

THE INDIAN DECISIONS, NEW SERIES,  
ALLAHABAD, VOL. V.

THE  
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(NEW SERIES)

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ALLAHABAD, VOL. V  
(1886—1887)  
I.L.R., 8 and 9 ALLAHABAD

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JUDGES OF THE HIGH COURT OF ALLAHABAD  
DURING 1886—1887.

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Chief Justices :

HON'BLE SIR W. COMER PETHERAM, KT.

" SIR JOHN EDGE, KT.

Puisne Judges :

HON'BLE MR. DOUGLAS STRAIGHT.

" " R. C. OLDFIELD (*Retd., 3rd March, 1887*).

" " M. BRODHURST.

" " W. TYRRELL.

" " SYED MAHMOOD.



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# THE INDIAN DECISIONS

NEW SERIES.

ALLAHABAD—VOL. V.

I.L.R., 8 ALLAHABAD.

8 A. 1=5 A.W.N. (1885) 315=10 Ind. Jur. 189.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Brodhurst.*

PARBATI (*Defendant*) v. SUNDAR (*Plaintiff*).<sup>\*</sup> [12th June, 1885.]

*Hindu Law—Brahmans—Adoption of sister's son—Suit for partition of property by person in possession making a false claim thereto.*

According to the Hindu Law a Brahman cannot validly adopt his sister's son.

B, a childless Hindu and a Brahman, adopted X, his sister's son, and subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to X. After B's death, X obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by P and S, two widows of B, who set up a right of inheritance from X, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by S against P for partition of the estate.

*Held* that the adoption of X by B, a Brahman, was invalid, and that P and S were not entitled to succeed him as his heirs.

*Held* also that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *Armory v. Delamirie* (1) and *Asher v. Whitcock* (2) referred to.

[R., 17 A. 294 (297) (F.B.) ; Reversed, 12 A. 51 (P.C.)=16 I.A. 186.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Mr. T. Conlan and Pandit Ajudhia Nath, for the appellant.

\* First Appeal No. 37 of 1884, from a decree of Maulvi Muhammad Maqsood Ali Khan, Subordinate Judge of Sharanpur, dated the 27th February, 1884.

(1) Smith's L.C. 6th edn. 313.

(2) L.R. 1 Q.B. 1.

1885  
JUNE 12.

APPEL-  
LATE  
CIVIL.

8 A. 1=  
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1885  
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Mr. C. H. Hill and Pandits Bishambar Nath and Sunder Lal, for the respondent.

APPEL-  
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### JUDGMENTS.

PETHERAM, C.J.—This is a suit instituted by one Musammat Sundar against Musammat Parbati, both of them being the widows [2] of one Baldeo Sahai, for partition of the property in suit said to be held jointly by them. As it is of great importance in the case to ascertain precisely the grounds upon which the claim is made, and the grounds upon which the defence is based, I will first proceed to explain them.

The plaintiff states in her petition of plaint as follows:—

"1. That the properties mentioned in the accompanying schedules form part of the estate of Lala Baldeo Sahai, deceased, who, being childless, declared Prem Sukh Das in his lifetime to be his adopted son and heir, solemnly executing a will in his favour in 1875. He died in December, 1878.

"2. That on the death of Lala Baldeo Sahai, the plaintiff and the defendant undertook to maintain Prem Sukh, minor, and to look after the affairs connected with the property.

"3. That Prem Sukh Das, who had not contracted a marriage, died during his minority, on the 3rd December, 1879.

"4. That the parties, who are the widows of Lala Baldeo Sahai, and mothers of Prem Sukh Das, obtained joint possession of all the moveable and immoveable properties, and lived together in commensality."

That is, in her petition of plaint she says in effect that, at the time of the death of Baldeo Sahai, he left an adopted son as his heir. Plaintiff and respondent took possession of the estate of Baldeo Sahai, on behalf of Prem Sukh Das, the adopted son, who was a minor. The minor died a year after. Since then the plaintiff and defendant remained in joint possession of the estate. Now the defendant is dealing with the property in a way to which she (the plaintiff) objects, and she asks for a division of the estate between them.

The defendant pleads that "Prem Sukh Das was not an adopted son of Baldeo Sahai, nor could he be adopted; the disputed property was acquired by him under a will executed by Baldeo Sahai. The plaintiff has no right in respect of the property in suit, and her claim in respect of it should be dismissed."

The parties went to trial upon the question of adoption, and in proving that Baldeo Sahai had adopted the minor Prem Sukh as [3] his son, it was proved that Prem Sukh was the son of Baldeo Sahai's sister. It is not necessary for us to consider the evidence as to the fact of adoption. The question is, had the adoption of his sister's son by Baldeo Sahai any legal validity? Baldeo Sahai himself had doubts about its validity. The will would not have been necessary had the adoption been a good one.

We have then to consider what was the position of the two ladies on the death of Baldeo Sahai. A form of adoption had been gone through and a will made. Prem Sukh was entitled to the same interest either under the will or by reason of the adoption. Whoever got possession of the estate, got it on behalf of Prem Sukh.

Both the ladies state that they maintained and brought up Prem Sukh, and they got their names registered as mothers of Prem Sukh.

During the lifetime of Prem Sukh, then, the two ladies were in possession of the minor's property, whom they recognised as their son. The result of this is, that they constituted themselves trustees for the minor.



As such, they continued to be in possession of the property till the death of the minor in December, 1879. After his death they continued in possession. They placed themselves in the position of his mothers, and as heiresses to him, and not in the position of the widows of Baldeo Sahai. That is the right which both claimed in the property, and upon the basis of which they remained in possession of the estate since the death of Prem Sukh.

Two contentions have been raised before us. The first is that the two widows are actually heirs; that the adoption was legal and valid; and that Prem Sukh was therefore the son of Baldeo Sahai and his two widows.

The question then is, can a Brahman (for the parties in this suit are Brahmans) in this country validly adopt his sister's son?

It is urged that the earlier authorities on Hindu Law do not prohibit such an adoption; that the view taken by the two *Mimansas* is opposed to these earlier authorities; and that the ancient texts upon which the *Mimansas* profess to base their view do not support that view. It is admitted that all the Courts have hitherto adopted [4] the view which the *Mimansas* take; but it is urged that as that view is wrong, the decisions based upon it are wrong also. I do not propose to re-open the question. All the Courts have acted upon the view taken by the two *Mimansas*, and we are bound to follow the authority of a long and uniform course of decisions. Sitting as a Division Bench of this Court, it is not competent for us to disturb the long and uniform course of decisions by all our Courts, from the earliest times, upon this point. If the respondent wishes to re-open the whole question, she must go to the Privy Council. It must therefore be held that the adoption of Prem Sukh Das was invalid, and that upon the death of Baldeo Sahai he took the estate under the will.

The question then arises:—What is the position occupied by the two ladies since Prem Sukh's death? They had no rights as mothers. They took possession of the estate on behalf of Prem Sukh, and their possession was that of trustees on his behalf. They remained in possession as heiresses, and as such set up a claim to his estate. That claim has failed.

It is then contended that, even allowing that they have no right to the property as the heiresses of Prem Sukh, still, inasmuch as they are in possession of the estate, they are competent to maintain a suit for its partition between themselves. Various authorities have been cited in support of this contention.

The first case cited to us was the case of *Armory v. Delamirie* (1). We are also referred to some of the cases mentioned in the note to this case.

Now in the first case, the plaintiff, who was a chimney sweeper's boy, had found a jewel. He carried it to the defendant's shop, and delivered it into the hands of the defendant's apprentice. The apprentice, under the pretence of weighing it, took out the stones, and returned the empty socket. In an action for trover by the plaintiff, it was held in this case that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all except the rightful owner.

Now in that case no false claim was set up; the claim was a claim to bare possession.

[5] The other case cited was *Asher v. Whitcock* (2), a case relating to land.

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In that case a person had enclosed from the waste of a manor a piece of land by the side of the highway in 1842. In 1850 he enclosed more land adjoining, and built a cottage. He occupied the whole till his death in 1860. By his will this person devised all his property to his wife for and during so much of her natural life as she might remain unmarried, and from and after her decease or second marriage, whichever event might first happen, to his only daughter in fee. After the death of this person, his widow remained in possession with the daughter, and in 1861 married the defendant. Early in 1863 the daughter died, and the mother also died soon after. The defendant continued to occupy the property, and the heir-at-law of the daughter brought this suit for ejectment against him. It was held in that case that a person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land and cannot show title or possession in any one prior to the testator. Possession is a good title against all the world, except against one who can show better title. By reason of his possession such person has an interest which can be sold or devised. If this person had devised his interest to two others, they might divide it among themselves.

In this case there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. We cannot recognize such a claim; to do so would be to recognize an illegal transaction, and we should be dividing an estate which has no legal existence. The suit is not maintainable, and we must allow this appeal, and dismiss the connected appeal No. 55 of 1884. No costs on either side in any of the Courts.

BRODHURST, J.—The plaintiff, the younger widow of Baldeo Sahai, Brahman, instituted a suit in the Court of the Subordinate Judge of Saharanpur against the defendant, the elder widow of the said deceased person, for partition, and for separate and complete possession of a half share of certain houses, and for other reliefs as contained in the plaint.

[6] The Subordinate Judge partly decreed and partly dismissed the claim, and from his decree the defendant has now appealed.

It is proved that Baldeo Sahai went through the form of adopting Prem Sukh, his sister's son, and, subsequently having reason to believe that such an adoption was invalid, he, on the 21st July, 1875, executed a will in favour of Prem Sukh.

Baldeo Sahai died in 1878, and Prem Sukh succeeded to possession of his estate; but he died in 1879 during his minority.

The adoption of a sister's son by one of the twice-born has been held in numerous rulings, and by every one of the High Courts in India, to be invalid under the Hindu Law, and the proposition of the plaintiff-respondent's learned counsel to the contrary, in my opinion, has not been and cannot be sustained.

The plaintiff-respondent did not obtain possession of the property in suit as a widow of Baldeo Sahai, but Prem Sukh succeeded to possession under the will, and on his demise the plaintiff was not entitled to the property, and had no right to bring the suit.

I therefore concur with the learned Chief Justice in allowing the appeal and in dismissing the suit without costs.

*Appeal allowed.*



**8 A. 6 (P.C.) = 12 I.A. 150 = 4 Sar. P.C.J. 663 = 9 Ind. Jur. 442.**

**PRIVY COUNCIL.**

**PRESENT.**

*Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch, and  
Sir Arthur Hobhouse.*

*[On appeal from the High Court for the North-Western Provinces.]*

**ALEXANDER MITCHELL (*Defendant*) *v.* MATHURA DAS  
AND OTHERS (*Plaintiffs*). [19th June, 1885.]**

*Act III of 1877 (Registration Act), ss. 17, 49—Effect of a registered instrument confirming a prior one of the same purport not registered.*

An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-section (b) of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held* that the fact of the prior deed not having affected the property being [7] unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the objects of the Registration Act.

[**F.**, 4 Bom. L.R. 893 (899); **Expl.**, 12 C. 696 (701); **Rel. on**, 20 Ind. Cas. 385 = 24 M.L.J. 664 = 14 M.L.T. 237 = (1913) M.W.N. 525; **R.**, 39 M. 219 (**F.B.**); 22 C. L.J. 380 (382) = 13 Ind. Cas. 455.]

**APPEAL** from a decree (16th January, 1882) of the High Court (1), reversing a decree (9th September, 1880) of the District Judge of Cawnpore.

The respondents, who had obtained a decree for Rs. 2,036, dated the 9th June, 1879, under an arbitration award against William Mitchell, formerly carrying on the business of cotton-screwing at Cawnpore, in execution attached the screwing-house and a bungalow adjoining in his occupation. Alexander Mitchell, resident in Scotland, father of William Mitchell, claimed the property as owner, alleging that the latter was merely his tenant; and obtained its release on the 11th August, 1879, under s. 280 of Act X of 1877 (Civil Procedure Code). Another son, Francis J. Mitchell, took possession as agent for his father.

On the 14th June, 1880, Mathura Das and others, now respondents, holders of the decree of the 9th June, 1879, sued both William and Alexander Mitchell, to obtain establishment of right in the property in dispute in accordance with the right of suit given in s. 283, on the ground that the property belonged exclusively to William. The defence was that the elder Mitchell had purchased from Messrs. Nicol, Fleming and Co., in 1873, and had continued to be owner.

The District Judge, into whose Court the suit was transferred, found that the property in suit, which was of upwards of Rs. 12,000 in value, had been acquired in good faith by A. Mitchell, the father, on payment of Rs. 12,406-12-0 to Messrs. J. Nicol, Fleming and Co., in September, 1873, as an investment for himself, and with the object of enabling his son,

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William Mitchell, whose possession thereof after such purchase was merely permissive, to make a favourable start in business; that the deed of the 25th September, 1873, was not produced for registration, through oversight, but that such omission had been supplied by the execution of the deed of the 31st December, 1878, to which the earlier deed was appended as a schedule; that the two instruments formed, in truth, one document, which was validly registered; and that if there were any [8] irregularity or defect in such registration by reason of the certificate of registration not being endorsed on the paper on which the later deed was written, such defect or irregularity was one merely of procedure, and did not render the registration of the document invalid. The Judge also found that even if the registration were invalid and the deed inadmissible in evidence, there was enough to show that the property belonged to the elder Mitchell. The suit was accordingly dismissed.

The plaintiffs having appealed, the High Court found, with reference to a mistake under which the Registrar's certificate had not been written on the confirming document, but on the schedule containing the deed of 1873, that the provisions of ss. 58, 59 and 60 of Act III of 1877 had not been complied with. They concluded, therefore, that neither of the documents was admissible in evidence, and that in admitting that of 1878 the Judge had decided erroneously. They intimated that there was much force in the suggestion of the council for the plaintiff, that registration of the deed of 1873 was intentionally not made, in order to let it appear that William Mitchell was the owner of the premises. The material part of the judgment is set forth by their Lordships.

The claim having been decreed in the High Court, Alexander Mitchell appealed to Her Majesty in Council.

For the appellant, Mr. R. V. Doyne, and Mr. Woodroffe argued that any *prima facie* case of ownership on the part of William Mitchell, consequent on his having been seen in occupation, had been rebutted by proof of the purchase of the property by his father. The title of the latter was established by the deed of the 31st December, 1878, which with its schedule was admissible in evidence. That the endorsement of the Registrar was on the wrong document was not a material mistake, and did not invalidate the registration.

Reference was made to Act III of 1877, *Muhammad Ewaz v. Birj Lal* (1), *Sah Makhan Lal Panday v. Sah Kundan Lal* (2).

The respondents did not appear.

#### JUDGMENT.

Their Lordship's judgment was delivered by

SIR B. PEACOCK.—Their Lordships are of opinion that the decision of the High Court in this case was erroneous, and that it ought to be reversed.

[9] It appears that an action was brought on the 14th June, 1880, praying:—"That a decree for establishment of right, as provided by s. 283 of Act X of 1877, be passed, with the order that the disputed property is the property of W. Mitchell, judgment-debtor, and is liable to be sold by auction in execution of the plaintiffs' decree." On the 11th June, 1879, the plaintiffs obtained a decree under an arbitration award against William Mitchell. In execution of that decree a screw-house, which was in the possession of William Mitchell, was attached. Upon that attachment



being made, Alexander Mitchell, the father of the defendant William, objected, and claimed that the property was not the property of William but was the property of him, Alexander. The matter was investigated by the Court out of which the execution issued, in accordance with the provisions of the Code of Civil Procedure; and having received evidence in the case, the Court decided that the property belonged to Alexander and not to William, and released it from execution. That order was not appealable; but the plaintiff, the then execution creditor, being dissatisfied with the order, the present suit was commenced, in accordance with the provisions of the Code of Civil Procedure, to have it declared the property was the property of the son, and liable to be seized in execution; it was in substance to reverse the order of the Court out of which the execution issued.

The way in which the father endeavoured to make out his title was this:—He said that on the 25th September, 1873, he purchased the property from Messrs. Nicol, Fleming and Co. It appears that the deed of conveyance which he attempted to put the evidence to prove that Messrs. Nicol, Fleming and Co. conveyed the property to him had not been registered. By the Registration Act—Act III of 1877, s. 49—it is enacted that “no document required by s. 17 to be registered,”—and the document of 1873 was a document of that nature—“shall, unless it be registered, be received as evidence of any transaction affecting such property or conferring such power.” The deed, therefore, not having been duly registered, was not admissible in evidence. But Alexander Mitchell produced a subsequent deed, namely, a deed which was executed on the 31st December, 1878. That deed is set out in the record. It refers to the deed of 1873, which is set out in a schedule as part of the deed of 1878. The memorandum of registration was written, not on the [10] first sheet of the deed of 1878, but at the end of the deed which was annexed as a schedule to, and was consequently part of the deed of 1878. The deed of 1878 not only confirmed the deed of 1873, but it went on to state that the parties to the deed did, and each of them did, “according to their and his respective estates and interests, grant, convey, assign, and confirm unto the said Alexander Mitchell, his heirs, executors, administrators and assigns, the piece or parcel of land” which is the subject-matter of the dispute in this case. So that the deed of 1878 was an actual conveyance from Messrs. Nicol, Fleming and Co. to Alexander Mitchell. Nicol, Fleming and Co. were proved to have purchased it from Gavin Sibbald Jones, who had mortgaged it to a person of the name of Churcher. There is no doubt that the property, having been the property of Nicol, Fleming and Co., passed by that deed from Nicol, Fleming and Co. to Alexander Mitchell. But it was alleged in the plaint that that deed was fraudulent and void. The fourth paragraph of the plaint says:—“The said property belongs exclusively to W. Mitchell, and he is in proprietary possession thereof; the sale-deed is quite fictitious, collusive and invalid, and executed without receipt of consideration money.” It is not attempted to impute any fraud to Nicol, Fleming and Co. They received the consideration money of Rs. 12,406 and conveyed the estate. The fraud attempted to be made out is that the conveyance was to Alexander Mitchell instead of the son, William Mitchell. The question is, who paid the consideration money for the conveyance? Was it William Mitchell or Alexander Mitchell? There is no evidence to show that William Mitchell had the means of purchasing the property. He had been acting merely as assistant of Nicol, Fleming and Co., in conducting

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the mill for them before the sale, and he continued to occupy the premises afterwards.

It was proved that the consideration money for the conveyance was paid by Alexander Mitchell. It was not paid by William Mitchell in Cawnpore, but to Nicol, Fleming and Co. in England by Alexander Mitchell, who lived in Scotland.

There was no evidence whatever to show that William Mitchell was the real purchaser, or that Alexander was merely benami for him; and their Lordships think that the decision of the first Judge, [11] that the property was Alexander Mitchell's and not William Mitchell's, was correct.

It has been urged by Mr. Woodroffe, and very properly urged, that it required some strong evidence to overturn the decision of the Judge of the execution Court, who, upon hearing the evidence came to the conclusion that the property was Alexander Mitchell's; and he asked—Was there any sufficient evidence that it was the property of William given before the Judge of the first Court, who decided in accordance with the view of the Court of execution? There appears to be no evidence. The evidence, on the contrary, shows that the money was paid by Alexander.

The Judges of High Court place some reliance upon the fact that the first deed was not registered in 1873. They say:—"Having established this lengthened possession on the part of their judgment-debtor, the plaintiffs, reasonably enough, contend that they have made out a *prima facie* case, which it lies upon the defendants to rebut. We think that this is the correct view of the position, and that it rests with the Alexander Mitchell to prove his title. This he seeks to do in a fashion which is, to say the least of it, extraordinary. He produces two documents, one purporting to be a deed of conveyance of the screw-house to himself, dated the 25th September, 1873, and the other a confirmation bond, executed by the same parties as the conveyance, and dated the 31st December, 1878. Now it is obvious that the true document of his title is the conveyance of 1873, but unfortunately for him it is unregistered, and therefore inadmissible in evidence." That document was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878 should not be given in evidence, and that deed, referring to the deed of 1873, was proved to have been executed, and their Lordships consider that it was duly registered. "Now it is obvious"—the Judges say—"that the true document of his title is the conveyance of 1873; but unfortunately for him it is unregistered, and therefore inadmissible in evidence. So the expedient of the confirmation bond had to be resorted to, and in March 1879 it was presented to the Collector for registration. Now, even supposing registration had been formally and properly completed, we should [12] have been very strongly disposed to hold that such an obvious attempt to defeat the provisions of the registration law should not be permitted to succeed. Indeed, to allow a transaction of such a kind to pass as legitimate would be to throw the door open to the very mischief at which this branch of legislation is aimed." Their Lordships do not understand what is the mischief to which the Judges allude. The Registration Act was not passed to avoid the mischief of allowing a man to be in possession of real property without having a registered deed, but as a check against the production of forged documents, and in order that subsequent purchasers, or persons to whom subsequent conveyances of property were made, should not be affected by previous conveyances,



unless those previous conveyances were registered. The Registration Act as regards real property, was not intended to be a clause similar to that which is in the Bankrupt and Insolvent Acts, by which persons who are allowed to be in the order and disposition of goods, with the consent of the real owners, are, as against creditors, to be considered the real owners.

Their Lordships therefore think that the second deed of conveyance, being registered, was a valid conveyance of the property from Messrs. Nicol, Fleming and Co. to Alexander Mitchell, and that it passed that property to Alexander, unless there was fraud either between those who conveyed the property to Alexander, or between Alexander and his son, in taking the conveyance to Alexander as the person who had really purchased the property, instead of to the son, who was in possession of the property, and who it is said paid the purchase money. Their Lordships see no evidence at all to show that there was any fraud of that kind, or between Alexander and his son, in having the confirmation deed of 1878 executed to the father.

With reference to the persons who paid the money, it was stated by the brother of William that the father had advanced the money for the purpose of promoting the interests of his son. There was some evidence given of rent having been paid by William Mitchell to his father for this property. It certainly was not very clearly proved that the rent was regularly paid. It was said there were letters showing that the different payments had been made, [13] but those letters were not produced. There certainly was one letter produced, in which Messrs. Nicol, Fleming and Co. admitted to have received a sum of Rs. 2,000 from William, in order to make a remittance to the father of £150. But the Judges put it in this way:—"Not a single entry under the head of 'rent' in the account-books of the firm of Mitchell and Co. is forthcoming, nor is a letter or receipt produced from Alexander Mitchell acknowledging any one of the payments which are alleged to have been made on account of rent. That moneys may have from time to time been remitted from Mitchell to his father, by way of interest on the advances made to start him in business, is likely enough; but, be this as it may, there is not a particle of satisfactory proof to show that rent was ever paid by William Mitchell to his father in respect to the screw-house." Whether the rent was ever paid by William Mitchell to his father is not the question. The question is, who paid the consideration money for the conveyance from Messrs. Nicol, Fleming and Co. to Alexander? Their Lordships think that the evidence clearly shows that the consideration money was paid by the father, and that he took the conveyance to himself. There was no evidence to show that the father lent the money to his son, and that the son was the real purchaser. Even if the father lent the money to the son, it is natural that he should take the conveyance to himself as a security for the repayment of the loan.

Under these circumstances, their Lordships are of opinion that the *prima facie* case, which was made out by showing that William Mitchell was in possession, has been rebutted by the evidence showing that the father paid the consideration money for the conveyance to himself, and that the property was conveyed to him. Their Lordships therefore think that the decision of the Judge of the execution Court, that the property was the property of Alexander, and not the property of William, was correct, and that this suit must fail in asking to have that judgment

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reversed. The Court of first instance, in the suit which is now under consideration, concurred with the decision of the Judge of execution.

Their Lordships think the decision of the first Judge was correct, and that the High Court were in error in reversing that decision.

[14] Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to order that the suit be dismissed with the costs in the High Court. The costs of this appeal must be paid by the respondents.

Solicitors for the Appellant—Messrs. *Sanderson and Holland*.

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### APPELLATE CRIMINAL.

*Before Mr. Justice Brodhurst.*

QUEEN-EMPRESS v. SUKHA AND OTHERS. [26th September, 1885.]

*Criminal Procedure Code, ss. 423, 436, 439—Appellate Court, powers of—Commitment.*

The appellate Court referred to in s. 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

The meaning of the words in s. 423 (b) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial," is as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session; and, in like manner, when the appellant, who was triable solely by the Court of Session, has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial.

**Overruled**, 15 A. 205=A.W.N. (1893) 105; D., 2 Weir 481 (482); Din., 16 B. 580=Rat. Un. Cr. C. 577; 23 O. 350 (351); 27 C. 172 (173); L.B.R. (1893—1900) 238 (240); 16 P.R. 1895 (Cr.)]

IN this case five persons, named Durga, Sukha, Ballu, Ram Din, and Dhani, were originally tried by the Deputy Magistrate of Pillibhit, a Magistrate of the first class, under s. 325 of the Penal Code, for intentionally causing grievous hurt to one Misri. Durga was, on the 4th March, 1885, acquitted, and the remaining four were convicted of the offence above-mentioned, and they were each sentenced to be rigorously imprisoned for three months, and to pay a fine of Rs. 10, or, in default, to undergo a further term of one month's rigorous imprisonment.

The four prisoners preferred an appeal to the Sessions Judge, who in an order dated the 16th April, 1885, observed that the [15] sentences that had been passed by the Magistrate were "wholly inadequate for the offences of which appellants have been found guilty by him;" and he added:—"Two courses appear open to me—one to report the case to the High Court for enhancement of punishment; the other, under s. 423 of the Criminal Procedure Code, to direct the committal of the appellants to this Court, sitting as a Court of Session, for trial. The latter course appears to me to be the most appropriate in the present instance. The Magistrate's order is accordingly annulled, and he is directed to commit the appellants to this Court for trial."

The four prisoners were accordingly committed to the Court of Session, and tried by the Sessions Judge under s. 325 of the Penal Code and also under s. 335, for causing grievous hurt or grave and sudden provocation; and the Sessions Judge, on the 12th June, 1885, convicted the four accused persons under the latter section, and sentenced them each to two years' rigorous imprisonment, inclusive of the terms they each had already undergone under the orders of the Deputy Magistrate.

The four prisoners appealed to the High Court. They were not represented either by counsel or pleader, and they did not take any special objection either of law or fact to their convictions and sentences.

The *Public Prosecutor* (Mr. G. E. A. Ross), for the Crown.

BRODHURST, J. (after stating the facts as above, continued):—When the case came before me for hearing, I saw reason to doubt the legality of the Sessions Judge's proceedings, and, at my request, first the Senior Government Pleader, and subsequently the Public Prosecutor, appeared to argue the legal point that arises in the case.

The point for consideration is, whether the Sessions Judge was, as he supposes, competent, when the appeal was preferred to him, to have adopted either of the courses he mentions; or was merely empowered, if he considered the sentences inadequate, to have dismissed the appeal, and to have referred the case to the High Court for enhancement of sentences, under s. 439 of the Criminal Procedure Code.

[16] Had Act X of 1872 been still in force, the Sessions Judge, in disposing of the appeal, might, under the provisions of s. 280 of the Code, have enhanced the sentences to any punishment that the Magistrate of the first class was competent to inflict—*i.e.*, to imprisonment of either description not exceeding two years and fine, or he might, under the same section amended by s. 28 of Act XI of 1874, have ordered the appellants to be re-tried; but he could not have ordered their commitment under s. 284, because their offence was triable by the Magistrate of the first class. It was only in sessions cases, in which the Court of Session considered that an accused person had been improperly discharged that it was competent, under s. 296, to direct that the accused person be committed for trial, and, under the same section, the Court was empowered to report the proceedings for the orders of the High Court, if it was of opinion that the punishment was too severe or was inadequate.

The High Court of these Provinces held on more than one occasion, as will be seen by referring to the judgment of Jardine, J., in *Queen v. Seetul Pershad* (1), that the Court of Session can only order the commitment of an accused person in cases exclusively triable by it; and I entertain no doubt that this was a correct exposition of the law during the time that Act X of 1872 was in force.

Act X of 1882 did not, so far as I am aware, extend the powers of the appellate Courts; on the contrary, it curtailed them by depriving those Courts of the power of enhancing sentences. That power was, by s. 439 of the Criminal Procedure Code now in force, conferred, under certain restrictions, solely upon the High Courts as Courts of revision. Under the latter section it is laid down that, "where the sentence dealt with under this section has been passed by a Presidency Magistrate or a Magistrate acting otherwise than under s. 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such

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Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class."

Had the Sessions Judge referred the case under appeal to this Court for orders, the sentences could not have been enhanced to [17] more than a total punishment of two years' rigorous imprisonment and fine—*i. e.*, to the punishment that the Magistrate of the first class was competent to inflict.

If the Sessions Judge was competent to order the commitment in the present case, he could do so only under cl. (b), s. 423 of Act X of 1882. If he is empowered by that section to order the commitment, the result of the amendment of the Criminal Procedure Code is that, whilst the Court of Session is, by Act X of 1882, deprived of the power of enhancing a sentence of, say, three months' rigorous imprisonment under s. 325 of the Penal Code into a sentence of two years' rigorous imprisonment and fine, it is nevertheless empowered to reverse the conviction under s. 325, and the sentence of three months' rigorous imprisonment and fine, to order a commitment under the same section, and to sentence the accused to rigorous imprisonment for seven years and to fine.

The meaning of the sentence "or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial," in cl. (b), s. 423 of the Criminal Procedure Code, is, in my opinion, as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be re-tried by a Magistrate of the first class, or by the Court of Session; and, in like manner, when the appellant who was triable solely by the Court of Session has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, if empowered to reverse the finding and sentence, and to order that the accused be committed for trial.

Reading ss. 423, 436, and 439 of the Criminal Procedure Code now in force together, I am of opinion that the appellate Court referred to in s. 423 can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

[18] Under this view of the law, the proceedings of the Sessions Judge are, I consider, illegal, and I therefore reverse them.

I nevertheless agree with the Sessions Judge that the sentences that were passed by the Deputy Magistrate were inadequate; I also think that the convictions and sentences contained in the Sessions Judge's judgment are appropriate; and I therefore, under the provisions of s. 439 of the Criminal Procedure Code, direct that each of the four prisoners (appellants) be rigorously imprisoned for two years, under s. 335 of the Indian Penal Code, the sentences commencing from the 4th March, 1885, the date of the Deputy Magistrate's judgment.



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## CRIMINAL REVISIONAL.

*Before Sir W. Comer Petheram, Kt., Chief Justice.*

QUEEN-EMPRESS v. MITTHU LAL. [26th October, 1885.]

*Act I of 1879 (Stamp Act), s. 61—Abetment of making an unstamped receipt—Act XLV of 1860 (Penal Code), s. 107.*

A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt, promising to affix a stamp thereto.

*Held* that this did not constitute abetment, within the meaning of s. 107 of the Penal Code, of the offence of making an unstamped receipt. *Empress v. Bahadur Singh* (1) distinguished; *Empress v. Janki* (2) and *Empress v. Bhairon* (3) referred to.

[F., 7 C.P.L.R. 21.]

THIS was a case in which one Mitthu Lal was convicted, under s. 109 of the Penal Code and s. 61 of Act I of 1879, of abetment of the offence of making an unstamped receipt.

It appeared that an unstamped receipt had been impounded in the Tahsildar's Court, and a prosecution of the maker ordered by the Collector. During this trial the Assistant Magistrate summoned Mitthu Lal, and charged and tried him and convicted him. He found that Mitthu Lal had accepted the unstamped receipt and had promised to stamp it, and had thus intentionally aided the illegal omission. The Magistrate sentenced the accused to pay a fine of Rs. 10.

[19] In reporting the case to the High Court for orders, the Sessions Judge observed as follows :—

"*Empress v. Janki* (2) and *Empress v. Bhairon* (3) were cited; but he (Assistant Magistrate) was of opinion that these cases had been overruled by the recent decision in *Empress v. Bahadur Singh* (1). As each of the Allahabad cases was the ruling of one Judge, he was at liberty to follow either; but the cases do not conflict with each other or the Bombay ruling. There it was held that merely taking an unstamped receipt was no offence. In *Bhairon's* case, the Magistrate found that a bond had been executed on plain paper owing to the obligee's consent to take it. The Judge, in referring the case, said there was no evidence whatever of this, and the conviction was quashed. In the last case, the abettor convicted was a money-lender, who got a debtor to sign an unstamped acknowledgment. Here the abetment is that the payer took the receipt and promised to stamp it. There is evidence of this. It seems a very strained interpretation of the law to say that this is abetment; and it would be just as reasonable to say a payer of money intentionally aids the making of an unstamped receipt by taking it without any promise to stamp it. The conviction should be quashed, I submit: anyhow it is bad, as the prosecution was not sanctioned by the Collector."

## JUDGMENT.

PETHERAM, C.J.—I am of opinion that the accused, Mitthu Lal, has not been guilty of the offence of abetment as defined by s. 107 of the

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(2) 7 B. 82.

(3) A.W.N. (1884) 37.

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(1885) 317.

Indian Penal Code. The facts, as proved, are that the accused paid a sum of money to a creditor, and that when the money was paid and he was to receive a receipt, the creditor said that he could not give a stamped one as he had no stamp. Upon this the accused accepted a receipt without a stamp, and promised himself to affix one. Upon these facts it is clear that the accused did not aid the offence by any fact, because he did nothing; and the only question is, whether he illegally omitted to do anything which he was bound by law to do. As far as I can see, he did all that he could do; he asked for a stamped receipt, and, on being informed that it was impossible to give him one, as the creditor had no stamp, he took the only thing he could get, that is, the [20] receipt without the stamp. The decision of Brodhurst, J., in the case of *Bahadur Singh* (1) is not in point. In that case the acknowledgment was written in the accused's own book and at his request. The present case is really governed by the other cases cited. The conviction and sentence on Mitthu Lal are set aside. The fine to be refunded if paid.

*Conviction quashed.*

8 A. 20 = 5 A.W.N. (1885) 321.

#### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.*

KRISHNA RAM (*Plaintiff*) v. GOBIND PRASAD AND ANOTHER  
(*Defendants*).<sup>\*</sup> [14th November, 1885.]

*Dismissal of suit for non-appearance of plaintiff ordered to appear under s. 66, Civil Procedure Code—Rejection of application to set aside dismissal—Appeal—Civil Procedure Code, ss. 66, 103, 107, 540, 588 (8).*

A plaintiff who had been ordered, under s. 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear and under s. 107, read with s. 102, his suit was dismissed. He then applied to the Court, under s. 103 for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit, under the provisions of s. 540.

*Held* that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Dal Singh v Kunjan* (2) referred to.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi Sukh Ram, for the appellant.

Mr. C. H. Hill and Mr. G. T. Spankie, for the respondents.

#### JUDGMENT.

STRAIGHT, J.—The circumstances of this case appear to be these:—The plaintiff instituted a suit in the Court of the Subordinate Judge of Azamgarh, on the 24th June, 1884, against the defendants, for establishment of his right to certain property which he alleged he had acquired by purchase in 1880, and for a declaration that such property was not liable to be sold in execution of the decree obtained

<sup>\*</sup> First Appeal No. 42 of 1885, from a decree of G. J. Nicholls, Esq., District Judge of Azamgarh, dated the 4th December, 1884.

(1) A.W.N. (1885) 30.

(2) 4 A. 387.



by the defendant Gobind Prasad on the 29th [21] September, 1883, against the vendors of such property to the plaintiff. The suit, which was originally instituted in the Subordinate Judge's Court was removed to the file of the Judge of Azamgarh for trial; and on the 15th November, 1884, after settling the issues, the Judge made an order, professedly under s. 66 of the Code, for the attendance of the plaintiff in person at an adjourned hearing on the 4th December following, with certain documents he considered material for the decision of the subject-matters in dispute between the parties. On this last-mentioned date the case was called on before the Judge, and he proceeded to dispose of it in a manner to which I will presently advert. It appears, however, that prior to this the plaintiff had preferred an appeal to this Court against the order of the Judge of the 15th November, 1884, already mentioned, and that appeal was heard by Oldfield and Mahmood, JJ., who set it aside on the 27th January, 1885 (1). The Judge, however, had meanwhile dismissed the suit for want of prosecution, on the ground that the plaintiff had failed to obey his order of the 15th November, 1884; and this decision of his professes to have been passed under ss. 107 and 136 of the Procedure Code. S. 136 had nothing really to do with the matter; and this was pointed out by Mahmood, J., in his decision above referred to; and I think we must now take it that the suit was dismissed for non-appearance of the plaintiff, under s. 107 of the Code. It is provided in that section that if a plaintiff or defendant, who has been ordered to appear in person under the provisions of s. 66 or s. 436, does not appear in person or show sufficient cause to the satisfaction of the Court for failing so to appear he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear. The order dismissing the suit in this case has, therefore, the same effect as if it had been passed under s. 102 of the Code, and the plaintiff's remedy in such cases is indicated by s. 103 of the Code. The plaintiff was well aware of these provisions, for he did apply to the Judge of Azamgarh, under s. 103 of the Code read with s. 107, for an order to set the dismissal aside. The Judge refused that application, on grounds which are not before us, and with which we are not concerned in this appeal; [22] but it is clear that the plaintiff might have, and ought to have, appealed to us against this last order of the Judge refusing to set aside the dismissal, under s. 588, cl. (8). This he has not done; on the contrary, he has preferred a first appeal as from a decree of the 4th December, which, in my opinion, he was not entitled to do.

It has been held by a Full Bench of this Court in the case of *Lal Singh v. Kunjan* (2) that a defendant against whom a decree has been passed *ex parte* cannot appeal from such decree under the general provisions of s. 540, but must adopt the remedy provided in s. 108 of the Code.

For analogous reasons to those given by the majority of the Full Bench in that case, I hold that the plaintiff is not entitled to appeal from the decree of the 4th December, 1884. He very properly applied, under ss. 103-107, to set aside the order of dismissal, and he ought, as I have before observed, to have appealed to us, under s. 588, cl. (8), against the order refusing that application. I may here remark that the propriety of this form of procedure is well illustrated by this case. Had the plaintiff followed it, all that we should have had to decide in his appeal from the

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order refusing to reinstate would have been as to the sufficiency or otherwise of the grounds made out by him for having the dismissal set aside. As it is, we are asked under the guise of an appeal from decree to determine not only that question but the merits of the case, which have, in fact, never been investigated or tried at all. The really crucial point is, whether the Judge had any right to do what he did under ss. 103-107 of the Code. Seeing that his order of the 15th November, for default in obedience to which he made his subsequent order of 4th December, was set aside by this Court, it follows as a necessary consequence that had a proper appeal from his order of refusal to set aside the dismissal of the suit been made to this Court, it must have succeeded, with the result that the case would have then been replaced on his file and tried in the ordinary manner. This is precisely what, in my opinion, the law intended, and not that the matter should come up in the inconvenient form of an appeal [23] from a decree. In this view the appeal must be, and hereby is, dismissed with costs.

PETHERAM, C.J.—I concur in the order proposed by my brother Straight.

*Appeal dismissed.*

8 A. 23=5 A. W. N. (1885) 310.

#### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.*

THE HIMALAYA BANK, LIMITED (*Plaintiffs*) v. THE SIMLA BANK, LIMITED, AND ANOTHER (*Defendants*).<sup>\*</sup> [16th November, 1885.]

*Registered and unregistered documents—Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage-deed—Act III of 1877 (Registration Act), s. 50.*

The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed.

*Held* that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhैया Lal v. Bansidhar* (1), *Shahi Ram v. Shib Lal* (2) and *Madar v. Subbarayalu* (3), referred to.

[F., 28 C. 139 (141); Appr., 13 A. 238 (290); R., 20 B. 158 (162, 165).]

THIS was a suit brought by the Himalaya Bank, Mussoorie, to recover a sum of Rs. 3,428-7-3, due on a bond, dated the 17th July, 1883, for Rs. 3,000, executed by the defendant No. 1, Mrs. E. McMullen. By this bond, certain land situate in Saharanpur and a dwelling-house thereon of value exceeding Rs. 100 were hypothecated to the plaintiff. The bond was duly registered on the 10th August, 1883. The defendant No. 1 did not appear to answer the suit. The defendants No. 2 were the Simla

<sup>\*</sup> First Appeal No. 19 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 2nd December, 1884.

(1) A. W. N. (1884) 136.

(2) A. W. N. (1885) 63.

(3) 6 M. 88.

Bank Corporation, Limited, who held a bond for Rs. 10,000, dated the 30th June, 1881, in which the defendant No. 1 had hypothecated to them, among other properties, the same dwelling-house as was subsequently mortgaged to the plaintiffs. This bond was executed by all the parties thereto. On the 25th July, 1881, Mrs. McMullen herself took the bond for registration to the office of the Registrar at Mussoorie, [24] and in his presence admitted execution and acknowledged receipt of consideration. Two certificates to this effect were endorsed on the bond and signed by the Registrar, who affixed thereto the office seal. At this point it was discovered that no representative of the Simla Bank was present as required by s. 35 of the Registration Act (III of 1877), and the bond was therefore returned to Mrs. McMullen, without the final certificate required by s. 60 of the Act, and without record in the register-book required by s. 61. The bond was passed on to the Simla Bank, and no further steps towards its registration were ever taken. On the 19th December, 1883, the Simla Bank put their bond in suit against Mrs. McMullen and one Moran, who, in execution of a money decree, had attached some of the property hypothecated in the bond. The defendant Mrs. McMullen did not appear, but the claim of the Simla Bank was contested by Moran, who urged that the plaintiffs' bond, being unregistered, was not admissible in evidence. On the 3rd March, 1884, the District Judge of Saharanpur decreed the claim, holding that the bond of the 30th June, 1881, was duly registered in compliance with the Registration Act.

On the 31st July, 1884, the present suit was brought by the Himalaya Bank under their bond, alleging as against the defendant No. 1, Mrs. McMullen, non-payment of the debt secured by that instrument, and as against the Simla Bank that they had taken possession of the mortgaged premises in or about the month of May, 1884, and still retained possession; and praying that, in default of payment of the debt due to them, with interest and costs, the said premises might be sold and the proceeds of the sale applied to such payment. The defendant No. 2 appeared and contested the suit, on the ground that under their deed of the 30th June, 1881, and the decree thereon of the 3rd March, 1884, they held a lien on the property which was entitled to priority over that held by the plaintiffs. In reply to the contention, it was argued on behalf of the plaintiffs that the bond of the 30th June, 1881, was not duly registered, and was therefore not admissible in evidence.

The District Judge, re-affirming the grounds of his decision in the case of the Simla Bank v. McMullen and Moran, held that the bond of the Simla Bank was duly registered, and therefore admissible [25] in evidence. He was of opinion that the proceedings before the Registrar at Mussoorie on the 25th July, 1881, amounted to what he described as "inchoate, though not actually completed, registration," and, in reference to his former judgment, he observed:—"I held then, and I hold still, that the bond was, to all intents and purposes, registered; that publicity had been given to it by Mrs. McMullen, the party most interested, inasmuch as she would have to pay the money, herself coming forward to register it, and I may add here that although it was not finally entered in the register, yet any person coming to search the registers to see if there was any lien on the property, could at once have ascertained from the clerk what proceedings, short only of actual and final registration, had taken place in the matter." The learned Judge passed a decree in the following terms:—"I decree now for the plaintiff in full against Mrs. McMullen for a sum of Rs. 3,428-7-3 with costs and future interest at 6 per cent.

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per annum *ex parte*, and against the house hypothecated, after the claim of the Simla Bank on its decree shall have been satisfied. The costs of the Simla Bank are payable by the plaintiff Bank to the extent of three-fourths. In all other respects the claim against the Simla Bank is dismissed."

The plaintiffs appealed to the High Court.

Mr. C. H. Hill, for the appellants, contended that the District Judge was wrong in holding that the bond held by the respondents had been duly registered in conformity with the provisions of the Registration Act. It was obvious that a document must be either registered or unregistered, and there could be no intermediate position, such as the Judge termed "inchoate" or "imperfect" registration. Under the Registration Act, what constituted registration was the entry in the register-book required by s. 60, and as no such entry had been made in respect of the defendants' bond, it must be taken to be unregistered, and therefore, under s. 49, to be inadmissible in evidence. Under s. 50, the plaintiffs' bond of the 17th July, 1883, having been duly registered, was entitled to priority over every unregistered document relating to the same property.

Mr. A. Strachey, for the respondents, admitted that the finding of the District Judge as to the registration of the bond of the 30th [26] June, 1881, could not be sustained. The respondents' title must now, however, be regarded as derived from the decree of the 3rd March, 1884, into which their bond had merged, and not from the bond itself. The terms of s. 50 expressly excluded from its scope questions of priority between registered documents and decrees or orders. The decree required no registration, and, not having been set aside by appeal or otherwise, must, so long as it existed, have all the incidents and effects which the law attached to decrees. *Parshadi Lal v. Khushal Rai* (1) was a direct authority; also *Bajinath v. Lachman Das* (2), *Kanhaiya Lal v. Bansidhar* (3) and *Shahi Ram v. Shib Lal* (4) were distinguishable, being cases of competing decrees, and not affecting a question of priority between registered documents and decrees obtained upon unregistered documents.

Mr. C. H. Hill was not called on to reply.

#### JUDGMENT.

PETHERAM, C.J.—I am of opinion that this appeal must be allowed and that judgment must be given in favour of the plaintiff. The real question in the case is, whether the title of the Himalaya Bank or that of the Simla Bank should prevail with respect to the mortgages executed by the defendant, Mrs. E. McMullen. The facts of the case are, that on the 30th June, 1881, the defendant, Mrs. McMullen, mortgaged a house in Saharanpur to the Simla Bank, to secure a sum of money. The mortgage-deed was never registered, and the amount due upon it was never paid off. On the 17 July, 1883, the same mortgagor executed a mortgage-deed in respect of the same house in Saharanpur, in favour of the Himalaya Bank, to secure a sum of money, and this deed was duly registered on the 10th August, 1883. There is no finding on the subject, but it must be assumed for the purposes of this case that the Himalaya Bank had no knowledge of the mortgage-deed of the 30th June, 1881, which, at the time of their own deed, was not registered.

(1) A.W.N. (1882) 15.

(3) A.W.N. (1884) 136.

(2) 7 A. 885.

(4) A.W.N. (1885) 63.



The first question is what was the condition of the titles to the property in suit at the time of the registration of the second mortgage-deed? The titles here in question are titles created by two mortgage-deeds. The matter is governed by s. 50 of the Registration Act, which is in the following terms:—"Every document of the kinds mentioned in clauses (a), (b), (c), and (d) of s. 17, and clauses (a) and (b) of s. 18"—which includes the mortgage-deeds before—"shall, if duly registered, take effect, as against the property comprised therein, against every unregistered document relating to the same property." It is only necessary to read the section to see what was the condition of the titles possessed by the two Banks at the time when the second mortgage-deed was registered. The registered deed of the Himalaya Bank was, by s. 50, given priority over the unregistered deed of the Simla Bank; so that at that time the Himalaya Bank, by virtue of their registered deed and the terms of the statute, was in the position of a first mortgagee, and the Simla Bank was in the position of a second mortgagee. The only interest, therefore, which Mrs. McMullen or the Simla Bank had in the property was what would remain after the debt of the Himalaya Bank had been satisfied. That was the condition of the titles in August, 1883. Upon this state of things, the Simla Bank took proceedings against Mrs. McMullen—to which the Himalaya Bank was not made party—to realise their security, and obtained a decree. Now, at the time when that decree was passed, the interest which Mrs. McMullen had was subject to the Himalaya Bank's mortgage. So that the Himalaya Bank held a first charge on the property, and the Simla Bank held a decree for money against Mrs. McMullen, and against any interest which remained in her after the first charge had been paid off. That was the effect of the decree. Then the present suit was brought by the Himalaya Bank, and the question raised by it is, whether the plaintiffs are entitled to have the property sold to satisfy their mortgage, or whether their mortgage is subject to the decree held by the Simla Bank.

I am of opinion that the decree of the Simla Bank only affected what was left of the property after satisfaction of the mortgage of the Himalaya Bank, and that the Himalaya Bank is therefore entitled to have the property sold.

The authorities on the subject appear to be somewhat at variance with each other. The difficulty arises from the words in s. 50 of the Registration Act immediately following those I have [28] already quoted,— "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." This, in my opinion, means that if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. I do not think that the section can in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed. Such an interpretation would manifest injustice, and would defeat the very object with which the registration law was enacted—namely, that publicly registered documents should have effect as against documents not registered. To give priority to a decree obtained against a mortgagor behind the mortgagee's back would be to defeat this object.

I should have thought it necessary to refer the determination of this case to the Full Bench were it not that my brother Tyrrell concurs in the

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opinion which I have just expressed. It appears from the judgment in *Kanhaiya Lal v. Bansidhar* (1) that my brother Straight is now of the same opinion. Again, in the case of *Sahai Ram v. Shib Lal* (2), Mr. Justice Oldfield and Mr. Justice Mahmood expressed the same view in the following words:—"There is no doubt in my mind that the registered bond of the plaintiff takes effect, as regards the property comprised in it, against the defendant's unregistered bond under s. 50. This gives priority to the incumbrance created by it over the incumbrance created by the defendant's bond, and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds." This precisely expresses the view which I take in the present case; and the same view has been taken by the Madras High Court in *Madar v. Subbarayalu* (3).

We therefore have the concurrent opinions of Mr. Justice Oldfield, Mr. Justice Mahmood, Mr. Justice Straight, Mr. Justice Tyrrell, the Madras High Court and myself, that this is the correct construction of the terms of s. 50 of the Registration Act; and under these circumstances I have thought it right to deliver judgment in the case now. The appeal is allowed with costs, and the plaintiffs declared entitled to judgment, that this mortgage be realised as a first charge against the mortgaged property.

TYRRELL, J.--I am of the same opinion, and, having given careful consideration to the terms of s. 50 of the Registration Act of 1877, I accept the interpretation placed on the words "not being a decree or order" by the learned Chief Justice.

*Appeal allowed.*

8 A. 29=5 A.W.N. (1885) 314=10 Ind. Jur. 192.

#### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Tyrrell.*

NIHAL SINGH AND OTHERS (*Plaintiffs*) v. KOKALE SINGH AND OTHERS (*Defendants*). \* [16th November, 1885].

*Pre-emption—Wajib-ul-arz—Right of pre-emptor to stand in the position of the purchaser.*

A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

Held that it could not be said that the partner of the vendor had not only the right of pre-emption but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and the purchaser.

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village named Pachnan. The clause of the *wajib-ul-arz* relating to pre-emption was in the following terms:—"Up to this time, no case of

\* First Appeal No. 45 of 1885, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th September, 1884.



pre-emption has ever occurred. The practice, however, in the neighbourhood has been that when any co-sharer desires to sell his property, he sells first to the nearest partner, after him to the partner in the *thoke*, then to the partner in the village; failing all these, to a stranger. We also accept this practice." The plaintiffs, Nihal Singh and five other persons, alleged that they were co-sharers in the village with the defendant Girind Singh; that, on the 3rd February, 1883, Girind Singh sold a five annas share out of his ten annas share in the village to the defendants Kokale Singh and Muhabbat Singh, who were "total strangers and inhabitants of a different mauza," for a sum of Rs. 10,000, of [30] which Rs. 6,000 were paid in cash, and, in respect of the balance, a two annas six pies share of the property was mortgaged to the vendor by the vendees; that the sum of Rs. 15,000 was falsely entered in the sale-deed as the consideration for the sale; and that in order to defraud the plaintiffs, the defendants executed and registered a false and collusive mortgage deed in respect of the remaining two annas six pies share, for Rs. 5,000. The defendants pleaded in reply that the ten annas share of Girind Singh constituted a mahal distinct and separate from that constituted by the plaintiffs' share in the village, and that the plaintiffs were therefore not entitled to pre-emption under the terms of the *wajib-ul-arz*; that the plaintiffs had refused to purchase the property in dispute; and that the consideration for the sale was correctly stated in the sale-deed as Rs. 15,000, out of which Rs. 6,000 had been paid in cash and the balance secured by two mortgage-deeds for Rs. 4,000 and Rs. 5,000 respectively.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the claim for pre-emption, but found that the true consideration for the sale was Rs. 15,000 as stated in the sale-deed, and that the plaintiffs' allegation that the mortgage-deed for Rs. 5,000 was false and collusive had not been substantiated by the evidence. The Court therefore passed the following decree—"It is ordered that the plaintiffs' claim for possession of the property in dispute be decreed. The plaintiffs should deposit in this Court Rs. 15,000, full sale-consideration, within twenty days from the date this decision becomes final. As the plaintiffs denied the correctness of the sale consideration, and the defendants denied the plaintiffs' right of pre-emption, each party will bear its own costs. If the plaintiffs fail to pay the sale-consideration within the appointed time, their suit shall stand dismissed, and the costs of the defendants, with interest thereon at eight annas per cent. per mensem, will be charged to them."

From this decree the plaintiffs appealed to the High Court. It was contended on their behalf (i) that the Court of first instance was wrong in holding that the consideration for the sale was the amount stated in the sale-deed, and (ii) that "the appellants, pre-emptors, are entitled to be placed exactly in the same position [31] as the vendees. The lower Court's decree, directing possession to be given to the appellants on payment of full consideration, is erroneous."

Pandit Nanda Lal, for the appellants.

Mr. T. Conlan and Munshi Kashi Prasad, for the respondents.

#### JUDGMENT.

PETHERAM, C. J.—I think that this appeal must be dismissed and the decision of the Court below affirmed. The suit is to enforce a right of pre-emption. The plaintiffs and the vendor are co-sharers. The co-sharers who are defendants in the suit sold to the other defendants, who are strangers, the amount of consideration being Rs. 15,000. They made

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a bargain with the defendants-vendors that a portion of the purchase-money should remain on credit. The plaintiffs obtained a decree. They are the appellants before the Court, and they urge that they must have the same credit in respect of payment of the purchase-money as that arranged between the vendors and the vendees-defendants. I do not think that is the meaning of the *wajib-ul-arz*. The stranger and the vendors made some particular bargain regarding the payment of the purchase-money, with which the pre-empting plaintiffs had nothing to do. I do not think it possible to say that the plaintiffs have not only the right of pre-emption, but also the right to be put in the same position, with reference to all the peculiar incidents of the payment of the purchase-money, as that arranged by the vendors and vendees. The decision of the lower Court is affirmed, and this appeal is dismissed with costs, except that the plaintiffs are to be allowed twenty-one days to deposit the purchase-money, reckoning from the day on which the decree of this Court reaches the lower Court.

TYRRELL, J.—I concur.

*Appeal dismissed.*

8 A. 31—5 A.W.N. (1885) 318.

#### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.*

WAJID ALI SHAH (*Defendant*) v. DIANAT-UL-LAH BEG (*Plaintiff*).\*  
 [26th November, 1885].

*Suit for declaration that property is wakf—Act XX of 1863, ss. 14, 15, 18—Civil Procedure Code, s. 539—Act I of 1877 (Specific Relief Act), s. 42.*

A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf*. He did not allege [32] himself to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement in which he denied that the property now in question was *wakf*.

*Held* that, unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained.

*Held* that, inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863, or under s. 539 of the Civil Procedure Code.

*Held* that the suit was not maintainable under the provisions of s. 42 of Act I of 1877 (Specific Relief Act).

*Held*, therefore, that the suit was not maintainable.

*Held*, further, that the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes, it would not be proper to make the declaration prayed for by the plaintiff, even if the suit were maintainable.

[F., 20 C. 297 (409); Appr., 11 A. 18 (23, 27) (F.B.); R., 24 B. 170 (181)=1 Bom. L.R. 649, 26 B. 174 (183)=3 Bom. L.R. 718; D., 32 A. 631 (633)=7 A.L.J. 797=6 Ind. Cas. 835 (836); 2 M.L.J. 251 (252).]

THE defendant, Wajid Ali Shah, was in possession of certain property situate in the city of Gorakpur, and consisting of an imambara, a mosque,

\*First Appeal No. 48 of 1885, from a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakpur, dated the 13th January, 1885.

and an eedgah. In 1880 the plaintiff, Dianat-ul-lah Beg, brought a suit against him, upon the allegations that the property did not belong to the defendant, but was an endowed property, of which he had improperly assumed the management and in respect of which he had improperly obtained mutation of names in his favour from the revenue Court; and that the defendant had mismanaged and wasted the property and misappropriated its income. The plaintiff accordingly prayed that Wajid Ali Shah might be removed from the management. In reply, the defendant filed a written statement, dated the 26th August, 1880, in which he denied that he was in possession of the property as manager only thereof, and also that the property was *wakf*, claimed to hold as proprietor. The suit was dismissed on the 30th September, 1880, for deficient payment of court-fee on the plaint. On appeal, the High Court on the 8th July, 1881, dismissed the appeal in the following terms:—"The deficiency not having been made up as ordered, the appeal is struck off."

The present suit was brought by the same plaintiff against the same defendant for a declaration that the property in question, was *wakf*. He claimed to be interested in the property as a Muhammadan, and interested in the worship at the mosque and eedgab, [33] and in the good resulting from the imambara; and stated as the cause of action the denial by the defendant in his written statement in the former suit, that the property was of the character alleged by the plaintiff. In reply, the defendant raised contentions substantially the same as those which were put forward on his behalf in the former suit.

The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim. On appeal by the defendant to the High Court, it was contended on his behalf, *inter alia*, that the suit was not maintainable.

Mr. T. Conlan, Munshi Hanuman Prasad and Sheikh Mehdi Hasan, for the appellant.

Lala Lalta Prasad and Maulvi Hashmat-ul-lah, for the respondent.

### JUDGMENT.

PETHERAM, C.J.—I am of opinion that this appeal should be allowed, and the ground upon which I wish to base by judgment, is that the action as brought is not maintainable, whatever the facts may be. I desire to guard myself against expressing any opinion upon the question whether the property in dispute is or is not *wakf*. If it were necessary to consider that point, I think that a new trial would be necessary, in order that the evidence might be adduced to determine the true character of the property. The evidence on the record is wholly insufficient for the determination of this question, and I therefore refrain from expressing any opinion in regard to it. I confine myself to saying that, under any set of circumstances which have been suggested in this case, the action is not maintainable.

The action is one of which the character has been formulated by the plaintiff himself in his plaint. He begins by stating that he is a Muhammadan. He then goes on to say that there is certain property situated in the Gorakhpur district, of which he is not a resident, and that this property is *wakf*, and is in the defendant's possession. He proceeds to state that, on the 26th August, 1880, the defendant in certain legal proceedings asserted a title to the property, which was inconsistent with its character being *wakf*. He therefore claims a decree, declaring that

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the property in the defendant's possession is in the defendant, but that it is *wakf*.

[34] I am of opinion that unless it can be shown that the action is maintainable under some statute, it cannot be maintained; and the question therefore is, whether there is any statute which enables such an action to be brought.

Now Act XX of 1863 is an Act which provides for the management of religious endowments, and ss. 14, 15, and 18 provide a machinery by which the rights and powers of trustees in reference to such property may be ascertained. Again, the Civil Procedure Code, s. 539, provides a procedure for ascertaining the rights of trustees of public property. The question then is, whether the present suit can be brought under the provisions of either of these statutes.

When these provisions are considered, it is obvious that the suit is not maintainable under any of them, because under them it is necessary that some permission should be given to the plaintiff to bring the suit. It is admitted that, in the present case, no such permission was obtained. So that the plaintiff in effect admits that this suit was not contemplated by either of the Acts I have mentioned. The only other provisions that could apply to the subject are those of s. 42 of the Specific Relief Act, which gives to persons who are entitled to certain interests the right to bring suits for the declaration of such interests.

As I have already observed, the only right asserted by the plaintiff in his right as a Muhammadan to have the property kept as *wakf* for the general body of persons who believe in the Muhammadan religion. S. 42 of the Specific Relief Act applies to "any property," and, in certain circumstances, allows such a person to bring a suit for a determination of his title to such character or right. But the scope of the section is confined to the two classes which it specifies. The plaintiff in this case cannot sue as one of the first class, because he has no "legal character" which is denied by any one: he only asserts his character as a Muhammadan, and that has not been questioned. Nor does he for himself assert a right as to any property, and by no act of the defendant has his right to any property been denied.

[35] The suit therefore does not come under the provisions of s. 42, and as it is not contemplated by either of the other statutes to which I have referred, I am of opinion that it is not maintainable. I may add that even if it were possible to hold that the suit was maintainable under s. 42 of the Specific Relief Act, I am of opinion that this is not a case in which this Court, in the exercise of its discretion, would be disposed to grant relief. Under s. 42, such relief is always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself shows that the defendant was using the property for charitable purposes, I do not think that it would be proper to pass such a decree as the plaintiff asks for, even if he could bring the suit. Under these circumstances the appeal must be decreed with costs.

OLDFIELD, J.—I am of the same opinion.

*Appeal allowed.*



8 A. 35=5 A.W.N. (1885) 322.

## APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.*

AFZAL-UN-NISSA BEGAM (Plaintiff) v. AL ALI (Defendant).<sup>\*</sup>  
[27th November, 1885.]

*Civil Procedure Code, Chapter XV, s. 191—Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.*

A Subordinate Judge having taken all the evidence in a suit before him adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed.

*Held*, that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial, became a nullity.

*Held* also that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code to prove their allegations in a different manner.

*Jagram Das v. Narain Lal* (1) referred to.

[Diss., 8 A. 576 (F.B.); R., 91 P.R. 1904=5 P.L.R. 1905.]

THE facts of this are sufficiently stated for the purposes of this report, in the judgment of Petheram, C.J.

[36] Munshi Hanuman Prasad and Mir Zahur Husain, for the appellant.

Pandits Ajudhia Nath and Sundar Lal, for the respondent.

## JUDGMENT.

PETHERAM, C.J.—I am of opinion that this case must go back to be tried by the Subordinate Judge of Moradabad, on the ground that nothing that can be called a judgment by a Judge trying the case has ever been given. The observations which I made in *Jagram Das v. Narain Lal* (1) are applicable to the present case, and the considerations which then weighed with me, affect my mind now in the same manner. I should not have thought it necessary to add anything to the observations which I made on that occasion, if I had not been informed that my judgment had led to some confusion as to the mode in which cases of this kind should be dealt with. The only addition I propose to make to my former observations is by pointing out what appears to me to be the course which should have been adopted in the present case, which is a fair illustration of what commonly happens.

The suit was instituted on the 25th May, 1883, in the Court of the Subordinate Judge of Moradabad, an office which was then filled by Maulvi Nasir Ali Khan. It went through the ordinary course of the proceedings necessary for fixing issues and ascertaining the matters to be tried. Maulvi Nasir Ali Khan fixed a date for proceeding with the evidence,

<sup>\*</sup> First Appeal No. 29 of 1885, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 23rd December, 1884.

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and accordingly on various occasions he sat for the purpose of taking evidence, and on the 17th April, 1884, the taking of evidence was concluded before him. He then heard everything that was brought before him, and he directed that an account should be prepared in the office. After this, various adjournments took place for various reasons which it is not necessary to mention, until the 20th September, 1884, which was a date fixed by him for the disposal of the suit before himself, the evidence being then complete. Upon the 20th September there was a proceeding to the effect that there was no time for disposing of the case on that day, and making a further adjournment to the 9th December. That proceeding seems to be of the kind which is generally adopted when an adjournment is necessary. When the 9th December arrived, the case would be taken up as adjourned from the 20th September, 1884, which was [37] itself the date of an adjournment from the date originally fixed by the Subordinate Judge for the hearing of the case. That original date would be the date of the hearing, and all subsequent dates would be those of adjournments. What took place on the 9th December, therefore, would be a proceeding held by adjournment in the trial heard on the original date.

Now, when the 9th December arrived, Maulvi Nasir Ali Khan had left Moradabad, and was succeeded in the office of the Subordinate Judge by Maulvi Zainulabdin. When the case was called on, it was his duty to try it. The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, became a nullity, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him.

The question then arises—What was the duty of Maulvi Zainulabdin. I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But by the act of fixing a date, he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way, as if the day were the first on which the case had ever come on for hearing, except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself.

For these reasons, I am of opinion that the trial of this case is a nullity, and that the case must be remitted for trial by the [38] Subordinate Judge of Moradabad. The costs will be costs in the cause.

OLDFIELD, J.—I am of the same opinion.

*Cause remanded.*



8 A. 38 = 5 A.W.N. (1885) 323.

## CRIMINAL REVISIONAL.

*Before Mr. Justice Brodhurst.*

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QUEEN-EMPRESS v. GANGA RAM AND ANOTHER. [2nd December, 1885.]

Act XLV of 1860 (Penal Code), s. 211—Prosecution for making a false charge—Opportunity to accused to prove the truth of charge.

A complaint of offences under ss. 323 and 379 of the Penal Code, was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code.

*Held* that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *The Government v. Karimdad* (1) referred to.

[F., A.W.N. (1907) 268 = 6 Cr.L.J. 340; R., 14 C. 707 (711) (F.B.); A.W.N. (1907) 195 = 4 A.L.J. 471 = 29 A. 587 = 6 Cr.L.J. 42; A.W.N. (1907) 288 = 6 Cr.L.J. 396 = 30 A. 52 = 4 A.L.J. 790; 39 M. 750 = (1912) 1 M.W.N. 499 (F.B.) = 14 Ind. Cas. 305 = 11 M.L.T. 367 = 22 M.L.J. 419 = 12 Cr.L.J. 209; Diss., 2 P.R. 1907 (Cr.) = 18 P.W.R. 1907 = 49 P.L.R., 1907 = 5 Cr.L.J. 491 = 6 Cr.L.J. 258.]

IN this case the petitioners, Ganga Ram and Durga, prosecuted two persons, named Chidda and Chandan, for theft, under s. 379, and assault, under s. 323 of the Penal Code. The complaint was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Joint Magistrate of Aligarh dismissed it, ordered the prosecution of the petitioners under s. 211 of the Penal Code for making a false charge, and sent the case to the Magistrate of the District, who, on the 25th July, 1885, passed an order under s. 195 of the Criminal Procedure Code, referring the case to the Deputy Magistrate for disposal. An application for revision of this order was made to the District Judge of Aligarh, upon grounds which it is not necessary to set forth. The Judge dismissed the application by an order dated the 29th August, 1885. The petitioner applied to the High Court to revise this order on the following grounds:—

"The sanction for the prosecution should not have been given without giving the complainants an opportunity for proving the truth of their case, which was merely thrown out on the report of the police.

[39] "It was for the Magistrate alone to ascertain whether the statements of the complainants were credible or not."

Babu Ram Das Chakarbatî, for the petitioners.

The Junior Government Pleader (Babu Dwarka Nath Banarjî), for the Crown.

## JUDGMENT.

BRODHURST, J.—One of the grounds for revision is, that sanction under s. 195 of the Criminal Procedure Code should not have been given until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police.

This objection is, I think, valid, and it is supported by the judgment of Garth, C.J., and Field, J., in *The Government v. Karimdad* (1). Under the circumstances above referred to, I set aside the Magistrate's order of the 25th July, 1885.



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8 A. 39 (P.C.)=12 I.A. 159=4 Sar. P.C.J. 670=9 Ind. Jur. 482.

## PRIVY COUNCIL.

PRESENT :

*Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.**[On appeal from the High Court for the North-Western Provinces.]*MUHAMMAD ABDUL MAJID (*Defendant*) v. FATIMA BIBI (*Plaintiff*).

[23rd and 24th June, 1885.]

*Muhammadan law—Will—Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation.*

Words such as "always" and "for ever" used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life.

An instrument in the nature of a will made by a Muhammadan, gave shares in his property to his surviving widow, son, and grand-children, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates.....All the matters of management in connection with his estate should necessarily and obligatory rest 'always' and 'for ever,' in his hand." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect, in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will; *held* that, on its true construction, the plaintiff, a sharer under it was entitled to the full proprietary right in, and [40] to the possession of her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers.

[*Appr.*, 23 A. 194=28 I.A. 1; *Rel. on*, 12 Ind. Cas. 324; *R.*, 23 A. 324=28 I.A. 65=8 O.C. 61(63); *D.*, 3 O.C. 55 (62).]

APPEAL from a decree (6th January, 1882) of the High Court affirming a decree (18th June, 1880) of the Subordinate Judge of Jaunpur. The question now arising was as to the right construction of the words in an instrument which, although all its dispositions were not altogether testamentary, was termed a will throughout the case.

On its construction depended the question whether or not the plaintiff had rightly obtained a decree in her suit for possession of her share under the instrument, which was executed under the following circumstances:—Muhammad Imam Bakhsh, a Sunni Muhammadan of Jaunpur, being about to go on a pilgrimage to Mecca where he afterwards went, and where he died, executed the instrument, "by way of a will," as he stated in it, on the 19th August, 1860, and caused it to be registered. He died about a year afterwards. His family then consisted of one surviving wife, Hingan Bibi, and her daughter, the respondent, Fatima Bibi; also of a grandson and grand-daughter, both minors, and of Muhammad Haidar Husain, his son by a wife who died before him, this son being the father of Muhammad Abdul Majid, the present appellant.

By the first clause in his will, as it was called, Imam Bakhsh after stating who were his legal heirs as well as who were the other members of his family, dedicated a fourth part of his property, excluding certain

immoveables, to the maintenance of a college and a mosque, and to other similar objects. The remaining three-fourths of his estate, as also all the immoveables excluded from the above dedication, he directed to be divided into four shares, or "sehams;" and of these he gave two to the respondent, Fatima Bibi, and of the other two shares he gave one to his son Muhammad Haidar Husain, and one to his grandson and grand-daughter above mentioned.

The will then stated the assent of Fatima Bibi and the other sharers to the dispositions made, and provided for the management of the four annas share directed as above-mentioned, of which share it directed that the management should be retained by Muhammad Haidar Husain, and by some capable descendant [41] after him. Of all the testator's estate also the management was given to Haidar Husain, who, as to the lands, was to obtain *dakhil-kharij* in his name. This son was to continue in possession of the full sixteen annas of the estate, of which the management was to rest with him "always" and "for ever" (*hameshawa dawami ke liye*). There were also prohibitions of alienation to strangers.

The dispositions of the will were accepted by Hingan Bibi, by Muhammad Haidar Husain, and by the respondent; this assent being necessary on account of the testator's having made the shares materially different from those which the law would have given, which latter would have been one-eighth to the widow, with a division of the residue between the son and daughter, the former taking two-thirds and the latter one-third. Muhammad Haidar Husain entered upon the management and continued to pay their due proportion of the profits to the parties entitled until he died on the 20th July, 1875. On his death the present appellant, his eldest son, applied for mutation of names in the settlement record, the respondent filing her objections to the proposed entry, the dispute resulting in the present suit, which was brought on the 5th May, 1879.

The judgment of the Subordinate Judge of Jaunpur, Kashinath Biswas, was to the following effect :—He held that the important issue was whether the plaintiff was entitled to receive possession of the *corpus* of her share in the estate. The first question, therefore, was whether Haji Imam Bakhsh, the testator, intended to deprive the plaintiff or her children and heirs of possession of the share secured to her by the so-called will for all time to come, or only during the lifetime of Haidar Husain, the manager. Examining the clauses of the will, the Subordinate Judge held it to be clear that an absolute right of ownership was given to her. This had been qualified in favour of Haidar Husain during his life in virtue of the formal acceptance of the provisions of the will, he taking the right of management. The real question was whether that right was to go beyond the person and beyond the life of Haidar Husain or was limited to him for life.

The judgment continued thus :—" Throughout the clauses 5 and 6, in fact throughout the whole of the document, Haidar [42] Husain in relation to the management of the estate, was mentioned in his individual person. Nowwhere his heirs-at-law are mentioned as representing him, after his death, in the management of the estate, at least divided between the heirs of the testator or those whom he wished to benefit by his inheritance. At one place only, in clause 6, the words '*qaim maqam*' have been used as respects Haidar Husain, where or the testator says, that an auction-purchaser of the rights and interests of a sharer in the estate will not have the right of disturbing the possession and superintendence of Maulvi Muhammad Haidar Husain or of his '*qaim maqam*.' Here

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the words are clearly used in the sense of a personal representative, or as one standing in the place of Haidar Husain in his absence or by delegation. The will throughout is altogether silent as to the management, after the death of Haidar Husain, or by far the larger portion of the estate which was declared to belong to, and was divided into shares between, the legal heirs of the testator and the children of a deceased daughter. The omission or the silence on the point is the more striking when it is remembered that the testator specially provided, in clause 3, for the management, after the death of Haidar Husain, of the smaller portion of the estate which was assigned or set apart for charitable purposes. It is noticeable, besides, that in explaining, in clause 6, his object for the restriction as regards possession, the testator says: 'My, the declarant's, real object is, that all the properties belonging to me, the declarant, should, as specified above, remain for ever in possession of my children (*hamare aulad*).' This clearly shows that the testator did not mean that, after the death of Haidar Husain, his son or sons should take the management, to the exclusion of one begotten by the testator, as the plaintiff certainly is. But it is said that in giving the powers of management to Haidar Husain, the testator used the words '*hamesha wa dawami ke liye*' ('for ever and in perpetuity'). The word '*hamesha*' may as well mean 'always,' and '*abad*' in Persian is another word for '*dawami*' both meaning 'for ever' or 'in perpetuity.' These words, when applied to a person individually, as they are certainly here used, mean no more than the lifetime of that person. In this sense the word '*abad*' is used in the Hedaya on the subject of usufructuary wills, in chapter VI [43] of Ballie's Digest of Muhammadan Law, pp. 652-55 (1). The testator himself appears to have been fully aware of the real meaning of the words '*hamesha*,' '*dawami*' and '*abad*,' as in clause 6, in making it obligatory on his children (*aulad*) to give a right of pre-emption to co-sharers; he uses the words '*naslan bad naslan*' ('generation after generation') with the word '*dawami*' ('in perpetuity'). Reading the whole of the will, it appears to me that Haidar Husain, because of the confidence his father had in him, and of the high ability he possessed, was appointed an executor in his own person and such a power is not certainly inheritable by his son or heir-at-law in the absence of a provision to that effect in the will."

An appeal from the above was dismissed. The material part of the judgment of the High Court (STUART, C.J. and STRAIGHT, J.) was the following:

"The case for the appellant was ably and exhaustively argued by Mr. Hill; but it is unnecessary, in the view we take of the matter, to detail at length the points taken by him. It seems to us, that whether the instrument of the 19th of August, 1860, be considered as of a testamentary character in the nature of a will, or a deed of gift, or partly one and partly the other, is a mere question of terms, that is of no very great importance. The Subordinate Judge has regarded it in the light of a will, and under the circumstances in which he and we are called upon to consider it, the designation is perhaps not an unreasonable one. Be this as it may, it is certain that all the parties to whom it has reference, among them the father of the (defendant) appellant, and the (plaintiff) respondent, by the pen of her husband, gave their assent to its provisions by subscribing their names, and no point is raised upon either side as to the validity of the document itself, or the mode in which it was

(1) Hamilton's Hedaya, Book LII, Chapter V; of usufructuary wills.



executed—the sole question in difference being the interpretation to which it is open. It is also obvious that, whether Haidar Husain was or was not legitimate, an issue, by the way, which I am glad to think it is unnecessary for us to decide, his father Imam Bakhsh had the very greatest confidence in him, and intended to hand over to him the entire administration of his affairs so long as he lived. To this arrangement the (plaintiff), respondent, having [44] herself assented, was of course unable to raise any objection, nor indeed does it appear that she ever desired to do so; on the contrary, she recognised the powers of Haidar Husain, to the fullest extent, down to the time of his death in July, 1875, as is evidenced by the *ikrar nama* (agreement) of the 26th September, 1867. While it may well be that Imam Bakhsh, being bent upon a long and distant journey, from which he might naturally feel he was not likely to return, was desirous of making provision for the management of his estates, immediately upon his departure, as also for settling their distribution in the event of his death, it is far more probable that he ever intended to prevent his heirs for all time from acquiring the fee-simple of the properties, the rents and profits whereof they were to receive in stipulated proportions from Haidar Husain so long as he lived. Mr. Hill contended that by the language of the document of the 19th of August, 1860, an estate in fee of the whole four sehams was conveyed to Haidar Husain, but we find nothing in any of its clauses, in our judgment, either directly or indirectly, to justify any such construction; on the contrary, we concur with the Subordinate Judge where he points out the obvious contract between the language of clause 3 in contradistinction to that to be found in clauses 5 and 6. We know of nothing, either in Muhammadan or any other law, forbidding the creation of an interest of the kind now claimed by the (plaintiff) respondent, namely, limited during the existence of one life, and absolute on such life falling in. It certainly seems to us much more reasonable to infer that this was the intention of Imam Bakhsh, than to hold that he meant to perpetuate, for all time, to Haidar Husain and his heirs the possession and management of his estates, so as to exclude his other children or their issue from ever obtaining the *corpus* of the share allotted to them. Under any circumstances, the latter alternative should not, in our judgment, be adopted, unless the words of the instrument were so strong and clear as to leave no other construction possible. We do not feel called upon to discuss the case of any greater length, approving as we do generally of the remarks made by the Subordinate Judge and the conclusions arrived at by him. In our opinion, the plaintiff has made out her case to two sehams claimed by her, and the appeal should be dismissed, with costs; in this [45] and the lower Court, the amount to be regulated according to the value of the relief decreed, less that refused."

On this appeal,

Messrs. T. H. Cowie, Q. C., and Mr. R. V. Doyne, for the appellant, argued that on the due construction of the instrument of 19th August, 1860, the appellant, as representing his father, was, on the death of the latter, entitled to succeed to the office of manager of his grand-father's estate, subject to the right of the respondent to receive her share of the profits. The present suit tended directly to break up the estate of Muhammad Imam Bakhsh and to defeat the general intention of his so-called will. Sufficient effect had not been given to the intention apparent in the fifth clause, nor to the words in the clause relating to alienations to strangers to the effect that the right of possession and management, given

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to Haidar Husain, was not to be disturbed, concluding, as they did, with the expression "or whoever may be his representative." These words indicated an intention on the part of the testator that his estate should at all times remain under the management of a representative of Haidar Husain. The respondent, while taking benefits under the will in excess of what she would have received by law as one of the heirs, ought not to be allowed to set aside the restriction subject to which her interest in the testator's property was conferred.

Mr. *Graham*, Q.C., and Mr. *J. D. Mayne*, for the respondent, were not called upon.

## JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal arises out of a disposition of his property made by one Imam Bakhsh. The disposition, which was not strictly a will, because it was made in his lifetime and he reserved to himself some benefit under it, was made on the 19th August, 1860, and he died about a year afterwards. At the time he made it the state of the family was this: He had two wives. By the first he had a daughter, Musammât Fatima Bibi, who had a son, Hafiz Syed-uddin, then dead. He had another daughter, Musammât Makki Bibi, who had died, leaving two children, Muhammad Ibrahim and Mariam Bibi. By the second wife he had a son, Maulvi Muhammad Haidar Husain, who died in July, 1875, leaving his eldest son, [46] the present appellant and the defendant in the suit, and other children. The contention between the appellant and respondent arose after his death. It was this, as stated in the plaint of the respondent which was filed on the 5th of May, 1879. In that she states the disposition of the property by her father, Imam Bakhsh, and that the management of the whole property was intrusted to Haidar Husain, and after the death of Imam Bakhsh, she, the plaintiff, confirmed him as manager, and that she has not disputed any of the rights of Haidar Husain. Then, after stating that he was in possession of the property and acted as manager, and stating his death, she says, that, after his death, the defendant, without the consent and permission of the plaintiff, improperly took possession of the property constituting her share, and asked the Revenue Court to enter his name in the place of that of Haidar Husain, and that she gave notice to the Revenue Court of her dissent from that. She then goes on to say, "that the defendant, notwithstanding his want of right, not only arbitrarily declares himself to be the manager of the whole property, but considers and represents himself to be the permanent owner of the whole property, and by his own authority, and with the view of injuring the plaintiff, has committed and omitted to do acts calculated to cause great loss to her; and she prays that a decree may be passed in her favour declaring her right, permanent proprietary title and possession to her share in the property detailed below," and "that complete possession of her share may be awarded to her: that the defendant's possession and management may be removed."

The defendant, in his written statement, sets up this claim. "From the death of Maulvi Muhammad Haidar Husain the whole property mentioned in the will and the agreement legally devolved upon and came into the possession of the defendant under the express conditions and directions of the said documents, and with reference to inferences drawn from them. According to the terms of will, the rules of the Muhammadan



law, and the principles of justice, the defendant alone is entitled and competent to retain possession (subject to the conditions of the will), in order to carry out its provisions, which are to be carried out in perpetuity and for ever, and not for a limited period." It may here be noticed that the defendant is not the only heir of [47] Muhammad Haidar Husain, there are other persons who are also his heirs. The contention is that although the defendant is only one of the heirs, he alone is entitled and competent to retain possession.

This being the contention of the parties, the provisions in the document may now be looked at, to see how far the defendant's contention is supported by its provisions, and how far the right of the plaintiff to recover in this suit is established. Imam Bakhsh begins by saying: "I had two wives married according to the Muhammadan law: one, Musammat Hingan Bibi, who is at present alive, and by whom I had two daughters, one, Musammat Fatima Bibi, who is alive, and her son, Hafiz Syed-ud-din Muhammad Syed Bakht, now deceased, was adopted by me as my son, and the other, Musammat Makki Bibi, who died, leaving one son, Muhammad Ibrahim, and a daughter, Mariam Bibi, minors. My second married wife died, and Maulvi Muhammad Haidar Husain, a son by her, is alive. Therefore, according to the Muhammadan law, Musammat Fatima Bibi, my daughter, and Maulvi Muhammad Haidar Husain, the children of my loins, are my legal heirs." He then goes on to provide that the whole income of a four-annas share of his villages and estates shall be devoted to charity and works of beneficence, and the remaining twelve annas of the villages and estates of the whole of his other property shall be divided into four 'sehams' (shares), and gives one share to Hafiz Syed-ud-din Muhammad Syed Bakht, one to Fatima Bibi, one to Maulvi Muhammad Haidar Husain, and one to Muhammad Ibrahim and Mariam Bibi, and says:—"During my, the declarant's lifetime they shall continue to receive the profits of those 'sehams' (shares): the one 'seham' of Hafiz Syed-ud-din Muhammad Syed Bakht will be received by his mother, Fatima Bibi. She will be the owner of her own one 'seham' and of one 'seham' of Hafiz Syed-ud-din Muhammad Syed Bakht, in all of two 'sehams.' She is at liberty to give them to anyone she may like among her own children. It will be necessary and incumbent on all the said heirs to perform all the necessary and obligatory terms of this document, which they have of their own will consented to observe, and they will not have the power to dissent from it on any plea of law or Muhammadan law." The assent which is here stated is shown by their putting their names to the document after the signature of Imam Bakhsh. Then in the third [48] clause he provides for what is to be done with the four annas share which was devoted to charity. He says:—"He, Maulvi Muhammad Haidar Husain, shall always be the manager of this four-annas share; none of the heirs shall have the right to interfere in any way in the aforesaid four-annas share. It shall be incumbent on Maulvi Muhammad Haidar Husain to keep the entire management in his own hands." A little lower down he says, "after Maulvi Muhammad Haidar Husain, whoever from the descendants is just, virtuous, and capable of performing this duty shall be the superintendent and manager of that four-annas share. In short my, the declarant's, object is this—that the manager-ship and superintendentship should always continue with Maulvi Muhammad Haidar Husain, and after him, as specified above, whoever among the descendants is capable of performing this work." The word "descendants" there means among his own descendants—not limited to

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the descendants of Muhammad Haidar Husain; and as far as this provision goes it would seem to point to some selection being made from amongst his descendants in order to have a person who should have the management of the charity property. Then we come, under the fifth clause, to the provision which he makes with regard to the remainder of his property. In the fourth clause he had said what there seems to be no doubt was his wish:—"The aforesaid heirs should continue in harmony and eat and reside together, so that being united, the estate may continue to improve and the name always be preserved." In the fifth he says: "Maulvi Muhammad Haidar Husain shall continue in possession and occupancy of the full sixteen annas of all the estates, villages, lands lying at different places, and moveable and immoveable property (collections from the villages). All the matters of management in connection with this estate should necessarily and obligatorily rest always and for ever in the hands of Maulvi Muhammad Haidar Husain." Here we have the words always and for ever." But these words, according to several decisions of this Board, do not *per se* extend the interest beyond the life of the person who is named. *Per se* they are satisfied by limiting the interest which is there given to the life of Muhammad Haidar Husain. The Subordinate Judge has made observations upon the meaning of these words which are quite supported by the authorities. So far, then, there [49] is nothing in the words used by the testator to indicate an intention that the possession and management were to go to any one of his descendants after the death of Muhammad Haidar Husain. He then gives directions as to the recording of the name and goes on to say:—"No heir and no stranger shall at any time or period have, on any ground, or in any way, power to object to or oppose any of the matters above mentioned, or to take possession or to make any arrangements of his own regarding the estates. In all these matters all persons shall be entirely powerless;" showing there an intention to keep the property in the hands of his family if possible, and that no strangers should at any time come in and have any part of it. This is still further shown by the sixth paragraph. But before that he directs that Haidar Husain is to make collections of the profits, and says that he is to pay the profits of two out of the four shares to Fatima Bibi, "and the profits of one 'seham' he may take himself, and the profit of one share, that of Muhammad Ibrahim and Mariam Bibi, after deducting the expenses, he is to keep in deposit with himself," according to the provisions of a subsequent clause. This part clearly shows that what he intended was that during the life of Haidar Husain he was to give to the parties their shares of the profits. But there is no direction that this should be done by any other person after the death of Haidar Husain. The direction is applicable to Haidar Husain only, who is directed himself to pay the profits. Then he says:—"My, the declarant's, real object is that all my estates may always remain in possession of my descendants as specified above"—repeating the intention previously shown—"and no interference of any stranger on any account may be permitted therein, and my property should not be allowed to pass into the hands of any stranger. Hence I enjoin on Musammam Fatima Bibi, Maulvi Muhammad Haidar Husain, Muhammad Ibrahim, Mariam Bibi, and also their descendants, generation after generation in perpetuity, that when any of them is disposed to transfer his share by sale, mortgage, or lease, &c., then he must first offer to transfer to all of his sharers in property; and so long as the sharers are willing to take it, he must by no means.

transfer to others." There, it may be observed he does not speak of profits. He had spoken previously of the shares and profits; but here he seems to [50] be speaking of shares in the property, and the shares of the different persons, amongst others of Fatima Bibi, and he directs that they shall not transfer their shares of the property to strangers. Certainly that does not indicate an intention that the property should not be vested after the death of Haidar Husain in the persons to whom he had given the shares. Then he says:—"The strangers will not have any power to take any possession or occupancy of the transferred property beyond receiving the profits which will be handed to him;" and "the purchaser also, beyond receiving the profits, shall have no power or right of possession or occupancy over the property sold; nor by the auction shall the right of possession and management be disturbed of Maulvi Muhammad Haidar Husain, or whoever may be his representative." Mr. Cowie rightly admitted that by "representative" here is meant, not a successor of Haidar Husain in the right of Haidar Husain in any way, but a person who might, during Haidar Husain's life, be his agent; thus again indicating that he was making a provision rather for what was to be done during the life of Haidar Husain than for what was to be done afterwards.

