyat have a right to make "improvements" in their land, and "improvement" is defined in section 76 (1) to mean any work which adds to the value of the holding, which is suitable to the holding and which is consistent with the purpose for which it was let, such as *e.g.*, wells, tanks, water-channels [76(2)(a)], and suitable dwelling-houses, for the raiyat and his family with all necessary out-offices, [76 (2) (f)]. Under sec. 108, cl. (p) of the Transfer of Property Act, which section however has not yet been extended to agricultural leases (s. 117), a lessee must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes.

Trees.—Under the former law it was decided that, though a tenant had a right to enjoy all the benefits of the growing timber during his occupation, he had no right to cut down the trees and convert the timber to his own use (*Abdul Rahman* v. *Dataram Bashi*, W. R., Sp. No, 1864, 367) ; but he had a right to the possession of trees on his land (*Mahomed Ali* v. *Bolaki Bhagat*, 24 W. R., 330). Now, under the terms of this section a raiyat with a right of occupancy may cut down trees on this land without his landlord's consent, unless there be a custom to the contrary, of which it is for the landlord to give evidence (*Nafar Chandra Pal Chaudhri* v. *Ram Lal Pal*, 22 Calc., 742). As to the ownership of the trees themselves, if the tenant has a perpetual lease at a fixed rent and the lessor has reserved no reversionary interest in the land or the trees growing on it, the lessees are entitled to the ownership of the trees (*Saroda Sundari Debia* v. *Gomi*, 10 W. R., 419 ; *Golak Rani* v. *Nabo Sundari Dasi*, 21 W. R., 344). See also *Harbans Lal* v. *Maharaja of Benares*, (23 All., 126). But in the case of raiyats with only rights of occupancy, according to the decision in *Nafar Chandra Pal Chaudhri* v. *Ram Lal Pal*, and the long series of decisions cited

in that case, the trees are the property of the proprietor of the land on which they grow, though the tenant has a right to enjoy all the benefit that the growing timbers may afford him during his occupancy, and to cut them down subject to a custom to the contrary. But the proprietor's rights are subject to modification or complete extinction by contract and custom. The case of *Nafar Chandra Ghosh* v. *Nand Lal Gosami*, (22 Calc., 751, note) affords an example of the modification of his rights in this respect by custom; for, in this case, it was found that by the custom of the *zamindari*, the *zamindar* was entitled to recover only one-fourth share of the value of the trees cut down by the raiyats, when the raiyats had them cut down without his consent or permission. A different rule has, however, been laid down in the North-West Provinces with regard to the fallen wood of self-sown trees. It has there been held that a *zamindar* claiming a right to the fallen wood of self-sown trees growing on an occupancy holding must prove some custom or contract, by which he is entitled to such wood, there being no general rule in India to the effect that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees (*Nathan* v. *Kamala Kuar*, 13 All., 571). When there was a custom in a village that the raiyats could, when they required fire-wood for the purposes of cremation and on occasion of village feasts, appropriate *agachha* or valueless trees, grown on the land of the raiyats after they had been inducted into possession, with the permission of the *barua* or village headman, and on such permission being asked nothing had to be paid by the raiyats, it was held in a case in which certain *agachha* trees had been cut down without such permission being asked for, that the landlord could have sustained no damage by reason of the acts of the raiyats in cutting and misappropriating the trees (*Samsar Khan* v. *Lochin Das*, 23 Calc., 854.) A tamarind tree is not an *agachha* or shrub (*Nilmani Maitra* v. *Mathura Nath Joardar*, 4 C. W. N., clix: 5 C. L. J., 413). The case of *Man Mohini Gupta* v. *Raghu Nath Misra*, (23 Calc., 209) affords an illustration of a landlord's right in trees being extinguished by contract. In this case, a lease of a mauzah was granted for the express purpose of clearing jungle land and bringing it under cultivation, and it was held that, as there was no reservation in the lease of the right in the trees, the lessee had the right to appropriate them, when cut. A perpetual injunction restraining the defendant from planting trees the roots of which are likely to penetrate the foundation of plaintiff's building and wall, is unworkable (*Lakshmi Narain Banurji* v. *Tara Prasanna Banurji*, 31 Calc, 944).

Obligation of raiyat to pay rent.

24. An occupancy-raiyat shall pay rent for his holding at fair and equitable rates,

Extended to Orissa, (Not., Sept. 10th, 1891).

The expression "fair and equitable rates" is apparently taken from sec. 5 of Act X of 1859 and of Act VIII, B. C., of 1869, which laid down, as is done in sec. 27 of this Act, that the rate previously paid by the raiyat shall be deemed fair and equitable until the contrary is proved.

Protection from eviction except on specified grounds.

25. An occupancy-raiyat shall not be ejected by his landlord from his holding, except in execution of a decree for ejectment passed on the ground—

(*a*) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or

(*b*) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected.

Extended to Orissa, (Not., Sept. 10th, 1891).

Protection from eviction.—Before a tenant can be ejected on the grounds mentioned in clauses (a) and (*b*) of this section, the landlord must serve a *notice* on the tenant specifying the 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; and no suit for ejectment can be brought unless the tenant has failed to comply within a reasonable time with the notice (sec. 155). Under sec. 178, sub-section (1), clause (*c*), nothing in a contract made before or after the passing of the Act shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act. Under the former rent law, it was ruled that, though in strict law a farmer forfeits his lease by the withdrawal of the security given by him at the time of taking the farm, yet cases of forfeiture are not favoured, when no injury has resulted, or where a money compensation is a sufficient remedy (*Alam Chandra Saha* v. *Moran & Co.*, W. R., Sp. No., 1864, Act X, 31). But in another case it was said that parties must be bound by the terms which they have deliberately agreed upon between themselves (*Ram Kumar Bhattacharji* v. *Ram Kumar Sen*, 7 W. R., 132). As to breach of conditions of leases it was decided that in the absence of a provision for the cancelment of a lease, or that the landlord

shall have a right of re-entry on breach of any of its stipulations, a breach does not cancel a lease or give a right to eject (*Augar Singh* v. *Mohini Datta Singh*. 2 W. R., Act X, 101). But when forfeiture is provided as the penalty for the breach of any particular clause, it may be enforced (*Mahomed Faiz Chaudhri* v. *Shib Dulari Tewari*, 16 W. R., 103; *Bir Chandra Manik* v. *Hussain*, 17 W. R., 29); and there is nothing incompatible in the two remedies of damages and forfeiture for breach of the conditions of a lease (*Chandra Nath Misra* v. *Sardar Khan*, 18 W. R., 218). On the expiry of the term of a lease, by which a *ghat* together with certain *jote* lands were let out at a certain annual *jama* for both the *jote* lands and the *ghat*, the defendants held over for many years on the same terms. The plaintiff gave the defendants notice to quit and sued for *khas* possession of the *ghat*: *held*, that the plaintiffs were entitled to *khas* possession of the *ghat* though the defendants were occupancy raiyats as regards the *jote* lands (*Hayes* v. *Ghina Barhi*, 33 Calc., 459). A suit for ejectment of a tenant cannot be maintained, unless the tenancy has been determined, i. e, unless there has been a previous notice to quit or a demand for possession (*Deo Nandan Prosod* v. *Meghu Mahton*, 11 C. W. N., 225). See note "*Determination of relation of landlord and tenant*," at the commencement of Chap. VIII.

Use of land in a manner unfitting it for purposes of tenancy.—In a suit under this Act a tenant was sued for converting land admittedly let for agricultural purposes into an orchard, and he was held to have used it in a manner unfitting it for the purposes of the tenancy and to be liable to ejectment (*Saman Gope* v. *Raghubar Ojha*, 24 Calc., 160: 1 C. W. N., 223). Whether the building of an indigo factory on a portion of land let out for agricultural purposes, renders the land unfit for the purposes of the tenancy depends upon the circumstances of the individual case and is a question of fact (*Hari Mohan Misser* v. *Surendra Narain Sing*, 6 C. L. J., 19: 11 C. W. N., 794: 34 Cal., 718 P. C.)

Denial by tenant of his landlord's title no ground of forfeiture or ejectment.—The denial by a tenant of his landlord's title is no ground of forfeiture of his tenancy under the Tenancy Act, as under the former law, and he cannot now be ejected for this reason (*Debiruddin* v. *Abdur Rahim*, 17 Calc., 196; *Dhora Kairi* v. *Ram jewan Khairi Mahatan*, 20 Calc., 101). This is still the law in districts in which Act VIII, B. C., of 1869 prevails, but a denial in the written statement would not operate as a forfeiture (*Nijamudin* v. *Mamtajudin*, 28 Calc., 135: 5 C. W. N., 263). But the rule that the denial of the relation of landlord and tenant does not operate as a forfeiture, does not apply when the defendants have denied in a previous suit that they were the plaintiff's ten-

ants, and when that denial has been given effect to by a decree of Court. When it has been found that the land belongs to the plaintiffs, and in the previous suit it was found that the defendants were not the plaintiffs' tenants, the defendants have no right to remain on the land, and the plaintiffs are entitled to *khas* possession (*Nil Madhub Basu* v. *Anant Ram Bagdi*, 2 C. W. N., 755 ; *Faiz Dhali* v. *Aftabuddin*, 6 C. W. N., 575 ; *Haranath Chakravarti* v. *Kamini Kumar Chakravartti*, 3 C. L. J., 25*n* ; *Ramgati* v. *Pran Hari Seal*. 3 C. L. J., 201). But the correctness of these decisions was doubted in *Mallikadari* v. *Makham Lal Chaudhuri*, 2 C. L. J., 389 : 9 C. W. N., 928,) in which it was laid down that the doctrine of forfeiture by disclaimer of landlord's title does not apply to raiyati tenancies governed by the Bengal Tenancy Act and the principal of estoppel cannot be applied to make the doctrine of forfeiture indirectly applicable to such tenancies. A tenant defendant, who sets up an adverse title in himself, may be estopped from setting up an occupancy right in appeal (*Satya Bhama Dasi* v. *Krishna Chandra Chatturji*, 6 Calc., 55). See also *Sujjad Ahmad Chaudhuri* v. *Ganga Charan Ghosh*, (1 C. L. J., 116 : 9 C. W. N., 460.) A lessee of a service tenure incurs a forfeiture of his tenancy by denial of his landlord's title and the landlord would be entitled to eject him, if he declared by some act or other, antecedent to the institution of the suit, his intention to determine the tenancy. Notice to quit in such a case is not necessary. Such a case falls within the Transfer of Property Act (*Anandamoyi* v. *Lakhi Chandra Mitra*, 33 Calc., 339). Nor is a notice to quit necessary for the ejectment of a tenant whose denial of the relation of landlord and tenant, succeeded in defeating a previous suit by the landlord (*Khater Mistri* v. *Sadruddi*, 34 Calc., 922). As to what would constitute a sufficient denial, see *Mathewson* v. *Jadu Mahto* (12 C. W. N., 525) where the denial of plaintiff's title as landlord, while admitting that the defendant was a tenant of the land, was not considered a sufficient disclaimer.

Now, a tenant who renounces his character as a tenant of the landlord by setting up, without reasonable or probable cause, title in a third person or himself, is liable to have a decree for damages passed against him. See the new section 186 A, added by s. 57, Act I, B. C., 1907 and Act I, E. B. C., 1908.

Non-payment of rent.—An occupancy raiyat cannot be ejected for arrears of rent ; but his holding can be sold in execution of a decree for the rent thereof (sec. 65). Section 6 of Act X of 1859 and Act VIII, B. C., of 1869 provided that a raiyat had an occupancy right in land "so long as he paid the rent payable on account of the same." It was, accordingly held that, though non-payment of rent did not bar the acquisition of an occupancy right, payment of rent was necessary to

maintain it, and non-payment rendered a raiyat liable to be evicted (*Narain Rai* v. *Opnit Misra* 9 Cal., 304 : 11 C. L. R., 417). So, where a raiyat had been dispossessed and had failed to pay rent for five or six years, it was held in a suit by him for possession that he had no subsisting right of occupancy (*Hem Chandra Chaudhuri* v. *Chand Akund*, 12 Calc., 115). In another case, however, it was said that mere non-payment of rent did not necessarily amount to a forfeiture of the right of occupancy (*Masyatulla* v. *Nurzahan*, 9 Calc., 808 : 12 C. L. R., 389), and in a case in which the decision in *Hem Chandra Chaudhuri* v. *Chand Akund* was specially considered, it was said that, though non-cultivation of the land, coupled with non-payment of the rent, might be sufficient to justify the conclusion that the tenant had relinquished the land, mere non-payment of rent was not in itself sufficient to show that there was no subsisting right of occupancy (*Nilmoni Dasi* v. *Sonatan Doshayi*, 15 Calc., 17). When the relation of landlord and tenant has once been proved to exist, mere non-payment, though for many years, is not sufficient to show that it has ceased. A tenant who alleges this must prove it, particularly if he is in possession of the land (*Rango Lal Mandal* v. *Abdul Ghafur*, 4 Calc., 314 : 3 C. L. R., 119). See note, p. 26. Non-payment of rent will not relieve an occupancy raiyat of his status of tenant so as to give him a title to the land (*Poresh Narain Rai* v. *Kashi Chandra Talukdar*, 4 Calc., 661). Nor does it do so, even when coupled with the fact that the landlords never recognised him as a tenant (*Ambika Sundari Guha* v. *Dino Nath Sen*, 9 C. W. N., ccxxxix).

