(1865) 06 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 2064 of 1864

Bisheshur Mookerjee and Others		APPELLANT
	Vs	
Thakooranee Dossee		RESPONDENT

Date of Decision: June 19, 1865

Judgement

Trevor, J.

Before proceeding to answer these questions, it will be well to notice certain objections which have been taken to the form of the present action. An action for enhancement of rent, it has been contended, can only be maintained after a notice has been formally served on the tenant in accordance with the provisions of section 13 of Act X of 1859; that a suit for a kabuliat, at an enhanced rate prospectively, is not maintainable at all, or, if maintainable, can only be decreed for one year; that under the law the tenant is entitled to know the terms on which he is to be permitted to occupy, before he is dragged into Court, whereas by the admission of a suit like the present the tenant is harassed with law proceedings and law costs, when he has never given the plaintiff any cause of action, and possibly never intends to occupy the lands at all. These objections, I think, are not well-founded. The ordinary and most proper mode of proceeding to be adopted by a zamindar or other person wishing to enhance the rent of his tenant is, doubtless, by a notice u/s 13 in the first instance, and then by a suit for the recovery of that rent, to be brought within the term specified in the proviso at the end of section 32 of Act X of 1859; but it appears to me that it is also competent to a zamindar or other person to bring an action for a kabuliat, and in that form to raise the question as to the particular enhanced rate at which the potta and kabuliat shall be exchanged between the parties. Suits for the delivery of pottas or kabuliats are both expressly recognized in section 23, and also in sections 80 and 81 of Act X of 1859. It is true that section 76 only gives the Collector power to fix the term in suits for the delivery of a potta; but regarding, as I do, the suit for a kabuliat as the correlative of the suit for a potta, I think that by implication this section applies equally to both classes of suits, and this without any detriment to the ryot who, u/s 19, can, after notice given at any time,

relinquish the land held by him. As to the argument drawn from the supposed hardship to the tenant arising from his being brought into Court unnecessarily, and without having given plaintiff any cause of action, I would observe that, if the present action were one founded on an injury already actually committed, and were brought without any notice or demand, there would be no ground for the contention now raised; and regarding this action simply as a declaratory one brought, that is, for the Court''s determination as to the amount of enhanced rent to be paid from the beginning of the year subsequent to the passing of the decree, I think that the suit itself is in the nature of a demand, and that the answer of the defendants objecting to the claim made, is equivalent to a repudiation of that demand, rendering him liable, in case his contention fails, to be saddled with the costs of the action, which, of course, he would not have been, had he admitted the right claimed by the plaintiff prospectively.

2. Whether, in suits like the present, grounds for enhancement beyond those stated in section 17 are admissible, is a point not legitimately raised before the Court, the ground for enhancement, on which the present suit is based, being one of those expressly mentioned in that section of the law. I, therefore, decline to enter into a consideration of this point in the present reference.

3. In determining the question proposed to the Court, it will be necessary, in the course of my remarks, to consider briefly the relative right of the Government, zamindars, and ryots in Bengal, before the enactment of Act X of 1859; 2ndly, the effect, if any, which Act X had on the previous relation of zamindars and ryots; and, 3rdly, the principle which, under the circumstances set forth in the question put to the Court and under their present relation, should be adopted in the adjustment of their rents.

4. It might be sufficient, when considering the first point above noted, to limit myself to the relative rights of Government, zamindars, and ryots with a right of occupancy, as gathered from the Regulations of Government passed in 1793 and subsequent years. As, however, the learned counsel and pleaders have turned the Court''s attention to the state of things existing before the Decennial Settlement, I propose to make a few remarks on that period.

5. The earliest authentic records seem to point to a state of things in which the gross produce of the soil was, in some places, of right shared between the king, the village landholders, and the permanent or khud-kasht tenants who cultivated the lands of the village in which they resided, retaining them during their lives, and transmitting them to their descendants; and in others, in which there were no village landholders, between the king and the aforesaid tenants. At the time of Menu, the proportion legally claimed by the king was one-sixth, and so long as the demand of the State was fixed, the profits of the village communities and permanent tenants remained unchanged; but when the State, as was afterwards the case, raised its demand on the produce, the profits of the other sharers in the produce diminished

in an equal proportion.

6. In the state of things described above, property, says an able historian of India Mountstuart Elphinstone, Vol. I, Chap. 2, in the English sense of the term,--that is, the exclusive use and absolute disposal of the powers of the soil in perpetuity was in no one person; each party was equally entitled by right to a share of the produce, and the practical question, under such circumstances, is not in whom property resides, but what proportion of the produce is due to or claimable by each party.

7. Coming to later times, we meet with the class of persons, the predecessors and ancestors of the zamindars of the Perpetual Settlement, who seem not to have had any existence before the time of the Mahomedan conquest. The sovereign and the permanent or khud-kasht tenants are always present; and in parts of the country other than Bengal, the village landholders, who all, in different proportions, receive their shares of the produce. It would be out of place to enter into an antiquarian discussion as to the rights of the zamindars, whether they were public servants filling a conditional office generally renewable and revocable on defalcation, but conveying no right of property in the grantee, the sovereign ruler being the sole proprietor of the soil, in right and fact the real actual landlord; or whether, even if they did not originally possess, they did not acquire in course of time a property in the soil, and the right annexed thereto of disposing of it by sale, gift, and mortgage, subject, however, under any mode of alienation, to the sovereign''s claims for revenue. It will be sufficient to cite here, and to accept as sufficiently accurate for present purposes, the definition of a zamindar given by Mr. Harington Vol. III, p. 400. "A zamindar," says that gentleman, "appears to be, under the Mogul constitution and practice, a landholder of a peculiar description not definable by any term in our language; a receiver of the territorial revenue of the State from the ryots and other under-tenants of the land, allowed to succeed to his zamindari by inheritance, yet generally required to take out a renewal of his title from the sovereign or his representative, on the payment of a fine of investiture to the Emperor, and a nazarana or present to his provincial delegate the Nazim; permitted to transfer his zamindari by sale or gift, yet commonly expected to obtain previous special permission; privileged to be generally the annual contractor for the public revenue received for his zamindari, yet set aside with a limited provision in land or money when it was the pleasure of Government to collect the rents by separate agency, or to assign them temporarily or permanently by the grant of a jaghir or altamga; authorized in Bengal since the early part of the eighteenth century to apportion to the pergunnas, villages, and lesser divisions of land within his zamindari, the abwab or cesses imposed by the subadar, usually in some proportion to the standard assessment of the zamindari established by Toran Mull and others, yet subject to the discretionary interference of public authority, either to equalize the amount assessed on particular divisions, or to abolish what appeared oppressive to the ryot; entitled to any contingent emoluments proceeding from his contract during the period of his agreement, yet bound by the terms of his tenure to

deliver in a faithful account of his receipts."

8. The settlement of Toran Mull, alluded to in this extract, was, according to Sir John Shore, formed by collecting, through the medium of the canungoes and other inferior officers, the accounts of the rents paid by the ryot, which served as the basis of it. It was made about 1582, and remained essentially in force for very many years. Under it, in accordance with the principle of Mogul finance, the gross produce of land was divided in certain proportions between the sovereign and the husbandmen; the share of the former being from one-half to one-eighth of the gross produce, according to circumstances, and the zamindars, with whom the settlement generally was made, receiving in Bengal a portion of the land or its produce for their use and subsistence under the name of nankar, which did not in the aggregate exceed one per cent of the revenues collected by them. The rate of rent, or revenue, to be paid by each ryot under the settlement of Toran Mull, and which represents a portion of the gross produce converted into money, was, in after time, designated the assal, or original rate, to distinguish it from those taxes or cesses which were subsequently imposed, and which, though not, speaking generally, directly raised from the land, yet immediately or mediately pressed upon its cultivators. The origin of these cesses is not quite clear. Whether they were originally devised by Government as a means of raising the revenue of the State, or whether, having been, in the first instance, devised by the zamindars as an unauthorized means of increasing their emoluments, they, on being discovered, gave the Government officers a hint as to a mode in which the demands of the State could be effectually raised, it is not very material now to enquire. It is quite clear that, however originating, from the time of Jaffir Khan, that is, since the reign of Aurangzebe, at the beginning of the eighteenth century, they became an acknowledged subadari impost. They were in general levied upon the standard assessment in certain proportions to its amount; and the zamindars who paid them were authorized to collect them from their ryots in the same proportion to the rents paid by them. When the value of the produce of the land remained the same as it had been previously, their imposition operated as an arbitrary enhancement of rent, which would not have been the case, had the increase in the demand always arisen from an increase in the value of the Government share of the produce when measured in money. An increase of this nature, to a certain extent, must have taken place, according to the best authorities, between the time of Toran Mull and that of Jaffir Khan, from the extension of commerce and the influx of silver into the country; and it is not improbable that it may have had the effect of making these impositions less severely felt by the tenantry than they otherwise would have been. But, be that as it may, it remains, as observed by Mr. Mill, a fact "that, though the demands of the great landholder--the State--were swelled by fiscal rapacity, it was thought necessary to have a distinct name and a separate pretext for each increase of exaction, so that the demand has sometimes come to consist of thirty or forty different items in addition to the nominal rent. This circuitous mode of increasing

the payments assuredly would not," proceeds Mr. Mill, "have been resorted to, if there had been an acknowledged right in the landlord to increase the rent. Its adoption is a proof that there was once an effective limitation, or real customary rent, and that the understood right of the ryot to the land, so long as he paid rent according to custom, was at some time or other more than nominal."

9. It is useless to attempt to trace right principles during the last years of Mahomedan rule in Bengal. The only principle of action traceable throughout is a determination on the part of the ruling power to exact, by means of arbitrary imposts, as much rent as possible from the zamindars or farmers of revenue as might be. "The mode of imposition," as remarked by Sir John Shore, "was fundamentally ruinous both to the ryots and zamindars; and its direct tendency was to force the latter into extortion, and all into fraud, concealment, and distress" Sir John Shore''s Minute of June 1789, p. 44.

10. It does not appear that after the acquisition of the Dewanny by the East India Company, any marked improvement, in the method of apportioning the share of the produce of the land between the parties entitled to it, was made. The settlement, sometimes quinquennial, but generally annual, was made sometimes with the zamindar, who, according to the preamble of Regulation II of 1793, after the deduction of the expenses of collection, paid over ten-elevenths of the net rents of his property as revenue to Government, retaining the remaining one-eleventh as his zamindari profits,--and sometimes with strangers, who at auction bid over the head of the zamindar himself. In this case the zamindar received the profits of his nankar land, or some particular sum payable either by the farmer or from the public treasury; and the farmer, in order to enable him to meet his engagements with Government, frequently made without sufficient regard to the assets of the property which he had obtained in farm, resorted to every sort of exaction over his temporary tenants. This state of things was rendered worse by the ingenuity of the native collectors of Government, "who," to use the words of Government, "in 1786, had endeavored to confound the limits of different districts, to vitiate accounts, to increase old abwabs, and to super add new ones, and, in short, to involve oppression in such mystery and difficulty as nearly to defeat and set at defiance all attempt at detection."

11. It was in the midst of this state of things that the Decennial Settlement was determined on, which afterwards became perpetual. Its object was to fix the Government demand, to fix the demand which the zamindar should make on his tenants, and to guarantee to the zamindar the profits arising from his bringing waste lands into cultivation, and inducing the ryots to cultivate the more valuable articles of produce. "The rents of an estate can only be raised," remarks Lord Cornwall is, "by inducing the ryots to cultivate the more valuable articles of produce, and to clear the extensive tracts of waste land which are to be found in almost every zamindari in Bengal" Lord Cornwallis'' Minute, dated the 3rd February 1790, Vol. II,

p. 185, Harington''s Analysis. By this Settlement the demand of the State was fixed for ever, thus at once remedying, perhaps too decisively and adversely to itself, the evil which had become chronic in Bengal, arising from the uncertainty in the share of the produce which the Government might claim as its own. The Government, moreover, has asserted, in the preamble of the Regulations XIX and XLIV of 1793, its right to a share of the produce of every biga in Bengal, assessed and un-assessed, unless held lakhiraj under a valid grant; or, in other words, unless Government has transferred its right to such share to individuals for a term or in perpetuity; and it has limited its demand in perpetuity over all assessed estates to the sum that, under the Settlement, was assessed upon them, leaving the zamindar to appropriate to his own use the difference between the value of the proportion of the annual produce of every biga of land which formed the unalterable due of Government according to the ancient and established usage of the country, and the sum payable to the public. It has declared, moreover, that the zamindars, whatever they may have been originally, and however liable heretofore to be displaced from their estates with the bare pittance of nankar or other small allowance, are the actual proprietors of the soil; and that, as an implied consequence, they will not be liable to be ejected from their estates, but that, on failure to pay the revenue assessed upon them, their estates or portions of them, sufficient to meet the Government demand, will be brought to sale. Government, moreover, expressed a trust that, sensible of the benefit thus conferred on them, the zamindars would exert themselves in the cultivation of their lands (a considerable portion of which was then under jungle), under the certainty that they would enjoy exclusively (that is, without the interference of Government) the fruits of their own good management and industry; and Government reserved to itself the power, acting under the duty which belongs to it as ruling power, of protecting all classes of people, and more particularly those who from their situation are most helpless, of enacting, whenever it might deem it proper, such Regulations as it might think necessary for the protection and welfare of the dependant talookdars, ryots, and other cultivators of the soil; and it declared Regulation I. 1793 that no zamindars, independent talookdars, or other actual proprietors of land, shall be entitled on this account to make any objection to the discharge of the fixed assessment which they have respectively agreed to pay.

12. These words clearly show that, though recognized as actual proprietors of the soil,--that is, owners of their estates,--still zamindars and others entitled to a settlement were not recognized as being possessed of an absolute estate in their several zamindaris; that there are other parties below them with rights and interests in the land, requiring protection just in the same way as the Government above them was declared to have a right and interest in it which it took care to protect by law; that the zamindar enjoys his estate subject to, and limited by, those rights and interests; and that the notion of an absolute estate in land is as alien from the Regulation law as it is from the old Hindu and Mahomedan law of the country.

13. What, then, are those rights and interests recognized by law belonging to the ryots--for with them we are alone concerned--which limit and control the right of the zamindar in his own estate? At the time of the Decennial Settlement, the ryots were, in Bengal, as in other parts of India, divided into khud-kasht or resident, and py-kasht or non-resident. It has indeed been contended before us that time is of the essence of a khud-kasht tenure; that a ryot simply residing in a village in which his land is, is not a khud-kasht ryot; and that, in order to constitute a khud-kasht ryot under the Regulations, he must be a resident hereditary ryot; and that if he has not succeeded by right of heirship, he does not fall within that class of tenants. But it appears to me that, whether we look to the etymology of the word or to the thing itself, there is no reasonable ground for question. Khud-kasht ryots are simply cultivators of the lands of their own village, who, after being once admitted into the village, have a right of occupancy so long as they pay the customary rents, and therefore with a tendency to become hereditary, and with an interest in the produce of the soil over and above the mere wages of labor and the profits of stock; in other words, above the cost of production.

14. These tenants seem, at the Settlement, practically and legally, though not by express Statute, to have been divided into two classes, the khud-kasht kadimi, and the simple khud-kasht, or those who had been in possession of the land for more than twelve years before the Settlement, and those whose possession did not run back so long. Both by the Hindu and Mahomedan law, as well as by the legal practice Colebrooke''s Digest of the Regulations, Vol. III, page 4 of the country, twelve years had been considered sufficient to establish a right by negative prescription,--that is, by the absence of any claim on the part of other persons during that period,--and hence the doctrine which has obtained that khud-kasht ryots in possession twelve years before the Settlement, were, under no circumstances, not even on a sale for arrears of revenue, liable either to enhancement of rent, or eviction from their holding, so long as they paid the rents which they had all along paid. The existing leases of khud-kasht ryots at the time of the Settlement, who had no prescriptive rights, were, with certain exceptions specified in section 60 of Regulation VIII of 1793, to remain in force until the period of their expiry; and those ryots were entitled to renewal of their leases at pergunna rates section 7, Regulation IV of 1794; and on a sale for arrears of revenue such ryots were entitled to a new settlement at the pergunnah rates, and could be evicted only after declining to enter into engagement with the purchaser at the same rates section 5, Regulation XLIV of 1793; Clause 6, section 29, Regulation VII of 1799. It may here be observed that written engagements between the tenants and other parties were not the custom of the country. The entry of the tenants'' names, and of the rents, in the papers of the village accountants, was the only evidence of title which the great majority of the tenants in the country then held. The Regulations of 1793 attempted, but ineffectually, to introduce generally the system of the exchange of written engagements between the zamindars and their tenants.

15. Khud-kasht ryots, whose tenancy commenced Subsequently to the Decennial Settlement, are entitled to hold on at the rate which they have either expressly or impliedly contracted to pay during the incumbency of the zamindar who granted the potta, and of his representatives, whatever that rate may be section 5, Regulation XLIV of 1793; section 7, Regulation IV of 1794 Clause 5, section 29, Regulation VII of 1799; and on a sale for arrears of revenue, they also are entitled to a renewal of their leases by a purchaser at the pergunna rate. Should the rate in the engagement cancelled by the sale have been below that figure, they can only he evicted on refusing to renew at the pergunna rates. Moreover, it was enacted generally by section 6 of Regulation IV of 1794, that if a dispute arises between the ryots and the persons from whom they may be entitled to demand pottas regarding the rates of the pottas, it should be determined in the Dewanny Adawlut of the Zilla in which the lands were situated according to the rates established in the pergunna for lands of the same description and quality as those respecting which the dispute arose.

16. The Legislature, as just now observed, was, in 1793, anxious to encourage the exchange of pottas and kabuliats between the zamindars and their tenants; but so fearful was it, lest, from weakness or improvidence, the zamindars just recognised as actual proprietors should injure their own properties, and also endanger the stability of the Government revenue by granting long leases at insufficient rents, that it restricted the period for which leases could be granted to ten years, renewable in the last year for another period of ten years Section 2, Regulation XLIV of 1793. This law remained in force till 1812, when, by Regulation V of that year, section 2, the above restriction was taken off, and zamindars were declared competent to grant leases for any period which they might deem most convenient to themselves and tenants, and most convenient to the improvement of their estates. Moreover, by Regulation XVIII of the same year, it was explained, in consequence of certain doubts which had arisen on the construction of section 2 of Regulation V of 1812, that the true intent of the said section was to declare proprietors of land competent to grant leases for any period, even to perpetuity, and at any rent which they might deem conducive to their interests.

17. This law did not, however, expressly, or by implication, override the rights of khud-kasht ryots to hold at pergunna rates. It simply declared that, having regard to the rights of others, the zamindar might grant leases for any period or any rent, be it high or be it low, provided the tenants were willing to pay it, and he to take it. Again, by section 2 of Regulation VIII of 1819, it was declared that all leases and engagements for the fixing of the rent now in existence, that may have been granted or concluded for a term of years or in perpetuity, by a proprietor under engagement with Government, or other persons competent to grant the same, shall be deemed good and valid tenure, notwithstanding that the same may have been executed before the passing of Regulation V of 1812, and while the rule of section 2 of Regulation XLIV of 1793 above alluded to, was in full force and effect.

18. Thus, then, the khud-kasht ryots, though they were entitled to pottas at the pergunna rates by the laws of 1793 and following years, and though, u/s 6 of Regulation IV of 1794, the Courts were, in case of disputes, to determine the rate of the potta according to those rates, still, under the operation of the laws above cited, ryots might, if they pleased, bind themselves by specific engagements irrespective of those rates; and, of course, having done so voluntarily, they would be held strictly to the terms of their engagement. As I have observed above, it had become the practice of the Government for the time being, to collect various imposts from the zamindar, who again was entitled to collect them from the ryots; and from their number and uncertainty, they had been intricate to adjust, and a source of oppression to the tenants. These also were entered in the papers on which the Decennial Settlements were based, and consequently had been legalized and recognized by it. By section 54 of Regulation VIII of 1793, all proprietors of land and dependant talookdars were required to consolidate these charges with the assal, or original rate, into one specific sum. And by section 55 of the same law, proprietors and farmers of lands, of whatever description, were prohibited imposing any new abwab or mathot on the ryots, and a penalty was enacted in case of any infringement of the prohibition.

19. When then the term ''pergunna rate'' occurs in the Regulations of 1793, 1794, and 1799, in connection with khud-kasht ryots, the question arises, is it confined to the particular portion of the produce of land to which, by the custom of that pergunna, the demand of the zamindar is limited, or does it include also the abwab recognized by Regulation VIII of 1793 which has become consolidated with it? The Court has been told indeed, that the pergunna rate never meant anything; that it was a mere myth; but that, if it did mean anything, it was only another term for the zamindar''s discretion or moderation; and that, even if those rates existed in 1793, they had become well nigh obsolete in 1812; for although, by section 6 of that law, it is enacted that established pergunna rates, where such existed, shall determine the amount to be collected by Government officers and purchasers at sales for arrears of revenue, still by section 7 it is enacted that, in cases in which no established rates of the pergunna or local division of the country may be known, pottas shall be granted and the collections made according to the rate payable for land of a similar description in the places adjacent. I cannot assent to the doctrine that the Legislature in 1793 and the following years used terms without meaning, and directed the Court to settle disputes according to a rate which then had no existence. I must rather conclude that the terms which the Legislature used to denote the rate which was to form the limit of the zamindar''s demand, represented something real and distinct at that period; and although, in the shape of a pergunna rate, the limit on the zamindar''s demand had become, by 1812, in some places, indistinct, still the limit existed in the shape of the rate which was payable for lands of a similar description in the places adjacent--a rate which is in fact the same thing with the pergunna rate, under a different form--the customary rent deduced from

the similar rate paid in places adjacent rather than from a rate current in the pergunna.

20. Reverting then to the question, what the words ''pergunna rate,'' as used in the old laws, meant, I have no hesitation in holding that it must be considered to mean the assal, or original rate, the rate of Toran Mull, together with the abwab which had been subsequently levied from the tenants and recognized by the Settlement. It is true that these two quantities joined together did not probably exactly represent that share of the produce calculated in money which, under a pure system of customary rents, would have been developed; but judging from the increased wealth of the country, which had, from commerce and the influx of precious metals, resulted between the time of Toran Mull and the Decennial Settlement, the assessment which had been increased in one form did not probably differ widely from what it would have been had the other and natural mode of calculating the increase been adopted. Since the Decennial Settlement, however, the rates of rent have adjusted themselves to the varying prices of the produce irrespective of any extraneous demand; and the terms used in Regulation V of 1812 have regard to the varying rates in the different localities which have resulted solely under the increased activity and industry caused by the comparative security obtained under the Permanent Settlement.

21. To suppose that a pergunna or local rate of rent could be permanently fixed in amount when the circumstances of the country were improving, is to suppose an impossible state of things. The proportion of the produce calculated in money payable to the zamindar, represented by the pergunna or local rate, remains the same; but it will be represented, under the circumstances supposed, by an increased quantity of the precious metals.

22. The rates of rent, then, which khud-kasht ryots under the old Regulations were liable to pay, independent of contract, remained in all cases, whether under a purchase at a sale for arrears of revenue, or otherwise, fixed either at the pergunna rate, the rate payable by land of a similar description in the places adjacent, or at rates fixed according to the law and usage of the country; and they were entitled to hold their lands so long as they paid those rates. But when Regulation XI of 1822 was passed, the use in section 32 of that law of the terms khud-khast kadimi ryot, or resident and hereditary ryot with a prescriptive right of occupancy, to designate the cultivator who would not be liable to eviction on a sale for arrears of revenue, gave rise to the doctrine, that khud-kasht ryots who had their origin subsequent to the Settlement were liable to eviction, though, if not evicted, they, u/s 33, could only be called upon to pay rents determined according to the law and usage of the country; and also, that the possession of all ryots whose title commenced subsequent to the Settlement was simply a permissive one, that is, one retained with the consent of the landlord S.D. Decisions for 1856, pp. 617 to 628. Again, by Act XII of 1841, and Act I of 1845 (which repealed the former), a purchaser acquired his estate free of all

encumbrances which had been imposed on it after the time of the Settlement; and he is entitled, after notice given u/s 10 of Regulation V of 1812, to enhance at discretion,--anything in the Regulations to the contrary notwithstanding,--the rents of all under-tenures in the said estate, and to eject all under-tenants with certain exceptions, amongst which are khud-kasht kadimi, but not simple khud-kasht ryots. It follows that these laws distinctly gave the purchaser the power to eject a khud-kasht ryot whose tenure was created after the Permanent Settlement, and if not ejected, they are liable to be assessed at the discretion of the landlord. This word "discretion" entirely annihilated the rights of the khud-kasht tenants created subsequent to the Settlement in estates sold under these laws. It reduced them from tenants with rights of occupancy, so long as they paid the established rate of the pergunna, or the rate which similar lands paid in the places adjacent, into mere tenants at the will of the zamindar, who might in any year eject them, and place in their stead any tenant competing for the land. It is, in short, introducing into this country competition in the place of customary rents.

23. As to py-kasht ryots, they are nowhere expressly mentioned in the laws referring to Bengal. If they held under pottas at the time of the Settlement, they were entitled to hold them till the expiry of the lease under the comprehensive terms of clause 1, section 60, Regulation VIII of 1793, which included even them. In section 10 , Regulation LI of 1795, which referred to Benares, they are expressly mentioned, and they are declared to be equally entitled with khud-kasht ryots to have their pottas renewed at the established rates, provided the proprietor or farmer chooses to permit them to cultivate the land held by them, which they have the option to do, or not to do, as they think proper, on the expiry of all py-kasht leases. In Bengal, the rates of py-kasht ryots at the present date, though it seems to have been different formerly, are generally above the pergunna rates. They have always been considered to have no rights independent of the particular engagements under which they hold; and those being cancelled, they are liable to immediate eviction.

24. Such was the state of the law when Act X of 1859 was passed, under the power, it may be presumed, which the Governor-General in Council had reserved to himself in the 7th Article of the Proclamation inserted in Regulation I of 1793, of enacting, whenever he might deem it proper, such Regulations as he might think necessary for the protection and welfare of the ryots and cultivators of the soil. They were, in the opinion of the Legislature, insufficiently protected; hence the new law which re-enacted with modifications certain old laws rescinded by it, and which, moreover, as we shall see presently, interfered with the rights of the zamindars as laid down in the Legislation of the last thirty years.

25. By the first section of this Act are rescinded all those Regulations which laid down the rights of khud-kasht or permanent resident ryots; Regulations IV of 1794 and V of 1812, as to the rates at which they were entitled to pottas, were repealed, and such parts of section 26 of Act I of 1845 (by which law Act XII of 1841 was

repealed) as related to the enhancement of rents and the ejectment of tenants by the purchasers of an estate sold for arrears of Government revenue, was modified; and it was enacted by section 3 that ryots who hold lands at fixed rates of rent which have not been changed from the time of the Permanent Settlement, are entitled to receive pottas at those rates; and by section 4 proof that the rent has not been changed for twenty years, raises the presumption that the land has been held at that rent from the Permanent Settlement. By section 5 it is enacted that ryots having right of occupancy, but not holding at fixed rates, as described in the two preceding sections, are entitled to receive pottas at fair and equitable rates; and, in case of dispute, the rate previously paid by the ryot shall be deemed to be fair and equitable, unless the contrary be shown in a suit by either party under the provisions of this Act. Then follows section 6, by which it is enacted that "every ryot who has cultivated or held land for a period of twelve yours, has a right of occupancy in the land so cultivated or hold by him, whether it be held under potta or not, so long as he pays the rent payable on account of the some; but this rule does not apply to khamar, nij-jote, or seer 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 respects the actual cultivator) to lands sub-let for a term, or year by your, by a ryot having a right of occupancy. The holding of the father or other person through whom a ryot inherits shall be deemed to be the holding of the ryot within the moaning of this section." section 7 declares that "nothing contained in the last proceeding section shall be hold to affect the terms of any written contract for the cultivation of land entered into between a landholder and a ryot, when it contains any express stipulation contrary thereto;" and section 8 declares that "ryots not having rights of occupancy are entitled to pottas only at such rates as may be agreed on between thorn and the persons to whom the rent is payable."

26. All ryots, then, whether khud-kasht or py-kasht, with the right of occupancy, are, u/s 6 of this law, entitled to pottas at fair and equitable rates; and the point which we have eventually to determine is the meaning to be given to the words "fair and equitable" under the circumstances of the present case. Before, however, proceeding to the determination of that point, a preliminary difficulty has to be settled. It has been urged before the Court that section 6, in whatever way it he read, affects the vested rights which zamindars have, under existing laws, in their lauds hold by ryots who may occupy it for twelve years; that whereas those persons had no right of occupancy at all previously, but were more tenants-at-will, the Legislature gives that right to them now after twelve years'' occupancy only; that, consequently, the law should be road, not retrospectively, but prospectively,--that is, it should be road in such a manner as to give the zamindar an opportunity to avoid its, to him, disadvantageous enactments, and in such a way as to infringe as little as possible on his vested rights; and the case of Moon v. Darden 2 Exch., 22, cited and approved in Jackson v. Woolley, 8 Exch., 788 has been cited to us as an authority. Undoubtedly, with reference to past transactions and to such as are still pending,

laws should be construed as prospective, not as retrospective, unless they are made expressly applicable to them; but in the present instance the Court has to deal, not with past transactions, but with the status or condition of persons; and the Court has only to determine whether the Legislature intended to, and did in furtherance of that intention, declare or enact that the status or condition of a ryot with right of occupancy should be held by or given to all ryots who might either at the passing of the Act have occupied, or might at any time, partly before and partly after its enactment, occupy for twelve years; or whether it simply enacts that twelve years'' continuous occupancy subsequent to the passing of the Act should confer that condition on every ryot so holding. This point must be determined with reference to the terms of the law and the intent of the Legislature as gathered therefrom.

27. After having attentively considered the point raised before the Court, and keeping in mind the magnitude of the innovation which by the interpretation adopted by me is wrought on the immediately previously existing law, I am clearly of opinion that the terms of the Act confer on every tenant, be he a khud-kasht or py-kasht ryot, in every estate in the country, who had held at the time of the passing of the Act, or might at any time, partly before and partly after the enactment of the law, occupy for twelve years, a right of occupancy, whether he had that right before or not. The inexact terms of the law might, if considered alone, leave a doubt on the subject. But when the terms of the section are considered in connection with the repeal of the old laws regarding the rights of khud-kasht ryots, except as to proceedings commenced before the Act came into force--with the modification of Act I of 1845, so far as relates to the enhancement of rent and the ejectment of tenants by an auction-purchaser, a modification which, as the old laws are repealed, would have nothing upon which to act, did the law not intend to affect the status of parties from the date on which it was passed and to be in force accordingly--and with the contemporaneous enactment of a new Sale Law, Act XI of 1859, attended with the total repeal of Act X of 1845, in which there is a section (37) with a proviso, which becomes intelligible only on the supposition that section 6 is current law,--I cannot entertain a doubt that it was the intention of the Legislature, as gathered from the terms of the law, with which alone sitting as a Judge I have to do, that the law in question should affect the status of all ryots falling within its terms on and from the date of the passing of the Act.

28. This being my opinion, and the points referred to the Court not having fallen through, as they would have done had the Court at largo thought differently, I have now to consider the meaning of the terms "fair and equitable," under the circumstances of the present case, when applied to ryots with a right of occupancy.

29. It has been urged by the learned counsel, Mr. Doyne, that there are three classes of tenants; khud-kasht ryots holding at an invariable rate from before the settlement; ryots holding from old dates, but subsequent to the Settlement; and the creatures of Act X; that the first class may be said to pay a rent regulated by custom;

that the second class might be able to show the same, though, as the zamindar might at any time put an end to their tenancy, it is difficult to see how they could show a rent regulated by custom; but that to the third no custom could apply, for previous to the enactment of Act X, they were mere tenants-at-will; that the legislature, by section 6 of Act X, has only given these ryots a right of occupancy, or, in other words, a preference or a refusal curtailing in no way the right of the zamindar as to the rate of rent which he might demand; that the zamindar, being absolute owner, is entitled to a full rent, a rent proper under the system of competition, chat is, the portion of the value of the whole produce which remains after the deduction of the ryot''s costs of production,--in other words, to rent calculated on the principle of Ishore Ghose''s case; that the rates of rent by the system of proportion in the case of a rise in the price of the produce can only be adopted with any show of justice in a case in which it appears clearly that the rate existing up to the present time is based on a certain proportion of the ryots'' produce; that although it is alleged that the pergunna rates were so calculated, there is no proof of the fact; that, even were the mode of calculation just, it would at present be impossible of application, for one could not find the value of the ryot''s produce at the time of the last adjustment of the rent; that the zamindars have hitherto always entered into engagements with their tenants on calculations based on the theory of rent laid down by political economists; and that this right should be continued, and the principle laid down in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 148, 131; on review, 184 confirmed.

