and the other two Advocates are willing to work in the case; and they will then be entitled to withdraw the compensation deposited towards their legal fees when the appeal has been heard. On these terms the petitioner is permitted to withdraw her application fo cancellation of the vakalatnama and engage another senior Advocate, if she so desires, to argue the case. Mr. Ram Krishna Jha, Mr. Arun Chandra Roy and Mr. Kali Prasad Upadhaya are entitled to the costs of this application.

LETTERS PATENT APPEAL.

Before Terrell, C.J. and Macpherson, J.

1930.

April, 1.

GANPAT LAL

v.

WAZIRA SINGH.*

Abandonment—auction-sale of holding—formal delivery of possession—original tenant continuing in possession and asserting title—whether constitutes abandonment—mere transfer insufficient—entry, landlord's right of—limitation, when begins to run against landlord—trespasser, possession of, necessary.

If, in spite of a court sale and delivery of possession, the raiyat actually remains on the land in disregard of the delivery of possession and asserting his tenancy, there is no abandonment by the raiyat and the landlord is not entitled to enter on the land as from the date of formal delivery of possession. Something more than mere transfer, at least *contra invitum*, is necessary to give the landlord a right of re-entry, or a cause of action for a claim to possession.

Held, therefore, that time does not begin to run against the landlord, under the law of limitation, until a person, whom he could designate a trespasser, is actually cultivating

*Letters Patent Appeals nos. 88, 89, 90 and 91 of 1928, from a decision of the Hon'ble Mr. Justice Ross, dated the 3rd August, 1928, affirming a decision of Babu Phanindra Lal Sen, Subordinate Judge of Patna, dated the 25th June, 1927, who in turn reversed a decision of Maulavi Abdul Aziz, Munsif, 1st Court of Patna, dated the 26th June, 1926.

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the land of the tenancy asserting a right adverse to his tenant, such tenant no longer having any connection with the land.

Monmotha Kumar Ray v. *Josada Lal*(1), *Rameshchandra Mitra* v. *Debia Charan Das*(2), *Siperunnessa Bibi* v. *Ramdeb Rai*(3), *Jogendra Nath Sircar* v. *Tincowri Bhattacharjya*(4) and *Atheruddin Taluqdar* v. *Murari Mohan Dutt*(5), followed.

Kalicharan Ghosh v. *Arman Bibi*(6) and *Prosanna Kumar De* v. *Ananda Chandra Bhattacharjee*(7), distinguished.

Appeal by the defendant no. 3.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

S. K. Mitra and *S. B. Prasad*, for the appellant.

K. P. Jayaswal and *B. C. Sinha*, for the respondents.

MACPHERSON, J.—In these four appeals under the Letters Patent the defendant no. 3 Ganpat Lal is the appellant.

The landlords of Alipur Keora brought four suits for the recovery of possession of as many holdings on the ground that in the absence of any custom of transferability of holdings in the village the appellant had purchased the holding of the defendant no. 1 in each case and obtained delivery of possession thereof on the 7th February, 1915, from which date therefore the plaintiffs' raiyat defendant no. 1 had abandoned the holding and plaintiffs were consequently entitled to re-enter.

The defences of the appellant were that he had been recognized as raiyat by the previous landlord and that the suit was barred by limitation.

The first Court negatived the contention as to limitation but sustained the plea of recognition and dismissed the suits.

(1) (1923) 28 Cal. W. N. 300.
(2) (1924) 28 Cal. W. N. 602.
(3) (1919) 24 Cal. W. N. 117.
(4) (1909) 10 Cal. L. J. 147.
(5) (1926) 47 Cal. L. J. 21.
(6) (1908) 13 Cal. W. N. 220.
(7) (1925) 30 Cal. W. N. 231.

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In appeal the contention as to limitation was not again pressed and the learned Subordinate Judge finding against the plea of recognition decreed the suits.

His decree was affirmed by a learned Judge of this Court, against whose decision these appeals have been preferred.

