

In conclusion, let me say that I am very well aware of how imperfectly I have dealt with my subject. I trust, however, that I may have succeeded in pointing out that purchase in some of its forms can no more be defended than bribery at an election. I would remind some of those able and distinguished men, who on a former occasion before this Society advocated purchase in the case of hospital appointments, that they have been misunderstood, and their authority has been cited in support of systems of purchase of which I cannot doubt they also would strongly disapprove. Although I admit that in this age, and with a society such as this, soundness of argument goes further than authority, and that which is said has more effect than who it is that says it, yet it is certain that the weight of an eminent man's name is often cast into the balance, and the lighter the scale the more need for that kind of weight. It is, therefore, all the more necessary that men of authority should be careful in defining their views, otherwise they are liable to be suspected of countenancing what in reality they would shrink from as dishonest and dishonorable.

V.—*Tenures and Land Legislation in British India.*—By Henry Dix Hutton, Barrister-at-law.

[Read Tuesday, 25th January, 1870.]

THE Irish land question verifies a twofold truth. Every social movement grows out of an antecedent intellectual progress, yet the results of solitary thought gain both in depth and interest by becoming instrumental to the solution of great problems. The impossibility, now recognized, of reforming the relation of landlord and tenant in Ireland by the English system, or economic *laissez-faire*, has promoted the search after enlarged conceptions in the study of foreign land-systems, and a genuine social philosophy. In this view, and not as suggesting slavish imitation, I invite your attention to the ancient tenures and modern land legislation of British India.*

The historic analogies and contrasts between India and Ireland are alike remarkable. Both countries were occupied for centuries—India exclusively—Ireland in the main—by numerous native communities, organized on the primitive system known as tribal, and governed by chiefs nearly independent and possessing semi-hereditary power. In both countries, also, the original population was eventually subjugated by a stronger power. In Ireland, however, the native system was entirely disorganized before the successive settlements of the seventeenth century completed its ruin. The native Hindoo tenure, on the contrary, long flourished and acquired

* For the materials of this paper, I am much indebted to the friends who have kindly furnished me with the recent Indian enactments; and to the essays by Mr. George Campbell (*Systems of Land Tenure*, Cobden Club, India); and Judge West on the *Land ques ion in Ireland viewed from an Indian stand-point*, by a *Bombay civilian*.

a solid social basis; and the subsequent Mahommedan rule fortified its political authority by respecting the native land institutions. Only with the decline of the Mogul Empire did a state of anarchy ensue, the consequences of which manifested themselves during the eighteenth century, and became interwoven with English policy and legislation in India. The extent of this disorganization, nevertheless, varied greatly; and the history of different provinces exhibits sometimes great ignorance or disregard of native habits and ideas, at other times a just appreciation of these. To comprehend this double aspect of British rule in India, it is essential to understand the fundamental conceptions of the Hindu land-institutions.

In the earliest times the Hindu tenure was essentially tribal, and, as such, distinguished by two characteristics. First, the property in the land belonged to the tribe; the possession was granted to the heads of its component families. Secondly, this possession was not individual and perpetual, but joint and temporary, the land being liable to resumption and redistribution by and for the benefit of the tribe. These two characteristics, universal, I believe, in primitive societies, gave to occupiers a *status* distinct from proprietorship and equally so from tenancy-at-will. But the system of joint and changing cultivation has, even in nations still barbarous, been gradually modified and transformed—sometimes into individual property, but more frequently into individual occupancy more or less stable in its character. To the present day in many parts of Hindostan, wherever conquest, anarchy, or mistaken administration have not broken up primitive institutions, the village (which includes the surrounding territory cultivated by its inhabitants) still forms the political unit; but, except as regards grazing commons, there is no landed communism—each member of the village cultivating his own share, which is no longer subject to redistribution.

On the other hand, the principle of occupancy has survived and attained to an hereditary character. Older families occupying larger tracts acquired a superior position, and hereditarily exercised certain offices, as those of village accountant and registrar, connected with the land institutions; but the mass of the cultivators who resided permanently in the village, acquired and transmitted rights of occupancy, involving the claim to exclusive and undisturbed possession, subject only to certain customary dues. With the development of society, the tribe expanded into the state, and both village proprietors and village occupiers were bound to pay a certain proportion of the produce to the state. The dues thus paid constituted a public rent or land-tax, which originally consisted of a certain customary proportion of the produce of the village lands. The recognition of this customary limitation of the state rent is clearly marked, as Mr. Mill has observed, by the fact that its subsequent increase always took the shape of distinct cesses, levied sometimes on equitable grounds, sometimes by arbitrary power. The land dues thus paid at this day form nearly half the revenue of British India.