These are the provisions of the will, and it is difficult to see in them any provision by the settlor which would confer upon the present defendant the right which he now claims to have. There is nothing to show that the heirs of Haidar Husain were to take his place in the succession and management, and, even if there were, there would be this difficulty, that, if it went by right of succession to the heirs of Haidar Husain, they would all, and not the present defendant alone, come in. Thus expressions clearly denoting that the management is to be in a single hand would, by a strained application of them to a period beyond the life of Haidar Husain, be used to vest the management in a number of hands.

It has been contended by Mr. *Doyne* that there ought to be, and that there might be, a selection, by some sort of family council, of one of the heirs of Haidar Husain, who should succeed him in the management, and, in default of any appointment by a kind of family council, that might be made by the Court. We find in this document no provision of the kind, nothing to indicate that it was the intention of the settlor that there should be any selection; and it seems to their Lordships, whatever might [51] have been the wish of the settlor to keep the property in the family, impossible to say that he has so framed this instrument as to carry out such an intention or to effectuate such a wish beyond the life of Haidar Husain. The right of Fatima Bibi to her shares in the property is clear upon the terms of this instrument, unless the defendant could show that there were provisions in it which would control that part of it, and limit her for ever (for that seems to be the contention) simply to an enjoyment of the profits, and not to have any other interest in the property. There are words which indicate an intention that she should take an interest in the property with an attempt, no doubt, to control her in the disposition of it, and to prevent her parting with it to strangers.

It is unnecessary to allude to what is said in the judgments of the subordinate Court and the High Court. Their Lordships are of opinion that the conclusion they came to was a correct conclusion, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The costs of it will be paid by the appellant.

Solicitor for the appellant: Mr. *T. L. Wilson*.

Solicitors for the respondent: Messrs. *Barrow and Rogers*.

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REVI-  
SIONAL.

8 A. 51=5 A.W.N. (1885) 326.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. BANDHU. [7th December, 1885.]

8 A. 51=  
5 A.W.N.  
(1885) 326.*Animal "nullius proprietas"—Bull set at large in accordance with Hindu religious usage—Appropriation of bull—Act XLV of 1860 (Penal Code), ss. 403, 410, 411.*

A person was convicted and sentenced under s. 411 of the Indian Penal Code for dishonestly receiving a bull, knowing the same to have been criminally misappropriated. It was found that, at the time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies.

*Held* that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore *nullius proprietas*, and incapable of larceny being committed in respect of it; and that the conviction must be set aside.

[F., 9 A. 348 (350); 87 P.L.R. 1904=5 P.R. 1904 (Cr.); R., 18 B. 212 (215); 17 C. 852 (860); D., 11 M. 145 (146)=1 Weir 498; 4 Bom. L.R. 463 (464); 1 Weir 500 (501); Diss., 34 P.R. 1888 (Cr.)]

[52] THIS was a case reported for orders, under s. 438 of the Criminal Procedure Code, by Mr. C. Donovan, Sessions Judge of Benares. One Bandhu was, on the 21st September, 1885, convicted by Raja Jai Kishen Das, C.S.I., a Magistrate of the first class, under s. 411 of the Indian Penal Code, for dishonestly receiving a bull, knowing the same to have been criminally misappropriated, and sentenced to six months' rigorous imprisonment. The evidence showed that about midnight, on the 1st September, the accused was found going along a road in Mauza Sheonathpur, driving a bull before him. Upon being questioned by a chaukidar, he said he was an Ahir, but immediately corrected himself, saying:—"I am a Chamar and live at Ramnagar, and the bull belongs to the Maharaja. I am taking it to Ramnagar." He also stated:—"My house is at Goghra. The bull has been sent for by Madar and Samer, butchers. They have promised to pay me eight annas." The accused was then taken into custody. The bull was found to be blind, and to bear a brand indicating that it had been set at large by some Hindu at the time of performing funeral ceremonies in accordance with Hindu religious usage. Before the Magistrate the accused stated:—"I do not know who is the owner of this bull. Madar and Samer brought it from some place and gave it to me. I do not know where they drove it. The said two persons told me to take the bull secretly to their house, and promised to pay me eight annas. It was given to me at Goghra, on the western road leading to Chigya; they made me stay near Bari Bagh from now till evening, and then told me to drive it. I acknowledge my fault that I took the stolen property with me at their instigation. Being hungry, I was tempted by the offer of eight annas."

The Magistrate, in convicting the accused, observed:—"Although no one has been found to be the owner, custodian, or keeper of this bull, yet it may be gathered from the statement of the accused himself that the butchers had come by it by illegal means. The bull is not stolen property, but there is no doubt that it was brought by means of misappropriation, and that the accused knowingly retained it for taking it



away. Hence the accused is guilty under s. 411, according to the definition given in s. 410 of the Penal Code."

[53] The accused appealed to the Sessions Judge, who, in dismissing the appeal, made the following observations:—"It was certainly not the intention of the persons who set the bull at large that any human right of property should be attached to it by any one, and the intentions of such persons are respected by general public feeling; and the bulls so let loose are looked upon as not liable to be converted to use in any way that would interfere with their liberty. I may be straining a point, but I think it may be held that the Hindu public have such an interest in these '*Sānds*' remaining unmolested and at liberty, as to make them the subject of a sort of public right, and so bring them within the meaning of 'property.' I find that the bull was, for the purposes of s. 403, 'property,' and that it was dishonestly misappropriated, and had therefore become stolen property (s. 410, Penal Code); and I affirm the conviction and sentence of the lower Court dismissing this appeal. As the question I have discussed, and upon which the case turns, is novel, but nevertheless may turn up again, and as my finding that the bull was 'property' was not arrived at without some hesitation, I think it well to submit the proceedings for the information of the High Court."

Munshi *Kashi Prasad* appeared for the prisoner, Bandhu.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

#### JUDGMENT.

STRAIGHT, J.—I am much indebted to Munshi *Kashi Prasad* for taking so much pains to put the case for the accused man before the Court. I entirely agree with what fell from the *Junior Government Pleader*, that an animal of the kind to which this case has reference was not "property" at the time of the alleged misappropriation, within the meaning of the Indian Penal Code, for it was not only not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor, and had given the beast its freedom to go whithersoever it chose. It was therefore "*nullius proprietas*," and as incapable of larceny being committed in respect of it as if it had been "*feræ naturæ*." I am not now concerned to determine whether cases may not occur in which the killing of such an animal would be an offence; but I have simply to decide whether the conviction of Bandhu, under s. 411, can be upheld. I do not think that it can be; and setting [54] aside the orders of the Magistrate and the District Judge, he will stand acquitted. If he has not found bail and is in custody he will be at once released; if he has, no further order will be necessary.

*Conviction set aside.*

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8 A. 54=5 A.W.N. (1885) 330.

## APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

UDIT SINGH (*Plaintiff*) v. PADARATH SINGH AND ANOTHER  
(*Defendants*).<sup>\*</sup> [7th December, 1885.]

8 A. 54=

5 A.W.N.

(1885) 330.

*Pre-emption—Mortgage by conditional sale—Act XV of 1877 (Limitation Act), sch. ii, No. 120—Time from which period of limitation begins to run.*

A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December, 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April, 1881.

In a suit for pre-emption in respect of the mortgage,—*held*, with reference to art. 120, sch. ii of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April, 1881, declaring the conditional sale absolute and giving him possession. *Rasik Lal v. Gajraj Singh* (1) and *Prag Chaubey v. Bhajan Chaudhri* (2) referred to.

[Overruled, 14 A. 405 (412) (F.B.); R., 13 A. 126 (146); 3 O.C. 184 (187).]

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of a mortgage by conditional sale, dated the 23rd March, 1868, made by the defendant Chatarpal Singh to the defendant Padarath Singh. The mortgagee had applied under Regulation XVII of 1806 for foreclosure of the mortgage, on the 21st April, 1873, and the year of grace allowed by that Regulation had expired on the 24th May, 1874, and a proceeding by the District Court foreclosing the mortgage had been drawn up on the 8th December, 1875. He had subsequently sued to have the conditional sale declared absolute and for possession of the mortgaged property, and had obtained a decree on the 28th April, 1881, for the relief claimed. On the 30th November, 1883, he had obtained possession of the mortgaged property in execution of that decree. This suit was instituted on the 27th March, 1884. [55] The defendant Padarath Singh, the mortgagee, set up as a defence that the suit was barred by limitation.

The Court of first instance (Munsif of Basti) held that the suit was barred by No. 120, sch. ii of the Limitation Act, computing the period of limitation from the 8th December, 1875. It observed as follows: "It has been ruled in the following decisions that in cases of conditional sales the term of limitation for a pre-emptive suit should be calculated from the date of foreclosure—*Nath Prasad v. Ram Paltan Ram* (3) and *Ashik Ali v. Mathura Kandu* (4). The case last cited is similar to the present. I therefore, without disposing of the other issues, dismiss the plaintiff's claim with costs."

On appeal the lower appellate Court (Subordinate Judge of Gorakhpur) concurred with the Munsif that the suit was barred by limitation under art. 120, but computed the period of limitation from the 24th May, 1874, the date of the expiration of the year of grace.

The plaintiff appealed to the High Court, contending that the period of limitation should be computed from the date the mortgagee had obtained possession in execution of his decree.

<sup>\*</sup> Second Appeal No. 112 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 31st July, 1884, affirming a decree of Munshi Shiva Sahai, Munsif of Basti, dated the 5th May, 1884.

(1) 4 A. 414.

(2) 4 A. 291.

(3) 4 A. 218.

(4) 5 A. 187.

Lala Lalta Prasad, for the appellant.  
Mr. Carapiet, for the respondent.

## JUDGMENT.

STRAIGHT, J.—The article of the Limitation Law admittedly applicable to this case is art. 120, and the only question is, from what point are the six years to be held to commence. Now, although the final order for the foreclosure was made in December, 1875, Padarath Singh, the vendee, was compelled to bring a suit for declaration of his title and possession, and it was not until the 28th April, 1884, that he obtained a decree, under which possession was subsequently given him on the 30th November, 1883. For the reasons given by me in *Rasik Lal v. Gajraj Singh* (1), I think that the pre-emptor is entitled to contend that his full right to impeach the sale had not accrued until the validity of the sale, as between the vendor and vendee, had been established by a Court, for *non constat*, but that it might have been found invalid, in which case his cause of action would have disappeared. It is not neces-[56]sary for me to discuss here whether I am prepared to adopt the view expressed by my brothers Oldfield and Brodhurst in the case of *Prag Chaubey v. Bhajan Chaudhri* (2); as taking the decree of the 28th April, 1881, as the starting point, the present suit, which was started on the 27th March, 1884, is abundantly within time. In my opinion this appeal must be decreed, and the decrees of the lower Courts being reversed on the preliminary point on which they threw out the suit, the case will be remanded to the Munsif, under s. 562 of the Civil Procedure Code, for disposal on the merits. The costs hitherto incurred will be costs in the cause.

TYRRELL, J.—I agree in the views stated and the order made by my learned brother.

*Appeal allowed.*

8 A. 56=5 A.W.N. (1885) 327.

## APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

THAKUR DAS (*Decree-holder*) v. SHADI LAL (*Judgment-debtor*).<sup>\*</sup>  
[7th December, 1885.]

*Execution of decree—Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.*

A decree, which was passed on the 8th December, 1881, in a suit on a simple mortgage-bond, contained the following provision :—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February, 1885, the decree-holder applied for execution of the decree.

Held that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. ii of the Limitation Act, and not of art. 179, should be applied to the case, and the application for execution having

<sup>\*</sup> Second Appeal No. 72 of 1885, from an order of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 23rd June, 1885, affirming an order of Sayyid Zakir Husain, Munsif of Farukhabad, dated the 9th March, 1885.

(1) 4 A. 414.

(2) 4 A. 291.



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been made within three years from the 8th April, 1882, when the right to ask for execution accrued, was not barred by limitation.  
[F., 26 M. 780 (786) = 13 M.L.J. 412; L.B.R. (1893-1900) 588 (590); Appr., 16 A. 237 (239); R., 17 A. 39 (40).]

THE decree of which execution was sought in this case, bearing date the 8th December, 1881, was made in a suit on a simple mortgage-bond. It contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by sale of the mortgaged property." The decree-holder applied for execution of the decree on the 17th February, 1885. The Court of first instance (Munsif [57] of Farukhabad) rejected the application on the ground that it was barred by limitation. The Court was of opinion that the decree-holder should have applied for execution within three years from the date of the decree, as provided by art. 179, sch. ii of the Limitation Act, inasmuch as the decree could have been executed against the judgment-debtor personally from its date, although it could not have been executed against the mortgaged property till the expiration of four months from its date, and no such application having been made, the present application was barred.

On appeal by the decree-holder the lower appellate Court (District Judge of Farukhabad) affirmed the order of the Court of first instance.

The decree-holder appealed to the High Court, contending that the application was not barred by limitation.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represented.

#### JUDGMENT.

BRODHURST and TYRRELL, JJ.—The Courts below were wrong in applying the provisions of art. 179, sch. ii of the Limitation Act to this case. The decree made on the 8th December, 1881, provided expressly that the decree-holder might not apply for its execution till after expiry of four months from that date, that is to say, till after the 8th of April, 1882. Therefore the limitation of art. 178 applies to the case before us. The decree-holder has three years from the date when the right to ask for execution accrued to him. His application of the 17th February, 1885, being within three years from the 8th April, 1882, is not barred. The appeal is decreed with costs.

*Appeal allowed.*

8 A. 57 = 5 A.W.N. (1885) 331 = 10 Ind. Jur. 232.

#### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

TAHAL (*Plaintiff*) v. BISHESHAR AND ANOTHER (*Defendants*).<sup>\*</sup>  
[11th December, 1885.]

*Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings—Act I of 1877 (Specific Relief Act), s. 21.*

One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter deferred. The defendants [58] pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract.

<sup>\*</sup> Second Appeal No. 149 of 1885, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 9th January, 1885, reversing a decree of Shaikh Maula Bakhsh, Munsif of Mirzapur, dated the 23rd August, 1884.

Held that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act.

The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it.

[Appr., 11 B. 199 (214); R., 29 A. 13 (14) = 3 A.L.J. 613 = A.W.N. (1906) 253; U.B.R. (1897-1901) 542.]

THE plaintiff in this suit claimed possession of a house. He alleged that many years ago he and his brother, the father of the first defendant, Bisheshar, and grand-father of the second defendant, Khannu, had made a division of their ancestral property; that the house in question, which was a part of such property, fell to the plaintiff's share; and that he had been wrongfully dispossessed of it by the defendants. The defendants pleaded—(i) that there had been an agreement between the plaintiff and themselves to refer the matter to arbitration, and that the suit was barred by the last paragraph of s. 21 of the Specific Relief Act; and (ii) that there had been no such division of property as alleged by the plaintiff; and that, assuming that such division had been made, the plaintiff was entitled to one-half of the house only.

Upon the first of these contentions, the Court of first instance (Munsif of Mirzapur) observed as follows:—"I have very carefully considered the objection founded on the concluding paragraph of s. 21 of the Specific Relief Act, and the conclusion to which I have come is adverse to the defendants. To succeed in that plea, the defendant must, in my opinion, prove that the plaintiff has refused to perform the contract to refer to arbitration. This has not been done—not even alleged nor suggested—by the defendants: on the contrary, one of their witnesses, Debi Prasad, gives as a reason why there was no award, that which I think to be equally the fault of the defendants. He says:—'No award has been delivered; since the agreement the parties have quarreled, and the present suit has been instituted; therefore no award was made.' I understand him to mean that neither party abided by the contract, and therefore there was no award. This appears to me to be the law itself. As an authority, if needed, I refer to *Koomud Chunder Dass v. Ohunder Kant Mookerjee* (1). The plaintiff's own [59] explanation why he would not conform to the aforesaid agreement is, that the arbitrators had refused to decide, and that some of them have died since the institution of the suit. The first portion of this statement is disputed, as the pleader for the defendants contends that the arbitrators did not refuse; but whether they did or did not refuse is, I think, immaterial, since it is now admitted that some of them are dead; and, this being so, I hold that the agreement has ceased to be operative between the parties (*Russell on Arbitration*, p. 156). It had been also urged that as the arbitrators, who are stated to be now dead, were alive, and all were willing to adjudicate, at the time the suit was brought, the question of the liability of the plaintiff under the agreement should be determined as it then stood: that, looking at it in that aspect, I should hold the present suit to be barred by s. 21 of the Specific Relief Act, and relegate the plaintiff to a fresh suit. This seems to me a too inequitable view of the matter, and I cannot adopt it. I therefore hold that nothing has been shown to bar the present suit." On the merits of the suit the Court found that there had been a division of the ancestral estate, and

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that the house in question had fallen to the plaintiff's share, and had been held by him for forty years. The Court accordingly decreed the suit.

The defendants appealed to the District Judge of Mirzapur. Upon the question whether the suit was barred by s. 21 of the Specific Relief Act, the Judge observed:—"The Munsif seems to have drawn the conclusion that both parties agreed to revoke the reference to arbitration; for he says, 'I understand him (Debi Prasad) to mean that neither party abided by the contract, and therefore there was no award.' But I do not think that more can be deduced from the witness's words than that the parties quarrelled in the course of the arbitration, and thereupon the plaintiff rushed into Court. Now this, I think, amounted to a refusal to perform his share of the contract. He had contracted to await and abide by the award of the arbitrators. Instead of doing this, he rushed into Court before the arbitrators had had time to complete the inquiry upon which they had entered. This case, then, is clearly distinguishable from *Koomud Chunder Dass v. Chunder Kant Mookerjee* (1), cited by the Munsif, where the reference to arbitration had been [60] contingent, but when the contingency arose, the defendants omitted to call upon the plaintiff to carry out his contract to refer the dispute to arbitration, and, in consequence of this omission and of the plaintiff's omission to bring the case before the arbitrator, the case never came before the arbitrator at all. That precedent merely shows that from the mere omission of the plaintiff to bring the case before the arbitrator, it cannot be inferred that he has refused to allow it to go before the arbitrator, and the same rule is laid down in *Atma Roy v. Sheoharan Rai* (2). But here the case was actually before the arbitrators, and the plaintiff tried to withdraw it from their cognizance by filing this suit. Under these circumstances, I think the suit is barred. The cause of action is said to have accrued on the 17th January, 1882, and the house in suit was admittedly one of the two houses specified in the agreement of the 18th May, 1883; and it is clear, therefore, that the subject of the present suit is one of the subjects that the plaintiff had contracted to refer. The Munsif assigns another reason for holding that the suit is not barred, namely, that some of the arbitrators being admittedly now dead, the agreement had ceased to be operative. But I think that 'the existence of such contract' in s. 21, means 'the existence of such contract at the time of institution of the suit,' as clearly appears from the context. Whether or not the plaintiff may be entitled to institute a suit after the death of some or all of the persons named as arbitrators, he was not entitled to institute the present suit at a time when all those persons were alive. I reverse the Munsif's decree, and dismiss the suit with costs in both Courts."

The plaintiff appealed to the High Court, contending that the suit was not barred by s. 21 of the Specific Relief Act.

Munshi Kashi Prasad, for the appellant.

Babu Ram Das Chakrabati, for the respondent.

#### JUDGMENT.

BRODHURST and TYRRELL, JJ.—It is admitted in this case that the parties agreed to an arbitration on the 18th May, 1883. One of them has brought this suit for part of the subject-matter referred to the arbitrators more than a year after that date. The defendants plead the bar of s. 21 of the Specific Relief Act, but they do not allege in their answer to the



plaint that the plaintiff [61] refused to perform his contract to submit to arbitration. And one of the arbitrators, a witness in this case, has sworn that the arbitrators did not decide the case because "the parties were contentious among themselves." The Judge, in appeal, held that the mere act of filing this suit on the part of the plaintiff is tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act. We cannot take this view; and we hold that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it. We allow the appeal, and setting aside the decree of the lower appellate Court, remit the appeal for determination on the merits, under s. 562 of the Civil Procedure Code. Costs will be cost in the cause.

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CIVIL.  
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8 A. 57=  
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10 Ind. Jur.  
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*Appeal allowed.*

8 A. 61=6 A.W.N. (1885) 1.

### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

DHANAK SINGH AND OTHERS (Defendants) v. CHAIN SUKH  
(Plaintiff).<sup>\*</sup> [12th December, 1885.]

*Lambardar and co sharer—Suit by co-sharer for profits—Burden of proof—Act XII of 1881 (N.-W.P. Rent Act), s. 209.*

When a co-sharer claims a dividend on the full rental of the mahal, and the lambardar pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar, in the sense of s. 209 of the N.-W.P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections.

[R., 12 A. 301 (F.B.).]

THE plaintiff in this suit, a recorded co-sharer in a mahal, sued the defendant, the lambardar, for his share of the profits, claiming in respect of the full rental of the mahal. The Assistant Collector trying the suit gave the plaintiff a decree for profits calculated on what the defendant and the patwari said had been collected, on the ground that it was for the plaintiff to prove that more was collected, or that the defendant was able to collect more, which he had not done. On appeal to the District Court the plaintiff contended that he was entitled to a share of profits calculated on the full rental of the mahal, and that if the lambardar asserted that he had collected less than the full rental, the burden of proving that fact rested [62] on him, and also of showing that he was unable to collect the full rental owing to circumstances which would relieve him of the responsibility of accounting to the share-holders for the full rental. The District Judge allowed this contention; and, as the defendant had not proved that he had not collected the full rental, and had not shown that he was

<sup>\*</sup> Second Appeal No. 160 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 12th November, 1884, modifying a decree of Pandit Maharaj Narain, Assistant Collector of the first class, Farukhabad, dated the 29th March, 1884.

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8 A. 61 =  
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(1886) 1.

unavoidably prevented from collecting, he gave the plaintiff a decree for the amount he claimed.

The heirs of the lambardar appealed to the High Court.

Mr. *Carapiet*, for the appellants.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondent.

### JUDGMENT.

BRODHURST and TYRRELL, JJ.—The burden of proof has been wrongly laid by the appellate Court on the lambardar in this case. When a co-sharer claims a dividend on the full rental, and the lambardar pleads in reply that the actual collection fell short of that rental, it is incumbent on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar in the sense of s. 209 of the Rent Act, before he can succeed in getting a decree for a sum in excess of the actual collections. The Court below has ruled erroneously to the contrary effect; and we must modify his decree to this extent.

The appeal is allowed, with costs in proportion to the amount by which the decree will be thus reduced.

*Appeal allowed.*

8 A. 62 = 5 A.W.N. (1885) 332.

### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.*

CHHIDDU (*Defendant*) v. NARPAT AND OTHERS (*Plaintiffs*).<sup>\*</sup>  
[12th December, 1885.]

*Jurisdiction—Civil and Revenue Courts—Suit by lessee of occupancy tenant for recovery of possession—Act XII of 1881 (N.W.P. Rent Act), s. 95 (n).*

S. 95 (n) of the N.W.P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease, from which the lessor has ejected him; and such a suit is exclusively cognizable by it.

*s. Muhammad Zaki v. Hasrat Khan (1) and Ribban v. Partab Singh (2) distinguished.*

THE plaintiffs in this suit, claiming to be the sub-tenants of the defendant a tenant with a right of occupancy, under a lease in writing, and alleging that the defendant had illegally ejected them, sued for possession of the land leased to them. The suit was instituted in the Court of the Munsif of Etah. The defendants set up as a defence to the suit, amongst other things, that the suit was one cognizable in the Revenue and not in the Civil Courts. Upon the issue framed on this contention the Munsif held, that, the dispute being between two cultivators, the suit was cognizable in the Civil Courts, and, deciding the other issues in favour of the defendant, dismissed the suit. On appeal by the plaintiffs, the lower appellate Court (Subordinate Judge of Mainpuri)

<sup>\*</sup> Second Appeal No. 189 of 1885, from a decree of Maulvi Muhammad Abdul Basit, Subordinate Judge of Mainpuri, dated the 17th September, 1884, reversing a decree of Maulvi Sukhawat Ali, Munsif of Etah, dated the 27th June, 1884.

(1) A.W.N. (1882) 61.

(2) 6 A. 81.

gave them a decree, holding also, for the same reason as the Munsif, that the suit was one of which the Civil Courts could take cognizance.

The defendant appealed to the High Court.

Mr. Simeon, for the appellant.

Babu Ram Das Chakarbat, for the respondents.

### JUDGMENT.

OLDFIELD, J.—In this case it is admitted that the defendant has the rights of an occupancy cultivator in this land, and the plaintiff is a lessee from him. The suit is a suit to recover possession of the land under the lease from which the defendant has ejected the plaintiff. The only question before us is, whether the Civil Court has jurisdiction to entertain this suit. In my opinion the finding of the lower Court on this question is wrong. The suit is exclusively cognizable by the Revenue Courts. The lower Court is wrong in holding that when both the parties are cultivators the suit is cognizable by the Civil Courts, because there is no relation in that case of landholder and tenant as contemplated by the Rent Act. This is not so; the matter in suit is a matter on which an application of the nature mentioned in s. 95 (n)—“application for recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed”—might be made. The rulings cited by the learned pleader for the respondent—*Muhammad Zaki v. Hasrat Khan* (1) and *Ribban v. Partab Singh* (2)—are distinguishable. In those cases the suit was brought against the [64] defendant as a trespasser for a declaration of right. The decree of the Court below is reversed, and the suit is dismissed with costs in all Courts.

PETHERAM, C.J.—I concur.

*Appeal allowed.*

8 A. 64=6 A.W.N. (1886) 2.

### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.*

MUHAMMAD ABID AND ANOTHER (*Plaintiffs*) v. MUHAMMAD ASGHAR (*Defendant*).<sup>\*</sup> [14th December, 1885.]

*Arbitration—Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code, ss. 509, 509, 511, 523—Application to set aside award—Act XV of 1877 (Limitation Act), sch. ii, No. 158.*

In an agreement to refer certain matters to arbitration, which was filed in Court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

<sup>\*</sup> Second Appeal No. 191 of 1885, from a decree of E. B. Thronhill, Esq., District Judge of Jaunpur, dated the 21st November, 1894, reversing a decree of Maulvi Nasur-ul-la Khan, Subordinate Judge of Jaunpur, dated the 31st March, 1894.

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8 A. 62=  
5 A.W.N.  
(1885) 332.



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DEC. 14.

APPEL-  
LATE  
CIVIL.

8 A. 64=  
6 A.W.N.  
(1886) 2.

*Held* that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award, such as the law contemplated. *Lachman Das v. Brijpal* (1) referred to.

*Held* that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

*Held* that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

*Held*, also, that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of [63] the Civil Procedure Code, i.e., applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds.

[F., 2 O.C. 355 (357); D., 29 C. 36 (40); 8 C.L.J. 475 (476); 23 Ind. Cas. 842.]

THE facts of this case are stated in the judgment of the Court.

Mr. C. H. Hill and Shah Asad Ali, for the appellants.

Mr. T. Conlan and Pandit Ajudhia Nath, for the respondent.

#### JUDGMENT.

PETHERAM, C.J., and OLDFIELD, J.—This is a case coming under s. 523 of the Civil Procedure Code.

The plaintiff applied in writing to the Court of the Judge of Jaunpur to file an agreement entered into by him and the defendant to refer certain matters to arbitration. The agreement is dated the 27th August, 1879, and the application was presented on the 17th August, 1883.

This application was numbered and registered as a suit, as required by the section; and notice was given to the parties to show cause why the agreement should not be filed. The defendant filed some objections, which were disallowed; and the Court, made an order of reference, as required by the section, to the two arbitrators named in the agreement.

By this agreement only two arbitrators were named, and no provision was made for difference of opinion, by appointing an umpire, or otherwise. It appears that one of the arbitrators applied to the Court to appoint an umpire, as the arbitrators could not agree; and the Court did appoint an umpire, and directed that the award should be submitted on the 17th March, 1884.

The defendant, on the 14th March, 1884, objected to the umpire appointed by the Court; and no notice would appear to have been taken of the objection; and an award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court on the 15th March, 1884.

Some objections were filed to it by the defendant on the 27th March, which were disallowed; and the Court passed a decree in conformity with the award. The defendant then appealed to the Judge, who reversed the decree, on the ground that the award was illegal, inasmuch as it was not consistent with the agreement for the Court to appoint an umpire, or for the award to be made by the umpire and one only of the arbitrators named.

[66] In appeal by the plaintiff, it has been urged that no appeal lay to the Judge, and that the defendant was precluded from appealing.

inasmuch as he had not applied to set aside the award within the ten days allowed by art. 158 of the Limitation Act, and that it was within the power of the Court to appoint an umpire, and for the umpire and one arbitrator to make the award.

We think the appeal must fail. An appeal will lie to the Judge from the decree of the first Court with reference to the Full Bench ruling of this Court to which the Judge refers (1), where there has been no legal award such as the law contemplates; and this is the case here, as it seems to us that the agreement gave the Court no power to appoint an umpire, and required that the award should be made by the two arbitrators named by the parties.

It has been contended that s. 509 of the Civil Procedure Code gives the Court a power to provide in the way it did for difference of opinion among the arbitrators; and we were also referred to s. 508.

But s. 509 and the other sections preceding s. 523 are only made applicable to cases coming under s. 523 (like the one we are dealing with) so far as their provisions are consistent with the agreement filed under s. 523.

The terms and intentions of the agreement itself must therefore be looked to, to see if s. 509 or s. 511 could be properly applied in this case; and we think they could not, as no implied power to appoint an umpire can be gathered from the agreement of the parties, which appears to have been that the two arbitrators named by them should alone and in consultation arbitrate between the parties, by coming to some unanimous decision upon the matters referred. There will be therefore no legal award in this case.

We do not think that there is any force in the plea that the defendant-respondent is precluded from contesting by way of appeal the decree of the first Court, because he did not apply to the Court to set aside the award within the time allowed by art. 158 of the Limitation Act.

This article applies to applications under the Civil Procedure Code to set aside an award, that is, to applications referred to [67] in s. 522, which are those to set aside an award on any of the grounds mentioned in s. 521.

The defendant, in appeal, however, does not contest the award on any of those grounds.

His objection is that the persons who made the award had no power at all to make it; and there was, in consequence, no legal award; and he questions the legality of the procedure. Whether or not the defendant would be precluded in appeal from making objections on any of the grounds mentioned in s. 521, because he had not applied to set aside the award on those grounds within the time allowed by the Limitation Act for making the application, is a question we need not determine, as it does not arise here; but there is nothing with reference to the Limitation Act to prevent him from raising the question he now does.

A long argument was addressed to us by Pandit *Ajudhia Nath* on behalf of the defendant, that the plaintiff-appellant's application to file the agreement was itself barred by limitation under art. 178 of the Limitation Act; but taking the view here taken, that the appeal fails it is unnecessary to discuss it.

The appeal is dismissed with costs.

*Appeal dismissed.*

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8 A. 64 =  
6 A. W. N.  
(1886) 2.

(1) *Lachman Das v. Brijpal*, 6 A. 174.

1885

DEC. 14,

8 A. 67=6 A.W.N. (1886) 1.

## APPELLATE CIVIL.

APPEL-

LATE

CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

8 A. 67=

6 A.W.N.

(1886) 1.

GOPAL DAI (*Plaintiff*) v. CHUNNI LAL (*Defendant*),\*

[14th December 1885.]

*Execution of decree—Attachment of property—Payment into Court of money due under decree—Civil Procedure Code, s. 295—Assets realized by sale or otherwise.*

*G* and *C* held decrees against *B* and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of *G*'s decree.

*Held* that *G* was entitled to the sum of Rs. 1,200 paid into Court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization of the property of the judgment-debtor.

*Purshotamdass Tribhovandass v. Mihanant Surajbharthi Haribharthi* (1) approved.

[*Appr.*, 28 M. 380 (383)=15 M.L.J. 202; R., 23 B. 264 (269); 6 P.R. 1903; D., 16 B. 91 (93); 26 C. 772 (776).]

[68] THE plaintiff in this suit, Gopal Dai, a Hindu widow, obtained a decree against her husband's father and brother for a maintenance allowance of Rs. 120 per mensem. In February, 1883, she applied for execution of this decree, praying to recover Rs. 1,200, arrears of the allowance, by the attachment and sale of a village belonging to the judgment-debtors. The village was attached, and then the judgment-debtors paid into Court the amount of the arrears. By the order of the Court executing the decree the amount was rateably divided between the plaintiff and other persons who held decrees against the plaintiff's judgment-debtors, and had applied for execution thereof. One of these decree-holders was the defendant in this suit, Chunni Lal, to whom Rs. 844-3-9 were paid. The plaintiff sued to recover this amount from him. Both the lower Courts held that the defendant was entitled to the amount under the provisions of s. 295 of the Civil Procedure Code.

In second appeal by the plaintiff it was contended on her behalf that the provisions of s. 295 were not applicable under the circumstances.

Pandit *Ajudhia Nath* and Babu *Jogindra Nath Chaudhri*, for the appellant.

Mr. *W. M. Colvin*, for the respondent.

## JUDGMENT.

OLDFIELD and BRODHURST, JJ.—We are of opinion that s. 295 of the Civil Procedure Code does not apply to this case.

The plaintiff and defendant held decrees against Babu Bishambhar Nath, and took out execution of them, and the judgment-debtor's estate, mauza Barara, was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of the plaintiff's

\* Second Appeal No. 1663 of 1884, from a decree of Babu Pramoda Charan, Judge of the Small Cause Court, Agra, exercising the powers of a Subordinate Judge, dated the 26th August, 1884, affirming a decree of Lala Baij Nath, Munsif of Agra, dated the 9th May, 1884.



decree, and the question is whether the plaintiff is entitled to this sum, or it was rateably divisible among the decree-holders.

We think that this sum cannot be held to be assets realized by sale, or otherwise, in execution of a decree, so as to be rateably divisible under s. 295. It cannot be said that there was a realisation from the property of the judgment-debtor, and so the payment does not come within the meaning of s. 295. The payment would not release the property from attachment, or stop sale in execution of the defendant's decree.

[69] We concur in the view of the law taken by the Bombay High Court in *Purshotamdass Tribhovandass v. Mahanant Surajbharthi* (1), which supports the view we take here.

The plaintiff is therefore entitled to a decree, and we reverse the decree of the lower Court, and decree the claim with all costs.

*Appeal allowed.*

1885  
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APPEL-  
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8 A. 67=  
6 A.W.N.  
(1886) 1.

8 A. 69=6 A.W.N. (1886) 3.

APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

THE LAND MORTGAGE BANK OF INDIA (*Plaintiff*) v. MOTI  
AND OTHERS (*Defendants*).<sup>\*</sup> [15th December, 1885.]

*License, revocation of—Works of permanent character executed by licensee—Act V of 1882 (Easements Act), ss. 60, 61.*

In a suit by a zamindar to have his right declared to build a house on some waste land in the mauza, the defendants, who were tenants in the mauza, resisted the claim on the ground that they had built wells and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung.

Held that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed.

[R., 12 N.L.R. 75 (81); D., 14 P.R. 1897.]

THE facts of this case are stated in the judgment of the Court.

Babu Jogendro Nath Chaudhuri, for the appellant.

The respondents were not represented.

### JUDGMENT.

OLDFIELD and BRODHURST, JJ.—The claim is by a zamindar to have his right declared to build a house on some waste land in the mauza. Defendants are tenants in the mauza, and assert that they have built wells and water-courses on this land, and have a right also to use it as a threshing-floor and for stacking cow-dung. On these grounds they resist the claim.

<sup>\*</sup> Second Appeal No. 61 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 10th December, 1884, modifying a decree of Maulvi Muhammad Anwar Husain, Munsif of Kaimganj, dated the 13th June, 1884.

(1) 6 B. 588.

1885  
DEC. 15.

APPEL-  
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CIVIL.

8 A. 69=  
6 A.W.N.  
(1886) 3.

The Court below admits that the defendants have no proprietary right in this land, but has dismissed the claim on the ground that they have acquired a right to use it for the purposes claimed.

[70] But if they have acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use can only be as licensees of the plaintiff; and, on the facts found in this case, it can be revoked by the plaintiff, except in respect of the wells, which are works of a permanent character, and on which the defendants have incurred expenses.

The principle of ss. 60 and 61 of the Easements Act is quite applicable to this case, although that Act is not in force here.

In this case, their right to the wells which they have made cannot be interfered with; but the zamindar can revoke the license as to the other use claimed of the land.

The decree of the Court of first instance, which, while decreeing the claim to build the house, preserves the rights as to the wells and taking water from them, and also provides, by consent of the plaintiff, facilities for a threshing-floor, &c., is fit to be affirmed.

We set aside the decree of the lower appellate Court, and restore that of the first Court with costs.

*Appeal allowed.*

8 A. 70=5 A.W.N. (1885) 324=10 Ind. Jur. 305.

#### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.*

BHOLAI AND ANOTHER (*Plaintiffs*) v. KALI AND ANOTHER  
(*Defendants*).<sup>\*</sup> [9th December, 1885.]

*Hindu Widow—Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 42.*

The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property, during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree; in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond.

*Held* that if the widow's possession were only a possession by the plaintiff's consent entitling her merely to receive the profits for her maintenance, the [71] plaintiffs might eject her from the property, and that before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate.

*Held*, also, that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and upon its face, mortgaged

<sup>\*</sup> First Appeal No. 18 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 3rd December, 1884.



her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.

[R., 7 O.C. 187 (190); U.B.R. (1892-1896), 623 (626).]

THE plaintiffs in this suit alleged in their plaint that they and one Doman Pandey were members of a joint and undivided Hindu family; that Doman Pandey died leaving him surviving a minor son called Nihor; his other son, Behari, having died during his father's lifetime leaving a widow, the defendant Musammat Kali; that Nihor died a few days after his father and before his name was entered in the revenue records in respect of the right and interests of his father; and that, owing to the circumstances mentioned above, "the name of Musammat Kali, daughter-in-law of Doman Pandey, was caused to be entered in respect of the rights and interests of Doman Pandey, merely by way of consolation and courtesy to the said Musammat, who had in fact no right to the property in question, and her name had hitherto continued to be recorded." The plaintiffs then went on to allege that, "notwithstanding her want of right in every way," Musammat Kali had, on the 21st May, 1877, executed a bond for Rs. 778 in favour of the defendant Raghubans Pandey, in which she made a simple mortgage of a one anna and one pie share in mauza Sihonda, a part of the property recorded in her name; that Musammat Kali was not competent to make the mortgage, nor was there any necessity for the loan, nor was the bond in question in any way valid and enforceable as regards the plaintiffs, nor had Musammat Kali any right in the property "other than her possession as a trustee in lieu of her alimony;" that in addition to the bond mentioned above Musammat Kali had given another bond to Raghubans Pandey, on which the latter had, on the 6th February, 1884, obtained a decree, in execution of which he had caused a part of the property recorded in the name of Musammat Kali to be attached; and that the property was not liable for this debt and had [72] been wrongfully attached, Musammat Kali having no right therein, and the debt not having been contracted for necessary purposes. On these allegations the plaintiffs claimed the following reliefs:—

"That by establishment of the plaintiffs' right and invalidation of the bond, dated the 21st May, 1877, and of the attachment proceedings, it may be declared that the under-mentioned property, recorded in the name of the female defendant, can in no way be liable for the amount due under the bond dated the 21st May, 1877, and for the amount of the decree dated the 6th February, 1884."

In the mortgage-bond, in respect of which relief was claimed, Musammat Kali, after stating that she had borrowed Rs. 778 from Raghubans Pandey at the rate of Re. 1-8-0 per cent. per mensem, and promising to repay that amount within one year, and after stating the purposes for which the money had been borrowed stated as follows:—

"I hypothecate a one anna and one pie share of mouza Sihonda..... for this sum, and I will not mortgage or transfer it in any way until the said sum with interest is repaid."

The suit was defended by both defendants upon the ground, amongst others, that Doman Pandey had in his lifetime separated from the family to which he and the plaintiffs belonged; that Behari, the deceased husband of Musammat Kali, had not predeceased his father Doman

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and his brother Nihor, but, on the contrary, Nihor had died first and then Doman, and Behari had succeeded to the property recorded in his father's name, and had in turn been succeeded by Musammat Kali as his heir; and that the debts which the lady had contracted she had power to contract, and the plaintiffs were not competent to maintain the suit, inasmuch as they were not the next reversioners, Behari's daughter and daughter's son being alive.

The defendant succeeded in this defence and their other defences in the Court of first instance (Subordinate Judge of Gorakhpur), which dismissed the suit. The plaintiffs appealed.

Messrs. *T. Conlan* and *G. T. Spankie*, for the appellants.

Mr. *C. H. Hill*, Babu *Jogindro Nath Chaudhri*, and *Lala Jokhu Lal*, for the respondents.

[73] Mr. *G. T. Spankie*, for the appellants:—The evidence on the record shows that Behari, husband of the defendant Musammat Kali, predeceased his father Doman and his brother Nihor. The family was joint, and Kali enjoyed the profits of the estate, by permission of the plaintiffs, in lieu of her maintenance only, and not by reason of any interest possessed by her in the property. This being so, her possession was necessarily restricted to her own personal enjoyment, and could not be alienated by her. The mortgage executed by her in favour of the defendant No. 2 was therefore an illegal transaction, and the plaintiffs are entitled to a declaration to that effect.

[PETHERAM, C.J.—If the defendant's possession depends wholly on the plaintiffs' permission, she is their tenant-at-will, and they can eject her at any moment. In that case, however, they must seek their relief by ejectment, and cannot, with reference to the proviso to s. 42 of the Specific Relief Act, sue for a mere declaration of their title. The Legislature intended by that section that the Court might grant to a plaintiff the relief granted by the Court of Chancery in cases where no relief at common law was available. Where a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the Court of Chancery would give him this indirect form the relief, the more direct kind not being open to him. A mere declaration was never granted except on this condition. On the other hand, if the plaintiffs in this case cannot eject the widow at their will, she has at all events a right to possession, and that is surely a transferable interest?]

What the plaintiffs desire is not the ejectment of the widow, but the invalidation of the mortgage of the estate by her. All that the proviso to s. 42 of the Specific Relief Act forbids is a suit for a pure declaration, without further relief: it does not compel a plaintiff to sue for all the relief which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. The plaintiffs here ask for consequential relief, in addition to a declaration, for they seek to set aside the alienation and the attachment proceedings. Secondly, assuming that the plaintiffs [74] cannot eject the widow, it does not follow that she has at transferable interest in the property. Her interest was by its very nature confined to her personal enjoyment, and incapable of transfer, resembling in this particular the interest of an occupancy-tenant under Act XII of 1881 (N. W.P. Rent Act), whose alienations though invalid do not entitle the landlord to eject him from his holding. The analogy of English estates is misleading when applied to the possession and transfer of property under the Hindu law.

[PETHERAM, C.J.—You say that the family being joint, the widow of Behari took no interest in the estate, but a mere right of maintenance, but that, by a family arrangement, the reversioners allowed her a life estate in lieu of her maintenance. What evidence is there to show that this life estate was confined to her personal enjoyment, and that she was not competent to transfer it?]

That is the necessary legal consequence of the facts that the family was joint, and that the widow's possession was in lieu of maintenance. She was not in the position of the widow of a separated Hindu.—*Hurdial Singh v. Shewdial Singh* (1).

[OLDFIELD, J.—Surely the power of the widow to transfer an interest of this kind is a matter of evidence in each case.

PETHERAM, C.J.—If the widow had the limited interest you have described, nothing beyond that interest can be affected by her alienations. If the mortgage-deed does not specifically refer to the whole estate, it must be assumed to relate to such interest only as the mortgagor could legally deal with, and you cannot sue upon the assumption that she meant to deal with more. How then is the title of the reversioners endangered?]

Such a transfer is injurious to the reversioners, because the transferee may be put in possession, and they may be compelled to sue him for ejectment, possibly long after the evidence regarding this transaction has ceased to exist. The bond purports, upon its face, to mortgage the whole one anna and one pie share: it contains nothing which confines its operation to the widow's interest, and [75] the *onus* of proving such restriction would lie upon any person asserting it.

[PETHERAM, C.J.—Ought not the plaintiffs to have objected in the execution proceedings to the attachment of the property in execution by the defendant Raghubans Panday?]

They were not obliged to do so: s. 283 of the Civil Procedure Code does not establish any new form of suit. The form of suit is an old one, and the object of the section is to save it, and to prevent any possible impression that the order refusing to release the property from attachment is conclusive.

Mr. C. H. Hill, for the respondents, was not called on to reply.

### JUDGMENT.

PETHERAM, C.J.—I am of opinion that this suit is not maintainable. The facts, as alleged by the plaintiffs-appellants themselves, are, that the female defendant is the widow of a Hindu who was a member of an undivided Hindu family, and that they (the plaintiffs) represent the other members of that family. They allege that, after the death of their brother, they allowed the widow's name to be recorded in his place, in respect of his rights and interests in the property in dispute, out of compliment to her, and that subsequently, although she was not entitled to any interest in the property itself, but only to receive maintenance from them, she was allowed to receive the profits in lieu of the maintenance. They further state that, under this arrangement, she obtained and still continues in possession, and that she executed a deed of mortgaging the property to the other defendant. They bring this suit to obtain a declaration that the mortgage was an illegal transaction. It is a suit which

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1885 must be brought under s. 42 of the Specific Relief Act, or it cannot be brought at all.  
 DEC. 9. — Upon this state of facts, the widow's possession—which the plaintiffs themselves allege to be an actual possession—must have one of two characters. Either it is a possession by the plaintiffs' consent, entitling her merely to receive the profits for her maintenance, or it is a possession for her life, given to her in exchange for the annuity which, under the arrangement I have referred to, she has released to the plaintiffs. In either case, I am of opinion that the suit is not maintainable. If her possession is merely permissive, and extends no further than the collection of the profits, then the plaintiffs may eject her from the property, if they [76] are at any time dissatisfied with her mode of dealing with it. Then, before they can claim the relief provided by s. 42 of the Specific Relief Act, they must claim the other relief to which they are entitled—that is to say, the relief of ejectment, that being the substantial and real relief appropriate to such a cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for the annuity which she had released to the plaintiffs, then she possessed an interest which, so far as I can see, she had a right to dispose of. The mortgage-deed in question contains no description of the amount of the estate mortgaged by her. It is expressed with extreme vagueness, and, upon its face, mortgages her share of the property only. It could therefore have no operation beyond her share; and, in my opinion, no Court would be justified in interfering, and in making such a declaration as the plaintiffs ask for, merely because the deed is so vague that they apprehend that some imaginary claim may possibly be made by somebody at some time or other. Under these circumstances, I am of opinion that the suit and the appeal must be dismissed. Each of the respondents will be allowed his own costs separately.

OLDFIELD, J.—I agree in the opinion that this is not a case in which the declaration sought for should be granted. I may add that we have heard the appeal on its merits, and I see no reason to interfere with the decision of the Court of first instance. The appeal is dismissed with two sets of costs.

*Appeal dismissed.*

8 A. 76 = 6 A.W.N. (1885) 19 = 10 Ind. Jur. 269.

#### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

RAGHUNATH PRASAD (*Defendant*) v. GOBIND PRASAD (*Plaintiff*).\*  
 [12th December, 1885.]

*Hindu Law—Joint family—Power of the father to alienate ancestral property for pious purposes.*

According to the Hindu Law, the power of a father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande v. Babu Kunwar Singh* (1) referred to.

\* Second Appeal No. 168 of 1885, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 6th January, 1885, reversing a decree of Babu Khetra Mohun Ghose, Offg., Munsif of Cawnpore, dated the 22nd July, 1884.

(1) S.D.A.P., (1843) vol. 5, 24.



[77] In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above mentioned, the son having contended the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the lower appellate Court for the purpose of ascertaining whether the endowment had been made *bona fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff.

[R., 24 B. 547 (555) ; D., 11 M.L.J. 310 (311).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Nand Lal*, for the appellant.

Mr. *Shivanath Sinha* and *Lala Lalta Prasad*, for the respondent.

### JUDGMENT.

BRODHURST and TYRRELL, JJ.—This is a suit brought by an adult son against his father and the trustee of an idol, on whom the father conferred a house and some moveable effects by a deed executed on the 6th May, 1881.

It is conceded that the father and the son are joint owners of a considerable ancestral estate. It is also unquestionable that the shares of the parties in case of a partition between them would be half and half each. On the 8th April, 1884, the son brought this suit to cancel the deed of transfer, on the single ground that, under the Hindu law, his father was incompetent to make any disposal whatever of the ancestral estate without his, the son's, consent.

The first Court tried this issue and decided it in favour of the father, dismissing the claim of the plaintiff. The latter pleaded in appeal before the District Judge the absolute inability of his father to deal with the property as he had done, the absence of any legitimate necessity for the alienation in question, and, finally, that the motive of the endowment was not piety to the gods, but malice against the son, who had interfered with a previous disposition of a portion of the property in favour of Musammat Gumti, a sister of the plaintiff. The Judge found that the father's powers to make an alienation of ancestral estate against the will of his son would not extend the provision of a permanent shrine of a family idol; and that, even if it did, the alienation should be restricted to "a small portion" of the estate. The Judge, holding that the alienated property represented a value of Rs. 693 out of an entire estate worth Rs. 4,000, decided that the gift was exclusive, and decreed the appeal and the suit. This decision is challenged in second [78] appeal; and an examination of the authorities is sufficient to show that a father is competent to deal with ancestral property, not only for the especial exigencies mentioned by the Judge, but also to make "pious and reverential gifts to Brahmans, as Brahmutra Krishnarpana," also "gifts from affection towards Vishnu and other divinities"—*Gopal Chand Pande v. Babu Kunwar Singh* (1). The finding of the Judge on this point therefore cannot stand; and we are not informed on what materials he based his finding that the value of the estate is Rs. 4,000 only. The Judge has also omitted to decide the important plea as to the real motive underlying the gift—that is to say, the question of the good faith of the donor.

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(1886) 19 =  
10 Ind. Jur.  
269.

We have not materials on the record to enable us to dispose of these questions. We therefore refer the following issues for trial under s. 566 of the Civil Procedure Code:—

1. What is the value of the entire ancestral property of the parties to the suit?

2. Has the endowment been made *bona fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff-respondent, as pleaded by him in his fifth plea before the Judge?

On receipt of the findings, ten days will be allowed for objections.

*Issues remitted.*

8 A. 78 = 6 A.W.N. (1886) 5.

APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

PAIGI AND ANOTHER (Defendants) v. SHEONARAIN (Plaintiff).  
[18th December, 1885.]

*Husband and wife—Hindu Law—Restitution of conjugal rights—Suit by Hindu husband out of caste at time of suit—Decree for restitution conditional on plaintiff's obtaining restoration to caste.*

In a suit by a Hindu, a *sunar* by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Muhammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to [79] render him liable to perpetual excommunication, and, upon making certain amends, he could obtain restoration to his caste.

*Held* that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste.

*Held*, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste.

*Held* also that, under the Hindu law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights.

[Not followed, 27 A. 96 (97) = A.W.N. (1904) 173 = 1 A.L.J. 433; F., 13 A. 126 (163); R., 28 C. 37 (43, 47); 28 C. 751 (768) = 5 C.W.N. 673; 34 C. 971 (979) = 9 C.W.N. 510 = 1 C.L.J. 283.]

THE facts of this case are stated in the judgment of Straight, J.

\* Second Appeal No. 256 of 1885, from a decree of W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 13th January, 1885, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 17th April, 1884.



Babu Baroda Prasad Ghose, for the appellants.  
Mr. Abdul Majid, for the respondent.

## JUDGMENT.

STRAIGHT, J.—This is a suit brought by the plaintiff, Sheonarain, a *sunar* by caste, against Musammat Paigi, his wife, and Musammat Sarasuti, his mother-in-law, for restitution of conjugal rights.

His allegations are, that he was married to the defendant Musammat Paigi eight years ago; that she now refuses to cohabit with him, and that she is kept from doing so by the second defendant, her mother.

The defendants pleaded two matters in reply. In the first place, it was pleaded that, under an agreement of the 1st June, 1876, the plaintiff had, prior to his marriage to the defendant No. 1, undertaken to live in the house of his mother-in-law, defendant No. 2, with his wife after marriage; that defendant No. 1 was married to him on that condition; that he has left the house and refuses to live in it, and is therefore not entitled to enforce [80] his marital rights, and that the defendant No. 1 can consequently withdraw herself from him. In the second place, it was pleaded that the plaintiff, having taken a Muhammadan woman as his mistress, and having lived and eaten food with her, has been put out of caste; and that, under these circumstances, defendant No. 1 cannot be called upon to go back to him, as, if she did, she would be excluded from caste herself. As to the first of these defences, I need scarcely say it is absurd, and of course could not be seriously entertained in a Court of law, and need not be noticed further.

Both the Courts below have given the plaintiff a decree, and the defendants are appellants before us from the decision of the Subordinate Judge.

The pleas in appeal are in substance as follows:—

1. That as the plaintiff is still out of caste, the defendant, his wife, is not bound to return to him.

2. That until he has been restored to caste no cause of action can accrue to him.

Now it has been found by both the Courts that the plaintiff did leave his wife and cohabit with another woman, whom now, however, he has given up, and was consequently turned out of caste; but that the impropriety and breach of caste rules and regulations of which he was guilty was of such a character and description as did not render him liable to perpetual excommunication; but that, upon his making certain amends, by feeding his caste-fellows, he can obtain restoration to his caste that of a *sunar*. This is now admitted to be so on both sides.

Now I need scarcely say that unless we can hold that by being excluded from caste under the circumstances I have mentioned, the plaintiff had extinguished his ordinary civil rights as a husband to require his wife to live with him, or that, in other words, the marriage had, under the Hindu law, thereby been dissolved, he is entitled to come into Court to seek the relief he asks, if he is not otherwise disqualified from obtaining it. But while entertaining this view, we are, I think, bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she may raise to [81] such process being granted, either on the ground that she has been subjected before to personal injury or cruelty at the hands of her husband, or that she goes in fear of one or the other, or that the husband is actually living in adultery with another woman, or that, if she resume cohabitation

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(1886) 3.

or association with him, he being outcasted, she will herself incur the risk of being put out of caste.

I therefore think that, in decreeing a claim of this description, a Court is entitled, if it sees good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case fairly demand.

Applying this principle to the present case, it seems to me that the defendant Musammat Paigi may reasonably ask us, before compelling her to return to her husband, to make it a condition that he shall first obtain his restoration to caste, and to this extent I think her appeal should succeed. Having looked into the authorities on the subject, I am not prepared to hold, until corrected by a higher tribunal, that, under the Hindu law, the fact that a husband has had adulterous intercourse with another woman, which has ceased at the time of suit, is an answer to a claim by him for restitution of conjugal rights.

Before stating what the decree here should be in terms, I have to observe, with reference to Musammat Sarasuti, that no case whatever has been made out by the plaintiff for making her a party to the proceedings, and the suit as against her must be dismissed. It only remains for me to direct that the decree be framed in the following terms:—

It is ordered and decreed that this appeal be decreed; that the suit in respect of Musammat Sarasuti do stand dismissed; and that it be declared that the plaintiff is entitled to his conjugal rights as to Musammat Paigi; and that, upon his obtaining his restoration to his caste, the defendant Musammat Paigi, his lawful wife, do and is hereby ordered to return to his protection within one month of such restoration to caste and of request by him to her to return thereto.

In the event of the plaintiff satisfying the condition of this decree, and the defendant Musammat Paigi wilfully failing to obey [82] its directions, her obedience will be enforced in manner provided by s. 260 of the Civil Procedure Code.

The costs of this appeal will be paid by the respondent, who will also pay the costs of Musammat Sarasuti throughout the litigation.

The defendant No. 1 will pay her own costs in the Court below.

TYRRELL, J.—I concur.

*Appeal allowed.*

8 A. 82=6 A.W.N. (1886) 6.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

GANGA RAM AND ANOTHER (*Defendants*) v. DATA RAM AND ANOTHER (*Plaintiffs*).<sup>\*</sup> [18th December, 1885.]

*Appellate Court, powers of—Withdrawal of suit—"Decree"—Appeal—Civil Procedure Code, ss. 373, 582.*

Where, on appeal from a decree dismissing a suit, the appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under

<sup>\*</sup> Second Appeal No. 206 of 1885, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 11th December, 1884, affirming a decree of Maulvi Manim-ud-din Ahmad, Munsif of Ghaziabad, dated the 11th September, 1884.

s. 373 of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh one—*held* that the order of the appellate Court was a “decree” within the meaning of the Civil Procedure Code, and afforded a proper ground of second appeal to the High Court.

*Per* STRAIGHT, J., that, with reference to the terms of s. 582 of the Civil Procedure Code, the appellate Court had power to avail itself of the provisions of s. 373 and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *Gregory v. Dooley Chand Kandary Mull* (1) and *Khatoon Koonwar v. Hurdoot Narain Singh* (2) referred to.

Also *per* STRAIGHT, J., that it could not be said that the Appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal.

*Per* TYRRELL, J., that it might be taken that the appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that, in this view, there was no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code.

[Not followed, 17 A. 97 (99); 13 A.L.J. 444=37 A. 326=28 Ind. Cas. 857; F., 21 P.R. 1909=32 P.L.R. 1909; D. 16 A. 19 (21); 18 C. 322 (323); 40 M. 259=21 M.L.T. 82=(1917) M.W.N. 217 and 246=5 L.W. 558 and 565=37 Ind. Cas. 414 (F.B.).]

THE plaintiffs sued the defendants for the following reliefs:—  
(a) that a wall which they represented had been built on their land by [83] the defendants might be ordered to be demolished; (b) that they might be put in possession of 7 bighas and 13 biswas of land of which they alleged they had been dispossessed by the defendants. The defendants, in their written statements, objected to the plaint as not being sufficiently specific, both in regard to the situation of the wall sought to be removed and also to the boundaries of the land sought to be recovered.

The Munsif of Ghaziabad, who tried the suit, was of opinion that he was not entitled to reject the plaint upon this ground, and proceeded to dispose of the suit on the merits, and in the result dismissed it. On appeal by the plaintiffs the District Judge of Meerut was of opinion that the plaint was informally drawn, that it did not state of how much land the plaintiffs had been dispossessed, or in what way the erection of the wall had deprived them of the land; and he expressed an opinion to the effect that the Munsif ought to have returned it for amendment before the first hearing. He added that under the Full Bench ruling in *Damodar Das v. Gokal Chand* (3), no return for amendment could now be made, and in the result he gave the plaintiffs permission to withdraw the suit with leave to institute a fresh suit. He ordered the plaintiffs to pay all the defendants' cost up to that point.

From this decision the defendants appealed to the High Court on the following grounds:—

1. That the Judge, as a Court of appeal, had no power to make the order he did.

2. If he had the power to do so, he exercised his power improperly and irregularly.

A preliminary objection was taken to the hearing of the appeal by the pleader for the respondents, upon the ground that the order of the Judge did not come within the definition of “decree” as used in the Civil Procedure Code, and it therefore could not be made the subject of second appeal.

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CIVIL.

8 A. 82=  
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Babu Jogindro Nath Chowdhuri, for the appellants.  
Munshi Kashi Prasad, for the respondents.

## JUDGMENT.

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[84] STRAIGHT, J. (after stating the facts continued):—I must deal with this preliminary objection first, and upon it I have only this much to say, that it seems to me that the order with which the Judge closes his judgment must be treated and regarded as one disposing of the suit and the appeal before him. It must, I think, be held to have put an end to the decree which had been passed in the defendant's favour by the Munsif, and it was therefore such an adjudication as must be regarded in the light of a *decree*. In this view of the matter, it affords a proper ground for a second appeal to this Court.

The next question to consider is the first point taken by the appellant. Had the Judge, sitting as a Court of appeal, power to make the order he did, with reference to the provisions of s. 373 of the Civil Procedure Code? Now, by s. 582 of the Civil Procedure Code, it is provided that a Court of appeal shall have in appeals the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits, and the provisions contained in the previous portion of the Civil Procedure Code shall be applicable to appeals, so far as such provisions are applicable. It therefore comes to this, that, in so far as they may be applicable, a Court of appeal has power to avail itself of the provisions of s. 373. In this connection I may refer to a ruling of Sir Barnes Peacock—*Gregory v. Dooley Chand Kandary Mull* (1)—which, though delivered in reference to the provisions of the old Civil Procedure Code (Act VIII of 1859, read in conjunction with s. 37 of Act XXIII of 1861), may nevertheless be regarded as an authority in regard to the present Code. There it was held that a Court of appeal had the power to allow a plaintiff to withdraw a suit and institute a fresh one. In other words it was there decided that a Court of appeal is in this respect, placed in the same position as a Court of original jurisdiction; and if such Court of original jurisdiction has not done what it ought to do, then the Court of appeal may itself do what that Court ought to have done. I may observe that there is another ruling to the like effect—*Khatoon Koonwar v. Hurdoot Narain Singh* (2). Agreeing in the views expressed in those cases, I think with [85] regard to the first contention of the appellants, that the Judge had power, as a Court of appeal, to make the order he did.

The only other point for consideration is, whether the Judge was right in making his order, or was the exercise of his discretion so unreasonable that we ought to set his order aside.

Now by s. 373 of the Civil Procedure Code, read with s. 582, the Judge had, as I have already ruled, a discretion to permit the plaintiffs to withdraw the suit with leave to sue again. That discretion the Judge has exercised; and, without expressing any opinion as to whether, had I been in his place, I should have taken the course he did, I think it enough to remark that I cannot say that he exercised his discretion so unreasonably or erroneously as to compel our interference with it in appeal.

Looking to all the circumstances of the case, I dismiss the appeal; but as the defendants might well have accepted the Judge's order which



gave them all their costs, I think this appeal was a very unnecessary proceeding, and that they ought not to have any costs. Consequently each party will pay his own costs on the appeal.

TYRRELL, J.—The difficulty I felt in dealing with the procedure adopted by the lower appellate Court was, that a plaintiff could not, in my judgment, conceivably be allowed to withdraw, in the proper sense of that term, from a suit that had reached its termination in a decree. To allow a plaintiff to withdraw from a decreed suit is tantamount to allowing him to withdraw from the operation of the decree in that suit, which would stand, however, as a valid operative decree, such withdrawal notwithstanding, in favour of the defendant. In other words, it seemed to me that the District Judge, who had not in any way considered the decree in appeal before him, had not pronounced any decision on its legality or propriety, had left it in all respects undisturbed, could not allow the plaintiffs-appellants before him to withdraw from the suit under s. 373 of the Code, so as to enable them to bring a fresh suit. If there were no other obvious difficulties in the way, the subsisting decree of the Court of first instance would bar any second action in the same matter.

[86] But, on consideration, I think that we may take it that the Court below—though this was not done in express terms—meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect discerned by the Court of appeal in the plaint, the basis of the suit and the decree.

Taking this view of the meaning and effect of the decree before us, I see no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code; and in this view of the case I readily concur in the order proposed by my brother Straight.

*Appeal dismissed.*

8 A. 86 = 6 A.W.N. (1886) 11.

#### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

DURGA PRASAD (*Defendant*) v. SHAMBHU NATH AND OTHERS  
(*Plaintiffs*).<sup>\*</sup> [21st December, 1895.]

*Mortgage—Suit by mortgagee for possession of the mortgaged property—Sale of mortgaged property by mortgagor—Pre-emption—Purchaser for value without notice—Adverse possession—Act XV of 1877 (Limitation Act), sch. ii, No. 144.*

Under a registered deed of mortgage dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October, 1869, the mortgagors sold the property, and thereupon one R brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree and got the property and sold it in 1871 to D. In 1883 the mortgagee brought a suit against D to obtain possession under his mortgage.

*Held*, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the possession of a person who purchased property

<sup>\*</sup> Second Appeal No. 156 of 1885, from a decree of G. E. Knox, Esq., District Judge of Agra, dated the 4th November, 1884, affirming a decree of Babu Abinash Chandra Banarji, Subordinate Judge of Agra, dated the 5th March, 1884.

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DEC. 21.

APPEL-  
LATE  
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8 A. 86=  
6 A.W.N.  
(1886) 11.

by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee v. Dhondro Chunder Mookerjee* (1) distinguished.

*Held* also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not [87] having notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India.

*Held*, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase.

[Diss., 141 P.R. 1907=57 P.L.R. 1908=93 P.W.R. 1907; R., 13 A. 28 (40); 12 O.C. 45 (49).]

On the 20th May, 1869, Kunj Behari Lal, a defendant in this suit, on his own behalf, and as the *sarbarakar* or manager of Musammat Tejo, also a defendant in this suit, executed a deed of mortgage in favour of one Bakhtawar Mal in respect of a share in a village called Baroli and of other shares in other villages. The deed provided that the mortgagor should deliver possession of the mortgaged property to the mortgagee; that the latter should pay the Government revenue out of the profits, and also pay himself Rs. 270 yearly as interest, and pay the balance to the mortgagors; and that if what remained after the payment of the Government revenue did not amount to Rs. 270, the mortgagors should make good the deficiency, and as long as they did so, the mortgagees should not sue for the principal till the end of the year 1280 fasli, corresponding with the 7th September, 1873.

The mortgagees did not deliver possession of the property, and on the 13th September, 1870, the mortgagors sued them for Rs. 270, the interest for the first year, and obtained a decree against Kunj Behari Lal alone. Tejo being exempted. The mortgagors then came to an arrangement with the mortgagees. On the 18th March, 1871, they gave one Sham Lal, a servant of the mortgagee, a general power-of-attorney, which authorised him to take possession of all their property, including the mortgaged property, and to realize the profits and, after paying them a certain sum by way of maintenance, to pay the balance to the mortgagee on account of his debt. This power also authorized Sham Lal to collect the debts due to the mortgagors and pay them to the mortgagee on the same account. This power was apparently not acted on. On the 28th September, 1871, the mortgagors gave the mortgagee a bond for Rs. 1,000, out of which sum they were only paid Rs. 226, the balance being deducted as follows:—Rs. 375 were deducted as due under the decree mentioned above; Rs. 349 were deducted as the interest due on the mortgage-deed from the date of that decree to [88] the date of the bond, and Rs. 60 were deducted on account of moneys advanced subsequently to the date of the mortgage-deed.

On the 19th June, 1874, Tejo executed a deed of sale of certain property in favour of the mortgagee in part satisfaction of the principal and interest due on the mortgage-deed, and Kunj Behari Lal also executed deeds of sale of certain properties in favour of the mortgagee in part satisfaction of the moneys due on the mortgage-deed and the bond. On



the 21st September, 1874, the latter made another payment of Rs. 325, in part satisfaction of the money due on the mortgage-deed and the bond, by executing a deed of sale for that amount of certain property in favour of the mortgagee. In this deed the several sums which had been paid to the mortgagee on account of the mortgage and bond were set out, and it was stated that a balance of Rs. 3,105 was due to him.

In the meantime, on the 7th October, 1869, Kunj Behari Lal sold to one Bansidhar the share in the village Baroli, part of the property mortgaged by the deed of 20th May, 1869, to Bakhtawar Mal. One Raghobar claimed the share by right of pre-emption and obtained a decree for it on the 2nd August, 1870. On the 20th April, 1871, Raghobar sold the property to Durga Prasad. Bansidhar and Raghobar had been in possession of the share, and Durga Prasad obtained possession of it on the date of the sale to him.

The present suit was brought in March, 1883, by the next friend of Sambhu Nath, the heir of Bakhtawar Mal, for possession of the property mortgaged to him by the deed of the 20th May, 1869. Durga Prasad and certain other persons to whom other portions of the mortgaged property had been transferred were made defendants jointly with the mortgagors.

The plaintiff alleged in his plaint that, having regard to the acknowledgments and part-payments by the mortgagors, the suit was within time, and that his cause of action arose in January, 1883, when the defendants refused to give him possession.

All the defendants defended the suit on the ground that it was barred by limitation, more than twelve years having elapsed from the date of the mortgage; and the defendant Durga Prasad further defended it on the ground that he and his vendor [89] had been in adverse possession of the share in the village of Baroli for more than twelve years, and the suit as regards that share was barred by limitation.

The Court of first instance (Subordinate Judge of Agra) held on the first point that, inasmuch as the mortgagors had down to the year 1874 repeatedly acknowledged the title of the mortgagee in several documents executed by them, and had not only paid him down to the 21st September, 1874, interest on the mortgage-deed, but had also paid him a portion of the principal, the suit was not barred by limitation simply because it had not been brought within twelve years from the date of the mortgage, but the plaintiff was entitled to the benefit of ss. 19 and 20 of the Limitation Act. The Subordinate Judge referred to *Mankee Koer v. Sheik Manoo* (1).

On the second point it was contended for the defendant Durga Prasad that the principle laid down by the Privy Council in *Brijonath Koondoo Chowdry v. Khelut Chunder Ghose* (2) and *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee* (3) applied to him, there being no difference between his position and that of a purchaser at an execution-sale. On this point the Subordinate Judge held that the defendant Durga Prasad was not in the position of a purchaser at an execution-sale, but was a person claiming under a voluntary alienation from the mortgagor. The Subordinate Judge further observed as follows:—"As a private alienee of the mortgagor a slight inquiry at the registration office would have disclosed to him the mortgage in favour of Bakhtawar Mal. If he did not make such inquiry, it was his fault, and he cannot be considered

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(1) 14 B.L.R. 315.

(3) 14 M.I.A. 101=8 B.L.R. 122.

(2) 14 M.I.A. 144=8 B.L.R. 104.



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to be a *bona fide* purchaser without notice. There is nothing to show that Bakhtawar Mal wilfully concealed his mortgage from him. Durga Prasad must therefore be held to have purchased the property subject to the plaintiff's mortgage."

The Subordinate Judge in the result gave the plaintiff a decree for possession of the mortgaged property, which, on appeal by the defendant Durga Prasad, the lower appellate Court (District Judge of Agra) affirmed.

[90] The defendant Durga Prasad again contended in second appeal that the suit was barred by limitation so far as it affected him.

Babu *Dwarka Nath Banarji*, for the appellant.

Mr. *T. Conlan*, for the respondents.

### JUDGMENT.

OLDFIELD and BRODHURST, JJ.—Kunj Behari and Musammat Tejo mortgaged the property in suit by a registered deed, dated 29th May, 1869, to the plaintiff. Under the deed the plaintiff had a right to immediate possession: by arrangement, however, between the mortgagors, and mortgagee, the former remained in possession. The right, however, of the plaintiff to obtain possession as against the mortgagors was kept alive. The mortgagors, however, on the 7th October, 1869, sold the mortgaged property in suit to one Bansidhar. One Raghobar brought a suit in respect of the sale to enforce pre-emption and obtained a decree in his favour and got the property; and he made a sale of it on the 20th April, 1871, to the defendant in this suit.

The plaintiff-mortgagee has now brought this suit against the defendant to obtain possession under his mortgage. The suit was instituted on the 17th March, 1883. His claim has been decreed, and the material question in appeal is, whether the defendant can successfully plead limitation against the plaintiff.

It has been contended that Raghobar, who obtained the property by asserting a right of pre-emption by suit, is in a better position than an ordinary purchaser by a private sale, and has a position analogous to that of a purchaser at an execution-sale; and that his possession was not as mortgagor and in acknowledgment of the continuance of the title of the mortgagee, but as absolute owner; and his possession and subsequent possession of defendant will be adverse to the right of the mortgagee, and the suit barred by limitation; and we are referred to the case of *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee* (1). The position, however, of a person who purchases property by asserting a right of pre-emption is not, in our opinion, analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser and enters into the same contract of sale with the vendor that the purchaser was making. There is privity [91] between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. The case of *Anundoo Moyee Dossee* (1) is therefore not applicable. Moreover, that case was not governed or decided under the present Limitation Act. Art. 144, Act XV of 1877, is the law which governs this case; and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. There is nothing to show—and it is not pretended—that until recently,

(1) 14 M.I.A. 101=8 B.L.R. 122.

when the present dispute arose, there were any conflicting claims in respect of the mortgage from which the assertion of an adverse title on the defendant's part against the plaintiff can be gathered, so as to make his possession adverse. The lower Courts have further held that the defendant-appellant had constructive notice of the mortgage by reason of the instrument being registered. This is a question which need not be discussed. It would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage; but his not having notice of it otherwise will not affect his liability.

The principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, has no applicability in our Courts.

There is no equitable ground why the plaintiff's right under the mortgage should be defeated by the defendant's purchase. It has priority; and if the defendant had no notice, it will not affect the plaintiff, who was not responsible for that.

The appeal is dismissed with costs.

*Appeal dismissed.*

8 A. 91—6 A.W.N. (1886) 12.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

BHAGWANT SINGH AND ANOTHER (*Plaintiffs*) v. TEJ KUAR AND OTHERS (*Defendants*).<sup>\*</sup> [24th December, 1885.]

*Civil Procedure Code, s. 13—Res judicata.*

Two-thirds of a village were sold by T, P, and B. B was the widow of S, her name being recorded in respect of the property formerly recorded in his [92] name, and what she sold was his one-third share in the village, the other onethird being sold by T and P. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit C, D, and M, to whom belonged the remaining one-third share in the village. These latter persons contended, *inter alia*, that the family was a joint one, and that B was not competent to alienate her deceased husband's share in the village. The Court decided that the family was joint. After B's death, her daughter K, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share. A suit was brought by certain persons who had purchased the right in the same village of the representatives in interest of C, D and M, against K, her mortgagee, and their vendors, to set aside the mortgage and recover the interests which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res judicata* by reason of the decision in the former litigation.

*Held* that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants *inter se*, but simply as against the plaintiff, and could only be *res judicata* against him or parties claiming under the same title; and the decree in that suit was therefore not binding against K in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with B, K's mother, and on the same side.

<sup>\*</sup> Second Appeal No. 72 of 1885, from the decree of A. F. Millett, Esq., District Judge of Shahjahanpur, dated the 12th November, 1884, affirming a decree of Maulvi Muhammad Ismail, Munsif of Bisauli, dated the 30th June, 1884.



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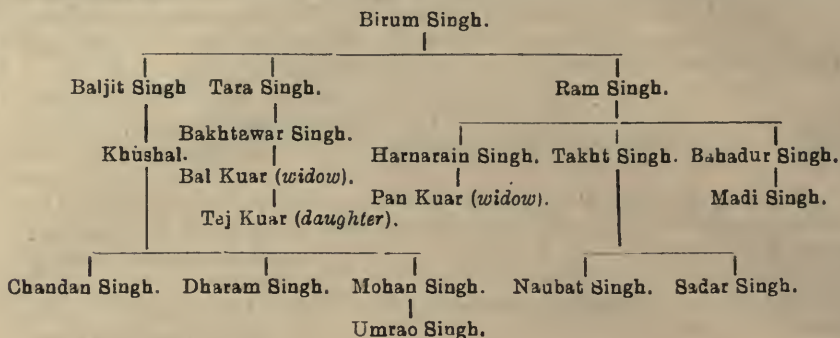
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(1886) 12.

*Shadal Khan v. Amin-ullah Khan* (1) referred to by Straight, J., and distinguished by Tyrrell, J. *Narain Kuar v. Durjan Kuar* (2) referred to by Straight, J.

[Appr., 25 B. 74 (78) ; 6 C.P.L.R. 87 (89).]

THE following genealogical table is material to the question raised by this appeal:—



Birum Singh died possessed of a number of villages, which, on his death, devolved on his three sons, Baljit Singh, Tara Singh, and Ram Singh, in equal one-third shares.

Bakhtawar Singh, son of Tara Singh, died in 1858, leaving a widow, Bal Kuar, whose name was recorded in respect of the [93] property recorded in her husband's name at the time of his death. On the 1st September, 1862, Takht Singh, one of the sons of Ram Singh, Madi Singh, one of his grandsons, Bal Kuar, and Pan Kuar, widow of Harnarain Singh, son of Ram Singh, sold to one Ram Prasad and certain other persons two-thirds of one of the villages mentioned above, called Bisauli. The vendors having refused to give possession of the property, the purchasers sued them for possession of it. Chandan Singh, Dharam Singh, and Mohan Singh were made defendants to the suit after its institution. They contended, amongst other things, that Bal Kuar was not competent to alienate her deceased husband's one-third share in Bisauli, as the family was a joint one. Bal Kuar contended that the three defendants named above were illegitimate, and therefore not competent to challenge the sale. Takht Singh and Madi Singh contended that they were the heirs to Bakhtawar's share. The question whether the family was joint was decided by the Court of first instance in the affirmative, and this decision became final in 1868.

In 1880 Bal Kuar died, and on her death Tej Kuar's name was recorded in respect of the property which had been recorded in Bakhtawar Singh's name, and, after his death, in Bal Kuar's name. On the 2nd May, 1881, Tej Kuar gave a usufructuary mortgage of one of the villages above mentioned to one Makund Ram. In August, 1883, Umrao Singh, Naubat Singh, and Sardar Singh sold their interests in the same village. The purchasers brought the present suit against Tej Kuar, the heirs of the mortgagee, and their vendors, to set aside the mortgage by Tej Kuar and recover the interests which they had purchased. They alleged, *inter alia*, that at the death of Bakhtawar Singh, the family was joint and his rights and interests had passed on his death to the surviving male members of



the family, and contended that the question whether the family was joint or not was *res judicata* with reference to the decision in the former litigation.

Both the lower Courts disallowed this contention.

In second appeal by the plaintiffs they raised the same contention.

Mr. T. Conlan and Pandit Ajudhia Nath, for the appellant.

[94] Babu Dwarka Nath Banarji, Pandit Bishamber Nath, and Munshi Hanuman Prasad, for the respondents.

### JUDGMENT.

STRAIGHT, J.—I am clearly of opinion that this appeal fails. The only plea pressed upon us by the learned counsel is the first, which invites us to disagree with the view of the learned Judge upon the point of *res judicata*. Assuming, though without conceding it, that Musammatt Tej Kuar would be bound by a decree formerly obtained against her mother, Bal Kuar, in respect of the subject-matter of the present suit, such decree would only be binding in the hands of the person who obtained it, or of persons claiming under a title acquired from him. The plaintiffs-appellants before us are not the assignees of Ram Prasad, the plaintiff in the suit of 1868, who, it may be remarked, was unsuccessful in that litigation, but of Chandan and others, who were arrayed in it as defendants along with Bal Kuar and on the same side. In that proceeding the question whether the family was joint or divided was not determined among the defendants *inter se*, but simply as against the plaintiff; and it could only be *res judicata* against him or parties claiming under the same title. My attention has been called to *Shadal Khan v. Amin-ullah Khan* (1). I can only say that if it was intended to lay down in that case that a decree in a suit makes all material questions raised therein *res judicata* as between the defendants to it, I must most respectfully but firmly express my dissent, which is only in accordance with the views expressed by me as far back as 1880, in the case of *Narain Kuar v. Durjan Kuar* (2).

This is the only point before us in second appeal, and such being my opinion with regard to it, the appeal must be dismissed, and is dismissed, with costs.

TYRRELL, J.—I concur in dismissing this appeal with costs, and will only add that in the case of *Shadal Khan v. Amin-ullah Khan*, it was especially noted that the parties to the former suit were in appearance only, and not in fact, on the same side or in the same array, but were, in fact, on opposite sides and controversially maintaining opposite propositions on the issues under trial.

*Appeal dismissed.*

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(1) 4 A. 92.

(2) 2 A. 738.

1886

JAN. 2.

APPEL-  
LATE  
CIVIL.

8 A. 95 =

6 A.W.N.

(1886) 13.

8 A. 95 = 6 A.W.N. (1886) 13.

## [95] APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*RAGHUBAR DAYAL AND ANOTHER (*Plaintiffs*) v. BUDHU LAL  
(*Defendant*).<sup>\*</sup> [2nd January, 1886.]*Mortgage—Redemption—Suit to redeem brought before expiration of term of mortgage.*

A mortgage-deed, dated the 15th March, 1883, stipulated that the mortgagor would "pay the interest every year and the principal in ten years," that "the principal shall be paid at the promised time, and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagees should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 16th July, 1884.

*Held*, upon a construction of the mortgage-deed, that the advance by the mortgagees to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagees could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju v. Vadju* (1) referred to.

[**Not F.**, 201 P.R. (1889); **Cons.**, 10 A. 602 (609); **R.**, 29 A. 471 (473) = 4 A.L.J. 375 = A.W.N. (1907) 133; 20 B. 677 (684); 16 C.P.L.R. 59 (61); **D.**, A.W.N. (1901) 36; 39 C. 828 = 15 Ind. Cas. 287 = 17 C.W.N. 149.]

THE plaintiffs in this suit, the purchasers of one of two houses mortgaged by one Janki Prasad, sued to redeem the mortgage. The defendant set up as a defence that the term of the mortgage had not expired, and therefore the mortgage was not redeemable.

The material portion of the deed of mortgage, which was dated the 15th March, 1883, was as follows:—

"I, Janki Prasad, do hereby declare that I have borrowed Rs. 200 of the Empress of India's coin, half of which is Rs. 100, with interest at the rate of Rs. 2 per cent. per mensem, from Budhu Lal, in order to pay two instalments of mortgage-money due to Gopi Lal, and also to carry on my own business, and mortgage the two pucca-built houses situate in Etawah, which are already hypothecated to Gopi Lal, promising to pay the interest every year, and the principal in ten years. The money has been received in this way:—Rs. 100 have been left with the creditor to pay the instalments due to Gopi Lal, and the remaining Rs. 100 have been [96] received in cash. The agreement is that the principal shall be paid at the promised time, and the interest every year. In any year in which the interest is not paid up, it shall be calculated and added as principal, and interest shall be charged thereon at the above rate till the date of payment; and in this way every item of interest shall be calculated as principal, and interest shall be charged on the aggregate amount. If the principal, interest, and compound interest is not paid up at the

<sup>\*</sup> Second Appeal No. 338 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 16th December, 1884, reversing a decree of Lala Mata Prasad, Munsif of Etawah, dated the 31st July, 1884.



stipulated period, then the creditor is at liberty to realize his money from the houses mortgaged and from my other moveable and immoveable property and my person by bringing a suit. I will not transfer the property mortgaged until the payment of the debt. If I do, the transfer shall be null and void."

The suit was instituted on the 16th July, 1884.

The Court of first instance (Munsif of Etawah) held as follows on the question whether the mortgage was redeemable within the term of ten years:—"It is true that the term fixed for the repayment of the mortgage-money is ten years, but there is not a word in the mortgage-deed prohibiting or precluding the mortgagor from getting the property redeemed before that period. In the absence of a contract to the contrary, I see no reason why the mortgagor or the plaintiffs should not be allowed to repay the debt and protect themselves from the future burden of the interest to be accumulated."

