A MANUAL

OF THE

LAND TENURES OF THE KUMAUN DIVISION

(HILL TRACTS)

BY

V. A. STOWELL, I.C.S.

(*Deputy Commissioner of Garhwal*)

ALLAHABAD:

SUPERINTENDENT, PRINTING AND STATIONERY, UTTAR PRADESH, INDIA

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PREFATORY NOTE

THE peculiar land tenures which prevail in the hill tracts of the Kumaun Division, the old province of Kumaun and Garhwal, have never hitherto formed the subject of any comprehensive and systematic description. A most valuable sketch of the local customs was compiled by Mr. Pauw and forms Chapter II of his Garhwal settlement report, but his account is all too brief and leaves many subjects almost untouched, while giving a detailed account of other points. It is much to be regretted that he did not expand his unequalled knowledge into a separate and comprehensive work on the subject. Beyond his sketch, a few brief paragraphs in the settlement reports of Messrs. Batten, Beckett, Ramsay and Goudge and a small pamphlet by Pandit Ganga Dat, retired Deputy Collector, are all the material available for a student of the subject, a subject presenting many local peculiarities and full of vexed questions.

This Manual represents an attempt to put together a complete and systematic account of the hill tenures, omitting those of the Bhabar and Tarai, which tracts have an entirely different system of tenures.

The lines on which it was suggested that the work should proceed comprised the bringing together into a short Manual of the information collected at recent settlements, a collection of the more noteworthy decisions by the Board of Revenue, Sir Henry Ramsay and other Commissioners, and a note on the rights of villagers in measured and unmeasured land, Nayabad grants and the like, with reference to the orders of Government on these questions.

In a compilation of this kind, which covers much hitherto almost untouched ground, there will no doubt be some mistakes and omissions, though I have endeavoured by a thorough study of all the available records and reports to make it as correct and complete as possible.

Where Mr. Pauw has given a fairly complete account of a subject, as in the case of the historical introduction, hissadari succession or gunth lands, I have based my account mainly on his report from which quotation has been made freely, and I have directed particular attention to giving full treatment to subjects which he has left untouched or treated with unusual briefness.

In the Kumaun hills we have a village proprietary system somewhat like that of Madras and unlike anything which is found anywhere else in these provinces, and a tenancy system based on custom and case-law only, with many of its principles of recent development and for all its apparent simplicity with many difficult and disputed points which puzzle at times even courts of long experience in the hills.

The districts of Kumaun being under the Scheduled Districts Act are administered under the Kumaun Rules and all suits, civil as well as revenue, are heard by the ordinary district revenue staff.

Until quite recent times Kumaun and Garhwal were administered by a small body of officers who were, generally speaking, permanently attached to the division ; their long experience gave them a thorough knowledge of local conditions and their patriarchal administration of a naturally obedient people enabled them to settle most disputes offhand.

In modern times, however, the frequent transfer of officers between the hills and the plains, which has been unfortunate for Kumaun in many ways, and the increasing sophistication of the people, combined with less summary methods of adjudication, have altered matters considerably. Officers coming to Kumaun for the first time without previous knowledge of the hill districts find themselves very much at sea in the novel conditions of their work. Associations and analogies drawn from customs in the plains combine with ignorance of the local peculiarities to lead them astray, and their early mistakes in turn are utilized by litigants to mislead their successors.

When we find numerous conflicting rulings on disputed points delivered by successive Commissioners of the division, it is not surprising that lower courts frequently go wrong.

There are various dubious points on which no rulings at all appear to exist ; but so far as was possible I have collected and put together in a more or less connected form all the well-admitted principles of the hill tenures and all the leading rulings on doubtful points.

It is most unfortunate that a good many years ago, in order to relieve a congested record-room, nearly all the old files of the Commissioner's court down to the latter part of Sir Henry Ramsay's Commissionership were weeded out and destroyed. A vast amount of valuable material showing the crystallising of unwritten custom into settled case-law and containing the original expositions of the tenures as gathered by the earlier Commissioners, men of great experience in Kumaun, has thus been lost, and there is a great scarcity of comprehensive and leading

judgments among the later files, due no doubt in many cases to the fact that older decisions had discussed and laid down the principles applicable to the particular question at issue. At the same time it is worth remembering that Sir Henry Ramsay, by the testimony of an old official who worked under him, generally objected to the principle of fixed rulings on points of custom and often refused to follow his own previous decisions. He preferred, he said, to settle each case on its own merits as seemed equitable to him at the time, and not according to a rigid principle for all cases of the same class.

The Board of Revenue have a revisional power in rent and revenue cases, but it is very seldom used, while many points are decided on the civil side, where the Commissioner is still the High Court of Kumaun.

The result of my search for rulings has thus been somewhat disappointing. The entire contents of the Commissioner's record-room numbering a good many thousand files have been gone through and selected files again examined in detail, but the decisions worth noting, which have been finally extracted, are surprisingly few.

Many of the important rulings of recent times have been collected by Pandit Lilanand Joshi, Superintendent of the Commissioner's office, an official of great experience, to whom I am much indebted for his active assistance and for the use of his note-books of accumulated materials. Several vakils and pleaders of the division have collected notes of rulings ; but, so far as I can gather, these notes include very little that is not also in Pandit Lilanand's collection or in the Garhwal settlement report.

I append a short bibliography of authorities referred to in the Manual, and a brief glossary of certain terms in use in the hills, of which some introductory definition seems desirable.

Bibliography—

(1) Official reports on the Province of Kumaun, edited by J. H. Batten, Esq., C.S., Commissioner of Kumaun (Agra 1851, and Calcutta 1878). Its most important contents are Mr. Traill's Statistical Sketch of Kumaun, Mr. Batten's Garhwal settlement report (1842), and Mr. Batten's Kumaun settlement report (1848).

(2) Mr. Beckett's Garhwal settlement report (1866).

(3) General Ramsay's report on Mr. Beckett's settlement of Kumaun (1874).

(4) Mr. Pauw's Garhwal settlement report (1896).

(5) Mr. Goudge's Almora and Naini Tal (Hill Tracts) settlement report (1903) and his separate pargana reports.

(6) Pandit Ganga Dat Upreti's Pamphlet on the privileges and duties of landlords and cultivators in the Kumaun Division (Allahabad, Indian Press, 1903).

(7) The North-Western Provinces and Oudh Land Revenue Act, No. III of 1901, as extended to the Kumaun Division and rules and orders relating to the Kumaun Division (Allahabad, Government Press, 1905).

Introductory Glossary of Terms in use in the Hills

Weights and Measures

Nali ... ... (1) A measure of capacity equal to two seers of grain.
or

Patha (Garhwal) ... (2) A measure of land, the area in which two seers of wheat is sown, standardised by Mr. Traill at 12×20 yards=240 square yards (see Sir Henry Ramsay's Kumaun settlement report, paragraph 28, and Mr. Batten's Kumaun report. paragraph 2). The nali is the usual standard of weight or area among hillmen.

Bisi ... = 20 nalis=4,800 square yards or practically an acre.

Jarib ... = Mr. Beckett's chain of 20 yards with ten sub-divisions of 2 yards each the standard for rough land measurement in the hills. Mr. Goudge makes the startling remark that "the square measure of this chain made a bisi of 4,000 square yards and the 20th of this is a nali" (paragraph 17) and the Government resolution on his report accepts this statement.

A little reflection will show that the square of 20 yards is 400 square yards and not 4,000. A bisi, moreover, is not 4,000 square yards, but 4,800 square yards and a nali is not 1/20th of 4,000 square yards. The bisi and the jarib have no connection except through the nali.

Mr. Traill standardised the nali (see "nali" above) at 20×12 yards =240 square yards; the jarib represents the long side of the

nali, while six of its ten subdivisions make the short side.

The chain is based on the nali and not *vice versa*.

Pirai ... = A weight (usually used for grain) of 16 nalis or 32 seers.

Don (Garhwal) = A pirai.

Mana ... = ¼ nali (½ lb.).

TENURES

Hissa or bant ... Coparcenary share of a proprietor.

Hissadar ... Coparcenary proprietor.

Shikmi or Shikmi-hissadar. A joint-hissadar with the man in whose name the famiiy share stands recorded; the shikmi is usually the younger brother or nephew.

Bhai bant ... Division *per capita*.

Sautia bant ... Division half and half between the sons of two wives.

Zamindar ... An agriculturist, a villager (not being a Brahman or a Dom); the term has none of the connotation that it has in the plains; it is often used with a flavour of contempt, "a mere villager."

Asl mauza ... The chief or parent village to which the "lagas" or subsidiary villages are attached; the "laga" is sometimes merely on outlying portion and offshoot of the "asl" village and sometimes a small separate village, which has been attached to the asl village and united to it for revenue purposes, owing to its having been dependent on the latter in some way or to its being the property of the co-sharers of the asl village. The asl village and lagas are held under one revenue engagement.

Dhara, Rath	...	A clan, a set of related families forming a division in a village, a faction. A village is often owned by two or more dharas of different castes.
Sanjait (zamin)	...	Undivided measured common land; either common to the whole community (gaon sanjait) or common to certain families or co-sharers only.
Mao, Muwasa hence	...	A family.
Mawari bant	...	Division of sanjait land equally by families (irrespective of their proportionate shares in the village).
Girbi	...	Mortgage.
Girbi-naman	...	Mortgage-deed.
Dal-bhol	...	(1) Foreclosure. (2) Purchase.
Gunth land	..	Land, the revenue of which has been assigned to the religious endowment.
Sadabarat	...	Grant of land and assignment of its revenue for charitable purposes (feeding pilgrims in particular).
Padhan or Malguzar	..	The headman of a village from whom the revenue engagement is taken and who is responsible for collecting and paying in the revenue of the village.
Padhanchari land	.	Is land held from Government free of revenue by the padhan for the time being in lieu of cash remuneration or of part of it for the performance of his duties (see chapter on padhans).
Mukhtar padhan	...	The agent of non-resident minor or otherwise incapable padhan.
Ghar padhan	...	In villages held wholly by khaikar tenants is the representative head khaikar who collects the revenue and malikhana and

		makes it over to the padhan and does the work of a padhan generally, a "sub-malguzar under the sadr malguzar" (Sir Henry Ramsay).
Khaikar	...	(1) An under-proprietor whose rights as the original occupant cultivator have been usurped by or granted to some other person at some former period. This is the "pakka khaikar."
		(2) An occupancy tenant (who or whose predecessor never had any higher right). This is the "kachcha khaikar."
Sirtan (asami)	...	A tenant-at-will. Sirti is his rent (also rakm).
Pahari (in Pali Pachhaun pargana) Paswan (in Garhwal).		The village messenger, unofficial chaukidar and general servant; he receives one nali of grain per harvest from each family of the village. Is usually a Dom.
Rakm ...	...	Either (1) land revenue or (2) rent. A hissadar or a share of land is spoken of as "so many rupees rakmi."
Bhent ...	...	Irregular dues (nazrana) taken by thokdars, padhans or hissadars from tenants, usually in cash.
Kuli-bardaish Kuli-godam.		The furnishing of coolies and supplies to travellers and troops in accordance with ancient custom and the terms of the settlement agreement.

CLASSES OF LAND

Talaon, Shera	...	Permanently irrigated land.
Panchar, Shimar	..	Imperfectly irrigated land (not often used).
Upraon	..	Dry terraced land ("upland"), first class (awwal) and second class (doyum).
Ijran ...	...	Inferior terraced land cultivated intermittently.
Katil, Khil	...	Unterraced inferior land cultivated intermittently.

CHAPTER I

General Introduction

(1) *Historical sketch*

It is unnecessary for my purpose to go into the history of the hill districts prior to the British occupation. Mr. Pauw has given an excellent historical summary of the origins of the various tenures and the present land system, and I cannot do better than reproduce several paragraphs of his report as an historical introduction to the subject. He has summarised all that can be found in earlier reports, and though his remarks were written especially with reference to Garhwal, yet they are equally applicable to Almora and Naini Tal. As Mr. Goudge remarks on page 10 of his report, "the tenures are exactly the same in Almora and Naini Tal as they are in Garhwal." The various tenures in respect of their present status will be dealt with in detail in subsequent chapters, but this preliminary sketch is useful as giving a general idea of the several classes of cultivators and others who figure in these pages, their development and how they came to occupy their present positions.

Under the native kings the proprietary right in land was vested in the Sovereign and inalienable. Mr. Traill writes: "The paramount property in the soil here rests with the Sovereign. This right is not only theoretically acknowledged by the subject, but its practical existence is also deducible from the unrestricted power of alienation which the Sovereign always possessed in the land. . . . . These tenures" (of the occupant zamindars) "were never indefeasible, and as they were derived from royal grants either traditional or existing, so they might be abrogated at the will of the Sovereign, even without allegations of default against the holder, and without reservation in his favour.* The peculiar nature of the country rendered the exercise of this right frequent in the neighbourhood of the capital. The difficulties of procuring supplies in the province have been

Mr. Pauw's para. 35.

Proprietary right under native kings vested in the Sovereign and inalienable.

*"Compare Sir Henry Ramsay's remark (page 14 of the Kumaun Report) that up to 1835 Mr. Traill might have transferred an entire village and hardly any one would have questioned his right to do so."

alluded to. Individuals settling at Almora or Srinagar, under the auspices of the reigning prince, in consequence received the gift of a small portion of land for the establishment of their families. Where a provision in land was called for to reward military services or to remunerate the heirs of those slain in battle, it was usually made at the expense of existing rights."

Mr. Pauw's para. 36.

That or grants of land.

"The property in the soil is here termed *that* and grants in *that* conveyed a freehold in the soil as well as the produce." "The rents of these lands have at subsequent periods been almost wholly resumed to the rent-roll, but the property in the soil has generally been suffered to remain with the heirs of the grantee. It is on grants of this nature that the rights of a large body of the occupant landholders are founded."

NOTE—*The* terms "*that*", "*thatwan*" are wholly obsolete.

Cultivators.

"The land in the interior seldom changed proprietors. The greater part of the present occupants there derive their claims to the soil solely from the prescription of long-established and undisturbed possession; and this remark applies also to many individuals more particularly Brahmans, whose ancestors, having originally obtained estates on grants, not conveying any property in the soil, their descendants have subsequently, by the migration of the actual occupants, come into the full possession both of land and produce." Of grants which did not convey "property in the soil," but were only assignments of revenue, the most common were those made as remuneration for the fulfilment of a public office, known as Negichari, Kuminchari, Jaidad, etc., and those made for the endowment of religious establishments.

It would appear from this that all cultivators of the soil, whether grantees or not, came to be in course of time on much the same footing, so long as no one obtained a grant against them. Mr. Traill also adds: "The occupant zamindars hold their estates in hereditary and transferable property." Mr. Traill had better means of judging of the tenures which prevailed under the Rajas than any one since his time; but there are two reasons for supposing that the right of cultivators in land was not transferable. In the first place local tradition ascribes the origin of the private right of transfer of land to the introduction of the British rule, while again, no private right of transfer exists in Tehri-Garhwal at the present day which is ruled by the descendants of the old Garhwal Rajas, and where there

is every reason to suppose that the old customs are preserved more or less intact. A sale of land in Tehri-Garhwal even by a grantee is regarded as an assumption of the royal prerogative and punished accordingly. Of course the right of transfer alone is referred to. As in Tehri at the present day, so in Garhwal under the native kings, no doubt transfers took place, and for a consideration ; probably, as in Tehri by the form of a mortgage of the transferor's holding, with cultivating possession to the transferee ; a mortgage which was never afterwards redeemed. And it is probable that, under the Gurkhas, who cared for little but the revenue raised from the country, such transfers were regarded by the authorities with indifference. Their cultivating rights are commonly mortgaged by khaikars in Garhwal at the present day, though the holdings are regarded as non-transferable—a fact which is not improbably a survival of the original custom of transfer by those in cultivating possession of land.

The under-proprie ary righs. Khaikars.

"Where the land granted," says Mr. Traill, "was already held in property by others those occupant proprietors if they continued on the estate, sank into tenants of the new grantee, who, moreover, by the custom of the country, was permitted to take one-third of the estate into his own immediate cultivation or sir. Of the remainder of the estate, the right of cultivation rested with the original occupants, who were now termed khaikars or occupants in distinction from thatwan or proprietor." In Nagpur there are a number of villages illustrative of this system, the high castes, Bartwals, Bhandaris, Rawats, etc., no doubt the more recent grantees, being the proprietors of the whole village with cultivating rights in part only, while the Khasiva castes, no doubt the earlier occupants, hold the remainder of the village as khaikars of the high caste proprietors. It would appear that if the grantee did not at once exercise his right to take part of the village into his own immediate cultivation, he was subsequently debarred from getting a footing there at all, and remained entitled merely to his manorial dues. Mr. Batten derives the word khaikar from khana to eat), and kar (the royal revenue), that is, he may enjoy the land so long as he pays the revenue. Besides the Government revenue (sirti) the khaikar was called on to pay to the proprietor various dues known as bhent (special cash payments), dastur (dues in kind) and pithai (an annual trifling cash rent).

Mr. Pauw's para. 37.

The occupancy right Khurnis or Kainis.

"The khurnis were tenants and settled on the estate by the proprietors, and by long-continued occupancy might come to be considered in the light of khaikars from whom indeed they differed little except in the nature of the rent to which they are

Mr. Pauw's para. 38.

liable." As the khurni or kaini, according to Mr. Traill, paid a higher rent than any other description of tenant, it was no doubt found convenient to allow him a hereditary right to cultivation, though strictly this belonged only to the khaikar. The land of the childless khurni would, moreover, naturally revert to the proprietor at his death, and this may not improbably be the reason why the khaikar, who in villages where the grantee forebore to take cultivating possession in the beginning, now entirely excludes his heirs, so that on a khaikar in such a village dying without an heir or even collateral, his land reverted to the body of khaikars: should he die in a village where the proprietor holds land in cultivating possession, the holding passes not to the body of khaikars but to the proprietor. The analogy of position between khaikars and khurnis would probably have been quite sufficient to establish this custom. Mr. Batten says regarding the khurnis: "This class of tenants is fast becoming merged into that of khaikars." It seems doubtful whether during the period of British rule they were ever distinguished, as no mention is made of khurnis in the oldest settlement papers; they appear to have been treated exactly as khaikars, and certainly not only is no distinction made now, but the very name is lost, and it would be impossible to find out whether any given khaikar acknowledged for his ancestor a vassal tenant, or a reduced occupant proprietor. Sir Henry Ramsay, however, is said to have acknowledged a distinction between pakka and kachcha khaikars, having reference no doubt to the under-proprietary and occupancy rights discussed in this paragraph, and in a settlement dispute relating to Mangaon, patti Dug in the Almora District, decided by Pandit Amba Dat, Deputy Collector, in A.D. 1843, the same technical expression "pakka khaikar" is used.

NOTE—The terms "khurni" and "kaini" are now entirely obsolete.

Mr. Panw's para. 39.

Kamins, sayanas and thokdars.

"The three terms kamin, sayana and thokdar have the same meaning kamin being used in the south of Garhwal and sayana in the north, and the officers represented by these names corresponded to the zamindars or farmers of land revenue of the plains. They were as a rule chosen from among the principal landholders of the tract." "The influence once obtained in the situation," says Mr. Traill, "generally led to its continuance in the same family, even when the individual holder was changed, and in some instances the kamins themselves eventually succeeded in obtaining a grant of the feud under the usual conditions." The thokdars again "appointed one of the proprietors of each village, under the designation of a padhan, to levy and account directly to them for its cess."

Padhans.

The padhan was removable at the will of the kamin and sayana". "The remuneration of the kamin and sayana consisted of a trifling Nazrana from each village," and a portion of land rent-free in their own village. They also received the customary due from the padhans of their tract, viz., Rs.2 on the marriage of a daughter, the leg of every goat killed and a mana of *ghi* and a basket of maize (mungari khandi) in the month of Sawan. These precise customary dues are universal throughout Garhwal, from tenants to proprietors and of old from proprietors to padhans and padhans to thokdars, and were no doubt insisted on rather as a symbol of feudal subjection than for their intrinsic value. The reason for taxing the daughter's marriage and not the son's is no doubt that on the former occasion the father receives a considerable sum of money from the bridegroom. The padhan, like the thokdar, besides the customary dues, enjoys a portion of land rent-free in his own village, now known as the padhanchari land. Mr. Traill thus describes the padhan of his time: "The padhan is the village ministerial officer entrusted with the collection of the Government demand and with the supervision of the police of his village. He is commonly one of the village appointed with the approbation of the other joint sharers and is removable for malversation or at the requisition of the majority of sharers He collects the Government revenue agreeable to their several quotas. He pays also the rent of his own immediate share of the estate. He is remunerated by fees on marriages, and a small portion of land set apart for the purpose. There is no hereditary claim or right to the situation of padhan, but generally the son succeeds without opposition, unless incapable from youth and want of talent, in which case the sharers are called upon to choose another padhan from among themselves. Uncultivated lands which may not have been subjected to division among the proprietors are managed by the padhan, and the rents yielded from their cultivation are accounted for by him to the body of proprietors, who take credit for the same in the quota of the Government cess to which they are respectively liable."

It is not clear that the thokdar in the earliest times actually farmed the revenue, and it seems probable that the amount of his collections was determined by the State. The State assessments were not, however, made on each individual village, a lump sum being frequently assigned to several, and in such cases, no doubt, the distribution of the assessment was left to the thokdars.

NOTE—The term "kamin" has practically died out, while "sayana" used loosely as equivalent to "squire" and does not necessarily imply that the man referred to is a thokdar. The thokdar has now a very different position to that described in this paragraph.

Mr. Pauw's para. 40.

The hissadari or proprietary right.

The hissadari right is, as before mentioned, said to have been an introduction of the British rule. The idea of land without a private owner seems to have been repugnant to the earliest British administrators and as in the plains the proprietary right was conferred on the zamindars or revenue collectors, so in Garhwal it was conferred on the occupant cultivators, unless some one else could show that a grant of the land, and not merely an assignment of the revenue, had been made to him. The cultivators were then termed hissadars or co-sharers in the estate, and were allowed full rights of transfer in the cultivated land of the village. These rights were never extended to the waste lands as will be shown further on. In the grant of this proprietary right, however, the thokdars or sayanas appear to have frequently used their position as collectors of the land revenue to secure to themselves hissadari right to which they were never entitled. Mr. Batten thus explains how this has come about: "When the thokdar of a mahal has accepted the malguzari patta of one or more of its mauzas owing to the failure in procuring a village padhan, he has been recorded in the settlement misl as a kind of farmer in order to distinguish him from the actual proprietors of the village lands. In some of the poorer and less populous parganas the influential thokdars have, during the course of former settlements, continued to increase their proprietary possessions, and to obtain by silent usurpation a title to such acquisitions merely because no record whatever was at the time taken as to whether they became the holders of the padhanship because they were by right entitled to the office or whether they became so because they have been elected or accepted as managers of the estate merely for the period of the settlement lease." When in such cases the thokdar obtained the hissadari right, the occupant proprietors sank into the position of khankars in exactly the same way as in the case of a new grantee under the native kings. Perhaps even a more frequent case of usurpation of the proprietary right was that of assignments, of revenue granted for the fulfilment of public offices, the kanungos, negis, etc. frequently getting the land recorded as their own property.

Mr. Pauw's para. 41.

Sirtans or tenants at will.

"Another kind of resident tenants, however," says Mr. Traill, "who rent the land which the proprietors from absence or other causes are precluded from cultivating themselves, have no right of occupancy either acknowledged or prescriptive. The tenants pay their rent either in kut, kind (commonly at one-third of the produce), or in money according to existing rates or engagements or to former usage. Where there is little demand for the land it is usually let for a moderate money rate, which tenure is termed sirtan, that is the renter pays merely sirti." The term sirti meant the Government land revenue proper under the Rajas,

the original "agricultural assessment." The sirtan tenant formerly paid nothing but the land assessment and was expressly exempt from the various extra cesses which formed three-fourths of the public demand. These latter fell on the proprietor.

"Where there is no offer for the land by any of the resident cultivators, the owner lets it to any of the inhabitants of the surrounding villages. This is termed paekasht cultivation. . . The paekasht cultivation is from its uncertainty necessarily subjected to a lower rate of cess than other lands. The fickle disposition of such cultivators is notorious and their employment a speculation." On which Colonel Gowan (Commissioner of Kumaun in 1837) has noted: "At present the only distinction between the sirtan and paekasht tenants is the duration of tenure; the sirtan tenants being generally permanent, the paekasht removable at will." The tendency has been, as in the case of the kaini and khaikar, to confuse the status of the paekasht and sirtan, much to the latter's disadvantage. Mr. Backett (in 1865) even went so far as to say the sirtan "has no permanent rights whatever. He makes his own arrangements with the proprietor usually only for one crop." In the time of Mr. Traill, and even till much later, the competition for cultivators exceeded the demand for land, and this secured the most favourable terms to all tenants-at-will, who in fact paid less rent than any other kind of tenant, little more than the actual Government revenue assessed on the land.

Other cultivators. Haliya and sajhi.

Neither the haliya nor the sajhi are, properly speaking, sub-tenants. The former cultivates as a vassal of his master, and can hardly be said to have a holding of his own. The latter exists only in the Bhabar, and his status, though more independent, is somewhat similar. Mr. Pauw's para. 42.

The haliya was originally, and for some years even under the British rule, a slave. They are thus described in Mr. Mosely Smith's report on "Slavery in Kumaun," dated the 5th February, 1836. "Serfs or *adscripti glebae* under the denomination of hali, by means of whom Brahmans and other principal landed proprietors who are restricted by the custom of the country from personal labour in the fields, cultivate as much of their land as practicable, and who are invariably doms or outcastes, belonging with their children and effects to the lord of the soil, like the beasts or other stock on it. . . . Field slaves . . . are boarded and lodged by their owners and receive moreover a *than* of cloth for a dress every third year. On the occasions also of their marriages the master defrays the wedding expenses. The purchase of slaves for agricultural and other purposes is still very common in this province." Excepting that these doms are now not bound to the land or to any one master, this description

almost entirely holds good at the present day, for though the bond of slavery is gone, the haliya is as dependent on his master as ever. His emoluments have perhaps somewhat increased. He gets a blanket every rainy season and the suit of clothes more often, and at the harvest he usually receives a present of eight nalis or a don of grain. He entirely tills and reaps as much land as one man is capable of cultivating, all instruments, etc., being supplied by his master and all the produce going to him. Khasiyas or Rajputs are also employed as haliyas, but almost all these are simply in the position of servants.

(2) *Hill castes*

It will be as well to supplement the foregoing account of the various characters who figure in the agricultural system of the hills by a brief note on hill castes in general and a short description or sketch of a hill village and its organization, with special reference to certain points cognate to the subject of this Manual.

A mention of the caste system is necessary for an understanding of some points of custom relating to succession, adoption and the like, which will be discussed in the chapters on hissadars and khaikars. Leaving aside the Bhotias whose agricultural holding is a negligible quantity, and the few scattered Muhammadans and banias who are nearly all shopkeepers or dwellers in towns, the population of the hill districts may be divided into (*a*) Hindus of four main classes and (*b*) doms of aboriginal non-Aryan blood.

The Hindus, who are known as "biths" in contradistinction to the doms, may be droadly divided into Brahmans, Rajputs (Chhattris), Khas-Brahmans and Khasias or Khas-Rajputs. As distinguished from the higher classes of Brahmans and Rajputs, the Khasiyas do not generally wear the sacred thread, though they are gradually assuming it, and are really of Sudra or mixed origin ; they call themselves Rajputs. The Khas-Brahmans wear the sacred thread, but are generally of doubtfully pure origin ; some of them are the offspring, or descended from the offspring, of a Brahman father and a Rajut or Khasiya woman. In Garhwal these four classes, of whom the Khasiyas are the most numerous, supply more than 95 per cent. of the total number of hissadars and khaikars.

In Almora Mr. Goudge says, the majority of the people are Khas-Rajputs, a blending of pure Aryan with some aboriginal hill stock. A few Rajput castes are later arrivals and their blood is purer . . . . and of the inferior Brahmans he remarks: "Such Brahmans are distinguished from their higher caste-fellows as 'halbanewale,' i.e. cultivators, or Pitaliya Brahmans, from the custom they had of wearing the bracelet of brass instead of the triple thread. High caste Brahmans are mainly confined to Joshi, Tiwari, Pants, Upretis and Pandes."

The only rigid line that is in these days strictly drawn and never transgressed is between these Hindu castes and the doms. These latter aboriginals hold a very little land here and there, but, generally speaking, they form a class of menial servants and workers in metal, leather and wood. They have, as Mr. Pauw remarks, hardly emerged from their former state of slavery and may be dismissed from further consideration as a special class so far as this Manual is concerned. Subject to a few modifications and relaxations by local custom, the Mitakshara law prevails among all the Hindu castes of the division. For further particulars of these hill castes reference may be made to sections 13 to 15 of Mr. Pauw's report.

Before quitting the subject, however, mention should be made of the Naiks, a caste holding several villages in the Almora District and one or two in Naini Tal and Garhwal. They are Hindus belonging to none of the abovementioned four classes and they can neither intermarry nor eat and drink with any of the other Hindu castes. Their female children are invariably brought up to the trade of prostitution and are sent to the plains to follow their trades as soon as they are old enough, returning to their villages in later life. Their family customs regarding property and succession are not unnaturally somewhat obscure and lax.

(3) *A hill village*

The typical hill village is of a fairly regular type, though local cricumstances and the variations of the climate interfere with its normal character to some extent in the widely differing tracts that are found between the Bhabar and the snows.

The hills consist of a seemingly endless series of ridges and valleys, each ridge or spur leading up to another in a tortuous chain and each valley a stream-bed leading down into a larger valley.

We may take as typical a valley with easy sloping sides with a good stream running down its main bed fed to some extent by smaller streams and springs from the little ravines that score the hillsides.

The upper parts of the ridges that bound the valley are clothed with forest ; on the lower hillsides lie a chain of villages with their cultivation interspersed with patches of bush, jungle or inferior forest where the land is too steep or too poor for cultivation or where an unusual distance intervenes between one village and the next.

Each village usually comprises a strip of the hillside of more or less width and running from the stream at the bottom of the valley up to the top of the ridge, where it meets the boundary of some village in the valley beyond the ridge. From the villages

that lie in the same valley on either side of it is divided by some natural boundary, such as a torrent bed or a spur of the hill.

The village boundaries.

These boundaries enclose much unmeasured forest and grazing land, the property of Government, as well as the cultivated lands which are the actual property of the villagers and on which they pay land revenue. They are the "assi sal" or "san assi" boundaries of the village, so called from Mr. Traill's general measurement and fixing of boundaries for the whole province in A.D. 1822 or 1880 Sambat.

These boundaries convey no proprietary right of any kind to the villagers over the unmeasured land which they enclose, but they represent the areas in which by custom or user the village has its special grazing grounds and its separate water-supply and gets its timber, if there is sufficient forest to supply this last.

Our typical village lies between 3,000 and 5,000 feet in elevation ; this represents the commonest elevation and the best land in the hills (*cf.* Mr. Goudge's Almora Settlement Report, pages 12 and 13).

The village site.

The village itself lies in the middle of the cultivation part way up the hillside and consists of more or less regular short rows of stone-walled and slate-roofed houses, generally two-storeyed, with a few isolated houses near by. The average village is small and only contains fifteen or twenty houses. The better class of houses mentioned above belong to the Hindus of the village ; and the later generally constitute the hissadari and khaikari element in the village.

At some distance away are the doms' quarters (domana), generally houses of an inferior type, though sometimes similar to those of the Hindus.

The doms are usually servants or ploughmen, or else workers in leather, metal, stone, wood, etc. ; sometimes they have a little land to cultivate as sirtans, and occasionally they are regular cultivating tenants-at-will.

Where a man is a sirtan tenant with a proper holding he either builds himself a house of sorts on or near his land, or else he is given by his landlord and old empty house to occupy or a ruined building to repair.

Mr. Pauw has described the houses of a hill village in paragraph 16 of his report.

The cultivation

Irrigated land.

The main stream in the bed of the valley is usually the only water which suffices for any irrigation. A kachcha "band" is thrown across the stream some way up the valley, and the water is led along the hillside in a gravitation channel (gul) so as to irrigate a few of the lowest terraces of cultivation. This gul probably operates one or two water mills (gharat) in its course, though these mills, which grind most of the grain in the hills, often have a separate short gul in the bed of the stream.

The amount of irrigated land in the village depends on the character of the valley ; many valleys in Almora with broad easy slopes or flats of land along their streams have large areas of fine irrigated land, but such spots are very rarely found in Garhwal.

The irrgated area is nearly 8 per cent. of the total cultivation in Almora, while in Garhwal it is only about 3 per cent. in Naini Tal it is about $6\frac{1}{2}$ per cent.

Irrigated land is called "talaon" or "shera", "Shimar" in which rice only is irrigated from a spring on the spot without any gul and "panchar" where only wheat is irrigated, are names sometimes used of special varieties of irrigated land. Talaon or shera is irrigated the whole year and is regularly double-cropped.

If the stream at the bottom of our village is one with a broad bed, there are probably some strips of land lying in the bed or along the side of it practically level with the steam ; such strips have a precarious existence and are often stony and sandy, but sometimes form valuable though fluctuating cultivation.

Bagar land.

This is known as bagar land and causes many disputes when it is washed away and then reappears, and after lying waste for some time is taken up by some one other than the previous occupant of it.

Dispute about water.

Disputes about water are common, since many small streams do not supply nearly enough water for the wants of all the villages that would like to utilize it. Such disputes are easy to settle in principle, but troublesome in practice. A village that has been irrigating from a stream from former times clearly has a prior claim to the water against another village higher up the stream, which has hitherto had no irrigation and which subsequently starts an irrigation channel and cuts of the water from the village below. The difficulties arise when both villages have had irrigation for a long time and the upper village takes to using more than its old share of the water, or the supply of

water decreases temporarily or permanently. Again, villages on opposite sides of a stream and both taking water from about the same place will be found constantly quarrelling about their respective supplies. There is no permanent means of measurin the water-supply or of enforcing a fixed division, and so, through a local inspection by the court often results in a settlement for the time being, such quarrels break out again and again. Disputes about water rights are settled by civil suit, though application for permission to make new channel in unmeasured Government land is usually first made to the Deputy Commissioner and summary enquiry as to existing rights and possible objections made before permission is granted. This does not debar any person whose rights of user, etc. are affected from taking action in the courts to restrain the other party from infringing such rights.

Disputes regarding the leading of water channels through land belonging to some person other than the owner of the channel are, of course, simple questions either of aggreements on the subject made between the parties or, failing such agreement, of the law of easements.

As regards water-mills and irrigation channels, Sir Henry Ramsay laid down the general principle that the latter must always have the preference where there is an inadequate water-supply for both, but I have found no case in which this has been concretely applied ; he doubtless carried it out in the summary orders, which he frequently passed on the spot and enforced without further procedure. The subject of water-mills is dealt separately with in a later section.

Upraon land.

Above the irrigated land and around the village rise the terraces of upraon land (dry "upland"). While ordinary irrigated land gives its regular two crops a year, upraon land gives three crops in two years, two kharifs and one rabi. The regular standard rotation throughout the hills for upraon is (1) rice (or jhungara), (2) wheat (or barley), (3) mandua, (4) fallow, recommencing again in the following kharif. Ordinary dry land is thus all under cultivation every year in the kharif and half of it fallow for the rabi, the other half bearing wheat or barley. For this purpose a village is divided into two *sars* or divisions in which similar stages of the rotation come in alternate years.

Mesne profits.

This is important to remember in suits for mesne profits since a plaintiff will often claim for a rabi crop on the whole area of his holding or for the value of wheat followed by rice, and such claims should always be regarded with suspicion.

It may be mentioned here that a fair rough standard of mesne profits in an average village on ordinary dry land is one rupee

a nali per annum taking all crops together; for irrigated land two rupees or even more is fair; and for inferior land (ijran and katil, etc.) in years when it is cultivated eight annas or thereabouts.

(These rates may be compared with the soil units adopted at settlement; see Mr. Goudge's report, page 15, also page 20 and Mr. Pauw's page 93.)

Inferior land.

Beyond the regularly cultivated dry land lies the zone of inferior land which is cultivated intermittently, a crop or two is taken off it and it is then left fallow (*banjara*) for two or three years, during which time bushes and shrubs grow over it, and it appears to a casual observer to be land that has been abandoned and has gone out of cultivation altogether. Such land when terraced is "*ijran*," when merely a natural sloping hillside, it is *katil* (or *khil*). Land that has really fallen out of cultivation is *wairan*.

But apart from the measured and assessed (or assessable) land recorded at settlement in the names of the villagers, there is, wherever cultivation has not reached its practicable limits within the village boundaries, a continual and more or less gradual expansion of the cultivation into the adjoining unmeasured Government land. Provided that this extension is in continuation of old cultivation and does not involve the destruction of trees it is recognized as a customary right of the villagers and Government does not interfere with anyone making it. The villagers themselves, however, often quarrel over such extensions when they consider the available grazing land is getting too limited or when the extensions interefere with rights of way, access to water or the supply of water or the like.

All the land in or near a village is divided by traditional usage into blocks or divisions, known as *thoks*, each having a local name; their boundaries are ravines or ridges, or simple breaks in the continuity of cultivation, etc.

When unmeasured land is broken up for cultivation in a separate thok, apart from the old cultivation such a clearing is called *nayabad* (or naya-abad) the *nautor* of the plains, it required special sanction, unlike the more extension of old cultivation; all such extensions are dealt with in a later section.

Very often a village having outgrown the limits of convenience for cultivation from one centre, or having taken up some land at a distance from its old blocks of cultivation will be found to have one or more lagas or *dakhli mauzas* (*offshoots* or daughter villages), which reproduce the parent village in miniature around a separate site, and are combined with it in

one revenue mahal ; the degree of attachment or separation obtaining between the *asl* village and its *lagas* varies, however, in different cases, and a *laga* must not always be considered as merely a part or an outlying colony of the *asl* village. References to this will be found in dealing with pacific questions in later chapters.

The people of the village have been described to some extent already in the historical extract quoted and in speaking of castes. It need only be said that the typical village has its thokdar (often residing in another village) who may or may not own a share in the village, but who generally receives certain thokdari dues from it. It contains a number of proprietors (hissadars) and of proprietary families comprising two or more brothers or near relatives holding a joint share and often living together as a joint Hindu family : the head of one house is the padhan or malguzar, the village headman, who collects the revenue and resembles the lambardar of the plains. The hissadari body often consists of a number of families all of one caste and all more or less inter-related, descended from one or two original founders of the village ; sometimes it consists of two sets of families or clans of different castes.

The khaikars contribute a further quota of families, also sometimes all or most of them inter-related, though generally not connected with the hissadari families (*cf.* the historical sketch on the origin of these classes).

There may be a few sirtans apart from the servant class of doms, but often the typical village has no regular sirtan cultivators.

The "ploughman" or "servant" and the "artificer" doms complete the population.

The figures, so familiar in the plains, of the village bania is lacking altogether in our hill village. A well-to-do cultivator will sometimes put out some money at interest, mainly with acquaintances who want temporary accommodation ; but the professional money-lending class is conspicuous by its absence. May it always remain so !

Each man either grows his own grain or, if he is a dom, is fed by his employer or employers or gets his wage in grain, and so the grain dealer is equally missing from the hill villages. The little bazars where he is to be found are few and far between, and even there he is most often only an ordinary villager, a Brahman or a Khasiya.

(4) *Settlement records*

Before proceeding to deal with specific tenures, a brief account of the village land records is necessary.

Except in the cadastrally-surveyed portions of the Garhwal District, there is nothing in the shape of annual village records prepared in the hills. A set of village papers is prepared at settlement and remains the basis of administration and the sole record-of-rights and tenures until the next revision of settlement, supplemented only by the record of mutations effected during the currency of settlement.

The prevailing system of tenures, in which the varying tenant rents and the complicated systems of a changing tenantry found in the plains have no place, and the absence of tenancy legislation renders this system quite adequate for all practical purposes. The vast majority of the land is held by cultivating proprietors, or by permanent khaikars with fixed and unvarying rents, and for these a permanent record-of-rights and holdings is all that is needed. Settlements in the hills are based on assumed land values and not on tenant rents which do not exist to furnish any standard. The expense, moreover, of maintaining annual records for the enormous number of minute fields which make up a hill village would be prohibitive and quite disproportionate to the small amount of advantage to be gained from having such records. There were over 28 lakhs of fields surveyed and recorded in the Garhwal settlement of Mr. Pauw, of an average area of about one-tenth of an acre each, and this total does not include two parganas and parts of others which were not surveyed. In the surveyed tracts the areas held by cultivating proprietor and khaikars amounted at the last settlement to 15/16 of the whole assessable area; and of the small amount held by sirtans some is not held in the shape of real tenant holdings, but is held for instance by khaikars, whose holdings are too small for them, or in small plots by ploughmen or by artificer doms who cultivate a little land in addition to their regular vocation. Accordingly even in Garhwal all we have beyond the settlement records is a quinquennial revision of the map and *khasra*, which deals not with holdings or tenants, but with alterations in field and extension of cultivation, each patwari's circle being divided into five sub-circles which are gone over in turn in a cycle of five years. It is accordingly a negligible quantity so far as rights and holdings are concerned.*

Mr. Pauw's page 14,

The permanent settlement records are the same for all the hill districts though the details recorded have differed slightly

*This revision has been altered under recent orders (March, 1907), and now only deals with extensions of cultivation for which a *khasra* and additions to the map are made.

at different settlements and differ a little in different districts (*e.g.* as to the classification of land).

Phant.

The original and most important record is the *phant* (or fard phant) and abstract village record-of-rights and revenue-roll which was first introduced into use throughout the division by Mr. Batten some 60 years ago. It is usually in the form of a lengthy sheet or roll of hill paper. The heading shows an abstract of the land revenue, cesses, and rates payable by the village, and also the thokdari and malguzari dues (if any).

Following the heading in Part I, showing the name of the malguzar and his mukhtar, if he has one, and the names of the hissadars in their various shares and joint shares with the area of the share, revenue cesses, rates, and dues payable on it with their totals, the last entry being the common gaon sanjait assessed to revenue (parat bhitar) where it exists. After the totals of these revenue-paying lands come the unassessed malguzari land (if any), the sanjait land unassessed to revenue (gáon sanjait parata báhik) and in Garhwal the measured and surveyed land entered in the name of Government ("hissadar sarkar, Kaisar-i-Hind"). This last entry is not found in Almora and rarely in Naini Tal, and refers mainly to old cultivation found abandoned at the last settlement and so struck off the assessed area or to surveyed culturable plots lying among the cultivation. The total of the village area of measured and surveyed land closes Part I of the phant.