The material facts are briefly as follows:

In 1907 Rampragash Lal who was the landlord of the village conveyed it to Sujait Ali whose interest was eventually sold for arrears of Government revenue on the 26th September, 1921, and purchased by the plaintiffs' vendor who sold to the plaintiffs on the 12th May, 1922. The village contained 54 bighas 8 kathas of tenancy land which was held by six raiyats. Bulaki Lal who held 20 bighas was dispossessed by a thikadar who held between 1898 and 1902, and the other raiyats. Bulaki Lal successfully sued in 1898 for recovery of possession and in execution of his decree for mesne profits sold up in 1900 the remaining 34 bighas 8 kathas of tenancy land. The present appellant purchased the holdings in the name of Bulaki Lal and delivery of possession was given in May, 1902. But in the record-of-rights finally published on the 26th May, 1911, the names of the original tenants are recorded in respect of their respective holdings, the rent of which is bhaoli. Then the defendant no. 3 instituted in 1913 in the name of the widow of Bulaki Lal a suit for recovery of possession of the land which was successful. Delivery of possession was given on the 7th February, 1915. The appellant had some further disputes with defendant no. 2, a daughter of Bulaki Lal, in which he was successful in a suit in 1918.

The contentions before us are that the decision under appeal is erroneous both on the question of limitation and on the question of recognition.

As to limitation the point made before the Munsif which was that the appellant had been in adverse

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possession for over twelve years is admittedly untenable and was not repeated in the appellate Court. In this Court the contention is that the real point is that when the plaints were filed in April, 1925, the landlord had lost his right of suit by the lapse of twelve years from May, 1902. The learned Judge of this Court held that the question was not when the defendant's title accrued but when the holdings were abandoned by the original tenants, that it was one of mixed law and fact and that the Courts below having found that it was only in 1915 that the appellant got possession, the real abandonment must be held on the facts to have taken place in 1915 and the suit was not barred.

It is urged by Mr. S. K. Mitra that it is a pure question of law and that delivery of possession of the holdings of the raiyats having been given to appellant in 1902, it must be assumed that actual possession was given to the auction-purchaser resulting in abandonment by the original raiyat which gave the landlord a cause of action on and from that date for recovery of possession of the lands of the holding on the ground of abandonment.

Reliance is placed upon the decision in *Kali Charan Ghosh* v. *Arman Bibi*(1). But though it was there held that no direct proof of ouster was necessary when the holding had been sold and possession was in fact given to the purchaser, there is the important distinction that there the original raiyat definitely repudiated his tenancy from the date of his private sale. In the present instance the appellant entirely failed to show that he had ever paid rent in respect of the holdings to the landlord. On the contrary the evidence, including the entry in the record-of-rights, made it abundantly clear that so far from repudiating tenancy, the raiyats held on tooth and nail, successfully maintained their possession against the auction-purchaser and were recorded as raiyats during the record-of-rights and were in fact

(1) (1908) 13 Cal. W. N. 220.

dispossessed from the land in February, 1915, that is within twelve years of the institution of the suits. In my judgment it is not the date of formal delivery of possession that is significant in a case like the present. If, in spite of a court sale and delivery of possession, the raiyat actually remains on the land in disregard of the delivery of possession and asserting his tenancy, there is no abandonment by the raiyat and the landlord is not entitled to enter on the land as from the date of formal delivery of possession. The contract between the landlord and his tenant is that the latter shall cultivate the land and pay rent for it. In the present instance the raiyats, so far from ceasing to cultivate or repudiating their relation to the landlord as raiyats, were in cultivating possession of the land in assertion of their tenancy and, if they did not pay rent, implied that they were liable and ready to do so. Constructive repudiation cannot be here inferred so as to affect the landlord, who was entitled to ignore if indeed he knew of those transactions which left his raiyat cultivating the land settled with him as a raiyat and asserting his tenancy, and time could not begin to run against him under the law of limitation until a person whom he could designate a trespasser was actually cultivating the land of the tenancy asserting a right adverse to his tenant, such tenant no longer having any connection with the land. That only occurred in the present cases when the appellant secured for the first time actual possession in 1915 and not till then had the landlord any right to khas possession. As to *Dayamayi's* (1) case which has been cited the ultimate test of the determination of the tenancy is abandonment under section 87, relinquishment or repudiation, none of which occurred in these cases prior to 1915.

Mr. Mitra has indeed referred to *Prosanna Kumar De* v. *Ananda Chandra Bhattacharjee*(2) as showing that it is not necessary to prove as a fact that

(1) (1914) I. L. R. 42 Cal. 172, F. B.
(2) (1925) 30 Cal. W. N. 231.

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the holding has been abandoned and that abandonment may be directly inferred from the fact that the entire holding was sold and possession given to the purchaser. That, however, was a case where the purchaser of the holding at a private sale was put in possession by the vendor, who did not remain in possession of any portion of the holding nor make any arrangements to pay the rent. As the learned Judges remarked, the second appeal was concluded by the findings of fact.