Transfer not void.—The transfer of an occupancy holding which is not transferable by local custom or usage is not a void transaction. It is voidable by the landlord but binding between the parties and their privies (*Haridas Banerjee* v. *Udoy Chandra*, 12 C. W. N., 1086).

Invalid transfer of a whole or part of holding.—The sale or parting with the whole or part of a holding is not a ground of forfeiture according to the Tenancy Act, and so where a raiyat had sold half of his holding but remained in possession of the other half, and when the rent of the whole of the holding had been deposited in the Collectorate to the credit of the landlord, it was held that he was not liable to be ejected (*Kabil Sardar* v. *Chandra Nath Chaudhri*, 20 Calc., 590). See also *Bansi Das* v. *Jagdip Narain Chaudhri*, 24 Calc., 152 ; *Durga Prasad Sen* v. *Daula Ghazi*, 1 C. W. N., 160 ; *Gozaffar Hussain* v. *Dalgleish*, 1 C.W.N., 162 ; *Kissen Pertab Sahi* v. *Tripe*, 2 C. W. N., cliv ; and *Kamaleshwari Prasad Singh* v. *Haraballabh Narain Singh*, 2 C. L. J., 369. Where there are several tenants of a holding and each of them holds a separate portion, each such portion should not be treated as a separate holding and a transfer of one of such portions will not operate as an

abandonment which will entitle the landlord to re-enter that portion (*Satis Chandra* v. *Bejoy Kumar*, 13 C. W. N., cxx). But if a tenant transfers his holding, ceases to pay rent for it and accepts a new tenancy from the transferee, the landlord is entitled to eject the transferee as a trespasser (*Kali Nath Chakravarti* v. *Upendra Chandra Chaudhri*, 24 Calc., 212 : 1 C. W. N., 163 ; *Samujan Rai* v. *Mahatan*, 4 C. W. N., 493). See also *Dwarka Nath Misra* v. *Harish Chandra*, (4 Calc., 925) ; *Sristidhar Biswas* v. *Madan Sardar*, (9 Calc., 648) ; *Pratap Chandra Das* v. *Kamala Kanta Saha*, (4 C. L. J., 13 n) ; and *Harihar Mukhurji* v. *Jadu Nath Ghosh*, (7 W. R., 114), in which last mentioned case it was said that a tenant having a right of occupancy cannot create a tenure intermediate between himself and the *zamindar*. But if the tenant after selling his non-transferable holding, resides on the property and cultivates it for sometime and then goes to reside elsewhere, the rent being paid in his name, there is no abandonment and the landlord can not re-enter (*Mathura Mandal* v. *Ganga Charan Gope*, 33 Calc., 1219, Rampini J. dissenting). So, under the old law a mere invalid transfer of a non-transferable holding did not give a *zamindar* a right to take actual possession, so long as the rent was paid by the recorded tenant or his heirs and not by a stranger (*Jai Krishna Mukhurji* v. *Raj Krishna Mukhurji*, 5 W. R., 147). Nor did it work a forfeiture of the tenancy (*Gora Chand Mostafi* v. *Baroda Prasad Mostafi*, 11 W. R., 94 : 13 B. L. R., 279 note ; *Saddai Parira* v. *Baistab Parira*, 15 W. R., 261 : 12 B. L. R., 84 note ; *Dwarka Nath Misra* v. *Kanai Sirdar*, 16 W. R., 111). But when an occupancy raiyat sold his holding, gave up possession and disclaimed all interest in it, his right of occupancy ceased and the landlord could eject the purchaser (*Hara Mohan Mukhurji* v. *Chintamani Rai*, 2 W. R., Act X, 19 ; *Harihar Mukhurji* v. *Jadu Nath Ghosh*, 7 W. R., 114 ; *Durga Sundari* v. *Brindaban Chandra Sarkar*, 11 W. R., 162 ; *Suhodra* v. *Smith*, 20 W. R., 139 : 12 B. L. R., 82 ; *Narendra Narain Rai* v. *Ishan Chandra Sen*, 22 W. R., 22 : 13 B. L. R., 274 ; *Ram Chandra Rai* v. *Bhola Nath Lashkar*, 22 W. R., 200). So, also, if an occcupancy raiyat not authorised to transfer his holding creates a usufructuary mortgage of it, the landlord is entitled to eject him (*Krishna Chandra Datta* v. *Kishori*, 10 C. W. N., 499 : 3 C. L. J., 222 ; *Rasik Lal Datta* v. *Bidhu Mukhi Dasi*, 33 Calc., 1094 : 4 C. L. J., 406 : 10 C. W. N., 719 ; *Rajendra Kishore* v. *Chandra Nath*, 12 C. W. N., 878). The mortgagee of a portion of a non-transferable occupancy holding can maintain a suit against the landlord and his mortgagor for a declaration that a decree for rent obtained by the former against the latter was fraudulent and collusive (*Brahamdeo Narain Singh* v. *Ramdawn Singh*, 12 C. W. N., clxxvi). But if the landlord purchases such a holding in execution of a money decree he will not

be estopped from opposing the suit of a mortgagee from the raiyat (*Asmatunnissa Khatoon* v. *Harendra Lal Biswas*, 35 Calc., 904 : 12 C. W. N., 721 : 8 C. L. J., 29). But where defendants 2 and 3, who had a non-transferable occupancy holding sold it to defendant No. 1, and took an underlease from the latter, it was held that the landlord was entitled to get a decree for possession against defendant No. 1, and was not entitled to get *khas* possession against defendants 2 and 3, but only to receive rent from them (*Dina Nath Rai* v. *Krishna Bijai Saha*, 9 C. W. N., 379). This was followed in *Madar Mandal* v. *Mahima Chandra Mazumdar*, (33 Calc., 531 : 3 C. L. J., 343), in which it was ruled that the mere sale of a right of occupancy to a third person, notwithstanding that the vendors remain in occupation under a sub-lease from the purchaser, does not amount to abandonment or entitle the landlord to eject the original tenants. See also *Nadhu Mandal* v. *Kartik Mandal*, (9 C. W. N., 56). But when a raiyat transferred a non-transferable holding to a third person, took a sub-lease from his transferee and refused to pay rent to his landlord, as before, and when dispossessed sought to recover possession not under his former right as raiyat, but as under-raiyat of his transferee, and persisted in refusing to pay rent to his landlord, it was held that he was not entitled to recover possession (*Rajani Kant Biswas* v. *Ekkari Das*, 7 C. L. J., 78 : 34 Calc. 689).

A landlord cannot sue his tenants for the rent of a holding and at the same time sue a *zar-peshgidar* for the same on the ground that the *zar-peshgidar* is in possession of a portion of the same (*Ramadas* v. *Thakurdas*, 1 C. L. J., 136.)

Representative.—It has been held, however, that a purchaser of a non-transferable occupancy holding is a representative of the raiyat and can, as such, maintain an application for setting aside a sale for arrears of rent at the instance of the landlord (*Haradhan Rakhit* v. *Girish Chandra Mukerjee*, 13 C. W. N., 98 : 8 C. L. J., 327). But see *Prasanna Kumar Middar* v. *Bama Charan Mandal* 9 C. L. J., 68 *n*. See also "Representative" pp. 123 and 124.

Onus of proof.—When the plaintiff sued for ejectment and it was disputed whether the land was agricultural, it was held that the onus lay on the defendant, (1) because the lands were situate within a Municipality, and, (2) because he was a tenant and sought exemption from ejectment (*Sashi Bhusan Mukhurjee* v. *Sriram Samanta*, 10 C. W. N., cclxxxviii).

Annual tenancy. Notice to quit.—To determine an annual tenancy the notice should require the tenant to quit at the end of the year of the tenancy (*Hemangini Chaudhurani* v. *Srigobind Chaudhury*, 6 C. W. N., 69 : 29 Calc., 203).

Co-sharer landlords.—A co-sharer landlord cannot eject a tenant even in respect of his own share, or in case of a service holding, maintain a suit for the *khas* possession of his own share (*Ghulam Mohiuddin* v. *Khairan*, 8 C. W. N., 325).

Limitation.—The period of limitation for ejectment under clause (a) of this section is two years under art. 32, Sch. I of the Limitation Act (*Soman Gope* v. *Raghubar Ojha*, 24 Calc., 160 : 1 C. W. N., 223 ; *Sarup Das* v. *Jageswar Rai*, 26 Calc., 564 : 3 C. W. N., 464). The period of limitation for a suit for ejectment under clause (b) of this section is one year under art. 1, Sch. III, appended to this Act.

Devolution of occupancy-right on death.

26. If a raiyat dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immoveable property ; provided that in any case in which under the law of inheritance to which the raiyat is subject his other property goes to the Crown, his right of occupancy shall be extinguished.

Extended to Orissa (Not. Sept. 10th, 1891).

Heritability of occupancy-rights.—There can be no question now as the heritability of occupancy rights. See note to sec. 20, sub-section (3) and *Ananda Kumar Naskar* v. *Hari Das Haldar*, (27 Calc., 545: 4 C. W. N., 608). Formerly, notwithstanding the provisions of sec. 6 of Act X of 1859 and Act VIII, B C., of 1869, doubts were expressed by Peacock, C. J., as to their heritability (*Ajudha Prasad* v. *Imambandi Begam*, 7 W. R., 528), and in one case it was decided that on the death of an occupant raiyat the *zamindar* could let the land to whom he pleased and that a distant relation of the deceased raiyat was not entitled to succeed by inheritance (*Jati Ram Sarmah* v. *Munglu Surmah*, 8 W. R., 60). There can not be a partial acceptance or renunciation of an inheritance, nor can one of several heirs accept a part only of an inheritance to the prejudice of the other heirs and of the creditors of the deceased. An acceptance in part has the effect of an acceptance of the whole, and carries with it the same liability (*Moazam Hassain* v. *Bhauddin*, 5 C. W. N., 189).

Liability of heirs of occupancy raiyats.—Under the present Act, it has been held that "inasmuch as heirs of a raiyat who may have died intestate having rights of occupancy, succeed to his holding, and inasmuch as a raiyat is bound to pay rent unless he surrenders in the manner prescribed by section 86, the heirs are liable to pay rent whether they hold

the lands or not. The *zamindar* would not be at liberty to occupy the lands of such a tenant, unless he has obtained from the heirs something amounting to an actual surrender, and unless he has himself proceeded in the manner prescribed by section 87. Therefore, heirs of a deceased dying intestate, having rights of occupancy, are entitled to hold until they have, expressly, or in a manner from which a surrender may be presumed, as is stated in sec. 86, relieved themselves from such liability, and unless they have surrendered or done something from which a surrender in the terms of section 86 can be presumed, they are liable for the rent. Non-cultivation of the land does not necessarily amount to a surrender" (*Peari Mohan Mukherji* v. *Kumaris Chandra Sarcar*, 19 Calc., 790). But the Allahabad High Court in *Lekhraj Sing* v. *Rai Singh*, (14 All., 381) has decided that it is only an occupancy raiyat in possession *who has accepted the occupancy holding* that is liable to be sued for arrears of rent which accrued during the lifetime of the person from whom the right of occupancy has devolved upon him. In his judgment in this case, Edge, C. J., observed :—"The person on whom the right of occupancy devolves is not bound to accept the tenancy, but if he does accept it, he, in my opinion, must accept it subject to its burdens, and one of these burdens is the legal liability to pay the rent which is in arrear." Knox, J., also pointed out that the person who had succeeded to the position of tenant might plead as answer to a suit for arrears that he was not the tenant of the plaintiff and had never attorned to him.

Decrees for arrears of rent obtained against a Hindu widow are personal debts, payment of which can be enforced only against the property left by her, and not against her husband's estate which has passed to the next heirs (*Krishto Gobind Mozumdar* v. *Hem Chandra Chaudri*, 16 Calc., 511). But they are a first charge on the tenure or holding on which they have accrued and may be executed against it (sec. 65).