30. It appears, as I have observed above, that, under the old Regulations of Government, all resident khud-kasht and permanent ryots had enjoyed a right of occupancy, and were entitled, unless they had waived their right by entering into a specific contract inconsistent with it, to enjoy the same so long as they paid their rent, either according to the pergunna rate, or to the rate which such lands paid in places adjacent, or the rate fixed by the law and usage of the country; and their tenures could not, by clause 5, section 18 of Regulation VIII of 1819 (a section of law repealed by Act X of 1859, and re-enacted in a more complete form in section 78 of this Act), be cancelled, except after a summary suit obtained at the end of the year, and on failure on the part of the tenant to pay the amount immediately after the decree had been obtained. The right of occupancy which the khud-kasht permanent tenant formerly enjoyed has been granted by clause 6 to all tenants occupying their lands for the space of twelve years, whether under potta or otherwise; and they are entitled to receive pottas at fair and equitable rates. Now, I cannot agree with the learned counsel in thinking that the Legislature intended merely to give to those tenants a preferential right to hold, the land being then subject to be rack-rented by the zamindars. I agree with the Select Committee that sat on Act X of 1859, which remarked that the recognition of a right of occupancy in the ryot implies necessarily some limit to the discretion of the landholder in adjusting the rent of the person possessing such a right; and I think that the terms "fair and equitable" are used with

reference to that limit; or, in other words, to the right which tenants with a right of occupancy had under the old Regulations, and that therefore they are the equivalent of pergunna rates, rates which similar lands bear in places adjacent, or rates fixed by the law and usage of the country, and are to be explained and interpreted by those customary rates;--in short, it appears to me that it was the intention of the Legislature to place the ryot whose rights were created by Act X in exactly the same position as all other tenants with a right of occupancy held under the old Regulations,--and this notwithstanding that recent Legislation had curtailed the rights which be enjoyed under those old laws. And here I would notice the error which seems to me to pervade the reasoning of the learned counsel, viz., that of considering that the principle of competition has ever in this country, to any appreciable extent, determined the mode in which the gross produce shall be divided between the zamindar and the ryot.

31. "It is only," observes Mr. Mill, "through the principle of competition that political economy has any pretension to the character of a science Vol. II, page 292. So far as rents, profits, wages, prices are determined by competition, laws may be assigned for them. Assume competition to be the exclusive regulator, and principles of broad generality and scientific precision may be laid down according to which they will be regulated. But it would be a great misconception of the actual course of affairs to suppose that competition exercised, in fact, this unlimited sway. Competition, in fact, has only become in any degree the governing principle of contract at a comparatively modern period. The further we look back into history, the more we see all transactions and engagements under the influence of fixed custom. The reason is evident. Custom is the powerful protector of the weak against the strong, their sole protector where there are no laws or Government adequate to the purpose, though the law of the strongest decides. It is not the intention, or, in general, the practice of the strongest to strain the law to the utmost; and every relaxation of it has a tendency to become a custom, and every custom to become a right. Rights thus originating, and not competition in any shape, determine in a rude state of society the share of the produce enjoyed by those who produce it. The relation, more especially between the landholder and the cultivator, and the payment made by the latter to the former, are in all states of society but the most modern, determined by the usage of the country. Never until late times has the condition of the occupancy of land been, as a general rule, an affair of competition. The occupier for the time has very commonly been considered to have a right to retain his holding whilst he fulfils the customary requirements, and has thus become in a certain sense a co-proprietor in the soil." Mr. Mill goes on to give India as an example of his remark, observing, at the same time, that "the customary rents have become obscure, and that usurpation, tyranny, and foreign conquest have, to a great degree, obliterated the evidence of them;"--and he adds "that the British Government of India always simplifies the tenure of a ryot by consolidating the various assessments (that is, the real rent and the taxes subsequently imposed) into

one, thus making the rent, nominally as well as really, an arbitrary thing, or at least a matter of specific agreement; but it scrupulously respects the right of the ryot to the land, though until the reform of the present generation (reform even now only partially carried into effect) it seldom left him much more than a bare subsistence." These remarks seem to me admirably to describe the state of things which has existed in this country, to show that any reasoning drawn from facts peculiar to England must be fallacious, and also to confirm the view which I have taken of looking upon section 6, Act X of 1859 as a further reform, to adopt Mr. Mill''s language, made by the present generation in the interest of the ryot, and a partial return to the old state of things, entitling ryots with right of occupancy acquired under the law by a twelve years'' occupancy to obtain pottas at a rent fair and equitable according to the custom of the country and not according to the theory of English political economists, by whose analysis, when applied to this country, all that is not comprehended in the wages of his labor, and profit of the ryot''s stock, must he the landholder''s rent.

32. As, then, the terms "fair and equitable" seem to me to have relation to the customary rate of the country representing a share of the gross produce calculated in money under whatever form of expression it be designated, and as the law directs that in case of disputes the rate of rent which, a ryot with a right of occupancy has paid shall be considered fair and equitable until the contrary be shown, it is a fair presumption that the rent now paid represents the customary rent in the absence of any proof to the contrary. Under this presumption, then, when the value of the produce has increased otherwise than by the agency or the expense of the ryot or the zamindar, and simply in consequence of the rise of prices, what is the principle on which the rents should be adjusted?

33. As the rent now paid represents the customary rent, it represents on the view which I have adopted, that proportion of the gross produce calculated in money to which the zamindar was entitled; and as the increase in the produce has arisen from circumstances independent both of the zamindar and the ryot, the zamindar is entitled to arise in his rent proportionate to the increased value of his share of the produce. The formula, then, by which this increase should be determined seems to me to be the following. The value of the gross produce before the alleged alteration in the same is to the rent which the land then bore, as the altered value of the produce is to the rent which should be assessed on it; or, in another form, the old rent must bear to the new rent the same proportion as the former value of the produce of the soil bears to its present value. This method of calculation on the supposition that the costs of production have risen in the same ratio, leave the parties as to each other in exactly the same relative position as they were. The value of the produce which each would receive, the one as rent, the other as ryot''s profits, or as representing his beneficial interest, would remain in the same proportion to each other, though the figures representing that proportion will be altered; but even if the costs of production have not increased in the same ratio, that is a point

which, under a system in which custom gives to a zamindar only a fixed portion of the produce, is immaterial, or rather one which will riot entitle the zamindar by his own act to alter that customary proportion. All the risk of seasons and markets is (as was observed by Baboo Dwarkanath Mitter) with the tenant. But this is not the main reason which entitles the tenant to retain the supposed advantage. It is the system itself which, having once fixed the proportion for which the ryot is liable to the zamindar, refuses to look at costs of production or matters of detail, being content with seeing that the payment of the fixed share of the produce belonging to the zamindar, or that the altered value of that share in money, is ensured to him. Not so, however, under the system in which competition determines the division of the produce. According to this, all that does not legitimately fall within wages and profit is rent, and the competition which has the tendency to reduce profit has the same tendency to raise landlord''s rents; but as I have given my opinion that that system does not ordinarily obtain in India, it is unnecessary to carry the subject farther.

34. An objection was made to the method of proportion on the ground that it was not universally applicable, and that this defect showed that the method is unsound in itself. But such is not the case; for whether the productive power remaining the same, the value of the produce has increased, or whether the productive power has alone increased, or whether the land be proved by measurement to be greater than the quantity for which the rent has been previously paid, provided the whole land be of one and the same quality, in all these cases coming u/s 17 of Act X of 1859, the method of proportion is applicable; and the objection, therefore, now under notice, need not delay the Court longer. But it was observed by the learned counsel that, granting that the system of proportion was the correct system to be adopted in a case like that before the Court, great and insuperable difficulties would arise in its application; that it would the impossible to find the value of the produce, net or gross, at the time of the last adjustment, which may have been at a remote period 5 and that by a, failure to settle the two first terms of the proportion, the whole calculation would break down. But I do not see any necessity for these supposed difficulties. A zamindar, on suing to enhance, must state the grounds on which he desires the enhancement. If his claim be founded on the increase in the value of the produce through a simple rise of price, he will, whatever the mode of adjustment determined on, have to state the circumstances leading to the demand, and he will have to inform the Court of the particular rise in price subsequent to the last adjustment which justifies that demand. In stating this, he will give the Court sufficient data for the formula above laid down. It is unnecessary to refer to the period of the last adjustment itself. The price of the produce, previous to the date of the alleged rise in value, will be sufficient data on which to base the formula of proportion; and when that is obtained, and the rent also, the two first terms of the formula are at hand, and no difficulty need be experienced.

35. But these remarks apply to cases in which there is no evidence to rebut the presumption that the rate hitherto paid, which, in case of dispute, by the direction of

the Legislature, is to be considered fair and equitable until the contrary be shown, is the customary rate. There may, and probably will, as was remarked by Mr. Doyne, be many cases in which parties will be sued for the enhancement of their rents, who were mere tenants-at-will, and who hold under written engagements in which their rents are based upon data inconsistent with the presumption of the rate being a customary rate, and thereby rebutting that presumption, but who by the operation of section 6 became vested with the right of occupancy. In these cases, of course, the method of proportion will not be applicable. The rents will be adjusted upon the same principle as they were under the old contract, to which the ryots voluntarily submitted themselves.

36. It was also urged that there were cases in which the old rents had, according to the written terms of the potta and kabuliat, been settled at rates below the ordinary one, in consideration of certain acts to be done by the tenants which are no longer required to be done; that in this case the rate in the old engagement could not be presumed to be the customary rate; but that before the method of proportion could be applied to these cases, the old rents must be adjusted so as to equal the rate which was ordinarily borne by similar lands in the places adjacent when such rate was uninfluenced by any extraneous circumstances. This contention is undoubtedly sound; and whenever it is shown from the contract itself that such extraneous circumstances have affected the terms of it, they must be eliminated, and a calculation made irrespective of those must be substituted in their place before the method of proportion can fairly be applied.

37. In answer, then, to the questions which have been put to the Court by the Division Bench, I would reply that the terms "fair and equitable," when applied to tenants with a right of occupancy, are to be construed as equivalent to the varying expressions, pergunna rates, rates paid for similar lands in the adjacent places, and rates fixed by the law and usage of the country,--all which expressions indicate that portion of the gross produce calculated in money to which the zamindar is entitled under the custom of the country; that, as the Legislature directs, that, in cases of dispute, the existing rent shall be considered fair and equitable until the contrary be shown, that rent is to be presumed, in all cases in which the presumption is not by the nature and express terms of the written contract rebutted, to be the customary rate included in the terms, pergunna rates, rates payable for similar lands in the places adjacent, and rates fixed by the law of the country; that in all cases in which the above presumption arises, and in which an adjustment of rent is requisite in consequence of a rise in the value of the produce caused simply by a rise of price and by causes independent both of the zamindar and ryot, the method of proportion should be adopted in such adjustments, in other words, the old rent should bear to the existing rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value, bears to its present value; that in all cases in which the above presumption is rebutted by the nature and express terms of the old

written contract, the re-adjustment should be formed on exactly the same principle as that on which the original written contract, which is sought to be superseded, was based; and that in cases in which it appears, from the express terms of the previous contract not still in force, that the rents then made payable by the tenant were below the ordinary rate paid for similar land in the places adjacent, in consequence of a covenant entered into by the ryot to cultivate indigo or other crops, the old rent must be corrected so as to represent the ordinary rate current at the period of the contract, before it can be admitted to form a terra in the calculation to be made according to the method of proportion above laid down.

Loch, Bayley, Jackson and Glover, JJ. concurred.

Macpherson, J.

38. The question in fact is--a ryot having a right of occupancy being entitled to a potta at "fair and equitable rates," what meaning is to be attached to these words, and how is it to be ascertained what rates are fair and equitable? Act X of 1859 is silent upon the point; and it is for the Court now to determine what rates are to be deemed fair and equitable.

39. It appears to me that, in order to arrive at a just conclusion in the matter, it is necessary to consider not merely the provisions of Act X, but also the position of ryots who had a right of occupancy prior to the passing of that Act. For if we shall find from the prior legislation, and from the earlier history of the country, that there was any known rule by which the rates to be paid by ryots who had a right of occupancy were ascertainable, that rule will form a legitimate and safe guide to the ascertainment of the rule which ought now to prevail. Act X was not intended to be generally subversive of the old law. It was an Act mainly for the protection and benefit of the ryot--an Act "to re-enact, with certain modifications, the provisions of the existing law relative to the rights of ryots, with respect to the delivery of pottas and occupancy of land, to the prevention of illegal exaction and extortion in connection with the demands of rent, and to other questions connected with the same," besides extending the jurisdiction of the Collectors, and providing for the easier recovery of arrears of rent. So that, where a question is left undecided by the express terms of the new law, we may well look to the former law to assist us in its solution.

40. I shall not enter upon the general history of the country prior to the Permanent Settlement. That history is referred to at some length in the judgment of Mr. Justice Trevor, and I shall only remark that it very strongly confirms the view which I take of the state of things prior to 1793, and which, I think, is shown by the Regulations of that year to have previously existed. As regards the legislation from 1793 down to Act X, it, in my opinion, shows clearly that the zamindar never was, and never was intended to be, the absolute proprietor of the soil. He never was proprietor in the English sense of the term, or in the sense that he could do with it as he pleased; for

certain classes of royts have, at all times, had rights quite inconsistent with absolute ownership, haying rights which entitled them to remain in occupation so long as they paid their rents.

41. We learn from the Regulations that, prior to the Permanent Settlement, the rents had been from time to time settled and adjusted with reference to the produce of the land, so much of the produce of each biga going to Government, and so much to the ryot. Whether in the name of rents, or in the name of abwabs and irregular imposts, the rents were from time to time adjusted, and there was a pergunna rate, or customary rate of the neighbourhood to refer to in case of dispute. In section I of Regulation II of 1793, it is recited that the amount of revenue payable formerly was liable to frequent variation; that estimates were formed by public officers of the aggregate rent payable by the ryots, and of that aggregate rent ten-elevenths went to the Government, and one-eleventh to the land-holder. So the preamble of Regulation XIX of 1793 recites that, "by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every biga of land (demandable in money or in kind according to local custom), unless it transfer its rights thereto for a term or in perpetuity, or limit the public demand upon the whole of the lands belonging to an individual, leaving it to him to appropriate to his own use the difference between the Value of such proportion of the produce and the sum payable to the public while he continues to discharge the latter."

42. Regulation I of 1793 makes the Decennial Settlement perpetual, and declares (section 4) to the zamindars and other actual proprietors of lands "that they and their heirs and lawful successors will he allowed to hold their estates at such assessment for ever." In section 7 it is said that the Governor-General in Council trusts that the proprietors of lands will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good "management and industry." It is to be observed that it is to the cultivation of lands that the attention of the zamindars is directed; it being open to them, as appears from other Regulations which came into force simultaneously, to make such arrangements as they pleased with new ryots as regards new lands not previously cultivated. Even on the face of Regulation I of 1793, however, the zamindar was not absolute proprietor: for it is expressly stated in it that, "to conduct themselves with "good faith and moderation towards their dependant talookdars and ryots," is among the duties of proprietors of land,--and section 8 reserves power to the Governor-General in Council to enact such Regulations as he may think necessary for the protection and welfare of the dependant talookdars and other cultivators of the soil."

43. By Regulation VIII of 1793, section 51, provision is made to prevent undue exactions from dependant talookdars, and the rules under which the amount payable by them may be enhanced are laid down. It is declared that they may be increased "by special custom of the district," or "by the conditions under which the

talookdar holds his tenure." section 52 enacts that the proprietor may "let the remaining lands of his estate under the prescribed restrictions, in whatsoever manner he may think proper." By sections 54 and 55 all abwabs and other irregular imposts on the ryots are directed to be consolidated with the rent, and it is forbidden to create any new abwabs or imposts of any kind. Section 56 says: "It is expected that in time the proprietors of land, & c., and the ryots, will find it for their mutual advantage to enter into agreements in every instance for a specific sum for a certain quantity of land." Where it is the custom to vary the potta for lands according to the articles produced thereon, and the parties shall prefer to adhere to the custom, the engagement between them is to specify the kind of produce, the quantity of lauds, amount and rate of rent, and term of lease, with other particulars. section 57 enacts that the rents to be paid by the ryots, by whatsoever rule or custom they may be regulated, shall be specifically stated in the potta." section 59 empowers the ryot to demand a potta from the person from whom he holds. section 60 declares that the pottas of khud-kasht ryots are not to be cancelled, except it be proved that "the rents paid by them within the last three years have been reduced below the nirikbundy of the pergunna." And section 62 provides for the appointment of putwarries,--one object of their appointment being to prevent oppression of the persons paying rent.

44. It will be seen that this Regulation teems with provisions quite incompatible with any notion of the zamindar being absolute proprietor. It will also be observed that the custom of the district and the pergunna rate are referred to as furnishing the rule for fixing the rent to be paid by those having the right of occupancy.

45. Regulation XIV of 1793, after expressing a fear lest foolish or vicious proprietors should grant pottas at a reduced rent for a long term or in perpetuity, and so endanger the Government revenue, goes on to say that at the same time it is essential that the proprietors of land should have a discretionary power to grant leases and fix the rents of their lands for a term sufficient to induce ryots to extend and improve the cultivation, & c. section 2 enacts that such pottas shall not be granted for a period exceeding ten years; and section 5 provides that sales for arrears of revenue shall cancel all pottas to ryots and engagements with dependant talookdars (save as therein excepted), and that the purchaser may demand from the ryots, & c., whatever the former proprietor would have been entitled to according to the established usage and rate of the pergunna or district, had the cancelled engagement or lease never expired.

46. I next come to Regulation IV of 1794, which in its preamble recites that it is essential for the protection of ryots to adopt rules to determine disputes between them and proprietors "regarding the rates of the pottas required to be granted by Regulation VIII of 1793, or the rates at which pottas that may expire or become cancelled under Regulation XLIV of 1793 are to be renewed." Section 6 provides that disputes regarding the rates at which pottas under Regulation VIII are to be granted

are to be decided by the Civil Courts "according to the rate established in the pergunnas for lands of the same description and quality;" and section 7 enacts that ryots whose pottas have expired or been cancelled under Regulation XLIV of 1793 are not bound to take new pottas "at higher rates than the established rates of the pergunna for lands of the same quality and description." They are entitled to renewed pottas at the established rates as under Regulation VIII of 1793.

47. Regulation IV of 1808 has also been referred to in argument. It applies only to Benares. It relates to the appointment of Canungoes, whose duties (amongst other things) were by section 6, clause 5, to compile information regarding pergunnas, "articles of produce, rates of rent, rules and customs established in each pergunna."

48. Another Benares law referred to was Regulation LI of 1795, of which sections 9 and 10 are somewhat similar to sections 6 and 7 of Regulation IV of 1794, which I have already mentioned. The conclusion of section 10 enacts that khud-kashts will be entitled to have their pottas renewed at the established rates, as are also py-kasht ryots, "provided the proprietor chooses to permit them to continue to cultivate the land which they have the option to do or not, as they may think proper on the expiration of all py-kasht leases; whereas khud-kasht ryots cannot be dispossessed as long as they continue to pay the stipulated rent."

49. Regulation VII of 1799, section 29, clause 5, enacts that any under-tenant whose lease is cancelled by section 5 of Regulation XLIV of 1793, may be ejected if he will not renew as provided by the Regulation to which I have already referred.

50. The next Regulation which has been quoted is Regulation V of 1812. section 2 removes the restriction which prevented zamindars from granting leases for more than ten years. section 5 says-- "There being reason to believe that the pergunna rates are, in many instances, become very uncertain, the following rules shall be approved on all occasions of that nature,"--(i.e., cases in which leases are cancelled by sales for arrears, under Regulation XLIV, 1793, section 5, & c.) Section 6 enacts that, "if any known established pergunna rates exist," they are to be the test of the rates at which new pottas are to be given; and section 7, that if no established rates of the pergunna or local division of the country be known, pottas are to be granted, & c., according to the rates payable for land of a similar description in the places adjacent; but if the pottas of the tenants of an estate generally, which may consist of an entire village or other local division, be liable to be cancelled under the above rules, new pottas shall be granted at rates not exceeding the highest rates paid for the same land in any one year within the period of the three last years antecedent to the period at which the leases may be cancelled.

51. Regulation VIII of 1819, while providing for the sale of talooks, & c., for arrears of revenue free from encumbrances, and free from all leases granted by the defaulting proprietor, provides, nevertheless (by section 11, clause 3), that the purchaser shall not be entitled to eject "a khud-kasht ryot or resident and hereditary cultivator."

52. So in Regulation XI of 1822 (which also relates to the sale of lands for arrears of revenue), section 32, it is enacted--Nor shall the said rule be construed to authorize any purchaser to eject a khud-kasht kadimi ryot or resident and hereditary cultivator having a prescriptive right of occupancy.

53. Again, by Act XII of 1841, section 27, purchasers of estates sold for arrears may, & c., "enhance at discretion the rents of all under-tenures in the said estate, and eject all tenants thereof," except (1) istemraris or mohurraris at a fixed rate twelve years before the Permanent Settlement; (2) tenures existing at the Permanent Settlement, and not proved liable to assessment, & c.; (3) "lands held by khud-kasht or kadimi ryots having rights of occupancy at fixed rents, or at rents assessable according to fixed rules under the Regulations in force," & c.

54. This provision was re-enacted in Act I of 1845, section 26 .

55. These are the Regulations and Acts prior to Act X which bear upon the subject. Having set forth in detail those portions of them which I think most material, it will be sufficient for me briefly to state the conclusions which I draw from them.

56. It appears to me, then, from these various enactments, and independently altogether of any history save such as they themselves relate, that zamindars never, at any time, were the absolute proprietors of their estates; but that they at all times have held subject to the rights of various classes of ryots whom the zamindar had no power to eject, so long as the proper rents were paid by them. The rent payable by some of those ryots was fixed and unalterable. The rent payable by others was subject to increase under certain conditions. Rents prior to the Settlement were fixed according to the produce of the land, so much of each biga going to the Government as landlord, and so much to the ryot. The same principle prevailed after the Settlement, save that the position of the zamindar, as landholder between the Government and the actual cultivator, was distinctly recognized, and he was declared to be the proprietor of the land in a certain restricted sense. The rents were from time to time adjusted, and there was a pergunna rate or customary rate of the neighbourhood (based on the original rule as to dividing the produce proportionately, and from time to time re-adjusted) to refer to in case of dispute, and according to these rates disputes were settled. Ryots who had a right of occupancy, but who were liable to have their rents increased, could not be enhanced above the pergunna or customary rates. As regards new lands and persons not having a right of occupancy, the zamindars could make what arrangements they pleased. It is unnecessary here to decide to what precise extent such ryots coming in under special engagements, did or could acquire a right of occupancy. For the purposes of the question before me, I consider it enough to look only at the position of such ryots as had an admitted right of occupancy, but were liable to have their rents enhanced according to certain rules. It further appears from the Regulations that the adjustment of the pergunna rates was much neglected,--probably owing to no great change having for many years taken place in

the amount or value of produce,--and that there were no recently adjusted rates to refer to, and no customary rates to form any general guide throughout the country.

57. In this state of things Act X was passed. It provides that persons having a right of occupancy shall be entitled to hold "at fair and equitable rates." It appears to me that, in the absence of any rule or guide contained in the Act itself, we may well, in considering what is fair and equitable, look at what was deemed to be "fair and equitable" in the case of persons having a right of occupancy prior to Act X. Under the old law, persons having a right of occupancy were not liable to have their rents increased, save according to the pergunna rate or customary rate of the district. Finding that this rule has prevailed ever since the Decennial Settlement, and prior to it, I may well presume that the rates so ascertained are "fair and equitable." In my opinion, where there has been any recent adjustment of the pergunna rates, they should certainly be now followed. In the absence of any customary rates of the neighbourhood, or pergunna rates, so recently adjusted as to form any distinct guide, I think that the rule of proportion, on which the pergunna rates or custom of the district were undoubtedly originally based, is, in the present defective state of the law, the best rule to be adopted, subject to certain qualifications.

58. It has been contended that "rent proper" or "rack-rent,"--such, a rent as would be obtained by putting the land up to competition,--is the only "fair and equitable" rent. But it appears to me that no such rent can possibly be fair or equitable, were it only for this simple reason that, in assessing the rent on that principle, nothing is allowed to the ryot for his right of occupancy. If he is to be rated on that principle, his right of occupancy must be ignored wholly, and he must stand precisely as he would have Stood had he had no such right. The right, if it exists, must needs be worth something. Yet in none of the calculations made or suggested to the Court, on the footing of "rent proper" or "rack-rent" or competition, has anything been allowed him on this account; nor indeed could it be. That the legislature intended the right of occupancy to be a valuable right, I do not doubt from the terms of Act X. How it is to benefit the ryot in any material degree, so long as it is merely to give him a preferential claim if no higher bidder comes forward, I am at a loss to see.

59. In my opinion, the rule of proportion,--as the old value of produce is to the old rent, so is the present value of produce to the rent which ought now to be paid,--is the rule which should be adopted in the absence of any recently adjusted pergunna customary rates. In so ascertaining the rate, we shall be ascertaining it on a principle similar to that on which the old pergunna or customary rates were fixed. We shall be doing what was deemed fair and equitable in the case of ryots having a right of occupancy prior to Act X, and what is not less fair and equitable, in the case of ryots having a right of occupancy under that Act. Let the zamindar seeking to enhance the rent go back to any year he chooses; let him go hack to the last adjustment if he can,--if not, to any year which he thinks will suit his purpose,--and let him prove that the proportion was then more favorable to him than it has

subsequently become. Either party should be at liberty, in each case, to prove any special circumstances tending to show that the application of the rule of proportion to that particular case would work injustice.

60. On the whole, the answer which I would give to the questions put, is in substance the same as that proposed by Mr. Justice Trevor,--in whose opinion as to Act X of 1859 not being merely prospective in its operation, as indeed in the greater part of his judgment, I entirely concur.

Phear, J.

61. The case has been argued before us at great length as befits its undoubted importance, and we have had the advantage of all the reasoning and illustration which the very able advocates of each side have brought to our notice. The answers to the questions seem to hinge on the interpretation to be given to the words "fair and equitable," as used in section 5 of Act X of 1859. And although the questions themselves are fairly specific, still they are, to say the least, but little comprehensive; and the way in which this case has come before us and has been treated by both sides in the discussion, obliges us to go beyond their limits and to attempt to enunciate the meaning of the words in question in the form of a general rule. We are thus prevented from confining ourselves to our legitimate function, namely, that of saying what is the effect of those words merely on the particular issue placed before us. I need hardly remark that the constitution and procedure of a Court of Justice is very ill adapted to carry even that which is often termed judicial legislation beyond the facts of the case material to the issue which is before the Court for decision. The Superior Courts of England have uniformly refused to countenance any attempt made to induce them to transgress this limit. It seems to me, however, that we are now asked, and in some sense compelled, to take a very large step into the region of pure legislation. It is foreign to our ways of proceeding and of deliberation to undertake the framing of a declaration of law which shall be prospective, and have application to eventual and unascertained conditions of fact; and I can scarcely hope that the effort to do this, which we are about to make, can end in a result which shall be satisfactory.

62. A preliminary objection has been raised (for the first time in this Court) that Act X does not apply to the case at all, inasmuch as it is said the defendant has no right of occupancy unless by virtue of section 6 of that Act; and it is contended that the qualification of twelve years mentioned in that section cannot be taken to embrace time, any portion of which had expired before the Act came into force. I think this objection must be over-ruled. It has been supported by argument which certainly seemed to me to exhibit some disregard of the distinction between "retrospective action" and present interference with vested rights; but fortunately it is not now necessary to go into the merits of this discussion, because it is, I believe, the unanimous opinion of the Court that the words of the section are so strongly explicit as to leave no sort of ambiguity as to their meaning, and it is only in cases of

ambiguity that recourse can be had to a priori presumption as an aid to construction. I conceive that the section in effect says: "Every ryot, who at the date when the Act comes into operation, has been, or at any date thereafter shall have been, in continuous occupation of land for the period of the preceding twelve years, whether that period comprises time which elapsed before the date of the Act coming into operation or not, has, from the time of the completion of the twelve years, a right of occupancy of the laud."

63. This being so, the suit is rightly brought under the Act, and it becomes necessary to see what the general scope of the Act is, so far as it concerns the settling questions of rent between landlord and tenant, in order to ascertain whether any guide is afforded by it to the "fairness and equity" of section 5. The result in my mind of the best consideration I can give the matter, aided by the very full discussion which has taken place, is that these words are not directly referable to, or dependent upon, the provisions of section 17 . I think the legislative effect of the Act upon the subject before us may be fairly summed up and arranged in the following manner:--

All ryots are entitled to receive pottas (section 2), and--

(I). Ryots having rights of occupancy (a), who hold lands at rates which either have not been changed, or must by law be presumed to have not been changed, since the time of the Permanent Settlement, are entitled to receive their pottas at those fixed rates (sections 3 & 4).

(b) Who do not hold land at any such invariable rates are entitled to receive their pottas at fair and equitable rates (section 5).

(II). Ryots not having rights of occupancy are entitled to pottas only at such rates as may be agreed on between them and the persons to whom the rent is payable (section 8).

64. On the other hand, every person who grants a potta, or tenders one, such as the ryot is entitled to receives is entitled to receive a kabuliat (section 9).

65. Provision is made for enabling the parties to enforce this right to a potta and kabuliat respectively, by the agency of a suit before the Collector; and in my judgment these rights are correlative. In the suit for the kabuliat, the main question must always be whether the corresponding potta is such as the ryot is entitled to receive; and as it has been judicially decided that the commencing the suit is sufficient evidence of the tender of the potta, the issue between the parties comes to be the same whether proceedings are first instituted by the ryot or by the zamindar.

66. It is said that, although a potta for a term of years may be sued for by the ryot at any time, yet the most that the landlord on his side can do is to sue for a kabuliat of an indefinite potta which shall fix the rent for one year or until the ryot objects; and

in support of this contention, the difference in the wording of sections 80 and 81 is referred to; also section 76 is relied upon as showing by implication that the Legislature only gave the Collector power to fix the term in the case of a ryot''s suit, But if this be so, what authority has the Collector in a suit for a kabuliat to fix the rent for a year even, or from year to year, until the ryot objects? As I have already said, I think the Act makes the landlord''s right to a kabuliat correlative to, and co-extensive with, the ryot''s right to a potta, and I do not, myself, see sufficient in the difference of phraseology just mentioned to lead to a contrary inference; and I may remark that this right of suit for a kabuliat does not give the zamindar, as might at first seem to be the result, a new right of compelling the tenant to occupy the land for a coming term of years whether he is willing to do so or not, because section 19 expressly enables the ryot in all cases, by giving proper notice, to throw up his holding whenever he likes.

67. The right to bring a suit of this kind is in fact a right to oblige the other side to submit to the arbitration of the Collector with regard to the terms upon which the holding shall be continued; and I see nothing in the Act to prevent this arbitration being invoked at any time when either party is dissatisfied with the existing relations between himself and the other, or on as many occasions in succession as the dissatisfaction may arise. The agricultural year always, I believe, commences with the month of Baisakh, and tenant-holdings, whether by contemplation of the Regulations, or by custom of the country, never involve fractions of years. Consequently, the Collector''s decision would generally, unless by the express consent of the parties, take effect from the beginning of the ensuing year. If, at the time of the application to the Collector, a potta is subsisting (whether it originated in agreement between the parties, or in a suit) comprehending a definite term which will not have expired at the end of the current year, it ought, probably, except in extreme cases or hardship, to bar the applicant''s claim. In all other cases, I conceive the bringing of the suit is intended by the Legislature to be sufficient notice on the part of the plaintiff to terminate the existing agreement as to rent at the end of the current year.

68. As to the current year, or the preceding year, supposing time not to have barred the landlord''s right to recover in respect of it:--

(A.) If a written potta for a term of years be in force, then the rent is fixed by that.

(B.) If such a potta, for any reason, be not in force, then the rent is that of the previous year, unless the landlord had, in or before the month of Chait which preceded the year in question, served on the tenant notice of enhancement and the grounds thereof, and the tenant either has not contested his liability, or, contesting it, has failed, in which case the rent is recoverable on the terms of the notice (section 13).

69. In the event of the ryot contesting his liability before the Collector, the latter must, I suppose, though I still feel hesitation as to this point, be guided to his judgment by considerations of "fairness and equity" whatever those words may mean as used in the 5th section; and if the ryot be one having a right of occupancy, those considerations must have exclusive relation to the grounds of enhancement mentioned in section 17 , and also relation to those of abatement in section 18 .

70. Again, the ryot may at any time formally complain to the Collector that the rent demanded of him is too high.

71. On the whole, then, I conceive the Act intended to give each side two modes of seeking relief against the other, namely:--

1st.--That of obliging him to enter into a prospective written agreement.

2nd.--That of adjusting the terms for each year, as the occasion arises.

72. It may well be that the Legislature, while it desired that every opportunity should be given for the creation, at the instance of either party, of leases for terms of some definite duration, yet felt obliged, by the character and circumstances of the cultivators, and the physical conditions of the country, to leave an opening for annual adjustment by judicial intervention.

73. The case before us falls under the first head only, and I conceive that we are in effect asked to direct the Court below what circumstances are to be looked at, in judicially fixing the terms of a potta as regards rent, such that it may be fair and equitable between the parties within the meaning of Act X of 1859, the potta being prospective and commencing with the ensuing year, and the tenant being a ryot having a right of occupancy.

74. The Act itself does not anywhere say expressly what the Legislature intended this fairness and equity to have regard to.

75. I do not consider that section 17 has any bearing on the point. In my judgment that section relates solely to what I will venture to term the de anno in annum process of section 13; it is clear that sections 14, 15, and 16 are necessarily confined to that, and section 17 appears, as regards its subject-matter, to follow them in natural sequence. The word "enhancement" used in it must, as it seems to me, mean the technical enhancement of section 13, in which section the word occurs for the first time in the Act, and can have no relation to any increase on a former rent, which may be the result of fixing a new rent in a suit for a potta or kabuliat.

76. In the absence, then, of any legislative instruction on the point, I think we ought to so construe the words "fair and equitable" as to disturb as little as possible the relation which obtained between the parties before, or independently of, the operation of the Act so far as it can be ascertained. And this relation differs, as I conceive, with each separate case, so that it is impossible for us to lay down a single

rule of assessment to be followed in all cases alike. On the one side, it has been contended for the zamindar that he has always possessed the right to exact a rack-rent from the ryot, and that the Court ought not, in fairness and equity, to recognize any principle of assessment which would not strictly lead to such a rent. On the other side, it has been urged with equal force that the ryot has been always entitled to some definite share of the produce of the land, and therefore the Court ought to lay down an inflexible rule of proportion. I do not think that either of these courses would be fair and equitable to the parties. In my judgment, the zamindar''s contention cannot be universally supported for two reasons--

1st.--Whatever may have been the abstract rights intended to have been conferred upon the zamindars by the Regulations, in practice they have, generally speaking, never been exerted to the extent of producing a rack-rent. This is hardly denied by any one; and the very considerable margin which any calculation of a rack-rent exhibits beyond that which the landlord even ventures to claim in litigation, sufficiently supports this position. If any principle of competition has ever (at any rate for the last seventy years) found play, it has done so in the face of such local public opinion or custom as has, in the majority of cases, modified its results to an extent that cannot readily be allowed for in calculation.