The primitive village system was thus gradually modified in two ways—one industrial, the other political. The industrial transformation consisted in substituting for a joint and precarious, an

individual and hereditary cultivation, based on a customary occupancy tenure. This embraced the mass of lands gradually brought into cultivation by an increasing population. It also extended over the lands at first appropriated to certain families, who, diminishing in course of time, allowed new comers to occupy, subject to the customary terms. In this and other ways, presently to be mentioned, there sprang up a class of intermediate and larger landholders. Their tenure also was based not on contract, but on *status*; it conferred no absolute right, being subject on the one hand to the state dues, on the other to occupancy claims of actual cultivators. These claims were supported not only by custom, but by the interests of the greater landholders, for in Hindostan the competition was not between cultivators for land, but by the rulers or superior landholders for cultivators.

The political transformation of the primitive system arose from the expansion of the tribe into the state—a process largely brought about by conquest. The Hindu system rested on a multitude of comparatively small independent principalities or chieftainships, generally hereditary. The Mahomedan conquests were far more extensive, and created a more complicated official system, which had a non-hereditary character. Their dynasties, however, did not, during the period of their strength, disturb the village tenures, so deeply rooted and well adapted for administrative purposes. But when the Mahomedan Empire fell to pieces, and during the disorganized period preceding the British conquest, a somewhat new state of things arose. Collectors or farmers of the land revenue in some districts assumed independence, and made their office semi-hereditary. They exercised their powers, territorial and political, to appropriate a larger share of the produce, by laying on new cesses, still, however, recognizing the customary occupation tenure of the cultivators. To use our language, the tendency of these officers—in Bengal called *Zemeendárs*—was to make their office, with its appertaining share of the revenue, an hereditary benefice, and as regards the cultivators, not to disturb their customary tenure but to raise their rent.

This state of things suggests reflections which show the unreasonableness and danger of applying purely English notions to land systems which diverge from the very peculiar and almost unique relation of landlord and tenant that prevails in England. The fact that the principle of hereditary occupancy survived and gained strength, while that of joint cultivation disappeared, proves the superior strength of the former. If time permitted, it would be interesting to show the strong hold which the occupancy principle took in European nations, ancient and modern. I cannot, however, omit to refer to its clear and long-continued recognition in that fountain of justice, the Roman law. Savigny has proved that the important doctrine of *possessio*, as distinguished from *dominium*, originated in the permissive, but in practice hereditary, occupancy of the *ager publicus* or state land, and Niebuhr's explanation of the agrarian laws illustrates the social significance of this system. The occupancy doctrine stands in direct contradiction with what I

may designate as the industrial feudalism and economic *doctrinaire-ism* so prevalent in England.

The feudal maxim, though in practice considerably qualified by the conduct of landlords and judicial decisions, still confiscates, for the benefit of the landowner, the tenant's improvements. But in India no such maxim prevailed. As Mr. Campbell, in his recent valuable essay on India, observes, "The making of an improvement which cannot be removed—the building of a well or even the planting of a tree—is always regarded with jealousy as an act involving ownership or at least permanent occupancy." Those who measure everything by enlightened self-interest, *laissez-faire*, and free bargaining, may consider this very absurd; but it strikes me as reasonable, and accordant with the history of human nature. From the earliest period, and indeed in all times and countries, more or less, two modes of acquiring and transmitting interests in property, and especially in land, have been recognized—gift and inheritance. The owner who, in the absence of any specific arrangement, stands by, allows, and encourages the cultivator to incorporate his labor and capital in permanent improvements of the soil, virtually confers a corresponding interest therein on the improver. Hence naturally springs a right of occupancy, which acquires a still stronger character by its hereditary transmission in families permanently living on the land thus reclaimed and improved. The *status* tenure, so created, differs totally from that which springs from contract—a modern and to this day, in many countries, infrequent mode of dealing with land. So long as the military spirit prevailed, the hereditary-occupancy principle also prevailed. With its decline the commercial spirit induced landlords to set it aside, while they preserved for their own benefit feudal maxims which it largely corrected. Again, the occupancy tenure is based not on contract but on two principles much older, more authoritative, and enduring—custom and equity. In India the customary tenure always prevailed. The modifications it underwent sprang not from express bargaining, but a sort of rough understanding of what was thought reasonable. Of course, rulers or powerful landholders could often impose oppressive claims on cultivators; but the new cesses, there is reason to believe, frequently represented a claim to revise the ancient rent on the ground of change in the value of money, and other reasons for an equitable increase in the landlord's share of the produce. Politically, also, the notion of an absolute proprietorship, indefensible even in England, was never admitted in India. The state was not, as is sometimes alleged, proprietor of the entire land, but at most of waste land, and usually disposed only of the revenue or rent—thus being a proportion, varying with circumstances, of the produce. On the other hand, the state having the greatest interest in cultivation, exercised, even where intermediate landholders existed, a certain control both over and in favour of the cultivator. The Indian cultivator, for the most part a peasant farmer, not only enjoyed permanent occupancy subject to certain customary dues, but was an object of protection. The term Ryot, employed to designate him, in fact means "the protected one."