Whether occupancy rights can be bequeathed.—Neither in this section nor in any other section of the Act is there any provision, analogous to that in section 11 in regard to permanent tenures, authorizing the testamentary bequest of occupancy holdings. From clause (*d*) sub-section (3) of section 178, which provides that nothing in any contract made between a landlord and tenant after the passing of this Act shall take away the right of a raiyat to bequeath his holding in accordance with local usage, it would seem that the framers of the Act intended the matter to be regulated by the provisions of section 183. If a will is made the heirs of the raiyat will be bound by the same (*Haridas Bairagi* v. *Udoy Chandra Das* 12 C. W. N, 1086 : 8 C. L. J., 261).

Failure of heirs—On a failure of heirs occupancy rights under this section are extinguished, in which respect they differ from tenures

which in similar circumstances escheat to the Crown. See note to section 17, p. 79.

Encumbrances—created by the raiyat become extinct upon his death without heirs (*Muktakeshi Dasi* v. *Pulin Behari Singh* 13 C. W. N. 12).

Occupancy rights transferable by custom.—This chapter contains no provision as to the transferability or non-transferability of occupancy rights. The question has been left to be decided by custom. Sir Steuart Bayley, when moving that the report of the Select Committee on the Bengal Tenancy Bill should be taken in consideration, on this point observed :—"Turning now to the incidents attached to the right of occupancy it will be seen that we have made a most important change in regard to one of these incidents—transferability. Instead of legalising it and regulating it by law, we have left it everywhere to custom." This has been effected by the provisions of section 183, which make the whole Act subject to "custom, usage and customary right," except so far as inconsistent with, or expressly or by necessary implication abolished by its provisions. The application of "usage" to the transferability of occupancy rights is emphasized by illustration 1 to section 183, which is to the effect that "a usage, under which a raiyat is entitled to sell his holding without the consent of his landlord, is not inconsistent with, and is not expressly or by necessary implication modified or abolished by the provisions of this Act. That usage, accordingly, wherever it may exist, will not be affected by this Act."

Moreover, by clause (*d*,) sub-section (3), section 178 of this Act, it is provided that nothing contained in any contract made between a landlord and a tenant after the passing of this Act shall take away the right of a raiyat to transfer his holding in accordance with local usage. Accordingly, in *Palakdhari Rai* v. *Manners*, (23 Calc., 179), decided under the Tenancy Act, and in which the defendants to whom certain occupancy holdings had been tranferred pleaded that they were transferable by custom or usage, it was held with reference to this illustration that a transfer in accordance with usage was valid, even without the consent of the landlord. In this case, the observation of their lordships of the Privy Council in *Jaggamohan Ghosh* v. *Manik Chand* (7 Mco. I. A., 263) on the subject of "mercantile usage" to the effect that "mercantile usage needs not the antiquity, the uniformity or the notoriety of custom," and that "it is enough if it appears to be so well-known and acquiesced in that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract" were referred to and it was said that "in applying this case, it must be borne in mind that it relates to a usage in dealing in a particular class of mercantile transactions and

contracts made in the course of such business. Consequently, in introducing these principles in the present case, which does not relate to contracts entered into between parties to the litigation, but affects a third party, the landlord, it would be necessary to prove the existence of the usage on his estate, or that it was so prevalent in the neighbourhood that it can be reasonably presumed to exist on that estate." In this case it was further pointed out that under both Act X of 1859 and Act VIII, B. C., of 1869, "occupancy rights were not transferable against the will of the landlord save by custom, not mere usage." "The Courts held" it was said, "that the custom of the country or the locality alone conferred the right of transfer of such holdings without the consent of the landlord. Sales of such holdings in execution of decree against such tenants used occasionally to be held. When they were held at the instance of the landlord as decree-holder, the transfer so affected would be with his consent, but when the sales were in execution of decrees by third parties, the right of transfer without such consent was generally disputed." Rulings under the law in which it has been admitted or held that occupancy rights are transferable by custom will be found in *Haro Mohan Mukhurji* v. *Lalan Mani Dasi*, 1 W. R., 5 ; *Jagat Chandra Rai* v. *Ram Narain Bhattacharji*, 1 W. R., 126 ; *Jai Krishna Mukherji* v. *Raj Krishna Mukhurji*, 1 W. R., 153 ; and *Sriram Basu* v. *Bissonath Ghosh*, 3 W. R , Act X, 3. Rulings to the effect that occupancy rights are not transferable save by custom are to be found in *Sriram Basu* v. *Bissonath Ghosh*, 3 W. R., Act X, 3 ; *Ajudhya Prosad* v. *Imambandi Begam*, 7 W. R., 528, (a Full Bench decision, overruling that in *Tara Mani Dasi* v. *Biressar Mazumdar*, 1 W. R., 86); *Durga Sundari* v. *Brindaban Chandra Sircar*, 11 W. R., 162 : 2 B. L. R., App., 37 ; *Nanku Ray* v. *Mahabir Prosad*, 11 W. R., 405 : 3 B. L. R., App., 35 ; *Annapurna Dasi* v. *Uma Charan Das*, 18 W. R., 55 ; *Snankarpatti Thakurani* v. *Saifullah Khan*, 18 W. R., 507 ; *Buti Singh* v. *Murat Singh*, 20 W. R., 478 : 13 B. L. R., 284 note ; *Narendro Narain Rai* v. *Ishan Chandra Sen*, 22 W. R., 22 : 13 B. L. R., 274. Their lordships of the Privy Council have also recently held that under the old rent law a right of occupancy cannot be transferred (*Chandrabati Koer* v. *Harrington*, 18 Calc., 349 : L. R., 18 I. A., 27).

Transfer piecemeal.—But the existence of a custom in a particular district by which rights of occupancy in such district are transferable will not justify the holder of such a right of occupancy in sub-dividing his tenure and transferring different parts of it to different persons ; and in case of such transfer the *zamindar* is entitled to treat the transferees as trespassers and eject them (*Tirthanand Thakur* v. *Mati Lal Misra*, 3 Calc., 774). See note pp. 115, 116, 117 and notes to sec. 183—"*Proof of custom*," and "*usage*."

Occupancy rights, not transferable by custom, do not pass at execution sales.—It is sometimes contended that, though there may be no custom or usage under which occupancy rights are transferable, they may yet pass at execution sales, and that such transfers, though not valid against the landlord, will yet be valid as against the former tenant. This, however, does not appear to be the law. Thus, in *Kripa Nath Chaki* v. *Dyal Chand Pal* (22 W. R., 169), it was ruled that the sale of a *jote* in execution of a decree against a *jotedar* does not prove it to be transferable, nor does the purchaser acquire a right of occupancy by his purchase where the right is not dependent on custom, but is a mere creation of the rent law. Then, in *Dwarka Nath Misra* v. *Haris Chandra* (4 Calc., 925), it was held that the right of occupancy acquired by a cultivating raiyat under sec. 6 of Bengal Act VIII of 1869, cannot be transferred either by a voluntary sale or gift or in execution of a decree, and that "there is no ground for distinguishing a voluntary sale from a sale in execution; for, if a sale by private contract would validly pass it, then a sale in execution would equally pass it, and *vice versâ*". The same was held in *Bhiram Ali* v. *Gopi Nath Saha* (24 Calc., 355 : 1 C. W. N., 396), in which it was ruled that "in the absence of custom or local usage to the contrary, a raiyati holding, in which the raiyat has only a right of occupancy, is not saleable at the instance of the occupancy raiyat or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent." See also *Piari Mohan Mukhurji* v. *Jati Kumar Mukhurji* (11 C. W. N., 83). In a subsequent case, *Basarat Mandal* v. *Sabulla Mandal* (2 C. W. N., cclxxix) in which *Bhiram Ali* v. *Gopi Nath Saha*, was cited, it was held that the question of transferability was one which might be raised by the landlord, but could not be legitimately raised by a trespasser, and it was said that the plaintiff in this case having purchased the tenant right, whatever its precise nature, it had a market value and was capable of being recognized by the landlord. The plaintiff had therefore a right to be protected in the enjoyment of his purchase against all the world, except possibly his landlord. See also *Ambika Nath Acharji* v. *Aditya Nath Maitra* (6 C. W. N., 624) and *Narain* v. *Dinabandhu* 9 C. L. J., 82*n*). But in *Durga Charan Mandal* v. *Kali Prosana Sircar* (26 Cal., 727 : 3 C. W. N., 586), *Bhiram Ali* v. *Gopi Nath Saha*, was followed and it was held (1) that an occupancy holding not transferable by custom, as also the interest of the judgment-debtor in such holding, are not saleable in execution of a decree for rent obtained by certain co-sharer landlords; (2) that a judgment-debtor may raise such an objection, and (3) that the confirmation of the sale was no bar to the raising of such

an objection. See also *Sitanath Chaturji* v. *Atmaram Kar* (4 C. W. N., 571). But in another case, the defendant had owned a non-transferable holding, which was sold in execution of a decree against him, and one K was the purchaser; K transferred his interest and the transferee sued for possession: *held* that the defendant having had full knowledge of the execution proceedings and not having objected to the sale, was not competent to resist the purchaser after confirmation of sale (*Murulla* v. *Burullah*, 9 C. W. N., 972). In *Majid Hossein* v. *Raghubar Chaudhri*, (27 Calc., 187), it has been decided that, when an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor is entitled under s. 244, C. P. C., to raise the question as to whether the holding is saleable by custom or usage, and to have that question determined by the Court executing the decree. In a suit for recovery of *khas* possession by the plaintiff who had purchased an occupancy holding in execution of a mortgage decree, the defendant claimed under a lease from a co-sharer landlord who also had purchased the holding in execution of a decree for his share of the rent: *Held*, that the question of the transferability of the holding did not arise (*Ayenuddin Nasya* v. *Srish Chandra Banurji*, 11 C. W. N., 76). When plaintiff had purchased a holding with the consent of the landlord, the question whether the holding was transferable by custom or usage without the consent of the landlord did not properly arise (*Bibijan* v. *Kishori Mohan Bandopadhya*, 11 C. W. N., clix). See also *Gauhar Khalifa* v. *Kasimudin* (4 C. W. N., 557) and *Durga Charan Agradani* v. *Karamat Khan*, (7 C. W. N., 607). A sale in execution of a money decree of an occupancy holding not transferable by custom is valid and effectual, if the sale is held with the consent of the landlord (*Ananda Das* v. *Ratnakar Panda*, 7 C. W. N., 572), or if a settlement is made by the landlord with the purchaser as soon as can be reasonably expected after the sale (*Dwarka Nath Pal* v. *Tarini Sankar Rai*, 5 C. L. J., 289: 34 Calc., 199: 11 C. W. N., 513). But when a non-transferable holding is sold by a tenant by a *kabala*, he is estopped from setting up the invalidity of the sale by him (*Bhagiraih Changa* v. *Hafizudin*, 4 C. W. N., 679). So also in the case of a mortgagor (*Krishna Lal Saha* v. *Bhairab Chandra*, 2 C. L. J., 19*n*). A non-transferable occupancy holding cannot be sold in execution of a decree obtained by an *ijaradar* of a fractional sharer for the share of the rent separately payable to him so as to pass the holding (*Sadagar Sarkar* v. *Krishna Chandra Nath*, 3 C. W. N., 742; *Jarip* v. *Ram Kumar De*, 3 C. W. N., 747).

Representative.—The question whether a purchaser of a part or the whole of a non-transferable occupancy holding is a representative of the judgment-debtor within the meaning of sec. 244 of the Code of

Civil Procedure, or a person whose immoveable property has been sold within the meaning of secs. 310A. and 311 of the Code of Civil Procedure, has given rise to some conflict of opinion and the matter is now under consideration by a Full Bench. See Appeal From Order No. 455 of 1907, referred to the Full Bench on the 14th July 1909. (Compare—*Srimati Nessa Bibi* v. *Radha Kisore Manikya*, 11 C. W. N., 312; *Bhiram Ali Shekh Sikdar* v. *Gopikant Shaha*, 24 Calc., 355; *Kuldip Singh* v. *Gillanders*, 26 Calc., 615 and *Sadagar Sarkar* v. *Krisna Chandra Nath*, 26 Calc., 937, on the one hand and in support of the negative, and on the other hand in support of the affirmative see *Bhagirath Changa* v. *Sheikh Hafizuddin*, 4 C. W. N., 679; *Ambika Nath Acharya* v. *Aditya Nath Maitra* 6 C. W. N., 624; *Ayenuddin Nasya* v. *Grish Chandra Banerjee* 11 C. W. N., 76; *Kabil Sardar* v. *Chandra Nath Nag Choudhuri*, 20 Calc., 590; *Durga Prosad Sen* v. *Doula Gazee*, 1 C. W. N., 160; *Sheikh Gozaffer Hossain*, v. *E. Dalgleish*, 1 C. W. N., 162; *Umar Ali Majhi* v. *Munshi Basiruddin Ahmed*, 7 C. L. J., 282; *Kunja Behari Mandal* v. *Sambhu Charan Roy*, 8 C. W. N., 232; *Bansidhar* v. *Kedar Nath*, 1 C. W. N., 114; *Asgar Ali Khan* v. *Asabuddin Kazi*, 9 C. W. N., 134; *Haradhan Rakhit* v. *Grish Chunder Mukerjee*, 13 C. W. N., 98.)