On the other hand, though the reported decisions do not include any case closely resembling the present in which though the purchaser of a holding at auction-sale had received formal delivery of possession, the raiyat remained in actual possession, asserting that he was the raiyat of the landlord, several decisions of the Calcutta High Court go to support the view that something more than mere transfer, at least *contra invitum*, is necessary to give the landlord right of re-entry, or a cause of action for a claim to possession. As was remarked in *Monmatha Kumar Ray* v. *Josada Lal Podder*(1), "There is a considerable amount of law dealing with the question of the right of the landlord to re-enter the land of a non-transferable occupancy holding after its transfer by the tenant, but in no case has it been held that the mere transfer apart from any other consideration gives the landlord a right to re-enter when the tenant transferor actually remains in occupation of the land."

Again in *Ramesh Chandra Mitra* v. *Daiba Charan Das*(2) it was held in a case where the entire occupancy holding has been sold in execution of a money decree as well as a mortgage decree and thereafter the raiyat took a sub-lease from the transferee and remained in possession of some part of the cultivation and the homestead and had not refused to pay rent, that the auction-purchaser could not be ejected as there was in law no abandonment or repudiation of the tenancy by

(1) (1923) 28 Cal. W. N. 300. (2) (1924) 28 Cal. W. N. 602.

the tenant and the landlord thus not having a right of present possession could not eject the transferee. It was pointed out by Rankin, J., that the circumstance that the tenant was still on the homestead land and still cultivated a part of the holding is a consideration which takes the case out of the qualification intended by the word " ordinarily " in *Dayamayi's*(1) case. Reference was there made to *Siperunnessa Bibi* v. *Ramdeb Rai*(2) where it was held that there was no abandonment by the raiyat and, therefore, no right of re-entry accrued to the landlord where the raiyat sold his holding but remained in cultivating possession on the strength of a sub-lease from his vendor. The decision was similar in *Jogendra Nath Sircar* v. *Tincowri Bhattacharjya*(3) where the sale of the holding was in execution of a money decree, and it was held that as the raiyat continued in possession of a portion of the holding and paid the whole rent, the landlord was not entitled to eject the purchaser as a trespasser as the tenant had not abandoned the holding. The decision in *Siperunnessa Bibi* v. *Ramdeb Rai*(2) and in *Monmatha Kumar Ray* v. *Josada Lal Podder*(4) were followed in *Atharuddin* v. *Murari Mohan*(5). No doubt one of the learned Judges doubted whether the very fact of the tenant transferring the whole of the holding to a stranger and attorning to him was not sufficient evidence of repudiation of the tenancy under the landlord, but the point obviously does not affect the present case where there was no attorning to a third person but the original raiyats persisted that they and nobody else held the holdings under the landlord and they did not cease to cultivate the holdings.

In my opinion the decision under appeal is correct.

(1) (1914) I. L. R. 42 Cal. 172, F. B.
(2) (1919) 24 Cal. W. N. 117.
(3) (1909) 10 Cal. L. J. 147.
(4) (1923) 28 Cal. W. N. 300.
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As to the second point it is urged that the facts found amount to recognition. The claim is now restricted to an incident of the year 1919 when heirs of Sujait Ali representing 8-annas of the inheritance sued the appellant for rent. It has been urged before us, first, that this constituted a recognition of the appellant's tenancy in the whole holding, because they made the other 8-annas co-sharers parties defendants —a position quite untenable—and in any event that it constituted a recognition by the plaintiff-co-sharers at least. But that is not the whole account of the matter. The suit was eventually withdrawn with liberty to bring a fresh suit, the ground being that

> "there were formal defects in the plaint one of them being this that although their collection was joint with that of the pro forma defendants still they had sought for recovery of their share of rental alone in these suits."

The learned Judge of this Court considered that as the suit was withdrawn, the landlord would not be bound by any statement contained therein as the withdrawal of the suit prevents it from being treated as a firm admission of a tenancy. I am inclined to agree with that view. But there is a further consideration. We have had the plaints translated and it appears that though the appellant and Musammat Raj Kuar also were sued, the first defendant in each case is the original raiyat, and the suit is brought against the defendants, not under the designation of raiyat (manifestly they could not all be the raiyat) but as "cultivators" thereof who reaped and took away the crops of the years in suit without the permission of the plaintiffs. Clearly the suits were deliberately framed to avoid recognition of the appellant as the raiyat of the holdings. This plea accordingly fails.

There is a further plea of the respondent which, however, it is unnecessary to examine.

The appeals are without merit and are dismissed with costs.

COURTNEY TERRELL, C. J.—I agree.

Appeals dismissed.