On appeal by the defendant the lower appellate Court (Subordinate Judge of Mainpuri) held that the mortgage was not redeemable within the term, observing as follows:—

"I think that the claim brought within the stipulated period of ten years is improper for the following reasons:—

In the first place, the mortgage-deed has the words 'on a promise to pay the principal amount in ten years.' It does not provide that the money shall be paid within ten years, but provides that it shall be paid in full ten years. Secondly, s. 60, Act IV of 1882, provides that on the principal mortgage-money becoming payable, a mortgagor is at liberty to tender its payment at any time he likes and demand that the mortgage-deed should be returned to him if the mortgage is without possession, or that he [97] should be put in possession if the mortgage is accompanied by possession. Hence this section provides that payment shall be made after the money has become payable—that is, after the expiration of the term of the bond and not within it. Thirdly, in the precedent *Vadju v. Vadju* (1) the suit brought within the stipulated period was held to be unmaintainable. Although that mortgage was accompanied by possession, yet the principles laid down in the precedent are not inapplicable to this case. There are time fixed for redemption and foreclosure of mortgage. In this case also redemption can be made and the mortgagee can obtain a decree and bring the property to auction sale at proper times. Fourthly, the suit is untenable also according to justice, because the creditor has lent his money for profit, i.e., to take interest for the stipulated period. His money is secure, and he will take compound interest. If his money be paid within the stipulated time, he will be deprived of the profit. Had it been the intention of the contracting parties that the money should be paid within the stipulated time, it would have been distinctly provided in the mortgage-deed that if the mortgagor should pay the money within that time, it shall be taken. But the mortgage-deed contains no condition to this effect, nor do the words 'within the stipulated period' occur in it. Hence I find that the suit brought within the stipulated time is unmaintainable."

The plaintiffs appealed to the High Court.

Munshi Hanuman Prasad and Pandit Nand Lal, for the appellants.

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Pandit *Sundar Lal*, for the respondent.

## JUDGMENT.

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STRAIGHT, J.—In this case the plaintiffs-appellants are the assignees of certain mortgagors under a mortgage-deed, dated the 15th March, 1883, of a house charged as security for the mortgage-debt, and the plaintiffs in this case sue for redemption of the mortgage and bring the money into Court for that purpose. The plea of the defendant-respondent is, in effect and substance, that the suit is premature; that the term of the mortgage was ten years, and that neither the plaintiffs nor their assignor was in a position, [98] under the terms of the instrument, to redeem the property before the ten years had expired. The lower appellate Court has adopted this view, and it is this decision of the Court which is impeached by the appeal before us.

The primary question is, under the term of the instrument of the 15th March, 1883, what was the time at which the principal money advanced on the mortgage was payable by the mortgagor to the mortgagee? In other words, after what date would the mortgagee be able to enforce his rights under the mortgage-deed?

I have no doubt that the lower appellate Court was right in the construction placed by it on the instrument of the 15th March, 1883, that the advance of Rs. 200 by the mortgagee to the mortgagor was for a period of ten years certain, and that while, on the one hand, the mortgagee could not enforce his rights during that period, on the other hand the mortgagor was not entitled before that period had expired to redeem the property. It is essentially a case in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal; and there is nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of this nature. Moreover, in the deed itself it is provided that the principal money is to be paid "at the promised time," and that, in default of such payment, certain contingencies shall arise. Reading this expression with the rest of the language of the instrument, it is obvious that by "promised time" was meant a specific point of time, and that was the period of ten years for which the mortgage was made. I may add that I entirely concur with the views of the learned Judges of the Bombay High Court expressed in *Vadju v. Vadju* (1), with regard to the principles which should be applied to such matters, and to which expression had been given in ss. 60 and 61 of the Transfer of Property Act.

The appeal must be dismissed with costs.

TYRRELL, J.—I am of the same opinion.

*Appeal dismissed.*

8 A. 99=6 A.W.N. (1886) 27.

## [99] CRIMINAL REVISION.

*Before Mr. Justice Oldfield.*

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QUEEN-EMPRESS v. JOKHU AND ANOTHER. [15th January, 1886.]

*Public nuisance, repeating or continuing—Injunction by public servant not to repeat or continue nuisance—Act XLV of 1860 (Penal Code), s. 291—Criminal Procedure Code, ss. 134, 143, 144, sch. v. Form 20.*

To support a conviction under s. 291 of the Penal Code, there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code. It is the infringement of this order that is punishable under s. 291 of the Penal Code. What is contemplated is an order addressed to a particular person.

A Magistrate's powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code. Chapter XI is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under s. 144 of the Code, be directed to the public generally when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community.

THIS was an application to the High Court for revision of an order of Mr. P. Gray, Joint Magistrate of Allahabad, dated the 22nd October, 1885, convicting the petitioners, Jokhu and Cheti, of an offence under s. 291 of the Indian Penal Code.

The first ground of the application was that "the petitioners were not, within the meaning of s. 291 of the Penal Code, enjoined by any public servant to discontinue the public nuisance complained of."

The facts of the case are stated in the judgment of the Court.

Mr. A. Strachey, for the petitioners.

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

## JUDGMENT.

OLDFIELD, J.—It appears that the Magistrate received a petition on the 16th September, 1885, complaining of a nuisance caused by cultivators of fields in the petitioners' neighbourhood spreading night-soil as manure on their fields. No one was named [100] in this petition; and upon it the Magistrate issued a proclamation forbidding, in general terms, any person spreading night-soil on his fields so as to cause disease or annoyance.

The proclamation was issued on the 19th September. On the 10th October, one Ali Jan charged Jokhu, the petitioner, and another person who is not before this Court, with offences under ss. 278, 290 and 291, with reference to spreading night-soil on their fields.

The police were directed to send up the accused. They sent up Jokhu and Cheti, the petitioners now before this Court (the latter not being one of those whom Ali Jan had charged); and the Magistrate instituted a prosecution against them under s. 291, and convicted them of an offence under that section, and sentenced them to a fine of Rs. 25 each,

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or simple imprisonment for one month. A petition has been presented for revision, on the ground that no offence under s. 291 has been committed; and in my opinion this is the case. S. 291 is as follows:—"Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance shall be punished with simple imprisonment for a term which may extend to one month, or with fine, or with both."

To support a conviction, there must be proof of an injunction to the petitioners individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code; and it is the infringement of this order or injunction that is punishable under s. 291 of the Indian Penal Code; and it is clear that what is contemplated is an order addressed to a particular person (see sch. V, Form 20).

In the case before me, these requirements have not been fulfilled. The only order of the Magistrate is contained in the proclamation addressed generally to the public at large. It sets out that some [101] persons, not named, have committed a nuisance by spreading night-soil on their fields; and all cultivators are ordered to refrain from spreading night-soil so as to cause disease or annoyance. It is difficult to see how any cultivator could take this order as necessarily applicable to himself. The act of using night-soil as manure is not in itself a public nuisance; and each cultivator might suppose in his individual case that the night-soil he used would not cause disease or annoyance so as to be an infringement of the order. S. 291 contemplates a wilful breach of an order against repeating or continuing a public nuisance; and the order must be brought home to the individual charged before he can be convicted under that section.

I may add that the Magistrate had no authority for the procedure he adopted in issuing the proclamation. His powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code.

The provisions of Chapter X contemplate orders to be directed to, and served on persons individually, and that opportunity shall be given to show cause against the order; and service of the order is to be made on the person against whom the order is made, if practicable, in the manner provided for service of summons; and it is only if such order cannot be so served, that it may be notified by proclamation published in such manner as the Local Government may by rule direct (s. 134).

It is only in emergent cases, to which Chapter XI applies, that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual.

In such emergent cases the order, which is to be served in the manner provided by s. 134, may be directed to "the public generally when frequenting or visiting a particular place" (s. 144). That is to say, an order may, under s. 144, be directed to the public generally, when frequenting or visiting a particular place, to abstain from a certain act; but this provision has no applicability to an order of the nature contained in the Magistrate's proclamation which was directed to a portion of the community, and had no concern with the public generally, frequenting or visiting a particular place.



[102] I notice this point as the Public Prosecutor referred to Chapter XI, and particularly this part of s. 144, to support the action of the Magistrate in issuing proclamation. I may add that Chapter XI is only properly applicable to temporary orders in urgent cases; and the order here was not of a temporary character; nor is there anything to show that the Magistrate considered immediate action necessary under this Chapter.

I have been asked by the Public Prosecutor to alter the conviction to one of an offence under s. 290,—committing a public nuisance—or other which the evidence may prove to have been committed. But this is not a case in which such action on the part of a Court of Revision is desirable, assuming it to have the power. The petitioners were only put on their defence in respect of the charge under s. 291, and the case was tried summarily; and there is no evidence on the record to which this Court can refer, so as to say that any offence has been committed; and it is, moreover, undesirable to take up now a charge in respect of a public nuisance which, if it was committed, is a thing of the past.

The convictions and sentences are set aside, and the fines will be refunded.

*Convictions set aside.*

8 A. 102 (F.B.) = 6 A.W.N. (1886) 24 = 10 Ind. Jur. 303.

#### FULL BENCH.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

KARIM BAKHSH KHAN AND OTHERS (*Defendants*) v. PHULA BIBI  
(*Plaintiff*).\* [20th January, 1886.]

*Pre-emption—Wajib-ul-arz—Vendor and purchaser—Clause fixing price in case of sale to a co-sharer—Sale to a stranger for higher price—Agreement running with land—Pre-emptor entitled to take property on payment of price fixed in wajib-ul-arz—Purchaser entitled to recover purchase-money.*

The *wajib-ul-arz* of a village contained a provision that any co-sharer desiring to sell his share should offer it to the other co-sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid [103] should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to the other co-sharers, sold it to a stranger, for a price higher than that which would be payable according to the above-mentioned provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser, and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers.

*Held* by the Full Bench that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to anyone else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price;

\* Second Appeal No. 1344 of 1884, from a decree of G. J. Nicholls, Esq., Offg. District Judge of Azamgarh, dated the 15th August, 1884, affirming a decree of Rai Soti Behari Lal, Subordinate Judge of Azamgarh, dated the 20th June, 1884.

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and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor.

*Akbar Singh v. Juala Singh* (1) distinguished by TYRRELL, J.

[F., 27 A. 12 = 1 A.L.J. 353 = A.W.N. (1904) 149; R., 11 A. 257 (261); 12 A. 234 (241) (F.B.); 3 A.L.J. 830 = A.W.N. (1906) 308; 12 Bom. L.R. 582 (585) = 7 Ind. Cas. 663; D., 7 A.L.J. 504 (506) = 6 Ind. Cas. 118.]

THE plaintiff in this suit claimed to enforce the right of pre-emption in respect of the sale of a two annas share of a village called Baranpur. This share had been sold by the defendant, Zahur Khan, a co-sharer, to the other defendants, strangers, the sale-deed being dated the 9th April, 1883, and the price stated therein being Rs. 750. The suit was based on the *wajib-ul-arz*. That document provided that a co-sharer, before selling his share to a stranger, should offer it to his co-sharers; and further, that the price to be paid, in case of sale to a co-sharer, should be calculated with reference to the price for which the share of one Karam Khan had been sold in 1860, which was Rs. 198. The plaintiff claimed the benefit of the sale upon payment of Rs. 148-8-0, the amount proportionate to the price of the share mentioned in the *wajib-ul-arz* as the standard of price in sales between the co-sharers of the village. The defendants-vendees pleaded (*inter alia*) that they were entitled to payment by the pre-emptor of the price mentioned in the sale-deed, the same having been actually paid by them to the vendor, and that the conditions of the *wajib-ul-arz* above referred to were not binding on them.

Both the Court of first instance (Subordinate Judge of Azamgarh) and the lower appellate Court (District Judge of Azamgarh) decreed the plaintiff's claim, conditionally on payment by her of Rs. 148-8-0, that being the amount of consideration payable according to the provisions of the *wajib-ul-arz* relating to sales between the co-sharers.

[104] The defendants appealed to the High Court. The appeal came on for hearing before Petheram, C.J., and Straight, J., who made the following order of reference to the Full Bench:—

"The only plea pressed on us in this appeal is the third plea, which raises the following question, namely:—Whether a condition of the *wajib-ul-arz*, such as is found in the present case relating to price, is binding upon the stranger-vendee without notice. According as this question is decided in the affirmative or the negative by the Full Bench, this appeal will be decided."

The question referred was altered by the Full Bench to read as follows:—

Whether a condition of the *wajib-ul-arz*, such as is found in the present case relating to price, is still binding on the land, notwithstanding the sale to the vendees."

Lala *Juala Prasad*, for the appellants.

Munshi *Kashi Prasad*, for the respondent.

#### JUDGMENT.

PETHERAM, C.J.—I am of opinion that the answer to this reference, as altered, should be in the affirmative. The facts of the case are, that by the *wajib ul-arz* of the village concerned it was agreed by the co-sharers that, if any of them desired to sell his share, he should offer it to the others before selling it to a stranger; and also that the price of the property, if sold to any of themselves, should be so much a share. One of the co-sharers sold his share to strangers for a greater price than that



mentioned in the *wajib-ul-arz*. A suit is brought by another of the co-sharers against the vendor and against the purchasers, in whose possession the share is; and the question arises whether, under the circumstances, the plaintiff is entitled to possession of the share on payment of the price agreed upon under the *wajib-ul-arz*. I am of opinion that he is. It has always been considered—and this view has been acted upon—that agreements of this nature run with the land to this extent, that a co-sharer wishing to purchase, and to whom the property has not been offered, can follow it in the hands of the vendee, and get possession of it himself. If this is so, the agreement so far runs with the land; and if it does so to any extent, it must, in my opinion, do so to the full extent of the agreement,—that is to say, a co-sharer is entitled to purchase at the [105] price agreed, before the property can be sold to any one else. As soon, therefore, as a co-sharer finds that another co-sharer has sold his share, he can call on the vendor and the purchaser to hand it over, upon payment of the price which he agreed to pay to those who were parties to the agreement. If the purchaser has paid more than was stipulated for in the agreement, he may get it back from the vendor. The pre-emptor can get the land under the original contract, that is to say, upon payment to his co-sharer of the price mentioned in the *wajib-ul-arz*; and the purchaser can recover the price which he paid, whatever it was, because the consideration has failed, and he has not got the land. For these reasons, I am of opinion that the answer to the reference, as altered, must be in the affirmative, and that the appeal must consequently be dismissed with costs.

STRAIGHT, J.—I am of the same opinion.

OLDFIELD, J.—I am of the same opinion.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—I am of the same opinion. The ruling in *Akbar Singh v. Juala Singh* (1) is distinguishable. The standard in this case is fixed and inflexible; in that case it was only a practicable alternative price to be adopted in the event of the selling and purchasing co-sharers being unable to agree together what the fair price should be.

8 A. 105 (F.B.) = 6 A.W.N. (1886) 25.

FULL BENCH.

*Before Sir W. Comer Petheram, Kt., Chief Justice Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

RAGHUNATH PRASAD (Plaintiff) v. JURAWAN RAI AND ANOTHER (Defendants).\* [22nd January, 1886.]

*Mortgage—First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of second mortgagee to bring to sale mortgaged property subject to the first mortgage.*

In 1874 a plot of land, No. 111, which, in 1866, had been mortgaged to L, was with other property mortgaged to R. In 1878 the equity of redemption in plot No. 111 was purchased by J, who paid off the mortgage of 1866. R brought a suit against J, to bring to sale the whole of the property included in the mortgage of 1874. The Court of first instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off

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\* Appeal No. 6 of 1885 under s. 10, Letters Patent.

(1) A.W.N. (1885) 216.



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[105] the mortgage of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874.

The Full Bench modified the decree of the Court of first instance by inserting after the words "land No. 111 to be exempted from the hypothecation lien" the words "in that property the interest of the plaintiff as second mortgagee only to be sold."

Per OLDFIELD, J., that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage, without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee.

Per STRAIGHT, J., that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the mortgagee of 1866: in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it endured.

[Appr., 22 C. 33 (44); Expl., 12 A. 548 (549); R., 29 A. 385 (393)=4 A.L.J. 273=A.W.N. (1907) 97=2 M.L.T. 248; 16 M. 121 (125); D., 13 A. 432 (452) (F.B.)]

THIS was an appeal to the Full Court, under s. 10 of the Letters Patent, from a judgment of Oldfield, J., dated the 19th March, 1885. The facts out of which the appeal arose were as follows:—Jurawan Singh and Daulat Kuar, co-sharers in a village called Chattardih, mortgaged a plot of land, No. 111, situate in that village, to one Lachman Rai, in May, 1866, for Rs. 401, the mortgage being a usufructuary one. Subsequently, on the 9th June, 1874, the mortgagors executed a simple mortgage of their four annas share in the village, including plot No. 111, to Raghunath Prasad. In June, 1878, the mortgagors executed a deed of sale, in respect of plot No. 111, in favour of Jurawan Rai and others, who paid off the mortgage of 1866 to Lachman Rai. In October, 1882, the second mortgagee, Raghunath Prasad, sought to bring the four annas share to sale by enforcement of his mortgage of June, 1874.

The Court of first instance (Munsif of Balia) decreed the claim in part, exempting from the decree plot No. 111, on the ground that it had been purchased by Jurawan Rai and others, who had paid off Lachman's mortgage of 1866, which had priority over the plaintiff's mortgage of 1874. On appeal, the Subordinate Judge of Ghazipur observed as follows:—The prior mortgage, which is alleged to have been satisfied out of the sale-price paid by Jurawan Rai, Suhawan Rai and Musammat Jairi, ceased to exist on the day it was satisfied. The mortgage to the plaintiff continued [107] to exist even after the prior mortgage was extinguished. Besides, the purchasers, having purchased the property (land No. 111) after it had been mortgaged to the plaintiff, must be held to have purchased it subject to the mortgage to him, and he is therefore entitled to enforce his mortgage on it. The decision of the lower Court is modified, and this appeal decreed by enforcing the plaintiff's mortgage on field No. 111, with cost of both Courts, and interest at the usual rate."

An appeal from this decree was preferred to the High Court, and came on for hearing before Oldfield and Mahmood, JJ. The judgments of the learned Judges will be found reported in I.L.R., 7 All. 569, and *Weekly Notes*, 1885, p. 112. The learned Judges differed in opinion, Oldfield, J., holding that "the prior mortgage was not extinguished, and that it afforded a defence against the claim seeking to bring the property to sale;" and that the decree of the lower appellate Court should be modified and that of the first Court restored; and Mahmood, J., holding that "a puisne incumbrancer is not prevented by the mere fact

of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage," and that the appeal should be decreed, and the case remanded to the lower appellate Court for disposal under s. 562 of the Civil Procedure Code.

The plaintiff appealed to the Full Court from the judgment of Oldfield, J., under s. 10 of the Letters Patent.

Mr. *G. T. Spankie*, for the appellant.

Munshi *Sukh Ram*, for the respondents.

### JUDGMENT.

PETHERAM, C.J.—I am of opinion, after reading the judgments of the two learned Judges of the Division Bench, and looking into the facts of the case, that on the part of one, at all events, of those learned Judges, there was some misapprehension, as to the real facts, and that, had it not been for that misapprehension, no difference of opinion could have arisen. Under these circumstances, I am of opinion that the proper mode of dealing with the matter is to alter the Munsif's order by inserting the words "in that property the interest of the plaintiff as second mortgagee only to be sold" after the words "land No. 111 be exempted from the hypothecation lien." The order as amended will be returned to the first Court for [108] execution. As regard costs, the Munsif's order will stand, but in reference to the proceedings subsequent to that order, there will be no order as to costs.

OLDFIELD, J.—I desire only to add that the suit was brought by the respondent against the first mortgagee of three bighas of land and in possession thereof, that mortgage being usufructuary; and I understood, and still understand, that the object of the suit, which was brought by a second mortgagee holding a second mortgage on the same property was to bring the land to sale so as to oust the first mortgagee and get rid of his mortgage without satisfying it. This, I am of opinion, he cannot do. I was therefore in favour of affirming the decision of the first Court, dismissing the suit. The second mortgagee has a right to sell such interest as he possesses as second mortgagee, and in this view I see no objection to the form of the decree proposed by the learned Chief Justice.

STRAIGHT, J.—I have consented to this form of decree, because it virtually represents the relief to which the plaintiff is entitled, namely, to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866. In other words, a purchaser at a sale in execution of this decree will have no further right than a right to take the property subject to the charge of the first mortgagee, that is, to the first mortgagee's right to possession of the property included in his instrument, and his other rights under that instrument, so long as it enures.

BRODHURST, J.—I agree in the form of decree proposed by the learned Chief Justice.

TYRRELL, J.—I also agree.

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8 A. 108 (F.B.)=6 A.W.N. (1886) 30.

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## FULL BENCH.

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BENCH.*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight,  
Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Oldfield.*

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(F.B.)=

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(1886) 30.

J. R. WILLIAMS (*Petitioner*) v. T. A. BROWN AND OTHERS (*Opposite  
Parties*).<sup>\*</sup> [23rd January, 1886.]

"Decree"—Order dismissing a suit under Civil Procedure Code, s. 381—Civil: Procedure Code, s. 2—Appeal.

The definition of "decree" in s. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree."

[109] Held by the Full Bench that an order passed under s. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code.

[*Dist.*, 4 L.B.R. 17 (F.B.) ; R., 19 B. 307 (308) ; 121 P.R. (1907) (F.B.)=51 P.W.R. (1907) ; D., 18 A. 101 (104) (F.B.).]

THIS was a reference to the Full Bench arising out of an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. The facts of the case sufficiently appear from the order of reference by Straight, J., in which Brodhurst, J., concurred, which was as follows :—

"This is an application to revise an order of the Subordinate Judge of Agra, passed on the 5th June last, dismissing a suit brought by the petitioner for failure to find security for costs as ordered. The order of the Subordinate Judge professes to be passed under s. 381 of the Civil Procedure Code.

"By way of preliminary objection to our entertaining this application for revision, Babu *Baroda Prasad* for the opposite party submits that the order of the Subordinate Judge, which is now impeached constituted a decree ; that, being a decree, it was open to appeal ; and that, therefore, the condition precedent required by s. 622 is absent, and the application cannot be entertained.

"In reply to this contention, Mr. *Howard* submits that it is impossible, looking to the definition of the term 'decree' in s. 2 of the Civil Procedure Code, to contend that the dismissal of a suit under s. 381 for default in finding security for costs is an adjudication upon a right claimed in a Civil Court by a party bringing a suit therein. He frankly concedes that there is a ruling of this Court in *Siraj-ul-haq v. Khadim Husain* (1) decided by my brothers Oldfield and Brodhurst, JJ., which is adverse to the position he is asserting ; but he has also called our attention to a ruling by my brothers Oldfield and Mahmood, JJ., in *Dianat-ul-lah Beg v. Wajid Ali Shah* (2) which favours his view. The question therefore appears to be one as to which there is some doubt ; and speaking for myself, I should, with great deference to my brothers Oldfield and Brodhurst, hesitate about following the ruling of theirs above referred to. It certainly does appear

\* Miscellaneous No. 213 of 1885.

(1) 5 A. 380.

(2) A.W.N. (1884) 154.



to me to be a strong thing to hold that where a plaintiff, having been required [110] to find security for costs, fails to do so, and his suit is dismissed even before any statement of defence has been put in or issues have been fixed, such dismissal constitutes a decree within the meaning of s. 2 of the Civil Procedure Code, and amounts to an adjudication upon the rights alleged by him in his plaint, in respect of which he seeks relief.

"Under the circumstances, it seems to me that this preliminary question should be referred to the Full Bench for determination. I do order that it be so referred."

Mr. J. E. Howard and Mr. G. Ross Alston, for the petitioner.

Mr. G. Ross Alston, for the petitioner.—The order of the Subordinate Judge dismissing the suit under s. 381 of the Code was not a "decree" within the definition contained in s. 2: it was therefore not appealable under s. 540, and the plaintiff's only remedy is by way of revision under s. 622. By s. 2, a "decree" is "the formal expression of an adjudication upon *any right claimed* or defence set up in a Civil Court;" but the right adjudicated upon in the order under s. 381 if the plaintiff's right to sue, and not the right which he claims in the suit. The provision in Act VIII of 1859 analogous to s. 381 of the present Code was s. 35, and the words used in s. 36 were "order rejecting the plaint." If these words had been used in s. 381 of Act XIV of 1882, then, with reference to the latter portion of the definition of "decree" in s. 2, the proceeding would have been a decree; but the words in fact used are "dismiss the suit" and by substituting these for the words "rejecting the plaint," the Legislature must have intended that the order under s. 381 should not be regarded as a decree. Again, in s. 371 of the present Code, the dismissal of a suit on failure of a bankrupt plaintiff's assignee to give security for the costs of the suit, is called an "order" and not a "decree." The provisions of this section are analogous to those of s. 381; and the omission of orders passed under s. 381 from the orders enumerated as appealable under s. 588 must be regarded as accidental. Again, with reference to ss. 205 and 206, there can be no "decree" where there is no judgment, and where a suit is dismissed under s. 381 without any adjudication upon the matters in issue between the parties, there can be no "judgment" in the sense described in s. 203.

[111] Babu Baroda Prasaā Ghose, for the opposite parties, was not called on to reply.

### JUDGMENT.

PETHERAM, C.J.—I am of opinion that the order under consideration was a "decree" within the definition of that term contained in s. 2 of the Civil Procedure Code. The plaintiff took the steps necessary to initiate his claim against the defendant, and filed his plaint. The defendant then made an application under the Code that the plaintiff be ordered to find security for costs, and accordingly an order to that effect was passed, which, upon the face of it, contained a provision that if security were not furnished within a certain time the suit should be dismissed. The security was not furnished within the time allowed; and thereupon a proceeding was drawn up, the effect of which was to dismiss the suit. The question before us is, whether this proceeding was the decree in the suit or whether it was a mere order. The definition of "decree" in s. 2 of the Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a decree;

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6 A.W.N.

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(1886) 30.

and it is impossible to contend that so long as this proceeding remained upon the record, the suit was not disposed of. I am therefore of opinion that the order in question was the decree in the suit, and was therefore appealable as a decree, and consequently is not open to revision by this Court under s. 622 of the Code. My answer to the question referred to the Full Bench is, that the order dismissing the suit for failure by the plaintiff to find security for costs as ordered, was a "decree."

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

3 A. 111 (F.B.)=6 A.W.N. (1886) 28.

FULL BENCH.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Oldfield.*

BADAMI KUAR (*Petitioner*) v. DINU RAI AND OTHERS  
(*Opposite Parties*).<sup>\*</sup> [27th January, 1886.]

*High Court's powers of revision—Civil Procedure Code, s. 622—"Jurisdiction"—"Illegality"—"Material irregularity."*

A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond which the plaintiff alleged had been recovered on her account by one of the defendants from the [112] obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code.

*Held*, by the Full Bench, that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs. 49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code.

The result of *Amir Hasan v. Sheo Bakhsh Singh* (1) and *Magni Ram v. Jiwa Lal* (2) is that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided its decision on questions of both kinds is final.

*Per* STRAIGHT and TYRRELL, JJ.—Clauses (a) and (b) of s. 584, specifying grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally;" that is to say to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (c) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, i.e., some "material irregularity" in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *Maulvi Mahammad v. Syed Husain* (3) referred to.

[F., 8 A. 519; 15 B. 148 (151); *Expl.*, 9 A. 104 (106) (F.B.)=A.W.N. (1886) 309; *Appr.*, 13 C. 225 (231); *Dis.*, 1 C.W.N. 633 (638); R., 10 A. 467 (470); 25 A. 509 (526) (F.B.)=A.W.N. (1903) 104; 14 C. 768 (778); 17 M. 410 (418) (F.B.); 39 M. 195 (F.B.); A.W.N. (1888) 148; 1 C.W.N. 617 (625); 18 Ind. Cas. 555 (F.B.)=13 M.L.T. 60=24 M.L.J. 112; 18 M.L.T. 59=17 Cr.L.J. 42=32 Ind. Cas. 330; 9 K.L.R. 161; L.B.R. (1872-1892) 487 (488); L.B.R. (1872-1892) 509 (511), 2 L.B.R. 333 (335).]

<sup>\*</sup> Application No. 63 of 1885, for revision under s. 622 of the Civil Procedure Code.

(1) 11 C. 6.

(2) 7 A. 336.

(3) 3 A. 203.



THIS was an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. The record having been called for, the application came on for hearing before Straight and Tyrrell, JJ., who made the following order of reference to the Full Bench :—

"In this case the petitioner before us sued, *inter alia*, to recover from the defendants a sum of Rs. 49-11-6, being the amount due under a bond, which she alleged had been recovered on her account by Sheodin Ram, defendant, from the obligors of the bond. The Munsif, before whom the case came, was of opinion that the determination of the plaintiff's right to the bond, in respect of which the said defendant had recovered the money claimed, involved the question of her heirship to the estate of Ganga Bishan, and there-[113]fore the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value. He therefore returned the plaint for presentation to the proper Court, under s. 57 of the Code.

"The petition for revision before us takes up the position that the order of the Munsif, upheld by the Judge, is open to revision under s. 622 of the Code, by reason of the Munsif, in erroneously returning the plaint to be presented in a proper Court, having failed to exercise a jurisdiction vested in him by law, within the meaning of s. 622 of the Civil Procedure Code. We refer to the Full Bench the question whether, under the above circumstances, and with reference to the Privy Council case of *Amir Hasan Khan v. Sheo Bakhsh Singh* (1), the provisions of s. 622 are applicable."

Pandit *Sundar Lal*, for the petitioner.

Babu *Sital Prasad Chattarji*, for the opposite parties.

#### JUDGMENT.

PETHERAM, C.J.—I am of opinion that the question in this case must be answered in the affirmative. S. 20 of the Bengal Civil Courts Act enacts that the jurisdiction of the Munsif shall extend to suits in which the value of the subject-matter of the dispute does not exceed Rs. 1,000. The Munsif has held that he had no jurisdiction in this case, because the title to a larger sum than Rs. 1,000 was involved in the question whether the plaintiff was entitled to recover the sum of Rs. 49, for which alone the action was brought. I think that he was wrong in this view, as the only subject-matter in this suit was the Rs. 49, and that the Munsif consequently failed to exercise a jurisdiction vested in him, and that the record may be called for by this Court in revision. The section has been considered by the Privy Council in the case of *Amir Hasan v. Sheo Bakhsh Singh* (1), and the Full Bench of this Court in the case of *Magni Ram v. Jiwa Lal* (2), and the result of those cases in my opinion is that the questions to which s. 622 applies, are questions of jurisdiction only. To make my meaning plain, I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under [114] s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that when no appeal is provided, its decision on questions of both kinds is *final*.

STRAIGHT, J.—I desire, in the first place, to say that I concur in the view expressed by the learned Chief Justice as regards the particular case

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referred. In the second place, I accede to the interpretation he has placed on the ruling of their Lordships of the Privy Council; and the reason I do so is, because it is most undesirable that, upon a question of practice of this kind, there should be a difference of opinion. I therefore surrender my own views in deference to the rest of the Court. But while doing so, I desire to make a few observations, because I was the Judge who wrote the judgment in the original Full Bench decision of the Court on this subject in *Maulvi Muhammad v. Syed Husain* (1); and I am anxious briefly to repeat hear the reasons upon which that judgment proceeded. As the section relating to this Court's powers of revision was originally drafted in Act X of 1877, it stood without the words in the present Code which have led to so much discussion; and there can be no doubt that at that time the jurisdiction of this Court depended purely on the question whether the Court below had improperly exercised its jurisdiction, or improperly refused to exercise it. In Act XII of 1879, amending Act X of 1877, the words "in the exercise of its jurisdiction illegally or with material irregularity" were introduced; and I presume that they were introduced with meaning and intention, and were intended to have some effect and operation. In order to ascertain what that meaning and intention was, it is necessary to look into the Code to see if it can be ascertained what was meant by the words "illegally" and "material irregularity." Now in s. 584, which specifies the grounds on which a second appeal lies to the High Court, I find what appears to me to supply a reasonable interpretation for these words. The section sets forth that no second appeal shall lie, except on the following grounds, namely,—"(a) the decision being contrary to some specified law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law." Taking these two clauses together, they [115] appear to me to embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Then, with reference to the words "material irregularity" in s. 622, cl. (c) of s. 584 indicates their meaning thus:—"A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits." In other words, I construe the words "material irregularity" to mean some material irregularity in procedure "which may possibly have produced error or defect in the decision of the case upon the merits." As an illustration of my meaning I will put two cases. A Munsif, who is seised of a suit below Rs. 500 in value, directs, in execution of the decree in the suit, that the tools of the judgment-debtor be sold. In such a case, an appeal would lie to the Judge; but there would be no second appeal to this Court. Here the Munsif makes an order which is contrary to law, because it is forbidden under s. 266 of the Code, and so he acts illegally. Again, a Munsif who has dismissed a suit *ex parte* entertains an application under s. 108 of the Code; and, without notice to the other side, orders that the suit be replaced upon his file and tried. This action on his part is a material irregularity in procedure, because it contravenes the directions of s. 109 to the effect that no such order shall be made without notice to the other side. These two

instances appear to me to be such as the "illegality" and "material irregularity" of s. 622 contemplate.

I need only add that, in my opinion, if there is one power which it is of the first importance that this Court should possess, it is the power of sending for the record in civil cases where no appeal lies. Experience shows that in a very great many such cases grave illegalities and material irregularities do occur in the proceedings of the Courts below; and it is essential that in such cases the High Court should have the power of interference.

OLDFIELD, J.—I concur in the answer proposed by the learned Chief Justice.

BRODHURST, J.—I entirely concur in the conclusions arrived at by the learned Chief Justice with reference to the decision of [116] the Privy Council in the case of *Amir Hasan Khan v. Sheo Bakhsh Singh* (1).

TYRRELL, J.—I concur in every word that has fallen from my brother Straight upon this matter.

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8 A. 116=6 A.W.N. (1886) 33.

### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

KANJI MAL AND OTHERS (*Judgment-debtors*) v. BIBI SAILO  
(*Decree-holder*).<sup>\*</sup> [1st February, 1886.]

*Execution of decree—Sale of immoveable property—Error in proclamation of sale as to incumbance to which property was liable—Civil Procedure Code, ss. 311, 312.*

In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was in fact one charge only, amounting to about Rs. 800.

*Held* that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it.

THIS was an appeal from an order of the Munsif of Moradabad City, dated the 7th September, 1885, refusing to set aside a sale of immoveable property in execution of a decree. The facts of the case are sufficiently stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellants (*judgment-debtors*).

Munshi *Hanuman Prasad* and Babu *Baroda Prasad Ghose*, for the respondent (*decree-holder*).

### JUDGMENT.

STRAIGHT and TYRRELL, JJ.—This is an appeal by a judgment-debtor, whose masonry house has been sold at auction and bought by the decree-holder for a sum of Rs. 552. Material irregularity in publishing and conducting the sale, with consequent depreciation in price, is alleged. We need not go into the question as to the conduct of the sale, whether

<sup>\*</sup> First Appeal No. 148 of 1885, from an order of Maulvi Muhammad Ezad Bakhsh, Munsif of Moradabad City, dated the 7th September, 1885.

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it was held at the time notified or not. For we are of opinion that there was admittedly such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the [117] fairness of the auction and affected the price. It was notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000; but, in fact, there was one charge only, and that about Rs. 800. Now this fact must have been known to the decree-holder who became the purchaser; and it is almost a necessary consequence that, assuming the house to be worth, as the Court below thought, Rs. 1,500, and it fetched Rs. 552 only, it would have commanded a higher price if the public had known, as the decree-holder did, that it was charged with Rs. 800 only.

We allow the appeal, set aside the sale, and direct that it be held anew, in the event of the decree not being in the meantime otherwise satisfied according to law.

The appellants will have the costs of this appeal.

*Appeal allowed.*

8 A. 117=6 A.W.N. (1886) 32.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

GUDRI LAL AND ANOTHER (*Plaintiffs*) v. JAGANNATH RAM  
(*Defendant*).<sup>\*</sup> [1st February, 1886.]

*Jurisdiction—Place of suing—Suit for sale of mortgaged property—Civil Procedure Code, ss. 16, 20.*

In 1879 *R* gave *J* a bond containing a simple mortgage of immoveable property. Subsequently *R* and *P* jointly gave *D* a bond containing a simple mortgage of the same property. In 1881 *D* obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 *J* obtained a decree in the Court of the Munsif of *G* (within the local limits of whose jurisdiction the property was not situated) for enforcement of his mortgage bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of *J*'s decree, so far as it ordered the sale.

*Held* that *J*'s decree could only be regarded as a simple money-decree, because, as shown by s. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and neither the proviso to s. 16 nor s. 20 of the Code met the circumstances.

*Held* therefore that the plaintiffs were entitled in this suit to have it declared that *J*'s decree was a simple money decree only; on the basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiffs' possession from any part of it.

[F., 17 B. 570 (572).]

[118] THE plaintiffs in this suit claimed the cancellation of a decree, dated the 9th September, 1882, in so far as it ordered the sale of a certain garden. It appeared that on the 4th April, 1879, Ram Tahal, one of the defendants, gave one Jagannath Ram a bond containing a simple mortgage

<sup>\*</sup> Second Appeal No. 211 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 17th November, 1884, affirming the decree of Maulvi Azizul Rahman, Munsif of Bangsaon, dated the 17th May, 1884.



of a garden situated within the local limits of the Munsif of Bansgaon, in the Gorakhpur district, which belonged to Ram Tahal and his brother Prag Ram jointly, in equal moieties. On the 16th September, 1879, Ram Tahal and Prag Ram jointly gave one Durga Dayal a bond also containing a simple mortgage of the same garden. On the 10th May, 1881, Durga Dayal obtained a decree for the sale of the mortgaged property; and it was put up for sale, and was purchased by the plaintiffs in the present suit, sons of Durga Dayal. On the 9th September, 1882, Jagannath Ram having sued in the Court of the City Munsif of Gorakhpur (within the local limits of whose jurisdiction the garden was not situated) to enforce his mortgage-bond, obtained a decree in that suit for, *inter alia*, the sale of the garden. The plaintiffs in this suit objected to the re-sale of the property; and their objections were disallowed. They then brought this suit against Jagannath, Ram Tahal and Prag Ram in the Court of the Munsif of Bansgaon. Their claim was based on the ground, amongst others, that the decree of the City Munsif of Gorakhpur, so far as it ordered sale of the property was made without jurisdiction, the property not being situated within the local limits of his jurisdiction. The Court of first instance disallowed this contention, but gave the plaintiffs a decree in respect of Prag Ram's moiety of the property, on the ground that Ram Tahal was not competent to mortgage the same, dismissing the suit so far as the moiety of Ram Tahal was concerned. The plaintiffs appealed; and the lower appellate Court (Subordinate Judge of Gorakhpur) affirmed the decree of the first Court.

The plaintiffs in second appeal contended again that the decree of the City Munsif of Gorakhpur, so far as it ordered the sale of the property, was made without jurisdiction, and was therefore so far void.

Munshi *Kashi Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent (Jagannath Ram).

#### JUDGMENT.

[119] STRAIGHT and TYRRELL, JJ.—We are of opinion that the lower Courts have taken a wrong view in dismissing that part of the suit which relates to the share of Ram Tahal. The plaintiffs are the purchasers of the whole property at a sale in execution of a decree obtained by their father, Durga Dayal, against Ram Tahal and Prag, and their purchase took place on the 3rd January 1884. No doubt at that time the defendant-respondent, Jagannath Ram, had a charge on the property by reason of the bond which was given him by Ram Tahal on the 4th April, 1879; and on the basis of this bond he had obtained a decree from the City Munsif of Gorakhpur on the 9th September, 1882. Now, of course, if the City Munsif of Gorakhpur had power to pass a decree on the basis of Jagannath Ram's bond and so to enable Jagannath Ram to enforce the decree by selling Ram Tahal's share in the grove in Bansgaon, the plaintiffs could not maintain the present suit, because, not only was the charge of Jagannath Ram prior to their own, but a decree upon the bond had been obtained by him before the plaintiffs had purchased the whole grove. Unfortunately for the defendant-respondent, Jagannath Ram, his decree, on the bond given by Ram Tahal in April, 1879, can only be regarded as a simple money-decree, because the City Munsif of Gorakhpur had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and that he was prohibited from doing so, is clear from the terms of s. 16 of the Civil Procedure

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Code. We do not think that the proviso to that section alters the position; and we dissent altogether from the remark of the Subordinate Judge, that s. 20 of the Civil Procedure Code meets the circumstances. Our conclusion accordingly is, that the plaintiffs are entitled in this suit to have it declared that the decree in favour of the defendant-respondent upon the bond given to him by Ram Tahal was only a simple money-decree, and that, on the basis of that decree, no process in execution could issue in respect of the grove to oust the plaintiffs' possession from any part of it. Whether or not the respondent can institute proceedings in any Court for enforcement of his lien, we are not concerned to discuss. The appeal is decreed with costs, and the decrees of the lower Courts modified by decreeing the plaintiffs' claim with costs in all Courts.

*Appeal allowed.*

8 A. 120=6 A.W.N. (1886) 7.

### [120] APPELLATE CRIMINAL.

*Before Sir W. Comer Petheram, Kt., Chief Justice.*

QUEEN-EMPRESS v. IMDAD KHAN. [21st December, 1885.]

*Criminal breach of trust—Master and servant—Servant entrusted with moneys for payment to tradesman of account settled by master for a specific sum—Gratuity by tradesman to servant—Right of master to benefit of gratuity—Act XLV of 1860 (Penal Code), ss. 405, 409—Powers of appellate Court to alter finding of Court of first instance—Criminal Procedure Code; s. 423—Accomplice—Evidence—Corroboration.*

Where a master entrusts his servant with money for the payment of an open account, i.e., an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bill and a reduction of the price by the servant, the latter obtains the reduction for his master's benefit, the money in his hands always remains the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has settled the account with the tradesman for a specific sum, and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master for the money. *Hay's Case* [In re *Canadian Oil Works Corporation* (1)] referred to.

Where the Court of Session had tried, convicted, and sentenced an accused person under s. 409 of the Penal Code, and the High Court was of opinion that the conviction was not sustainable under that section, the Court refused to alter the finding, under s. 423 of the Criminal Procedure Code, to a conviction for some other offence for which the accused had not been charged or tried.

Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice. *Empress v. Ram Saran* (2) referred to.

[R., 3 L.B.R. 232 (233); 1 Weir 467 (468); D., U.B.R. (1903), 3rd Qr., Penal Code, 9 (12).]

THIS was an appeal from an order of Mr. F. E. Elliot, Sessions Judge of Allahabad, dated the 19th January, 1885, convicting the appellant, under s. 409 of the Penal Code, upon two charges of criminal breach of trust as a public servant, and upon three other charges, under



s. 50 of the Post Office Act (XIV of 1866), and sentencing him to three years' rigorous imprisonment upon each of the two charges first mentioned.

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It appeared from the evidence for the prosecution that the appellant, Imdad Khan, was employed at Allahabad in the Railway Mail Service of Government Postal Department as Examiner [121] and Superintendent of Stores. It was his duty to receive stores supplied by contractors, to see that the contractors supplied the proper quantity and quality of stores, and to despatch the stores to out-stations on indent. It was also his duty to keep an account of the expenditure in respect of such stores. It was also his duty to receive the monthly bills of the contractors, to check the bills, and to draw the amounts required for their settlement from Government, in contingent bills made out and signed by himself, and countersigned and passed by the Inspector-General of the Railway Mail Service. It was also his duty, having drawn these amounts, to remit them to the contractors.

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Among the contractors supplying stores was a firm at Calcutta trading under the name of Tarni Charan Dat and Co. The contract between this firm and the Railway Mail Service was that the former should supply goods of a particular kind to the department for a period of two years, at prices specified in a schedule. Among the goods enumerated was a cloth called "*gazzi*," which was used in large quantities in the Postal Department. The scheduled price of this was Re. 1-12-6 per "*than*" or piece of eighteen yards. Up to January 1881 *gazzi* was despatched by the firm from Calcutta. In that month the appellant returned fifty-four pieces as being of inferior quality. Shortly after this, it was arranged between the appellant and Tarni Charan Dat and Co. that instead of their supplying *gazzi* from Calcutta, he should purchase it at Allahabad, draw from Government at the rate of Re. 1-12-6 per *than*, pay for the *gazzi*, and remit to them their profit. The profit was first fixed at 9 pies per *than*, but was subsequently increased to 1 anna. Under this arrangement *gazzi* was supplied at Allahabad by one Sadhu Lal. The quantities of *gazzi* cloth supplied were communicated to Tarni Charan Dat and Co.; the firm forwarded invoices for such quantities; upon the receipt of these invoices in duplicate, one was signed and returned by the appellant and the other retained in his office; the firm, having received the signed invoices, sent in bills; these bills were attached as vouchers to the contingent bills sent by the appellant to the Inspector-General for counter-signature; the countersigned bills were cashed by the appellant at the General Post Office at Allahabad; the contractors were ostensibly paid in full; and they gave receipts for the full amounts [122] of their bills. In May, 1884, it was discovered by the department that the *gazzi* was supplied by Sadhu Lal, and that he was paid for it at the rate of Re. 1-6-0 per *than*.

The case for the prosecution was that the appellant had retained the difference between the actual price paid to Sadhu Lal for the *gazzi* and the profit which he remitted to Tarni Charan Dat and Co., and his conduct amounted to criminal breach of trust by a public servant, within the meaning of s. 409 of the Penal Code; and that by sending to the firm remittance letters purporting to show that the whole of the sum specified in each was remitted, whereas a portion only was sent, he was guilty of incorrectly preparing documents with a fraudulent intention, within the meaning of s. 50 of the Post Office Act (XIV of 1866). There was no allegation that the *gazzi* supplied by Sadhu Lal was, upon any occasion,



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inferior in quantity or in quality to that which Tarni Charan Dat and Co. were bound under their contract to supply.

The case for the defence was that although, in consequence of the arrangement made with Tarni Charan Dat and Co., *gazzi* was supplied to the Railway Mail Service stores by Sadhu Lal at Re. 1-6-0 a piece, no part of the difference between that sum and the contract price of Re. 1-12-6 was retained by him, but the whole of such difference was transmitted regularly to the contractors.

The Sessions Judge of Allahabad, disagreeing with the assessors, was of opinion that the charges of criminal breach of trust and of incorrect preparation of documents with a fraudulent intention, were proved. He accordingly convicted the appellant upon those charges, and sentenced him, under s. 409 of the Penal Code, to six years' rigorous imprisonment but considered a further sentence under s. 50 of the Post Office Act unnecessary.

The accused, Imdad Khan, appealed from the Sessions Judge's order to the High Court, in whose judgment the other material facts of the case are sufficiently stated.

Mr. W. M. Colvin (with him Mr. *Habib-ullah* and Mr. *Durga Charan*), for the appellant, contended that the evidence for the prosecution was insufficient to support the conviction. He further argued that, assuming the facts alleged by the prosecution to be proved, they did not constitute the offence of criminal breach of [123] trust as defined in s. 405 of the Penal Code. The definition of that offence involved a "dishonest" misappropriation or conversion to the use of the offender of property entrusted to him; but here the appellant did not act "dishonestly" according to the definition contained in s. 24 of the Code, inasmuch as he did not cause "wrongful loss." The Government never paid a higher price for *gazzi* cloth than they had contracted to pay, namely, Re. 1-12-6 a piece, and there was no evidence whatever to suggest that the cloth supplied was, upon any occasion, inferior either in quantity or in quality to that which Tarni Charan Dat and Co. had contracted to supply. This being so, the conviction and sentence under s. 409 of the Penal Code were bad, and should be set aside.

The *Public Prosecutor* (Mr. C. H. Hill), with him Babu *Ram Prasad*, for the Crown:—The evidence taken in the Court of Session establishes the facts alleged by the prosecution. [To show this, the *Public Prosecutor* referred to the evidence in detail.] These facts amount to the offence of criminal breach of trust, as defined in s. 405 of the Penal Code. A person to whom money is remitted for the purpose of payment to a third party, holds the money for the use of the remitter until, by some act done, or by some engagement with the person who is the object of the remittance, the agent has consented to appropriate it to his use: Addison *On the Law of Contracts*, 4th edition, p. 72. If the purpose fails for which the property is entrusted to the agent, he is under an obligation to return it to the remitter, and the property of the remitter, is not divested until the object is performed: *Buchanan v. Findlay*, per Tenterden, C.J. (1). *Toovey v. Milne* (2) also shows that where money is paid for a special purpose, and the purpose fails, the money remains the property of the person paying it. In the present case, the moneys remitted to the appellant always remained the property

(1) 9 B. & Cr. 738 (749).

(2) 2 B. & Ald. 683.

of Government, because the object of the remittance was never fulfilled. That object failed when Tarni Charan Dat and Co. agreed with the appellant to receive payment at a lower rate than was fixed by their contract, and thereupon the appellant, who had all along held the moneys for the use of Government, became bound to refund them. Not having done so, but having converted them to his own use, he [124] caused "wrongful loss" to Government and "wrongful gain" to himself, and so acted "dishonestly" within the meaning of s. 23, and committed criminal breach of trust within the meaning of s. 405 of the Penal Code.

In *Harrington v. The Victoria Graving Dock Company* (1), it was laid down that "when a bribe is given, or a promise of a bribe is made to a person in the employ of another by some one who has contracted or is about to contract with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one" and its tendency "must be to bias the mind of the agent, and lead him to act disloyally to his principal.....It is quite immaterial that the employer was not in fact damaged." The commission paid by Tarni Charan Dat and Co. to the appellant was a profit made by him in the course of his employment as agent, and Government was entitled to take the benefit of such profit, and the appellant committed criminal breach of trust in converting it to his own use.

[PETHERAM, C.J.—Where one man employs another for a particular purpose, as, for instance, to sell property, and the agent takes money from a person to whom that property is sold, it is clear that the money must be received for the employer's benefit. It is a profit made by the agent in the course of his employment. But where the customer gives a present to an agent who is not employed for the purpose of selling, is the master entitled to take the benefit of it?]

The reasoning of Cockburn, C.J., in *Harrington v. The Victoria Graving Dock Company* (1) appears to cover such a case.

[PETHERAM, C.J.—Suppose that a man employs another to buy a carriage for him, and the agent makes the purchase. Here, if the carriage builder gives the agent a present, the master is no doubt entitled to take it, because the effect of the transaction is to reduce the price. But suppose the master himself makes the bargain, and settles the price, and sends his servant to the builder with the money, and the builder gives the servant £5. How is the master entitled to that? The £5 is no doubt given in order [125] that, when the carriage arrives, no fault shall be found with it. The benefit to the servant does not here spring out of a contract in which he is an agent.]

That case is not completely analogous to the present, for it supposes that the servant has actually handed over the money, and that the tradesman afterwards presents him with a *douceur*. Our case, on the other hand, is that the appellant appropriated the moneys entrusted to him while they were on their way from Government to the contractors. It is, however, immaterial whether the difference between the contract price and the actual price paid for the *gazzi* cloth was retained by the appellant, or whether he remitted the entire contract price to the contractors and received back from them the difference. In *Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha, and Telegraph*

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Works Company (1), James, L.J., laid down the rule that " any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal," and entitles him to have the contract rescinded, and that " a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."  
[PETHERAM, C.J.—Does not the Lord Justice there mean by " agent " an agent for the purpose of making the contract ? ]  
I submit that his meaning is wider, and that he lays down a general proposition applicable to all surreptitious transactions between an agent and the person with whom his principal is dealing. In Leake's *Digest of the Law Contracts*, p. 481, it is said:—" It seems that, although the payment to the agent be voluntary and made after the execution of the agency, it would be recoverable by his principal." In *Hay's Case* [In re *Canadian Oil Works Corporation* (2)], Mellish, L.J., said:—" There is no doubt about the rule of this Court, that an agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency, beyond his proper remuneration as agent." Again at p. 603, Mellish, L.J., gave the following illustration:—" A gentleman employs his servant to pay his tradesman's bills, and the servant goes to the tradesman and says, ' I have received [126] the money to pay your bill, but you must make me a present out of it.' The tradesman says, ' I am willing to make you a present'. Then a sum is deducted, the money is put down, and it is handed back. In a certain sense, no doubt, that sum of money will become the property of the servant. He could not be indicted for embezzlement, nor probably for putting it into his own pocket and using it; but there is no doubt that if an account was properly taken in any court of justice, he would be answerable for it, because it is perfectly obvious that if the creditor who received the payment is willing to make a deduction and discount from the sum he had received, that must be for the benefit of the master who is making the payment, and not for the benefit of the servant, who, without the consent of his master, has no right to receive any such profit." The reason why it is said that the servant could not be indicted for embezzlement is that, under the English statutes relating to that offence, it is an essential element of embezzlement that the property should be given to the offender for the use of the master, and, in the above case, the money was not paid to the servant for the master's use. This is not, however, an essential of criminal breach of trust as defined in s. 405 of the Penal Code; so that, in India, the conduct of the servant described in Mellish, L.J.'s illustration would be criminal breach of trust.

[PETHERAM, C.J.—Mellish, L.J., speaks of the tradesman as making a " deduction." This expression rather suggests that what the Lord Justice had in his mind was an open and not a settled account. It is arguable that there could be no " deduction " from an account previously agreed and settled between the master and the tradesman. If, for instance, the master sends his servant to pay a bill the total of which the master has not settled with the tradesman, and the items amount to £100, then if the agent and the tradesman make an arrangement by which ten per cent. is deducted from the total and £90 only are paid, and the servant, concealing the fact that a deduction has been made, appropriates the sum deducted, that is clearly embezzlement. But if the master has settled



with the tradesman to pay £100, and the agent pays over the whole £100 according to his instructions, and the tradesman then gives him £10, surely that is a present to which the master has no claim.]

[127] In *McKay's Case* (1), Mellish, L.J., referred to *Hafy's Case* (2) and other authorities as showing that all the benefits which the agent of one party receives under such circumstances from the other must be treated as received for the benefit of his principal. "All the remuneration which an agent so receives he receives on behalf of his principal, and it does not matter whether it formed part of the original bargain, or was a present as remuneration for services." So too, in *Parker v. McKenna* (3), Lord Cairns, L.C., said:—"The rule of this Court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.....The Court will not inquire, and is not in a position to ascertain, whether the bank has lost or not lost by the acts of the directors. All that the Court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency." James, L.J., said:—"It appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that." See also *Robinson v. Mollet* (4), and in particular the observations of Mellor, J.

These authorities are sufficient to show that the conduct of the appellant amounted to criminal breach of trust by a public servant. In Archbold's *Pleading and Evidence in Criminal Cases*, 18th edition, p. 478, the nature of the evidence necessary to establish the commission of embezzlement is described. Thus, "the usual presumptive evidence" in such cases is said to be "that the defendant [128] never accounted to his master for the money, &c., so received by him, or that he denied having received it." These conditions are satisfied in the present case. The appellant did not defend himself, as he might have done, by admitting the appropriation of the commission paid by the contractors, and setting up a claim of right to such appropriation. He met the charge by an absolute denial.

The fact that the contractors consented to the transaction does not affect the appellant's guilt. If they did not consent, his guilt would of course be obvious, for in that case no payment would be made, and Government would remain liable. But the agent cannot be absolved because the payee conspires with him to deprive the principal of his money.

In the next place, assuming that the acts of the appellant do not constitute the particular offence of which he has been convicted, this Court

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(1) L.R. 2 Ch. D. 1.  
(3) L.R. 10 Ch. App. 96.

(2) L.R. 10 Ch. App. 593.  
(4) L.R. 7 H.L. 812.

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has power, under s. 423 of the Criminal Procedure, to alter the finding to a conviction for any offence which they do constitute, and at the same time maintain the sentence. If the facts do not establish the offence of criminal breach of trust, they establish the offence of cheating, under s. 415, and of cheating and dishonestly inducing a delivery of property, under s. 420 of the Penal Code. Or the finding may be altered to a conviction under s. 161 (public servant taking a gratification other than legal remuneration in respect of an official act), or under s. 165 (public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant).

[PETHERAM, C.J.—Do you suggest that this Court may, in appeal, convict the appellant of an offence for which he was never charged or tried in the Court below, and in respect of which other evidence would have been necessary than that which was actually given?]

No. I confine myself to saying that, if this Court agrees with the Court below as to the facts, but is of opinion that the Court below has drawn an erroneous legal inference from them, or taken a wrong view as to the offence which they establish, it may, under s. 423, alter the finding so as to express their true legal effect.

[129] [PETHERAM, C.J.—The appellant has never been charged or tried for the offences you mention. It appears to me that s. 423 only empowers an appellate Court to alter the finding within certain limits and upon a particular charge. For instance, there may be a finding of murder upon a charge on which there might have been a conviction for manslaughter; and in such a case the appellate Court may alter the finding from murder to manslaughter. Such a course would be proper only where both findings were equally consistent with the charge upon which the appellant was tried.]

I submit that the scope of s. 423 is wider. It will be observed that s. 227 of the Criminal Procedure Code empowers a Court to alter any charge at any time before judgment is pronounced, or, in trials before the Court of Session or High Court, before the verdict of the jury is returned, or the opinions of the assessors are expressed. It is only where the absence of a charge, or an error in the charge, can be shown to have prejudiced or misled the prisoner in his defence, that a Court of appeal or revision will interfere (s. 232). Cheating (s. 415 of the Penal Code), and cheating and dishonestly inducing a delivery of property (s. 420), are offences *ejusdem generis* with criminal breach of trust (ss. 405, 409), and hence the alteration of a finding from a conviction under the latter to a conviction under the former sections is clearly within the powers of the appellate Court. A conviction under s. 161 would also be proper.

[PETHERAM, C.J.—The difficulty there is that it is not clear what the appellant's powers precisely were. Before it can be proved what the gratification was intended to buy, we must know what he could have done in return for it.]

S. 165 is also applicable. The expression "valuable thing" used in that section includes money given not for any of the objects described in s. 161, but as "*dasturi*": *Queen-Empress v. Kampta* (1).

S. 236 of the Criminal Procedure Code provides that where the facts are such that it is doubtful which of several offences they constitute, the accused may be charged with having committed [130] all or any of such



offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences. S. 237 provides that if, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, though he was not charged with it. Now, in the present case, the acts of the appellant were of such a nature that it is doubtful whether they constituted criminal breach of trust, or cheating, or taking an illegal gratification.

[PETHERAM, C.J.—These offences are, in the abstract, hardly *ejusdem generis*. Criminal breach of trust and accepting a bribe, for instance, are, popularly at all events, considered as unlike each other as any two crimes could be.]

Mr. W. M. Colvin, in reply.—The argument of the learned Public Prosecutor is that the appellant received from Tarni Charan Dat and Co. particular payments, that these payments represented profits made by him in the course of his employment as agent, that these profits were the property of his employers, and that, not having handed them over or accounted for them to Government, but having converted them to his own use, he acted dishonestly and was guilty of criminal breach of trust. My answer to this is that, assuming the appellant to have received the payments from Tarni Charan Dat and Co., he did not receive them in the course of his employment as agent. The agency was discharged *quoad* the particular transaction, as soon as payment to the contractors had been made, and any subsequent gift or commission to the appellant could not be described as profits made by him in the course of his employment, or in the matter of his agency. There was no *animus furandi* on the part of the appellant. The only authority directly in point which has been cited on behalf of the crown is a *dictum* of Mellish, L.J., in *Hay's Case* (1). That *dictum* must be read in connection with the particular circumstances of that case. It was an illustration [131] used in a case where an agent had received moneys from persons desiring to sell certain property to his principals, and had been invested by his principals with large powers of altering and even rescinding the contract. In that case, the moneys were undoubtedly received by the agent in the course of his employment, and his position was distinctly antagonistic to that of his principals. There were, under the circumstances, good reasons for not allowing the agent to retain what had been paid to him. But in the present case the appellant had no power to alter the terms and conditions of the contract. Reading Mellish, L.J.'s illustration with the facts of the case in which it was used, it evidently was intended to apply to an open and not to a settled account, and it is therefore not applicable to the circumstances of the present case.

[PETHERAM, C. J.—You say that the rule applies only to cases where there is an account capable of reduction by the servant.]

Yes, because those are the only cases in which the acceptance of the gratuity puts the servant into a position antagonistic to the master. The principle of the cases which have been cited is that the acceptance of the gift operates as a reduction of the price, and that the master is entitled to the benefit of such reduction. It has no application to a case where the price, fixed and agreed between the master and the tradesman, has been fully

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paid by the servant, and the tradesman then makes him a present. In Mellish, L.J.'s illustration, there was no real payment to the tradesman, and the handing over the money was a mere pretence.

The next question is whether the finding can now be altered to a conviction under some other section than s. 409 of the Penal Code. In the first place, s. 165 is not applicable. That section is confined to cases where a public servant obtains a valuable thing "without consideration or for a consideration which he knows to be inadequate." But in the present case there was ample consideration, for the appellant took upon himself nearly all Tarni Charan Dat's duties under the contract with Government.

[PETHERAM, C.J.—That was no consideration, because the appellant was already bound, as a Government servant, to give all his time to the service of Government. You need not, however, argue the question whether the finding should now be altered.]

### JUDGMENT.

[132] PETHERAM, C.J.—The accused Imdad Khan has been convicted upon two charges, framed under s. 409 of the Penal Code, of criminal breach of trust, and upon three charges framed under s. 50 of the Post Office Act (XIV of 1866). The accusation against him under the last-mentioned section is, in substance, one of falsifying documents with the object of concealing or assisting towards the criminal breach of trust to which the other charges relate. So that, as the Sessions Judge has held, the charges all stand or fall together; and if the accused be found guilty under any of them, he must also be found guilty under the others, though it is not necessary that there should be a separate sentence in respect of each. These being the matters charged, it is necessary, in the first place, to see what are the facts which are admitted, or, if not admitted, which have been established by the prosecution, and whether they constitute any offence; next, to ascertain what offence, if any, these facts when taken together, constitute under the Penal Code.

The facts, as I gather them, are, that in the Post Office Service of these Provinces there is a department called the Railway Mail Service, and, as a part of this, there is at Allahabad a large storehouse, in which are kept the stores required for the use of that department. There is no evidence upon the records which shows by whom or upon whose authority such stores are ordered, or whose mind it is that decides from time to time what stores are required. It is, however, clear that the accused Imdad Khan had for some years held an office in the Railway Mail Service at Allahabad as "Examiner" and "Superintendent" of stores. How long he filled this office is not shown. It is necessary next to ascertain so far as the evidence shows us, what his duties were. There is nothing on the record to suggest that he had any power of deciding what stores were required, or of giving any order for them. His duty was to supervise the stores when they came into stock, and to pass them as according to the sample, if they were of the quality they should be, and of the amount ordered and charged for. This was his business, so far as examination of the stores is concerned. Besides this it was his duty, after the goods had come into stock and had been passed, to check the accounts of the tradesmen supplying them, and, after checking them, to [133] forward in a lump all the tradesmen's bills which at that time were due—having first got them countersigned by his superior officer—to the person whose business it was

to pay them. Then, having obtained the money to be paid to the group of tradesmen, it was his duty to distribute it among them.

The charge against Imdad Khan is that, having obtained moneys from Government for the purpose of paying a particular tradesman, who is said to have supplied goods to this store, he appropriated these moneys to his own use, and thereby committed the offence of criminal breach of trust.

We must therefore see how the evidence upon this charge stands. The case set up by the prosecution is as follows :—It is said that a particular firm at Calcutta, trading under the name of Tarni Charan Dat and Co. had made a contract with Government for the supply of certain stores. The precise terms of the contract are not before us, but, from the action of the parties and from the heading of the memorandum, it appears that the contractor, Tarni Charan Dat, agreed to supply stores of a certain class, for a period of two years, at a price specified on a list or schedule of prices. I think it must be taken as proved that the contract between the parties was that Government, on the one hand, bound themselves for a period of two years to take these stores from the firm, and, on the other hand, the firm bound themselves for the same period to supply the stores at the rates agreed on. Among the articles enumerated in the schedule was a cloth called "*gazzi*," and the schedule price for this was Re. 1-12-6 a piece. The contractors therefore were under an obligation to supply Government with as much *gazzi* cloth as might be required at Re. 1-12-6 a piece, and the Government were under an obligation to take from the contractors all the *gazzi* cloth that was wanted, for two years, at the price stated.

The person whose business it was to give orders did order *gazzi* cloth from the Calcutta firm, and accordingly they sent the cloth to the storekeeper at Allahabad till January 1881. At that time a certain quantity of *gazzi* cloth, which was sent to Allahabad by Tarni Charan Dat, and which came to the stores, was examined by Imdad Khan, and he rejected it as not corresponding [134] with the sample kept in his office as a test piece. After this a different arrangement was made from that which had before prevailed. It was agreed that, instead of the *gazzi* being sent to Allahabad from the contractors' own shop, it should be supplied to the stores by a trader in Allahabad in the Calcutta contractors' name and it appears that in some way or other the directions to this trader to send in the cloth for the firm came through Imdad Khan. How they came, and how it was communicated to this person what quantity was required, is not clear; all that does appear is that, after the occasion in 1881 to which I have referred, the cloth was sent direct to the stores from the warehouse in Allahabad, in the name of the contractors in Calcutta, and that this was done in some way upon Imdad Khan's directions. It is necessary to see, in the next place, how the price of the cloth was dealt with. When the goods were supplied to the stores by the Allahabad tradesman, the form of the accounts, so far as Government were concerned, was not altered. The amount of *gazzi* which was sent to the stores was charged for in the accounts sent by the Calcutta firm to Government, as if they had supplied them, just as before the change had been made, and the same price, Re. 1-12-6 a piece was charged as Government were, under their contract to Tarni Charan Dat, bound to pay. So that, so far as concerned Government, there was no apparent change. The goods were still apparently sent by the Calcutta firm, and invoiced at the same prices as

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before; and Government continued to hand money to Imdad Khan to pay the tradesmen, and among others, to pay Tarni Charan Dat, for *gazzi* cloth.

At length it came to the knowledge of the authorities that the price which the Allahabad house were getting for *gazzi* was Re. 1-6 a piece, and that therefore the contractors were not getting the price which Government were paying, but six and a half annas a piece less. The discovery made them inquire who was pocketing the difference. Upon being questioned, Imdad Khan stated it was true that, in consequence of an arrangement made with Tarni Charan Dat, the person supplying the goods got Re. 1-6; but that he, as storekeeper, who had to draw the Re. 1-12-6 from Government, transmitted the whole of the price to the contractors. [135] This is the statement which he made at the outset of the inquiry and to which he has ever since adhered.

The Government, however, were satisfied that the statement was not true. They made inquiries of the persons actually supplying the goods, and of the Calcutta contractors, and they came to the conclusion that, after Imdad Khan's rejection of the *gazzi* cloth in 1881, a new arrangement was made between Imdad Khan and the contractors alone, by which the former contract was practically abrogated; that after this the *gazzi* was no longer supplied by the Calcutta firm at Re. 1-12-6 a piece, but by some person at Allahabad on behalf of the Calcutta firm, or of Imdad Khan, at Re. 1-6 a piece only; and that the balance went into the pocket of Imdad Khan. In other words, it is alleged that, after the transaction in 1881, there was an agreement between the storekeeper and the contractors that the price of *gazzi* should be reduced from Re. 1-12-6 to Re. 1-6; that to conceal this reduction from the person who had to pay for the *gazzi*, the books and accounts were falsified; and that the resulting profit was appropriated by Imdad Khan, who, though drawing the larger price, paid only the smaller.

Now, it is obvious that if this state of facts has been proved, it amounts to the offence of criminal breach of trust. It is, by whatever technical name it may be called, a stealing of the difference between the two prices by a servant of Government, and a falsification of accounts with the object of concealing the crime. This is, in fact, the case which the prosecution contend is proved, and upon which they rely. To see whether they are justified in this, we must examine the evidence which they assert to be proof, and see if it can be relied on.

Bearing in mind the nature of the offence charged, it is clear that, if it has been committed at all, it has been committed by Imdad Khan and the tradesmen jointly. It was, in fact, a conspiracy, to which all of them were parties, and of which the object was to obtain the cloth at a reduced price, and to steal the difference for the benefit of all. This being so, it follows that the tradesmen are no less guilty than Imdad Khan. It is important to note this in considering whether the commission of the offence [136] has been proved against Imdad Khan, who alone has been charged with it.

Now, if the facts are as I have just stated, the persons who must have been aware of the circumstances are Imdad Khan, Tarni Charan Dat, and the tradesman at Allahabad who supplied the cloth in Tarni Charan Dat's name. It is natural that when one of these persons is charged with criminal breach of trust, the others should be called as witnesses by the prosecution. And unless their evidence establishes the case against Imdad Khan, there is nothing upon the record that does.



The first of these witnesses that was called was a member of Tarni Charan Dat's firm. The contractors' story, if true, undoubtedly proves the case for the prosecution. They virtually say :—" We supplied these goods till 1881, and got for them a price of Re. 1-12-6 a piece. After the rejection of the goods in January, 1881, Imdad Khan said that he could get the stuff upon better terms at Allahabad; we replied, agreeing that he should do so upon any terms he pleased, and to carry on the accounts in such a way as to conceal the transaction, on condition of our receiving a share of the profit. We did not know who supplied the goods, or the price which he charged for them."

This statement, if true, proves the case of the prosecution because it shows that the old arrangement was abrogated, that a new arrangement was made for the supply of *gazzi* cloth at a reduced price, and that the account books were falsified in order that this arrangement might be kept secret. It also implies that Tarni Charan Dat and Co. are equally guilty with Imdad Khan, and upon their own statement there is no reason why they should not be tried and convicted.

The next witness for the prosecution, of those implicated in the transaction, and who would naturally be aware of the circumstances, is Sadhu Lal, the tradesman at Allahabad, who supplied the goods after January, 1881. His evidence, however, absolutely contradicts that of Tarni Charan Dat. He virtually says :—" It is true that I supplied the cloth at Re. 1-6-0 a piece. But I did not supply it upon instructions given by Imdad Khan. I supplied it upon a contract with the Calcutta firm, and I sent it to the stores [137] in their name. I was the person who had the contract with Government before the Calcutta firm had it. Besides *gazzi* cloth there were other articles which I supplied to the stores under the same arrangement as I have described."

Here, then, we have the evidence of two persons who, according to one of them, are accomplices of Imdad Khan in the offence of criminal breach of trust. One of the three criminals is in the dock, and the other two are called as witnesses to prove the charge against him. One of them is not only an accomplice, but, if the case for the prosecution is true, must have falsified accounts in order to assist the accused. The other, if his statements are true, in effect, destroys that case. How is it possible that any Court could safely convict the prisoner upon such evidence and under such circumstances as these?

The only other matters relied on by the prosecution are the books of Tarni Charan Dat. These have been examined with the object of proving the untruth of Imdad Khan's statement that he handed over the whole price to the contractors, because they are said to show that the whole price was never received. But the books are evidence only to this extent—that, in giving his testimony, Tarni Charan Dat might look at them for the purpose of refreshing his memory. They cannot, however, carry his evidence any further, nor do they alter the fact that the state of things alleged by Tarni Charan Dat rests upon his evidence, and upon his evidence only, denied by the appellant, and contradicted on oath by Sadhu Lal.

We have therefore the common case in which the only evidence against an accused person is the evidence of his accomplice. It is not necessary for me to refer in detail to the numerous cases in which Judges of the greatest eminence and experience, both in this country and in England, have held that unless evidence of this kind is corroborated in material particulars, it cannot safely be relied on. The reasons upon which this opinion is based are various. It is plain that where a witness

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**1885** against an accused person tells a story which equally incriminates himself, there is no reason for preferring his story to the prisoner's. If the story of Tarni Charan Dat is true, then he and Imdad Khan are both of [138] them rogues, and there is no ground for regarding either as more trustworthy than the other. By way of authority for this view, I need only refer to the judgment of my brother Straight in the case of *Empress v. Ram Saran* (1), in which the English cases are collected, and which fully explains the grounds upon which the highest authorities have decided that it is not safe to depend upon this class of evidence. It is enough for me to say that I entirely and absolutely agree with that judgment of my brother Straight, and with his opinions expressed thereon, which the authorities he refers to establish. For these reasons, I am of opinion that it would be unsafe to convict the appellant Imdad Khan upon evidence of this character, which is the only evidence against him, and I hold that he must be acquitted of the charge of criminal breach of trust.

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6 A.W.N.  
(1886) 7.

Next, with reference to the charges of falsification of account, they stand or fall with the charges of criminal breach of trust. They are charges of the falsification of the accounts which were sent by Tarni Charan Dat, showing that the goods were being supplied under the original contract at the original prices, with the object of enabling the criminal breach of trust to be carried out. They are, in fact, substantially the same accusation, and depend upon the same evidence; and, for the reasons I have already given, I think that, upon these charges also, the accused must be acquitted.

I desire now to make a few observations upon the law of criminal breach of trust in cases of this nature, with reference to the reduction of the price of goods.

Mr. *Hill* has laid much stress upon a *dictum* of Lord Justice Mellish in *Hay's Case* [In re *The Canadian Oil Works Corporation* (2)]. It is to the effect that if a master sends his servant to pay a bill, and gives him money for the payment, then if the tradesman makes the servant a present, the master is entitled to the benefit of it, because it amounts to a reduction of the price of the goods.

Now, if the account is an *open* one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill and a reduction of the price [139] by the servant, it is obvious that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has *settled* the account with the tradesman for a specific sum, and he sends the servant with the money, and the servant after making the payment, asks the tradesman for a present, then, if the servant takes the present and keeps it, he is not guilty of stealing, because he has no intention to steal; the money is given to him by a person whom he believes to have a right to give it. It may be that, according to the strict equitable doctrines of the Court of Chancery, the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory upon him to render an account.

(1) A.W.N. (1885) 311.

(2) L.R. 10 Ch. App. 593.



In the present case, however, this question does not really arise. The case for the prosecution is, not that part of the price was *given back* to the accused, but that he actually stole it by reducing it in pursuance of a conspiracy. And as this case rests entirely upon the evidence of the accomplices who are said to have conspired with him, I think, as I have already said, that it cannot safely be regarded as proved.

I have been pressed by the learned Public Prosecutor to alter the findings, so as to convict Imdad Khan of some other offence under some other provision of the law. For my part, I have serious doubts as to whether I could alter the finding in any case in such a manner. It is, however, enough for me to say that, in my opinion, such a course would not be right in the present case. If Imdad Khan is guilty of some other offence, he may be charged and tried for it. Upon this point I desire to express no opinion. All that I am concerned with is the offence for which he has been charged and tried, and I am of opinion that the evidence upon which he has been convicted is not such as can safely be relied on. Under these circumstances, I allow the appeal, and, setting aside the conviction and sentence, direct that the prisoner be released.

*Conviction set aside.*

8 A. 140=6 A.W.N. (1886) 42.

#### [140] APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Straight.*

RAMTAHAL RAM AND ANOTHER (Defendants) v. RAMESHAR RAM  
(Plaintiff).\* [9th January, 1886.]

*Suit adjournment of hearing of—Ex-parte decree—"Appearance" of defendant—Civil Procedure Code, ss. 108, 157.*

A Munsif, before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed, it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the outset and who had filed his *vakalatnama*. There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defendants, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances the plaintiffs gave their evidence and the Munsif decreed the claim.

*Held* that, under the circumstances stated, the defendants' pleader must be taken not to have been in Court on the date fixed, for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed; that it was therefore a fair inference that the defendants did not appear and the case was disposed of under s. 157 of the Civil Procedure Code; and that, under these circumstances, the provisions of s. 108 were applicable, and the decree was an *ex parte* decision, which it was open to the Munsif to reconsider.

*Hira Dai v. Hira Lal* (1) followed.

[*Appr.*, 23 B. 414 (424); *Cons.*, 23 C. 991 (995); *R.*, 18 A. 241 (243); 34 C. 403 (419)=5 C.L.J. 247=11 C.W.N. 329=2 M.L.T. 123; U.B.R. (1897-1901) 240.]

\* Second Appeal No. 441 of 1885, from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghazipur, dated the 6th March, 1885, reversing a decree of Muhammad Az'z-ul-Rahman, Munsif of Saidpur, dated the 7th December, 1883.

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6 A.W.N.  
(1886) 7.



1886  
JAN. 9.  
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APPEL-  
LATE  
CIVIL.  
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8 A. 140=  
6 A.W.N.  
(1886) 42.

THE plaintiff in this suit claimed possession of certain immoveable property. The Court of first instance (Munsif of Saidpur) on the 17th August, 1883, gave him a decree. On the 20th September, 1883, the defendants applied, under s. 108 of the Civil Procedure Code, for an order setting aside this decree. On the 23rd November, 1883, the Court granted this application, and appointed the 7th December, 1883, for proceeding with the suit. On the last mentioned date the Court tried the suit and dismissed it. The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Ghazipur) held that the decree first made by the Court of first instance was not an *ex-parte* decree, within the meaning of s. 108 of Civil Procedure Code, and [141] should not have been set aside under that section, and it restored that decree, reversing the second decree made by the Court of first instance.

In second appeal it was contended on behalf of the defendants that the decree first made by the Court of first instance was an *ex-parte* decree which could properly be set aside under s. 103 of the Civil Procedure Code.

The circumstances in which that decree was made are stated in the judgment of Petheram, C.J.

Mr. T. Conlan and Lala Jwala Prasad, for the appellants.

Pandit Ajudhia Nath and Munshi Kashi Prasad, for the respondent.

#### JUDGMENT.

PETHERAM, C.J.—I am of opinion that this appeal must be allowed, and the Subordinate Judge directed to reinstate the case upon his file, and to dispose of it according to its merits. The material facts of the case are as follows:—The action was brought at the beginning of the year 1883 by the plaintiffs against the defendants to recover possession of certain property. A summons was issued to the five defendants, citing them to appear before the Munsif on the 30th April, 1883, the action then pending, but no one appeared on that day. Two of the defendants—whether before or after the 30th April is not clear—applied to the Munsif to postpone the case, and upon this application the Munsif fixed the 15th May for the disposal of the suit, and the defendants were directed to file written statements before the 7th of the month. No written statements, however, were filed, and on the 15th May the plaintiffs appeared before the Munsif, and of the five defendants only two appeared and asked for further time to be allowed. This was granted and a date fixed, but when that day arrived and the matter again came before the Munsif, apparently no one appeared, and the Court passed a decree for the plaintiffs *ex-parte*. On the 8th June, the two principal defendants applied to the Munsif, under s. 108 of the Civil Procedure Code, on the ground that the decree against them had been passed *ex-parte*, and prayed that it might be set aside. This application was granted, and the Munsif reinstated the case upon his file, and fixed the 17th August for its disposal. I understand that the issues had been [142] settled, and on the 17th August what the Munsif had to do was to try the case. The questions in issue were questions of fact, so that it would be necessary to take evidence. When the 17th August arrived the plaintiffs appeared. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the beginning of the case, and who had filed a *vakalat-nama* in pursuance of the statute. But so far as I can ascertain, when the case came before the Court on the 17th August, the pleader had only his original

instructions to enter an appearance and file his *vakalat-nama*. He had no instructions as to the facts of the case or as to evidence to be adduced, nor was he provided with any of the means of conducting the defence. Under these circumstances the plaintiffs gave their evidence, and a decree was passed in their favour in the defendants' absence.

The question now arises whether this was an *ex-parte* decree which the Munsif could reconsider under s. 108 of the Civil Procedure Code; or whether, on the other hand, it was a decree of such a nature that it could only be dealt with by appeal. The determination of this point depends upon the further question whether the defendants, on the 17th August, 1883, did "appear" within the meaning of s. 157 of the Civil Procedure Code.

Now this Court, in the case of *Hira Dai v. Hira Lal* (1), has decided that the mere fact of instructing a pleader who has filed his *vakalat-nama* is not by itself sufficient to prevent a defendant from failing to make an appearance. We are bound by that ruling, and I entertain no doubt whatever of its propriety, and I am prepared to follow it.

There is nothing on the record to show that anything was done by the defendants beyond the instructions to the pleader at the outset to defend the suit; and this being so, I am of opinion that the pleader must be held not to have been present in Court on the 17th August, 1883, for the purpose of defending the suit on behalf of the defendants, because, as regards that part of the case, he had not been instructed, and therefore it is a fair inference that the defendants did not appear, and that the suit was disposed of under s. 157 of the Code. Under these circumstances the provisions of [143] s. 108 were applicable, and it was open to the Munsif to reconsider his decision; and the Judge, instead of interfering with the Munsif's discretion, ought to have disposed of the appeal upon its merits, and not upon a technical point. For these reasons I am of opinion that the appeal should be allowed, and the Judge directed to reinstate the appeal upon his file, and to dispose of it according to the merits. Costs will be costs in the cause.

STRAIGHT, J.—I am of the same opinion.

*Appeal allowed.*

8 A. 143=6 A.W.N. (1886) 43.

APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

LACHMAN KUAR (*Plaintiff*) v. MARDAN SINGH AND OTHERS  
(*Defendants*).\* [15th January, 1886.]

*Hindu widow—Re-marriage—Presumption of legality of marriage—Act XV of 1856.*

L sued for possession of certain immovable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower appellate Court on the grounds

\* Second Appeal No. 467 of 1885, from a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 5th February, 1885, reversing a decree of Babu Jai Lal, Munsif of Akbarpur, dated the 16th August, 1884.

(1) 7 A. 538.

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6 A.W.N.  
(1886) 42.



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8 A. 143=  
6 A.W.N.  
(1886) 43.

that the plaintiff at the time when her connection with the deceased began was the widow of one of his cousins; that, according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate.

*Held* that, the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and looking to the provisions of Act XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown, i.e., until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited.

[F., 72 P.R. 1908=64 P.L.R. 1908=47 P.W.R. 1908; R., 49 P.R. 1903=118 P.L.R. 1903; 65 P.R. 1911=145 P.L.R. 1911=10 Ind. Cas. 152.]

THE plaintiff in this suit claimed possession of a share in a certain village, as widow and heiress of one Aman Singh, a Hindu governed by the law of the Mitakshara, whom she alleged to have been at the time of his death separate from the other members of his family. The defendants were cousins of Aman Singh, and after his death had obtained an order in the Revenue Court, directing their names to be recorded in his place in respect of the share in suit. They contended that Aman Singh had lived jointly [144] with them; that the plaintiff was not his wife, but his mistress, and that she, having been excommunicated from the brotherhood on account of immorality, had no right of inheritance, under the Hindu Law, to the estate of Aman Singh. It appeared that the plaintiff was originally the wife of Achhru Singh, a cousin of Aman Singh, and had lived with the latter after the death of the former. The caste of the family was—the family were Gaur Rajputs—(Kshatriya).

The Court of first instance (Munsif of Akbarpur) found that according to the custom of the caste to which the parties belonged, the plaintiff, having been kept by Aman Singh as his wife, must be regarded as having been lawfully married to him. The Court also found that the allegation of the defendants to the effect that Aman Singh had lived jointly with them, and as to the immorality of the plaintiff, were groundless. It accordingly decreed the claim. On appeal, the Subordinate Judge of Cawnpore reversed the Munsif's decree and dismissed the suit, observing as follows:—"This Court, differing from the opinion of the first Court, holds that as Aman Singh was a Thakur Kshatriya by caste, and the plaintiff was the widow of the elder brother, she cannot be said to be a lawfully-married wife by reason of her being a concubine, and hence cannot be entitled to the inheritance of Aman Singh. There are three superior tribes among Hindus. Among them one is Kshatriya, and in such castes the marriage with a widow has never been held to be valid. If any widow lives in the keeping of any relation of her husband, she can never be considered to be the lawfully-married wife of that person."

In second appeal by the plaintiff, it was contended on her behalf, first, that the Subordinate Judge was in error in holding that the marriage of a widow with a relative of her deceased husband was illegal; and, secondly that the existence of such a custom of marriage in the caste to which the parties in the case belonged, had been established by the evidence.

Munshi Kashi Prasad, for the appellant.

Babu Dwarka Nath Banarji, for the respondents.

