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landed property has no right to do anything which alters the condition of the joint property without the consent of his co-sharers. If he thinks his interest in the property might be improved by works of a particular character, he can effect a partition, and improve his particular share. It seems, in this case, the plaintiff interposed when the defendant commenced the infringement of his (plaintiff's) rights. The suit was reasonable, and the Judge was quite right to order the removal of the materials of the building and the building itself, as far as it had gone.

The special appeal is dismissed with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

SRIHARI MANDAL *v.* JADUNATH GHOSE.*

Act X. of 1859, s. 65—Recording new Issue.

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A. sued B. for enhancement of rent at a rate specified; but at the trial failing to prove that proper notice had been served upon B., he claimed only rent at the rate formerly paid. No issue was recorded as to what the former rate had been, until the last day of hearing, after both parties and several of the witnesses had been examined in respect of the issues originally recorded; and the Collector without adjourning the case for trial upon such issue, having examined two witnesses who remained for examination, gave judgment in the case.

He d., that under section 65 of Act X. of 1859, the case ought to have been adjourned, and a convenient day fixed for trial upon the new issue. Case remanded accordingly.

THIS suit was brought for arrears of rent at enhanced rates. The plaintiff alleged that the defendant held a certain quantity of land for which he had to pay rent at the rate of 19 Rs. 6 annas yearly, and that upon certain specified grounds, he had given notice to the defendant to pay rent at an enhanced rate; and in accordance with that notice, he now sued to recover rent at the rate specified. The defendant, in his written statement, alleged that the quantity of land which he held was less than that stated by the plaintiff, and he also alleged that the rent was not 19 Rs. 6 annas, but 10 Rs. 15 annas.

* Special Appeal, No. 63 of 1868, from a decree of the Officiating Judge of Midnapore, affirming a decree of the Deputy Collector of that district.

The following issues were originally recorded, on the 18th of July 1867, by the Deputy Collector who tried the suit:

1. Was the notice duly served?
2. What is the amount of land held by defendant?
3. Can plaintiff claim the enhanced rent on account of excess in measurement?

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Several witnesses were then examined on both sides. It was found that no notice had been duly served upon the defendant; accordingly, the claim for enhanced rent was abandoned, on the 12th August 1867. On the 12th September 1867, the Deputy Collector recorded new issues, and having examined two witnesses who remained to be examined in respect of the former issues, delivered judgment. The new issues recorded were:

1. Is the land claimed lakheraj or not?
2. What is the amount of defendant's rent?
3. What arrear is due from him?

The Deputy Collector decided the first issue in favor of the plaintiff, that the land was not lakheraj. He also found that the rent of the holding was Rs. 19-6-3, out of which the plaintiff acknowledged the receipt of Rs. 11; and he, therefore, gave a decree for the plaintiff for the remainder, *viz.*, Rs. 8-6-3, with interest and costs.

On appeal, the Judge affirmed the decision of the Court below.

The defendant appealed.

Baboo *Anukul Chandra Mookerjee* (Baboo *Rash Behari Ghose* with him) for appellant.—The finding of the Judge that the lands are lakheraj is based solely upon the zemindary papers, and is, therefore, a finding upon no legal evidence. The plaintiff sued for arrears of rent at enhanced rates, and when it was found that no notice had been served, the suit should have been dismissed. The plaintiff gave up his main contention, namely his right to enhance, and, consequently, the issues originally recorded had to be altered; and the point then to be determined was, whether any arrears at the old rate were due or not. Under these circumstances, the Courts below ought to have at once dismissed the suit: or allowed the defendants an oppor-

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tunity of contesting this portion of the plaintiffs' claim, and adducing evidence in support of their defence.

Baboo *Ashutosh Chatterjee* (Baboo *Hem Chandra Banerjee* with him) for respondent.—The plaintiff sued to recover arrears of rent at enhanced rates, and though obliged to give up his claim for enhancement, there was no reason why his main claim should not stand. He was clearly entitled to recover arrears of rent at the old rate, and it was not necessary for him to bring a separate suit for this.

The other and the principal objection of the appellants is wholly untenable, inasmuch as when the new issue was recorded, the defendants were present in Court with their witnesses, and they could have easily proved, if so disposed, that no arrears were due from them. They failed to adduce any evidence, at the proper time, to establish their contention; they could not now plead ignorance and surprise.

The judgment of the Court was delivered by

JACKSON, J. (After stating the facts).—It has been argued before us, that there was no fair trial as to the original rate of rent paid by the defendant, the defendant having, with regard to the trial of that issue, been taken by surprise. The question is one in which, after some consideration, we think that the appeal ought to prevail. The directions as to the mode of trial and framing of issues under Act X., are somewhat different from those prescribed by the Civil Procedure Code. Act X. appears to contemplate suits before the Collector of two categories, one in which the question at issue is of an extremely simple kind, capable of being decided upon the evidence adduced in the first instance, and where the Collector can give judgment at once. In such cases, after hearing the evidence, and without the framing of any formal issue, the Collector is able to pass a decree. But section 65 provides (reads)* It seems to us,

*Act X. of 1859, s. 65.—“If on such ex- parties are at issue on any question upon
amination as aforesaid, it appears that the which it is necessary to hear further evi-

therefore, that when the Collector finds that there is a point on which the parties are at issue, and on which further evidence will be required, his duty is not only to frame such issue, but to fix a convenient day for the trial of that issue, regard being had to the facilities which the parties may have for producing their evidence. It would clearly not be fair, and not in accordance with the provision of that section, for the Collector having first framed certain issue, and having examined the parties or their witnesses, in connection with those issues, suddenly, upon the last day of trial, to frame a new issue of fact, demanding proof on either side, of which the parties had no notice, and as to which, consequently, they could not be prepared with their evidence.

It is impossible for us to say, as the matter comes before us in special appeal, whether the defendant, who appeals, could have produced further evidence, or no. It is sufficient for the purposes of this appeal to say, that possibly he might have been able to do so; and as the plaintiff can be, in no wise, prejudiced by affording the defendant an opportunity of producing that evidence, and as the defendant might be seriously prejudiced by not being afforded such opportunity, we think it right to set aside the decision of the lower appellate Court, and to remand the case, in order that the defendant may have the opportunity of producing evidence to show what the rate which was formerly paid by him may have been, and of course the plaintiff will, also, be at liberty to produce any further evidence which he may think necessary.

dence, the Collector shall declare and trial shall take place on that day, unless record such issue, and shall fix a convenient day for the examination of witnesses, and the trial of the suit; and there be sufficient reason for adjourning it, which reason shall be recorded by the Collector."

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