Onus and proof of transferability. The onus of proof of the transferability of an occupancy right is upon the person who alleges it to be transferable (*Shankarpatti Thakurani* v. *Saifullah Khan*, 18 W. R., 507; *Kirpamayi Debi* v. *Durga Govind Sarkar*, 15 Calc., 89; *Madhu Sudan Sen* v. *Kamini Kanta Sen*, 9 C. W. N., 895: 32 Calc., 1023). If the usage of transferability is set up, it is necessary to prove its existence on the estate of the landlord or that it is so prevalent in the neighbourhood that it can be reasonably presumed to exist on that estate (*Palakdhari Rai* v. *Manners*, 23 Calc., 179). To prove a custom or usage of transferability, it is not sufficient to show that such holdings are sold in the village or neighbouring villages. The essence of such a usage is that transfers made to the knowledge of, but without the consent of, the landlord, are valid and must be recognised by him (*Piari Mohan Mukharji* v. *Jati Kumar Mukharji*, 11 C. W. N., 83). A transfer of an occupancy holding cannot be justified by local usage, which is still growing up. The usage should have ripened into maturity (*Ramhari Singh* v. *Jabbar Ali*, 6 C. W. N., 861). The recognition by the landlord of a raiyat as a tenant of a portion of a holding is not sufficient to prove the custom of transferability (*Ganesh Das* v. *Ram Pratab Singh*, 5 C. W. N., clxxv). Where the lower appellate Court said: "There is abundant evidence on the record to show that such lands are actually sold in the neighbourhood, and the *kabalas* filed in this

case support this fact" : *held*, that this did not amount to a finding of a local usage (*Dinonath Ghosh* v. *Nobin Chandra Ghosh*, 6 C. W. N., 181).

Transfers of occupancy rights when transferable by custom how to be effected.—As already pointed out in the note to sec. 3, sub-sec. (18), pp. 42, 43, the sale or transfer of tangible immoveable property can, under sec. 54 of the Transfer of Property Act, be effected, if the property is worth Rs. 100, and upwards, by a registered deed of sale, or if worth less than Rs. 100, by a registered deed of sale or by delivery of the property. This will apply to the sale of occupancy holdings. No registration of the transfer in the landlord's *serishta* is required to be made and no suit to obtain such registration in now maintainable (*Ambika Prasad Chaudhri* v. *Keshri Sahai*, 24 Calc., 642). The provisions of secs. 12 to 16 of the Act apply only to permanent tenure-holders and raiyats holding at fixed rates, but under sec. 73 of this Act, when an occupancy raiyat transfers his holding without the consent of his landlord, the transferor and transferee are jointly and severally liable to the landlord for arrears of rent accruing after the transfer until notice of the transfer is given to the landlord. Under the old law, transfers of ordinary raiyati holdings did not require to be registered in the landlord's *serishta* (*Tara Mani Dasi* v. *Bireshsar Mazumdar*, 1 W. R., 86 ; *Haro Mohan Mukhurji* v. *Chintamoni Rai*, 2 W. R., Act X, 19 ; *Karu Lal Thakur* v. *Lachmipat Dugar*, 7 W. R., 15 ; *Uma Charan Sett* v. *Hari Prasad Misra*, 10 W. R., 101 ; *Jai Krishna Mukhurji* v. *Durga Narain Nag*, 11 W. R., 348), and in the case of a holding transferable by custom, the receipt of rent from the transferee by the landlord with knowledge of the transfer puts an end to the connection of the transferor with the holding (*Abdul Aziz Khan* v. *Ahmed Ali*, 14 Calc., 795).

Receipt of rent from transferee of non-transferable holding validates transfer.—It is clear that the receipt of rent by a landlord from the transferee of a holding not transferable by custom will validate the transfer (*Nobo Kumar Ghosh* v. *Krishna Chandra Banurji*, W. R., Sp. No., 1864, Act X, 112 ; *Mritanjai Sirkar* v. *Gopal Chandra Sarkar*, 10 W. R., 466 ; *Bharat Rai* v. *Ganga Narain Mahapatra*, 14 W. R., 211 ; *Allender* v. *Dwarkanath Rai*, 15 W. R., 320 ; *Amin Baksh* v. *Bhairo Mandal*, 22 W. R., 493 ; *Hamid Ali Chaudhuri* v. *Asmat Ali*, 11 C. W. N., clxviii). The same effect will result from the landlord having allowed sums paid in to the Collectorate as rent by the transferee to be carried to his credit (*Ram Gobind Rai* v. *Dashubhuja Debi*, 18 W. R., 195) ; and from his having made the transferee a party to a suit for rent and from his accepting a decree against him jointly

with others (*Ram Kishor Acharji* v. *Krishna Mani Debi*, 23 W. R., 106; *Mahomed Azmal* v. *Chandi Lal Pandey*, 7 W. R., 250). But in *Gaur Lal Sarkar* v. *Rameshar Bhumik*, (6 B. L. R., App., 92), it was said that the mere receipt of rent on the part of the *zamindar* from a purchaser from a tenant having a right of occupancy will not sanction the sale to the purchaser so as to give him a right of occupancy, as the *zamindar* might not have been fully aware of the transfer; and the payment of rent *marfatwary* confers no raiyati title on the *marfatwar* (*Khudiram Chaturji* v. *Rukhini Boishtobi*, 15 W. R., 197; *Kurani Dasi v. Sajani Kant Sing*, 12 C. W. N., 539); and when rent is taken from a purchaser as *sarbarahkar*, the purchaser is not recognised by the landlord as his tenant (*Rasomai Purkhait* v. *Srinath Maira*, 7 C. W. N., 132; *Deb Narain Dutt* v. *Baidya Nath Napit*, 13 C. W. N., cciii). Finally, in *Bhajohari Banik* v. *Aka Ghulam Ali* (16 W. R., 97) it was pointed out that the purchaser of a raiyati tenure is bound to communicate with the *zamindar* and obtain his consent to the transfer of the tenure, and that, without this being done, a *gumashta's* receipts of rent are not binding on the *zamindar*. Where the landlord received rent from the usufructuary mortgagee in possession and gave him receipts wherein the payment of rent was expressed to be "through" him as "the mortgagee," it has been held that the landlord recognised the transfer and was not entitled to recover *khas* possession (*Baroda Churn Dutt* v. *Hemlata Dasi*, 13 C. W. N., 833). The question whether a transferee was accepted as a tenant is a question of law (*Deb Narain Dutt* v. *Baidya Nath Napit*, 13 C. W. N., cciii). In *Sheo Charan Lal* v. *Prabhu Dayal*, (1 C. W. N., 142), it was ruled that having regard to the provisions of section 107 of the Transfer of Property Act, which lay down that a lease from year to year or for a term of more than one year can be made only by a registered instrument, the mere acceptance of rent by the real owner under a lease granted by a trespasser cannot bind the real owner. It does not, however, appear that the lease in this case was one granted for agricultural purposes (see sec. 117 of the Transfer of Property Act). A landlord purchasing a non-transferable occupancy holding, in execution of a money-decree, after the holding had been mortgaged to a third party, can resist the claim of the mortgagee on the ground that the holding is not transferable (*Asmatunnissa Khatun v. Harendralal Biswas*, 35 Calc., 904 : 12 C. W. N., 721 : 8 C. L. J., 29).

Sub-letting—The provisions as to sub-letting will be found in sec. 85. Under the section, any raiyat may sub-let his holding subject to certain restrictions, and under clause (*e*), sub-section (3), section 178 of this Act nothing contained in any contract made between a landlord and a tenant after the passing of this Act shall take away the right of an occu-

pancy raiyat to sub-let his land subject to, and in accordance with, the provisions of this Act.

Enhancement of rent.

Enhancement of rent. Presumption as to fair and equitable rent.

27. The rent for the time being payable by an occupancy-raiyat shall be presumed to be fair and equitable until the contrary is proved.

Extended to Orissa, (Not., June 27th, 1892).

The provisions to this section are supplementary to those of sec. 24, which prescribe that an occupancy raiyat shall pay rent for his holding at fair and equitable rates. The two sections are founded on the provisions of section 5 of Act X of 1859 and of Act VIII, B. C., of 1869, according to which the rate previously paid by a raiyat was to be presumed fair and equitable until the contrary was shown in a suit by either party. (See *Ishar Ghosh* v. *Hills*, W. R., Sp. No., F. B., 148 ; *Hills* v. *Jendar Mandal* 1 W. R., 3 ; *Thakurani Dasi* v. *Bisheshar Mukhurji*, 3 W. R., Act X, 29 : B. L. R., F. B., 202).

Restriction on enhancement of money-rents.

28. Where an occupancy-raiyat pays his rent in money, his rent shall not be enhanced except as provided by this Act.

Extended to Orissa, (Not., June, 27th, 1892).

Enhancement.—Enhancement of rent must mean an enhancement of the same kind of rent. A conversion of *nakdi* into *bhaoli*, cannot be regarded as an enhancement (*Hassan Kuli Khan* v. *Nakchhedi Nonia*, 33 Calc., 200 ; *Gauri Saran Mahto* v. *Mahamed Latif Hussain*, 4 C. L. J., 82 *n*).

Produce rents.—Produce rents apparently cannot be enhanced under the provisions of this sub-chapter. The only section of this sub-chapter that applies to rents payable in kind would seem to be section 27. A landlord can, however, always apply under sec. 40 to commute a rent payable in kind into a money rent, and then the provisions of this sub-chapter will be applicable. Under the old law, this could also be done, and in a case brought for this purpose it was held that the fact of the raiyat having paid in kind for a number of years was no bar to enhancement (*Thakur Prasad* v. *Mahomed Bakir*, 8 W. R., 170 ; *Mahomed Yakub Hossein* v. *Wahid Ali*, 4 W. R., Act X, 23).

29. The money-rent of an occupancy-raiyat may be enhanced by contract, subject to the following conditions :—

Enhancement of rent by contract.

(*a*) the contract must be in writing and registered ;

(*b*) the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat ;

(*c*) the rent fixed by the contract shall not be liable to enhancement during a term of fifteen years from the date of the contract[1] :

Provided as follows—

(i) Nothing in clause (*a*) shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed.

(ii) Nothing in clause (*b*) shall apply to a contract by which a raiyat binds himself to pay an enhanced rent in consideration of an improvement which has been or is to be effected in respect of the holding by, or at the expense of, his landlord, and to the benefit of which the raiyat is not otherwise entitled ; but an enhanced rent fixed by such a contract shall be payable only when the improvement has been effected, and,

(1) Compare s. 9. No such restriction is placed on the enhancement of under-holder's rents by contract.

except when the raiyat is chargeable with default in respect of the improvement, only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.

(iii) When a raiyat has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord, nothing in clause (*b*) shall prevent the raiyat from agreeing, in consideration of his being released from the obligation of cultivating that crop, to pay such rent as he may deem fair and equitable.

Extended to Orissa, (Not., June 27th, 1892.)

This section applies only to an increase in the rate of rent, and not to an increase in the amount of rent by reason of an increase of the area (*Satish Chandra Giri* v. *Kabiruddin Mallik*, 26 Calc. 233 ; *Nilmadhab Saha* v. *Kadam Mandal*, 3 C. L. J., 74 *n*). On the expiry of the term of a prior settlement the plaintiff took a fresh settlement from the Government of certain lands and contracted with the Government that he would not collect higher rents than were recorded in the settlement papers :— *held*, that that contract would not prevent him from recovering from the defendants higher rents by enforcing a contract which the latter had entered into with him. Section 9 of Reg. VII of 1822 did not render such an agreement illegal (*Gaur Chandra Saha* v. *Mani Mohan Sen*, 32 Calc., 463). When additional rent is claimed on the ground that the defendant has converted arable land into pasture land, and that both by contract and custom arable land is liable to pay more rent than pasture land, the suit is not one for enhanced rent under sec. 29 (*Rameswar Singh* v. *Kanchan Sahu*, 1 C. L. J., 78 n).

Clause (a).— A widow may sign a *kabulyat* on behalf of her minor son agreeing to pay enhanced rent, and the son on attaining full age and entering on possession of the tenancy is bound by the *kabulyat* (*Watson & Co.* v. *Sham Lall Mitra*, 15 Calc., 8). The words "both parties to give effect to the terms of the solehnamah" do not amount to incorporating the *solehnamah* in the decree and, therefore, the decree does not make any matter mentioned in the *solehnamah res judicata* or

judicial evidence, when it has not been registered (*Atiram Saha* v. *Nidan Mandal*, 10 C. W. N., liv).