#### JUDGMENT.

STRAIGHT and BRODHURST, JJ.—We both feel that what professes to be the judgment of the Subordinate Judge in appeal is a



[146] most inadequate and unsatisfactory production, and it is not proper for us, upon the basis of it to determine a question of such vital importance to the plaintiff and her two children as is involved in the present suit. She claimed upon the basis of her being the widow of ore Aman Singh, deceased, and the mother of his two infant daughters, to have her right declared as his widow to possession of the property in suit; the effect of which declaration, if granted, would have been that the two infant daughters, if they survived her, would, on her death, succeed to the share, assuming always that the allegation made by the defendants that they were joint with Aman Singh was not made out. The plaintiff seems, in the first Court, to have given evidence to show that she was married to Aman Singh, and that her two infant daughters were the offspring of that marriage. Under these circumstances, and looking to the provisions of Act XV of 1856, we are inclined to think that the presumption was in favour of the legality of such marriage, until the contrary was shown, that is, as in the present case, until the defendants have established that, according to the custom of the caste of Gaur Rajputs, to which Achhru and Aman Singh belonged, the marriage of a cousin with his deceased cousin's widow is prohibited. With these remarks, and without repeating what we have already said as to the character of the decision of the Subordinate Judge appealed from, we think that the appeal was not in reality tried at all by that officer, for he entirely failed to grasp the legal points involved in the case, or to record a decision with which, looking to the real questions raised between the parties, it is possible for us to deal as a Court of appeal. The only proper course appears to us to decree the appeal, and set aside the judgment and decree of the lower appellate Court.

We remand the case to the present Subordinate Judge of Cawnpore, for restoration of the appeal to his file and for trial *de novo* on the merits in advertence to our remarks as to Act XV of 1856, and with due regard to the pleas taken in the memorandum of appeal to the lower appellate Court. The costs of this appeal and the other costs hitherto incurred in the litigation will be costs in the cause.

*Appeal allowed.*

8 A. 146 (F.B.) = 6 A.W.N. (1886) 37.

### [146] FULL BENCH.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

BASTI RAM (Defendant) v. FATTU (Plaintiff).\* [21st January, 1886.]

*Civil Procedure Code, s. 244—Question for Court executing decree—Separate suit—Civil Procedure Code, ss. 266, 316.*

The provisions of s. 244 (c) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the

\* Second Appeal No. 1482 of 1884, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 23rd July, 1884, affirming a decree of Kuar Mohan Lal, Munsif of Muzaffarnagar, dated the 23rd April, 1884.

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FULL  
BENCH.

8 A. 146

(F.B.)=

6 A.W.N.,

(1886) 37.

object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

A judgment-debtor whose occupancy-tenure had been sold in execution of a decree for money, sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of s. 9 of Act XII of 1881 (N.-W.P. Rent Act).

Held by the Full Bench that the question involved in the suit was one of the nature referred to in s. 244 (c) of the Civil Procedure Code as determinable only by order of the Court executing the decree, and that the suit was therefore not maintainable. *Narain v. Puran* (1) referred to.

[F., 22 A. 86 (88, 89) ; 22 A. 108 (110) ; R., 23 A. 346 (348) ; 26 A. 447 (453) = A.W.N. (1904) 161 = 1 A.L.J. 65 ; 26 O. 727 (731) ; 14 A.L.J. 846 = 36 Ind. Cas. 281 ; 9 C.W.N. 972 ; 2 O.C. 315 (317) ; 8 O.C. 409 (416) ; D., 24 C. 355 (357).]

THE defendant in this suit held a decree for money against the plaintiff. In execution of that decree he caused to be attached and advertised for sale the plaintiff's right of occupancy in certain lands. The plaintiff objected to the attachment on the ground that the sale in execution of decree of such a right was prohibited by s. 9 of Act XII of 1881 (N.-W. P. Rent Act). The Court executing the decree disallowed this objection on the 9th August, 1883, and the tenure was put up for sale, and purchased by the defendant on the 20th August, 1883, and possession of the lands was delivered to him.

The plaintiff brought this suit against the defendant to set aside the order disallowing his objection and the sale, and to recover possession of the land, on the ground that the sale was illegal and void, being in contravention of the provisions of s. 9 of the Rent Act. The Court of first instance (Munsif of Muzaffarnagar) gave the plaintiff a decree as claimed. The defendant appealed on [147] certain grounds. At the hearing of the appeal he urged, in addition to those grounds, the ground that s. 244 of the Code of Civil Procedure was a bar to the suit. This ground the lower appellate Court refused to consider, as it was a new one and had not been taken below, and affirmed the decree of the first Court.

The defendant, in second appeal, again contended that the suit was barred by s. 244 of the Civil Procedure Code.

With reference to this contention, the Court (Petheram, C.J., and Tyrrell, J.) referred the following question to the Full Bench :—

"Is a suit brought by a *quondam* judgment-debtor against the purchaser of his occupancy-tenure, who was also his decree-holder, barred by the rule in s. 244 (c) of the Civil Procedure Code?"

Munshi *Kashi Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

### JUDGMENT.

OLDFIELD, J. (PETHERAM, C.J., and STRAIGHT, BRODHURST, and TYRRELL, JJ., concurring).—By s. 244, Civil Procedure Code, it is provided that certain questions shall be determined by order of the Court executing the decree, and not by separate suit. Amongst these are all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge, or satisfaction of the decree.

(1) A.W.N. (1889) 218.



The questions must be questions which arise between parties to the suit or their representatives, and which relate to the execution, discharge, or satisfaction of the decree.

If they are questions of this nature, and which properly arise between the parties or their representatives, they must be determined by order of the Court executing the decree, and not by separate suit; and the provision disallowing a separate suit to determine these questions applies not only to prohibit a suit between parties and their representatives, but also a suit by a party or his representatives against an auction-purchaser in execution of the decree, the object of which is to determine a question which properly arises between parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

[148] If the question be of this nature, it is one which by s. 244 must be determined by order of the Court executing the decree, and not by separate suit; and it is immaterial whether the party did or did not raise it prior to the auction-sale at the time of execution. If he did not, he lost the remedy which the Legislature has provided.

That this was the intention of the Legislature, and that a question of this kind cannot be raised by a party to the suit in which the decree was passed against a purchaser in execution of that decree seems evident from s. 316, which provides that, as far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of the sale-certificate.

In the case before us a judgment-debtor has sued the auction-purchaser to recover the property sold in execution of the decree on the ground that the property, which is a tenant's right in land, is not by law saleable in execution of a decree. This question is one which arose between the plaintiff-judgment-debtor and the decree-holder, who is also the purchaser, and was determined against the former by the Court which executed the decree prior to the sale; and it is a question which must be considered to relate to the execution, discharge or satisfaction of the decree. It is, in effect, whether certain property was liable to attachment and sale to satisfy the decree.

Certain things are, by s. 266, Civil Procedure Code, not liable to attachment and sale; and questions regarding liability to attachment and sale arising out of the provisions of s. 266 would clearly be questions within the meaning of s. 244, Civil Procedure Code. The question of the liability of the property, the subject of this suit to attachment and sale, arises out of a provision in the Rent Act; but equally with questions under s. 266, Civil Procedure Code, it is one which falls within the meaning of s. 244, Civil Procedure Code.

For these reasons I am of opinion that the suit is not maintainable, and on re-consideration I modify the opinion I expressed in the case of *Narain v. Puran* (1).

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*Before Sir W. Comer Pettheram, Kt., Chief Justice, Mr. Justice  
Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst,  
and Mr. Justice Tyrrell.*

ABDUL KADIR (*Plaintiff*) v. SALIMA AND ANOTHER (*Defendants*).<sup>\*</sup>  
[21st January, 1886.]

*Suit for restitution of conjugal rights—Muhammadan Law—Dower—Plea of non-pay-  
ment—Form of decree.*

According to the Muhammadan Law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and has a defence to a claim for cohabitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principles recognized by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim.

It is a general rule of interpretation of the Muhammadan Law that, in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Quazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and, in the application of legal principles to temporal matters, the opinion of Quazi Abu Yusuf is entitled to the greatest weight.

*Moonshee Buzloor Ruheem v. Shums-oon-nissa Begum* (1), *Mulleeka v. Jumeela* (2), *Ranee Khajooroonissa v. Ranee Ryeesoonissa* (3), *Nawab Bahadoor Jung Khan v. [180] Useez Begum* (4), *Jaun Beebee v. Sheikh Moonshee Beparee* (5), *Gatha Ram Mistree v. Moohita Kochin Atteah Doomoonnee* (6), and *Eidan v. Mazhar Hussain* (7), referred to. *Sheikh Abdool Shukhoor v. Raheem-oon-nissa* (8), *Wilayat Hussain v. Allah Rukhi* (9), *Nasrat Hussain v. Hamidan* (10), and *Nasir Khan v. Umrac* (11), overruled.

<sup>\*</sup> Second Appeal No. 414 of 1884, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 15th March, 1884, reversing a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 12th December, 1883.

(1) 11 M.I.A. 551. (2) L.R. Sup. Vol. I.A. 135=11 B.L.R. 375.  
(3) 2 I.A. 285=5 B.L.R. 84. (4) N.W.P.S.D.A. R. (1843-46) 180.  
(5) 3 W.R.C.R. 93. (6) 14 B.L.R. 298.  
(7) 1 A. 483. (8) N.W.P.H.C. R. (1874) 94.  
(9) 2 A. 831. (10) 4 A. 205.  
(11) A.W.N. (1882) 96.

In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Muhammadans governed by the Hanafi Law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan Law.

Held by the Full Bench that the lower appellate Court's view of the Muhammadan Law relating to conjugal rights and the husband's obligation to pay dower, was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit.

[F., 30 B. 122 (125)=7 Bom. L. R. 684; 17 C. 670 (674); 11 M. 327 (328); 4 A.L.J. 180 (N); 1 L.B.R. 145; 10 O. C. 11 (13); 164 P.R. 1883; 5 P.R. 1891; 14 P.R. 1891; R., A.W.N. (1889) 122; 15 O.C. 127; 7 S.L.R. 138=24 Ind. Cas. 881.]

THE plaintiff in this suit claimed restitution of conjugal rights. The parties to the suit were Sunni Muhammadans governed by the Hanafi law. The plaintiff was married to the defendant Salima on the 15th March, 1883, and her dower was fixed without any specification as to whether it was to be partly or wholly prompt or deferred. She cohabited with her husband, the plaintiff, up to the 15th June, 1883, when she went on a visit to her father, the defendant Chimman. On the 28th June, 1883, the plaintiff instituted the present suit on the allegation that he requested Chimman to allow Salima to return to cohabitation with him, but that Chimman "flatly refused to comply with the plaintiff's request and obstructed him in bringing the defendant Salima with him; that the defendant Salima had "been won over by the defendant Chimman to his own side;" and that the plaintiff's wife, the defendant Salima, was "not therefore willing to come with the plaintiff. Upon these allegations the plaintiff prayed that "the defendant [151] Chimman be ordered to send the defendant Salima with the plaintiff, and not to interfere with the latter in bringing her with him, and the defendant Salima be also ordered to come with the plaintiff, and live with him as his wife."

To the suit so instituted two separate defences were made on one and the same day, the 24th July, 1883.

The defendant Chimman simply protested against being impleaded in the suit, stating that he "never refused to send Salima to her husband's house," that she was "herself wise and major," and could "form a judgment as to her own interests."

The defendant Salima raised three main pleas in defence:—*First*, that she had been irrevocably divorced by the plaintiff, and was therefore no longer his wife; *secondly*, that "notwithstanding the divorce, the plaintiff had not paid the defendant's dower," so that, "even if the plaintiff had not repudiated the defendant, he was not competent to bring his suit so long as he did not satisfy her dower-debt," and *thirdly*, that the plaintiff had treated her with cruelty, and she was therefore in fear of grave personal injury.

In this stage of the case the plaintiff deposited the whole dower money in Court on the 20th August, 1883; and the Court of first instance (Munsif

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of Mirzapur) having examined the evidence produced on either side, held that the allegations set up in defence were not proved; that the nature of the dower not having been "specified at the time of marriage, only a part of the dower becomes, under the Muhammdan law, payable on demand;" that "before the institution of the suit, the dower was never demanded by the defendant;" that "the defendant having insisted on payment of the dower, the plaintiff has paid the money into Court;" and that such payment under the circumstances of the case entitled the plaintiff "to succeed in his claim for bringing his wife to his house."

Upon appeal by both the defendants, the lower appellate Court (District Judge of Mirzapur), relying upon certain rulings, and without going into the merits of the case as to the pleas regarding divorce and cruelty, held that "the whole of the dower is to be considered as prompt" under the Muhammadan law, and that "payment into Court after institution of the suit was insufficient, because the husband had no cause of action at the time when he [152] brought his suit." Upon this ground the District Judge, decreeing the appeal, dismissed the suit *in toto*.

The plaintiff appealed to the High Court, impugning the view of the Muhammadan law taken by the lower appellate Court.

The appeal came on for hearing before Oldfield and Mahmood, JJ., who, having regard to the ruling of the Court in *Sheikh Abdool Shukkoar v. Raheem-un-nissa* (1), *Wilayat Hussain v. Allah Rakhi* (2), and *Nazir Khan v. Umrao* (3), referred to the Full Bench the question "whether, under the circumstances of this case, the plaintiff had the right to maintain the suit."

Mr. *Amir-ud-din*, for the appellant.

Pandit *Ajudhia Nath*, for the respondents.

#### JUDGMENT.

PETHERAM, O.J. (STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL JJ., concurring):—This case was argued before the Full Bench on the 26th March, 1885, when the Judges constituting the Court were the same as now, except that Mr. Justice Mahmood was officiating for Mr. Justice Tyrrell. Mr. Justice Mahmood has now left the Court, but we have had the advantage of his written opinion, which we adopt and deliver as the judgment of the Court. His opinion answers the question referred to the Full Bench in the affirmative, as follows:—

MAHMOOD, J.—The question raised by this reference is one not free from difficulty, arising partly from the manner in which the subject has been dealt with in the text-books of Muhammadan law, and partly from the *ratio decidendi* adopted in some of the reported cases which I shall presently refer to and discuss. But before doing so, I consider it necessary to recapitulate the fact of this case, so far as they are required for the purposes of answering this reference.

(After stating the facts as stated above, the learned Judge continued as follows:.) The plaintiff has preferred this second appeal impugning the view of the Muhammadan law taken by the lower appellate Court, and the question raised by the contention of the parties is one the decision of which will affect the domestic family life of the Muhammadan community. It therefore [153] falls essentially within the purview of s. 24 of the Bengal Civil Courts Act (VI of 1871), which binds us to adhere to the rules of Muhammadan

(1) N.W.P.H.C.R. (1874) 94.

(2) 2 A. 831.

(3) A.W.N. (1882) 96,



Law in determining such questions. The clause is a reproduction of s. 15, Bengal Regulation IV of 1793. Referring to that clause, the Lords of the Privy Council, in *Moonshee Buzloor Ruheem v. Shums-oon-nissa Begum* (1) which was a suit for restitution of conjugal rights by a Muhammadan against his wife, made certain observations which furnish the guiding principle upon which such cases should be determined. After quoting certain passages from the judgment of the learned Judges of the Calcutta High Court, their Lordships went on to say :—"The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Muhammadan law, but according to what is termed "equity and good conscience," i.e., according to that which the Judge may think the principles of natural justice require to be done in the particular case. Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India,.....and they can conceive nothing more likely to give just alarm to the Muhammadan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Muhammadan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society, as for instance if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own senses of what is just and fair, without reference to positive law, would let the wife go free ; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband" (pp. 614-615).

I have quoted the passage at such length, because it has come within my notice that vague and variable notions of the rule of "justice, equity and good conscience" are sometimes regarded as affecting the administration of native laws in such matters to a [154] degree not justified or necessitated by the general municipal law applicable to all persons, irrespective of their race or religion ; and applying the observations of the Lords of the Privy Council to the present case, I have no doubt that this case must be decided according to the rules of Muhammadan law, the order of the Court, whatever it may be, being, of course subject to such rules, as the exigencies of the general municipal law may require.

In this view of the case the reference cannot, in my opinion, be satisfactorily answered without considering, *first*, the exact nature and effect of marriage under the Muhammadan law upon the contracting parties ; *secondly*, the exact nature of the liability of the husband to pay the dower ; *thirdly*, the matrimonial rights of the parties as to conjugal cohabitation ; and *fourthly*, the rules of the general law as to the decree of Court in such cases.

But as preliminary to the consideration of these various points, I may observe that a suit for restitution of conjugal rights is a suit "of a civil nature," within the meaning of s. 11 of the Civil Procedure Code, and this view is supported by the terms of articles 34 and 35, sch. ii, Limitation Act (XV of 1877), and the provisions of s. 260 of the Code itself. To quote the language of the Privy Council in the case already referred to, "upon authority, then, as well as principle, their Lordships

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have no doubt that the Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to co-habitation; and that that suit must be determined according to the principles of the Muhammadan law" (p. 610).

What, then, are the rules of the Muhammadan law upon the first three points which I have already enumerated? I will deal with each of those points separately, and in doing so will refer to the important rulings which constitute the case law upon the subject.

In dealing with the first point, I adopt the language employed in the Tagore Law Lectures (1873) in saying that "marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Kuran, yet the Muhammadan law does not [155] positively prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which the marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case" (p. 291). That this is an accurate summary of the Muhammadan law is shown by the best authorities, and Mr. Baillie, at page 4 of his Digest, relying upon the texts of the *Kanz*, the *Kifayah*, and the *Inayah*, has well summarized the law:—"Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness. The pillars of marriage, as of other contracts, are *Bejab-o-kubool*, or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance." The Hedaya lays down the same rule as to the constitution of the marriage contract, and Mr. Hamilton has rightly translated the original text (1):—"Marriage is contracted—that is to say, is effected and legally confirmed—by means of declaration and consent, both expressed in the preterite." These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Muhammadan law. I have said enough as to the nature of the contract of marriage, and in describing its necessary legal effects I cannot do better than resort to the original text of the *Fatawa-i-Alamgiri* which Mr. Baillie has translated, in the form of paraphrase, at page 13 of his Digest, [156] but which I shall translate here literally, adopting Mr. Baillie's phraseology as far as possible:—"The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the

(1) الذكاح ينعقد بالايجاب والقبول بلغايتين يعبرهما عن الماضي (هداية)

\* ككتاب الزكاح



other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category (1) " (with reference to prohibitions of the marriage law).

That this conception of the mutual rights and obligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law and other European systems which are derived from that law cannot, in my opinion, be doubted; and even regarding the power of correction, the English law seems to resemble the Muhammadan, for even under the former "the old authorities say the husband may beat his wife;" and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily stepped in to give to the wife personal security which the matrimonial law does not. To use the language of the Lords of the Privy Council in the case already cited:—"The Muhammadan law, on a question of what is legal cruelty between [157] man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it." 'The Court,' as Lord Stowell said, in *Evans v. Evans*, 'has never been driven off this ground' " pp. (611-612).

Now the legal effects of marriage, as enumerated in the *Futawa-i-Alamgiri*, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Muhammadan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife.

This leads me to the consideration of the second point, upon which the greatest stress has been laid in the argument at the bar. It was contended by the learned pleader for the respondent that, under the Muhammadan law, the wife's dower is regarded as nothing more or less

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(1) اما احكامه فكل امتداع كل منها بآدمي الرجة الماذون فيه شرماً  
كذا في فتح القدیر و ملك الحمیس وهی میزرتها ممتدة عن الخروج والبرز  
وجرب المهر والنفقة اوالسرة علیه و حرمة المعاهرة والارث من الجانبيين و  
وجوب العدل بين النساء و حرقهن وجرب اطاعته عابها اذا ادعاها الي الفراش  
و الایة تادیبها اذا لم تطعه بان نشرت و استحباب معاشرتها بالمعروف  
كذا في البحر الرائق و تحریر الجمع بين الحکین و من في معاذها كذا  
فالسراج الزهراج (عالم غیری كذاب النکاح) •



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than price for connubial intercourse, and that the right of cohabitation does not therefore accrue to the husband till he has paid the dower to the wife. The argument, so urged, renders it convenient to deal with the third point along with the second.

I have already shown that, under the Muhammadan law, the right of cohabitation comes into existence at the same time and by reason of the same incident of law as the right of dower. That the latter right may modify and affect the former cannot be doubted: how it affects and modifies it is the main subject of this reference. Dower, under the Muhammadan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although the man were [158] to engage in the contract on the special condition that there should be no dower."—(Hamilton's Hedaya by Grady, p. 44). Even after the marriage the amount of dower may be increased by the husband during coverture (Baillie's Digest, p. 111); and indeed in this as in some other respects, the dower of the Muhammadan law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text-books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy. Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Muhammadan law. Under that law marriage does not make her property the property of the husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the law-giver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has been imposed, and it may either be prompt, that is immediately payable upon demand, or deferred, that is payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when at the time of the marriage ceremony no specification in this respect is made, the whole dower is presumed to be prompt and due on demand [*Mirza Bedar Bukht Muhammed Ali Bahadoor v. Mirza Khurruddin Bukht Yahya Ali Khan Bahadoor* (1). The question when such dower becomes payable was discussed by the Lords of the Privy Council in *Mulleeka v. Jumeela* (2) and in *Ranee Khajooroonissa v. Ranee Ryeesoonissa* (3), and in the former of these cases their Lordships approved the rule laid down by the Sadr

(1) 2 Suth. P.C.J. 823.

(2) L.R. Sup. Vol. I.A. 135—11 B.L.R. 375.

(3) 2 I.A. 235—5 B.L.R. 84.

Diwani Adalat of these provinces in *Nawab [159] Bahadoor Jung Khan v. Uzeez Begum* (1), wherein the Court considered "the nature of the exigible dower to be that of a debt payable generally on demand after the date of the contract, which forms the basis of the obligations, and payable at any period during the life of the husband, on which that demand shall be actually made, and therefore until the demand be actually made and refused, the ground of an action at law cannot properly be said to have arisen." These rulings leave no doubt that although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture, and that it is only upon making such demand that it becomes payable in the sense of performance being rendered in fulfilment of an obligation.

The right of dower confers another right upon the Muhammadan wife, and the nature of this second right is described in the Hedaya in a passage on which the learned pleader for the respondent has relied for his contention. The passage is to be found in Grady's edition of Hamilton's Hedaya, at page 54; but as the translation is not sufficiently close, and is moreover interpolated with paraphrases, I translate the original text here literally, since much depends upon the exact meaning of the passage:—"It is the wife's right that she may deny herself to her husband until she receive the dower, and she may prevent him from taking her away (that is, travelling with her), so that her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole exigible dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment (himself); and if the whole dower is deferred, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter Abu Yusuf holds the contrary opinion. And if the husband has retired with her, the same would be the answer according to Abu Hanifa: but the two disciples have said she has not the right to deny herself, and the difference of opinion subsists [160] where there is retirement with her consent; but if she was forced or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our Doctors (1)."

(1) N.-W.P.S.D.A.R., (1843-46) 180.

(1) للمرأة ان تمنع نفسها حتي تأخذ المهر وتمنع ان يخرجها اي يسافر بها ليذهب حقها في البذل كما تمنع حق الزوج في المجدل وصار كالبيع والامن للزوج ان يمنعها من السفر والخروج من منزلها وزيارت اهلها حتي يوفيه المهر كله اي المجدل لان حق الحبس لا ينافي الاستحقاق وليس له حق الاستيفاء قبل الايفاء ولو كان المهر كله موجه اليها ان تمنع نفسها لانتقاطها حقها بالمجدل كما في البيع وفيه خلاف ابي يوسف رح وان دخل بها مذكول الجواب عند ابي حنيفة رح وقال ليس لها ان تمنع نفسها والخلاف فيها اذا كان الدخول برضاها حتي لو كانت مكرهة اركان صبيحة او مجنوناً لا يقطع حقها في الحبس بالاتفاق (هداية كذاب النكاح) \*



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Another passage to be found in the *Durrul Mukhtar* has also been cited by the learned pleader for the respondent, and I translate it here before considering the exact effect of these authorities upon the present case :—

"It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly (2)."

Relying upon these passages, the learned pleader for the respondents contends that the right of cohabitation does not accrue to the husband at all until he has paid the prompt dower, and that, inasmuch as the plaintiff in the present case had not paid the dower to his wife, defendant No. 2, her refusal to cohabit with him did not afford a cause of action for a suit for restitution of conjugal rights. In support of this contention certain reported cases have been cited, which I wish to notice here. In *Sheikh Abdool Shukkoar* [161] v. *Rizheem-oon-nissa* (3) it was held that a suit will not lie by a Muhammadan to enforce the return of his wife to his house, even after consummation with consent, until her prompt dower has been paid. The rule was followed to its fullest extent in *Wilyat Husain v. Allah Rakhi* (4) and in *Nasrat Hussain v. Humidan* (5), and in the former of these cases it was held that a Muhammadan cannot maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is prompt and has not been paid. In *Eidan v. Mahar Husain* (6), where the suit prayed for restitution of conjugal rights, and the defendant in her written statement having claimed dower, the lower appellate Court, setting aside the decree of the first Court, decreed the claim conditional upon payment of prompt dower, this Court, upheld the decree by a judgment which is silent upon the specific question whether the dower not having been paid before suit, the plaintiff had the right to come into Court with such a prayer. In *Nazir Khan v. Umrao* (7), however, a Division Bench of this Court upheld the decree of the lower appellate Court, which had dismissed the suit *in toto*, reversing the decree of the Court of first instance, which had passed a decree in favour of the plaintiff (husband) conditional upon his paying the prompt dower. The ruling is in full accord with the *ratio decidendi* adopted in the case of *Sheikh Abdool Shukkoar* (3), which appears to be the leading case upon the point under consideration, so far as this Court is concerned. No ruling of any other High Court was cited at the hearing in support of the respondent's contention except the case of *Jaun Beebee v. Sheikh Munshee Beparee* (8) which does not appear to me to be decisive on either side of the contentions raised in the case. The ruling of this

(2) لها منعه من الرطى ودراعيه شرع بجميع الحفر بها ولربعد رطى ارجلها  
فيهما لان كل ر طقة معقود عليها فتسليم البعض لا يوجب تسليم الباقي لانه  
ما بين تسليمه من المهر كذا او بعضاً (درالمختار باب المهر) \*

(3) N.-W.P.H.C. R. (1874), 94.

(5) 4 A. 205.

(7) A.W.N. (1882) 96.

(4) 2 A. 831.

(6) 1 A. 483.

(8) 3 W.R. Cr. 93.



Court in *Sheikh Abdool Sukkoar v. Rahim-oon-nissa* (1) is, therefore the only leading case upon the subject, but, with due deference, I am unable to agree in the rule there laid down.

The texts cited by the learned pleader for the respondents undoubtedly show, what is a well-recognised rule of the Muhammadan law of marriage, that the marriage contract having been a [162] completed and its legal effects having been established, the right of claiming prompt dower comes into existence in favour of the wife, and that she can use such a claim as a means of obtaining payment of the dower and as a defence for resisting a claim for cohabitation on the part of the husband against her consent. And when I say this, I put the case in favour of the respondents in its strongest possible light, for even upon this question in cases where cohabitation has taken place, the conflict of authority is too great to render it an undoubted proposition of the Muhammadan law. The learned Judges in the case to which I have just referred seem to have appreciated this difficulty, but preferred to adopt the view of Imam Abu Hanifa in preference to the concurrent opinions of his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, notwithstanding the fact that a passage was cited to them from the *Durrul Mukhtar* in support of the view that "where on such a point there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail." Both Imam Abu Hanifa and Imam Muhammad were purely speculative jurisconsults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Qazi Abu Yusaf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the *Khalifa* Harun-ul-Rashid, the advantage of applying legal principles to the actual conditions of human life, and his *dicta* (specially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction. But before proceeding any further, I wish to quote a passage from the celebrated *Fatawa Qazi Khan*, a text-book as high in authority as the *Durrul Mukhtar* :—

"A wife, having surrendered herself to her husband before the fulfilment (*i.e.*, payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower. She has this right in the opinion of Abu Hanifa; but Abu Yusaf and Imam Muhammad maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. And [163] according to the opinion of Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey (1)." But the best summary of the law is to be found

(1) N.-W.P.H.C.R. (1874) 94.

(1) امرأة سمعت نفسها الى زوجها قبل استيفاء المهر ثم منعته نفسها ولاستيفاء المهر كان لها ذلك في قول ابي حنيفة رحمه الله و قال ابو يوسف و محمد ليس لها ان يمنع من الوطى واشتبهت الروايات عنهما في الامتناع عن المسافرة و علي قول ابي القاسم الصغار لها ان يمنع عن المسافرة (وقوي بإضي خن كقول النكاح) \*

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in the latest authoritative work on the Muhammadan law, the *Fatawa Alamgiri* in a passage which Mr. Baillie has translated somewhat briefly at pages 124-25 of his celebrated Digest. The passage being the most complete exposition of the law upon the subject, I translate it here myself as closely as possible, from the original text itself:—

"In all places, when the husband has had connubial intercourse with her, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing fulfilment (*i.e.*, payment) of her exigible dower, it is her right to do so according to Imam Abu Hanifa; but this is opposed to the opinions of his two disciples (Qazi Abu Yusuf and Imam Muhammad), and in like manner the husband cannot prevent her from going out or travelling or going on a voluntary pilgrimage, according to Abu Hanifa, except when she goes out in an indecent manner. As to her right to all this before she has surrendered herself (consummation), there is unanimity of opinion, as there is as to the rule when the husband has had connubial intercourse with her whilst she is a minor or has been forced or insane, in which cases her father might refuse to surrender her until the payment of her prompt dower—so in the *Itabiyyah*. And if the husband has had connubial intercourse with her or retired with her with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower according to the written engagement, or the prompt part of it according to the custom of our country. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Shaikh-ul-Imam, the juriconsult, the pious Abul Qasim Assaffar, was accustomed to decide according to Abu Hanifa, so far as going on a journey is concerned; but in the matter of refusing herself, he used to decide according to the opinions of [164] the two disciples, and several of our learned doctors have approved of this distinction (1)."

Having cited these various passages from text-books of the highest authority upon the Muhammadan law, I proceed to consider the exact effect they have upon the present case. And here I have to point out that in this case the Court of first instance found that no demand for dower had been made by the wife (defendant No. 2) before the institution of the suit, and that she had already cohabited with her husband, the plaintiff, and there is no question that she had attained majority when she was married. These matters were not dealt with by the lower

(1) في كل صوضع دخل بها او صعد الخمرة وناكد كل المهر لورادت ان تمنع نفسها لاستيفاء المهر الا اذا خرجت خروجاً فاحشاً و قبل تسليم النفس لها ذلك بالاجماع و كذا اذا دخل بها ردى صغيرة او مكزومة و صغيرة فلا بل حبسها حتي يرفق لها المهر كذا في العذبة ولو دخل الزوج بها او خلقتها برضاها فانها ان تمنع نفسها عن السفر بها حتي تسقولي جميع المهر على جواب الكتاب والمهر في عرف ديارنا عند ابي حنيفة رح و لا ليس له ذلك و كان الشيخ الامام الفقيه الزاهد ابو القاسم الصغار رح يفتي في السفر بقول ابي حنيفة رح وفي منع النفس بقولها و استحسن بعض مشايخنا رح اختياره كذا في المحيط •



appellate Court, which decided the case upon the preliminary point, and they may be taken to be so for the purposes of this reference.

I have already said enough to show that the right of dower does not precede the right of cohabitation which the contract of marriage necessarily involves, but that the two rights come into existence simultaneously and by reason of the same incident of law. The right of the wife to claim maintenance from her husband arises in the same manner as one of the legal effects of marriage, and to say that any of those effects are not simultaneously created by the contract of marriage amounts, in my opinion, to a violation of the fundamental notions of jurisprudence regarding correlative rights and obligations arising from one and the same perfected legal relation. Indeed, so far as the question now under consideration is concerned, the rules of Muhammadan [165] law leave no doubt when that system of law is consulted as a whole and not upon isolated points. The fact of the marriage gives birth to the right of cohabitation not only in favour of the husband but also in favour of the wife, and to say that the payment of dower is a condition precedent to the vestiture of the right, is to hold that a relationship, of which the rights and obligations are essentially correlative, may come into existence at one time for one party and another time for the other party. If the payment of dower were a condition precedent to the initiation of the right of cohabitation, a Muhammadan wife, having quarrelled with her husband, could not sue him for cohabitation till she had in a previous litigation sued and, obtaining a decree, realized her dower, because, *ex hypothesi*, her right of cohabitation with her husband would be dependent for its coming into existence upon the payment of her dower. Yet such is the logical result of the argument pressed upon us on behalf of the respondents. Such, however, is not the rule of the Muhammadan law, and even the passages which have been cited on behalf of the respondents do not support any such proposition. The passage in the Hedaya, which I have closely translated from the original Arabic text, no doubt entitles the wife to resist the claim of the husband for cohabitation with her by pleading the non-payment of her prompt dower, but it proceeds essentially upon the assumption that his right to put forward such a claim is antecedent to the plea. In the passage itself he is called "the rightful person," and the impediment of the enforcement of his right of cohabitation with his wife is stated to be the non-payment of her prompt dower, a rule which, having been borrowed from the Muhammadan law of sale, is based simply upon the analogy of the lien which the vendor possesses upon the goods for payment of the price before delivery. The rule is simply, analogical, and giving to it its fullest scope, it falls far short of maintaining the proposition upon which the argument for the respondents rests. The passage from the *Durrul Mukhtar*, following, the analogy of sale even further, expressly lays down that the right of the wife to resist the husband's claim for cohabitation is intended to be for the purpose of realizing her prompt dower. The same is the effect of the passage which I have cited from the *Fatawa Quazi Khan* and the *Fatawa Alamgiri*, and the rule, as stated by the Muhammadan [166] jurists, bears, in the eye of jurisprudence, the strongest possible analogy to the ordinary rule of the law of sale, which has been best stated in s. 95 of the Indian Contract Act (IX of 1872), namely, that "unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid." The same is the principle upon which, in the law of sale, the

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right of stoppage *in transitu* is based, and the lien which the vendor has amounts to nothing more or less than the definition given by Grose, J., in *Hammonds v. Barclay* (1), that it is "a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." But this lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place. I have followed up the analogy of sale so far, because nearly the whole argument of the learned pleader for the respondents proceeded upon the circumstance that in the passages, which he cited, marriage has been compared to sale, dower to the price, and surrender of the wife to her husband to delivery of goods in the law of sale.

But to return to the passages which I have quoted from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, it is apparent that the sole object of the rule which entitles the wife to resist cohabitation is to enable her to secure payment of her prompt dower. And it is equally apparent from those passages that the opinion of Imam Abu Hanifa is contradicted, not only by his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, but also by Shaikh Assaffar so far as the question of cohabitation is concerned. Imam Abu Hanifa and his two disciples are known in the Hanifa school of Muhammadan law as "the three Masters," and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third. Now, bearing this in mind, it is clear that the two disciples of Imam Abu Hanifa, regarding the surrender of the wife to her husband as bearing analogy to delivery of goods in sale, held that the lien of the wife for her dower, as a plea for resisting cohabitation, ceased to exist [167] after consummation. According to the ordinary rule of interpreting Muhammadan law, I adopt the opinion of the two disciples as representing the majority of "the three Masters," and hold that, after consummation of marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate action.

But the rule enunciated by me need not be applied in its fullest extent to the present case, because here in the first place, it has not been found that the wife ever demanded her dower before the suit was filed, or that she declined to cohabit with her husband the plaintiff upon the ground that her dower had not been paid. She relied upon allegations of divorce and cruelty, both of which were found by the Court of first instance to be untrue, and upon these findings I hold that she had no defence to the action. The plaintiff, as I have already shown, acquired by the very fact of the marriage the right of cohabitation; he was not bound to pay the dower before it was demanded, and upon the findings of the first Court, the first intimation which he had of such demand was the written defence of his wife (defendant No. 2) in the course of this unfortunate litigation. And upon intimation of such a demand, he actually brought money into Court and deposited it for payment to his wife, the defendant No. 2, as her dower. Under such circumstances, the view of the learned District Judge, which follows the rulings to which he has referred, simply amounts to saying that the plaintiff must institute another suit like the present for enforcing the same remedy. I have already said that the

present suit, bearing in mind the conjugal rights created by the Muham-  
madan law, was not premature, and the view of the learned District  
Judge can only have the effect of circuity of action in contravention of  
the maxim that it is to the benefit of the public that there should be an  
end to litigation.

This leads me to the consideration of the fourth point formulated by  
me at the outset, namely, the general law as to decrees in such  
cases. The question involves mixed considerations of substantive  
law and procedure, and the answer to it is fully [168] furnished  
by the *dicta* of the Lords of the Privy Council in the case  
of *Munshee Buzloor Ruheem v. Shums-on-nissa Begum* (1), to which  
reference has already been made. After giving a brief sketch of the  
matrimonial law of the Muhammadans, their Lordships went on to say :  
"The Muhammadan wife, as has been shown above, has rights which  
the Christian—or at least the English—wife has not against her husband.  
An Indian Court might well admit defences founded on the violation of  
those rights, and either refuse its assistance to the husband altogether, or  
grant it only upon terms of his securing the wife in the enjoyment of her  
personal safety and her other legal rights ; or it might, on a sufficient  
case, exercise that jurisdiction which is attributed to the Qazi.....Enough  
has been said to show that, in their Lordships' opinion, the determination  
of any suit of this kind requires careful consideration of the Muhammadan  
law, as well as strict proof of the facts to which it is to be applied (p. 612)."

Abiding by this *dictum*, I have carefully considered the Muhammadan  
law as I have already stated, whilst the facts of the case must, for the  
purposes of this reference, be taken to be those found by the Court of first  
instance. And upon this state of things I am of opinion that the decree  
passed by the Court of first instance was right and proper. The question  
as to the form of decree in such cases and the manner in which it may be  
executed was discussed in a very learned judgment by Markby, J., in  
*Gatha Ram Mistree v. Mookita Koachin Atteah Doomoonee* (2) in which  
that learned Judge, after briefly reviewing the laws of other civilised  
countries, came to the conclusion that the Ecclesiastical Law of England  
was the only system which justified the view that "a Court could enforce  
the continuous performance of conjugal duties by unlimited fine and  
imprisonment ; but the learned Judge declined to follow that law in  
Indian cases, and held that the provisions of s. 200 of the old Civil  
Procedure Code (Act VIII of 1859) were not applicable to decrees for  
restitution of conjugal rights. The Legislature has, however, stepped in  
to remove doubts upon this point, and ss. 259 and 260 leave no doubt as  
to the manner in which a decree for recovery of a wife or for restitution  
of conjugal rights can be enforced under the present Code. The case before  
[169] Mr. Justice Markby was, however, one between Hindus, and all  
that he said in that case would not necessarily apply to a case between  
Muhammadans. Nor need the English law upon the subject be consulted,  
though I may observe that, judging by the ruling of Mr. Justice Coleridge  
in *In re Cochrane* (3), the rule of English law as to the husband's general  
power over the wife's personal liberty goes as far as any civilised law can  
go in the direction of subjecting the wife to the control of the husband.  
An account of that case is given by Mr. Macqueen in this treatise on the  
Rights and Liabilities of Husband and Wife, and it appears that the order

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(1) 11 M.I.A. 551.

(2) 14 B.L.R. 298.

(3) 8 Dowling's P.C. 630=4 Jur. 534.



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of the Court in that case was very peremptory—"Let her be restored to her husband." The rules of our law, however, necessitate no such course, and in passing decrees in suits for restitution of conjugal rights among Muhammadans, the *dictum* of the Privy Council already quoted furnishes the guiding principle. Courts of justice in India, in the exercise of their mixed jurisdiction as Courts of equity and law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case, upon the principles which have been so well stated by Mr. Justice Story in his celebrated work on Equity Jurisprudence, 11th ed., ss. 27 and 28. So I understand the principle upon which the observations of the Lords of the Privy Council in the case to which I have so often referred were based, and I may with advantage cite another passage from that judgment:—"It seems to them clear that if cruelty in a decree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Muhammadan law (pp. 615-616)."

In the case in which their Lordships made these various observations the question of non-payment of dower as a defence to the action did not arise, nor do the facts of the case as found in the [170] report show whether the dower was prompt or deferred, whether it had been demanded or not before institution of the suit, and of course there was nothing in the way of deposit by the husband of the amount of dower during the course of the trial in the Court of first instance. These are the distinguishing features of this case; and if the distinction has any tendency to alter the principle, such tendency is entirely in favour of the plaintiff-appellant's case.

To return once more to the case of *Sheikh Abdool Shukkoar v. Raheem-on-nissa* (1), which is the leading case upon the subject, I have to observe, with profound deference, that the *ratio decidendi* adopted in that case seems to me to proceed upon a misconception of the rule of Muhammadan law as to the exact time when the right of mutual cohabitation vests in the married parties, and also as to the exact nature of the husband's liability to payment of dower, and the exact scope of the right which a Muhammadan wife possesses to plead non-payment of dower in defence of a suit by her husband for restitution of conjugal rights. It is one thing to say that such a defence may be set up under certain conditions: it is a totally different thing to say that "until the dower was paid no cause of action could accrue to the plaintiff." The payment of dower not being a condition precedent to the vesting of the right of cohabitation, a suit for restitution of conjugal rights, whether by the husband or by the wife, would be maintainable upon refusal by the other to cohabit with him or her; and in the case of a suit by the husband, the defence of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be

(1) N.W.P.H.C.R. (1874) 94.



prompt. Such was actually the form of the decree which was upheld by this Court in *Eidan v. Mazhar Husain* (1), and a decree to the opposite effect was approved by another Bench of this Court in *Nazir Khan v. Umrao* (2). Defences which do not go to the root of the action, but only operate in modification of the decree, are well known to our Courts, and the principles upon which they are based are recognised by Courts of equity both in England and in America under the general category of compensation or lien when pleaded by the defendant in resistance or modification of the plaintiff's claim. I have already said enough, with reference to the argument of the learned pleader for the respondents, to introduce an analogical comparison between the contract of sale and the contract of marriage under the Muhammadan law, and between the claim of a Muhammadan wife for her dower and a lien as understood in the law of sale. "A lien is not in strictness either a *jus in re* or a *jus ad rem*, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged.....It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money."—(Story Eq. Jur., 11th ed., s. 506). So that, pushing the analogy of the law of sale to its fullest extent, the right of a Muhammadan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Muhammadan law which would render such lien capable of being pleaded so as to defeat altogether the suit for restitution of conjugal rights.

There is one more consideration which I wish to add to the reasons which I have already given at such length in support of my view. The Muhammadan law of marriage recognises nothing except *right*; in its legal sense, as the basis of legal relations and of those consequences which flow from them. And if the husband did not before payment of dower possess the right of cohabitation with his wife, it would follow as a necessary consequence in Muhammadan jurisprudence that, where the dower is prompt and cohabitation has taken place before the payment of such dower, the issue of such cohabitation would be illegitimate. It would be easy to show that such would be the logical consequence in Muhammadan law of the reasoning pressed on behalf of the respondents; but I need not go further in considering this matter, as I have referred to it only because in the course of the argument it was said that, before payment of prompt dower, the cohabitation of a Muhammadan wife with her husband was simply a matter of concession and not of right as understood in that law.

For these reasons I would answer the question referred to the Full Bench in the affirmative, leaving it to the Bench that [172] referred the case to deal with its other aspects. And I may add that I have considered it my duty to go so fully into this question out of respect for the rulings which were cited on behalf of the respondents, but in which I have been unable to concur, and also because such questions, which usually arise only among the poorer classes of the Muhammadan population, seldom come up to this Court for adjudication, but of course affect domestic relations of the Muhammadan community at large.

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JAN. 21,  
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FULL  
BENCH  
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8 A. 149  
(F.B.) =  
6 A. W. N.  
(1886) 53.

1886

JAN. 22.

8 A. 172 (F.B.) = 6 A.W.N. (1886) 35 = 10 Ind. Jur. 340.

FULL  
BENCH.

8 A. 172

(F.B.) =

6 A.W.N.

(1886) 35 =

10 Ind. Jur.  
340.

## FULL BENCH.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice  
Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst,  
and Mr. Justice Tyrrell.*

DEOKISHEN (*Defendant*) v. BANSI AND ANOTHER (*Plaintiffs*).<sup>\*</sup>  
[22nd January, 1886.]

*Res judicata*—Civil Procedure Code, ss. 562, 588 (28)—Second appeal—Civil Procedure  
Code, ss. 565, 566—Determination of case by High Court.

In a suit for pre-emption in respect of a share of a village, the Court of first instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower appellate Court, dissenting from this opinion, reversed the first Court's decree, and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, viz., the amount of the consideration for the sale. In appeal from the order of remand, the High Court, on the 3rd January, 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565 or s. 566, as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of first instance, under s. 566, as to the amount of consideration, and accepting the first Court's finding upon that issue, decreed the plaintiffs' claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record.

*Held* by the Full Bench that the defendants were not prevented by the operation of the High Court's order of the 3rd January, 1884, from disputing the right of pre-emption, inasmuch as that order was a decision of a merely interlocutory character passed in the same suit, and the questions [173] of fact involved therein were decided only so far as was necessary for the purpose of passing the order, and it could not be regarded as determining the main question in the suit, which was still open, and must be decided in the final decree in the suit.

*Per* STRAIGHT, J., that the jurisdiction of the High Court in appeal under s. 588 of the Code from the Judge's order of remand was, like the jurisdiction of the Judge in passing the order, limited by the terms of s. 562; and hence the remark made in the High Court's order, dealing with the plaintiffs' right of pre-emption, could only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right.

*Held* by PETHERAM, C.J., and OLDFIELD and TYRRELL, JJ., that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed, in fact, in the village, if the evidence for answering this question was already on the record, and that in such a case, the question need not be referred to the Court of first appeal. *Bal Kishen v. Jasoda Kuar* (1) referred to.

*Per* STRAIGHT and BRODHURST, JJ., *contra*. *Bal Kishen v. Jasoda Kuar* (1) referred to.

[Overruled, 9 A. 147 (148) (F.B.); R., 14 A. 348 (349); 15 A. 413 (414); 10 O.C. 350 (351).]

<sup>\*</sup> Second Appeal No. 1284 of 1884, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 17th July, 1884, reversing a decree of Babu Sanwal Singh, Munsif of Jaunpur, dated the 1st March, 1884.



THIS was a reference to the Full Bench by Petheram, C.J., and Straight, J. The facts of the case and the questions referred are stated in the order of Straight, J.

STRAIGHT, J.—This is a suit for pre-emption. The plaintiffs assert a right of pre-emption on the basis of an award effected between the ancestors of the plaintiffs and the ancestors of the defendants 2 and 3, as also upon a condition of the terms of the *wajib-ul-arz*, a copy of which they allege themselves unable to produce by reason of the same having been destroyed at the time of the mutiny. On the basis of these allegations, the plaintiffs seek to avoid and cancel an alleged sale by the 2nd and 3rd defendants to the 1st defendant of an 8 annas share of mauza Chuk-Sadho. The defendants pleaded that Chuk-Sadho was not a village to which the award relied on by the plaintiffs had reference; that no custom of pre-emption existed in that village; and that the amount of consideration for the sale impeached and sought to be set aside by plaintiffs was paid in full. It therefore comes to this, that the plaintiffs come into Court asserting that an agreement was come to, by which their ancestors were entitled to assert pre-emption in respect of Chuk-Sadho. The Munsif of Jaunpur, who tried the suit as a Court of first instance, virtually disposed of it on the point that the village Chuk-Sadho did not form part of Basdeo Patti, to [174] which alone the award had reference; and he seems to be of opinion that no custom of pre-emption had been established. The learned Judge, before whom the case came in first appeal, differed from the Munsif on the point of Chuk-Sadho being unaffected by the award, and considered that there was a strong presumption in favour of the village Chuk-Sadho having formed an integral part of Basdeo Patti.

He further held that by the award of 1248 Fasli the right of pre-emption is proved to have existed in Basdeo Patti, and therefore corollarily in Chuk-Sadho. He further noticed that in the *wajib-ul-arz* for 1881 the co-sharers of Chuk-Sadho have acknowledged the custom of pre-emption to exist "in the future." "I have no doubt," he observed, "that it also existed in the past as alleged by the plaintiffs."

Having found these facts, the Judge reversed the decision of the Munsif, decreed the appeal, and remanded the case under s. 562 to the Munsif, for a decision on the remaining issue of fact.

This order of remand under s. 562 of the Code was open to appeal to the High Court under s. 588 and was so appealed. The pleas in such appeal shortly were that the District Judge was wrong in holding that Chuk-Sadho village was part of Basdeo Patti; that the *wajib-ul-arz* was not admissible as evidence; and that the custom had not been proved. The High Court, consisting of the Hon'ble Mr. Justice Oldfield and the Hon'ble Mr. Justice Brodhurst, heard this appeal on the 3rd of January, 1884, and passed the following order:—

"We are not disposed to interfere with the finding, which is one of fact, that the plaintiffs have a right of pre-emption: the appeal is therefore dismissed with costs.

"The Judge was in error in remanding the case under s. 562, and his order so far is set aside, and he is directed to proceed under s. 565 or 566, Civil Procedure Code, as may be applicable."

Now a great deal of argument has been addressed to us with respect to this order of the 3rd January, 1884; but before considering this further, it will be convenient to notice what followed upon the passing of this order.

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JAN. 22.

FULL  
BENCH.

8 A. 172.

(F.B.)=

6 A.W.N.

(1886) 35=

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[175] The case went back to the District Judge of Jaunpur, and I must conclude that the last portion of the order was the operative part of the same, namely—

"The Judge was in error in remanding the case under s. 562 and his order so far is set aside, and he is directed to proceed under s. 565 or 566, Civil Procedure Code, as may be applicable."

The Judge of Jaunpur then replaced the case on his file; but as the issue as to the amount of consideration had not been tried, he remanded the suit under s. 566 for evidence and a finding on this point; and in due course a finding was recorded, and the Judge having accepted that finding, which was necessarily confined to the question of the amount of consideration, the case now comes up again in second appeal in the High Court and three pleas have been urged before us—(1) that neither according to the *wajib-ul-arz* nor local custom have plaintiffs a right of pre-emption; (2) that inasmuch as some of the plaintiffs were strangers and not co-sharers, the co-sharer plaintiffs had lost any right of pre-emption they might have had; and (3) that the suit was barred by limitation.

The point we have been concerned with and have heard argued at great length is, whether the finding as to the custom of pre-emption is *res judicata* by reason of the order of this Court dated the 3rd January, 1884. It seems to me, however, that that question does not strictly arise in this appeal, because, in my opinion, the Judge of Jaunpur, who was first seized with it, dealt with it and disposed of it upon a condition of things which plaintiffs had never asserted. The Judge treated it as a custom, and not, as alleged by plaintiffs, as arising from the terms of a contract or agreement between the ancestors of the parties. In my opinion the Judge has not decided according to law; and if I were deciding the case I should order the case to be sent to the District Judge to be tried according to the allegation of the plaintiffs; but there is a difficulty, as all the evidence that is necessary to the determination of the case is on the record; and the learned Chief Justice is strongly of opinion that under s. 565 of the Code we are bound—although the case is before us in second appeal, and there being the whole evidence on the record—to examine that evidence, [176] and decide the case according to that evidence. I am committed to a contrary opinion; and, as at present advised, see no reason to alter that opinion, and, therefore, under these circumstances, and looking to the fact that my brothers Oldfield and Brodhurst may be able to afford us their assistance, we propose to submit the question for the decision of the Full Bench in the following terms:—

(1) Are the defendants prevented by the operation of the order of this Court, dated the 3rd January, 1884, from disputing the right of pre-emption in any way?

(2) Can this Court look into the evidence already on the record for the purpose of finding whether a right of pre-emption exists, in fact, in the village Chuk-Sadho, if the evidence for answering this question is already on the record, or must this Court refer the question to the Court of first appeal?

PETHERAM, C.J.—I concur with my brother Straight in submitting the above questions for the consideration and decision of a Full Bench.—

Lala Juala Prasad and Pandit Ajudhia Nath, for the appellants.

Munshi Hanuman Prasad and Munshi Kashi Prasad, for the respondents.

## JUDGMENT.

PETHERAM, C.J.—I am of opinion that our answer to the first of the two questions which have been referred to us should be in the negative. The reason for this opinion is, that the decision which is relied on and set up as concluding the matter, is a decision of a merely interlocutory character, which was passed in the same suit which is now before us. I am of opinion that the questions of fact involved in that interlocutory proceeding were decided only so far as was necessary for the purpose of passing the order; and that that decision must not be regarded as determining the main question in the suit, which is still open, and must be decided in the final decree in the suit.

Upon the second question referred to the Full Bench, I am of opinion that our answer should be in the affirmative. In the case of *Bal Kishen v. Jasoda Kuar* (1) I have already stated my [177] views upon this subject, and I have nothing to add to what I then said except that I entirely adhere to it.

STRAIGHT, J.—With reference to the first question referred to the Full Bench, I am of the same opinion. The decision of this Court, which is prayed in aid and set up as matter of *res judicata*, as regards the plaintiff's right of pre-emption, is one which was passed on an appeal from an order of remand by the Judge under s. 562 of the Civil Procedure Code, which was preferred to this Court under s. 588. Under the provisions of s. 562, the Judge before whom the appeal from the Munsif came, was only competent to remand the case to the Munsif, if it appeared to him that the Munsif's decree had "disposed of the case upon a preliminary point, so as to exclude any evidence of fact" essential to the determination of the rights of the parties. The jurisdiction of the Judge to pass an order of remand under s. 562 was limited by the terms of that section; and that being so, the jurisdiction of this Court was similarly limited in dealing with an appeal from his order preferred under s. 588. Under these circumstances the remark made in the order of this Court, dealing with the plaintiff's rights of pre-emption, can only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right. The parts of this Court's order which was within the competence of the Court to make under ss. 562 and 588 was the latter part, in which it was held that the Judge was wrong in remanding the case under s. 562, because, as a matter of fact, the Court of first instance had not disposed of the suit in the manner contemplated by that section.

Upon the second question referred to the Full Bench, as I understand the majority of the Court to be in favour of giving an answer in the affirmative, and as the question is one relating to practice, I am unwilling to say anything that might seem like a reflection upon the opinion of the majority of the Court; and I prefer to say merely that I adhere to the view which I expressed in *Bal Kishen v. Jasoda Kuar* (1).

OLDFIELD, J.—I concur with the learned Chief Justice in the answers which he proposes to both of the questions referred to the Full Bench.

[178] BRODHURST, J.—I concur with the learned Chief Justice upon the first question. Upon the second, it is enough for me to say that I concur in the opinion expressed by my brother Straight in: *Bal Kishen v. Jasoda Kuar* (1).

TYRRELL, J.—I concur upon both questions in the answer proposed by the learned Chief Justice.

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JAN. 22.

FULL  
BENCH.

8 A. 172

(F.B.) =

6 A. W. N.

(1886) 33 =

10 Ind. Jur.

340.



8 A. 178 = 6 A.W.N. (1886) 51.

## APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*SUBA BIBI (*Plaintiff*) v. BALGOBIND DAS (*Defendant*).<sup>\*</sup>  
[29th January, 1885.]

1886

JAN, 29.

APPEL-  
LATE  
CIVIL.8 A. 178 =  
6 A.W.N.  
(1886) 51.*Fraudulent transfer—Burden of proof—Muhammadian Law—Sale of immoveable property by Muhammadian in satisfaction of wife's dower—Consideration—Deferred debt.*

A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. *Wood v. Dixie* (1), *Chowne v. Baylis* (2), and the authorities collected in the notes to *Twyne's Case* (3), referred to.

Pending a suit for recovery of a debt, the defendant, who was a Muhammadian, executed a deed of sale dated in June 1882 of a four annas zamindari share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money decree against the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right, and to set aside the attachment order.

*Held*, that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or [179] an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four annas still remaining the property of the vendor, and as such liable to the attachment.

*Held*, applying the general principles of the Muhammadian law as to deferred debts, that there was good consideration for the sale of June 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit.

[F., 15 M.C.C.R. 105; R., 11 B. 666 (674); 25 B. 202 (216); 24 C. 825 (827); 5 A. L.J. 358; 14 A.L.J. 1183 = 37 Ind. Cas. 684; A.W.N. (1899) 220; A.W.N. (1901) 64; 13 C.P.L.R. 180 (185); 13 C.W.N. 160 (162); 5 Ind. Cas. 179 (180); 17 O.C. 173 = 25 Ind. Cas. 164; U.B.R. Civil (1892–1896) 315 (317); Disc. 30 A. 321 (323) = A.W.N. (1908) 125 = 5 A.L.J. 601; D., A.W.N. (1890) 15.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Lala Juala Prasad, for the appellant (plaintiff).

Mr. T. Conlan and Munshi Sukh Ram, for the respondent (defendant Balgobind Das).

## JUDGMENT.

STRAIGHT, J.—This was a suit brought under the following circumstances:—The plaintiff, Suba Bibi, is the wife of the defendant

<sup>\*</sup> Second Appeal No. 513 of 1885, from a decree of C. Donovan, Esq., Officiating District Judge of Benares, dated the 19th December, 1884, reversing a decree of Shah Amad-ul-lah, Munsif of Benares, dated the 8th February, 1884.

(1) 7 Q.B. 892.

(2) 31 L.J. Ch. 757.

(3) 1 Smith's L.C. 12.



Muhammad-ud-din and was married to him in 1877. On the 22nd May in that year, Muhammad-ud-din executed a *kabin-namz* (1) in her favour, declaring the sum of Rs. 4,000 to be the amount of deferred dower due to her, and hypothecating a four-anna zamindari share. This instrument was not registered. Some time in June, 1882, the defendant Balgobind Das commenced a suit against Muhammad-ud-din for recovery of a debt due to him from that person, and applied for attachment before decree of the four-anna share, which application was refused. On the 23rd June, 1882, Muhammad-ud-din executed a deed of sale of the four-anna share in favour of Suba Bibi, the plaintiff, the consideration recited therein being the amount of the dower-debt. Subsequently Balgobind Das obtained a simple money-decree against Muhammad-ud-din for Rs. 925-5-0, and in execution attached the four-anna share. Suba Bibi objected to the attachment on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. Hence the present suit for a declaration of her right, and to set aside the attachment order. The Subordinate Judge decreed the claim; but the Judge, on appeal, holding that "the sale-deed was written simply in view to delay and defeat the creditor of the vendor," reversed his decision, and dismissed the suit. It is from the Judge's decree that the appeal to this Court [180] by Suba Bibi is preferred. It will be convenient here to remark that the proof put forward by the defendant in answer to the plaintiff's claim consists of the plaint in the former suit against Muhammad-ud-din, and the order of attachment obtained by him under his simple money decree, bearing date the 5th July, 1882. Beyond this there is no other proof. The question, then, with which we are concerned is, whether the Judge's judgment can be sustained. In my opinion it cannot. A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart, of course, from cases in which either insolvency or bankruptcy is involved, is not void. In other words, if a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference. In *Wood v. Dixie* (2) the Court of Queen's Bench held that a sale of property for good consideration is not, either at common law or under the statute, void merely because it is made with intent to defeat the expected execution of a judgment-creditor; and in the days when there was forfeiture on conviction for felony, it was ruled that an assignment before conviction, if made *bona fide*, was not assailable—*Chowne v. Baylis* (3); and see the authorities collected in the notes to *Twyne's Case* (4). In the present case, if there was, in fact, a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four-anna share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court has any power to disturb it. It was for the defendant Balgobind Das to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four-anna share

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(1) Deed of dower.  
(3) 31 L. J. Ch. 757,

(2) 7 Q. B. 892.  
(4) 1 Smith's L.C. 12.

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JAN. 29.  
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APPEL-  
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CIVIL.  
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8 A. 178 =  
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(1886) 51.

still? continuing the property of Muhammad-ud-din and as such liable to the attachment. I [181] have already stated that the only materials put forward by the defendant Balgobind Das to support his plea of fraud are the plaint and the order of attachment in the suit of 1882. These of themselves are next to worthless; for, as I have observed, if Muhammad ud-din did make the assignment of his property to his wife *bona fide* and in payment of the dower-debt, it does not, in the slightest degree, matter that he did so to defeat any steps in execution that might be taken against him by Balgobind Das. The Judge's decision, therefore, so far as the grounds upon which he bases it are concerned, cannot be sustained. It remains, however, to be seen whether there was consideration for the sale; in other words, was the deferred dower-debt good and valid consideration? The general rule of the Muhammadan law is, that "dower, like any other debt, may be made a consideration for a transfer of property from the husband to the wife"—*Tagore Lectures*, 1873, p. 362; and when after dower has been fixed at a certain amount at marriage, and the husband subsequently sells his immoveable property in lieu of a part or the whole of such amount of dower, a person entitled to the right of pre-emption may assert it—*Fida Ali v. Muzaffar Ali* (1). Upon the subject of deferred debts the following passage from the *Fatawa-i-Qazi Khan*, Vol. III, p. 502, is important:—"If a person by whom a deferred debt is due makes a compromise with the creditor that the debt shall become exigible forthwith, it is valid when made without consideration, because the postponement was the right of the debtor, which he was entitled to forego. Similarly, if he should say 'I have annulled the postponement of this debt,' or 'I have relinquished the postponement,' this would amount to his saying 'I have rendered the debt exigible forthwith.'" So at p. 497 of the second volume of the same work, it is laid down:—"If a person to whom a deferred debt is due should purchase anything from his creditor in lieu of the deferred debt, and after taking possession should return the same by cancellation of the sale, the condition as to postponement of the debt does not revive." Applying these general principles as to deferred debts to the particular dower-debt with which we are concerned in the present case, I think that there was good consideration for the sale of the 23rd of June, 1882, [182] by Muhammad-ud-din to the plaintiff, and that, in the absence of proof of fraud of the kind I have indicated by Balgobind Das, she is entitled to maintain it, and to succeed in the present suit. I quite agree as to the propriety of scrutinizing closely transactions of such a character between husband and wives, but as in, I should say, ninety-nine out of a hundred cases among Muhammadans a dower-debt is due from the husband—a fact of which most people are aware—those who deal with the husbands have no reason to complain if, having failed to obtain security, they find themselves defeated by the preferential payment of a debt which stands upon just as legal a footing and equality as their own. In the view I take of the matter, the appeal is decreed with cost, and the decision of the Subordinate Judge being restored, the plaintiff's claim will stand decreed with costs in all Courts.

BRODHURST, J.—For the reasons given by my brother Straight, I concur with him in decreeing the appeal, and in restoring the judgment of the Court of first instance, with costs in all the Courts.

*Appeal allowed.*



8 A. 182=6 A.W.N. (1886) 47.

## APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*ALLAH BAKHSH ((Defendant) v. SADA SUKH AND OTHERS (Plaintiffs).\*  
[5th February, 1886.]*Mortgage by conditional sale—Interest—Foreclosure.*

A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession, contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decree. In 1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest.

Held that whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the [1883] failure to get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *Rameshur Singh v. Kanahia Sahu* (1) referred to.

[F., 8 P.R. 1890.]

THE plaintiff in this suit claimed to foreclose a mortgage. It appeared that on the 27th May, 1872, a certain person mortgaged by conditional sale, for Rs. 150, certain immoveable property to the plaintiff. The mortgage-deed provided that possession should be given to the mortgagee, and that the principal money should be paid within ten years from the date of execution of the deed, and in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"It has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. On the 18th June, 1878, the mortgaged property was purchased by the defendant Allah Bakhsh, at a sale in execution of decree. On the 20th September, 1884, the plaintiff brought the present suit against the heirs of the mortgagor and the purchaser in the Court of the Munsif of Chibramau, praying for foreclosure, and claiming the mortgage-money with interest at 8 annas per cent. per mensem. The defendants pleaded, *inter alia*, that, having regard to the terms of the mortgage-deed, the plaintiff was not entitled to claim interest. On this point the Munsif made the following observations:—"It is admitted that the plaintiff did not get possession. There is consequently no reason why he should not get interest or mesne profits or damages. It is proved from the statement of the plaintiff's witnesses that the mortgaged share yielded a profit of Rs. 200 a year. The plaintiff was deprived of that profit. If the plaintiff had brought a suit for compensation, he would have got it to the extent proved; but, instead of claiming compensation or mesne profits, he has claimed interest at a very low rate. This is not at all unfair. In my opinion he is undoubtedly legally entitled to get the

\* Second Appeal No. 556 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 26th February, 1885, affirming a decree of Maulvi Muniruddin Ahmad, Munsif of Chibramau, dated 10th December, 1884.

(1) 3 A. 653.

1886

FEB. 5.

APPEL-  
LATE  
CIVIL.

8 A. 182=

6 A.W.N.

(1886) 47.



1886  
FEB. 5.  
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APPEL-  
LATE  
CIVIL.  
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8 A. 182=  
6 A.W.N.  
(1886) 47.

interest claimed. Interest has always been allowed in cases where the mortgagee has not received possession." The Munsif decreed the claim, and ordered that if, within six months from the date of decree, the principal sum, with the interest claimed, were not paid by the defendants, the [184] latter should be absolutely debarred of all right to redeem the property.

The defendant Allah Bakhsh appealed from this decree, on the grounds that "if the respondent failed to obtain possession according to the condition, it was his own fault;" and that "as the mortgage was not made known at the time of the purchase by the appellant, the interest on the mortgage-money cannot be charged on the mortgaged property." The appeal was heard by the Subordinate Judge of Farukhabad, whose judgment contained the following observation:—"As possession was not delivered, there is no reason why the plaintiff should not recover interest on the mortgage-money. There is no rate of interest entered in the mortgage-deed, but the plaintiff has claimed a very low rate of interest. Hence the plaintiff's claim to interest is open to no objection. The defendant's plea that as the plaintiff delayed in obtaining possession, his claim to interest abated is improper. . . . As the auction-purchaser purchased the property subject to lien, that property is liable for all that lien with which it stood charged at the time of the purchase, or with which it was charged subsequent to the purchase. . . . It has been contended that the interest in such cases is simply damages, which ought to be charged on the person of the executant or his representative, and that it has nothing to do with the property. This argument of the appellant is rebutted in this way, that the mortgage-deed is dated the 27th May, 1872, and is conditional for ten years, while the defendant purchased the property on the 18th June, 1878, at auction. Therefore, just as the original mortgagor was personally liable for damages, the auction-purchaser also became liable for damages in consequence of his not delivering possession within the prescribed time." The Court dismissed the appeal.

In second appeal by the defendant Allah Bakhsh, it was contended on his behalf that the lower Courts had erred in allowing interest as claimed, and in decreeing foreclosure in respect of interest as well as the principal due under the mortgage.

Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the respondents, heirs of the original plaintiff, deceased.

#### JUDGMENT.

[185] BRODHURST and TYRRELL, JJ.—The ruling in the Full Bench case of *Rameshar Singh v. Kanahia Sahu* (1), the principle of which was adopted in the case of F.A. No. 37 of 1885, determined here on the 27th January, 1886, is altogether in point, the case of the present appellant being even stronger than that of the Full Bench ruling above cited. In the contract made between the vendor and the respondents on the 27th May, 1872, it was expressly agreed that no interest was exigible or payable under the conditional sale-deed. Whatever claim the respondents may have against their mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, they have none enforceable in this respect against the land which has passed free from charge for interest to the appellant by purchase. The appeal must prevail, and is decreed with costs.

*Appeal allowed.*

8 A. 185 = 6 A.W.N. (1886) 48.

## APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.*DIPNARAIN RAI AND OTHERS (*Plaintiffs*) v. DIPAN RAI AND OTHERS (*Defendants*).<sup>\*</sup> [12th February, 1886.]*Bond—Interest—Penalty.*

The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due both compound interest and an increased rate shall be payable amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender.

In a bond dated in February, 1877, for a sum of money payable in June, 1882, it was provided that interest should be paid at the rate of Rs. 9 per cent. per annum on the Puranmashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the [186] suit at Rs. 15 per annum, and compound interest for the same period at the same rate.

*Held* that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date.

*Held* that, for this purpose, the proper course was to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 per cent. from the due date of payment, upon the entire sum which was due when the bond became due, i. e., the principal added to the compound interest calculated at Rs. 9 per cent.

The same obligee held another bond executed by the same obligors in June, 1879, for a sum of money payable in June, 1882, with interest at Rs. 9 per cent. per annum. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum.

*Held* that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs. 9 per cent. per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond.

[*Disse*, 10 M. 203 (204); F., 20 C. 328 (348); R., 29 M. 491 (496); 36 M. 229 = 18 Ind. Cas. 417 (F.B.) = 24 M.L.J. 135 = 13 M.L.T. 20 = 11 O.C. 307 (309).]

THE suit out of which this appeal arose was one for the principal moneys and interest due on two bonds. The first bond which was dated the 3rd February, 1877, was one for Rs. 1,475 payable on the last day of Jaith, 1289 fasli, corresponding with the 1st June, 1882. The rate of

<sup>\*</sup> First Appeal No. 69 of 1885, from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghazipur, dated the 27th January, 1885.

1886

FEB. 12.

APPEL-  
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(1886) 48.



1886  
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APPEL.  
LATE  
CIVIL.  
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8 A. 185 =  
6 A. W. N.  
(1886) 48.

interest was Rs. 9 per cent. per annum, and the interest was payable on the Puranmashi of every Jaith, and there was a proviso in the bond that if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. The second bond, which was dated the 25th June, 1879, was for Rs. 725, payable with interest at the rate of Rs. 9 per cent. per annum on the same date as the principal of the first bond was payable. There was a proviso that if the principal and interest [187] were not paid on the due date, the obligees should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. The plaintiffs claimed interest on the principal amount of the first bond from its date to the date of the institution of the suit at the rate of Rs. 15 per cent. per annum and compound interest for the same period at the same rate. They claimed interest on the principal amount of the second bond from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum. The suit was instituted on the 2nd December, 1884. The Court of first instance refused, in respect of the first bond, to allow compound interest or the increased rate of interest except from the date of default, that is to say, it allowed interest from the date of the bond to the date it became due at the original rate, and from the latter date to the date of the institution of the suit it allowed interest on the consolidated amount of principal and interest at Rs. 15 per cent. In respect of the second bond, the Court awarded interest from its date at Rs. 1 per cent, thus increasing the original rate by four annas per cent. per mensem.

The plaintiffs appealed on the ground that they were entitled to recover the whole amount of interest claimed by them.

Munshi Hanuman Prasad and Lala Juala Prasad, for the appellants.

Mr. C. H. Hill and Pandit Sundar Lal, for the respondents.

### JUDGMENT.

PETHERAM, C J.—This appears to me to be a case in which it will be well to consider the proper manner of dealing with bonds of this description. The suit was brought to recover the principal and interest due on two bonds, and the question was what amount was recoverable for interest. By the terms of the first bond, the interest was to be at the rate of Rs. 9 per cent., and was payable yearly, and there was a proviso that if it was not paid when due, it should be increased to Rs. 15 per cent. and should be calculated as compound, and not as simple interest. It is clear that when a man lends money, for the use of which interest is to be paid, and the interest is not paid when it becomes due, the borrower breaks his contract, and the lender may re-[188]cover damages for such breach, and, at the time of making the contract, it is open to the parties to consider and agree the amount of damage which in such a case the borrower shall pay for having broken his contract, or may name a penal sum which shall be the outside limit of the damage which can be recovered. It is clear that an agreement, that if the interest is not paid punctually, the lender shall be entitled to add it to the principal, and so recover compound interest, will indemnify the lender against loss, because although he does not get his money, he leaves it at interest, and therefore sustains no loss. Again, it is clear that a lender may indemnify himself in another way. He may do so by stipulating that, in the event of interest not being paid punctually upon the date it is due, the rate of



interest shall be increased. But it is obvious that if he insists on *both* kinds of damages, that cannot be a fair agreement with reference to the loss sustained by him, as the two together amount to more than an indemnity against loss, and so must be a penalty.

In this case, the lender stipulates for both kinds of damages. He stipulates for compound interest as an indemnity against loss, and also for interest to be paid at an increased rate. These two stipulations put together cannot, as I have said, be regarded as a fair agreement with reference to the loss sustained by the lender, but as a penalty; and it is therefore the Court's duty to limit that penalty to what is the real amount of damage sustained by the plaintiff, who is the lender, in consequence of the defendant's breach of the contract to pay the interest at the due date. The rate of interest at which the money was lent was Rs. 9 per cent. per annum, and if the interest be calculated with rests, that is if compound interest is allowed, the lender will be completely indemnified against loss. The proper course therefore will, I think, be to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond. From the time when the principal became due under the bond, no provisions for payment of interest is made, and the plaintiff is to blame for not having enforced his remedy at an earlier date; and, in my opinion, he should only recover simple interest at Rs. 9 per cent. from the due date of the bond to the date of payment, upon the entire sum which was due when the bond [189] became due, that is to say, the principal added to the compound interest calculated at Rs. 9 per cent.

With reference to the second bond, in which the parties agreed upon an increased rate of interest on non-payment by the borrower at the specified time, and in which they did not agree that interest should be calculated at compound interest, it seems to me that such increased rate of interest may fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay on the due date, and therefore that Rs. 2 per cent. per mensem, the increased amount agreed on, should be paid down to the date when the bond became due. But as the plaintiff failed to compel payment, and allowed it to remain overdue for a long time, I think that the interest may fairly revert to the old rate of Rs. 9 per cent. from the due date of the bond, and the amount must be calculated from that date on that basis on the whole amount of principal and interest then due on the bond. Costs will be paid in both cases in all Courts in proportion to success.

OLDFIELD, J.—I am of the same opinion.

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8 A. 185—  
6 A.W.N.  
(1886) 48.

1886

FEB. 13.

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BENCH.8 A. 189  
(F.B.) =  
6 A.W.N.  
(1886) 52.

8 A. 189 (F.B.) = 6 A.W.N. (1886) 52.

## FULL BENCH.

*Before Sir W. Comer Peiheram, Kt., Chief Justice, Mr. Justice Straight,  
Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*MAHADEO PRASAD (*Plaintiff*) v. MATHURA AND OTHERS (*Defendants*).<sup>\*</sup>  
[13th February, 1886.]*Act XII of 1881 (N.-W. P. Rent Act), ss. 7, 95 (1)—Ex-proprietary tenant—Determination of rent by Revenue Court—Suit for arrears of rent as so determined for period prior to such determination.*

An application was made in the Revenue Court under s. 95 (1) of the N.-W.P. Rent Act (XII of 1881), by the purchaser of proprietary rights in a mahal for determination of the rent payable by his vendors, who had become, under s. 7, his ex-proprietary tenants in respect of the land they had previously held as *sir*. The Revenue Court, by an order dated the 18th February, 1884, fixed the rent at a particular sum, payable annually, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act. In May, 1884, the purchaser sued the ex-proprietary tenants to recover from them arrears of rent at the sum so fixed, for a period of three years prior to the Revenue Court's order.

[190] Held by the Full Bench that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February 1884, subject to any question of limitation that might arise.

[R., A.W.N. (1897) 13 ; 9 O.C. 227 (228, 229) ; D., 9 A. 185 (187) ; 16 A. 209 (210) ; 11 O.C. 187 (189).]

THIS was a reference to the Full Bench by Oldfield and Brodhurst, JJ. The facts of the case and the point of law referred are stated in the order of reference, which was as follows :—

"The plaintiff purchased the proprietary rights and interests of the defendants, and obtained possession in January 1881. The defendants thereupon became ex-proprietary tenants of the plaintiff in respect of the land they had previously held as *sir* under s. 7 of the Rent Act. In 1883 the plaintiff filed an application in the Revenue Court under s. 95 (1), for determination of the rent payable by the defendants on the holding.

"It appears that the *sir* holding had been recorded in the *jamabandis* with a rent payable on it of Rs. 168-9-3, and the plaintiff asked to have the same enhanced at the prevailing rates. The Revenue Court fixed the rent payable annually by the defendants at Rs. 170-14-11, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act.

"The Revenue Court's order is dated 18th February, 1884.

"The plaintiff has now brought this suit to recover arrears of rent, at the sum so fixed, for the years 1289, 1290, 1291 *fasli*, ending the 30th June, 1884, that is, for a period prior to the order of the Revenue Court determining the rent.

"We may add that there has been no express contract on the part of the defendants to pay rent, nor have they paid any rent to the plaintiff on the holding, but the defendants became, by operation of law (s. 7 of the Rent Act), tenants of the plaintiff from the time of sale, with a liability to pay him rent at four annas less than the prevailing rate payable by tenants-at-will for land of similar quality and similar advantages ; and the question arises whether they are not in consequence bound to pay rent from the

<sup>\*</sup> Second Appeal No. 154 of 1885, from a decree of W. Barry, Esq., District Judge of Banda, dated the 12th December, 1884, reversing a decree of Babu Harnam Chander Seth, Assistant Collector of Karwi, dated the 25th August, 1884.

date of sale at the amount fixed subsequently by the Revenue Court; and if the order of the Revenue Court cannot have retrospective effect, whether they are not, as tenants, under a liability to pay some rent which a Revenue Court can enforce, and if so, on what principle should the amount of rent be decreed?

[191] "We refer to the Full Bench the question whether the plaintiff is entitled to recover arrears of rent for the years in suit, at the amount determined by the Revenue Court's order of the 18th February, 1884, and if not, can he recover any, and what amount of rent in the Revenue Court?"

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant (plaintiff).

Mr. *W. M. Colvin* and Babu *Sital Prasad Chatterji*, for the respondents (defendants).

### JUDGMENT.

PETHERAM, C.J.—I am of opinion that in this case the plaintiff is entitled to recover arrears of rent for the years in suit at the amount determined by the order of the Revenue Court dated the 18th February, 1884, subject, of course, to any question that may arise under the Limitation Act, which is not before us, and upon which I express no opinion. My reasons for this opinion are, that the tenancy was created by the plaintiff's purchase of the original landlord's interest, and the rent, when fixed under the statute which provides the means for determining the rent payable, becomes the rent which is to be paid during the whole tenancy, or the rent of the land held by the tenant during the whole of his tenancy; and as soon as that has been fixed, the landlord can put his remedies in force, if the tenant fails to pay the debt. I would answer the questions referred in the affirmative.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

8 A. 191=6 A.W.N. (1886) 46.

### CIVIL REVISIONAL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

BANDHAN SINGH (*Plaintiff*) v. SOLHU AND OTHERS (*Defendants*).<sup>\*</sup>  
[18th February, 1886.]

"Decree"—Order rejecting application under Civil Procedure Code, s. 44, Rule a, and returning plaint—Appeal—Civil Procedure Code, ss. 2, 44.

No appeal lies under any of the provisions of s. 559 of the Civil Procedure Code from an order under s. 44, rule a, rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property.

[192] In a plaint filed in the Court of a Subordinate Judge, the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave, under s. 44, Rule a, of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint, with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively in the Court of the Munsif.

<sup>\*</sup> Application No. 6 of 1886, for revision under s. 622 of the Civil Procedure Code of an order of H. A. Harrison, Esq., District Judge of Meerut, dated the 2nd October, 1885, affirming an order of Babu Mrittonjoy Mukarji, Subordinate Judge of Meerut, dated the 3rd August, 1885.

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8 A. 189  
(F.B.)=  
6 A.W.N.  
(1886) 52.



1886.  
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Held that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of s. 44, Rule a, of the Code, its effect was to reject the plaint; that such an order was a decree, with reference to the definition in s. 2, and was appealable as such to the District Judge; and that therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s. 622.

8 A. 191 =  
6 A. W. N.  
(1886) 46.

THIS was an application to the High Court to exercise its powers under s. 622 of the Civil Procedure Code. It appeared that a plaint was presented in the Court of the Subordinate Judge of Meerut, in which the plaintiff claimed possession of certain houses, and also certain grain, which it was alleged was in the houses. At the same time the plaintiff presented an application, under s. 44 (a) of the Civil Procedure Code, in which he asked the leave of the Court to join the claim for the grain with the claim for the houses. The plaint was registered. On the 3rd August, 1885, the Subordinate Judge rejected the application, and on the same day made the following order on the plaint:—"This plaint was registered by a mistake of the office, and should not have been registered until the application of plaintiff for permission to join two causes of action was disposed of by the Court. The application for permission to join the causes of action in the same suit has been disallowed to-day. This plaint is therefore returned to the plaintiff, in order that he may file two separate suits in the Court of the Munsif of Ghaziabad."

The plaintiff appealed to the District Judge of Meerut from the order refusing his application. The District Judge dismissed the appeal, holding that the order was not appealable.

The plaintiff preferred the present application on the grounds (i) that the claims for the houses and the grain had been properly joined; (ii) that if permission under s. 44 of the Civil Procedure [193] Code was necessary, the Subordinate Judge had improperly refused such permission; and (iii) that the plaint had been erroneously returned for amendment.

Lala Juala Prasad, for the plaintiff.

Pandit Sundar Lal, for the defendants.

#### JUDGMENT.

OLDFIELD and TYRRELL, JJ.—This is an application under s. 622 of the Civil Procedure Code. The petitioner instituted a suit by filing a plaint in the Subordinate Judge's Court, in which he claimed to recover possession of a house, together with some grain which was stored in it. The plaint was registered. Subsequently to its registration, it appears to have been considered that the claim for grain could not be joined in the same suit with the claim for possession of the house under the terms of s. 44 (a), by which no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property.

Accordingly the plaintiff filed an application to the Subordinate Judge for leave to join the cause of action. The Subordinate Judge refused leave, and returned the plaint with directions that the petitioner should institute two separate suits for the recovery of the house and the grain in the Court of the Munsif of Ghaziabad.

The plaintiff (petitioner) appealed from the order refusing leave under s. 44 (a) to the Judge, and the Judge dismissed it on the ground that no appeal lay from the order to him.

The plaintiff has now appealed to this Court to revise the orders of the Courts below under s. 622 of the Civil Procedure Code.

There was no appeal to the Judge from the order of the Subordinate Judge under any of the provisions in s. 588 of the Civil Procedure Code. He therefore rightly dismissed the appeal, which had been instituted as an appeal from an order, and this Court cannot interfere in revision with his order. Nor, however irregular the Subordinate Judge's order may be, is this Court empowered to interfere with it under s. 622.

The order of the Subordinate Judge is substantially an order rejecting the plaint. It was made on the ground that the plaintiff had joined a cause of action with a suit for recovery of immovable [194] property. This may be a misapplication of s. 44 (a); but the effect of the order was to reject the plaint, and such an order is a decree, with reference to the definition in s. 2 and is appealable as a decree to the Judge, and in consequence an appeal lies in the case to the High Court, and that Court cannot interfere under s. 622.

On these grounds the application is dismissed with costs.

*Appeal dismissed.*

8 A. 191=6 A.W.N. (1886) 50.

### APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.*

GANGA SAHAI (Plaintiff) v. LACHMAN SINGH AND ANOTHER  
(Defendants).<sup>\*</sup> [25th February, 1886.]

*Mortgage—Usufructuary mortgage—Interest—Waiver.*

By a deed of usufructuary mortgage dated in 1875 a sum of Rs. 30,000, with interest at Re. 1 per cent. per mensem, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and, among these, a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November, 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6 per cent. per mensem.

*Held*, that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, i.e., Re. 1 per cent. per mensem.

On the 26th April, 1875, the defendants in this case gave the plaintiff a usufructuary mortgage of certain shares in certain villages for a period of ten years. The principal sum secured by [195] the mortgage was Rs. 30,000, and the mortgage-deed contained the following provisions:—

"We will place the mortgagee in possession of the mortgaged property. The interest, with expenses, is agreed upon to be Re. 1 per cent. per mensem, and the profit of the mortgaged villages are fixed to be Rs. 2,812 per annum, and Rs. 3,600 on account of interest will be due

<sup>\*</sup> First Appeal No. 94 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 18th February, 1885.

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8 A. 191=  
6 A.W.N.  
(1886) 46.



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CIVIL.  
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A. 194 =  
6 A.W.N.  
(1886) 50.

from us to the mortgagee. We will pay Rs. 788 in cash every year to the mortgagee. Should the profits exceed Rs. 2,812, the mortgagee will take the excess as commission for collections. We declare that the mortgagee shall remain in possession and receive the profits in lieu of interest after paying the Government revenue. Any increase effected by the mortgagee during the period of mortgage shall be his. After the expiration of the period we will pay back the mortgage-money in a lump sum and redeem our property. Should we fail to do so, the mortgagee shall remain in possession, and we will not interfere. Should the possession of the mortgagee be interfered with, by reason of the order of any Court or the violence of the mortgagors, the mortgagee shall be competent to realize the mortgage-money, with the interest which may be found due, from our persons, the mortgaged property and our other property, whether the term has expired or not, and the interest for the period the mortgagee is out of possession shall be charged at the rate of Re. 1-6 per cent. per mensem. We will get mutation of names effected by the end of Kuar. Should we fail to get mutation of names effected, or not allow the mortgagee to collect, the mortgagee shall, without regard to the period, cancel all the conditions of the deed, and shall realize all the money with interest at the rate of Re. 1-6 per cent. per mensem, to be charged from the date of execution of the deed, by instituting a suit. He shall also be competent to obtain proprietary possession by bringing a suit."

The plaintiff was not placed in possession of the mortgaged property, nor was he paid any interest by the defendants.