2nd.--It is impracticable, under the circumstances of these cases, to make, ab extra, an assessment of the true, or even approximately true rack-rent. The various formulae of the political economists for a farming rent are but so many analyses of the result of free competition; at best, they only express the amount of rent in terms of other elements, which are themselves the results of free competition. If the free competition never existed, or, having once existed, has in any manner been put an end to, the element depending upon it cannot be ascertained. The right of occupancy itself seems, then, to be a great stumbling-block in the way of working any politico-economical formula, and certainly (independent of anything introduced by the new Act) there has, as it seems to me, been no such open market bearing upon the value to be given to the ryot''s skill, the amount of risks run by him, the profits obtainable by the application of his capital to other pursuits (or in other modes), & c., & c., as is capable of producing trustworthy data for getting at what would be the market rent, on the hypothesis of a free competition for the land which does not now exist. And indeed I cannot help thinking that there is a fundamental mistake at the bottom of all the calculations which have been made for this purpose. It has been attempted to estimate the rent payable by the ryot to the zamindar on the footing of its being a proper farming rent, such as is given birth to where there is a limitation of the demand and dependent upon the amount of profit to be got by the investment of capital, and no other limitation. But the condition and circumstances of the ryot, as I understand them, are not such as to give rise to a farming rent; his capital, when he has any, is so small, and his hereditary habits of life such, that (speaking of him as a class) he seems generally to have no alternative but to cultivate the land. He cannot carry himself and his capital into other markets,

or at any rate, never, to any appreciable extent, thinks of doing so. The profits derivable from his skill, labor, and capital never have affected the rent he pays, nor, economically considered, ought to do so. His tenancy, if of a competitive character at all, is of the nature of a cattier tenancy, in which the rent is purely the result of the relation of the numbers who want the land on one side to the supply of land on the other; and the numbers who want the land are in no way determined by the profits obtainable by the investment of capital and skill. No other class than this ryot class is seeking the land, and consequently the rent cannot possibly be got at by any process other than actual competition. And it is worth remarking that the result of this will be that, if the numbers of the ryots wanting land are small, relatively to the quantity of land wanting ryots, the tenant may well get a portion of the profits of the soil, which, under the estimate of a proper farming rent, would go to the landlord.

77. I can as little agree to the general rule contended for by the ryot as I can to that of the zamindar, because I do not think that the former has at all established any definite claim in all cases to a proportionate part of the produce of the laud.

78. A third alternative has had prominence given to it during the discussion of this case, which, as far as I am able to give it expression, seems to be this,--namely, that, by some sort of natural equity, the tenant ought only to get so much of the profits of the land as is attributable to the application of his labor, skill, and capital, and that the landlord, as owner of the soil, ought to get all the rest. I am convinced that a doctrine so vague as this finds no countenance in any writers on Political Economy, and a little reflection shows that it is practically inapplicable. It is physically impossible to separate the part of the produce which is due to the tenant''s exertions, from that which is the result of the intrinsic qualities of the land; without land and without cultivator alike, there would be no agricultural produce at all, and it is simply absurd to attempt in any case to distinguish that which is due to the one cause from that which is due to the other. In fact, the sharing of the produce between landlord and tenant never has been, and never can be, based on any consideration of this kind; and there is nothing inherently inequitable in an arrangement, which may, in the estimation of those accustomed only to farming rents, give the tenant even an apparently extravagant portion of the produce.

79. With the view I take, it is not at all necessary to discuss the question as to what are the respective rights of khud-kasht and py-kasht ryots. I think every case must turn on its own attendant circumstances.

80. When the Collector is called upon in any given case to determine the rent which it is fair and equitable that the ryot should pay, he ought to enquire--

1st.--Whether at the last antecedent period, when the arrangement between the parties (either then created or previously existing) was such as must, by reason of tacit acquiescence or otherwise, he taken to have been fair and equitable, that arrangement contained express stipulations as to rent; if so, then these stipulations,

unless the reason for them is gone, should be followed in arriving at the rent for the new potta. Under this head would be ranged all actual rack-rent and cattier rent agreements, whenever any such have been come to; and if the Collector is called upon to act upon an arrangement of this kind, I can give him no alternative to looking at the actual market, because I believe, for the reasons I have already mentioned, that there is no other fair and equitable mode of arriving at competition rents in this country.

2nd.--If the Collector finds no express agreement to guide him, then he must ascertain whether the ryot is legally entitled by custom, based either on his personal status, or on the character of the land occupied by him, to any definite share of the produce of the land, or to any beneficial interest in it. If the ryot is so entitled, the rent must be adjusted accordingly.

3rd.--If neither express agreement, nor legal right in the ryot, be found to have determined the amount of rent, the last arrangement must, I conceive, have been governed by some locally prevailing custom, or the rent regulated tacitly according to some locally prevailing rates; and in that case I think the custom ought to be complied with, and the rates adhered to. It is obvious from what I have already said that these rates will, by the nature of the case, be almost invariably such as to give to the ryot''s holding a beneficial character; and, therefore, I think the fair presumption will be, in the absence of evidence, or unless a different foundation be actually shown, that the rate was originally based upon the principle of sharing the produce of the land between the ryot and zamindar in a fixed ratio. Many of my learned brothers are of opinion that this is not properly a presumption of fact, but is in truth a matter of legal right established by history. I confess that I feel great difficulty in seeking and ascertaining law from such a source; and further I am reluctant, while acting judicially, to pledge myself to the acceptance of any particular version of a history which notoriously rests upon most imperfect materials. Under these circumstances, although my conclusion on this point is, I believe, practically in unison with that of the majority of my colleagues, I regret that I cannot place it on the foundation which they have chosen, but am compelled so far to separate from them as to rest it solely on a presumption which I consider to be natural and justifiable, quite independently of any history whatever. The result of applying this presumption would be that the new fair and equitable rent would, be the same proportionate part of the new produce that the old rent was of the old produce.

81. And I further think that, in all cases, the duration of the intended potta must be taken into consideration as an element affecting the question of fairness and equity.

82. By proceeding in the manner I have attempted to sketch out, the Collector will, I believe, be enabled to determine what rent would be fair and equitable between the ryot and his landlord within the meaning of the Act. And I think, under the peculiar circumstances of this case, to which I have already alluded, I cannot usefully put my answers to the questions submitted to us into a less general shape.

Campbell, J.

83. I entirely concur with Mr. Justice Trevor, except in the use of any expression which might seem to imply any doubt whether a ryot possessing right of occupancy can be, in any shape, subjected to enhancement on any ground other than those mentioned in section 17 , Act X of 1859. Though this question does not properly arise on the limited reference of the Division Bench, it has been argued that, in such a suit as this, for a kabuliat at an enhanced rate, the zamindar is not restricted to those grounds. I am decidedly of opinion that he is limited to the grounds mentioned in section 17 , in whatever shape he sues or can sue.

84. The provisions of section 6, Act X of 1859, are so entirely declaratory in their terms, and in that sense would seem to define so unambiguously the class of ryots possessing rights of occupancy, while the old Regulations explain so clearly the status of occupant ryots, that it might seem at first sight unnecessary to go further hack into historical retrospects, with a view to determine the character of their rights. But it has been thought necessary to open up this enquiry, with a view to show that, in fact, the occupancy rights of the present day are not of the character which is claimed for those of ancient days, or that we must, at any rate, distinguish between different classes of ryots whom Act X of 1859 has included within, a too wide definition. It would seem to be assumed that the old ryots and their descendants never had very high rights; that, whatever they were, they have for the most part died out; that the occupancy ryots of Act X of 1859 are, as a body, the creation of that Act; and that occupancy tenures must he treated as so created for the first time, and the Act construed as if it merely conferred certain limited tenant-rights upon those who before held as tenants-at-will. To test these arguments, some historical survey has become necessary.

85. I take the same general view as Mr. Justice Trevor with regard to the history and nature of landed tenures in Bengal before the Permanent Settlement. There can be no doubt that the settlement attributed to Toran Mull (and alluded to by Mr. Justice Trevor), like all the settlements of Akbar and his successors, and indeed, all the detailed settlements of the British Government founded upon the same system, dealt primarily with the individual ryot, and fixed the sum payable by him for the land which he cultivated. The process is described by Elphinstone, pp. 475-6. It appears that the average produce of the biga of land of each description was ascertained, and the Government share was then calculated, one-third being the full demand, and deduction being made for fallows, occasional inundations and droughts, inferior soils, & c. The average dues of the State (in grain) being thus ascertained, the grain rates were commuted into money on an average of the price currents of the nineteen previous years, and the rates so obtained were calculated on the land of each ryot. The option of paying in kind according to the established proportion seems, however, to have been maintained. Thus the payments of the ryots were fixed by an act of State quite independent of the will of any other subject,

or of any question of competition or relation of landlord and tenant in the English sense. Whether the revenue was paid direct to the officers of Government, or by the village communities jointly through their head men, or through hereditary zamindars of a superior grade, the quota due from each ryot was fixed and recorded; that was the unit of the whole system from which all calculations started. The headmen and zamindars were remunerated for their services, or received the hereditary dues to which prescription entitled them in the shape either of percentages on the collections from the ryots, or of nankar land held exempt from revenue. That is clearly the old law of the country in general, and of Bengal in particular. Even when, in the decline of governments, the State control became relaxed, and the ryots became subject to much oppression on the part of those placed over them, they still had some protection in the only ever-surviving law of the East--''Custom.'' The old-established rates they have always continued to cling to as sanctioned by ''Custom.'' That custom the worst oppressors could not openly defy; and hence, as shown by Mr. Justice Trevor, all extortions and imposts took the shape of extra cusses, levied on various pretexts. Even when thus, by oppressions, the sums levied may have been raised up to or even beyond a rack-rent, the remark of Mr. Mill seems irresistible, that the shape in which they were taken and the survival beneath all imposts of the old customary rates, is the strongest evidence that the right of the ryot survives, to become again beneficial in better times.

86. That these rights survived in this shape in Bengal up to the time of the introduction of British rule, there is the amplest evidence. Every early paper on the subject teems with evidence to show that the ryots were very much more than tenants-at-will, even where legal and illegal-exactions had been imposed to the farthest on the proper or ''assal'' rates.

87. Indeed, the concurrence of the early Regulations of the British Government in every different part of India, made at different times, under different circumstances, and by different Governments, which, in other respects, differed most widely in their views on kindred subjects, would seem sufficiently to establish that, under the old law and custom of India as everywhere found, on the assumption of territory by the British Government, some right in the soil still belonged to the ryot. However widely they differ in regard to the superior rights of Government and the great landholder, they all concur in the view that neither the Government nor the great landholder had an absolute and complete right, but that some right was concurrently enjoyed by the ryot in the shape of a right of occupancy at rates regulated by custom.

88. On this general question, I would only further add to what Mr. Justice Trevor has said, that with reference to a frequent modern assertion that this alleged right is a mere invention or resuscitation of a benevolent British Government, I have sent for the three greatest and best authorities on the modern Native States in different parts of India--books which were written long before these discussions arose. I take Tod''s Rajpootana for the north of India, Malcolm''s Central India for the centre, and

Buchanan''s Journey in Mysore (then under Native Government) for the south. I turn to the indices to see what is said of the ryots. I find the following:--

Tod puts their rights very high. He says (Vol. I, p. 494):-- "The ryot (cultivator) is the proprietor of the soil in Mewar. He compares his right to the ''a'' khye d''hooba" Tod''s Note.-- "The d''hooba grass ''immortal,'' but ''a'' khye, ''not to be flourishes in all seasons, and most in the eradicated,'' and its tenacity to the soil deserves intense heats; it is not only ''amara,'' the distinction." He calls the land his Bapota, the most emphatic, the most ancient, the most cherished, and the most significant phrase his language commands for ''patrimonial inheritance.'' He has Nature and Menu in support of his claim, and can quote the text alike compulsory on prince and peasant-- "Cultivated land is the property of him who cut away the wood, or who cleared and tilled it,--an ordinance binding on the whole Hindu race, and which no international wars or conquest could overturn;" for, as the author a little further on observes, we may "trace a uniformity of design which at one time had ramified, wherever the name of Hindu prevailed; language has been modified and terms have been corrupted or changed, but the primary pervading principle is yet perceptible."

89. Malcolm (Vol. II, p. 25) says:-- "The settled and more respectable hereditary cultivators of Central India have still many privileges, and enjoy much consideration. Their title to the fields their fore-fathers cultivated is never disputed while they pay the Government share. If they are unable from age or want of means to till their field, they may hire laborers, or make it over to another person, bargaining with him as they like about the produce; but the field stands in the Government books in the name of its original tenant. In general, a fixed known rent and established and understood dues or fees are taken from such persons, beyond which all demands are deemed violence and injustice. These, however, have been of late so universal, that the condition of the hereditary cultivators as compared with others has been little enviable."

90. Buchanan puts the right somewhat lower, and more like that recognized by our modern law.

91. He says (Vol. I, p. 124):-- "The ryots or farmers have no property in the ground; but it is not usual to turn any man away so long as he pays the customary rent. Even in the reign of Tippoo, such, an act would have been looked upon as an astonishing grievance."

92. Again, Vol. II, p. 90, after describing the different kinds of headmen or renters of villages, he adds,-- "Neither can legally take from the cultivators more than the custom of the village permits. This custom was established by one of the Mysore Rajahs." And same Vol., p. 109,-- "A farmer cannot be turned out of his possession so long as he pays the fixed rent; but if he gives over cultivation, the officers of Government may transfer his lands to any other person."

93. We might probably consider this to be a very accurate description of the old state of things in Bengal.

94. For an exact account of the state of things prevailing in Bengal at the time of the Permanent Settlement, and the terms on which the settlement was made, so far as the present question is concerned, it is really hardly necessary to look beyond the very text of the Regulations themselves.

95. The nature of the ancient rights of the ruler or superior landlord is thus shown--

By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every biga of land (demandable in money or kind according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter Preamble to Regulation XIX of 1793. Same words repeated in Preamble, Regulation XLIV of 1793.

96. Previously to the Permanent Settlement, the zamindars had very limited rights, and were liable to be capriciously dispossessed, and arbitrarily assessed upon on account of their gross receipts Preamble of Regulation II of 1793, Regulation 1 of 1793, section 7, Clause 1. "The amount of assessment was fixed upon an estimate formed by the public Officers of the aggregate of the rents payable by the ryots or tenants for each biga of land in cultivation, of which, after deducting the expenses of collection, ten-elevenths were usually considered the right of the public, and the remainder the share of the landholders."

97. By the Permanent Settlement, the amount of assessment on the zamindars was irrevocably fixed; they were declared to be proprietors of the land, and they were encouraged to "exert themselves in the cultivation of their lands under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them or their heirs and successors by the present or any future Government for an augmentation of the pubic assessment, in consequence of the improvement of their respective estates" Regulation I of 1793, section 7, Clause 1; same, Clause 2.

98. But general reservation was made that "the Governor-General in Council will, whenever he may deem it proper, enact such Regulations as he may think necessary for the protection of the dependant talookdars, ryots, and other cultivators of the soil" Regulation I of 1793, Section 8.

99. Hence it appears that the rights, first of the ruling power, and eventually of the zamindars to whom those rights were assigned, consisted in the share of the produce of every biga leviable from the ryots in money or kind according to custom.

100. The zamindar also acquired the power "to let the remaining lands of his zamindari or estate under the prescribed restrictions in whatever manner he may think proper" Regulation VIII of 1793, section 52.

101. The zamindar, therefore, took the estate, subject to certain restrictions, in addition to his obligations to discharge the Government revenue. What then are these restrictions?

102. The zamindars are to grant pottas to the ryots, which, "shall be specific as to amount and conditions. The rents paid by the ryots, by whatever rule or custom they may be regulated, shall he specifically stated in the pottas, which, in every possible case, shall contain the exact sum to be paid by them. He (the zamindar) shall, in concert with the ryots, consolidate the impositions under the name of abwab, mathot, and other appellations with the assal into one specific sum;" and he shall not "impose any new abwab or mathot upon the ryots under any pretence whatever. A ryot, when his rent has been ascertained, may demand a potta," and the pottas must all be settled by the end of the year 1198 Regulation VIII of 1793, Sections 52, 54, 55, 57, and 59.

103. Again, all leases made previous to the conclusion of the settlement (and not obtained by collusion, & c.), are to remain in force till their expiration, and "no proprietor shall cancel the pottas of the khud-kasht ryots except upon proof that they have been obtained by collusion, or that the rents paid by them within the last three years have been reduced below the nirikbandi of the pergunnas, or that they have obtained collusive deductions, or upon a general measurement of the pergunna, for the purpose of equalizing and correcting the assessment" Regulation VIII of 1793, section 60.

104. Further it was enacted that, "if a dispute shall arise between the ryots and persons from whom they may be entitled to demand pottas regarding the rates of pottas, it shall be determined in the Dewanny Adawlut of the zilla in which the lands may be situated, according to the rates established in the pergunna for lands of the same description and quality as those respecting which the dispute may arise" Regulation IV of 1794, Section 6.

105. And, "The rules in the preceding section are to be considered applicable not only to the pottas which the ryots are entitled to demand in the first instance under Regulation VIII of 1793, but also to the renewal of pottas which may expire, or become cancelled under Regulation XLIV of 1793; and to remove all doubts regarding the rates at which the ryots shall be entitled to have such pottas renewed, it is declared that no proprietors shall require ryots, whose pottas may expire or become cancelled under the last-mentioned Regulation, to take out new pottas at higher rates than the established rates of the pergunna for lands of the same quality and description, but that the ryots shall be entitled to have the pottas renewed at the established rates" Regulation IV of 1794, section 7.

106. It is thus clear that, as regards the then existing ryots, the zamindar had no power to fix rents at discretion, but was bound to consolidate the established assal and abwab into one sum, "in concert with the ryots," to give pottas for the sums so ascertained, and to renew expired and cancelled pottas; that all disputes regarding the rates were to be settled by the Courts, according to the established rates of the pergunna; and that, at any rate with respect to khud-kasht ryots, the zamindar had no power to cancel or refuse to renew pottas once granted, or to eject the ryots. Rents were absolutely and entirely regulated by custom, and not by competition.

107. By another Regulation XLIV of 1793, section 2 zamindars were declared not competent to "fix at any amount the jumma of an existing dependant talook for a term exceeding ten years, nor to let any lands in farm, nor to grant pottas to ryots or other persons for the cultivation of lands for a term exceeding ten years." But this provision was subsequently repealed with retrospective effect by Regulations V of 1812, Section 2, XVIII of 1812, Section 2, and VIII of 1819, Section 2, by which all such leases were rendered valid and legal, and zamindars were declared competent to grant pottas at any rent for any term. The object of the original enactment was not to prevent the zamindar''s settling permanent ryots at the pergunna rates, but to prevent his granting improvident leases below those rates; for, as observed by the Privy Council in a late case Ranee Surnomoyee vs. Maharajah Sutteeschunder Roy, turning on another part of the same Regulation, and with respect to such restrictions-- "their meaning is properly to be collected from the policy and intent of the Regulation. The object of the Government was that the jumma should be duly paid, and that the means of paying it should not be withdrawn by improvident grants. The power given to the purchaser supposes the talookdars and the ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent according to the established usages and rates of the pergunna or district." The power of the proprietor himself was certainly not greater than that of the auction-purchaser. As observed by Lord Cornwallis in his Minute,--
The rents of an estate can only be raised by inducing the ryots to cultivate the more valuable articles of produce, and to clear the extensive tracts of waste lands.

108. Looking to the expressions regarding the expiry and renewal of pottas, and the advantage to be derived from more valuable articles of produce, I imagine that the framers of the early Regulations very probably contemplated periodical re-adjustment of rates between zamindars and ryots with reference to the value of produce, in the same way as was originally contemplated in Akbar''s settlements (Elphiustone, p. 476), the plan of which was that the money-rates were to be fixed every ten years on the average rates of the preceding ten,--that is, the grain rates remaining the same, the money rates were to be adjusted in proportion to the average price of grain. But no express provision was made to this effect in the Regulations of 1793.

109. It being then clearly established that, by the terms of the Permanent Settlement, the zamindars were not made absolute and sole owners of the soil, but that there were only transferred to them all the rights of Government,--viz., the right to a certain proportion of the produce of every biga held by the ryots, together with the right to profit by future increase of cultivation, and the cultivation of more valuable articles of produce; it being further established that the khud-kasht or resident ryots retained a right of occupancy in the soil, subject only to the right of the zamindars to the certain proportion of the produce represented by the pergunna or district rates: we have next to consider the changes which occurred between the Permanent Settlement and the passing of Act X of 1859. Little material change was made by the Legislature. The declaration of Regulation V of 1812, that, where pergunna rates were no longer clear, the term "rates payable for land of a similar description in the places adjacent" should be substituted, is a mere accommodation of the existing law to the march of society. The only material change affecting certain estates is to be found in the gradually increasing stringency of the Sale Laws. During the first generation subsequent to the Permanent Settlement all new khud-kasht ryots settled by the proprietors on waste or other lauds were in case of sale absolutely protected. The purchaser could neither evict them nor enhance their rents beyond the customary rates; he could but take rent "according to the established usages and rates of the pergunna or district" Regulations XLIV of 1793, section 5; IV of 1794, section 7; VII of 1799, section 29, Clause 5; Ranee Surnomoyee vs. Maharajah Sutteeschunder Roy, . But by Regulation XI of 1822 this protection is narrowed to the case of any "khud-kasht kadimi (old khud-kasht) ryot or resident and hereditary cultivator having a prescriptive right of occupancy" Regulation XI of 1822, section 32. Perhaps we may infer that the purchaser acquired the right to terminate all other tenures created since the Settlement, and to evict the holders. Still, as in truth this right of eviction was scarcely ever exercised, and it appears that, if not exercised, the purchaser was still limited to the pergunna rates "according to the law and usage of the country" Regulation XI of 1822, Section 33, the practical effect of this Regulation does not seem to have been great as respects the question now before us; and it is therefore hardly necessary to enquire what was the exact term of prescription which then made a man an old khud-kasht ryot.

110. By the later Sale Laws, Acts XII of 1841 and I of 1845, stringent provisions were introduced. Protection was given to "khud-kasht or kadimi" ryots, but the purchaser had power not only to evict, but also to enhance at discretion the rents of all other ryots. The sales under this Act were, however, comparatively few.

111. It may here be observed that, in truth, in the later enactments, the word "khud-kasht" is so variably coupled with the other terms "kadimi," "resident," "hereditary," "resident and hereditary," that it became very difficult to say who were privileged against auction-purchasers, and who came within the various descriptions of khud-kasht ryots. But I have no doubt that, as explained by Mr.

Justice Trevor, the original khud-kasht of the early Regulations was simply the resident ryot permanently settled in the village, as opposed to the py-kasht ryot. The two words "khud-kasht" and "py-kasht" are used as correlatives, and as between them including all ryots.

112. Such being the laws, it may be conceded that, from the time of the Permanent Settlement, the zamindars have been free to make such arrangements and contracts as pleased them regarding all land in which no rights were held by ryots or others at the time of the Settlement, or which at any time might lapse by the failure or abandonment of the ryots, subject only to this that a man once admitted on an ordinary khud-kasht tenure, without limitation of time, could not be ejected or enhanced beyond the customary rates, except in certain cases, by an auction-purchaser. The question is, what in fact did the zamindars do? Did they, by the investment of capital, cultivate the waste for their own benefit? Did they take every opportunity of asserting an absolute right in every field that lapsed, and farm it out on true commercial principles? Or did they in truth adhere to the old practice and custom of the country, and seek to increase the rent-roll, merely by settling new ryots on the old customary terms, leaving them to cultivate in their own way, and to occupy the land without limitation of time, subject to the payment of the rents established by the custom of the locality? It is notorious and well established by history, both general and judicial, that the latter was almost the universal rule. The zamindars did not invest capital in agricultural operations after the modern fashion. They did not seek to get rid of the old ryots and the old system, and to establish large commercial farms. On the contrary, the endeavour was to get new ryots. Ryots were considered to be the only riches, and the struggle of a good landlord was not to get rid of the ryots, but to tempt away another man''s ryots by the offer of favourable terms. The ryot who was settled on waste or other ryots land, cultivated it, stocked and furnished it, built his house, and dug his tank at his own expense, or by his own labor. Hence it naturally followed, that, according to the ancient custom and present understanding between the parties, the new ryot who permanently settled in the village as a khud-kasht or resident ryot, acquired all the rights, privileges, and immunities accorded by usage to khud-kasht ryots. The ryots so settled were protected in the first instance by law in case of sale, and, after the passing of Regulation XI of 1822, they were in practice protected by habit and the interest of the purchaser, and resumed their former status. Of resident ryots, only the few who may have come in under special contracts at variance with the custom, or whose tenures passed under the Sale Laws of 1841 and 1845, held on any other than the customary terms. In every case that comes before us, it is patent that, up to the present day, rents in Bengal are usually regulated by the customary rates; sometimes in the shape of pergunna rates, more generally in that of local rates, universally known in each estate or part of the country. Frequently, zamindars know nothing of their estates, have no clue to the actual positions of each jumma or ryot''s holding, but simply collect on a paper roll showing the annual payment due

from each ryot according to the custom.

113. But were the customary rates varied or enhanced, or, how were they regulated? It seems a somewhat singular omission that in the Regulations no provision is made for any enhancement of the pergunna rates payable in money. The customary or pergunna rates were of three kinds:--

1. Grain rates, being the original share of the produce not commuted into money, and which generally continued to prevail in the province of Behar.

In this case, as the value of the grain increased,--if taken in kind, it fetched more money--if annually struck in money at the market rates, more money was received,--there was no need of any special provision for enhancement. The rent, as it were, enhanced itself.

2 & 3. Money rates more common in Bengal,--i.e., when the grain rents were commuted into money in either of two ways, which are distinguished in section 56, Regulation VIII of 1793, as follows:--

2. "Where it is the custom to vary the potta according to the articles produced thereon" (on the land), that is, there were established rates not for each kind of laud, but for each kind of produce,--so much per biga for rice, so much for wheat, so much for cotton, so much for sugar-cane. In this case the zamindar would benefit by the substitution of more valuable for less valuable articles of produce; but the kind of produce remaining the same while it increased in value, he would not benefit.

And 3. The system which it was hoped would ultimately prevail where the rates were fixed not on each kind of produce, but on each quality of land, and thus there was fixed "a specific sum for a certain quantity of land, leaving it to the option of the ryots to cultivate whatever species of produce may appear to them likely to yield the largest profit." In this case, it is evident that, without some mode of enhancement, the zamindar would benefit neither by the introduction of new products, nor by the rise in value of the old products. The expression in Lord Cornwallis''s Minute that the zamindars are to benefit by "inducting the ryots to cultivate the more valuable articles of produce," does not seem to occur in the Regulations; and as respects land held on these money rates, no provision for such benefit seems to be made. In truth, it seems very doubtful whether, if the khud-kasht ryots paying these specific money rates had stood together on the letter of the Regulations, and steadily resisted enhancement, they ever could have been enhanced.

114. It is remarkable that, throughout the whole litigation of the long period between 1793 and 1859, no principle of enhancement, other than a reference to existing pergunna or local rates, is anywhere to be found. There have been conflicting decisions as to the prescription by which a right of occupancy was acquired, and great doubt was thus thrown on that subject; but as regards any rule of enhancement, either at discretion, or on any other rule, save and except the

standard of rates paid by the same class of ryots in places adjacent, there is nothing. We have particularly drawn the attention of the counsel on both sides to this point, and it is clear that there is no such case. When the customary rates were enhanced, it must have been done without the least assistance from the law or the Courts of Judicature. In fact, however, the rates have generally been enhanced. The zamindars had great power over their ryots; the interference of the law was but partial; the zamindars could do much without law; and the reliance of the ryots was much more on custom than on law.

115. Moreover, in this matter, the zamindars had a strong equity on their side. Although no rule of enhancement was laid down by the law, it seemed hard that, as the relative value of produce and money altered, as produce became relatively more valuable, and money relatively less valuable, the zamindar should continue to receive, as representing his share of the produce, a sum of money actually representing a smaller purchasing power, a smaller quantity of grain, and a smaller proportion of the produce. The fact seems to be that this contingency of a change in the relative value was omitted to be provided for.

116. But as the country progressed, and as the zamindar''s expenses increased, without a corresponding increase of income, he had, according to custom and ancient rule, a strong equitable claim to a re-adjustment which should restore to him his own fair share of the produce. Power and equity being then combined, it is not wonderful that, in the absence of any regulated mode of adjustment, it was irregularly effected by various irregular devices resulting in compromise between the zamindar and the body of the ryots. As Harrington puts it:-- "Every part of the transaction is a subject of contention; the demands on both sides are unreasonable, and are finally terminated by a compromise."

117. A common process seems to have been a mere repetition of the old process by which Toran Mull''s assessment was enhanced. In spite of the prohibition against adding abwabs, or cesses, to the consolidated rates of the time of settlement, illegal cesses (almost always in the regulated form of percentages, so many annas or pie in the rupee, or so many seers in the mound) were from time to time added on, and gradually annexed to the custom; then as they became complicated and heavy, and led to resistance, compromise was effected, and the extra cesses were merged into a rate somewhat enhanced, to which the ryots consented. Then, as further increase of value took place, more cesses were super-imposed on the rates, and presently another compromise took place. Sometimes in one way, and sometimes in another, the rates by mutual compromise and consent were from time to time enhanced, and the pergunna rates were frequently split up into local rates special to estates and sub-divisions, according to the area of each new compromise. Still the new rates always had and have some local area. They were and are common to the body of the ryots of that locality. When the majority or body of the ryots had consented to an equitable compromise, an enhanced local rate was established, and refractory

individuals could be and were raised to that standard.

118. The nature of the occupancy tenure of the ryots of the class under discussion, as it existed prior to the passing of Act X of 1859, cannot be better described than in the words of the Right Honorable Holt Mackenzie, in his evidence before the Select Committee of the House of Commons in 1832:--

They may be generally described as cultivators possessing a fixed hereditary right of occupancy in the fields cultivated by them, or at their risk and charge; their tenure being independent of any known contract, originating probably in the mere act of settlement and tillage; and the engagements between them and the zamindar or (in the absence of a middleman) the Government officer, serving, when a ay formal engagements are interchanged, not to create the holding, but to define the amount to be paid on account of it. They cannot justly be ousted so long as they pay the amount of value demandable from them; that being determined according to local usage, sometimes by fixed money rates, or rates varying with the quality of the land, or the nature of the crop grown; sometimes by the actual delivery of a fixed share of the grain produce; sometimes by an estimate and valuation of the same; sometimes by other rules; and what they so pay is in all cases distinctly regarded as the Government revenue or rent, whether assigned to an individual or not; in none depending on the mere will and pleasure of another. There are varieties of right and obligation which one could fully explain only by a reference to individual cases; but this is my general conception of the rights of the class whom I should consider the proprietors of the fields they occupy. In Bengal Proper they are usually called ''khud-kasht ryots'' (i.e., ryots cultivating their own,) and by this class of persons I believe the greatest part of the lands in that province is occupied.

119. At the time of the passing of Act X of 1859 then the state of things was this. The tenures and rents of the ryots were still for the most part regulated by the old customs of former times. But two things specially required legal definition:--

First.--There was doubt as to the mode or prescription by which a khud-kasht or occupancy tenure was acquired, and which tenures were of this character. It was not certain whether mere settlement in the village on the ordinary terms, without limitation of tenure, gave such a right, or what length of prescription established that right. The various Sale Laws had also introduced a large element of confusion, different estates being variously affected according to the date of sale. And, what is perhaps most important of all, owing to the absence of public records in Bengal, the perishable nature of private evidence, and the discredit attaching to private documents and oral evidence in this country, it was very difficult to prove whether a ryot''s holding was really ancient, or what was the date of its creation; the oldest holdings were imperiled by the absence of reliable proof.

Second.--There was an entire want of any regulated and defined legal mode of enhancing the customary money rates.

120. Setting aside re-enactments and details, the most important provisions of Act X referred to these two points.

121. Section 1 expressly repealed the existing Sale Laws so far as they gave rights of ejection and enhancement beyond the customary rates.

122. Section 6 declared that twelve years'' holding was to be taken as the test of a prescriptive right of occupancy, unless the presumption was contradicted by an express written contract (section 7). That was a protection in favor of the ryot, settling all doubt as to the rights of those who had held so long.

123. Sections 5, 13, and 17 declared the right of the zamindar to enhance the rents of all tenures which had either submitted to enhancement since the Permanent Settlement, or had been created without specific stipulation since that period, provided that it was proved that the former rent was not fair and equitable, and that the grounds of enhancement should be confined to certain particular grounds specified in section 17 .

124. At first it appears to have been intended to confine these grounds to two, in accordance with the letter of the old Regulations, viz.:--

1. That the rent paid by any ryot was below the prevailing rate paid by the same class of ryots in the places adjacent; and

2. That the ryot held more land than he paid for.

125. But before the Bill finally passed, a third very equitable ground of enhancement was added, giving the zamindar the right to claim an increased rent in consequence of the increased value of the produce,--an increase which both the old custom of division of produce would have given him, and the subsequent practice had in fact without express provision of law more or less given him. Enhancement might henceforth be awarded on the specific ground "that the value of the produce or productive powers of the land have been increased otherwise than by the agency and at the expense of the ryot." This was a new provision in favor of the zamindar.