Part II gives the khaikari land (already included in the hissadari totals of Part I). It shows for each holding the hissadars' names, the number of the hissadari holding which includes the land, the names, parentage, etc., of the khaikars, the areas of their holdings, the revenue *plus* malikana payable on each holding, the cesses, rates, and dues payable and the total payable.

The ghar-padhan is also shown in khaikari villages where such a post exists.

The *muntakib* gives each separate share (or khata) in detail of fields with their area, classification of soil and the thok they are situated in. It also shows the hissadars of each khata and the khaikar or sirtan, if any, of each number. There are columns for the rents of these latter tenants in Garhwal but they were often left blank.

The *khasra* is the original measurement record of fields by serial number as surveyed, giving their area, thok, hissadár, and tenant classification, and crop and area of crop at time of settlement. It is of little use during the currency of settlement and is seldom referred to.

The *tehriz* is the abstract of the muntakib, giving the totals for each khata or block of numbers.

It was not prepared in the last Garhwal settlement except for one pargana and is somewhat superfluous. The shikmi fard (where it exists) shows in detail the interests in joint holdings.

Maps. The village map or shajra needs no particular description.

In the cadastrally-surveyed portions of the division the maps have been printed on cloth and are fairly accurate: in the remaining portions they are on tracing-cloth or even on hill paper and of very inferior accuracy: the older maps such as those of Mr. Beckett's survey are often so much out of date that the fields cannot be identified on them.

The records in general. The records briefly described above have not at all been prepared at each settlement in all the three districts.

Whether newly-prepared at the latest revision of settlement or not, however, they will be found with unimportant variations to be of the nature described.

Where the existing records were all prepared afresh at the recent settlements they present little difficulty.

For the greater part of Garhwal at the last settlement entirely new maps, khasras, phánts, and muntakhibs were made out: the tehriz was only made out for a small area as it is really a superfluous record.

For these areas the records are adequate. For the remainder of the district, however, no new survey was made. A rough calculation was made of the extension of the cultivated area, and the revenue was re-assessed on this basis in a somewhat haphazard way. There is thus no record or measurement of the cultivated area and the actual holdings and shares of these tracts other than that of Mr. Beckett's settlement of over 40 years ago. Only a new phant with a rough re-distribution of the revenue was made out in the last settlement. It is thus difficult to ascertain the actual facts of the extent of shares and holdings, the date of extensions of cultivation, and other facts relating to tenures in these tracts. In Almora the records of Mr. Beckett's settlement of some 35 years ago were in Mr. Goudge's settlement allowed to stand for all the cultivation recorded in them, but all extensions of cultivation and all nayabad lands were surveyed and complete measurement records framed for them. These records form a kind of supplement to the papers of the previous settlement. These lands were plotted into the old maps. The phants were, however, entirely re-written and brought up to date by the entry of the names of the existing hissadars and khaikars for the old cultivation

and the addition of the newly measured areas with their hissadars and khaikars and their proportionate increase of revenue. As, however, the names thus brought up to date by mutation in the phants were not similarly corrected in the old measurement records (muntakhib, etc.), and as moreover the entry of interest in new cultivation in the phant was not made on quite the same principle of abstraction as the entries carried on from Mr. Beckett's settlement, some confusion and difficulty is inevitable in dealing with the mixed holdings of new and old cultivation and tracing them through all the records.

In Naini Tál a complete new survey was made and an entirely new set of records compiled.

It will thus be seen that in a considerable proportion of the hills a court which sets out to deal with question regarding the precise interest held by a man in his village or the actual area and specific fields he owns often has a somewhat complicated task to deal with. Even in the resurveyed tracts there is some difficulty in identifying the numbers allotted in the new survey with the very different record of the same land in the old maps and records, owing both to radical changes in the fields themselves, and also sometimes to the inaccuracy of the old maps. It often happens, for instance in Garhwal, that a man sold land or a share amounting to, say, 50 nalis about the year 1890 ; the purchaser waited till settlement to get his name recorded and then found that he had got 70 or 80 nalis under the new survey, when the numbers representing the land purchased were identified.

Apart from the question of difficulties in interpreting the settlement records there is the question of the reliability and accuracy of the entries.

Reliability of the records. The parcha.

In this connection the settlement parcha requires mention. At the time of the preparation of the *khasra* and simultaneously with it, slips were written up giving for each man, whose name appeared in the khanapuri of the *khasra*, a list, of the fields which were entered in his name so that he could check them. These slips were the settlement parchas.

Frequency of mistakes.

Later on a settlement court went round for attestation of the record (mukabala) and heard any objections raised to the entries and decided disputes regarding them. Owing, however, to venality, carelessness or ignorance on the part of the amins who made the original entries, and the lack of intelligence and of caution on the part of the villagers, a great many wrong entries remained uncorrected, in very many cases the villagers concerned never discovered that the entries were wrong for years afterwards.

These mistakes are most common in the older records, such as those of Mr. Beckett's settlement which still hold good for all the old cultivation in Almora, and they consist most frequently of the entry of specific fields in the names of the wrong hissadars or khaikars, though there are a good number of mistakes due to the mistaken entry of the names of certain men as co-sharers in joint shares.

One village in Chaugarkha came to my notice in the course of my work in Almora, where the amin either out of spite or for some dishonest reason had made wrong entries for nearly all the land of the village, and these entries had all passed into the attested records. Thus nearly all the fields in *A's* possession were shown as *B's* and *C's* fields; *B's* fields were shown as in *C's* and *D's* possession, and so on. Thirty years later the villagers were still occupied in getting the mistakes corrected, by suit or otherwise, as they came to light. They were litigating more out of sheer perplexity than from a desire to wrongfully appropriate one another's land. It is, therefore, necessary to enter a caution against giving the settlement records in the hills any such weight of presumption as attaches to the regularly-revised and checked village papers in the plains. In the case of the later papers the much greater familiarity of the people with their annual records and the greater caution taught by experience is a further safeguard against error. The entries must, of course, be given a *prima facie* presumption of correctness and it is for the party contesting their accuracy to give proof of their inaccuracy, but they cannot be allowed to carry such weight as is sometimes given them by officers accustomed to the much greater authority which attaches to similar records in the plains.

Reliance on them must be tempered with reasonable caution, once a fair case against them is shown to exist. As Mr. D. T. Roberts, Commissioner, remarked in a Kumaun appeal, settlement entries are only presumptive evidence and may be, and often are, incorrect.

Other settlement records.

The settlement records of each village, besides those dealing with the details of measurement, revenue, and proprietary and other interests, comprise the settlement agreement (ikrár-náma) and certain memoranda relating to village customs, etc. These last have varied at different settlements and in different districts. As these papers are of considerable importance and interest with regard to various points of custom and tenure, I append* translations in full of specimen copies from the settlements of Mr. Beckett (Almora), Mr. Pauw (Garhwal), and Mr. Goudge (Almora and Naini Tal).

*Appendix to this chapter.

They carry considerable weight as authoritative statements of the ascertained village customs and local conditions.

(5) *General notes on suits regarding land*

Before closing this chapter it may be as well to add a few words on the courts in Kumaun and their work in rent, revenue and civil suits and matters, as defined in the Kumáun Rules with reference to questions relating to land.

Assistant Collectors coming from the plains with no experience of civil work are often puzzled over the distinctions between civil and rent work and liable to certain common errors, which are particularly likely to arise in the case of courts holding the unusual position of being at once revenue and civil courts. A reference to a few of these points may obviate some of the mistakes which I have found to occur very commonly.

Rule 30 of the Kumaun Rules specifies all suits which can be heard as rent suits in Kumaun. No other suits are rent suits and no suit coming under the definition of rule 30 can be tried as a civil suit (see rule 21). Thus a suit by a hissadar to eject a khaikar is a rent suit under rule 30 (3), since a khaikar ranks as a tenant. But a suit by a hissadar against a khaikar or heirs of a khaikar for a declaratory decree that certain land has lapsed to the hissadar's possession and become khudkasht is a civil suit under section 42 of the Specific Relief Act.

Similarly, if a hissadar claims that a pretended khaikar (or the heir of khaikar) has ousted him from land, which had been in his khudkhasht possession, and sues for a declaratory decree with consequential relief in the shape of recovery of possession, this is also a civil suit under the Specific Relief Act, since the plaintiff is suing the defendant as a trespasser and not as a tenant.

A khaikar suing his hissadar to recover possession of land must sue under the Kumaun Rules, section 30 (7). A khaikar who has lost possession of his land to his landlord for more than six months cannot recover his land (Kumaun Rules, Schedule A-2); see, however, the chapter on khaikars and their position as regards such suits.

Suits between two khaikars about land are, of course, civil suits, but if a hissadar puts another khaikar into possession of one khaikars land, the latter can sue them both under section 30 (7) since the khaikar co-defendant was only an agent of the landlord's for ejectment.

A khaikar cannot sue his hissadar under section 9 of the Specific Relief Act since this would entail a civil court's hearing a suit described in rule 30.

A sirtán cannot sue to recover possession when ejected (see chapter on sirtáns for rulings).

A civil court cannot entertain a suit to enforce a correction of the Revenue Records (Settlement Papers); see many rulings of the Allahabad and other High Courts, Allahabad, XVIII, 270, for instance. Nor is there any provision for a rent or revenue suit for this purpose. The proper procedure is for the aggrieved party to obtain a decree declaratory of his title or right, and then to apply on the basis of this decree to the revenue court for entry of the said right or title by mutation. It is still quite common in Kumaun to find suits entertained and decrees passed "to have *A B's* name expunged from the records for such and such land and the plaintiff's name entered in his place." Such suits cannot lie. The plaint should be amended.

The proviso to section 42, Specific Relief Act, is a frequent stumbling-block, and I have seen many suits for declaratory decrees admitted and such decrees passed, when such a suit or decree was clearly barred by this proviso.

Suits for declaratory decrees with consequential relief are often admitted either on a ten-rupee court-fee stamp (as for a declaratory decree only) without valuation of the relief, or on a valuation according to the revenue payable on the land. In such cases the valuation for court-fee purposes has to be fixed by the plaintiff, under section 7 (IV) (*c*) of the Court Fees Act.

There is also endless confusion caused by an ignoring of the terms of section 9 of the Specific Relief Act and failure to distinguish between such a summary suit and a regular suit for recovery of possession based upon an alleged title.

Orders issued from the Commissioner's court several years ago drawing attention to this point and requiring that in all cases of possible doubt the plaintiff should be called on to amend his plaint by an addition to show whether he wished to sue under section 9 or on the basis of title. But cases constantly come up in appeal in which it is almost impossible to tell whether (*a*) the plaintiff was suing or (*b*) the lower court was trying the case as a summary suit or otherwise. The two classes of suits are radically different.

A suit under section 9 of the Specific Relief Act must be brought within six months of the ouster which forms the cause of action; the plaint only bears half the court-fees of a regular suit for possession and a decree in such a suit is non-appealable. The only issue for decision is whether the plaintiff (not being a tenant suing his landlord) has or has not been ousted from possession, otherwise than in due course of law, within six months before the date of institution of the suit. No question of title can be raised or considered in such a suit, and it

is no reply to the suit to plead that the defendant was *de jure* entitled to the land and had previously been evicted by the plaintiff without any show of title. The decree in such a suit has no effect on any question of title and merely throws the burden of suing for title on the party who fails in the summary suit.

A regular suit for recovery of possession on the basis of title has a limitation period of twelve years (Article 142, Schedule II, Act XV of 1877); the plaint must bear full court-fee stamps under section 7 (V) of the Court Fees Act and the decision turns on the question of title and not of ousting and is appealable.

A word may finally be added regarding the form of the decree in a suit by a reversioner against a Hindu widow or other person holding a life interest in property who has alienated it by sale or mortgage or otherwise. Such suits are common in Kumaun and it has been a common practice to grant decrees declaring the alienation null and void *ab initio.* This is incorrect; the decree in such a suit should declare that the alienation will be valid during the lifetime of the alienor only and after his or her death will be null and void as against the revisioner. (Such a decree does not, of course, establish the title of the reversioner who sues as against any other reversioners who may subsequently raise a claim.)

From a considerable experience of litigation in Kumaun I think that the above notes may help to save a considerable number of unnecessary appeals and mistakes of procedure and some avoidable confusion.

I append a copy of an order of the Board of Revenue, received since the above notes were written, which draws attention to a source of confusion referred to above.

"*Copy of B. O. no.* 1274/*II-P., dated Allahabad, the* 19*th March,* 1906, *to the Commissioner of the Kumaun Division*

It has been noticed by the Board in appeals preferred to them from time to time from the Kumaun Division that a careless habit prevails in that division of leaving it uncertain whether a case is brought on the revenue or civil side.

2. If the case is a revenue one the particular section of the Kumaun Rules under which it is brought must be noted in the plaint and the record must show clearly whether the court is dealing with the case on the revenue or on the civil side."

APPENDIX TO CHAPTER I

EXHIBIT A

Mr. Beckett's Hukumnama

(Kumaun settlement)

Kharag Singh is recorded thokdar in mauza **Jangliagaon,** including (laga) Chanoti, patti Chhakháta. He will receive Rs.4-10-9 as thokdári dues at Rs.3 per cent. Formerly **Daula** and Bebia were màlguzàrs. They were succeeded by **Bachi** and Sháhbáz, respectively. The proprietors of the village have never yet been apportioned between the málguzàrs. For the future Bachi alone will be málguzár. In 1880 *sal* there were 37 bisis of land recorded in Janglia and 8 bisis in Chanoti and Rs.87 was the revenue fixed for both villages. In the present settlement the area of both villages is 204 $\frac{4}{20}$ bisis. The boundary of the vilage is extensive. Less land is cultivated because the proprietors go down to the Bhabar. The future revenue will be Rs.156 and besides this the following cesses will be realized :

	Rs.	a	p.
(1) Patwari rate	6	3	10
(2) School cess	4	10	10
(3) Dak cess	4	10	10
Total ..	15	9	6

There is 4 $\frac{5}{16}$ nàlis Padhànchári land ; the padhán will in addition get Rs.7-8-3 in cash to make the total dues received by him equivalent to 5 per cent. of the revenue.

His=a bant ho raha hai. The village has been partitioned. The rate of *málikána* from khaikars is Rs. 25 per cent. on the revenue.

There are three mills belonging to (1) Kunwaria and Khimua, (2) Gangua and Bachua, (3) Bachi Bhana and Dungru. These mills have been assesed at Re.1 each. One mills, that of Bachi Bhàna and Dungru, as the àsámis go to the Bhâbar (in the winter), has been assessed at Rs.2 only (*sic !*). The owners of these mills will get one *náli* (two seers) for each *pirái* (32 seers) of corn ground in their mills as their dues. There is no fishery. Phants to be prepared nali-sharah (showing shares in nális).

Applications may be called for.

Dated 22nd January, 1872.

According to Commissioner's order, Shâhbáz, for his lifetime, will remain recorded as malguzàr for his own share.

Dated 11th October, 1872.

(NOTE—The remarks about the mills is unintelligible. The remark that "the village has been partitioned" (*hissa bant ho raha hai*) is ambiguous.)

EXHIBIT B

Mr. Goudge's Hukmnáma

The mukâbala of mauza Ledhra, laga of Haldiyàni, in patti Chauthán has been made today.

Deo Singh is the mâlguzár. There is no padhánchàri land: his dues are paid in cash. The thokdár is Deo Singh, he gets Rs.3 per cent. dues. No mill. It has been explained to the hissadárs of the village that any one having any objection should state it within 30 days and anyone desiring to appeal should also do so within the same period.—20th September, 1900.

EXHIBIT C

Mr. Beckett's Ikrarnama

We, the undermentioned padhàns and hissadárs of mauza Janglia, patti Chhakhata, pargana Chhakhata, district Kumaun, agree that, according to Act IX of 1833, Rs.5,147-13-0 has been fixed to be the revenue of our village including all cesses for 30 years to come.

We agree to pay Rs.5,147-13-0 from 1st June, 1872 (Fasli years 1279-80) to 31st December, 1901 [corresponding to Fasli year 130 (*sic!*)] for the following 30 years on the following conditions:

	Rs. a. p.		Rs. a. p.
For the kharif harvest	(85 12 9)	For the rabi harvest	(85 12 9)
In November ..	(42 14 5)	In May	(42 14 5)
In December ..	(42 14 4)	In June	(42 14 5)

(1) The land revenue Rs.156 will be paid in instalments as mentioned above, into the tahsil through the padhán.

(2) We will pay Rs. 4-10-10 per annum as fixed dak dues at Rs.3 per cent. of the revenue.

(3) We will pay Rs.4-10-10 per annum as school cess at 3 per cent. of the revenue.

(4) We will pay Rs.6-3-10 as patwári rate at Rs.4 per cent. of the revenue.

(5) Dalip Singh has been appointed malguzar of the village at the present settlement; he will get Rs.7-8-3 in

cash as his malguzari dues at 5 per cent. besides 4/ $\frac{5}{16}$ nalis padhanachari land.

(6) If we wish to cultivate the undivided land of the village, we shall by common consent of all the hissadars divide it.

(7) We will preserve any boundary pillars that may be erected in our village. We can do what we like with the measured land of our village, but the unmeasured waste jungle, within the boundary of the village, is in the hands of Government. Grass and wood will be taken by all villagers from such jungles as has hitherto been the custom : no one shall object to this.

(8) If any villager leaves the village and goes away or becomes incapable or dies without issue, or if any hissadar's heir through minority cannot cultivate his share, the panch hissadars are responsible for cultivating his land.

If a khaikar's heir for any reason cannot cultivate his holding, he will not give it to another khaikar : he will hand it over to the hissadar and will always write a ladawa. If a khaikar or hissadar goes away from the village without having executed a ladawa he will still be responsible for the revenue of his share until the hissadárs have arranged for its cultivation.

(9) Government will be informed beforehand when any one proposes to start a new mill or re-start an old mill intending to levy dues to the corn ground.

(10) No transfer of land will be made without the fact being notified to Government. This will not apply to the case of sirtans.

(11) All the people of the village equally will pay the amount of any fine imposed on the village.

(12) We will report through the patwari the occurrence of murder, theft or death of an heirless person in the village. Lawaris property will be made over to the malguzar of the village.

(13) We will carry out orders regarding repairs to roads.

(14) We will never object to supply kuli bardaish.

(15) We will not sell the land of the village to outsiders without the consent of all the co-sharers.

It will be sold to outsiders only if none of the co-sharers agree to buy it. The deed will be registered and attested by the signatures of some of the villagers.

(16) The hissadars are at liberty to let their land to sirtans and to take it away from them.

(17) If it is discovered at any time that any land of any co-sharer has escaped measurement and assessment, the Government will be at liberty to measure and assess it.

(18) We will pay Rs.4-10-9 per annum as thokdari dues through the patwari to Thokdar Kharag Singh.

(19) There is no *gunth* land in the village.

EXHIBIT D

Mr. Goudge's memorandum of village customs

We, the undermentioned malguzars, hissadars, and khaikars of mauza Ranibagh Chaughanpata, patti Chhata, pargana Pahar Chhakhata, district Naini Tal, agree that the following village customs are correct :

Pre-emption.

(*a*) If any one sells land without the consent of, or without having consulted his heirs and the other co-sharers of the village, the latter have the right of pre-emption.

Cultivation of unmeasured land.

(*b*) Unmeasured land cannot be cultivated without the permission of the District Officer. The person who brings unmeasured land under cultivation has a right to it (*i.e.*, as against other villagers).

Appointment of a malguzar.

(*c*) The eldest son or nearest heir of a malguzar succeeds to the malguzarship if there is nothing special against his appointment ; otherwise a selection is made from among the other co-sharers of the village.

Malikana or proprietary dues.

(*d*) The thokdar, Soban Singh, son of Kishan Singh Mahara, gets from the tahsil his Rs.3 per cent. dues. The hissadars collect malikana from their khaikars. The padhan makes collections from gaon sanjait khaikars, and after paying the Government revenue divides the malikana among the co-sharers according to the quota of revenue paid by each hissadar.

Irrigation.

(*e*) The irrigation channel starts within the boundary of village.

Division of property.

(*f*) The custom of Sautiya bant prevails. Sometimes fields, sometimes movable, are given by way of jethon.

Gunth or muafi.

(*g*) There is no gunth or muáfi: the village is khálsa.

(*h*) Fuel and grass are brought from "Kàla Chauri" and "Mora" forests, and timber for houses and agricultural purposes is brought from "Gaulapár," "Kumalikot." and "patiya" forests.

Fuel and fodder.

(*i*) Gauchar rights—Cattle are grazed from Kàla Chauri to Patiya.

(*j*) There is no village servant. The malguzar arranges for bardáish, etc.

(*k*) Nothing is giving to any temple.

(*l*) There are 8 or 10 mango trees; anyone can take the fruit. There is no sanjait item.

(*m*) There are eleven families who supply the usual kuli and bardaish.

EXHIBIT E

Mr. Goudge's Ikrárnàma

We, the màlguzárs, hissadárs of mauza Ledhra, patti Chauthan, pargana, Dhaniakot, agree that we will pay Government revenue Rs.32 land revenue for the first five years (from 1st July, 1902 to 30th June, 1907) and in accordance with Government sanction we will pay Rs.38 (including all cesses) per annum from 1st July, 1907 to 30th June, 1932, and until a new settlement is made ; Government has reserved its right over minerals.

We agree that we the villagers without the previous permission of the District Officer will not extend cultivation beyond our measured land outside the demarcated chaks of . . . .

We shall cut wood for domestic use, not for sale, in accordance with the orders issued from time to time by the District Officer. We shall graze our cattle according to old customs. It is oúr duty to supply kuli bardaish as agreed at the last settlement.

We shall carefully preserve all marks connected with the survey measurement within the village.

(NOTE—The items of revenue payment are confusedly entered. The demarcated chaks are not specified.)

EXHIBIT F

Mr. Pauw's memorandum of village customs, Garhwal

For village Kunti, patti Karondu Palla, pargana Ganga Salan, district Garhwal.

(*a*) *Pre-emption*—Any hissadar wishing to sell his land must inform in the first place his kinsmen and near relatives

and then other co-sharers of his village of his intention. If they do not buy the land he can sell it to others. If without giving information, as stated above, any hissadár sells his lands the right of pre-emption will be as follows :

(1) If the land is sold to any resident co-sharer then the nearest kinsman, within the third generation of the vendor, will have a right to pre-emption.

(2) If the land is sold to a person who is neither a kinsman nor a near relative of the vendor nor is a resident hissadár of the village ; then the nearest kinsman, up to the third generation of the vendor in the first place and after him a resident proprietor of the village, will have a right to pre-emption.

(*b*) *Reclamation of waste lands*—Waste lands other than those which were measured and given to the villagers, viz. the waste lands whict adjoin or lie in the midst of the cultivated fields, are the property of Government. When any unmeasured land is brought under cultivation, it is necessary to obtain the District Officer's permission to do so. If cultivation is extended into unmeasured land without the District Officer's permission, nobody will have proprietary right in it.

(*c*) *Appointments of malguzars*—The eldest issue (male) of a malguzar is a appointed malguzar with the sanction of the District Officer. If the málguzàr has no son, then his nearest kinsman or relative (male) is generally made málguzár with the sanction of the District Officer : provided he is in other ways fitted for the post. If there is no such man then any other co-sharer (male) of the village, whom the District Officer considers fit, is appointed malguzar.

(*d*) *Mallikana, e.g. dues to thokdars*—There is no thokdár in thih village.

(*e*) *Special customs of irrigation, if any*—There is no gul in this village.

(*f*) *Customs about partition, whether bhai bant or sautiya bant is observed and whether jethon is allowed*—No jethon is allowed and bhai bant is customary in this village.

(*g*) *Whether the mahal is revenue-free or the revenue is assigned*—This village is khalsa and the revenue goes to Government.

(*h*) *Custom as to timber cutting*—The people of the village bring fuel from Semlya and Doba and timber for houses from the above places with the permission of the District Officer.

(*i*) *Custom as to grazing* The pasture of this village lies within the boundaries of Semlya and Doba.

(*j*) *Payments to village servants and their duties*—Dundi is the paswan of this village. He looks after the sanitation. The villagers give him nali (one nali of grain per household) at the time of harvest.

(*k*) *Payments to temples, etc.*—Nothing from this village.

(*l*) *Division of miscellaneous income from mills, fruit trees, etc.*—There are no mills and fruit-trees in the village.

(*m*) *The number of people in the village liable to furnish bardaish, and the nature of bardaish, at time of settlement*—Excluding the malguzar, there are ten families liable to furnish coolies and bardaish in this village and they will furnish coolies and bardaish according to custom.

Rents will be collected from the khaikars 21 days before and from the sirtans 30 days before the revenue kists fall due.

The malguzar collects rent from the khaikars and sirtans in the gaon sanjait land and after paying in the Government revenues distributes the malikana among all the co-sharers.

At the former settlement in many villages land measured in one village was included by *intikhab* or *khetabat* in the phant of some other village. At this settlement such lands have been surveyed in that village where they were measured at the former settlement.

The man who owned such lands has been recorded as hissadar. But such hissadar, if he be not otherwise a hissadar in the village, is not entitled to a share in the sanjaint lands of that village. Such hissadar will get a share in the sanjait lands of his own village.

List of shikmi hissadars

1. Chhawanu and Lutha, sons of Kamla, are entitled to equal shares and are entered jointly. One family.

Khailkars—Debu, Kiru, Kamlu, Moti were four brothers. Debu's son is Rup Singh ; Kiru's son is Jhagru ; Kamlu's sons are Sitalu, Gaju, Ganeshu, and Kundu ; Moti's sons are Sher Singh and Bahadur. These all are entitled to four equal shares. Four families.

2. Jai Ram, Nand Ram, Naru, and Bhaj Ram were four brothers. Bhaj Ram's sons are Gundaru, Phajitu, and Brahma. Shares are equal. Families are four. Nand Ram's share is separate and the other three are joint sharers.

Khaikars are Thagua and Kalmu, sons of Dhaunklu. Two families.

NOTE—Jai Ram is malguzar. At the last settlement there were 9/16 nalis of padhanchari land and Re.0-8-9 was paid as additional padhanchari dues. At this settlement the padhanchari land measured 15 $\frac{13}{16}$ nalis.

EXHIBIT G

Settlement agreement of Mr. Pauw's Garhwal settlement

We, the malguzars (or malguzars of mauza Kunti, patti Karondu Palla, pargana Ganga Salan, agree to pay the following revenue, *viz.* Rs.28 per annum, on condition of Government sanction, from 1st April, 1896 to 31st March, 1916.* and thereafter till the next settlement is made.

We admit that the State has reserved to itself all rights in minerals.

We admit that all unmeasured land is the property of Government ; and that villagers can only exercise the privileges of grazing and cutting wood (for their own use, but not for sale) or extending cultivation subject to such limitations as the District Officer may from time to time impose.

We admit that we are bound to furnish bardaish in accordance with the custom entered in the memorandum of village customs, which we have attested.

We agree to take care of and preserve all survey marks which have been erected within our village boundaries.

In the memorandum of village customs for our village we agreed to furnish coolies and bardaish as usual. We now with our will and with Government sanction make an alteration in that clause and agree that instead of the usual bardaish we will pay the bania's dues at one pie or three pies per rupee of the Government revenue and continue to furnish coolies.

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*This was subsequently extended to 31st March, 1926. Supplementary agreement taken under G. O. no. 1142/X—247-B., dated the 10th May, 1898.

CHAPTER II

THE HISSADARS OR PROPRIETARY BODY

(1) *The village proprietary body*

Origin.

We have seen in the historical sketch quoted from Mr. Pauw how the properietary or hissadari right originated in Kumaun.

Put briefly, the holders of this right derived their title either (1) from being found as the actual original cultivators of the soil, or (2) from grants of villages made over the heads of the cultivators in pre-British times, or (3) by usurpation of the rights of, and an assumption of proprietary title over the heads of, the poorer and more ignorant classes of cultivators in the primitive period of British rule. In more recent times the clearing and cultivation of waste, forest land and nayabad grants have been means of acquiring proprietary right, and of course new proprietors have in places obtained rights by purchase.

(2) *Various types of proprietary bodies*

In the most common type of village, however, we still find a proprietary body representing the original community of cultivators and thus often all of one caste and more or less interrelated. The village is parcelled out into small holdings (expressed in areas and not in fractions). In such villages the settlement is practically a "raiyatwari" one, as Mr. Traill first remarked. In the other classes of villages we have something which in origin resembles, to some extent, the plains zamindari, in the course of time, however, many of the grantee or usurping families have become by multiplication proprietary bodies of hissadars much resembling those of the former class, only differing from them in having much of theeir land and sometimes entire villages held by khaikars who represent the original cultivators.

There is thus very little "zamindari" in the plain sense of the term : the terms "pattidari" and "bhaiyachara" are also unknown in the hills and the classification of proprietors under these heads or their sub-divisions would be only confusing.

Mr. Batten in his Kumaun settlement report, paragraphs 20 and 21, discussed this point and gave a comparison of the hill proprietary interests with the pattidari and zamindari of the plains, remarking that the application of these classifications to Kumaun would be unnecessary and even mischievous.

In practice all proprietors, *qua* proprietors, are known simply as hissadars, whatever form their proprietorship may take.

Putting aside, however, the few cases where a single proprietor owns a village and where accordingly questions about the inter-relation of the proprietary body do not arise we may first take for consideration the prominent features of the proprietary body as it exists in the great majority of villages.

The normal type of village proprietary.

Each village forms (with its lagas, if it has any) a separate mahal; it is held under a separate revenue engagement. This holds good for all villages in the hills, however owned, the only exception, I believe, being pargana Askot, which is held by the Rajwar of Askot on one single engagement. All the proprietors of the village are jointly and severally liable for the land revenue assessed on the whole village. Perfect partition is altogether unknown in the hills and we have a village proprietary system resembling in the commonest cases either pure pattidari or imperfect pattidari.

Out of the proprietary body (the panch hissadaran) one or more padhans or malguzars are appointed; there is usually only one, but where a village is divided into two hostile clans or where other special reasons exist for the appointment of two or more padhans, there may be more than one. The padhan collects the land revenue from the co-sharers, and where there are two padhans the various co-sharers are apportioned between them at the time of the creation of a second padhanship. Such a division of the padhanship, however, does not operate as a partition of a mahal or relieve any of the co-sharers of their joint liability in respect of the whole village as a revenue unit. The padhan must be a hissadar of the village of which he is padhan. His general position and duties are described in a later chapter.

The records, in which the proprietary and other interests are entered, have been described in the last chapter.

The shares of the various hissadars are not, in the common type, fractional portions of the whole village without a division of specific lands; such fractional shares are only found in a few villages, usually those held by a single family.

Gaon sanjait.

In the ordinary village the shares of the various recorded hissadars in all or the greater part of the village land are separately held and recorded under a system of imperfect partition; there is usually some jointly held common land (*gaon sanjait*). (I refer of course to measured land the actual property of the hissadars and not to unmeasured Government land, which is in sense "common" land of the village.) Where there is such common land which has not yet been partitioned, it is usually owned by the whole body of hissadars in proportion to the amount of their separate shares.

Thus in a very small village we might have the land owned thus :

Hissadar	Area	Revenue
		Rs. a. p.
A	80 nalis (separate holding of specific fields).	5 0 0
B	56 nalis	4 0 0
C	24 nalis	1 4 0
Gaon sanjait ..		
A½		
B7/20	40 nalis.. ..	2 0 0
C3/20		
	Total revenue ..	12 4 0
		(For all of which A, B and C are all ultimately liable.)

Any hissadar can have his proportionate share of the *gaon sanjait* separated off by imperfect partition, and when this is done the remainder of the land ceases to be strictly *gaon sanjait* and remains *sanjait* of certain specific hissadars only. The portions partitioned off become amalgamated with the already existing separate shares of their owners. The management and partition of *gaon sanjait* and specific questions regarding it are dealt with in a separate section later on.

Shikmi hissadars

There is also the common case of a joint family holding its land unpartitioned. A number of brothers, or an uncle and nephew, or two or more similar relatives very commonly own an undivided share which is recorded in the name of the eldest brother or the head of the family only; the other joint co-sharers are known as *shikmi* hissadars with him. Their names may or may not be recorded in the remarks column of the settlement muntakhib. (The entry of all names by mutation or a report for such entry is not compulsory as a preliminary condition for the appearance of a party in the revenue courts of Kumaun.) In other case all the names of the joint family members are entered in the records, but the share remains recorded as joint. In the case of joint family holdings the actual land of the share is often held and cultivated separately by the separate members of the family under a private partition or division.

Any member can get his land and share formally separated off and recorded separately by applying to the courts for partition.

Special questions regarding joint holdings and their partition will be found discussed in separate paragraphs later on.

We thus have, as a standard type, a community of petty cultivating proprietors, each with full proprietary right over his own specific share and his fractional share in common land, and only united by a common liability for land revenue.

Other types of vi lages.

Two types of village proprietary bodies other than that described above may be mentioned (i) those where the whole village is held in common by a number of hissadars without any division of specific lands, their shares being expressed either (*a*) as fractions or (*b*) as units of a convenient total or (*c*) in areas representing shares.

For instance	Hissadars	Measured land of village	Revenue
			Rs. a. p.
(*a*) Sanjait of..	A .. .. $\frac{1}{3}$ B .. .. $\frac{1}{3}$ C .. .. $\frac{1}{3}$ Total .. 400 nalis	400 nalis..	20 0 0
(*b*) Sanjait of..	A 4 shares .. .. B 2 ,, ... C 2 ,, ... D 1 share .. .. E 1 ,, ... F 1 ,, ... G 1 ,, ... Total .. 12 shares	400 nalis..	20 0 0

i.e., (1) A, (2) B and (3) D, E, F and G represent three original equal shares

For instance	Hissadars	Measured land of village	Revenue
(*c*) Sanjait of ..	A 30 nalis .. .. B 40 ,, ... C 40 ,, ... Total .. 160 nalis.	160 nalis..	Rs. a. p. 10 0 0

(ii) Villages where the common land has been partitioned up and the whole of the land is held in separated shares. Each of these types represents one portion of the mixed village which, as described above, contains both *sanjait* land and also separate holdings.

Villages of type (i) are constantly being broken up by imperfect partition, as the sharers find it more convenient to have specific separate lands in place of an intangible share with its restrictions and tendency to give rise to friction.

The hybrid form where some individuals have got their share of the common land partitioned off, while a considerable number of separate hissadars still hold the balance of the *sanjait* land in common, does not call for any separate remark. The types change with partition and fresh areas of *gaon sanjait* may come into existence from lapsed shares.

(3) *Lapsed holdings*

A co-sharer sometimes, though very rarely, abandons his land, or he may die leaving no heir. In such cases the remaining proprietors succeed to the lapsed share (see Pauw, page 43). The padhan on behalf of the hissadars usually arranges for its cultivation, as in the case of ordinary *gaon sanjait* land, until it is partitioned.

This succession of the remaining hissadars is in accordance with Kumaun custom and is the logical consequence of joint village liability for the revenue, since Government settles the village measured area as a whole with the proprietors as a jointly liable community and any portion of the village land so settled for is, so far as Government is concerned, merely fractional share of the village property and the villagers are entitled to deal with in *inter se* without reference to Government, subject to the payment of the revenue. The custom was recognized by Sir Henry Ramsay in Bach Ram *versus* Chanar Singh and others of Sunsari, Chauthan (order of 6th October, 1874) and by Mr. D. T. Roberts Commissioner, in Tila, appellant-defendant *versus* Bhagwat Singh, etc. plaintiffs-respondents, mauza Mohamari, Kaklason, on 11th May, 1892.

Cases, however, have occurred, I am informed, where such shares have been resumed on behalf of Government and sold by the Deputy Commissioner. I have not been able to find any specific instances of this, and such a practice is certainly opposed to custom and enquity. The quotations which are made by Mr. Pauw from Mr. Traill and from the settlement agreement confirm the view taken and the rulings quoted above.

(4) *Value of hissadari right*

Mention has been made of average rates of mesne profits in the introductory chapter, since this is a question affecting proprietors and tenants alike. The market value of the hissadari right

requires notice under the present section. No very definite standard can be laid down, as the price of land is steadily rising in the hills and varies very largely in different parts, according to the quality of the soil, the pressure of population and the proportion of the available area which has been brought under cultivation, the varying value which the people of different tracts attach to their cultivation, the elevation and climate and other factors.

Mr.Pauw (page 64) gives a table showing the number of years "purchase" of the revenue obtained at sales by order of the court and by private transfer during a series of 24 years up to 1895. The average price comes out in the case of sales by order of court to Rs.30 per Re.1 of revenue assessed, and in the case of private transfers to Rs.52 per Re.1 of revenue.

This table, however, is unsatisfactory in that it does not distinguish between sales of khudkasht hissadari land and sales of the hissadari right over land held by khaikars. It is also discounted for use in the present day by the further rise in the price of land which has taken place since 1895. During the period to which the table refers the quinquennial average for private transfers rose from Rs.16 per rupee of revenue for 1871—76 to Rs.66 for the period 1891—95. Mr. Pauw also remarks on the tendency to overstate the actual price in private sales with a view to defeat claims for pre-emption. There is no doubt such a tendency, but in comparing the rates for private sales with those of sales by order of court and in discussing the reasons for the difference he has not made allowance for the dislike of people to purchase land at a court-sale ; the purchaser at such sale is often in an invidious position in a village and has much difficulty in obtaining his proper rights. Artificial prices again are often obtained at such sales by the decree-holder buying the property for the amount of his decree, though this may be above the real value of the land.

Mr. Goudge has not given any similar table of prices for Almora ; he remarks, however, on the high prices prevailing and the material increase in the value of land (page 16), and has given some statistics on the subject in the pargana reports, and a note of prices in Naini Tal. In Naini Tal the average price per nali only rose from Rs.3-8-11 in the decade following Mr. Beckett's settlement to Rs.4-12-1 in the decade preceding Mr. Goudge's settlement, while in Almora the pargana rates show a vastly greater increase.

Taking a few at random, I find the corresponding rates are for Kali Kumaun pargana Re.1-6-7 and Rs.4-2-11 ; for Danpur about Re.1-14-9 and Rs. 6-4-0, and for Pali Panchaun about Re.1-15-9 and Rs.5-4-0. For practical purposes, however, a more definite and easily applicable standard is necessary. The above mentioned rates are for all kinds of land mixed up together and are already tending to fall below the rising standard of value.

In Almora I found that a generally accepted fair average price for khudkasht hissadari was Rs.100 for land paying Re.1 revenue; this is a fair standard for ordinary village land. Good irrigated land will often fetch a higher rate, while land in the remoter parts especially when of rather poor quality, will often sell at a considerably lower rate. The market value of the land thus varies more widely than the revenue rates for the different qualities.

Disregarding abnormal rates, such as obtain near Almora town or in some exceptionally rich valleys the Someswar valley for instance, it may be said that average rates for area in ordinarily well-cultivated tracts will be found to be about Rs.6 a nali for good dry land, Rs.12 to Rs.20 for irrigated land, and Rs.3 or Rs.4 for inferior land. In some cases irrigated land brings as much as Rs.25 a nali or even more, and inferior land may sell for Rs.2 a nali. *Gharbara* land (garden plots adjoining the village site) which is usually dry brings about as much as irrigated land.

The above rates are based on a fairly wide experience of private transfers in Almora. In Garhwal the rates run perhaps rather lower on the average, though in the better tracts they are quite as high.

These rates per nali will be found to correspond roughly with the revenue rates of Rs.100 per Re.1 of revenue, and are thus higher for Garhwal than Mr. Pauw's rates.

Hissadari right in khaikari land.

In the case of khaikari land all that the hissadar can sell is his right as proprietor to receive a percentage on the revenue as *malikana,* with a possible prospect of the land reverting to khudkasht in the absence of direct heirs to the khaikar.

This means that all the hissadar receives is 25 per cent. in Almora and Naini Tal and 20 per cent. in Garhwal upon the revenue, *plus* certain small customary dues which are unauthorized, but are collected in practice. [A few exceptional villages pay malikana at other rates varying from 10 per cent. to 100 per cent.] The hissadar thus normally only gets an income of about Re.0-4-0 a year on Re.1 revenue-paying land held by khaikar. In the old days when land was plentiful and cheap and tenants or labourers harder to get, this was not to be despised, but nowadays the difference in value between such land and khudkasht land has widened immensely.

Still it is much better to be the proprietor of land held by a khaikar than not to have the land at all, and the market price of the hissadari right in such land is much higher than its pecuniary return would justify ; it may be taken at from one-third to one-half of the price of khudkasht land.

[On this showing the premium paid by a tenant for a khaikari lease should be from half to two-thirds of the hissadari khudkasht price of the land ; but it is usually lower, the reason being that a

hissadar generally only creates new khaikari right when he has more land than he can manage and so leases to a khaikar outlying land which is of little value to him, but which he does not want to sell ; he probably cannot get a satisfactory sirtan for it or wants to keep an old tenant and is tempted by the substantial premium he gets.

Sales of *benap* extensions.

It may be noted here that as a rule, in the absence of any express condition to the contrary, a sale by a hissadar of his hissadari land includes the handing over to the purchaser of any extensions of cultivation into unmeasured land which the vendor may have made in continuation of the measured land sold. He cannot, legally speaking, sell such land as it is Government property ; but he hands over possession and such rights over it as he himself possessed. This is usually specified in the comprehensive term of the sale-deed. This fact further complicates any attempt to fix a standard of value for hissadari land, since by the time when a revision of settlement approaches most hissadars have added considerably to their measured land by unmeasured extensions and a recorded share of 40 nalis may represent a total area of 60 or 70 nalis which the purchaser actually gets. What the result would be if a hissadar sold his entire share in a village to a purchaser, but reserved to himself his extensions of cultivation in unmeasured land, is a hypothetical question that has never been decided yet. He would be no longer a hissadar of the village paying any revenue in it, but would be holding revenue-free (as a proprietor) land which he had under the usual custom brought into cultivation as a proprietor. The only case bearing on the point appears to be one where a mortgagee in ossession extended the cultivation of the mortgaged land into adjoining unmeasured land and was recorded as hissadar of this unmeasured land at settlement. In this case, however, the mortgagee was himself also a hissadar of the village. It was held that his entry as proprietor was correct (Jai Kishan and other *versus* Kirpal Dat of Dania), Rangor by Davis as Commissioner on 3rd February, 1903.

(5) *Specific questions regarding the hissadari right*

So far, the proprietary body in general and its composition have been described and the value of the hissadari right discussed. It now remains to consider specific questions of customs relating to proprietorship in land which are peculiar to Kumaun.

