and the plaintiff's suit dismissed with all costs.

Bayley, J.—This is a suit to assess at enhanced rents a tenure which is admittedly held under a howladaree amulnamah-kubooleut propounded by plaintiff as given by defendants, and not denied by defendants to have been so given.

This kubooleut states that after one year rent-free (1260) the rent is to be one rupee a kanee in 1261, two rupees a kanee in 1262, three rupees a kanee in 1263, and the *poor-dustoor* (full customary) rate of five rupees per kanee in 1264.

The land is termed jungle puteet. Excess found with reference to the boundaries after measurement is to be assessed. An extra allowance of area (as is usual in howlah tenures) to about $\frac{1}{6}$th is given in, *i. e.*, 1 kanee 4 gundahs is to be held rent-free, while 1 kanee is to bear the agreed rent.

It is impossible, I think, to read this kubooleut without coming to the conclusion that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of partly rent-free and partly progressive jumma allowed in those cases (and not in the case of *cultivated* lands), and that the full customary rent of 5 rupees per kanee from 1264 was thereafter to be paid. I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear *all* the expense and trouble of reclamation, and, having done so, was, in the first year after full rent could be paid, *viz.*, after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rate of neighbouring cultivated lands as to which no jungle waste had to be cleared.

Then as the *excess* area, I think it was clear that supposing, after reclamation, more land of the lessor's was found held by the lessee than given by the specifications of the lease *as to boundaries*, that excess should, as part of the same lease, be liable to the same terms as the other lands originally given under it.

In respect to the question whether the disputed pottah is a forgery or not, I do not think it is necessary to determine the point, while the admitted kubooleut, on which the plaintiff sues, is before us, containing the admitted agreement of the parties. I would dismiss plaintiff's case.

The 3rd January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Hindoo Law—"Recovered Property."

Case No. 204 of 1867.

*Application for review of judgment passed by the Hon'ble Justices W. S. Seton-Karr and A. G. Macpherson, on the 5th June 1867, in Regular Appeal No. 309 of 1866.**

Bissessur Chuckerbutty and others, Defendants (Appellants), *Petitioners,*

versus

Seetul Chunder Chuckerbutty, Plaintiff (Respondent), *Opposite Party.*

Mr. Tagore and *Baboo Bungshee Dhur Sein* for Petitioners.

Baboo Sreenath Dass for Opposite Party.

The Hindoo Law on the subject of "recovered" property applies to cases in which the property has passed from the family to strangers, and has been held by them adversely to the family, and not to cases where the property has been held by one claiming (though unfoundedly) to be a member of the family.

Merely obtaining a decree for possession is not "recovering" the property.

"Recovery," if not made with the privity of the co-heir, must at least be *bonâ fide*, and not in fraud or by anticipation of the intentions of the co-heir.

Macpherson, J.—We are asked to review our judgment in this case on the ground that the defendants (the applicants for the review), at their own expense and by their own exertions, recovered the property of Shib Soonduree from the wrongful possessor Ram Chunder, by a separate suit, and that, therefore, we have erred in not, in the first instance, giving a fourth of the recovered property to the defendants, and declaring the plaintiff entitled to only a half share of the residue.

There are various grounds in addition to that relied upon by us in our judgment, on which we think that the conclusion at which we arrived was correct, and that no review ought to be granted.

In the first place, it appears to us that this is not a case of the *recovery of property which has been lost* within the meaning of those texts of the Hindoo Law which provide for a fourth share being allotted to the recoverer. The property in suit was never, in fact, lost to the family, for Ram Chunder held it, not as being a stranger, but as being

* *See* 8 W. R., page 13.

the adopted son of Shib Soonduree; and upon the one question of his being or not being her adopted son, his whole title admittedly turned.

The Hindoo Law, on the subject of "recovered" property, does not, in our opinion, apply to cases such as this—cases merely of disputed inheritance; it applies to cases where the property has been seized by others, or lost—cases in which it has passed from the family to strangers, and has been held by them adversely to the family, and not merely under an alleged (though unfounded) title as members of the family.

In the Dyabhaga (Chapter VI., Section 2, Clause 31), referring to the recovery by the father of lost property inherited from the grandfather, it is spoken of as property "which has *long* been lost." And in Clause 34, we find the following: "Vrihashpati "says: 'Over the grandfather's property "'which has been *seized (by strangers)* and "'is recovered by the father,'" &c. Clause 38 is as follows: "Sankha propounds a special "rule regarding land—'Land inherited "'in regular succession, but which had "'been *formerly* lost, and which a single "'heir shall recover,'" &c. So the Dya Krama Sangraha (Chapter 4, Section 2, Clause 6) says: "So Yajnyavalkya: 'An-"'cestral property which had been *before* "'*usurped* by any one, and afterwards re-"'covered by an heir,'" &c. And (Clause 8) he has stated a special rule regarding "land—'land inherited in regular succes-"'sion, but which has been *formerly lost*, "'and which a single heir shall recover,'" &c.

In Sir William Jones's translation of the Institutes of Manu (Chapter IX., Clause 209) the rule, which is probably the foundation of all the subsequent texts, is thus stated: "If "a son by his own efforts recover a debt or "property unjustly detained, *which could "not be recovered before by his father*, he "shall not, unless by his free will, put it "into parceny with his brethren, when, in "fact, it was acquired by himself."

No doubt, some of these texts are of general application, and do not relate specially to the recovery of land. But all of them have a bearing on the question, and, looking at them together, we have no doubt that they were all of them meant to apply to cases in which the property recovered (whatever its nature) had actually passed away from the family into the hands of strangers.

In the next place, it is not proved that the property, which is the subject of this suit, was, in fact, "recovered" by Bissessur, as alleged. The plaintiff instituted his suit some six months before the High Court decided, in the appeal in Bissessur's case, that Ram Chunder had not proved himself to be the adopted son of Shib Soonduree. The plaintiff in his plaint alleges Ram Chunder to be in possession: Ram Chunder, by his written statement, impliedly admits that he is so; and Bissessur nowhere in his written statement states that he is himself in possession. The mere obtaining a decree for possession would not, as it appears to us, be in itself "recovering" the property.

Finally, we find that "recovery," if not made with the privity of the co-heirs, must at least have been *bonâ fide*, and not in fraud of their title or by anticipating them in their intention of recovering the lost property. (*See* Strange, Vol. I., p. 217, 2nd Ed.) And in Halhed's Gentoo Code, which was quoted by the learned Counsel who supported the application for a review of our judgment, the same principle is expressly laid down. The rule is thus given (Chapter II., Section 9, page 79, of the edition of 1776): "If in the same "manner, *by permission of the partners*, "one of them occupies any glebe land of his "father and grandfather, then he shall "divide such glebe into four shares; and "from them he shall first take to himself "one share, and afterwards divide the three "remaining shares equally between himself "and his partners." (*See* also Colebrooke's Digest, Book V., Chapter 5, Section 2, para. 359, and the comments by Juggannatha.)

Bissessur, in his suit against Ram Chunder, chose to ignore his co-heir, the plaintiff in the present suit, and acted throughout antagonistically to, if not in fraud of, the rights of the plaintiff. Under such circumstances, even if Bissessur had "recovered" the property, he would not have been entitled to retain in the first instance a one-fourth share by way of remuneration for having recovered it.

On the whole, we are of opinion that we decided rightly in holding that the defendant Bissessur and his brothers were entitled to only an eight-annas share of the property inherited from Haradhun on the death of Shib Soonduree, and we reject this application with costs.