126. It appears, then, that the principal provisions of Act X were in fact those by which on two points the hitherto rough and somewhat uncertain unwritten practice was reduced to definite law,--in one case, in favor of the ryot, by defining the prescriptive right of occupancy; in the other in favor of the zamindar, by acknowledging the right to enhancement on the ground of increase of the value of produce. It is with this latter provision that we have now to deal. Unfortunately, the law, while stating the ground of enhancement, does not exactly specify how it is to be applied. Hence the present difficulty.

127. Taking the words of section 17 alone, enhancement may, it is urged, be applied in three ways:--

First.--Mr. Doyne seems to argue that, when increase of value has occurred, the old rent is as it were expunged, and a new rent is to be fixed without any reference either to the amount of the old rent, or to the amount of increase in value, or to the custom, but simply at the competition or market rate which the land would fetch in the market--at the rate which any person bidding on purely commercial principles would give for it. But the Judges of this Court seem now to be all agreed that the nature of an occupancy tenure and the provisions of Act X of 1859 altogether negative this extreme doctrine of competition rates; that in fact the increase of rent must in some shape or other be measured and limited by the increased value of the produce when that is the ground on which increase is sought.

It remains, then, only to decide on the remaining modes of applying this ground of increase, viz.:--

Second.--The whole increase in the value, after deducting the actual increase in cost of production, may, it is said, be given to the zamindar.

Or, Third.--the rent may be increased in the same proportion as the value has increased, so that the relative situation of the parties may remain as before, and if there were profit shared between them under the old arrangement, any new profit may also be shared between them.

128. To decide this question, it has been thought necessary to go beyond the Act itself. The view which seems to have been taken by the learned Chief Justice in Hills'' case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, and which is now supported by Mr. Doyne, is that Section 6 must be considered not to be in any respect a definition of pre-existing rights of parties having different interests in the soil, but a new provision--a sort of benevolent interference between the absolute owners of the soil and the tenants who had heretofore held under them at their mere will--an interference with vested rights of property on one side in favor of those who had no rights whatever on the other side, in violation of the ordinary rules of property and political economy; that therefore such a provision must be construed very strictly in favor of the old proprietor and against those on whom these new rights were thus arbitrarily conferred; and that, under such a construction, the ryots can only have the rights of occupancy expressly given to them, while the zamindar must take in the shape of rent all the beneficial interest created by change of circumstances. At any rate it seems to have been considered by the learned Chief Justice, that, if any ryot claims any higher right than that above expressed, he must prove it altogether independent of the provisions of Act X; that upon him lies the whole onus of proving some ancient tenure and custom prior to the Permanent Settlement under which he can claim some other rate.

129. I cannot take this view of the nature and intent of Section 6. Its form is altogether declaratory. It may be, and probably is, the case, that, in substituting for the previous uncertainty a new and comprehensive definition, some persons were

included in the terms of the definition whose claims were not before well established; but it seems to be quite beyond doubt that it was the intention of the Legislature to declare existing rights, not to create wholesale an entirely new class of rights. No general right of occupancy is given to all tenants who have held for twelve years. By the terms of Section 6, express exception is made in regard to "land belonging to the proprietor of the estate or tenure," that is, land absolutely owned by him as distinguished from the ryoty land. When such land called "khamar, nij-jote, or seer" is let either for a term, or year by year, as also when the land of occupancy ryots is sub-let by them, no length of holding gives a right of occupancy. Further, as respects ryoty land, by the express provisions of section 7, every written contract inconsistent with the right of occupancy overrides all claim to such right, it being reasonably assumed that, in the absence of express written contract, the ordinary custom prevailed and the ordinary prescription ran. The declaration establishing a test by which the right of occupancy is to be tried only affected those cases in which there was nothing, either in the character of the land or in the written contract, to contradict that declaration.

130. If there could be any doubt as to the intention of the framers of the Act, as evidenced by the declaratory form of the words, it is set at rest by the actual recorded expression of those intentions. Among the papers printed and put into our hands on the trial of this case, is an extract from the Report of the Select Committee of the Legislative Council, which settled the details of Act X of 1859; and this shows exactly how this 12-year clause got into its present position. This passage is as follows:--

Section 6.--The laws in force speak of khud-kasht ryots as possessing rights of occupancy, and in some places the word ''khud-kasht'' seems to be considered as synonymous with resident'' Regulation LI of 1795, section 10 ; Regulation VIII of 1819, Section 11, Clause 3, and section 18 , Clause 5. ''Resident'' was therefore the word used in the original Bill. But it has been pointed out by the Western Board that residency is not always a condition of occupancy; and it appears that, after much enquiry, it was prescribed by an order of the Government of the North-Western Provinces in 1856 as most consistent with the general practice and recognised rights, that a holding of the same land for twelve years should be considered to give a right of occupancy. We have followed this precedent, and altered the section accordingly.

131. It would probably not be proper to use this evidence with the view of altering the ordinary meaning of the words of the Act; but it may fairly be used to support their plain declaratory form and meaning against a forced and less obvious construction. It is, then, absolutely certain that (whether or not they were strictly and exactly right in the definition adopted) it was the intention of the Legislature to declare and define existing rights,--not to create a new class of rights; and in that sense the plain words of the Legislature must be taken. The 12-year rule, thus

declared and established, covered the great mass of resident ryots who had held so long or much longer, and relieved from the burden of proof ancient ryots whose proofs could not be carried back beyond a limited period. It amounted, in fact, to this. All holders of ryoty lands, who can prove a 12-year holding, shall be presumed to be ryots of the occupancy class, unless the contrary is proved by express written contract (under section 7). If, in Bengal, some comparatively few py-kasht ryots were wrongly included in the definition, that is an accident, and not the rule. This creature of Act X, whom it is sought to make the normal occupancy-ryot, seems to be, in practice, a rare creature. He is more common in theory than in actual cases. Probably most of those to whom the old custom did not give such rights do not now assert them. At any rate, in all the cases which have given rise to this reference, the ryot claims much older rights, and the real contention is almost always with men of a much higher class. In Hills'' case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148 the ryot, we gather, claimed to have held from ancient times, and it was admitted that he had held for at least thirty years. In the present cases, no attempt is made to contradict or deny the ryot''s assertion of ancient holding. There is generally little or no contest about the occupancy character of the holding. It would then, it seems to me, be most unjust to assume (till the contrary is proved) that the occupancy-ryot whose right is tested by the definition declared by the law, is a mere creature of Act X, who had no rights whatever before that Act passed, and so to throw on him that burden of proof of which it was the very object and essence of the law to relieve him,--a burden which, if, according to a hard construction, it is necessary to prove his holding from before the Permanent Settlement, it will now at this distance of time be almost impossible for him to bear. Such a construction would, in fact, reduce the great mass of the ancient ryots to the status of the most recent holders.

132. It seems to me that the presumption and onus are now quite the other way; and that any argument founded on the regency and character of a holding which comes within the definition prescribed by law, must be supported by proof that the tenure really is one of the regency and character on which the argument is based.

133. The right of occupancy is declared by the law--that is not now in question--but for other questions connected with the incidents of such tenure, it must, I think, be presumed that every man who comes within the definition is an occupancy or khud-kasht ryot according to the custom of the country, and that his tenure has the ordinary incidents of such a holding according to the ordinary custom:--all this should be presumed till, at least, the contrary is proved.

134. Now, it is quite certain that the ordinary and most important incident of an occupancy tenure is a right to hold at a customary rent according to the usage of the places adjacent. It might be a question whether the effect of a new definition, which might include in the class of occupancy-ryots some persons not before belonging to that class, would be to promote them to all the privileges and incidents

of the ordinary occupancy tenure. I think that at any rate every occupant ryot must be prima facie presumed to hold under the ordinary customary law and subject to the ordinary incidents; that if it be proved that the tenure was hitherto subject to other incidents, then in such a case the new law may be construed strictly, and only those new lights will be acquired which the law expressly gives or the custom presumes on points un-contradicted by evidence; when other incidents, not absolutely inconsistent with the right of occupancy given by the law, are proved, then those incidents will continue attached to the occupancy tenure.

135. We deal then, first, with the ordinary occupancy-ryot, whose rent is not shown to be otherwise than an ordinary customary rent. How is that rent to be enhanced on account of increase in the value of the produce?

136. It seems to me to be certain that the customary rent represents the proportion of the produce which was the ancient right of the ruling power; and that if that rent be, as it were, resolved into its original elements, it will, when expressed in money, increase with the increase in the value of the produce exactly in proportion to that increase. The old proportion of the produce, the right first of the Government, and afterwards of the zamindar, was in Bengal commuted into pergunna rates expressed in money. Those pergunna rates were in course of time transmitted in a somewhat altered form, and became the modern "rates paid in the places adjacent." But still these modern customary rates of the present day are the direct descendants of the old rates expressed in the form of a proportion of the produce. So long as the grain rates were from time to time converted into money, they rose in proportion to the increase of value: and since they have been permanently commuted into money rates, no other rule of enhancement is anywhere to be found. The only other systematic mode of enhancing the customary rates known to history also follows the method of proportion, viz., that by "abwabs," or cesses, added to the "assal" or original rates, in the shape of a percentage or proportion, as clearly shown by Sir John Shore in the extract and example quoted from him by Harrington, Vol. III, p. 435:--
At present there are many abwabs or cesses collected distinct from the nirik, and not included in it, although they are levied in certain proportions to it. The following abstract of a ryot''s account will show, the mode in which this is done:--

137. History and equity seem to me both directly to point to the rule of proportion, that is, that as the value of produce increases, the rent should increase in the same proportion.

138. As respects the other mode by which the whole increased value is added to the rent and given to the landlord (still dealing with the ordinary occupancy-ryot holding on a customary rent), it seems to me--

First.--That it is inequitable to give to one of two parties interested in the soil the whole of any profit arising from it; and.

Second.--That it is at variance with the old arrangement between the parties, and the old practice, and inconsistent with the nature of the customary rents.

Third.--This mode seems to me to necessitate the consideration of elements of calculation not contemplated by the law, and to become in practice impossible of application. In order to ascertain the comparative or proportional increase of value, it is not necessary to ascertain the actual gross produce of the land at either one period or the other, but only the relative value of the staple products at the two periods. Mere price currents, showing, e.g., the market price of rice at the different periods, are sufficient to show that the value of the produce of rice-fields has doubled (increase of productive power not being alleged). But to ascertain the absolute increase of the value of the gross produce, we must begin by ascertaining not only the price current, but also the actual quantity produced. Nor is that enough. It is manifest that, with the general increase of prices, the cost of production will also ordinarily more or less increase (in fact, the food of men and cattle, and many other things are directly affected by the same increase), and to give to the zamindar the whole increase in the gross value of the produce would be a great injustice. Hence every such calculation supposes that the cost of production at either period must also be calculated. This is introducing a new element not mentioned in the law, and it involves a much more difficult calculation, such as was attempted in Hills'' case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148. I believe it to be beyond dispute that, in practice, it is wholly and absolutely impossible for the Courts to arrive at a safe and correct result, showing the true rent and actual net increase of value by this process. It may, in some places, be possible to ascertain market rates of rent; but to ascertain the true rent by the process indicated in Hills'' case is, I believe, wholly impossible.

139. I would, therefore, reject this mode as being--

1.--Not fair and equitable.

2.--Contrary to custom and law.

3.--Practically impossible.

140. To return to the method of proportion. A subsidiary question has been a good deal argued, viz., whether, before applying it, the cost of production should also be taken into consideration. It is said that the cost of production may not always exactly follow the value of produce; that it may sometimes increase in a greater or less proportion relatively to the increase in the price of produce, or may remain stationary, or decrease when prices increase, or vice versa. The latter supposition is not probable in this country. As has been said, many of the items which enter into the cost of production are identical with those which make up the value of products, or very closely follow them; and some of the objections to dealing with this element have already been noticed. It may, however, be admitted that, more or less, the increase in cost of production may somewhat vary from the ratio of increase of

value of gross produce; and it might be the strictest theoretical equity to calculate first the net value of produce after deducting the cost of production, and then to apply the rule of proportion to this net value.

141. I think, however, that the law contemplates, as ground for increase of rent, the gross value of the produce, and not the net value. The cost of production is not mentioned, and no increase of rent could be sought on the ground that the cost of production has decreased. That would be one of the accidents, the advantage of which is left to the ryot.

142. Then it is certain that, in the original division of the produce on which the customary rent is founded, no variation is allowed on account of variable cost of production. It is presumed that, in a rough and general way, the value of produce and cost of production, sooner or later, follow one another. In fact, originally, there was hardly any such distinction. No money calculation entered into the matter. The ruling power took its share of the produce; the ryot and his family and his cattle consumed their share, and paid out of it in grain the dues of the village carpenter and blacksmith and weaver. It is therefore only consistent in following out the old analogy to follow it out in the old way, not in a new way. However theoretically equitable, a calculation of the costs of production would, in practice, only introduce an element of confusion not contemplated by the law. As a decrease in the cost of production, the value of produce remaining stationary, would clearly, under the law as it stands, be the profit of the ryot; so if the rate of increase of some items of the cost of production somewhat lags behind, and is slower in attaining its maximum than the increase in market value of produce, that also is an accident which the law and custom give in favor of the ryot. In the more improbable case in which the cost of production might increase in a greater ratio than the value of produce, that might be an accident against the ryot. But my own opinion is that ordinarily this can happen only in countries where corn is largely imported, and that is certainly not likely to be the case in Bengal and the valley of the Granges. In this country a great labor market has always greatly raised the price of grain; witness much recent experience in many parts of India. And it may be observed, as a means of getting over any theoretical difficulty arising on that score, that there is a singular difference between sections 17 and 18 of Act X, which can hardly he mere accident, viz., that, while section 17 strictly provides that there shall be no enhancement, except on one of three specific grounds, section 18 , immediately following, merely declares certain grounds of abatement, but omits the words which would limit all abatement to those particular grounds. It may be that if, by an extreme accident, an excessive increase of cost of production, without corresponding increase in prices, rendered the ryot''s rent, as adjusted by custom and proportion, permanently higher than the market value, he might claim a reduced potta on general grounds of fairness and equity. That, however, is beyond the present question; and it may be generally observed that, in dealing with customary rights, we can hardly strictly apply those rules of Political Economy which assume competition principles to the exclusion of

custom and moral force.

143. I think, then, that in the case of all occupancy-ryots holding on rents which may be presumed to be customary, or in regard to which no other established rule of enhancement can be shown, enhancement sought on the ground of increase in the value of produce should be decreed exactly in proportion as the current prices of the staple articles of produce yielded by the land have permanently increased. The last adjustment by mutual consent must (in the absence of any special stipulation) be considered to have been at that time the fair and equitable rent by which both parties are bound. Either party may go so far back if he chooses, but no farther. The party coming into Court must show the increase of price at the present period as compared to that period, or to a series of subsequent years. If subsequent years be taken, or the date of the last adjustment does not appear, the opposite party may carry his evidence as far back as he pleases, so that a last adjustment be not overstepped. The increase will be calculated on the average of a few years at the period farthest back (and consequently nearest to the last adjustment) so shown as compared to the average of recent years. The officer making the calculation must of course be satisfied that there is a real increase in the value of the produce likely to be durable, and that the rise in prices is not the temporary result of bad harvests, an occasional extraordinary demand, or any such irregular cause.

144. Of course, the whole of the above has reference to increase sought under clause 2, section 17 only. The old rule, that ryots holding for any reason (other than express and binding stipulation of the zamindar) at rates below the customary rates, can at any time be raised up to those rates, is distinctly re-enacted by clause 1; and exceptionally low rates can always be adjusted to the rates payable by the same class of ryots in places adjacent, under that clause, independent of increase on account of increased value of produce. But if the adjacent rates have already been increased on account of increased value of produce, a double increase on that ground of course cannot be had by taking advantage of the same element under both clauses.

145. There remains only the case where it may happen that the contract under which the ryot holds, though so indefinite in regard to the term of holding as not to defeat the claim to right of occupancy, still shows that the rent was not a customary rent, and supplies materials from which some rule of enhancement other than the customary rule can be found, e.g., when the potta is for rates above the customary rates, and shows that it was based on some other calculation, or stipulates for renewal at market rates. On the zamindar''s proving such a case (and in such a case only), enhancement may be decreed on the basis supplied by the original contract, and not on the customary basis; provided only the case comes within the terms of section 17 of Act X as respects some ground of enhancement. Low rents on special stipulations would first be adjusted under clause I by raising them to the full local rates.

146. The only difficulty as regards the practical working of the simple and direct rule of proportion would be the case in which the crops produced have been wholly changed, where, for instance, some new and valuable staple has been introduced. It may be said, you may compare rice with rice, or wheat with wheat. You may also compare two different staples, which, according to the old custom, were divided in the same proportion; but you cannot compare rice with sugar-cane; they are, as it were, incommensurate quantities. This case has not yet been presented to us, and I understand that in Bengal there is not the same rotation and variety of crops which we have in other parts of the country. Rice land, I am told, usually remains rice land, till by artificial means the character of the land itself is changed. The crop is not changed without a change on the surface of the land, by which it is removed into another class. If that be done by the ryot, the increased value of produce resulting is not a ground of enhancement of rent. But it may be necessary to meet the case of new or improved staples. It will generally happen that the introduction on the old ground of new staples, rendering it more valuable, will raise the value of the old staples in much the same proportion. For instance, the excessive rise in price and consequent extension of cotton cultivation in Western India has led to an equal rise in the price of grain. In such a case the increase of value caused by new staples may be measured by the increased price of the old staples. But if this cannot be done, it is certainly the case that rice and sugar-cane (as an example) are incommensurate things. Staples of great value, which owe most of their value to the large expenditure of capital in their cultivation, cannot be compared to those which a light cultivation obtains easily from the laud. That is known and recognized by all the Revenue systems of Native States, which are generally regulated in this respect by wonderfully correct principles of Political Economy. Not only does the State proportion of different crops vary according to the nature of the cultivation required, but in and parts of the country irrigated crops of any particular grain pay a smaller proportion than unirrigated crops of the same grain, because a greater proportion of the former is due to labor and capital. And sugar-cane, cotton, vegetables, and such valuable products always pay fixed money rates, so that the extra expenditure of capital is not taxed. When then new staples have been introduced and no sufficient measure can be derived from the increased value of old staples, in that case only it may be necessary so far to depart from the direct proportion of current prices, and equitably to estimate, as best may be, the actual increase in the annual value of the land, increasing the rent in the proportion of that increase. If such a case arises, the rule of proportion may, I think, in some shape, still be applied.

147. To sum up, the question principally argued before us seems to be simply this: "Are the zamindars absolute owners of the soil, and the ryots persons without any other right than one recently conferred upon them, to protect them against capricious ejectment, namely, a right of occupancy at full market or competition rents; or have the ryots also certain rights in the soil by law, custom, and

prescription?"

148. That question we are, without disagreement, disposed to answer by saying, "all occupancy-ryots are not necessarily of one class. While some have high customary rights, others may possibly be mere tenants-at-will, recently converted into occupancy ryots." The substantial difference is only as respects the onus or ordinary presumption.

149. The majority of the Court seem to be of opinion that a ryot who has held for twelve years and upwards must be presumed to be a khud-kasht ryot; and entitled to the privileges of the "khud-kasht" of the laws till the contrary is shown; and that if it be shown that the ryot has come in at a date subsequent to the Permanent Settlement, still, if he came into the village as a khud-kasht or resident ryot, or has held more than twelve years without any express contract and at customary rates, he must be presumed to have acquired by consent, law, custom, and prescription, the ordinary customary privileges in regard to the rate of rent. That custom traced to its origin gives us the rule of proportion.

150. We are all again agreed that if, in a possible case, written contract inconsistent with the customary rate, and a holding under that contract, be proved, effect must be given to the contract, except so far as it is varied by the strictest interpretation of the provisions of Act X of 1859.

151. I would return to the Division Bench the answer proposed by Mr. Justice Trevor.

Pundit, J.

152. I agree with Mr. Justice Trevor except with regard to certain remarks in his judgment concerning sections 13 and 17 of Act X of 1859. What is written below relates to those sections and to matters which were discussed during, and arise in the trial of, this case, which are not noticed in detail by Mr. Justice Trevor, and which, I think, are necessary to be recorded to support the decision adopted by me, as well as to answer the arguments on the opposite side.

153. I have purposely avoided to write anything concerning the points of the case in which I agree with the other Judges, and regarding which they have written elaborate and learned remarks.

154. section 17 of Act X of 1859 provides that the rents paid by ryots having rights of occupancy without fixed rates cannot be enhanced except on the three following grounds:--

1st.--That the rents paid by the ryots are below the rate paid by the same class of ryots for similar lands in the neighbourhood having similar advantages.

2nd.--That the value of the produce or the productive power of the lands has increased otherwise than by the agency or at the expense of the ryot.

3rd.--And that the lands held by the ryot are proved on measurement to exceed the quantity for which rent was previously paid.

155. An enhancement supposes an existing rate or amount of rent to be increased.

156. The last of the three grounds mentioned above, properly speaking, is not one for enhancement, but only for adjustment of rents. The second might include a rise in the value of the produce or the productive powers of the land at the expense of the landlord. The first ground pre-supposes that the rents of the generality of the neighbouring ryots have been properly adjusted with reference to the surrounding causes, and have been brought up to the highest amount payable under the law.

157. In this part of the country the zamindars do not improve their estates by laying out any large amount of capital in draining or otherwise improving the lands. In several localities they, however, advance seed or money to their ryots, build and maintain some embankments, or dig and keep clear, and in a working order, certain water-courses, or prepare some wells. All these works and proceedings generally are such matters of necessity, that without them it would be impossible for the ryots to make any profitable cultivation. When the law speaks of an increase in the value of the produce or the productive powers of the soil at the expense of the zamindars if it is included in section 17 , generally it must mean to refer to expenses like those mentioned above, and not of any greater magnitude.

158. Section 18 provides that a ryot having a right of occupancy can ask for an abatement of his rents on the ground of diminution by diluvion or otherwise, or decrease in the value of the produce or of the productive power of the land, or on the ground of the lauds being, on measurement, found to be less than the quantity for which he was paying rent. Whether he can ask for an abatement also upon any other grounds is not intended to be decided by this section. It is, however, clear that the list given above is, almost exhaustive of the reasonable grounds for abatement. Any decrease in the costs of production not being made a ground for enhancement, an increase in the same would not be a just ground for an abatement.

159. Section 13 provides that under-tenants or ryots who hold or cultivate without written engagements or under written engagements not specifying the period of such engagement, or whose engagements have expired or have become cancelled in consequence of the sale for arrears of rent or revenue of the tenure of the estate in which the lands held or cultivated by them are situated, and which have not been renewed, shall not be liable to pay rents at an enhanced rate, unless notice be issued before the commencement of the year for which the enhanced rates may be asked. Under the proviso recorded at the end of section 32, a suit for such enhanced rates may be instituted after three months of the expiration of the year for which such rents are asked.

160. The demand, however, may also be made at any time within three years from the expiry of the year for which such rents are claimed. u/s 14 the ryot may,

immediately after the service of notice, contest the validity of this demand by a suit, without waiting for a claim at the enhanced rates being brought against him by the landlord.

161. Section 23, clause 1, speaks of suits to obtain kabuliats and pottas, and to fix the rates at which the rents are to be paid. Section 76 enacts that, when a ryot having a right of occupancy demands a potta, and there is any difference regarding the terms, the Collector has to fix the rents and the term of the lease, which latter, however, in estates permanently settled, is not to exceed ten years.

162. The expiry of the term does not necessarily terminate the tenancy of the ryot. The term fixed is the period during which the rent is to be paid at the rate mentioned in the potta. When from any ryot, having a right of occupancy without any fixed rates of rent, a kabuliat is asked by the landlord, and a decree is given for the execution of the same, the terms of the deed as fixed by the Court cannot, speaking technically, be operative beyond a year. In the case, however, of a potta being asked by such a ryot, the Collector can fix for it a period extending beyond a year, and during this term the landlord has no right to enhance upon any ground whatsoever. Perhaps the ryot also cannot sue during the existence of this term for an abatement except in cases of diluvion. It may, however, be observed here that the ryot has always the liberty of relinquishing his lease by giving notice at the end of the year after which (see section 19) he intends to give up his lease.

163. Section 5 provides that, in case of disputes, the rents previously paid by a ryot having a right of occupancy without any fixed rates of rents are to be considered fair and equitable, unless the contrary be shown "in a suit under the provisions of the Act."

164. It follows from this that, in a case for enhancement under the second head of the second ground mentioned in section 17 , the landlord and the Court must assume the rents previously paid to be fair and equitable, and that the landlord, when he wants to disturb them, must proceed under the first ground for enhancement.

165. The right to ask for a kabuliat mentioned in section 23, against the tenants and ryots independent of any enhanced rates of rent, is necessarily confined to cases where there is no written engagement, or where, by operation of law or time, the former potta has become cancelled, or, owing to a division of the estate, it has become necessary to ask for a kabuliat from the ryot who by his former engagements was bound to pay rents to other parties than the person now entitled to demand the same. Those who merely succeed to the former landlord, either by inheritance or as purchasers or assignees, have no right to ask for a fresh kabuliat.

166. The kabuliat may also be asked in cases of a permanent tenure, when it may have been originally given on condition of settling the amount of rents with reference to a measurement to be made at some future date, or with regard to the

quantities to be cultivated within a certain period. In these cases the rates of rents are settled before, and the necessity for demanding kabuliats through Courts arises afterwards from disputes regarding the quantity by measurement, or concerning the quality or the condition of the lands. In these cases, generally, a mere amalnama is given at first, or some deed executed providing for the future exchange of the potta and kabuliats after a certain period. Even by the Sale Law of 1859, ryots having a right of occupancy (section 37 of Act XI of 1859) are not liable to pay any indefinite and unlimited amount that may be asked. It is, therefore, evident that, in all cases purely for kabuliats, either the rates are fixed, or are simply required to be fixed, by reference to some standard, viz., the nirik of the pergunna or the prevailing rates of the neighbourhood. No landlord can be allowed to ignore the provisions of section 17 by simply asking for a kabuliat when his real intent is to ask an enhanced rate of rents. The landlord may, both when there was and when there was not a kabuliat before, ask for an enhanced rate u/s 17 , and at the game time ask also for a kabuliat at the enhanced rate sued for by him, but that will not give him any right to ask for a general adjustment even of the old rents, and to pass over the restrictions imposed by sections 17 and 13.

167. When, however, a kabuliat may be asked (irrespective of any right to enhance), if the case requires a settlement of the rates, they are to be fixed according to the prevailing rates of similar lands in the neighbourhood; and where the rates are already fixed, the amount of rent to be inserted in the kabuliat is to be summed up at that rate upon the quantity of the land which, after investigation, may be found to exist, or found to be liable to pay rents. It is therefore manifest that in ordinary cases for kabuliats, and accordingly also in suits for pottas, no question of enhancement or abatement can be allowed to be raised. If, however, when the value of the produce of the lands of his ryot may have risen, the landlord sues for a kabuliat fixing and determining the rates of rent to be paid by the tenant, he can ask only for a kabuliat, and the rents to be fixed must necessarily include the share of the enhanced value. If the rents in the neighbourhood have already adjusted themselves with reference to the altered state of things, the rents to be paid will be fixed with reference to those prevailing rates. If the rents have not so adjusted themselves, the rates prevailing before the rise in the value of the produce is first to be found out, then the share of the enhanced value is to be added to it, and the total of both will represent the proper rent.

168. If it be held that objection against the fairness of the old rates can be raised in all cases for kabuliats and pottas, the double process mentioned above must be adopted in these suits also.

169. The object of the, law, however, appears to keep all cases under one right quite separate from others involving other rights.

170. In the present case owing to a rise in the value of the produce upon the rents previously paid by the tenant, an enhancement is asked. It is therefore a case for

enhancement, and not simply for a kabuliat, though a kabuliat is demanded by the plaint. It is true that a case for enhancement must be for the rents of past years, and in this case a kabuliat is asked for three years, and these are partly in future, still the fact of the insertion of this prayer cannot he allowed to alter the real merits of the claim. As the tenant had not given a kabuliat before, if the landlord had said "that the ryot has not given me a kabuliat, that I have offered him a potta, that I want a kabuliat accordingly," and no mention had, on the ground of a rise in the value of the produce, been made of any right to ask for an enhanced rate (equal to that paid by the generality of ryots for similar lands before the rise in the value), it may have been a case for a kabuliat fixing the rents. The prayer to ask a kabuliat for three years is redundant, as no order fixing the rates for three years can be granted by the Court at the suit of the landlord. For a suit like this, where virtually an additional rent is asked upon the second ground mentioned in section 17 , issue of notice u/s 13 before the beginning of the year for which the enhanced rent is asked, is essentially necessary; but as no objection regarding the non-service of such a notice is taken by the tenant, it may be supposed that one was issued as required by the law. In all such cases the adjustment for one year is practically an adjustment for an indefinite period, viz., up to the time that any cause does not arise for a further enhancement or for abatement. Most of the ryots throughout Bengal hold without pottas and have seldom given kabuliats, yet the rents payable by them are known to the parties concerned, and are evident from papers produced when disputes arise.
171. In the present case it is admitted that the value of the produce has risen without the agency of either the landlord or of the tenant, merely by a general rise in the value of the produce, owing either to an increase in the demand or a general rise in the price by a greater influx of gold in the country.

172. In order to find out what is the proper rent according to the rules laid down by political economists, we must find out, first, the average yield of a stated quantity, say a biga. To find this, we have to ascertain the yield of the different crops from several separate and similar parcels of the land, at least in the year for which the enhanced rate is demanded, as well as for one or several years preceding that rise. We have then to find out the average value both of the increased and of the former products. This must be done by reference to sales made by more than one person of their several products during the two periods. We have afterwards, by a most tedious and complicated calculation, involving the consideration of numerous items, to fix the average costs of these products. In order to calculate this average of costs, we must not only find the value of several things, but also, by some arbitrary mode of calculation, the exact amount of those items that are necessary to produce the average of any particular produce per biga. The calculation of all these averages must, therefore, for the sake of this average of costs, be made by taking into consideration the amount of lands likely to be cultivated by some limited standard, as a couple of bullocks and a plough. Now each ryot does not hold an equal quantity, or exactly sufficient for one or more ploughs. The necessary things must

be purchased, and the bullocks fed even when the lands held by a ryot may not exactly be sufficient for one or more pairs of bullocks. The labors of the husbandman must be entirely devoted to the looking after his field, even if it be composed of bighas less in number than the quantity fixed for one plough. It is quite clear that, owing to the difference in the quantities of land held by different ryots, the calculation of the general average by those rules and such standards cannot be expected to be fair and equitable to all the ryots. It may be favorable to some, and must be the contrary to others. The average quantity of the seeds, of manure, or even of the labour per biga, may not be open to the same objection. The exact quantity of these may be fairly discovered by a calculation on the principle of averages; but the calculation of the average of many other items must be wrong from the very nature of those items; and if those averages are defectively fixed, the result will tell against the correctness of the average of the increase in the value of the produce found by this process.

173. It is only after these perplexing, tedious, and almost impracticable calculations that an average of the increase per biga can be found either in the price of the produce or the productive powers of the land. In such a calculation, correctness is out of all question.

174. It was for this cause of impracticability of arriving in this country at any correct result, that Government, by section 2, Regulation XIX of 1833, modified that portion of Regulation VII of 1822 which provided rules for assessment upon this principle of the calculation of averages. The costs of production being further under the control of the ryot, he cannot, when he is entitled to a deduction of them in any account fixing his rent, be expected to exercise any attempt to reduce these expenses by any device or discovery. He knows he will get these expenses deducted, and so does not care what they are in amount. Further, knowing that he is not to participate in any part of the increased profits, he, as a general rule, may rather be tempted to spend more than the sum he would have spent; if induced by hope of participation in the profits, he might be led to adopt many measures of economy.

175. The calculation according to the rules of Political Economy may be adopted when the rents are not limited by any custom, and is adapted to a country where people, for want of opportunities for laying out their capital, look to the cultivation of land as means of realizing something for maintaining themselves and their families and for increasing their wealth. Agriculture here is no part of any commercial investment. When there is a rise in the value of the produce of lands, the same causes which have brought about this state of things must have raised the value of many other things likely to be required by the cultivators of the lauds. Besides, the very produce of the fields is as much necessary to the ryot as to other people.

176. If the value of money has thus virtually diminished, it is quite apparent that if no more than the former amount of profits is given to the ryot, when an

enhancement is to be made on account of the increased value of the produce, this amount will not now represent the exact value of the money originally reserved to the tenant. It may be said that one-half of a smaller sum may be the fair share of a tenant in one state of things, but the same portion out of a much larger amount might, in another state of things, not necessarily be so; but in answer to this it is to be kept in mind that when civilization and wealth increase, and are more diffused, many things which were luxuries before are sure to become necessaries even to the ryot and his family; and under such a state of things, he must now have a larger amount than he had before, unless it is intended that he is to be reduced to a state of comparatively greater wretchedness and destitution than he had the misfortune to be in before.

177. Generally speaking, the rise in the value of the produce is not the effect of expenses incurred by the landlords. In cases, however of the rise of the productive powers of the soil, such expenses may have materially contributed to bring about the increased productive powers.