In many branches of the subjects, of course, questions of rights in immovable property in Kumaun, as elsewhere, are to be decided by the ordinary substantive Civil law as in force in Kumaun or according to the usual Hindu or Muhammadan law, as the case may be. It is not proposed to discuss in this Manual any questions regarding land which come under ordinary laws, such as the

Transfer of Property Act, the Specific Relief Act, the Contract Act and the like, nor yet the standard rules of Hindu (Mitakshara) or Muhammadan law. Reference will thus be made only to the customs peculiar to Kumaun, where they differ from those prevailing elsewhere ; and in all cases not mentioned in the Manual it is to be assumed that the ordinary law prevails.

Gaon sanjait and.

The undivided village land is usually managed by the malguzar or padhan on behalf of the panch hissadars. Theoretically, all the hissadars should profit by it proportionately to the extent of their shares either by holdng a portion of the land or by receiving a share of the profits to go towards paying their shares of the revenue assessed on it (if any) and perhaps a little more. Compare Messrs. Pauw and Goudge's memoranda of village customs given above. In practice, however, there are various methods of holding or managing such land. In some cases the hissadars themselves cultivate it in fairly proportionate shares by mutual consent and pay the proportion of the revenue due from them according to the amount of their recorded shares. In other cases, where forest and waste land is scarce, the *gaon sanjait* is left uncultivated and preserved for pasture, the hissadars paying the revenue as above.

In other cases again the malguzar lets the land to sirtans and collects the rents, from which he pays the revenue due on the land. If there be any surplus he sometimes divides it among the hissadars ; but often, if he is a powerful malguzar, he keeps the surplus himself.

In Garhwal it is a not uncommon practice, where the *gaon sanjait* is let out to tenants, for the rents to be kept by the malguzar as a fund to meet the common village expenses, the hissadars paying the revenue on the land without receiving any direct return from it.

In some villages such land or a part of it is given rentfree to the village doms, who work for the hissadars in various ways, while sometimes, where it is let out to tenants, the rents are devoted to common religious worship on behalf of the village. There is thus no recognised general rule which can be set up as the normal method of managing *gaon sanjait;* all that can be said is that each village follows such custom at is approved by the hissadars in general ; the management is a matter of mutual agreement. If any co-sharer is dissatisfied with the share of *gaon sanjait* that he holds or with the existing method of managing it, it is open to him to apply for partition of his proportionate share and he can get it separated off, though things may be made unpleasant for him if the other hissadars do not approve of the *gaon sanjait* land being broken up. If some one or more hissadars get their shares thus partitioned, off, the land left *sanjait* of the remaining hissadars is no longer strictly *"gaon sanjait"*,

but it continues practically as such, the only difference being that some of the village hissadars no longer have any rights in or (immediate) liabilites in respect of it. It practically disappears, as *gaon sanjait,* when only a small portion of the hissadars continue to hold a small remainder of it jointly.

The management and partition of such land naturally gives rise to a good many disputes of various kinds, but there are singularly few rulings to be found relating to it.

Specific areas of *gaon sanjait* like other undivided property cannot be alienated except with the consent of all the proprietors nor can the malguzar or any fraction of the hissadars create khaikari right in any specific portion of the undivided land except with the consent of and on behalf of all the co-sharers (see Durga and others, appellants-defendants, of Pokharisain, patti Sabli Garhwal *versus* Jai Singh and Lachhman Singh, decided on 22nd August, 1892, by Mr. D. T Roberts). If any act prejudicial to the common right is done by the malguzar or any hissadars, the remaining hissadars have their remedy by suit. Such instances occasionally occur, and, I have recently tried an appeal where the padhan had begun to build himself a cowshed on one of the waste *gaon sanjait* fields kept for pasture against the wishes of all of the other hissadars. He had to stop.

(6) *Partition of gaon sanjait*

The interest of the individual hissadars in *gaon sanjait* are usually proportionate to the revenue payable on their separate shares, and the common land is thus normally partitioned on this basis, known as "rakm sharah". In some villages, however, the custom of "mavari bant" (division according to families, *mao*) prevails ; in such cases every family holding a share in the village is entitled to an equal share in the *sanjait land.* The custom, where it exists, will generally be found recorded in the village memorandum of customs ; sometimes the land will be found in the settlement measurement records entered as *"gaon sanjait mavari bant".*

Where there is no such record to be found in the village papers there is a strong presumption against the existence of the custom, which is an unusual one. Where it does exist care nor be taken in making a partition to ascertain which of the existing shares represents the original "families" in question, since if is not to be assumed that each share now recorded entitles the holder to a "family" share in the *sanjait.* An original "family" may now be represented by several brother or cousins holding separate shares ; or one member of a family may have sold his share to an outsider who has got his purchased land partitioned off ; in this case in the absence of any specific provisions to the contrary in the sale-deed the purchaser and the members of the original family would get one family share between them. An instance of the recorded custom of *mavari bant* being enforced

against the wishes of most of the parties to the case may be found in Dalip Singh and others *versus* Ram Singh and others of Tanda, Borarau, decided by Mr. Giles as officiating Commissioner on the 31st August, 1891. This, however, referred to the *gaon sanjait* land of the khaikars in a village held entirely by khaikars. In partitioning the *gaon sanjait* when the hissadars are already in cultivating possession by mutual consent, existing possession is maintained as far as possible, but of course the mere fact that a hissadar has none or very little of the land in the possession does not affect his right to get his full proportionate share at the expense of the possession of others. I should not mention this had I not seen a case in which certain hissadars were given a decree by the first court for exclusive title in a specific block of the *sanjait* land against a co-sharer who had been holding none of the land in that block, simply on the ground that they had been in possession in that block and he had not.

This refers to the ordinary *gaon sanjait* of old cultivation and assessed to revenue.

There is, however, a ruling of Mr. D. T. Roberts referring to somewhat different and unusual circumstances which is worth quoting. Certain land in mauza Mason, Garhwal, was measured at settlement as *sanjait* of four co-sharers, though it was uncultivated waste, and no revenue was assessed on it (it was *parat bahik*). Subsequently three of the four hissadars broke up the land and reclaimed it ; they improved and cultivated it for a long time (more than 12 years) and then the heir of the fourth co-sharer, who had never taken any action with regard to it since the settlement, stepped in and claimed one-fourth of it. It was held that he had lost all claim to it (Swaru and Jai Ram *versus* Bhawani, decision of the 7th October, 1892).

Where the *gaon sanjait* is left waste for pasture or for any other reason and some hissadars wish to cultivate a portion of it, but all the hissadars are not agreeable, the former party must apply for partition ; they cannot coerce the other party even if they have a majority on their side, since all such dealing with the *sanjait* and must be mutual consent. See Mr. Beckett's settlement agreement, of which a typical specimen is appended to the preceding chapter. (See also the Board's order in the case of Jasodhar and others of Ghaneli, Tala Syunara, Almora *versus* Kamli and others, dated the 13th July, 1891, where the above principle is clearly laid down.) This point is sometimes misunderstood I have seen a case where some co-sharers had quite correctly been given a civil court decree to restrain certain others from breaking up and cultivating a certain area of waste *sanjait* land against the will of the plaintiffs. Subsequently, however, when the defendant party applied for partition of their share of the *gaon sanjait*, this area was excluded from partition altogether on the ground that its cultivation had been prohibited by the previous decree and it must, therefore, remain common

waste. This was wrong ; the dissenting party could only claim to keep as common waste such land as should remain their *sanjait* after partition of the shares of the other party.

(7) *Joint holdings*

Shikmi hissadars.

The joint holdings of several hissadars, usually brothers or near relatives, are the cause of much trouble and many disputes in the hills owing to the common habit of having the entire holding recorded in the name of the head of the family alone and to the extremely casual habits of the people with regard to mutations and to the proper recording of transfers of interests. They are also very slow to get proper partitions made when they are needed until driven to it by quarrels or by sheer necessity. They are resorting to partition with increasing frequency nowadays, as the increase of population and cultivation produces greater unwieldiness in joint holdings, while greater intelligence and education on the part of the people impresses on them the advantages of a proper division of property. There is also a tendency towards the disruption of the joint family, and the greater prevalence of litigation leads to an increase in the number of partitions.

Mr. Pauw has the following remarks on joint holdings and shikmi hissadars:

"According to the Mitakshara, which is supposed to regulate customs connected with Hindu law in Garhwal, the whole estate is liable for debts incurred by the manager of the undivided joint family, while each of the members, having only an undivided share of the whole and not full proprietary rights over any part, is unable to alienate his portion of the inheritance (Mayne's Hindu Law, section 327). The only remedy against this lay in partition. But in the hills the shikmi hissadar has always been permitted to exercise full proprietary rights over his nominal share of the inheritance and to claim that his portion shall not be held responsible for debts due from the manager unless he is specifically mentioned as liable in the decree. A fraudulent use is frequently made of this power, particularly in the case of private sales" (page 43).

Where all the shikmi hissadars are resident and in possession, it is usual for the land to be divided by a private arrangement into shares made up of specific plots, and it is common for one hissadar to sell not merely his share, but specific fields out of the undivided estate. This is a fruitful source of litigation, as is only natural. In former days in such cases it was customary for the courts to make a sort of irregular partition in the execution proceedings, when the purchaser sued for possession of his share, by drawing up a *fard* or list for the purchaser and another for the remaining original hissadars. This was not merely a formal proceeding for giving possession, but was regarded as an

actual separation of the land and as conveying exclusive rights in the portions allotted (*cf.* Chandri of Machyalgaon, patti Painon *versus* Kalamu and Sheo Dat, which came before Mr. D. T. Roberts, Commissioner, in Revenue appeal no. 7, decided on 28th April, 1893).

Strictly speaking a vendor of a share in a joint holding cannot convey any right to specify lands; but when the joint holding has been held in separate possession by a private arrangement, the purchaser is entitled to be given possession of the fields so held by the vendor, though he cannot claim exclusive title in them. If either party is not satisfied with this arrangement, their remedy lies in a regular application for partition, when the facts of the previous possession will be considered so far as is feasible in making an equitable division. When, as often happens, one or two members of a joint family stay at home and cultivate the land, while other co-sharers go out into the world in service or other occupations, the whole land remains joint. The absent co-sharers would not ordinarily lose any of their rights in the estate, though the Board in Badri Dat *versus* Purnnand of Naya Sangroli, Salam, Almora (order of 14th July, 1887), held that when one hissadar had been altogether out of possession of any portion of the estate for many years even though he might have paid his quota of revenue, the revenue court was justified in rejecting his application for partition. (*Quoere*: he should be referred to a civil suit to establish his title).

With the exception noted by Mr. Pauw, the questions arising out of joint holdings are referable to the ordinary rules of Mitukshara law.

The common omission in the records in Kumaun to specify by name all the shikmi co-sharers in hissadari holdings must not be overlooked, as the presumption is in favour of each member of a family having his normal share in the ancestral land whether he or his predecessors are named in the records or not.

A typical instance of the confusion of joint holdings which recently came to notice in an old file may be quoted. A large holding had stood in the name of *A* for many years; on a dispute regarding it being taken into court it appeared that the existing owners comprised one of *A's* sons, a brother of *A's*, couple of nephews and some grandchildren, while somehow or other a relative who had no title to any part of the estate by inheritance had got hold of some of the land and on the strength of this had sold a considerable portion of the estate to an outsider. It is always necessary, as this case shows, to enquire into the actual interests in joint holdings when disputes arise, as a shikmi hissadar often sells or tries to sell an area of land in excess of his real share, and with the somewhat confused settlement records this often leads to mistaken entries in mutation. In a recent case

five hissadars jointly owned some 250 nalis ; one of them sold 70 nalis to an outsider and the settlement records after a mutation gave the result that four men held 50 nalis each and the fifth 70 nalis out of a total of 250 nalis !

Partition of joint holdings.

A few remarks on this subject may be added to the above note.

The holdings of khaikars cannot be divided among hissadars when the latter are partitioning their joint estate.

Rule 9 of the Kumaun Supplementary Partition Rules of 1900 prescribes the procedure to be followed with regard to land held by khaikars. The point was discussed fully by Mr. Hamblin, Commissioner, in Parbin Singh and Daulat Singh of Khargaon Bichhla Chaukot *versus* Ratan Singh and Lachham Singh (order of 9th December, 1901).

The former custom was to divide up the khaikars according to their rent without regard to the limitation laid down in rule 9. (Thus hissadars A, B, C, D and E jointly had four khaikars W, X, Y and Z paying Rs.5 rent each, W would be allotted so far as the hissadari interest was concerned fourth-fifths to A and one-fifth to B. X would be allotted three-fifths to B and two-fifths to C, and so on.)

Askot.

Askot is an impartible taluka (Lala Ranjit Singh *versus* Rajwar Pushkar Pal, decided by Mr. D. T. Roberts, Commissioner, on 11th August, 1892). This appears to be the only impartible estate in Kumaun. (A thokdarship is not an estate, but an office ; see section on thokdars.)

Primogeniture.

Primogeniture, which is a cognate custom, may be alluded to here ; it has, as stated by Mr. Pauw, been claimed by a family in Idwalsyun, and more recently was asserted in the case of a muafi estate in Kandarsyun ; the claim failed in both instances and I have found no case of its being established in Kumaun.

Partition, unmeasured land.

Unmeasured extensions of cultivation cannot be dealt with by a court in partition, since such benap land is legally the property of Government, until it has been assessed to revenue and a settlement made for it; there are, moreover, no records-of-rights and measurement for such lands. I mention this as I have seen a case in which a court in addition to partitioning the recorded holding of the parties, drew up similar lists purporting to partition some unmeasured land which they had jointly broken up and cultivated, and which the partition amin had surveyed. It is, however, uncommon to find jointly held extensions of cultivation into unmeasured land; they are usually made by one man on his own account. A properly sanctioned nayabad grant, made jointly to two or more persons, could, however, no doubt be partitioned in the usual way.

(8) *Pre-emption*

The Kumaun custom of pre-emption is a constant source of litigation and has produced a great number of rulings, not always consistent, regarding its own peculiar rules. The origin, as Mr. Pauw remarks, is uncertain ; but it has only been crystallised by definite rulings into a fixed formula in modern times, as the old cases quoted by Mr. Pauw indicate.

In questions distinct from the local peculiarities, which determine who may claim to pre-empt and in what circumstances, the ordinary rules of law apply and the rulings of the various High Courts should be observed.

The period of limitation for pre-emption suits, for instances, is that prescribed by the Limitation Act, namely, one year. (The exact phraseology of article 10 of Schedule II to the Act is worth noting carefully. Note that when the vendee is already in possession of the property sold, e.g., as a tenant or mortgagee, there must be a definite notice or a public act indicating the change of status to the claimant before the period of limitation will begin to run.) Compare also section 182 of Act III of 1901. In Kumaun, as elsewhere, it is extremely common, when there is any likelihood of the claim of pre-emption being raised, for a fictitious price to be entered in the sale-deed. Mr. Pauw has remarked on this "well-known device" on page 64 of his report.

It is therefore safe to follow the rulings of the Allahabad High Court, Indian Law Reports, V Allahabad, 184, and IX Allahabad, 225, that in pre-emption cases it is only necessary for the plaintiff to adduce very slight evidence of the nominal price being a fictitious one in order to shift the burden of proving its correctness on to the shoulders of the defence, who then have to give strong proof in support of their case. In dealing with claims for pre-emption it is always necessary to keep in mind two points. One is that the custom constitutes an interference with the normal principle of freedom of contract and may easily be used for vexatious or dishonest purposes. Claims for pre-emption should thus be dealt with with care to avoid doing injustice to people who have done no wrong. It is very probable that in Kumaun a certain proportion of such suits are instituted simply with the idea of exacting from the purchaser a payment to induce the claimant to waive his rights, or else in the hope of getting decreed a forced sale of land at a price below its real value by misleading the court. Still, such cases are probably not common. The second point to keep in mind is the meaning or object of the custom.

The idea of giving near relatives a right of pre-emption against other co-sharers of the village is to enable the property of the "family" in a wide sense to be preserved intact, if an improvident member parts with his share of it.

The right of the village co-sharers against outsiders enables them to keep the village community with its joint lands and joint revenue free from "undesirable aliens"—to use an appropriate modern phrase.

On this latter point Sir Henry Ramsay remarked in a case of 1886 in dismissing the suit of a relative who was not a co-sharer in the village concerned, that the object of pre-emption is to secure village proprietors against the injurious instruction of outsiders not to secure the rights of distant relatives.

Coming to the definite points of local custom we find the general principle of the custom stereotyped, as Mr. Pauw says, in the memorandum of village customs of the last Garhwal settlement as follows :—

(1) The option of purchase must first be given to the vendors' kinsmen and then to the other co-sharers. If they decline to purchase, the vendor may sell to any outsider. If the vendor gives them no prior intimation, they may claim to pre-empt.

(2) A relative of the vendor within the third degree has a right of pre-emption against any purchaser who is an unrelated or more distantly related co-sharer.

(3) If an outsider purchases, then the first right of pre-emption lies with relatives within the third degree and failing them with other resident co-sharers of the villages.

The custom is referred to more briefly in Mr. Goudge's settlement memorandum which notes that if any man sells land without the consent of, or without consulting, his heirs and the other co-sharers of the village, the latter will have the right of pre-emption. Mr. Beckett's Almora agreements merely say "we will not sell village land without the consent of all the co-sharers. It will be sold to outsiders only if none of the co-sharers agrees to buy it."

The first requisite, therefore, to entitle a man to claim pre-emption is that he should be a co-sharer, and a resident co-sharer, of the village.

Relative, but not a co-sharer.

A near relative who is not a co-sharer in the village has no right of pre-emption at all. *See* Parsi Sah *versus* Bijai Ram and others, decided by by Colonel Erskine, Commissioner, on 16th December, 1890 ; also Amba Dat *versus* Bijai Ram by Mr. Ross, and other decisions.

Non-resident co-sharers.

A non-resident co-sharer also has no right of pre-emption, *see* the Garhwal village memorandum and Gajadhar Juyal *versus* Jora and others of Kandi, Malla Dhangu, second appeal no. 10 of 1902 by Mr. Hamblin, Commissioner.

Co-sharer by purchase.

A co-sharer, who has himself become a co-sharer by purchase, has the same right of pre-emption as any other co-sharer. Mr. D. T. Roberts, Commissioner, in Moti *versus* Lal Singh and Bachi, second appeal no. 17 of 1893.

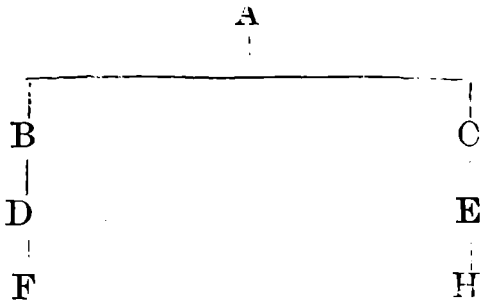
Non-ancestral land.

A near relative cannot, as such, claim pre-emption in non-ancestral land (Bali *versus* Amlanand, by Sir Henry Ramsay, 18th September, 1873, quoted by Mr. Pauw).

(NOTE—For the purposes of a suit between a co-sharer and an outsider it would not matter whether the land was ancestral property of the vendor or not; the point would have nothing to do with the question.)

Decree of relationship.

I have not found any appellate rulings regarding the manner of calculating the "third degree" of relationship; but from Kumaun custom and decisions of lower courts it is clear that the correct method is to count back to the common ancestor, who is number 1. Thus in a family—



D and E (first cousins) are related within the third degree; but D and H are not. This is, of course, different from the method of calculation according to the Succession Act (X of 1865).

Failure to pre-empt subsequent sale.

The mere fact that co-sharers have failed to claim pre-emption when land is sold on one occasion does not debar them from claiming the right at a subsequent sale of the same land. This follows from a consideration of the object of custom. (Gajadhar *versus* Jora and others, referred to above.)

Asl and *laga* villages.

"For the purposes of pre-emption the *asl* village and the *laga* are one." A hissadar of *laga* village has no right of pre-emption against a purchaser, who is a hissadar of the *asl* village but not (before then) of the *laga* (Mr. Giles, officiating Commissioner, in Dat Ram *versus* Raghunathu and others, 11th July, 1891). The converse would, of course, hold good also.

A khaikar has no *locus standi* with regard to pre-emption.

Khaikars and pre-emption.

When a khaikar in a village, in which the hissadar had no khudkasht, purchased a hissadari right in the village, it was held that a hissadar of the village had a right of pre-emption against the khaikar purchaser (Mr. Hamblin, Commissioner, in Narayan Singh and another *versus* Chanar Singh, mauza Baina, Silor, appeal no. 15 of 1901). (*See* also Colonel Quin in Pan Singh *versus* Dan Singh, appeal no. 20 of 1896).

Buildings.

The custom of pre-emption does not apply in the case of buildings as distinct from the land on which they stand (Jai Kishan and others of mauza Talasu *versus* Maheshanand. Mr. Hamblin, Commissioner's order in appeal no. 11 of 1901.)

Almora town and Muhammadans.

In town lots in Almora the custom of pre-emption prevails; it depends on propinquity of relationship (within the third degree), the pre-emptor need not own a share in the lot sold. Co-sharers, as such, have no rights in such cases. In the case of Muhammadans residing in Almora town the legal forms enjoined in the *Shara Muhammadi* are not applicable; they follow the rules of the Hindus, Colonel Grigg in Lachhmi Ballabh *versus* Ali Bakhsh and others, order of 27th April, 1894, referring to a previous decision of Sir Henry Ramsay. (*See* also Mr. J. V. Stuart, Deputy Commissioner's remand report in the same case.)

Contractual condition overrides pre-emptive right.

A sold land to *B* on condition that, in the event of resale, *A* and his heirs should have the first right to re-purchase. Subsequently the land was re-sold to *A*'s descendants. The vendor's brother claimed to pre-empt as a relative and as a co-sharer. Held that the contractual condition overrode the customary right (appeal no. 4 of 1901. Jayanand and Amba Dat *versus* Amba Dat and Sheo Dat, by Mr. Hamblin, Commissioner).

(9) *Succession*

There are various peculiar local customs relating to succession. Mr. Pauw has given a fairly full account of these customs; and on several of the points there is nothing further to add as no rulings are forthcoming.

It is only necessary to note at the outset that the normal rules of succession are those of the Mitakshara law; and these prevail except in the cases of peculiar custom detailed below. This remark and the customs described in detail apply to Hindus only; these appear to be no special local rulings or customs applicable to the very small number of Muhammadans living in the hills.

The claim of primogeniture has been alluded to above in speaking of partitions and impartibility and need not be discussed again, as it has never been successfully maintained in Kumaun.

Sons.

There are three points of custom calling for notice with regard to succession by sons.

Santia bant.

Of these customs that of *sautia bant* has perhaps formed the subject of the greatest number of rulings. Mr. Pauw has discussed it at considerable length, and I reproduce his remarks in full. He says: "It is not infrequent for a well-to-do man to have more than one wife. In such cases the inheritance is occasionally divided according to the number of wives, each son taking according to his mother's share instead of according to the number of sons of the same father (*bhai bant*). As a *bona fide* instance of this species of division the case of Ratan Singh of Thaplyalgaon, Gagwarsyun *versus* Sibhu and others (20th July, 1869, Sir Henry Ramsay, Commissioner) may be cited. But *sautia bant* is the exception, not the rule. In 1861, Sir Henry Ramsay ruled on the case of Nand Ram and others of Chandol Rain, Nandalsyun *versus* Bhajan Dat and another: 'In the absence of a will, *sautia bant* cannot be made by the courts,' and again in the case of Sher Singh of Kirsal, Taili Chundpur *versus* Ratan Singh (9th August, 1876): 'In the absence of a written agreement or will, or the strongest evidence, a *sautia bant* ought not to be given' and in 1886 the Board (Mr. Daniell) reversed a decision of the Commissioner (Mr. Ross) in the case of Rabi Dat of Kwirali, Idwalsyun *versus* Abhe Ram and others (6th July, 1886), holding that *bhai bant* is the law and *sautia bant* should not be allowed 'unless any valid authority is proved to exist which alters the law in a particular case.' The required authority is usually a division made by the father in his lifetime, or a will, or the most undoubted proof of the custom of *sautia bant* in the family, such as the fact of its having been allowed in specific cases before. But so far as I am aware, in no case has this species of division been allowed on evidence of the latter class alone. In the case of Padmu and others of Gahar, Paidulsyun *versus* Sheo Dat, the defendant was the son of one wife and claimed half of the inheritance while the plaintiff's three sons of two wives demanded *bhai bant*. The attestation of existing possession showed that the defendant was in possession of half the share, and from this a *sautia bant* made by the father was inferred (Sir Henry Ramsay, 5th December, 1877). Similarly in the case of Ganga Dat of Budoli, Gagwarsyun *versus* Bhajan Dat and others, *sautia bant* was inferred from existing possession of long standing (13 or 14 years) and a new division refused (Mr. Roberts, Commissioner, 12th September, 1892)."

A few remarks may be added to supplement the above account. The custom is said, in a judgment by Mr. Pauw himself, to be apparently of Nepalese origin and of comparatively recent introduction. It is often claimed, but seldom admitted by the courts (though the mere fact that it is so constantly alleged might suggest that it is probably more common as a genuine custom than the many decisions against it would seem to show ; compare the last two cases quoted by Mr. Pauw in which it had been actually carried out.)

It is, however, a custom "in variance of ordinary Hindu law. The presumption is in favour of equal inheritance among all the sons and cogent proof is required of a custom to the contrary." (Mr. D. T. Roberts, Commissioner, in Jit Singh, etc. *versus* Udai Singh and Lal Singh, 2nd May, 1893.)

In Asaru and others *versus* Bali Ram and others, in 1876, Sir Henry Ramsay quashed a *sautia bant* that had been actually carried out by the father, on the ground that the mere fact of his having two wives living in separate houses and at feud with each other did not justify him in making a *sautia bant*. For an instance of this custom being proved and upheld, reference may be made to the case of Khimia, etc. *versus* Narpati of mauza Chichon, Talla Chaukot (final order of the Local Government, dated 27th January, 1899).

Reference may also be made to the sample memoranda of village customs appended to the preceding chapter. It will be seen that in Mr. Goudge's memorandum, paragraph 6, notes the prevalence of the custom of *sautia bant* in the village in question (which was taken at random). I find, however, from an examination of the papers of 44 Garhwal villages that in 43 the custom of *bhai bant* alone prevails, while in one village alone it is noted that *"bhai bant* prevails and also (where the parties consent) *sautia bant."*

Jethon.

The custom of *jethon* or the extra portion of the first born (*jehta larka*) is not infrequently set up in Kumaun though it is not very often established. This custom is mentioned by Mayne (Hindu Law, paragraph 488, 6th edition) as now obsolete except possibly as a special family custom ; but it certainly continues to a not inconsiderable extent in Kumaun.

The sample memoranda of village customs quoted above in respect of *sautia bant* may be again referred to on this point, and I may note that of the 44 Garhwal villages taken at random the papers of which were examined (*see* remarks on *sautia bant*) no less than 10 record the custom of *jethon* as prevailing, while in one other it is noted as sometimes being followed and sometimes not. This is rather surprising testimony to the commonness of this custom, which is normally regarded by the courts as one requiring very strong proof, when any claim of the kind is set up.

I have not found any specific cases of its being upheld by the Commissioner or the Board of Revenue, Mr. J. R. Reade in Jhagar Singh *versus* Ishri Singh of Kothar, Lohba (the only ruling I have seen on the subject), remarked (14th January, 1889) :—

"The claim of *jethon* must be incontestably proved to be a custom of the individual family concerned." I have seen a case in which the custom was clearly proved, though the suit to enforce it failed for a formal defect. Cases are occasionally met with where existing inequalities between the shares of brothers are explained by this custom having been put into force. There do not seem to be any fixed principles for determining the amount or area of the extra share claimable under this custom. It appears, indeed, sometimes to be a matter for mutual agreement rather than a custom enforceable at law. It is normally a question only to be raised at the time of partition of the family estate (whether a formal partition by the court or a private division by the parties or by a *panchayat*).

In the case mentioned above, however, it appeared that certain specific lands were set apart on the father's death as *jethon* land, the bulk of the estate remaining joint property.

Illegitimate sons.

The question of the right of illegitimate sons to inherit a share of the father's immovable property is a particularly vexed question in Kumaun and has often produced mistaken decisions. This is due mainly to the peculiar and changing condition of the hill-castes, which has been described in a previous chapter. Even with a knowledge of the local caste conditions and the customs relating to marriages or irregular connexions, it is not easy to arrive at a correct decision.

The circumstances of the illegitimacy are generally uniform. A man takes another man's wife or widow and lives with her (whether he has or has not already a wife living). In some cases the man pays the woman's price to the husband, if he is alive, or to the relatives of her husband or failing them to her own family; in other cases nothing is paid. In any case a ceremony is performed by the family priest and frequently the man proclaims the entry of the woman into his family by killing goats and feasting his *biradari*. The man and woman thus living together are known respectively, as *dhant* and *dhanti* The connexion is commonly a permanent one; it is very common in Kumaun among the ordinary villagers and is not considered in any way disgraceful. When the woman has been paid for, the off-spring of the connexion are socially equal to all members of their fathers' *biradari*. In the other event they are inferior to some extent until the price is paid. This can be done at any time, the children may themselves do it. As far as the question

of inheritance is concerned, however, the children of both classes of *dhantis* are equal.

It is the children of these connexions regarding whose rights there are constant disputes.

It is a well-known principle of Hindu Law that among the higher castes (Brahmans, Chhattris and Vaishs) an illegitimate son has not a right to a proper share in the estate, but only to maintenance. On the other hand, among Sudras an illegitimate son by a recognised concubine has a definite right to a certain share of the family estate, though this custom has been the subject of much discussion and varying rulings (*see* Mayne's Hindu Law, pages 723 *et seq.*, 6th edition). The children of a *dhanti* woman are admittedly illegitimate. This being so the normal trend of decisions is to apply the abovementioned rules of Hindu Law regarding the higher castes without due consideration of the class of people to whom the rule is being applied.

Every Hindu villager in Kumaun calls himself a "*Rajput*" or a "Brahman."

But, in reality, as has been mentioned in the remarks on the hill castes in the introductory chapter, and as may be seen from the settlement reports of Messrs. Pauw and Goudge, the most numerous class of proprietors in the hills are really of Sudra origin or of castes of dubious standing. Some of them have assumed the sacred thread and others are gradually doing so, but they are as a matter of fact Sudra or of mixed origin, and, as such, the inheritance of shares by illegitimate sons is to be regarded as a normal state of things among them, and not as an immoral local custom requiring to be strictly proved.

I have never seen this view of the question discussed in any ruling; Mr. Pauw merely refers incidentally to the right "which is sometimes recognized, of an illegitimate son to succeed to his father's inheritance in default of other issue"; this is putting it very inadequately. The rulings available generally refer to the custom among some definite high caste. No record containing any general discussion of the question as regards the normal Khasiya villagers has been discovered.

It may safely be asserted, however, from a considerable experience of incidental and undisputed instance that among the ordinary villagers of somewhat dubious caste as distinct from the undoubted Brahman and Rajput caste an illegitimate son inherits equally with legitimate sons as a matter of course. This is a natural result from the actual facts of the origin of the ordinary village castes.

I remember a case between some Khas Brahmans in an Almora village. A left four sons, B, C, D and F; D died without issue and illegitimate son of F sued the legitimate sons of B and C for

a one-third share of D's land. The defendants objected that the plaintiff was illegitimate, but the latter pointed out that B and C themselves had both been illegitimate sons of A and yet had each inherited without question one-fourth of his estate.

The real question at issue in such cases is not so much (as it is usually put), whether illegitimate sons of Kumaun can claim to inherit a proportionate share in the ancestral estate, as whether the parties belong to a genuine Brahman or Rajput caste or to a Khasiya caste.

The following cases on the subject may be referred to for rulings. :

Among "bishts" the sons of *dhantis* do not inherit equally with legitimate offspring. (Bachi *versus* Mahendra Singh of Basur ; Malla Tikhun. Colonel Grigg's order of 28th April, 1894, differing from the Lower Court's finding.)

In Bach Ram and Ganga Dat *versus* Tarapati and others of Bheta, Katyur, the title of three sons of a village Brahman by a *dhanti* to full shares of his estate was decreed by Mr. Giles, as officiating Commissioner, on 14th August, 1891.

In Nar Singh *versus* Ram Singh and others of Sirkot, Borarau, the plaintiff was the only legitimate son and he claimed half the estate by *sautia bant* against the four sons by a *dhanti*. It was held that he was only entitled to a one-fifth share. (Mr. Ross, Commissioner, 15th September, 1887.)

In Radhapati *versus* Hari Kishan (appeal no. 34 of 1889) and Jharu *versus* Nathu and Ram Dat (no. 14 of 1893-94), the Commissioner, Colonel Erskine quashed the claims of sons of *dhantis* in the case of Brahmans ; in the latter case he referred to the rights of illegitimate sons among Sudras. In the former case a special remand inquiry into the alleged local custom was made. In none of these cases apparently was the point raised whether the parties were of genuine Brahman or Rajput castes. In Umrao Singh and Kirpal Singh *versus* Jhagru of mauza Nagrasu, Garhwal (Colonel Erskine, Commissioner, 15th March, 1894) the legitimate sons had admitted the right of the defendant, whose claim was, therefore, upheld. It thus appears that there is no important variation in Kumaun of the normal Hindu law in respect of this custom. Genuine Brahman and Rajput castes follow the regular custom whereby illegitimate sons have no claim upon their father's estate for anything more than maintenance.

At the same time it is most necessary to keep in mind the very important fact that a great number of hill villagers, who bear Brahman or Rajput names, are not of genuine Rajput or Brahman caste, but as Khasiyas. It thus really becomes a question of fact regarding the status and the caste of the parties to

each individual case, and since this is a matter of considerable doubt and obscurity in many cases, it is often necessary to enquire into the actual custom regarding such inheritances prevailing in the particular caste in question.

The Bhawaj.

The custom relating to a man's keepting his elder brother's widow has been described by Mr. Pauw in the following terms :

"In all but the very highest castes in Garhwal it is the custom for a man to take into his house as his wife the widow of a deceased elder brother (*bhawaj*). In such cases the woman is regarded as equal to a lawfully-married wife and offspring as legitimate (*asl*) children ; but if the *bhawaj* continues to live in her deceased husband's house, she is looked upon as a mere concubine and the issue is illegitimate (*kamasl*) (Kirpal Singh of Pharkandai, Iriyakot *versus* Pratab Singh, M. Giles, Commissioner, 18th July, 1891). In part of Malla Salan, pattis Khatli and Bangarsyun, the son of a *bhawaj* is not allowed to take rice with his kinsmen though otherwise under no disability. The term *bhawaj* like the term *bhai* is somewhat loosely used, and is applied to the wife of a cousin and sometimes to the wife of a distant relative; though not usually so if resident in a different village. In such cases, however, the right of the son of a *bhawaj* as such, usually becomes merged in the narrower right which is sometimes recognised, of an illegitimate son to succeed to his father's inheritance in default of other issue."

With regard to this custom reference may be made to two rulings. In one of Colonel Erskine's in Jamnu *versus* Musammat Manuli and others, a Garhwal case of 15th March, 1894, it was held that the *bhawaj*, after the death of her protector, the second brother had no claim to a life interest in his property as against the third brother. This seems in convict with the usual custom. In Padua *versus* Bhawan Singh and others of Machor, Malla Lakhanpur, however, the Commissioner, Mr. Ross, held that it is quite customary for men to take up with the widows of their deceased brothers and the children are treated as on an equality with any other children of the family. Bhawan Singh, the son of the *bhawaj*, would inherit as against collateral relatives.

Adoption.

The case referred to above (Padua *versus* Bhawan Singh and others) may also be quoted in reference to the practice of adoption in Kumaun, as it is the only reference that has come to light to the informality and casualness of procedure which is habitual among the hill people with regard to adoption.

Bhawan Singh (the son of *bhawaj*) took a widow with her son, Jasa, to live with him and treated Jasa as his son. It was

held that Jasa was practically adopted by Bhawan Singh; that such informal adoption is all that takes place in these hills and that except amongst the inhabitants of large towns and rich people the formalities required by Hindu Law are never gone through.

The widow.

Reverting to points of custom more directly relating to succession Mr. Pauw's remarks on succession by the widow may be quoted in full.

He says: "In default of sons, the widow as elesewhere succeeds to the inheritance for life. Alienation of the estate by her to liquidate the real or pretended debts of her husband forms the basis of many suits. With a view to forestall and avoid litigation, it was formerly the custom for the widow wishing to alienate land for this purpose to apply to the district officer, who, after a short inquiry, if the circumstances justified, made an executive order permitting her to do so."

Such petitions are occasionally presented even now and afford useful opportunities to warn the intending vender of the law on the subject and the disabilities of widows in respect of alienation. Such summary executive orders "permitting" sales by widows were only precautionary measures to prevent litigation, and could not bar subsequent suits by the heirs or invalidate the operation of ordinary Hindu Law. (Mr. D. T. Roberts, Commissioner, in Mathura Dat *versus* Musammat Dhaun Sundari and Sheikh Kullu; 21st July, 1892).

The daughter and gharjawain.

Regarding the succession of the daughter and the gharjawain there is little to add to Mr. Pauw's remarks. He says (page 43):

"The daughter's position in the hills is much weaker than under ordinary Hindu Law. Though decisions such as Bahadur Singh and others of Mathana. Ringwarsyun *versus* Prasadi, 28th August, 1885 (Mr. Ross, Commissioner) and Kura of Talli Kolri, Khatli *versus* Lalu, 3rd May, 1892 (Mr. Roberts, Commissioner), have declared the daughter entitled to succeed in preference to unrelated co-sharers of the village and distant relatives, still her right is not generally recognised by the people themselves.

It is the custom for a man who has no son to marry his daughter to a son-in-law who agrees to live in his house and who is known thereafter as the ghar-jawain. In such a case the daughter takes her father's inheritance, but should she go into her husband's house, the inheritance usually descends to the nearest male heirs of the deceased. Even in the case of a ghar-jawain the relatives frequently make a strong fight for the property, especially if the marriage has been arranged by the widow after the death of her husband. In such cases it is not uncommon for the widow to go through the form of selling the land to the ghar-jawain on the pretence that the sale

proceeds are required to repay him the cost incurred in settling her husband's debts." The ghar-jawain custom is analogous to that of adoption and appears to be based on similar grounds and practised under similar circumstances. Thus it may be deduced that a man who has a son living cannot adopt or affiliate a ghar-jawain, nor can a widow do so. An exactly similar custom prevails in a certain caste in Madras and is fully discussed in India Law Reports, IV Madras, page 272.

The tekwa.

"Occasionally in some Khasiya villages, the whole of the deceased's property is made over to another man, on the condition that he lives with the widow as his wife. This second husband is known as tekwa. The reversioners, by this arrangement, give up their claim to any part of the deceased's property. The practice is regarded as a somewhat immoral one." (Pauw, page 44). I had never come across any instance of this practice.

Jogis.

"Among the various castes of jogis, known as Giri, Pauri, Nath, Bairagi, etc., the succession lies to the *chela* or disciple, not to the son. This is not improbably a remnant of the time when this class was celibate. At the present date celibacy is seldom observed, while a large number, particularly near Srinagar, are mere cultivators, and only to be distinguished from others by their orange coloured dress and the custom prevailing amongst some of them of wearing large wooden rings in their ears." (Pauw, page 45.)

Naiks.

The Naik caste has been described in the note on the hill castes in the introductory chapter. The females of this caste are, as there stated, invariably devoted to prostitution as soon as they attain the age of puberty and continue to follow their trade for a good many years.

Two natural results of this state of things are that the females of this caste being the chief money-makers are more important personages and have more voice in the management of affairs than females in ordinary castes; and, secondly, that it does not do to enquire too closely into questions of descent and legitimacy in respect of members of the caste. Naturally among such a small and abnormal community, few occasions for laying down principles of law applicable to their holding of property have arisen, and the courts have refrained from dogmatising as to the rules that should be observed.

The *local classicus* on the subject is a Ramgarh, Naini Tal case between Lal Singh and Gusain, plaintiffs, and Musammat Sundar, defendant, decided by Colonel Grigg, Commissioner, on the 3rd September, 1894. In this case a very full inquiry was made, and it was held that the right of sisters to succeed to ancestral property in this caste was clearly proved, and that among Naiks a sister succeeds to a brother's property in default of male heirs.

In Revnue Appeal no. 19 of 1893-94 Diwanu of mauza Muku Malla *versus* Lungi, Colonel Erskine, Commissioner, held that in a community of Naiks it would be superfluous to enter too closely into questions of legitimacy.

Bhotias.

The Bhotias of Kumaun are a partially Hinduised race of mixed origin ; some sub-divisions of them have gone a considerable way towards adopting Hindu customs and religion, etc. They are a non-agricultural people and their wealth consists of flocks of sheep and goats for trading with Tibet. Their civil disputes rarely come before the British Courts, and there appear to be no cases on record regarding their landed property or succession to landed estate. A brief quotation may, however, be made from Mr. C. A. Sherring's Notes on the Bhotias of Almora and Garhwal, published by the Asiatic Society, Calcutta, 1906. He says (page 97) ! "There could be no greater mistake than to suppose that the Mitakshara Law is applicable to any of the Bhotias ; in fact, excluding Johar, the Bhotias do not even know what the Vedas are. It is in questions relating to property, the law of inheritance, adoption and woman's property, that the difference between the Bhotias and other Hindus is most clearly seen. A woman has no special property of her own, although at the will of her husband or father she may be allowed to keep what she earns, but this is entirely dependent on the pleasure of the man concerned. The laws of inheritance are not those of Hindu Law, and the principles applicable to adoption as found in Mitakshara Law, are unheard of. As a matter of fact, in cases of adoption the choice invariably falls upon the heir. The idea of a joint family is quite unfamiliar. The father is the absolute owner of all property, including ancestral, and can mortgage on his own signature without reference to his sons. When the infirmities of age impair the father's business capacity, the sons divide the property and he is more or less at their mercy. There is no fixed share apportioned to him, but custom generally insures that some extra portion is put aside for him, and he lives with the son who is his favourite. Frequently the father is neglected, and cases of great hardship on parents who have been rich, but whose property has been taken by the sons, are often met with. A son can at any time insist on partition. Johar and Mana are exceptions, in that the father can refuse to give his sons shares in his self-acquired property : but in regard to ancestral property he has no choice."

Muhammadans.

There are no special local customs relating to succession to landed estate among the small Muhammadan community in Kumaun, so far as can be ascertained.