In November, 1884, the plaintiff brought this suit against the defendants to recover the mortgage-money. He claimed interest from the date of the mortgage-deed to the date of suit at Re. 1-6 per cent. per mensem.

[196] With reference to the interest claimed the defendants stated in their written statement as follows:—"The plaintiff, though repeatedly told by the mortgagors, intentionally did not take possession of the mortgaged property, nor did he get mutation of names effected under s. 97, Act XIX of 1873. The plaintiff committed this omission with the particular object, and under the misapprehension, that he might be considered entitled to get interest at Re. 1-6 per cent. per mensem. Under these circumstances the plaintiff is not entitled to receive Rs. 2,812 per annum on account of interest and costs, which was stipulated to be recovered from the profit of the estate, because no breach of contract took place on the defendants' part."

The Court of first instance framed the following issue on the question as to the amount of interest to be awarded:—"Whether the interest should be allowed at Re. 1-6 per cent. on account of the defendants' failure to deliver possession; or whether the delivery of possession did not take place on account of the plaintiff's negligence and laches, and therefore it is unfair to charge interest at a higher rate, and whether this rate being penal should be amended or not?"

Upon this issue the Court held as follows:—

"The actual rate of interest entered in the document is Re. 1 and the agreement for payment of interest at Rs. 1-6 per cent., under special circumstances, is entered in the document in these words:—"If we shall fail to have mutation of names effected or deliver possession at the time of collection, then the mortgagees shall, by rendering null and void all the conditions entered in this document, recover the mortgage money with interest at Re. 1-6 from the date of the execution of this document, before the expiration of the term, by means of a suit.' This rate of interest, viz.,



Re. 1-6 per cent., was to be allowed in case of the defendants' failure to have the mutation of names effected or deliver possession of the mortgaged property, after the mortgage had been made, and the plaintiff's filing a suit for the recovery of the mortgage-money with interest. Then an excessive amount of interest would have been allowed for a short period by way of penalty. According to this condition, the plaintiff is not justified in not suing for nine years [197] to recover his mortgage-money, after he had not received possession of the property, in order to charge interest for the whole period at the rate of Re. 1-6 per cent. per mensem instead of Re. 1 per cent., which was agreed upon to be paid partly in cash and partly from the income of the estate. Under these circumstances it is not necessary to inquire now whether the delivery of possession was not made owing to the defendants' default or the plaintiff's negligence. But this conclusion should certainly be deduced from the foregoing facts, that the plaintiff, through his own negligence, failed to take possession, with the object of realizing interest at a higher rate, and therefore, according to the terms of the document, he is not entitled to get interest at a higher rate than Re. 1 per cent."

The plaintiff appealed to the High Court, contending that the rate of interest claimed, being the contract rate, and reasonable and fair, had been improperly reduced, and that the condition in the mortgage-deed relating to the interest claimed had been misconstrued.

Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the appellant.  
Mr. T. Conlan and Mr. W. M. Colvin, for the respondents.

#### JUDGMENT.

PETHERAM, C.J., and STRAIGHT, J.—The only question in this appeal is, whether the creditor is to recover interest on the bond in suit at the rate of Re. 1 or Re. 1-6 per cent. per mensem. The facts of the case are really not disputed, and the question in our opinion turns entirely on the construction of the bond itself. By that, it appears that the plaintiffs and others in the year 1875 lent a sum of Rs. 30,000, at one per cent. per mensem, on the security of a certain property: the bond then contains various provisions which were inserted in the deed for securing payment of interest, all of which were for the benefit of the creditor. *Inter alia*, it was provided that the mortgagee should have possession of the security, and should take the profits on account of interest, the profits being agreed at a certain figure, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the creditor might [198] treat the money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per mensem.

These provisions were, as we have said before, for the benefit of the creditor, and he was at liberty to waive them if he pleased. What actually happened was, that the creditor did not take possession of the security, and took no steps to obtain such possession, or to recover the money for nine years, during which period no interest has been paid. In our opinion, the fair inference of fact to draw from this state of things is, that the creditor waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, that is, one per cent. per mensem. That rate has been allowed by the Judge, and for these reasons we think that the appeal should be, and it is, dismissed with costs.

*Appeal dismissed.*

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FEB. 25.  
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APPEL-  
LATE  
CIVIL.  
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8 A. 194=  
6 A.W.N.  
(1886) 50.

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8 A. 198=6 A.W.N. (1886) 56.

MARCH 15.

## APPELLATE CIVIL.

APPEL-  
LATE  
CIVIL.*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*KHAYALI (*Defendant*) v. HUSAIN BAKHSH AND ANOTHER (*Plaintiffs*).\*  
[15th March, 1886.]8 A. 198=  
6 A.W.N.  
(1886) 56.*Lease—Lease for one year—Lease exceeding one year—Act III of 1877 (Registration Act), ss. 17 (d), 18 (c).*

A kabuliyat dated the 6th May, 1880, and executed by the lessees of a house in favour of the lessors set forth that the house was let to the former at an annual rent of Rs. 3, for a term of one year. It also contained this stipulation:—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs. 7-8 arrears of rent, the defendant pleaded that, according to the right construction of the lease, he was entitled to occupy the house, and the lessors were not entitled to eject him therefrom so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May, 1884; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

*Held*, that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration; that the defendant had been a mere tenant-at-will since the [199] expiry of the year 1880-81; and that the plaintiffs were therefore entitled to possession of the house. *Hand v. Hall* (1) referred to.

[F., 17 C. 548 (556); 9 C.P.L.R. 88 (89); R., 12 A.L.J. 219=36 A. 176=22 Ind. Cas. 933; 13 N.L.R. 30.]

THE plaintiffs in this case sued the defendant for possession of a house and for Rs. 7-8 arrears of rent in respect thereof. The defendant was in possession under a kabuliyat executed by him in favour of the plaintiff and dated the 6th May, 1880. It was set forth in this document that the house was let to the defendant at an annual rent of Rs. 3, for a term of one year. Then followed these words:—"I (the defendant) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court."

The defendant, in answer to the suit, pleaded that, according to the right construction of the lease, he was entitled to occupy the house, and the lessors were not entitled to eject him therefrom so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May, 1884; that the time for payment of rent for the year 1884-85 had not arrived; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

The Court of first instance (Munsif of Kanauj) construed the lease in the following manner:—"The lease is for one year, but it contains a provision that it shall remain in force so long as the lessee or tenant continues to pay the stipulated rent. In other words, it is a kabuliyat for one year, containing a provision extending the term to more than one year." The Court, upon this view of the lease, held that it was an instrument of which the registration was compulsory under s. 17 (d) of the

\* Second Appeal No. 766 of 1885, from a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 6th February, 1885, modifying a decree of Babu Prag Das, Munsif of Kanauj, dated the 6th December, 1884.

(1) L.R. 2 Ex. D. 355.



Registration Act of 1877, and that, not having been registered, it was inadmissible in evidence by reason of the provisions of s. 49. The Court accordingly dismissed the suit.

On appeal by the plaintiffs, the Subordinate Judge disagreed with the Munsif upon the construction and effect of the lease, and was of opinion that it was not compulsorily registrable, and therefore inadmissible in evidence because not registered. The Court, after referring to the terms of the instrument, observed:—"It can-[200]not be considered from these words that a provision has been made in the lease that, so long as the rent continues to be paid, the plaintiffs shall not be at liberty to eject the tenant, or that the lease has become for such a longer period than one year that its registration is compulsory. It is evident that the lease in question in this case is for a term of one year. The case of *Apu Budgarda v. Narhari Annajee* (1) has a bearing upon this case. It is held therein that if, in a document for which the term of one year is specially prescribed, any subsequent words are used for the continuance of possession, they are considered to appertain to the future consent of the parties, and cannot in any way affect the actual fixed term or create a fresh right, as based on contract, in favour of any party. Hence the registration of the lease in question cannot be considered to be compulsory, and it cannot be inferred from the lease that there is a mutual contract to the effect that subject to the condition of paying the annual rent, the defendant has a right to hold possession for ever against the plaintiffs' consent. The lease was for a term of one year, which has expired. The defendant does not deny the fact of his being a tenant. Hence, I hold that the plaintiffs are entitled to a decree for possession of the house by ejectment of the defendant, the tenant."

From this decision the defendant appealed to the High Court.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondents.

#### JUDGMENT.

OLDFIELD and TYRRELL, JJ.—The lower appellate Court has taken a right view of the lease executed in May of 1880 between the parties.

It was a lease for one year only, and, thus falling under s. 18 of the Registration Act, it was admissible in evidence without registration. The principle laid down in *Hand v. Hall* (2) by the Court of Appeal is applicable, and the case cited by the Court below is in point. The appellant therefore has been a mere tenant-at-will since the expiry of the year 1880-81, and the respondents are entitled to the relief accorded to them by the lower appellate Court. The appeal is dismissed with costs.

*Appeal dismissed.*

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APPEL-  
LATE  
CIVIL.

8 A. 198-  
6 A.W.N.  
(1886) 56.

(1) 3 B. 1.

(2) L.R. 2 Ex. D. 355.



1886

FEB. 5.

APPEL-  
LATE

CRIMINAL.

8 A. 201=  
6 A.W.N.  
(1886) 63.

8 A. 201=6 A.W.N. (1886) 63.

## [201] APPELLATE CRIMINAL.

*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. PARMESHAH DAT. [5th February, 1886.]

Act XLV of 1860 (*Penal Code*), s. 21—*Public servant*.

Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant," within the definition contained in s. 21 of the *Penal Code*.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. J. Simeon, for the appellant.

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

## JUDGMENT.

STRAIGHT, J.—This is an appeal from a decision of the Sessions Judge of Gorakhpur, Mr. R. J. Leeds, dated the 26th September, 1885, convicting the appellant of three offences under s. 420 of the *Penal Code* of cheating. These offences relate to three aggregate sums of Rs. 455-4-11, Rs. 297-14-3, and Rs. 323-15-4, constituting a very considerable amount of money, which was improperly paid to other persons in consequence of misrepresentations made by the accused. The appellant has also been convicted under s. 167 of the *Penal Code*, but no sentence has been passed upon him in respect of that section. This latter conviction involves the question whether the accused was a public servant, and subject to the responsibilities attaching to that character. It appears that his duties were as follows :—He was, and had been for several years, attached to the tahsildar's office at Gorakhpur,—i.e. he was employed at the office without receiving any pay, and was learning the duties performed there by the officials, in the hope and expectation of eventually being taken on the staff, and paid like the other persons employed in the office. It seems to me that it is now too late for the contention to be raised on his behalf that he was not a "Public servant," within the definition contained in s. 21 of the *Penal Code*. I am of opinion that any person, whether receiving pay or not, who chooses to [202] take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognized as filling the position of a public servant, must be regarded as one, and that it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a public servant. If such a contention were allowed, and the question whether a man was a public servant were to depend wholly upon the test of his receiving or not receiving a salary, very great mischief and difficulty might arise in a country like this, where numerous persons are engaged in the performance of public duties without pay. I am therefore of opinion that the appellant must be regarded as coming within the definition of "public servant." This disposes of the first objection which has been taken on the appellant's behalf. I will now briefly state the circumstances under

which the accused has been convicted. It appears that the military authorities, for purposes of convenience, made an arrangement with the Collector of Gorakhpur, by which the latter should ascertain every month, through the tahsildar's office, what were the current rates in the bazar for grain and other articles of food; and in the ordinary course of business it was the accused's duty to prepare an average list of such rates in Persian, which he had to take to Mr. Augustin, in the Collector's office, and to read out to him from the Persian list the figures of the rates. From this Mr. Augustin made a list in English for the Collector, who forwarded it to the commanding officer of the regiment, who, upon the basis of the list so prepared, directed payment from time to time to the banias supplying the articles of food required. So that, if by any arrangement with any persons in the bazar, the accused chose to make incorrect statements as to the amount of the rates of food to Mr. Augustin the list prepared by Mr. Augustin upon such statements would necessarily be incorrect also, and this would result in larger sums being paid to the banias than they were entitled to receive. I cannot conceive circumstances more clearly within the meaning of s. 420 of the Penal Code. It has been proved that the Persian list of averages prepared by the accused was correct, and Mr. Augustin has shown that his English list was prepared with reference to the [203] translation of the Persian list given to him by the accused. A comparison of the two documents makes it obvious that the appellant misrepresented the contents of the Persian list, because in Mr. Augustin's list there was a large excess in the alleged prices. The case is overwhelming, and I must dismiss the appeal.

*Conviction affirmed.*

8 A. 203 (F.B.)=6 A.W.N. (1886) 58.

#### FULL BENCH.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

JIWAN ALI BEG (*Applicant*) v. BASA MAL AND OTHERS (*Opposite Parties*).\* [13th February, 1886.]

*Civil Procedure Code, s. 549—Practice—Appeal—Security for costs—Poverty of appellant.*

*Held* by the Full Bench (TYRRELL, J., *dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

THIS was an application by the respondent in First Appeal No. 133 of 1885 for security for costs which came on for hearing before Straight, J., who made the following order of reference to the Full Bench:—

"This is an application by the respondent in an appeal to this Court, that the appellant, who was unsuccessful in the Court below, be ordered to give security for the cost incurred, not only in that Court, but in this appeal. The allegation of the respondent in his petition, and vouched

\* Miscellaneous Application in F. A. No. 133 of 1885.

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8 A. 201  
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FULL  
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8 A. 203  
(F.B.)=  
6 A.W.N.  
(1886) 58.

by affidavits, is that the appellant is a person without means, and indeed I understand the appellant's counsel to admit that, so far as he is aware, except the property which is the subject-matter of the present suit, and which was hypothecated in the bond sued upon, the appellant possesses no property whatever. Under these circumstances, the respondent urges that the appellant be required to furnish security. It has been ruled on three occasions in this Court—twice by myself (1) [204] and once by Mr. Justice Mahmood (2)—that mere poverty alone is not a sufficient ground for requiring security for costs from an appellant, and I have certainly been under the impression that that was the recognised rule in the English Courts, which also has been followed by the Bombay High Court in *Maneckji Limji Mancherji v. Goolbai* (3). Mr. Hill has, however, called my attention to two rulings of the Court of Appeal in England, which seems at least to modify the old decisions, and to show that poverty or insolvency is a good ground for requiring security for costs from the appellant. As the question is one of practice, and for considerable importance to those engaged in appeals in this Court, I refer it to the Full Bench for determination."

Mr. C. H. Hill, for the petitioner, referred to *Harlock v. Ashberry* (4) and *Farrer v. Lacy, Hartland & Co.* (5).

Mr. T. Conlan and Pandit Ajudhia Nath, for the opposite parties.

#### JUDGMENT.

STRAIGHT, J.—We are unable to lay down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed; but we may go so far as to say that the mere fact of the poverty of an appellant, standing by itself, and without reference to any of the general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs.

PETHERAM, C.J., and OLDFIELD and BRODHURST, JJ., concurred.

TYRRELL, J.—S. 549 of the Code prescribes no conditions which absolutely entitle a respondent to an order under the terms of that section requiring the appellant to furnish security for the costs of the appeal; and I should hesitate to import into the provisions of the section any rule either way upon the question whether or not the poverty of an appellant by itself justifies an order requiring him to furnish security for costs.

(1) *Dalip Singh v. Azim Ali Khan* and *Backman v. Backman*, A.W.N. (1884) pp. 99 and 103 respectively.

(2) *Lakshmi Chand v. Gatto Bai*, 7 A. 542.

(4) L.R. 19 Ch. D. 84.

(3) 3 B. 241.

(5) L.R. 28 Ch. D. 482.



8 A. 205 = 6 A.W.N. (1886) 58.

## [205] APPELLATE CIVIL.

Before Sir Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Straight.

BASA MAL AND ANOTHER (*Defendants*) v. MAHARAJ SINGH, MINOR,  
BY HIS NEXT FRIEND, SARUP KUAR (*Plaintiff*).  
[8th March, 1886.]

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LATE  
CIVIL.

8 A. 205 =  
6 A.W.N.  
(1886) 58.

*Hindu law—Joint Hindu family—Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.*

When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 49, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge.

If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest, in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, i.e., the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder.

*Girdhare Lall v. Kantoo Lall* (1), *Deendyal Lall v. Jugdeep Narain Singh* (2), *Suraj Bunsî Koer v. Sheo Persad Singh* (3), *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (4), *Multayan Chetti v. Sangili Vira Pandia Chinna-tambiar* (5), *Hurdey Narain Sahu v. Rooder Perakash Misser* (6), *Nanomi Babuasin v. Modun Mohun* (7), *Ram Narain Lal v. Bhawani Prasad* (8), *Gaura v. Nanak Chand* (9), *Appovier v. Rama Subba Aiyar* (10), *Phul Chand v. Man Singh* (11), *Chamaili Kuar v. Ram Prasad* (12), and *Rama Nand Singh v. Gobind Singh* (13), referred to.

[F., 13 A. 216 (219) ; 1 O.C. 53 (59) ; Appr., 9 A. 142 (146) ; R., 12 A. 99 (100) ; 4 Bom. L.R. 587 (600) ; 11 M. 64 (68).]

[206] THIS was an appeal from a decree of the Subordinate Judge of Moradabad, dated the 23rd November, 1883, which came before Petheram, C.J., and Straight, J., and was referred by them to the Full Bench. The order of reference, in which the facts are fully stated, was in the following terms :—

\* First Appeal No. 66 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 23rd November, 1883.

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| (1) 14 B.L.R. 187 = 22 W.R. 56 = 1 I.A. 321.   | (2) 3 C. 198 = 4 I.A. 247.     |
| (3) 5 C. 148 = 6 I.A. 88.                      | (4) 5 C.L.R. 477 = 6 I.A. 233. |
| (5) 6 M. 1 = 9 I.A. 128.                       | (6) 10 C. 626 = 11 I.A. 26.    |
| (7) Decided by the P.C. on the 18th Dec. 1885. | (8) 3 A. 443.                  |
| (9) A.W.N. (1883) 194 and A.W.N. (1884) 23.    | (10) 11 M.I.A. 75.             |
| (11) 4 A. 309.                                 | (12) 2 A. 267.                 |
| (13) 5 A. 884.                                 |                                |

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" In this suit the minor plaintiff, by his mother and guardian, sued for a declaration of his right to possession of  $5\frac{1}{2}$  biswas shares in two mahals of Kasba Mughalpur, and for the cancelment of a miscellaneous order of the 2nd of February, 1883, under the following circumstances :— The plaintiff alleges that his father, Chaudhri Sheoraj Singh, upon the death of his grandfather, Chaudhri Bhan Partab Singh, inherited certain valuable properties, among which were the mahals in suit ; that subsequently his said father, having, by his 'immoral and licentious life,' wasted and squandered the income derivable from the ancestral properties, was, on the 9th July, 1878, obliged to borrow Rs. 3,000 from the defendants, and mortgaged in their favour the shares in Mughalpur already mentioned ; that the said defendants, in the year 1879, instituted a suit on their bond against the said Sheoraj Singh ; that the plaintiff, by his guardian, prayed the Court in which such suit was pending to make him a party thereto under s. 32 of the Code ; that his application was rejected and a decree was given in favour of the defendants against Sheoraj Singh on the 20th June, 1879 ; that the shares in Mughalpur were first bought to sale in execution of that decree in May, 1880 ; that subsequently to such sale the plaintiff filed an application to have it set aside, but it was refused, though the sale was ultimately set aside at the instance of the judgment-debtor ; that the defendant Basa Mal and one Ganeshi Mal, representative of Sita Mal, the other decree-holder, having brought the mortgaged property to sale a second time, on the 21st November, 1881, purchased it for Rs. 2,000 ; that the plaintiff thereupon urged objections to possession being given to the said auction-purchaser and opposed it, and the latter then filed an application to the Court under s. 335 of the Code, and on the 2nd of February, 1883, such application was decided in favour of the auction-purchasers, Basa Mal and Ganeshi Mal, and they were ordered to be put in possession ; that this order gave the plaintiff the cause of action on which he now sues ; and that Sheoraj Singh, being joint with the [207] plaintiff, had no power to charge the joint property, and such charge was void and of no effect as to the whole. The defence set up was, in substance, that the property was not ancestral, that the bond was executed for necessary purposes, and that Sheoraj Singh, as guardian of and manager for his minor son, the plaintiff, was competent to make the charge.

" The Subordinate Judge, finding that the debt to the defendants under the bond was incurred for immoral purposes, and that the property was ancestral, gave a decree in the plaintiff's favour for half his claim. From that decision the defendants have appealed to this Court, and the plaintiff has filed one objection. The pleas before us were, that the debt to the defendants was incurred for legitimate purposes ; that the plaintiff failed to establish, as he was bound to do that the amount borrowed from the defendants was used for immoral purposes ; that the facts show that the present suit is instituted with the connivance and at the instigation of Sheoraj Singh. The plaintiff's objection, on the other hand, is to the effect that the Subordinate Judge should have decreed his claim in whole and not in part. As the case is one involving considerations akin to those that have arisen in another case referred to the Full Bench, we think this should also go. In making the reference we find, as a fact, that the property was ancestral ; that the plaintiff is in possession of it ; that there is evidence to show that, though a considerable portion of the bond-money advanced on the bond of the 9th July, 1878, to Sheoraj Singh, was required for a necessary purpose, namely, the payment of revenue, he had



got himself into the position of having to take a loan by reason of his imprudent and extravagant proceedings, and that the defendant purchased with notice of the plaintiff's claim. Upon these findings we refer the appeal to the Full Bench for disposal."

The Full Bench, however, did not dispose of the appeal, but, without expressing any opinion in regard to it, returned it to the Divisional Bench for determination. The appeal was then heard by the Divisional Bench.

Pandit *Bishambar Nath*, for the appellants.

*Lala Juala Prasad*, for the respondents.

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# JUDGMENT.

[208] PETHERAM, C.J., and STRAIGHT, J.—The circumstances of this case are set out at length in the order by which the appeal was originally referred to the Full Bench for decision, and they need not be recapitulated. The matter now has come back to us for decision, for reasons that need not be detailed, and, before disposing of it, we think it desirable briefly to refer to certain decisions of their Lordships of the Privy Council, which were commented upon in the course of the arguments, as also some rulings of this Court, with a view to ascertain what are the clear and intelligible rules to be applied in the determination of these cases of a Hindu son seeking to avoid alienation of joint ancestral property by his father. At the outset, and by way of introduction to the consideration of the subject, the description given by Lord Westbury of the characteristics of the joint Hindu family may be usefully quoted:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he (that particular member) has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment by the members of an undivided family"—*Appovier v. Rama Subba Aiyar* (1). In this connection it will be convenient to refer to the principle laid down in *Phul Chand v. Man Singh* (2) by Straight and Tyrrell, JJ., "that every son born to the father of a joint Hindu family in possession of ancestral property acquires a positive, though undefined, share in the joint estate co-extensive with and as large as that of all the other members of the joint family, including his father, and that it is competent for each and every member of a joint family at any time to demand partition of the ancestral property." It has further been the rule of decision in this Court [see *Oldfield, J.*, in *Chamaili Kuar v. Ram Prasad* (3), and *Straight and Brodhurst, JJ.*, in *Ram Nand Singh v. Gobind Singh* (4)] that one member of a joint and undivided Hindu family cannot mortgage or sell his share of the joint property without the [209] consent, express or implied, of his co-parceners. These rulings may be said to state the most important incidents that mark the relations of the members of the joint Hindu family *inter se*; and we now proceed to ascertain how far those relations have been touched or modified in

(1) 11 M.I.A. 75.

(3) 2 A. 267.

(2) 4 A. 309.

(4) 5 A. 384.



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reference to transactions between the father of the joint family, its natural head and manager, and third parties by which the joint ancestral property has been mortgaged or sold.

The first important decision of the Privy Council on the questions of the power of the father of such a family to deal with the joint ancestral estate is to be found in the case of *Girdharee Lall v. Kantoo Lall* (1). This was an action by a son in the lifetime of his father and uncle to set aside a sale of ancestral property made by them, on the ground that a sale by one member of an undivided property passes no interest in it whatever, and that any other member of the family can set it aside and bring the property back into the family. The Privy Council dismissed the suit, on the ground that ancestral property, which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. The next case is that of *Deendyal Lall v. Jugdeep Narain Singh* (2). That was a suit by a son to recover possession of ancestral property which had been taken possession of by an auction-purchaser of "the rights and proprietary and mokurrari title and share of Tufani Singh, the judgment-debtor," who was the father of the plaintiff. The Privy Council decreed the claim, on the ground that possession of the undivided property could not be taken under a sale of one undivided share, but gave the defendant a declaration that he was entitled to stand in the shoes of Tufani Singh, and to obtain a share of the property by bringing a suit for partition. The judgment contains an expression of opinion that only the undivided share of the father can be sold in a suit to which he only is made a defendant; but inasmuch as the defendant in that suit had only brought the [210] interest of the father, the point was not necessary for the decision of the case. The next case is that of *Suraj Bansi Koer v. Sheo Persad Singh* (3). A family, consisting of a father and his minor sons, was in possession of an ancestral estate, and the father mortgaged the estate to secure a sum of Rs. 13,000 and interest, which he held himself borrowed for and spent in immoral purposes. The Privy Council held, on the authority of the case of *Deendyal Lall* (2) that the purchases under a decree on the mortgage security after the death of the father were cancelled as against the surviving sons, who had a right to have the estate partitioned and to obtain possession of the share of the father, and that the mortgage and the decree upon it would not effect the undivided share of the other members of the family *because the money was borrowed and spent for immoral purposes*. In the course of the judgment, they affirmed the following propositions as being established by the case of *Kantoo Lall* (1): "first, that where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale, being strangers to

(1) 14 B.L.R. 187=22 W.R. 56=1 I.A. 321.

(2) 3 C. 198=4 I.A. 247.

(3) 5 C. 148=6 I.A. 88

the suit, if they have not had notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceeding."

The case of *Bissessur Lall Sahu v. Maharajah Luchmessur Singh* (1) has been referred to, but on examination does not appear to have any bearing on the questions. In that case, an undivided family acquired, in 1847, the property which was in question, and afterwards decrees were obtained against various members of the family for debts which were undoubtedly debts for which the whole family was liable, and for which they might have been sued, and the family property been sold, had proper proceedings been [211] taken. The Privy Council held in that case that the Court might look behind the decrees to ascertain whether the defendant was sued in his individual character or as the representative of the entire family, and that the execution should be in accordance with the real facts, and not necessarily against the property of the apparent defendant only. The next case in order is that of *Muttayan Chetti v. Sangili Vira Pandia Chinnatambiar* (2). The facts of that case are complicated, and it is not easy to gather from the report exactly what they were; but it is clear that the main question was, whether a property (that at the time of the mortgage was in the possession of a family which consisted of a father and son) mortgaged by the father alone could be sold after the death of the father under a decree obtained against him alone upon the mortgage. The Privy Council held that it could, the reasons given being that the whole zamindari, or at least the interest which the defendant, the son, took therein by heritage, was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts, and the Committee re-affirmed the doctrine laid down in *Girdharee Lall's Case*. The next and last decision of the Privy Council on the subject is contained in the case of *Hurdey Narain Sahu v. Rooder Perakash Misser* (3). In that case an ancestral property was in the possession of a family which consisted of a father and son. It appeared that the father was indebted to the defendant in the suit of Hurdey Narain, partly on account of a mortgage and partly for further advances, and that Hurdey Narain brought a suit against him in order to recover the debt, and on the 14th of March, 1873, obtained a common money-decree against him, and that the ancestral property was afterwards attached and sold under the decree, and purchased by Hurdey Narain, the judgment-creditor.

Under these circumstances the Privy Council say that the question which arises is, what was the right or interest in the ancestral property which Hurdey Narain acquired by his purchase at the sale in execution of the decree, and upon the authority of *Deendyal's Case* they held that as the decree was against the father alone, [212] and was a money decree only, such interest was confined to that of the judgment-debtor, the father, only and did not transfer the entire property to the purchaser. There is yet one more case recently decided by their Lordships, and not yet reported, namely, *Nanomi Babuasin v. Modun Mohun* (4), on appeal from Calcutta. There are two sons sued to avoid a sale of the ancestral property held in execution of a decree against their father. The Subordinate Judge in whose Court the suit was tried found that all that had passed at the auction-sale to the purchaser was the right, title, and interest of the father, and he therefore gave the

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(1) 5 C.L.R. 477=6 I.A. 233.

(3) 10 C. 626=11 I. A. 26.

(2) 6 M. 1=9 I.A. 128.

(4) Decided the 18th December, 1885,



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plaintiffs a decree for the ancestral property *minus* the father's share. On appeal the High Court reversed the decision of the Subordinate Judge holding that the auction-purchaser bought the whole property, including the interests of the plaintiffs. The latter then appealed to the Privy Council, and their Lordships, after referring to *Deendyal Lall's Case*, observed:—"If the expressions by which the estate conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone, the absence of the sons from the proceeding may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." In the result their Lordships held that, as the purchaser had succeeded in showing that he bought the entirety of the estate, the suit of the plaintiffs had been rightly held to have failed.

We now come to the cases which have been considered in the High Court of these Provinces. That of *Ram Narain Lal v. Bhawani Prasad* (1) was decided by the Full Bench of this Court on the 24th January, 1881, that is to say, after that of *Bissessur Lall Sahu* and before that of *Hurdey Narain Sahu v. Rooder Perakash Misser* (2). In that case the facts were, that an ancestral estate was in the possession of an undivided family which consisted of a father and four sons. The father borrowed a sum of money, and as security gave a bond by which he hypothecated a [213] portion of the ancestral estate, describing it as his own. The lender afterwards sued the father on the bond and obtained a decree against him personally and for sale of the mortgaged property. A sale took place under the decree, and the question was what passed to the purchaser. The majority of the Court (Stuart, C.J., Pearson, Spankie, and Oldfield, JJ.) held on the authority of *Bissessur Lall Sahu's Case*, that it was competent for the Court to go behind the decree, and to ascertain whether the money was borrowed for family purposes, and, upon its appearing that such was the case, to sell the family property under it. Straight, J., thought that as the decree was against the father alone, his share only could be sold under it. Another case is that of *Gaura v. Nanak Chand* (3). The only question in that case was on whom the burden of proof rested, when it was alleged that the property had been parted with by the father for unauthorised purposes, and the Court held that the burden of proving the assertion was on the person who made it; in other words, that the transaction would be presumed to be a legal and proper one until the contrary appeared.

It seems to us that two broad rules are deducible from the foregoing authorities, and they are these;—First, that when a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debts incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter I, s. 48,

(1) 3 A. 443.

(2) 10 C. 626=11 I.A. 26,

(3) A.W.N. (1883) 194 and A.W.N. (1884) 23.



and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge. Next that if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution [214] is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, *i.e.*, the right to demand partition to the extent of the father's share. In this last-mentioned case the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder.

Applying these rules to this appeal, we are of opinion that it must succeed, and that the decree of the Subordinate Judge cannot stand. That the  $2\frac{1}{2}$  biswas share of Mughalpur was sold at the execution sale under the decree obtained against Sheoraj Singh and purchased by the defendants is clear from the terms of the decree and of the sale-certificate, and there can be no doubt that the entirety of the interest passed to them. The plaintiff has failed to show that the debt for which the bond was executed was an immoral one; indeed, a considerable porportion of the money borrowed was used for the purpose of paying arrears of revenue. We decree the appeal and dismiss the cross-objection, and, reversing the decree of the Subordinate Judge, we dismiss the suit with costs in all Courts.

*Appeal allowed.*

8 A. 214=10 Ind. Jur. 383.

# APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Straight.*

DHUM SINGH (*Defendant*) v. GANGA RAM AND OTHERS (*Plaintiffs*).\*  
[12th March, 1886.]

*Vendor and purchaser—Failure of consideration—Suit for money had and received for plaintiff's use—Debt—Limitation.*

Prior to September, 1879, pecuniary dealings took place between D and B, resulting in a debt due by the former to the latter of Rs. 33,000 for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and, on the 1st September, 1879, it was arranged that D should execute a sale-deed conveying to B certain immoveable property for Rs. 55,000, and that B should pay this amount by giving D credit to the extent of the debt and paying the balance in cash. In August 1880 D sued B for specific performance of the contract, which, he alleged, had been settled and executed, for the sale of the property. B in defence alleged that although [215] certain terms and conditions as to the sale had been definitely settled for embodiment in a formal sale-deed, it was only subject to these terms and conditions that he had been prepared to complete the transaction, and that, as they had been omitted from the document executed by D on the 1st September, 1879, he had never accepted that document. In March, 1884, the High Court, on appeal, dismissed the suit, holding that the parties had never been *ad idem* with reference to the

\* First Appeal No. 62 of 1885, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 26th March, 1885.

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contract alleged by *D*, and that the document of the 1st September, 1879, had never been finally accepted so as to be binding and enforceable by law. In September, 1884, *B* sued *D* for recovery of the sum of Rs. 33,000 with interest. He contended that, under the terms of the arrangement made on the 1st September, 1879, the debt of Rs. 33,000 then owing to him changed its character; that it was no longer merely the old balance due by the defendant, but having been credited in the latter's books, should be treated as a payment by him (the plaintiff) as a deposit on account of the sale; that the suit was therefore one for money had and received by the defendant to the use of the plaintiff; and that the cause of action did not arise until the contract failed, by reason of the decree of the High Court on 14th March, 1884, dismissing the suit for specific performance.

*Held* that this contention must fail, and the debt must be treated as the old balance due by the defendant to the plaintiff, inasmuch as by terms of the agreement itself which the plaintiff set up, no deposit was payable, and the price was not to be paid till the completion of the contract, and inasmuch as the plaintiff, in demanding payment, after the negotiations had failed, demanded simply as for the balance of the old debt, and not as for the return of the deposit.

*Held*, further, that the 1st September, 1879, upon which the contract set up by the plaintiff was alleged to have been completed, was the latest possible date upon which the debt could be said to have become due, and that, inasmuch as the present suit was not brought until the 18th September, 1884, it was barred by limitation.

THE facts of this case were as follows:—On the 1st September, 1879, Dhum Singh, defendant, was indebted to one Baru Mal in the sum of Rs. 33,359-3-9 for money lent. On the same date Dhum Singh executed a deed of sale whereby he conveyed to Musammatt Basu, the wife of Baru Mal, a village called Tailipura and certain shares in nine other villages, in consideration of the payment of Rs. 55,000. On the same day the deed was delivered to Baru Mal, and at the time of its delivery he gave Dhum Singh a letter in the following terms:—

"Baru Mal begs to send his compliments to Dhum Singh. I have for the present kept with me the sale-deed of matza Tailipura, &c., in all ten villages, for Rs. 55,000. It will be registered to-morrow, Rs. 21,610-12-6, due to you on account of this sale-deed, after setting off Rs. 33,359-3-6, will be paid as follows:—Rs. 10,000 at the time of registration, and Rs. 11,640-12-6 after mutation of names has been effected."

[216] The sum of Rs. 33,359-3-6 mentioned in this letter as set-off against the purchase-money was the amount mentioned above as due to Baru Mal from Dhum Singh for money lent.

On the same day Dhum Singh credited and debited in his account-books to Baru Mal the sum of Rs. 33,359-3-6, the entries being in these terms:—

"Credited to Sah Baru Mal Rs. 33,359-3-6. Rs. 33,359-3-6 were due to Sah Baru Mal on account of the balance under the account-books. In the sale-deed for Rs. 55,000, credit was allowed for the same amount with reference to your letter.

Debited to Sah Baru Mal Rs. 33,359-3-6. Rs. 33,359-3-6 were due to you on account of balance under the account-books. The same have been paid off and credited to Sah Baru Mal in respect of the sale-deed amounting to Rs. 55,000.

Dhum Singh also balanced his account with Baru Mal, and debited him with Rs. 21,640-12-6, being the balance of the purchase-money. This entry continued to be made in his account-books from year to year, and was existing at the time of the institution of the suit out of which this appeal arose. In the account-books of Baru Mal the sum of Rs. 33,359-3-6 continued to be debited, with interest, to Dhum Singh, and was so debited at the time.

On the 29th September, 1879, Baru Mal, having in the meantime refused to accept the sale-deed, sent a letter to Dhum Singh in these terms:—

"As you have not yet replied to my several oral messages, I am obliged to give you notice hereby, that instead of the sale-deed of the 1st September, which your manager,



with intent to cause loss to me, has executed in my favour, altering the wording of the rough draft and omitting the conditions necessary to the sale, and which is, on account of this defect, useless and a piece of waste paper, your will execute, within four days, a correct and faultless sale-deed in respect of Tailipura, &c., the sold villages, on another stamped paper, specifying all the conditions agreed upon between us, in accordance with my rough draft, to a letter, and after due registration cause mutation of names to be effected in my favour respecting the property sold. If you will not do so, I will, after the expiry of the said term, be entitled to recover, according to the banking usage, the custom of the country, the court practice, and justice, besides Rs. 33,359-3 6, the balance in my favour, on the account-books, a further sum of Rs. 1,500 as damages for the loss sustained by me on account of your fraudulent proceedings mentioned above. This is written to you by way of information. You are at liberty either to act as above and deal fairly, or let the term expire and choose to pay Rs. 1,500 as damages, besides the above-mentioned debt. Please send a reply, as you desire, by return of post. If you will not send [217] a reply within the terms, I will assume you have accepted to pay Rs. 1,500 as damages in addition to the debt due to me."

The dispute between the parties was referred to arbitration, but no arbitration took place, and on the 3rd August, 1880, Dhum Singh sued Baru Mal and his wife Basu for specific performance of the contract represented by the sale-deed executed by him. The principal relief which he sought in that suit was follows:—

"That after declaring the sale transaction and sale-deed in respect of the aforesaid villages to have been established and completed, the defendant be ordered to have the sale-deed registered within a reasonable date from the date of the order, and after deduction of Rs. 33,359-3-6, the amount of debt due to him (defendant), to pay Rs. 10,000 at the time of registration, and Rs. 11,640-12-6 at the time of mutation of names, to the plaintiff, and in case defendant No. 1 fails to comply with the aforesaid order for having the registration and mutation of names effected within the term granted by the Court, he may be ordered to pay Rs. 21,640-12-6 in a lump sum to the plaintiff."

The case of Dhum Singh was that the sale-deed executed by him on the 1st September, 1879, had been accepted by Baru Mal on that day.

The defence of Baru Mal was that it had been agreed between the parties that the sale-deed should be drawn in the terms of a draft prepared by his karinda; that he had not accepted the sale-deed executed by Dhum Singh on the 1st September, 1879, but had received it in order that he might compare it with the rough draft, and satisfy himself that the deed corresponded with the draft before he accepted the deed; that as the deed did not correspond with the draft, he had refused to accept it; and that under the circumstances he was not bound to accept it.

The Subordinate Judge of Saharanpur (Maulvi Muhammad Maksud Ali Khan), by whom the suit was tried, on the 24th February, 1881, holding that the sale-deed executed by Dhum Singh on the 1st September, 1879, represented the contract of sale, gave him a decree as claimed.

Baru Mal appealed to the High Court, which, on the 14th March, 1884, reversed the decree of the lower Court and dismissed the suit. The judgment of the High Court (Straight and Tyrrell, JJ.) was in these terms:—

"This is an appeal from a decision of the Subordinate Judge of Saharanpur, passed on the 24th of February, 1881, decreeing [218] the plaintiff-respondent's suit for specific performance of an alleged contract of the 1st September, 1879, relating to the sale to, and purchase by, the defendant-appellant Baru Mal of certain shares of villages in the Saharanpur district. The plaintiff Dhum Singh and the defendant Baru Mal are Mahajans (Saraogis) carrying on their business at Saharanpur, and Musammat Basu, the 2nd defendant, is the wife of defendant No. 1. Dhum Singh and Baru Mal are related by marriage, and down to the time of the transaction, out of which the present litigation has arisen, would seem to have been on friendly terms. It appears that prior to the month of

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August, 1879, there had been considerable pecuniary dealings between the plaintiff and Baru Mal, whom we shall for the future call *the* defendant, which at that date had resulted in an indebtedness from the former to the latter, in round numbers, of some Rs. 33,000. According to the defendant's own account, his son, Ajit Singh, objected to so large a debt remaining outstanding, and, in consequences of this, negotiations were commenced with a view to effecting some settlement, upon the basis that, among other incidents of the arrangement to be come to, the plaintiff should transfer his proprietary interests in certain villages to the defendant's wife. We are not for the moment concerned to inquire into the details of what passed in the course of these preliminaries; it is enough for immediate purposes to say that on the 1st of September, 1879, a deed was executed by the plaintiff, purporting, in lieu of a debt due from him of Rs. 33,359-3-6, which was to be written off as satisfied, and for a cash payment of Rs. 21,640-12-6, to convey all his rights in ten mauzas therein specified to Musummat Basu, wife of Baru Mal. This is the instrument specific performance whereof is sought by the suit now before us in appeal, which was instituted on the 3rd of August, 1880. The main plea set up by the defendant in the Court below was to the effect that, in the course of the negotiations above adverted to, certain terms and conditions, which for the moment need not be more particularly mentioned, had been arranged between the parties for embodiment in a formal sale-deed; that it was only upon these terms and conditions that the defendant was prepared to complete the transaction; that those terms and conditions were intentionally and fraudulently omitted from the document [219] executed by the defendant on the 1st September, 1879; and that the defendant never finally accepted that document as then drawn up so as to make it a valid and binding contract and enforceable in law. There were other pleas relating to certain arbitration proceedings, which were commenced under agreement between the parties, and to a demand made by the plaintiff for damages, with which we need not concern ourselves.

"The Subordinate Judge decreed the plaintiff's claim for specific performance, but dismissed it as to the damages; and the defendants appeal.

"Four contentions were urged before us on their behalf. First, that looking to the prayer of the plaint and the fact that the sale-deed of the 1st of September, 1879, was made in the favour of the defendant Musammat Basu, no decree could legally be passed against the defendant Baru Mal specifically to perform the same; second, that the parties having referred their differences the arbitration by an agreement of the 15th December, 1879, the suit was barred by the latter part of the proviso to s. 21 of the Specific Relief Act; third, that there never was any completed and final contract between the parties binding on the defendant, of which specific performance could properly be granted; fourth, that even if there was a valid contract, it was so vague and indefinite in its terms as not to warrant the Court below in exercising the discretionary powers conferred by Act I of 1877.

"In the view we take of the case, it will be more convenient at once to discuss and deal with the third of the above grounds taken by the appellants, as it virtually comprehends and directly affects all the material questions in difference between the parties. It goes without saying that, if there was no absolute and unqualified acceptance of the terms of the contract of September, 1879, by the defendant, there was no contract which can be specifically enforced. Was there then such an acceptance in fact? Before entering, however, upon an

examination of the evidence, we feel ourselves constrained to remark, as we did at the hearing, that it is matter for regret to find that a dispute between two native gentlemen of position and related to one another, which might easily have been amicably arranged, should have developed into such an embittered controversy. [220] It is to our minds most unfortunate that our consideration of what otherwise would have been a simple question of fact is complicated and embarrassed by recriminatory charges of bad faith, deceit, misrepresentation and fraud, and we cannot but regret that the efforts we felt ourselves justified in making to induce them to abandon their several imputations, and to compromise the dispute, should have proved unsuccessful. With this much by way of parenthesis we now revert to a consideration of the question of whether the defendant gave such an unqualified and absolute acceptance to the terms of the instrument of the 1st of September, 1879, as to constitute it a contract enforceable against him. After going very carefully into the whole of the evidence, on the one side and the other, and with the strongest indisposition to differ with so experienced and intelligent a judicial officer as the Subordinate Judge upon matters of fact, we find ourselves unable to agree in the conclusions he has arrived at upon this part of the case. The story told by the plaintiff and his witnesses as to what occurred on the 1st of September prior to, at the time of, and after, the execution of the sale-deed seems to us to present many improbabilities. For example, it is scarcely credible that a wealthy gentleman in the position of the defendant, with karindas and agents to attend such matters for him, would have subjected himself to the trouble and labour of reading out the draft "word by word" to the copyist of the sale-deed, and again when the copy had been completed of comparing it with the original draft. The plaintiff would have us believe that the sale-transaction was of the most ordinary and simple description. What necessity then was there for the plaintiff to adopt such very unusual and experimental precautions? and, as far as we can see, it is not pretended that down to the time of the defendant's going to the house of the plaintiff, on the 1st of September, there had been any serious hitch or difficulty over the arrangement of the preliminaries, and we may we think fairly assume that, when he went there, it was with the full intention of completing the transaction. We cannot believe that his presence on the occasion in question was a cunning pretence and deceit on his part, resorted to for the purpose of getting out of his moral obligations towards the plaintiff's purchase on the conditions already settled. It comes to this, therefore, that the defendant was then ready and willing to close with the [221] plaintiff. But did he do so? The answer must we think be unhesitatingly in the negative. It is admitted that the defendant was allowed to take the sale-deed away with him; in fact, it has been produced in the suit from his custody. That there was something exceptional in this mode of proceeding is clearly indicated by the fact that the letter to be found on page 1 of the respondent's book was required by the plaintiff and given by the defendant. Under ordinary circumstances, the instrument would have remained with the vendor at any rate until the transaction has been perfected to the extent of registration, and the receipt of the Rs. 10,000 in cash to be paid thereon. What cause then was there for so unusual a course to be pursued as that which we find to have been adopted in the present case? For while, on the one hand, no reason of any sort is assigned by the plaintiff for this departure from ordinary practice, on the

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other, the defendant says that, before according his final assent to the sale-deed, he wished to have it compared with the draft in the hands of his karinda Partab Singh and took it away with him for that purpose. We confess that this appears to us to be a rational and natural explanation. For it must be remembered that, at that time, the plaintiff and defendant were upon perfectly amicable terms, and while, as a matter of business, the latter might, without offence, have wished, for his own protection, that his agent should examine the document by the rough draft, his saying so would have been a breach of manners, of which one native gentleman would hardly have been likely to be guilty towards another. If, as the plaintiff asks us to believe, the contract had been finally and irrevocably concluded by the defendant, it is difficult to understand why the former should have allowed the document embodying it to go out of his possession, still more why the latter should have wanted it at such a late hour of the night, when it was understood that the parties were to meet at the registration office on the following day. It does not seem to be suggested that the defendant then had it in his mind to wriggle out of the transaction; on the contrary, as we understand the plaintiff's allegation, it was not till after this that the defendant's sons brought pressure to bear upon their father to repudiate the contract. If the defendant had given the absolute and unqualified assent which is now alleged we should not, in the ordinary nature of things, have found him [222] carrying off the instrument with him and giving by way of acknowledgment such a letter as that of the 1st September. It was pressed upon us by the counsel for the plaintiff, that it was in the highest degree improbable that the defendant would have allowed a Rs. 500 stamp to be wasted, and that he must have assured himself as to the terms of the contract before it was committed to stamp paper. It is enough to say, in answer to this, that the plaintiff himself states that he had agreed to find the stamp, and there was therefore no reason for the defendant to concern himself on that score. With regard to the evidence of the defendant and Bahal Singh as to the conduct of the scribe Shaikh Bakhsha, we cannot adopt the Subordinate Judge's view that it has been invented for the purposes of this case; nor do we think that the statements of Kishen Lal, Khushi Ram, and Karta Kishen, which go to corroborate their account of the matter, should be summarily discredited simply because these persons are intimate friends of the defendant and his sons. Shaikh Bakhsha is unfortunately dead, and we have no materials to hand which would justify us in forming any presumptions as to whether, if he had been called, he would or would not have corroborated the plaintiff's story. So again we have not before us the draft from which the sale-deed is said to have been faired out, and its absence is accounted for by an assertion on the part of the plaintiff and his witnesses that it was destroyed on the 1st of September at the instance of the defendant. We find it hard to believe this statement, which credits the plaintiff with a want of the most ordinary prudence and caution, not to be expected from a man of business. Nor is it intelligible why the defendant, who, according to the plaintiff, was then perfectly satisfied with the contract, should have concerned himself about the draft. We confess that we view this part of the evidence for the plaintiff as gravely suspicious, and the impression it leaves upon our minds is unfavourable. If then the draft, which was admittedly supplied by the defendant to the plaintiff, was not destroyed, which we seriously doubt, what has become of it, and why is it not produced? The answer is so obvious that we need not pursue the matter further,



" So far we have been dealing with the circumstances more directly relating to what transpired on the 1st of September, and, [223] regarding them as a whole, we think that all the probabilities point in favour of the version which is given by the defendant and his witnesses. We now pass to the consideration of the conduct of the parties subsequently to that date. It is said by the plaintiff that the motive of the defendant's repudiation of the contract was that his sons objected to the sale-deed being in their mother's name, and in consequence brought pressure to bear upon their father. Except a very vague statement on the part of the tahsildar Narain Singh, which of itself is insufficient to justify any such inference, we have no material to warrant our concluding that such was the case.

" The negotiation had been going on during the month of August, and both of the defendant's sons were apparently familiar with the mode in which it was proposed the sale transaction should be carried out. If their influence with the defendant was as great as is suggested, they could as readily have brought it to bear before the 1st of September as afterwards, and if, as seems to be hinted, the defendant thought he had made such a good bargain, it is scarcely probable that he would at the last moment have thrown it up at the instance of his sons. While on the one hand the plaintiff's allegations in this respect appear to us to have no substantial foundation, in reason or fact, the defendant's explanation on the other seems perfectly rational and probable. Before attending at the registration of the sale-deed, and paying over hard cash to the amount of Rs. 10,000, he wished to assure himself that the terms of the document were in harmony with the rough draft that had been retained by his karinda, Partab Singh. What could be more natural? It was not likely he should say to the plaintiff in terms: " Your scribe Bakhsha is well known to be a cunning person, and I should like to make sure that he has not played me any tricks," for to have done so would, according to our knowledge of native habits, have been a grave breach of politeness. But he might well have wished, as he says he did, to take away the sale-deed with him for the purpose of ascertaining whether all the conditions agreed upon had been entered. The Subordinate Judge, in reference to this part of the defendant's case, rejects the rough draft-deed produced by Partab Singh as fabricated and fictitious, and thus virtually convicts the witnesses Partab Singh [224] and Khushi Ram of deliberate perjury and the defendant of abetting the fabrication of false evidence. We cannot agree in his conclusions, nor do we regard the reason given for them as sufficient. In his letter to the plaintiff of the 27th of September, 1879, the defendant speaks of 'the wordings of the rough draft having been altered.' If we understand the Subordinate Judge aright—at any rate the learned counsel for the plaintiff was very explicit on the point—the suggestion is that the draft now produced was manufactured long after the arbitration proceedings had proved infructuous. But how is this consistent with the passage in the letter noticed immediately above, unless which we cannot believe, the defendant, having already caused one false draft to be concocted, was at the risk and pains to get a second forged for the purposes of his defence to the present suit. It is not out of place to remark here that the wholesale perjury and forgery of papers with which the Subordinate Judge credits the defendant is somewhat irreconcilable with his description of that gentleman as 'a respectable and extensive landholder' of the Saharanpur district. We do not concur in the Subordinate Judge's view either that the draft produced

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is fictitious, or that the statements now made by the defendant about the omissions from the sale-deed, as to the reasons which led him not to conclude the contract, have been concocted since the arbitration was withdrawn. Upon the face of the sale-deed it is to be observed that though the 'area' (*rakba*), which would ordinarily be understood to mean area in actual bighas, 'and revenue' are mentioned as 'set forth below,' no detail of the kind is to be found at the foot of the instrument, and no explanation worth a moment's serious attention is offered upon this point by the plaintiff or his witnesses. The notion that because the defendant, having land contiguous to that of the plaintiff, could satisfy himself upon the question of area, there was no particular necessity for his requiring it to be entered in the sale-deed, seems to us an absurd one. For he might have a very good general idea as to the extent of the property and its value, and nevertheless wish for particulars to be specified in black and white, so as to bind his vendor. There is nothing in the conditions set forth in the rough draft which it was unreasonable for the defendant to require before completing [225] the purchase, or, and this to our minds is very important, that the plaintiff, if he was disposed to deal fairly, could have objected to give. Far from agreeing with the Subordinate Judge that the 3 *parchas* and the rough draft are fictitious and fabricated documents, we, on the contrary, think there is every ground for believing them genuine, while his criticisms on the defendant's letters of the 29th of September and the 15th and 23rd of October strike us as strained and ill-founded. True, these letters are written in view of the possibility of legal proceedings, but they are couched in language which, in our judgment, indicates a genuine desire and readiness on the part of the defendant to bring the matters in difference with the plaintiff to an amicable settlement. Regarding the letter purporting to be signed by the defendant, and dated the 3rd of September, we entertain very serious suspicions. It does not fit in with the other facts in the case, and what makes us most doubtful about it is that not a word of reference is made to its receipt or to the matters with which it is concerned in the plaintiff's letter to the defendant of the 3rd October. There is only one further point upon which we feel called upon to touch, and that is the plaintiff's startling allegation that the defendant, on the morning of the 2nd September, got the signatures of Sant Lal and Kundan Lal affixed to the sale-deed. Why he did so, or what particular virtue was to attach to the addition of these two names, we are not told, nor is his conduct, as described by the plaintiff, explicable on any intelligible grounds. Looking at the evidence as a whole, and giving it our best and most anxious consideration, we have come to the conclusion that the balance of proof is in favour of the defendant, and that the plaintiff has not made out to our satisfaction that the sale-deed ever became a contract binding on the defendant and enforceable against him in law. In this view of the matter the 3rd ground of appeal taken for the defendant succeeds, and it follows as a necessary consequence that the plaintiff's suit must fail. It therefore becomes unnecessary to consider the other questions raised, and it only remains for us to decree the appeal with costs, and to order that the decree of the Subordinate Judge be reversed, and that the plaintiff's suit stand dismissed with costs in the lower Court."

[226] On the 18th September, 1884, Baru Mal and Basu Kuar instituted the suit out of which this appeal arose against Dhum Singh. The plaintiffs stated in their plaint as follows:—



"1. That on the 1st September, 1879, Lala Dhum Singh, defendant, executed a sale-deed in respect of his interest in ten villages, Tailipura, &c., in favour of Musammat Basu Kuar, plaintiff No. 1, and wife of Baru Mal, with the permission and under the management of the said Baru Mal, plaintiff No. 2, and out of Rs. 55,000, being the amount of the sale consideration entered in the sale-deed, the defendant gave credit for Rs. 33,559-3-6, being the amount of the debt due by the defendant to Baru Mal, plaintiff, on account-books, and thus settled the account of the debt and gave credit for it as part of the sale consideration.

"2. That on the defendant having taken several steps contrary to the engagement in the preparation and execution of the sale-deed, a dispute arose between the plaintiffs and the defendant, whereupon the defendant unjustly brought a claim against the plaintiffs for completion and enforcement of the contract of sale, which (claim) was decreed by the Subordinate Judge of this district on the 24th February, 1881, against these plaintiffs. At last, on an appeal by the plaintiffs, that claim was absolutely dismissed by the High Court, who held the contract to be invalid on the 14th March, 1884.

"3. That notwithstanding the rescission and annulment of the contract of sale, the said defendant objects and refuses to refund the amount of Rs. 33,359-3-6 for which he had given a set-off in the sale consideration, although, seeing that the plaintiffs did not obtain the property sold according to the engagement, and that, in consequence of the defendant's own illegal acts, the contract of sale was declared to be no longer enforceable as mentioned above, the amount for which the defendant had given credit to the plaintiffs on account of the sale consideration ought to be refunded both in law and justice.

"4. That accordingly the amount in question was repeatedly demanded from the defendant, who at first made excuses from day to day, but ultimately refused to pay it.

"5. That in consequence of this series of illegal acts of the defendant, the plaintiffs suffered a loss to the extent of Rs. 20,015-8-0, which would have been acquired by them by way of usual interest on the sum of Rs. 33,359-3-6.

"6. That the cause of action accrued on the 14th March, 1884, the date on which the contract of sale was declared invalid, and on the 3rd August, 1884, the date of the defendant's refusal.

"The plaintiffs seek the following reliefs:—

"(a). That a decree for recovery of Rs. 33,359-3-6, principal amount, and Rs. 20,015-8-0, being the amount of damages on account of interest, in all Rs. 53,374-11-6, as well as future interest, may be passed in favour of the plaintiffs against the defendant, by enforcement of the lien which a purchaser legally has on the subject of the sale in the event of annulment of that sale."

[227] Baru Mal having died after the institution of the suit, his sons were made plaintiffs in his stead. The defendant stated in his written statement of defence as follows:—

"1. That in the former suit between the parties to this suit it has been held by the High Court that no contract regarding the sale of the zamindari interest of the defendant in mauzas Tailipura, &c., and in favour of the plaintiffs, had been entered into between the defendant and Musammat Basu Kuar or Baru Mal, deceased, father of the other plaintiffs.

"2. That neither Baru Mal, deceased, nor the plaintiffs paid any amount to the defendant, in any way, on account of the consideration of the sale alleged by the plaintiffs respecting the property in question.

"3. That the amount of Rs. 33,359-3-6, alluded to in the 3rd para. of the plaintiffs' petition of plaint, was found due from the defendant to Baru Mal, deceased, on account of debt; and in reference to the said amount of debt, Baru Mal, deceased, never did an act which might have the effect of taking away from it the properties of a debt, or in consequence of which the said amount might be deemed to have been paid out of, or credit given for it in favour of the defendant on the consideration of the sale alleged by the plaintiffs in respect of the above-mentioned property.

"4. That notwithstanding any proceedings that may have been taken regarding the sale of the property, as alleged by the plaintiffs, Baru Mal and others, plaintiffs, continued to deny, from the very beginning, the existence of a contract between the two parties respecting the sale of the property alleged by the plaintiffs, and they all along admitted the aforesaid amount of Rs. 33,359-3-6 as a debt due by the defendant.

"5. That the plaintiffs' claim in respect of the said amount of Rs. 33,359-3-6 is barred by limitation, and that on the dates mentioned in the petition of plaint on

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which the cause of action is alleged to have accrued, nothing has happened such as might furnish the plaintiffs, or any of them, with a cause of action for recovery of the said amount.

"6. That the rest of the amount claimed by the plaintiffs, or any portion of it, has never been due to the plaintiffs, or any of them, from this defendant; and apart from the fact that the amount in question may be regarded as interest accruing on the aforesaid sum of Rs. 33,359-3-6, or in any other light, that part of the claim is also now barred by limitation, if it be even assumed that the defendant was ever liable to pay that amount, which is moreover unreasonable.

"7. That Baru Mal or the plaintiffs never purchased the property in question as held by the High Court, nor are they entitled to any sort of lien on the property in question, on account of any portion of the amount claimed in this suit."

The Court of first instance (Subordinate Judge of Saharanpur), treating the suit as one for the recovery of a debt of [228] Rs. 33,359-3-6, held that the suit was within time. It observed as follows :—

"This is a case in which the two parties rely upon the very statements and evidence referred to in the former suit, contrary to the former contention; that is, the plaintiffs refer the Court to defendant's statements and evidence, and say that he struck off Rs. 33,359-3-6 from the head of balance of debt and admitted the same to be part of the sale-consideration of the immoveable property, and made entries in his account-books accordingly, and that, therefore, it no longer remained a simple debt. The defendant, on the other hand, relies on the fact that the plaintiffs all along contended in the former suit that the sale was not an absolute one, and that the contract of sale was void; that accordingly they hitherto retained the aforesaid item in their account-books as one of debt, and that, therefore, with regard to the expiry of limitation, they cannot now recover the amount in question. I am of opinion that the amount claimed is of the nature of a debt on account-books. The sale-deed which was executed was, in consequence of the fact that it was not executed in accordance with the contract admitted by the two parties, declared to be defective, and the plaintiff's right of revoking the contract was admitted by the High Court, and the defendant's claim to have the sale completed and the sale-deed completely executed was dismissed. Hence the disputed amount of debt reverted to its original condition. The plaintiffs are not right in stating that, according to ss. 64 and 65 of the Contract Act, this part of the consideration of the sale-deed was recoverable by the plaintiffs. As to the plea of limitation, it may be observed that it is wrong. The defendant, on the 3rd August, 1880, instituted a suit for having this amount of debt set-off against the consideration of the sale-deed: on the 4th March, 1884, that claim was dismissed by the High Court on appeal. The plaintiffs were under s. 12 of the Code of Civil Procedure, not competent to seek determination of this debt by means of a separate suit during the pendency of the above-mentioned suit, nor could the Court determine it separately. Therefore, for the period in which the plaintiffs were taking proper steps against the setting-off of the amount in question, an allowance should be made to the plaintiffs in computing the term of the suit, and the benefit of exclusion (of time) provided in S. 15, Act XV of 1887, should by reason of bar under s. 12, Civil Procedure Code, be given to the plaintiffs."

As to the lien claimed, the Court held that the amount claimed being of the nature of a debt, the plaintiffs had no lien on the property specified in the sale-deed; and as to interest it held that the plaintiffs should be allowed interest at the rate of 7 annas and 9 pies per cent. per mensem. It accordingly gave the plaintiffs a decree for Rs. 33,359-3-6, with interest at the rate above mentioned, and dismissed the rest of the claim.

The defendant appealed to the High Court.

Mr. C. H. Hill and Pandit Sundar Lal, for the appellant.

[229] Mr. T. Conlan, Mr. G. T. Spankie, and Pandit Bishambar Nath, for the respondents.

Mr. Hill contended that the lower Court had erroneously applied the provisions of s. 15 of the Limitation Act, and the suit, being one for a debt, was barred by limitation.

Mr. Conlan.—The suit is not one to recover a debt, but one for money had and received by the defendant for the plaintiff's use and is governed by art. 62 of the Limitation Act. The money was received by the defendant

when he treated it as received by him, by crediting it in his books, and it must be taken to have been received for the plaintiff's use when the High Court dismissed the former suit. When that happened, there was a total failure of consideration, because the defendant had already repudiated the contract which the plaintiff set up.

Mr. Hill was not called on to reply.

### JUDGMENT.

PETHERAM, C.J.—This was an action to recover a sum of Rs. 33,359-3-6, which was admittedly due by the defendant to the plaintiff, and if the defendant were an honest man he would pay the debt. He has, however, set up the plea of limitation, and the law says that he may set up that plea, and that, even if he does not, the Court is bound to give effect to it. The Judge before whom the case was tried gave judgment for the plaintiff upon grounds which it is not necessary to notice, because they have not been insisted on before us by the plaintiff's counsel, who has urged other reasons for the contention that the Limitation Act is not applicable. It is contended by him that the debt had become due by the defendant to the plaintiff within the prescribed period of limitation, and the only question therefore which we have to determine is, at what time did the debt become due.

Prior to September, 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the defendant to the plaintiff of Rs. 33,359-3-6, that being the identical amount which is claimed in the present suit. In September, 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The defendant apparently was not in a position at that time to pay in money, but he had certain landed property, and negotiations took place for [230] the sale of this property to the plaintiff, and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the plaintiff should pay this amount by giving credit to the defendant to the extent of the debt due by him, and paying the balance in cash. So far the negotiation swere completed, except apparently a few minor points. In the end, however, a dispute arose as to what had been settled as to the actual terms of the bargain which were to be reduced into writing. The defendant brought a suit against the plaintiff for specific performance of the contract which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal, the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then plaintiff, but was in fact the contract set up by the then defendant, who is now plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shows is, that the contract set up in that suit was not proved, because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiation failed, because they resulted in no agreement; and the original debt due by the present defendant to the present plaintiff always remained due and is so still.

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It is alleged that the contract was completed on the 1st September, 1879, and that is therefore the latest possible date we can look to in considering when the money became due. The whole amount had in fact become due before that date, by reason of prior transactions; but, upon the view most favourable to the plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a later date than that. The present suit was brought on the 18th September, 1884, that is to say, much [231] more than three years from the latest possible date upon which the debt can be said to have become due. Under these circumstances, the suit is barred by limitation. The plaintiff's contention is that the contract which he set up was found to have been completed; and under its terms this money, having been credited in the present defendant's books, was to be treated as a payment by the present plaintiff as a deposit on account of the sale; and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i.e.*, when this Court decided that the contract set up by the present defendant was not, but that set up by the plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itself which is now set up by the plaintiff, no deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present plaintiff's letter to the defendant demanding payment of the money, and dated the 29th September, 1879, the plaintiff did not demand the money of the defendant or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to say that the money was anything but the old balance due from the defendant to the plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the defendant a decree. The appeal must be decreed with costs.

STRAIGHT, J., concurred.

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#### APPELLATE CIVIL.

*Before Sir Comer Petheram Kt., Chief Justice, and Mr. Justice Tyrrell.*

SITA RAM (*Plaintiff*) v. ZALIM SINGH AND ANOTHER (*Defendants*).<sup>\*</sup>  
[16th March, 1886.]

*Hindu Law—Joint Hindu family—Liability of ancestral estate for satisfaction of father's debt, when not incurred for immoral purposes.*

A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit *G* died, and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas and not merely against the share therein which *G* during his lifetime might have got separated, [232] the plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special

<sup>\*</sup> First Appeal No. 118 of 1884, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 19th April, 1884.



licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in G's personal expenses.

*Held*, that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanomi Babuasin v. Modun Mohan* (1) followed.

[R., 14 B. 320 (326), 31 A. 176 (231) (F.B.) = 6 A.L.J. 263; D., 9 A. 493 (495).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Ajudhia Nath* and Babu *Dwarka Nath Banarji*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Sukh Ram*, for the respondents.

### JUDGMENT.

PETHERAM, C.J., and TYRRELL, J.—Sita Ram, a money-lender, brought this suit on a mortgage bond dated the 9th June, 1880, and two revenue receipts with a promissory note, against his debtor, Thakur Gotam Singh, the head of a joint undivided Hindu family. He claimed his money with interest by enforcement of his mortgage on ten biswas of ancestral estate in Kunwara, pledged to him as security by Gotam Singh. While the suit was in progress Gotam Singh died and the right to sue being deemed to survive, the defendant's son, Zalim Singh, and his widow, Bhawani Kuar, were brought on the record, as his legal representatives, in his place, under the provisions of s. 368 of the Civil Procedure Code. As the suit was first brought in the lifetime of Gotam Singh, the sole question was whether the debt was due and the hypothecation valid. But his death changed the aspect of the case, and new issues arose for decision. It is an unquestioned fact that the property hypothecated is part of a joint undivided ancestral estate, and it is no less certain that, on the death of Gotam Singh, the entire estate passed on his son, Zalim Singh, by survivorship. The plaintiff's right therefore to maintain his suit against Gotam Singh's heirs and his estate in their [233] hands after Gotam Singh's death, did not survive on the same ground or in the same way as it would in the similar suit brought against heirs and estates *not* governed by the Hindu law and subject to devolution by survivorship as distinguished from inheritance; in other words, the son of Gotam Singh, who, immediately on his death, took, and now represents, the whole ancestral estate, is not a person holding any property of Gotam Singh, which the latter's creditors can follow as assets of the paternal estate into the hands of the son as heir. But under the law affecting Hindu joint ancestral estate, every member of the family is a potential owner of a separable portion of his share of the estate; and as such he is competent to charge his debts on the undivided estate to the extent of his own partible, though unseparated share. It is this right to sue which has survived to the plaintiff after the death of Gotam Singh—the right to seek for a decision that, his debt being proved, the share in the estate which Gotam Singh might have got separated as his own in his lifetime stands charged with this debt under the mortgage-deed on which the claim is based, and, being made the subject of partition, may now be sold or otherwise dealt with in satisfaction of the debt. But the plaintiff wants something more. It is conceivable, and perhaps probable, that Gotam Singh's share in the family ten biswas of Kunwara may not suffice to pay the debt, and the plaintiff consequently asks for a decree against the whole ten biswas now in Zalim Singh's possession which Gotam Singh affected to deal with in his bond of June 1880.

(1) Decided by the Privy Council on the 18th Dec. 1885.

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There are two ways in which a Hindu son might be saddled with the responsibility of a paternal debt in connection with property like this ten biswas of Kunwara. The father, as head of the family and manager of its estate, might have raised the loan in this express capacity for family purposes, the money borrowed being thus applied, so as to make the son a party to the contract by procuration of his father, and by participation on his own part in the benefit of the loan. Or the plaintiff might have pleaded that the debt incurred was of such a character that the Hindu law imposed upon a pious son the duty of discharging it from his own estate. In the present case, the latter line was adopted by the creditor; and accordingly we find that the main issue propounded by the Court below was,—“What was the necessity under [234] which the money was borrowed by Gotam Singh? and was it such that the ancestral estate should be held liable for the debt?”

The Court found on the evidence, which is practically uncontradicted, in this respect, that while the father was grossly extravagant and selfish in his expenditure, still there is no evidence that the proceeds of this particular loan were applied to any special “licentious acts;” but finding that “the money in question was neither borrowed to meet any family necessity, nor laid out in necessary expenses, but was used in the personal expenses of Gotam Singh,” the Court below decreed that the debt should be charged on the share of Gotam Singh alone. This decree is challenged here on the ground that the evidence does not warrant this finding of fact, as it does not establish that Gotam Singh “wasted the money on immoral purposes,” or that the debt is such that a pious son is free to repudiate it.

It is now settled law that “sons cannot set up their rights against their father’s alienation for an antecedent debt, or against his creditors’ remedies for their debts, if not tainted with immorality. On this important question of the liability of joint estate there is now, as their Lordships think, no conflict of authority,”—*Nanomi Babuasin v. Modun Mohun* decided on the 18th December, 1885.

The Court below was therefore wrong in exempting half of the whole property mortgaged for his debt by the father Gotam Singh; and, allowing the pleas of the appellant in this respect, we must modify the decree so as to make it a decree enforceable against the entire joint ten biswas share in Kunwara, with costs. The plea in respect of the disallowed claim for Rs. 299-0-3 is without force, and is disallowed with proportionate costs.

*Appeal allowed.*

8 A. 234=6 A.W.N. (1886) 78=10 Ind. Jur. 343.

#### APPELLATE CIVIL.

*Before Sir Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Brodhurst.*

MUHAMMAD ALLAHADAD KHAN AND ANOTHER (*Plaintiffs*) v.  
MUHAMMAD ISMAIL KHAN AND OTHERS (*Defendants*).<sup>\*</sup>  
[22nd March, 1886.]

*Muhammadian law—Legitimacy—Effect of acknowledgment of sonship.*

*Held* by PETHERAM, C.J., that, according to the Muhammadian law, the effect of an acknowledgment by a Muhammadian that a particular person, [235] born of the acknowledger’s wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to

<sup>\*</sup> First Appeal No. 83 of 1885, from a decree of Babu Mirtonjoy Mukerji, Sub-ordinate Judge of Meerut, dated the 3rd March, 1885.



give him the *status* of legitimacy, is to confer upon such person the *status* of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashruf-ood Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* (1), *Muhammad Amat Ali Khan v. Lalli Begum* (2), and *Sadakat Hossein v. Mahomed Yusuf* (3), referred to.

In a suit for possession, by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son.

Held by PETHERAM, C.J. (BRODHURST, J., dissenting) that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the *status* of a legitimate son capable of inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the *status* of legitimacy.

Held by BRODHURST, J., *contra*, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff, and give him the *status* of a son, capable of inheriting. *Sadakat Hossein v. Mahomed Yusuf* (3) referred to.

THE plaint in this case stated that one Ghulam Ghaus Khan died on the 6th November, 1879, leaving by his lawful wife, Moti Begam, two sons, the plaintiff Muhammad Allahdad Khan and Ismail Khan, defendant, and three daughters, Fidayat-un-nissa, Karmat-un-nissa, and Barkat-un-nissa, defendants; that the property left by Ghulam Ghaus Khan was divisible, under Muhammadan law, into 7 sihams or shares, of which 2 shares devolved upon each of the sons and 1 share upon each of the daughters; and that in order to raise money for the purposes of this suit the plaintiff Allahdad Khan had sold one of his shares to the other plaintiff; and the plaintiffs claimed possession of 2 shares out of 7 shares in certain villages left by Ghulam Ghaus Khan; a [236] declaration of their right to redeem 2 shares out of 7 shares in certain other villages left by him, the setting aside of certain alienations made by the daughters; and mesne profits.

The defendants, Ismail Khan and the three daughters, set up as a defence to the suit that the plaintiff Allahdad Khan was not the son of Ghulam Ghaus Khan, but his step-son, having been born of Moti Begam before she married Ghulam Ghaus Khan.

The case of the plaintiff was that Allahdad Khan was the eldest son of Ghulam Ghaus Khan by Moti Begam, and that even if they failed to prove that Allahdad Khan were the son of Ghulam Ghaus Khan, yet Ghulam Ghaus Khan had acknowledged him to be his son, and therefore, under Muhammadan law, Allahdad Khan was entitled to inherit as the son of Ghulam Ghaus Khan.

The question which the lower Court considered was, "Did Ghulam Ghaus Khan acknowledge Allahdad Khan as a son of his body, or is he really a son of his loins?"

The lower Court held that the plaintiffs had failed to prove that Ghulam Ghaus Khan had acknowledged Allahdad Khan to be the son of

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(1) 11 M.I.A. 94.

(3) 10 C. 663=11 I.A. 31.

(2) 8 C. 422=9 I.A. 8.



1886 his body, or that Allahdad Khan was the son of his body, and dismissed  
MARCH 22. the suit.

APPEL- The plaintiffs appealed to the High Court.

LATE In support of their case the plaintiffs relied on, amongst other  
CIVIL. evidence, the following documentary evidence :—

- (a) A letter dated the 15th April, 1861, from Ghulam Ghaus Khan to Allahdad Khan. This letter was addressed as follows :—  
"Barkhurdar Mian Allahdad Khan, the solace of my life,"—  
"barkhurdar" being a form of address to a son. In this letter Ghulam Ghaus Khan asked Allahdad Khan to send him a power-of-attorney authorizing him to sue on certain bonds of which Allahdad Khan was the obligee. On the back of the letter he wrote a draft of the power. The material portion of the draft was as follows :—"I, Allahdad Khan, do declare that I hold certain bonds, but in consequence of my being in service I am unable to go to Bulandshahr and file suits thereon. I have therefore [237] appointed my father, Muhammad Ghulam Ghaus, my general attorney for suing on those bonds, etc."
- (b) A plaint in a suit instituted by Ghulam Ghaus Khan on one of the bonds mentioned above as attorney of Allahdad Khan. This plaint was entitled :—"Ghulam Ghaus Khan, Mukhtar (Attorney) of Muhammad Allahdad Khan, his son, etc.," and was signed by Ghulam Ghaus Khan.
- (c) A deposition of Ghulam Ghaus Khan, taken in the suit above mentioned and signed by him, dated in June, 1862, in which spoke of Allahdad Khan as "his son."
- (d) A general power-of-attorney, dated in October, 1877, executed by Fidayat-un-nissa, defendant, daughter of Ghulam Ghaus Khan, appointing "her own brother," Allahdad Khan, her general attorney.
- (e) A letter from Ghulam Ghaus Khan to Allahdad Khan, dated in 1861, addressed as follows :—"To my Barkhurdar, light of my eyes and comfort of my soul, Muhammad Allahdad Khan. May he live in peace."
- (f) Certain other letters from Ismail Khan, defendant, to Allahdad Khan, which, it was contended, showed that the writer treated Allahdad Khan as his elder brother.

The defendants relied on a copy of paragraph 5 of the *wajib-ul-arz*, dated the 17th December, 1870, of one of the villages in suit. This, it was alleged, was a declaration by Ghulam Ghaus Khan. It was signed by the Deputy Collector and by "Fazal Husain, mukhtar of the zemindar." The paragraph was in these terms :—

"No property is transferred by mortgage, but in future I have every power to transfer it to any person I like : my eldest son, Muhammad Ismail Khan, is major, and intelligent and clever ; and the two other sons are minors : after me my eldest son Muhammad Ismail Khan shall be the owner and manager of the whole estate, and both his younger brothers shall, during their minority and after attaining majority, remain under his control and live joint with him ; their elder brother shall attend [238] to their necessary expenses and render every kind of assistance on the occasion of their marriages, &c."

Mr. W. M. Colvin, Mr. Abdul Majid, Isala Lalta Prasad, and Shah Asad Ali, for the appellants.

Mr. T. Conlan, Lala Juala Prasad, and Babu Jogindro Nath Chaudhri for the respondents.

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## JUDGMENT.

BRODHURST, J.—One Ghulam Ghaus Khan resided at Jhajhar, zila Bulandshahr, and owned zemindari and other property in that district. According to evidence on the record, he was twice married, and he also had a concubine. The latter survived him, whilst both of his wives predeceased him. He died on the 6th November, 1879, and left several legitimate and illegitimate children, the former being by his second wife, Moti Begam, and the latter by the concubine Mussammatt Nanhi.

Almost immediately after the death of Ghulam Ghaus, proceedings for mutation of names were taken in the Revenue Court. All the persons then claiming to be the heirs of Ghulam Ghaus took part in those proceedings, and on the 15th March, 1880, the Deputy Collector, Lachman Singh, decided the case in favour of Ismail Khan, son of Ghulam Ghaus Khan, and directed that his name should be substituted for that of his father in the register of mutations. In consequence of their order a suit was, on the 4th May, 1880, brought in the Court of the Judge of Meerut against Ismail Khan, who alleged that he was, and was admitted to be, the legitimate and eldest son of Ghulam Ghaus and Moti Begam.

The plaintiffs were eight persons—namely, the three full sisters of Ismail Khan, Nanhi, styling herself Nanhi Begam, widow of Ghulam Ghaus, and her three sons and one daughter, calling themselves the lawful issue of Ghulam Ghaus Khan. These plaintiffs claimed their respective shares in the property of Ghulam Ghaus, deceased. The case was tried by the Subordinate Judge of Meerut. The defendant, as is reported on page 724, I.L.R., 3 All., “set up as a defence to this suit that Nanhi Begam was not the lawful wife of Ghulam Ghaus Khan, and her children by him were illegitimate, and therefore her claim and that of such children to inherit Ghulam Ghaus Khan’s estate was not maintainable; and that by the custom of the family, which the will of Ghulam Ghaus [239] Khan recognised and affirmed, the eldest son succeeded, and females were excluded from succession, and therefore the claim of the other plaintiffs, the daughters of Ghulam Ghaus Khan, was not maintainable. The Court of first instance fixed the following issues, among others, for trial:—“Is Nanhi Begam the married wife of Ghulam Ghaus Khan or his mistress? Is she, and are her children, entitled to inherit? Are the daughters of Ghulam Ghaus Khan entitled to inherit, or are females in the families of Ghulam Ghaus Khan not entitled to inherit, and the eldest son alone succeeds, and other members of the family are excluded from inheritance? How far can the will be acted on? The Court found on the evidence in the case that the children of Nanhi Begum by Ghulam Ghaus Khan had been uniformly treated by their father and his lawful daughters and son as legitimate, and held, relying on *Khajooroonissa v. Rowshan Jehan* (1), and the Privy Council decision therein cited; that it must be presumed that Nanhi Begam was the lawful wife of Ghulam Ghaus Khan, and her children by him legitimate. It also found that there was no such custom of succession in the family of Ghulam Ghaus Khan as was set up by the defendant; and it held, relying on *Khajooroonissa v. Rowshan Jehan*, that, according to Muhammadan law, a devise of property could not be made to one heir to the exclusion of the other heirs without their consent; and that therefore the plaintiff

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could not be excluded from inheriting by the will of Ghulam Ghaus Khan in the defendant's favour. It accordingly gave the plaintiffs a decree for their legal shares of the estate of Ghulam Ghaus Khan. The defendant appealed to the High Court. On his behalf it was contended on the evidence that Nanhi Begam had not been treated by Ghulam Ghaus Khan and the members of the family as his wife, or her children by him as legitimate, and that the custom of succession in the family set up by him was proved."

A Bench of this Court (Spankie and Straight, JJ.), after referring to the evidence on the record and certain rulings of the Privy Council, observed:—"We therefore cannot but conclude that Nanhi was not the wife of Ghulam Ghaus Khan, and that the children were born illegitimate, and have never been legitimated by treatment in the house of their father as legitimate, [240] and on this ground the suit of Nanhi and her children must fail." The learned Judges also held that the custom alleged by the defendant-appellant of primogeniture, and the exclusion of the females and other heirs from inheritance, was established against the defendant; that this plea failing, "the heirship of the three legitimate daughters of Ghulam Ghaus Khan cannot be disputed;" and the learned Judges consequently modified the decree of the first Court, dismissing the claim of Nanhi Begam and her children, and giving the remaining three plaintiffs, the full sisters of the defendant, a decree for the shares to which they were entitled under the Muhammadan law.

The original suit was instituted on the 4th May, 1880, and was decided on the 14th July, 1880. The appeal was filed on the 13th August, 1880, and was disposed of on the 21st April, 1881. During the whole time that the above-mentioned proceedings lasted, Allahdad Khan never applied to be made a party, and he did not bring his present suit until the 13th May, 1884, i.e., not until after the expiration of three years from the disposal of the above-mentioned appeal, and of four and a half years from the date of the death of Ghulam Ghaus Khan.

He now alleges that he and the defendants Ismail, Musammats Fidayat-un-nissa, Karamat-un-nissa and Barkat-un-nissa, "are the children of Ghulam Ghaus Khan by Musammata Moti Begam, his lawful wife;" that cases and proceedings which he alludes to have taken place in his absence and without his knowledge, and therefore he and the other plaintiff also, as explained in para. 7 of the plaint, sue for his share of the property left by Ghulam Ghaus Khan. The defendants replied that the plaintiff was not the son of Ghulam Ghaus Khan; that he was not born in wedlock; that he came with Moti Begam to Ghulam Ghaus Khan's house; that under the Muhammadan law he did not possess any right in the estate left by Ghulam Ghaus Khan; that his allegations were entirely false; that "all the proceedings taken in the revenue, the criminal, and the civil cases by the defendants Nos. 2, 3 and 4 against defendant No. 1, were taken with the knowledge and information of the plaintiff and in his presence, and he conducted the proceedings in the said cases as a karinda (agent) of defendant No. 1, against defendants Nos. 2, 3, and 4, without [241] advancing his own right against the defendants in any Court; that had plaintiff been the eldest son of Ghulam Ghaus Khan, his name would surely have been recorded in the village administration paper, verified by Ghulam Ghaus Khan; that, as a general rule, any son or daughter brought by a wife with her to the house of her second husband is called by the latter his son or daughter: therefore if Ghulam Ghaus Khan has on some occasion called plaintiff No. 1 his son, it shall not make the said plaintiff

actually his son." The Subordinate Judge appears to have fully considered the evidence that has been adduced on either side, as also the law and the rulings referred to, and he has found that Allahdad Khan is not a son of Ghulam Ghaus Khan; that Ghulam Ghaus never really acknowledged him to be his son; that Allahdad consequently has no right to inherit any portion of the estate of Ghulam Ghaus; and the Subordinate Judge has dismissed the suit with costs.

The plaintiffs have taken numerous grounds of appeal against this decision. They still contend that Allahdad is the eldest and legitimate son of Ghulam Ghaus and Moti Begam, having been born in wedlock, and that even if he was not born in wedlock, he has been legitimated by Ghulam Ghaus Khan's admission and treatment of him, and that the judgment of the lower Court is opposed to the evidence, the law, and the rulings of the Privy Council and of every High Court. I concur generally in the opinion that the Subordinate Judge has expressed with regard to the evidence for the plaintiffs.