178. In Bengal, an advance by a landlord to improve his estate is a thing unfortunately a mere contingency written in the books of laws, but not yet practically realized. Even in cases where the rise in the productive powers or the rise in the value of the produce may have been the effect of some expense by the landlord, the law does not appear to enact that the whole of the increase must be given to the landlord. It may fairly be supposed that in such cases the landlord, besides the old rent, is justly entitled to the market rate of interest upon the capital laid out by him, and if anything still remains of the increased value, it is left to the Courts of Justice to determine what are the fair and equitable proportions in which this balance is to be divided between the tenant and the landlord. If in such cases the entire increased amount of profit is not awarded by law to the landlord, it must be clear that it was the intention of the lawmakers to leave to the said landlord the entire increase, where the rise in the value is as much unconnected with him as with the tenant. The ryot as a party connected with the land has some right, irrespective of his former position, to receive some portion of this increase as the holder of the land, and the party who raises and sells the quantity of the produce which fetches the present higher value. Fair and equitable rates required to be fixed by a Court of Justice, and specially with reference to the known and established rights of tenants in the country, must mean something different from the highest rents which can be procured by putting up the farming of the lands to competition. The simplicity of the rule of proportion, its pliability to be adopted in many other cases than the one now before us, and the fact of its not being opposed to the principles which appear to have generally guided the fixing of rents throughout the country, have induced me to adopt it.

179. It cannot be said that the law has said in so many words that this rule of proportion should be observed. In adopting the rule of proportion, we are not

obliged to make any difficult enquiries. The old rent is always shown, and the particulars of the increase itself must be supplied by the landlord to start his case. He proves that a maund of a certain produce of the land fetched one rupee before, but that since so many years, the price increasing, it now fetches from such a time rupees two per maund. The value of agricultural produce is a thing almost within the personal knowledge of the generality of the villagers, and there are various satisfactory records showing what it was for several years past. We have but to find out the average produce of the present time. The quantity of the produce in all such cases of enhancement upon the ground of the increase in value is assumed, on both sides, to have been the same before as it is at present.

180. The landlord is not likely to be a loser when he gets his rents in the same proportion that he got them before, and the ryot cannot in any way be said to encroach upon the rights of his zamindar, when he is allowed to retain (for his costs and his share of the profits) only the share that he received before. It is quite within the power of the tenant to give satisfactory evidence of the quantity produced. The value of this quantity according to the old price being easily calculated, we discover by calculation the proportion that the former rent bore to the amount of that value, and by subtracting this value from the amount found by calculation to represent the present value, we at once find the amount of the increase in the value. Then we have to give to the landlord out of the present value the same proportion which his former rent bore to the former value. It was within the power of the landlord to have raised the former rents before the increase, if the former rates were from any cause lower than those paid by others of the same class in the vicinity for similar lands. When further increase of value takes place from time to time, the adjustment on the rule of proportion will not become the less fair and equitable, because in amount a larger sum is left to the ryot. His gains relatively and proportionately with those of his landlord have not risen, though, as compared with his former share, the amount of the present share may appear to be larger. This rule of proportion is not likely, on the ground of the calculation being made on the gross, and not on the net value of the produce, to be injurious to the landlord. It is not likely to be so to the tenant, except when the rise in the costs of production may exceed the proportionate rise in the value of the produce. This is not, however, likely to happen at all. It is not only an extreme and improbable, but almost an impossible case. If it can be supposed that a rise in the value of the produce, much beneath the proportion of the rise in the costs of production, or a rise in the first without any rise in the other, are cases any way possible, leave may be granted in any of these cases to the ryot or the landlord, as the case may be, to make special application to the effect that the proportion of the profits for him of the increased valuation should be divided with reference to the value of the net, and not the gross produce.

Seton-Karr, J.

181. After ample time for consideration, I concur in the answer which it is proposed to send to the Division Court. That answer is contained in the elaborate and clear judgment of Mr. Justice Trevor, which seems to me conclusively to establish the following points; and that, by a reference to the whole course of legislation on this important subject, from 1793 downwards, as well as to facts disclosed by Indian history.

182. Neither by Hindu, by Mahomedan, or by Regulation law, was any absolute right of property in land vested in the zamindar to the exclusion of all other rights; nor was any absolute estate, as we understand the same in England, created in favor of that class of persons. The ryot has by custom, as well as by law, what we may term a "beneficial interest in the soil."

183. The Decennial Settlement, while enhancing the status and fixing the rights of the zamindars, did not intend to alter, and did not alter, the common law of the country, with regard to ryoty tenures; khud-kasht ryots, whose tenures commenced at, or subsequently to the Decennial Settlement, were still entitled to hold such tenures either at the pergunna rates, or, what is the same thing, at rates payable for lands of a similar description in the neighbourhood.

184. Pergunna or local rates are perfectly capable of ascertainment.

185. Such ryoty tenures and rights being in existence all over the country, though not very well defined, Act X of 1859 fixed twelve years to be the limit after which the right of occupancy of an ordinary resident, permanent, or khud-kasht ryot could not be questioned, and conferred the same right of occupancy on other ryots, who formerly and without that enactment might, perhaps, not have been entitled to the same by the common usage and custom of the country.

186. These points appear to me to have been set out in the judgment I allude to, at such length, and to be supported by such arguments'' reasons, and authorities, that it is not necessary for me to attempt to go over the same ground again. The same views are further established by the judgment which Mr. Justice Campbell has written at considerable length and with great force. I have, therefore, only to add some remarks on the three several principles according to which it has been suggested for the one side or the other, that rent ought to be enhanced by zamindars, and that Courts of law ought to decree enhancement.

187. The first is the principle of competition. At the time when the rent question was argued before the whole Court, at great length and with consummate ability on both sides, one of the learned counsel, as I understood him, expressly abandoned the theory of competition, although Mr. Doyne did contend for the adoption and soundness of this principle. But I do not understand that any one of my learned colleagues looks with favor on this proposal either as warranted by the law and custom of the country, or as even calculated to effect a settlement of the rent difficulties. On the legal aspect of the principle, it must be conceded that it is one

applicable to English landlords and English tenants, and that it has been with them adopted, as the feudal system passed away, from the consideration that an English land-owner has now a complete and absolute right in his land, and can deal with the same as he would deal with any other article or chattel over which he has entire and uncontrolled dominion. Still, not to say that rents by custom, such as quit-rents, and fee-farms, do exist in some parts of Great Britain, and that even there, competition, though general, is not absolutely universal, this said principle of competition is, I do not hesitate to say, hitherto, practically and as a general rule, unknown in India. We find no trace of it in the works of Hindu or Mahomedan writers. It was never expressly sanctioned, contemplated, or even implied by any section of all the Regulations of Lord Cornwallis. It is abhorrent to the temperament, social habits, and attachment to the soil which distinguish the agriculturists of India to an extent unequalled by the agriculturists of any European Kingdom. If one or two instances can now be cited where zamindars, in the neighbourhood of Calcutta, or in some of the Metropolitan districts, have put up lands which have come into their own actual possession by death or desertion to competition, such partial exceptions will only be a more convincing proof that ordinary rents all over the country were, and are still, regulated not by competition, but by some other principle. Indeed, if the word "competition" deserves to be applied at all to any dealings in respect of land, the term must mean, in India, competition by zamindars for ryots, and not by ryots for lands. I can perfectly understand that a legislator might think a system, under which England has attained such an eminent degree of agricultural prosperity and advancement, to be a system which will benefit all countries and peoples, and that he might wish to introduce the same into the provinces of India. I say that I can perfectly understand the feeling which would prompt such a course of policy, though I might doubt the expediency of the measure when I considered the opposite customs, in respect to the cultivation of lands and the collection of rents, which had long been recognized and acted on; the traditions which are consecrated by ages; and the vast and almost irreconcilable differences of character and feeling between the European and Asiatic races as dwellers in rural villages, and as tillers of the soil. But, under the peculiar circumstances of this country, we have, as Judges, to carry out the law with regard, not to what we might think the best possible scheme for improving the various processes to agriculture, and for enabling men, first to amass, and then to distribute wealth, but with regard to the wording and spirit of the law itself, and also with regard to the customs and habits of the people, where the Statute law is silent; and we are bound to take care that we do not sanction or introduce strange principles in the settlement of what is admitted to be a vexed and difficult question, left designedly for the Courts of Law to settle as they best may. Finding therefore, no trace of rents by competition either in the laws of 1793, or in the Act for the settlement of all questions between landholders and ryots, known as Act X of 1859, or in those customs and peculiarities which make up the Common Law of the country, and without which all Statute laws are mere pieces of parchment, bearing indeed the stamp of the Legislature, but without vitality or

effect, I am clearly of opinion, and so, I understand, are all my learned colleagues without exception, that whatever rule may be taken to guide Law Courts in future in the enhancement of rents, that rule must and cannot be competition.

188. Next, we come to the second principle proposed or suggested for our acceptance, as well as for the guidance of the subordinate Courts. And this I understand to be as follows:--

In cases where rent is sought to be enhanced by reason of an increase in the value of the produce owing to a general rise of prices, and independent of the agency either of zamindar or ryot, the old rent is to be taken as the basis, but the whole of the profit, less the increase in the cost of production, is to be taken by or decreed to the zamindar.

189. I have very fully considered this proposal, but must own that I am unable to find any one sound principle by which it could be supported, or any countenance for it either in the previous history of the rent difficulty, or in the wording of Act X of 1859, or lastly in the intention of the Legislature which enacted that law. In truth, it seems to me even less capable of support than the theory of rents by competition. Competition, if the laws were not pointedly opposed to that view of the subject, and if we had no clue to the policy of the Hindu, the Mahomedan, or the British Government in former days, might be plausibly and fairly supported by arguments to the effect that this principle was the best when the laws were silent on the subject: that accumulation of capital was admittedly productive of great advantage to all countries: that there is no improvement to be looked for in agriculture from petty agriculturists, or mere cultivators, or unless wealth and means be massed in the hands of one individual; that only individuals possessed of such means, and vested also with the exclusive dominion over the soil and with power to eject ryots and cancel leases, can benefit the general population; and that a system which has worked such wonders in Great Britain must imperatively produce the same effect in India, or wherever it is fairly and fully tried. But the theory of the old rent as the basis (for it is not denied that there must be some existing basis on which to decree an enhancement), plus the increased value of the produce as the superstructure, cannot be supported by any such reasoning. If we still keep the old rent and add to it, we are dealing with what was, notoriously, fixed by the ancient custom of the country--that is, with cases in which landlord and tenant came to an understanding that they were to share in the profits of the soil without any thought of competition or rack-rent, and under an implied agreement and custom that if the ryot would take the land for so much, or would continue to live on and cultivate his father''s holding, he should not be ejected so long as he paid his rent. We thus commence with a customary rent, and it seems to me therefore that enhancement ought to be decreed on somewhat the same principles as those by which the rent was originally fixed, viz., by custom, unless the law has laid down some other principle as our guide. Now, on what principle, derived either from the Statute Law, or the Common

Law, is the whole of the increase, deducting the cost of production, to be handed over to the zamindar? It cannot be on the presumption that the ryot originally received from the land what was just sufficient to repay him for his toil, to keep alive his cattle, and to allow him seed sufficient for the next year''s harvest. This, we have seen, was not the principle on which rents were fixed either before or after the Perpetual Settlement between the zamindar and the ryots. Neither can it be on the special proviso that the zamindar has done anything to improve the land, for the law applicable to the very case which we are considering, expressly states that we are to provide for suits in which the increase is not owing to the agency either of the zamindar or of the ryot. Neither, again, can the proposed rule rest on any general argument drawn from the part which the zamindar takes in directing and aiding the agricultural operations of the cultivator. The zamindar, it is perfectly notorious, takes no part in controlling or assisting the various processes of agriculture, for I do not consider the advance of tuccavee for seed, made occasionally in frontier or jungly districts, as anything but partial exceptions not to be taken into account. He bears none of the risk. He supplies none of the capital. He makes no contribution to the ryots'' stock, and he is never anywhere charged with the erection or the repairs of the ryots'' houses, which do not belong to, and are never claimed by him, but which are invariably removed by the ryot, when he changes his residence to some other village. Nothing, then, which can be discovered in the familiar and social relations between the zamindar and the ryot would seem to authorize us to say that, when the value of produce increases by the sheer growth of the country in prosperity, by the introduction and extension of railways, by the rise in prices, by the general security of property, and by the gradual expansion of civilisation, the ryot is to get nothing, and the zamindar is to take everything. That a reasonable share of the increase is to fall to the zamindar on account of his increased expenses, and his unquestioned position and rights, is admitted, so as to make the division fair and equitable; but it must be so to both parties. And this requisition will be hardly satisfied by deducting in the ryot''s favor the mere increase of the cost of production. In many cases this may be much less than the increase in the value of the produce. And in all cases, it will not amount to a recognition of the rights and position of the ryot.

190. Can we, then, find any grounds for such a rule in the actual wording or in the presumed intent of the law? Surely, as far as mere words are concerned, we cannot. Had the Statute been intended thus to solve all our difficulties, nothing would have been more simple than to add a section to that effect. Instead of any such plain direction, we have the words "fair and equitable rates." But what of fairness or of equity, it may be asked, can there be discerned in a system which would take away all the advantages of an increase, when there is an increase, from one person who bears the labor of cultivation, the risk of the seasons, and the chances of the market, and would make over the same to another person who has no such burden and no such chances to bear? It may be a source of regret that the law did not lay down

some more precise rule or formula than the words "fair and equitable rates," or even that the Courts of Justice are at all made the vehicle of expounding the law in the matter; but as we are bound to consider and decide the point, I do not see how we can give everything to the zamindar, if we pay due attention to the ordinary meaning and import of language.

191. So much, then, for the language of the law. Then can we, admitting the want of precision in the language of the section, support the above principle on what we may conceive to have been the intention of the legislature? Now, the intent and scope of Act X of 1859 was much canvassed before and at the time of its passing. The Legislature avowedly came forward to fulfill the pledges of the Legislature of 1793, to repair its own unfortunate omissions, to supply what, owing to the neglect and apathy of the zamindars, had not been conferred on the ryot, and to place the whole of the relations between the two parties on a more satisfactory and equitable footing,--on a footing which should raise and elevate the ryot, while it in no way impaired those substantial rights which Lord Cornwallis had guaranteed to, or had conferred on, the native gentry of Bengal. Some of the men who passed that well-known Statute were men of intimate knowledge of the Revenue Laws, and of the habits of the people, and all were men distinguished by philanthropy, and by active sympathies for the general well-being of the people. Did they, then, deliberately sit down to enact a law which, on one of the most constant and fertile sources of dispute and disagreement, laid it down that the ryot, for whose interest the law was passed, was to derive no benefit from the general good government and increased prosperity of the country, and that the zamindar, to whose neglect the law was in part owing, should derive all the benefit? I cannot gather from the debates that such was their intention, nor can I think any such ruling as that proposed for our acceptance, would have received their sanction, or would have been consistent with their notions of what is "fair and equitable." We must constantly bear in mind that we are now sitting to carry out their intentions, and to apply, practically, in the contests between both parties, a rule, which is to have equity and fairness to both for its base. Now, if the rent of the zamindar rises, without any effort on his part, in the proportion and scale on which it was originally fixed by the custom of the country and the consent of both parties, I do not think that it can be said that it does not rise in fairness and equity as far as he is concerned.

192. It follows, then, that I can discover nothing to support this second principle of enhancing rents, either in the consistency and plausibility of the theory itself, or in the Common Law of the country, or in the relations in which the zamindar stands to the agriculturist, or in the positive language and wording of the enactment, or in the supposed intentions by which the members of the Legislature were actuated at the time. I must, therefore, reject the same as not implied or recognized by the custom of the country, and as not warranted by the laws of the State.

193. In fact, this principle can be adopted only on the theory that no ryots, no ordinary resident cultivators, none, in fact, except khud-kasht kadimi ryots, or ryots who can prove their existence as far back as the Decennial Settlement, have any rights of occupancy, or had any until Act X conferred the same on them by its celebrated section 6. But the lengthy arguments in the case, and Mr. Justice Trevor''s judgment, as well as Mr. Justice Campbell''s and those of my colleagues which I have for the first time heard to-day, have clearly shown and have satisfied me that such is not the case, and indeed the theory with which I am dealing can only be supported by holding that the ordinary khud-kasht ryot who came into existence after 1793, in the spread of agriculture which marked the British rule, is a mere tiller of the ground, who has no permanent connection with or beneficial interest in the soil; that evictions and ejectments have been, not only occasionally avowed in legislative theory, but have been largely resorted to in practice; that between 1793 and 1859 the whole Common Law of the country has been obliterated, and the feelings and customs of the population from the highest to the lowest have been completely revolutionized; and that the right of occupancy given by section 6 allows no ryot, except the class of kadimi khud-kasht, anything but the preferential right to squat, and to accept, if not a mere rack-rent, at least a rent which practically excludes him from all participation in the surrounding prosperity of the country, and reduces him to a dead and uniform level of risk and hard work, for the pure benefit of the zamindar, without any prospect of amelioration or increase of his own.

194. Not to go over the same ground of the Regulations and Acts unnecessarily, it may be stated with confidence that the reverse of all the above considerations is the case. Khud-kasht or resident ryots from father to son were always considered to have a right to remain on the land so long as they paid their rent. Customary rates and pergunna rates recur again and again in our legislation. The zamindar with all his powers and rights, large as they no doubt are, is not an absolute landholder. The ryot has an interest in the land much beyond that of a mere day-laborer or of a person entitled to the wages and the enhanced cost of production. The Regulations and Acts extending over a period of years, universally appeal to precedent, and nowhere actually annul or obliterate the solemn pledges of 1793.

195. Possibly, the Legislature, in seeking to repair neglect and omission, may have extended the privileges of occupancy at fair and equitable rates, to classes who otherwise would not have obtained it had things been left to themselves. Py-kahst tenants, and even mere squatters, may now, after twelve years, unless the zamindar be vigilant, claim rights of occupancy, which the Courts, interpreting Act X of 1859, may be compelled to uphold in their favor. But we are not dealing with such a case in this instance, nor have the generality of the cases that have come before the Court been of this kind. In nearly all cases, rights of twenty and thirty years have been pleaded. In any view, we are to administer and not to alter the law, and we cannot take into our consideration any particulars in which legislation perhaps went beyond that which popular custom and general practice would have warranted.

196. Finding, then, the second theory to require for its support a state of things other than exists, and other than the Legislature has all along recognized, I come to the last rule, the rule of proportion.

197. No via quarta is proposed, or even hinted at, for our acceptance. This rule of proportion, it seems to me, will combine many of the requisites for which we ought judicially to look, in laying down general principles, on which zamindars can make, and Courts can enforce claims. It will proceed from the basis of ancient, recognized, and universal custom, and it will adapt that ancient custom to a new, a higher, and an improved state of things. It will be in strict conformity to what I understand to be the intention of the Legislature, and to what I think is a just interpretation of the words of Act X. It will depend on evidence which, in most cases, will be ascertainable without extraordinary difficulty, viz., evidence as to what is the present price of various kinds of produce compared with the price of the same articles some ten, or twenty, or thirty years ago. I believe that materials do exist for this enquiry, and that there are men in every haut, grunge, or bazar in the country who will supply such information. By eliminating all the cost of production, one additional source of confusion and intricacy will be removed, and all minute and almost impracticable enquiries into wages, stock, profits, and the like, will be saved. Then, as regards the zamindars, it seems to me that such a plan will be equally "fair and equitable" to him. Without an additional anna of expenditure, without any increase of risk or any new share of contingencies, he will be able to raise his rents, not merely to the level of local pergunna rates, but generally all over his zamindari, in proportion to his own naturally increasing expenses, and to the more substantial wealth and prosperity of the ryots of his estate. He will share, like others, in the advantages, as well as in the disadvantages, of a general rise of prices. There are, no doubt, cases in which it may be difficult to ascertain the old rates at which rents were fixed; and there may be others to which the proposed rule will not apply at all. In regard to the latter, Mr. Justice Trevor''s judgment leaves the point open; and in regard to the former, all we can say is that there is no rule that the wit of man can devise under the present state of the law, which may not he difficult of application on some occasions, or may not work hardship or apparent injustice on others. The worst that can be adduced against the proposed rule is that it may be unequal, difficult of application, or uncertain in effect. But what is certain, and the only thing that is certain at present, is, that the rule in the case of Ishore Ghose 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148 has not only not furnished other zamindars and the subordinate Courts with a useful and available precedent, but that after all the time, the toil, and the great learning that has been expended on that case, we are not told that it has even settled the question finally between the actual parties to the suit.

198. After this, I think we can have little hesitation in adopting the rule of proportion as our guide. There is, in fact, no other resource left. Other modes of adjustment have been successively cut away from under our feet, by a preponderance of

argument, or by the sure test of experience. I admit that the Courts of this country are placed in this matter in a position which, it is not too much to say, resembles that of no other Courts in the world. If the principle of competition be anywhere fully established, the rents of lands are settled on the well-known maxims of political economy, demand and supply, and law Courts have very little, if anything, to do with the decision of such questions. If the Legislature had laid down a distinct and detailed principle for regulating enhancement, then Courts would only have to apply that principle, as they would any other. But with us, competition is a mere theory, and the law has failed to lay down a principle, except in vague and general language. We must remember, however, that zamindars have been accustomed to bring their cases of enhancement and of rents into our Courts from the earliest period of our rule, and that this system, which forces them into Courts, and which thus contradicts all assumption of absolute and unqualified rights on their part, is no strange or novel system to them.

199. We must, then, do the best in our power, and by a resort to past custom, as well as by a consideration of the present circumstances of the time and country, and of the intent and language of the law, we must endeavour to discover some rule which shall not be too cumbrous for the machinery at our disposal to work, which shall prove itself to be of general but not perhaps universal adaptation, which shall carry out the intentions of the Legislature, which shall be neither too much in advance nor too much behind the feelings of the age, and which shall be fair to the ryot, while it is not inequitable to the zamindar.

200. The rule of proportion, as far as I can judge at present, seems to me to combine all these requisites; and, in any view of the case, to come closer to the mark and to interpret the enactment better, than any other rule which has either been discussed in theory or been tried in practice.

201. I would, therefore, transmit to the Division Court, and as a consequence to all the subordinate Courts, the answer proposed by Mr. Justice Trevor, with which answer I hereby intimate my entire concurrence, so that the various classes of subordinate Judges may know in what particular decision they are to find the law of the majority of the Court. In support of that judgment, and with regard to the principles laid before us, I have thought it expedient separately to record my own reasons. I may add, after this consideration of the case judicially, that, without any extravagant exceptions that such a ruling will dispose of all the difficulties as to rents all over the Lower Provinces, I entertain a hope that it will go some way to decide matters, that it will be capable of adaptation to the general circumstances of the country, that it will tend to bring the interests of both parties closer together, and that it will be welcomed as a relief by the ryots, and perhaps even as a boon by some of the zamindars.

Kemp, J.

202. As considerable difference of opinion exists as to the principles upon which suits for enhancement of rent brought by a landlord against a ryot having a right of occupancy, on the ground that the value of the produce has increased otherwise than by the agency or at the expense of the ryot, are to be determined, and as there appear to be conflicting decisions upon the subject, the question has been referred for the decision of a Bench consisting of all the Judges of this Court.

203. A preliminary question was raised and argued with reference to the wording of section 6, Act X of 1859, whether the section is to be construed retrospectively or prospectively.

204. On this point I give my opinion with much diffidence. I would observe that, though it is generally true that a statute shall not be so construed as to operate retrospectively, still if the words are plain and manifest, and can have no meaning unless such a construction be adopted the Court is bound to give effect to them notwithstanding any particular hardship, inconvenience, or detriment which may be thereby occasioned. It appears to me that the words used by the Legislature in the said section will admit of no other reasonable interpretation than that the Legislature intended them to be construed retrospectively.

205. As to the principle upon which suits for enhancement of rent against a ryot with a right of occupancy are to be determined, I am of opinion that the jumma hitherto paid by the tenant must be presumed to be fair and equitable, and that it cannot be enhanced unless the landlord, upon whom the onus lies, can prove that, under some one of the grounds laid down in section 17 of Act X of 1859, the jumma is liable to enhancement.

206. Much has been said in the course of this protracted argument on the subject of the status of the ryot prior to the enactment of Act X of 1859. It has been contended by the learned counsel for the zamindars that, previous to the aforesaid enactment, the only ryots who had any rights of occupancy at all were the kadimi khud-kasht ryots, or their descendants; and that, with the exception of tenants of that class, all other tenants whose tenures were either created at some time subsequent to the Perpetual Settlement, as well as those who, to use the words of the learned counsel Mr. Doyne, are the mere creatures of Act X, are mere tenants-at-will, liable to ejectment at the caprice of the zamindar, unless they pay the highest rate of rent which can be obtained by competition. On the other hand, it was argued by the pleader for the ryots, Baboo Dwarkanath Mitter, who conducted their case with very great ability, that both previous to and subsequent to the Perpetual Settlement, indeed up to the passing of Act X, no ryot of any description or class could be ejected as long as he paid his rent according to the pergunna rates, or, in the absence of such rates, according to customary and prevailing rates.

207. It appears to me to be unnecessary to record an opinion at any length upon the vexed question of the rights and status of the ryot at the time of the Perpetual

Settlement and subsequent thereto up to the passing of Act X of 1859, inasmuch as that enactment has definitely declared what the rights of the ryots are. I shall content myself with briefly stating that, in my opinion, prior to the Perpetual Settlement, the zamindars possessed no absolute or proprietary title in the soil, that such title was for the first time, and gratuitously, vested in them by the British Government. The name of zamindar was wholly unknown to the Hindus, and was borrowed, together with the office, from Mahomedan institutions. During the Hindu administration, the ryot was the real proprietor of the soil; cultivated land, says the text of Menu, "is the property of him who first cleared and tilled it."

208. The zamindars under the Mahomedan Government were mere contractors, collectors, or farmers of the revenue, receiving a percentage for their trouble and responsibility, and small grants of land in the shape of nankar or chakran for their subsistence. I am further of opinion that the settlement was originally made with the ryots, the Sovereign receiving a portion of the crop either in kind or in money, and the ryot the remainder: what this portion was is variously stated by different authorities, but this much is abundantly clear, that the "assal jummabandi" was based upon a rule of proportion and on custom, and not fixed by competition, and that as long as the ryot paid the assessment fixed, or was willing to do so, he was not liable to ejectment.

209. When the proprietary title in the soil was vested in the zamindars by the British Government, the rights of the ryots were expressly reserved, and the framers of the Perpetual Settlement distinctly intimated to the zamindars that the Government reserved to itself the power of enacting such Regulations as it might deem necessary and proper for the protection of the ryots and other cultivators of the soil, and that no zamindar or other actual proprietor of the land would be entitled on that account to make any objection to the fixed assessment which they had respectively agreed to pay. (See clause 1, section 8, Regulation I of 1793.)

210. The Hon''ble Court of Directors, in their Minute conveying their sanction to the Permanent Settlement with the zamindars, remarked-- "We expressly reserve the right, which clearly belongs to us as Sovereigns, of interposing our authority in making from time to time all such regulations as may be necessary to prevent the ryots being improperly disturbed in their possession, or loaded with unwarrantable exactions, such interposition being clearly consistent with the practice of the Mogul Government, under which it appeared to be a general maxim that the immediate cultivator of the soil duly paying his rent should not be dispossessed of the land which no occupies." (See page 189, volume II, Harrington''s Analysis.)

211. In the Minute recorded by the Marquis of Cornwallis on the 3rd of February 1790, His Lordship observed, "that every biga of land cultivated by the ryots must have been cultivated by an express or implied engagement, that a certain sum should be paid for each biga and no more, and that the rents of an estate can only be raised by inducing the ryots to cultivate the more valuable articles of produce, or

by clearing the extensive tracts of waste land which are to be found in almost every zamindari in Bengal." In another part of the same Minute are the following remarks: "Neither is the privilege which the ryots in many parts of Bengal enjoy of holding possession of the spots of land which they cultivate, so long as they pay the revenue assessed upon them, by any means incompatible with the rights of the zamindars. Whoever cultivates the land, the zamindar can receive no more than the established rent which in most places is fully equal to what the cultivator can afford to pay. To permit him to dispossess one cultivator for the sole purpose of giving the land to another, would be vesting him with a power to commit the wanton act of oppression from which he would derive no benefit."

212. From these remarks, it appears to me clear that His Lordship was sensible that the ryots had rights, and that their rents were fixed upon some established and customary principle.

213. All the old Regulations from 1793 to 1812 speak of pergunna rates as fixed by custom and not by competition; and section 7, Regulation IV of 1794, enacts that "no proprietor of land shall require ryots to take out pottas at higher rates than the established rates of the pergunna for the same quality and description of laud, but that ryots shall be entitled to have such pottas renewed at the established rates."

214. The old Sale Laws make clear mention of the established rates; and it was only in 1822, by Regulation XI of that year, that even an auction-purchaser at a sale for arrears of the Government revenue could eject occupant ryots, and this power of ejectment was taken away from them in the case of ryots with rights of occupancy by Act XI of 1859.

215. To come to Act X--and by this Act alone all suits for enhancement of rent must be determined--we find three classes of ryots defined--

1st.--Those who are protected from enhancement under sections 3 and 4.

2nd.--Those who have rights of occupancy as declared in section 6, and whose rent is not liable to enhancement as a rule, but only on certain grounds and circumstances which must be strictly proved by the zamindar; and

3rd.--Tenants who have no right of occupancy, and who may therefore he said to be tenants-at-will.

216. In the present instance, we are dealing with the cases of ryots coming under the second class.

217. Admitting, then, that the zamindar has established a ground for enhancement, viz., that the value of the produce has increased otherwise than by the agency or at the expense of the ryot, on what principle is the rent to be enhanced?

218. Mr. Justice Campbell has very clearly shown in his judgment referring these cases, that there is no fixed rule for the guidance of the lower Courts. Each Court

proceeds upon some arbitrary rule of its own, and even the same Court is not guided by one uniform rule, though the claim to enhance may be made on one and the very same ground. It is therefore clearly a matter of vital importance to the prosperity of the whole agricultural community that some fixed and certain rule should be established. Anything is better than the present system of doubt and confusion.

219. Three propositions have been submitted for our consideration:--

1st.--That a ryot who has acquired a right of occupancy u/s 6, has no preference over a third party who has not acquired such right, beyond that of not being liable to ejectment as long as he consents to pay the highest market or competitive rate.

2nd.--That all increase in the value of the produce, after deducting any increase in the expenses of cultivation, which include a fair and equitable rate of wages, interest on stock, & c., is the sole right of the zamindar, and must be added to the old rent, the whole forming the rent payable to the zamindar.

3rd.--That the increased rent should bear to the old rent the same proportion as the former value of the soil bears to its present value.

220. The first proposition has my unqualified disapproval. It is neither fair nor equitable. It deprives the occupancy-ryot of every privilege which Act X has vested in him, and relegates him to the position of a mere hired laborer, without a hope or prospect of any amelioration of his wretched condition. The rights of the ryots, though they may have been in abeyance for nearly a century, have never been lost to them; the hope of their recognition has been too long deferred, but those rights have at length been conceded to them by Act X. The Select Committee who sat on the Bill (Act X) remarked that the "recognition of a right of occupancy in the ryot necessarily implies some limit to the discretion of the landlord in adjusting the rent of the person possessing such a right." If the ryot with a right of occupancy is liable to ejectment, unless he pays the highest rate of rent that can be obtained by competition, his position is much the same as a tenant-at-will, and the declaration that he has rights of occupancy appears to me to be a mere mockery.

221. The second proposition is also, in my opinion, neither fair nor equitable. The original adjustment of the rent was made according to customary rates, and the rent payable by the tenant was not rent proper in the sense used by political economists. The zamindar spends no money in improving the land--he takes no risks upon himself of drought, inundation, loss of crops, & c. On what principle of equity and fairness can he claim the whole increase in the value of the crop? Are the ryots to benefit in no degree by a rise in the price of agricultural produce, though they run all the risk?

222. The third proposition appears tome to come up to the standard of what is fair and equitable to both parties; the theory is one of easy application, it is uniform in

its operation, it is one that adapts itself to the simple understanding of the ryot, and is not, as far as I can judge, productive of loss to any party, inasmuch as the rise in the value of the produce and the rise in the rent proceed pari passu. All intricate and vexatious enquiries, and details, of which both parties are impatient, are rendered unnecessary by its adoption; and as no better rule suggests itself to me, I cannot but give it my unqualified approval. It is of course very difficult to lay down a general rule which shall meet the varied circumstances under which suits for enhancement of rent may be brought; and in assuming the proposed rule as the best adapted for all but exceptional cases, I wish it to be understood that in cases where a special contract exists, binding the parties to other proportions, the rule will not be applied.

Morgan, J.

223. The suit which is before the Division Court in special appeal is a suit by the plaintiff, a purchaser of an estate sold by auction for arrears of Government revenue, against the defendant, a ryot, who has gained a right of occupancy under the 6th section of Act X of 1859. In form it is a suit for a kabuliat, but the substantial issue between the parties is admitted to be whether the defendant''s rent can be enhanced, and at what rate, the value of the produce of the land having increased. The question which has been asked of us by the Division Court, and the only question which, I conceive, it is competent to us authoritatively to answer on this occasion, relates to the principle which the Court should lay down for the guidance of the Deputy Collector on the trial of the suit which is to be remanded to him. Many other questions may arise in the suit, and some have been discussed here, which I think it needless to consider, beyond remarking, with reference to one of the latter, that in my opinion the appropriate form of suit in a case like the present is a suit for enhancement, brought after due service of a notice specifying the grounds on which an enhancement of rent is claimed, according to the provisions of the 13th section of Act X of 1859.

224. The only rule of decision which the Legislature has provided to guide the Courts in enhancing the rents of ryots having rights of occupancy, but not holding at fixed rates of rents, is that contained in the 6th section. Such ryots "are entitled to receive pottas at fair and equitable rates."

225. These indefinite words have, as may well be supposed, received various constructions. In the Courts below, it appears from the case now before us that three widely different interpretations have been given to them: 1st, that the rent should be increased in proportion to the net increase in the value of the produce; 2nd, that the increased rent should be what upon open competition may be obtained as rent; 3rd, that the increase in value should be equally divided between zamindar and ryot. And of this last interpretation, again, it is said by one learned Judge that the principle of dividing the increase equally may, in many cases, be roughly equitable, while by another the principle is said to be in fact no principle at all, and to be established on no fair and equitable basis.