Doms.

The Doms, though most probably of aboriginal descent, follow the customs of the Hindu castes as regards religion, marriage, inheritance, etc. The illegitimate sons of *dhantis* inherit as among the Khasiyas, and their customs are distinctly lax as regards these connections, a woman sometimes going on from one paramour to a second and a third.

Owing to their very backward state and the fact that they own very little land, it is seldom that questions of succession among them—or indeed any other questions except those of petty debts—come before the courts. There are no ruling forthcoming regarding Doms as a separate class.

Muafidars.

There are very few revenue-free proprietary holdings in the hills, and the tenure is one calling for no particular notice. When British administration was first introduced, a great number of muafis were found in existence though Mr. Pauw, page 42, implies otherwise. These were resumed wholesale by Mr. Traill (*see* Mr. Batten's Kumaun report, paragraph 24), and the subject was further enquired into in 1855-56, and has long been finally settled. The remaining muafi estates are simply hissadari holdings on which the revenue has been remitted, and the proprietary right in them follows the usual rules applicable to revenue-paying land.

The custom of primogeniture, as has been noted above, was recently alleged in the case of one Garhwal muafi, but the claim was not sustained.

(10) *Boundary disputes*

The question of village boundary disputes and unmeasured cultivation at a debatable spot between two villages belongs more properly to the section on unmeasured land and nayabad, and will be considered in that connection.

Boundary disputes between hissadars in respect of old measured cultivation present no particular local features in Kumaun. In the usual case of a row of terraced fields one above another there are obvious difficulties in the way of a man's "removing his neighbour's landmarks."

Miscellaneous.

Gunth (or temple) lands and the proprietary title in them will be referred to in a subsequent chapter.

Sadabart lands.

Sadabart lands will also be dealt with under the heading of Miscellaneous tenures. The proprietary right in sadabart villages is, it may be mentioned here, precisely on the same footing as in ordinary *khalsa* revenue paying villages.

Hissadars in nayabad and unmeasured land.

The general question of nayabad grants and the extension of cultivation into unmeasured land will be dealt with in a separate chapter. A few words may, however, be added here regarding the position of the hissadar in such land when it has been granted in nayabad or brought under cultivation. In a sanction nayabad grant the hissadar has exactly the same rights as he possesses in old measured land, subject to any special conditions which may be inserted in the order granting the land. It was for instance directed by Mr. Hamblin as Commissioner that in reporting for sanction a proposed nayabad grant, where there are trees standing on the land, it should be stated whether a condition requiring the trees to be left unfelled is necessary or not. If such a condition were inserted, the grantee hissadar's power over the land would be limited in a manner which would never apply in a case of old measured land. Since, however, it is probable that grants of land for nayabad will very seldom be recommended in cases where there are trees which should not be cut, standing on the land, this condition is not likely to be often enforced.

A hissadar can sell his nayabad grant as freely as he can sell his old measured land, unless there is a special condition precluding sale attached to the grant. This was formerly doubted, but was finally laid down by Mr. Hamblin, Commissioner (letter No. 2131/IV-A—38 of 1900), on a reference from Almora.

In one case in Almora, the record of which has remained undiscovered in the recent search, it appeared that certain measured land, which had been lying waste and had become overgrown with forest, had by mistake been included in a nayabad grant made in favour of certain hissadars other than the recorded owners of the land and the grantees supposing the land to be *benap* had broken it up and cultivated it. On a suit by the original owners it was ruled by Mr. Hamblin, Commissioner, that if the grantees could not show sufficient length of adverse possession to give them a good title, it was open to the recorded owners to establish their title and recover possession in the old measured portion of the grant notwithstanding the duplicate settlement in favour of the grantees (which was of course invalid in the case of land already the property of others). The question of the sale of unmeasured extensions of old cultivation has been referred to in dealing with the selling value of hassadari property.

Relation between vi:-dagers regarding unmeasured land.

This question and the whole subject of disputes about unmeasured cultivation present little difficulty if only we keep in mind the clear distinction which is often overlooked or confused, between (1) the relations of the villages *inter se ;* and (2) the relations between the villagers and the State in respect

of such land. Between Government and the villagers the relation is that between a supreme proprietor and his dependents. The question is one of executive action or of procedure under the Forest Act and Government can prohibit any extension of cultivation or other act of the villagers, when such cultivation or act seems injurious to the public interest or otherwise inadmissible : but if the cultivation or action is unobjectionable from the point of view of public interests, Government sanctions it or acquiesces in it and takes no action, and it then becomes a simple question of civil and customary rights between the villagers. If A makes an extension of cultivation adjoining his old land and Government does not object on public grounds, then A has a good title to that land as against B, C and D, unless B, C or D can prove a pre-existing civil right of user or custom over the land, such as a right of way or an old threshing floor, which right has been injuriously affected by A's action. Then it becomes a simple question of prior right *inter se* subject to the acquiescence of the overlord, Government, in the land being utilized or occupied by one or other of the parties. If this view of the situation is kept in mind, it will be found a comparatively simple matter to settle questions between hissadars and others regarding possession and right in unmeasured land.

The whole question will be dealt with in a more general discussion on the subject of nayabad and waste lands in a subsequent chapter.

CHAPTER III

KHAIKARS

(1) *General remarks....Authorities followed*

The original and nature of the khaikari tenure have been indicated in the lengthy quotation made in the introductory chapter from Mr. Pauw's report.

From the earliest days of British administration the position and rights of the khaikars and the question of succession to khaikari holdings have been the subject of incessant warfare, in which the unfortunate khaikars, numerically the weaker side and socially and officially of little weight and influence through their poverty and ignorance, have steadily been getting the worst of the struggle and are still only too often unfairly deprived of their rights.

As Mr. Pauw remarks (page 46) : "The fact is that nine out of every ten hillmen are hissadars, and every curtailment of the right of succession to the khaikars is to their advantage".

It is not too much to say that the khaikari tenure forms the central crux of the Kumaun system of land tenures. It is, therefore, essential to begin with a clear understanding of the origins of the various groups of tenures now classed together as khaikari.

The origin and status of khaikari tenure and the khaikar tenant will be found referred to and discussed in the following papers and reports, on which I base my account :--

Mr. Batten's collection of official report of the province of Kumaun (1851 and 1878) pages 105 to 107 and 111 (quoting from Mr. Traill's report of 1829), 263–290.

Mr. Beckett's Garhwol Settlement Report (1866), pages 9, 10, 50 and 51.

Sir Henry Ramsay's Report on Mr. Beckett's Kumaun Settlement (1874), pages 15–17, and page 7 of the Board's forwarding letter.

Mr. Pauw's Garhwal Settlement Report (1896), Chapter VI.

Mr. Goudge's Almora and Naini Tal Settlement Report (1903) pages 10–12.

As an example of the one-sided representation of the origin of the khaikari tenure which has often misled officers ill informed regarding the local tenures, reference may be made to page iv of Pandit Ganga Dat's pamphlet on landlords and cultivators in the Kumaun Division, where an account is given which entirely ignores the most important class of ex-proprietary khaikars.

An inadequate, though less one-sided, view of the tenure is to be found in a long note on the subject submitted by Mr. Giles, as Senior Assistant Commissioner of Kumaun, to the Commissioner, in his letter No. 1277/II--3, dated the 22nd April, 1890 (in his paragraph 7 particularly).

(2) *The main classes of khaikars*

Two inclusive classes of khaikars.

The existing khaikari tenures may all be classed in two great divisions :—

(*a*) The under-proprietary khaikar in villages held entirely by khaikars.

(a) Firstly, we have those khaikars who present the original cultivating proprietors of the land, and who were deprived of their independent right by grants or assignments of the proprietary right under native rule, or were by fraud or force reduced to the status of khaikars by usurping thokdars, muafidars or padhans in the early days of British rule (*cf*). Pauw, page 33, and Henry Ramsay, page 15).

These ex-proprietor are the *pakka* khaikars and their right is really an under-proprietary one (*cf.* Messrs. Pauw and Goudge). But of this class of khaikars the only ones that have succeeded in preserving a distinct existence with recognized status and rights superior to those of the inferior classes of khairkars are those whose villages remained in the cultivating possession of the khaikars alone, the hissadars not having succeeded in obtaining khudkasht cultivating possession in them.

In many cases, however, the grantee or usurping hissadar obtained khudkasht possession in the village, and in all such cases the original occupant khaikars lost their distinctive status as *pakka* ex-proprietary khaikars and have sunk inextricably into the general inferior class of occupancy tenant khaikars. See, however, paragraph 14 below on recent invasions of khaikari villages.

Our first class of khaikars, therefore, consists of the old occupant cultivators in villages where the hissadars hold no khudkasht land ; all villages held entirely by khaikars belong to this class since no instance is on record of an entire village of khaikars having any other origin.

(*b*) Other khaikars.

(b) The second class of khaikars is that of the inferior, *kachcha* or occupancy-tenant khaikars ; it comprises all khaikars other than those of the wholly khaikari villages described above. All these remaining khaikars, whatever the origin of their tenures may have been, are now on a precisely equal footing as regards their status and rights.

This second main class of khaikars may be sub-divided as follows according to the origin of their khaikari rights.

The sub-divisions given include all the possible ways in which the khaikari right has originated in the past or can now be acquired or created :

Ex-proprietary khaikars in khudkasht villages.

(i) The old occupant ex-proprietor in villages where the grantee or usurper obtained or possessed khudkasht possession in the village. The grantee was "by the custom of the country entitled to take one-third of the estate into his immediate possession or *sir*" (Mr. Traill, paragraph 14, quoted on page 111 of the Collection of Reports). If he failed to do so, the old occupants continued to hold the higher under-proprietary status to class (*a*), though it seems illogical that the fact of the grantee taking khudkasht possession of part of the village should affect the status of the old occupants so as to leave them worse off than similar cultivators in villages where the grantee did not get possession. In both cases the khaikars were really *pakka* ex-proprietary khaikars. In practice, however, the old occupants in the khudkasht villages sank to the status of the ordinary *kachcha* occupancy khaikar.

Khurnis : original occupancy tenants.

(ii) The Khurnis or Kainis—both terms are now obsolete—old permanent tenants settled on the estate by the proprietor and allowed a hereditary right after long occupancy. They have now become merged in the class of *kachcha* khaikars which is a rise of status for them, as they used to pay higher rents and were more dependent on the proprietor [*cf.* Mr. Batten's Glossary to the Collection of Reports: "a vassal tenant permanently attached to the soil" . . . . "originally settled as *abscriptus* (sic.) *glebœ*"].

These two classes (i) and (ii) represent the old ancestral khaikars of the period before the framing of records, and the body of khaikar tenants can no longer be recruited in either of these ways.

Khaikats by virtue of registered leases.

(iii) Of the more recent modes of acquisition and creation of khaikari right the most common is that of a registered agreement given by the hissadar on payment of a premium. Such instruments must be registered since they are in effect permanent leases and many tenants and others suffer from inability to enforce their rights under these deeds through lack of the necessary precaution of having them registered.

Khaikars by virtue of agreement at settlement.

(iv) At settlement a tenant-at-will or other person may be recorded as a khaikar at the request of the hissadar, usually under some previous agreement between the parties. It is common, in fact, for instruments purport-

ing to confer khaikari rights to defer the entry of such rights till the date of the next settlement.

Khaikars in nayabad lands.

(v) Of more recent date is the custom of Government exercising the power of conferring khaikari right on tenants who have broken up and improved unmeasured Government land on behalf of some proprietor though the original status of such tenants was only that of sirtans of tenants-at-will.

The sovereign right of Government over all unmeasured and unassessed land (which is now technically district protected forest) has always been indisputable in Kumaun, and this power is now exercised to confer the status of a khaikar on a tenant who has at his own expense and by his own labour reclaimed Government waste land in a separate chak or thok apart from old measured land. This appears to have been first done during the last Garhwal settlement following a ruling of 1891.

By way of explanation it should be premised here that in the hills no length of occupancy in old measured and assessed land gives a sirtan any title to occupancy or khaikari rights (*see* the following chapter on sirtans).

Extensions of cultivation by khaikars.

It may further be noted that a tenant, who is already a khaikar, is entitled to khaikari right in the extensions of cultivation made by him in unmeasured land ; this, however, is an extension of an existing khaikari right and must be distinguished from the creation of an entirely new khaikari tenancy in favour of a sirtan, with which we are now dealing.

These khaikari tenures may be created either by the Commissioner's order at the time of making a summary nayabad settlement or grant of a block of unmeasured land, or by the Settlement Officer in dealing with extensions of cultivation in the ordinary course of settlement.

Mr. Goudge's report (page 12) may be quoted as putting the above facts more concisely. He says : "No length of occupation in land already measured and assessed can change a tenant-at-will into a khaikar ; but inasmuch as holding may be increased in the hills by reclamation of the adjoining waste, cultivators may acquire khaikari rights through consideration of the labour and expense incurred in reclamation without the hissadar's assistance and of length of occupation. The Commissioner of Kumaun has thus created khaikars in nayabad grants, and I have throughout exercised a full discretion in determining the

status of cultivators of benap or land reclaimed from Government waste".

Summary of khaikari origins.

To sum up briefly the above account, we have two main classes of khaikars of differing status :—

(1) The old ex-proprietary and the under-proprietary cultivators in villages where the hissadars have never obtained khudkasht cultivating possession ; and

(2) all khaikars of whatever origin, holding in villages where the hissadars have khudkasht land.*

This latter class comprises as sub-classes arranged according to their origins :

(i) the ex-proprietary cultivators in villages where the hissadars have khudkasht ;

(ii) the old khurni occupancy tenants ;

(iii) khaikars who have acquired their status by registered leases ;

(iv) khaikars promoted from sirtans or otherwise given khakari rights by the hissadar's consent at settlement ; and

(v) khaikars created by order of the Commissioner or Settlement Officer in newly measured and assessed lands.

To this account it may be added on the negative side that—

No acquisition of khaikari by sirtans in measured land.

(1) a sirtain or tenant-at-will can never acquire khaikari right by length of possession as a tenant in old measured and assessed land ; and

No ex-proprietary *sir* rights.

(2) that there is nothing in Kumaun corresponding to the ex-proprietary *sir* tenancy of e plains in the case of a hissadar whose proprietary right is sold up. The hissadar in such cases has no claim to continue to hold any portion of his land as a tenant under the purchaser.

(3) *Kachcha khaikars in mixed villages.....Origin and acquisition of right*

In order to keep clear the wide difference between the superior khaikars of villages held wholly by khaikars and the inferior khaikars of ordinary mixed villages it seems best to treat the two classes separately and independently in all questions relating to the tenures.

*But see also paragraph 14 below.

In the following paragraphs (3) to (8) accordingly will be found a discussion of the customs relating to acquisition of rights, succession, rent, alienation, etc., so far as the occupancy khaikar of the mixed village, in which the hissadar holds khudkasht land, is concerned. Some of these customs also apply in purely khaikari villages, but these will be indicated in dealing with such villages later on.

Customs regarding *kachcha* khaikars in mixed villages.

To define the khaikar briefly it may be said that he is a permanent tenant with a heritable but non-transferable right* in his holding, and paying a rent fixed at settlement, which cannot be altered during the currency of a settlement.

The khaikar tenant defined.

The rent of a khaikar bears no relation to the rents of other tenants, who in the hills are too few to afford any standard for rent rates or revenue assessments. Revenue assessments in the hills are based on a rough classification and valuation of the cultivated area of a village and an estimate of its general prosperity, and have nothing to do with rents received by the proprietors.

His rent.

The rents of the khaikars are fixed by simply taking the proportionate amount of revenue assessed on their holdings and adding a fixed percentage as malikana.

He pays the land revenue *plus* malikana.

Thus, except in some abnormal cases, a khaikar pays the revenue demand on his land plus a *malikana* of 20 per cent. in Garhwal and 25 per cent. in the rest of Kumaun. In a few special cases a higher or lower percentage was allowed by Mr. Beckett, who first commuted the varying and uncertain dues previously paid into a fixed cash percentage. Subsequent settlement officers have followed his settlement of this question without any deviation.

Acquisition of khaikari right.

The various modes in which a khaikari tenure may originate have already been described briefly.

Old occupant cultivators and occupancy tenants.

No new rights, as has been remarked above, can now originate on the basis of the ex-proprietary tenancy of the old cultivator of the occupancy tenure of the former khurnis or kainis. Practically all such cases have been settled and recorded long ago, and though sirtans have occasionally been known to claim khaikari right on the ground that they are really descended from old proprietors, or that they have for generations been acknowledged as having a kind of permanent right of occupancy yet there seems to be no case on record in which any such claim has been successful when contested by the hissadar. They should

*This was first remarked by Mr. Traill as long ago as 1829.

have raised their claim 40 or 50 years ago at the latest, when all khaikari holdings were recorded and their rents fixed, and of late years such claims have become increasingly unsustainable since the recent settlements.

Unrecorded ancestral khaikari established.

There is one case on record, however, where such a khaikari right was established under the following circumstances :

Kalia, who claimed to be an old unrecorded khaikar, was tenant of certain land which was sold in 1886 by the hissadar to Kute Singh and others. The sale deed clearly mentioned the fact that Kalia had khaikari right. Subsequently one of the purchasers denied this right, though two of them admitted it. It was held by the Commissioner, Colonel Erskine, that Kalia was actually a khaikar, though not recorded and the non-entry of his tenure in the settlement papers did not vitiate his claim (Kalia *versus* Kute Singh and others, of mauza Barkinda, Palla Naya ; order of 13th December, 1893). Now-a-days, however, as sirtans do not acquire khaikari rights by length of possession, the absence of any entry in the settlement papers is generally conclusive of the tenant's status being only that of an old sirtan.

Portion of old khaikari holding omitted by mistake in the records.

It is of course, less difficult for a recorded khaikar to show that certain lands, which he has always held on the same terms as his recorded khaikari, but which have not been entered in his holding in the records, are really khaikari land and have been omitted by mistake (*cf.* Gujrani *versus* Madho Singh and Kundan Singh of mauza Badholi Maundarsyun, decided by Colonel Erskine, Commissioner, on 14th March, 1894).

Acquisition of khaikari by registered deed.

The creation of khaikari right by means of a registered lease is now the usual means whereby the tenure originates. Many a misguided tenant is defrauded into paying a premium for an unregistered deed, and suits for the recovery of the consideration paid, when the plaintiff has vainly tried to get his tenure recorded, are not at all uncommon.

In such cases, when the tenant has been put in possession of the land, but cannot get his khaikari right, he remains a sirtan in the land until duly rejected.

Such unregistered deeds often provide that the record of khaikari right shall be deferred till the next revision of settlement. In the meantime they can confer no rights and at settlement the fulfilment of the conditions depends on the assent of the hissadar, and not on the ineffective lease.

Sometimes an agreement to execute a registered deed after a certain period is given instead of an unregistered lease. This is a different matter and failure to carry out the agreement

would involve a question of specific relief under Act I of 1877. Money compensation alone could presumably be given.

A source of difficulty with regard to these registered leases is often found in cases where one or more owners of unpartitioned land purport to create khaikari right in their share of the land. This they cannot do, unless their share is admittedly held in the shape of specific separate land and the other co-sharers agree to the transaction. This is not infrequently the case; it is found in partitions that one or more of the parties have admittedly given khaikari rights in part of the common land and are, by agreement, allotted such portions of the land in lieu of part of their share of khudkasht. But if the other joint hissadars object such giving of khaikari rights is *ultra vires*.

In Durga and others, appellants-defendants *versus* Jai Singh and Lachhman Singh, plaintiffs-respondents of mauza Pokharsain, Sabli, decided by Mr. D. T. Roberts, Commissioner, on 22nd August, 1892, one Jit Singh, had made Jai Singh khaikar of his khudkasht and also of his share in the *gaon sanjait* land. Jai Singh sued the hissadars for partition and possession of this portion of the *sanjait* land. It was held that khaikari right is only established when possession is given by the hissadar who creates the right; no hissadar can create khaikari right in common land because the right must be in a definite area and not in an unseparated share of wasteland. Partition, moreover, can only be demanded by co-sharer and not by tenants in common land.

Khaikari tenures created by hissadars at settlement.

The creation of new khaikari tenures in old measured land by hissadars at settlement is referred to by Mr. Pauw (page 50) as follows:—

"At the time of settlement, however, occupancy tenures are created by the hissadar and sirtan agreeing that the latter shall be recorded as a khaikar in the new papers. From a decision of Sir Henry Ramsay (Sarbal Singh *versus* Ratanu and another, Hitoli Aswalsyun, 1866) it would appear that the hissadar is not subsequently entitled to rescind the bargain then made.

This is a simple matter depending on an agreement admitted before and given effect to by a settlement court. As mentioned above, in such cases the parties have often executed written agreements years before settlement containing the condition that effect shall be given to them at the time of settlement. But such precedent agreements, if not duly registered, could not be legally enforced at settlement, any more than such unregistered leases can be recognized at other times: the carrying out of the agreement depends on the assent of the hissadar in the settlement court. (Once hissadar has agreed to the entry at settlement, he must abide by his word, as in the case quoted by Mr. Pauw.)

Cost of acquiring khaikari right by deed and value of the khaikari right.

I have referred in the chapter on hissadrs to the value of the hassadari right in land held by khaikars and also incidentally to the premia (bhent) paid by new khaikars for their leases and for acquisition of khaikari right. Mr. Pauw on page 50 of his report puts this premium at about half the selling value of the land (as khudkasht). The price should be going up, as tenants get more plentiful and land more valuable. Sub-division of hissadari holdings, as the population increases, leaves less superfluous land to be given to khaikars. On examining some recent registered khaikari leases at Pauri, however, the following result was obtained :

In 25 leases an area of 1,222 nalis (about 60 acres) was leased and the total premia paid amounted to Rs. 2,014 or rather under Re. 1-12-0 a nali ; varying between extremes of Rs.8-8-0 a nali and Re. 0-4-0 a nali. Excluding one very large area the average of the remaining 24 leases comes to nearly Rs.2 a nali. If the lands leased were of average quality these figures would indicate a rate decidedly under half the selling value as khudkasht. As a rule, however, a hissadar gives rather inferior land to a khaikar and keeps the best part of his estate for himself. Probably, then, these figure indicate rate of about half the selling value of the land or rather less the leases did not in any case state the revenue of the land transferred. The figures for the premia may not have been correctly shown in the deeds in all cases.

Another test in an indirect way is the proportion of compensation paid to the hissadars and to the khaikars, respectively by agreement of the parties, when land has been acquired for public purposes. In one or two recent cases of this kind in Garhwal the hissadars and khaikars have voluntarily agreed that three-fourths of the compensation paid should go to the khaikar and only one-fourth to the hissadar. This seems to have been remarkably liberal conduct on the part of the hissadars. Combining the above results with the experience of some cases in Almora it may be said that the permium paid for khaikari right and the value of the right may be taken on the average to be about half the value of khudkasht land, or Rs.50 per rupee of revenue ; but the data are somewhat discrepant. The question is, however, one which is very seldom in dispute before the courts.

Acquisition of khaikari right in unmeasured land.

On the subject of the creation of new khaikari tenures in new cultivation by the Settlement Officer in making out his new records or by the Commissioner in sanctioning nayabad grants I have already quoted Mr. Goudge's remarks. I cannot do better than give in full Mr. D. T. Roberts, Commissioner's instructions of the 24th February, 1893, to the Settlement Officer of Garhwal on this

subject. They put the position with great clearness and are equally applicable to nayabad grants, when the circumstances are similar.

Mr. Roberts laid down the principles to be observed as follows :

"(1) In view of the Board's ruling in the case of Murti *versus* Uttam Nath, decided on 21st January, 1891, the instructions given for the preparation of the record-of-rights in land unmeasured at last settlement and now under cultivation require amendment at one point.

(2) The present instruction is that in case of land unmeasured at last settlement which since then a sirtan has broken up and now cultivates, the cultivator shall be recorded as a sirtan and the hissadar from whom he holds a proprietor.

(3) A sirtan has no occupancy rights in land measured at last settlement as belonging to hissadars or khaikars. The wajib-ul-arz of last settlement records the right of hissadars to take back from sirtans the land given out to them and the effect of an entry under the present instruction is to record that the cultivator has no right of occupancy and holds his land subject to such rent or service as the hissadar may agree to.

(4) But the Board's ruling above referred to lays down that in the case of unmeasured land which a tenant has broken up and brought under cultivation since last settlement, and of which he has continued in uninterrupted possession through a long series of years, the zamindar has no right of ejectment. The long series of years is not specially determined and the period in the case in which the ruling was given was found to be over 20 years.

(5) One of the principal grounds of this decision is that in unmeasured land the State is proprietor and it follows from the position that the State has tolerably free hand in determining the condition on which the cultivators of the unmeasured land shall continue to hold.

And as there is no clear custom regulating the grant out of unmeasured land by proprietors and as the word sirtan implying a casual tenancy from year to year in measured land does not necessarily apply in any case to a tenant who has broken up and cultivated wasteland with the consent of the proprietors, it by no means follows that even if the tenant has not held through a long series of years the landlord is empowered to eject him.

(6) The true position would seem to be this : (i) if the unmeasured land is not a mere extension on the boundary of the tenant's original holding but is new land, then if the tenant has had uninterrupted possession for a long

series of years he has unquestionably acquired on occupancy right. By analogy with the rule in the plains, a period of 12 years should be reckoned sufficient ; (ii) if the possession has not been for 12 years or more the circumstances of the case require to be considered. If the land has never been cultivated by the landlord himself and if the tenant has been put to labour and expense in clearing and cultivating the land without any express stipulation that the landlord could turn him out at will, the tenant should be recognized as having a right of occupancy ; (iii) if the land is a mere extension to unmeasured land of the previous holding of a sirtan, the presumption should be that he only holds as a sirtan whatever be the length of occupancy.

(7) Tenants recognized as having a right of occupancy on the grounds above stated should be recorded as khaikars and their rent like that of other khaikars should be fixed at the Government revenue plus 20 per cent. in the absence of written agreement to the contrary."

The Board's order of the 7th September, 1903, in Nand Kishore, etc., of Gali, Rangor *versus* Dhanua and others, regarding the application of these rules to Almora may also be referred to.

A further question in this connection is regarding the procedure for an ordinary rent court, if a case of ejectment regarding such land came up before it, where no settlement or nayabad order had ever been passed. Cases often occur when a hissadar during the currency of settlement has had nayabad cultivation made in a separate thok away from measured land without the formality of applying for a nayabad grant. Such cases are irregular, of course, as genuine nayabad, the breaking up of new land in a separate chak or thok as distinguished from mere extensions in continuation of old measured land, should only be made after applying for a nayabad grant at any rate when the cultivation is more than an insignificant plot or is right in the forest. In the remoter parts, however, inconsiderable areas of such nayabad often pass unnoticed, for many years and are not interfered with when found to be of old standing and not of an objectionable nature.* In the case of such land if the hissadar ejects or tries to eject his tenant the court should evidently follow the rules quoted above and declare the tenant to be entitled to resist ejectment if the circumstances appear such that he would be recorded as a khaikar at settlement or in nayabad proceedings. This is the principle laid down in the famous original decision of Uttam Nath *versus* Murthi on which the settlement instructions were based, these instructions being an expansion in detail of that ruling (see the chapter on sirtans, paragraph 2). Compare Mr. Hamblin, Commissioner's order

*See Chapter VIII on nayabad.

in Autar Singh and another *versus* Sarup Singh, special rent appeal No. 1 of 1899-1900.

Extension of cultivation by recorded khaikars.

It is necessary to distinguish these cases, where a sirtan or other person cultivating nayabad under a hissadar is raised to the status of a khaikar from the ordinary case of a khaikar who extends his khaikari cultivation into unmeasured land or breaks up fresh land in the village. A khaikar has just as much right to extend his cultivation into unmeasured land as a hissadar has, even in villages where the hissadars hold khudkasht.

This was settled, as Mr. Pauw says, but Sir Henry Ramsay in the case of Fateh Singh *versus* Hansa and others. The judgment is worth quoting in full :

REVENUE APPEAL No. 46 OF 1882

Appellants—Hansa and others (of Deori Kutora).

Respondents—Fateh Singh.

Appeal against order giving respondent a decree for 434 nalis.

Appelants are khaikars and respondent a hissadar of the village Deori Kutora. These villages are assessed at Rs.55. This claim for wasteland is nothing more or less than an attempt to establish zamindari right within the village boundaries. The khaikars of this village are old marusi asamis. Waste unmeasured land is the joint property of Government and villagers. If it were deemed advisible to establish a nayabad or to preserve a block of jungle, Government has the right to do so, though such wasteland is left uninterfered with, if it is not required by Government. The recorded hissadar has no right to claim hissdari during the currency of the settlement in jungle land brought under cultivation by the khaikars. He may cultivate new land if he likes ; but he cannot claim rent on land which does not belong to him, nor can he assess khaikars till proprietary right has been sanctioned in it, as at present he has no such right. I cancel the order of the Lower Court and dismiss plaintiff's suit with costs. Dated the 4th Feburary, 1882.

The two points are—

(1) that Government, and not the hissadars, is the owner of all unmeasured lands; and

(2) that the rights allowed by Government are allowed to the "villagers" and not to the hissadars alone in domination over the other villagers.

The right of khaikars to khaikari right in the extensions made by them has been followed without dispute in the latest settlements of all three districts.

The order of the Board in Sheo Dat of Guil, patti Dhangu *versus* Kalamu and others, dated the 15th August, 1893, may be mentioned in this connection ; it only related however, to a case in which the khaikar broke up land by agreement with the hissadars.

(4) *Termination of a khaikari tenure is mixed villages*

Having considered the various origins of khaikari tenures it may be as well to consider next how such tenures are terminated. There are four ways in which khaikari land may lapse to the proprietor in khudkasht villages.

These ways are—

(i) by ejectment for non-payment of rent or for other cause ;

(ii) by voluntary relinquishment on the part of the khaikar (ladawa) ;

(iii) by dispossession for a period of upwards of six months ;

(iv) by failure of the line of succession on the death of a khaikar.

This fourth way is the central question of succession to khaikari holdings, and is the most important point of customs relating to this tenure.

Ejectment for non-payment of rent.

Of the ejectment of khaikars Mr. Pauw says (page 48) :

"The ejectment of khaikars can only take place on a decree of Court which is usually only made in case of proved inability to pay the assessment, for instance, non-satisfaction of a decree for rent. It thus happens that the ejection of khikars is almost unknown. The hissadar is also very cautious in interfering with a khaikari holding unless armed with ladawa as it generally ends in his being mulcted in costs."

As the rent of a khaikar is always extremely light and a few rupees is easily raised in the hills, it is very rarely that a khaikar really cannot pay his rent, and if he is a thriftless never-do-well or wants to throw up his tenure for any reason, the hissadar is nearly always ready to pay him a round sum to relinquish his holding since the value of the khaikari right, as we have seen above, is very considerable and always far above any three years' rent that the hissadar could claim. Accordingly I have not found a single record of a case in which a khaikar was ejected for non-payment of rent. It was reported in Almora that one or two cases had occurred in the past and one suit of the kind was once filed in my court ; but on the defendants being summoned he promptly paid into the court the arrears of rent and costs and the suit was dismissed. There are thus no clear rulings on the subject and

the procedure that should be followed is not at all clear. Mr. Pauw, it will be seen, puts it vaguely. Whether a hissadar should first get a decree for arrears of rent and on failing to get satisfaction should sue or apply for ejectment on the basis of his decree, or whether he should sue direct for ejectment on the ground of non-payment of rent, or should sue in the alternative for arrears of rent, or in default for ejectment, is nowhere laid down. There is no provision in the Kumaun rules for ejectment by application or notice, and it would appear that the hissadar should either sue directly for ejectment on the ground of non-payment of rent and get a decree if the defendant fails to pay the amount due into court, or else that the hissadar should first get a decree for arrears of rent and then file a further suit for ejectment if the decree cannot be satisfied by attachment of the other property of the khaikar. In the solitary case referred to above the hissadar adopted the former direct course, but the latter double procedure appears to be that contemplated in Mr. Pauw's note.

It would seem also that non-payment of however small a sum would entail ejectment from the entire holding. It would be more equitable perhaps if the court had the power to determine the area of the portion of the holding, ejectment from which would fairly represent the amount of rent due.

Ejectment by hissadar objecting to transfer by khaikar.

The only other case in which it has ever been held that a hissadar can claim to eject a khaikar would appear to be in the event of the latter's attempting to mortgage or otherwise transfer his holding. This is not so much the ejectment of the khaikar as the resumption by hissadar of land which has passed out of khaikar's hands. Even this power, however, is of doubtful extent.

Mr. Pauw's remarks on the subject are as follows (page 47):

"It is a very general practice for khaikars to give cultivating possession in some of their land as security for the payment of a loan, that is to say, by deed or verbally they mortgage their holdings. In the case of Dhan Singh *versus* Makhandu of Kot, Sitonsyun, the defendant, a khaikar, similarly mortgaged land to various people, and the plaintiff hissadar sued to recover the land. The court of first instance (Colonel Garstin), after examining the papers, found that two of the mortgages had been recorded in the settlement papers, that there was hardly a tenant in the village but had some land mortgaged, that the plaintiff admitted that the custom of a mortgaging for a short time was a common one, and that if the defendant would redeem in short time he would not object. Plaintiff was given a decree that if defendant failed to redeem in two years he might redeem himself. Sir Henry Ramsay in appeal ruled: "As there is no special clause in the settlement agreement and the whole village does not appear to be in the hands of khaikars, I do not see why

the khaikars of Kot should be different from others. If they can mortgage, they can sell. Therefore any mortgage that khaikars can make must be purely nominal and can convey no right to any other of the khaikari land he holds" (22nd August, 1873). The order was cancelled and the plaintiff given immediate possession. No more recent case has occurred; but it is difficult to see why the hissadar is prejudiced in a case of this kind any more than by a sub-lease of the holding, and the commonness of the latter custom is evidenced by the record of the former and present settlement. In either case the occupancy must terminate with the real khaikar's death, and as there can thus be no unauthorized prolongation of the khaikari tenure, the hissadar's reversionary interest remains unimpaired. Mr. Pauw, however, was misinformed in saying that no more recent case had occurred. In Khiru and Ganeshu, appellants-defendants *versus* Bali Ram of Pokhri, Sitonsyun, decided by Mr. Ross, Commissioner, on 17th August, 1888, Bali Ram sued for possession of the holding of a deceased khaikar Bhimu on the ground that he had mortgaged his holding. Mr. Ross said : "Bhimu had a perfect right to mortgage the life-interest in his khaikari holding. Bhimu's son must most distinctly succeed and inherit his holding." Though the circumstances were somewhat different the ruling is a very definite and unequivocal one on the subject of khaikari mortgages. It is to be noted that what can be mortgaged is only the life-interest of the existing tenant.

Another case indirectly bearing on the question is that of Gaje Singh of mauza Bhawani, Khatsyun *versus* Sri Ram and Ishri Dat, decided by Mr. D. T. Roberts as Commissioner on the 9th September, 1892. A khaikar, Harku, had adopted his nephew, Gaje Singh, and then handed over his holding to Gaje Singh. On Harku's death three years later the hissadar sued for cancellation of the transfer and the adoption. Mr. Roberts upheld the title of Gaje Singh; but this case is a mixed question of adoption and transfer. A khaikar could no doubt make over his holding to his son and heir during his lifetime and leave the village without the hissadar being entitled to object, and Gaje Singh having been adopted was in the position of a son (see succession among khairkars *infra*). Though the decisions of Mr. Ross naturally do not carry the same weight as those of Sir Henry Ramsay, yet I think on this point his ruling backed by Mr. Pauw's opinion and the indisputable custom of the country of khaikars mortgaging their land may fairly be set against Sir Henry Ramsay's decision.* Apart from such cases of mortgages the hissadar could no doubt step in and resume the land if a khaikar made or purported to make a final alienation of his land by sale or gift and handed the land over to a third party.

*Since the above remarks were written Sir Henry Ramsay's ruling has been followed and a mortgage by a khaikar in a mixed village declared null and void by Mr. Campbell, Commissioner, in Ranjit Singh of Jawar, Balla Langur *versus* Ratan Singh and others; order of the 27th May, 1907.

Other questions relating to transfer and sub-lease by a khaikar will be dealt with later on.

Relinquishment by khaikar.

The khaikar may also relinquish his land at any time by a deed of relinquishment (ladawa) executed in favour of his landlord, but not to the prejudice of his partners in the holding. Thus in the case of Chhoti *versus* Jivanand of Uprainkhet, Bachansyun, the plaintiff widow of a deceased khaikar, sued to cancel a ladawa given by her eldest son to the hissadar defendant, as she had a younger son. Sir Henry Ramsay ruled: "If Paunlya did not wish to cultivate the land, his younger brother had the right to all, and Paunlya had no right to give it up by ladawa." The deed of relinquishment was accordingly cancelled (4th September, 1878) (Pauw, page 46). See also paragraph 8 of the sample copy of Mr. Beckett's Ikrarnama appended to the Introductory chapter, this condition was a stereotyped one for all villages, but only applies to mixed villages in which the hissadars have khudkasht.

Such relinquishments are not common now-a-days, and when they do occur are usally of the nature of a "buying out" by the hissadar of the khaikar's interest (see above on the value of the khaikari tenure). A khaikar can of course only relinquish the land in favour of his own hissadar or of all the hissadars if there are more than one. He cannot convey any special interest in his land to one or two out of a number of hissadars by giving his ladawa in favour of such individual or individuals.

Notice of relinquishment.

In the unusual event of a khaikar wishing to resign his land and the hissadar being unwilling to accept the resignation, the khaikar should, it appears, in order to terminate his liability, file a petition in court for notice to issue to the hissadar that the khaikar had resigned his holding (*cf.* Jethua *versus* Jot Ram of Kaphali, Kauriya Walla, decided by Colonel Grigg on the 18th June, 1896).

Khaikar out of possession for over six months.

Article 2, Schedule A of the Kumaun Rules, fixes the period of limitation for a suit by a tenant to recover the occupancy of land at six months from the date of dispossession. A khaikar is a tenant and a suit by a tenant against a landlord to recover the occupancy of land is a rent suit under clause B (7) of rule 30 of the Kumaun Rules. The period of limitation fixed in the abovenamed Article 2 of Schedule A applies to such suits.

Hence if a khaikar is dispossessed by the hissadar and remains out of possession for over six months without filling a suit he loses the right to recover his land and his khaikar determines (*cf.* Chanar Singh *versus* Lalmani and others of Bamanchaura, Girwar, order of Mr. Hamblin, Commissioner, of the 3rd September, 1900).

This rule only applies to rent suits, as between a tenant and his landlord.

If the khaikars is dispossessed or ousted by a trespasser, not having proprietary right in the land, it is an ordinary civil court matter. Nor would the hissadar apparently derive any title to resume land from the khaikar's being out of possession by the act of a trespasser. The trespasser *per contra* could never acquire khaikari right as against the hissadar, though he might in time make good his title through adverse possession as against the dispossessed khaikar.

(5) *Khaikari succession in mixed villages*

The fourth case in which a hissadar can resume or recover possession of khaikari land forms one of the aspects of the question of succession to khaikari holdings.

The customs relating to succession are the most important of the various questions relating to the khaikari tenure, and turn on the point of whether the hissadar can or cannot in any particular event claim to resume the holding as having lapsed through the absence of a qualified heir.

The following remarks, as premised above, rate only to mixed villages in which the hissadar hold khudkasht.

The khaikari right is a heritable one, but the classes of relatives entitled to succeed to it are limited. The exact point of limitation is a great point of dispute.

Sucoession : sons.

"As regards the right of relative to succeed, no doubt has ever been expressed as to the son's right," says Mr. Pauw (page 46) : As regards illegitimate sons, however, I can find no rulings. Instances are often met with in which the sons of a *dhanti* wife have suceeded to a holding without dispute ; but I do not remember any instance of a hissadar contesting such a succession on the ground of the son's illegitimacy. The fact is that the majority of khaikars are of inferior caste as the old occupant cultivators in the villages would naturally be, and among such khasiya castes there is no question about the right of a *dhanti's* sons to inherit. I had an instance of this before me recently when the son of a *dhanti* had inherited without dispute a fifth share of his father's holding equally with four legitimate sons (Gyan Singh *versus* Kuttu of mauza Goila, Civil Appeal no. 41 of 1906).

Daughter's succession.

"The daughter's right is more doubtful, though in the case of Musammat Sauni and another *versus* Prasadu and others, Pauri, Nandalsyun, the plaintiffs sued to succeed their mother as khaikars, and got a decree which was upheld by Colonel Erskine on appeal (19th May, 1890). In a former case a nephew had been preferred to a daughter and a daughter's son, even when the latter were

supported by the proprietor while still earlier cases had declared the nephew incapable of succeeding at all—facts which only show the necessity for a clear exposition of existing rulings. The daughter's right is no doubt a highly equitable one, and would apply a *fortiori* in the case of a ghar-jawain and daughter's son, though it can hardly be said that the rights of either are generaliy recognised" (Pauw, page 46).

Daughter's son and ghar-jawain.

On the above points of succession by the daughter, daughter's son and ghar-jawain the only ruling forthcoming appears to be that of Jaman Singh *versus* Chanar Singh of Mainkot, Malla Salt, in which Colonel Erskine held on the 26th August, 1889, that a daughter's son cannot claim to succeed to holding of his (maternal) grandfather.

On no subject in Kumaun is there so much need, not merely as Mr. Pauw says for a clear exposition of existing rulings, but for any authoritative and reasoned ruling at all as in the case of khaikari successions.

Widows.

The widow inherits a life-tenure in the absence of sons. Mr. Pauw says (page 46) : "As regards heirs other than descendants, the widow has an undoubted claim to succeed in the absence of sons, and in this is preferred to the daughters." In the case of Ratan Singh *versus* Dhaunkalu and others of Sirwana, Iriyakot, the plaintiff hissadar sued to obtain land from the defendants cultivating on behalf of the deceased khaikar's widow, Sir Henry Ramsay ruled : "While the wife of the deceased khaikar is alive this claim is inadmissible" (9th May, 1872).

Adopted sons.

"The right of an adopted son to succeed would not be worth noticing were it not that it was denied in several cases by Mr. Ross while Commissioner. Sir Henry Ramsay, however, in the case of Kamrup *versus* Narayan Singh, Kirkhu Mawalsyun (1st February, 1882). clearly upheld the right of an adopted son to succeed, and in the case of Sri Ram and another *versus* Gaje Singh of Bhawain, Khatsyun (9th September, 1892), and Kirpa, of Ghiri, Kapholsyun *versus* Kedaru (1st (August, 1894) this view has been re-affirmed." (Pauw, page 46.)