I agree with him in thinking that Mr. Young, who was examined by commission, has to the best of his belief, deposed with entire truthfulness, but nevertheless I consider that Mr. Young's evidence is of very little, if any, value. Mr. Young's evidence relates to matters that occurred about 24 years previously, and amounts to this,—that when he was at Bulandshahr in 1860, Ghulam Ghaus Khan brought Allahdad Khan, who was then a young man of 20 years of age, to see him, and brought him, so far as Mr. Young remembers, "as his son," and afterwards, in 1861 or 1862, sent him to Banda where Mr. Young was Superintendent of Police, and Mr. Young deposes:—"I gave him [242] the appointment of head constable of police on the strength of his being the son of the above (Ghulam Ghaus Khan). I have always considered Allahdad Khan to be his son, being sent to me as such, as far as I can remember." Mr. Young is apparently by far the most credible of the plaintiff's witnesses, and great stress has been laid upon what he has stated; but from his evidence it is not clear that Ghulam Ghaus Khan informed Mr. Young that Allahdad Khan was his own son; and that Mr. Young's knowledge with respect to Ghulam Ghaus Khan's family was extremely limited is apparent from his evidence in cross-examination. Moreover, as Ghulam Ghaus Khan had in 1857 saved the life of Mr. Young, it is natural to suppose that on his application, Mr. Young would gladly have conferred the appointment of head constable upon Allahdad Khan, provided that the young man was qualified for the post, and it is not probable that Mr. Young would, under such circumstances, have hesitated to comply with Ghulam Ghaus Khan's request, even if he was then aware that Allahdad was not Ghulam Ghaus Khan's own son, but his step-son. From the evidence on the record, I am satisfied that Allahdad Khan was the son of Moti Begam, and that he was born a year or two before Moti Begam was married to Ghulam Ghaus Khan. Prior to that marriage Moti was a prostitute, and there is no proof who was the father of Allahdad. There is no evidence that Moti co-habited with Ghulam Ghaus Khan before their marriage. Had she done so and borne a child to him, it is improbable that the marriage would have been so long delayed, and if Ghulam Ghaus believed Allahdad to be his son, he surely, after he had married that son's mother, would have taken effective steps to legitimate his son, and to make it widely known that Allahdad was his eldest son, and an heir to his property. He did not do so. Allahdad was from about his second year at Jhajhar, and he apparently lived

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sometimes with his maternal grandmother and uncle, but more frequently at the house of his mother and her husband. He was thus brought up with his half-brothers and sisters, the legitimate children of Ghulam Ghaus Khan and Moti Begam; and as his own father's name was unknown, as he came to Ghulam Ghaus Khan's house in his infancy, was the son of Ghulam Ghaus Khan's wife, and the brother of Ghulam Ghaus [243] Khan's children, he doubtless came to be regarded by Ghulam Ghaus as a step-son, and to be called his son, much in the same way as a European, who marries a widow with young children, will ordinarily call those children his children, and be termed by them their father. If Ghulam Ghaus did, under the circumstances above mentioned, speak of Allahdad as his son, he apparently did not thereby act contrary to the custom prevailing among Muhammadans.

The few letters and other documents that have been filed by the plaintiffs, and are specially relied upon by them, bear dates corresponding with the years 1861 and 1862. In none of them is Allahdad called the eldest son of Ghulam Ghaus or his own son and heir. They were written at the time when Allahdad Khan was employed as a head constable in this district of Bānda, and the power-of-attorney was executed with the special object of enabling Ghulam Ghaus to sue for money due to Allahdad, and which the latter, owing to his being in Government service in a distant district, would not otherwise have been able to realize.

In accordance with the practice, a man in executing documents or making his deposition states the name of his father. Had Allahdad in the general power-of-attorney executed by him in favour of Ghulam Ghaus Khan, or in the evidence of the latter person, been described as the son of an unknown father, it would have reflected upon Moti Begam, the lately-deceased mother of Allahdad and wife of Ghulam Ghaus Khan; it would have revived a scandal that had perhaps been forgotten after many years of married life, and would have been highly unpleasant to both men, and for these reasons Ghulam Ghaus Khan was probably in the document, as in ordinary conversation, styled the father of Allahdad Khan. Allahdad was apparently 30 years of age when Ghulam Ghaus Khan died; but with the exception of the few papers written 17 or 18 years before his death, and under the special circumstances mentioned above, there is no documentary evidence to support the plaintiff's allegations. On the other hand, if the *wajib-ul-arz*, dated the 17th of December, 1870, is, as I think, admissible in evidence, it furnishes the strongest proof against Allahdad's pretensions. The extract from the *wajib-ul-arz*, which has been admitted [244] by the lower Court, was admitted in evidence by another Subordinate Judge in the suit of 1880, and was considered by a Bench of this Court in the first appeal above referred to as having been disposed of on the 21st April, 1881. The *wajib-ul-arz* appears to have been duly attested and signed by Raja Lachman Singh, a Deputy Collector in charge of the settlement office at Bulandshahr, under Rule 49 of rules issued with the sanction of the Governor-General in Council under s. 257 of Act XIX of 1873. The *wajib-ul-arz* was produced before Raja Lachman Singh, in the presence of the mukhtar of Ghulam Ghaus Khan, of the patwāri of his village, and of the kanūngo, and I see no reason whatever to doubt that its contents were in accordance with the wishes and instructions of Ghulam Ghaus Khan; and this being the case, it is obvious that in September, 1870, that is at a time when there was not alleged to have been any difference between Ghulam Ghaus and Allahdad, Ghulam Ghaus Khan caused an entry to be made in the settlement record that Muhammad

Ismail Khan was his eldest son; that he would be the owner and manager of the whole estate; that the two other sons of Ghulam Ghaus were minors; and that they both would, during their minority and after attaining majority, live jointly with Ismail Khan and under his control.

Allahdad was at that time 30 years of age but he is neither mentioned as a son nor referred to in any way whatever. This *wajib-ul-arz* was prepared, attested, and signed nine years before Ghulam Ghaus died; its contents, if Allahdad was the eldest son, were very startling, untrue, and unjust. They must have been well known to many persons, and could not well be concealed from the eldest son, who had been disinherited and ignored without any apparent reason. But this document was never disputed during the nine years that Ghulam Ghaus lived after its execution.

There has been no consecutive course of treatment of Allahdad by Ghulam Ghaus during a number of years, tending to show that Ghulam Ghaus considered him the son of his loins and an heir of his estate; on the contrary, the acts of Ghulam Ghaus, from the time of his marriage with Moti Begam up to the date of his death, seem to me to prove that Ghulam Ghaus did not regard Allahdad as a son who was eventually to succeed to a [245] share of the ancestral estate. Allahdad, if the son of Ghulam Ghaus Khan, was his eldest son. The *Rais* of Jhajhar, with a property valued at two lakhs of rupees, would not be likely to allow his own eldest son and heir to take the post of head constable of police and go away to a distant district; but it is intelligible that he would be glad to obtain an appointment of that kind for his wife's illegitimate son, and consider it a suitable provision for the young man. The following appears to be established facts:—that Allahdad, was not born in wedlock; that he was the son of Moti by an unknown father; that his mother was at the time of his birth, and up to the time that she married Ghulam Ghaus, a prostitute; that Allahdad did not go to Ghulam Ghaus Khan's village to reside there until he was one or two years of age or more; and that when there he lived sometimes with his maternal grandmother and uncle, who apparently were persons of low position, and sometimes with his mother and her husband; that in 1861, when he was about 21 years of age, Ghulam Ghaus Khan obtained for him the post of head constable of police in the district of Banda, and he was thus sent to a considerable distance from the town of Jhajhar; that in the course of about eighteen months he was dismissed from his appointment; that he subsequently for several years tried to obtain his reinstatement, but without success; that he returned to Jhajhar and constantly resided there with his wife and family; that he admittedly was there in October, 1879, that is, only a few days before Ghulam Ghaus Khan died; and that he and his wife did not finally leave that town until towards the end of 1883; that Ghulam Ghaus Khan made no allusion to him in the *wajib-ul-arz* of 1870, and styled Ismail Khan his eldest son; and although there was no variance between Ghulam Ghaus and Allahdad prior to 1879, Ghulam Ghaus had, for at least two years previous to 1879, made over the management of his estate to Ismail Khan, who admittedly was his legitimate son, had never taken service, and always remained at home.

It is conceded that there was not any ill-feeling between Allahdad and Ghulam Ghaus prior to 1879. The former deposed:—"At the beginning of 1879 there was some variance between myself and Ghulam Ghaus Khan. He died on the 6th November, [246] 1879. The matter of difference was, that my sister Fidayat-un-nissa, who was a widow,

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was about marrying a second time, to which Ghulam Ghaus and Iemal Khan had consented, but I had not been consulted. There was no difference before then." There is no reliable evidence that there was, even in 1879, any difference between Ghulam Ghaus and Allahdad, and if the latter was the eldest son and was on good terms with his father, there is no apparent reason why his consent to his sister's re-marriage should not have been asked for equally with that of Ismail, his younger brother. His admission that he was not consulted tells against the position he sets up for himself.

Were Allahdad either the legitimate or legitimated son of Ghulam Ghaus Khan, it is not highly improbable that Ghulam Ghaus Khan and his other sons and daughters, legitimate and illegitimate, should all, without any sufficient reason, have acted towards him in the way they are shown to have done. It is proved that Allahdad not only knew about the mutation proceedings in the Revenue Court and the suit of 1880 in the Civil Court, but that he also used to attend upon Ismail Khan's pleader on behalf of Ismail Khan during the pendency of those cases, and his acts and omissions for many years past tend to support the allegations of the defendants-respondents and to prove the falseness of his claim. From the evidence and the whole circumstances of the case it is, I think, palpable that Allahdad was not the son of Ghulam Ghaus Khan; that he was not legitimated by Ghulam Ghaus, and that he well knew that he was, at the highest, nothing more than Ghulam Ghaus Khan's step-son had never been called his son except by courtesy, and had no right to any share in his (Ghulam Ghaus Khan's) property. This case is, in my opinion, very different to the cases referred to by the learned counsel for the appellants, and is not governed by any of the Privy Council rulings. The most recent judgment of their Lordships of the Privy Council on this branch of the Muhammadan Law that has come to my notice was delivered in December, 1883, in the case of *Sadukat Hossein v. Mahomed Yusuf* (1). In that judgment, on page 36, the following passage occurs:—"The Judge of the primary Court, who saw and who heard the witnesses, and the Judges of the Supreme [247] Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been sufficiently established by recognition so as to enable him to claim as heir."

I see nothing to lead me to believe that Ghulam Ghaus Khan ever regarded Allahdad in any other light than that of a step-son; and applying the principle contained in the above remarks of their Lordships of the Privy Council to the present case, I find that there is no sufficient evidence of the acknowledgment by Ghulam Ghaus Khan of Allahdad Khan as his son, from which an inference is fairly to be deduced that Ghulam Ghaus Khan ever intended to recognise him and give him the *status* of a son capable of inheriting, and I would therefore dismiss the appeal with costs.

PETHERAM, C.J.—The evidence in this case proves, in my opinion, that the plaintiff-appellant, Allahdad Khan, was the illegitimate son of

(1) 10. C. 663=11 I.A. 31.

Ghulam Ghaus Khan. I also think, upon the evidence, that he was born before the marriage of Ghulam Ghaus Khan with Moti Begam, and therefore it has been established that he was in the inception, at all events, an illegitimate son of his father. Then there is the material circumstance that it is proved by evidence, the truth of which is beyond doubt, that upon several occasions, in 1862, Ghulam Ghaus Khan did at the time acknowledge the plaintiff Allahdad Khan to be his son in fact. I refer in particular to the letter from Ghulam Ghaus Khan to Allahdad Khan, dated the 15th April, 1861, in which the latter is directed to prepare a general power-of-attorney, describing the former as his father. I take it as proved, therefore, first, that Allahdad Khan was, in fact, Ghulam Ghaus Khan's illegitimate son, and secondly, Ghulam Ghaus Khan acknowledged him as such on many occasions after his marriage with Moti Begam. The case thus resolves itself into a pure question of law, namely:—What, [248] according to the Muhammadan law, is the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledged's wife before marriage, is his son? How does such an acknowledgment affect the *status* of the person in reference to whom it is made? The answer to this question appears to me to depend upon the effect of several decisions of the Privy Council, and if the decisions were precisely in unison, there would be no difficulty in the matter. At first sight, however, they appear to be contradictory, and I have found it far from easy to arrive at a definite conclusion as to the rule of law which they were intended to express. The first of the rulings I refer to is in the case of *Ashrufodd Dowlah Ahmed Hossein Khan v. Hyder Hossein Khan* (1). The parties in that case belonged to the *Shia* sect of Muhammadans. This respondent claimed to be the son of Nabab Ameenood Dowlah, but the appellants alleged that he was illegitimate. "He, however, relied on a *moottah* (or irregular) marriage with his mother with the Nawab, and his consequent birth in wedlock, and insisted that the Nawab had in his lifetime acknowledged him as his son; and he further relied on a decision of the Civil Judge at Lucknow in a summary suit for the administration of goods of the Nawab, under the Acts Nos. XIX and XX of 1841 and X of 1858, by which he had obtained a certificate of joint administration and title with the appellants, subject to their right to bring a suit to prove his illegitimacy. The appellants denied the *moottah* marriage and the declaration and acknowledgment by the Nawab of the respondent as his son, and set up and relied on a deed of disclaimer and repudiation of the respondent, executed by the Nawab in his lifetime, denying that the respondent was his son, which deed was proved in the suit." In that case, therefore, the respondent was the Nawab's son, and a question arose as to his legitimacy, and whether, supposing him to be illegitimate, he had been acknowledged by his father, and the *status* of a legitimate son was conferred on him. The judgment of the Privy Council was delivered by Sir James Colville. He said:—"The appellants brought their suit in the Civil Court at Lucknow on the 6th June, 1861. The object of the suit, as it appears from the plaint, was to be relieved [249] from the effects of the summary decree and to establish the respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment. The issues, as also the finding, are carefully framed and

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evidence an accurate knowledge of the Muhammadan Law as to legitimacy. The first, second, and third issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second, and third issues are as follows:—First, did Nawab Ameenood Dowlah (deceased) contract *moottah* with defendant's mother before or after his birth? Second, has the deed of repudiation (dated 23rd *Suffar Hijri*) the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made? Third, if defendant be not a legitimate son, is he an illegitimate son of deceased? It was admitted on the pleadings that a *moottah* marriage at some time had been contracted between the late Vizier and the respondent's mother, but the plaintiff stated in effect that the conception and birth of the respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a debt to it, and alleged the legitimacy of the respondent as a child born of that marriage. The existence of *moottah* marriage therefore, at some time, was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word 'sonship,' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Muhammadan law, of acknowledgment of antecedent right established by the acknowledgment of the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy of a son."

From this it is obvious that in 1866, when the judgment of the Privy Council in that case was delivered, their Lordships were of opinion that an acknowledgment of mere sonship was not sufficient; that the question was not whether the person concerned was acknowledged to be the son of the acknowledger, but whether the [250] father, by acknowledgment, had given him the *status* of a legitimate son. This is different from the question whether the father had acknowledged that the person was in fact his son, that being a preliminary matter. I gather, especially from the third issue mentioned, that the Privy Council were at that time of opinion that a Muhammadan could not make another person's son his own, but that all he could do was to give his illegitimate son the *status* of legitimacy, if he desired to do so.

Now, in the present case, it is clear from the facts proved that Ghulam Ghaus Khan, though he intended to acknowledge Allahdad Khan, as *his son in fact*, never intended to give him the *status* of a legitimate son, because he did not treat him as his legitimate son, and the young man's conduct, after his father's death, shows that he never understood his father to have meant to give him the *status* of a legitimate son, or to have done more than acknowledge the fact of his sonship.

The next decision of the Privy Council on this subject was in the case of *Muhammad Azmat Ali Khan v. Lalli Begum* (1) decided in 1881, and it appears to me that the sole question on the determination of which the present case depends, is whether this second judgment of the Privy Council has altered the law laid down in the first, so as to establish the proposition that a mere acknowledgment of the fact of sonship confers the *status* of legitimacy. In delivering their Lordships' judgment Sir Montague Smith said:—"The only question which remains on this part of

the case is as to the effect of these acknowledgments. Both the Judges of the Chief Court, who have given learned and careful judgments, have gone very fully into the authorities upon this question. Their Lordships, however, are relieved from a discussion of these authorities, inasmuch as the rule of Muhammadan law has not been disputed at the Bar, namely, that the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons, unless certain conditions exist, which do not occur in this case."

Now the conditions here referred to were not such as exist in the case before us. They were conditions showing that it was [251] impossible that the person claiming the rights of a son should be, in fact, the son of the person whom he alleged to be his father. What was held was that an acknowledgment of children by a Muhammadan *as his sons* gave them the *status* of legitimacy. I am unable to avoid the conclusion that this is what was held by the Privy Council in that case.

Now this decision is binding on us, unless it has been overruled by the Privy Council itself. The only other ruling of their Lordships on the subject is in *Sadakat Hossein v. Mahomed Yusuf* (1). In delivering judgment, Lord Fitzgerald quoted the observations of Sir Montague Smith upon which I had commented to the effect that "the acknowledgment and recognition of children by a Muhammadan as his sons gives them the *status* of sons capable of inheriting as legitimate sons," and said:—"Their Lordships do not intend at all to depart from that rule, or to throw any doubt upon it." So that the proposition laid down by Sir Montague Smith is distinctly re-affirmed. Lord Fitzgerald then continues:—"The Judge of the primary Court, who saw and who heard the witnesses, and the Judges of the Supreme Court who examined into the evidence, afterwards concur in opinion that there was sufficient evidence of the acknowledgment by *Amir Hossein* of *Selim* as his son, from which an inference is fairly to be deduced that the father intended to recognise him and give him the *status* of a son capable of inheriting. Upon that point both the Courts come to one conclusion, and that conclusion their Lordships adopt. They think that the *status* of *Selim* as son has been especially established by recognition so as to enable him to claim as heir."

This latter passage does to some extent appear to dilute the proposition stated by Sir Montague Smith, but as the first passage distinctly and in terms affirms that proposition, I am of opinion that it carries the plaintiff before us the whole way that is necessary for the establishment of his case. Under these circumstances I am of opinion that the judgment of the first Court should be reversed and the plaintiff's claim allowed, but as there is a difference of opinion in this Court, our decree must be in accordance [252] with that of the Court below. I must add, in reference to the question of law which I have discussed, that I have given expression to what appears to me to be the law as laid down in the books, but that the law so laid down is not, in my opinion, in accordance with the custom of the people of this country.

*Appeal dismissed.*

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APRIL 5.

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8 A. 252=6 A.W.N. (1886) 71.

CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS v. DUNGAR AND ANOTHER. [5th April, 1886.]

8 A. 252= Act XLV of 1860 (Penal Code), s. 201.

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(1886) 71.

S. 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crime, but only to the cause of a person who screens the principal or actual offender. *Queen v. Ram Scander Shooter* (1), *Reg. v. Kashinath Dinkar* (2), *Empress v. Kishna* (3), *Empress v. Behala Bibi* (4), and *Queen-Empress v. Lalli* (5), referred to.

[F., 22 C. 638 (640) ; R., 8 Cr. L.J. 191=1 S.L.R. 73 (81) ; 1 L.B.R. 316 (325) ; 1 L.B.R. 327 (328) ; 1 P.R. 1904=30 P.L.R. 1904 ; Rat. Un. Cr. C. 799 (800) ; 2 Weir 301.]

THIS was a case the record of which the High Court of its own motion called for in the exercise of its powers of revision. The facts are sufficiently stated in the order of the Court.

## ORDER.

BRODHURST, J.—Dungar Singh and his wife Dulari were committed to the sessions under ss. 302, 109-302, and 411, of the Indian Penal Code, *i.e.*, they were committed of the offences of murder, abetment of murder, and dishonestly receiving stolen property.

The Sessions Judge apparently struck out of the second charge from the charge-sheet, and in lieu of it entered a charge under s. 201 of the Penal Code, as follows :—"At Sumerwa, knowing that Thakur Singh had been murdered, concealed his body, causing evidence of the offence to disappear, with the intention of screening the murderer from legal punishment."

The Judge, concurring with the assessors, found both of the accused not guilty of murder, but "guilty of concealing the body of Thakur Singh, knowing that he had been murdered, intending to screen the murderer from legal punishment."

[253] The Judge, concurring with the assessors, found Dungar Singh not guilty of dishonestly receiving stolen property, and, concurring with one assessor, and differing from the other two assessors, he found Dulari guilty of the last-mentioned offence.

The Judge sentenced Dungar Singh to five years' rigorous imprisonment under s. 201, and he sentenced Dulari to seven years' imprisonment under s. 201, and to three years' similar imprisonment under s. 411, the latter sentence to commence on the expiration of the former one.

The boy who was murdered was a distant relative of the accused. He was missed on the morning of the 17th August last. Search was made for him, and the Judge observes :—"On the morning of the 19th the body was found in the ruin of Hazari Singh, which had been previously searched without the body being found. It appears to have been buried, so the neighbouring houses were searched, and in Dungar Singh's house signs of a body being buried were found, and both accused have throughout the enquiry and trial admitted that the body was actually

(1) 7 W.R. Cr. 52.  
(4) 6 C. 789.

(2) 8 B.H.C.R.Cr.C. 126.

(3) 2 A. 713.  
(5) 7 A. 749.

buried in their house. An armlet worth Rs. 3 was on the body, silver bracelets worth Rs. 25 were missing, and also gold earrings worth Rs. 5-8. Dungar Singh was *challaned* on the 19th August, and on the 21st Dulari, in the presence of the head constable and two respectable witnesses, went to her house, and putting her arm far into a pacca drain, produced the four *karras*, which are recognised as those of the boy."

Dungar Singh "declares that next morning his wife showed him the corpse in the house, and he proposed to produce it before the head constable, then in the village, but on his wife saying that she would be charged with the murder, he buried it in the house, and in the night put it into Hazari's ruin."

Dulari "in her subsequent statements to the Magistrate still states that Girwar Singh killed the boy, but that she did not see him do so, and that she found the corpse lying in her house at dawn, and told her husband, who proposed to show it to the head constable, but that she persuaded him not to do so, as the head constable would accuse her of the crime. She states that only the armlet was on the body and no other ornaments, and that she [254] alone buried the body, and subsequently threw it into the ruin. Before this Court she prays that whatever punishment be given may be inflicted on her, as if her husband is punished, he will lose his zemindari share. I am of opinion that the circumstantial evidence proves a murder committed by one or both of the accused persons, but that it does not conclusively prove which of them is guilty of the crime. It may have been committed by the wife in the absence of the husband, or by the husband in the absence of the wife, and hence it cannot be brought home to either of the accused persons."

With regard to the charge under s. 201 of the Penal Code that was added in the Court of Session the Judge has observed :—"It may be urged perhaps that that section does not apply to a criminal concealing the evidence of his own crime. I cannot think there is any force in this argument. Every rational system of jurisprudence is careful to distinguish and punish separately each separate step in crime in order that a criminal may have a motive for stopping short even in the midst of criminal acts. A criminal who obliterates all traces of his crime has distinctly taken one step further against public justice than a criminal who does not do so, and should be punished accordingly. I cannot imagine that any person, merely because he is a criminal, has a vested right to defeat the course of justice, which is withheld from innocent persons ; nor can I see that a criminal who has escaped conviction for a major crime, by obliterating all evidence of the crime, should be allowed to do this with impunity. I cannot see that any doctrine of merger is applicable, unless the minor crime is distinctly included in the major, and I do not think that a person accused, *e.g.*, of illegal possession of a weapon, could claim an acquittal on the ground that he had committed a murder with that weapon. I have no doubt that the words of s. 201, Indian Penal Code, construed in the strictest manner ; do cover the case of a criminal concealing his own crime. If the Legislature meant otherwise, it could and should have said so, but it has not said so, nor do I think it meant so."

I do not feel called upon to express any opinion as to the way in which s. 201 of the Indian Penal Code should have been drawn. [255] All that I conceive I have to do is to decide whether that section does or does not apply to a criminal causing disappearance of evidence of his own crime. The section is contained in Chapter XI, the heading of which is "Of false evidence and offences against public justice." The marginal

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note of s. 201 is "Causing disappearance of evidence of an offence committed or giving false information touching it to screen the offender." This is a correct abbreviation of the section, and from the wording of the section itself, and for the reasons given by Mr. Justice Lloyd, there is not, in my opinion, any room for doubt that the section applies merely to the person who screens the principal or actual offender. There are several judgments of High Courts in India which support this opinion, and I am not aware of any that are in conflict with it. All of these judgments have not been reported, but it is quite sufficient to refer to the following five rulings—*Queen v. Ram Soonder Shootar* (1), *Reg. v. Kashinath Dinkar* (2), *Empress v. Krishna* (3), *Empress v. Behala Bibi* (4), *Empress v. Lalli* (5). These rulings extend over a period of about nineteen years, and are by nine Judges of three of the High Courts. It is incredible that all of them can have escaped the notice of the Legislature, and it is therefore reasonable to suppose that the section would have been amended had its meaning been misinterpreted by so many Judges of at least three of the High Courts in India. As, in my opinion, the conviction of Dungar Singh and Dulari under s. 201 of the Indian Penal Code is illegal, I am constrained to annul the convictions and sentences under that section, and to direct that Dungar Singh be released.

I see no reason to interfere with the sentence that has been passed upon Dulari under s. 411 of the Indian Penal Code.

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8 A. 256 = 6 A.W.N. (1886) 74.

[256] APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

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HARJAS AND OTHERS (*Defendants*) v. RADHA KISHAN (*Plaintiff*).<sup>\*</sup>  
[12th April, 1886.]

*Sir-land—Ex-proprietary tenancy—Act XII of 1881 (N.-W. P. Rent Act), s. 7.*

The words "held by him as *sir*" in s. 7 of Act XII of 1881 (N.-W. P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled, as *sir*; and as literal an interpretation should be placed upon these words as is consistent with the canons of construction.

In 1879, one of the defendants sold a one-third share of certain *sir-land* in a village to the plaintiff, who, at the time, was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that after the sale, he continued in possession of the *sir-land* till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land.

*Held* that the defendants, being ex-proprietary tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of s. 7 of the N.-W. P. Rent Act; and the plaintiff's contention that because for four or five years the defendants failed to assert their ex-proprietary tenant rights, they were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability.

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<sup>\*</sup> Second Appeal No. 990 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Shaharanpur, dated the 27th March, 1885, modifying a decree of Munshi Ganga Saran, Munsif of Shaharanpur, dated the 9th December, 1884.

(1) 7 W.R. Cr. 52.

(3) 2 A. 713.

(4) 6 C. 789.

(2) 8 B.H.C.R. Cr. C. 126.

(5) 7 A. 749.

*Held* also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his *sir* at the time of the sale of his proprietary interest, within the meaning of s. 7 of the Rent Act.

[R., 8 N.L.R. 147.]

THE plaintiff in this suit, on the 29th July, 1879, purchased from Didari, defendant, a one-third share of 39 bighas and 10 biswas of *sir*-land situate in mauza Tawaya, which jointly belonged to Didari and his two brothers, Hazari and Harjas. These two persons were defendants in the Court of first instance. Hazari died subsequently to the passing of the decree of that Court, as likewise Didari. It appeared that at the time of this sale the plaintiff was in cultivatory possession of the land representing Didari's share under a mortgage from the latter, dated the 3rd September, 1877. The plaintiff alleged that he continued in possession till July, 1884, when Didari wrongfully dispossessed him at the [257] instigation of the other defendants, and he claimed, by reason of such dispossession, to recover the land and mesne profits. The defendant Didari set up as a defence that under s. 7 of the N.-W.P. Rent Act he was entitled to possession of the land as an ex-proprietary tenant.

The Court of first instance (Munsif of Saharanpur) held that although the plaintiff had been allowed to remain in possession after the sale, his dispossession and Didari's entry on the land was not wrongful, inasmuch as the plaintiff had not acquired possession by virtue of the sale, and as Didari was entitled to possession an ex-proprietary tenant from the date of the sale. It found that "there was nothing to show that Didari surrendered or relinquished such right;" and that it was in all probability because he was ignorant of his right, that he did not at once avail himself of it, but allowed the plaintiff to remain in possession. It therefore dismissed the suit.

On appeal by the plaintiff, the District Judge of Saharanpur held that the defendant Didari was not justified in dispossessing the plaintiff, notwithstanding that he might have acquired the right of an ex-proprietary tenant, and from the time of the sale, inasmuch as the plaintiff had remained in possession for four or five years after the sale, and that Didari's proper course was to apply to the Revenue Court to have it determined that he was an ex-proprietary tenant, and to have his rent fixed, and to recover possession. For these reasons the District Judge gave the plaintiff a decree for possession of the land.

The heirs of Didari and Hazari and the defendant Harjas appealed to the High Court.

Munshis *Haruman Prasad* and *Madho Prasad*, for the appellants.  
*Shah Asad Ali*, for the respondent.

#### JUDGMENT.

STRAIGHT, Offg. C. J.—This is a suit brought by the plaintiff-respondent upon the strength of a deed of sale dated the 29th July, 1879 to recover possession of one-third of a ten-biswansis share, which had been conveyed to him by the sale-deed executed by Didari, who was one of the three sharers who owned that ten bis-[258]wansis share. The defence to the suit was that the land claimed by the plaintiff was the *sir*-land of the defendant, and that at the time of the sale of the one-third biswansis share he held it as his *sir*, and that by the operation of law he became the ex-proprietary tenant of the land.

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Now it is conceded that the defendants are the ex-proprietary tenants of the land in suit, and apparently the only contention seriously put forward on behalf of the plaintiff is, that because for four or five years the defendant failed to assert his ex-proprietary tenant rights, he is debarred from doing so now. But such a contention could only be a well-founded one had there been any provision either in the Limitation Act or the Rent Act creating such a disability. It has also been urged for the plaintiff that, inasmuch as he was in possession of this land as mortgagee at the time of sale, and continued to hold it afterwards, Didari, his vendor, did not "*hold*" the land as his *sir* at the time of the sale of his proprietary interest within the meaning of s. 7 of Act XII of 1881. I do not concur in the construction which the learned pleader for the respondent places upon this section. I think that the words "*held by him as sir*" must be construed to mean land belonging to him, or to which he was entitled, as *sir*. In my opinion, we ought to give as liberal an interpretation as is consistent with the canons of construction to these words. Otherwise it is easy to foresee how the door may be opened to the very mischief at which the Act aimed, by sales in future being preceded by a possessory mortgage of the land subsequently conveyed, so that the purchaser should be in possession of the *sir* at the date of sale, and thus be able to say that he and not the ex-proprietor held it at that time. Thus the provisions of the statute would be easily evaded. I think that this appeal must be decreed, and the decree of the first Court restored with costs in all Courts.

MAHMOOD, J.—I entirely concur in the order proposed by the learned Chief Justice, but I wish to add a few words. It is admitted by the plaintiff that the defendants are in possession of the land, which is the subject-matter of the suit. It is also granted that the only title on the basis of which the plaintiff claims this land, is the sale-deed dated the 29th July, 1879. It seems to me that upon this state of things much less depends upon what the defendants can show than upon the title which the plaintiff can show. [259] The learned District Judge seems to take it for granted that Didari was an occupancy-tenant, but had ceased to be so by the operation of some rule of law, of which I am not aware, and which the learned Judge does not mention in his judgment. If we were to allow the judgment of the learned Judge to stand, we would be turning out of possession a person who is entitled to hold possession of the land sold by the operation of law. I entirely concur in, and fully accept, the interpretation placed by the learned Chief Justice upon s. 7 of Act XII of 1881. It seems to me that the plaintiff's title to the possession of the land fails, and his case must therefore fail.

*Appeal allowed.*

8 A. 259 = 6 A.W.N. (1886) 75.

## APPELLALE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*HAZARI AND OTHERS (*Defendants*) v. CHUNNI LAL (*Plaintiff*).\*  
[14th April, 1886.]*Surety—Act IX of 1872 (Contract Act), ss. 134, 137, 139, and 141.*

A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms:—In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

*Held*, that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequences of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that this action was much more serious than "mere forbearance" in favour of his debtors, the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141); and that the suit must consequently be dismissed.

[F., 11 A. 310 (314); 24 A. 504 (503); 2 N.L.R. 42 (43).]

[260] THE plaintiff in this case claimed Rs. 719-6-0. It appeared that the plaintiff, Chunni Lal, held a decree for money against certain persons and took out execution of it. In the course of the execution-proceedings he agreed to accept payment of the decretal amount in eleven annual instalments, the defendants in the present suit giving him a bond in which they agreed to pay the debt in case of default on the part of the judgment-debtors, and mortgaged certain immoveable property as collateral security. The judgment-debtors paid five instalments and then made default. In the present suit Chunni Lal sought to recover the amount of the decree from the sureties. At the time of suit the decree had become time-barred, Chunni Lal having omitted to apply for execution. The terms of the surety-bond are stated in the High Court's judgment.

The first Court dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree.

It was contended in second appeal on behalf of the defendants, with reference to the terms of the surety-bond, that the sureties had been discharged in law by the conduct of the creditor, in allowing the decree to become time-barred.

\* Second Appeal No. 1162 of 1885, from a decree of E. B. Thornhill, Esq.; District Judge of Jaunpur, dated the 22nd May, 1885, reversing a decree of Maulvi Muhammad Nasirullah Khan, Subordinate Judge of Jaunpur, dated the 15th January, 1885.

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Mr. C. H. Hill, for the appellants.

Mr. T. Conlan and Babu Jogindro Nath Chaudhri, for the respondent.

## JUDGMENT.

OLDFIELD and TYRRELL, JJ.—Having carefully examined the terms of the surety-bond, the basis of this action, we are of opinion that they amount to this, that the creditor having given his debtor time to pay Rs. 816-3-6, costs, and interest at 8 annas per cent., the amount of his judgment-debt, the debtor covenanted to pay this sum in eleven years by engaging, on the occurrence of a single default, to execute his decree for the whole sum remaining due under it, on the expiry of one month from the date of the default, and the sureties bound themselves to guarantee satisfaction of the decree debt, in the event of failure of payment, by the mode indicated above. In other words, the debtors were to have time, and to make punctual periodical payments, failure in punctuality to be necessarily followed within one month by execution of the decree on the decree-holder's part, the sureties becoming then and thereafter responsible for any eventual failure in full satisfaction [261] of the decree. The words of the deed were:—"In case of default of paying the instalments, the whole decretal money, with costs, and interest at 8 annas per cent. shall be executed after one month; and for the satisfaction of the decree-holder, we, the executants, stand as surety of the judgment-debtors to Rs. 816-3-6, with all the costs of the Court and interest." The first and necessary step to be taken on occurrence of a default was, within a month from its date, execution of his decree on the part of the creditor. The language of this part of the covenant is peremptory, and imports much more than the usual agreement under such circumstances that the decree-holder may or is at liberty to execute his decree, if he pleases, on a default. Instalments were regularly paid for five years, down to the 20th April, 1879; then payments ceased, and the decree-holder took no steps against his judgment-debtors to execute his decree which is now defunct by lapse of time. He sues the sureties of the unpaid balance due on the decree, with interest to the date of his suit, instituted in November, 1884. Having failed in the Court of first instance, he obtained a judgment from the District Judge in appeal; and the sureties seek in second appeal to get that decree set aside. On our reading of the peculiar terms of the agreement set out above, we are satisfied that the appeal should prevail. It must be conceded that the legal consequence of the respondent's omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties, then, would, under the rule of s. 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (s. 137, *id.*) "mere forbearance on the part of the creditor to enforce his remedy against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than "mere forbearance" in favour of his debtors. And we hold that by his failure to carry out this express part of his agreement, he did an act (s. 139, *id.*) inconsistent with the equities of the sureties, and omitted to do an act which his [262] duty to the sureties (under the agreement) required him to do, whereby the

eventual remedy of the sureties themselves against the principal debtors must necessarily have been impaired. We are also of opinion that by allowing his decree to become incapable of enforcement, the respondent deprived the sureties of the benefit of the decree, which was a subsisting security in his hand at the time when the contract of suretyship was entered into, and the loss of this security, to the benefit of which the sureties were entitled, through the act of the creditor, would operate to the discharge of the sureties to the extent of the value of that security (s. 141, *id.*). In this view of the facts of the agreement and of the law applicable to them, we must set aside the decree of the lower appellate Court, and, allowing this appeal, dismiss the respondent's suit with all costs.

*Appeal allowed.*

8 A. 262=6 A.W.N. (1886) 87.

APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

RAM SAHAI AND OTHERS (*Decree-holders*) v. THE BANK OF BENGAL  
(*Judgment-debtors*).<sup>\*</sup> [28th April, 1886.]

*Execution of decree—Costs—Reversal of decree—Refund of costs recovered by execution—Interest.*

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

*Held*, that the appellant was entitled to the interest claimed on the refund of costs. *Forester v. The Secretary of State for India in Council* (1) referred to.

[F., 20 A. 430 (432); 9 M. 506; 15 M. 203 (212).]

ONE Gur Prasad sued for the sale of mortgaged property, impleading the mortgagor and the Bank of Bengal, which had purchased the mortgaged property at an execution sale. The Subordinate Judge of Cawnpore, by whom the suit was tried, dismissed the claim for the sale of the property, awarding the Bank its costs, with interest. The Bank recovered these costs, amounting to Rs. 642, that is, Rs. 633 principal and Rs. 9 interest, in execution of the decree. The plaintiff appealed from the decree of the [263] Subordinate Judge to the High Court, which, on the 4th May, 1885, gave the plaintiff a decree for the sale of the property, and awarded him costs. The heirs of the plaintiff applied to obtain in execution of the High Court's decree the refund of the sum paid to the Bank under the decree of the Court of the Subordinate Judge on account of costs—that is to say, of the sum of Rs. 642, together with interest at the rate of Rs. 6 per cent. per annum. The Bank objected to paying interest on the refund claimed, and this objection was allowed by the lower Court. The decree-holder appealed to the High Court.

Pandit Nand Lal and Pandit Moti Lal, for the appellants.

Pandit Nand Lal relied on *Jaswant Singh v. Dib Singh* (2) and *Forester v. The Secretary of State for India in Council* (1).

<sup>\*</sup> First Appeal No. 41 of 1886, from an order of Munshi Rai Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 14th December, 1885.

(1) 3 C. 161.

(2) 7 A. 432.

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8 A. 262=  
6 A.W.N.  
(1886) 87.

Mr. G. T. Spankie, for the respondent, referred to *Rodger v. The Comptoir d' Escompte de Paris* (1) as expressly deciding the point whether interest should be granted on refund of costs. The cases cited for the appellant are not in point. The first does not relate to costs, and in the second *Rodger v. The Comptoir d' Escompte de Paris* is distinguished.

## JUDGMENT.

BRODHURST and TYRRELL, JJ.—Apart from authority, which is strong and clear on the general question of restitution, we are satisfied that, in common justice and fairness, the appellants are entitled to the moderate interest they claim on their money, which has now to be refunded to them by the respondent.

This consists of a principal sum of Rs. 642, of which Rs. 9 were interest, recovered wrongfully in a former stage of the litigation by the respondent from the appellants as compensation for the respondent's costs. The Court below has not understood the rule laid down in *Forester v. The Secretary of State* (2). It is of course true that a Court executing a decree for costs cannot award interest on those costs not given by the decree. But the case before us is quite different. The question is not of awarding interest to the successful appellant on the costs given him by the decree under execution, such interest being not awarded on the decree. The question is, whether interest may or not be given on the sum [264] wrongly obtained, as described above, by the respondent from the appellant, restitution of which is now secured by the operation of the final decree in the case. We allow the appellant's claim and decree his appeal with costs.

*Appeal allowed.*

8 A. 264=6 A.W.N. (1886) 89.

## APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

JUGAL KISHORE (*Plaintiff*) v. HULASI RAM AND ANOTHER (*Defendants*).<sup>\*</sup>  
[30th April, 1886.]

*Partnership—Joint Hindu family—Suit by one member for debt due to family firm.*

In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks (3)."

*Held* that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him his sons being his partners in the ancestral business, and he not being the managing member or proprietor.

[R., 25 A. 378 (383) ; 25 B. 606 (611) ; 156 P.R. 1899 (F.B.) ; 159 P.R. 1899 (F.B.).]

<sup>\*</sup> Second Appeal No. 1350 of 1885, from a decree of T. R. Redfern, Esq., District Judge of Agra, dated the 4th May, 1885, affirming a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 24th December, 1885.

(1) 7 Moo. P.C.C. N.S. 314=L.R. 3 P.O. 465.

(2) 3 C. 161.

(3) "Proprietors."

THE plaintiff in this case, Jugal Kishore, and his five sons were members of a joint Hindu family, and carried on jointly an ancestral money-lending business. The plaintiff sued the defendants for money lent by the firm to them. The plaintiff was examined, and stated that he had made his sons the owners of the firm, retaining his interest in it to profits and losses, and that by reason of increasing infirmities he had ceased to take an active part in the management of the affairs of the firm, and that the active partners were his sons. Upon this the defendants objected that the plaintiff was not competent to sue alone, and his sons should have been joined as plaintiffs, and not having been so joined, the suit should be dismissed. The Court of first instance disallowed this objection, and trying the suit on the merits, dismissed it. The plaintiff appealed, and the defendants contended in support of the decree that the suit ought to have been dismissed, "because, on the showing of the plaintiff, the contract was made with his firm, and his partners were not parties to the litigation."

[265] The lower appellate Court held that, as the plaintiff was not the managing member of the family firm, "the ordinary rule which requires a suit relating to the business of a partnership to run in the names of all the partners, ought to be enforced." It therefore dismissed the appeal.

The plaintiff appealed to the High Court upon the ground, amongst others, that the plaintiff, as head of the family, was entitled to sue on its behalf.

Mr. W. M. Colvin, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

#### JUDGMENT.

BRODHURST and TYRRELL, JJ.—We cannot interfere. The appellant stands in this position, that he has declared the firm to which the debt is due to be ancestral, and he has asserted that the control of its business is in the hands of his sons jointly. He calls them "maliks (1)." From either point of view, then, he cannot sustain this suit in his own individual capacity. His sons are his partners in the ancestral business, and he is not the managing member or proprietor.

We dismiss the appeal with costs.

*Appeal dismissed.*

8 A. 265=6 A.W.N. (1886) 89.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.*

KALIAN BIBI AND ANOTHER (*Plaintiffs*) v. SAFDAR HUSAIN KHAN AND OTHERS (*Defendants*).\* [2nd April, 1886.]

*Pardah-nashin*—Civil Procedure Code, ss. 129, 136—Discovery of documents.

In a suit brought by two Muhammadan *pardah-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under s. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had

\* First Appeal No. 154 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 27th April, 1885.

(1) "Proprietors."



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been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtar, with a list of their documentary evidence, but the affidavit and list was considered defective upon several grounds, one of which was that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them personally, praying [266] that the Court would have it verified in any manner thought proper, provided that their *pardah-nashini* were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiff, and no sufficient ground for non-compliance had been shown.

*Held*, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs, with regard to the orders made under s. 129 of the Code, that looking at the disabilities of the plaintiffs, and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s. 136.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *Abdul Majid*, Mr. *J. Simeon*, and Maulvi *Mehdi Hasan*, for the appellants.

Mr. *G. E. A. Ross*, and Pandit *Nand Lal*, for the respondents.

#### JUDGMENT.

STRAIGHT, Offg. C.J., and TYRRELL, J.—The appellants, two Muhammadan *pardah* ladies, brought a suit in the District Judge's Court at Gorakhpur, on the 10th June, 1881, for recovery of landed property by their right of inheritance to part of the estate of one Muhammad Wazid. The suit was dismissed as barred by limitation. But in first appeal it was remanded for re-trial under s. 562, Civil Procedure Code. When the case was restored in the Court below, and came on for trial, the Judge made an order under s. 129, Civil Procedure Code, requiring the plaintiffs-appellants to "produce with an affidavit all the papers connected with the points at issue in the case which were or had been in their possession or under their control." After some ineffectual proceedings, the plaintiffs were ordered to file their affidavit peremptorily on the 1st April, 1885. On that date an affidavit was filed on behalf of the plaintiffs by their mukhtar and brother Kazi Muhammad Ikram Ali, with a list of their documentary evidence. This mukhtar appeared under a special power-of-attorney, executed and registered in their behalf under the hands of the two ladies on the 27th and 28th March, 1885. The Judge found the affidavit and list of the 1st April defective, because, (i) it was not made personally by the plaintiffs, (ii) because it disclosed only documents connected with the issues on the record, and (iii) because it disclosed only documents in possession of the ladies, and failed to disclose [267] or mention documents once, but not at present, in their possession. Therefore the Judge gave the plaintiffs further time to the 16th April, 1885, to amend these defects. On the 15th April, the plaintiffs filed before the Judge an affidavit purporting to be made by them personally, praying that "the Court may have it verified in the manner it thinks proper, provided petitioners' *pardah-nashini* is not interfered with." On the 27th April the Judge disposed of that petition and of the suit by his order which is now appealed to us. It runs as follows:—"The order of this Court not having been complied with, although ample opportunity

has been given to the plaintiffs, and no sufficient ground for non-compliance having been shown, I have no alternative, much as I regret the necessity, but to exercise the power given me by s. 136, Act XIV of 1882, and to direct that the suit be dismissed for want of prosecution, and I now make an order to that effect, with costs, and the usual interest thereon."

Without going into the question of the sufficiency or insufficiency of the action of the plaintiffs with regard to the orders made under s. 129 of the Court, it is enough here to say that, looking at the disabilities of the plaintiffs and the circumstances of their suit, it appears to us that the case was not one in which it was expedient to enforce the liability to which they may have exposed themselves under the peculiar provisions of s. 136 of the Code.

We therefore allow the general plea of the appellants, and, decreeing this appeal, remit the case for trial to the Court below. The costs here will be costs in the cause.

*Appeal allowed.*

8 A. 267 = 6 A.W.N. (1886) 91.

APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

BEHARI LAL (*Plaintiff*) v. HABIBA BIBI AND OTHERS (*Defendants*).\*

[16th April, 1886.]

*Pardah-nashin—Execution of deeds.*

A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *pardah-nashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registrable, and it was presented for registration by a person who professed to be authorized by a power-of-attorney in that behalf. The only proof given by the plaintiff that this power-of-attorney was executed by the ladies, or [268] with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them, nor did he know their voices, that he went to their residence, that there were two women behind a *pardah* whom the executors of the bond said were their respective wives, and that these women acknowledged they had made the power-of-attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond.

*Held* that, even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it.

*Bustoor Ruheem v. Shunsoonnissa Begum* (1), *Ashgar Ali v. Debroos Banoo Begum* (2), and *Sudisht Lal v. Sheobarat Koer* (3) referred to by MAHMOOD, J.

[F., 12 M. 380 (384); 7 A.L.J. 445 = 6 Ind. Cas. 689; 3 C.P.L.R. 118 (119); 6 C.P.L.R. 35 (36); Appr., 14 A. 8 (12); R., 2 A.L.J. 436; 12 C.L.J. 115 = 3 Ind. Cas. 380.]

THE plaintiff in this case claimed the amount due on a bond, dated the 16th September, 1873, from Rafi-ud-din Ahmad, and his wife Habiba Bibi, and Salima Bibi, the wife of Nurul Hasan, by whom the bond purported to be executed. He also claimed the sale of certain zamindari property mortgaged in the bond. This property was property which the

\* First Appeal No. 199 of 1895, from a decree of Rai Raghu Nath Sahai, Sub-ordinate Judge of Azamgarh, dated the 31st July, 1885.

(1) 11 M.I.A. 551 = 8 W.R.P.C. 3.

(2) 3 C. 324.

(3) 7 C. 245 = 8 I.A. 39.

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two female defendants, who were sisters, had inherited from their father. The bond purported to be executed by Habiba Bibi "by the pen of Rafi-ud-din Ahmad," her husband, and by Salima Bibi "by the pen of Nurul Hasan," her husband. It was registered on the 27th September, 1873, by one Maula Khan, under a *mukhtar-nama*, or power-of attorney, which purported to be executed by Rafi-ud-din Ahmad, Habiba Bibi, and Salima Bibi, and was authenticated by the Suh-Registrar, who had issued a commission for the examination of the ladies as to the voluntary nature of the execution of the power by them. The defendant Rafi-ud-din Ahmad did not defend the suit. It was defended by the female defendants, who pleaded that they had not executed the *mukhtar-nama*, or the bond, and had no knowledge whatever of those deeds and had not benefited in any way from the money advanced under the bond.

The Subordinate Judge of Azamgarh, by whom the suit was tried, dismissed it in respect of the female defendants. He found that they had no knowledge of the *mukhtar-nama* or the bond, and [269] had not benefited in any way from the money advanced under the bond. The plaintiff appealed to the High Court.

Munshi Kashi Prasad and Munshi Hanuman Prasad, for the appellant.

Pandit Ajudhia Nath and Munshi Ram Prasad, for the respondents.

#### JUDGMENT.

STRAIGHT, Offg. C.J.—This was a suit brought by the plaintiff Behari Lal upon a bond dated the 16th of September, 1873, for Rs. 6,700, purporting to have been executed by one Rafi-ud-din, for himself and for his wife Habiba Bibi, and by one Nurul Hasan on behalf of his wife Salima Bibi. The two ladies were the daughters of Fakhr-ud-din Ahmad, and Rafi-ud-din was his nephew, and the property said to have been charged admittedly came to the hands of the obligors upon the death of Fakhr-ud-din, to whom it had belonged. The bond of the 16th of September, 1873, was, as I have said, not signed by either Habiba Bibi or Salima Bibi, and it was subsequently presented for registration by one Maula Khan, who professed to be authorized in that behalf by a power-of-attorney dated the 17th September, 1873. Now the bond can only be given in evidence and held to be binding against the ladies, *qua* their immoveable property charged therein, if it was duly registered, and the question whether it was so registered turns upon whether the power-of-attorney was in fact made by them, with their conscious consent and full knowledge and comprehension of what they were authorizing Maula Khan to do. The Subordinate Judge has found that the bond to the plaintiff was not proved to have been executed with the knowledge of the ladies; that they are not shown to have benefited by it in any way; and, as I understand him, he also rejected the power-of-attorney as not binding on them.

It is upon this latter point that I am prepared to deal with the appeal and dispose of it. Now there can be no doubt—and many Privy Council rulings are to be found approving the principle—that in cases such as that before me, in which the interests of *pardah-nahsin* women are concerned, those who seek to affect them with liability under an instrument of the kind sued on here, are bound to prove that they had knowledge of the nature [270] and character of the transaction into which they are said to have entered, that they had some independent and

disinterested adviser in the matter, and that they put their hands to the document relied on, or authorized some other persons to execute it for them, fully understanding what they were about in doing so. In the present case all that the plaintiff has proved by one witness, Imam-ud-din, is that upon a particular day he went to the residence of the ladies, with whom he was not personally acquainted, nor did he know their voices. He says there were two women behind a *pardah* who were said by their husbands, Rafi-ud-din and Nurul Hasan, to be their respective wives, and that these persons acknowledge they had made the power-of-attorney. Now I will go the length of saying that even if the ladies behind the *pardah* were in fact the two defendant Musammats, I should not, in reference to the principles already enunciated, be prepared to hold that this is enough to bind them. I think it was for the plaintiff—who is seeking to bring their property to sale on the strength of a transaction with these two *pardah-nashin* ladies—to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it. This, in my opinion, he has wholly failed to do, and, under such circumstances, I think the lower Court was right in dismissing the suit, and I therefore dismiss the appeal with costs. With regard to the application made to-day for the admission of the *mukhtar-nama*, which was rejected below, it is unnecessary to say more than that I have dealt with the case as if it were in evidence.

MAHMOOD, J.—I am of the same opinion. I entirely concur with the learned Chief Justice in his estimate of the evidence. It is an estimate which I, from my acquaintance with the facts of Muhammadan life to which it refers, accept as in keeping with the rulings of the Privy Council in such matters, which have done for the *pardah-nashin* women what their life requires, which is, that they should be placed, by analogy, on a footing somewhat similar to that of persons *non compotes mentis*. The doctrines of equity which relate to such persons have been stated in s. 228 of Story's work on Equity Jurisprudence, where it is laid down that "Courts of Equity deal with the subject upon the most enlightened principles, and [271] watch with the most jealous care every attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith (*uberrimæ fidei*), or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests." I desire to embody this passage in my judgment for the benefit of the Subordinate Courts, to which, generally speaking, such works as Story's are not accessible; and for the same reason I wish to read certain passages from the judgments of the Lords of the Privy Council in order to show the manner in which their Lordships have from time to time applied the doctrine of equity to *pardah-nashin* ladies. The leading case upon the subject is *Bazloor Ruheem v. Shumsoonnissa Begum* (1), where their Lordships made the following observations (p. 585)—"The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Muhammadan and a Hindu woman; nay, that in all that concerns her power over her property, the former is by law more independent than an Englishwoman of her husband. It is no doubt true that a Musulman woman, when married, retains dominion over her own property, and is

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free from the control of her husband in its disposition; but the Hindu law is equally indulgent in that respect to the Hindu wife. It may also be granted that in other respects the Muhammadan law is more favourable than the Hindu law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Musulman woman of rank, like the Hindu, is shut up in the *zanana* and has no communication, except from behind the *pardah*, or screen, with any male persons, save a few privileged relations or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be [272] presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a *pardah-nashin*, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him." The principles upon which these observations proceed must not be lost sight of in connection with such cases. Again, in *Ashgar Ali v. Debroos Banoo Begam* (1), which was also a case in which a Muhammadan *pardah-nashin* lady was concerned, their Lordships made observations which seem to me to be very pertinent to cases like the present. Their Lordships said (p. 327):—"it is incumbent on the Court, when dealing with the disposition of her property by a *pardah-nashin* woman, to be satisfied that the transaction was explained to her, and she knew what she was doing, and especially so in a case like the present, where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property." There are many other cases to be found in the Reports which lay down the same doctrine, but I will cite only one more passage from the judgment of their Lordships in a recent case—*Sudisht Lal v. Sheobarat Koer* (2), in which the facts were somewhat similar to those of the present case:—"Their Lordships desire to observe that there is no satisfactory evidence that this *mukhtar-nama* was explained to the defendant in such a way as to enable her to comprehend the extent of the power she was conferring upon her husband. In the case of deeds and powers executed by *pardah-nashin* ladies, it is requisite that those who reply upon them should satisfy the Court that they had been explained to, and understood by, those who execute them. There is a want of satisfactory evidence of that kind in the present case. But their Lordships do not desire to rest their decision upon this ground . . . . . If it had been proved that the husband had contracted loans and obtained advances on behalf of his wife, it may be that under this power-of-attorney she would be bound by his acts, as being within the scope of his authority. But it would have to be shown, not only that he borrowed the money, but that [273] it was borrowed for her." These passages seem to me to be closely applicable to the circumstances of this case.

With reference to the observations of the learned Chief Justice, I have only to add that in all these transactions, the important thing to see is what was actually done. In the present case there is nothing to

show that this large sum was ever utilized for the ladies' benefit, and there is no satisfactory evidence to show that they took part in the execution of the *mukhtar-nama*, or understood its contents, or that they were aware of the existence of the bond, or that it was executed with their consent. The findings of the lower Court are satisfactory, and I would not interfere.

*Appeal dismissed.*

8 A. 273—6 A.W.N. (1886) 95.

APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

KOJI RAM (Plaintiff) v. ISHAR DAS AND ANOTHER (Defendants).<sup>\*</sup>  
[17th April, 1886.]

*Suit for money paid by a pre-emptor under a decree for pre-emption which has become void—Act XV of 1877 (Limitation Act), sch. ii, Nos. 62, 97, 120—Suit for money had and received for plaintiff's use—Suit for money paid upon an existing consideration which afterwards fails.*

Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs. 1,595, the pre-emptor decree-holder, in August, 1880, applied for possession of the property in execution of the decree, alleging payment of the Rs. 1,595 to the judgment-debtors out of court, and filing a receipt given by them for the money. This application was ultimately struck off. In April, 1881, judgment was given in the appeal, increasing the amount to be paid by the decree-holder to Rs. 1,994, which was to be deposited in court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree-holder assigned to K his right to recover from the judgment-debtors the sum of Rs. 1,595 which he had paid to them in August, 1880. In December, 1883, K sued the judgment-debtors for recovery of the Rs. 1,595 with interest.

*Held*, that No. 62 of the Limitation Act did not govern the suit, but that No. 97, and, if not, No. 120, would apply, and the suit was therefore not barred by limitation.

THE suit out of which this appeal arose was brought under the following circumstances:—In February, 1880, one Ram Lal obtained a decree for pre-emption in respect of certain property, [274] conditional upon payment of Rs. 1,595 to the purchasers. This decree was upheld on appeal by the District Judge in April, 1880, and the purchasers preferred a second appeal to the High Court. Pending this appeal, Ram Lal, in August, 1880, applied for possession of the property in execution of the decree in his favour, alleging that he had paid the sum of Rs. 1,595 to the judgment-debtors out of court, and filing a receipt given by them for the money. This application was ultimately struck off, in consequence of the applicant's failure to comply with an order directing him to file a copy of the decree. After this the High Court, in April, 1881, gave judgment in the appeal, which it so far allowed as to increase the amount to be paid by the pre-emptor to Rs. 1,994-4, which sum was to be deposited in court within one month from receipt of the decree in the lower Court. Ram Lal did not pay the balance thus directed to be paid to the purchasers, and the decree for possession accordingly became void. In February, 1882, Ram Lal assigned to the plaintiff in the present suit, Koji Ram, his right

<sup>\*</sup> Second Appeal No. 1264 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 30th July, 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 22nd May, 1884.

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APRIL 17.  
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APPEL-  
LATE  
CIVIL.

8 A. 273 =  
6 A.W.N.  
(1886) 95.

to recover from the purchasers the sum of Rs. 1,595 which he had paid to them in August, 1880. In March 1882, the plaintiff made an application in the execution department for recovery of the amount; but the purchasers objected that he was not a "representative" of Ram Lal within the meaning of s. 244 of the Civil Procedure Code, and therefore could not take proceedings in the execution department. This objection was allowed; and the plaintiff in consequence brought the present suit in December, 1883, for recovery of the Rs. 1,595, with interest thereon, in the Court of the Subordinate Judge of Aligarh. That Court decreed the claim for Rs. 1,595, but disallowed the claim for interest. The defendants appealed to the District Judge of Aligarh. That Court held that the suit was barred by limitation, with reference to No. 62, sch. ii of the Limitation Act, as a suit "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use," the period prescribed for which was three years from the date when the money had been received by the defendants.

In second appeal by the plaintiff it was contended on his behalf that the District Judge was wrong in applying to the suit [275] the provisions of No. 62 of the Limitation Act, and that the limitation properly applicable was that provided by No. 120.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

#### JUDGMENT.

OLDFIELD and TYRRELL, JJ.—We are of opinion that art. 97 of the Limitation Act may be applied to this suit, and, if not, art. 120 would apply. The suit is not governed by art. 62, as the Judge considers. In the above view the suit is not barred by limitation, and we set aside the decree of the lower appellate Court, and remand the case for trial on the merits. Costs to follow the result.

*Appeal allowed.*

8 A. 275 = 6 A.W.N. (1886) 119 = 10 Ind. Jur. 423.

#### APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Mahmood.*

HABIB-UN-NISSA AND ANOTHER (*Plaintiffs*) v. BARKAT ALI AND ANOTHER (*Defendants*).<sup>\*</sup> [20th April, 1886.]

*Muhammadian law—Pre-emption—Acquiescence in sale—Relinquishment of right.*

According to the Muhammadian law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right.

In a suit to enforce the right of pre-emption founded on the Muhammadian law it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiff's any time within a year, and if the latter paid the price and purchased the property for themselves.

*Held* that by the very fact of their taking the agreement, the plaintiff's had relinquished their right of pre-emption, and were precluded from enforcing it.

[R., 19 A. 334 (336).]

<sup>\*</sup> Second Appeal No. 1305 of 1885, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 24th June, 1885, confirming a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Meerut, dated the 15th April, 1885.

THE plaintiffs in this case, Muhammadans, claimed to enforce the right of pre-emption in respect of the sale of a house and certain land appertaining thereto. The right was founded on Muhammadan law. The vendor, Barkat Ali, and the vendee, defendants, were Muhammadans, and the property was sold on the 27th October, 1833. On the day of the sale the vendee gave the plaintiffs an agreement in writing to sell the property to them, the terms of which were as follows :—"I have to-day purchased the house of [276] Jalal-ud-din from Barkat Ali : counting from to-day, if (plaintiffs) within one year pay me what I have paid for the house, I will sell it to them, provided that they purchase for their own use and residence and not for sale to another."

The defence to the suit was that the plaintiffs had not, as required by the Muhammadan law of pre-emption, made the *talab-i-mawasabat*, or immediate demand, and had therefore lost their right, and that they had also lost it, according to the same law, by accepting from the vendee the agreement set out above, and thereby acquiescing in the sale to him.

The Court of first instance dismissed the suit on the ground that the plaintiffs had not made the "immediate demand." The plaintiffs appealed, and the lower appellate Court affirmed the decree of the first Court on that ground, and on the further ground that they had relinquished their right, by accepting the agreement from the vendee. The plaintiffs appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Durga Charan*, for the appellants.  
Mr. T. Conlan and Maulvi *Abdul Majid*, for the respondents.

#### JUDGMENT.

MAHMOOD, J.—Having heard the learned pleader for the appellants, I am of opinion that the appeal should be dismissed with costs.

The suit was one for pre-emption, arising out of a sale made on the 27th October, 1833, in favour of Abdul Rahim, defendant-respondent, by one Barkat Ali, the other defendant-respondent. The pre-emptors are two ladies, who claim pre-emption under the Muhammadan law. The questions of law to be considered are two, namely,—(i) whether the "*talab-i-mawasabat*," or immediate demand, had been properly made as required by the Muhammadan law; (ii) if it was, have the plaintiffs relinquished their right by entering into the agreement dated the 27th October, 1833, with Abdul Rahim?

This agreement was made on the same date as the sale, and thereby the purchasers agreed to sell the property to the plaintiffs-pre-emptors any time within a year, and if the latter paid the price and purchased it for themselves. Now, according to the Muham-[277]madan law, if the pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right. Mr. Baillie, in his celebrated *Digest of Muhammadan Law*, at page 499, which reproduces a passage of the *Fatawa Alamgiri*, states the law as follows :—"The right of pre-emption is rendered void by implication, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale, as, for instance, when knowing the purchase, he had omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or, in like manner, when he has made an offer for the

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424.

house to the purchaser ; or has asked him if he will give it up to him ; or has taken it from him on lease, or in *moozaraut*—all this with knowledge of the purchase."

This passage is conclusive, and leaves on doubt that by the very fact of their taking the agreement referred to above, the plaintiffs have relinquished their right of pre-emption and are precluded from enforcing it.

In this view of the question it is unnecessary to consider the first question. I would dismiss the appeal with costs.

TYRRELL, J.—I am quite of the same opinion.

*Appeal dismissed.*

8 A. 277 = 6 A.W.N. (1886) 93.

### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

ZAINAB BEGAM (*Plaintiff*) v. MANAWAR HUSAIN KHAN AND ANOTHER (*Defendants*).<sup>\*</sup> [27th April, 1886.]

*Civil Procedure Code, ss. 556, 558—Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.*

In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence when the appeal was called [278] on for hearing. The Court rejected the application, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

*Held* that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.

[R., A.W.N. (1895) 140; 121 P.R. 1907 = 51 P.W.R. 1907.]

THIS was a first appeal from an order passed by the Subordinate Judge of Moradabad, under s. 558 of the Civil Procedure Code, refusing to re-admit an appeal. The appellant, Mussammat Zainab, was plaintiff in the suit which was dismissed by the Court of first instance (Munsif of Amroha). She appealed from then Munsif's decree to the District Judge of Moradabad, who transferred the appeal to the Subordinate Judge. The appellant failed to appear either on the day fixed by the Subordinate Judge for the hearing of the appeal, or on the subsequent days to which the hearing was adjourned. Instead, however, of dismissing the appeal for default under s. 556 of the Civil Procedure Code, the Subordinate Judge tried it and dismissed it upon the merits. Subsequently the appellant applied to the Subordinate Judge, under s. 558, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. This application the Subordinate Judge rejected, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

<sup>\*</sup> First Appeal No. 39 of 1886, from an order of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 19th September, 1885.

On this appeal it was contended for the appellant that the Subordinate Judge was not justified in rejecting her application, without inquiry into the truth or otherwise of the allegations made therein regarding the cause of her absence at the hearing of the appeal.

Babu *Ratan Chand*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

### JUDGMENT.

BRODHURST and TYRRELL, JJ.—The Subordinate Judge, as a first appellate Court, had the appellant's appeal before him. On the day fixed for hearing, and on adjourned dates, the appellant did not attend in person or by pleader. The Subordinate Judge then had but one legal course open to him—to dismiss the appeal in default (s. 556). It was illegal to try the appeal on the merits. [279] The judgment given in this way is a nullity, and must be cancelled: its existence therefore was and is no bar to the re-admission of the appellant's appeal (s. 558), if it was not barred by limitation or otherwise inadmissible. We must allow this appeal, and direct the restoration to the file of the application for re-admission under s. 558 on the merits, the costs of this appeal being costs in the cause.

*Appeal allowed.*

8 A. 279 = 6 A.W.N. (1886) 96.

### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and  
Mr. Justice Tyrrell.*

LAL SINGH AND ANOTHER (*Defendants*) v. DEO NARAIN SINGH AND OTHERS (*Plaintiffs*).<sup>\*</sup> [28th April, 1886.]

*Hindu Law—Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.*

The rule enunciated by the Privy Council in *Muddum Thakoor v. Kantoo Lall* (1) and *Suraj Buns Koer v. Sheo Persad Singh* (2), "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee," is limited to antecedent debts, i.e., to debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he

<sup>\*</sup> Second Appeal No. 286 of 1885, from a decree of E.B. Thornhill, Esq., District Judge of Jaunpur, dated the 30th January, 1885, reversing a decree of Maulvi Muhammad Nasir-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 22nd December, 1883.

(1) 14 B.L.R. 187 = 1 I.A. 321.

(2) 5 C. 148.

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APRIL 28.

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LATE  
CIVIL.

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6 A.W.N.  
(1886) 96.

was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

[Appr., 9 A. 493 (496) ; R., 31 A. 176 (189) = 6 A.L.J. 263 ; A.W.N. (1889) 142 ; 4 Bom. L.R. 597 (600) ; 16 C.P.L.R. 169 (170) ; Diss., 18 A. 215 (220).]

THE three plaintiffs in this case were the sons of Ram Dihal, the first defendant, and on the 3rd October, 1883, when the suit was instituted, they were, so it was stated, aged respectively as follows :—Deo Narain Singh, 23 ; Ram Narain Singh, 18 years and 2 months ; Jagat Narain Singh, 15 years and 2 months. On the 12th December, 1864, Deo Narain alone having been born, Ram [280] Dihal made a conditional sale of two annas out of a four-anna ancestral zamindari share in favour of one Naipal Singh for Rs. 1,200. The consideration given by the conditional vendee was that he paid off some prior incumbrances created by Ram Dihal, and also gave him a sum in cash. The two annas were to be held to be sold if the Rs. 1,200 were not re-paid by the 25th June, 1877. On the 28th November, 1871, Ram Narain Singh and Jagat Narain Singh then having been born, Ram Dihal sold to the other defendants in this suit the entire four-anna share, the consideration being Rs. 1,200, left with the vendees to pay off the conditional sale of 1864, Rs. 232 due to the vendee under a mortgage, and Rs. 1,500 in cash. The plaintiffs sued to set aside this sale to the extent of three annas, upon the ground that it was made without legal necessity and for immoral purposes, and that Ram Dihal had no power to sell the whole property. The defendants pleaded, among other matters, that they gave good consideration for the sale, and that, as regards the sum in cash handed over to Ram Dihal, it was taken for the necessary expenses of the family. The Court of first instance (Subordinate Judge of Jaunpur), holding that the *onus* lay on the plaintiffs to prove that the sale was made for improper purposes, and that the money had been taken for necessary purposes of the family, dismissed the suit. On appeal by the plaintiffs the District Judge of Jaunpur, holding that it lay with the defendants to establish the necessity for the sale, reversed the first Court's decree and decreed the claim of the plaintiffs.

The defendants appealed to the High Court, contending that the District Judge was wrong in placing the burden of proof on them, and that it was for the plaintiffs to acquit themselves of their obligation under the Hindu law to pay their father's debts, by showing that they were contracted for purposes which, under that law, were not binding upon them.

Mr. T. Conlan, Munshi Hanuman Prasad, and Munshi Kashi Prasad, for the appellants.

Pandit Ajudhia Nath and Pandit Sundar Lall, for the respondent.

#### JUDGMENT.

STRAIGHT, Offg. C.J., and TYRRELL, J. (After stating the facts the judgment continued) :—It seems to us that the principle enun-  
[281]ciated by their Lordships of the Privy Council in *Suraj Bansi Koer's Case* (1) as to the effect of an earlier decision of that tribunal in *Muddun Thakoor v. Kantoo Lall* (2), must be our guide in the present instance. It is as follows :—"That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay of an

(1) 5 C. 148.

(2) 14 B.L.R. 187 = 1 I.A. 321.

antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted". It will be seen from this passage that where an antecedent debt is the consideration for a sale by the father of the ancestral property, or it is charged by him to raise money to pay off an antecedent debt, it rests with the sons to show that such debt was contracted for immoral purposes to the knowledge of the vendee or mortgagee. But it is to be observed that this rule is limited to antecedent debts, that is to say, debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. As we understand it, the distinction drawn by their Lordships is founded on the view that while in the one instance the vendee or mortgagee is not to "be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate," on the other hand, "he may reasonably be expected to prove the circumstances of his own particular loan"—*Hunooman Pershad Panday's Case* (1). The authorities therefore seem to come to this that in those cases where a person buys ancestral estate or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal [282] necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

Adopting this rule and applying it to the present case, it is obvious that the Judge below in dealing with it did not appreciate the distinction to be drawn as indicated above, and that his decision does not meet the difficulties of the position. It seems to us therefore that the proper course for us to adopt is to remand the following issues under s. 566 of the Code for determination:—

1. As to the Rs. 1,200, and Rs. 232 antecedent debts, part of the consideration for the sale to the defendants, have the plaintiffs established that those debts were contracted for immoral purposes, and that at the time the sale was impeached the defendants had notice they were so contracted?

2. As to the Rs. 1,500 paid in cash to Ram Dihal by the defendants, have they proved that they made reasonable and proper inquiries before handing it over, and that they did it believing it was required for the legal necessities of the joint family of which the plaintiffs were members, and that Ram Dihal, as managing member and head, required it for purposes of the joint family?

The findings, when recorded, will be returned into this Court, with ten days for objections from a date to be fixed by the Registrar.

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(1) 6 M.I.A. 419.



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8 A. 282=6 A.W.N. (1886) 119.

APRIL 28.

## APPELLATE CIVIL.

APPEL-  
LATE  
CIVIL.*Before Mr. Justice Mahmood and Mr. Justice Oldfield.*

8 A. 282=

6 A.W.N.

(1886) 119.

MUHAMMAD SALIM (*Plaintiff*) v. NABIAN BIBI AND OTHERS  
(*Defendants*).<sup>\*</sup> [28th April, 1886.]*Civil Procedure Code, s. 13—Res judicata—Dismissal of suit under s. 10, cl. ii, Act VII of 1870 (Court Fees Act)—Dismissal of suit for misjoinder—Dismissal of suit "in its present form."*

The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form" (*ba haisiyat maujuda*), upon two grounds: first with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was undervalued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit.

[283] Held that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*.

*Per* MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. S. 10 is simply a penal clause to enforce the collection of the court-fees, and dismissal of a suit under its provisions cannot operate as *res judicata*.

Also *per* MAHMOOD, J.—The condition in s. 13 of the Civil Procedure Code, that the former suit must have been "heard and finally decided," means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ramnath Roy Chowdhry v. Bhagbut Mohaputter* (1), *Shokhee Bewah v. Mehdee Mundul* (2), *Dullabh Jegi v. Narayan Lakhu* (3), *Rungrav Rajvi v. Sidhi Mahomed Ebrahim* (4), *Fateh Singh v. Lachmi Koor* (5), *Roghoonath Mundul v. Juggut Bundhoo Bose* (6), and *Saikappa Chetti v. Rani Kulandapuri Nachiyar* (7) referred to.

Also *per* MAHMOOD, J.—The words *ba haisiyat maujuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by chapter XXII of the Code is not the only manner in which a plaintiff can come in to Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai v. Kalka Prasad* (8) dissented from. *Watson v. The Collector of Rajshahye* (9) and *Salig Ram v. Tirbhawan* (10) referred to.

[R., 3 C.P.L.R. 3 (5); D., 9 C.W.N. 679 (687).]

<sup>\*</sup> Second Appeal No. 1866 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 2nd June, 1885, confirming a decree of Maulvi Ahmad-ul-lah, Subordinate Judge of Azamgarh, dated the 23rd December, 1884.

(1) 3 W.R. Aot X Rul. 140.

(3) 4 B.H.C.R.A.C. 110.

(5) 18 B.L.R. Ap. 37.

(7) 3 M.H.C.R. 84.

(9) 13 M.I.A. 160.

(2) 9 W.R. 327.

(4) 6 B. 482.

(6) 7 C. 214.

(8) 5 A. 595.

(10) A.W.N. (1885) 171.

THE facts of this case are stated in the judgment of Mahmood, J.  
 Mr. C. H. Hill and Mr. Abdul Majid, for the appellant.  
 Maulvi Mehdi Hasan and Lala Jokhu Lal, for the respondents.

## JUDGMENT.

MAHMOOD, J.—I accept the argument addressed to us by Mr. Abdul Majid on behalf of the appellant, and I would decree this appeal, and, setting aside the decisions of both the lower Courts, remand the case to the Court of first instance for trial on the [284] merits. I will state my reasons for coming to this conclusion. The facts of the case, so far as they are necessary for the disposal of this appeal, are these :

Muhammad Salim, the plaintiff-appellant, purchased the property in suit from Musammat Nabian, under a deed of sale executed on the 4th September, 1871, but being probably unable to secure possession of the property, he brought a suit against the vendor and others, who are included as defendants in this suit. On the 9th November, 1872, that suit was dismissed on the ground of misjoinder, and also because the suit was under-valued, and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court. In the order of dismissal there is no reference to s. 10 of the Court-Fees Act VII of 1870. The words used are :—"The claim of the plaintiff in its present form is dismissed with costs ;" and I think the learned pleader for the respondent has rightly argued that the order must be taken to have been passed under the section above mentioned. From this order an irregular sort of miscellaneous appeal was preferred by the plaintiff, but the appeal was dismissed on the 12th April, 1873, when that litigation terminated. Matters stood thus until the 9th September, 1884, when the present suit was instituted by the same plaintiff, in respect of the same property, against the same defendants, and practically with the same object as the former suit. The suit has been resisted by the defendants, who, *inter alia*, pleaded that the suit has barred *in limine*, and in support of this plea they relied mainly upon the rule of *res judicata* as enunciated in s. 13 of the Civil Procedure Code. The plea has been accepted by both the lower Courts, and they have concurred in dismissing the suit without going into the merits.

The learned counsel for the appellant contests this view of the law in the argument which he has addressed to us, and he contends that there has been no real adjudication of the rights of the parties, and therefore neither the plea of *res judicata* nor any other plea in bar of the action applies to the case. I accept this contention. It is a fundamental rule of law that where there is a right there is a remedy—*ubi jus ibi remedium* ; and the operation of this maxim cannot be defeated, unless the plaintiff has already had his remedy, or [285] the remedy is barred by some clear and positive rule of law. Here the plaintiff asserts that by his purchase of the 4th September, 1871, he has become the owner of the property for which he sues, and if this assertion is true, he has his *jus*, and is entitled to his remedy, which, of course, cannot be granted without a proper adjudication of the merits of his title. There has clearly been no such adjudication in this case, and indeed the learned pleader for the respondents virtually concedes that the judgments of the lower Courts can be supported only upon the ground of the application of s. 13 of the Civil Procedure Code to this suit, though he has also attempted to rely upon other provisions of the law, and especially upon cl. ii of s. 10 of the Court-Fees Act, and

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contends that the expression in the Munsif's order that the suit was dismissed "*ba haisiyat maujuda*," that is, in the form in which it was brought, will not prevent the operation of the plea of *res judicata*.

It seems to me that much misapprehension prevails in the Mufassal in regard to pleas which bar an action in *limine*, and I may take this opportunity of expressing my views upon the subject as briefly as I can, especially as they will dispose of the whole argument pressed upon us by the learned pleader for the respondents. The rule that no one ought to be harassed twice, if it be clear to the Court that it is for one and the same cause—*nemo debet bis vexari, si constat curiæ quod sit pro una eadem causa*—is only a rule of adjective law or procedure which operates as a qualification or limitation of the maxim *ubi jus ibi remedium*, which I have already quoted. The maxim is the basis of the rule of *res judicata*, which was so fully considered in the celebrated case of the *Duchess of Kingston* (1) by Sir William De Grey, C.J., who delivered the unanimous judgment of the learned Judges in that case. The rule explained there has never been materially altered, and I look upon s. 13 of our own Civil Procedure Code as a reproduction of the old rule of law. Now the argument of the learned pleader for the respondents has left the impression upon my mind that he contended that the mere dismissal of a suit will, because it is a decree, operate as *res judicata*. This is not so. Judgments, orders or decrees which operate in bar of the action have been provided for by s. 40 of the Evidence Act (I of 1872), which makes [286] them relevant and thus admissible in evidence. But that section comprehends a vast class of such proceedings which cannot be confounded with the rule of *res judicata*. For instance, we have in the Civil Procedure Code itself the provisions in ss. 43, 103, 244, 317, 371, 373, which, though barring an action in *limine*, must not be confounded with the rule of *res judicata* as enunciated in s. 13 of the Code. On the other hand, it is not every dismissal, though incorporated in a decree, that will operate in bar of a second action; and illustrations of this are to be found in ss. 99 and 99-A of the Code itself, which permit a fresh suit in express terms. I have said all this in order to show that it is not every decree or judgment which will operate as *res judicata*, and that every dismissal of a suit does not necessarily bar a fresh action.

Now the question is whether the dismissal of the plaintiff's former suit under s. 10 of the Court Fees Act can be regarded as *res judicata* barring the present action. The next question is, whether the dismissal of a suit for misjoinder would have any such effect; and lastly, the question is whether the dismissal of the suit "*ba haisiyat maujuda*," that is, in the form in which it was brought, which occurs in the Munsif's order in the former suit dated the 9th November, 1872, has any bearing upon the question. I have enumerated these points because they distinctly arise from the contention of the learned pleader for the respondents, and I will deal with them *seriatim*.

First, then, I have no doubt whatsoever that the dismissal of a suit under cl. ii, s. 10 of the Court Fees Act can never operate as *res judicata* so as to bar a fresh action, where the plaintiff has valued his claim rightly and has paid adequate court-fees. The section begins by laying down the rule that if a suit has not been properly valued, "the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or net profits been rightly

(1) 2 Smith's L.C. 8th ed, p. 784.

estimated." And then comes cl. ii, with which we are concerned :—" In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." Now what I wish to say in the first place is that the object of these provisions, as indeed of the whole [287] Act, is to lay down rules for the collection of one form of taxation, and this I regard to be the scope of the enactment, though it contains no preamble at all : and I hold it as a fundamental rule of construction that statutes which impose pecuniary burdens, or encroach, upon the rights of the subject, or qualify those rights must be construed strictly. The rule applies with especial force to such provisions as provide a penalty, whatever its nature may be. These rules which are applied by Courts of Justice in England to Acts of Parliament are too well recognized to require any citation of authorities, and I hold that they are in the main applicable to the interpretation of the enactments of the Indian Legislature. This being so, I am of opinion that the dismissal of a suit under s. 10 of the Court Fees Act is intended to be simply a penal clause to enforce the collection of the court-fees, and that if such dismissal is sought to operate as a plea barring a fresh action *in limine* as *res judicata*, we must look elsewhere in the statute book. The learned pleader for the respondent points to s. 12 of the Civil Procedure Code in support of his contention. But the rule there laid down expressly renders its application subject to the all-important condition that the former suit "has been heard and finally decided." Now, it is not necessary for me to enter into an elaborate explanation as to what these words mean, for, as far back as 1865, two learned Judges of the Calcutta High Court, in *Ramanath Roy Chowdry v. Bhagbut Mohaputter* (1), laid down the rule that a former judgment proceeding wholly on technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. Again, another Bench of the same Court, in *Shokhee Bewah v. Mehdee Mundul* (2), held that a suit on the same cause of action, and between the same parties as a former suit which was summarily dismissed without being tried on its merits, is not one on a cause of action which "has been heard and determined by a Court of competent jurisdiction in a former suit," and that the latter suit would therefore not be barred. To come closer to the point now before us, we have the judgment of Couch, C.J., in *Dullabh Jogi v. Narayan Lakhu* (3), where the suit had been dismissed on the ground of improper valuation, and where it was [288] held that such dismissal would not operate as *res judicata* barring a subsequent suit. It is true that these rulings were passed before either the present Civil Procedure Code or the Court Fees Act existed; but I hold that even under the present law they are applicable to cases like the present. Indeed, the judgment of Latham, J., in *Rungrav Rajvi v. Sidhi Mahomed Ebrahim* (4), is a very recent authority, and there is much in the *ratio decidendi* there adopted which supports my view, though the exact point with which I am now dealing was not decided. Then as to the question of dismissal of the former suit on the ground of misjoinder or multifariousness, I need only cite *Fateh Singh v. Lachmi Koor* (5), which is an authority for saying that such a dismissal does not operate as *res judicata*. I may also cite *Raghoonath Mundul v. Jaggut Bundhoo Bose* (6) in support of my view.

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(1) 3 W.R. Act X Rul. 140.  
(4) 6 B. 482,

(2) 9 W.R. 327.  
(5) 13 B.L.R. Ap. 37.

(3) 4 B.H.C.R.A.C. 110.  
(6) 7 C. 214.



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It remains for me now only to deal with the third point upon which the argument on behalf of the respondent has proceeded. It is true that in the case *Ganesh Rai v. Kalka Prasad* (1) two learned Judges of this Court held that the dismissal of the former suit "in the form it was brought" did not amount to permission to sue again, contemplated by s. 373 of the Civil Procedure Code, and such dismissal must be regarded as a "decision" thereof in the sense of s. 13, *Explanation III*, and therefore as a bar to the fresh suit. The words in the original decree in that case appear to have been the same as here—i.e., the claim was dismissed "*ba haisiyat maujuda*," and no doubt much would depend upon the interpretation of these words. With due reference to the learned Judges who decided that case, I confess I am unable to accept the view of the law there enunciated. The report of the case shows that the former suit had been dismissed on the ground that the plaintiff had not filed his certificate of sale with the plaint, that is to say, for a purely technical irregularity with reference to the rule contained in s. 59 of the Civil Procedure Code. The suit had not been tried upon its merits, and the Munsif took care to qualify his decree by dismissing the suit "*ba haisiyat maujuda*," which cannot, in my opinion, be dealt with as nugatory in interpreting that decree; and if proper effect is given to such words, they can have [289] only one meaning, namely, that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. Whether such a qualified decree was right or wrong is another matter; but if it was wrong, it might have been a proper subject of complaint on the part of the defendant, against whom the suit was dismissed only as then brought, and he might possibly have taken measures, either by way of review or appeal, to make the decree final in the sense of the dismissal being upon the merits of the claim and not upon technical grounds of form; and if he did not take such measures, the decree must be taken as it stands, unless indeed the circumstances of the case showed that it was in reality a decree dismissing the suit after adjudication of the rights of the parties. But it was not so; and I cannot interpret such a decree as having the force of a final adjudication upon the merits of the issues raised between the parties, so as to operate as *res judicata* when a suit is instituted in proper form and the rights of the parties have to be adjudicated upon. Further, I am not prepared to accept the view upon which the judgment of the learned Judges in the case cited seems to proceed, to the effect that the procedure provided by Chapter XXII of the Civil Procedure Code is the only manner in which a plaintiff can come into court for the second time to ask for adjudication upon the merits of his rights—merits which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. Nor can I hold that *Explanation III* of s. 13, Civil Procedure Code, upon which the learned Judges in that case relied, would have any bearing upon a case such as the present. What really happened in this case was, that the Munsif in dismissing the suit "*ba haisiyat maujuda*"—in the form in which it was brought—adopted a course long known to the Mufassal Courts in this country under the somewhat inaccurate name of "*non-suit*"—a state of things to which the Lords of the Privy Council referred in *Watson v. The Collector of Rajshahye* (2), which is the leading case upon the subject, and in

(1) 5 A. 595.

(2) 13 M.I.A. 160.

which the former suit was dismissed by a decree which reserved to the plaintiff the right to bring a future suit. [290] Their Lordships, after stating the law as it then stood, made the following observations with reference to the reservation contained in the former decree :—

"It has been argued that that decree, not having been appealed against by the respondents in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court, in a case in which the former decree had been pleaded as *res judicata*, and which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case."

These observations leave no doubt in my mind that we can in this litigation examine the decree of the 9th November, 1872, in order to satisfy ourselves as to whether that decree can be properly pleaded as *res judicata* barring the present suit. But, as I have already said, that decree disposed of the suit upon the ground of purely technical defects, which in a just juridical sense cannot be regarded as a final adjudication upon the rights of the parties, so as to furnish a basis for application of the plea known in the Roman law under the name of *exceptio rei judicatae*, which is the foundation of the rule incorporated in s. 13 of our own Civil Procedure Code. And interpreting that section as I do, I adopt the language used by the learned Judges of the Madras High Court in *Saikappa Chetti v. Rani Kulandapuri Nachiyar* (1), when I say that to conclude a plaintiff by a plea of *res judicata*, it is not sufficient to show that there was a former suit between the same parties, for the same matter, upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Res judicata dicitur quæ finem*. [291] *controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolute contigit* (Dig. XLII, Tit. I. Sect. I). The case of *Ganesh Rai v. Kalka Prasad* (2), already referred to, ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling, and we did so before in a case [*Salig Ram v. Tirbhawan* (3)], in which the point for determination was very similar to this case.

