which is now in question in this suit; and, *thirdly*, that this property (Dogachea) was particularly named as part of the property divided.

If this witness is worthy of being believed, his testimony entirely makes out the plaintiff's claim.

On the other hand, the defendant complains that secondary evidence of the contents of the deed ought not to have been received, because he says the plaintiff has given no evidence to the effect that it is not within her power to produce the deed itself.

I believe we are unanimous in thinking that this objection comes now too late.

The issue was distinctly raised in the Court of first instance as to the custody in which the deed was, and as to its contents; and it does not appear that any objection to the admission of the secondary evidence on that issue was made in that Court.

The case came up to this Court on special appeal from the decision of the Lower Appellate Court, and as far as we can learn, neither in this Court nor in the Lower Appellate Court, was any objection ever hinted relative to the reception of this evidence. It was only when the case was remanded back to the Lower Appellate Court for re-trial upon an issue named that the objection was first made.

Now, I need not point out that an objection of this kind not only comes properly in the Court of first instance, but cannot well be made in any appeal Court. For, if it were made at the time when the evidence is tendered, and were then held good, it would be in the power of the party desiring to adduce secondary evidence to take some steps for procuring the original, or at any rate to account for its absence. In a Court of appeal, this course is out of the question.

But, further, I am not altogether prepared to say that, under the circumstances of this case, the secondary evidence would have been improperly received, even had it been objected to. The plaintiff had in her verified plaint asserted that the original document was in the possession of the principal defendant, and she had asked the Court to summon him to produce it, thus doing all she could, in pursuance of the provisions of Section 40 of Act VIII. of 1859, for procuring the production of the document if she really believed, or had cause to believe, that it was in the possession of that defendant. The defendant in his written statement declared that the document was not with him, but at the same time supported the *bona fides* of the plaintiff's statement by saying that he knew where it was; that it was in the possession of Tarinee Churn, and therefore certainly not under the immediate command of the plaintiff. Then we have Tarinee Churn examined in the cause, and deposing on oath to this document, with all the other documents, being in possession of the first named defendant.

I should be very loth to say that a Court of justice having arrived at this stage of the conflict between the parties could not, in the exercise of its discretion, allow the plaintiff to produce secondary evidence of the contents of the document, to go of course for as much as it might be worth.

We think, then, that the defendant has not succeeded in his contention, and that the plaintiff has good ground, on special appeal, to complain of the conclusion at which the Judge has apparently arrived. For, to repeat, we think that the admission of secondary evidence cannot now be rightly objected to, and that the secondary evidence which the plaintiff has adduced, if it is to be believed, established the plaintiff's case.

We, therefore, reverse the decision of the Lower Appellate Court, and remand the case for re-decision, adding the direction that if the Judge believes the evidence of Kishoree Mohun Bose he ought to give a decree in favor of the plaintiff.

Costs will follow the event.

The 3rd June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Uniform rent—Rent in kind and in cash.

Case No. 608 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 12th December 1868, reversing a decision of the Deputy Collector of that District, dated the 15th September 1868.

Miterjeet Singh and others (Defendants), *Appellants,*

versus

Toondun Singh (Plaintiff), *Respondent.*

Baboo *Narain Bose* for
Appellants.

Moulvie Syud Murhumut Hossein for
Respondent.

An arrangement, by which a certain rent in cash is to be paid in lieu of rent in kind, does not show a variation in the rate of rent, but is tantamount to saying that the money-rate represents and is equivalent to what was paid before in another way.

Glover, J.—THIS was a suit for enhancement of rent on 87 beegahs 10 cottahs of land from the year 1275, after notice.

The defendant pleaded that the land had been in the possession of himself and his predecessors from generation to generation at a uniform rate, and that he was entitled, therefore, to the presumption arising under Section 4 of Act X. of 1859. He also objected to the grounds of enhancement as stated in the notice, and likewise to the quantity of land which the plaintiff stated he was possessed of. His allegation was that he held 2 beegahs 10 cottahs less than stated by the plaintiff.

The first Court considered that there was no presumption arising in favor of the defendant; that a variation in the rate of rent was proved; and that there was no evidence that the defendant held below the rates prevailing in adjacent lands possessing similar advantages; but for the reasons given by him, the Moonsiff gave the plaintiff a decree at the rate of 3 rupees per beegah. This decision dissatisfied both parties, and two appeals were preferred to the Judge, the result of which was that the plaintiff got a decree for enhancement at the rate of 7 rupees per beegah, the Judge holding that the pottah by its terms showed that there had been a variation in the rate of rent subsequent to the Decennial Settlement, and that no presumption arose under Section 4 of Act X. of 1859.

The only point which it is necessary for us to notice in special appeal is the one arising under Section 4 of Act X. of 1859. The special appellant contends that the wording of his written statement sufficiently shows that he claimed to hold the whole of the lands from the date of the Permanent Settlement, especially when in that statement he made a special reference to, and claimed the benefit of, Section 4 of Act X. of 1859. It has been ruled in several decisions of this Court that where a ryot pleads that he and his family have held certain lands from generation to generation, and on the strength of that holding claims the benefit of the presumption arising under Section 4 of Act X. of 1859, he should be supposed to have dated his claim from the date of the Permanent Settlement; but that where a tenant fixes some particular date as the one from which his tenancy commenced, no matter how remote that date might be, if subsequent to the Permanent Settlement, he was no longer entitled to claim the benefit of the presumption arising under Section 4.