Further reference may be made in support of this right to Mr. D. T. Roberts' decision in the case of Gajal Singh, an adopted nephew *versus* Sri Ram and Ishri Dat mentioned above with reference to transfers by khaikars, and also to Colonel Grigg's order in Har Dat Singh *versus* Harkua (Revenue appeal 1 of 1893-94, dated the 4th July, 1904).

Collaterals.

"Collaterals, as a rule, are only allowed to succeed if they share in the cultivation of the holding (i.e. are what is known as shikmi). There are no definite rulings on the subject, but Mr. J. R. Reid has

expressed his opinion that section 9 of Act XII of 1881, might fairly regulate succession in this case." (Pauw, page 46.)

The rule laid down by Mr. Pauw is identical with the ruling laid down by Mr. Giles as Commissioner on 16th July, 1891, in Bhim Dat or Kalwari *versus* Bhagdeo of Chaurasu, that "a collateral is only entitled to succession to the khaikari tenure when he has jointly cultivated the land with the khaikar," a ruling recently quoted and followed by Mr. J. S. Campbell, Commissioner. See also the Board's order in Dharma Nand *versus* Kamlapati of Dinga, Silor, dated 9th October, 1889.

The commonest cases of dispute relate to succession by brothers or nephews. The ruling of Mr. Giles quoted above dismissed the claim of a nephew. For an instance of a joint brother's title to succeed, Ganga Dat *versus* Bachua (Commissioner's appeals 7 and 13 of 1885) may be referred to. The Board's order referred to above upheld a similar claim. *per contra* in Tika Ram *versus* Birua and others, Mr. Ross wrote on the 10th December, 1887: "The land not being ancestral and the brothers having lived separately they have no claim."

But when two brothers took a joint lease from the hissadars and their sons succeeded them, on the death of one of the sons without direct heirs it was held that his cousin, the son of the other joint lessee, was entitled to succeed to the holding, although the brothers and their sons had been in possession quite separately and had had their holdings separately recorded in the settlement records (Bhawan Singh of Kotuli, Borarau *versus* Gauri Dat and others, Mr. Giles, Commissioner's order of 31st August, 1891).

In this case the joint lease saved the situation as against the hissadars. But if, in an ordinary case, two brothers inherited their father's holding and thereafter separated and held the land in two distinct holdings, separately cultivated and paying separate rents, the survivor could not claim to inherit if his brother died without direct heirs.

The question turns on the point whether the collateral was actually a shikmi in joint cultivation of the holding or not; he must apparently have had an unseparated interest with the deceased khaikar during the latter's lifetime and have been jointly liable for the rent, since this is the point where the hissadari interest is affected. This can often be tested from the village records where there are shikmi-fards made out at settlement or where all the joint holders were entered in the phant and muntakhib. In fact the record of the holding is often made the main test, which apportions the burden of proof to one side or the other.

On this view, if two brothers had separate holdings and one of the two, having no direct heirs, called in one of his nephews

to assist in the cultivation of his holding, the nephew would not inherit, inasmuch as he was not shikmi with his uncle, since he had no joint interest in the holding during his uncle's life. His interest would be in his own father's separate holding, and he was not a joint cultivator with his uncle, but an assistant of or dependent on his uncle. He would not for instance be liable with his uncle for the rent of the latter's holding. This view would seem to follow from the use of the term shikmi in Mr. Pauw's remarks, but it might be held perhaps an unduly strict limitation. The flaw might in any case be got over by the adoption of the nephew by his uncle (*cf.* the case quoted above under succession by adopted sons, provided that the adoption were admissible in Hindu Law. The whole question is one of which different officers have taken narrower or more liberal views according to their prepossession in favour of the hissadar or khaikar and to their previous ideas derived from experience in the plains. If such a succession is admitted, however, the line must still be drawn at some point ; for instance a khaikar's widow, having no children, often gets in a nephew or collateral to cultivate for her ; in such a case presumably the collateral would acquire no claim to inherit, since he had no joint interest or joint cultivation with the last holder of full right in the tenure, namely, the widow's deceased husband.

Succession of collaterals, etc., by acquiescences of hissadar.

Despite these limitations, however, collaterals, who have no strict right to inherit, do at times succeed by the acquiescence of the hissadar. Mr. Pauw remarks (page 46) : "Succession by relatives other than those mentioned can take place with the consent of the co-sharer, but not otherwise ; but this may be regarded rather as a renewal of the khaikari right than a continuation of it." This consent, tacit or express, usually refers to cases of collaterals. The important point to notice about such succession is that when the hissadar has tacitly or expressly recognised it over a considerable interval of time, he cannot subsequently turn round and raise the question of the collateral's right to inherit.

Mr. D. T. Roberts, Commissioner, in Tej Singh and Khim Singh *versus* Moti (7th September, 1892) laid down the custom as follows :

"Now, although collaterals may have no right to succeeed to a deceased khaikar's holding there is no doubt that they frequently do so with the tracit or express permission of the proprietors ; and it is also an adimitted custom of Kumaun that a khaikari right may be created at the will of the proprietor. When, therefore, a collateral has been suffered to succed and to retain possession for so long a period as 12 years, I think the tacit consent of the proprietor is to be presumed and that he has no right to turn round after so long a period and raise the point of hereditary right."

Mr. J. R. Reid's order in Lachhmi Ballabh *versus* Pania (appeal 71 of 1889) takes a similar view.

The same doctrine of *factum valet* would no doubt apply in the case of heirs other than collaterals ; for instance a daughter's son or *ghar-jawain* (see above), if the hissadar acquiesced in their succession, though it would not help an outsider who had no shadow of claim to inherit from the deceased khaikar.

(6) *Transfers as between khaikars*

The question of transfers by khaikars as affecting their relation with the hissadar has been dealt with above. Whatever view is taken of the hissadar's right to resume land mortgaged by a khaikar, there is no doubt that the mortgage is binding on the khaikar in his relation to the mortgagee. See Daulat Singh *versus* Khimia of Kauli, Kaligarh, decided by Mr. D. T. Roberts, Commissioner, on 27th July, 1892. Whether the hissadar tries to intervene or not is a different question.

Sub-lease by khaikar.

A khaikar can sublet his land and get it cultivated through any one he likes. There is no question about this so long as he does not purport to make over the khaikari right. Colonel Fisher, as quoted by Mr. Pauw, ruled this in Suraj Singh *versus* Amar Deo. Mr. Pauw goes on to say (page 47) : "This of course holds a *fortiori* in proprietary villages. In these, however, the right to sublet has been by no means always acknowledged, decisions having been sometimes given to the effect that if a khaikar cannot cultivate all his land it is his duty to resign it to the proprietor?" But in the case Bakhtawar Singh of Chamlan, Katli *versus* Kaulu and another where the hissadar sued to recover land so sublet, Mr. Ross in appeal ruled : "The proprietor cannot interfere. Kaulu is the khaikar and he can cultivate through whom he likes. At Kaulu's death, Ratanu's tenancy will cease, and Kaulu's heirs, if any, will succeed, or the land will lapse to the proprietors (19th September, 1887)."

A further ruling in which it was laid down that a khaikar has a perfect right to lease his land is that of Dharm Singh *versus* Madho Singh (Commissioner's appeal no. 81 of 1885 by Sir Henry Ramsay).

(7) *Partitions between khaikars*

The question of the partitioning of the proprietary right in khaikari holdings has been referred to in the chapter on hissadars. Joint khaikars can also obtain partition of their holdings. Such partition may be (*a*) imperfect, division of the land held, leaving the parties jointly liable in the last resort for the whole rent, or (*b*) perfect, a complete separation both of land and of rent, i.e., of the liability for the several sums making up the previously joint rent.

Imperfect partition may be had at the desire of any of the joint tenants; but perfect partition can only be effected with the previous consent of the hissadars (*see* Partition Rules, rule 30).

The hissadars cannot have the land of a joint khaikari holding partitioned up against the will of the khaikars, so that separate khaikars may hold under separate hissadars; nor can the joint khaikars be made to pay their respective shares of rents in separate sums to separate hissadars. (*See* Tulsi and others *versus* Lachham Singh of mauza Gori-Patti Sila; Mr. Ross, Commissioner's order of 30th June, 1886; *see* also the Partition Rules, rule 9 on page 35 of the Kumaun Rules).

(8) *Khaikari rents*

The rents of khaikars, as has been explained above, are fixed at settlement and represent a calculation of the revenue assessed on the land *plus* a malikana allowance varying from 10 per cent. to 100 per cent. on the revenue, but usually 20 per cent. in Garhwal and 25 per cent. in Almora and Naini Tal.

Under these circumstances the question of khaikari rents presents few difficulties and causes few disputes. The rents are usually paid without difficulty. The commonest disputes are regarding the collection and distribution of the rents of khaikars, who hold under a number of joint hissadars. Where the khaikar holds *gaon sanjait* land under the whole body of proprietors, the malguzar collects the rent and after crediting the revenue, distributes, or is supposed to distribute the malikana among the hissadars. It is in such cases and where several hissadars are joint proprietors over a khaikar that the hissadars quarrel over the rents. This, however, is not strictly speaking a question of khaikari tenure.

Deposit of rent.

A khaikar can pay his rent into Court under rule 44 of the Kumaun Rules, if the hissadar does not accept it and give a receipt for it.

Unmeasured land.

A hissadar cannot claim any rent for extensions of cultivation made by a khaikar in unmeasured land, though he will get the hissadari right and malikana at the next revision of settlement (*see* Fateh Singh *versus* Hansu and others, Sir Henry Ramsay's ruling quoted in full above.

In a very few individual cases by mutual agreement between khaikars and hissadars it has been settled that the former shall continue to pay in kind or in service in lieu of the malikana percentage. This is a question of simple fact in each case; it has been recorded at settlement in the case of one or two villages in Almora, and I know of no other cases of the kind.

If, however, a khaikari lease creating a new tenancy is executed during the currency of a settlement and such lease provides for special terms of payment, it is not open to the khaikar to take objection to these terms and claim to pay only 20 per cent. or 25 per cent. on the revenue of the land (Colonel Erskine, Commissioner, in Diwan Singh *versus* Deo Singh of Kamdai Patti Katli, decision of 12th May, 1890).

Khaikari rents under special leases.

In such a case, however, the rent would be reduced to the customary percentage at the next revision of settlement. In Mohan Lal and another *versus* Padua, of mauza Thumnagaon, Bararau, a khaikar had agreed under a pre-settlement lease to pay a grain rent; subsequent to the settlement it was held that he was only liable for the cash rent fixed at settlement, which had superseded the previous agreement (Mr. Ross, Commissioner, on 12th December, 1887).

(9) *Khaikars in villages held entirely by khaikars*

The origin of all classes of khaikars has been discussed above. It is worth, however, quoting in full here Mr. Goudge's succinct account of the origin of this special class of khaikars:

"It may be stated broadly" he says (page 10 of his report) "that the khaikars partake of the character of under-proprietors and of occupancy tenants. They resemble 'under proprietors' in villages which are held entirely by khaikars, and occupancy tenants in villages where some of the land is held by the hissadars in khudkasht. The use of the one name khaikar for these two classes of tenure was an unfortunate one. It is impossible to say whether the name was so employed before Mr. Beckett's time or not, but it is certain that nothing could have been fixed before his survey and record-of-rights in which he made no clear discrimination between the two. When khaikars hold the entire area of the village, they are to be regarded as originally the hissadars in virtue of their having first reclaimed it from waste. Under native forms of government the collection of the revenues was farmed to influential landholders in certain localities, and they thus acquired, particularly in parts of the district remote from the headquarters of Government, a means by which they might assert rights over the tracts entrusted to them when British revenue settlements were introduced, even though their official position as collectors and farmers of revenue was abolished. In course of time they had established themselves in a kind of *quasi*-feudal position as overlords in the villages of the tracts entrusted to them. These overlords were generally known as *sayana* in relation to the villages entrusted to them, and the cultivators continued to observe the custom of paying them various dues in kind or service. These dues, however, were not of the nature of rent, and did not imply

that the *sayana* had any proprietary title in the villages. They were a remuneration for the many services which he could render in deciding disputes or representing the people before higher authorities, and a tribute of respect to his higher birth and position. Originally also they had been doubtless exacted by him in the course of his functions as collector of revenue. Until last settlement there had been no elaborate record-of-rights, and the primitive condition of things had been left undisturbed; but with survey and preparation of a wajib-ul-arz it became necessary to consider and determine clearly all existing rights. Mr. Beckett commuted the vague dues, paid in service and kind, into a percentage of the revenue assessed on each village which was payable as malikana to the *sayana*. Inasmuch as all khaikars throughout the district paid a similar percentage to the hissadars, he allowed the name khaikar to be applied to these people in cultivating possession of whole villages also, who only recognized the *sayana* as overlord and not as proprietor of their land. It would have saved much ambiguity and misunderstanding in the future if he had clearly distinguished by some separate title these distinct forms of khaikari tenure. It is probably due to this confusion of terms that legal authorities is Kumaun have held that khaikars in a wholly khaikari village cannot transfer their holdings by sale or gift (*vide* Colonel Fisher's ruling quoted in paragraph 51 of the Garhwal Settlement Report). Rulings have not been uniform, and there is much need for a clear statement of custom and law with definitions of each form of khaikar" (page 11).

The present position and rights of these khaikari bodies of old cultivators who have succeeded in preserving their villages intact and free from the invasion of the hissadar, form indeed the most difficult portion of the subject to do justice to.

These khaikari villages have always been and still are the object of constant attack by the hissadars anxious to effect an entry and break down their privileged position, and there are perhaps few classes of tenants and other agriculturists in India who have suffered more from a confusion of terminology and from the ignorance of the history and peculiarities of their tenure too often displayed by the courts in deciding the fights over these villages. Such ignorance has been natural enough in the case of officers new to Kumaun in the absence of any law on the subject and of any clear exposition of the history and real position of these communities. As Mr. Pauw says (page 15): "Owing to the absence of any written law on the subject of these tenures and to the unscrupulousness and untruthfulness of litigants, new authorities are apt, merely from inability to ascertain the correct custom to give decisions absolutely opposed to all recognized rights." And, it must be said, the officers and officials of local extraction, belonging as they do almost ex-

clusively to the proprietary class, who are overlords of the khaikars, have at times not been free from bias in favour of their own class and have been inclined to slur over the special status and the peculiar rights of the pakka khaikar in his stronghold. The influence of such local opinion and suggestion in the decisions of local officers or in the reports and notes of local officials must have told to the detriment of the khaikars in influencing the minds of European officers when first acquiring experience of the Kumaun tenures. I may mention briefly in this connection the well-known series known as the Lakhorakot khaikari cases. If there is one principle indisputably settled in the case of these khaikari villages it is that on the death of a khaikar without direct heirs lapsed holding reverts to the whole community of khaikars and not to the hissadars. In the Lakhorakot cases a number of khaikari villages in the Chaukot pattis were held by an important family of thokdars, in these villages a considerable number of holdings had thus lapsed by death of the khaikars between 1885 and 1887. At the recent revision of settlement it was found that, by the action of a certain tahsildar, all these lapsed holding had wrongly been recorded by mutation as the hissadar's khudkasht, and he thus claimed to have obtained cultivating possession in all these villages; in almost all the cases the mutation had been carried out surreptitiously and the whole procedure and claim was clearly null and void.

(10) *The real status of these khaikars*

Now what is the real status of the khaikars in such villages. "They are not mere tenants with a right of occupancy, a position which is practically that of the kachcha khaikars. They are in all respects equal to proprietors with the exception that they cannot sell their holdings and they pay a small sum in addition to the quota of revenue due from the land recorded in their names," says Sir Henry Ramsay (Kumaun Report, page 15).

They are under-proprietors.

"Khaikars in a village held entirely by khaikars" is, says Mr. Pauw (page 45), "the modern form which the under-proprietary right has assumed." "They resemble under-proprietors' in villages which are held entirely by khaikars, and occupancy tenants in villages where some of the land is held by the hissadars in khudkasht," says Mr. Goudge (quoted above).

The Board of Revenue (Messrs. Hardy and Thomson) have gone further in the case of Tilok Singh of Naugaon, Rithagarh *versus* Dalip Singh (Petition no. 20 of 1902-1903).

Or sub-settlement holders.

"It is unfortunate," they remark, "that a single word has been used in Kumaun to denote both the bodies of men who were practically *sub-settlement holders* and others who were possessed of mere occupancy rights." The origin of this unfortunate confusion lies with Mr.

Beckett (*see* Mr. Goudge's remarks quoted in the last paragraph).

To what an extent this confusion has affected the status of this class will be suggested in dealing with various points later on ; Mr. Goudge in the remarks quoted above mentions one point, the right of transfer.

By a rule, which is clearly wrong, it has been the practice to treat such villages when once a hissadar has obtained a khudkasht footing in them, as if the whole character of the village had thereby been changed and the khaikars had lost their special status. This is quite contrary to a ruling (Debi Dat *versus* Prem Singh) quoted by Mr. Pauw : *see* also paragraph 14 below.

How far the latter have suffered by such acquisition of khudkasht, which must in the great majority of cases have been effected by unfair or illegal methods, is shown by the table given on page 11 of Mr. Goudge's report. He shows that in Almora between Mr. Beckett's settlement and his own the hissadars effected an entry and got khudkasht in 106 out of a total of 515 villages previously held wholly by khaikars. Some definite action is clearly needed to preserve the remaining rights of this unfortunate class, and still more is needed a series of clear rulings recognizing and defining the just rights of these under-proprietors as a separate body. It will soon be too late to break the gradually crystallising customs which at present unduly limit their privileges and indeed at the present rate they seem likely to be gradually edged out of existence by the persistent incursions of the hissadars. As a basis might be laid down the principle stated by Sir Henry Ramsay (page 16 of the Kumaun Settlement Report) : "The proprietor has *no* power to interfere with these khaikars or their land, waste or cultivated."

(11) *Succession in khaikari villages*

As the main bone of contention is the question of succession in such villages, this will be the first point considered. It is unfortunate that no clear separate rulings, taking notice of the special character of these villages, are available on most points.

Succession by heairs.

As regards succession by heirs of a deceased khaikar the same rules have been observed as in the case of khaikars in mixed villages. Thus only a limited class of heirs can claim to succeed. This is evidently on the analogy of the "occupancy tenant" position of the khaikar in mixed villages. It is inequitable on the under-proprietary theory and remembering the special character of these communities. Succession in these cases, it would seem reasonable, should be regulated by the ordinary rules of Hindu Law as in the case of hissadars.

In the case of Upan Deo *versus* Bachi Singh of Thala Mamal, Malla Salt (order of 18th July, 1892), the Board applied the rule, excluding collaterals from any claim to succeed as of right, to a wholly khaikari village, but the ruling is not a very positive one. From the phrases used in this decision it would seem that the Board were rather tentatively accepting a view of the case than laying down a decisive ruling. "The custom of Kumaun is" they say, "believed to be as alleged" (*i.e.* as regards the hissadar's not succeeding). "But under the custom it is understood that collaterals have no prior title to lapsed khaikari lands ; such lands lapse to the khaikari community." Otherwise I have found no rulings laying down specifically that the same rules must apply to cases of inheritance in the villages as are applicable to khaikars in mixed villages. There seems, therefore, to be some room for an unfettered consideration of the question by the higher Courts.

The question mainly affects the right of succession by collaterals.

If, however, succession as of right is to be limited, there comes the further question of succession by consent. In mixed villages, as has been shown, other heirs may succeed by consent of the hissadars. In the wholly khaikari village such succession must evidently be by consent of the reversioners, the whole body of khaikars, since—

(1) they are the heirs entitled to succeed and to deal with the holding as they like, in default of direct heirs ;

(2) "the hissadar has no power to interfere with these khaikars or their land" (Sir Henry Ramsay, as quoted above) ;

(3) in no case can the hissadar succeed to possession of the holdings.

It was thus ruled in Amba Dat *versus* Lalmani and others of Takoli, Malla Tikhun, by Mr. Macdonald, officiating Commissioner, on 24th February, 1889, that a collateral can succeed with the consent of the panch khaikars and the hissadar cannot object.

That similar successions take place constantly in such villages is certain : cases are often met with when a cousin or nephew is found to have succeeded.

(12) *Lapsed holdings in khakari villages*

It has been remarked above that in such villages the hissadar can in no case claim to succeed to a lapsed holding and make it his khudkasht. This is the irreducible minimum to which the special rights of these villages have been brought. Mr. Pauw has discussed the question in detail on page 45 of his report. He says : "in the former case" (*i.e.* in the case of wholly khaikari

villages) to quote Mr. J. R. Reid's words in the case of Padmu and others of Timli, Laga Pali Khatli *versus* Gauri Dat and another, in an order, dated the 28th March, 1889, as Commissioner, "the khaikars alone have a right to arrange for the cultivation, pasturage, etc., including the succession to land lapsing owing to the death, heirless, of khaikars, the breaking up of waste, etc., while the hissadars have no right beyond the collection of revenue, cesses and padhanchari." It would be hardly necessary to give instances, by quoting cases, of such a well-known and well-established principle, were it not that owing to the absence of any written law on the subject of these tenures, and to the unscrupulousness and untruthfulness of litigants, new authorities are apt, merely from inability to ascertain the correct custom, to give decisions absolutely opposed to all recognized rights. It is sufficient to give one such instance. The village of Milai is held entirely by khaikars, who pay revenue to the muafidar. At last settlement the khaikars who represent the old cultivators, who have sunk into tenants of the grantee, were recorded as proprietors in consequence of their independent position. On appeal they were subsequently reduced to the position of khaikars. But there could be no question of their under-proprietary right or the fact of their holding the whole village, Balmukand, the present muafidar, sued a khaikar Lalmani, for recovery of possesion of land broken up by the latter on the ground that it was his khudkasht (a perfectly preposterous plea ; a similar suit had in fact been dismissed in 1888) and by some means or other got a decree. The defendant in appeal pleaded that the whole village was in possession of khaikars, and that the muafidar by custom could only take the malikana and had no right to interfere with the cultivation. The Commissioner, however, refused to modify the decision (5th May, 1893), and an appeal to the Board of Revenue met with the same fate (2nd September. 1893), though in the case of Padmu *versus* Gauri Dat, quoted above, the Board had themselves decided that the khaikars in a similar village were entitled to the possession of land which the hissadars had actually partitioned out amongst themselves. The cases of Khushal Singh of Dyuna, Talla Dora *versus* Lachhi and others (8th June, 1889, and Gangapuri of Mangaon; Dug, *versus* Parsi Sah (20th December, 1893), both of which went up at one time or another to the Board, are perhaps the leading cases on the subject of the holdings of khaikars in villages held entirely by khaikars. Both are Almora cases and in both the custom was held to apply not only to principal but also to laga villages held entirely by khaikars, when there was any evidence that the khaikari holding represented an old under-proprietary tenure. They both refused to the hissadar the right to resume the land of an heirless khaikar and in both cases it was decided that the land should go to the common body of khaikars. The principle is, however, by no means a modern one. Sir Henry Ramsay men-

tions it in the Settlement Report of Kumaun, and a judicial decision by him to the same effect exists in Harak Singh of Chyunkot Sabli *versus* Debi Dat (26th June, 1882). Again in the case of Kaira and another *versus* Dalip Singh and another of Jukani laga of Bangar, Sabli, in which the hissadars wanted to divide among themselves the unassessed waste land of the village of Jukani held entirely by khaikars. Sir Henry Ramsay ruled: "Since all Jukani is in possession of khaikars the unmeasured land will not be divided amongst the hissadars" (30th November, 1877). In the case of Banwa and another *versus* Bala Dat, of Rauthiya, Chalansyun, in which the defendant, a hissadar, got a deed of relinquishment from a khaikar in a village held entirely by khaikars, and the plaintiff, a khaikar, sued for the land, Mr. Ross, Commissioner, ruled: "The hissadar cannot get possession of any khaikari land. If a khaikar wishes to give up any of his land, it must go to the other khaikars." It was also ruled that the hissadar had no right to cultivate unmeasured land in the village (9th April, 1888). Nor does the hissadar improve his position by obtaining, by fraud or collusion, the cultivating possession of land in the village. It has been laid down in the case of Debi Dat *versus* Prem Singh and others, decided by Mr. J. R. Reid, Commissioner, on 9th January, 1889, that hissadar so obtaining land is on precisely the same footing as regards rights and privileges as any other khaikar, and that the land so cultivated is not equivalent to khudkasht, nor does it affect the under-proprietary rights of the other khaikars" (page 46).

(13) *Further rulings*

In the above quotation the questions of succession in *asl* and *laga* khaikari villages, *ladawas* in the hissadar's favour, and the fraudulent obtaining of cultivating possession by the hissadar have been clearly dealt with.

Some supplementary remarks and rulings may be added.

Suit by the khaikari body.

Suits by the khaikars in such cases must be brought by, or on behalf of the whole khaikari community and not on the basis of right of inheritance by collaterals or other relatives of the deceased, who are not direct heirs. *See* the decision in Upan Deo *versus* Bachi Singh quoted above, and also Bhim Singh and Chanar Singh *versus* Khim Deo and others, mauza Thala, Palla Salt (Mr. Giles, Commissioner's order of 11th October, 1893), when the khaikari body succeeded after the collaterals suing as individual heirs and not on behalf of the whole body had failed.

Laga villages.

The rights of khaikars in *lagas*, where the hissadars hold khudkasht in the *asl* village, were further upheld with reference to former rulings, in Mangal Singh *versus* Saropu and others of Sarainkhet, Bichhla Chaukot (Mr. Davis, Commissioner's order of 20th February, 1903). This was one of the Lakhorakot cases referred to above.

In this as in the other cases of the series it was held that the mere fact of the hissadars getting mutation surreptitiously for a lapsed holding without ever obtaining or asserting actual possession could not in any way affect the rights of the khaikars. "Mutation of names in the phants is conducted at headquarters, and it was very easy to conceal what was being done from the khaikars themselves and get entries changed without an inquiry whether the village was held entirely by khaikars or not," says Mr. Goudge (Page 11).

Mutation effected by hissadar.

Another *laga* case was that of Tilok Singh of Naugaon *versus* Dalip Singh, in which the Board delivered a long and important judgment by Mr. Hardy from which quotation has been made above.

Lagas.

In that case no decision on the principle involved was given ; but it was remarked that the decision "would probably depend on the degree of separation or connection which is held to obtain between an *asl* village and its *laga*" and "it would also depend on the constitution of the khaikari body." The connection between *lagas* and their *asl* villages is a point to which little attention has ever been directed. It varies greatly ; some *lagas* are mere modern extensions of a large central village, whilst others represent small old-established villages practically quite separate from the village to which they are subordinated. An interesting side light on the question may be found in paragraph 6 of Mr. Batten's Kumaun Settlement Report of 1848 (page 276 of the Collected Reports), where he remarks that "most of the quarrels were satisfactorily arranged by the separation of *dakhli* from *asli* mauzas, rendering the former independent and enjoying the dignity of their own pottah."

The question of a khaikari community holding a separate village, or only having *laga* of an *asl* village may thus have depended in many cases on the simple order of a settlement officer, passed without any consideration of any possible effect on the status of the cultivators. Where an old-established *laga* could so easily be transformed it would seem unfair to make the status of the khaikars in such a *laga* suffer from the accident of their *laga* not having been separated at settlement. *See,* however, Mr. Batten's rules for the Garhwal Settlement regarding padhanships and the settling of mahals printed on pages 98–100 of the "Collected Reports," and in particular rules 12–16 regarding the principles of separating or keeping united *asli* and *dakhli* villages. These rules, however, though showing the principles on which orders were passed, do not throw much light on the original nature of the connection between the *asl* and the *laga* village.

Ladawas.

A further instance of a relinquishment by a khaikar in such a village, executed in favour of the hissadar being quashed and the land given to the khaikari body may be found in Khima and others *versus* Mohan Singh and others, Mr. J. R. Reid, Commissioner's order of 8th January, 1889 (appeal 97 of 1888).

Mortgage to hissadar by khaikar.

An insidious method of attempting to obtain khudkasht in a khaikari village on the part of the hissadar is to get a khaikar to give him a usufructuary mortgage of his holding on condition of relinquishment in default of redemption. The hissadar in such a case counts on being able, when the relinquishment is enforced, to point to his long cultivating possession when the other khaikars object. Such a mortgage is inadmissible and the khaikari body can resume the land if the holding is made over to the hissadar in this way. (Prem Singh *versus* Johari and others of mauzas Sadai, Malla Chaukot, Mr. Shakespear, Commissioner's order of 16th June, 1903).

(14) *Hissadar effecting an entry in khaikari villages Resultant status*

Hissadar actually effecting entry into khaikari village.

The consequences when a hissadar has once obtained a footing in a wholly khaikari village form a question to which too little attention has been paid. The khaikars cannot turn the hissadar out again, if they have slept on their rights for so long a time as to bar their suit by limitation. In one of the Lakhorakot cases, that of mauza Buranspani, the hissadar did effect his entry openly. The land, which he got one khaikar to relinquish in his favour was actually in possession of another khaikar, Chamia. The latter fought the hissadar up to the Commissioner's Court on the question of mutation, but failed in this as also in a subsequent suit for the land. Seventeen years later at settlement the khaikari community put in a claim for the land, but as Chamia had been holding as a sirtan for 17 years and it was held that the other khaikars must have known of his prolonged struggle for the land, their claim failed by reason of limitation (Rup Singh and others *versus* Mangal Singh, of Buranspani, Malla Chaukot, order of the Board of 2nd February, 1904).

Status after hissadar has effected entry.

When, however, the hissadar has in any way effected an entry and got khudkasht possession, his having done so should not on principle affect the rights of the remaining khaikars. Mr. Reid's ruling in Debi Dat *versus* Prem Singh and others, quoted by Mr. Pauw, is of great importance on this point; the reference will be found in paragraph (12) above. The equity of this ruling is obvious. That a whole body of under-proprietary cultivators should be reduced to an inferior position, merely by a

hissadar getting possession of one holding is evidently wrong. If a zamindar in the plains bought out one of his under-proprietors, no one would think of suggesting that all the other under-proprietors in the mahal should thereby be reduced to occupancy tenants. Unfortunately in practice this ruling is habitually disregarded from ignorance of its existence or from ignorance of the facts of the individual case. The usual inquiry in such cases very rarely goes beyond the question of whether the village is one in which the hissadar has cultivating possession. The further question as to when and under what circumstances he got possession is hardly ever raised ; it is assumed that the village is an ordinary mixed one. The khaikars having lost their original uninvaded position make no further effort to reassert their special rights in subsequent cases, owing no doubt mainly to their ignorance of the fact that they still have a privileged position It is this fact that explains the keenness of the hissadars to acquire khudkasht or even to merely get in the thin end of the wedge by a nominal mutation in such villages, as noted by Mr. Goudge (page 11). What is really needed is the compiling of a special village record showing once and for all the villages in which under-proprietary khaikars are holding with special status and privileges, thus redressing the original wrong done to this class at Mr. Beckett's settlement. Such a record should include not merely those villages that have, survived intact up to the present, but also those which have been invaded by the hissadar, but in which by Mr. Reid's ruling (and on the basis of simple justice) the khaikars are still entitled to the special under-proprietary status.

A somewhat similar state of things to that produced by a hissadar getting khudkasht in one of these villages results from a khaikar acquiring the hissadari right over his own or other holdings in such a village. In such a case he would clearly continue to be a khaikar in his cultivating possession on the same principle as that laid down in Mr. Reid's ruling. If he succeeded to a portion of a lapsed holding, it would be as one of the panch khaikars and not as a hissadar.

Padhanchari land in khaikari villages.

The holding by a padhan-hissadar of padhanchari land in khaikari village is not a holding of khudkasht (Khushhal Singh *versus* Lachhi and others of Dyona, Talla Dora, Board's order of 9th May, 1888). The padhan holds his padhanchari land in the capacity of a sirtan of Government, and not with hissadari right in it.

(15) *Rent in khaikari villages: defaulting khaikars*

In these villages, in Sir Henry Ramsay's words (Kumaun Report, page 16) "a sub-malguzar or ghar-padhan realizes the

revenue as well as malikana from his brother asamis and makes the whole over to the proprietor, who is also the sadr malguzur."

The rent is fixed by the Settlement Officer in the same way as in the case of other khaikars. The assessment is fixed on the estimated amount which (*plus* malikana) the khaikars and fairly pay.

In practice the ghar-padhan often pays the revenue direct to Government and only the malikana to the padhan. The position of the ghar-padhan will be considered later in connection with that of the malguzar and his deputies. (*See* also Chapter V, paragraph 3 on Mr. Batten's khaikar padhans.)

The hissadar has no claim to the holding of a defaulting khaikar in such villages. In the case of defaulter "the hissadar can only sue for arrears" (Mr. Goudge, page 11). This does not mean that he can only sue the defaulter; if he cannot realize from the individual, he can sue the panch khaikars of the villages as a community. Doubtless if he could not even then realize the amount of his decree from all of them (which is an impossible contingency with fair procedure, since there would always be ample property to proceed against) he might then succeed in gaining possession of the land. The point to remember is that in all relations with the hissadar (as in succession to lapsed holdings) these khaikars form a joint village community.

In the village of Timli Chaukot, a khaikari village, the khaikari body broke up and cultivated among themselves the unassessed (*parat bahik*) gaon sanjait land; the hissadars objected and also claimed rent on the land. It was held that the hissadars had no claim for rent and no power to interfere with the doings of the khaikari body in any way (Padmu and others *versus* Gauri and Gaju, Colonel Erskine, Commissioner's order of 13th May, 1890, upheld by the Board's order of 1st June, 1891).

(16) *Transfers by khaikars in khaikari villages*

Mr. Pauw quotes the ruling of Colonel Fisher (who was only Commissioner for a short time in 1881-85) in the case of Suraj Singh *versus* Amar Deo and others, to the effect that khaikars in such villages cannot sell or transfer their land. This is the only ruling forthcoming on the question, and it does not appear that any consideration was given to the special character of the class of khaikars who had sold the land. "It is probably due to this confusion of terms" (*i.e.* calling both occupancy and under-proprietary tenants "khaikars") "that legal authorities in Kumaun have held that khaikars in a wholly khaikari village cannot transfer their holdings by sale or gift (*vide* Colonel Fisher's ruling

quoted in paragraph 51 of the Garhwal Settlement Report)" (Mr. Goudge, page 11).

Since the hissadar cannot get possession in such villages, does not succeed to lapsed holdings, has no right in anything but his malikana in connection with them and "has no power to interfere with these khaikars or their land" (Sir Henry Ramsay), the logic of Mr. Goudge's remarks is irresistible. The panch khaikars are the successors to any lapsed or abandoned holding, and clearly if anyone is entitled to object to a khaikar's transferring his holding it is the other khaikars and not the hissadar. The latter's sole right, his malikana, is safe being recoverable from the whole body of khaikars if the transferee defaults.

I think the right of under-proprietary khaikars in such villages to transfer their holdings should be recognized, as is implied by Mr. Goudge. If the other khaikars object, they might be held entitled to resume the holding, having the transfer cancelled, or they might simply be allowed the right of pre-emption.

I dismissed on the above principle, and after consulting Mr. Goudge, the claim of the proprietor to have such a transfer by gift cancelled and the land given to him, in an Almora case, but the decision was not appealed.

As the question stands at present, however, subordinate courts in Kumaun are presumably bound by the only available ruling, Colonel Fisher's.

It is, however, worth while calling attention in this connection to Sir Henry Ramsay's remark in the case of Dhan Singh *versus* Makandu of Kot, reproduced from Mr. Pauw's report in paragraph 4 above. In disallowing the mortgage by the khaikar he said, "as there is no special clause in the settlement agreement, and the whole village does not appear to be in the hands of khaikars, I do not see why the khaikars of Kot should be different from others." The second qualification of this remark certainly suggests that Sir Henry Ramsay might have differentiated between a mortgage by a khaikar in a wholly khaikari village and a similar mortgage in a mixed village. Even in the latter class of village, as has been noted in paragraph 4, the question of the power of mortgage is an open one.

(17) *Partitions in khaikari villages*

Partitions of joint holdings in such villages are made under the Kumaun Partition Rules as in the case of other khaikars. In the case of gaon sanjait lands of the khaikars in such villages partitions may, as with hissadars, be made *rakmsharah* according to the respective rents paid by the parties, or by "mawari bant" each family taking an equal share; this refers, of course, to sanjait land held by the village khaikars who also have separate holdings. For an instance of *mawari bant* among khaikars the

case of Dalip Singh and others *versus* Ram Singh and others of Tanda, Borarau, may be referred to (Mr. Giles, Commissioner's order of 31st August, 1891).

Where some khaikars wish to cultivate gaon sanjait waste pasture and others object, the former must resort to partition ; the majority cannot coerce the minority or settle the disposal of such land ; unanimous agreement is necessary or else the division of the land by partition (*see* Jasodhar and others *versus* Kamli and others quoted in the hissadari chapter on the partition of gaon sanjait ; this was a khaikari case, the principle applying equally to hissadars of khaikars.

(18) *General*

The above paragraphs have discussed the position of this special class of khaikars in almost all points.

They have right over unmeasured land and gaon sanjait in their village to the same extent as the hissadars have in khudkasht villages. The hissadar has no right to cultivate unmeasured land in the village (*see* Mr. Pauw, as quoted in paragraph 12).

Extensions of cultivation are, of course, measured as their khaikari at settlement.

Generally speaking, they occupy a stronger position than khaikars in other villages in all points, but there is much need for a clear and authoritative series of rulings and formulation of principles, which the court should follow in dealing with these communities. Many points have never yet been discussed by the higher courts with reference to, and with a full consideration of, the status of these khaikars, and on some points there certainly seems to be a need for a revision of existing rulings.

CHAPTER IV

SIRTANS

(1) *Classes of sirtans*

The sirtan, or tenant-at-will, forms the third of the Kumaun trinity of agriculturists.

There is some confusion even in Mr. Pauw's account from a faliure to recognize the simple fact that the term sirtan covers at least four distinct kinds of tenancy, which should really to some extent be given different status and rights.

The sirtan, however, in all his aspects is a person of small importance in the hills, and as a genuine tenant agriculturist he occupies a very insignificant position in the economic system of Kumaun.

As has been mentioned in an earlier chapter, about 94 per cent. of all the land in Garhwal is cultivated by hissadars or khaikars and only about 6 per cent. by sirtans (*see* Pauw, page 14), and of this 6 per cent. which is shown as cultivated by some eleven thousand tenants in minute holdings, a considerable proportion is held by what may be called nominal sirtans.

The genuine agriculturists sirtan, who is only a sirtan, forms only a fraction of the eleven thousand and holds considerably less than 6 per cent. of the land.

There are no figures available for the numbers of sirtans and the area held by them in Almora and Naini Tal, but the proportion is probably not very different. "They are of little importance" says Mr. Goudge (page 12). In Naini Tal, he says in his separate Naini Tal report, they are very few in number, and are mostly either doms holding land on service tenure or hissadars of one village cultivating land in another village.

One main reason why sirtans are so few is, as he remarks in his Kali Kumaun Pargana Report, that, as far as possible, a hissadar cultivates his land himself or by dom servants or other hired labourers, and he only lets out the land when he cannot get labour to cultivate it.

The historical origin of the sirtans is briefly given in paragraph 40 of Mr. Pauw's report, which has been reproduced in Chapter I.

The following varieties of tenure are at present classed together as sirtani, and the holders considered as subject to the general customs relating to sirtan tenants :

The maurusi sirtan.

(i) *The old maurusi sirtan*—This is the original sirtan to whom Colonel Gowan referred in 1837 as being "generally permanent" (Pauw, paragraph 41). In the cases where big hissadari families hold considerable areas of land which are too large to cultivate as khudkasht and are not held by khaikars, holdings are often found which have been held by sirtan families for several generations at a fixed rent or a rent only varied at settlement. This is the class of sirtan about whose occupancy rights there have been conflicting decisions. They must originally have been very near the status of khurnis or kainis, which latter class apparently rose from sirtans by evolution (*cf.* Pauw, paragraph 38). Probably some of them were really old khurnis or kainis, who failed to get recorded as khaikars at the former settlements. They still often assert their right of permanent occupancy and might fairly be allowed this right. They have evidently suffered, as Mr. Pauw says, from confusion between the paekasht and the sirtan

The modern sirtan,

(ii) Secondly, there is the modern "sirtan proper", a tenant-at-will holding under an agreement sometimes written and sometimes verbal, of recent date. He is the real tenant-at-will with no title to any permanency or privileges. As we go back through the last century, however, we pass in a way from the one class into the other. The modern sirtans may be more changeable, but in many cases he may settle down and his children become *maurusi* tenants in the course of the next century, just as the old-esttablished sirtans were once newly-settled tenants on agreement in past generations. In any attempt to distinguish the two classes the difficulty would be to fix the period to which it would be reasonable to go back. The hereditary tenant whose family have held the same holding for perhaps 120 years deserves some consideration, but is the tenant whose continuous holding dates from 1850 or 1870 to be held an old hereditary tenant or not?

Nominal sirtans ; firs class.

(iii) The third class of sirtans consists of doms who are primarily artizans, village servants, ploughmen and the like, and who are sometimes given a little land to cultivate free of rent, or at a nominal rent, in return for their services. Compare Mr. Goudge, as quoted above. They are not really agricultural tenants and they form an insignificant class. The great majority cultivate only as servants and not on their own account at all. This class of sirtans needs no special consideration.

(iv) The fourth class of nominal sirtans results partly, as Mr. Pauw says (page 50), "from an exchange of land for cultivation between hissadars or from a hissadar cultivating in common waste" (soil, measured waste). In the latter case, however, the hissadar could hardly be called a sirtan; he cultivates the gaon sanjait in his capacity as one of the hissadars, though he may pay something extra above his proportion of the assessment. In addition to hissadars cultivating as sirtans by exchange of land for convenience, a hissadar of a khaikar who has a very small holding may take a little land in sirtani tenure to assist in maintaining his family.

Nominal sirtans; second class.

Where suitable waste land is available, however, he would naturally preper to extend his cultivation into unmeasured land.

In this class, again, the cultivator is primarily a hissadar or khaikar, and only in a secondary way is he a sirtan.

The Paekasht tenant does not exist as a separate class now. A sirtan of any of the four classes may be a paekasht (non-resident) cultivator, but the term is rarely, if ever, heard in current use.

Paekasht tenant.

The real agriculturist sirtans of the first two classes are all that it is necessary to consider in this chapter.

The points requiring consideration are few and fairly simple.

The question of liability to ejectment in measured and unmeasured land respectively, the method of ejectment, and the customs regarding compensation for improvements form the most notable points to be discussed.