Clause (b).—A contract which contravenes the provisions of this clause is wholly void. It is not divisible, so that a decree for enhanced rent up to the extent allowed by law cannot be given (*Krishna Dhan Ghosh* v. *Brojo Gobinda Rai*, 24 Calc., 895 : 1 C. W. N., 442 ; *Probat Chandra Gangopadhya v. Chirag Ali*, 33 Calc., 607 ; *Manindra Chandra Nandy* v. *Upendra Chandra Hazra*, 9 C. L. J., 343). But an agreement embodied in a *kabulyat*, to pay a certain amount of rent and which had been entered into by the raiyat not as an agreement for the enhancement of rent, but as a settlement of a dispute as to the nature and character of the existing rent so as to avoid further litigation, is not an agreement to enhance within the meaning of this clause (*Sheo Sahai Pandey* v. *Ram Rachia Rai*, 18 Calc. 333 ; *Nath Singh* v. *Damri Singh*, 28 Calc. 90. See also *Madhu Manjhi* v. *Nil Mani Singh*, 18 W. R., 533). But under s. 109 B (2) and s. 147 A (3), added to the Act by Act I, B. C., of 1907, where any agreement or compromise made for the purpose of settling a dispute as to the rent payable is filed before a Revenue officer or in Court, the Revenue officer or the Court is required, in order to ascertain whether the effect of such agreement or compromise is to enhance the rent in a manner, or to an extent, not allowed by s. 29 in the case of a contract, to record evidence as to the rent which was legally payable immediately before the period in respect of which the dispute arose. And under s. 109 B (1) and s. 147 A (2) the Revenue officer or Court is not allowed to give effect to any agreement or compromise, the terms of which, if they were embodied in a contract, could not be enforced under this Act. Apparently, therefore, the rulings as to the effect of agreements entered into with the object of settling disputes as to the rent payable have been set aside where Act I, B. C., of 1907 is in force. The provisions of clause (*b*) are not retrospective and do not apply to a *kabulyat* executed before the passing of this Act (*Tejendra Narain Singh* v. *Bakai Singh*, 22 Calc., 658). It was further held in the last cited case by Prinsep and Ghosh, J. J, (Rampini, J., dissenting), that a stipulation in a *kabulyat* executed in 1881 that on the expiry of seven years a fresh lease would be executed, and that if the raiyat cultivated the lands without executing a fresh lease, he would pay rent at the rate of Rs. 4 per bigha (a rate much higher than that fixed for the term of seven years) was in the nature of a penalty and could not be enforced. By an oral agreement in the year 1885, a tenant agreed to pay an enhancement of rent, and he paid rent at that rate until subsequently in the year 1893 he executed a registered *Kabulyat* by which he agreed to pay a further enhancement of rent, which was more

than two annas in the rupee. The landlord then sued on the *kabulyat* for the rent agreed to therein, and it was held (1) that, inasmuch as the enhancement of rent referred to in s. 29 of the Bengal Tenancy Act refers to enhancement after the promulgation of the Act, if in this case the enhancement which was made in the year 1885 was before the Act came into force, it would not bar an enhancement during the period of fifteen years from the date thereof, as contemplated by cl. (3) of s. 29. But if the said enhancement was made after the Act came into force, it would also not bar a subsequent enhancement within fifteen years from the date thereof, as the previous contract was only an oral one, and was not effectual and binding upon the defendant : (2) that having regard to cl (b) of s. 29, as the enhancement was more than two annas in the rupee, the registered *kabulyat* was bad in law, if the rent then agreed to be paid was an enhanced rent. The *kabulyat* was also bad in law, if the rent agreed to be paid was partly enhanced and partly increased rent (*Mathura Mohun Lahiri* v. *Mati Sarkar*, 25 Calc., 781). So also, a Kabulyat consolidating three several *jamas* found on measurement to contain more lands than what was mentioned in the original kabulyat (*Ajuh nnessa Bibi* v. *Hakim Biswas*, 13 C. W .N., cciii). When a lease is in the nature of a usufructuary mortgage, no right of occupancy can accrue by holding under such a lease. Hence, cl. (b) of sec. 29 does not bar a claim to increased rent (*Mohan Lal Dobey* v. *Radhey Koer*, 7 C. W. N., ccxv).

A *kabulyat* executed by an occupancy raiyat at an enhanced rate of more than two annas in the rupee, although executed in consideration of the avoidance of stringent conditions in a previous lease, is void (*Probat Chandra Gangapadhya* v. *Chirag Ali*, 33 Calc., 607 : 11 C. W.N., 62 : 4 C. L J., 320).

Onus.—The onus of proving that a *kabulyat* contravenes the provisions of sec. 29 (b) is upon the tenant (*Luchmi Pershad* v. *Ekdeswar Singh*, 13 C. W. N., 181). But when it is shown what the tenant defendant's previous rent was, the onus lies upon the plaintiff land-lord to justify enhancement claimed in contravention of the provisions of clause (*b*) of this section (*Manindra Chandra Nandy* v. *Upendra Chanara Barza*, 9 C. L. J., 343).

Proviso (1). Effect of payment of rent for three years.—In the case of *Mathura Mohun Lahiri* v. *Mati Sarkar* (25 Calc., 781), cited above, it was further held that having regard to the proviso (1) of s. 29 and the provisions of s. 27, the plaintiff would at any rate, (*i. e.* failing the *kabulyat*) be entitled to recover rent at the rate paid by the defendant for more than three years. When a raiyat agreed on behalf of himself and his co-sharers to pay enhanced rent, and the enhanced

rent was paid for four years, it was held that it might be assumed that the co-sharers acquiesced in the arrangement, and the holding would be liable for the rent, and the co-shares would be answerable to the raiyat who had made the arrangement to pay the enhanced rent for any payment made under it (*Barhanudin Howladar* v. *Mohun Chandra Guha*, 8 C. L. R, 511). But it was subsequently decided by a Full Bench in *Bepin Behary* v. *Kristodhone*, (9 C. W. N., 265 : 1 C. L. J., 10 : 32 Calc., 395) that proviso (1) to s. 29 does not control clause (b) of that section. The landlord of an occupancy raiyat cannot therefore recover rent at the rate at which it has been paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed, if such rate exceeds by more than two annas in the rupee the rent previously paid by the raiyat. The case of *Mathura Mohun Lahiri* v. *Mati Sirkar*, so far as it decided to the contrary was wrongly decided. The rate contemplated by proviso (1) is not the average rate (*Bepin Behari Mandal* v. *Krishna Ghosh*, 32 Calc., 395 : 9 C. W. N., 295 : 1 C. L. J., 10; *Asraf Paramanik* v. *Sarada Prasad Rai*, 10 C. W. N., civ). The rule would appear to be that save on the ground of a landlord's improvement or release from the obligation to grow a special crop, the money rent of an occupancy raiyat cannot be enhanced by contract between the raiyat and his landlord by more than two annas in the rupee, or oftener than once in fifteen years. Higher or more frequent enhancement can only be obtained by suit. See also *Ram Tarun Chatturji* v. *Asmatullah*, (5 C. W. N., ccxxiv). Where tenants after mortgaging their land agree to pay, and for two or three years pay, an increased rent to their landlord who is ignorant of the mortgage, and the property is afterwards sold in execution of the mortgage debt, the *zamindar* is entitled to recover the increased rent from the tenants or from the party who has succeeded to their rights and interests (*Mitrajit Singh* v. *Raj Chandra Rai*, 15 W. R., 448).

Proviso (ii). To justify enhancement in contravention of cl. (b) of sec. 29, evidence as regards the improvement effected by the landlord and of the fact that enhancement was agreed to be paid in consideration of such improvement is admissible (*Probat Chandra Gangapadhya* v. *Chirag Ali*, 33 Calc., 607 : 9 C. W. N., 62 : 4 C. L. J., 320.)

Proviso (iii). An agreement to pay an enhanced rent in case the tenant raises a particular crop is not protected by proviso (iii) to sec. 29 (*Probat Chandra Gangapadhya* v. *Chirag Ali*, 33 Calc, 607 : 9 C. W. N., 62 : 4 C. L. J., 320.) When *kabulyats* are executed for increased rents on account of increase in the areas of the holdings, but not for enhanced rates, sec. 29 has no application (*Nil Madhub Saha* v. *Kadam Mandal*, 3 C. L. J., 74 *n.*)

Enhancement of rent by suit.

30. The landlord of a holding held at a money-rent by an occupancy-raiyat may, subject to the provisions of this Act, institute a suit to enhance the rent on one or more of the following grounds, (namely) :—

(*a*) that the rate of rent paid by the raiyat is below the prevailing rate paid by occupancy-raiyats for land of a similar description and with similar advantages in the same village [or in neighbouring villages,] and that there is no sufficient reason for his holding at so low a rate ;

(*b*) that there has been a rise in the average local prices of staple food-crops during the currency of the present rent ;

(*c*) that the productive powers of the land held by the raiyat have been increased by an improvement effected by, or at the expense of, the landlord during the currency of the present rent ;

(*d*) that the productive powers of the land held by the raiyat have been increased by fluvial action.

Explanation.—"Fluvial action" includes a change in the course of a river rendering irrigation from the river practicable when it was not previously practicable.

Extended to Orissa, (Not., June 27th, 1892).

The words in brackets in clause (a) were inserted by the Bengal Tenancy (Amendment) Act, III, B. C., of 1898 which was extended to Orissa by Not., Nov. 5, 1898. A suit for enhancement of rent under this section may be referred to arbitration (*Ganga Charan Rai* v. *Sasti Mandal*, 6 C. W. N., 614) : and a claim for increase of rent under sec.

52 may be properly joined in the same suit (*Sarada Charan Chatterjee* v. *Iswar Samli*, 11 C. W. N., 1154).

Clause (a). Prevailing rate.—A definition of the expression "prevaling rate" is now to be found in section 31 A, sub-section (1), introduced into the Tenancy Act by the amending Act of 1898, where it is provided that "in any district or part of a district to which this sub-section is extended by the Local Government by notification in the *Calcutta Gazette*, whenever the prevailing rate for any class of land is to be ascertained under section 30, clause (a) by an examination of the rates at which lands of a similar description and with similar advantages are held within any village or villages, the highest of such rates at which and at rates higher than which the larger portion of those lands is held may be taken to be the prevailing rate." On the subject of the amendments made in this section and in sec. 31 of this Act by the amending Act of 1898, it was said in the Statement of Objects and Reasons of the Bill to amend the Act :—

"The third object of this Bill is to amend the substantive provisions of the law relating to the enhancement of rent, so as to make them workable on certain points on which they are now practically inoperative. In suits and proceedings for enhancement of rent on the ground of prevailing rate, the Civil Courts and Revenue Officers are bound to confine their enquiries and comparisons of rates to the same village, and the definition of what is a prevailing rate is so vaguely worded that in practice it is found almost impossible to enhance rents on this ground. A revenue survey village in Bengal may contain 100 acres, or several thousand acres, or may consist of scattered blocks. It does not necessarily furnish a proper standard of comparison. As regards the meaning of the term "prevailing rate," there is only one decision of the High Court bearing on the subject, and that declares that a prevailing rate is *not* an average rate, but does not explain what it is. The view taken by the Special Judges generally has been that a prevailing rate is a uniform rate paid by a majority of the raiyats for lands of the same class in the village. This was the interpretation generally put on the term "pervailing rate" under Act X of 1859. The effect of the wording of section 30 of the Act, as it stands, is to give a ground of enhancement which cannot be worked. It is proposed to somewhat enlarge the area for comparison, while an attempt is made to define what is meant by "prevailing rate." Whatever objections there may be to this ground of enhancement generally, it is universally admitted that when land is held at a pepper-corn rent by reason of fraud or collusion between the proprietor's *amla* and the raiyats, there is no other ground on which the *zamindar* can obtain an enhancement up to a reasonable rate except that of the "prevailing rate," and in such case it is just that this ground of enhancement should be made a workable one. The intention of the amendments proposed in

sections 30 and 31 of the Act, and of the new sections 31 A and 31 B is to effect this object, without at the same time endangering the interests of the tenants by making an average rate a prevailing rate, thus rendering it possible to level all the lower rates up to such average rate, while maintaining all the higher rates, however much in excess they may be of the average rate. As, under the definition now proposed, a prevailing rate will always be found where rates exist at all, and the effect of the new definition will be to greatly facilitate the enhancement of rents, and as rents are known to be already too high in certain districts, power is taken by Government to withhold the operation of the new definition from any district or part of a district. In order to guard against all the rates being levelled up to the maximum rate, by manipulation of new prevailing rates from time to time, it is provided in section 31 B that a previling rate once determined shall not be liable to enhancement except on the ground of rise in prices."