For these reasons my order in the case is that this appeal be decreed, that the decrees of both the lower Courts be set aside, and that the case be remanded to the Court of first instance under s. 562, Civil Procedure Code, for trial upon the merits. Costs to abide the result.

OLDFIELD, J.—I concur in the order of remand.

*Case remanded.*

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(1) 3 M.H.C.R. 84.

(2) 5 A. 595.

(3) A.W.N. (1886) 171.



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FULL BENCH.

*Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield,  
Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

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(F.B.)=

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(1886) 94.

QUEEN-EMPRESS v. MADHO. [3rd May, 1886.]

*Prosecution, withdrawal from—Government Pleader—Public Prosecutor—Criminal Procedure Code, s. 494.*

*Held* by the Full Bench that a person appointed by the Magistrate of the District, under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494.

THIS was a reference to the Full Bench. The point of law referred is stated in the order of Brodhurst, J., by whom the reference was made.

BRODHURST, J.—I called for the record of this case on perusal of the Sessions statement of the District of Cawnpore for the month of December, 1885.

[292] Madho Brahman was committed for trial on a charge of murder. After the witnesses for the prosecution had been heard, the Sessions Judge recorded the following note and order :—"The Government Pleader, with the consent of the Court, withdraws from the prosecution, under s. 494, Criminal Procedure Code. Accordingly Madho is acquitted of murder under s. 302, Indian Penal Code." The Government Pleader had apparently been appointed by the Magistrate of the District, under the 2nd paragraph of s. 492 of the Criminal Procedure Code, to be Public Prosecutor merely for the purpose of this case, and as he had not been appointed to be a Public Prosecutor "by the Governor-General in Council or the Local Government," he was not, in my opinion, competent, even with the consent of the Court, to withdraw from the prosecution, and the acquittal of Madho Brahman was, I think, under the circumstances stated, illegal.

There is, however, a passage in a judgment of a Bench of this Court in the case *Empress v. Ramanand* (1), which seems to support the order of the Sessions Judge. The observations referred to were probably made in the absence of any discussion on that particular point, and it may have been supposed that, as in Bengal, so in these Provinces, all Government Pleaders had been appointed to be *ex-officio* Public Prosecutors; but as the judgment has been reported, and as the matter is one of very considerable importance, I refer the case for orders to the Full Bench.

The following opinion was given by the Full Bench :—

## OPINION.

STRAIGHT, Offg. C.J., and OLDFIELD, BRODHURST, and TYRRELL, JJ.—We assume, for the purpose of answering this reference, that there was a withdrawal of the case; and we desire only to say that we are satisfied that the person charged with the prosecution had not the power of a Public Prosecutor, with regard to withdrawal, under s. 494 of the Criminal Procedure Code.

8 A. 293=6 A.W.N. (1886) 106.

## [293] CRIMINAL REVISIONAL.

*Before Mr. Justice Oldfield.*

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QUEEN-EMPRESS v. JANKI PRASAD AND OTHERS. [4th May, 1886.]

*Act XLV of 1860 (Penal Code), ss. 99, 353—Warrant of arrest in execution of a decree only initialled by proper officer—Civil Procedure Code, ss. 2, 251—"Signed"—Right of private defence.*

A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted under s. 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad and the officer could not legally execute it, and consequently no offence under s. 353 of the Penal Code had been committed.

*Held* that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant.

*Held* also, with reference to s. 99 of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence.

[R., 31 C. 424 (425); 6 C.W.N. 845 (847); 31 M.L.J. 305=(1916) 2 M.W.N. 183=4 L.W. 377=36 Ind. Cas. 161.]

THIS was an application for revision of an order of Hakim Muhammad Amjad Ali, Magistrate of the first class, dated the 26th January, 1886, which order had been affirmed by the Sessions Judge of Benares, Mr. C. Donovan, on appeal.

The applicants, Janki and five other persons, were convicted by the Magistrate of an offence under s. 353 of the Indian Penal Code. It appeared that a warrant for the arrest of Janki in execution of a decree had been delivered by the Munsarim of the Court executing the decree to a process-server of the Court called Iman Bakhsh. This warrant was not signed by the Munsarim, but only initialed by him. When Iman Bakhsh proceeded to execute the warrant, he was assaulted by Janki and the other applicants, his friends.

It was contended for the applicants that the arrest was illegal, the warrant not being signed as required by s. 251 of the Civil Procedure Code, and therefore the resistance to the arrest did not constitute an offence under s. 353 of the Indian Penal Code.

[294] Mr. W. M. Colvin, for the applicants.

The Government Pleader (Munshi Ram Prasad), for the Crown.

## JUDGMENT.

OLDFIELD, J.—This is an application for revision of a conviction under s. 353, Indian Penal Code, for assaulting a public servant in executing a warrant of arrest. The warrant was issued for the arrest of a debtor under the provisions of s. 251, Civil Procedure Code. It was signed with the initials of the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution, who was the officer resisted.



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It cannot be disputed that the warrant fulfilled the requirements of s. 251, except in one particular, to which exception is taken, namely, that it was signed with the Munsarim's initials and not his full name, and it is contended that the warrant was, in consequence, bad, and the officer could not legally execute it, and consequently there was no offence committed under s. 353.

I cannot allow this contention. S. 251 directs that the warrant shall be signed by the Judge or such officer as the Court appoints in this behalf. S. 2, referring to the word "signed," is to this effect:—" 'Signed' includes marked, when the person making the mark is unable to sign his name; it also includes stamped with the name of the person referred to." This paragraph is not very explicit; but assuming it means that the person signing should, if able to write, write his name in full—and certainly it is proper that this should be done in the case of a warrant—I do not hold that because the signature on the warrant is confined to the initials of the name, it was not the duty of the officer to execute it,—and referring to s. 353 of the Penal Code under which the conviction has been made, that is really the question here,—and whether the warrant was such a warrant as it was the duty of the officer receiving it to execute.

I think it was. It was in all other respects in form, and in the particular of the signature it bore what was intended to be the signature of the proper officer, and it bore the seal of the Court, and it was delivered to the proper officer to execute, who received it from the officer authorized to issue the warrant as the warrant of the Court, and I think it became the duty of the officer to whom [295] it was delivered to execute it. He would in fact have failed in his duty in not executing it; and any resistance to him will be resistance to a public servant in the execution of his duty as such. The officer was acting under s. 353 of the Indian Penal Code, in good faith, under colour of his office. I may notice as bearing on the question that the act of the accused does not cease to be an offence on the ground that the act was done in the exercise of the right of private defence, as there is no such right under s. 99, Indian Penal Code, against an act done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. Looking to the facts of the case, I am of opinion that the option of a fine may be given, and I alter the sentence in each case to a fine of Rs. 10, or rigorous imprisonment for one month.

*Conviction affirmed.*

8 A. 295=6 A.W.N. (1886) 98.

## APPELLATE CIVIL.

Before Mr. Justice Straight, Offg., Chief Justice, and  
Mr. Justice Tyrrell.

NURA BIBI (Plaintiff) v. JAGAT NARAIN AND OTHERS (Defendants).<sup>\*</sup>  
[4th May, 1886.]

*Mortgage—Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of 1882 (Transfer of Property Act), ss. 95, 100—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 134, 148—Burden of proof.*

K and J jointly mortgaged 36 sahams or shares of an estate to C, giving him possession. C transferred his rights as mortgagee to T and M. In execution of a decree for money against K held by M, K's rights and interests in the mortgaged property were sold, and were purchased by P, whose heirs paid the entire mortgage-debt. R, an heir of J, sued the heirs of P, to recover from them possession of J's sahams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by P. The plaintiff alleged that the mortgage to C had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since C transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sahams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point.

[298] *Held*, applying the equitable principle adopted in ss. 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. ii of the Limitation Act (XV of 1877), and it was not possible for one of the two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other, to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

*Held*, therefore, that No. 148 and not No. 134 of sch. ii of the Limitation Act was applicable to the suit.

*Umrunnissa v. Muhammad Yar Khan* (1) distinguished. *Pancham Singh v. Ali Ahmad* (2) referred to.

*Held* also that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishan Dutt Ram v. Narendra Bahadoor Singh* (3) referred to.

[F., 14 A. 1 (5) (F.B.); 32 P.R. 1905=39 P.L.R. 1905; R., 11 A. 423; 11 A. 438 (451); 21 O.L.J. 104=27 Ind. Cas. 780 (781); U.B.R. (1892—1896) 490 (491); U.B.R. (1897—1901) 469 (470).]

THE facts of this case were as follows:—Two Muhammadan ladies, named Khuban Bibi and Jan Bibi, owned respectively 31 sahams or shares and 5 sahams or shares of a certain estate. They jointly mortgaged the

<sup>\*</sup> Second Appeal No. 1098 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th June, 1885, reversing a decree of Rai Pandit Indar Narain, Munsif of Allahabad, dated the 2nd January, 1885.

(1) 3 A. 24.

(2) 4 A. 58.

(3) 3 I. A. 85.

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36 shares to one Chitu, giving him possession. Chitu transferred his rights as mortgagee to persons called Teja Bibi and Makhdum Bakhsh. Makhdum Bakhsh held a decree for money against Khuban Bibi, and he caused her rights and interests in the property to be put up for sale in execution of that decree, and the same were purchased by one Panna Lal, whose heirs paid the mortgage-debt. The plaintiff in this case was the heir of Ramzan, one of the heirs of Jan Bibi. She claimed to recover from the heirs of Panna Lal possession of Jan Bibi's 5 sahamas, on payment of a proportionate amount of the mortgage money paid by Panna Lal.

The plaintiff alleged that the mortgage to Chitu had been made forty years before suit.

The defendants set up as a defence that a much longer period than forty years had expired since the date of the mortgage; that [297] forty-one years had passed since Chitu had transferred his right as mortgagee; that they had redeemed the mortgage 21 years ago, and had been since its redemption in proprietary and adverse possession of the shares in suit; and that the suit was barred by limitation.

The Court of first instance (Munsif of Allahabad) gave the plaintiff a decree, applying No. 148, sch. ii of the Limitation Act, and holding as follows on the question of limitation:—

"The plea of limitation which has been set up is, in the opinion of the Court, untenable. To render a claim barred by limitation it is necessary that full sixty years should elapse after the expiry of the term of the mortgage. The defendants do not know when the mortgage was originally made to Chitu. The plaintiff also is unaware of this. The burden of proving that sixty years have elapsed, however, rests with the defendants; but they have failed to adduce any proof and therefore the plea set up by them fails. The burden of proof is thrown on the defendants for two reasons—(i) because they affirm a fact which the plaintiff denies, and (ii) because the burden of proof rests with the party which would be the loser if no evidence were given by either party. The law takes great care that mortgaged property should not pass from the hands of the original owners to the hands of strangers. The defendants try to create their 'proprietary title in the property, and therefore the burden of proof should be thrown on them.'"

The defendants appealed, contending that the suit was governed by No. 134, and not No. 148, of the Limitation Act; and that the burden of proof as to limitation was on the plaintiff and not on them.

The lower appellate Court (District Judge of Allahabad) held on these points as follows:—

"With regard to the first of these two contentions, the appellants seek to show that art. 148 applies only to an original mortgagee, and not to others to whom a mortgage has been transferred, and that as the defendants-appellants, if not, as they assert, proprietors, must be held to have purchased the mortgage from the [298] mortgagees, the case comes under art. 134 and is governed by the twelve years' period of limitation. No authority has been cited in support of this contention, and I am unable to see that the plaintiff-respondent is other than the owner of an equity of redemption, suing a mortgagee to redeem or recover possession of immoveable property, or that the circumstances, as stated above, deprive the plaintiff-respondent of the longer period of limitation prescribed by art. 148.

"But on the second point I hold the lower Court's finding to have been mistaken. The *onus* lies on the plaintiff, and not on the defendants—

appellants. I quite concur in the finding that the defendants cannot be said to have had proprietary possession. They purchased the equity of redemption of Khuban's shares only, not of those of Jan Bibi's; and the fact that the mortgage was executed jointly by Khuban and Jan, and that the appellants paid off the whole, does not seem to give them any better position than that of mortgagees in respect of Jan Bibi's shares. They acquired in those shares the right of the mortgagee and nothing more.

"But it is clearly the duty of the plaintiff to prove that the suit has been instituted within sixty years of the time when the right to redeem accrued. Her suit is possible only under art. 148, and she has therefore come into Court on the averment implied in its conditions: neither the fact that the averment is challenged by the defendants, or that they admit a mortgage, seems to me to shift the burden on them.

"The point was not made the subject of a clear issue by the lower Court, though considered in its decision and presumably argued before it. The plaintiff-respondent's pleader has been offered, and has declined, further opportunity of adducing proof. It is apparent that the plaintiff-respondent is in fact unable to give such proof. She stated in her plaint that the original mortgage took place forty years ago, but the defendants-appellants have proved that forty-one years have elapsed since the transfer by Chitu, the original mortgagee, to Teja Bibi and Makhdum Bakhsh.

"Under these circumstances, I am of opinion that the plaintiff-respondent's suit must fail."

[299] The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindra Nath Chaudhri*, for the respondents.

#### JUDGMENT.

STRAIGHT, Offg. C.J., and TYRRELL, J.—We think the lower Courts were right in holding that the period of limitation applicable to a suit of this nature is that provided by art. 148 of Act XV of 1877. It was so decided by Pontifex, J., in an unreported Calcutta case mentioned on page 162 of Mr. Mittra's excellent work on Limitation; and our only difficulty is a Full Bench ruling of this Court in *Umrunnissa v. Muhammad Yar Khan* (1), which at first sight appears to be at variance with this view. Upon examination, however, it will be seen that the applicability of art. 148 to the facts of that case was never raised or considered, the arguments and *ratio decidendi* being confined to the question of whether, assuming art. 144 to supply the limitation, there had been adverse possession on the part of the defendants which would defeat the plaintiff's suit. It was held that there had not; but beyond this the decision did not and could not go, and the point now before us may therefore be regarded as *res integra*. In the ruling of Pontifex, J., above adverted to, that learned Judge speaks of the co-mortgagor who redeems the entire mortgage as "standing in the shoes of the mortgagee" in respect of such portion of the redeemed property as belongs to the other mortgagor, and this Bench decided much to the same effect in *Pancham Singh v. Ali Ahmad* (2). The equitable principle recognised in these rulings is now embodied in s. 95 of the Transfer of Property Act, which declares that "where one of several mortgagors redeems the mortgaged property

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(1) 3 A. 24.

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and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses properly incurred in so redeeming and obtaining possession." What that charge carries with it is explained in s. 100 of the same statute, which says that, where "by operation of law the immoveable property of one person is made security for the payment of money to another, all the provisions hereinbefore contained as to a mortgagor shall, as far as may be, apply to the owner of such property, and the provisions of ss. 81 and 82 and all [300] the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge." We only refer to these provisions, which cannot govern the mortgage in the present case, which was long antecedent to the Transfer of Property Act, by way of analogy; but applying the equitable principle that they adopt, the effect is the same, namely, that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor and in its entirety, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose will be in the nature of a suit for redemption. Such a suit naturally falls within the definition of art. 148 of Act XV of 1877, and we fail to appreciate how it is possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

The only remaining question is as to whether the learned Judge rightly held the burden of proof to be on the plaintiff. The defendant is admittedly in possession, and, in our opinion, though the existence of a mortgage as the origin of such possession was conceded by him, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit.—*Kishan Dutt Ram v. Narendar Bahadoor Singh* (1). We assume that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, and under these circumstances very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. But she produced none; and though offered an opportunity to bring forward further evidence, her pleader declined to do so. Under these circumstances, we think the learned Judge below was right, and the appeal is dismissed with costs.

*Appeal dismissed.*

8 A. 301 = 6 A.W.N. (1886) 97.

APPELLATE CIVIL.

[301] *Before Mr. Justice Straight, Offg. Chief Justice,  
and Mr. Justice Tyrrell.*

PARAGA KUAR (*Judgment-debtor*) v. BHAGWAN DIN AND ANOTHER  
(*Decree-holders*).<sup>\*</sup> [5th May, 1886.]

*Execution of decree—Civil Procedure Code, s. 230—Meaning of "granted".*

Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, i. e., an application for execution should not be granted if a previous application has been allowed under the provisions of that section.

<sup>\*</sup> First Appeal No. 122 of 1885, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 4th July, 1885.

The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not "granting" an application within the meaning of s. 230 of the Code, and ss. 245, 248 and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249.

In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March, 1877, various amounts were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March, 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March, 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March, 1884, the decree-holder applied once more for execution of the decree.

*Held*, that neither the previous application of the 9th March, 1881, nor that of the 5th March, 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Civil Procedure Code, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed.

THE facts of this case are sufficiently stated in the judgment of Straight, Offg. C. J.

Mr. W. M. Colvin and Munshi Hanuman Prasad, for the appellant.

Pandit Bishambar Nath and Munshi Kashi Prasad, for the respondents.

#### JUDGMENT.

[302] STRAIGHT, Offg., C.J.—On the 26th August, 1865, one Bhagwan Din, the respondent before us, obtained a decree against a person named Hattu Singh. It was an instalment decree for Rs. 3,214-14-2, payable by yearly instalments, commencing in the year 1866, and extending to the year 1882, in all a period of 16 years. In the year 1870 the judgment-debtor Hattu Singh died leaving behind him a widow named Manni Kuar and two daughters, one of whom had a son named Jai Jodhan Singh. He also left among his heirs a nephew named Zalim Singh, whose widow, named Paraga Kuar, is the appellant before us.

Now down to March, 1877, various amounts had been paid on account of the decree, and on the 6th March of that year, an application for execution was made against Manni Kuar, the widow of the deceased Hattu Singh. The result of these proceedings was, that an arrangement was come to on the 11th May, 1877, for liquidation of the amount then due, and this arrangement was confirmed by the Court on the 9th June, 1877. The next application for execution, with which we have to do, was made on the 9th March, 1881. At this time the decree was more than 12 years old. There was an office report made to the effect that Manni Kuar had died, and therefore notice was issued to Jai Jodhan Singh and Paraga Kuar, widow of Zalim Singh above named, surviving heirs of the judgment-debtor. On the 6th April, 1881, it was notified to the Court that another arrangement had been effected under which a certain sum had been paid by Jai Jodhan Singh in satisfaction and discharge of the claim against him, and that the balance of Rs. 800 had

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been agreed to be paid by Paraga Kuar by yearly instalments. On the 5th March, 1883, there was another application for execution against Paraga Kuar, which was the last preceding application for execution to that which we have to deal with, namely, that of the 31st March, 1884, and what is prayed by the decree-holder is, that the execution of the decree of 1865 should be allowed by attachment and sale of the property of Paraga Kuar.

That application has been granted by the lower Court, and Paraga Kuar prefers this appeal. The only real ground on which we are asked to disturb its order is, that the original decree having [303] been more than 12 years old at the date of the two last applications for execution, it is barred by limitation. Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is 12 years old, there is a prohibition against its being executed more than once, that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section.

Now the test to apply to this case is, to see whether the last of those applications preceding the application the granting of which is the subject of appeal, was *granted*, because, if granted, the prohibition referred to in the section applies. The last preceding application was that of the 5th March, 1883, and all that seems to have been done was, that application was made, notice to appear was issued, and after this notice, a petition was put in intimating that some arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. It appears to me impossible to say that the mere filing of a petition with the result that the application contained in it is subsequently struck off, is granting an application within the meaning of s. 230 of the Code; and looking to the provisions contained in ss. 245, 248 and 249, it also appears to me that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In other words, it is one thing to ask for execution of a decree, and another to have such application granted. I therefore think the last preceding application here was not one that can be said to have been "granted." The same may be said as to the application of the 9th March, 1881; nothing more was done as to that than as to the application of the 5th March, 1883. Therefore that also is not within the prohibition contained in s. 230.

Under these circumstances the decree, though twelve years old and upwards, is not barred by s. 230 of the Civil Procedure Code, and therefore the plea of limitation fails on that ground.

It has been suggested that the Judge has not tried the question whether Paraga Kuar was a party to the compromise of 1881; [304] but no such objection has been put forward by her in her grounds of appeal. Her plea was that the execution of the decree was barred by limitation, and, though this matter has been before this Court in another shape in appeal from the District Judge, and is again before us, no such allegation has ever been formally made on her part, nor has it been entered in the memorandum of appeal. Under these circumstances we should not be justified in interfering with the order of the lower Court or delaying the execution of the decree. The appeal is dismissed with costs.

TYRRELL, J.—I concur.

*Appeal dismissed.*

8 A. 304=6 A.W.N. (1886) 125.

## CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS v. DHUNDI. [8th May, 1886.]

*Attempt to cheat—Act XLV of 1860 (Penal Code), ss. 417, 511.*

In a prosecution for an attempt to cheat, under ss. 417-511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas* and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so indorsed to the central office and present it to be cashed.

*Held* that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside.

THIS case was reported to the High Court for orders by Mr. W. Young, Sessions Judge of Agra. The facts were set forth in the Judge's reference as follows:—"The applicant for revision, Dhundi, Ahir, is a servant of Kallu Mal, Bania, of Mathura, and the case against him is that he, at the central octroi office in Mathura, on the 16th December, 1885, falsely represented three *kuppas* (skins), which were there and then produced, to contain ghi, [305] whereas only two contained ghi and the third contained oil, and that the object of this false representation was to obtain a certificate entitling him to a refund of octroi duty on three *kuppas* of ghi, which would have amounted to 30 annas, instead of the proper refund, which would have been 25 annas only. The prosecution alleges that, prior to granting the refund certificate, the octroi officers took the precaution of examining the contents of the three *kuppas*, and found that, in fact, two only contained ghi and the third oil. Whereupon Dhundi was charged with attempt to cheat, and was tried on that charge, and finally was convicted and sentenced to pay a fine of Rs. 4, or, in default, to suffer one month's rigorous imprisonment. Dhundi denies the fact, and says that he never alleged the three *kuppas* to contain ghi, and I notice that the prosecution produce no invoice in his master's writing, detailing the *kuppas* as three *kuppas* of ghi. This is a considerable defect in the proof, for it is usual to send such invoices when goods are presented for refund of octroi. I notice also that accused alleges enmity between the octroi superintendent and his (accused's) master. However, I should not refer this case if it had been solely the facts which were doubtful. I think that even supposing the fact to have been that the accused misrepresented the contents of the *kuppas* as he is said to have done, he yet had not completed an attempt to cheat, but only had made preparation for cheating. The procedure in case of a refund of octroi at Mathura is, that the central office, on satisfying itself that the articles produced are what they are said to be, grants a certificate, which

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certificate is indorsed by the outpost clerk when he passes the goods (on which refund is claimed) out of the town. The owner takes back the certificate so indorsed to the central office, and here these certificates are encashed once a week, *viz.*, on Saturdays. Now, even supposing that Dhundi by false representations had succeeded in getting a refund certificate for 30 annas, yet he still had a *locus penitentiæ*. He had to get it indorsed at the outpost, and had to present it on the following Saturday for encashment before he finally lost all control over it, and could no longer prevent the completion of the offence. Before that time (*i.e.*, the time of presentation on a Saturday), he might have altered his mind even from prudence, if not from penitence, and torn up the certificate, [306] and no cheating could then have happened. The definition of cheating is so comprehensive that I must add a sentence or two with reference to the argument that the mere inducing the clerk to do a thing (*viz.*, to give the certificate), which he would not have done unless so deceived, would amount to cheating. It is to be noted that the act or omission must be one that causes, or is likely to cause, damage to such person, damage or loss, &c. But here the mere certificate by itself and until indorsed, and until further action had been taken upon it, could not possibly have caused loss or damage to any person. And further, as a matter of fact, no such certificate was delivered to Dhundi. For these reasons, I think the decision below wrong in law, and would recommend its reversal."

#### ORDER.

BRODHURST, J.—For the reasons stated by the Sessions Judge, I annul the Deputy Magistrate's finding and sentence of the 29th February, 1886, and direct that the fine, if realized, be refunded.

*Conviction set aside.*

8 A. 306=5 A.W.N. (1885) 311.

#### APPELLATE CRIMINAL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

#### QUEEN-EMPRESS v. RAM SARAN AND OTHERS.

[11th November, 1885.]

*Accomplice—Evidence—Corroboration—Act I of 1872 (Evidence Act), ss. 114 (b), 133.*

The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice, is not illegal, that is, it is not *unlawful*, but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R. v. Webb* (1), *R. v. Dyke* (2), *R. v. Addis* (3) and *R. v. Wilkes* (4), referred to.

(1) 6 C. and P. 595.  
(3) 6 C. and P. 388.

(2) 8 C. and P. 261.  
(4) 7 C. and P. 272.

[307] The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.

In the trial of *RS*, and *M*, upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of *P*, who was jointly tried with them for the same offence, (ii) the evidence of an accomplice, (iii) the evidence of witnesses who deposed to the discovery in *R*'s house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found.

*Held* that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner *P*.

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THE appellants in this case, Ram Saran, Piru, Mohib Ali, and Ram Ghulam were convicted by Mr. G. J. Nicholls, Sessions Judge of Ghazipur, of the murder of a boy called Gur Prasad, and were sentenced to death, the order of the Sessions Judge being dated the 18th August, 1885. The facts of the case, so far as they are material for the purposes of this report, are stated in the judgment of Straight, J.

The appellants were not represented.

The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

#### JUDGMENT.

STRAIGHT, J.—In this case four persons—Ram Saran, Piru, Mohib Ali, and Ram Ghulam—have been convicted by the Sessions Judge of Ghazipur of the murder of a boy named Gur Prasad, son of Damri, *Bania*, on the 16th June, 1885. All the convicts have appealed, and the case has also come in the ordinary course before us for confirmation of the sentences of death which have been passed on the appellants. The case is one which has caused my brother Tyrrell and myself great anxiety, and has occupied much of our time, and looking to the care with which the Judge tried it, and to the circumstance that the assessors concurred with him in his verdict, we have hesitated long before arriving at the conclusion, as regards some of the appellants, that the convictions cannot be sustained.

The circumstances of the case are shortly these. On Tuesday, the 16th June, the deceased boy, Gur Prasad, was staying with his sister at Sikandarpur, and on that day he left her house, and [308] neither by her eyes nor by the eyes of any other of his relatives was he ever again seen alive. At the time he left, he was wearing certain articles of jewellery, and his sister's attention having been aroused at about noon by his non-appearance, she inquired after him, but in consequence of his father being absent at the time, no serious steps were taken to bring his disappearance to the notice of the authorities. It was not until Thursday, the 18th, that complaint was made to the police, when at the instance of the sister, they were informed that the boy was missing, and that no trace of him could be found. On the same day, Piru, one of the accused, was sent for, but he does not appear to have given any information at that time. He was warned that he had better give information or he would be sent before the Magistrate, and was then allowed to go to his home. On the 19th he was again sent for, but no serious information was then obtained from him; but on the 20th, having been again brought to the thanah, and in consequence of information then given by him, the police went to the house of the accused Ram Ghulam. There, according to the evidence of two witnesses for the prosecution, after some hesitation, Ram Ghulam



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produced from a hole in the corner of his room certain of the articles of jewellery which the boy was wearing when he left his sister's house on the 16th June, and which must have been taken from his body. So that, as regards Ram Ghulam we have this evidence, that upon information given by Piru, the police went to his house which was searched, and that he there dug up these ornaments. Following on Piru's statement regarding the ornaments, the house in which he himself lived was examined, and under the earthen floor a grave was discovered, and therein undoubtedly was found the body of the unfortunate lad Gur Prasad. At this stage it appears that Ram Ghulam and Piru were taken into custody, and so remained during all the subsequent proceedings.

Now it seems that all the four appellants, together with one Sukhai, *Teli*, were intimate friends and acquaintances; that with the exception of Ram Saran they all belonged to a disreputable class known as "Mokhs"; and that they were in the habit of dancing and frequenting public places together. On the 30th June, Sukhai made a long statement to the Deputy Magistrate, not the Magistrate who was subsequently engaged in the inquiry—[309] by which he implicated not only himself and Piru, but also Ram Ghulam, Ram Saran and Mohib Ali, the other appellants, already mentioned as having been concerned in the boy's murder. On the 1st July, Piru also made a statement bearing a singularly close resemblance to that made by Sukhai, and for the purpose of this judgment, it may be at once remarked here that the two accounts circumstantially coincide in representing that Sukhai and Piru and the other three appellants were engaged in the murder of Gur Prasad on the night of Tuesday, the 16th June. In addition to these materials for arriving at a conclusion in the matter, there is also the evidence of two men, one Ishri, *Mali*, and the other Rang Lal, to the effect that Rang Lal, about noon on the 16th, saw Piru, Sukhai, and Mohib Ali, with the boy at Sukhai's door, and that Ishri, on the evening of the 16th instant, before sunset, saw the four prisoners, with Sukhai sitting in Shamshera's *dalan*, i.e., near the place where the body was afterwards found. Now these circumstances, so far as my memory serves me, exhaust the matters proved on behalf of the prosecution, and upon these materials the Judge has convicted all the four appellants. I may, in passing, observe that Piru, who pleaded guilty in the Sessions Court, was nevertheless tried jointly with the other accused, and therefore his confession made before the Deputy Magistrate on the 1st July, and subsequently repeated before the Judge, might be taken into consideration as against the other prisoners.

With regard to Piru, his case may be dismissed at once. The Judge, upon the materials before him, very properly convicted Piru of murder; and that he took part in the commission of the crime, there cannot be a moment's doubt. While the evidence as to the cause of death is not strictly proved as regards the other accused, Piru's own admission as to the mode in which death was caused is clear against himself, so that he cannot take advantage of the fact that there is no scientific proof of the cause of death. With regard to the other appellants the matter stands thus. As to Ram Ghulam, the case for the prosecution is supported by the confession of Piru, by the evidence of Sukhai, who received a pardon and was called as a witness, by the circumstance that on the 20th June, some ornaments belonging to Gur Prasad were [310] discovered at his house, and by the evidence of one of the two witnesses to whom I have referred, who says that he saw Ram Ghulam with the other prisoners on

the evening of the 16th instant before sunset. That is the whole of the case against him; and, with the exception of the digging up the ornaments, it is the same against Ram Saran and Mohib Ali; and it raises crisply and clearly the question as to whether, upon the materials which I have described, we can sustain the convictions and direct that the capital sentences be carried out.

Now I cannot help saying that there is a great deal of loose talk in Courts of Justice regarding the precise position of an accomplice witness, and the legal effect of a conviction based upon such a witness's evidence. The law in this country, as expressed in ss. 133 and 114 of the Evidence Act, is in no respect different from the law of England. It simply reproduces a rule of practice which the English Courts have recognized, time out of mind, and which, I may add, their tendency of late years has been to apply with great strictness. The rule is this. A conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*. But experience teaches that it is not safe to rely upon the evidence of an accomplice unless it is corroborated, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated; and, when trying a case with a jury, to warn a jury that such a course is unsafe. Further, not only is it necessary that the evidence should be corroborated in material particulars, but the corroboration must extend to the identity of the accused person; and in this connection I may refer to the case of *R. v. Webb* (1), in which Williams, J., said:—"You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon, for at least knowing how the felony was committed. It has been always [311] my opinion that confirmation of this kind is of no use whatsoever." Then again, in the well-known case of *R. v. Dyke* (2), Gurney, B., said:—"Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice unconfirmed with respect to the party accused." So in the case of *R. v. Addis* (3), Paterson, J., expressed a similar view. Again the *dicta* of Lord Abinger have frequently been referred to in cases of this kind, and are cited in Taylor's work on Evidence as crisply and fully representing the latest principles which the Courts in England have applied in dealing with this question. Upon the opening of the case he said:—"I am clearly and decidedly of opinion, and always have been, and always shall be, that there must be a corroboration as to the particular prisoner:" and when he came to sum up the case to the jury, he said:—"I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike. It is a practice which deserves all the reverence of law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the

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(1) 6 C. and P. 595.

(2) 8 C. and P. 261.

(3) 6 C. and P. 388.



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accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused." He then goes on to make a remark which is most thoroughly applicable to cases of the kind which occur in this country:—"A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to show that the [312] party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the public house. If they were found together under circumstances that were extraordinary, and where the prisoner was not likely to be, unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there, and he left when they were shutting up the house. It is perfectly natural that he should have been there, and have left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him: all the rest depends on the evidence of the accomplice. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence." The same view was expressed in *R. v. Wilkes* (1) by Alderson, B., and in many other rulings.

So that, as I understand the rule, there must be some corroboration independent of the accomplice, or, as in the present case, of the accomplice and the co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. I may add that it is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first, nor does the fact that there are two make it unnecessary that both should be corroborated. Again, the accomplice must be corroborated, not only as to one, but as to all, of the persons affected by the evidence, and because he may be corroborated in his evidence as to one prisoner, it does not justify his evidence against another being accepted without corroboration.

These principles seem to me to be embodied in the Evidence Act in force in this country, and in applying them to the case before us, the question is—what is the corroboration here, and is there any independent evidence corroborating the statements of Piru and Sukhai in such a manner as to prove satisfactorily that [313] the other three appellants were actually engaged in the murder of Gur Prasad?

First with reference to Ram Ghulam there is the evidence of Ishri, Mali, and of him alone, who says that in the evening, about an hour before sunset on the 16th June, he saw the four prisoners in Shamshera's *dalan*. If that is corroboration of the kind that is necessary, it does corroborate the statements of Piru and Sukhai, both of whom say that shortly before sunset the prisoners were sitting with the boy Gur Prasad in Shamshera's *dalan*. But is it sufficient corroboration? It is conceded.

that the prisoners were in the habit of going about together. There is nothing remarkable in this ; it was an occurrence which might have been observed any day : and I may remark that it renders the witness's evidence liable to some suspicion ; for if the prisoners were so continually together, why should he have noticed their being together upon this particular occasion ?

The only other circumstance affecting Ram Ghulam, is that he produced the jewels from the corner of his house on the afternoon of Saturday the 20th June. I have given much anxious consideration and reflection to the question whether this can be regarded as corroboration showing that Ram Ghulam participated in the murder. It would no doubt be corroboration of the evidence of an accomplice that the prisoner participated in a robbery, or that he has dishonestly received stolen property, but, in my opinion, it can be carried no further. It is quite within the bounds of possibility that a murderer might hand the proceeds of his crime to a person who might be found in possession of them and be in guilty possession of them to the extent of knowing they were stolen ; but it requires a very long and dangerous leap to arrive at the conclusion that the possession of the property taken from a murdered person is adequate corroboration of the evidence of an accomplice, charging such person in possession with participation in a murder. Under these circumstances, I have come to the conclusion, though not without much doubt and hesitation, that there is no proper corroboration of the statements of the accomplice, Sukhai, or of the co-confessing prisoner, Piru, sufficient to satisfy the requirements of the law, and that for this reason the appeal of Ram Ghulam must be allowed and he must stand acquitted.

[314] It follows as a necessary consequence that, if the case for the prosecution as against Ram Ghulam fails, it must fail as against the other two accused, Ram Saran and Mobib Ali ; for neither of them was found in possession of any property whatever belonging to Gur Prasad, and there is no other evidence. I have only a few words to add as to the remarks made by the learned Judge, towards the close of his judgment, in regard to the materials upon which he bases his conclusions. He says :— "These narratives are corroborated by the finding of the corpse buried in Piru's house"—which is undoubtedly strong evidence against Piru,— "by the finding of the ornaments hidden on the premises of Ram Ghulam"—upon this point I need not repeat the observations I have already made—"by the evidence of Rang Lal and of Ishri, *Mali*,"—as to which again I need not repeat what I have said—"by the association of all five, or of all but Sukhai, in the lease of the grove from Misri Lal, a grove which adjoins that of Damri Lal, where the boy had gone for mangoes,"—a fact of very little value—"by the neglect of Shamshera, brother of Piru, a town chaukidar, to give his message about the boy's being missed"—a matter the importance of which, or how it affects the prisoners, I am unable to see,— "by the association in depravity of all four (Ram Saran being excepted), by Ram Saran's close intimacy with Ram Ghulam, and by the propinquity of the dwellings of Sukhai, Mohib Ali, and Piru, and of Darmi Lal, and by the bad character of all five men." Now, here I must observe that the learned Judge appears to me to have been over-pressed by certain matters which ought not to have influenced his mind at all. He had nothing to do with the bad characters of the prisoners. Their characters were absolutely irrelevant to the case. If they are any of them had previously been convicted of any crime, such as was relevant to the particular matter now charged, such, for instance, as robbery, dacoity, or

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any similar offence, such conviction might have been proved in a formal and proper manner and would then have been relevant. But the bad characters of the accused were not relevant, and the Judge appears to have allowed his mind to be influenced by matters which were calculated to mislead him, and to cause his mind to place a colouring upon the facts, which did not assist him in forming a calm and dispassionate judgment on the case.

[315] Before concluding, I must remark, that according to the statements of Sukhai and Piru, the jewels were given on the night of the murder to one Durga Tewari. It is not clear from the statements of Piru whether Durga was aware of the manner in which the jewels had been obtained ; but, if Sukhai be believed, Durga was not aware of it, and did not know that the ornaments were the proceeds of a murder. It is remarkable the Durga Tewari was never placed in the witness-box to state what actually happened, and whether the jewels were in fact handed to him as stated. This evidence would have been important ; because I am not sure that if the jewels had been handed to him in the presence of all the prisoners, immediately after the murder and near the scene of it, there would not have been corroboration of the statements of those two persons. My brother Tyrrell and I have most anxiously considered this case. We may of course have our suspicions as to the correctness of the conclusions arrived at by the Judge and the assessors ; but our decisions in criminal cases, and especially in so grave a matter as a capital offence, must not depend on mere suspicion but must be regulated by the principles of law laid down for the guidance of Courts of Justice. We have no alternative but to allow the appeals of Ram Saran, Mohib Ali, and Ram Ghulam, and direct that they stand acquitted. With regard to Piru, his appeal is dismissed, and we direct that the capital sentence be carried into execution.

TYRRELL, J.—I fully concur in what has fallen from my brother Straight and in the orders he proposes.

8 A. 315 = 13 I.A. 57 = 4 Sar. P.C.J. 707.

## PRIVY COUNCIL.

### PRESENT :

*Lord Blackburn, Lord Monkswell, Lord Hobhouse and Sir R. Couch.*

*[On appeal from the High Court, North-Western Provinces.]*

BALWANT SINGH (*Appellant*) v. DAULAT SINGH (*Respondent*).  
 [17th February, 1886.]

*Civil Procedure Code, s. 549.*

An appeal, although it may have been rejected by the appellate Court, under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.

[316] The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, held by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.

APPEAL by special leave from an order (29th November, 1882) of the High Court, refusing to restore to the file an appeal rejected (14th August, 1882) for default in furnishing security for costs demanded by its previous order (26th June, 1882).

The present appellant, as the son of the deceased elder brother of Jagendra Balli, deceased, late Raja of Sikri, obtained a decree (21st November, 1881) in the Court of the Deputy Commissioner of Jalaun against the respondent, the late Raja's younger and surviving brother, for possession of the raj estates. This decree was reversed by the Commissioner of Jhansi on the 28th February, 1882, and against it an appeal to the High Court was filed on the 5th May following. On the 3rd June, the respondent obtained an order under s. 541 of the Code of Civil Procedure, calling on the appellant to show cause why security to the amount of Rs. 2,500 should not be given by him for costs of the appeal. On this the appellant did not appear, and the High Court, on the 26th June, made the order that the appellant should deposit security within six weeks. On the 5th August, three days before the six weeks expired, appellant showed cause why he should not be ordered to give security. This, however, had no effect to prevent the High Court, on the 14th August, striking the appeal off the file with costs, on the ground that this was "of necessity," as the security had not been filed within the time prescribed.

On the 9th September following the appellant presented a petition for the restoration of the appeal, alleging that the order of the 3rd June had not at any time been served upon him, and offering security to the amount fixed in the order of the 3rd June. On this notice to the respondent to show cause was issued, and cause being shown on the 29th November, 1882, the petition of restoration was rejected by an order of that date, of which the terms are set forth in their Lordships' judgment.

The appellant on the 28th January, 1883, applied to the High Court for permission to the appeal to Her Majesty in Council; and [317] notice to the opposite party having been issued, under s. 600 of the Code of Civil Procedure, the certificate of leave to appeal was refused.

On the 12th December, 1883, on the appellant's petition setting forth the above facts as grounds, on which petition Mr. *W. A. Raikes* appeared for the petitioner, special leave to appeal was granted by the Judicial Committee.

On this appeal, Mr. *E. V. Doyne* and Mr. *W. A. Raikes*, for the appellant. Whether the order of the 26th June, 1882, was rightly made or not, that of the 14th August was clearly made without due regard to the appellant's not having had an opportunity to show cause, a fact which appeared on his petition of the 5th August. The order of the 29th November, 1882, was wrong for the same reason; and the tender of security should have been held sufficient to secure to the appellant the appeal to which he was entitled.

Mr. *T. H. Cowie*, Q. C., and Mr. *C. W. Arathoon*, for the respondent. The High Court rightly exercised its discretion to refuse to re-admit an appeal, rejected strictly within the terms of s. 549.

Counsel for the appellant were not called upon to reply.

#### JUDGMENT.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—This come before their Lordships in rather a peculiar way, and there is some difficulty in saying what in substance is the proper course to be taken. It appears that the appellant is seeking

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to recover property in the possession of the respondent, and that being defeated before the Commissioner of Jhansi, he appealed to the High Court. The respondent applied that the appellant might give security for costs, and on the 3rd June, 1882, the High Court made an order directing the appellant to show cause why the respondent's petition should not be granted. That order to show cause was not properly served upon the appellant, and on the 26th June, the appellant, then, as it would seem, knowing nothing about the order, a further order was made by the High Court in these terms:—"Appellant has not appeared, and he is hereby required to deposit security to the extent of Rs. 2,500 within six weeks from this date," viz., by the 8th August. On the 5th August the appellant presented a petition showing cause why he should not be ordered to give security, and [318] on the 14th August another order was made by the High Court. It is simply in these terms:—"Security has not been filed within the time prescribed by the Court. The appeal is therefore of necessity struck off the file with costs." Whether the Court considered the merits of the cause then for the first time shown by the appellant, does not appear; but if they did, he was not allowed any time at all to tender his security. On the 9th of September the appellant presented a petition in which he stated the non-service of the original order to show cause of the 3rd June, and his ignorance of it until he got information in time to file his petition on the 5th August; and he prayed for the restoration of the appeal. It would seem that, on that petition, an order was made dated 13th September, 1882; but their Lordships cannot tell certainly upon what proceedings that order was made, nor can they do more than guess at the terms of it, for by some omission which is entirely unexplained, that order has not been transmitted to this country. The direction given by Her Majesty on the petition for leave to appeal was that the High Court should transmit the prior orders and also all subsequent orders relating to the refusal to restore the appeal, but for some reason or other this order has not been retransmitted. The nature of it can only be gathered from a subsequent order which was made in this way. On the 27th November, 1882, the appellant again petitioned the High Court, and in that petition he states that "in obedience to the order of the Court, dated 13th September, 1882, the petitioner submits herewith two security bonds for Rs. 2,500 as detailed below, and prays that proper order may be made for the restoration of the appeal to its original number of file." Therefore it would seem that by the order of the 13th September, the Court had held that the appellant must give security, and had allowed time for the purpose. On the 27th November he tenders the security and asks that the proper order may be made for the restoration of the appeal. Upon that there comes an order of the 29th November, which their Lordships have great difficulty in understanding. It is a very short one. It does not say on what petition or proceedings it was made except that it was on a petition of the appellant. It does not state who appeared upon it. The whole of the order is this:—"The petitioner's appeal was [319] not dismissed under s. 556 or s. 557 of the Civil Procedure Code. This petition therefore is not entertainable under s. 558 of that Code, and it is inapplicable to an order made, as ours was made, under s. 549 of the Code." It is extremely difficult to apply the terms of this order to the petition of the 27th November, and is a matter now of uncertainty and dispute what petition the order speaks of and what order it speaks of. The effect of it is apparently to maintain in full force the order of the 14th August, by which the appeal was struck off the file.

It appears to their Lordships that the case has never been fully considered by the High Court.

The question is first, whether the appellant should give security ; and their Lordships assume that on the 13th September he was ordered to give security after hearing him ; and next, whether, on giving security, the appeal should be restored to the file. That seems never to have been considered by the High Court, because they held that the petition of the 27th November, which was to restore after tendering security, was not entertainable and could not be listened to. Their Lordships will humbly advise Her Majesty to make an order that the appellant may give security for the costs mentioned in the order of the 3rd June, 1882, of such nature as shall be satisfactory to the High Court and within such reasonable time as shall be fixed by that Court ; and that upon his giving such security his appeal shall be restored to the files of that Court. There will be no costs of this appeal.

Solicitors for the appellant :—Messrs. *Oehme and Summerhays*.

Solicitors for the respondent :—Mr. *T. L. Wilson*.

8 A. 319 = 6 A.W.N. (1886) 118.

### APPELLATE CIVIL.

*Before Sir Comer Petheram, Kt., Chief Justice, and  
Mr. Justice Straight.*

LAKHMI CHAND (*Plaintiff*) v. GATTO BAI (*Defendant*).<sup>\*</sup>  
[22nd March, 1886.]

*Adoption—Hindu Law—Jains—Second adoption by widow.*

In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and [320] that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent to the husband's death, the defendant had adopted another person, who had died prior to the adoption of the plaintiff, and without leaving widow or child.

*Held* that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies are necessary, are controlled by the Hindu Law of adoption, and the *Kritima* form of adoption not being recognised by the Jain community, or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband.

*Held* therefore that the adoption of the plaintiff was valid and effective.

*Held* that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son, so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *Sheo Singh Rai v. Dakho* (1) referred to.

THE parties to this suit were Jains (Saraogis). The plaintiff sued the defendant for a declaration that he was adopted in January, 1856, by the defendant to her deceased husband Kishen Lal, (who died in September, 1843) and that as such adopted son he was entitled to possession of

<sup>\*</sup> First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Sami-ul-Jah Khan, Subordinate Judge of Aligarh, dated the 27th June, 1884.

(1) 1 A. 688 = 5 I.A. 87.

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all the property left by Kishen Lal. The defence to the suit was, that subsequent to the death of her husband Kishen Lal, the defendant, in 1844, had adopted one Nemi Chand, in whom the whole estate had thereupon vested, and that she had consequently no power to make a second adoption; and that, in fact, she had not adopted the plaintiff.

It appeared that not long after the death of Kishen Lal the defendant had adopted Nemi Chand. Nemi Chand died in August, 1855, at the age of 13 years, without leaving either widow or child. The lower Court dismissed the suit, holding that the defendant had not adopted the plaintiff, and that she could not do so, the adoption of a second son not being valid, according to the precepts of the Jain religion.

The plaintiff appealed to the High Court, contending that the lower Court was in error in holding that his adoption by defendant was not established, and that the defendant had no power to make it.

[321] Mr. *W. M. Colvin*, Mr. *C. H. Hill* and Pandit *Ajudhia Nath*, for the appellants.

Mr. *G. E. A. Ross* and Mr. *T. Conlan*, for the respondent.

### JUDGMENT.

PETHERAM, C.J., and STRAIGHT, J.—(After coming to the conclusion that the adoption of the plaintiff was established, observed as follows:—

But it is said for the respondent, even if this be so, that is something short of proof of an adoption to Kishen Lal. We do not feel pressed by this contention; if there was an adoption, in fact, we think it must be taken that it was an ordinary adoption to her deceased husband. It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely, that she can make an adoption without the permission of her husband or the consent of his heirs, and that she may adopt a daughter's son; and further, that no ceremonies or forms are necessary. But, except that in these respects it is not controlled by the Hindu law of adoption, we think that in all others its principles and rules are applicable, and that the *Kritima* form of adoption not being recognised in the Jain community, or among the Hindus of these Provinces, it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband.

The only remaining question of law is, whether the defendant having once adopted Nemi Chand after the death of her husband, and the whole estate having vested in him, she had the power to make a second valid adoption to her husband, so as to divest herself a second time of the property, and to vest it in the second adopted son.

It is contended on behalf of the defendant that upon the death of Nemi Chand, the estate of Kishen Lal vested in her as his heir, and not as the heiress of her deceased husband, and that it could not afterwards be divested so as to vest in another person as a second adopted son of her husband. This, however, does not seem to us to be the case, as the effect of the second adoption being to make the second adopted son the son of her husband, he must be treated as if he had been born, or at all events conceived, in the life-time of the husband, and his title relates back [322] to the date of the death of the elder brother, the first adopted son; so that if the elder brother has left no widow or child who would succeed him to the exclusion of his younger brother, a second adopted son succeeds as heir to the father.

This view seems to us to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son.

of the deceased husband, and it appears to be in accordance with that taken by the Privy Council in the case of *Sheo Singh Rai v. Dakho* (1), and with the statement of the customs of the Jains as declared by Seth Raghunath Das and the other lay witnesses for the plaintiff. It is true there is a difference of opinion on the question of the custom among the expert witnesses, but in our opinion that of the lay witnesses is of infinitely more value on this point; and for these reasons we think that the defendant had power to make a valid adoption to her husband a second time, and that the adoption of the plaintiff was valid and effective.

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### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice and Mr. Justice Tyrrell.*

IDU (*Applicant*) v. AMIRAN (*Opposite Party*).<sup>\*</sup> [4th May, 1886.]

*Muhammadan law—Custody of children—Act IX of 1861, s. 5—Appeal.*

The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

*Held* that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

[323] *Held* also that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application.

THE facts of this case are sufficiently stated in the judgment.

Mr. W. M. Colvin, for the appellant.

Mr. T. Conlan and Munshi Hanuman Prasad, for the respondent.

### JUDGMENT.

STRAIGHT, Offg. C.J.—This is an appeal from an order passed by the Judge of Jaunpur, on the 20th February last, rejecting an application made by the present appellant under s. 1 of Act IX of 1861. The parties are respectively husband and wife, and the minors, in regard to whom the

<sup>\*</sup> First Appeal No. 45 of 1886, from an order of W. H. Hudson, Esq., Judge of Jaunpur, dated the 20th February, 1886.



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application was made, are Yusaf Ali and Basit Ali, respectively aged 12 and 9 years, they being the sons of the appellant and respondent. At present they are in the possession of the respondent, and the application was to have them taken out of such custody and handed over to the appellant, their father. The Judge refused the application, and hence this appeal. It has been urged as an objection to our hearing the appeal that it has been preferred as an appeal from an order, whereas, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and it should have been made under the rules applicable to a regular appeal. Looking to the peculiar nature of the proceedings, it seems to me that this is a highly technical objection, and as all the evidence of the case is upon the record and is all taken down in English, it is clear that we should be only delaying the hearing of the appeal upon very inadequate grounds were we to accede to the learned Munshi's contention. We have therefore heard the case, and have no doubt whatever that upon the materials disclosed in the record, the learned Judge was wrong in rejecting the application made to him by the appellant. The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which, if my memory serves me rightly, the father's title to the custody of his children [324] subsists from the moment of their birth; whilst, under the Muhammadan law, a mother's title to the custody of her children remains until they attain the age of 7 years. I may observe in passing that this principle of Muhammadan law was enunciated by my brother Mahmood, J., very recently in the determination of first appeal No. 129 of 1885 (1). *Prima facie*, therefore, the appellant, who is the father of the two boys, was by law entitled to have them in his custody, subject always to the principle which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury. I do not say that this exhausts the considerations that might arise that would warrant the Courts in refusing an application for the custody of minors; but it is enough to say, in regard to the present case, that there is nothing in the record which discloses any proper grounds to justify the Court below in refusing to grant the application which the appellant made. Under these circumstances, the appeal is decreed with costs, the rejection of the application of the appellant is set aside, and his application is granted; and it is ordered that the respondent do, within one month from the date on which this order reaches the Court below, deliver up the two boys, Yusaf Ali and Basit Ali, into the custody of their father, the appellant; and it is further ordered that, in the event of respondent failing so to do, coercive measures to enforce this order, as provided in s. 260 of the Civil Procedure Code, may be adopted.

TYRRELL, J.—I concur.

*Appeal allowed.*

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(1) See next case.

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## APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SITA RAM (Plaintiff) v. AMIR BEGAM AND OTHERS (Defendants).<sup>\*</sup>  
[5th May, 1886.]

*Muhammadan Law—Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882 (Transfer of Property Act), ss. 78, 85—Res judicata—Civil Procedure Code, s. 13—Meaning of “between parties under whom they or any of them claim.”*

Upon the death of G, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son A, one upon each of his five daughters, and one upon his widow B. The name of B only was recorded in the revenue registers in respect of the zamindari property left by G. In 1876, A and B gave to X a deed of simple mortgage of  $2\frac{1}{2}$  biswas out of 5 biswas share of a village included in the said property. In 1878, A and B gave to S a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's “own” property. In 1882, X obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by X himself in January, 1884. In February and November, 1884, the daughters of G, obtained *ex-parte* decrees against A and B in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885, S brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants A and B, G's daughters, and X, alleging that the decrees of February and November, 1884, were fraudulently and collusively obtained, and as to the auction-sale of January, 1884, that the  $2\frac{1}{2}$  biswas were sold subject to his mortgage, he not having been made a party to the suit brought by X upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that B's position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of 1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against A and B in February, 1884, were conclusive, by way of *res-judicata*, against the plaintiff, who, as mortgagee from A and B, claimed under a title derived from them.

*Held* that there being no evidence to show that the decrees of February and November, 1884, were fraudulently and collusively obtained, the Court of first instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff; and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter.

*Khub Chand v. Kalian Das* (1) and *Ali Hassan v. Dhirja* (2) referred to.

*Per* MAHMOOD, J.—According to the Muhammadan Law, the surviving widow, though held in respect by the members of the family, would not be entitled to deal with the property so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. Even therefore

<sup>\*</sup> First Appeal No. 129 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 23rd April, 1885.

(1) 1 A. 240.

(2) 4 A. 518.

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if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the [326] rule of estoppel contained in s. 115 of the Evidence Act, or the doctrine of equity formulated in s. 41 of the Transfer of Property Act, but here no such circumstances existed.

Also *per* MAHMOOD, J.—The decrees of February and November, 1884, did not operate as *res judicata* against the plaintiff, inasmuch as a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee. The plaintiff in the present suit could not be treated as a party claiming under his mortgagors, within the meaning of s. 13 of the Civil Procedure Code, and that section must be interpreted as if, after the words "under whom they or any of them claim," the words "by a title arising subsequently to the commencement of the former suit" had been inserted. *Dooma Sahoo v. Joonarin Loll* (1) and *Bonomalee Nag v. Koylash Chunder Dey* (2) referred to. *Outram v. Morewood* (3), *Boykuntnath Chatterjee v. Ameeroonissa Khatoun* (4), *Katama Nachiar v. Srimat Raja Moothoo Vijaya Raganadha* (5) and *Ram Coomar Sein v. Prosunno Coomar Sein* (6), distinguished.

The principles of the rule of *res judicata*, as part of the law of civil procedure properly so called, and those of the rule of estoppel, as part of the law of evidence, explained and distinguished.

THE facts of this case were as follows :—

One Ghulam Rasul Khan died in 1872, leaving as his heirs his widow Amir Begam, a son called Ali Sher Khan, and five daughters called severally Wilayati Begam, Nihali Begam, Nawab Begam, Sakina Begam, and Jafri Begam. According to the Muhammadan law of inheritance his estate was divisible into eight shares, two of which devolved on the son, one on each daughter, and one on the widow. On his death the name of his widow only was recorded in the revenue registers in respect of the zamindari property left by him. This property included a five-biswas share of a village called Kadirganj. On the 17th October, 1876, Amir Begam and Ali Sher Khan gave one Alam Singh and certain other persons a simple mortgage of 2½ biswas out of the 5 biswas. On the 28th October, 1878, Amir Begam and Ali Sher Khan gave the plaintiff in this case a bond for Rs. 3,000, in which the 5 biswas, described as the widow's "own" property, was mortgaged by way of simple mortgage. On the 1st December, 1882, [327] Alam Singh and his co-mortgagees obtained a decree against Amir Begam and Ali Sher Khan for the sale of the mortgaged property, and caused it to be put up for sale, and bought it themselves, on the 31st January, 1884.

Subsequently Nihali Begam, Nawab Begam, Sakina Begam, and Jafri Begam, four of the daughters of Ghulam Rasul Khan, having sued their mother and brother for their shares by inheritance in the 5 biswas, obtained an *ex parte* decree against them on the 27th February, 1884; and Wilayati Begam, the fifth daughter of Ghulam Rasul Khan, also having brought a suit against Amir Begam and Ali Sher Khan for her share in the 5 biswas, obtained on the 24th November, 1884, an *ex parte* decree for the same.

(1) 12 W.R. 362.

(2) 4 C. 692.

(3) 3 East. 346.

(4) 2 W.R. 191.

(5) 9 M.I.A. 539.

(6) W.R. Jan.-July, 1864, p. 375.

In January, 1885, the plaintiff brought the present suit on the bond of the 28th October, 1878, in which he claimed Rs. 5,404-15, principal and interest, and the sale of the 5 biswas. Besides the executants of the bond, Amir Begam and Ali Sher Khan, he made the four surviving daughters of Ghulam Rasul Khan and the heirs of the fifth daughter, deceased, defendants to the suit; and also Alam Singh and the other purchasers of  $2\frac{1}{2}$  hiswas of the 5 biswas. He prayed that he might be allowed to recover the amount due on the bond by the sale of the 5 biswas, "without any regard to the decrees of the 27th February, 1884, and the 24th November, 1884, and the auction-sale of the 31st January, 1884." He alleged as to those decrees that they were fraudulently and collusively obtained, and as to the auction-sale, that the  $2\frac{1}{2}$  biswas were sold subject to his mortgage.

The Subordinate Judge of Mainpuri, by whom the suit was tried, held that the decrees impugned were not fraudulently and collusively obtained, and the shares of the daughters were not liable to be sold in satisfaction of the plaintiff's mortgage; and that the portion of the 5 biswas purchased by Alam Singh and his co-mortgagees was not liable to be sold in satisfaction of the plaintiff's mortgage, his being a second mortgage; and gave the plaintiff a decree for the recovery of the money claimed by the sale only of the rights and interests of Amir Begam and Ali Sher Khan remaining in the 5 biswas.

[328] The plaintiff appealed to the High Court.

Mr. C. H. Hill and Munshi Hanuman Prasad, for the appellant.

Mr. T. Conlan, Mr. W. M. Colvin, Mr. Abdul Majid, and Pandit Bishambar Nath, for the respondent.

#### JUDGMENT.

OLDFIELD, J.—This suit was brought on a bond dated the 28th October, 1878, executed by Amir Begam, widow of one Ghulam Rasul Khan, in consideration of an advance of Rs. 3,000. The plaintiff sought a decree for principal, with interest, and sale of the 5 biswas share in a village which the bond purported to hypothecate. The suit has been decreed in the Court below against the widow, Amir Begam, and against the son, Ali Sher Khan; but so far as it sought to make the shares of the five daughters of Ghulam Rasul Khan liable, and so far as it sought to interfere with a prior bond in respect of a  $2\frac{1}{2}$  biswas share of the property, and the right of the respondents Alam Singh and others (auction-purchasers), the plaintiff's suit was dismissed. The appeal is preferred by the plaintiff against that portion of the decision of the lower Court which was given against him.

The hypothecation bond sued on purports to be made in the name of Amir Begam herself, in respect of her own property, acting on her own behalf and in her own right; and the suit also was brought on the allegation that the property hypothecated was owned and possessed by the executant of the bond; and it has not been brought on the footing that she held the property in any way for the other heirs of Ghulam Rasul Khan. The whole of the property hypothecated clearly was not held by her in her own right. The five daughters of Ghulam Rasul Khan had a right to shares in the same as heirs of their father, and for this right they brought suits and obtained decrees, as they were fully entitled to do. I do not see that there was any fraud or collusion, and, in my opinion, the lower Court was right in exempting this set of defendants from all liability to the plaintiff.

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The next point urged, namely, that the appellant is entitled to bring to sale the property bought by the auction-purchasers Alam Singh and others also fails. The hypothecation-bond, upon which the decree and sale proceeded, was a prior one dated the 17th [329] October, 1876, and the property was purchased by Alam Singh and others on the 31st January, 1884. The appellant's hypothecation-bond being the later one, the transaction could only be questioned on the ground of fraud, of which there appears to be none whatever. For the above reasons the decision of the lower Court must be affirmed and this appeal dismissed with costs. The two sets of respondents will be entitled to costs in proportion separately.

MAHMOOD, J.—I am of the same opinion. The facts of the case are simple enough, namely, that the deceased Ghulam Rasul Khan died some time in the year 1872, leaving as his heirs, according to Muhammadan law, a widow named Amir Begam, a son named Ali Sher Khan, and five daughters named Jafri Begam, Wilayati Begam, Nawab Begam, Nihali Begam, and Sakina Begam. It is clear that immediately on the death of Ghulam Rasul Khan, according to the rigid system of inheritance which is to be found in the sacred texts of the Kuran, his property devolved in specific portions on these seven persons, who were his heirs. What happened afterwards was, that in respect of such of his property as consisted of land paying Government revenue, instead of the names of all the heirs being entered in the Government records, the name of the old lady alone was entered. This is often done among Muhammadans out of respect to the mother of a family; but on the part of the appellant there has, in the present instance, been a very faint attempt to make out that the Begam was put in possession of the whole property in this manner in lieu of dower. This might be made out, of course, where there were adequate grounds, and when such grounds were supported by adequate evidence. But in the present case there are no grounds for such a contention. It was further urged that her position as head of the family entitled her to deal with the property, so as to bind all the members of the family, though using her name only. But that is not so; and the argument of the learned pleader for the appellant upon this point seemed to me to proceed upon a confusion between the position of a Hindu widow and the legal *status* of a Muhammadan widow, as in this case. The surviving widow among Muhammadans, though looked on with respect by her own children or younger members of the family, holds a position very different to that of the widow among other nations, where the law of inheritance and succession proceeds upon other principles. The mother, being looked upon with respect and sympathy, would probably have the consent of her children to the entry of her name in lieu of her deceased husband's name as a mark of respect. An illustration of this is furnished by the unreported case of *Maulvi Inayat Rasul v. Khairunnissa*, decided by this Court on the 15th July, 1875. From all I have learnt of the present case, the entry of Amir Begam's name was entirely due to the notions and feelings which I have just described; for if it had been to show a possession adverse to the five daughters, these people would not have been on such affectionate terms as it is shown they were. Amir Begam, I understand, was not the step-mother of these young ladies, but their own mother, and therefore no such argument as to adverse possession could be easily sustained. What happened after this record of the old lady's name was, that on the 17th October, 1876, she and her son, Ali Sher Khan, executed a hypothecation-bond in favour of the respondents Alam Singh and others, defendants No. 3. The bond was

sued upon, and the 2½ biswas share was purported to be sold in enforcement of lien on the 31st January, 1884. I mention this to show the connection of Alam Singh and others, who purchased the property at that sale.

On the 27th February, 1884, four of these young ladies having sued their mother and their brother, obtained a decree for their shares of the property,—a circumstance which suggests the inference that they had heard of the alienations which their mother and brother had been making, and became anxious to secure their rights. The fifth lady, Wilayati Begam, similarly obtained a decree for her share on the 24th November, 1884. Both decrees were *ex-parte*, and this circumstance has been referred to as supporting the plaintiff's allegation of fraud and collusion, but I cannot admit that it does. The plaintiff's rights arose from the bond of the 28th October, 1878, which in no way could affect the share of these young ladies, unless, indeed, circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in s. 115 of the Evidence Act (I of 1872), or the doctrine of equity formulated in s. 41 of the Transfer of [331] Property Act (IV of 1882). But here no such circumstances exist, for it is not shown or pretended that the young ladies, who are "*pardah-nashins*," by any declaration, act, or omission, intentionally caused or permitted the plaintiff to believe that their mother and brother were the exclusive owners of the property when the mortgage was made in the plaintiff's favour. Nor is it made out that the plaintiff is a *bona fide* transferee for value, in the sense of his having taken reasonable care to ascertain the title of his transferors. On the contrary, he knew that the property had been inherited from Ghulam Rasul, and he might easily have found out that there were other heirs besides the widow and the son.

Then, as to the decrees of 27th February, 1884, and 24th November, 1884, there is absolutely no evidence that these decrees, though *ex parte*, were passed in collusion. I should say that it was impossible to contest those decrees, and the mother and the son acted rightly in not defending the suits. On the other hand, the argument suggested on behalf of the respondents, that the decrees are conclusive against the plaintiff, seems to me to be unsound, though it raises an important question of law, which I shall decide in this case. In the case of *Dooma Sahoo v. Joonarain Loll* (1), the general principle was laid down by Dwarka Nath Mitter, J., that a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. The principle of the rule was subsequently adopted in *Bonomalee Nag v. Koylash Chunder Dey* (2) by Markby and Prinsep, JJ., who, however, complained of the paucity of case-law upon the subject, and adopted the rule, after expressing considerable hesitation and doubt, because Mitter, J., had not stated any reasons for the rule he laid down. With due respect to those learned Judges, I cannot help feeling that there is no substantial ground for entertaining doubts upon the question, and I will take this opportunity of stating my reasons for this proposition.

The plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litem ordinationem*, but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence [332] as furnishing a ground of estoppel. In England, and I may say also in America, the rule is usually dealt

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(2) 4 C. 692.



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with as belonging to the law of evidence, for there judgments *in personam*, which operate as *res judicata*, are as often treated as falling under the category of estoppels by record. Sir Fitz James Stephen, the distinguished jurist who framed our Indian Evidence Act (I of 1872), and whose views have been accepted by our Indian Legislature in framing s. 40 of that Act, adopted what seems to me the only logical and juristic classification by treating the rule of *res judicata* as falling beyond the proper region of the law of evidence, and as appertaining to procedure properly so called. That the effect of the plea of *res judicata* may, in the result, operate like an estoppel, by preventing a party to a litigation from denying the accuracy of the former adjudication, cannot be doubted. But here the similarity between the two rules virtually ends; and it is equally clear that the *ratio* upon which the doctrine of estoppel, properly so called, rests, is distinguishable from that upon which the plea of *res judicata* is founded. The essential features of estoppel are those which have found formulation in s. 115 of the Evidence Act, the provisions of which proceed upon the doctrine of equity (upon which s. 41 of the Transfer of the Property Act is also based) that he who by his declaration, act, or omission has induced another to alter his position, shall not be allowed to turn round and take advantage of such alteration of that other's position. All the other rules to be found in Chapter VIII of the Evidence Act, relating to the estoppel of tenant, or of acceptors of bills of exchange, bailees or licensees, proceed upon the same fundamental principles. On the other hand, the rule of *res judicata* does not owe its origin to any such principle, but is founded upon the maxim *nemo debet bis vexari pro una et eadem causa*—a maxim which is itself an outcome of the wider maxim *interest reipublice ut sit finis litium*. The principle of estoppel, as I have already said, proceeds upon different grounds, and I think the framers of the Indian Codes of procedure acted upon correct juristic classification in dealing with the subject of *res judicata* as appertaining to the province of procedure properly so called. Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel, is to say that whilst [333] the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party, who, relying upon those declarations or acts, altered his position. In other words, *res judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence. Further, the theory of *res judicata* is to presume by a conclusive presumption that the former adjudication declared the truth, whilst "an estoppel," to use the words of Lord Coke, "is where a man is concluded by *his own* act or acceptance to say the truth," which means, he is not allowed in contradiction of his former self, to prove what he *now* chuses to call the truth. Thus the plea of *res judicata* proceeds upon grounds of public policy properly so called, whilst an estoppel is simply the application of equitable principles between man and man—two individual parties to a litigation. I have given expression to these views because they explain and form necessary steps of the reasons upon which my ruling, as to the exact point before us, will proceed.

The question then resolves itself into this, whether the decrees of the 27th February, 1884, and the 24th November, 1884, which were obtained by the respondents in a litigation commenced subsequent to the plaintiff's mortgage of 1878, and to which litigation he was not a party, can be held

to operate as *res judicata* against him. And in this light the question seems to me to rest upon the interpretation of s. 13 of the Civil Procedure Code,—a section which has, before now, given rise to much judicial exposition. The main part of that section is as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or *between parties under whom they or any of them claim*, litigating under the same title, in a Court of jurisdiction competent to try such subsequent, suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Here it is clear that the plaintiff was not a party to the former suit, and all that can be said in support of the argument, that he is bound by the former decrees, must proceed upon the hypothesis [334] that, as mortgagee from Amir Begam and Sher Ali, he claims under a title derived from them. The merits of the argument depend upon the interpretation of the words emphasized by me in reading s. 13 of the Code; for the issue in this litigation as to the title of the plaintiff-respondent is the same as in the former suits, and the effect of the former decrees would be conclusive against the plaintiff, if he could in this litigation be treated as a party claiming *under* his mortgagors, within the meaning of the section. The section has been no doubt carefully framed, and has given legislative expression to one of those rules of law which are most difficult to formulate for purposes of codification. The difficulty of formulating such a rule is best illustrated by the fact that the language adopted by the Legislature in s. 13 of the Code of 1877 had to undergo considerable alteration when the present Code (Act XIV of 1882) was enacted. Further, as illustrating the difficulty, I may refer to what I said in *Sheoraj Rai v. Kashi Nath* (1) as to the interpretation of the word "*suit*" in this section, with reference to the Privy Council ruling in *Misir Raghobardial v. Sheo Baksh Singh* (2). But I have no doubt that in interpreting the language of that section, we cannot ignore the fundamental principles of the rule to which that section gives expression, unless, indeed, the express words of the statute clearly contradict those principles. Now, what is the meaning of *claiming under* as used in the section? There can be no doubt that the plaintiff in this case derives his right under the title which his mortgagors, Amir Begam and Sher Ali, possessed in the mortgaged property, and in this sense his title had been derived in privity to them; but is that privity subject to the adjudication of the 27th February, 1884, and of the 24th November, 1884? This really is the question upon which the determination of the point now before us depends; and I may add that the decision of the question must practically rest upon similar principles, whether we regard the matter as appertaining to the class of estoppels by record or to the rules of procedure properly so called. Further, in the decision of this point, the question whether the former decrees were passed in contested or uncontested suits would paly no important part; for if the plaintiff can be properly regarded as privy to his mortgagors for the pur- [335] poses of this question, he would, in the absence of fraud, be concluded by *ex-parte* decrees as much as by decrees in contested suits, on the ground that a title hampered by either an estoppel or an adjudication cannot pass free of the consequences of such estoppel

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(1) 7 A. 247.

(2) 9 C. 439=9 I.A. 197.



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or such conclusive adjudication, in conformity with the principle which is the foundation of the maxim that he gives nothing who has nothing—*nihil dat qui non habet*. But the maxim itself affords indications of another rule of law, that he who takes under another, is not bound by any acts which that other does subsequent to the grant. It is upon this principle that the law of mortgage recognizes the rule that no act of the mortgagor done subsequently to the mortgage can operate in derogation of the mortgagee's right. And I will presently show that it is upon the same principle that no estoppel incurred after the mortgage, and no conclusive adjudication as the result of a subsequent litigation by which the mortgagor is bound, can affect the rights of the mortgagee. The reasons of the rule or nowhere stated better than by the eminent American writer Mr. Bigelow, in his celebrated treatise on the law of estoppel (at page 94), and I will quote him here as adopting his language at the risk of prolixity.

"Having ascertained the effect of judgment estoppels upon the actual parties to the record, let us now inquire into the effect and operation of personal judgments against those who were not strictly or nominally parties to the former suit, but whose interests were in some way affected by it. And first of privity, which by Lord Coke is divided into privity in law—i.e., by operation of law, as tenant by the courtesy; privity in blood, as in the case of ancestor and heir; and privity in estate—i.e., by the action of the parties, as in the case of feoffer and feoffee. These divisions are only important in defining the extent of the doctrine of privity; and as the rules of law are not different in questions of estoppel in these divisions, it will not be necessary to present them separately. But it should be noticed that the ground of privity is property and not personal relation. Thus an assignee is not estopped by judgment against his assignor in a suit by or against the assignor alone, instituted after the assignment was made, though if the judgment has preceded the assignment the case would have been different; hence privity in estoppel arises by virtue of succession. [336] Nor is a grantee of land affected by judgment concerning the property against his grantor in the suit of a third person begun after the grant. Judgment bars those only whose interest is acquired after the suit, excepting of course the parties."

The principles stated in this passage are supported by many cases, chiefly American, which the learned author cites in the pages that follow. Speaking for myself, I am perfectly prepared to accept the enunciation of the law as applicable to Indian mortgagees, because, whilst there is nothing in s. 13 of the present Civil Procedure Code to contradict my view, my notions of jurisprudence are consistent with what I have said. Looking to the definition of mortgage as contained in the first paragraph of s. 58 of the Transfer of Property Act (IV of 1882) and to cl. (b) of the same section, which defines simple mortgages, I am of opinion that hypothecation or simple mortgage, as understood in this country, is, in the eye of jurisprudence, a species of what are known as *jura in re aliena*, that is, estates carved out of full ownership, and that when such an estate has once been created, the mortgagor cannot represent it in any subsequent litigation. And, to use the words of Mr. Bigelow, "it should be noticed that the ground of privity is property and not personal relation." And if this is so, the estate which has already vested in a mortgagee cannot be represented in, or adjudicated upon, in a subsequent litigation to which he is not a party; for the simple reason that a decree of Court in such cases can neither create new rights, nor take away existing ones,

but can only enforce the rights as they stand between the parties, and in enforcing such rights, cannot go beyond the rights of the parties to the litigation.

The effect of this view no doubt is to go somewhat beyond the letter of the statute, though not to contradict a single expression employed in s. 13 of the Civil Procedure Code. To put the matter concretely, I interpret that section as if after the words "*under whom they or any of them claim,*" the words "*by a title arising subsequently to the commencement of the former suit,*" existed in the section; and I think I am within the recognised rules of interpretation when I read the section in this manner.—*Vide* Chap. IX, Maxwell on the Interpretation of Statutes, p. 274, &c. Indeed, as a pure question of analogy, I may refer to the words in cl. (b), [337] s. 27 of the Specific Relief Act (I of 1877), which are similar to those which I have interpreted in s. 13 of the Civil Procedure Code, as fortifying my view, because the ultimate principle upon which a specific performance of contracts may be enforced against those who were not actual parties to the contract itself, proceeds upon principles analogous to those upon which a judgment *in personam* against a party operates as *res judicata* against those who claim under him,—the question of notice needing proof in the one case, and in the other being presumed under a doctrine similar to the one upon which constructive notice by *lis pendens* is founded.

I will now deal with the cases which were cited before Markby and Prinsep, JJ., in *Bonomalee Nag v. Koylash Chander Dey* (1) as opposed to the view which I have expressed. The case of *Outram v. Morewood* (2) does not touch the question, because all that Lord Ellenborough held in that case was, that the matter which had been adjudicated upon in a previous litigation as against Ellen Morewood (she being then sole), before her husband had any right to the subject-matter of the litigation, could not be re-opened in a subsequent litigation between the same parties, though such litigation may have had a different form or object. This clearly is not the case here. Again, the next case—*Boykuntnath Chatterjee v. Ameroonissa Khatoon* (3) does not apply either, because a purchaser at a sale for arrears of Government revenue takes a title which is regulated by special legislation, which cannot govern cases such as the present. The case of *Katama Nachiar v. Srimut Raja Moottoo Vijaya Raganadha* (4) would at first sight seem more to the point, but it really is not applicable, because the equity of redemption possessed by a mortgagor is vastly different to the estate of a Hindu widow, who, as the Lords of the Privy Council (at page 608) point out, is an absolute owner for some purposes; and the question whether a conclusive adjudication against her, *quoad* the estate, would bind the reversioners, would naturally depend upon the nature and *bona fides* of the litigation. The position of a mortgagee is in no sense similar to that of a Hindu reversioner, and it follows that the same rule would not be applicable to both. Nor has the case of *Ram Koomar Sein v. [338] Prosunno Coomar Sein* (5) any bearing upon the present question, simply because a person who acquires a prescriptive title by adverse possession under the law of limitation, is not bound to respect any contracts entered into between the mortgagor and the mortgagee, to both of whom his possession is adverse—a state of things which is not applicable to the present case, even by analogy.

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(1) 4 C. 692.

(2) 3 East. 346.

(3) 2 W.R. 191.

(4) 9 M.I.A. 539.

(5) W.R. Jan.-July, 1864, p. 375.



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There is thus no authority against the view which I have enunciated at such length, and I hold that, after a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon, and conclusive as against, such mortgagee. Applying this conclusion to the present case, I hold that the decrees of 27th February, 1884, and 24th November, 1884, do not operate as *res judicata* against the plaintiff-appellant.

But whilst the decrees are not conclusive against the plaintiff, it should be noticed that the present suit was brought to enforce his lien, not only against the shares of his mortgagors, Amir Begam and Ali Sher Khan, but also against the shares of the five daughters; and further, also against the property purchased by Alam Singh and others, covered by the hypothecation of the 17th October, 1876. The simple issue therefore in the case is, as my brother Oldfield has put it—Has the plaintiff acquired, under the hypothecation-bond of the 28th October, 1878, any lien over more than Amir Begam and Ali Sher Khan possessed in their own right at the time they executed the bond? I have already said that the position of a Muhammadan widow in respect of her deceased husband's estate, is ordinarily nothing more or less than that of any other heir, and I will here add, with reference to what has been urged on behalf of the appellant, that even in case of minority of her children, she cannot exercise any power of disposition with reference to their property, because she cannot act as their guardian in respect of such matters. Under certain limitations, she may act as guardian of the person of her children till they reach the age of discretion, but the control of their property never vests in her without special appointment by the ruling [339] authority, in default of other relations who are entitled to such guardianship. The facility of divorce on the one hand, and of re-marriage of widows on the other, account for this doctrine of the Muhammadan law. So that, even if some of the daughters were minors, as is suggested here, at the time of the plaintiff's mortgage, their shares could not be affected by the transfer. Then, of course, there is also the important fact that the widow in executing the mortgage now sued upon, did not profess to act on behalf of her daughters. And therefore on neither hypothesis can their shares be subjected to the lien which the plaintiff seeks to enforce in this litigation.

Now as to the remaining defendants Alam Singh and others, it is urged on behalf of the plaintiff-appellant that, inasmuch as he was not made a party to the suit for enforcement of lien on the bond of the 17th October, 1876, therefore he is not bound by any proceedings which took place upon that bond, including the sale of the 31st January, 1884. This argument has only partial force, but cannot prevail. The law, as it stood before the Transfer of Property Act, as to the necessity in a suit by a first mortgagee of making a subsequent mortgagee a party, was explained by me in *Ali Hasan v. Dhirja* (1), following the ruling of Turner, J., in *Khub Chand v. Kalian Das* (2). It was there held that it was not absolutely necessary to make puisne incumbrancers parties to a suit by a first mortgagee, and that a sale in enforcement of the prior mortgage would defeat the rights of the puisne incumbrancer, who is conclusively presumed in

(1) 4 A. 518.

(2) 1 A. 240.

jurisprudence to take with knowledge of the prior mortgage, or at least cannot take more than his mortgagor had to give. The puisne incumbrancer could of course escape the decree by proving fraud or collusion, or he might prevent the sale in enforcement of the prior incumbrance by redeeming it. But if neither conditions are satisfied, sale in enforcement of the prior incumbrance would defeat the puisne incumbrance. Since the passing of the Transfer of Property Act (IV of 1882), it seems, under certain conditions, necessary, according to s. 85 of the Act, to make puisne incumbrancers parties, with the result that if they do not redeem, their lien will be defeated in the absence of fraud, which might disturb the rule of priority [340] under conditions such as those contemplated by s. 78 of the Transfer of Property Act (IV of 1882). But no such case is set up here, and I therefore concur with my brother Oldfield in the order which he has made.

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*Appeal dismissed.*

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*Before Mr. Justice Straight, Offg. Chief Justice.*

G. S. JONES (*Plaintiff*) v. H. LEDGARD AND OTHERS (*Defendants*).<sup>\*</sup>  
[9th March, 1886.]

*Arbitration—Filing award in Court—Civil Procedure Code, ss. 525, 526—Partnership—Agreement to refer disputes to arbitration.*

The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire. Certain differences having arisen among the three partners two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed but they refused to do so. The first mentioned partners then nominated an arbitrator, who in his turn nominated another, and these having appointed an umpire, made an award. One of the partners at whose instance the matter in dispute had been referred to arbitration presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objection within the meaning of s. 520 or s. 521 of the Code.

*Held* that the word "parties" as used in s. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *prima facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed. *Willcox v. Storkey* (1) and *Re Newton and Hetherington* (2) referred to.

*Held* also that ss. 525 and 526 of the Code, read together, mean that the party coming forward to oppose the filing of the award must show cause, that is, must establish by argument, or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient, when it is sought to make

<sup>\*</sup> Suit No. 1 of 1886.

(1) L.R. 1 C.P. 671.

(2) 19 C.B. (N.S.) 342.



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the award a rule of Court, for the defeated party to come and merely say upon a verified petition that [341] this or that ground referred to in ss. 520 and 521 existed against the filing. *Sree Ram Chowdry v. Denobundhoo Chowdhry* (1) and *Ichamoyee Chowdhrahee v. Prosunno Nath Chowdhry* (2) dissented from. *Dutto Singh v. Dosad Bahadur Singh* (3), *Dandekar v. Dandekar* (4), and *Chowdhry Murtaza Hossein v. Bechunnissa* (5) referred to

THIS was an application to file and enforce an award, dated the 30th March, 1885, under the provisions of ss. 525 and 526 of the Civil Procedure Code.

The application was made to the Subordinate Judge of Cawnpore, and, having been numbered and registered as a suit, was subsequently transferred to the High Court for trial.

The applicant was Gavin Sibbald Jones, and the other parties were William Wilson and Henry Ledgard, executors of the last will and testament of Henry Charles Bevan Petman. It was stated in the application that the said G. S. Jones, James Hunt Condon and H. C. B. Petman carried on business together at Cawnpore as Wool Manufacturers, under the style of the "Cawnpore Woollen Mills Company" from the 18th April, 1878, to about the 3rd August, 1882, under a deed of partnership, dated the 18th April, 1878; that divers differences and disputes having arisen between the said G. S. Jones, J. H. Condon, and H. C. B. Petman, with respect to the accounts relative to the said trade, which embraced also a claim made by one Jai Dayal against the Company, (and which had been paid by the said G. S. Jones), he the said G. S. Jones and the said J. H. Condon, in accordance with the provisions of the 32nd clause of the deed of partnership dated the 18th April, 1878, called upon the said William Wilson and Henry Ledgard as such executors as aforesaid by a letter dated the 25th March, 1885, requiring them, *inter alia*, to refer the said disputes to arbitration; that the said Henry Ledgard as one of such executors as aforesaid replied to the said letter on the 25th March, 1885, protesting against any resort to arbitration, whereupon he the said G. S. Jones and J. H. Condon, by an agreement, dated the 27th March, 1885, referred the said disputes to the arbitrament of Samuel Maurice Johnson, who by virtue of the powers conferred upon him by the deed of partnership and the said agreement of the 27th March, 1885, nominated [342] the Reverend George H. McGrew as the other arbitrator; that the said arbitrators, (having first duly nominated Samuel Burton Newton as their umpire) did on the 30th March, 1885, duly make and publish their award in writing concerning the matters referred to them, and ordered, amongst other things, that the several payments in the said award directed to be made should be made within three months from the date of the award; and that the said H. Ledgard and W. Wilson as such executors as aforesaid and the said J. H. Condon had had due notice of the publication of the said award, but they had not paid the sums therein directed to be paid to him, the said G. S. Jones.

The prayer in the application was that the Court would, in accordance with the provisions of ss. 525 and 526 of the Civil Procedure Code, order that the said award should be filed, and further that it would give judgment in accordance therewith and pass a decree thereon.

On the 16th March, 1886, on the application of the executors, Mary Petman, widow of H. C. B. Petman, was joined as a defendant.

(1) 7 C. 490.  
(4) 6 B. 663,

(2) 9 C. 557.

(3) 9 C. 575.  
(5) 3 I.A. 209.

On the 28th April, 1886, H. Ledgard filed a written statement in which he stated as follows:—

"1. That undersigned has been the acting executor of the said Henry Charles Bevan Petman's estate, since grant of probate of the same to undersigned with William Wilson of Delhi, his co-executor, by this Honourable Court in the month of March, 1885.