(2) *Liability to ejectment : measured land*

As regards the claim to occupancy right in old measured land which is practically only raised by tenants claiming to be maurusi sirtans of old standing a history of the question is given by Mr. Pauw as follows (page 47 of his report) (*see*, however, my remarks following the quotation) :

"As regards the right of sirtans of long standing to a permanent occupancy, the most various rulings have been given at different times. In the case of Mopta and others of Bajyun, Talla Nagpur versus Kitalu, the plaintiffs, who had held land as sirtans since 1840, if not earlier, sued in 1874 to have their holding made a khaikari one. The Court of first instance held that plaintiffs should have sued within three years from settlement to alter the entry : "Act X of 1869 is not in force in this district, and therefore length of tenure does not give an occupancy right. There is a want of sequence in the reasoning, but

Sir Henry Ramsay affirmed the decision (21st April, 1874). On the other hand, in the case of Parmanand and another *versus* Biju and others of Jaspur, Dhaundyalsyun, the plaintiffs, hissadars, sued to recover land from sirtans Biju and others, whose names were not entered in the settlement papers. It was found that the latter had held more than thirty years, and therefore "by the law of limitation" could not be disturbed. Sir Henry Ramsay dismissed the hissadar's appeal (15th January, 1884). Finally on 24th August, 1885, it was decided by Mr. Ross that the defendants having virtually an occupancy tenure were only liable to pay rent as khaikars. Thus the transformation was made complete. The famous decisions of Lal Singh *versus* Amar Singh and others given by the Board on 22nd September, 1887, finally decided that sirtans could not obtain occupancy rights by length of tenure. The plaintiffs sued to eject the defendant, a sirtan who had held over twelve years. The evidence was chiefly of a negative character, but it was found that there was nothing to show that sirtans obtained occupancy rights after twelve years' possession, Mr. Daniell accordingly held that "the Commissioner's decision is contrary to usage in Garhwal, and must therefore be reversed". This decision was held to govern all cases till 1891, though it would appear that the Board did not intend a strictly literal interpretation of the ruling that no length of tenure whatever would confer occupancy rights, by the case of Rati Ram *versus* Sher Singh of Amkoti, Nandalsyun, in which the plaintiff, a sirtan who had held since 1857, sued to establish a right of occupancy and got a decree which was confirmed by the Board on the 6th January, 1890. In the case of Uttam Nath *versus* Murthi, of Amri, Malla Dhangu, however, the plaintiff, a sirtan, ejected from waste common land broken up by him since settlement, sued, for reinstatement. On the 16th January, 1889, the Commissioner, Mr. Reid, ruled: "There is no law or custom in Garhwal that leaves an occupancy and improving tenant at the mercy of the co-called landholders. The first principle of the land law in Garhwal is that in settled and assessed lands only have the so-called land holders complete and undivided proprietary rights . . Landholders, so-called have therefore no preferential claim to land broken up by cultivators without aid from them, and if those cultivators remain in possession for a sufficiently long time unopposed by the landholders or with their consent, the landholders have no title to eject them". The Board in upholding this judgment observed: "The fact appears to be that when Messrs. Traill and Batten, and to some extent, also Mr. Backett made their settlements, tenants were scarce in the hill tracts and the question of occupancy rights received little attention . . . The sirtan is a purely temporary occupant of land and must not be confounded with tenants who have broken up and brought under cultivation waste land, and have continued to occupy uninterruptedly through a long series of *versus* Amar Singh.

This seems to be about the only question on which Mr. Pauw has really got confused. He has mixed up two totally distinct questions.

There is, firstly, the question of sirtan who has cultivated old measured and assessed land for many years and who claims occupancy right on the ground of length of tenure. This covers the cases he quotes down to and including Lal Singh *versus* Amar Singh.

And, secondly, there is the case of a sirtan who has broken up and reclaimed waste land and held it for a long time, and whose claim to occupancy right rests partly on his having been the original cultivator to break up and improve the land and partly on the principle that the hissadar is not the real proprietor except in assessed and settled land. This is clearly the meaning of the Board's order in the Uttam Nath case, though the land there was measured land, it was, however, waste land which had never been cultivated or assessed to revenue. See also the settlement instructions based on this ruling, which have been reproduced in Chapter II, paragraph 4.

And the case of Rati Ram *versus* Sher Singh is on exactly the same footing and not, as Mr. Pauw implies, parallel to that of Lal Singh *versus* Amar Singh.

In Rati Ram *versus* Sher Singh the tenant had broken up and reclaimed unmeasured waste, according to the story which was accepted, and the land had subsequently been measured at settlement as khudkasht. These two cases have thus nothing to do with the question of acquiring occupancy rights by mere length of tenure in old measured land. They are simply the first steps to the custom of conferring khaikari right on a sirtan who had broken up Nayabad and held and improved it for a long time, which custom was developed into a fixed principle at the last Garhwal settlement.

This latter custom has been fully dealt with in the chapter on khaikars (paragraph 4 acquisition of khaikari right in unmeasured land).

If this custom relating to Nayabad and unmeasured land is to be extended at all on the strength of these rulings, it can only be to the extent that he breaking up and improvement of a holding of waste land and its tenure for a long time gives a right of occupancy even when the land was measured land before the tenant reclaimed it, though the rulings do not authorize its extension to assessed proprietary land paying revenue. But the other principle, that of Lal Singh *versus* Amar Singh, that mere length of possession in old measured and assessed land gives no right of occupancy, still holds good. It was not disturbed, as has been pointed out by the two later rulings quoted by Mr. Pauw, and it is the principle still followed (*e. g.* Bijlya and others *versus* Machendra Singh and others of Mirchora, Aswalsyun, by Mr. D. T. Roberts, Commissioner, on

the 3rd of May, 1892, Khima and others *versus* Jai Deo of Chetar Giwar, by Colonel Erskine, Commissioner, 26th July, 1890, and other rulings). Compare also the rules for the Garhwal Survey at the last settlement rule 31; "occupancy by a sirtan since last settlement or during the last twelve years will not give him khaikari right." This principle also extends to the simple extensions of an old holding of measured land into adjoining bits of unmeasured waste. Such extensions are merely improvements of the holding and the sirtan acquires no superior right in them. *See* the settlement instructions in paragraph 4 of the chapter on khaikars and Autar Singh and others of mauza Ubot *versus* Sarup Singh, order of Mr. Hamblin, Commissioner, of the 19th April, 1900.

Taking the whole question, then, it may be laid down that—

(1) a sirtan gains no occupancy right by mere length of tenure in old measured and assessed land or by extending his sirtan holding into adjoining unmeasured land. He can be ejected at any time;

(2) a sirtan who breaks up and reclaims at his own expense and by his labour a holding in unassessed waste (*nap or benap*) and holds it for aconsiderable time acquires (under the conditions given in the settlement instructions) an occupancy right in it and cannot be ejected.

The first rule is, of course, subject to the possibility that a tenant might prove that he and his family had really been holding as unrecorded khaikars and were not really sirtans (*see* chapter on khaikars, paragraph 3).

(3) *The process of ejectment*

The contested point in connection with the actual procedure of ejecting a sirtan is as to whether the hissadar can turn the sirtan out summarily, if the latter is not willing to quit his holding voluntarily, or whether the hissadar must file a regular suit for ejectment, or putting it in another way, if the hissadar does eject a sirtan without legal process, is the latter entitled to recover possession by summary suit and compel the hissadar to sue to eject him?

Mr. Pauw has discussed the question at considerable length in paragraph 53 of his report; but as the most recent rulings have reversed the former custom, it is not necessary to quote his remarks in full. The custom which prevailed in his time was that a sirtan summarily dispossessed could sue and recover possession and the hissadar then had to sue to eject him, in which latter suit the question of compensation (if any) for improvements was decided and the decree for ejectment made conditional on payment of the compensation. As in many cases no compensation was payable, this led to curious results.

Mr. Pauw talks of the "curious spectacle of a tenant forcibly dispossessed without payment for improvements suing to be reinstated and being told to sue for compensation". This does not seem a very startling spectacle; but I have seen in Almora a case on Mr. Pauw's principle, which was much more curious. A sirtan sued and got a decree for recovery of possession in January and the hissadar thereupon sued in February and got a decree for ejectment, no compensation being payable. Thereafter both took out execution of their respective decrees and the ludicrous spectacle was seen of a puzzled court ordering the sirtan to be restored to possession and at the same time directing him to be turned out. The climax of the case came when the sirtan having been duly put in possession filed a criminal trespass case against the hissadar acting under his counter-decree. Colonel Erskine's principle of a suit by the tenant under section 9 of the Specific Relief Act cannot stand any longer in view of the provisions of rules 30B (7) and 21 of the Kumaun Rules.

Modern rulings.

The later rulings are that a sirtan tenant when summarily ejected by the landlord without legal process cannot recover possession; he can only sue for compensation for improvements or for illegal ejectment. This modern principle was first laid down by Mr. Hamblin, Commissioner, in the case of Hari Kishan Tiwari of mauza Sainjwari *versus* Dharam Singh (Special Revenue Appeal No. 3 of 1900-01) in a lengthy judgment, of which the gist is given below. The principle was followed by Mr. Shakespear, Commissioner, in Jungaria *versus* Debi Singh of Majgaon, Talla Kosyan, on the 23rd of November, 1903, and this decision was upheld by the Board on appeal.

The main points of Mr. Hamblin's judgment were that a sirtan cannot resist ejectment, and if the landlord sues for ejectment he must get a decree under Kumaun Rules 30A (3); that there is no procedure in the Kumaun Rules corresponding to ejectment by notice as in the plains; that when a landlord wishes to eject a sirtan he has either to sue for ejectment or to eject him without legal process; that in the latter event the question for decision is whether the tenant can obtain a decree for occupancy under rule 30B (7); that there is no doubt that he can recover compensation for illegal ejectment under rule 30B(8) (b); that when the tenant sues he can only succeed if he can prove that he has a right to possession, and it is not enough to prove illegal ejectment; that it seemed to have been recognized that it was unnecessarily encouraging litigation to allow a sirtan to sue a landlord for recovery of possession when the landlord could at once apply through the court for his ejectment and must obtain it; and that while the sirtan was therefore given no power of recovering possession in cases of illegal ejectment, he was allowed compensation in such cases. It was pointed out that through the Kumaun Rules elsewhere speak of the

"possession" of land, rule 30B(7) only refers to the recovery of the occupancy of land.

Compensation for illegal ejectment could presumably only be claimed where the tenant had been evicted from land on which crops were standing or which had been ploughed and prepared for crops, and to the extent of the damage suffered by the tenant from the loss of such crops and labour. Such claims and those for improvements are the only ones ever raised by the tenants. An earlier ruling which may be compared with those mentioned above was that of Bag Singh *versus* Motia of Pipali, Malla Silor, in which a sirtan had been ejected from two houses and chauks and two fields. Mr. D. T. Roberts, Commissioner, gave him a decree for recovery of the houses and chauks, but refused him possession of the fields (order of the 11th May, 1892).

[NOTE—A doubt may perhaps be suggested as to whether such a summary ejectment should be called an "illegal" ejectment, "Illegal" suggest that it is contrary to some positive rule of law or customary law. The context of the Kumaun Rules as applied in the above ruling by Mr. Hambli might suggest that the compensation for illegal ejectment refers to cases of ejectment of an occupancy tenant or a tenant holding under an agreement who would recover possession under Rule 30B(7).]

To sum up finally, then, a sirtan summarily ejected by his landlord cannot recover possession, unless he can prove that he has a right to possession (as holding under an unexpired agreement, or as entitled, under the rulings and instructions regarding tenants breaking up and improving new land, to occupancy right).

(4) *Compensation for improvements*

There are no definite rules regarding improvement by tenants and compensation claimable for them. The principles embodied in the law in force in the plains might fairly be applied in most cases.

There are few rulings of any importance on the subject. Mr. Pauw only makes the brief remark:

"Regarding the assessment of compensation, Mr. Roberts ruled, as Commissioner, that 'the mere upkeep of the fields in the ordinary condition suitable for the cultivation of measured land is not a ground for award of compensation.' 'Compensation can only be given for such improvements the full benefit of which the respondents have not reaped' (Pancham Singh and others *versus* Rishmu and others, Dalagaon Khatli, 28th August, 1893, page 50)."

The fact is that there are rarely improvements made by sirtans in the hills of any importance at all, except the breaking up and improving holdings of waste land, in which case,

as has been shown, they will generally get occupancy right as their reward.

The extensions of cultivation by sirtans into adjoining waste, which do not give occupancy right under the principles followed, would form a fair ground for awarding liberal compensation ; but otherwise the planting of a few fruit trees, the construction of one or two inferior buildings, the terracing and walling of inferior unmade land, and occasionally the carrying of a water channel to the land represent, as a rule, the limit of a sirtan's improvements.

There appear to be no rulings relating to the question of the hissadar's consent being obtained to the making of improvements by the tenant. In the case of the breaking up and improving a new holding in waste land the improvement forms, of course, the main object of the tenure. Nor would any hissadar be likely to object to having his old hissadari land extended into adjoining waste. The other classes of petty improvements are hardly likely to give rise to any disputes as to the tenant's right to make them, and the hissadar's consent may be presumed if he did not object at the time they were made.

After allowing for the length of time during which the sirtan may have enjoyed the benefit of his improvements, there is no doubt regarding his right to compensation for such improvements, except perhaps in the case of dwelling-houses.

As regards, houses Mr. D. T. Roberts, Commissioner in Puna Nayal *versus* Bishan Dat of Pandegaon, Pahar Chakhata, ruled on the 9th January, 1893, that a dwelling-house is not an agricultural improvement for which a sirtan can claim compensation on ejectment ; a sirtan builds at his own risk ; he can remove the materials. This ruling was confirmed by the Board on the 14th June, 1893.

Contrast, however, Mr. D. T. Robert's other ruling in Bag Singh *versus* Moti, referred to in paragraph 3 above, in which a sirtan was restored to possession of two houses and chauks until compensated for them. There are other rulings awarding compensation for houses especially when a sirtan had been, or was being, ejected from his entire holding in the village. (The house very commonly does not stand on the cultivated land : it is often built on waste unmeasured land). In Jivanand *versus* Puna of Bamangarh, Borarau, Mr. Ross, Commissioner, ruled on the 9th December, 1887, "if the house and cowshed are in the sirtani land . . . . . he 'the landlord' must pay compensation." There is certainly some equity in the view that when a sirtan loses all the land he holds in a village and thus has to

leave the village and his house is rendered worthless to him, he should get some compensation for it. A house is a necessity for a tenant to cultivate the land from.

The difference between the circumstances in the hills and those in the plains must be remembered. In the hills a sirtan losing his holding probably has to set out to look for another holding in another village, wherever he can find one; in the plains the ejected tenant merely takes some other land in the same village. In view, however, of the 1893 ruling quoted above it would seem that compensation cannot be awarded for a dwelling-house; a cowshed might be differentiated as an agricultural improvement. Considering the circumstances in the hills there would not seem to be much difference between a house built on the holding and one built outside it in waste land. In the latter case, however, the sirtan could not presumably be ejected from the house, at any rate without compensation, and he might perhaps sell it if he had to leave the village.

Limitation of suit for compensation.

It is important to notice the phraseology of the rules prescribing limitation for suits for compensation in Schedule A to the Kumaun Rules.

The six months' period runs from the date of the decree (where there has been a suit) and not from the date of execution of the decree in both cases. (This rule, however, raises further questions of *ex parte* decrees obtained without the knowledge of the tenant). A case in which this question was promient was that of Ratanmani *versus* Churamani and Hiramani of Siroli, Kamsyar, decided by Mr. Hamblin, Commissioner, on the 29th June, 1901.

(5) *Sirtani rents*

The question of the rent paid by sirtans is an unimportant one, unlike the corresponding question in the plains. The former state of things is given in Mr. Pauw's paragraph 41 (reproduced in Chapter 1 *supra*).

Of the modern custom in Garhwal Mr. Pauw's only remarks in paragraph 54:

"More than half of the sirtani holdings in Garhwal are held by literal sirtans, i. e. payers of the sirti or land revenue alone. This may result from an exchange of land for cultivation between hissadars, or from a hissadar, cultivating in common waste. In other cases near relationship or friendship induces one man to give another some land to cultivate, or in new or unproductive villages he may be brought in to aid in the cultivation and so eke out the Government revenue. Usually the feudal dues, bhent (consisting of Rs.2 on the marriage of a daughter), dastur a leg of every goat killed, a seer of ghi in Sawan and a basket of maize yearly), and in some cases also pithai (a nominal rent of one or two timashis yearly), are paid to the hissadar of the land even when no competition rent is

taken. The competition rent, where it exists is usually tihar or a third of the produce in good land and chautha, or a fourth part, in the inferior. In the best shera as much as a half is taken. Money rents are rare except among the tenants of tea planters. In Chiranga, Pindarwar, I was told that four nalis to the rupee, or Rs.5 per acre, was the rent rate."

Mr. Goudge remarks that there are no available statistics of rent paid by tenants-at-will, and goes on to say (paragraph 25) ; "The chief landlords who have tenants-at-will are the rich absentee proprietors who live in Almora and depend on their villages for a supply of grain for food and to defray the Government revenue. They invariably take rent in kind when they can make terms with the villagers and when the distance is not too great, so that carriage becomes expensive. On the other hand, the villagers prefer to pay in cash, and they generally get their way when they are far away. Thus the fertile villages of Borarau and Kairarau pay in kind . . . while those of Gangoli largely pay in cash. The rates of produce taken are half for irrigated and double-cropped land with a small allowance for labour and seed, and for all other lands, one-third, one-ourth or one-fifth according to the quality of the outturn. Rent in kind is much more profitable to the proprietor than rent in cash". He gives estimates of the value of grain rents and quotes cash rents varying from three or four times the Government revenue down to Rs.1-2 per Re.1 of revenue, or even the Government revenue alone.

Taking the two very different parganas of Kali Kumaun "which is full of forest and waste land and scantily populated, and Pali Pachchaun, which is densely populated and fully cultivated", Mr. Goudge remarks on the former "stated broadly there is no such thing as rent known in this pargana." "The hissadars keep as khudkasht all land they can cultivate themselves or which they can get labour to cultivate, and for the rest of their land they are glad if they can get tenants to keep the fields from falling into waste and save themselves from paying revenue on uncultivated land". In Pali Pachhaun he says : "strictly speaking there is no rental system." All the land is cultivated by hissadars or khaikars. Such sirtans as there are hold very small holding or pay grain rents to absentee proprietors. Sirtans in khaikari villages pay the Government revenue plus the usual khaikari malikana percentage. Sirtans in newly broken up lands pay nominal sums only.

Under the above circumstances it will be seen that the rental question is one calling for little notice. No ruling laying down any general principle regarding sirtani rents has been discovered, and disputes on the subject are infrequent and turn on simple questions of fact.

It can only be said that when the value of a grain rent may vary from Rs.35 a bisi on irrigated land down to perhaps Rs.3

a bisi on inferior land, and when cash rents may vary between Rs.9 and Re.1 or less per bisi, it is by no means easy to settle disputes regarding the amount payable by a tenant in the absence of any village rent records and generally also of any written agreement.

Fortunately, as has been said above, the annual number of cases coming before the courts, that turn on the rental rates of sirtans, might almost be counted on the fingers of one's hands, except occasionally when some big landlord has a general row with a number of his tenants.

There do not seem to be any further points relating to the sirtani tenure that require notice. There can be no questions regarding succession, since the tenure is not heritable, unless the landlord chooses to continue the son or other heir of a deceased sirtan in possession of the holding.

CHAPTER V

Padhans and Ghar-Padhans

(1) *General definitions, etc.*

Padhans.

The padhan or malguzar—"Sadar malguzar" as Sir Henry Ramsay and Mr. Beckett called him—is the head of the village community, collects the revenue, and is also a police officer; he manages the village common land and its affairs generally, subject to the approval of the hissadars, and provides coolies for carriage, etc., according to custom.

Mr. Traill's description of this official has been quoted in full by Mr. Pauw in his paragraph 39, which has been reproduced in Chapter I of this Manual.

The general history of the office does not require much notice.

The usual rule is one padhan for each asl village (with its *lagas*) held on a separate revenue engagement. Sometimes there are two or even more padhans in one village either by reason of the village being divided into different clans or castes (*dhara, rath*) or by reason of its having several lagas attached to it, the whole forming an unwieldly unit for one man to manage. (Compare also Mr. Batten's rule 16 about the appointment of additional padhans in *dakhli* villages. Collected Reports, page 99.) The principle, however, was very elastic at one time; and Sir Henry Ramsay remarks (page 20 of the Kumaun Settlement Report that at the 20 years' settlement some villages had as many as ten padhans.

Mr. Batten had allowed the hissadars of large villages to "elect two or more padhans, each to manage his particular division of the estate and to collect the Government revenue and his own dues from the shareholders belonging to his own particular party or clan". (Collected Reports, page 99).

This system caused a great deal of mischief, says Sir Henry Ramsay, and it is now the rule to keep the number of padhans as low as is consistent with efficient and harmonious management of the village. Few villages have more than one padhan nowadays. Compare Bishan Singh *versus* Ram Kishan, Mr. Hamblin, Commissioner's order in Revenue appeal no. 1 of 1901-2 on the undesirability multiplying malguzars for every faction that chooses to ask for a separate one. On the other hand one man, who owns land in several villages, is often padhan of two or more villages; an influential thodkar is usually also padhan of several villages. Where one man is padhan of two closely adjoining villages he often does the padhan's work for both

himself, but where the villages are far apart he is called on to appoint a *mukhtar* or agent to do his work in the village where he is non-resident.

Where the padhan is a minor there is also a mukhtar appointed by the district officer to do the work until the minor attains majority. In one or two instances women hold the position of padhan (though the case is extremely rare now) and may or may not have mukhtars to do their work.

The mukhtar and his position will be dealt with later on.

Ghar-padhan.

A different personage regarding whom there has been considerable confusion and dispute is the "ghar-padhan" a "sub-malguzar" as Sir Henry Ramsay called him, in khaikari villages, where the hissadar padhan cannot be resident, and also occasionally in other (mixed) villages as well.

The ghar-padhan appears to be, and to always have been, in all cases a khaikar. His office will be separately discussed later on.

(2) *The padhan : general position*

The position of the padhan has been briefly defined in the first sentence of this chapter. He signs, on behalf of the village community, the settlement agreement and his chief duty is to realize the land revenue from the hissadars and pay it to Government.

Chapter VIII of the Land Revenue Act, III of 1901, is in force in Kumaun and in the notification extending it, section 4(3) of the Act is modified to run "Malguzar means a person appointed under rule 49, clause (1) of the Kumaun Rules, 1894, to represent all, or any, of the co-sharers in a mahal. Note—Read every reference to a lambardar as referring to a malguzar, or to a padhan or sirgiroh where a malguzar is known by either of these names."

The malguzar is thus primarily responsible for the revenue of his village or villages with the hissadars behind him. His remuneration (compare section 141 of the Act) consists of either *padhanchari* land (held rent-free as a tenant of Government) or if the revenue of such land be not equivalent to 5 per cent. of the revenue of the mahal, then to a cess on the revenue to make up the 5 per cent. He is also exempted from service as a coolie, "a distinction much prized," as Mr. Pauw says.

Questions relating to the padhanchari land will be discussed in a later paragraph.

The police-powers and duties of the padhan are detailed in chapter VI of the Kumaun Rules.

The principal questions requiring notice in connexion with this official relate to his appointment and dismissal and to the padhanchari land.

(3) *Appointment of malguzars*

The appointment of malguzars and additional malguzars is provided for in rules 49(1) and 50 of the Kumaun Rules, and section 45 of the Revenue Act, as modified for Kumaun, but no provision is made for their dismissal. They are, however, dismissed for misconduct or other good reason by the Deputy Commissioner.

Mr. Traill's rule Mr. Beckett

The office is normally hereditary in practice and usually always has been so. "There is no hereditary claim or right . . . but generally the son succeeds without opposition unless incapable from youth or want of talent, in which case the sharers are called upon to choose another padhan from among themselves," wrote Mr. Traill. (Collected Reports, page 106).

"The office of padhan is hereditary, except in special cases, when, from the son of the former padhan having been a child at his father's death, a relative had been appointed to the duty." (Mr. Beckett's Garhwal Report, page 10.)

Mr. Batten's rules for appointing padhans and for their remuneration (Collected Reports, pages 98—100) have been referred to above. In ordinary villages his rule was to allow election by vote except in the case of an old established right.

Khaikar padhan.

A curious custom, which deserves mention, is his allowing (rule 15) the khaikars, in wholly khaikari villages, under certain circumstances to have and elect a village padhan (not ghar-padhan) of their own "under the same rules as those made for bhaiyachara mauzas, which they often resemble in all but name." There do not seem to be any khaikar padhans, as distinct from ghar-padhans, in existence nowadays, though traces of the custom may be found in recent times. In the case of Narayan Singh and Ganga Singh *versus* Sham Singh of Garsari, Talla Chaukot, Sham Singh, khaikar, had been appointed gharpadhan against the will of the hissadars. On cross-appeals Colonel Grigg, Commissioner, appointed Sham Singh padhan, as there was "no need of a duplicate set of officials" (order of the 27th July, 1898).

There are, however, certain objections to a khaikar who is not a hissadar in the village and who thus does not engage with Government for the revenue, but only pays rent, being entrusted with the direct responsibility for the revenue. He has, as the custom now stands, no transferable interest in the village to be security for his liability (*cf.* Mr. Beckett's paragraph 28 and ghar-padhans as discussed in a later paragraph). It seems probable that Sham Singh (if he is still alive) is the last khaikar padhan in existence.

Mr. Pauw's rules.

In Mr. Pauw's Garhwal Memorandum of Village Customs the appointment of malguzars is dealt with in the 3rd para-

graph. He makes the appointment normally hereditary; but failing a candidate from the malguzari family, any other male co-sharer of the village, whom the district officer may think fit, is to be appointed.

The hereditary claim.

Generally speaking the claim of the son or the nearest heir to succeed is admitted, and he is rarely opposed by the hissadars, unless there is some strong objection to him. There is some doubt, however, regarding the case of minor sons or heirs. In former times a minor would never have been appointed at all (*see* Mr. Traill's remarks and the quotation from Mr. Beckett above; also Mr. Pauw's remarks in his paragraph 55). Latterly, however, owing no doubt to the strengthening of the hereditary theory it has been customary to appoint the minor heir as padhan and to appoint an adult relative to act as mukhtar during the padhan's minority. Mr. Beckett would have appointed the adult relative padhan and made the minor await a vacancy. (Garhwal Report, page 10).

The custom has varied with different officers; some have followed the above rule in all cases, whatever the age of the minor might be; others have refused to appoint a minor under some fixed age such as 10 or 12 years. If the minor was below such age, an adult relative was appointed as padhan and not as mukhtar, either for his life-time or until the minor should attain majority. There are obvious objections to having an infant padhan primarily responsible for the revenue, with an uncontrolled mukhtar, and it would be well to avoid the practice of appointing minors as padhans altogether, or at any rate minors less than, say, 16 years of age.

The following decisions may be referred to on the general question of appointment. In Raghunathu *versus* Gaya Dat of Bamiakola, Garhwal, Mr. D. T. Roberts, Commissioner, ruled that mere superiority of hereditary claim should not prevail to bar consideration of relative fitness (order of the 22nd June, 1892).

Mr. Hamblin, Commissioner, in Bhagdeo *versus* Jaman Singh of M. Patar Raur, Garhwal, laid down that "preference must be given to hereditary claims and the opinion of co-sharers can only be taken when there is a conflict of such claims" (or no such claims at all) (order of the 23rd December, 1899). In Debia *versus* Purnand of Surkhil, Malla Salan, Mr. Hamblin preferred the adult son by a dhanti woman, who had succeeded to half his father's estate, to a minor legitimate son (22nd May, 1902).

Padhan must be a hissadar.

The padhan for obvious reason must be a hissadar of the village (compare Mr. Beckett, page 10). Where a son or heir claims to succeed, or where an old padhan wishes to resign in favour of his son, the son or heir should, therefore, be re-

quired first to get mutation of a share into his own name before being appointed.

Non-hereditary appointments.

Where there is no son or heir claiming the appointment, or where there are two heirs with fairly equal claims, or where the heir is not appointed for some special reason, the hissadars are called on to vote for such candidates as may come forward, unless only one is put forward and is unopposed.

The appointment is made, when there is a contest, after a consideration of the voting and of the relative claims and fitness of the candidates.

On this point again different officers have held varying views, some considering mainly the fitness of the respective candidates, and others mainly weighing the votes and the shares of voters.

Mr. Batten's rules certainly favour the custom of simple election by votes in the absence of hereditary right, while Mr. Pauw's memorandum seems to contemplate the unfettered selection of the Deputy Commissioner. There can be no doubt that considering what Mr. Batten calls "the republican nature of the communites and the strong opposition to all arbitrary measures" it is expedient to pay considerable attention to the votes of the hissadars with a view to securing the harmonious and efficient management of village affiairs. The malguzar in Kumaun is only "*primus inter pares*," an ordinary hissadar among his equals, and if the village in general is strongly opposed to him, he will never make an efficient malguzars and will also have a very uncomfortable time. It is necessary, however, sometimes to disregard the wishes of the majority when their candidate has been convicted of some offence which renders him undesirable as malguzar, or is heavily indebted or otherwise decidely unsuitable.

The chief disputes occur when the ex-malguzar has been dismissed for some serious offence and the office declared to be forfeited from his family; in such cases the majority of the villagers will often unite in a strong faction to support the claimof his son or brother.

Appointment of women.

There are very few women holding the post of malguzar, probably not more than half a dozen in the whole division. They are never appointed except for some special local custom of for very special reasons. They usually have a mukhtar to do the work. The appointment of women is obviously most inadvisable altogether.

Claims of padhanship by purchaser.

As Mr. Pauw remarks, when the share of a malguzar is sold, the purchaser almost invariably claims the office along with it. This is absurd. The purchaser can apply with any other hissadar for the vacant post, and if he is the most suitable

candidate he may be appointed. But if, as may often be the case, he is an outsider and has only newly become a hissadar by purchase, he is not likely to make the best malguzar. In Sheo Dat *versus* Mohania of Basai, Bel, low caste man had bought the padhan's share and Mr. Shakespear, Commissioner, ruled that in no case does the malguzarship go with the property sold. It is inadvisable to appoint a low-caste man while a high-caste man is available (order of 11th February, 1904).

Dismissal of padhans.

There are no definite rules regarding the dismissal of padhans, nor are there any noteworthy rulings on the subject. The usual grounds of dismissal are (*a*) conviction of an offence in the criminal courts, (*b*) being heavily involved in debt, so as to be practically insolvent, or having all his shares in the village mortgaged, (*c*) having sold his entire share in the village, or (*d*) serious misconduct or misbehaviour, such as persistent neglect and delay in collecting and paying in the revenue, disobedience of orders, failure to check or report serious forest offence in the village, serious misconduct in respect of his police duties, bad livelihood or vicious habits, and the like.

Proceedings for the dismissal of a malguzar should not be too summary; it has often been the custom to pass orders simply on the report of a peshkar or similar official. The malguzar and the other side (if any) should be summoned and given a hearing (*see* Jit Singh *versus* Ban Deo and Moti Ram *versus* Indramani, both Naini Tal cases, decided by Mr. Hamblin, Commissioner, as Miscellaneous Revenue Appeals 2 and 4 of 1901-2).

(4) *Padhanchari land and remuneration of padhans*

As mentioned above the padhan's remuneration commonly takes the form of padhanchari land, which is held by him, rent and revenue-free, as sirtan of the State as hissadar (*cf.* Mr. Pauw page 42); but where its revenue at the village rate would not be equivalent to 5 per cent. on the village jama, or where there is no padhanchari land, he receives a cash cess on the revenue to make up the 5 per cent. The padhanchari land is a very old institution in Kumaun. In Mr. Traill's time the padhan was remunerated "by fees on marriages and a small portion of land set apart for the purpose." Mr. Batten in somewhat vague rules left the remuneration to "mutual agreement" or "panchayat." The padhanchari lands were made over rent-free according to the actual amount found to be held in that way; when there were none, he did not create any, except with the villagers' consent; but if the dues were "too small" he allowed a money equivalent of about 6¼ per cent. on the revenue. At Mr. Beckett's settlements the remuneration was finally fixed at 5 per cent. in land or cash, on the basis of the lands actually held. About the cash remuneration no difficulties arise; but about

the land there are not infrequent disputes. Old *maurusi* padhan families often try to assert proprietary title or other special right in the land. It is improbable that in some cases the padhanchari land was originally part of the padhan's own family land, on which the revenue was remitted as his remuneration.

The modern principle, however, recognizes no right in it beyond that of a rent-free tenancy and the land is strictly attached to the office, whatever family may hold the latter. The Board's order no. 704/II–18, of the 29th April, 1886, laid it down that a malguzar can do what he likes with padhanchari land for his lifetime, but on his death his successor must get all of it unencumbered.

Similarly Mr. Ross, Commissioner, in Bachua *versus* Ramua and others of Ladholi, Darun (order of 12th September, 1887), ruled that no one can acquire rights in such land adverse to the padhan; each succeeding padhan must succeed to it unencumbered. He can give it out to tenants during the term of his padhanship, but at his death or dismissal the right of the tenants lapse.

In the famous Bhaltgaon, Talla Giwar case, which went on at intervals from 1834 to 1895, it was finally decided that the heirs of an ex-padhan (or series of padhans) cannot claim to hold the padhanchari land on payment of rent, however, long the family may have held it. The new padhan can evict them. In this village the padhanchari land was very extensive and valuable.

The final decision on this point was given by Colonel Grigg, Commissioner on the 14th May, 1895 (Nand Lal *versus* Musammat Dharm Sundari and others); but the parties were still fighting over possession, trespass, mesne profits, rent, etc., six or seven years later.

A curious attempt at creating padhanchari land occurred recently in Baret, Bichhla Katyur, when in a village of two hissadars one had to pay malguzari dues to the other. The former made over by a deed some land to the padhan to be held in lieu of payment of the dues. He also sued for a declaration of this fact to prevent the padhan claiming dues in future. The Lower Court gave a declaration that the land was padhanchari and directed it to be recorded so. It was held that this was impossible, all that was possible was a declaration that the land was held by the defendant in lieu of any dues claimable by him.

(Lachhi *versus* Sur Singh, order of the Local Government of 18th August, 1904, reversing the Commissioner's decision.)

Other perquisites of the padhan.

The padhan occasionally comes in for other perquisites by virtue of his office. He often makes something out of the gaon sanjait land as has been mentioned in the hissadari chapter.

In one case a padhan came in for a curious windfall. Mauza Deoria, Urgam is a gunth village under the Badrinath temple. A khaikari holding in the gaon sanjait land lapsed and lay waste for some years, the malguzar paying the revenue due on it to the temple. Then the Rawal of Badrinath gave him a lease of the land and he took posession and cultivated it. Over 12 years later the other co-sharers sued to have cancelled the mutation obtained by the padhan for this land. It was held that after so many years acquiescence the hissadars could no longer claim to have it made common land again. (Bhup Singh and others *versus* Kanak Singh and others, order of Mr. D. T. Roberts, Commissioner, of the 24th August, 1892.) See also paragraph 14 of the chapter on khaikars regarding padhanchari in khaikari villages.

(5) *The mukhtar padhan*

The mukhtar or mukhtar (i) padhan is the agent and representative of a non-resident, minor or woman padhan. He is "considered competent to perform all acts for the real padhan, though his liability to be ousted at the will of the latter prevents his holding the same authority or prestige," says Mr. Pauw. He is appointed, in the case of a non-resident adult padhan, by the Deputy Commissioner on the nomination of the padhan. The latter can nominate any qualified man, and if he is fit he is always appointed; if he turns out unfit or misbehaves, the padhan may be called on to replace him by another man, but he is always the padhan's nominee and agent only, and no one has any right to object or claim any right to the post (*cf.* Mahendra Singh *versus* Chintamani and Padi of Banoli, Malla Dora, order of Mr. Hamblin, Commissioner, of the 11th June, 1902).

If a non-resident padhan living at a distance from a village neglects to appoint a mukhtar, and the administration of the village necessitates some resident agent to collect the revenue, supply coolies, etc. an order is issued to the padhan to nominate a mukhtar or else to become resident himself. If he refuses, the only course is to dismiss him from his malguzarship and appoint a new malguzar. The malguzar can dismiss or change his mukhtar at will on applying to the Deputy Commissioner, subject to the new nominee being approved as a fit man for the post.

In the case, then, of the mukhtar of an adult padhan the mukhtar is simply an agent and nominee of the padhan; the

latter remains responsible to Government for the proper collection of revenue and the administration of the village by his agent.

In the case of a minor padhan, the mukhtar is appointed by the Deputy Commissioner by selection of the most suitable relative of the minor, and his dismissal in case of necessity also lies in the hands of the district officer. The mukhtar in such cases would be, presumably, responsible for his own default or negligence in the same way as a guardian is.

The mukhtar's name is recorded in the settlement records. He usually holds the padhanchari land of his village, but his remuneration is a matter of private arrangement between him and his principal.

(6) *The ghar-padhan*

The *ghar-padhan* is the head representative khaikar in a wholly khaikari village. He is to the khaikari community what the padhan is to the hissadari community. There being no resident hissadar in such khaikari villages, a special official is needed to collect the revenue and malikana and manage and represent the villagers. "He as a rule enjoys the padhanchari land and pays the Government revenue direct to the patwari, paying the hissadari dues alone to the proprietors" (Mr. Pauw, page 51).

Like the class of khaikars whom he represents, the ghar-padhan and his position have been the subject of considerable dispute and he has had fluctuations of status. As the khaikars of his class have suffered by confusion with the kachcha occupancy khaikar, so he has been confused with the inferior *mukhtar,* as a mere agent and servant of the padhan.

History of the post.

Unless the "village padhan" of Mr. Batten's Garhwal rules (rule 21, paragraph XIII of the 1842 report) or his khaikar padhan of rule 15, refer to ghar-padhans, the first mention of the ghar-padhan seems to be in paragraph 20 of Mr. Batten's Kumaun report (1848), where he says: "In coparcenary zamindaris" (meaning apparently khaikari villages) the mauzas are generally managed by one of the oldest asamis under the name of ghar-padhan, who in remuneration for his trouble is allowed to hold part of his land rent-free, and is exempted from personal services, etc. (kuli godam)." In his glossary of hill terms he calls the *ghar-padhan* a "privately appointed manager."

The more modern form of *ghar-padhan,* however, originated apparently with Mr. Beckett. In Garhwal, he says (Report, page 10): "When a padhan was non-resident, from his being a padhan in several villages, I kept such a man padhan for the

collection of revenue, but nominated a resident khaikar *ghar-padhan* for the performance of police duties."

In Kumaun Sir Henry Ramsay says (page 21). "In some cases sub-padhans, *i.e.*, ghar-padhans, were appointed with the object of looking after the asamis rights and collecting the revenue. These ghar-padhans can at any time be removed by the district officer or Commissioner on its being shown that they can be dispensed with without injury to the village" (*cf.* his paragraph 25, page 16 also on ghar-padhans in the wholly khaikari villages). It will be seen from this that ghar-padhans were officials appointed by the Settlement Officer and not mere nominees or agents of the padhan; they were sometimes apparently appointed in mixed villages, as well as in wholly khaikari villages, in place of a nominated mukhtar. The question, however, is only of importance with reference to wholly khaikari villages, where the ghar-padhan represents and looks after the interests of the community. There do not seem to be any ghar-padhans now surviving in mixed villages; the representative of the padhan in such villages is now always a mukhtar.

The disputes regarding the office have all turned on the claim of the padhan to interfere with the ghar-padhan, to nominate and appoint him or to dismiss him or dispense with any ghar-padhan altogether; this involves the whole status of the ghar-padhan, his independence as head of the khaikars and practically answerable only to Government or his subordination into a mere servant of the padhan. The former position was clearly that intended by Mr. Beckett and Sir Henry Ramsay, but many attempts have been made to lower his status to that of a mere mukhtar.

Mr. Pauw has given the history of the varying rulings on the subject on page 51 of his report.

Sir Henry Ramsay, it will be seen, consistently upheld the independence and authority of the ghar-padhan; while Messrs. Ross, Reid and Giles reduced him to a mukhtar's position. Colonel Grigg upheld his independence in several cases, while Mr. Hamblin described him in one order as "an agent appointed by the malguzar for a khaikari village; . . . the position is only one of agency" (*cf.* page 5 of Pandit Ganga Dat's pamphlet). This position has been very commonly taken and in reports on cases of succession, etc. in such villages it has been a common practice for tahsildars to treat the question as one of a mukhtarship, ignoring the fact that the last incumbent was a recorded ghar-padhan. Fortunately for the ghar-padhan, however, the question has been finally settled by the Board (Messrs. Hardy and Thomson) in the case of Hayat Singh of Tanda, Talla Dora (order of 20th/27th February, 1904). The judgment is worth

reproducing in full as it gives a final and authoritative exposition of the status and rights of the ghar-padhan :

"This is a Kumaun revision. Applicant was appointed ghar-padhan by the Deputy Commissioner, Almora, in place of one Durgia, who had resigned the appointment. The malguzar of the village appealed against the Deputy Commisioner's order and the Commissioner removed applicant and ordered that no ghar-padhan be appointed.

It is obvious from the wording of the Commissioner's order that he considered the ghar-padhan a mere agent of the malguzar and that the later's wishes should determine the question of the appointment or non-appointment of the ghar-padhan.

The Commissioner has wrongly interpreted the position of the ghar-padhan. These men are found only in the villages held by the permanent tenants khaikars, in which the malguzar has no power of interference, the revenue being collected by the ghar-padhan from his brother asamis and handed over with the malikana, to which the malguzar is entitled, by the ghar-padhan. The later's duty is also to look after the tenant's rights. He can be removed by the district officer or Commissioner on its being shown that his service can be dispensed with without injury to the village (Ramsay's settlement report, pages 15, 16 21). The Commissioner has made no effect to show that the ghar-padhan's services can be safely dispensed with and the fact that a ghar-padhan has been appointed in the past and that the present applicant's appointment was deemed advisable by the Deputy Commissioner show that the post should be continued. General Ramsay's settlement report, from which I have quoted, shows that the ghar-padhans were appointed in those villages in which the khaikars are in reality ousted proprietors whose rights have been one way or another secured by the malguzar between whom and the khaikars bad blood exists. The malikana which the proprietor receives was enhanced at the recent settlement, but the enhanced malikana was given by way of consolation for exclusion from the village, the revenue of which with the malikana was collected by one of the khaikars who was appointed ghar-padhan. The Commissioner's decision ignores this sensible arrangement and will tend to dispute, as the malguzar will now be enable to collect the revenue and malikana himself. I set aside the Commissioner's order and restore that of the Deputy Commissioner."