The case referred to in the above extract is apparently the case of *Shital Mandal* v. *Prasanna Mayi Debi*, (21 Calc., 986), in which it is said that the words "prevailing rate" in clause (a), section 30, appear to be used in the sense in which they are used in the earlier cases under Act X of 1859, and mean "the rate actually paid and current in the village, and not the average rate."

As the definition of "prevailing rate" given in section 31 A (1) will only apply in those districts to which the local Government may extend the provisions of that sub-section, the rulings in *Shital Mandal* v. *Prasanna Mayi Debi* and other cases on this subject will be of importance in suits arising in districts to which they may not have been extended. In another case under clause (a), section 30, where it was found that there was no one prevailing rate, and that the raiyats holding lands in the village of similar description and with similar advantages paid ren at varying rates, it was held that the lowest rate might be taken and the rent of the defendants might be enhanced up to that rate (*Alif Khan* v. *Raghunath Tewari*, 1 C. W. N., 310). When there were different kinds of land, and the majority of tenants holding lands similar to those of the defendant paid a higher rate, this higher rate was held to be the prevailing rate (*Mangni Rai* v. *Seo Charan Munder*, 1 C. W. N., clxxix). In one case, decided under the former law, *Dina Ghazi* v. *Mohini Mohan Das*, (21 W. R., 157), it was held that, if a generally prevailing rate cannot be found, the currency of the different rates being so nearly equal as to make it impossible to say which is the prevailing rate, the average of the different rates current in the village may be taken and treated as the prevailing rate. But this case stands by itself. In *Samira Khatun* v. *Gopal Lal Tagor*, (1 W. R., 58), *Roshan Bibi* v. *Chandra Madhab Kar*, (16 W. R., 177) and *Audh Bihari Singh* v. *Dost Mahomed*, (22 W. R., 185), it was expressly said that the adoption of an

average rate from different rates was not the correct mode of fixing the proper rate, and in *Sadhu Singh* v. *Ramanugraha Lal*, (9 W. R., 83), the words "prevailing rate" were held to mean the rate generally prevalent, or the rate paid by the majority of the raiyats in the village. In *Dhunraj Kunwar* v. *Uggar Narain Kunwar*, (15 W. R., 2), they were said to mean the rate paid by so large a majority of the same class of tenants for similar lands as would justify one to hold the rate to be the prevailing rate. Then, it was observed that a decision must be arrived at as to what is the prevailing rate, and a decree should not be given for "a fair rate" (*Pelaram Kotal* v. *Nund Kumar Chattoram*, 6 W. R., Act X, 45). That rate need not be the prevailing rate; it may be a lower rate (*Akul Ghazi* v. *Aminuddin*, 5 C. L. R., 41). *Patwarian* and *abwabs* must not be taken into consideration in finding what is the prevailing rate (*Barmah Chaudhri* v. *Srinand Singh*, 12 W. R., 29). The fact of a particular rate of rent having been decreed against two raiyats not having rights of occupancy is not enough to show that the rate so decreed is the rate prevailing in the neighbourhood (*Sarahatunnissa* v. *Gyani Baktaur*, 11 W. R., 142). Nor can the rate claimed be held to be established as the prevailing rate on the probability, or even the certainty, that if the rents of the neighbouring occupants were re-adjusted, they would come up to the rate claimed (*Brindaban De* v. *Bisona Bidi*, 13 W. R., 107). But the evidence of three *patwaris* who put in their *jamabandis*, showing the rates paid by almost all the raiyats, i. e., the majority, was held sufficiently to prove the prevailing rate (*Priag Lal* v. *Brockman*, 13 W. R., 346).

Clause (a). Lands of a similar description.—In one case, *Tikaram Singh* v. *Sandes*, (22 W. R., 335), in which, although the plaintiff had not given evidence as to the rate of rent payable by tenants of the same class holding lands of precisely similar quality and adjacent to those occupied by the defendant, yet he had given evidence as to such lands so occupied of a somewhat better quality than those occupied by the defendant, and the rate of rent allowed was such as, regard being had to the slight difference in the quality of the lands, was proper to award in conformity with the spirit of the rent law, it was held that this decision was reasonable and was accordingly affirmed. The principles enunciated in this case, however, hardly seem to be good law.

Clause (a). Sufficient reason for holding at low rate.—Sufficient reasons for raiyats holding at exceptionally low rates would seem to be that they hold the land on reclaiming or *jangalburi* leases, or have reclaimed the land (see *Nur Mahomed* v *Hari Prasanno Rai*, W. R., Sp. No., 1864, Act X, 75 ; *Chaudhri Khan* v. *Gaur Jana*, 2 W. R., Act X, 40 ; *Parmanand Sen* v. *Paddamani Dasiya*, 9 W. R., 349 ; *Surasundari*

Debi v. *Gulam Ali*, 19 W. R., 141; *Haro Prasad Rai* v. *Janmajai Bairagi*, 9 Calc., 505 : 12 C. L. R., 251), or that they belong to classes of raiyats holding land at favourable rates of rent in accordance with local custom [see sec. 31, clause (c)].

Clause (b). Rise in prices.—Under the old law, (sec. 17, clause (2), of Act X of 1859 and sec. 18, para. (3), of Act VIII. B. C., of 1869) a raiyat's rent could be enhanced on the ground of a rise in "the value of produce." This was difficult to prove : see *Haro Prasad Rai* v. *Umatara Debi*, (7 Calc., 263). It will in future be easy, in consequence of the provisions of sec. 39, which prescribe the preparation of lists of the market prices of staple food-crops, to establish a right to enhancement on the ground of a rise in prices, which must be a rise in the prices of food-crops, and will not depend on the value of the particular crop grown by the raiyat, which, if for export, may fluctuate with the fluctuations of foreign markets.

Clauses (c) and (d). Increase in productive powers of land.—The old law allowed of an enhancement of rent on the ground of an increase in "the productive powers of land, otherwise than by the agency and expense of the raiyat." This ground of enhancement has now been subdivided into two, *viz.*, landlords improvements and fluvial action, which alone, in the opinion of the framers of the Act, "can bring about an increase in the productive powers of the land so as to justify an enhancement of rent." "All other cases," it was said by Sir Steuart Bayley, "seem to resolve themselves into cases, such as railways or canals, in which the landlord will get his enhancement by improvement of prices, or else into improvements effected by Government or by the raiyat" (Selections from papers relating to the Bengal Tenancy Act, 1886, p. 415).

Increase of area.—Under the old law the raiyat's rent could also be enhanced on the ground of an increase in area of the land held by him. This is, properly speaking, not a ground of enhancement, and is therefore dealt with separately in section 52.

No notices of enhancement required.—As already pointed out in the note to s. 6, p. 58, notices of enhancement are wholly unnecessary.

By whom suit for enhancement may be brought.—Having regard to the provisions of sec. 188 of this Act, a suit for enhancement of rent on the grounds specified in this section must be brought by all the landlords, and cannot proceed at the instance of some only of the fractional co-sharers (*Gopal Chandra Das* v. *Umesh Narain Chaudhri*, 17 Calc., 695 ; *Baidya Nath De Sarkar* v. *Ilim*, 2 C. W. N. 44 : 25 Calc., 917). See note to sec. 188. Sec. 30 of the Act does not

apply to the enhancement of the rent of an undivided share of a holding (*Horibot Brahma* v. *Tasimudin Mandal*, 2 C. W. N, 680). A suit for enhancement may be brought by a farmer (*Durga Charan Chaturji* v *Golak Chandra Biswas*, 23 W. R., 228) ; by an ijaradar when there is no stipulation in his lease precluding him from so doing (*Durga Prasad Mahanti* v. *Jainarain Hazrah*, 2 Calc., 474) ; and by a Hindu widow, whether suing as widow of her deceased husband or as guardian of her minor son (*Surja Kanth Acharji* v. *Hemanta Kumari*, 20 Calc., 498 : L. R., 25 I. A., 25).

Time from which enhancement takes effect.—Under the provisions of sec. 154, a decree for enhancement, if passed in a suit instituted in the first eight months of the agricultural year, ordinarily takes effect from the commencement of the next agricultural year ; if passed in a suit instituted in the last four months of the agricultural year, it ordinarily takes effect on the commencement of the next year but one following : but a later date may for special reasons be fixed by the Court.

Arbitration.—In a suit for enhancement of rent under sec. 30 the case was referred to arbitration. *Held*, that the arbitrator had jurisdiction to settle a fair and equitable rent as the parties declared that they would be bound by what the arbitrator would decide (*Ganga Charan Rai* v. *Sasti Mandal*, 6 C. W. N., 614).

Court-fees.—Under sec. 6, sub-sec. 11 of Act VII of 1870, in a suit to enhance the rent of a raiyat having a right of occupancy, the amount of the fee payable shall be computed according to the amount of the rent of the land to which the suit refers, payable for the year next before the date of presenting the plaint.

Rules as to enhancement on ground of prevailing rate.

31. Where an enhancement is claimed on the ground that the rate of rent paid is below the prevailing rate—

(*a*) in determining what is the prevailing rate the Court shall have regard to the rates generally paid during the period of not less than three years before the institution of the suit, and shall not decree an enhancement unless there is a substantial difference between the rate paid by the raiyat and the prevailing rate found by the Court ;

(*b*) if in the opinion of the Court the prevailing rate of rent cannot be satisfactorily ascertained without a local inquiry, the Court may direct that a local inquiry be held under Chapter XXV (O.XXVI Act V of 1908) of the Code of Civil Procedure by such Revenue officer as the Local Government may authorise in that behalf by rules made under section 392 (O.XXVI r. 9. Act V of 1908) of the said code :

XIV of 1882.

(*c*) in determining under this section the rate of rent payable by a raiyat his caste shall not be taken into consideration, unless it is proved that by local custom caste is taken into account in determining the rate ; and, whenever it is found that by local custom any description of raiyats hold land at favourable rates of rent, the rate shall be determined in accordance with that custom ;

(*d*) in ascertaining the prevailing rate of rent the amount of any enhancement authorised on account of a landlord's improvement shall not be taken into consideration ;

[(*e*) if a favourable rate has been determined under clause (c) for any description of raiyats, such rate may, if the Court thinks fit, be left out of consideration in ascertaining the prevailing rate ;

(*f*) if the holding is at a lump rental, the determination of the rent to be paid may be made by ascertaining the different classes of land comprised within the holding, and

applying to the area of each class the prevailing rate paid on that class within the village or neighbouring villages.]

Extended to Orissa, (Not., Jan. 27th, 1892).

Clauses (*e*) and (*f*) of this section have been added by the amending Act III, B. C., of 1898, which has been extended to Orissa, (Not., Nov. 5th, 1898).

Clause (b). Government Notification regarding rank of Commissioner.—In the *Calcutta Gazette* of 22nd July, 1890, Part I, p. 756, is published the following notification, with reference to the provisions of cl. (*b*) of this section :—

"In modification of the Government notification, dated 4th Nov., 1885, the Lieutenant-Governor has been pleased to make, under sec. 392 of Act XIV of 1882, the following revised rules as to the persons to whom commissions shall be issued under the Bengal Tenancy Act.

"Whenever, under secs. 31 (*b*) and 158 (2) of the Bengal Tenancy Act, a Court directs that a local inquiry be held under Chap. XXV (O.XXVI Act V of 1908) of the Code of Civil Procedure, the commission shall be issued to such person, not being below the rank of a Sub-Deputy Collector, as the Collector of the district may, from time to time, select for the purpose."

"The Court shall issue a precept to the Collector requiring him forth-with to nominate a fit person as above to conduct the inquiry, and the commission shall be issued to the person nominated."

Clause (b). Board of Revenue's instructions regarding local inquires.—The Board of Revenue in its circular No. 4 for August 1894, points out that the person to whom the commission is issued

"is bound, under the Civil Procedure Code, to make the local inquiries himself. He may entertain a reasonable staff of chainmen and amins to enable him to perform the work properly.

"No cost should be incurred to meet the charges of the local inquiry beyond that actually allowed by the Court issuing the commission, under rule 30 (b) at page 41 of the High Court's General Rules and Circular Orders, as revised in 1891. If the probable costs were calculated with regard to the time likely to be occupied in the execution of the commission, and the commissioner finds that the time fixed is insufficient, he should give timely notice to the party at whose instance the commission was issued and report the fact to the Court. Then, unless the sum necessary to cover the expenses for such further period as may be required to complete the execution of the commission is deposited in Court by the party and the commissioner certified of such deposit, he should suspend the investigation at the close of the period originally fixed, pending the further instructions of the Court.

The expenses of the commission will generally fall under the following heads :

(1) Remuneration of the commissioner.

(2) His travelling and halting allowances.

(3) Charges for the temporary subordinate establishment that may be employed.

(4) Incidental charges that may be unavoidable.

