expenses were furnished to him. The bailiff witness, who deposes to the service, admits that Khogendro expressed his willingness to attend if his expenses were tendered, but he knows nothing further, and there is nothing on the record to show that they were tendered; whilst, on the other hand, there is proof that Mr. Cowell's expenses were tendered and received. Now, if the defendant's plea of payment to the zemindars, and his subsequent handing over of the receipts to Khogendro, were true, we should have expected that he would have spared no pains to secure such a very important witness as Khogendro himself. Mr. Cowell could have had no special knowledge of anything connected with the suit, and his evidence could have proved little or nothing; but Khogendro's was the backbone of the defendant's case, and yet we find him altogether neglecting his interests and omitting to deposit the money which would have secured the presence of his principal witness. We do not therefore, at this late stage of the case, consider ourselves justified either in ordering Khogendro's evidence to be taken, or in taking it ourselves. The less so as there were other ways of proving the payments by the evidence of the parties to whom and in whose presence they were made. We may remark in this place that Ishen Chunder's own deposition as to the time and manner of his alleged making over of the receipts to Khogendro is extremely vague and unsatisfactory. He makes three distinct and opposite statements as to the year, and two as to the month. He admits, moreover, that he never mentioned the fact to the Receiver, Mr. Cowell, nor entered any memo. of the transaction in what he calls his *pucca* account-books; and, as we have before stated, although he mentions the names of at least four persons who were present, he has not thought proper to call any one of them as a witness.

It remains then that the defendant, on whom was the *onus* of proving payment of what was admitted to be the correct rate of rent due on the estate, has altogether failed to prove such part of it as relates to the balances of the years 1275 and 1276. And we see no force in the defendant's objection as to the year in which some of the money was paid. That money was paid as rent *in* 1276, whilst there was still a balance of 1275 unpaid is likely enough, but there is nothing on the record to show that that money was paid as rent *for* 1276, or that rent for that year was paid whilst there was still a balance due for 1275.

As the *onus* of proving payment in full was on the defendant, and as he failed to support that *onus*, both the plaintiff and the co-plaintiff Onath Nath Deb are entitled to their full shares of the balance of the admitted rent. The decree of the Court below is modified accordingly, and Mr. Cowell, the Receiver, and Onath Nath Deb will each recover Rs. 1,724-11-4 with interest. The appeal of Ishen Chunder (No. 274 of 1871) is dismissed, and Ishen Chunder will pay the whole costs of this litigation.

The 26th April 1872.

Present:

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

Act VIII. of 1859, s. 2—Res adjudicata—Right of Occupancy (under Act X. of 1859, s. 6)—Holding as Koorfadar or Trespasser—Erection of Building—Acquiescence.

Case No. 859 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 24th April 1871, affirming a decision of the Moonsiff of Ghattal, dated the 23rd January 1871.

Ishen Chunder Ghose and others (Plaintiffs), *Appellants,*

versus

Hurish Chunder Banerjee (Defendant), *Respondent.*

Baboo Taruck Nath Dutt for Appellants.

Baboo Bama Churn Dutt for Respondent.

Plaintiff having in a former suit obtained a declaration that certain lands was his mál land, and not defendant's lakheraj, served defendant with a notice to quit, and on his non-compliance with that demand, brought the present suit for ejectment and *khas* possession. HELD that section 2, Act VIII. of 1859 did not apply to such a case, the causes of action in the two suits not being the same.

HELD, also, that defendant's holding either as a *koorfadar* (sub-lessee) or as a trespasser gave him no right of occupancy under section 6, Act X. of 1859; and that his erection of a mud house on the land and dwelling there for more than 12 years afforded no presumption of acquiescence on the part of plaintiff.