Following this decision Mr. Campbell, Commissioner has ruled that "*prima facie*, if a village held entirely by khaikars the appointment of a ghar-padhan from among the khaikars is essential. Appellant is not a resident of the village and cannot efficiently perform the duties of a malguzar" (Bakhtawar Singh of Maindoli, Gujru *versus* Deo Ram order of the 28th May, 1906).

Practically speaking, then the ghar-padhan in khaikari villages is padhan in all but direct revenue responsibility, and "the responsibility of the original padhan in such villages, though it may exist nominally, is such a remote contingency as to be practically negligible." (Pauw, page 50.)

The ghar-padhan is appointed by the district officer without nomination by the padhan, though it is no doubt preferable that the latter should approve of the man appointed, and is usually chosen, as in the case of padhans, for his hereditary title, he is dismissible only by the district officer for neglect of duty or misconduct or other strong reason, and not at the request of the padhan.

In fact his position is simply the logical consequence of the position of these khaikari villages, in which (to quote Sir Henry Ramsay once more): "The proprietor has no power to interfere with these khaikars or their lands." The proprietor's right are solely limited to the receiving of his malikana and the payment by the khaikars of the revenue.

Holding of the phant.

The padhan and not the ghar-padhan is entitled to hold the village phant and should make it over to the ghar-padhan when necessary for the collection of revenue. Mr. Hamblin, Commissioner, in Partab Singh and others *versus* Narayan Singh and others of Maujera, Gujru, confirmed on further appeal by the Board.

The ghar-padhan's remuneration.

Regarding the remuneration of the ghar-padhan there are no authoritative rulings.

Mr. Batten, as quoted above, says "he is allowed to hold part of his land rent-free." Mr. Pauw says "he, as a rule, enjoys the padhanchari land." It is obviously fair that he should do so as he does the whole malguzari work of the village and the padhan does nothing beyond receiving the malikana and sometimes the revenue which the ghar-padhan has collected. The land, moreover, is really part of the khaikars' land, as the whole village is held by them. There have been many instances of the padhanchari land being decreed to the ghar-padhan when the padhan has sought to get possession of it, thought in other cases the padhan has succeeded in ejecting the ghar-padhan. In Nain Singh of Maithana, Khati *versus* Damodar, Mr. Shakespear ruled: "The ghar-padhan has never been dismissed and his dismissal is necessary before he can be ejected from the land he holds." (Order of the 9th September, 1905). The padhan probably seeks to get possession of it as a step towards getting a footing in the village, though, as mention in the chapter on khaikars, the holding of padhanchari land in a khaikari village by the padhan does not constitute khudkasht possession in the village.

Cash dues.

There are no ruling regarding the disposal of the cash padhanchari dues in khaikari villages, where there is no padhanchari land, nor do any disputes on the subject seem to have come before the courts. It is generally reported to be a matter of mutual agreement between he padhan and ghar-padhan.

CHAPTER VI

THOKDARS

(1) *History and General Remarks*

The thokdar and his position do not call for any lengthy discussion. Mr. Pauw has given a brief account of the office in his paragraph 39 (reproduced in chapter 1).

Thokdar, *kamin* and *sayana* meant originally almost the same thing, though not quite, as Mr. Pauw would imply.

The *kamins* was a farmer of revenue for villages in which he had no proprietary interest at all; he merely collected dues from them as an official.

The *sayana* had proprietary rights in his *taluka* of two kinds. In some villages he was a hissadar with land either khudkasht or held by khaikars under him. In other villages he was a kind of over-proprietor not owning any land or hissadari right, but with a right to receive a certain portion of their profits from the cultivators, who were hissadars and not khaikars. (Messrs. Ramsay and Strachey's note of 26th June, 1856, paragaphs 2 to 5).

Both of them were thokdars, and there is now no officially recognized title other than of the thokdar.

The term *kamin* is now almost entirely obsolete, and *sayana* is used losely of prominent proprietors of old family, who may or may not be thokdars; their predecessors no doubt were officials *sayanas*.

Mr. Traill reduced all thokdari dues to 3 per cent. on the revenue, but this order was never really carried into effect (see Sir Henry Ramsay's Kumaun Report).

The final settlement of thokdars and their position was made by Messrs. Beckett and Ramsay on lines which were identical for both Garhwal and Kumaun.

Mr. Pauw, paragraph 56, may be quoted on this point and on the present position of thokdars. He says: "The power of the thokdars was much broken down at last settlement." Mr. Beckett says: "They were at first revenue as well as police officers. Their revenue duties were transferred to padhans; and as police they were found to be much worse than useless. As it paid them best always to let off a criminal, they generally made themselves so obnoxious that in 1856, the Senior Assistants of Kumaun and Garhwal, drew up a joint memorandum recommending that this class of officials should be relieved of all police duties, and as far as possible be observed on casualties occurring, or at the next settlement." Accordingly at settlement numbers of thokdars were struck off and the remuneration of the

rest fixed at the rate of 3, 6 or 10 per cent. on the Government revenue instead of the dues in kind previously taken. The Kumaun officer who recommended the abolition of thokdars was Sir Henry (then Captain) Ramsay ; but in 1874 he wrote : " Since that time have been compelled to change my views . . . It was absolutely necessary to maintain thokdars as far as possible, to ensure the due performance of police duties on the part of padhans. The abolition of the office of thokdars, which had existed so long, would be very unpopular with all except the democrats, who, more than others, required to be kept in check . . . Some of these thokdars are gentlemen . . . They occupied a feudal place in the estimation of their subjects."

At present the thokdar's duties are chiefly ornamental, though he is supposed to supervise the padhans in their work as police. The office is, therefore, strictly hereditary and descends by the rules of primogeniture. But if there is no direct heir, one of the same family, usually the nearest relative is appointed. The claims of women to thokdari rights, though advanced as in the case of padhans, are disallowed. The thokdars comprise representatives of the best old families only, and are the only men who have any pretence to be called, the aristocracy of Garhwal. They are no longer, however, the feudal magnates of former times, and in fact are of very little more consequence than other cultivators. But they are the only body who preserve Garhwal society from one dead level and as such deserving of continuance. Their dignity is somewhat increased by their position as police officers being held to entitle them to the possession of arms free of a licence."

The only error in this account is contained in the last sentence ; the thokdars are exempted by notification under the Arms Act in respect of a gun and a sword, and are not held to be entitled to possess them in virtue of their position as police officers. Their position and duties as police are laid down in chapter VI of the Kumaun Rules.

In Almora and Naini Tal, as in Garhwal, certain important thokdars were allowed 6 per cent. or 10 per cent., in place of 3 per cent., at Mr. Beckett's settlement. At Mr. Goudge's settlement under the Board's orders the same sum was fixed for the dues of these 6 per cent. and 10 per cent. thokdars as they had hitherto been receiving ; thus only in the case of dues at 3 per cent. was there any increase corresponding to the enhanced revenue.

(2) *Succession and Dismissal*

The appointment of thokdars is a matter coming under rules 49, 50 and 54 of the Kumaun Rules. The Commissioner passes orders on the Deputy Commissioner's proposals. Mr. Pauw has given the rules of succession : see the quotation from his report,

a few lines above. There is nothing to add to his remarks, beyond mentioning the fact that in one or two instances two men hold one joint thokdari. Thokdars can also be dismissed from their office (for misconduct or other good reason) by the Commissioner but this has very rarely been done in recent times (*cf.* however, the case of Daulat Singh referred to below).

There have been very few noteworthy decisions relating to thokdars.

(3) *Thokdari Dues*

Their dues are collected with the revenue and cesses, but kept separate and deposited in the Kharij-az-Siyaha until paid over to the thokdars. These dues have been the cause of a few disputes. They are considered as a remuneration of the office, and not as private property. Hence they cannot be alienated. There is no such thing as "shares" in thokdari dues; this was settled in 1849 by Mr. Batten in Deo Singh *versus* Bhagtu of Mason, Choprakot, where the plaintiff claimed by inheritance a one-third share of the dues. It was laid down by Mr. D. T. Roberts, Commissioner, that a thokdar can bind himself to pay some of his dues to a relative or other person, but he cannot alienate the dues or bind his successor. (Guman Singh *versus* Khushal Singh of Mandari Muandarsyun, order of the 10th May, 1893).

In the case of Daulat Singh of Kota Malla, Malla Badalpur, the Board (Mr. H. D'O. Moule) passed the following order:

"The duties performed by a thokdar may not be of much account; still it is clearly a service tenure and the rights and duties are personal to the thokdar and cannot be transferred by sale or mortgage to another. I should prefer to consider Daulat Singh as under suspension from the office of thokdar, and would make his reinstatement conditional on his redeeming the mortgage of this thokdari dues and thus releasing the office of thokdar from an incumbrance which it was never meant to bear. I would give Daulat Singh a reasonable time, say a year, in which to effect this" (Order of the 14th October, 1898). In this case Daulat Singh had mortgaged his dues in 1880 to a creditor and the dues had been paid to the latter under Colonel Fisher's orders until Mr. Pauw took action and got Colonel Grigg, Commissioner, to dismiss Daulat Singh and abolish the thokdari.

In the case of Pratab Singh and Balwant Singh of Chamara Bijlot the thokdari dues had been paid to a creditor under a court decree for 28 years, to gradually extinguish a mortgage debt. Colonel Grigg, as in Daulat Singh's case, dismissed the thokdars and abolished the thokdari, but the Board (Messrs. La Touche and Rose) let the existing arrangement for clearing off the debt continue (Order of the 3rd/5th May, 1898). As the debt was incurred and decree passed before Pratab and Balwant Singh succeeded to the thokdarship, this case conflicts with the

principle laid down by Mr. Roberts in the case of Gauman Singh *versus* Khushal Singh, quoted above.

(4) *Thokdari Land*

From Mr. Pauw's remarks in his paragraph 46 it might naturally be inferred that "thokdari" land, held revenue-free similarly to padhanchari land, was to be found in almost every village. This is due to an ambiguity of expression, since such land is only to be found in two instances in Garhwal, and is certainly very rare, if it exists at all, in the other districts.

As in the case of padhanchari, the thokdar holds this land in lieu of receiving cash dues from the hissadars ; he is recorded as sirtan in it under the State as hissadar, Hidayat Singh of Kansua holds 140 nalis on this tenure.

CHAPTER VII

GUNTH, SADABARAT AND MISCELLANEOUS TENURES

(i) Gunth

(1) *Mr. Pauw's Remarks*

Gunth lands, or lands assigned as religious endowments and attached to temples, are of considerable extent and importance in the hills, the chief assignment being those of the great temples of Badrinath and Kedarnath.

Mr. Pauw has given a lengthy and comprehensive account of rights in gunth lands and orders relating to them, and after reproducing his account there is little left to add by way of supplement. He says (paragraph 45):

"The term gunth by which all assignments of land made to religious establishments are now designated is of comparatively recent introduction, dating only from the times of the Gurkhas, the older names by which such endowments were known being the ordinary Hindu words *sankalap* and *bishanprit*. It appears from Mr. Traill's writings that these grants were merely assignments of land revenue and conveyed no property in the soil, though in many cases the descendants of the Brahmans to whom they were originally made have subsequently, by the migration of the actual occupants, come into full possession of both land and produce." The number of religious assignments of this description made by the native kings was exceedingly numerous, comprising either the whole or part of several hundred villages in Garhwal alone. The grants were almost all upheld by the Gurkhas, and also by the British Government, though in many cases the original title deeds had been lost, and the claim rested chiefly on the *de facto* possession of the revenues of the land. Between 1850 and 1854 an inquiry was conducted into the title of the temples in gunth villages, and a large number of villages, regarding the assignment of which no proof could be offered, were resumed to the revenue roll, though in the case of very many the lands were upheld as gunth, on confirmatory documents granted to the temples by Mr. Traill, and in consequence of continued possession of the revenue.

The chief contested points regarding the tenure of gunth lands relate to the positions of the temples with regard to the land; their position with regard to the cultivators, and the revenue payable by the latter; and finally the tenure enjoyed by the cultivators of the land themselves. At the present settlement on the principle that nothing is lost by large claims, the temples, particularly Kedarnath, claimed most extensive

rights in the gunth villages, alleging the very exhaustive terms of the original grants, which in reality were only technical modes of expression such as are even in these days used in private deeds of conveyance. The right of the temple managers to interfere in the cultivation of lands, which are not actually in the cultivating possession of the temple worshippers or servants has never been recognized, nor until quite recently does it appear to have been arrogated. For instance in A.D. 1827 the Rawal of Badri nath wished to settle cultivators in the gunth village of Bina in patti Lohba, which had lain waste for fifty years, but first asked Mr. Traill's permission to do so. Again in the years following the last settlement whenever waste gunth villages were settled with cultivators, a Nayabad grant was made in precisely the same way as in revenue-paying villages, by the district authorities; the only difference being that the revenue so assessed went to the temple instead of to the treasury. In the case of Ganga Ram *versus* Ramdhan of Sunkoli Chalansyun, a most voluminous litigation which went on in various shapes from 1888 to 1895, it was distinctly laid down that the temple had no authority to settle its waste villages with anyone, and that it could give its lessee no title to possession. Claims of the temple for dues from unmeasured land lying within the nominal boundaries of gunth villages have met with a similar rebuff. In the case of Kedaling *versus* Ghunanand Panda and others, the plaintiff, Rawal of Kedarnath, sued the defendants for grazing dues in respect of Ukimath jungle. The claim was dismissed and Sir Henry Ramsay ruled in appeal "that parties can do what they like by mutual arrangement, but no dues can be taken which are not entered in the settlement papers." The rights of the temples over gunth land were finally laid down in G. O. no. 2880/1—348-B of the 15th November, 1895, as follows:

(1) That the claim by the managers of the temples of Badrinath and Kedarnath and other shrines in Garhwal to waste land in the gunth villages is wholly untenable.

(2) That where the grants in gunth villages consist of entire villages which were held revenue-free at last settlement, the whole of the revenue shall continue to be assigned or released.

(3) That where the grants consist of parts of villages, the cultivated area in excess of the original grant shall be resumed and assessed.

As regards any attempt to interfere in the management of cultivated villages, the result has been the same as instance Ramanand *versus* Parmanand of 15th February, 1820, and Bhagotu *versus* Basulling Rawal of 8th July, 1829. In both these cases the Rawal Kedarnath tried to get gunth villages under his own control, but Mr. Traill ruled that the cultivators should continue to pay the temple revenue through the Brah-

man sub-grantee, and that the dues payable by the latter should continue at the fixed rate mentioned in the deed of grant. In the record-of-rights made for gunth villages at last settlement, the resident cultivators were as a rule recorded as hissadars, as was done in the case of cultivators in revenue-paying lands at the British conquest, the revenue paid by them going, however, as heretofore to the temples. The revenue was at the same time assessed in cash instead of in grain and miscellaneous services. But the Rawal of Kedarnath finding that the temple would lose by this arrangement persuaded the villagers around Ukhimath to continue to pay in grain at the rate of one *don* (32 *sers*) to a rupee of revenue. As the price of grain rose, a tendency was evinced to shirk this arrangement, and finally stamped agreements were taken from the villagers to pay a fixed amount in grain. In one case such an agreement was upheld so far as it related to the signatories by Colonel Reade, Senior Assistant Commissioner, but in the subsequent case of Kedarling *versus* Debu and others of Ukimath, where the plaintiff, Rawal of Kedarnath, sued the defendants khaikars in Asma village, for grain rents, it was decided that only the rent fixed by the Settlement Officer could be demanded—a decision which was upheld by Sir Henry Ramsay in appeal (June 1, 1880). At the present settlement this subject still formed an agitating topic around Ukhimath, and a reference was made on the subject to the Board of Revenue, who ruled the utter illegality of any private arrangement for paying grain rents when these had been fixed by the Settlement Officer in cash.

The disputes regarding the nature of the tenure of cultivators in gunth lands, who were all recorded as hissadars at last settlement, chiefly concern their ability to alienate the lands they cultivate. It has been urged with some show of truth that the proprietary right was given to such cultivators somewhat too freely at last settlement. For instance, it will frequently be found in part gunth villages, such as Kimotha in Bishla Nagpur, that the same men cultivating both mahals are recorded as khaikars under the thokdar in the revenue-paying land as hissadars in the gunth. The inference of course is that the original grant was of half the village to the thokdar and half to the temple, and that the cultivators in both parts should have been recorded as khaikars. In other cases the gunth lands are in the direct cultivating possession of the temple worshippers and servants who enjoy the land, revenue-free, as payment for the services performed by them in the temple. Whether this position came about by reversion to the temple authorities of the possession of the land owing to the migration of the original cultivators, or whether it is due to a direct grant of property in the soil to the temple authorities, the original cultivators being ousted at the time of the grant, it would be idle at this distance of time to enquire. But in all such cases, too, the cultivators in possession, whether they held merely

because they happened at the time to be temple servants or otherwise, were recorded as proprietors, though they held merely the usufruct of the land in return for their services. This usufruct is of course a far more considerable sum than the revenue of the land. In many cases the worshipper of the temple holds an acre or so of land, the produce of which enables him to eke out a subsistence. But he could not possibly live on the rupee or so of revenue assessed on the land, which would be all the temple would receive if the land were sold to an outsider, and the consequence of such a sale would be that the worship of the temple would cease, and the purpose for which the grant was made would be rendered ineffectual. It has, therefore, been ruled on various occasions that temple worshippers, and servants holding the possession of land as direct payment for their services in the temple are not entitled to alienate it. The earliest discovered case of this kind is an Almora one, though it would appear from correspondence that earlier decisions to the same effect had been given by Sir Henry Ramsay in Garhwal. In Kundan Lal Sah of Almora *versus* Panua, gunth land of the above description was attached in execution of a decree. Colonel Garstin, the Senior Assistant Commissioner, referred the legality of the attachment to the Commissioner, Sir Henry Ramsay, in these terms: "In my opinion where gunth land is in possession of the pujaris in return for which they are required to perform service in the temple, the land in their possession cannot be attached in satisfaction of their private debts. For, if it is auctioned, this service in the temple will fall on the purchaser and this cannot be performed by every caste. This opinion will be sent to the Commissioner. In villages in which the possession of the gunth land is not with the temple servants, the temple authorities do not appear entitled to raise any objection to attachment." On which Sir Henry Ramsay's order of the 13th June, 1878, was: "The opinion of the Senior Assistant Commissioner is correct. Gunth lands should not be attached in satisfaction of a private debt." In 1880 a still stronger case occurred in Garhwal (Durga Singh of Marwara Nandalsyun *versus* Salig Ram). The defendant, a Mahant, wrote to the plaintiff mortgage-deed hypothecating temple land. The plaintiff sued for foreclosure. The defendant was the recorded co-sharer and in possession of the land. The claim was dismissed on the ground that the mortgage and land was the gunth of Lachhmi Narayan Shankar Mat, and that the Mahant had no power of alienation. "If the Mahant is given such powers, no temple lands will remain." Sir Henry Ramsay dismissed the appeal on the 19th November, 1880. In another Almora case, Gulab Singh of Tuhar Salt Palla *versus* Ram Dat, Sir Henry Ramsay's ruling of 1878 was amplified by Mr. Giles, Senior Assistant Commissioner, as follows: "There are two kinds of gunth land. Of one kind the pujari of the temple receives the profits as payment for his services to the temple. With such land a decree-holder against the pujari has.

I conceive, no right of interference. But with respect to the other kind of gunth land the temple stands in the place of Government with regard to ordinary revenue-paying land. Its assessment was fixed at settlement and the temple authorities have no power to alter it, nor, so long as the revenue-payer meets the demand have they any power of interference with him." Colonel Erskine in appeal endorsed this opinion (18th December, 1890). Another case is that of Dulanath *versus* Padamgir and another, Binkoli, Malla Katyur. One Lucha Nath sold land recorded in his name as co-sharer and which he held revenue-free in consideration of performing service in the temple, to Padamgir. The latter was admittedly incompetent to perform this service, and the plaintiff, sirgiroh of the temple, sued to cancel the sale. It was admitted that other sales had taken place. It was held by Mr. Giles, Deputy Commissioner, that in such case the *pir*, for the time being, had not done his duty, and that "such neglect can give the appellant no right to the wrong that would be done to the temple by transfer to him." Also that "any worshipper might bring into court a case of perversion of the temple endowment." This decision was upheld on both grounds by the Commissioner, Colonel Erskine (4th December, 1893). It is only just to add that the decisions of these authorities from Sir Henry Ramsay downwards have been overthrown by the most recent cases in point, also Almora ones, Prem Singh of Bageswar *versus* Kuna Sah (21st July, 1894), and Daulat Singh Bhandari of Melchaunri, Malla Katlyur *versus* Amba Dat others. Gunth villages in which the land is in the direct cultivating possession of the temple worshippers are by far the less numerous. In the other and larger number of instances in which the obligation of the cultivators begins and ends with the payment of the revenue to the temple, there has never been any question regarding the power of the men recorded as hissadars to alienate their land, as appears from the above cases."

(2) *Further Remarks*

It will be seen that the main points which call for notice are the position of the temples in respect of unmeasured land and Nayabad in gunth villages, the nature of the tenure of the cultivators of gunth, the inalienability of the temple's rights in gunth, and the question whether the cultivators of gunth land can alienate their rights or not.

On the question of the temple's claim to rights over waste and forest land Mr. Pauw quotes the Government order of 1895, but the position had been very clearly and emphatically laid down in the Board's letter no. 38 of the 1st May, 1868, to the Commissioner of Kumaun which after referring to the "novel and hiherto unknown principle, that any one except the State can posses the right to forests" ruled that "the gunth tenures must follow the law of the province, and gunth villages

cannot be held to possess rights which are conceded in no other case, but are held to vest exclusively in the State.

Regarding alienations by cultivators recorded as hissadars in gunth lands, there is no doubt as Mr. Pauw says, regarding the power of alienation possessed by hissadars, who only have to pay revenue to the temple.

Regarding the case of service tenures in gunth, it will be seen that all the earlier rulings held them to be inalienable. Mr. Pauw quotes two recent rulings as reverisng this principle. In the first case, however (Prem Singh *versus* Kuna Sah), I find that this is hardly a fair deduction from the decision in which Colonel Grigg wrote "the income from the lands goes, or is intended to go, to the suport of the temple. If this is so, . . . then the custodians of the temple are at liberty to sue for the income." He thus, rightly or wrongly clearly understood the case to be one of land held on a simple payment to the temple and the decision has nothing to do with the inalienability of service tenures.

In the other case of Daulat Singh *versus* Amba Dat and others of Meldungri (not Melchaunri, as Mr. Pauw has it) the case went up to the High Court on a reference by the Local Government and was remanded to the Commissioner for inquiry regarding certain issues. In these issues and in the inquiry and findings on them there was no mention of the relation between the temple and the person in possession of the land and no inquiry as to whether the holding was subject to the performance of any service to the temple, or was merely subject to an annual payment. Put briefly the Commissioner's report on the remanded issues was that the persons holding the land were recorded as proprietors, that Daulat Singh had no *locus standi* as a plaintiff, and that he had himself sold similar gunth land and was thus debarred from raising any objections at all.

On these findings the suit was dismissed without further comment. In his original judgment the Commissioner (Colonel Grigg) had remarked: "There is nothing to show that the income arising from this land will not be devoted to the temple as heretofore, or that the person to whom the land is gifted will not perform the services required, or that the temple will suffer in any way by this gift." It would thus appear that this case also is a somewhat weak foundation on which to base the general principle that gunth land held on service tenure can be alinated by the recorded co-sharers. It is obvious that if a Brahman holding such land on condition of service as a priest sold the land to Dom, the temple would suffer, the service condition of the tenure could not be performed and the object of the endowment would be defeated.

The circumstances would be totally different from those assumed in Colonel Grigg's remarks above. The utmost, then,

that could be deduced from this ruling would be that a co-sharer holding gunth land on a service tenure can only alienate the land provided that the transferee is equally competent to render the service on which the tenure is conditional. It would seem safer, however, to follow the earlier rulings of more experienced Commissioners that gunth lands held on a service tenure cannot be alienated by the persons holding them.

Temple offices.

Frequent disputes arise relating to the succession to Offices connected with the temples. These are hardly questions relating to land tenures though they sometimes have some connexion with the subject, as in the case of malguzars of gunth villages, who are also police officers like other padhans. Each temple has its own peculiar set of officials (Rawals, Daroghas, Likhwars, Sirgirohs, Mahants or others) and system of management, and nothing can be said or is necessary to be said on the subject as a whole. The district officer appoints the malguzars and the succession of the other officials is a matter for the managers of the temple (if any) or for civil suit.

In one instance, in Almora, a darogha claimed the post of malguzar also as a predecessor had held both offices; his claim failed.

In Sher Singh *versus* Tara Dat an application was made for the recording of the applicant's name as sirgiroh (head managing priest) of the temple of Jageshwar, Darun; Mr. Hamblin, Commissioner, ruled that the matter was one that could not be entertained by a revenue court; it was a subject for a civil suit (order of the 15th June, 1900).

Temple revenues.

Very few disputes occur nowadays regarding the payment of revenue and dues to the temples. One case may be mentioned. Certain villages of the Kedarnath gunth are held under the temple by the padhans, who receive the revenue and in turn supply certain fixed quantities of oil and flour to the temple. On the revenue being raised at Mr. Pauw's settlement, it was held that the Rawal was entitled to claim a proportionately larger amount of flour and oil for the temple.

(Parmanand and others *versus* Rawal Ganesh Ling, order of Mr. Davis, Commissioner, of the 28th October, 1902).

(ii) Sadabart

(3) *General Remarks*

The sadabart assigned villages are to be found in all the three districts. There are no peculiarities of tenure connected with them and there is nothing to add to Mr. Pauw's remarks. He says (paragraph 46):

"The sadabart villages consist of charitable endowments of land revenue for the purpose of the distribution of food to

pilgrims proceeding to Badrinath and Kedarnath, the greater part of which were assigned under the Gurkha Government. Besides scattered villages in Barahsyum they comprise the whole (excepting gunth villages) of pargana Dasauli and pattis Parkandi Bamsu and Maikhanda of pargana Nagpur. The administration of these revenues at first rested with the temples, but Mr. Traill, took the funds into his own hands and used them to improve the roads and bridges leading to the shrines. In 1850, the revenues were placed under the control of a local agency, and the income was devoted to the erection and maintenance of dispensaries, where medical relief was distributed to the pilgrims, and to the building of rest-houses along the pilgrim route. The system of management by local agency proved a failure, and the control of the funds was transferred to the District Officer of Garhwal. The revenue is still applied to these purposes. The cultivators of sadabart villages are in exactly the same position in regard to their lands as the cultivators of revenue-paying villages. The assessment of both is collected in the same way, but that of the former constitutes the income of an excluded local fund. Padhans are appointed and the revenue collected in the same way as in khalsa villages. The same rules also apply in questions of waste lands and nayabad ; the increased revenue in the case of nayabad or revision of settlement goes to sadabart fund, the endowment of which includes, I believe, entire villages only.

(iii) Potato cultivation

(4) *General History. The Potato Mahals*

The peculiar system of potato cultivation may be mentioned briefly. The growing of potatoes was started a good many years ago ; they are grown to some small extent in ordinary villages, but the particular potato cultivation to which this paragraph refers is of a different character. The potato grows best in virgin newly cleared soil on high ridges, where oak forests have been cut down, and prior to the introduction of a proper system of administering the district of forests, large areas were cleared for this purpose amidst the oak forests of Naini Tal and the southern borders of Almora towards Mornaula. The crop was an extremely profitable one and the penalties inflicted, when any prosecutions were instituted, were quite inadequate. The impolitic system was followed, moreover of fining the cultivator, and then (as the forests had already been cleared) giving him the land. This has now been stopped. Reference to regular Nayabad grants for potato cultivation will be found in the Nayabad Rules, rule IX on page 42 of the Kumaun Rules (1905 edition). The former system was for certain enterprising men from Almora (largely from the Someswar valley) to visit the potato villages and take a lease of the land, measured or unmeasured, for the year from the villagers. The more modern practice, where potatoes are grown in legitimate village lands, is for

these growers to come in as *sajhis,* paying the villagers a proportion of the crop, usually one-third, *plus* the Government demand. There are also in Naini Tal certain potato mahals, consisting of the former illicit clearings, which have continued; they are assessed separately under Government orders at Rs.2 an acre as Government mahals with the potato-growers as sirtans. They are under the management of the Deputy Commissioner and may be relinquished to him, in which event he may either re-let them to another tenant or leave them waste. The growing of potatoes is a branch of agriculture of considerable importance in Naini Tal and large quantities are annually exported via Haldwani.

(iv) Water Mills

(5) *General. Rights in Mills and Disputes About Them*

The little streams which are to be found in all the valleys of the hills turn a large number of water mills (gharat or ghat) by which most of the grain is ground. The have been mentioned in the first chapter in connexion with the sketch of a typical hill village. In a particularly favourable stream with a steep course, a chain of six or eight miles may sometimes be met with in the space of a quarter of a mile or so, the water being carried on in a continuing channel (gul) from one mill to the next. Mr. Pauw has described the working of a water mill on page 20 of his report. Mills are often permanent, sometimes standing among irrigated fields and worked by the fall of the irrigation channel; often, however, they stand among the gravel and boulder beds of a largish stream-bed and are washed away annually in the rains and re-erected in the winter; others on small streamlets only get enough water to work in the rains.

Question of rights.

Rights in the water-supply are allowed according to priority of user. If a gul is carried through another man's land, it is usually a matter of agreement between the parties or might in the case of an old mill be a question of easement.

Mills are often used jointly by the descendants of the original builder, though they are often allotted to one of a family in a private partition of the family property. A mill can be sold by the proprietor or proprietors.

Disputes regarding mills.

Disputes in connexion with water mills usually take the form of questions of water rights. These have been referred to in chapter I as being often very difficult to settle in practice. As mentioned there, Sir Henry Ramsay laid down the principle that the claims of irrigation channels to water must always have preference over those of water mills. He no doubt enforced this in his usual summary orders on the spot, but no concrete examples are available, and it is difficult to tell precisely how

far he meant the principle to go. If *A* has an old water mill on a stream and *B* wants to take all the water into a new irrigation gul higher up the stream, is *A's* mill to be abolished or not? *A* might be directed to remove his mill to a point above the new irrigation gul, but this would not always be feasible. Such disputes between mills and irrigation channels do not often arise, since a mill does not consume the water it uses and by a little arrangement both can usually exist amicably, side by side. In the only opposite case I have known, a mill-owner had a prior right by user to the water and got a decree for his right. Mr. Davis, Deputy Commissioner, directed that the mill should be stopped on the irrigation-claimant paying compensation to the mill-owner.

Diluvion caused by mills.

Another source of disputes arises where mills adjoin cultivation in a broad stream-bed and are alleged to cause damage by inducing diluvion. Girwar in Almora is a notable locality for these disputes, there being much land almost on a level with the stream there.

The mill channel and its *band* are said to divert the current, when the river rises or a flood comes down, and so cause damage to fields in their direction. The villagers in Girwar assert that much land has been washed away through the action of these *bands* and channels. There do not seem to have been any decision regarding the rights of the land-owners to have the mills removed, or the liability of the mill-owners for damages.

Profits of mills.

Except in the case of a public free mill, the owner takes a percentage of one *nali* (two sers) for each *pirai* or *don* (32 sers) of grain ground at his mill; and as Mr. Beckett shows he makes a large profit out of it.

(6) *Mill Rents*

An annual rent of from eight annas to Rs.3 is levied on every mill; it is collected with the land revenue and is credited to the District Board as a local source of income. These rents formerly formed a sort irregular local fund in the hands of the district officer and were expended by him on any public work to which he chose to devote them.

The rents rule higher in Almora than in Garhwal and are assessed on considerations of the perennial or seasonal nature of the mill, the supply of water, the prevailing local rate, etc.

They were first initiated throughout the division by Mr. Beckett. He recommended (Garhwal report) that the rents should be credited as sayar. The remarks of Sir Henry Ramsay on their introduction in the Kumaun District at Mr. Beckett's settlement may be quoted. He says (paragraph 67): "Although water mills do not belong to land revenue, I would here explain that a small tax has been put upon such mills,

and amount thus realized should be credited to local funds, by which means it may be used for the benefit of the people who contribute it. Hand mills are seldom used in Kumaun. A small mill is erected at the cost of Rs.5 to Rs.10 on any ravine or river from which a stream can be diverted so as to give the requisite fall, according to the volume of water. The villagers resorting to such mill have to pay $2\frac{1}{2}$ sers in every maund of grain they bring to it, and this payment gives a very large profit. No one has a better right to monopolize the water than another. At the same time, the man who erects such a mill asserts the right of preventing the erection of another which shall interfere with his. Thus the owner of a mill, or mills, collects from the villagers a large profit to which he had no more right than others, and, to prevent disputes, as also to ascertain how many mills existed, as well as their position, all mills have been taxed at the rate of Re.1 to Rs.3 per annum ; and this money, realized indirectly from the whole of the people, should I think, be devoted to their benefit."

Their questionable position.

Now, although these mill rents were thus introduced and have been collected ever since and form part of the District Board income, they do not appear to rest on any clear legal basis. They are not land revenue and the Land Revenue Act can have nothing to do with them. There is no mention of them in the Kumaun Rules. They might perhaps be brought within the sphere of the district forests under the Forest Act in the same way as all questions of water rights and fisheries within the reserved forests appertain to the Forest Department, or as the Naini Tal lake fisheries have been dealt with under the Forest Act. But they have never been in any way connected with the district forest administration. The theory on which orders have been passed is that the water of streams is the property of the State and the mill-owner only has such rights in it as he is allowed by the orders passed in sanctioning and assessing his mill.

The district officer has the rents collected, sanctions new mills and fixes the rents for them, and allows the relinquishment and cancels the assessment of abandoned mills.

Orders for the demolition of unauthorized mills, the collection of arrears from previously unsanctioned mills, and the like have regularly been passed and uhpeld on appeal, but it is difficult to see what definite legal sanction there is for such procedure unless it be the Forest Act (which was only extended to the District Forests in 1893).

No re-assessment of mill rents is made at settlement. They might, as Mr. Beckett suggested, fairly be re-assessed and raised in many cases. (*See* paragraph 21 of his Garhwal report " the present mill rent will greatly increase as soon as the novelty of the charge has passed away ").

All mill rents in khalsa and gunth villages go to the District Board. In sadabart villages they go to the sadabart fund. Public or charitable free-mills (dharm gharat) in which no dues are levied for the grinding of corn are not assessed to rent. They are not common.

(v) Coolies and Utar

(7) *General Position. Duties and Penalties*

The necessary supply of coolies for transport, public or private, has always been a difficult problem in Kumaun. Mr. Pauw has a brief paragraph on it, showing that the difficulty has existed since the earliest days of the British occupation. Quoting from Mr. Traill he says paragraph 57 : "Owing to the contracted state of the population, the insufferable indolence of the male part of it, and their general aversion to carrying burdens the nature of very species of labour in this province, whether on public works or in transports has always been compulsory. Although various measures for the relief of the population have been, from time to time devised, such as the purchase in 1822 of an establishment of mills (since abolished) at a heavy expense, for the purposes of public transport, and the increase of the rate of hire on the most liberal scale, the employment of the hill Khasiyas in this service has been as yet in no degree rendered voluntary. The demands fo this species of labour would appear calculated to benefit the lower classes of the people by affording them a never ceasing source of employment. The aid of the civil power has nevertheless been found to be indispensable in the collection of Khasiyas for public and private purposes." So wrote Mr. Traill ; and though the state or population in Garhwal is now by no means contracted, the difficulty in procuring labour for transport purposes remains as great as ever.

The custom is embodied in the settlement agreements, and there is no dispute as to the duty of the villagers under their agreement; the difficulty is to enforce the agreement owing to the insufferable indolence and the aversion to carrying burdens to which Mr. Traill alludes. No hillman is willing to carry a load for a fair wage, and with the increased prosperity of recent times it is not too much to say that in some places a traveller might vainly offer a wage of a rupee a march without getting a single voluntary coolie to carry an ordinary load. The custom of forced labour extends to the carriage of baggage for officials, troops and travellers and of heavy materials for public purposes, such as timber for bridges, material for buildings, etc. it further comprised annual repairs for local roads, though this has now been discontinued and it includes the keeping up of village roads or paths. All such labour, except the last item, is paid for at fixed rates. An extension of the principle, more by way of suasion to organized effort than of direct order, is to

the building and repairs of village schools. The great increase of travelling in the hills in modern times has immensely increased the calls on the villagers, and, correspondingly, their objection to the custom. Hence there is constant trouble over travellers being stranded and unable to proceed for want of coolies.

The difficulty arises from the fact that there is no direct and efficacious method of dealing with refractory villages.

The ultimate sanction of the system lies in the settlement agreement, and the breach of the condition regarding coolies would justify the cancelling of the settlement; but this would only be proposed in very flagrant cases and would require to be very strongly supported for Government to sanction it; it has never, I believe, been resorted to, or proposed hitherto. Short of this extreme measure, various methods of enforcing the obligation have been resorted to. The villagers used at times to be prosecuted under section 188 of the Penal Code, either by itself or read with Bengal Regulation XI of 1806, but such prosecutions are irregular. The Bengal Regulation would only at the outside justify proceedings against the malguzar as a police officer.

The commonest practice has been to simply summon the refractory villagers or the malguzars to the tahsil or sub-divisional court and warn them, the recovery of the summons fee acting as a slight penalty. This, however, is of little effect in many cases; some wealthy villages, which consistently neglect their duty, actually have village funds for the payment of any such fees, so that the coolies whose turn it is to go do not suffer at all, they are accustomed to immunity from other punishment. Regarding this summoning of villagers the High Court has held that they cannot be compelled to attend the tahsil or court as accused persons and cannot be punished under section 174, Indian Penal Code, if they refuse to appear.

In the case of King-Emperor *versus* Gopia and others of Khatyari (Criminal Revision No. 805 of 1903) fourteen men had been summoned to the tahsil and had refused to appear; they were then prosecuted under section 174, Indian Penal Code; and fined Rs.2 each. The High Court (Knox and Aikman, Judges) quashed the conviction on the ground that the coolies had been summoned as accused persons, and there was no authority under which they could be summoned as such.

Executive action can be taken to some extent, for instance by dismissing the malguzar for not doing his duty, but it is often impossible to take such action as will be effective. In the old days such default was dealt with in summary fashion; a village in the Someswar valley, which defied Sir Henry Ramsay's orders, was fined by him the sum of Rs.500. What really seems needed in Kumaun is a short enactment regulating the supply of coolies and imposing a light pecuniary penalty for refusal to carry out

orders. It was suggested at the recent Almora and Naini Tal settlement that a penalty clause should be inserted in the settlement agreement, but this was not approved of. The Board preferred to trust to executive action and the customary taking of talabana and the dismissal of malguzars, if necessary. In flagrant cases the settlement engagement may be cancelled and the revenue enhanced so as to enable other arrangements to be made in lieu of the default made by the villagers. [B. O. No. 2266IN./I—993A, dated the 30th August, 1904.]

Exemptions. Thokdars, padhans, ghar-padhans and mukhtar-padhans are exempt from having to carry loads or supply personal substitutes.

Orders of Government. The following orders of Government for interpreting the terms of the settlement agreement may be referred to :

Government order no. 2618/I—303-B. dated the 10th October, 1895, to the Commissioner, Kumaun division, lays down that all land-owners, whether present or absent, are responsible for the maintenance of the village roads, that resident land-owners are bound to supply labour for the carriage of loads both to Government and to travellers, but no resident of a village who is by custom exempt from *personally* carrying a load, shall be required to give *personal* service. Reservists are exempt from personally carrying loads.

All such labour is to be paid for at rates fixed by the Deputy Commissioner with the sanction of the Commissioner. All resident land-owners are bound to supply provisions to travellers on payment. Wages for the collection of fuel and grass supplied are to be paid. A supplementary G. O. no. 3038/I—303-B, dated the 27th November, 1895, explains that a non-resident land-owner cannot be called on to supply labour or provisions, but a resident land-owner, who is personally exempt from carrying loads, may be called on to provide a substitute : all resident land-owners are bound to supply labour.

(vi) The Nali Bania

(8) *The System and its Working*

The origin of the nali bania system is thus explained by Mr. Pauw (paragraph 57) : "In the interior there are few or no shops, and it has therefore always been customary that villages shall supply, on payment, such articles of food, fodder and fuel as are necessary, to travellers and officers on tour in the district. For the last three settlements, therefore, a clause has been inserted in the settlement agreement whereby every landholder and cultivator is bound to supply coolies (labour) and bardaish (supplies) according to custom and the requisitions of authorized officers. With a view to obviate the inconvenience which

would result from distant villages being called on in their turn to supply food to a single traveller, and arrangement was made at last settlement whereby the villages of one or more pattis agreed to appoint a single man as shopkeeper for all, remunerating him by a portion of grain at each harvest which varied in different parts. The amount of grain so given was measured by nalis and the shopkeeper was thence called the nali bania. Nali banias exist in the more frequented pattis of Garhwal. In others the people continue to themselves supply camps and travellers moving within their boundaries."

The only explanatory note necessary to this account is that the villagers agreed that each family should supply one *nali* of grain at each harvest to the bania, and this was the origin of the term *nali* bania. Subsequent to the writing of Mr. Pauw's report however, the system in Garhwal was changed to that already in force in Almora and Naini Tal, under which a cash cess of three pies in the rupee on the revenue is collected from the villagers in lieu of their obligation to provide supplies, and from the funds thus obtained, Government banias are appointed and paid stipends to keep shops and furnish supplies, on payment, at the various halting places and for fixed localities.

A supplementary amendment to the settlement agreements was accordingly taken in Garhwal under G. O. no. 1142/I—297-B, dated the 10th May, 1898, to the Commissioner, Kumaun division.

Mr. Pauw represented that the system would not work well in Garhwal, but it was brought into force with the proviso "in out-of-the-way places travellers must be prepared to make their own arrangements" (G. O. no. 1634/I—297-B., dated the 15th June, 1898). The cash cess system works satisfactorily in Almora and Naini Tal, but has always given trouble in Garhwal.