The first will be calculated on the basis of the actual pay which the person to whom the commission is issued has been receiving. The second will be regulated by the scale prescribed for officers of Government of the class to which the commissioner belongs, unless the Court should, for exceptional reasons, order an allowance in excess of the above. The third and the fourth will be passed on the authority of the Revenue officers concerned, but must on no account assume proportions so as to exceed, in conjunction with the charges under heads (1) and (2), the sum actually allowed by the Court."

The Board of Revenue in its circular No. 7 of April, 1899, says :—

"The words 'from time to time', in the notification, above quoted" (*i. e.*, the Government notification) "give the Collector the option of changing his nomination, if in case of sickness, transfer, urgent press of work, or other valid reason, his original nominee cannot make the enquiry."

Clause (c).—The provisions of this clause are founded on, and are almost identical with, those of section 20 of the North-Western Provinces Rent Act (XII of 1881). The custom in question must be a local, and not a family custom. (Reynolds's N. W. Provinces Rent Act, p. 34).

What may be taken in certain districts to be the "prevailing rate."

[31A. (1) In any district or part of a district to which this sub-section is extended by the Local Government by notification in the Calcutta Gazette, whenever the prevailing rate for any class of land is to be ascertained under section 30, clause (*a*), by an examination of the rates at which lands of a similar description and with similar advantages are held within any village or villages, the highest of such rates at which and at rates higher than which the larger portion of those lands is held may be taken to be the prevailing rate.

Illustrations.

(a) The rates at which land of a similar description and with similar advantages is held in a village are as follow :—

Bighas.						Rs.	A.	P.
100	...	...	...	...	... at	1	0	0
200	...	...	...	...	... „	1	8	0
150	...	...	...	...	... „	1	12	0
100	...	...	...	...	... „	2	0	0
150	...	...	...	...	... „	2	4	0
Total...700								

Then, Rs. 2-4 is not the prevailing rate, because only 150 bighas, or less than half, are held at that rate. Rs. 2 is not the prevailing rate, because 250 bighas, or less than half, are held at that or a higher rate. Re. 1-12 is the prevailing rate, because 400 bighas, or more than half, are held either at this or a higher rate, and this is the highest rate at which, and at rates higher than which, more than half the land is held.

(b) The rates at which land of a similar description and with similar advantages is held in a village are as follow :—

Bighas.						Rs.	A.	P.
100	...	...	...	...	... at	1	0	0
250	...	...	...	...	... „	1	4	0
150	...	...	...	...	... „	1	8	0
150	...	...	...	...	... „	1	12	0
50	...	...	...	...	... „	2	0	0
Total ... 700								

Then, for the reasons given in illustration *(a)*, neither Rs. 2 nor Re. 1-12 is the prevailing rate, nor is Re. 1-8 the prevailing rate, because only 350 bighas (exactly half) are held at Re. 1-8 or at rates higher than Re. 1-8. In this case Re. 1-4 is the prevailing rate, because more than half the lands are held at Re. 1-4 or higher rates, and this is the highest rate at which, or at rates higher than which, more than half the land is held.

(2) The Local Government may, by a like notification, withdraw sub-section (1) from any district or part of a district to which it has been extended as aforesaid.]

Extended to Orissa (Not., Nov. 5th, 1898) and to the district of Tipperah (Not., No. 1470, T. R., dated September 1st, 1900)

Section 31A.—This is a new section introduced into the Act by the amending Act III, B. C., of 1898. In it the Legislature for the first time abandons the principle laid down in the rulings of the High Court (see note, pp. 134, 135) to the effect that the prevailing rate is that paid by the majority of raiyats in the village and, prescribes that the highest of the rates at which and at rates higher than which the major portion of the lands of any area is held may be taken to be the prevailing rate. This is a new departure in two respects, *viz.*, (1) that the prevailing rate is now defined not with reference to the number of raiyats paying rent, but with reference to the quantity of land for which rent is payable; and (2) that it enables the highest of rates in the ascending scale of rates, at which and at rates higher than which the major portion of land of a similar description and with similar advantages in the same village or in neighbouring villages is held, to be taken as the prevailing rate; so that in time all lesser rates may be raised to this rate. The provisions of sub-section (1) will, however, only be applicable in those districts to which the Local Government may see fit to extend them. See note, pp. 133, 134.

Limit to enhancement of prevailing rate.

[31B. When the prevailing rate has once been determined by a Revenue Officer under Chapter X or by a Civil Court in any suit under this Act, it shall not be liable to enhancement save on the ground and to the extent specified in section 30, clause (*b*), and section 32.]

Extended to Orissa (Not., Nov. 5th, 1898).

Section 31B.—This section was also introduced into the Act by the amending Act of 1898.

In the statement of Objects and Reasons it was stated: "In order to guard against all the 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." The section applies only to the enhancement of a prevailing *rate*, when such a rate has once been determined. It would not apparently prevent the *rent* of a particular holding being enhanced on any of the other grounds specified in section 30 of the Act, *i.e.* "landlord's improvements" or "fluvial action." Where such grounds are applicable to a particular

holding, its rent can apparently be enhanced, even though the rent had been fixed with reference to a prevailing rate.

Rules as to enhancement on ground of rise in prices.

32. Where an enhancement is claimed on the ground of a rise in prices—

(*a*) the Court shall compare the average prices during the decennial period immediately preceding the institution of the suit with the average prices during such other decennial period as it may appear equitable and practicable to take for comparison ;

(*b*) the enhanced rent shall bear to the previous rent the same proportion as the average prices during the last decennial period bear to the average prices during the previous decennial period taken for purposes of comparison : provided that, in calculating this proportion, the average prices during the later period shall be reduced by one-third of their excess over the average prices during the earlier period ;

(*c*) if in the opinion of the Court it is not practicable to take the decennial periods prescribed in clause (*a*), the Court may, in its discretion, substitute any shorter periods therefor.

Extended to Orissa (Not., June 27th, 1892).

Clause (a).—Section 39 provides for the preparation of price-lists so as to enable the provisions of this clause to be given effect to.

Clause (b).—The rule of proportion embodied in this clause is that laid down by the Judges in the case of *Thakurani Dasi* v. *Bisheshar Mukhurji* (B. L. R., F. B., 202 : 3 W. R., Act X, 29). The deduction prescribed in the proviso is to allow for the increased cost of production. The Select Committee on the Bill on this point said :—"We recognised the difficulty of making the Courts ascertain the actual cost of produc-

tion, and, as it was necessary to fix an arbitrary limit, we have fixed the deduction at one-third as a general rule" (Selections from papers relating to the Bengal Tenancy Act, 1885, p. 384).

Rules as to enhancement on ground of landlord's improvement.

33. (1) Where an enhancement is claimed on the ground of a landlord's improvement--

(*a*) the Court shall not grant an enhancement unless the improvement has been registered in accordance with this Act ;

(*b*) in determining the amount of enhancement the Court shall have regard to--

(i) the increase in the productive powers of land caused or likely to be caused by the improvement,

(ii) the cost of the improvement,

(iii) the cost of the cultivation required for utilizing the improvement, and

(iv) the existing rent and the ability of the land to bear a higher rent.

(2) A decree under this section shall, on the application of the tenant or his successor in interest, be subject to re-consideration in the event of the improvement not producing or ceasing to produce the estimated effect.

Extended to Orissa (Not., June 27th., 1892).

The subject of "improvements" is dealt with in sections 76 to 83. The rent of an occupancy raiyat may, also under section 29, be enhanced by private contract made between the landlord and the raiyat on account of an improvement made by the landlord ; but the enhanced rent fixed by such contract is only payable subject to the restrictions laid down in proviso (ii) to section 29.

Rules as to enhancement on ground of increase in productive powers due to fluvial action.

34. Where an enhancement is claimed on the ground of an increase in productive powers due to fluvial action—

(*a*) the Court shall not take into account any increase which is merely temporary or casual;

(*b*) the Court may enhance the rent to such an amount as it may deem fair and equitable, but not so as to give the landlord more than one-half of the value of the net increase in the produce of the land.

Extended to Orissa (Not., June 27th, 1892).

The rule laid down in clause (*a*) follows the High Court rulings under the old law in *Krishna Mohan Patro* v. *Hari Sankar Mukhurji*, (7 W. R., 235) and *Abdul Ghani* v. *Bhattu*, (22 W. R., 350).

Enhancement by suit to be fair and equitable.

35. Notwithstanding anything in the foregoing sections, the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable.

Extended to Orissa (Not., June 27th, 1892).

Power to order progressive enhancement.

36. If the Court passing a decree for enhancement considers that the immediate enforcement of the decree in its full extent will be attended with hardship to the raiyat, it may direct that the enhancement shall be gradual; that it is to say, that the rent shall increase yearly by degrees for any number of years not exceeding five until the limit of the enhancement decreed has been reached.

Extended to Orissa (Not. June 27th, 1892).

Limitation of right to bring successive enhancement suits.

37. (1) A suit instituted for the enhancement of the rent of a holding on the ground that the rate of rent paid is below the prevailing rate, or on the ground of a rise in prices, shall not be entertained if within the fifteen years next preceding its institution the rent of the holding has been enhanced by a contract made after the second day of March, 1883, or if within the said period of fifteen years the rent has been commuted under section 40, or a decree has been passed under this Act or any enactment repealed by this Act enhancing the rent on either of the grounds aforesaid or on any ground corresponding thereto or dismissing the suit on the merits.

Failure in a previous suit for additional rent for additional lands, does not bar a similar suit within fifteen years, *Moharja Radhakisore Manikya* v. *Umedali*, (12 C. W. N., 904).

(2) Nothing in this section shall affect the provisions of section 373 of the Code of Civil Procedure (O.XXIII. r. 1, of Act V of 1908).

XIV of 1882.

Extended to Orissa (Not, June 27th, 1892).

Sub-section (1).—The 2nd March, 1883, is the date on which leave to introduce the Bill to amend the rent law was obtained.

A decree obtained in a suit instituted to enforce a contract made before the 2nd March, 1883, in which the defendant agreed to pay a higher rent was held to be no bar under the provisions of this section to a suit for enchancement of rent under the provisions of the Tenancy Act (*R. Mitter* v. *Dwarka Nath Chakravartty*, decided by Prinsep and Banerjee, J.J., May 28th, 1891).

A suit for both enhancement and arrears at an enhanced rate is maintainable. The causes of action, though separate, may be combined under sec. 45. C. P. C., (*Gudar Tewari* v. *Brij Nandan Prasad*, 5 C. W. N., 880).

Waiver of enhanced rent decreed.—In 1267 the Plaintiff obtained a decree in a suit to enchance the defendant's rent. It was held

that the acceptance by the plaintiff of the old rent from 1268 to 1271 was no waiver of his claim to the higher rent decreed to him (*Lauder* v. *Binod Lal Ghosh*, 6 W. R., Act X, 37).

Reduction of rent.

Reduction of rent.

38. (1) An occupancy-raiyat holding at a money-rent may institute a suit for the reduction of his rent on the following grounds, and, except as hereinafter provided in the case of a diminution of the area of the holding, not otherwise, (namely) : —

(*a*) on the ground that the soil of the holding has without the fault of the raiyat become permanently deteriorated by a deposit of sand or other specific cause, sudden or gradual, or

(*b*) on the ground that there has been a fall, not due to a temporary cause, in the average local prices of staple food-crops during the currency of the present rent.

(2) In any suit instituted under this section, the Court may direct such reduction of the rent as it thinks fair and equitable.

Extended to Orissa (Not., June 27th, 1892).

A raiyat cannot by any contract made after the passing of this Act contract himself out of the provisions of this section [(sec. 178, sub-sec. (3), cl. (*f*)].

Reduction of rent.—An occupancy raiyat cannot sue for a reduction of rent except on one of the grounds specified in this section. He, therefore, cannot sue to have his rent abated on the ground that it is higher than the prevailing rate. But neither could he do so under the old law (*Baban Mandal* v. *Shib Kumari Barmani*, 21 W. R., 404). Nor could he have applied for abatement of rent on the ground of fraud, his remedy being to apply to have the contract set aside (*Sukur Ali* v. *Amla Ahalya*, 8 W. R., 504 ; *Darimba Debya* v. *Nilmani Singh Deo*, 5 C. L. R.,

465) ; and a landlord receiving remission from Government on account of damage done to his estate by a cyclone was not on that account bound to allow a remission to his under-tenants, unless he had received the former on the understanding or agreement that he would allow it in turn (*Golak Chandra Mahanti* v. *Parbati Charan Das*, 15 W. R., 167).