Kemp, J.—THE plaintiff is the special appellant in this case. He sued to recove

khas possession of two cottahs of land by removal of a mud house erected by the defendant on that land. The plaintiff is admittedly the talookdar of the mouzah on which the land is situated. Previously, the plaintiff sued the ryot Muddun Ghose to enhance the rent of his tenure, and in that suit included these two cottahs. Muddun Ghose pleaded that these two cottahs did not form part of his holding, but that they belonged to the lakheraj holding of the present defendant. The present defendant also intervened in that rent-suit and claimed these two cottahs as lakheraj, and the result of that was that the rent was assessed on the holding of Muddun Ghose, excluding the two cottahs which were claimed in that suit as lakheraj by the present defendant, and which claim was supported by the tenant Muddun Ghose. The talookdar, therefore, being foiled with reference to these two cottahs, brought a suit for a declaration that these two cottahs were mâl lands and for possession. It was found in that suit that the lands were not lakheraj, but that they were mâl lands, and a plaintiff's title to them as mâl land was declared. The plaintiff then served a notice on the defendant to quit the land; and the defendant not having complied with that demand, the present suit is brought.

Both Courts have dismissed the plaintiff's claim, mainly on the ground of equity—that, as the defendant had built a mud house on the land at some expense, and dwelt there for a long time, more than 12 years, it would not be equitable to eject him. The first point is whether section 2 of Act VIII. applies to this case or not. We are clearly of opinion that section 2 does not apply. That section refers to causes of action which have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. Now, it is very clear that the present cause of action which is for ejectment of the defendant and *khas* possession is not the same cause of action tried in the former suit. Therefore section 2 does not apply.

We then come to the question whether the defendant has acquired a right of occupancy in this land. We think that he has not. It is very clear that, if the defendant claims to have held this land as a *koorfa* tenant or sub-lessee of Muddun Ghose, such holding would not give him a right of occupancy. Then it may be said that he has held the land as lakherajdar; but it has been found in a suit between the parties, namely, the present plaintiff and the defendant, that the land was not lakheraj, but that it was the mâl land of the plaintiff. Therefore, if the defendant held as *koorfadar*, he acquired no right of occupancy; and if he held otherwise, he held as a trespasser, and his holding as a trespasser would not under section 6 give him any right of occupancy. This has been ruled in the case of *Shaikh Peer Buksh*, reported in the Special Number of the Weekly Reporter, Full Bench Rulings, page 146, by the late Chief Justice Sir Barnes Peacock and Justices Bayley and Kemp.

Then we come to the question of Equity. We do not think that this is a case which is at all on all fours with the case reported in Volume XII. of the Weekly Reporter, page 495. In this case, we do not think that the defendant is entitled to any sympathy from the Court. It appears that he fraudulently set up this lakheraj holding in collusion with the tenant of the plaintiff, Muddun Ghose. A great deal has been said about the fact of the plaintiff standing by and allowing the defendant to erect this mud house at considerable expense. Now, until the point was settled in the suit brought by the plaintiff to have his mâl right declared, and which suit was brought after the plaintiff had been unsuccessful in the suit against the ryot Muddun Ghose for the rent of these two cottahs, we think it cannot be said that the plaintiff was under any other impression than that these lands were part and parcel of the holding of his tenant Muddun Ghose. That tenant having a right of occupancy, and the land being *bastoo* land, any erection by any third party holding from Muddun Ghose would not be a matter with which the zemindar could interfere; but the matter assumed a very different aspect when the zemindar, on bringing his suit for rent against Muddun Ghose, was met by the plea that a portion of the land was not in the tenancy of Muddun Ghose, but was the lakheraj of the defendant, a plea which eventually wholly failed in the subsequent suit. We therefore think that the ruling in Volume XII. does not apply to this case. That was a case in which a party took lands from the zemindar, and transferred them to other parties who erected *pucca* buildings thereon. The zemindar wanted to demolish these *pucca* buildings, on the ground that the original tenant had no transferable rights. It was held in that case that there was evidence, although that evidence was meagre, of a custom to transfer, and it was considered that the conduct of the

zemindar in allowing his ryot to transfer the lands, and the transferree to erect *pucca* buildings, without immediately attempting to stop him in so doing, amounted to an acquiescence in the transfer and to standing by while the tenant spent a considerable amount of money on the buildings.