The fundamental features of Indian tenures, therefore, were state ownership, usually limited to a customary share in the produce, with a certain power of adding new cesses, which in time acquired the force of custom; and an hereditary occupancy enjoyed by the cultivators, subject to such dues, payable either to the public authorities or to intermediate landholders. The latter class, embracing collectors or farmers of the revenue, prevailed extensively during the decline of the Mahomedan Empire in certain districts—especially in Bengal, where they were styled Zemeendárs. With this state of things the British government had to deal, during the gradual extension of its rule throughout India. The plans adopted have differed widely, and their execution even more so. Both were greatly influenced by one cause, an attachment to the “English System,” interpreted, however, in different ways by different men. This disposition displayed itself in two leading modes: first, the notion of landlord and tenant, the former occupying the position of a great proprietor wielding a social influence, half industrial, half feudal; secondly, the idea of individual property, with power of selling and willing, and liability to sale for debt. Two very distinct types of tenure, respectively corresponding to these views, were developed out of existing germs under British rule. The first, or landlord-and-tenant type, is represented in the Zemeendáree Settlement, which prevails in the Presidency of Bengal, by which the cultivators were placed under the large landholders. The second, or individual-property type, seems to have largely influenced the settlements of Bombay and Madras, styled Ryotwáree. In the latter two Presidencies, the British Government dealt directly and individually with the Ryots. The Ryotwáree Settlement recognized no intermediate landholder, but planted each cultivator on his land for a definite term of years at a fixed rent, subject to an equitable revision at the expiry of the lease. In both these settlements the native village organization was disregarded, though it is right to add, that this was in a great degree owing to its instability and gradual extinction in those localities. In more recent times, other settlements, for example those in the Punjab and North-west Provinces, have been, to a considerable extent, based on the village as the political unit for tenure and revenue.

It is, however, essential to observe that the British leanings to the English relation of landlord and tenant, and abstract economic notions, seldom if ever led to a total disregard of native institutions in the framing of the various Indian settlements. Even under the best of these arrangements, indeed, much injustice seems to have been practically wrought by official bias, and, as Mr. Campbell points out, by throwing the *onus of proof* on the wrong party. This last cause has been peculiarly active and prejudicial in those provinces where continued anarchy prevailed, and time was not allowed for the establishment of a new customary tenure. But despite of these shortcomings, the Ryots’ claim to hereditary occupancy was, generally speaking, recognized, and this was especially the case in the three Presidencies. The Ryotwáree Settlement of Bombay and Madras confers an individual holding direct from government at a