How reduction of rent can be claimed.—Under the old law a raiyat entitled to a reduction of rent had three courses open to him. He could either sue for abatement of rent or wait till sued by his landlord and then set up a claim to a set-off, or he might complain of an excessive demand of rent and sue for a refund (see Bell's Law of Landlord and Tenant, 2nd. edit., p. 57 ; and *Barry* v. *Abdul Ali*, W. R., Sp. No., 1864, Act X, 64 ; *Baikantho Paraki* v. *Surendro Nath Rai*, 1 W. R., 84 ; *Savi* v. *Abhai Nath Basu*, 2 W. R., Act X, 28 ; *Dindyal Lal* v. *Thakru Kunwar*, 6 W. R., Act X, 24 ; *Nil Mani Singh Deo* v. *Annoda Prasad Mukhurji*, 10 W. R., F. B., 41 : 1 B. L. R., F. B., 97 ; *Mahtab Chand* v. *Chitro Kumari Debi*, 16 W. R., 201 ; *Gaur Kishor Chandra* v. *Bonomali Chaudhuri*, 22 W. R., 117). The present section only provides for a reduction of rent being obtained on the grounds specified in it in a suit instituted for the purpose. A tenant may also obtain a reduction of rent under section 52 (1) (b) on the ground of a deficiency proved to exist in the area of his tenure or holding, but whether this reduction must be sued for, or whether the deficiency of area may be pleaded by way of set-off, is not apparent. A raiyat from whom any sum has been exacted as rent may also sue under sec. 75 for a refund and for an additional sum as a penalty.

Permanent deterioration of soil of holding—In *Gauri Patra* v. *Reily*, (20 Calc., 579), it was said that the Judge of the Court below was wrong in his interpretation of the word "permanent" in this section. He seemed to think that a deterioration ought not to be held to be permanent, if by application of capital and skill the cause of the deterioration might be removed. But a more liberal interpretation must be put upon the word, and it must be construed with reference to existing conditions. Under the old law it was held that the grounds on which a raiyat could claim an abatement must have resulted from causes beyond his control (*Mansur Ali* v. *Harvey*, 11 W. R. 291), such as a deposit of sand on part of his land (*Inayatullah* v. *Ilahi Baksh*, W. R., Sp., 1864, Act X., 42)

Produce-rents.—The provisions of sec. 38 apply only to rents payable in money. There is no provision of this Act under which raiyats paying rent in kind can claim or sue for a reduction of rent.

Price-lists.

Price-lists of staple food-crops.

39. (1) The Collector of every district shall prepare, monthly, or at shorter intervals, periodical lists of the market-prices of staple food-crops grown in such local areas as the Local Government may from time to time direct, and shall submit them to the Board of Revenue for approval or revision.

(2) The Collector may, if so directed by the Local Government, prepare for any local area like price-lists relating to such past times as the Local Government thinks fit, and shall submit the lists so prepared to the Board of Revenue for approval or revision.

(3) The Collector shall, one month before submitting a price-list to the Board of Revenue under this section, publish it in the prescribed manner within the local area to which it relates, and if any landlord or tenant of land within the local area, within the said period of one month, presents to him in writing any objection to the list, he shall submit the same to the Board of Revenue with the list.

(4) The price-lists shall, when approved or revised by the Board of Revenue, be published in the official Gazette; and any manifest error in any such list discovered after its publication may be corrected by the Collector with the sanction of the Board of Revenue.

(5) The Local Government shall cause to be compiled from the periodical lists prepared under this section lists of the average prices prevailing through-

out each year, and shall cause them to be published annually in the official Gazette.

(6) In any proceedings under this Chapter for an enhancement or reduction of rent on the ground of a rise or fall in prices, the Court shall refer to the lists published under this section, and shall presume that the prices shown in the lists prepared for any year subsequent to the passing of this Act are correct, [and may presume that the prices shown in the lists prepared for any year prior to the passing of this Act are correct], unless and until it is proved that they are incorrect.

(7) The Local Government, subject to the control of the Governor-General in Council, shall make rules for determining what are to be deemed staple food-crops in any local area and for the guidance of officers preparing price-lists under this section.

The words in brackets were inserted in this section by the amending Act of 1898, which has been extended to Orissa (Not., Nov. 5th, 1898).

Price-lists.—Price-lists relating to current times have been prepared ever since the passing of the Tenancy Act under rules to be found in Chap. II of the Govt. rules under the Tenancy Act (see Appendix I). By Govt. notification No. 4307 L. R., dated Nov. 7th, 1896, published in the *Calcutta Gazette* of Nov. 11, 1896, Part I, p. 1150, price lists for periods anterior to the passing of the Tenancy Act in certain specified marts in the Orissa division have been ordered to be prepared (see Schedule II appended to the Govt. rules, Appendix I).

Sub-section (6).—This sub-section, as originally passed, provided that only price-lists "prepared for any year subsequent to the passing of the Act" should be presumed to be correct. The Bill to amend the Act, which afterwards became the Bengal Tenancy (Amendment) Act, 1898, proposed to omit these words.

On the motion of the Hon'ble Babu Surendro Nath Banerjee in Council, the words now inserted in the section were added to it, and the words it was proposed to omit were allowed to remain. The effect of

this amendment is that price-lists for periods subsequent to the passing of the Act shall, and those for periods prior to the passing of the Act may, be presumed to be correct, until it is proved that they are incorrect.

Rules regarding the preparation of price-lists.—For these rules, see Chap. II, of the Government Rules under the Act, Appendix I.

Commutation.

Commutation.

Commutation of rent payable in kind.

40. (1) Where an occupancy-raiyat pays for a holding rent in kind, or on the estimated value of a portion of the crop, or at rates varying with the crop, or partly in one of those ways and partly in another, [or partly in any of those ways and partly in cash,] either the raiyat or his landlord may apply to have the rent commuted to a money-rent.

(2) The application may be made to the Collector or Sub-divisional Officer, or to [a Revenue-officer appointed by the Local Government under the designation of Settlement Officer or Assistant Settlement Officer for the purpose of making a survey and record-of-rights] under Chapter X, or to any other officer specially authorized in this behalf by the Local Government.

(3) On the receipt of the application the officer may determine the sum to be paid as a money rent, and may order that the raiyat shall, in lieu of paying his rent in kind, or otherwise as aforesaid, pay the sum so determined.

(4) In making the determination the officer shall have regard to—

(*a*) the average money-rent payable by occupancy-raiyats for land of a similar description and with similar advantages in the vicinity ;

(*b*) the average value of the rent actually received by the landlord during the preceding ten years or during any shorter period for which evidence may be available ;

(*c*) the charges incurred by the landlord in respect of irrigation under the system of rent in kind, and the arrangements made on commutation for continuing those charges ; and

[(*d*) improvements effected by the landlord or by the occupancy-raiyat in respect of the raiyat's holding, and to the rules laid down in section 33 regarding enhancement of rent on the ground of a landlord's improvement.]

(5) The order shall be in writing, shall state the grounds on which it is made, and the time from which it is to take effect, and shall be subject to appeal in like manner as if it were an order made in an ordinary revenue proceeding.

(6) If the application is opposed, the officer shall consider whether under all the circumstances of the case it is reasonable to grant it, and shall grant or refuse it accordingly. If he refuses it, he shall record in writing the reasons for the refusal.

Under sec. 178, sub-section (*3*), cl. (*g*), nothing in any contract made after the passing of the Act can take away the right of either landlord or tenant to apply for a commutation of rent under this section. But it has been ruled that a landlord may demand payment of rent in kind in accordance with the original contract, although the tenant has paid rent in money for some years (*Sohabat Ali* v. *Abdul Ali*, 3 C. W. N., 151.)

Rents payable in kind.—"The system of rent payment in kind prevails extensively only in the districts of Gaya, Shahabad and Patna, where the character of the country renders necessary the maintenance of an

elaborate village system of irrigation; but in most, if not all, other districts of the province lands are also found, the produce of which is divided between the cultivator and the landlord, and the marked absence of applications for commutation would seem to indicate that this section of the law is little known. It may, however, be also largely due to local custom recognizing in such cases no right to the land in the cultivator, but merely to a share of the produce raised by him. In Bihar the holding of land on a produce rent, known as the *bhaoli* (1) system is a regular form of tenancy, very common in the three districts named above lying south of the Ganges.....The practical difficulties in the way of maintenance of the system of irrigation by the raiyats themselves, which would necessitate combination among the residents of each village or of several villages, where a water channel serves more than one village, have undoubtedly established among the tenants a preference for the *bhaoli* system. Under it the rental varies with the outturn of the crops, and the tenants are, at least, secured half their produce; while the landlord on whom the duty of maintaining the irrigation work devolves, is under a strong inducement in his own interests to keep them in fair order." (Secy. to the Board of Revenue's report on the working of the Tenancy Act, No. 419A, dated 30th April, 1892, para. 21).

Board of Revenue's instructions under this section.—The Board of Revenue in their circular No. 5, dated June, 1892, have issued the following instructions for the guidance of officers to whom applications for commutation are made.

"The Board have reason to believe that misconception exists among some officers as to the requirements of the law under section 40 of the Bengal Tenancy Act, and that this has led to the rejection of applications for commutation of rents payable in kind on insufficient grounds, and the consequent discouragement of such applications. They desire, therefore to point out that, subject to the grounds of his decision being recorded and to an appeal, the officer dealing with an application under the section has full discretion to seek for such evidence, and make such injuiry, as he may deem necessary in order to determine the money-rent to be fixed. If the tenants are unable to produce receipts showing the quantity of produce previously received by the landlord or its cash-equivalent—and they will seldom possess such receipts—or the landlords file papers purporting to give previous outturns and divisions of the crops which the tenants repudiate, or which are apparently false, the applications should not necessarily be rejected, but the officer should endeavour to arrive at a fair estimate of the money-rent by recording and duly considering such oral testimony as may be produced by the parties, by reference to other sources of information, such as the cess papers of the estate, and, if necessary, by local injuiry conducted in person or through some other competent officer. See Board's Settlement Manual of 1908 Part II, Chap. XI, r. 526 p. 137.

(1) Probably a contraction of *bhao*, rate and *wali*, relating to.

Sub-section (5).—The provisions of this sub-section are imperative. The object of requiring the time from which the order is to take effect to be stated is to enable the parties to know from what date the new arrangement is to come into operation. It ought not to be left in uncertainty and in the absence of any date being fixed in the order, the order must be taken to be practically inoperative, or at any rate, to remain in suspense, until it is amended by the specification of the term of its operation (*Raghunath Saran Singh* v. *Dhoda Rai*, 18 Calc., 467).

An appeal from an order of a Collector under this section to the Commissioner must be preferred within 30 days (Sch. III, art. 5). An order passed in appeal by a Revenue Court under sec. 40 is final (*Saligram Singh* v. *Ramgir*, 3 C. W. N., 311).

Sub-section (6).—When the application for commutation is opposed, the application may be granted or refused, according as the officer disposing of it may think proper. The section does not provide for the case, which is of common occurrence, in which the application is opposed on the ground that the rent is not payable in kind but in money.

No suit will lie in Civil Court to call in question propriety of an order under this section.—A tenant made an application to the Collector under sec. 40 of this Act for a declaration that he was the defendant's raiyat in respect of a parcel of *guzastha kasht* land and for commutation of the rent which had hitherto been payable in kind. The Collector granted the application ; but the order was reversed on appeal by the Commissioner. The tenant then sued under section 42 of the Specific Relief Act for substantially the same relief as he had asked before the Collector. It was held (1) that an order passed in appeal under sec. 40 is final, and no suit lies in the Civil Court by which its propriety can be questioned ; and (2) that before the passing of the Tenancy Act no suit could lie in the Civil Court for commutation of the rent, and, therefore, the special procedure laid down in sec. 40 for enforcing the new right created therein is the only procedure which can be followed (*Saligram Singh* v. *Ramgir*, 3 C. W. N., 311).

Changes made by Act I, B.C., of 1907.—The alteration in sub-section (2) made by s. 11, Act I. B. C., 1907, was, it was said in the Select Committee's report, for the purpose for ensuring that the power to commute rents should be entrusted only to an officer of some standing. The Select Committee explain the reason for the addition of clause (*d*) as follows :

"At present section 40 contains no provision requiring an officer commuting produce rents to have regard to improvements made by the landlord or tenant in respect of the holding under commutation. We consider this a de-

fect, as the existence of such improvements is often an important factor in determining the amount of the cash rent to be fixed on commutation. We propose, therefore, to add a provision to sub-section (4) of section 40 allowing this to be done."

Period for which commuted rents are to remain unaltered.

[**40A**. (1) Where the rent of a holding has been commuted under section 40, it shall not, except on the ground of a landlord's improvement or of a subsequent alteration of the area of the holding, be enhanced for fifteen years; nor shall it be reduced for fifteen years, save on the ground of alteration in the area of the holding, or on the ground specified in clause (*a*) of sub-section (1) of section 38.

(2) The said period of fifteen years shall be counted from the date on which the order takes effect under sub-section (5) of section 40.]

This section has been added to the Act in Bengal by sec. 12 Act I, B. C., of 1907. In explanation of the introduction of this section the Select Committee on the Bill observe that the absence of such a provision as this would seem to be a defect in the present law.