We, therefore, think that the plaintiff is entitled to the relief he asked for, namely, to *khas* possession. We, therefore, decree his suit on the terms of the plaint, reversing the decisions of the Courts below, with costs to be paid by the defendant, respondent.

The 26th April 1872.

Present:

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

Limitation — Lakheraj Title — Dispossession (under color of Sale in Execution).

Case No. 861 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 26th April 1871, reversing a decision of the Moonsiff of Jehanabad, dated the 30th December 1870.

Dedar Buksh (Plaintiff), *Appellant,*

versus

Ake Cowree Singh and others (Defendants), *Respondents.*

Baboo Woopendro Chunder Bose for Appellant.

Mr. J. S. Rochfort and *Baboo Gopeenath Mookerjee* for Respondents.

The twelve years' and not the one year's limitation applies to a suit to establish plaintiff's title as *Lakherajdar* and to establish that the lands in question are not the lands of the judgment-debtor in execution of a decree against whom defendants purchased the land and under color of that sale ousted plaintiff.

Kemp, J.—We think that the decision of the Judge is wrong in this case, and that the decision of the first Court is perfectly correct. This is not a suit to set aside an order under section 246, but it is a suit by the plaintiff to establish his title as *lakherajdar* and to establish that the lands are not the lands of the judgment-debtor Imdad Ali in execution of a decree against whom the defendant purchased the land. Moreover, the objection of the plaintiff under section 246 which was rejected on the 8th of September 1868, was not followed by any process on the part of the decree-holder, the defendants in this case. The attachment was allowed to fall through and the case was struck off, and it was in execution of another decree that the attachment and sale took place, and it was under colour of that that the plaintiff was ousted. It appears to us that the one year's limitation does not apply to this case but that the twelve years' limitation applies. The case must, therefore, go back with reference to plots Nos. 1, 2 and 3 for the Judge to find on the twelve years' plea and on the merits if necessary.

With reference to lot No. 4, it is clear that the plaintiff's suit was dismissed in the first Court, and no appeal was preferred by the plaintiff. That decision is, therefore, final and must stand. With this modification the appeal is decreed with costs in proportion.

The 26th April 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Appeal to Privy Council — Valuation — Act VII. of 1870, s. 7 — Declaratory Decree — Consequential Relief — Irrigation — Power of High Court—Consolidation.

In the Matter of

Ajuas Kooer, *Petitioner,*

versus

Mussamut Luteefa, *Opposite Party.*

Mr. R. T. Allan for Petitioner.

Mr. C. Gregory for Opposite Party.

In ascertaining whether or not there ought to be an appeal to the Privy Council, the High Court has only to look at the value of the question at issue in the litigation.

In a case of conflicting claims with regard to the waters of a flowing stream, the matter at issue so far as regarded the applicant, having been to have her lands irrigated in the way she claimed, the value of that matter, according to section 7 of the Court Fees' Act VII. of 1870, was held to be the extent to which her interests would be deteriorated if that right could not be established.

Quære.—Whether the Court had power to consolidate the two suits at this stage.

Markby, J.—This application is made with reference to two cases, one, in which Mussamut Luteefa sued Mussamut Ajuas Kooer and other persons to establish certain rights which she claimed in a stream flowing from the Mohabeer Hill, and the other a suit in which the defendants in the former suit were plaintiffs, and the plaintiff in the former suit was defendant, relating to rights which were also claimed in the same stream. The two suits were dealt with in the Mofussil Court together and one judgment was delivered. In this Court the appeals are said to have been heard separately; but here also only one judgment was delivered. The application now is to be at liberty to prefer one appeal to Her Majesty's Privy Council against the decision of this Court of the 21st December 1871, and that the two suits and