fixed rent, subject to periodical equitable revisions. The same regard to native institutions was shown in the Bengal settlement, contrary to the general belief prevalent hitherto in England, that Lord Cornwallis converted the Zemeendárs into proprietors, and treated the Ryots as mere tenants at will. Such was not the case. Lord Cornwallis knew perfectly that the Zemeendárs were not absolute owners, nor did he make them such. He simply made an arrangement under which they acquired a perpetual interest in the lands, the revenue of which they had collected and accounted for, on the terms of paying a fixed sum to the state. He hoped that they might perform the office of capitalist landlords, augmenting their own revenues and the general prosperity by encouraging the cultivation of waste lands, and inducing the Ryots to raise new and more valuable products. He assumed that the Zemeendárs and Ryots, abandoning native habits, would enter into written contracts for reclaiming the wastes, and defining the proportion in which new products were to be shared. But the Bengal settlement of 1793-4 expressly recognized the customary rights of various classes of cultivators. Resident Ryots who had been in possession for twelve years before the settlement, that being the Hindoo period of prescription, were exempted both from enhancement of their ancient customary rent and from eviction, so long as they paid such rent. Resident Ryots who had not acquired a prescriptive right, were declared entitled to renew their leases at the rates customary in the district for the like land. Resident Ryots, whose holding commenced after the settlement, were to be bound by any special contract, but in the absence of such they should hold at the customary rate. The superior landholders were enjoined to consolidate the original rate and all extra cesses into one sum, and prohibited from imposing any new cess on the Ryots.

The practical machinery for recording and preserving their occupancy right was, however, very defective. Neither did the Zemeendárs act according to Lord Cornwallis's expectations. They made no special contracts, but allowed new cultivators to occupy their waste lands at customary rates. As the value of produce rose from the change of money and other causes, despite of the prohibition just mentioned, fresh cesses were imposed, and the aggregate charges in time gave rise to a new customary rate. Subsequent enactments relating to state-sales for arrears of the Zemeendárs' rents, placed the Ryots in a worse position than they enjoyed under the settlement. This, combined with the efforts of greater landholders, who were stimulated by mercantile ideas to set aside the ill-defined customary claims of Ryots, led, after the Sepoy mutiny, to the passing of the Act X of 1859, for Bengal and the North-west Provinces. This act was essentially declaratory. Setting aside the late enactments, so far as these were inconsistent with the spirit of the settlement; supplying modes of proof needed to do substantial justice; and laying down rules for adjusting the rents on customary and equitable principles, it confirmed the rights of Ryots who, by virtue of the settlement of 1793, were entitled, either as proprietors subject to a fixed rent, or as hereditary occupiers at a customary rent. All who

could prove unvarying payment for twenty years were, *prima facie*, placed under the first or proprietary class. The second or occupancy class, presumptively embraced those who could show an undisturbed occupancy of twelve years, unless the superior landowner could prove that they were not customary tenants, or show that the land occupied was part of his demesne.

The spirit of the Act of 1859, was a great advance on the settlement of 1793, for while according validity to special contracts, the recent enactment plainly recognized the practical predominance of a tenure based on custom and equity. The Act of 1859 declared that the occupancy-rent should be liable to enhancement only on specified grounds, of which two deserve particular mention. The first, applied to cases where the actual rent fell below the customary rent levied for lands of a like nature in the same district; the second, embraced cases where the value of the produce or the productive powers of the land had increased otherwise than by the agency or at the expense of the Ryot. The last-mentioned ground in time gave rise to a question of interpretation, which was decided in the celebrated Rent-Case, brought on appeal before the High Court of Judicature of Bengal, in the year 1865.

This case shows the necessity for checking the influence of extreme economic notions, too often appealed to by Englishmen in support of very unjust and unreasonable proceedings. The European indigo planters in India had long allowed the Ryots to hold at the old and low customary rents, on condition of their delivering the indigo plant at rates below the market value. In time this created great dissatisfaction, and caused disturbances which obliged the government to interfere, and prevent the oppressive practice of the planters. Thereupon they fell back upon the Act of 1859, and alleged that the "fair and equitable rate" of enhancement there sanctioned by it, meant the highest rent obtainable by competition. The indigo planters' interpretation, if allowed, would have practically destroyed the customary occupancy tenure, and transferred to them even the increased value due to the Ryots' labour and capital. The High Court, however (by fourteen voices against one dissentient), decided that the Ryot was not merely entitled to the increased value due to his own exertions, but to share with the planter in the increase arising from causes independent of either party. The increased value in the particular case arose from the rise of prices, and the court decided that the rent should be raised only to a sum proportionate to the increase of value.

The principles of Act X of 1859, have been largely adopted in more recent settlements, into which time does not allow of my entering. It is both interesting and instructive to observe in the history of the land legislation of British India, how home prejudices have gradually yielded to an enlightened, just, and humane regard for native ideas and institutions, how a great and difficult question of tenure has been solved by repudiating industrial feudalism and economic *doctrinaireism*, in favor of customary law and equitable principle.