The reasons for this are twofold, firstly, the much smaller amount available for dealing with a larger area than in Almora; and secondly, the almost complete absence in Garhwal of any regular shop-keeping class, such as has developed to some small extent in Almora. In Garhwal the only men who can be got for the small pay available are simply ordinary villagers who become nominal shop-keepers but have no idea of commercial methods of getting in stocks of cheap grain at harvest and dealing with their business in an intelligent and provident manner. They go on from hand-to-mouth and are always liable to break down when any call is made on their resources: if they are dismissed, it is often most difficult to get any one to take their places. Hence it has come about that in actual practice in many parts the people have reverted to the old system. By a mutual arrangement the bania pays to Government the cash cess on the circle for which he is appointed: he gets this back as his stipend and in lieu of paying the cash cess the villagers give him the *nali* of grain as in

former times. This is simply a matter of private arrangement between the bania and the villagers.

Though the present arrangement is a defective one, it is difficult to see what better system could be introduced, unless in future the cess were raised to six pies in the rupee.

(vii) Village servants

(9) *General remarks*

In many parts of the hills there are no village servants apart from the Doms, who work sometimes as lohars, etc., for the villagers generally and are paid according to their work. The padhan is the police officer with a very different status from that of the chaukidar in the plains. There are, however, in Garhwal the *paswan* and in parts of Almora—almost exclusively in Pali Pachhaun—the *pahari* whom Mr. Batten also terms the *kotal* or *meldar*. The *paswan* and *pahari* are generally village servants, watchmen, messengers and assistants to the padhan ; they carry Government orders or the patwari's messages from one village to the next, do a little chaukidari, carry the padhan's orders for coolies, etc., and so on. They are usually Doms, and are remunerated by a payment of one nali of grain from each family in the village at each harvest.

CHAPTER VIII

MEASURED AND UNMEASURED LAND. NAYABAD AND FORESTS

(1) *General remarks. Divisions of subject*

To a new-comer from the plains the distinctions of measured and unmeasured land (*nap* and *benap*) and all the questions regarding unmeasured waste and forest lands present a somewhat complicated problem.

The subject forms one of the chief branches of district administration in the hills, perhaps the most important of all; and in no other matter is local knowledge and experience so essential. For very many questions relating to nayabad, district forest management and the rights and practices of villagers not merely a general knowledge of principles and rules, but an actual local knowledge of each portion of the district is necessary. As long ago as 1842 Mr. Batten urged upon officers moving about the district the "immense importance of personal investigation and arrangements on the spot."

Kali Kumaun or Badhan requires very different treatment from Pali Pachhaun or Chaundkot with regard to the preservation of forest, the allowing of nayabad and other questions.

Taking the whole subject analytically it may be divided into the headings of (1) measured and (2) unmeasured land. The former requires little notice as a general question; the preceding chapters have dealt with rights and tenures in it. Unmeasured land will be considered with reference to (*a*) rights and customs relating to the cultivation of it—

(i) as between the State and the villagers and

(ii) as among the villagers *inter se,*

and (*b*) rights and customs other than those relating to cultivation, in two similar sub-divisions.

(2) Nap *and* benap. *Rights in measured land*

As only a small fraction of the area of Kumaun belongs to the people and is cultivated, the settlement surveys and measurements have been practically confined to these areas of village cultivation.

"Waste land is known as *benap,* unmeasured, because hitherto such estimates or measurements of area as have been made at succeeding settlements have only taken account of cultivated or culturable and terraced land," as Mr. Pauw puts it.

And in common phraseology *nap,* "measured land" is understood to mean settled land which is private property, as opposed

to *benap*, "unmeasured land" which is always the property of the State.

Measured land.

In Almora this is almost literally the case; all areas shown in the settlement maps and records are the property of the villagers, excepting only roads, streams, camping-grounds and the like, though such areas include land which has relapsed to forest for many years in places and other land which has never been cleared at all. Mr. Beckett, chiefly in tracts where forest abounded round the villages, measured up and recorded in the names of the villagers rough blocks of culturable land as unassessed *laik awadi*, which they might cultivate if they wished to extend their holdings. These blocks and the relapsed lands still stand in the names of the villagers as hissadars, and can be cleared and cultivated by them, by mutual agreement when, as is usual, the land is recorded as *gaon sanjait*.

Kaisar-i-Hind land.

In Garhwal, however, such land as had relapsed into jungle or permanent waste, or had never been cultivated was, by Mr. Pauw, struck off the area recorded in the names of the villagers and settled with them in the cadastrally surveyed tracts. The plots, however, remain on the settlement records and are recorded in the name of the State (Kaisar-i-Hind) as hissadar. Other waste plots, which intervene among the cultivation and were plotted in the new cadastral survey maps, were similarly recorded in the village papers. Such areas are known as Kaisar-i-Hind land, and so far the villagers' rights are concerned they rank as unmeasured land. The villagers have no proprietary right over them, as they have in the Almora lands which still stand recorded as their hissadari. Subject, however, to the usual precautions about the destruction of trees, the Kaisar-i-Hind plots are considered a legitimate field for the extension of cultivation.

Naini Tal comes between Almora and Garhwal in a way. The villagers retain the old measured waste or fallow of Mr. Beckett's settlement; it has not been struck off the village area, or made Kaisar-i-Hind land; and there are further the surveyed plots of "zone" land of the new settlement, which somewhat resemble Mr. Beckett's *laid awadi* land or Kaisar-i-Hind land in Garhwal. There is hardly any Kaisar-i-Hind area in Naini Tal except roads, streams and a few special areas of land. The "zone" lands which are dealt with further on; are not recorded in the village papers.

Rights in measured land.

Each hissadar has the fullest rights over his own share of the measured and assessed land; he can do whatever he likes with it, subject only to the customary rules of law regarding the rights of other individuals. The State has nothing to do with such land so long as the revenue on it is paid and the terms of the settlement agreement observed. The same is the case with the common and waste lands in which the villagers are recorded

as proprietors, they can have them partitioned and cultivate them or leave them waste as they think fit. Decisions regarding mutual rights in these lands will be found under the appropriate headings in the preceding chapters.

Nayabad grants once they have been sanctioned become ordinary measured land, subject only to any special conditions that may be laid down when the grant is made (*cf.* the chapters on hissadars, last paragraph).

Fee-simple grants and grants under the waste land rules may be mentioned here; in Garhwal they form, as Mr. Pauw remarks, the only instances in which proprietary rights exist over uncleared waste and forest land. Subject to any special conditions prescribed for individual cases all the land of such grants ranks as ordinary measured land and the owners have full proprietary right over it. The rights of the State in minerals alone are reserved. Survey and rough measurement records exist for all these grants.

(3) *Unmeasured land*

Unmeasured land and Kaisar-i-Hind, whether forest, waste or broken up for cultivation, are, as has been mentioned, the property of the State. This has always been an unquestionable principle and may be found emphasized by all successive authorities. The only attempts made to contest it, in the case of gunth and muafi villages, have, as shown in the last chapter, only resulted in the clear re-affirmation of the principle.

It is unnecessary to quote further authorities for such an undoubted principle. The State is the sole and supreme proprietor in all unmeasured waste and forest lands, and no one else can claim any proprietary rights over any portion of such lands until such right is expressly created by the State through its local representatives. The position was finally asserted on a legal basis when all unmeasured forest and waste lands were in 1893 declared to be district protected forests (Notification no. 869/F. 638-11, dated the 17th October, 1893). The State as supreme proprietor could do anything it chose with such lands, and does exercise its powers freely, so far as the interest of the forests and of the public require, in accordance with the provisions of the Forest Act.

At the same time, however, it recognises the ancient and customary rights of the villagers in forest lands and only regulates their exercise, and in exceptional cases interferes with them, when such action is necessary, in the interests of the forest and of the people themselves. The adjustment in practice of the balance between the villagers' rights and their free exercise on the one hand and the proper preservation of the forests on the other, so as to produce a fair and beneficial equipoise with as little fric-

tion as possible, forms the most delicate task of district administration in the hills and one that must always depend largely on the personal equation.

The notifications of the 17th October, 1893, and the 24th October, 1894, which are printed in the Forest Manual, read with Chapter IV of the Forest Act (VII of 1878) give the present legal position of the district protected forests. In 1903 a set of rules was drawn up, under which it was proposed to close considerable areas of forest for protection under stricter rules than those notified in 1894. The scheme has ,howevere, been modified and the areas specially selected for protection are still in the same legal position under the 1894 notifications as they were previously. The only difference in their administrations has been in the way of improved supervision by the forest staff. A few small areas have been closed by notification under section 29 of the Act for reproduction.

The notifications in the Forest Manual need not be reprinted here; their provisions and effect will be referred to in dealing with detailed rights. Apart from these notifications having the force of law various rules and instructions for guidance on specific points of administration have been issued and will be referred to under their appropriate heads. The departmental management of the district forests is in the hands of the District Officers, with a special staff, clerical and executive; it need not be described here.

Part II—Cultivation of unmeasured land

(4) *The State and the villages; legal position. Buildings*

Throughout Kumaun, and especially in the tracts which unite a suitable elevation with a small population and large areas of forests, there is a constant expansion and extension of the cultivated area by the clearing of the unmeasured waste and adjoining the measured cultivation or at suitable spots at a distance from the old cultivation. This has always been the custom in Kumaun and in earlier times, when the population was more scanty and land was everywhere plentiful, the people were left to do pretty much as they liked in the matter. The forests were considered ample for all possible needs and little attention was paid to the question of limiting cultivation with reference to the conservation of forest.

A man started a new village by clearing the forest and at settlement he was recorded as its proprietor. See Mr. Batten's rules 8 to 11 on pages 98 and 99 of the Collected Reports.

In the absence of any actual measurements of cultivation, prior to Mr. Beckett's settlement, it is impossible to tell how much increase has taken place in the cultivated area since the earliest days of the British occupation. Mr. Beckett's measurements

were very inaccurate; and in Garhwal Mr. Pauw, after allowing 40 per cent. for the deficiency of area in that survey as compared with the actual facts, calculated that cultivation had increased about 60 per cent. during the term of settlement pages 115-116 of his report). All this increase consisted of extensions into unmeasured land. Similarly in Almora at Mr. Goudge's settlement the increase of assessable area was found to be 24 per cent. and in Naini Tal 40 per cent.

The State and the villagers.

The regulation by Government of such extensions of cultivation is of comparatively recent introduction. Modern practice divides new cultivation in unmeasured Government land into two distinct classes—

(i) the customary extension of old cultivation into adjoining waste in simple continuation of existing measured land or in intervening plots of waste surrounded by the old cultivation;

(ii) nayabad cultivation, the clearing of separate blocks of land or in Government forest at a distance from old cultivation in a separate *thok* or *chak*.

Ordinary extension of cultivation.

Of the first class of new cultivation, Mr. Pauw writes (page 37) . . . "The custom of the country has been that new cultivation could be made by the villagers by mutual consent within and around their assessed lands and that new cultivation in separate *thoks* required a nayabad grant. The system of requiring executive sanction to all extensions of cultivation large or small arose in 1887 'for the better control of reckless destruction of timber.' As applications for this sanction numbered thousands annually, any elaborate inquiry was impossible. No maps were made, nor was it considered practicable to require the applicant to make a week's journey or more to the district court in a matter of a few square yards of land. The application was simply referred to the patwari for report as to the suitability of the land for cultivation, the trees on it, and so on; and if the report was favourable, the application was granted. It is not surprising that this method with its want of publicity and the power it gave to the patwaris was used largely by unscrupulous persons to get sanctioned in their name land actually in the cultivating possession of others. Orders were issued by Mr. J. R. Reid, as Commissioner, for discontinuing this system on the 1st January, 1889, but it survived nevertheless. These applications were rendered unnecessary by the Board's order no. 199/I—534 of 1st March, 1895, which laid down that the cultivation of small plots of intervening waste between cultivated fields may be left to the village community without permission being required in each individual case. The only restriction on such cultivation is

now that contained in the forest rules notified as G. O. no. 843F/638—69, dated the 24th October, 1894, rule 6: 'No extension of cultivation, where it involves the cutting of trees shall be made without the permission in writing of the Deputy Commissioner.' This permission has the advantage that it cannot be abused to filch the proprietary right from someone else."

The legal aspect of the case.

Mr. Pauw was not quite correct in saying that the only restriction now existing is that contained in the rule he quotes. The notification of the 24th October, 1894, under section 29 of the Act, prohibits within the district forests "the clearing of any land for cultivation except as provided by rule 6, etc." (the rule quoted by Mr. Pauw). The rules as framed lead to a logical *impasse*. All clearing is prohibited *except* as provided (i.e., permitted by rule 6 of the other notification). When reference is made to rule 6 to see in what cases clearing is permitted, we are only told that extensions of cultivation involving the cutting of trees are prohibited. It is nowhere notified in what cases clearing is permitted. If it is assumed that rule 6, when it says that extensions involving the cutting of trees are prohibited, means that all other clearings are permitted (which is logically unsound), then the notification under section 29, when it says that "the clearing of any land is prohibited, except as provided by rule 6, etc.," really means "the clearing of all land is permitted except as provided by rule 6," which is a most singular mode of expression. If this is so, then there is no power under the Forest Act to prohibit or penalize any nayabad cultivation, however undesirable, in the middle of forest, so long as it is made in a clear patch or no trees are cut. In practice, however, it has been held that prosecutions can lie under the Forest Act, when forest land has been cultivated without any trees being cut. In King-Emperor *versus* Bhawan Singh of Khurpa Tal the High Court while reversing that part of a sentence under section 32 of the Forest Act, which ordered the accused to demolish a house built by him, allowed the conviction for cultivating unmeasured land to stand, though there was no question of trees having been cut. In view, however, of the uncertain phraseology, of the rules it has been the practice latterly, when it is desirable to prohibit cultivation, not involving the cutting of trees, for the reason that it is otherwise injurious or inadmissible to prosecute under section 447 of the Penal Code, when orders to refrain from cultivation have been ignored.

Such prosecutions are, of course, rare, since the interest of the State and the public welfare is not often prejudiced by the existence of cultivation in the neighbourhood of old cultivation and in places where there are no trees; and where real nayabad is cleared in new *thoks* apart from old cultivation, the villagers generally apply for permission beforehand. The tendency has

been, however, too much to interfere with and prohibit extensions, which are only objected to on the ground of injury to private customary rights and which do not affect the State or its interests (see below on such private objections).

It may be noted before leaving the legal aspect of the subject that the phrase "involving the cutting of trees" has been held to refer only to actual trees, and not to include bushes, brushwood or shrubs.

Buildings.

The rules under sections 29 and 32 of the Forest Act do not apparently apply to buildings, where no cultivation is made. Buildings may, however, conveniently be referred to here.

At the instance of the Public Works Department a G. O. was issued in 1897 (no. 3143W./98, Public Works Department, dated the 29th June, 1897), prohibiting in unmeasured land the erection of any building or enclosure within 20 feet from the edge of any public road or the felling of any tree within 50 feet of the edge of such road without the previous sanction of the Deputy Commissioner, and in the case of a road under the Public Works Department until the Deputy Commissioner shall have obtained the sanction of Government. These acts were prohibited as prejudicial to the safety of the road and to public convenience. As this order was never notified under the Forest Act it has no legal force of itself. The cutting of reserved trees can be prohibited and penalized in accordance with its provisions; but as regards all other trees it is legally a dead letter. As regards buildings the practice is to prohibit the erection of them and in case of disobedience to prosecute under section 447 of the Penal Code. In the case of Bhawan Singh, referred to above, the Sessions Judge in his order referring the case to the High Court remarked that instead of ordering the accused to demolish his building, the demolition should have been carried out by executive order of the Deputy Commissioner. Except when objected to by the Public Works Department under the Government Order referred to above, the building of houses is rarely, if ever, objected to.

(5) *The State and the villagers; ordinary practice The "zone" system*

So far the strict legal position between the State and the villagers has alone been considered. In the vast majority of cases no question of legal restriction arises and old cultivation is extended freely without any objection on the part of the State. This is in accordance with old custom, and villages may be met with, where the old cultivation has been extended by hundreds of *nalis* over adjoining waste and bush-clad slopes in quite a small number of years, and without any formalities. The Board's Order of 1895 quoted by Mr. Pauw (see above) was a

re-introduction of the old custom with regard to such extensions. Subsequently, in 1897, a new system was initiated in Naini Tal to regulate extensions of cultivation by giving the villagers a free hand within a fixed area around their old cultivation.

The zone system.

This is known as the "zone" system. It was decided in 1897 in connexion with the approaching view survey of the Naini Tal hill tracts, that zones to admit of reasonable extension of cultivation should be demarcated *in situ* round the measured land of each village, or where there was no convenient adjoining land then in some other place within the village boundary. This was accordingly done in 1897-98. In these zones, which were surveyed, the villagers are allowed to clear land and cultivate without further permission and without assessment of revenue until the next settlement, the extensions being made by mutual consent or in accordance with village custom. The land in the zones is considered as excluded from the District Forest rules, except that the cutting of trees may be prohibited.

Naini Tal.

If the surveyed area already included sufficient culturable waste, no zone was demarcated.

No new cultivation is permitted outside the zones, except under the Nayabad Rules.

The blocks of zone land are indicated in outline on the survey maps with their areas, but they are not recorded in the khasra or *muntakhib* (G. O. no. 2361/I—379-B., dated the 10th July, 1896, and B. O's. nos. 2590-N./I—706, dated the 8th September, 1897, and 2003-N./I—642, dated the 16th August, 1898).

In Naini Tal the above definite demarcation of zones was carried out by a special officer everywhere, but a less precise procedure was necessary in Almora and Garhwal since in the latter district the survey and settlement were over and in the former there was nothing beyond Mr. Beckett's maps. Following on the same Government Order the B. O's. were nos. 1703-N./I—706, dated the 18th August, 1896, and 524-N./I—706, dated the 8th June, 1897. The principles laid down are that the people are allowed to extend cultivation in waste land adjoining their present cultivation; that all clearings outside the zone, within which free cultivation is permitted must be treated as nayabad, and that no extension whether within or without the zone is admissible, when it involves the cutting of trees, without the written permission of the Deputy Commissioner.

In Almora and Garhwal.

In the cadastrally-surveyed tracts of Garhwal the Deputy Commissioner was to mark off a zone on the map and give permission to cut trees, part of the surveyed area being left out where it included forest. As the surveyed area very rarely included any forest, such action was only taken in one or two places, and Mr.

Pauw issued general orders making the cadastrally-surveyed areas the zone within which free cultivation might be permitted, subject to the obtaining of special permission when the cutting of trees was involved.

In the unsurveyed tracts (part of Garhwal and the whole of Almora) the areas shown on Mr. Beckett's maps are to be taken as the zone.

Nothing was done in this connexion during the recent Almora Settlement.

Notwithstanding the above-mentioned rules, there are still numbers of applications received for permission to cultivate, sometimes asking for a Nayabad grant of land adjoining old cultivation. Summary inquiry is made and if the land asked for appears to be such is comprised in the usual zone, the applicant is told that it is permissible to cultivate the land. Some of these applications are no doubt genuine petitions from villagers who think they ought to ask for permission: but a very large number have an ulterior object. The hill villager loves a quarrel with his enemy over the cultivation of unmeasured land, and such petitions very often mean that there is a dispute about the cultivation of the land in question and the applicant wishes to anticipate objectors by obtaining an order allowing cultivation.

The above sketch represents the attitude of Government towards the question of extensions adjoining measured land. This is quite distinct from the question of the mutual and civil rights of the villagers in relation to such extensions. The permission to cultivate, whether under the general rules or on a specific application, merely removes the action from the sphere of criminal law or executive intervention and indicates that the State raises no objection to it: it does not give any one or more villager's proprietary right over the zone lands or entitle them to interfere with each other's customary rights or convenience. This further question will be discussed in a later paragraph.

(6) *Nayabad*

Outside the zone lands extensions of cultivation come under the Nayabad Rules. This is a totally district question from the general permission to extend cultivation free of revenue in continuation of old measured fields. Nayabad grants require specific inquiry and sanction in each case, and involve the active intervention of the State, which confers proprietary right and settles the land on payment of revenue, or in the alternative, steps in to prohibit the clearing and appropriation of the land.

The following extracts from Mr. Pauw (paragraph 43) give the history of the Nayabad question.* "In the case of grants of waste land, known as Nayabad leases, he" (Mr. Batten) "laid

Cf. also the first part of paragraph 4 above.

down that the village most adjacent to the tract or within whose boundary it lay, should have the first refusal, and no grant should be allowed within a certain distance of assessed village lands." . . . "Extension" (of cultivation into unmeasured land), "however, did not mean the breaking up of new land at a distance from the village and perhaps in the heart of a forest. This is evident from the case of Syanri village in Nandak, where it is noted in the last settlement papers that a fine of five years' back revenue was levied on a new piece of cultivation made without permission in Bengali tok, a mile or so from the other cultivated land of the village. Such tracts distant from the village formed the subject of the separate Nayabad grants spoken of by Mr. Batten. In making such grants the second of Mr. Batten's conditions, namely, that the site of the grant should be distant from assessed village land is always followed unless there are special reasons to the contrary, though the first of his conditions that the grant should always be offered to the nearest village is impracticable in these days, as the nearest village will invariably take up the land even at ten times a fair rent, merely to prevent a stranger acquiring it. An instance in point is Marwara village in Lohba, which, on proposals being made a few years ago for a grant of land at Diwalikhal above the village, took up the whole at an annual revenue of Rs.100, three times the amount of the revenue paid by their entire village, and this although they were quite unable to cultivate the whole of the grant land, and in fact only made a few fields in it. A third condition has become necessary of recent years and is usually acted on, namely, that grants shall not be made where there are forests of valuable timber which there is any possibility of bringing to market, as in such cases the property destroyed is far more valuable than the rental of the land. Of course not only where the timber is required for villagers, but even in cases where the timber is not largely in excess of all possible village requirements, no application for a Nayabad grant would be considered for one moment."

The rules regulating the present procedure regarding Nayabad grants were sanctioned in 1895 and will be found on pages 42 and 43 of the Kumaun Rules (1905 edition). They prescribe a consideration of the circumstances affecting neighbouring villages and their customary rights, and prohibit grants on the tops or steep sides of hills. Condition requiring the land to be terraced are laid down in rule VIII, and in individual cases special conditions may be added in the order of sanction, such as prohibiting the felling of certain trees (see chapter on hissadars, last paragraph). Subject to the observance of any prescribed conditions the grant conveys ordinary proprietary title in the land. Khaikari right may be conferred on tenants who clear and improve such lands under the grantee; (see chapters on khaikars and sirtans). Instances are sometimes found where clearings of Nayabad have been made without previous application

and sanction. In such cases the land may be either settled under a Nayabad lease or may be resumed and further cultivation prohibited, with or without a prosecution for illicit cultivation. Where such a grant is considered admissible, arrears of revenue up to three years are taken at times as a penalty. The revenue rate fixed for such leases is usually that prevailing in the village, within which the land lies, for land of the same class or of the class which the Nayabad will attain to.

As a general rule Nayabad grants are only recommended where forest and waste land is abundant and usually to residents of the village within the nominal boundaries of which the land is held to lie. There are few suitable tracts now left where, in fairness to the neighbouring villagers, grants of any considerable area can be given to outsiders ; this is still occasionally done, in the case, for instance, of deserving native officials or officials on retirement. A Nayabad grant constitutes a separate revenue mahal until the next revision of settlement, when it is usually included in the village in which it lies or made into a *laga* of such village.

The villagers cannot contest the right of Government to confer proprietary right in unmeasured land by a nayabad grant.

They may, however, as in the case quoted in the chapter on hissadars establish the fact that land erroneously given in a nayabad grant was already their measured proprietary land.

And in Bachi and others *versus* Chanar Singh of Basoli, Rangor, where the latter had got a nayabad grant in his own name and the other hissadars sued for a share in it, Colonel Grigg, Commissioner, held that where hissadars other than the grantee claim title and possession in nayabad they can sue to establish their right on the customary principle (following a ruling of Sir Henry Ramsay's that all hissadars in actual possession are entitled to share in nayabad). Colonel Grigg also followed other rulings of the High Court (vii, Allahabad, 649, etc.) .(Commissioner's order of the 9th March, 1899.) A nayabad grant is thus not conclusive *inter partes*. Presumably the villagers affected could similarly establish an ancient right of way or water within a nayabad grant, though they could not interfere with the cultivation of the land or any action necessary thereto on such grounds as the claim of ancient grazing rights. Such claims are considered before the grant is sanctioned (see rule iv), and any customary rights to be continued within the area should be laid down in the conditions of the grant.

(7) *Village boundaries*

The question of village boundaries may be mentioned here, as it is one that concerns both extensions of cultivation and also other rights of the villagers. These village boundaries have

been referred to in the sketch of a hill village in the opening chapter. In 1880 (Sambat) Mr. Traill carried out a great so-called "measurement" of the whole province and included all lands of whatever description within the nominal boundaries of the villages, so that however far the forest stretched on any side of a village, the limits of that village extended through the forest until it met the boundary of some other village. There was no actual measurement of the forests and only an estimate of the cultivated blocks. These boundaries are known as the *assi sal* boundaries. They were merely convenient divisions of the district, a "nominal allotment of waste" (Mr. Batten), and conveyed no proprietary right over waste and forest land to the villagers, though in most cases they corresponded with the village customary sphere of grazing and timber rights especially in the more closely cultivated tracts. Though these boundaries, as now understood, are always called Mr. Traill's *san assi* boundaries, Mr. Beckett says (Garhwal Report, paragraph 8) that they had existed "from time immemorial". They have in the course of time become more and more identified with the customary rights of the villages and the settlement papers (*cf.* appendix to Chapter I), note the customary grazing land and sources of fuel and timber either as being within the village boundary, or as in specifically named areas outside the boundary.

The attenuated legal existence of the *san assi* boundaries, as an actual delimitation of the village forest and waste, ended, as Mr. Goudge points out, when all forest and waste was notified as District Forest in 1893 (Almora Report, paragraph 16); but they are still of importance in relation to the customary rights of user and easement of adjoining villages. This aspect of the case will be referred to later on.

As regards new cultivation, Mr. Pauw remarks (page 38): "Notwithstanding the large area of waste land usually existing outside the cultivation of the village, but within the nominal boundaries, boundary disputes are not uncommon, and refer usually to a patch of cultivation on or near the nominal boundary line when the latter consists of a ridge, frequently in the middle of it. In such cases, it was ruled by the Board in 1891, 'the land should be included in the village to which the persons in possession belong'; the ancient boundaries being altered accordingly."

This order requires to be applied with understanding; it refers to genuine boundary plots and could not in any way justify or support a man who crossed right over all debatable ground and took up a plot in the middle of the waste land of another village. In populous tracts and on suitable slopes the cultivation of two villages sometimes actually intermingles and is often separated only by the narrowest of lines. In such places

it is often of importance to a village that its neighbours should not cross a certain streamlet bed and cultivate the scanty waste land of the former. When, however, a broad stretch of waste and forest intervenes between two villages, or where both have abundant waste on opposite sides, meticulous accuracy in observing the boundary cannot be insisted on. So far as the State is concerned, then there are no legal village boundaries other than those of the actual measured area ; as regards the mutual rights of the villagers such boundaries exist.

(8) *New cultivation. Relation of the villagers* inter se

Turning more particularly to the mutual relations between the villagers in respect of new *benap* cultivation, such relations naturally fall into the two classes of those between village and village, and those between the various residents of the same village.

Village against village.

The former have been referred to in the last paragraph, and turn on the question of the customary boundaries and the rights of the villagers within a certain sphere. Where the cultivated lands of two villages closely adjoin, so that "zone" extensions of cultivation may be made freely about the boundary line, the people of one village would clearly be entitled to defend their customary sphere of "zone" land, which has always been their waste pasture or recognised as used by them exclusively, against the incursion of cultivation from the next village and could sue for an injunction to inhabit any such cultivation.

In many cases, however, the boundaries lie well outside the limits of permissible extensions and in such cases any new cultivation would come within the sphere of executive action, as nayabad, and would be decided by the intervention of the District Officer. Any clear invasion of the customary limits of another village would no doubt the disallowed.

Villages, however, are intensely jealous of the least infraction of their old boundaries, even if they do not affect their interest in the slightest degree. Only last year two villages in Malla Kaliphat quarrelled over the building of one or two shops near the road ; these villages were separated by about 5½ miles of virgin forest and their nominal boundaries crossed the road just where the men of one village were erecting shops. They disputed violently as to whether the boundary ran a few yards on the one side or on the other side of the shops and were much dissatisfied at being told that it was nonsense to dispute over a point of the kind. The complainant village did not want to erect any shops and had not the slightest real interest in the question of whether they were erected or not.

Much more common are the disputes between members of the same village. The hillman loves to seize an opportunity of harassing his enemy, and when his enemy clears and cultivates some waste land, an opening is often found. Mr. Pauw (page 38) says on this subject: "For the protection of the village communities against a too pushing member, and to enable it (sic) to enforce its decisions regarding the cultivation of waste or common land, a civil suit lies against an extension of cultivation, or an executive order permitting such cultivation. Such suits have been common since the last settlement and possibly previously, and Sir Henry Ramsay has left several decisions to the effect that grazing land must not be brought under cultivation against the will of the village community (*e.g.* Situ Rai of Kandara, Talla Kaliphat *versus* Panchmu, 30th November, 1875). The case of Kishna of Dandalgaon, Nandalsyun *versus* Dhonkalu (26th February, 1895) is a recent decision of the Commissioner's court to the same effect. It is frequently the custom of villagers from petty spite to sue to restrict cultivation on unmeasured land long after such cultivation has been made. Regarding such cases Mr. D. T. Roberts, as Commissioner, ruled in the case of Hayat Singh of Syuni Bachhansyun *versus* Jawaru and others (17th August, 1893): "Mere extension of cultivation without permission or even in face of an old prohibition should not be allowed as an excuse for one quarrelsome resident of a village to harass and annoy the rest of the villagers. When the question has to be considered whether *gauchar* should be allowed to be broken up and cultivated, it is the general interest of the villagers and not of any particular one of them that should weigh. In this case the kanungo reports that the land has been under cultivation for twelve years, and it is admitted that much of it has been under cultivation for a long time. The Deputy Collector's order directs that it all be made waste again in order to limit the inconvenience suffered by one villager. Such an order is injudicious and tyrannical. The whole area is only three or four acres and it is inconceivable that this diminution of the area of pasturage can have much effect."

Disputes between members of a village.

The general permission to extend cultivation is subject to due regard for village custom and respect for the rights of user and easement enjoyed by the villagers in general. Thus a man in extending cultivation must not close any of the old village paths or obstruct a right of way; he may not appropriate the land in which the village cattle have their watering-place or their customary gathering place (*parao*); and in villages where grazing land is scanty, he may not appropriate any considerable area of the common pasture, except by general consent. If he does any of these things, he can be restrained by a suit on the part of those whose customary rights are infringed.

Such a suit in the case of a genuine grievances is generally brought by the hissadars as a body or by a considerably number of them.

Not frequently, however, such suits are brought merely in a vexatious spirit, as in the last case quoted by Mr. Pauw. Cases of this class can generally be most satisfactorily decided by a visit to the spot and a local inspection, but this is not always possible. In the case of a complaint about scarcity of pasture land, which is perhaps the commonest objection raised being usually thrown in as a make-weight in addition to any other alleged injury to rights, a local knowledge of the tract is very desirable. In many parts where there is ample forest and grazing land objection to an acre or so of cultivation on the ground of inconvenience by diminution of the grazing area must be purely vexatious and obstructive. On the other hand in certain parts of Pali Pachhaun, Chaundkot and other parganas the available area of waste is so limited in some villages that they maintain a careful and systematic arrangement for grazing land and even a fuel-reserve. In such a case it would be unfair to allow one man to appropriate anything more than a very small extension for cultivation in opposition to the general wishes of the community and to their jointly agreed-on plan of management of the common land. In some villages even the measured and assessed common land is specially kept waste for grazing, and such villages it is clear that there can seldom be much room for expansion in the unmeasured area.

(9) *Rights in unmeasured cultivation*

In writing of Nayabad the rights of the grantee in relation to other villagers have been referred to already. In extensions of cultivation, when once made, subject to any such objections on the grounds of injury to customary rights, as have been mentioned in the last paragraph, the person clearing and cultivating the land has a title to hold it as against any other villager (*cf.* exhibit D of appendix to Chapter I). He has not got proprietary right and does not obtain it till the next settlement; but he has a right to retain possession as against any one else and no one else has any claim to a share in the land.

The same applies to two or more men jointly extending cultivation. As noted in previous chapters hissadars, khaikars and (subject to their landlord) sirtans can extend cultivation, and they retain in such cultivation the respective status that they have in the adjoining old measured land.

A hissadar can transfer his possession and his prospective proprietary right in unmeasured extensions as in measured land; as mentioned in an earlier chapter, a hissadar selling his measured land in a village usually hands over his unmeasured extensions

with it, though he cannot legally sell a non-existent proprietary right. Similarly a pre-emptor would be entitled to get possession of the extensions which had been handed over under the first sale.

The previous chapters on hissadars, khaikars and sirtans may also be referred to on rights in unmeasured cultivation.

PART III—RIGHTS IN UNMEASURED LAND NOT RELATING TO NEW CULTIVATION

(10) *The State and the villagers*

Apart from extensions of cultivation into Government unmeasured land, there are various other miscellaneous rights in the produce of such land, which have always been enjoyed by the people. Among the rights of this class are those of grazing, cutting grass, taking fuel, getting timber for building and agricultural purposes, lopping twigs and leaves for fodder, getting stone for buildings, and taking bamboos, fruits or the honey of wild bees.

Rights in the district forests.

The villagers have always enjoyed the right of meeting their requirements in these matters from the neighbouring forests, and they are still allowed very considerable freedom subject only in certain directions to the simple regulations laid down under the Forest Act. It is not necessary to reproduce here the rules in force or to recount in detail the working of the district forests. It may be briefly said that as regards grazing and cutting grass, taking stone for buildings and ringals and bamboos and wood for fuel and collecting wild honey or fruits, etc., the villagers are allowed full liberty by Government in their surrounding forests ; and there is no official interference with them in any way. As regards the supply of timber for houses it is given free at fixed times on a system of indents in the case of reserved trees, and other trees can be cut for timber or for agricultural implements freely at any time. Mature trees may be lopped for fodder or manure freely, provided that they are not cut excessively so as to injure them.

The only restriction or regulation of rights is thus in the selection of trees to be cut for timber and in restraining excessive lopping, and these restrictions are only imposed as necessary for the management and preservation of the forests. Two general conditions, however, are applicable to all exercise of their rights. The rights are intended to supply the genuine domestic and agricultural needs of the villagers only. They must, therefore, in exercise of their rights (1) not take any forest produce for trade or in order to sell it ; and (2) they must only take what they really need ; they must not cause wanton mischief or damage the forest by excessive cutting of trees in excess of their *bona fide* requirements. A villager may cut oak, which is an unreserved tree, for agricultural implements freely,

but at times a villager will cut scores of oak trees on land adjoining cultivation on this plea, but really with intent to have land on which to extend cultivation without cutting trees. such practices are inadmissible. Similarly a villager, who takes a contract, cannot cut trees in order to burn lime in the exercise of his free rights, since this is a taking of forest produce for trade purposes. Again a shop is not a domestic or agricultural necessity, and a man who wants to build a shop must pay for the timber. All collection and removal of forest produce for sale or for purposes of trade must be paid for and done under a licence from the District Officer.

The above remarks apply to all the district protected forests, whether managed through the district forest staff or through the revenue staff, excepting only the few small areas that have been closed for reproduction by notification. In these the exercise of rights is temporarily suspended.

Burning of forests.

It has been the immemorial practice of the villagers in Kumaun to burn many of the district forests, especially pine forests, every year with a view to stimulating the new growth of grass and to render the forests passable for cattle (since a bed of fallen pine needles on a step slop is as slippery as ice and causes many fatalities to cattle). In the open district forests firing is permitted, but in the closed areas managed by the district forest staff, it is not allowed. Firing is an offence punishable under section 32 *(d)* of the Forest Act.

Whether the firing of hill forests causes as much damage as is often asserted, is a question which need not be discussed here.

Shooting and hunting.

A separate licence is necessary for shooting or hunting in the district forests, except for certain exempted classes. A gun licence alone does not convey any right to shoot or hunt. Similar rules have been introduced for the fishing in the Naini Tal lakes which lie within the district forests, but in all other waters within these forests fishing is free of all restrictions except that water may not be poisoned. Water may not be poisoned and fish may not be destroyed by explosives.

Reserved forests.

In the reserved forests, however, and in certain demarcated protected forests which are managed by the Forest Department the rights of the villagers have been settled and notified and are exercised under considerably stricter limitations, which need not be detailed here. The requirements of the villagers are met without payment, as far as the forests can supply them, and a regulation of the exercise of rights under careful supervision and not a limitation of rights is the chief object aimed at in the administration of the reserved forests in this connexion.

No firing of the forest is allowed in reserved forests. Shooting and fishing rules are also enforced.

(11) *Rights of the villagers* inter se

The first reference to the relations between villagers and villagers in respect of these rights, as distinct from the relations between the State and the villagers, is found in Mr. Batten's Garhwal Report, paragraph XVI.

He says of Mr. Traill's *san assi* boundaries that this division of waste had been found useful in giving separate tracts for pasture for the cattle of different villages ; the villagers, however, were strictly forbidden from levying dues for the privilege of grazing within certain boundaries unless the custom of paying and receiving them had been immemorial. "No one had a right, merely on account of the inclusion of certain tracts within village boundaries to demand payment for the use of pasture grounds or for the permission to cut firewood or timber."

Question between different villages.

No villagers, says Mr. Backett, had rights empowering them to dispose of timber, claim pasturage fees or exclude their neighbours who had from olden times enjoyed the privilege of grazing cattle, cutting wood, etc. (Garhwal Report, paragraph 8).

The whole question turns in fact, as between one village and another, on the ancient and customary rights of user. These are recorded in the village memoranda at Settlement (see sample copies appended to chapter I) and no one has any power to interfere with their exercise. But on the other hand, as in the case of extensions of cultivation, no village has the right to invade the customary rights of another village to the latter's detriment where the former village has never hitherto exercised any rights. Each village has its own fixed customs and ancient rights over certain tracts of adjacent waste and forest land, and no other village can interfere so as to injure the customary interests of the first village.

In some tracts particulary on high ground, where there is much snow in winter, a village will have a certain area which by mutual agreement is left untouched throughout the hot weather and rains to raise a hay crop, no cattle being taken to graze there. In the autumn the whole village goes out and cuts the hay. Where a provident arrangement of this kind has been followed by custom for many years, it would be an obvious infringement of their rights if the people of another village, who had never been in the custom of grazing cattle or getting grass from that area, came over and cut all the preserved grass.

The question, however, is most often acute in the most populous and cultivated tracts, where experience has taught the people the need for, and the value of, fuel and grass and

timber. In these regions many villages may be seen, which have cultivated practically all the land in their boundaries and have only a few acres of barren grazing land and hardly a single tree left. Such villages, driven by hard experience, will often make careful arrangements for fodder and fuel. The practice of keeping measured common land waste for grazing has been mentioned before. Some villages keep a little fuel reserve, an area of waste on which brushwood and bushes are preserved and encouraged to grow, and which is cut over at a fixed time by mutual arrangement to provide fuel. In such cases it is only the village which has by ancient custom and user the right of taking fuel and grass from such an erea, that is entitled to do so, and that village can claim damages against any outsiders who infringe their customary rights. It would obviously be inequitable if a village which had recklessly cultivated every acre of its own land and cut every stick of brushwood within its own customary sphere, could go over into the land of a more provident village and take their store of fuel and grass from the edges of their fields.

Similarly in such tracts, among many villages which have not a tree left except a few on the edges of cultivated fields, which are private property, some villages will be found to have a compact block of a few acres (often only one or two) of forest preserved in the middle of their scanty grazing land. The preservation (*palna*) of such a block often means considerable self-denial and forethought on the part of the villagers. It will also be found that they have always had the exclusive customary right of getting fuel or wood from that area and other villages have never exercised any such right. In all such cases, the village is entitled to maintain its customary rights over the areas where it has always had a clear exclusive right as against other villages, the customary rights of which lie elsewhere. Decrees have frequently been given for damages, where such rights have been invaded by outsiders. A recent case in which this was done was Lachhi Ram and others of Gadoli, Maundarsyun *versus* Mukh Ram and others of Bagyali (Mr. Shakespear, Commissioner's final order of 15th September, 1905) in which the plaintiff were awarded damages and an injunction for the cutting of fuel from their preserve by a village which had no customary right to take it. In such cases the villages that have not preserved any fuel or grass for themselves, should go and get it from the nearest large area of district forest, where they will injure no one's rights by taking it. In the case of the little blocks of preserved forest in such villages Government has no doubt the power to allot trees to any neighbouring village, but this should not be done in fairness to the village affected, when the other villages have not been in the custom of getting trees from the protected block. There are often standing orders in such cases, some of them dating many years back, that no other village is to be given

trees from the block in question. I should not mention the question at such length, were it not that it has been alleged in places that the conversion of the waste and forest land into district protected forest has done away with all such customary rights as between villagers within specific spheres. This is a mistake; the notification altered or defined the status of forests lands as between the State and villagers; it was never intended to do away with the mutual customary rights of the villagers. Very recently a village applied for some pine seed and for permission to set aside part of their waste land and establish a small chir forests on it for the village supply, on the understanding that the trees they grew would not be given away to outsiders; such laudable efforts merit encouragement and protection both in equity and in accordance with custom.

(12) *Questions between individual villagers*

Very few questions arise between members of the same village community in respect of these rights in unmeasured land, other than those relating to new cultivation. In the matter of new cultivation it is generally a case of every man for himself, in the case of other rights they belong to, and are exercised by, the whole community as a united body. The cattle all graze together, the women all go together to cut grass or gather fuel and no one has any special preserve or separate rights of his own. There can be no definite fixed allotment of such rights between the various inhabitants and they seldom quarrel over the exercise of them. There are occasional disputes over fruit trees in waste land which one man alleges to be common property, while another claims to have planted and preserved them as his own. But the most usual source of trouble in this direction relates to trees standing among measured fields. The field walls of terraced cultivation or the short slopes between two fields often have isolated trees standing on them : these trees are used to store straw upon, lopped for fodder or used in special ways, and finally cut for timber. They are generally protected and grown by some cultivator and are by custom recognized as private property, though the stripe on which they stand may be technically a bit of unmeasured land. When they stand between the fields of two different men, there are not infrequently disputes as to the cutting of them, but these are simply questions of fact. Questions of right of way and water generally relate to cultivated land, since no one interferes with them except in the way of cultivation. Occasionally one or more men will try to appropriate part of the village waste for a special grass preserve or some such purpose : this they have no right to do against the will of the community in general. On the whole, however, the village community is generally fairly harmonious except in questions relating to cultivation.