with the present, namely, special appeal* No. 571 of 1865, decided on the 6th September 1865.

According to the view which I have just expressed, the defendants are not liable to be called upon to pay a rent greater than Rupees 5 per kanee with the prescribed rukba, for so much of the plaintiff's land occupied by them as lies within the boundaries specified in the kubooleut, and is, therefore, held subject to the terms alone which are therein mentioned, and no others. I also think, for the like reasons, that their jumma of Rupees 280 cannot be increased by the addition of an amount for rent of such lands as they may hold in excess of the 4 droons, 3 kanees, 4 gundahs within those boundaries, except by proceeding in the manner expressly laid down for that purpose in the kubooleut; and this suit is certainly not a step in accordance therewith. As far, therefore, as concerns the land lying within the mentioned boundaries, I am of opinion that this appeal should be decreed, and the plaintiff's suit be dismissed with costs in both Courts.

As regards the land of the plaintiff which the defendants hold outside the boundaries given in the kubooleut, I think the plaintiff is entitled to receive rent for it at a fair and equitable rate, but the evidence before the Court does not enable me to determine what rate would be fair and equitable. There is nothing to show whether that portion of land was, at the time when its culture was first commenced, equal to, in quality or condition, or better or worse than, the land for which the lessees in 1260 agreed to give a gradual rent rising to 5 rupees. And, even if this starting point had been given us, we have no means afforded to us of discriminating between that portion of the present increased annual production of the land which is due to the efforts of the lessees, and that which is attributable to the improvement by other means of the productive power of the land itself, and I think it would not be equitable to oblige the defendants to pay a rent calculated on the present annual market-value of the land, without any deduction whatever in consideration of the expenditure effected by them in bringing about the state of productiveness which the original jungle or waste land now exhibits. It lay upon the plaintiff to make out distinctly and separately the different elements upon which he has rested his right to enhance, namely, excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of produce. It is not enough for him to show that there has been a general increase in some one or all of these respects since a given period (in this case since the land was waste, and bore nothing but hoghle grass), he must with reasonable definiteness establish the amount of each of those which he relies upon. If, for instance, he does not choose to, or cannot, separate the increment of productiveness which is due to his tenant's agency, in a case where that agency is admittedly most markedly operative, and must be taken account of, from that which proceeds from other causes, it is certain that the Court cannot do so for him. It seems to me that the plaintiff has failed to support with proper evidence that part of his case upon which alone he is, as I conceive, legally entitled to seek for enhancement of rent; and therefore that, even as regards this, his suit ought to be dismissed.

Under all the before-mentioned circumstances, it results that, in my judgment, this appeal ought to be decreed in its entirety,

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* The 6th September 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Case No. 571 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 7th January 1865, reversing a decision passed by the Deputy Collector of that District, dated the 20th July 1864.

Chikundee Nikaree (Plaintiff), *Appellant,*

versus

Anund Chunder Mitter and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboos Dwarkanath Mitter and *Ashootosh Dhur* for Respondents.

Pundit, J.—THE allusion in the pottah, dated 7th of Joisto 1257, to the special appellant's liability to pay the rents that may, after general survey, be fixed for the lands held by him, refers to the *amount* of rent that for the quantity found in his possession, according-ly to the highest rate mentioned in the pottah, he may have to pay. To construe otherwise would be unfair to the tenant who has to pay for all works of damming, draining, clearing, &c., necessary to bring the lands into a state fit for cultivation.

It cannot easily be believed that for new-formed chur lands, not yet properly made fit for cultivation, requiring a great deal of labour and expense to make them worth holding by an agriculturist, on condition of paying lower rate only for 5 or 6 years, and that, too, progressive in each year, a pottah would be taken, that is, on terms according to which the landlord will have a legal right to demand an enhancement at any time after that short interval.

We, accordingly, decree the appeal with costs, and, reversing the decisions of both the Lower Courts with costs, decree the claim of the special appellant.

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.