226. In this Court there have been two conflicting decisions, which have caused the present case to be referred to the Full Court.

227. According to the first of these decisions--Hills v. Ishore Ghose 1 Marsh., 151; W.R., 48, 131; on review, 148, the Court recognized the principle of competition as the mode of ascertaining the fair and equitable rate of rent. In the Chief Justice''s judgment disposing of the application for a review, it is said, with reference to the terms of the 5th section which have been quoted:-- "This, in my opinion, gave the ryot no greater right than would be created by a covenant in a lease to renew it at a fair and equitable rent. To be fair and equitable, it must be fair and equitable so far as both parties are concerned, not fair and equitable as regards the ryot, and unfair and inequitable as regards the proprietor of the land; and it would not be fair and equitable to a landowner to fix the rent at a lower rate than he could obtain from a new tenant if he had not been deprived by the Act of the Legislature of his power of determining the tenancy and re-letting the land to a new tenant."

228. According to the later decision--Shib Narain Ghose v. Kashee Pershad Mookerjee and others 1 W.R., 226, the rent paid in adjacent places by ryots of the same class for land of equal fertility will show the fair and equitable rate; or if rents in the neighbourhood have not adjusted themselves to the altered circumstances of the lands, then the adjustment must be "according to the method of proportion, that is, the increased rent must bear to the old rent the same proportion as the former value of the produce of the soil bears to its present value."

229. I agree with the majority of the Court in holding that the first of these two decisions is erroneous. Whatever may be the fair and equitable mode of adjusting the rent between a zamindar and a ryot having a right of occupancy under the Act, I think that it was not intended by the Legislature, and that it is not the true meaning of the words they have employed, to give to such a ryot no greater right or interest in the Land than that of retaining possession of it so long as he pays a rent equal to that which other persons having no such right may be willing to pay.

230. I think if we advert to the previous law, as we must do in order to give a proper construction to the words "fair and equitable," we shall have little difficulty in concluding that this construction is incorrect.

231. Act X of 1859 is not, for the most part, an Act introducing new law. It is, as the preamble declares, a re-enactment with modifications of the provisions of the then existing law relative (among other things) to the rights of ryots with respect to the delivery of pottas and the occupancy of land. The Act defined and settled several Important questions connected with the relative rights of zamindar and ryot which had remained undefined and unsettled from the commencement of legislation in Bengal; and it further collected in one enactment the existing laws connected with rent and the occupancy of land, which were before contained in a great number of Regulations extending over a period of sixty years.

232. It may be that, while re-enacting and modifying and defining, the Act does in fact, in some respects, also extend the old law in such a way that not only are old rights restored, but some new rights have been created. However this may be, it is our duty to give full effect to all its provisions.

233. The first question which arises for our decision is whether, by the 6th section, a right of occupancy is given to all occupants who have occupied their present holdings for twelve years, or only to those who, after the passing of this Act, shall occupy for twelve years. As to this, the rule of construction is clear. Laws are generally to be construed to be prospective, and intended to regulate the future conduct and rights of persons; but where the intention of the Legislature is manifest and unambiguous, the Court is as much bound to give effect to it here as in other cases. The words of the section, in my judgment, plainly include all occupants for twelve years, as well those whose occupation had commenced before the Act passed, as future occupants; and this view is strengthened by the mode in which old laws are presently repealed, the new enactment being evidently intended forthwith to supply their place.

234. I have said that, in my opinion, we must look to the previous legislation on this subject in order to construe the Act of 1859. Much of the legislation of 1793 remained in force when the Act passed. I will very briefly state the effect of the principal laws of 1793 and of subsequent years; but before doing so, it is also necessary to advert to the state of things prior to the commencement of our legislation.

235. Before the Permanent Settlement and from a time long previous to our rule, the state of property in land here seems to me to have been a kind of joint ownership between the Government and the cultivators. The revenue of the Government was derived in a great measure from the land. The Government was entitled to a portion of the produce, and the cultivator was entitled to the rest. The share of each was ascertained, and the right of the cultivator to hold his land so long as he paid his assessment to the Government was never questioned. It is true that the State did not limit itself to the share of the produce set apart for it. It was the judge of its own wants, and had the power to exact at will from the cultivator; but, in fact, it so far recognized and respected the established mode of division that its increased demands did not take the shape of an increase in the cultivator''s rent. The "assal jumma," or original rent, remained unchanged. Of the many assessments which burthoned the ryot''s lands, this one invariably took the lead, and had the semblance at least of governing the mode by which the others were determined.

236. When I say that the State and the cultivators were together the owners of the lands, I do not mean to deny that intermediate rights of property of various kinds existed. But such rights had, for the most part, I think, a later origin than the others. They generally (although not always) originated either in the authority which was given to persons of various degrees to collect from the cultivators the portion of the

gross produce which belonged to the State, or in a gift by the State to individuals of its share of the produce. Those who collected the Government share were, in fact, so far as the Government was concerned, mere stewards or administrators, holding whatever they possessed in that character by a very precarious and uncertain tenure; but as against the ryots, they, undoubtedly, had great powers, and it is certain that they increased their incomes by collecting from the latter, under various names and pretexts, sums far in excess of the amount which they paid to the Government, or which the Government could fairly demand. But whatever was the position and authority of these intermediate persons, they had of right nothing that was intended by the State to enable them to trench upon the interests possessed by the cultivators, and it was the admitted right of the Government, and one which has never been relinquished, to interpose its authority for the protection of the cultivators. Indeed the ancient revenue system made provision (which perhaps our own system might well have adopted more effectually than it did) at once for the protection of the cultivators from oppression, and for securing the full legal right of the Sovereign, for it was the duty of certain officers who were independent of the zamindars to record and preserve whatever information was requisite to protect the ryot from exactions, and the State from loss. The great body of cultivators were persons settled on the lands cultivated by them, and having a right to hold their lands undisturbed so long as they paid their dues, the amount of which was ascertained (so far as it was at all lawfully ascertained) neither by the will of the zamindar nor by competition. As to the latter, it has been well observed that, "in a situation in which the revenue of the Sovereign was increased in proportion to the number of cultivators, and in which a great proportion of the land continued void of cultivators, there would be a competition, not of cultivators for the land, but of the land for cultivators. If a ryot cultivated a piece of ground, and punctually paid his assessment, the Sovereign would be far from any wish to remove him, because it would be difficult to supply his place." There were also other cultivators who migrated from time to time from one place to another. The former, the khud-kasht, were by far the most numerous and important class. The latter, the py-kasht ryots, had little or none of the local attachment which facilitated exaction from the fixed occupant. They would not submit to so high an assessment as the khud-kasht; and when they were oppressed, they easily abandoned the lands cultivated by them.

237. When the British Government had succeeded to the rights of the former rulers, and had experienced the evils arising from an arbitrary and uncertain assessment of the Government revenue, it was resolved to fix permanently the annual payment to be received by the Government (so as to give inducements to other persons having interests in the land to improve and extend cultivation), and also to convert the zamindars into land-owners.

238. The Regulations of 1793 finally established the permanency of the Settlement. Those Regulations, and the contemporaneous public papers, which have been quoted on both sides during the argument, clearly show both what was then given

to the zamindar and what was withheld from him. In my judgment he received nothing from the State which can justify the argument which has been put forward on his behalf, that his vested rights are impaired by the construction of the late Act which we are about to adopt. By the limitation of the Government demand, and the conversion of his zamindari tenure into a right of proprietorship, he gained much. Henceforward he alone was entitled to the profits to arise from the cultivation of the vast tracts which then lay waste and uncultivated, and from the growth by the ryots of the more valuable articles of produce on which an increased rent was payable. But the estate of which he became the proprietor was not an unencumbered estate, with which he was free to deal as if he alone were the proprietor. Besides the Government revenue, there were other charges upon it which materially limited his ownership. The ryots having rights of occupancy did not derive their rights from him, but from a title anterior to his; and the Government, in its bounty to the zamindar, gave only what it justly could give, that is to say, what belonged to itself, not what belonged to others. Nothing was given to him which could trench upon the cultivators'' rights, or which could justify a continuance by him of the exactions by which the ryot had been oppressed in former days. The laws of 1793 distinctly prohibited the imposition of any new abwab or cess. They directed the consolidation of all existing demands, and the issue of pottas with the amount or rate of rent specifically adjusted. They also provided for the renewal of pottas at determinate rates when cancelled under the rules existing against collusive or improvident agreements. The zamindar was bound to respect the leases in force at the time of the Settlement. He was allowed to let the remaining lands of his estate in whatever manner he thought fit, under the restriction prescribed by law (see Reg. VIII of 1793, section 52). He was free to engage or not with a new comer; but as regards all ryots on his estate who were entitled to demand pottas, he was bound, if a dispute arose concerning the rate of rent, to submit the matter to the decision of the District Court (Keg. IV of 1794), which was directed to fix the rent "according to the rates established in the pergunna" for similar lands. These provisions at least show the intention of the Legislature to protect the ryots from enhancement at the discretion of the zamindar or otherwise than by determinate rates.

239. But unfortunately, while the rights of the State and of the new proprietors were defined by law with sufficient certainty, all attempt to define the rights of the cultivators was postponed. The remedy given to them by suit in Court was practically worthless, or of little avail, because no sufficient rules for the guidance of the Courts had been provided by the Legislature (which has authority to give, and is bound to give, to the tribunals the rule of decision, and not to devolve upon them the task of searching for and inventing rules). The ascertainment of the established rates of the pergunna appears even at that period to have been a matter of great difficulty and uncertainty.

240. The laws of subsequent years tended more and more to depress and injure the great mass of cultivators having rights of occupancy. The powers which the

Government had thought necessary to reserve to itself for the recovery of the land revenue from the zamindars were far greater than those possessed by the zamindars for the recovery of their rent from the ryots. It was, therefore, found necessary in 1799 to give the zamindars (Regulation VII of 1799) summary and stringent powers against the ryots, including what was understood to be a power to oust the cultivator from his lands, leaving to him the remedy of a regular suit for their recovery, if he felt aggrieved. No measures were mean-while attempted for the ascertainment or more effectful maintenance of the cultivators'' rights, and in 1812, it seems to have been thought by the Legislature that all further endeavour in that direction was hopeless. The Regulations of 1812, by which the zamindar and ryot were authorized to make engagements at any rate of rent and for any term, have been regarded in very different lights. On the one hand, it has been supposed that they merely took away the old restriction on the zamindar''s power of leasing without in any way affecting the ryot''s rights; while, on the other hand, they have been regarded as having authorized the ouster of even the hereditary ryots from the possession of their lands when they refused to accede to any terms of rent which might be demanded of them, however exorbitant.

241. Whichever view may be correct, these Regulations of 1812 were no part or condition of the Permanent Settlement.

242. That portion of the permanent zamindari system which gave powers to the Government to sell the zamindar''s estate for arrears of revenue, further tended materially to injure the ryots. Whatever bonds may previously have united the two classes of hereditary payers and receivers of the land revenue, they were materially weakened by the operation of the Sale Laws. The precise nature of the interest and title conveyed to persons purchasing at public sales for arrears of revenue was not defined by the first Sale Law, under which a vast number of sales took place; and serious injury was, doubtless, sustained by the inferior tenants, in consequence of the latitude given to auction-purchasers. All the old engagements were cancelled by the law. It is true that the ryot was entitled to claim a new potta at the pergunna rate, and he might resort to the Courts to obtain its but this remedy was, as has been already stated, practically of little or no value.

243. The later Sale Laws of 1841 and 1845 contained provisions still more unfavorable to the cultivators, for they gave to purchasers unlimited powers of ejectment and of enhancing the rents of ryots. They reserved the rights of a class who were described as "khud-kasht or kadimi ryots," referring apparently to the same class who had been described in the previous Sale Law (Regulation XI of 1822) as "khud-kasht kadimi ryots, or resident and hereditary cultivators." This reservation introduced a distinction between "khud-kasht" and "kadimi khud-kasht" and was, I suppose, framed to give protection to no other than the khud-kasht of the time of the Permanent Settlement, and to those who derived their holdings by inheritance from him. But even as regards the class thus saved, after the lapse of half a century,

during which the law was ineffectual adequately to protect the cultivators, this class of ryots would necessarily be under great difficulties in supporting their rights by sufficient evidence.

244. The khud-kashts were generally little disposed to comply with the law respecting pottas. Their holdings were usually antecedent to written engagements, and they objected to any writing defining the amount of rent payable by them, from an apprehension that it might be regarded as derogating from their previous undoubted rights, and creating a new and less certain title.

245. The combined effect of the several causes which have been referred to, and mainly the defective legislation of 1793, and the omission of all attempt to define the rights of the cultivators, together with the adverse tendency of subsequent legislation, was that the undoubted rights of the great mass of the cultivators to hold their lands exempt from arbitrary enhancement, and subject only to customary rates of rent, were nearly obliterated and lost. The object of the Act of 1859, apparently, was to restore those rights; and to do this, it was necessary to define the class of persons who should be considered to have rights of occupancy. The 3rd and 4th sections relate to ryots who have held at fixed rates of rent from the time of the Permanent Settlement, and to the proof necessary in support of their rights. The following sections relate to those whose holdings are at rates not fixed. Before its enactment, the great majority of cultivating ryots, had their rights been duly observed and maintained, were entitled to hold their lands undisturbed on the due payment of their rent, and could not be compelled to pay rent at a rate dependent on the mere will of the zamindar, or otherwise than according to the customary rates or those prevailing in the district. The ryots generally were not migratory, but remained settled on the lands which they occupied. I do not think that the right of occupancy was formerly confined to those who had acquired such a right by prescription. It extended to all who had given unequivocal proof that they intended permanently to remain at the place of their settlements and who had been recognized as fixed residents of the locality, although their holding may have been of recent date. The khud-kashts were, doubtless, ordinarily, persons who derived their holdings from their ancestors, and whose rights were of old date; but I agree in what I understand to be the opinion of other members of the Court, that length of time or ancient origin was not essential to his existence, and that the language of the later Sale Laws unjustly limited the protection given to this class by recognizing only the lights of the kadimi or ancient khud-kasht.

246. Having regard to past history and legislation, which seem to me in such a matter as the present to be our necessary guides, I feel bound to say that those who have rights of occupancy u/s 6 of the Act are fairly and equitably entitled to a more substantial right than that merely of holding at such a rate as mere strangers might fairly be asked to pay. And since the Legislature, when it imposed upon the Courts the task of dividing the increased value of the produce of the land between

zamindar and cultivator (giving no other rule of decision than this--that the rate to be paid by the latter must be fair and equitable), could not have meant to entrust the Courts with an arbitrary discretion to make any division which might appear to them fair, I think we should construe the words as near as maybe in the sense which they would have borne in the old law, in settling the relations between landlords and ryots having rights of occupancy,--that is, in my judgment, that the fair and equitable rate is the rate ruling in the neighbourhood (as described in the 1st clause of the 17th section). If the tenant holds at a rate below this, his rent should be enhanced to this level.

247. When the rents of adjacent lands have not adjusted themselves to the increased value of produce, "the method of proportion" is suggested to be that which was contemplated by the Legislature by the words "fair and equitable." I do not dissent from this view, and I can myself suggest no more probable meaning. It is remarkable that no distinct provision appears to have existed formerly for a general enhancement of the customary rates. The State in former days before the land revenue was fixed, and the zamindar always, were able by means of abwabs or other cesses to obtain from the ryots more than a fall equivalent for any increase in the value of produce. The law has now prohibited all such cesses, and requires a consolidated rent to be fixed.

248. It was never intended that rents should not be fairly raised as the value of produce increased; but unfortunately no distinct rule has been laid down for their enhancement where the existing rates of rent in the neighbourhood have remained unaltered, notwithstanding a general rise in the value of produce. I have said that I do not dissent from the proposed "method of proportion;" but it is not without doubt as to whether this is the correct construction in the case supposed of the words "fair and equitable," that I concur in this portion of the judgment with the majority of the Court. In their conclusion regarding the other questions, I fully agree.

Norman, J.

249. I do not think it possible to answer the questions simply as they are put. They present alternatives, of which I cannot exactly accept either.

250. In considering the question of ryots'' rents, it was not unnatural that the Court, in Hills v. Ishore Ghose 1 Marsh., 151; W.R., 48, 131; on review, 148, should have adopted, as a rule for ascertaining a ryot''s rent, the well-known definition of Mr. Malthus, more particularly as a rule somewhat similar in terms is well known and is applied successfully and satisfactorily in English Courts for the purpose of ascertaining, for rating purposes, under the 6th and 7th Wm. IV, c. 96, s. 1, the rent which a tenant might be expected to give, so as to get at the "net annual value" of railways, gas-works, water-works, and other undertakings not usually let at a rent.

251. Mr. Malthus defines rent to be "that portion of the value of the whole produce which remains to the owner of the land after all the outgoings belonging to its cultivation of whatever kind have been paid, including the profits of capital employed, estimated according to the usual and ordinary rate of agricultural stock at the time being. In a Minute on the working of Act X, which, I believe, is now published, I have given my reasons for thinking that this definition of rent is unsound. It appears to be a statement of the mode in which, and extent to which, the laws of supply and demand act upon rents, rather than a true definition of any rent that ever was, or in the nature of things will be, paid by a tenant to the owner of the land. Mr. Malthus'' definition, taken literally, makes rent the balance of profit over all outgoings, including the estimated profit of agricultural stock, a quantity utterly uncertain, and fluctuating from year to year with every change of the seasons or market. Whereas if there is any one quality which can he predicated of ordinary rent, it is that it is in its nature certain.

252. The Court in Hills v. Ishore Ghose Marsh., 151; W.R., 48, 131; on review, 148 did not apply the rule literally, and corrected it to some extent by taking an average over several years. But the modified rule as applied in Ishore Ghose''s case Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, in which the Court alters the words "Agricultural Stock" into "Agricultural Capital," does not, in its terms, appear to me to make any sufficient allowance for tenant''s profits, viz., profits equal to the return which the employment of equal skill and capital in any other occupation or investment might be expected to produce over and above the wages of labor and the bare interest of money.

253. In the elaborate enquiries necessary in order to apply Mr. Malthus'' definition as a rule for the ascertainment of a ryot''s rent, it was found that the system broke down by its own weight. In a case alluded to by the Chief Justice in his Minute on Act X, tried before Mr. Grey, it took two months to record the evidence which was given in one suit, for the purpose of showing what was the fair and equitable rent to be paid for a few bighas of land. Therefore, even if the definition is correct, it does not furnish a practical working rule capable of being applied by Courts of Justice in dealing with ryots'' rents.

254. But the original theory of rent in this country, and the rates which, under the laws and customs of this country prior to Act X, were practically obtainable by zamindars, make rent in this country something very different from that which is defined by Mr. Malthus.

255. At the time of the Decennial Settlement it was recognized that, by the ancient law of the country, the ruling power was entitled to a certain proportion of the produce of every biga of land (see Preamble, Regulation XIX of 1793). Of this public demand, which was then the sole rent demandable from the ryots, ten-elevenths were considered as the right of the public, and the remainder the share of the zamindar (see Preamble, Regulation I of 1793). Thus, the original theory of rent in

this country appears to have been that it was a right to a certain proportion of the gross produce. The Regulations of 1793 which have been already referred to at great length, while formally declaring the property in the soil to be in the zamindars, make provision for the protection of the ryots in their holdings, and for regulating the amount of rent to which they were to be subject.

256. According to the old Regulations [(1)], if disputes arose between the zamindar and the tenant, the dispute was to be adjusted according to the pergunna rate, and not according to the rate which a zamindar might obtain if he could let his land to the best bidder; and this continued to be the law down to the passing of Act X of 1859. Mr. Justice Trevor has shown what the pergunna rates originally were. The increasing competition for land, the rents which new tenants paid for land unoccupied, or previously held by ryots not having rights of occupancy, or under the contracts which parties would enter into for leases in pursuance of the liberty given to zamindars under Regulation XLIV of 1793, would naturally tend to raise the average of rents. The imperfect records of such transactions might be expected to introduce uncertainty into the pergunna rates. Accordingly, in Regulation V of 1812, we find that it was declared that "there was reason to believe that the pergunna rates were in many instances very uncertain." By section 6 it was enacted that, "if any known pergunna rate shall exist, the same shall serve to determine the amount of rent which should be received by persons deputed to attach lands on the part of Government, or by the purchasers at the public sales." section 7 enacted that, "in cases in which no established rates of the pergunna or local division of the country may be known, pottas shall be granted, & c., according to the rate payable for land of a similar description in the places adjacent; but if the leases and pottas of the tenants of an estate generally, which may consist of an entire village or other local division, be liable to be cancelled under the rules above noticed (the Sale Law Regulation, section 5, Regulation XLIV of 1793), new pottas shall be granted, and the collections made at rates not exceeding the highest rate paid for the same land in any one year within the period of the three last years antecedent to the period at which the leases may be cancelled." These provisions appear to me to show that, although the zamindars were by the Regulations constituted owners of the land, such ownership was not absolute. The Regulations which created a right of property in the zamindars do not recognize any absolute right in them to fix the rents of the lands at their own discretion. It is clear that, down to 1812, not even a purchaser at a sale for arrears of revenue could enhance the rents of his ryot beyond the pergunna rates.

257. Regulation XLIV of 1793 had empowered the parties to enter into engagements for a period of years at any rate of rent they pleased, and that power was extended by section 2, Regulation V of 1812. But if the parties could not agree, the pottas which by Regulation IV of 1794, section 7, were to be at the pergunna rates, if no established pergunna rates were known, were by section 7 of the later Regulation to be at rates payable for land of a similar description in the places adjacent.

Regulation XI of 1822 would seem materially to abridge the rights which, under the former Regulations, khud-kasht ryots in Bengal had previously possessed. But it probably did not affect any but the ryots of lands sold under that Regulation for arrears of revenue. There is nothing in that Regulation to affect the right of those who continued in occupation to hold at the pergunna rates. Section 27, Act XII of 1841, since repealed, but re-enacted by Act I of 1845, section 26 , provided that a purchaser at a sale for arrears of Government revenue made under that Act might enhance at discretion, after notice, & c., (anything in the existing Regulations to the contrary notwithstanding) the rents of all under-tenures in the said estate, and eject all tenants thereof, with the exception, among others, of "lauds held by khud-kasht or kadimi ryots having rights of occupancy at fixed rates or at rents assessable according to fixed rules under the Regulations in force." Therefore, down to the passing of Act X of 1859, no zamindar, except the very small class of purchasers under Acts XII of 1841 and I of 1845, suing to enhance the rent of a ryot, would be entitled to a decree except according to the pergunna rate, or, if the pergunna rate could not be ascertained, the rate payable for land of a similar description in places adjacent.

258. It was no doubt competent to the zamindar to dispossess any of the very large class of ryots who had no rights of occupancy who would not agree to his terms, and to enter into fresh arrangements with others at any rate of rent on which the parties could agree. But such a course of proceeding for raising rents was apparently not contemplated by the Regulations. In fact, the circumstances of the country have been such that, while, on the one hand, no zamindar would wish to lose his ryots, on the other the ryots cling to the soil; and the contest between the parties naturally would be, and I believe was, fought out in suits for enhancement, and not by a system of ejectment. It may well have been one of the objects of Act X to prevent this powerful engine of extensive ejectment from being brought to bear on a body of cultivators, large numbers of whom must have had some sort of prescriptive right, vogue and indefinite as it may have been, to occupy or cultivate the soil. No doubt the right of occupancy before the passing of Act X of 1859 was exceedingly ill-defined. There is a good deal in the Regulations which leads to the inference that khud-kasht ryots, resident cultivators, in Bengal, whether kadimi or not, had by custom a right of occupancy so long as they paid the usual rate. It seems to me that this custom is recognized in all the Regulations down to XI of 1822. And a reason for that custom has been suggested to me,--viz., that the building or purchasing a house in the village is a security to the zamindar for the ryot continuing to occupy as tenant. There appears to be no doubt also that py-kahst ryots had, in many instances, rights of occupancy. (See Directions for Revenue Officers in the North-Western Provinces, page 64.) Such rights were not only uncertain, but, if ancient, were, from the character and position of the parties by whom they were possessed, often exceedingly difficult of proof.

259. Act X does not treat the zamindar''s interest as absolute and unqualified so as to enable him to let his land to the best bidder. The 17th section distinctly restrains the absolute power of the zamindar to fix his own price for the use of his land. It matters not how many persons may be willing for their own purposes to give him double or treble the existing rent. He cannot claim increased rent from his ryot unless he can bring the case under the first or second clause of that section. The zamindar is, therefore, evidently under some circumstances bound to take from the ryot lower rates than he might obtain from new ryots if he were at liberty to treat with them.

260. If, then, the original theory of rent in this country is that it is the zamindar''s proportion of the produce, it seems not unnaturally to follow that (in the absence of any special circumstances) to say that such a rent is fair and equitable is equivalent to saying that a fair and equitable proportion of the produce of the land has been set apart for the landowner. If it be said that this limits the power of a zamindar to get a rack-rent for the land, I answer that such power is expressly limited by Act X, and that, practically, such power was limited under the Regulations in force at the time of the passing of Act X.

261. It is no part of our duty to defend the restrictions on the enhancement of rents introduced by Act X. We have simply to construe and give effect to the Act in the best way we can.

262. When section 17 says that no ryot having a right of occupancy shall be liable to have his rent enhanced except on particular grounds, it appears to me that, if enhancement is sought on any one of such grounds, the ground of enhancement must also furnish the measure of the extent to which the enhancement can be permitted.

263. I agree with the Chief Justice in thinking that ryots holding at fixed rates of rent, or claiming any definite or specific privileges in respect of rent, must be dealt with as ryots claiming to hold lands at fixed rents, or fixed rates of rent under the third and fourth sections, and for the present we may lay their cases out of consideration in dealing with ryots having rights of occupancy under sections 5, 6, and 17. No doubt it is possible to suppose cases in which rents payable at privileged rates might be enhanceable under the latter section.

1. With respect to the rents of ryots having mere rights of occupancy, a zamindar is entitled to claim from his ryots such rents as are paid by the same class of ryots for land of a similar description and with similar advantages in places adjacent. By the "same class of ryots," I understand ryots not holding at fixed rates of rent or with any peculiar privileges as to the rates of rent.

2. If such rents are too law, and the zamindar comes in simply on the allegation that the value of the produce has become increased otherwise than by the agency or at the expense of the ryot, he shows an increase in the value of that which primarily

belongs to the producer, to a proportion of which alone the zamindar is entitled. I think it must be taken that the old rent was fair and equitable; in other words, that at the time when it was fixed, it was the money value of the zamindar''s fair share of the produce of the land; and in order to give to the zamindar the same share of the produce which he formerly enjoyed, it is only necessary to give him an amount of rent which shall bear the same proportion to the old rent which the present price of the produce does to the former price. The ryot is surely entitled to the same share of the produce as he was under the former engagement, to whatever extent the price of such produce may have increased. It is for the zamindar who seeks enhancement to prove his case, and he must carry back his evidence as nearly as he can to the time when the rent was fixed.

3. If the rent consists partly of money and partly of services, or something equivalent to services, as an obligation to cultivate and supply indigo at a certain price, the value of such contract would have to be estimated and added to the old rent, and in such cases the aggregate value would form a term in the proportion.

4. If a ryot is holding below the rates paid by his neighbours, and in consequence of the increase of the value of produce, those rates are themselves too low, I think a zamindar may be entitled to the benefit of both grounds of enhancement in the same suit.

5. It may be taken roughly, in the absence of evidence to the contrary, that in general the cost of cultivation will have increased in a ratio proportionate to that of the increased price of produce. But in exceptional cases it may, no doubt, be found that the particular crop for which the land is specially fitted, as cotton, or crops on land in the vicinity of a town, has greatly increased in value without any general equivalent rise in the price of labor or the cost of food. In such cases, if the zamindar is not in a position to make out a case under the first clause, the increased profit may be divided between the zamindar and the tenant as may appear reasonable under the special circumstances of the case; and in like manner any extraordinary increase in the cost of production may be proved by the ryot in answer to the claim for enhancement on the ground of enhanced price of produce.

6. If the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot, as was said to have been recently the case with lands on the bank of the Damoodah protected from flooding by the embankments of the Railway, so that the land is capable of producing larger or more valuable crops as a return for the same outlay and the same labor, the whole of such increase appears to me to belong to the zamindar. It is an increase in the value of that which exclusively belongs to him; and in adjusting rent under the 17th section, it appears to me that the zamindar is entitled to the benefit of such increase subject to any increased expenses which may be caused to the tenant by the collection or realization of the larger profit.

264. We are all agreed that Act X applies to all holdings existing at the time of its passing.

265. As to the question whether the suit is maintainable at all. In the case of Ram Kanth Chowdhry v. Bhubun Mohun Biswas Ante, p. 25, in which I was in the minority, I gave my reasons for thinking that a suit for a kabuliat is not maintainable except in the case provided for by section 9. The ryot may sue for a potta, because he has a right to occupy. But the zamindar has no right to compel the ryot to continue as his tenant, and consequently no right to sue or compel him to enter into an agreement as to the terms of a future occupation; far less to call on him to execute a kabuliat for a definite term of years as is prayed in this suit.

266. I think further that Act X protects a ryot from all enhancement of his rent except after notice and under the provisions of section 13. It appears to me that, in entertaining a suit like that now before the Court, we are not redressing any wrong or making a declaration as to any existing right, but are assuming to determine what shall he the conditions of a future contract between the parties. And this, as it appears to me, is beyond the functions of any Court of Justice. One test is conclusive, viz., if the ryot does not like our decision, he cannot be compelled to execute the kabuliat, and may throw up his land at his own free will and pleasure. Had the Courts refused to entertain suits for kabuliats, had they confined themselves to trying suits for enhanced rent u/s 13, I think much litigation would have been saved. The parties in each case would have had a considerable time after the service of notice, and before litigation could be commenced, during which they might have treated or had time to consider whether the terms demanded were fair or not. During such negotiation and discussion between the parties as would probably have ensued, each party would have had an opportunity of ascertaining the views of the other, and even if the ryot did not submit and no terms were settled, some approximation to an arrangement might have been made, and the question for decision might, in many cases, have been most materially narrowed.
Steer, J.

267. Though I concur in the rule of proportion as held by Mr. Justice Trevor and Mr. Justice Campbell, I do not concur in all their views in regard to the status and the rights of the ryots prior to the enactment of Act X. It is necessary, therefore, that I should record a separate judgment from those learned Judges, and I will, therefore, proceed to read what I have recorded.

268. A great deal of argument was used by the counsel for the landlord and by the counsel for the tenant, respectively, as to the status of the Bengal zamindar and the Bengal ryot previous to the enactment of Act X of 1859. The changes wrought by Act X have, no doubt, made the consideration of this subject of comparative minor importance; still it is not to be passed over as immaterial, for it is of consequence to know what the rights of the tenants were under the old laws in considering upon

what principle their rents ought to be enhanced when the new law permits it to be enhanced at all.

269. Whatever uncertainty existed as to the past condition of the ryots, Act X of 1859 has made it clear what their present status actually is. The Act divides the whole body of the ryots into three classes: 1st--Ryots who have held at fixed rates from the date of the Permanent Settlement; 2nd--Ryots who have acquired a right of occupancy by a twelve-year''s holding; 3rd--Ryots who have not occupied for twelve years.

270. In respect to the 1st class of ryots, the Act declares them absolutely exempted from enhancement, with right of occupancy of course. In respect to the 2nd class, the same law declares that, on certain grounds shown to exist, their rents may be raised, but the enhanced rent must be a fair and equitable rent, upon which terms they are entitled to occupancy. With respect to the 3rd class, the law leaves them entirely at the mercy of the landlord, both in respect to rent and in respect to occupancy.

271. No difficulty exists as to the rights declared to attach to the 1st class of ryots; and the great and the almost insuperable difficulty this class labored under before the passing of Act X to adduce proof of payment of rent at a uniform rate from the Permanent Settlement, has been in a great measure removed by the presumption which the law raises in their favor, viz., the presumption arising from the proof of a uniform payment for twenty years, that the rent has not varied since the Permanent Settlement.

272. As this class of ryots stood before, they were not only required to prove that they held their lands at a fixed rate from the Permanent Settlement, but that they held them at those rates twelve years before the Permanent Settlement, and that by actual proof. Therefore, when Act X dispensed with positive proof of a fixed payment of rent from a period twelve years antecedent to the Permanent Settlement, and when it raised a presumption of payment at fixed rates from the Permanent Settlement, by proof adduced of payment at a uniform rate for twenty years, it must be admitted that very large concessions were made in favor of this class of ryots.

273. Great and undoubted, however, as the above concessions were in favor of the above always somewhat privileged class of ryots, they were altogether eclipsed by those which the Act conferred on the next class of ryots. That a right of occupancy was acquired by anything short of an occupation from a period prior to the Permanent Settlement, an occupation which entitled the ryot to be called a khud-kasht ryot, has always been, I think, a matter of doubt. But no manner of doubt can he entertained that the twelve years'' occupancy right was altogether unheard of before the Act suddenly conferred the right.

274. What ryots were entitled under the old laws to be called khud-kasht ryots, and what ryots were entitled to be considered as ryots who had acquired a prescriptive

right of occupancy, are subjects which, I think, have never been cleared up, either by the express authority of law, or by the authority of any judicial ruling. Are khud-kasht ryots then, as spoken of in the Regulations, those, and exclusively those, who were khud-kasht at the time of the Permanent Settlement? or does the term khud-kasht embrace also those ryots who, since the time of the Permanent Settlement, had, by a long residence in the village in which they held and cultivated land, acquired a prescriptive right of occupancy? These were, I think, even up to the passing of Act X moot questions, and are so still.