In this case, it is quite clear that the defendant did claim to be entitled to the presumption that he held from the date of the Permanent Settlement; and if he can prove that he has paid a uniform rate of rent for 20 years before the institution of the suit, he is entitled to the benefit of that presumption. It has been argued on the other side that the wording of the pottah itself shows that there was a variation in the rate of rent in the year 1249 F. S. We have had the pottah read to us, and it does not appear that there was any such variation as stated by the plaintiff. The reason for executing this pottah was that before the year 1249, the tenant in possession had been paying rent in kind, and the pottahdar was to make arrangements for the payment in future of the rent in cash; and the deed states that a rent of 2 rupees per beegah will for the future be taken in lieu of the rent in kind.

Of course, it is a simple impossibility for any body to say or prove, after such a long period of years, what was the actual value of the rent in kind paid up to the year 1249, inasmuch as that rent must have depended on very many circumstances, such as the fertility of the ground, the changes of seasons, and a hundred other things; but it seems quite clear to us that the fixing of 2 rupees a beegah in lieu of what had been paid in kind was tantamount to saying that that money-rate of rent represented, and was equivalent to, what had been paid before in another way. The law throws the burden of proving anterior variation on the party asserting it. If, in this case, the ryot shows that he has paid rent at a uniform rate for 20 years, he need do nothing more, and it will be for the landlord to prove that in some one of the years previous to the year 1249 the rate of rent had varied.

As the question of uniformity of payment of the rent for 20 years before suit has not been gone into by the Judge in the Court below, we think that the case must be remanded for that purpose. If the defendant can prove that for the last 20 years he has paid at a uniform rate of rent, and the landlord cannot disprove it, he, the tenant, will be entitled to the benefit of the presumption arising under Section 4 of Act X. of 1859, for there is nothing in the wording of the pottah showing a variation in the year 1249. Costs to follow the result.

The 4th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Section 230, Act VIII., 1859—Onus probandi—Possession.

Case No. 220 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 11th November 1868, affirming a decision of the Moonsiff of that District, dated the 27th March 1868.

Woodoy Tara Chowdhrain (Plaintiff), *Appellant,*

versus

Khajah Abdool Gunee (Defendant), *Respondent.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Mr. C. Gregory for Respondent.

In a suit under Section 230, Code of Civil Procedure, to recover possession, as part of plaintiff's share of a pergunnah, of certain fisheries of which she had been dispossessed by defendant, though they were part of a *julkur* mehal which had been left by a partition in the joint possession of all the shareholders, defendant averring that the fisheries in dispute had been created since the partition:

HELD, that it lay with the plaintiff to start her case by showing that the fisheries were a part of the *julkur* mehal held ijmalee by the parties, and that it was specially necessary for her to prove *bonâ-fide* possession.

Hobhouse, J.—THIS was a suit under the provisions of Section 230 of the Code of Civil Procedure to recover possession of certain *julkurs*, of which the plaintiff alleged she had been in possession as part of her share of Pergunnah Attia and had been dispossessed by the defendant. The plaintiff's contention was that she was one of the 8 annas shareholders of one part of the mehal, and that the defendant was one of the 8 annas shareholders of the other part of the mehal; that this mehal had been partitioned in 1838; that by that partition the *julkur* mehal was left in the joint possession and enjoyment of the shareholders of the 16 annas, and been held by them ever since; and that particular fisheries of which plaintiff sues to recover possession were part of that meha

The defendant does not seem to have denied the partition in question, nor that the *julkur* mehal at the time of that partition was left and had been ever since held ijmalee; but he averred that the particular *julkurs* for which the plaintiff sued were *not* a part of the *julkur* mehal created by the partition of 1838 and held ijmalee, but had been created since the partition had been created, he said, by the diluvion of one of his villages in the mehal, and had been ever since held by him as proprietor.

Both the Courts below have found that the plaintiff has failed to establish her case, and have dismissed her suit.

In special appeal, it is urged that the Courts below have proceeded on a wrong theory and thrown the burden of proof upon the wrong person, and two cases are quoted, (1) page 41, Volume VI., Weekly Reporter; (2) page 267, Gap Volume of the Weekly Reporter of 1864.

In both these cases, it seems to us, there was no contention but that the *julkurs* in question were a part of the original *julkur* mehal, or had sprung out of it or were additions to it.

Here, however, the first question that arises and was in issue between the parties was whether the two particular *julkurs* in dispute were a part of the *julkur* mehal held ijmalee by the plaintiff and the defendant as such part of such mehal. In such a case, the burden of proof was clearly upon the plaintiff to start her case, by showing that the particular *julkurs* in question were a part of the *julkur* mehal held in ijmalee by the parties; and, as pointed out by Mr. Gregory, it was especially necessary in this case that the plaintiff should prove the possession which she set up, because a suit under the provisions of Section 230 can only proceed on the ground that the plaintiff was *bonâ fide* in possession of the property which she sues to recover; while here we have a distinct finding of the Lower Appellate Court to the effect that "there is an "entire want of evidence as to the plaintiff's "possession."