275. While no doubt exists as to the right of those ryots who, from generation to generation, have cultivated the lands of the village in which they reside for a period antecedent to the Permanent Settlement, and who without any doubt are entitled to be called and classed with khud-kasht ryots, the greatest doubt exists as to whether any other class or description of ryots are entitled to be called khud-kasht ryots. If any ryot whose tenure came into existence since the Permanent Settlement, can, by any means, be called a khud-kasht ryot at all, it certainly is not the ryot who simply lives in the village and cultivates the land of the village. To be a khud-kasht ryot at all, implies that the ryot must not only be a cultivator of lands belonging to the village in which he resides, but he must be an hereditary husbandman. A khud-kasht right is not acquired in a day, but is transmitted; and it has never, so far as my knowledge extends, been laid down what exact length of holding gives a title to a tenant to consider himself a khud-kasht ryot.

276. Certainly, the old Regulations seem to point to other than those undoubted khud-kasht ryots whom the Permanent Settlement found upon the land; but what length of holding constituted a right by prescription has never been definitely or inflexibly laid down. If decisions are to be found in which a prescriptive right was deemed established by an occupation short of the Permanent Settlement, there are, on the other hand, plenty of decisions to show that length of occupancy was not deemed to entitle the tenant to be considered anything better than a tenant-at-will. If any other but the ancient ryot occupying from generation to generation had the right of occupancy, no others had it; and, therefore, in a vast majority of cases, Act X by the twelve years'' rule of occupancy has created rights which never existed before.

277. Under the old law, then, a great majority of the ryots who now have undoubted rights of occupancy at fair and equitable rates, were at the mercy of their landlords, and Act X has in fact put all these ryots of doubtful position on the same level. Whether the distinction between the old holder and the modern holder was purposely not recognized by the Legislature when it enacted Act X, for the reason that both were, before the passing of Act X, upon the same footing as respects their position to the zamindar, I cannot say; but certainly, when no distinction has been made between the two descriptions of ryots, he who has been immemorially on the land, and he who came there only twelve years ago, it would seem that in the mind

of the Legislature there was really no difference between them; neither had acquired a right of occupancy as against the zamindar, and neither could, therefore, compel him to recognize them, or force him to enter into engagements with them on any terms.

278. If, then, the Legislature has not intended that there should be any distinction between the ryot whose forefathers, it may be, first broke up the soil on which his descendants have ever since settled, and the ryot who found the land ready to his hand by the labor of others, the distinction need not have any effect with the Court in laying down the principle which is to be observed in determining what is a fair and equitable rent. What is fair for one, we must take to be fair for the other.

279. Three separate propositions have been put forward as to the mode of arriving at a fair and equitable rent in the case of a rise in the value of produce otherwise than by the agency of the ryot.

280. The propositions are: 1st.--That the rent be left to competition, and that the zamindar be allowed whatever rent he could obtain from any other ryot. 2nd.--That the rent be adjusted thus--give the ryot the benefit of all the profit he now derives from his lands from the last adjustment of his rent; give him, besides, out of the increased value of the produce what will repay him for the increased cost of production, and hand over the entire surplus to the zamindar. 3rd.--That the rent be adjusted thus--presuming that the old rent bore a just proportion to the old produce, give to the zamindar the same proportion as rent out of the present produce.

281. With respect to the first proposition, such a rule would, I think, not be equitable in the case of any, except a very few, of the ryots, to whom the law has given a right of occupancy. To say that a man has a right of occupancy, and at the same time to put it in the power of the zamindar to deprive him of it by putting his land, as it were, up to auction to the highest bidder, would be unfair to the ryot and frustrate the intention of the law.

282. To show the effect of the second proposition, the following case may taken:--

283. If the value of the produce be doubled, then out of the 30 rupees increase, say you deduct 8 rupees as the increase in the cost of production, and the remaining 22 the rule would give to the zamindar. The case would then stand thus--

284. Under the third proposition, the following case may serve as an illustration:--

285. Say that the value of the produce has doubled, then the case would stand thus--

286. If the second proposition is adopted, there will, in every case, arise a necessity for lengthened and difficult enquiries. To work out such a rule, it must be ascertained, 1st, what was the value of the produce when the rent was last adjusted? 2nd, what was the cost of production? 3rd, what was the share of profit

left to the ryot after his rent was paid? This would, however, only carry the case over the first stage; there would still remain to be ascertained, 1st, the present value of the produce; 2nd, what rise has taken place on the cost of production. To do this in every case would occasion such an amount of labor that the constituted Courts of the country could never get through it. Moreover, it does not seem fair and equitable that the ryot should get no share whatever of the increase in the value of the produce of his lauds, and that, though the value of agricultural produce had immensely increased, he himself is to derive not a particle of advantage from it.

287. The third proposition is certainly more simple and apparently equitable; such a rule would involve only two points of enquiry, viz., the former value of the produce, and the present value of the produce. These points ascertained, the rule could be worked out.

288. As a general rule, it may, I think, be fairly assumed that the last adjustment of rents was made upon a principle considered fair and equitable to both parties; and that the rent, as compared with the produce, represented the sum which the zamindar was willing to take, and the ryot to pay, as rent. That being, then, in the nature of a contract between the parties under the then state of circumstances, it is only necessary to carry out the principle of that contract into the present state of circumstances, to get at a fair and equitable rent. If the former rent was fair as compared with the former value of the produce, the same rule of proportion, if carried out, would give a fair rent now; and, as a general rule, I think this is the rule which should prevail.

289. It is true that, where the cost of production has not increased in the same ratio with the increase which has taken place in the value of produce, the rule would give to the ryot the larger share of the increase. But it may, I think, be safely inferred that the cost of production would generally keep pace, or nearly so, with the increase in the value of produce, and the rule would scarcely ever be found to operate with too great advantage to the ryot.

290. If the cost of production has doubled at the same time that the value of the produce has doubled, then the rule, which allows the zamindar to double his claim upon the ryot, is a fair mode of adjusting the matter. But if in any case the zamindar or the ryot could show that the former rent was not fixed with any reference to the former value of the produce, or that, for some special reasons existing at the time, the rent was fixed at too high or too low a figure, then the case would form an exception to the rule, and have, of course, to be treated differently. These exceptional cases would, however, not be numerous, and the rule would serve in all the ordinary cases.

291. This rule of proportion could not be called into requisition in those cases where it could be shown that the former rent was regulated with reference to some contract, or with reference to some ascertainable mode, whereby either party got a

certain fixed or regulated share of the profits. Wherever there was this contract, or custom, or usage, it should be given effect to in any future adjustment of the rent.

292. I may add that I think section 6 of Act X was meant to be retrospective, and I have already expressed my opinion elsewhere in these notes, that the Act created rights of occupancy which never existed before, and that in that respect the law was not declaratory but enacting.

Peacock, C.J.

293. The learned Judge, Mr. Justice Campbell, in his judgment to-day, says, "in the present case no attempt is made to contradict or deny the ryot''s assertion of ancient holding." But the questions, which I must assume were carefully prepared, are general, and refer generally to occupancy-ryots, and make no distinction between holdings which are ancient and those which are of modern date.

294. Although the first question refers to an increase in value arising only from rise of prices, I think that the rule which we lay down will be equally applicable to cases in which the increase has been caused by the proximity of a road, or of a canal, or railway, opening a new source for carrying to distant parts produce which for want of roads was formerly necessarily consumed in the immediate neighbourhood. Such causes may raise the value of produce without materially raising the price of labor, or adding to the expenses of production. But we must take care, lest, in answering a general question, and treating it as applicable to particular circumstances, we do not express an opinion which may hereafter be considered as applicable to all cases falling within the general question propounded. My answer is, therefore, confined to the question asked. If there was anything with reference to the antiquity of the holding which takes it out of the general rule, the facts ought to have been stated.

295. The case has been very elaborately argued by counsel upon both sides; but I cannot say that anything of importance has been brought forward which had not been previously considered in the arguments and in the judgments pronounced in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, and in the Minutes of the Judges written in consequence of that decision. I must confess that I have not beard or read any thing since Ishore Ghose''s case was decided, which has induced me to alter the opinions which I then expressed; and I should be wanting in sincerity if, out of deference to my learned colleagues, or for the sake of using expressions of courtesy, I were to say that anything which I have heard to-day has led me to entertain the slightest doubt as to the correctness of my former opinion. To that opinion I firmly adhere.

296. In that case it was held by Mr. Justice Bayley, Mr. Justice Kemp, and myself that the enhanced rent could not exceed the old rent with such portion of the increase added to it as would render it fair and equitable under the altered state of circumstances; and it was expressly stated that, in determining whether the whole of the increase was to be added the Judge mast be guided by all the circumstances

of the case. It was said-- "In the absence of proof to the contrary, he may take the old rent as fair and equitable rent with reference to the former value of produce--he must take into consideration the circumstances under which the value of the produce has increased, and whether those circumstances are likely to continue, and whether the value of the produce is likely to keep up to the present average in the ensuing year. He must consider whether the costs of production, including fair and reasonable wages for labor and the ordinary rate of profits derived from agriculture in the neighbourhood, have increased, and he must make a fair allowance on that account."

297. The decision in that case, whether right or wrong, was not a hasty one. The Judges before whom it was held were fully aware of the importance of the judgment they were called upon to pronounce, and of the numerous cases which would be governed by the principle to be laid down. They, therefore, took time to consider, and the judgment was not pronounced until they had given their utmost consideration to the case, and had expended much time in endeavoring to arrive at a just and sound conclusion which might govern other cases then pending, and might form a precedent for future cases. The principle of that decision was that the ryot was entitled to the full benefit of the old rent, and that it could not be enhanced beyond the amount warranted by the ground of enhancement. Rules were laid down for the guidance of the Judges in determining the facts, such as "rents which new ryots would pay," and the definition of rent by Malthus, merely as a guide to the Judge, some rule being necessary to ascertain what was the actual value or rack-rent, in case there should be no evidence of market value. In fact, the Judge stated expressly that there was no evidence of market value.

298. The case of The Queen v. The Grand Junction Railway Company 4 Q.B., 18 has been referred to. In that case the Court held that, in ascertaining for rating purposes the rent at which the railway might be reasonably expected to let to a tenant from year to year, the only deduction from gross receipts on account of tenant''s profits was a percentage on the capital employed. This deduction was in the particular case calculated at 20 per cent, having regard to the fair profits of such a trade carried on by means of so large a capital, and with such large risks. This percentage was allowed in addition to 5 per cent interest on the capital and all other expenses of carrying on the business of earners. It appears to me that the deductions which were made in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, were quite in accordance with the principle of that case; for under the definition of Malthus, not only interest, but profits on capital were allowed in addition to every expense of cultivation.

299. As my opinion is in the minority, and, I may say, stands alone, I feel right to point out more at large the reasons which still influence my mind, and prevent me from yielding my opinion to those of the other Judges of the Court.

300. In the judgment given in review in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, I showed--

1st.--That the zamindars were, in 1793, declared to be the proprietors of the lands, and encouraged to exert themselves in the cultivation and improvement of their estates, under the certainty that they would enjoy exclusively the fruits of their own good management and industry, and that no demand would ever be made upon them for an augmentation of the public assessment in consequence of the improvement of their respective estates.

2nd.--That from 1793 to 1812, they were prevented from granting pottas or leases to ryots for terms exceeding ten years; and consequently could not, during that period, have created ryots with hereditary rights of property in the soil.

3rd.--That after Regulation V of 1812, they were entitled to grant leases to all new ryots and to all ryots who were not entitled to demand a renewal of their leases, such as khud-kasht ryots at any rent, and for any term that might specifically be agreed upon between them; and that such leases, whether in perpetuity or for any term, were binding upon the zamindars and their heirs or assigns; and that the Courts were to give effect to the definite clauses of the engagements, and to enforce payment of the sums specifically agreed upon.

4th.--That, if the ryot''s original holding commenced after the date of the Permanent Settlement (and that, if it commenced before, it was for him to prove it, either by positive or presumptive evidence,) he was entitled to have effect given to any definite engagement between him and the land-owner, either as to the duration of the term, if any was specifically granted to him, or as to the amount of rent to be paid, or the rates at which it was to be assessed. But that if he failed to prove that any such engagement was entered into, or that the term for which he was to hold was ever fixed or defined, or that any stipulation was made as to the rate of rent at which he was to hold, he must be considered to have entered and held as a tenant for one year only, and to have continued to hold on with the consent of the land-owner from year to year, or according to the language more generally used in this country, as a tenant-at-will; and that, but for Act X of 1859, he would have been liable to have his tenancy determined by the land-owner, and to be turned out of possession at the end of any agricultural year. It was stated that it was unnecessary to determine whether, according to the law of this country, any notice to quit would have been necessary or not. If by custom or usage a notice to quit was necessary, the ryot would of course be entitled to it before his holding could be determined.

301. After Regulation V of 1812, a landowner had as much power to fix his own rents and terms as regards all new ryots and all others, except the khud-kasht ryots and such others of the old ryots as were entitled to a renewal of their leases, as any land-owner in England.

302. It has been observed in a book of very considerable authority on these subjects--I mean Directions for Revenue Officers in the North-Western Provinces, promulgated by the Lieutenant-Governor, and prepared, I believe, originally by the late Mr. Thomason, p. 61, para. 121,--that "Much confusion has arisen from the neglect to distinguish between proprietary and non-proprietary cultivators;" and it is there stated (paras. 121 to 128) that, throughout Hindustan, there is a large body of persons possessing an heritable and transferable property in the soil who are also cultivators, and their profits as proprietors and as cultivators are sometimes so mixed together that it is difficult to distinguish between them and the non-proprietary cultivators.

303. In many parts of Bengal, Behar, and Orissa, at the time of the Permanent Settlement, no attempt was made to distinguish proprietary from non-proprietary cultivators, but all were left indiscriminately to the mercy of superiors who contracted for the Government revenue, and who, whatever was their origin, were distinct from the village proprietors. A similar error was nearly committed in the talookdari estates in the North-Western Provinces.

304. A remedy for this manifest injustice has been often sought by an attempt to provide protection equally for all classes of cultivators, and the advocates for such measures have argued upon acts which in truth indicated the existence of much higher rights than those of mere cultivators.

305. The importance of the question is much diminished when the proprietary have been carefully separated from the non-proprietary cultivators, and the former confirmed in all the privileges to which they are justly entitled.

306. Still it is incumbent upon the Settlement Officer to define precisely the position of non-proprietary cultivators, in order that no doubt may remain as to the party entitled to benefit by future improvement of the land. So long as this is doubtful, exertion will be discouraged.

307. Non-proprietary cultivators are generally either the descendants of former dispossessed proprietors, or they have been located on the estate by the present proprietors or their predecessors. Their best security, no doubt, consists in the demand for their labor. A zamindar commonly reckons his wealth by the number of his assamis, and the fear of losing their services is often a sufficient provision against harshness or severity towards them.

308. There can, however, he no doubt that many non-proprietary cultivators are considered to have rights of occupancy, and thus two classes are commonly recognized--those who are entitled to hold at fixed rates, and those who are mere tenants-at-will.

309. Cultivators at fixed rates have a right to hold certain fields, and cannot be ejected from them so long as they pay those rates. They have no right of property in

the fields, and are not able to alienate them without the consent of the proprietors; but their sons, or their immediate heirs residing with them in the village, would succeed on the same terms as themselves: nor are they competent of themselves to perform any act which is considered to indicate proprietary right, such as the digging of a well, the planting of a garden, or the location of a laborer. Their simple right is to till their fields themselves, or to provide for the tillage, and for these fields they pay certain rates, and are in some cases liable to be called upon to perform certain services, or to pay certain fees to the proprietors. So long as these conditions are fulfilled, they cannot be ejected from their fields; and if an attempt is made to eject them, they have their remedy by summary suit before the Collectors. If they fail to pay the rent legally demandable, the proprietor must sue them summarily for the arrear, and on obtaining a decree in his favor and failing after it to collect his dues, he may apply to the Collector to eject them and to give him possession of the land.

310. "Tenants-at-will have no right extending beyond the year of their cultivation. When at the commencement of the agricultural year they agree to cultivate certain fields on certain terms, they are entitled to the occupation of those fields on the specified terms during the year; but at its close their right terminates."

311. I do not believe that, even before the Permanent Settlement, every cultivator who resided in the village in which his lands were situate, whether let into possession for a term or only as a tenant-at-will, or to hold from year to year, necessarily became a khud-kasht ryot.

312. The definition of khud-kasht in Wilson''s Glossary (287) is, a "cultivator of his own hereditary land." The words khud, self or own, and kasht, to sow, show that the term has reference to some proprietary rights, rather than to the fact of residence in the village. In column 267 of the same Glossary, tit khud-kasht, the definition is, "a resident cultivator, one cultivating his own hereditary lauds, either under a zamindar or a coparcener in a village." In Bengal, one class of them holding their lands at fixed rates by hereditary right, sometimes sub-let them, except the part about their dwelling in which they continue to reside; and, although, ceasing to cultivate and engaged in trade or business, they retain their designation of khud-kasht. The term is also applied in the North-Western Provinces to lands which the proprietor, or the payer of the Government revenue, cultivates himself.

313. A khud-kasht ryot probably derived his title by descent from or succession to one of the old village community, or some person who in ancient times had acquired a proprietary right in the land under the old Hindu or Mahomedan law by reason of his having reclaimed it. Menu says, "Sages pronounce cultivated land to be the property of him who cut away the wood, or who cleared and tilled it"--(Chap. IX, para. 44.) So property in waste land was, according to the Mahomedan law, established by reclaiming it with the permission of the Imam, according to Aboo Hanifa; and by the mere act of reclaiming it, according to Aboo Yousaf, and

Mahomed. (See Baillie on the Land Tax of India, Chap. VI, para. 42.) But however this may be, it is clear that since Regulation II of 1793, by which the right of property was declared to be vested in the land-holders, i.e., in the zamindars and independent talookdars, property in land which formed part of a permanently-settled estate could not be acquired by reclaiming it from waste. How then could it be acquired except by contract or adverse possession, or by prescription going back as far as to the time of the Permanent Settlement? I am of opinion that neither a right of proprietorship nor a right of occupancy could have been acquired by any other means in a permanently-settled estate.

314. The directions to Revenue Officers, para. 130, show that the right depends upon prescription. It is there said-- "It is impossible to lay down any fixed rule, defining what classes of cultivators are to be considered entitled to hold at fixed rates. They are known in different parts of the country by different names, as chupperbund, khud-kasht, kadimi, mouroosee hukdar, & c., all of which terms imply attachment to the soil or prescriptive right. Those who have no such right are commonly called hutcha assamis or py-kasht. It has sometimes been supposed that all ryots resident in the village (khud-kasht) are of the former class, and that those who reside in another village (py-kasht) have no rights. But there are frequent exceptions to this rule. Many cultivators residing in the village are mere tenants-at-will, whilst those residing in neighbouring villages may have marked and recognized rights. Prescription is the best rule to follow."

315. I am clearly of opinion that a ryot who, after the date of the Permanent Settlement, and especially after Regulation V of 1812, was let into possession by a zamindar to hold as tenant for a fixed term, or at will, or from year to year, or without defining the period during which his tenancy was to continue, did not before Act X of 1859, merely by reason of an occupation for twelve years, become a khud-kasht ryot. But it is not necessary to determine this point, because section 6 of Act X of 1859 makes no distinction between a khud-kasht and a py-kasht ryot. Each, if he has occupied for twelve years, has had a right of occupancy conferred upon him by that Act, which is hereafter shown to have had a retrospective effect.

316. It was suggested that the 6th section substantially converted every ryot who had occupied for twelve years into a khud-kasht ryot, and gave him a right to hold at fixed or customary rates. But there is nothing in the Act which, in my opinion, discloses any such intention.

317. In my former judgment in review in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, I showed that, prior to Act X of 1859, even a right of occupancy could not be gained merely by an occupation for twelve years. I there reviewed the authorities of the late Sudder Court upon the subject, and I referred to the case of Degumber Mitter v. Ramsoonder Mitter S.D.A. Dec., 1856, p. 617, in which, at page 624, it was held that the failure or forbearance of the zamindar to demand an increase of rent during twelve years did not create a right

of occupancy. A similar decision was come to in the case of Mussamut Lalahoonissa Khatoon v. Ram Gopal Sein Ib., 665. I have not heard the authority of either of those cases impugned, nor has it been contended that, before Act X of 1859, a mere occupation for twelve years conferred a right of occupancy, or a right to hold at less than the actual value of the land.

318. The Civil Law, in which it has been said "that we have the most complete, if not the only, collection of the rules of natural reason and equity, which are to govern the actions of mankind, and which has been called "ratio scripta," as containing the most perfect rules of reason for deciding all differences that may arise among men in their intercourse with one another" Dr. Strahan''s Preface to Domat''s Civil Law, held that a farmer or tenant could not acquire by prescription what he held by that title; "for, in order to prescribe, it is necessary to possess and to possess as master" Domat, translated by Strahan, Vol. I, Book iii, Tit. 7, sec. 5, § 11. But where a ryot or tenant holds at a certain rent with the consent of his landlord, there is no adverse holding at that rent. If a ryot could prove that he had held land for many years, and that whenever his rent was altered, he had claimed to hold at a fixed rent, or at a rent assessable according to some definite rules, and that such claim had been acquiesced in by the landowner, he would have evidence from which a prescriptive right to hold at that rent might be presumed; but a mere occupation of land for twelve years at a fixed rent, or at a rent which had been varied at the pleasure or caprice of the landowner, would be no evidence of such a right. That was expressly laid down by the late Sudder Court in the case, to which I have above referred, of Degumber Mitter v. Ramsoonder Mitter S.D.A. Dec., 1856, p. 617; and that decision was quite in accordance with the rule of the Civil Law.

319. In that case four Judges (Raikes, Colvin, Patton, and Trevor), reversing the decision of the lower Appellate Court, held that the landlord was entitled to enhance his rent to the full actual value of the land at which it had been assessed by the first Court. They said-- "It has been shown by Baboo Ramaprasad Roy in the precedents of the Court referred to in his argument, how the current of decisions have run on this question since 1845, and that this Court has, on several occasions, under different forms of words, almost invariably ruled that ''the claim to assess, being a perpetually recurring cause of action, cannot be barred by lapse of time.'' We would also refer to another case (not cited) at page 188 of the printed Decisions for 1849--Durpnarain Roy v. Sreemuttee Roy and others--as a case in point. The suit there was for re-adjustment of rent by a ryot, on the ground of excessive rates, the zamindar pleading payment of the rates objected to by the ryot for upwards of twenty years. A special appeal was admitted, to try whether lapse of time was not a fair and legitimate plea against the action, and the ruling therein was that, as the zamindar had produced no engagement binding the ryot to any particular amount of jumma, or as being in possession of any particular mehal of known boundaries, on which rent is payable without reference to what may be found, at any period, to be its exact extent by correct measurement, the ryot is not barred by having paid a

uniform rent for more than twelve years, from claiming a measurement and re-adjustment of the rent in the some manner as a zamindar, when not bound by express engagement, has always a claim to a like measurement.

320. These precedents must be held to establish the principle that, unless the landlord and tenant are bound by express engagement to a uniform rate of rent, the right to raise or reduce it, however dependant on other circumstances which may govern each particular case, is a right that cannot be disputed on the plea of lapse of time, nor be extinguished by prescription.

321. The appellant''s pleader has also proved by the submission of competent authorities on the subject, that under the English Statutes the law of limitation and prescription was held not to apply to suits of the nature before us. The reasoning on this seems to be that, as the tenant''s possession is from the first a possession with the consent of the landlord, it must be considered as permissive, however long it may continue, and that no length of time can therefore bar the landlord''s right of recovery, or secure to the tenant a title adverse to the landlord''s interests.

322. The connection between landlord and tenant, in this country, commences on a similar understanding. The under-tenant in Bengal, whether holding by potta or as a tenant-at-will, occupies his land with the consent of the zamindar, and the rent, however determinable, is only a consequence of the arrangement. Should the zamindar content himself with less than the local rates in the case of a tenant-at-will, the law only imposes upon the zamindar the necessity of serving such tenant with a notice before he can legally raise them; but the precedents of this Court, cited above, clearly indicate that the construction put upon the law here as well as in England is the same, and that the failure or forbearance of the zamindar to demand an increase of rent during twelve years, will not change a tenant-at-will into a tenant with permanent rights of occupancy.

323. It has been argued by Baboo Shumbhoonath Pundit, on the part of the ryot, that the landlord''s receipt of rent at a uniform rate during more than twelve years is evidence of his having abandoned his right to demand more, and prevent the exercise of the right ever after. But the payment of the same rent for a considerable time by a tenant cannot be proof of the landlord''s intention to restrict his own right of demand; it is far too ambiguous a fact to allow of any such conclusion being drawn in favor of the tenant. It is, moreover, an argument practically inconsistent with, any application of the Limitation Law. If that law, as assumed, barred the right of the landlord to reassess the lands for ever, he could not exercise that right in the event of the lauds being abandoned by the present occupant; the application of the law would not only affect his right over the present tenant, but would apparently fix the rent of the land at the present rates for ever.

324. "The Court, therefore, see no reason whatever to depart from the principle inculcated by the precedents, which hold that the Law of Limitation is inapplicable to

suits for the adjustment of rents."

325. Torrens, J., who dissented, said:-- "If a zamindar neglects all the requisitions of the law, which under his settlement he is bound by, he cannot come into Court and reap an advantage from his own laches, saying that at any time whatever, without respect to any general law of limitation, "I have a right to be heard in question of my ryot"s tenure, and to enhance at my discretion the assessment payable on it. It is true that I have not fulfilled any of the requirements of the law by settling with my ryots, or by giving the documents required of me to the Collector: it is true, too, that my ryot has asserted his right to hold at fixed rates for these last thirty years; that I have not before questioned this; but now he has laid out all his capital under the security relied on from my silence, and from my receiving from him only at the rate given in my zamindari accounts, I wish to raise his assessment tenfold, and if he cannot pay, eject him." This state of things was, I apprehend, never intended by the Decennial Settlement, but such would be the consequence, especially since the enactment of Act I of 1845, if the Law of Limitation cannot be held applicable to suits of this nature."

326. I should concur with Mr. Justice Torrens, if it had been proved, as he alleged, that the ryot had asserted his right to hold at fixed rates for thirty years, and the landowner had acquiesced in the claim; but that statement was used rather as an argument than as referring to the facts which had been proved in the particular case before the Court.

327. The case was determined with reference to a purchaser under Act I of 1845, but it must be equally applicable to any other landowner who let a ryot into possession under such terms that he was not precluded from raising his rent.

328. If, after Regulation V of 1812, a landowner let lands to a ryot at a certain rent without any agreement fixing the term of the holding, or binding the landowner not to enhance the rent, or if he should enhance it, to enhance it only according to certain fixed rules, the ryot would not have held at pergunna rates, or at customary rates, or at rates payable by similar ryots for similar lands in the neighbourhood; and the principle of the above case would show that a holding for twelve or twenty years would not have created a right to hold at such rates, and that the landowner, even after a holding for twelve or twenty years, would not, before Act X of 1859, have been precluded, after notice, from enhancing the rent to the full actual value of the land, or of ejecting the ryot if he would not consent to pay it.

329. What presumption then is to be made merely from the fact of a holding for twelve or twenty years not carried back prior to 1812, or to the date of the Permanent Settlement?

330. Act X of 1859 created a right of occupancy in all ryots who had occupied for twelve years, without reference to the fact whether they resided in the village or not. The Act applied to all ryots who had occupied for twelve years, and who were then

merely tenants-at-will liable to be removed at the end of any current year, if not without, at least after, a notice to quit, and to have their rents enhanced after notice of enhancement, to the full actual value of the lands. But was it the intention of the Legislature, when conferring such rights by retrospective operation, to derogate from the proprietary rights which were declared at the time of the Permanent Settlement to belong to the landowners, and to confer on those who were merely tenants-at-will, or tenants from year to year, not only a right not to be removed from their holdings, but also a right to hold at fixed rates or lower rents than other ryots would pay for the same land? As I said in my former judgment, to hold that the Legislature intended to confer rights of occupancy which did not previously exist at rents lower than such as could be reasonably obtained from new ryots, would, in nay opinion, be giving a construction to the Act which would render it an unjust interference with the vested rights of the landowners in the permanently settled districts, and a violation of the engagement which, at the time of the Permanent Settlement, was made with them by Government. Such a construction cannot be put upon the Act, unless the Legislature has declared its intention by the clearest and most unmistakable language. I cannot think that the Legislature, by using the words "fair and equitable rates," intended to give a ryot who obtained possession only twelve years ago, when he had no right to the land, and when the zamindar was not even bound to accept him as a ryot, or to admit him into possession, any proprietary rights which would entitle him, without express contract, to participate in any increase in the value of the produce of the land not caused by his own agency or at his expense.

331. Surely it could not have been necessary, in order to protect the ryots from unwarrantable exaction, to enact that a ryot who had no light in the land thirteen years ago, should, by reason of his having occupied it for twelve years, become entitled to hold it at a less rent than a new ryot would give for it.

332. It would surprise landowners in England if they were to find that, by an Act having retrospective effect, or by a construction put upon the words "fair and equitable," tenants who had held under leases for ninety-nine years at a nominal rent, or had held for twenty years as tenants from year to year at very low rents, had acquired rights of occupancy, and that at the expiration of the leases, or upon the determination of the tenancies, they were not merely not bound to quit, but were entitled to hold on at a lower rate than the landowners could obtain from new tenants.

333. Mr. Justice Campbell has referred to the report of the Select Committee as a legitimate guide for ascertaining the reasons of the Legislature for conferring a right of occupancy upon ryots who had held for twelve years. If he would refer to the proceedings of the Legislative Council for 1859, on the motion of Mr. Ricketts, at page 222, he would find equally legitimate evidence that it was not in fact the intention of the Legislature, when using the words "fair and equitable," to render

the pergunna rates, or customary rates, or the rates payable by similar ryots for similar lauds in the neighbourhood, the standard for determining what would be fair and equitable.

334. The pergunna rates were, in all probability, originally intended for the purpose of enabling the Government in assessing the revenue to ascertain what the landowners were in fact collecting from the ryots; not that the Government was bound in assessing the lands to treat the rents actually collected as the true value. It was the interest of the zamindars to show that the rents they were collecting were very low, and to make them up by abwab and cesses. In practice, the pergunna rates were seldom found to exist.

335. If it had been the intention of the Legislature that all ryots upon whom a right of occupancy had been conferred, should be entitled to hold at pergunna rates, or customary rates, or in the absence of such rates according to a rule of proportion, nothing would have been easier than to have added words to that effect. But they simply declared, by section 5, that tenants having rights of occupancy were entitled to receive pottas at fair and equitable rates, which, as I construe that section, also includes a right to hold at fair and equitable rates, leaving it to the Courts of Judicature to fix what would be fair and equitable in each case. It could not have been left to the landowner to fix his own rent, without enabling him to frustrate the intention to give a right of occupancy; for, if he could fix his own rent, he could easily compel the ryot to abandon his holding. There is nothing in the words "fair and equitable" which necessitates injustice to the landowners, or such a construction to be put upon the Act as to render it a violation of the engagement made with the zamindars at the time of the Permanent Settlement. What is just and equitable in each case is left to the Courts, and was intended to be left to them.

336. The right of occupancy acquired by reason of an occupation for twelve years is the mere creation of Act X. That Act, as I have already observed, did not take away the right of any ryot who had a right by grant, contract, prescription, or other valid title to hold at a fixed rate of rent. The rights of those who have held at fixed rates of rents which have not been changed from the time of the Permanent Settlement, are expressly protected by section 3, and section 4 has given them a more easy mode of proving those rights.

337. By the term "fixed rates of rent," I understand not merely fixed and definite sums payable as rent, but also rates regulated by certain fixed principles--such, for instance, as a certain proportion of the gross or of the net produce of every biga, or such a sum of money as would be equal to such a proportion of the produce, or such a sum as would give to the ryot any fixed rate of profit after payment of all expenses of cultivation. "Id certum est quod certum reddi potest" is a maxim of law. But if I am wrong in this construction, I think the ryot who could prove such a right would be entitled to the benefit of it in determining what would be a fair and equitable rent for such ryot to pay; what is fair and equitable for one is not

necessarily fair and equitable for another. What is fair and equitable for an old ryot, who has a prescriptive right to a certain proportion of net or gross produce, is not necessarily fair and equitable for the modem ryot, or for one who has occupied for a period of twelve years only, at the same rent at which he was let in, or at a rent from time to time enhanced or diminished by agreement, without reference to any fixed principles.

338. When conferring rights of occupancy upon all ryots who had occupied for twelve years, the Legislature distinguished between those who had a right to hold at fixed rates and those who had not. The former were provided for by sections 3 and 4; the others were to pay such rent as might be fair and equitable.

339. Holdings at fixed rates from the time of the Permanent Settlement were, by section 3, substantially treated as prescriptive holdings, giving a right to hold at fixed rates; and section 4 was passed in order to give the ryot a more easy mode of proving such a holding. The date fixed from which prescriptive rights were to be presumed was the time of the Permanent Settlement,--a time prior to that at which zamindars were declared to be the proprietors of the lands, and were authorized to fix their own rents and terms, and to deal with the lands as any other landed proprietors. This they were authorized to do by Regulation V of 1812, and the retrospective effect given to it by section 2, Regulation VIII of 1819.

340. Although the Legislature left those who had no prescriptive rights, or rights to hold at fixed rates, liable to pay fair and equitable rates, a limit was put to the grounds of enhancement by section 17. One ground of enhancement is that the rate of rent paid by the ryots is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. But that is not the only ground. The second ground is that the value of the produce or productive powers of the land have been increased otherwise than by the agency or at the expense of the ryot. It certainly could not have been the intention of the Legislature when they authorized an enhancement upon the ground of an increase in the value of the produce, or of the productive powers of the land, to limit that ground of enhancement, and to declare that the enhanced rate should not exceed the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. There could be no good reason for allowing the second ground if it was to be limited by the first; and if such a rule were adopted, there would be no mode of enhancing the rents, if they should all be too low.

341. The first question, in the mode in which it is put, seems to imply that the learned Judges who propounded it considered that the fair and equitable rate to be awarded must either be the rate which could be obtained by commercial competition in the market, or the rate to be determined by the custom of the neighbourhood in regard to the same class of ryots. It seems to be only for want of such a customary rate, or in consequence of the rates, as it is said, not having

adjusted themselves, that the rule of proportion is to be adopted.

342. But it has not been found in this case that there was a customary rate which has or has not adjusted itself. Suppose the usual rent was one rupee per biga for lauds of a particular description. Is that rent always to continue, however much the land may improve in value? If not, by what rule is it to be increased? Is there any rule which lays down the standard which is to be applied in increasing it? and if not, is the Court to say that, because there is no custom, or because the rents have not adjusted themselves according to a custom, we will create a new custom, and declare that the custom requires the rents to be increased, so that the landlord''s rent may always bear the same proportion to the present gross produce as the old rent did to the old gross produce?

343. If the rule of proportion was not the custom, how does the right, even if it exists, to hold at customary rates, entitle the ryot to have that standard applied? Is it to be applied as a principal of natural justice and equity independent of any custom to warrant it?

344. In the judgments by which the questions were submitted to a Full Bench in this case, Mr. Justice Campbell and Mr. Justice E. Jackson say that the enhancement shall be awarded in proportion to increase of the value of the net produce of the land.

345. E. Jackson, J., says:-- "I agree with Mr. Justice Campbell that the enhancement should be awarded in proportion to the increase of the value of the net profits of the land. By this mode of enhancement, the original agreement between the ryot and the zamindar is retained, and both continue to share in the increased net value of produce in the same proportion in which they agreed to share in the net value of the produce as it existed when the agreement was originally made. No sufficient ground is shown by either side to disturb that original agreement."

346. There was no finding by the lower Court of any such agreement, and no evidence whatever to prove that any such agreement ever existed, or from which any such agreement could be legally presumed. The mere fact that the rent originally fixed bore a certain proportion to the value of the net produce (which could not be ascertained at the time when the rent was fixed) is no more evidence, either actual or presumptive, of an agreement that that proportion should always continue to exist, than the fact that a certain amount of rent was fixed is evidence of an agreement that the same amount of rent should always continue. There is no more evidence of an agreement that the proportion should always remain the same, than there is of an agreement that the amount should always remain the same. But if there was an agreement that the rent should always bear, a certain proportion to the value of the net produce, why is the rent to be fixed in proportion to the value of the gross produce?

347. It has been contended that section 17 , Act X of 1859, extends only to cases of suits for enhancement, and not to cases in which the ryot asks for a potta, or the

landowner demands a kabuliat at an enhanced rent. This view has been apparently adopted by some, but I cannot concur in it.

348. The Act says that, in the case of a ryot having a right of occupancy, the rent paid shall be deemed to be fair and equitable (section 5). But the 17th section says:-- "No ryot having a right of occupancy shall be liable to an enhancement of the rent previously paid by him, except on some one of the following grounds."

349. When a right of occupancy exists, it appears to me that the rent previously paid cannot he enhanced, except for one of the grounds mentioned in section 17 , whether in a suit for enhancement, or in a suit for a kabuliat, or for the recovery of arrears at enhanced rates. The form of the procedure adopted by the landowner to obtain a higher rent than that previously paid, cannot alter his right. If it would, landowners would only have to sue for kabuliats at increased rents, instead of giving notice to enhance, and suing for enhancement or for the recovery of arrears of the enhanced rent.

350. According to Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, the enhanced rate cannot exceed the old rent, with such additions as the grounds of enhancement warrant. It is to be the old rent with something added to it. Whatever net profit the tenant derived from holding at that rent, he must, according to the decision in that case, retain after the rent has been enhanced upon the ground of the increased value of produce. If his rent were rupees 10 or 20 lower than a rack-rent of the land under the circumstances existing at the time when it was fixed, and consequently giving him a net profit to that extent beyond the whole expenses of production, he must continue, after enhancement, to enjoy the full benefit, conferred upon him when his rent was fixed, and the enhanced rent must to the same extent be lower than what would be a rack-rent of the premises, having regard to the increased value of the produce; for it is expressly laid down that the enhanced rent, cannot exceed the old rent with such portion of the increased value added to it as will render it fair and equitable; and that, in fixing the amount, the Judge must consider whether the costs of production, including fair and reasonable wages for labor, and the ordinary rate of profits derived from agriculture in the neighbourhood, have increased; and if so, that he must make a fair allowance on that account. In other words, all increased costs of production, including wages and agricultural profits, must be deducted from the increased value of produce before any part of the increase can be added to the old rent. It is only the net, and not the gross, increase, or such part of the net increase as will render the rent fair and equitable, that can be added to it. If the market value of the land should exceed the amount of the old rent, with the whole of the net increase added to it, the landowner would not be entitled to the full market value, but must make such a deduction as will leave the tenant the benefit of the full amount of profit which he derived from the old rent at the old value of produce; that is to say, the new rent must be as much lower than a full rack-rent of the land after the increase, as the old

rent was lower than a full rack-rent before the increase. To give the tenant more than this without the landowner''s consent, would be injustice to the landowner, and consequently cannot be fair and equitable.

351. It cannot be doubted that Act X did to some extent encroach upon the rights of the landowner when it created a new right of occupancy even at a fair and equitable rent, and limited the right to enhance to particular grounds; for it deprived the landowner of his right to turn out those ryots who, under the old law, were tenants-at will, if they would not come to terms, or if the landowner for any cause required to have his land again. But the words of the Act are clear; that the rent cannot be enhanced, except upon certain grounds specified in section 17 , and the Courts are bound not to enhance the rent beyond the amount which those grounds warrant.

352. Let us see how the case would stand according to the rule in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; review 148.

353. Suppose a ryot held land for twelve years at rupees 100 rent,--that the gross value of produce when the rent was fixed was rupees 300, and all the costs of production, including labor, interest, and profit on capital (which in Ishore Ghose''s case was said to be included in costs of production) amounted to rupees 100. The case would stand thus:--

354. In that case the tenant would get rupees 100 net profit, after paying all the costs of production, including profit on capital and wages, whether his own or those of hired laborers.

355. The ratio of rent to net value was 100/200 or &#65533;. The ratio of tenant''s net profit to net value is the same, 100/200 or &#65533;.

356. Suppose the value of produce should be doubled, and the costs of production, doubled--

357. If the owner''s rent were increased to rupees 300, it would not bear the same proportion to the present gross value (rupees 600), as the former rent (rupees 100) did to the former gross value (rupees 300), or the same proportion to the net value of produce (rupees 400), as the old rent (rupees 100) did to the former net value (rupees 200). It would be one-half instead of one-third of the value of gross produce, and three-fourths instead of one-half of the net value of produce, yet the ryot would still have the same amount of net profit as before.

358. Unless the ryot is made a co-proprietor by Act X of 1859, there is no reason why his net profit should exceed that which be derived from his former rent under the old circumstances, and the landowner be debarred of his right to let the land for rupees 300, if be could procure that amount by competition from ryots who would be satisfied with a clear net profit of rupees 100 over and above all expenses of production. If the ryot is not contented with the same amount of profit as he made

before the rise in prices, he is not bound to remain. He can give up his holding. His right of occupancy does not bind him to remain. It only binds the landowner not to turn him out. Whether it would be the interest of the landowner not to allow the ryot some addition to his former net profit, is another matter. In this respect the demand for labor and the necessity of giving the ryot some interest to exert himself would be the ryot''s security for liberal treatment by the land-owner. The landowner is not bound to allow his ryot to have a net profit of rupees 200 out of rupees 400, because, in fixing the rent in the first instance, he allowed him to hold at such a rent as in fact gave him a net profit of rupees 100 out of rupees 200. The two cases are very different. If the ryot could show that, by reason of a stipulation in the contract, or by prescription, he was entitled to have a particular share of a net or gross produce, the case would of course be different. But the mere fact of his rent having been fixed originally at rupees 100 lower then the rack-rent, or at such an amount as did in fact give him a net profit of rupees 100 out of a gross value of rupees 300, or out of a net value of rupees 200, does not show that the landowner was hound, either by prescription, or contract, or custom, to adjust the rent for ever at such a rate as would give him a net profit of one-third of the gross, or one-half of the net, produce, whatever might be the amounts. It might with as much reason be said that the ryot was always entitled to hold at rupees 100 rent whatever might become the value of the land, because, when the rent was first fixed, he was allowed to hold at rupees 100. If all the ryots in the district had had their rents adjusted, so as to give them a net profit of rupees 100 out of rupees 200, it would not create a custom or a right for them all to have a net profit of rupees 200 if the value of net produce should increase to rupees 400.

359. Every one knows that a business which gives very large gross returns is generally more valuable in proportion than one which gives smaller returns. The copyright of a book of which 10,000 copies are struck off and sold at the first issue, would, ceteris paribus, generally be worth more than ten times as much as one of which only 1,000 copies are struck off and issued. The reason is that the one gives larger net profits than the other. The author would not probably sell the copyright of the two books at prices bearing the same proportion to the number of copies issued, nor pay a publisher for publishing and printing the works the same proportion of the gross proceeds of the sale of the 10,000 copies as he would of the 1,000. Why then, should a landowner be legally bound to allow a ryot to hold at a rent which, under the altered circumstances, would yield a net profit of rupees 200 out of a net value of rupees 400, because he once allowed him to hold the same land at a rent which gave him a net profit of rupees 100 out of a net value of rupees 200? There is nothing in the Act which declares that he is so bound; and if he is not declared to be so, it is only by the Court''s construction of what is fair and equitable that he becomes so bound. I confess that I cannot see the equity, or justice, or fairness of such a decision.

360. Having shown that the rule in Ishore Ghose''s case secured the tenant as large a net profit under the altered circumstances as he derived from the old rent at the time when it was originally fixed, I will now consider the equity and justice of the rule of proportion.

361. It is said that the rent to be fixed must bear the same proportion to the present gross value of produce as the old rent did to the former gross value of produce.

362. Suppose it should be proved that an agricultural laborer, without any capital or property, fourteen years before the passing of Act X of 1859, applied to a zamindar to allow him to enter upon lands which had been abandoned or deserted by a former ryot who had held as tenant-at-will; that the zamindar consented; that the parties agreed upon a rent, say rupees 100, without any stipulation or agreement as to the basis upon which the rent was fixed; that the ryot entered and occupied from year to year, and continued in possession upwards of twelve years before Act X and up to the present time; that when the land was first let, the gross value of the produce was rupees 300; that all the expenses of cultivation, including labor, interest, and profit upon capital, and every other incidental expense of production, amounted to rupees 100. Suppose it should be further proved that the value of the produce had increased from rupees 300 to 900, and that expenses of cultivation had been doubled. This is not an improbable supposition; for in the present case, it was found that the former value of the produce was rupees 4-8 per biga, and the present value rupees 15; the former expenses rupees 1-4, and the present expenses rupees 3. The case would stand thus if the rule of proportion is to apply:--

363. The ryot received out of gross produce rupees 200, viz., rupees 100 for costs of production, and rupees 100 for net profit.

and the amount of rent and the amount of ryot''s net profit were equal.

364. But under the altered circumstances, if the rent must bear the same proportion to the present gross value of produce, as the former rent did to the former gross value of produce, the ratio of ryot''s net profit to gross value

and the ryot''s net profit will exceed the landlord''s rent by one-seventh of the net value.

365. Thus, whilst the ratio of the ryot''s net profit to net value is increased from ½ to 4/7, the ratio of the landowner''s rent to net profit is reduced from ½ to 3/7, and the ryot, instead of having a net profit of rupees 100, has now a net profit of rupees 400, which is rupees 100 more than the landowner''s rent.

366. Again, suppose that, in the course of the next twenty or thirty years, the present gross value of produce should be trebled, and the present costs of production doubled, the case would stand thus:--

and whilst the ratio of ryot''s net profit to net value would he increased from 4/7 to 1400/2300 or 1/2, 4/3, the ratio of rent to net value would be further reduced from 3/7 to 900/2300 or 8/2/3, and the ryot instead of having a net profit of rupees 100 as at first, or of rupees 400 after the first increase, would have a net profit of rupees 1,400, whilst the landlord would have only rupees 900 as rent.

367. But suppose the ryot, instead of continuing to hold and cultivate the lands, should have ceased to live in the village, and should have underlet them to another ryot who had held them for twelve years when Act XI of 1859 came into operation. The occupation of the under-ryot would not give him a right of occupancy as against the original ryot, for section 6, Act X of 1859, declares that the rule which gives a right of occupancy does not apply as respects the actual cultivator to lands sub-let for a term, or year by year, by a ryot having a right of occupancy.

368. The first ryot could, therefore, turn out the under-ryot, and would thus be enabled to obtain a competition rate of rent, or the market value of the land.

369. In the case above supposed of the value of produce (rupees 300), having trebled, and the expenses (rupees 200), doubled, it has been shown that the net value would be rupees 700, the rent rupees 300, and the net profit rupees 400. If the first ryot should re-let the lauds for rupees 600, the under-ryot would make a net profit of rupees 100, the same amount as was made by the first ryot when he first took the lands. In that case the first ryot would have a net rent of rupees 300, for he would receive rupees 600 as a competition rent from the under-ryot, and have to pay only rupees 300 to the landowner according to the rule of proportion. Thus, instead of being a mere agricultural laborer without capital or property, as he was when he first hired the land fourteen years ago, he would become a quasi lauded proprietor, receiving from the under-ryot a net rent of rupees 300, equal to the rent of the real landowner.

370. If any rule of proportion is to be applied as a test of what is fair and equitable, which I deny, the rule that the ryot''s net profit under the new circumstances shall bear the same proportion to the present net value of produce as the former net profit did to the former net value, would be more fair and equitable than the proposed rule of proportion. In that case the new rent would bear the same proportion to the present net value, as the former rent did to the former net value.

371. If the revenue settlement had not been made permanent, the Government would, at the next settlement, after the increase in the value of produce, assuming that it was likely to be permanent, have increased the revenue assessment, and, under the old practice, would have taken two-thirds, or, according to the practice now adopted in the North-Western Provinces, one-half of the net produce. (See Directions to Revenue Officers, page 3.) It is there said:-- "It is needless to enquire who, theoretically, is the owner of the soil. Undoubtedly, traces are often to be found of the existence and exorcise of a proprietary right in the land on the part of

the individuals. But so long as the sovereign was entitled to a portion of the produce of land, and there was no fixed limit to that portion, practically the sovereign was so far the owner of the land as to be able to exclude all other persons from enjoying any portion of the net produce. The first step, therefore, towards the creation of a private proprietary right in the land, was to place such a limit on the demand of the Government as would leave to the proprietors a profit which would constitute a valuable property. This is effected by providing that the assessment shall be a moderate portion, say two-thirds" (now one-half), "of the net produce at the time of settlement, and that the proprietor should be allowed all the benefits from improved or extended cultivation, which he may be able to obtain during the currency of his lease. This was further effected in most of the districts in the Lower Provinces, by mating the settlement permanent, and declaring the property in the soil to be vested in the landholders."

372. If the settlement had not been made permanent, the Government revenue in the case supposed of the net value of produce being increased from rupees 300 to 700, would, according to the rule of taking half the net produce, have been increased to rupees 350, and the landowner would have been entitled to receive from the ryot at least half as much again as the Government took from him, and would consequently have been entitled to rupees 525, i.e., rupees 350 Government revenue, and one-half as much again, viz., rupees 175.

373. The rules which regulate the respective rights of the Government and the landowners, where the settlement has not been made permanent, are shown in paragraphs 135 and 136 of Directions to Settlement Officers:--

When the Government fixes its own demand upon an estate, i.e., at the time of settlement, the Government officer is competent to fix the rates payable by the cultivator to the proprietor. He will he very careful not to do this arbitrarily, but he will refuse to admit the principle that, because a cultivator paid a low rent before the settlement, he is entitled to hold at the same rate, notwithstanding the Government demand has been re-adjusted. As a general rule, open to exceptions in special cases, the proprietors should be held entitled to raise the rent upon the cultivator till it reach half as much again as the average Government assessment upon land of the same quality.

When the Government restricts its own demand upon the proprietors, it does not prohibit the proprietors from raising their terms upon the cultivators, in such amount as may be equitable during the period of the settlement. General circumstances affecting the whole pergunna, such as the opening of new markets for the produce, the introduction of new articles of produce, increased facilities of irrigation, or a fall in the value of money, or circumstances having local effect in ganj or h[illegible]t, the new direction of a road, or the construction by the proprietors of some work for irrigation" (and I may add the proximity of a railway), "may all render it equitable that the proprietor should demand an increased rent, though the

Government jumma remain the same. The law has made provision for securing this right to the proprietors, fair opportunity having been afforded to the cultivators for contesting their demand.

374. The rules adopted in the North-Western Provinces, as described in the above paragraphs, are strictly in accordance with the ancient laws of the country, by which (as declared in the preambles of Regulations XIX and XXXVII of 1793) the ruling power was entitled to a certain proportion of the produce of every biga of land, and with the established custom or usage by which (as declared in section 7, Regulation I of 1793) the rulers have from time to time demanded an increase of the assessment from the proprietors of land; and for the purpose of obtaining this increase, frequent investigations have been made to ascertain the actual produce of their estates.

375. The Government, no doubt, would generally take the rents received by the land-owners as the basis of the revenue assessment, both in the Lower Provinces before the Permanent Settlement, and in the North-Western Provinces since Regulation IX of 1833, section 2; but if, when a new settlement is made, all the rents are too low in consequence of a considerable and permanent rise in prices, it would be necessary for the Collector to ascertain as nearly as possible what might fairly be expected to be the value of the net produce, and to assess the land in one-half the amount. "Net produce" is defined in the Directions to Revenue Officers, paragraph 52, to be "the surplus which the estate will yield after deducting the expenses of cultivation, including the profits of stock and wages of labor."

376. By the terms of the Permanent Settlement, Government pledged themselves to the zamindars that they were to have the full benefit of the assessments having been made permanent. To hold that the landowners are not fairly and equitably entitled to receive from the ryots since the Permanent Settlement as much as they would have done if the assessment had not been made permanent, and the land had been reassessed, is, in my opinion, to put such a construction upon Act X of 1859 as to render it a violation of the pledge made by Government to the zamindars at the time of the Permanent Settlement; for there is no doubt in my mind that, to give the land-holder the full benefit of that engagement, they ought to be allowed to collect as much from the land, and to enjoy as large a portion of the net produce, without an increase of the assessment, as they would have done if the settlement had not been made permanent, and the land-holders had been re-assessed. In fact, they were to have the full benefit of the assessment being fixed for ever, instead of being subject to have it increased in proportion as the value of the land increased. But how can they get the full benefit of this if they are to be prevented by an Act of the Legislature (and that a retrospective one), or by a construction to be put upon it, from receiving as much from their ryots as they might have done if the assessment had been increased? I have shown that, if the assessment had not been permanent, the land-owner in the case supposed would have been entitled to recover from the

ryot rupees 525 out of the net produce, rupees 700, viz., the one-half of the rupees 700 which he would have had to pay to Government as increase of revenue, and half as much more which he would have been entitled to take for himself. This would have left rupees 175 as net profit to the ryot; in other words, the Government would have taken one-half the net produce from the zamindar as revenue, the zamindar one-fourth in addition to the one-half which he would have had to pay to Government, and the ryot the other one-fourth, which would have given him rupees 175 net profit. Whereas, if the land-holder is to be restricted according to the rule of proportion to rupees 300, being one-third of the gross produce, rupees 900, he will receive rupees 50 less than he would have had to pay to Government if the land had been re-assessed to the revenue; and the ryot instead of getting only one-fourth of the increased value which he would have got if the land had been re-assessed, will get four-sevenths of it, whilst the land-owner gets three-sevenths. How-then can it be said that the land-owner enjoys exclusively the benefit of the public assessments having been fixed for ever when the ryot gets four-sevenths, and he gets only three-sevenths of the net increase?

377. If a zamindar had, by the express terms of a potta, granted lands to a ryot for fourteen years at a certain rent, with an agreement that the ryot should always have a right to occupy at a fair and equitable rent, could it be contended, in construing such a document, that it gave the ryot a right to have his rent always so adjusted as to bear the same proportion to the gross value of the produce for all time as the old rent did to the old gross value? If such a construction would be unreasonable, how can it be right to put the proposed construction upon the words "fair and equitable" in the 5th section of the Act?

378. If we go back to early days in search for customary rights, I think we shall fail to discover any custom under which the ryots received as much as one-half or even one-fourth of the net produce after paying all the expenses of production; or that, when a money rent was fixed, a ryot having a right of occupancy had a right to prevent the land-owner from increasing it beyond the proportion which such money-rent, when fixed, bore to the gross value of produce.

379. Act X of 1859 applies not only to the permanently settled districts, but also to the North-Western Provinces. If the Sudder Court of Agra should so construe the Act as to apply the rule of proportion, it will probably materially affect the Government revenue at the next Revenue Settlement. If such settlement is to be made upon the basis of the rights created by Act X, and every ryot who has a right of occupancy, whether existing before that Act or created by it, should be held to have a right to hold at a rent bearing the same proportion to the present gross value of produce as the old rent did to the former gross value of the produce, the landowners cannot be assessed at most at a higher amount of revenue than the amount of rent which, according to the principle of proportion, they are entitled to receive from their ryots. If the land-owner is prevented by Act X from raising his rent upon the cultivator

beyond a certain amount, can the Government assess him by increasing their revenue to an amount up to which he will not be entitled to raise the rent of his cultivators? But if it should be held that the fair and marketable value of the land is the rule in the North-Western Provinces, how can it, in fairness and justice to the zamindars in the permanently settled districts, be said that they are to be bound by the rule of proportion? It is the same Act and the same words in this respect which are to bind and to be construed in the North-Western Provinces and in the Lower Provinces of Bengal. If the rule of proportion is not to prevail in the North-Western Provinces, where the Government revenue is not fixed, and it ought not in fairness and equity to prevail there if the Government assess according to the net value, it ought not to be allowed to prevail and to be the rule in the permanently settled districts where the Government revenue is fixed. In the case now before us, Mr. Justice Campbell says:-- "This case has been decided on the principle of dividing the increased value equally between the zamindar and the ryot; and though in many cases such a decision might be roughly equitable, it cannot be applied in all cases, and is in this case a mere arbitrary guess at equity; a more definite rule is required." E. Jackson, J., says:-- "The principle that the net increase in value of produce is to be divided half-and-half between the ryot and the zamindar is in fact no principle at all. It is established on no fair and equitable basis." Such a principle is not, in my opinion, more rough than the principle adopted by Government in the North-Western Provinces in assessing the revenue at half of the net produce, and allowing the land-owner to take half as much more froth his ryot as he pays to Government for revenue. The principle acted upon in enhancing the rent in this case by the lower Courts was not to enhance in the same proportion as the former rent bore to the former gross produce; but it is in my opinion more fair and equitable (if any rule of proportion is to be adopted at all) than a rent assessed in that proportion, for it is in fact in precisely the same proportion, as, according to the finding of the lower Courts, the former rent, rupees 1-10 per biga, bore to the net value, rupees 3-4, and at the same time it gives the ryot a net profit bearing the same proportion to the present net value as the former net profit of the ryot bore to the former net value.
380. The finding was:--

381. This is more fair in my mind than the rule of proportion proposed to be adopted, without any proof that the rent was originally fixed upon the basis that the gross profits of the land were to be divided according to any such principle.

382. The rule of proportion clearly was not intended to be applicable to the first ground of enhancement mentioned in section 17 . It seems to me to have been intended that, if the rate paid by a ryot was below the prevailing rate, it might, if considered fair and equitable, he raised to the amount of the prevailing rate. It surely could not have been intended that it might be raised only to such an extent that it might bear the same proportion to the present prevailing rate as the old rent

bore to the former prevailing rate.

383. So, as to the third ground of enhancement that the rent may be enhanced if the quantity of land should be proved by measurement to be greater than the quantity for which rent had been previously paid, the Act did not mean that, if land should be increased in dimensions by alluvion, the tenant should necessarily pay for the new accretion rent at the same rate or in the same proportion per biga as for the old cultivated land. If the rule of proportion did not apply to the first and third grounds, why should it be held to be applicable to the second?

384. If we were entitled to do what is roughly equitable, instead of deciding upon accurate and correct principle, I think the most equitable thing would be to give the land-owner three-fourths, and the tenant one-fourth of the net increase according to the rule adopted in the North-Western Provinces of giving Government one-half, and allowing the land-owner to increase his rents upon his ryots until they amount to half as much again.

385. It could not be necessary for the protection and welfare of the ryots, and in order to prevent them from being improperly loaded with unwarrantable exactions, to pass a law which would prevent a land-owner in the permanently settled districts not only from taking such a proportion of the net produce as a land-owner in the North-Western Provinces would be allowed to take, but even to restrict him from taking as much of the net produce as the Government in the North-Western Provinces at present think it fair to take as the Government''s share of the net produce. I need not point out the extent of injury which a zamindar will sustain if, throughout his whole zamindari, every ryot with a right of occupancy is to be converted into a part proprietor with an interest equal to or even greater than that of the zamindar himself. To raise the status of the ryot, and, instead of leaving him as an agricultural laborer without capital or property, to convert him into a co-proprietor with interests equal to or greater than those of the zamindar, would, doubtless, be very benevolent if one were to do so at his own expense. But for the Legislature to do so by sacrificing the rights of the zamindar would, as it appears to me, so far from being fair and equitable, be an act of the greatest injustice.

386. I cannot, therefore, think that the words "fair and equitable" ought to receive such a construction as that proposed to be put upon them. Entertaining the opinion which, after much reflection and labor, I have formed in this case, I feel that I should not be justified in yielding that opinion out of deference to the opinions of my learned colleagues. On the contrary, I should consider that I was holding that the Legislature, in passing Act X of 1859, had violated the engagement which the Government made with the zamindars at the time of the Permanent Settlement, and had exercised a power which, Government stated, no longer existed, when in Regulation II of 1793 they declared, in the most emphatic language, that "no power would then exist in this country by which the rights vested in the land-holders by the Regulations could be infringed, or the value of the landed property affected; that

land must in consequence become the most desirable of all property, and the industry of the people would be directed to those improvements in agriculture which were as essential to, their own welfare as to the prosperity of the State." I answer the first question by stating that I still adhere to the rule laid down in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148.

387. As to the 2nd question--

We are asked, if the customary rate of the neighbourhood has not been adjusted with reference to the increased value of produce, then on what principle is the enhancement of that customary rate to be adjusted?

388. I confess I do not clearly understand the question. There is considerable confusion in the question, and also, in the judgment in which it was propounded, in the use of the words "rate of rent." Sometimes the word "rate" seems to be used as meaning the amount of rent, and sometimes as meaning the standard by which amounts are to be adjusted. The Courts have not the same power as a Collector at the time of making a settlement of fixing the rates payable by all the cultivators in a zamindari or pergunna. If no custom is proved, or no standard proved, the Court cannot make a new custom, or a new customary standard. Each case must stand upon its own merits.

389. If the rule of proportion is to apply, and all ryots of the same class are entitled to be assessed at the same rate for lands of a similar description and with similar advantages in the neighbourhood, they ought all to be assessed at the prevailing ratio of rent to gross value of produce. But if there is no such prevailing ratio, there cannot be any customary rate of proportion. The rule of proportion adopted cannot then depend upon custom.

390. There is no finding or evidence of any such prevailing ratio, or of any other custom, for adjusting the rents.

391. This, in fact, brings us round to the first question in cases where there is no proof, either direct or presumptive, that the ryot is entitled to have his rent adjusted according to a particular custom, or by a particular standard, or in a particular proportion. In such case I think the proper rule for adjusting the rent is that laid down in Ishore Ghose''s case 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148.

392. The old custom, if any could be proved, would probably be found to give the ryots not more than a subsistence; the portion of the gross produce which was formerly allowed to them was not often more than sufficient to pay for their wages as laborers with such amount as was necessary to repay the advances for seed and implements of agriculture. I do not believe that any custom could be found which would give the ryot as much as half of the not value of the produce when the Government used to take half or two-thirds of it for revenue.

393. Three preliminary objections have been made--

1st.--As to whether section 6, Act X of 1859, applied to cases in which the twelve years'' holding was wholly before, or partly before and partly after, the passing of the Act; or whether it extended only to cases in which there should be a holding for twelve years after the passing of the Act.

2nd.--As to whether a landlord could sue for a kabuliat at an enhanced rent, without having given a notice of enhancement, as required by section 13 of the Act.

3rd.--Whether he could sue for a kabuliat, without tendering a potta.

394. As to the first of these questions, the words "has cultivated or held for a period of twelve years," as used in section 6, would seem to apply to cases in which the holding was prior to the Act, whereas the words "whether it be held," & c., appear to have reference to the future; but looking to the preamble and the whole scope and tenor of the Act, I think it was intended by the Legislature that a holding for twelve years, whether wholly before or wholly after, or partly before and partly after, the passing of the Act, should entitle a ryot to a right of occupancy.

395. As to the second point, I am of opinion that a land-holder cannot sue for a kabuliat at an enhanced rent, without giving the notice required by section 13, Act X. In all the cases which were decided as analogous to Ishore Ghose''s 1 Marsh., 151; W.R., Special Vol., 48, 131; on review, 148, some of which were suits for kabuliats, the notice to enhance was admitted. section 13 enacts that the ryot shall not be liable to pay a higher rent than the rent payable for the previous year, unless a written notice shall have been served on such ryot in or before the mouth of Chaitra, specifying the rent to which he will be subject for the ensuing year, and the ground on which an enhancement is claimed. If the ryot is unwilling to pay the enhanced rent, he may give up the land under the provisions of section 19, which enacts that a ryot who desires to relinquish land held by him shall be at liberty to do so, provided he give notice of his intention in or before the month of Chaitra of the year preceding that in which the relinquishment is to take effect. If he fail to give such notice, and the land be not let to another person, he shall continue liable for the rent of the land. It is admitted, I believe, on all hands that a suit for a kabuliat at an enhanced rent for the current year in which the suit is brought cannot be maintained, without a notice served in or before the mouth of Chaitra in the preceding year; but it is contended that the suit for a kabuliat at an enhanced rent commenced in or before the month of Chaitra in any year, is tantamount to a notice to enhance, provided the kabuliat is not to have effect until after the expiration of the month of Chaitra in the year in which the decree is given. In the present case the suit was commenced on the 3rd February 1864 before the expiration of the month of Chaitra; it did not ask for a kabuliat for the ensuing year, but simply for a kabuliat; but possibly it must be intended that the plaintiff asked for a kabuliat for the ensuing agricultural year, and that the decree which is general is that a kabuliat is to

be granted for the ensuing year at the enhanced rent fixed. But still I am clearly of opinion that the plaintiff had no right before the end of Chaitra in one year to ask for a declaration that he would be entitled to a kabuliat for the next year at an enhanced rent. The decree in such a case could only be on condition that the ryot thinks proper to continue his holding after the end of Chaitra, for he may relinquish his holding u/s 19 if he gives notice of his intention in or before the month of Chaitra.

396. If such a suit can be commenced in Chaitra, the last month of the agricultural year, to declare the right to have a kabuliat in the ensuing year, it might also be commenced in Baisakh, the first month in the year, or in any intermediate month between Baisakh and Chaitra, to declare that the land-owner is or rather will be entitled to a kabuliat at an enhanced rent in the ensuing year. The tenant, if the suit can be so commenced, must either defend it or not. If he does not defend it, the suit may be tried ex parte and determined against him. If he defends, he must either incur the expense of employing a mooktear or vakeel, or he must waste his time by going to the Court, and waiting there till his suit has been heard; and this, if the suit be commenced at a particular time of the year, may drag him away from, his home during harvest or seed time.

397. Would it not be a complete answer to such a suit commenced in Baisakh for a kabuliat for the ensuing year, to say-- "The time has not arrived. I may be dead before next year, or I may think fit to give up possession in Chaitra next, or there may be a drought, and there may be no increase in the value of produce, or of the productive powers of my land; for all I can say now, the value of my produce next year may be nil. The suit cannot be determined now?"

398. To decide in May 1865 to what amount the rent for 1866-67 ought to be enhanced in consequence of an increase in the value of produce, in order to fix the rent at which a lease for 1866-67 ought to be decreed, would involve the necessity of the Court''s proceeding on speculation as to what might be, instead of acting on an existing or past state of facts.

399. Then, why allow a tenant to be harassed by such speculative action to determine what he may or may not be liable to do next year? Surely litigation in the mofussil is harassing enough at present, without adding to it by allowing a zamindar in 1864 to commence a suit to declare that he will be entitled to a kabuliat in 1865 if certain events do or do not happen in the mean time.

400. It has been suggested that, if a zamindar sues for a kabuliat at an enhanced rent, he may enhance without reference to the grounds of enhancement mentioned in section 17 . This point I have already referred to in another part of my judgment. As to the other point, whether a land-owner can sue for a kabuliat at an enhanced rent without first tendering a potta. Such a suit has in substance a two-fold aspect: first, to enhance the rent, and to declare the rate to which it is liable to

enhancement; and, second, for a kabuliat at that rent. I think the suit may be maintained, if notice of enhancement has been given, for the purpose of determining the amount to which the rent may be enhanced. A decree in such a suit will have the effect given to it by section 81, Act X of 1859, which declares that, if a person who is required by a decree to execute a kabuliat refuse to execute the same, the decree shall be evidence of the amount of rent claimable for him, and that a copy of the decree under the hand and seal of the Collector shall be of the same force as a kabuliat executed by the said person.

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(1) Regulation VIII of 1793, section 60. XLIV of 1793, section 5. LI of 1793, section 10 . IV of 1794, Sections 6-7. VII of 1799, section 29, Clause 5