2. That in discharge of the duties imposed upon undersigned as such executor, undersigned had occasion to write a letter on the 25th March, 1885, to Mr. T. Lewis Ingram, barrister-at-law, Lucknow, who was then acting as counsel for the said Gavin Sibbald Jones and James Hunt Condon, Civil Surgeon of Cawnpore, in the following terms, that is to say:—

'Cawnpore, March 25th, 1885, Lewis Ingram, Esq., (Lucknow).

Dear Sir,—In reply to your letter of January 24th and in continuation of mine of 27th *idem* and February 26th, I beg to inform you that probate of the will of the late Mr. H. C. B. Petman has now been granted in favour of Mr. Wilson and myself.

'We have taken the opinion of the late Mr. Petman's legal adviser and of independent counsel on the subject of the claim you make against the estate on behalf of Mr. G. S. Jones and Dr. Condon, and which you desire to refer to arbitration. In reply thereto I beg to invite your attention to Mr. Howard's (the late Mr. Petman's counsel) letter to you of January 26th, 1884, which was written [343] during Mr. Petman's lifetime, and to state that we do not feel justified in departing from the course he then adopted, and that we, therefore, protest against any resort to arbitration in the matter, and further we deny the liability in respect of the claim put forward by Messrs. G. S. Jones and Dr. Condon.

'As I purpose leaving for England the end of the current week, I shall be much obliged by your addressing any further communication on the subject to Mr. William Wilson of Delhi.

I am,  
Yours faithfully.  
(Sd.) H. LEDGARD,

Executor for the estate of the late Mr. H. C. B. Petman.

3. That despite the protest contained in the said letter and refusal on the part of the undersigned to join in any reference to arbitration, the said Gavin Sibbald Jones and James Hunt Condon professed to make a submission to arbitration on the part of the estate of the said Henry Charles Bevan Petman under a deed of co-partnership entered into on the 12th day of April, 1878, between the three aforesaid parties for the term of 500 years, but which was superseded and which said partnership was altered and a new partnership substituted by the addition of two new partners, to wit, William Earnshaw Cooper and George William Allen, who formed a new partnership with the aforesaid three persons on the 22nd day of December, 1881, whereby there was a complete novation in respect of the capital of the said partnership concern, the term of duration of the said business which was reduced to one hundred years, and the good will thereof: and the said last mentioned partnership was further absolutely dissolved and determined in August, 1882, when the said five co-partners formally transferred the stock and good-will of their business to a Limited Liability Company incorporated under the Indian Companies' Act.

4. That the matters of account forming the matter of the said alleged reference to arbitration, an award in which is sought to be filed against the executors of the said Petman's estate, were the subject matter of a civil suit instituted by one Jai Dayal Chaube of Cawnpore, in the Court of the Subordinate Judge of Cawnpore, on the 29th March, 1882, against the partners of the said Woollen Mills Company for a sum of Rs. 23,104, with interest, and in which the said Gavin Sibbald Jones was a confessing defendant, whilst the said Henry Charles Bevan Petman and the said James Hunt Condon successfully defended the same, and the said Subordinate Judge of Cawnpore, on the 3rd February, 1883, dismissed the said suit with costs in favour of the said defendants, which said judgment and decree were never appealed from by the said plaintiff and became final as between the said parties.

5. That in the course of the said judgment of the said Subordinate Judge of Cawnpore, the learned Judge commented in strong and unfavourable terms on the conduct of the said Gavin Sibbald Jones in relation to his private dealings with the said Jai Dayal Chaube and his conduct towards his said co-partners in connection therewith.

6. That for nearly a whole year subsequently to the dismissal of the said suit, and for nearly two years subsequently to the formal dissolution of the said [344] partnership by incorporation in a public company, the said Gavin Sibbald Jones and the said

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James Hunt Condon, whilst the said Henry Charles Bevan Petman was in India, made no attempt to raise any question as to the said matters or any others relating to the said dissolved business, and it was not until the said Henry Charles Bevan Petman retired to England during the winter of 1883 that any proposal was made to him to submit the said questions to arbitration, and the said Henry Charles Bevan Petman at once repudiated any liability for accounting to his said co-partners by arbitration or otherwise, with respect to any of the said matters alleged to be in dispute between the said persons, and on the 26th January, 1884, Mr. Petman's standing counsel, Mr. Howard, formally communicated the said refusal and objection on the part of the said H. C. B. Petman to Mr. Ingram aforesaid, who was then acting as counsel for the said Gavin Sibbald Jones and the said James Hunt Condon.

7. That notwithstanding the above refusal, nothing was done to submit the said matters to arbitration, until after Mr. Petman's death had deprived his estate of such evidence as he himself might have adduced before any Court in which the award, if given during his lifetime, had been sought to be filed.

8. That the award said to have been made in pursuance of the aforesaid reference to arbitration to which undersigned was no party is bad, upon the face of it, for the following, amongst other, reasons:—

- (a) Because it is made and purports to consider and weigh evidence which it took the said Subordinate Judge of Cawnpore several months to record, and professes to scrutinize items of account without, as stated in the said award on the face of it, any examination of vouchers or witnesses, on the 30th day of March, 1885, the very day and date on which one of the said arbitrators, to wit George Harrison McGrew, was appointed by Samuel Maurice Johnson, the arbitrator for Messrs. Jones and Condon, to consider, in the interests of the said Petman's estate, the various matters in dispute discussed in the said award, thus bearing evidence upon the face of the same of all absence of due regularity and propriety in the proceedings of the said arbitration:
- (b) Because the said award avowedly on the face of it revises and reverses the findings and reasons of the said Subordinate Judge of Cawnpore with respect to the various matters treated and finally disposed of in his said judgment, dated 3rd February, 1883, in the suit of the said Jai Dayal Chaube, and makes the said partnership responsible for sums expressly disallowed as not due by the said judgment.
- (c) Because the said award, whilst professing to deal with a reference between the co-partners relating to a dispute alleged to exist between them concerning a partnership business, in effect and throughout the main provisions thereof deals with the claims of the said Jai Dayal Chaube, an outsider, against the members of the said partnership, and the money award made by the said arbitrators against the said Petman's estate is in effect, a decree of the said Jai Dayal's claim as against all the three aid co-partners.

[345] 9. That the said Gavin Sibbald Jones, in the application before this Honourable Court to file the said award against the estate of the said H.C.B. Petman, avowedly bases the claim to file the same as against undersigned on a voluntary payment and discharge of the claim of the said Jai Dayal Chaube alleged to have been made (at some time not specified) by the said Gavin Sibbald Jones, and as such no payment made by the said Gavin Sibbald Jones can bind the said Petman's estate.

10. That the said Gavin Sibbald Jones was further not entitled to make the said reference to arbitration as against the estate of the said H.C.B. Petman under the 32nd clause of the deed of co-partnership referred to in his said application to file the said award, within the true meaning and intent of the said deed of co-partnership.

11. That the claim of the said Gavin Sibbald Jones to file the said award under the provisions of ss. 525 and 526 of the Code of Civil Procedure is bad in law, in that it is contrary to the provisions of s. 28 of the Indian Contract Act and s. 21 of the Specific Relief Act, and the award deals with items of account on which a suit would be barred by limitation.

12. That the rights of minor children of the said H. C. B. Petman are involved in the administration of the said estate, and undersigned prays that for the reasons above set forth the said claim to file the said award as against the estate of the said H. C. B. Petman be dismissed with costs in favour of undersigned as executor of the said estate."

On the same day William Wilson filed a written statement, in which he stated as follows :—

"1. That he joined with one Henry Ledgard of Cawnpore in obtaining probate of the will of the late Henry Charles Bevan Petman deceased from the Honourable the High Court of Judicature for the North-Western Provinces on the 2nd day of March, 1885.

2. That since the said date the undersigned has joined with the said Henry Ledgard in administering to the said estate, and jointly with the said Henry Ledgard declined to join any reference to arbitration of matters connected with the said estate.

3. That undersigned denies the right of any person joining in the said reference to arbitration to bind the estate of the said H. C. B. Petman behind the back of the duly authorised representatives of the said estate by *ex parte* proceedings, had, not between existing co-partners of a subsisting business, but by persons who at the time of the said reference were acting outside the scope and powers of the 32nd paragraph of a deed of co-partnership which was terminated in December, 1881, and relating to items connected with accounts of the year 1879, which had formed the subject of litigation between the parties in the year 1882, and which said litigation was finally concluded and determined by a judgment and decree of the Subordinate Judge of Cawnpore, dated the 3rd February, 1883, which became final and binding in the premises.

4. That the award made by the said arbitrators is illegal and bad on the face thereof.

[346] 5. That the attempt on the part of the plaintiff to make the same a rule of Court is contrary to the terms of s. 28 of the Indian Contract Act and s. 21 of the Specific Relief Act.

6. That under the provisions of s. 526 of the Civil Procedure Code this Honourable Court should dismiss the said application to file the said award with costs in favour of undersigned defendant."

On the 5th May, 1886, H. Ledgard filed a supplementary written statement, in which he stated as follows :—

"1. That the appointment of the Reverend George Henry McGrew as an arbitrator is bad in consequence of the failure of the plaintiff to comply with the provisions of the 32nd clause of the deed of co-partnership.

2. That the defendants were never served with notice of the date of place of arbitration and had no knowledge thereof prior to the making of the award; and the so-called arbitrators made their award without giving the defendants the opportunity of producing evidence if they had been so advised or of being heard."

On the same day the Court framed the following preliminary issue for trial :—

"Looking to the language of clause 32 of the partnership-deed of the 18th April, 1878, and to the circumstances under which the arbitration proceedings were held, were the defendants in law parties to the arbitration-proceedings, and so bound by the award in the sense of the procedure laid down in ss. 525 and 526 of the Civil Procedure Code."

The 32nd clause of the deed of partnership of the 18th April, 1878, ran as follows :—

"That in case any dispute or difference shall at any time arise between the said partners, or any partner or partners that may hereafter be admitted into the business with the aforesaid consent of all the parties to these presents, or between the survivors of them and the heirs, executors or administrators of a deceased partner or partners, touching or concerning the said business or any matter or thing herein contained or in anywise whatsoever relating to the said partnership business, or any of the affairs thereof, or concerning the true meaning and intent of these presents, the said dispute or difference shall, upon the request in writing of either of the said parties be referred to the arbitration of disinterested or indifferent persons to be chosen by each party in difference within fifteen days of such requisition in writing having been made and left at the place of business for the time being of the said partnership, or at the last known address of the said partners or representative of a deceased partner, and in case any of the said partners in difference or their or his heirs, executors and administrators shall refuse, neglect or fail to nominate an

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arbitrator, then the arbitrator named by the other party shall nominate another arbitrator, and the two arbitrators to be appointed as aforesaid shall, before proceeding in the said reference, nominate [347] another indifferent person to be umpire, and the said arbitrators shall make their award in writing within thirty days next after such reference shall be made, or in case the said arbitrators shall not make the award within the time last mentioned, then the matters in difference shall be submitted to the said umpire, who shall make his award in writing within thirty days next after the said matter shall have been so referred to him either by the arbitrators or by the parties or any or either of them, and such arbitrators and umpire or any or either of them shall have full power to examine the said parties and their respective witnesses, on oath or otherwise, and to call for and require the production of all books, papers, deeds, letters, vouchers, documents, and writings that they or he shall think necessary, and shall have all the power and authority given by the statute in that behalf, and the award of the said arbitrators, and the umpirage of the said umpire as the case may be, shall be final and conclusive between the said parties, and to this end it is equally understood and agreed that any submission or reference to arbitration under or by virtue of these presents, shall and may from time to time be made a rule of the Civil Courts of Cawnpore aforesaid, and be binding upon all the said partners under the provisions of ss. 525 and 526, Act X of 1877, otherwise called the new Code of Civil Procedure."

Mr. *T. Conlan* and Mr. *G. E. A. Ross*, for the plaintiff.

Mr. *J. E. Howard* and Mr. *C. H. Hill*, for Henry Ledgard and William Wilson, executors of the deceased H. C. Petman.

Mr. *Ross Alston*, for Mary Petman, widow of H. C. Petman.

#### JUDGMENT.

STRAIGHT, Offg. C.J.—This is an application by Gavin Sibbald Jones, under s. 525 of the Civil Procedure Code, asking to file an award, dated the 30th March, 1885. Notice was issued to the parties said to have been affected by the award, and who are also alleged to have been parties to the arbitration, to show cause why the award should not be filed; and they have now appeared and lodged verified petitions, setting forth the grounds on which they maintain that the application ought not to be granted. Before dealing more immediately with the application and the sections relating to it, namely, ss. 525 and 526 of the Code, I think it desirable, by way of preliminary, and for the purpose of explaining my views, to examine the provisions of Chapter XXXVII of the Code in which those sections are to be found. These provisions have been framed to provide for three things,—*first*, a reference to arbitration by consent of the parties in the course of a suit; *secondly*, means for making an agreement to refer, or the submission to arbitration, a rule of Court, and so seizing the Court of the matter, and giving it jurisdiction over [348] the award subsequently passed on the reference; and, *thirdly*, for an application by the parties who have entered into a private agreement under which an arbitration has been held, to file the award which is its outcome. These are three clear, distinct, and separate matters with which a Court has power to deal under Chapter XXXVII. As regards the first, I need say nothing, because its nature is well understood. With reference to the second, it appears to me that what was contemplated was, that the parties, having entered into an agreement to refer, could come to a Civil Court and ask it to make the agreement a rule of Court, and thus not only give the Court power to deal with any award made subsequently, but also jurisdiction over the arbitrators, so as to entitle it to exercise the powers which a Court, making a reference in a suit, would have under ss. 518, 520 and 521. That these provisions apply to this second class of matters, is shown by s. 524, which says :—"The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of

reference made by the Court under s. 523, and to the award of arbitration, and to the enforcement of the decree founded thereupon." But ss. 525 and 526, with which we are more particularly concerned, present a different state of things. The parties having by private agreement gone to arbitration, and an award having been obtained, any one of them may come to the Civil Court and have the award filed *in invitum* against the others, unless they can show that the award is open to objection on any of the grounds mentioned in s. 520 or s. 521. It is clear from the limitation mentioned in s. 526, which specifically confines the objections that may be taken to those referred to in s. 520 or s. 521, that the Court considering whether the award should be filed has no power to touch the terms of the award; and, if the ground of misconduct or other matters referred to in those sections are disclosed, the Court must refuse to file the award. Now, what is the effect of filing the award? The award, if filed, is to have the effect of an award under the provisions of this chapter. This means that when a Court resolves to file the award, having in this case determined beforehand whether any objections under s. 520 or s. 521 have been satisfactorily put forward, there must be a judgment and decree passed there and [349] then, and the award must be turned into a decree in the manner contemplated by s. 522. Whereas, in the one case, in cases referred by the Court in a suit, or in case of reference by an agreement by parties, which has been made a rule of Court, objections are to be entertained after the award has come back to the Court; in the other, the objections are preliminary to the award being filed.

In the present case the defendants have made two main objections to the filing of the award. In the first place, it has been contended that Messrs. Wilson and Ledgard, as executors of the deceased Petman, were not parties to the arbitration proceedings, and therefore cannot be bound by them; in the second place, it has been contended that, assuming them to have been parties, still, they having filed verified statements, which, upon the face of them, disclose grounds of objection within the meaning of s. 520 or s. 521, I must at once stay my hand, and cannot proceed to inquire into the "*bona fides*" or validity of those objections.

As regards the first point, it seems to me the answer is to be found in the language of cl. 32 of the partnership-deed. That partners may, in a partnership-deed, contract that future disputes shall be settled in a particular manner which ousts the jurisdiction of the ordinary tribunals, is undoubted, and is a condition which is recognized by the Courts. In saying this, I may refer to *Willcox v. Storkey* (1). In the argument in that case, Erle, C. J., referred to *Re Newton and Hetherington* (2), the effect of which is, that where the parties have agreed to refer matters of difference arising between them with regard to partnership matters to arbitration, they are bound by such agreement and by any proceedings that may be adopted thereunder. Moreover, it is laid down at p. 63 of Russell's work on arbitration that "when the agreement, though not naming the referees, provides for their appointment in a particular manner, and they are afterwards so appointed in writing, though contrary to the will of one of the disputing parties, this has the same effect as if the referees were named in the clause itself." In my opinion, by cl. 32 of the partnership-deed now before me, the parties to it did agree that they would submit their partnership disagreements to arbitration, for they said in terms [350] that if any difference should arise, "the said dispute or

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(2) 19 C.B. (N.S.) 342.



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difference shall, upon the request in writing of either of the said parties, be referred to the arbitration of disinterested or indifferent persons, to be chosen by each party in difference within fifteen days of such requisition in writing having been made and left at the place of business for the time being of the said partnership, or at the last known address of the said partner or representative of a deceased partner, and"—this is the most material passage—"in case any of the said partners in difference, or their or his heirs, executors, and administrators, shall refuse, neglect or fail to nominate an arbitrator, then the arbitrator named by the other party shall nominate another arbitrator, and the two arbitrators to be appointed as aforesaid shall, before proceeding in the said reference, nominate another indifferent person to be umpire." Now, on the 24th January, 1885, Mr. Ingram as representing the present applicant, wrote to Messrs. Wilson and Ledgard, stating as follows:—"My clients purpose referring their claim to arbitration under the terms of the deed of partnership, but have no desire to avail themselves of the power to force on an arbitration without you. I shall therefore be glad if you will inform me at your convenience whether it is your wish to join in the arbitration or not." That letter was not directly answered till the 25th March, when Mr. Ledgard replied to it in these terms:—"We have taken the opinion of the late Mr. Petman's legal advisers and of independent counsel on the subject of the claim you make against the estate on behalf of Messrs. G. S. Jones and Dr. Condon, and which you desire to refer to arbitration. In reply thereto, I beg to invite your attention to Mr. Howard's (the late Mr. Petman's counsel) letter to you of the 26th January, 1884, which was written during Mr. Petman's lifetime, and to state that we do not feel justified in departing from the course he then adopted, and that we therefore protest against any resort to arbitration in the matter, and further that we deny the liability in respect of the claim put forward by Messrs. G. S. Jones and Dr. Condon." Having given this matter my best attention, and having put the best construction upon this letter that I can, I am of opinion that it amounts to a distinct refusal on the part of Mr. Howard's clients to the nomination of an arbitrator, or to do anything in connection with arbitration proceedings. In consequence of the letter, Mr. Jones and Dr. Condon, by an agreement dated the 27th March, 1885, reciting all the matters concerned in the submission, agreed to refer the matters in difference to the arbitration of one Samuel Maurice Johnson. This agreement purported to be drawn up in accordance with cl. 32 of the partnership-deed. Mr. Johnson, in his turn, in conformity with the terms of the clause, nominated one George McGrew, and on the 30th March, a third person, Samuel Burton Newton, was formally appointed umpire. All that I need say is, that it appears to me there is sufficient reason to show that Messrs. Wilson and Ledgard are "*prima facie*" bound by the arbitration proceedings so as to bring them within the terms of s. 525 of the Civil Procedure Code, as parties to the arbitration, who should be called on to show cause why the award should not be filed. Mr. Hill has contended that the word "parties," as used in s. 525, applies only to persons who are actually before the arbitrators. But I do not think I ought to place so narrow a construction upon the terms of the section. If parties, by an agreement, have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, it appears to me that for the purposes of s. 525 they should be regarded as parties to that

arbitration. Were I to hold otherwise, they would have no power to appear before me, as in the present case, to lodge objections, with the result that no alternative would be open to me than to order the award to be filed. I think therefore that the first objection fails, and it is to the defendants' interest that it should do so. With regard to the second objection, namely, that the defendants having filed a verified petition, which discloses grounds of objection within s. 520 or s. 521, I should at once and without inquiry stay my hand, and refuse to file the award, leaving the parties to a regular suit upon the award, in which all matters relating to their differences might be investigated. Mr. Howard and Mr. Hill have cited two rulings by two learned Judges, for whose opinions I entertain the very highest respect, and from whom I should hesitate in differing, unless I felt constrained to do so. The first of these is *Sree Ram [352] Chowdhry v. Denobundhoo Chowdhry* (1) in which Pontifex, J., if I may say so with impropriety, appears to have somewhat unnecessarily gone out of his way to place a construction upon the meaning of the words "show cause" as mentioned in s. 525 and "ground" in s. 526. In *Ichamoyee Chowdhraanee v. Prosunno Nath Chowdhry* (2) Wilson, J., dealt with the point, and decided in effect that the contention now urged by Mr. Howard and Mr. Hill is sound, and is a correct view of the statute. Before examining the terms of the sections, I think it right to mention that Field, J., who, with Pontifex, J., heard the appeal in *Sree Ram Chowdhry v. Denobundhoo Chowdhry* (1), expressed no opinion upon the point, and that Macpherson, J., in the other case to which I have referred, observed that he would "hesitate to say that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no inquiry." In *Dutto Singh v. Dosad Bahadur Singh* (3) two learned Judges, Mitter and O'Kinealy, JJ., in terms expressed their dissent from the judgment of Wilson, J., in *Ichamoyee Chowdhraanee v. Prosunno Nath Chowdhry* (2). Now let us see what is the language of the section. Under s. 525, what is required is that the parties, other than those applying, must "show cause." As observed by Melvill, J., in *Dandekar v. Dandekars* (4) this is a perfectly well understood expression. I do not agree with Mr. Howard's suggestion that because the word "ground" is used in s. 526, the meaning of the expression "show cause" in s. 525 is cut down. It appears to me that if these sections are read together, they mean that the party coming forward must show cause, that is to say, must establish by argument, or proof, or both, reasonable ground for the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521. It is important to notice that ss. 525 and 526 in the present Code represent no novel principle. In s. 327 of Act VIII of 1859, the same provision occurred, except that the words there used were "sufficient cause." I find that their Lordships of the Privy Council, in dealing with an appeal relating to an award that had been filed under s. 327, went very elaborately into the grounds put forward by those who opposed the filing of the award in the Court below, and it seems to me that the remarks of [353] their Lordships favour the view I take of the provisions of the existing Code. I do not think that because the words "sufficient cause" in s. 327 of the Code of 1859 have been altered to "ground such as is mentioned or referred to in s. 520 or s. 521" in s. 526 of the present Code, the whole scope of the section has been altered, as the interpretation of Wilson and Pontifex, JJ., suggests. I think that

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(2) 9 C. 557.

(3) 9 C. 575.

(4) 6 B. 653.



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s. 526 was so framed as to bring the provisions of the Code into harmony with the language used by Sir James Colville in the Privy Council case to which I have referred—*Chowdhry Murtaza Hossein v. Bechunnissa* (1).

In addition to the cases I have mentioned, I have the authority of Melvill, J., in *Dandekar v. Dandekars* (2), and, under these circumstances, after giving the case my best consideration, I feel bound to hold that Wilson and Pontifex, JJ., placed an incorrect interpretation upon s. 525, and one which those who framed never intended it to bear. I need scarcely point out the mischief which would arise if, when parties had agreed to refer matters to arbitration, and an award had been passed, the defeated party were entitled, when it was sought to make the award a rule of Court, to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. Something more than this was, I think, intended by the Legislature, and so it seems to me commonsense should require. What I consider is required, is that such party should, by argument or evidence, or both, show substantial materials to warrant the Court in arriving at a conclusion that the reasons referred to in s. 520 or s. 521 exist in the particular case.

For these reasons, I am of opinion that both preliminary objections fail, and it will now be necessary to determine what the other issues in the matter ought to be.

8 A. 354 (F.B.) = 6 A.W.N. (1886) 110.

### [354] FULL BENCH.

*Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

AJUDHIA PRASAD AND OTHERS (*Plaintiffs*) v. BALMUKAND AND OTHERS (*Defendants*).<sup>\*</sup> [10th May, 1886.]

*Appeal—Ex parte decree—Civil Procedure Code, ss. 103, 108, 540, 560, 584—Construction of statute—General words.*

*Held* by the Full Bench (STRAIGHT, Offg. C.J., and TYRRELL, J., expressing no opinion), that a respondent in whose absence the appeal has been heard *ex parte*, and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s. 560 to the Court which passed the decree to re-hear the appeal *Ramjas v. Baijnath* (3) approved.

*Per* OLDFIELD, J.—There is a distinction between the case of a defendant in a Court of first instance and that of a respondent in an appellate Court not appearing, with reference to ss. 108 and 560 of the Code. *Lal Singh v. Kunjan* (4) and *Ramshet Bachaset v. Balkishna Ababhat* (5) referred to.

*Per* MAHMOOD, J.—The distinction is one of detail merely and not of principle. *Lal Singh v. Kunjan* (4) dissented from. *Zain ul-ab-din Khan v. Ahmad Raza Khan* (6), *Jamaitunnissa v. Lutfunnissa* (7), *Ashruffunnissa v. Lehareaux* (8), *Luckmidas Vilhaldas v. Ebrahim Osman* (9), *Anantharama v. Madhava Paniker* (10), and *Modalatha's case* (11) referred to.

<sup>\*</sup> Second Appeal No. 558 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 24th January, 1885, modifying a decree of Pandit Bunsidhar, Munsif of Shahjahanpur, dated the 24th November, 1884.

(1) 3 I.A. 209.

(4) 4 A. 387.

(7) 7 A. 606.

(10) 3 M. 264.

(2) 6 B. 663.

(5) 6 B.H.C.R. A.C.J., 161.

(8) 8 C. 272.

(11) 2 M. 75.

(3) 2 A. 567.

(6) 2 A. 67 = 5 I.A. 233,

(9) 2 B. 644.

Also *per* MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other.

[*Diss.*, 31 M. 157=3 M.L.T. 336; 5 O.C. 296; F., 9 A. 427; R., 11 B. 6 (F.B.); 121 P.R. 1907=51 P.W.R. 1907; D., A.W.N. (1892) 2.]

THIS was a reference to the Full Bench by Brodhurst and Tyrrell, JJ. The facts and the point of law referred are stated in the order of reference which was as follows:—

"This was a suit brought by the holders of a hundi against Ajudhia Prasad and Juala Prasad, the drawers, and Fateh Lal, said to represent the firm of Baldeo Das, drawee of the same. In the Court of the Munsif, Juala Prasad, who has failed in business, confessed judgment.

[355] Ajudhia Prasad denied that his son, Juala Prasad, had power to sign the hundi for him, and Fateh Lal made no appearance in the suit.

The Munsif gave the plaintiffs a decree against the confessing defendant, Juala Prasad, accepted the defence of non-responsibility set up by Ajudhia Prasad, and, on what materials we know not, dismissed the claim against Fateh Lal also. The latter had made no defence to the suit, had of course produced no evidence, and his interest in the matter does not seem to have been brought into issue. Under this decision, the plaintiffs held a decree against Juala Prasad alone, their suit standing dismissed against Ajudhia Prasad and Fateh Lal. The plaintiffs appealed to the District Court against the exemption of Ajudhia Prasad and Fateh Lal, and again Fateh Lal made no appearance in the appeal, but judgment was given by the lower appellate Court against him on the merits *ex parte*, as well as against the other respondent, Ajudhia Prasad, who defended the appeal. Now all these defendants—Fateh Lal, Ajudhia Prasad and Juala Prasad—have brought this second appeal.

A preliminary objection is taken for the respondents, that Fateh Lal, against whom the lower Court gave judgment *ex parte*, cannot maintain a second appeal against that judgment, but is restricted to his remedy as specially provided by s. 560 of the Code.

It has been ruled by a Bench of this Court in *Ramjas v. Baijnath* (1), that a second appeal would lie; but as one of the learned Judges, who was a party to that decision, subsequently held in Full Bench that a first appeal is not open to a defendant against an *ex parte* judgment under s. 108, Civil Procedure Code, and one of us has doubts with regard to the ruling under s. 560, Civil Procedure Code, we think it well to refer this question in the first instance, and also the decision of the appeal, to a Full Bench. We make order accordingly."

Pandit *Bishambar Nath*, for the respondents. Fateh Lal cannot appeal from the *ex parte* appellate decree made against him. He should have applied under s. 560 of the Civil Procedure Code for the re-hearing of the appeal. The ruling of the Full Bench in [356] *Lal Singh v. Kunjan* (2) is in point. In that case the word "may" in s. 108 has been construed to mean "shall," and the word "may" is also used in s. 560.

Mr. *Amir-ud-din*, for the appellant Fateh Lal. The case of *Lal Singh v. Kunjan* (2) is not in point. That related to an *ex parte* decree of a Court of first instance and not of an appellate Court. S. 584 does

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(1) 2 A. 567.

(2) 4 A. 387.



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not provide that there shall be no appeal in such a case, nor is there anywhere in the Code a provision against an appeal in such a case.

### JUDGMENT.

OLDFIELD, J.—The question referred to us has arisen in a suit which Balmukand and others, plaintiffs, brought against Fateh Lal and others, on a hundi. The suit was decreed in the first Court against one of the drawers, but dismissed against Fateh Lal, the drawee, and one of the drawers. The plaintiffs appealed, and the first appellate Court gave judgment *ex parte* against Fateh Lal. He instituted a second appeal in the High Court, and the question referred is, whether a second appeal will lie on the part of Fateh Lal, a respondent against whom a judgment has been given by the first appellate Court *ex-parte*, inasmuch as s. 560 of the Civil Procedure Code gave him another remedy by applying for a re-hearing of the appeal by the first appellate Court.

It has been ruled by a majority of the Full Bench of this Court that a defendant against whom a decree has been passed *ex-parte* by a Court of first instance cannot appeal, but is confined to the remedy provided in s. 108, by applying to have an order to set aside the *ex parte* decree—*Lal Singh v. Kunjan* (1). I was one of the Judges who dissented from the view held by the majority, and I was of opinion that the remedy by appeal is not taken away by reason of a procedure being provided by application for setting aside the *ex-parte* decree, and I am still of the same opinion for the reasons which I gave in that case.

I should, however, consider myself bound to follow the ruling in that case, if applicable to the case before us; but I think there is a distinction between the provisions in s. 108 and s. 560. In the latter the respondent would appear to have no right to insist upon [357] a re-hearing of the appeal, even when he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing; for the section provides that in that case "the Court may re-hear the appeal," thus allowing it a discretion to re-hear it or not. If this is so, the right of appeal cannot be taken away.

There is also a distinction between the case of a respondent who has succeeded in the first Court, and against whom a decree has been given *ex-parte* by the appellate Court, and the case of a defendant who sets up no defence and produces no evidence in the first Court. This distinction was pointed out in *Ramshet Bachaset v. Balkishna Ababhat* (2), and also by Sir R. Stuart, Chief Justice of this Court, in the Full Bench case of *Lal Singh v. Kunjan* (1), who while he concurred in holding that under s. 108 of the Civil Procedure Code, a defendant against whom a decree was passed *ex parte* could not appeal, drew a distinction between this case and that of a respondent against whom a decree has been given *ex-parte* by an appellate Court, who, he held, would still have his remedy by appeal, notwithstanding that he might apply for a re-hearing under s. 560; and this was the effect of the ruling by a Division Bench of this Court in the case of *Ramjas Baijnath* (3).

I would reply to the reference that a respondent against whom judgment is given by an appellate Court *ex-parte* is not deprived of his right of second appeal by reason of anything in s. 560 of the Civil Procedure Code, which permits him to apply to the appellate Court for a

(1) 4 A. 387.

(2) 6 B.H.C.R. A.L.J. 161.

(3) 2 A. 567.

re-hearing of the appeal, and return the case to the Division Bench for disposal.

BRODHURST, J.—A second appeal will, in my opinion, lie from an *ex-parte* decree of a lower appellate Court. In my judgment in *Lal Singh v. Kunjan* (1), I have given my reasons for holding that an appeal will lie by a defendant from a decree passed *ex-parte* under the provisions of Chapter VII of the Civil Procedure Code, and the opinions I have expressed are in accordance with judgments of one or more Benches of every High Court in India.

On the analogous question now referred, I think it sufficient to say that I concur in the judgments of Stuart, C.J., and Sparkie, J., [358] in *Ramjas v. Baijnath* (2), and in which those learned Judges ruled that an appeal will lie from an *ex-parte* decree of a lower appellate Court.

MAHMOOD, J.—I have arrived at the same conclusions as my learned brothers Oldfield and Brodhurst, but as at the hearing of the appeal the case appeared to me somewhat distinguishable from that decided by the majority of the Full Bench in *Lal Singh v. Kunjan* (1), I think it necessary to state my reasons fully, with the object of showing that now I hold that no real distinction in principle exists. What was ruled in that case was this, that because by s. 108 of the Civil Procedure Code there is provided a special procedure for the case of non-appearance by a defendant against whom a decree is passed, therefore the general provisions of s. 540, conferring the right of appeal, do not apply to such a case. My own view is that the right of appeal being a special remedy, apart from the ordinary application of the maxim *ubi jus ibi remedium*, can only be created by specific enactment. In this country, with regard to appeals, no rule of the common law exists, but there is a specific provision in the Civil Procedure Code. When I say that the right of appeal must be expressly granted by statute, I think I am within the authority of cases decided by the highest tribunals in England.

The question therefore is whether the appellant Fateh Lal could have maintained an appeal to the lower appellate Court. This is not the specific question to which this reference relates, but the answer to it must in principle be the same as the answer to the question which has been referred to the Full Bench. In the present case the plaintiff sued certain persons—Fateh Lal, Ajudhia Prasad, and Juala Prasad. Among these defendants Juala Prasad admitted the claim. Ajudhia Prasad said that he could not be held liable in law to the claim. Fateh Lal did not appear at all. The Munsif's decree was, that the claim, as against Juala Prasad, should be decreed because it was admitted; that as against Ajudhia Prasad it should be dismissed, because he had succeeded in proving his non-liability; and with regard to Fateh Lal, that it should be dismissed for reasons that do not clearly [359] appear. The plaintiff appealed to the Judge from that portion of the Munsif's decree which exempted Ajudhia Prasad and Fateh Lal from liability, and the District Judge heard the appeal in the presence of Ajudhia Prasad, and *ex-parte* so far as concerned Fateh Lal; but in consequence of the view which the learned Judge took of the law, he passed a decree against both. In the present case Ajudhia Prasad and Fateh Lal have joined with Juala Prasad in appealing to this Court against the whole of the Judge's decree, and this has given rise to the present reference.

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It is an admitted proposition relating to the construction of statutes, that whenever the common law is varied by statute, it is one of the elements of what has been called "*the golden rule*" of construction, that, in case of any difficulty arising, the Court will look to the common law to see how it stood before it was altered by the Legislature; and, in giving effect to the new law, will place a beneficial construction so as to "suppress the mischief and advance the remedy," the mischief being mainly indicated by what has been repealed or abolished. This was laid down by Lord Coke in *Heydon's case*, and has ever since, I believe, been acted upon by the Courts in England. In this country, I believe, it is not going too far to say that, just as a Court is bound to take notice of alterations of the common law effected by statute, so also, for similar reasons, it is bound to take notice of changes of the law by statutes which alter the specific provisions of earlier enactments *in pari materia*. Under the old Code, Act VIII of 1859, such matters were dealt with by s. 119. That section began with the following words "No appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance." This clearly shows that decrees of this kind were not, under the Code of 1859, open to appeal. This provision stood when Act XXIII of 1861 was passed. That Act dealt with the question of appeal; and in a section (s. 23) substituted for s. 332 of the Old Code, we find these words:—"Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, an appeal shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." So that under [360] Act XXIII of 1861, the law stood that, by an express provision *ex-parte* decrees were not open to appeal.

But it must be remembered that, even under that law, the Lords of the Privy Council in *Zain-ul-ab-din Khan v. Ahmed Raza Khan* (1) placed a very strict construction upon s. 119 of the old Code upon the ground that "a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication;" and they held that a defendant who had once appeared was excluded from the prohibition, and could appeal, even though the case was heard in his absence, and a decree was passed against him *ex-parte*. Then came Act X of 1877, in which the first sentence of s. 119 (already quoted) of the old Code was omitted. In ss. 103 and 108 of that Act, it was *not* laid down as in the former Act that decrees of this kind were not appealable. Moreover, if it had been intended to maintain the former rule restricting the right of appeal, s. 540 of the new Act—which was word for word the same as s. 540 of the present Code—should have contained a proviso that the right of appeal should not exist where the plaintiff failed to appear, and the suit was dismissed on that ground; or where, in consequence of the defendant's failure to appear and set up a defence, the suit was decreed. S. 540, however, contained no such proviso. It was expressed in the following terms:—"Unless, when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal *shall* lie from the decrees, or from any part of decrees, of the Courts exercising original jurisdiction, to the Courts authorized to hear appeals from the decisions of those Courts." I need say nothing as to the word "*shall*," but I must here point out that the section does not say "expressly provided *for*" but

only "expressly provided,"—two phrases which, as I understand the English language, mean two different things, and the difference of meaning is in favour of the opinion which I shall presently express. In the present case there can be no doubt that the Judge was authorized to hear the appeal; and the question is whether the word "*decree*" in s. 540 means to exclude the *ex-parte* decrees contemplated by s. 108. I take it to be an undoubted proposition of law that, in the interpretation of general words in a [361] statute, the Courts are bound to give those words the broadest possible effect, unless there is some specific reason for limiting their meaning. Further, there can be no doubt that if those words operate in derogation of the rights of the subject, the strictest interpretation must be placed upon them; and by analogy to the rule of criminal law that an accused person is entitled to the benefit of every doubt, every ambiguity (if any) must be construed in favour of the subject. The question then is, what reason is there for holding that the word "*decree*" in s. 540 means only decrees passed in contested, suits? I see no reason for so holding. The only argument is that, in another part of the Code, s. 108, the Legislature has provided one form of procedure for setting aside *ex-parte* decrees; but I have already said that "provided" as used in s. 540 must not be read as if meant that the contingency is "provided for." Then the question is, where two procedures or two remedies have been provided, can one of them be taken as operating in derogation of the other? Of course, where a statute itself creates a substantive right, obligation, or duty, and, as it were in the same breath, provides a special and exclusive remedy, such remedy would be the only one available for that purpose (Maxwell on the Interpretation of Statutes, pp. 495-500). But those principles are not applicable to the enactment now under consideration, and, as I observed during the argument, I see no more reason for holding that the right of appeal conferred by s. 540 is subject to the provisions of s. 108, than for holding that s. 108 must be read subject to the provisions of s. 540. Again, it must be remembered that a statute, though the expression of the will of the Legislature, is after all a document, and must be interpreted according to the broad and fundamental principles applicable to the construction of documents in general. This being so, I am within the authorities when I say that, in the construction of documents, a later covenant or provision governs those preceding it, on the theory that the later clause represents the later intention; but the preceding covenants or provisions never govern the subsequent ones; and it is also a rule that every attempt should be made to avoid inconsistency of meaning. These rules, however, are applicable only in cases of real conflict; but with due deference to the majority of the Full Bench in *Lal Singh v. Kunjan* (1), [362] no such conflict exists, for, as I shall presently show, s. 180 and s. 540 aim at two different ends. S. 108 says that the defendant against whom an *ex-parte* decree has been passed, "*may*" apply to the Court which has passed it to set it aside for certain specific reasons. It gives a choice to the party aggrieved, and does not compel him to adopt the remedy which it provides, or make other remedies impossible. If there is no conflict between the two rules, s. 540 obviously enables, not only a defendant, but a plaintiff, who does not appear, to appeal under the general provisions relating to appeals. In the case of the plaintiff's default, it is said that one who has taken no care to prosecute his claim in the Court of first instance, should not be allowed to appeal in the same

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(1) 4 A. 387.



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way as if he had taken all proper care. There appears to me to be nothing in this argument, because, supposing that the plaintiff does not appear, and the defendant does appear, the Court is bound to give the latter a decree, unless he admits the claim or part thereof; while, supposing the plaintiff does not appear, because he, in good faith, expects the defendant to be honest enough to admit the claim, and supposing the Court, in violation of the rule contained in s. 102 of the Code, which, in these circumstances, imperatively requires it to decree so much of the claim as is admitted, dismisses the suit *in toto*, in a such case the plaintiff, even though in default, would be entitled to appeal. It has never been contended in such circumstances that when a suit has been taken up in the absence of the plaintiff, and the Court, instead of decreeing the suit, dismisses it, the plaintiff could not appeal under the provisions of s. 540. It follows that, to this extent at all events, decrees passed in the absence of one of the parties are among the decrees to which s. 540 relates. What reason, then, is there for holding that a defendant who is in default has not the same right?

I have already said that the mere granting of one form of remedy cannot be regarded as taking away another. If we applied a different rule, it might be said that because s. 523 or s. 525 as to arbitration provides one form of remedy, therefore in those cases the ordinary remedy by a regular suit is barred; or that because s. 623 gives the power to apply for a review of judgment, the party entitled to make such application is thereby deprived of his right of appeal. I believe that the latest authorities on the [363] subject in England justify the proposition that anything, broadly speaking, which may be made the subject of an application for a new trial, may also be made the subject of appeal under the Judicature Acts; and I do not think our own law is radically different on this point.

For these reasons I am of opinion that s. 540 applies to *ex-parte* decrees, by which a suit is either decreed or dismissed, and enables a defaulting plaintiff to come up in appeal; and he would succeed if he showed that the Court below should not have dismissed his suit. It appears to me that there is no reason to regard s. 540 as limited in its scope to decrees passed in contested suits only. And if this is so, a defendant against whom a decree is passed *ex-parte* would, *a fortiori*, have a right of appeal. Nor is the reason far to seek. He may satisfy the appellate Court that upon the case as presented by the plaintiff himself in the plaint or upon the evidence as produced by him, the suit should not have been decreed, either because it was barred by some positive rule of law (such as limitation, *res judicata*, &c.), or because the plaintiff's own evidence contradicted the case set up by him. And I must add that this view does not imply that, in the absence of adequate materials on the record, the appellate Court would be bound to entertain any such grounds for setting aside the lower Court's decree as are contemplated by s. 108 of the Code. Ordinarily an appellant is confined to the facts and materials upon the record.

The truth is that s. 560 of the Code is a reproduction, *mutatis mutandis*, of the rule stated in s. 108 in the earlier part of the Code with reference to suits. The section provides that "when an appeal is heard *ex-parte*, in the absence of the respondent, and judgment is given against him, he may apply to the appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served, or that he was

prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him." This is exactly the same rule as is stated in s. 108, though I also feel that much might be said upon the distinction between the words "may" and "shall" which my brother Oldfield has pointed out. And I [364] may add that s. 560 of the Code is only a further illustration of the dissentient opinion which I expressed in *Jamaitunnissa v. Lutfunnissa* (1) in interpreting s. 582, that the Code throughout preserves the analogy, *ad litis ordinationem*, between the defendant in a suit and the respondent in an appeal. S. 584 of the Code, relating to the ground upon which second appeals may be preferred, is analogous in its provisions to s. 540, and the expression used in both sections is "unless when otherwise provided by by this Code," and the expression "otherwise provided for" is not adopted. And to what I have already said upon the point I may add that the distinction is a very wide one. The word "for" would imply that a remedy was elsewhere provided to meet the contingency; the word "by" without the word "for" means that the statute itself says there shall be no appeal. Again s. 522 provides that where a decree has been passed on an arbitration award, and is co-extensive therewith, "no appeal shall lie." This is an illustration of what the Legislature means by the word "provided by" in ss. 540 and 584. Then again, another illustration is to be found in s. 586 which provides that "no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes," where the value is less than Rs. 500. So that there it is "otherwise provided by" the Code, that no appeal is to lie. There is no corresponding provision laying down that no appeal shall lie from an *ex-parte* decree.

With reference to the case-law on the subject, I may refer to *Ashruffunnissa v. Lehareaux* (2), *Luckmidas Vithaldas v. Ebrahim Oosman* (3) and *Anantharama v. Madhava Paniker* (4), which all support my view. There is also a ruling of this Court in *Ramjas v. Baignath* (5), and another of the Madras Court in *Modalatha's case* (6), laying down the rule that, in second appeals, at all events, an appeal will lie from an *ex-parte* decree of the lower appellate Court. Further, even under the old law, there is a case—*Ramshet Bachaset v. Balkrishna Ababhat* (7)—in which a distinguished Judge, Couch, C.J., draws a marked distinction between the case of a defendant and that of a respondent not appearing. I accept [356] this distinction, but it is in my humble opinion one of detail only, and not of judicial principle as representing a fundamental doctrine.

For these reasons I hold that our answer to the question referred must be that a second appeal lies, under s. 584 of the Code, from a decree of the lower appellate Court passed in the absence of the respondent, whether the respondent were plaintiff or defendant in the suit.

STRAIGHT, Offg. C. J., and TYRRELL, J.—Upon consideration of the question referred to the Full Bench, we are of opinion that, as an amendment of the law on this subject is in contemplation by the Legislature, and will in all probability be shortly carried into effect, any remarks by us on the present occasion would, under the circumstances, be undesirable.

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(1) 7 A. 606.  
(5) 2 A. 567.

(2) 8 C. 272.  
(6) 2 M. 75.

(3) 2 B. 644.  
(7) 6 B.H.C.R.A.C.J. 161.

(4) 3 M. 264.



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MAY 12.

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8 A. 365=

6 A.W.N.

(1886) 129.

8 A. 365=6 A.W.N. (1886) 129.

## APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and  
Mr. Justice Mahmood.

SANT KUMAR, MINOR, BY HIS GUARDIAN, SUKH NIDHAN  
(Plaintiff) v. DEO SARAN AND OTHERS (Defendants).\*

[12th May, 1886.]

*Hindu Law—Daughter's son—Hindu widow—Decree against widow—Reversioner—  
Res judicata—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 42—Civil  
Procedure Code, s. 578.*

A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R*'s brothers *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After *K*'s death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, *S*, *M*'s son, who had been born after *K*'s compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu Law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the former suit by *M* were in fraud of his succession, and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and, upon these findings, gave him a decree declaring his right to [366] possession on *M*'s death. The lower appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit.

*Per* MAHMOOD, J., that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Aumirtolal Bose v. Rajoneekant Miller* (1), *Sibta v. Badri Prasad* (2), and *Bajinath v. Mahabir* (3) referred to.

Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given.

Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bona fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained. *Rani Anund Koer v. The Court of Wards* (4), *Nand Kumar v. Radha Kuari* (5), and *Katama Natchiar's case* (6) referred to.

Also that *M*'s withdrawal of her suit was not a bar to the suit of the plaintiff.

\* Second Appeal No. 1279 of 1885, from a decree of Maulvi Muhammad Ahmad-ul-lah Khan, Subordinate Judge of Gorakhpur, dated the 18th May, 1885, reversing a decree of Maulvi Aziz-ul-Rahman, Munsif of Banegaon, dated the 5th January, 1885.

(1) 15 B.L.R. 10=2 I.A. 113.

(3) 1 A. 608.

(5) 1 A. 282.

(2) 3 A. 134.

(4) 6 C. 764=8 I.A. 14.

(6) 9 M.I.A. 539 (543).

Also that it could not be said that a daughter's son, was not, under any condition, competent to maintain a declaratory suit of this nature during the lifetime of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right.

Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code.

This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner [367] grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere.

*Ram Kanaye Chuckerbutty v. Prosunno Coomar Sein* (1), *Sadut Ali Khan v. Khajeh Abdool Gunnee* (2), *Sheo Singh Rai v. Dakho* (3) and *Damoodur Surmah v. Mohee Kant Surmah* (4), referred to.

[F., 8 A. 429 (439); 9 A. 622; R., 29 A. 497=4 A.L.J. 365=A.W.N. (1907) 151; 33 M. 473=20 M.L.J. 204=7 M.L.T. 340; 5 Bom. L.R. 885; 6 C.L.J. 490; 24 P.L.R. 1900; D., 38 C. 639; 25 Ind. Cas. 921=1 O.L.J. 490.]

THE facts of this case were as follows:—One Ram Fakir had two brothers, Hanuman and Sheo Parshan, represented in this case by their sons. The plaintiff was the son of Mohra, daughter of Ram Fakir, who died many years ago, leaving also a widow Kadma. Upon the death of Ram Fakir, Kadma, his widow, obtained possession of his zamindari property, a 1 anna and 4 pies share in each of three villages, on the allegation that her deceased husband, having been separated from his brothers, and having died without leaving a son, she was entitled to succeed to his estate according to the Hindu law. After this, about the year 1865, probably soon after Ram Fakir's death, the sons of Hanuman and Sheo Parshan instituted a suit against Kadma for possession of the estate of Ram Fakir, and that litigation ended in a compromise, which the widow entered into with them on the 8th November, 1865. Under the terms of this compromise the widow recognized their rights, and conceded that, the family of Ram Fakir being joint, her right in his estate was limited to receiving maintenance for life only. At that time Sant Kumar, the plaintiff in the present case, had not been born. Kadma having died, Mohra, the mother of the plaintiff, instituted a suit on her own behalf for her father's estate, against the sons of Hanuman and Sheo Parshan, about the year 1880, but subsequently withdrew her claim on the 5th November, 1880, apparently without reserving any right to sue again.

The present suit was instituted by the plaintiff Sant Kumar as a minor, through his guardian, on the 1st December, 1884, against Mohra and the sons of Hanuman and Sheo Parshan, and its object was to recover possession of the estate of Ram Fakir, which was in the possession of the sons of Hanuman and Sheo Parshan, who were the principal defendants, on the allegation that, the family being divided, he was entitled, under the Hindu law, to succeed to such estate, and that the compromise

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8 A. 368=

6 A.W.N.

(1886) 129.

(1) 13 W. R. 175.

(3) 1 A. 688=5 I.A. 87.

(2) 11 B.L.R. 203=I.A. Sup. Vol. 165.

(4) 21 W.R. 54.



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of the 8th Nov-<sup>[368]</sup>ember, 1865, entered into by Kadma, and the withdrawal of the former suit by Mohra, were both in fraud of the plaintiff's succession, and were not binding upon him.

The suit was resisted by the principal defendants mainly upon the ground that Ram Fakir was a member of a joint Hindu family; that his widow, Kadma, was therefore entitled only to maintenance; that the compromise entered into by her before the plaintiff's birth was *bona fide*, as also the withdrawal of her claim by the plaintiff's mother, Mohra; that plaintiff was neither entitled to set aside those proceedings, nor had he any right to sue for possession in the lifetime of his mother, Mohra; and that the suit was barred by the rule of *res judicata*, the plaintiff's *status* being that of a legal representative of Kadma through Mohra. All these pleas were disallowed by the Court of first instance which found, *inter alia*, that Ram Fakir was separate in estate from his brothers; that the plaintiff was, therefore, entitled to succeed to the share of his maternal grandfather; that the proceedings taken by Kadma and Mohra could not prejudice his rights; but that the mother of the plaintiff being still alive, he was entitled to possession only upon her death. Upon these findings the Court of first instance gave a decree to the plaintiff declaring his right to obtain possession of the property upon the death of his mother Musammam Mohra.

Upon appeal the lower appellate Court, having regard to the case of *Nand Kumar v. Radha Kuari* (1), reversed the decree of the first Court on the ground that Kadma's compromise of the 8th November, 1865, was conclusive and binding upon the plaintiff, and also on the ground that, the plaintiff's mother being still alive, the plaintiffs had no *locus standi* to maintain the suit. For this latter proposition the lower appellate Court relied upon *Bajinath v. Mahabir* (2).

The plaintiff appealed to the High Court.

Babu Sital Prasad Chatterji, for the appellant.

Pandit Ajudhia Nath and Shah Asad Ali, for the respondents.

### JUDGMENT.

MAHMOOD, J.—In my opinion the first question to be considered in this case is, whether, upon the facts as stated by plaintiff <sup>[369]</sup> himself, he has any *locus standi* to maintain the suit. The general rule of Hindu law is, that a daughter's son can never succeed to the estate of the grandfather so long as there is in existence any daughter who is entitled to take, either as heir or by survivorship to her other sisters. This is the effect of the ruling of the Lords of the Privy Council in *Aumirtolal Bose v. Rajoneekant Mitter* (3) and also of the other cases cited by Mr. Mayne in his excellent work on Hindu Law and Usage, s. 478. In s. 479 of the same work the learned author, upon the authority of the ruling of this Court in *Sibta v. Badri Prasad* (4), goes on to say that, according to the Mitakshara law, a daughter's son takes his maternal grandfather's estate as full proprietor; on his death such estate devolves on his heirs and not on the heirs of his maternal grandfather, but that until the death of the last daughter capable of being an heiress, she takes no interest whatever, and can transmit none, and therefore if he should die before the last of such daughters leaving a son, that son would not succeed because he belongs to a completely different family, and he would offer no oblation to the

(1) 1 A. 282.

(3) 15 B.L.R. 10=2 I.A. 113.

(2) 1 A. 608,

(4) 3 A. 134.

maternal grandfather of his own father. These I take to be the undoubted propositions of the Mitakshara school of Hindu law, and fully consistent with the rule laid down by this Court in *Bajinath v. Mahabir* (1) so far as that case follows the ruling of the Privy Council above referred to. In short, a daughter's son—to use the words of Mr. Mayne—"takes not as heir to any daughter who may have died, but as heir to his own grandfather, and, of course, cannot take at all so long as there is a nearer heir in existence." I do not understand any of the rulings to which I have referred to lay down any rule which goes beyond saying that, during the existence of any daughters, the daughter's son cannot succeed to—that is to say, obtain proprietary possession of—his maternal grandfather's estate in a divided Hindu family; and it seems to me equally clear that, whenever, according to the rule of succession, the daughter's son does succeed to his maternal grandfather's estate, he succeeds as "full owner" in the sense in which that expression is understood in Hindu law. Now, this being so, I hold that during the lifetime of a daughter, the position of the daughter's son, with reference to his maternal grandfather's divided estate, is, at least by a close analogy, similar [370] to the *status* of such reversioners as trace their descent through the main line to the full owner. This is a conclusion which I think is borne out by the learned summary of the historical aspect of the rights of a daughter's son given by Mr. Mayne in s. 477 of his work: and I may add that the circumstance of the daughter's son being born *after* the death of his maternal grandfather, would have no effect upon his rights in a case such as the present. But it is of course clear that those rights do not entitle him under ordinary circumstances to succeed to the maternal grandfather's estate during the existence of a daughter, whether she be his own mother or maternal aunt. The claim for possession in this case was, therefore, rightly dismissed by the Munsif, but the question remains whether the declaratory decree, which he awarded to the plaintiff, was rightly interfered with by the lower appellate Court.

Upon this last question the nature of the plaint has to be considered, and after having read the pleadings in the case, I am of opinion that the prayer in the plaint is expressly and clearly wide enough to include a prayer for declaratory relief. This being so, the next point is, whether the plaint discloses any such circumstances as would entitle the plaintiff to ask for a decree such as the Munsif has given him. Questions of this kind formerly arose under the somewhat indefinite provisions of s. 15 of the old Civil Procedure Code (Act VIII of 1859), and numerous rulings are to be found in the reports as to the exact scope of declaratory relief. The matter is now governed by the provisions of s. 42 of the Specific Relief Act (I of 1877), and I have before now, in the case of *Balgobind v. Ram Kumar* (2), had occasion to express the manner in which I interpret that section in its application to declaratory suits by Hindu reversioners. According to those views, and with reference to the ruling of their Lordships of the Privy Council in *Rani Anund Koer v. The Court of Wards* (3), it seems to me that the present is a case in which, if the facts alleged by the plaintiff are true, he can maintain the suit. It is perfectly true, as was held by this Court in *Nand Kumar v. Radha Kuari* (4), that where, on her husband's death, a Hindu widow obtains possession of his estate as his heir, in a suit against her for possession thereof [371] by certain persons claiming to succeed to the estate as rightful

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(1) 1 A. 603.

(2) 6 A. 431.

(3) 6 C. 764=8 I.A. 14.

(4) 1 A. 282.



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heirs, a decree obtained by them would be a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow; in other words, such a decree would operate as *res judicata* against all who, in the order of succession, came after the widow, and in that sense may be dealt with as her representatives. But the peculiar nature of the "widow's estate" under the Hindu law is such that her position in litigation must necessarily be subjected to the qualification which the ruling which I have just cited imposes upon the operation of such a plea in bar of the action, namely, that the decree should have been fairly obtained against the widow in a *bona fide* litigation. This seems to me to be perfectly clear from the ruling of the Privy Council in the case of *Katama Natchiar* (1) where their Lordships made the following observations at p. 608 of the report:—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchiar's* lifetime, would have bound those claiming the zamindari in succession to her. And their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or in other words, unless that decree could have been successfully impeached on some special ground—it would have been an effectual bar to any new suit in the zila Court by any person claiming in succession to *Anga Mootoo Natchiar*. For, assuming her to be entitled to the zamindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

[372] Now, in the present case, the compromise which the principal defendants obtained from Musammat Kadma on the 8th November, 1865, was an arrangement which can scarcely be regarded as having any footing higher than that of an alienation which the widow in possession of her husband's divided estate could have made. At any rate, the compromise, whether it was made by a rule of Court or not, cannot, in my opinion, be dealt with as having the full force of a decree which would be the result of adjudication in a contested suit. Moreover, the plaintiff distinctly alleges in the plaint that the transaction of the compromise was not *bona fide*, and that it had not been fairly obtained. The question was therefore clearly in issue, and whilst the Court of first instance took a view favourable to the plaintiff's case the lower appellate Court had failed to enter into the merits of it, apparently under the view that the *bona fides* of the compromise was a matter of no significance at all.

Almost the same remarks, *mutatis mutandis*, are applicable to the manner in which the lower appellate Court has dealt with the position of Musammat Mohra and her action in withdrawing the suit which she had instituted against the principal defendants. It is admitted that the object of that suit was to recover possession of the property now in suit, on the ground that it formed the separate property of Ram Fakir,

and devolved upon her upon the death of her mother Musammat Kadma, which is said to have taken place in Asarh 1286 fasli (1879). The suit was not adjudicated upon but ended in being withdrawn on the 5th November, 1880, under circumstances which the plaintiff distinctly alleges were tainted with fraud and collusion. Upon this point also the Munsif took a view favourable to the plaintiff, but the lower Court has failed to go into the merits of the question because it held that the very existence of Musammat Mohra constituted a full answer to the present suit, as it deprived the plaintiff of *locus standi*. For this view the learned Subordinate Judge has relied upon the ruling of this Court in *Bajinath v. Mahabir* (1). Having carefully considered the report of that case, I am of opinion that it is not on all fours with the present case. The main proposition of law there laid down is undoubted; but there is nothing in the judgment delivered [373] by the learned Judges in that case to show that a daughter's son is not under any condition competent to maintain a declaratory suit of this nature during the lifetime of the mother or maternal aunt in respect of his maternal grandfather's property, to the full ownership of which he has a reversionary right. The awarding of declaratory relief is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff. The discretion is now regulated by s. 42 of the Specific Relief Act, and I have already said enough to indicate that, if the allegations of the plaintiff are true, a suit of this nature, so far as it prays for declaratory relief, would be maintainable: and I wish to take this opportunity of expressing a view which I have long entertained in connection with the power of interference which the appellate Court should exercise in cases where it is doubtful whether the circumstances fully justified a declaratory decree. The awarding of specific relief belongs to one of those branches of law, regarding which even the great jurists are not unanimous as to whether it falls within the province of procedure, *ad litis ordinationem*, or appertains to the reason of substantive law *ad litis decisionem*. Perhaps the simplest and safest view is to regard the subject as occupying a middle place between these two great divisions of law. But whether the awarding of declaratory decrees is a rule of procedure or a rule of substantive law, it seems to me that it does not occupy such a position in the juristic arrangement of legal rules as would vitiate decrees awarded in cases where its application may be doubtful. I may here observe that the Legislature, in framing the rule in s. 42 of the Specific Relief Act, has dealt with the matter as purely discretionary with the Court, and it is noticeable that the only restriction to which the discretionary power is made subject by the express letter of the statute, is contained in the proviso to that section, which lays down "that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." Beyond this restriction, no other limitation is imposed by the Legislature, though it may well be taken for granted, and it goes without saying that the Legislature did not intend the discretionary power [374] to be exercised in an unsound manner. The absence of any other restriction in s. 42 is all the more significant when we find that the same enactment, in laying down the rule as to a cognate branch of specific

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relief, and in leaving it to the discretion of the Court to decree specific performance of contracts, as framed s. 22 in language which expressly provides restrictions upon the power. For the latter section, after giving the power, goes on to say that "the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles, and capable of correction by a Court of appeal." Then the section goes on further, and, in two carefully-framed clauses, indicates the class of "cases in which the Court may properly exercise a discretion *not* to decree specific performance;" and again in another clause indications are given of the intentions of the Legislature as to the nature of cases in which Courts may award such relief. There are, of course, further provisions in the following few sections regulating the awarding of specific performance. Now, no such rules, of elaborate indications, of restrictions are to be found in the Act with reference to declaratory decrees. And I have said all this in order to answer the question whether, in a case such as the present, and granting that the plaintiff had *locus standi* to maintain the suit, and that the decree of the Court of first instance was sound upon the merits, the lower appellate Court would have been justified in reversing the decree simply upon the ground that the discretionary relief was improperly exercised in the affirmative by the Munsif.

I am of opinion that the question must be answered in the negative, and I hold that, so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, so long as that Court entering into the merits of the plaintiff's case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised. I know that in saying this I am laying down a strong proposition of law, and I am anxious to justify it further by statutory provisions themselves. I have already shown that whilst the discretion to decree specific performance of contracts expressly declared to be "capable of correction by a Court of appeal," no such provision exists in the Specific Relief Act as to declaratory decrees. I will say nothing as to the effect [375] of the word "*shall*" in the proviso to s. 42, because even if the plaintiff's whole case be accepted, that proviso would not apply to this case—he not being entitled "to ask further relief than a mere declaration of title" within the meaning of the statute. Putting the proviso, therefore, out of the question, I hold that an improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an "error, defect, or irregularity, whether in the decision or in any order passed in the suit or otherwise, not affecting the merits of the case or the jurisdiction of the Court," within the meaning of s. 578 of the Civil Procedure Code. That section contains one of the most salutary rules of law which the Code provides. The obvious aim of the clause, in keeping with many another provision in the Code, is to prevent technicalities from overcoming the ends of justice, and from operating as a means of circuitry of litigation, which the old method of English Common Law Courts so much encouraged. And in applying the clause to declaratory decrees in the manner in which I have suggested, it seems to me that we should be only giving effect to the policy of the Legislature. For I fail to understand what possible harm can arise where A, being admittedly entitled to a right against B, goes to a Court of competent jurisdiction, and after a full trial of his cause obtains from that Court a declaration consistent with the actual merits of the dispute. Such a declaration may possibly have been improperly made, owing to the absence of sufficient

reasons for awarding such a relief. But, after all, such a declaration, though irregular, only asserts a fact and confirms a right. The holder of such a decree obtains a conclusive evidence against his antagonist; and if the decree is sound upon the merits, the ends of justice are promoted by the issues not being re-opened and re-tried at a later period, when, by the lapse of time, the muniments of title and the evidence of witnesses may have disappeared.

Nor is the view which I have taken wholly unsupported by the case-law. I am aware that there are cases to be found in the Reports (under s. 15 of the Code of 1859), which may not be wholly consistent with my opinion. But the law has since been newly formulated by the express interference of the Legislature; and it is clear that a great deal of what I have said proceeds upon [376] the construction of s. 42 of the Specific Relief Act. But apart from this, there is a judgment of that eminent Indian Judge, the late Mr. Justice Dwarkanath Mitter, in *Ram Kanaye Chuckerbutty v. Prosunno Coomar Sein* (1), where the learned Judge laid down the rule of law which seems to me to be best suited to the conditions of litigation in this country, and to be consonant with sound principles of procedure. Referring to s. 15 of Act VIII of 1859 (which corresponds with s. 42 of the Specific Relief Act), and s. 350 of the same Act, which has been replaced and practically reproduced in s. 578 of the present Code, the learned Judge went on to say:—"It is true that it is entirely in the discretion of the Court to make a declaratory decree under s. 15, Act VIII of 1859; but after this discretion has been already exercised by a Court of competent jurisdiction, it does not lie within the power of a Court of appeal to set aside the decree of the lower Court upon an objection like this, which does not affect the merits of that decree, and which was not even taken at the time when it was passed." Whilst accepting this enunciation of the law, I will guard myself against being understood to say that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. I will lay down no rule upon this subject because, as I have already shown, the point does not arise in the case. It is sufficient to say that in *Sadut Ali Khan v. Khajeh Abdool Gunnee* (2) the Lords of the Privy Council, referring to the discretionary power as to declaratory decrees, expressed the principle that where a Court "has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion." And I may further add, as supporting my view, that in the case of *Sheo Singh Rai v. Dakho* (3) the Lords of the Privy Council denominated the objections as to the impropriety of maintaining the declaratory suit, when raised in appeal, as "somewhat technical," and declined to entertain them. The present case seems to me to be similar to *Damoodur Surmah v. Mohee Kant Surmah* (4), and if the allegations of the plaintiff [377] are substantiated, he can, in my opinion, maintain the suit, and reasonably claim declaratory relief. But unfortunately the manner in which the lower appellate Court has viewed this case, has prevented it entirely from entering into the merits of the case, upon the issues of fact raised by the parties. The defendants went the length of denying

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(1) 13 W.R. 175.

(3) 1 A., 688 = 5 I.A. 87.

(2) 11 B.L.R. 203 = I.A. Sup. Vol. 165.

(4) 21 W. R. 54.



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that the plaintiff's mother, Musammat Mohra, was the daughter of Ram Fakir. They alleged that Ram Fakir was not divided from his brothers, whom the defendants represent. There were also minor allegations of facts upon which the parties did not agree, but none of these points have been considered or determined by the lower appellate Court, and there is not even a finding as to whether the family of Ram Fakir and his brothers was joint or divided,—a point which is of course all-important in this case.

Under the circumstances, I think it is impossible to dispose of this appeal finally here, and I would therefore decree this appeal, and, setting aside the decree of the lower appellate Court, remand the case to that Court, under s. 562 of the Civil Procedure Code, for disposal upon the merits, with reference to the observations already made. Costs to abide the result.

STRAIGHT, Offg. C. J.—I agree to the order proposed by my brother Mahmood.

*Case remanded.*

8 A. 377=6 A.W.N. (1886) 127.

#### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

ABDUL HAYAI KHAN (*Plaintiff*) v. CHUNIA KUAR (*Defendant*).<sup>\*</sup>  
[21st May, 1886.]

*Amendment of decree—Execution of decree—Objection to validity of amendment—Civil Procedure Code, s. 206.*

The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the [378] decree disallowed the objection, on the ground that it was not such as could be entertained in the execution department.

*Held* that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party, as required by s. 206 of the Code.

*Held* also that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed.

[R., 11 A. 314; Expl., 28 C. 177=5 C.W.N. 192; Diss., 20 C.L.J. 512=27 Ind. Cas. 444.]

THE facts of this case were as follows:—In September, 1880, Chunia Kuar brought a suit against Abdul Hayai Khan on a bond, claiming Rs. 925, principal, and Rs. 1,116-13 interest,—total Rs. 2,041-13. The

<sup>\*</sup> Second Appeal No. 64 of 1885, from an order of W. T. Martin, Esq., Additional Judge of Aligarh, dated the 2nd April, 1885, affirming an order of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 22nd March, 1884.

defendant pleaded payment in satisfaction of the bond-debt to the extent of Rs. 1,196-14. In support of this plea he produced two receipts, one dated the 13th May, 1877, and the other, covering Rs. 875, dated the 27th November, 1878. The plaintiff admitted the first receipt, but denied the genuineness of the second. The only issue which the Court framed was as to whether the second receipt was genuine or not. This issue it decided against the defendant; and, making a deduction of the amount covered by the first receipt, it gave the plaintiff a decree for Rs. 815-2, principal, and Rs. 467-3-6 interest,—total Rs. 1,282-5-6. The decree was dated the 8th February, 1881. On the 22nd March, 1881, the plaintiff applied to have the decree amended, alleging that the amounts, both of principal and interest, entered in the decree, were not correct amounts. She alleged that the principal should be Rs. 817-4-6 and the interest Rs. 613-9-6,—total Rs. 1,460-14. On the 14th May, 1881, without giving notice to the defendant, the Court ordered the decree to be amended as prayed. On the decree-holder applying for execution of the decree as amended, the judgment-debtor objected to the validity of the amendment. The Court executing the decree held that it was not competent to entertain the objection in the execution-department. On appeal by the judgment-debtor the lower appellate Court concurred in the view taken by the first Court, and further decided that "the amendment was owing to arithmetical errors in calculating interest, and the amendment was not contrary to the judgment."

[379] The judgment-debtor appealed to the High Court. The respondent not appearing, the appeal was heard *ex-parte* in her absence, and the Court (Oldfield and Brodhurst, JJ.) decreed the appeal, and set aside the orders of the lower Courts allowing execution. The respondent applied for the re-hearing of the appeal, and the application having been granted, the appeal again came on for hearing.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Pandit *Ajudhia Nath* contended that the amendment of the decree was illegal, as it was not at variance with the judgment as originally framed, and because no notice of the proposed amendment had been given to the judgment-debtor.

Mr. *T. Conlan* and Mr. *G. T. Spankie*, for the respondent.

Mr. *Spankie* contended that the specification of relief granted in the decretal order of the judgment was arithmetically wrong, and at variance with that part of the judgment which preceded the decretal order; that a decree should agree with that part of the judgment which preceded the decretal order, and might be amended when it did not do so, notwithstanding it agreed with the judgment where the same specified the relief granted, but specified it erroneously by reason of arithmetical errors. It was further contended that the Court executing a decree, which had been amended by a Court competent to amend it, was not competent to determine whether the amendment was valid or invalid. In the execution-department only the questions mentioned in s. 244 of the Civil Procedure Code can be determined.

#### JUDGMENT.

OLDFIELD and BRODHURST, JJ.—This appeal was on the part of a judgment-debtor against the decree-holder, and was heard and decided on the 25th November, 1885. It has been admitted for re-hearing. It appears the decree, as it originally stood, was for Rs. 1,282-5-6.

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Subsequently, on application by the decree-holder, the Court which passed the decree, purporting to act under s. 206 of the Code, altered the decree and made it for a sum of Rs. 1,460-14-0. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282-5-6 and had been improperly altered. The objection was disallowed. On [380] appeal to the Judge that officer affirmed the order, and the judgment-debtor has preferred a second appeal to this Court.

We think our original order of the 25th November, 1885, must stand. The decree, as it originally stood, was in accordance with the judgment. The Court had no power to alter it as it did, and the proceeding is further irregular, in that no notice was given to the opposite party as required by s. 206. But a further contention on the part of the decree-holder is, that a question of this kind cannot be entertained in the execution-department; that the decree must stand as altered, and is not open to an inquiry whether it was properly altered when proceedings in execution are being taken. In our opinion this contention is not valid. We think that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and we think he could in this case raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed. On these grounds our order on this application is similar to the order we made in November, 1885, setting aside the execution proceedings with costs.

*Appeal allowed.*

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8 A. 380=6 A.W.N. (1886) 128.

### CRIMINAL REVISION.

*Before Mr. Justice Straight, Offg. Chief Justice.*

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QUEEN-EMPRESS v. MAHESHRI BAKHSH SINGH.  
[22nd May, 1886.]

*Act XLV of 1860 (Penal Code), s. 189—Threat of injury to public servant—Necessity for proving actual words used.*

In a prosecution for an offence under s. 189 of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner. The Sessions Judge, on appeal, affirmed the conviction, observing that it was immaterial what the words used were, and that the intention and effect of the words were plain.

*Held* that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether in fact a threat of injury to the public servant was really made by the accused.

THIS was an application for revision of an order of Mr. F. E. Elliot, Sessions Judge of Allahabad, dated the 1st May, 1886, [381] affirming an order of Mr. P. Gray, Joint Magistrate of Allahabad, dated the 1st April, convicting the applicant of an offence punishable under s. 189 of the Penal Code, and sentencing him to three months' rigorous imprisonment, and Rs. 25 fine, or, in default, two months further imprisonment. The applicant was charged with having threatened one Niamat Ali, head-constable of Karchana, for the purpose of deterring him from

the proper exercise of his functions as a public servant. The case for the prosecution was that on the evening of the 28th December, 1885, the head-constable was inquiring into a burglary which had taken place the night before in the house of one Mata Din, and was questioning certain persons of suspicious character, when the accused came up and threatened him by saying that these persons were his ryots, and if they were questioned further, he (the accused) would make a complaint about him. The head-constable deposed that the accused also threatened another constable by saying that he could have him deprived of his badge of office; but the constable in question stated that he had heard no such threat. The other witnesses for the prosecution differed from the head-constable as to the exact words used by the accused to the latter, though they agreed as to the general effect of those words. The joint Magistrate was of opinion that the offence specified in s. 189 of the Penal Code was clearly proved, and convicted and sentenced the applicant as above mentioned. On appeal, the Sessions Judge observed:—"It does not matter what the words used were. The witnesses do not agree as to the exact words used. We must look to the intention with which the words were used and the effect they had. It is perfectly plain to me that the intention was to intimidate the police-officer, and so to deter him from doing his duty; and it is in evidence that though the officer was not deterred from proceeding with his inquiry, the investigation was seriously hindered and impeded by the attitude taken by the appellant. Under these circumstances the Magistrate's order was, in my judgment, fully justified, and I therefore affirm both the conviction and sentence."

It was contended on behalf of the applicant that in the absence of proof of the exact words used and complained of, the conviction under s. 189 of the Penal Code was improper.

[382] *Lala Lalta Prasad*, for the applicant.

The *Government Pleader* (*Munshi Ram Prasad*), for the Crown.

### JUDGMENT.

STRAIGHT, Offg. C.J.—This conviction cannot be sustained. There is a serious conflict of testimony as to the words which were used by the petitioner regarding the complainant Niamat Ali, and it is exceedingly doubtful, upon the face of the whole evidence, whether any such threat of injury, as came within s. 189 of the Penal Code, was held out by the petitioner to the complainant. I do not agree with the Judge's observation, that it is immaterial what the words used actually were; on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether, in fact, a threat of injury to the constable was really made by the petitioner. It does not appear in what mode the complainant was conducting his examination of the several persons suspected of participation in the burglary, and it is possible that he conducted it in such a manner as might properly elicit from the petitioner a remonstrance or observation as to the impropriety of his conduct, accompanied by a threat to complain of him, which under such circumstances could not be the subject of a charge under s. 189. However this may be, the case is such a doubtful one that the conviction is not sustainable. The application for revision must, therefore, be allowed, and quashing the orders of the Magistrate and the Judge, I acquit the petitioner, and direct that he be at once released, and that the fine, if realized, be refunded.

*Conviction set aside.*

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## CRIMINAL REVISION.

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*Before Mr. Justice Straight, Offg. Chief Justice.*

QUEEN-EMPRESS v. JUGAL KISHORE.

[28th May, 1886.]

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(1886) 133.

*Art XLV of 1860 (Penal Code), s. 182—Prosecution under s. 182—Criminal Procedure Code, s. 195.*

A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. *Queen-Empress v. Radha Kishan* (1) overruled.

Where a specific false charge is made, the proper section for proceedings to be adopted is under s. 211 of the Penal Code.

[383] THIS was a case reported to the High Court for orders by Mr. T. Benson, Sessions Judge of Saharanpur. In this case three persons named Chajju Ram, Sadu Ram, and Jugal Kishore, were tried and convicted by the Cantonment Magistrate of Roorkee of an offence under s. 182 of the Indian Penal Code. The false information, in respect of which they were charged and tried, was given to a head-constable, and was to the effect that they believed it was probable that stolen property would be found in the complainant's house. The house was accordingly searched, but no stolen property was found, and it appeared that the object of the accused in giving the information was merely to annoy and humiliate the complainant. The latter obtained sanction from the District Superintendent of Police to prosecute the accused, and in the result they were tried and convicted as above mentioned, and fined Rs. 10 each. The Sessions Judge was of opinion that the conviction was bad, inasmuch as a private person was not competent to institute proceedings under s. 182 of the Penal Code, with reference to the ruling of Straight, J., in *Queen-Empress v. Radha Kishan* (1). He added :—"It appears to me that the High Court's ruling in *Queen-Empress v. Radha Kishan* (1) does away entirely with the remedy which apparently, on the face of s. 182, a private person has who is injured by false information given to the police, where such information is not in the nature of a complaint or institution of proceedings. It would appear to me, however, that the person so aggrieved has no other remedy. Nor can I see anything in s. 195 of the Criminal Procedure Code indicating that a private person cannot prosecute under s. 182,—rather the contrary. The section apparently contemplates a prosecution on the part of a private person sanctioned by a police-officer."

## JUDGMENT.

STRAIGHT, Offg. C.J.—I am glad that the learned Judge has reported this case, because it has afforded me an opportunity of considering my ruling in the case of *Queen-Empress v. Radha Kishan* (1). Upon further consideration I have come to the conclusion that the latter portion of my judgment in that case was erroneous, and that a prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public-officer to whom the false information was given, or of his official superior. I am induced to adopt this altered view upon closer consideration of s. 195 of the Criminal

Procedure Code, where a distinction is drawn between "sanction" and "complaint;" and I think that by the use of the former word it was contemplated that a prosecution may emanate from some person other than the officer interested. Though I take this view of the matter now, it would in no way have altered the order I made in *Queen-Empress v. Radha Kishan* (1), had I held it when that was passed, as, in my opinion, when a specific false charge is made, as in that case, the proper section for proceedings to be adopted under is s. 211. With these remarks the record may be returned.

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8 A. 384 = 6 A.W.N. (1886) 134.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

LACHMAN SINGH AND OTHERS (*Defendants*) v. SALIG RAM AND OTHERS (*Plaintiffs*).\* [29th May, 1886.]

*Lambardar and co-sharer—Government revenue—Payment by lambardar of arrears of revenue due by co-sharer—Charge—Act XII of 1881 (N.-W.P. Rent Act), s. 93 (g).*

In execution of a decree obtained by a lambardar under s. 93 (g) of the N.-W. P. Rent Act, the decree-holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had obtained a charge on it, and could bring it to sale to satisfy the decree.

*Held*, that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to a realization from personal and immoveable property of the judgment-debtors. *Nugender Chunder Ghose v. Sreematty Kaminee Dossee* (2) referred to.

[R. 13 A, 195 = A.W.N. (1890) 228 ; A.W.N. (1891) 9.]

THE facts of this case are stated in the judgment of the Court.

[385] Munshi *Madho Parshad*, for the appellants.

Pandit *Nand Lal*, for the respondents.

### JUDGMENT.

OLDFIELD, J.—The facts are as follows:—The appellant (defendant) Lachman Singh, lambardar and co-sharer in mauza Gujarpur, satisfied arrears of revenue due on the shares of his co-sharers, defendants 2, 3, and 4, and brought a suit against them under s. 93 (g) of the Rent Act, to recover the amount he had paid and obtained a decree, and in execution attached a 2-biswa and  $7\frac{1}{2}$  biswansi share on which the arrears had accrued.

The plaintiffs-respondents took objections to the attachment, they having, subsequently to Lachman Singh's decree, but prior to attachment,

\* Second Appeal No. 1663 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 22nd August, 1895, reversing a decree of Maulvi Muhammad Wajid Ali Khan, Munsif of Mainpuri, dated the 18th February, 1885.

(1) 5 A. 36.

(2) 11 M.I.A. 241 (358).



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8 A. 384=  
6 A.W.N.  
(1886) 134.

purchased the property from Lachman Singh's judgment-debtors in satisfaction of a mortgage-debt, and they contended that the property was not liable to sale under the decree. This objection was disallowed, and they have brought this suit to have it declared that the property is not liable to be sold in execution of the defendant Lachman Singh's decree, and to remove the attachment.

There were several defences to the suit set up by the principal defendant, but the only one with which we are concerned in this appeal is that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he obtained a charge on it, and can bring it to sale to satisfy the Rent Court decree. The first Court dismissed the suit on the authority of a decision of this Court—*Wazir Muhammad Khan v. Guaridat* (1). The lower appellate Court has decreed the claim apparently holding that the appellant Lachman Singh's contention that, by paying revenue, he obtained a charge on the estate, was invalid.

We have now an appeal on the part of the defendants. The question we have to decide is, not so much whether the defendant Lachman Singh obtained a charge on the property of the plaintiffs' vendors, as whether he can enforce any such charge in execution of the Rent Court decree which he holds. The decree which he holds is in a suit brought under s. 93 (g), Rent Act, in the Revenue Court. It is, and can be, no more than a decree for money against the vendors of the plaintiffs for arrears of Government revenue [386] payable by them through the lambardar. The suit does not, and could not, in a Revenue Court, seek to establish or enforce a charge on property, and neither does the decree give it, nor are there any powers conferred on the Revenue Court in execution of its decrees to enforce charges on immoveable property. S. 171 and the following sections deal with the powers of the Court in execution, which are confined to realization from personal and immoveable property of the judgment-debtors.

No doubt, by paying arrears of revenue, which he was bound to do, the defendant would obtain a charge on the estate against all persons interested therein for the sum paid, and this has been laid down by their Lordships of the Privy Council in *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (2); but that case is also an authority for the view I take in this case, that a charge of this nature cannot be enforced under a decree which is merely a personal decree against the judgment-debtors, against whom it was passed by a Revenue Court not competent to do more than pass a personal decree. If the defendant wished to establish a charge against the property in the hands of the plaintiffs, he should have established the same by suit against them in a Court of competent jurisdiction.

The case referred to by the first Court has no bearing on the question before us.

Second Appeal No. 379 of 1882 decided by a Division Bench of this Court on the 9th March, 1883, was referred to by the pleader for the appellants, to support his contention, and no doubt it does do so, but for the reasons I have stated, I am unable to concur in the view of the law taken in that case. I would dismiss the appeal with costs.

TYRRELL, J.—I concur.

*Appeal dismissed.*

8 A. 387 = 6 A.W.N. (1886) 136 = 10 Ind. Jur. 466.

## [387] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

DALIP AND OTHERS (*Defendants*) v. GANPAT (*Plaintiff*).  
[3rd June, 1886.]*Hindu Law--Inheritance--Sudras--Illegitimate son.*

Held that an *Ahir* who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a *Sudra*. *Vencatachella Chetty v. Parvathammal* (1), *Parisi Nayudu v. Bangaru Nayudu* (2), *Viraramathu Udayan v. Singaravelu* (3), *Rahi v. Govinda* (4), and *Narayan Bharthi v. Laving Bharthi* (5) referred to.

[R., 23 B. 257; 32 B. 562 = 10 Bom. L.R. 736; 39 M. 136 (159) = 29 M.L.J. 793 (816) = 18 M.L.T. 552 (568) = (1916) 1 M.W.N. 31 = 2 L.W. 1247 (1266) = 33 Ind. Cas. 858; 6 C.P.L.R. 144.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu Baroda Prasad Ghose, for the appellants.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the respondent.

## JUDGMENT.

OLDFIELD and TYRRELL, JJ.—This appeal raises a question as to the rights of inheritance of illegitimate sons of *Sudras*, the parties in this case being *Ahirs*. The plaintiff claims to succeed to a share of the property left by Shahzadeh, on the ground that he is his son by a woman named Musammat Salomi. It has been found as facts by both Courts that Salomi was the wife of Shahzadeh's paternal uncle, and on the death of her husband she entered into a *karao* marriage with one Sukhain, and that the plaintiff was the offspring of an adulterous intercourse between her and Shahzadeh after her marriage with Sukhain. Accepting these facts, with the findings on which we cannot in second appeal interfere, we are opinion that the plaintiff has no right to inherit Shahzadeh's property. He is the offspring of adulterous and consequently illegal intercourse, and incapable of inheriting even as a *Sudra*.

There are numerous decisions by the Courts to this effect—*Vencatachella Chetty v. Parvathammal* (1), *Parisi Nayudu v. Bangaru Nayudu* (2), *Viraramuthi Udayan v. Singaravelu* (3), *Rahi v. Govinda* (4) and *Narayan Bharthi v. Laving Bharthi* (5).

The appeal is decreed, and the decrees of the Courts below are set aside, and the suit dismissed with all costs.

*Appeal allowed.*

\* Second Appeal No. 1725 of 1885, from a decree of G. R. C. Williams, Esq., Deputy Commissioner of Jhansi, dated the 7th October, 1885, confirming a decree of Syed Mahdi Ali, Extra Assistant Commissioner of Mau Ranipur, Jhansi District, dated the 28th August, 1885.

(1) 8 M.H.C.R. 134.  
(4) 1 B. 97.

(2) 4 M.H.C.R. 204.

(3) 1 M. 306.  
(5) 2 B. 140.



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8 A. 388=6 A.W.N. (1885) 140.

## [388] APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.*8 A. 388=  
6 A.W.N.  
(1886) 140.SITLA BAKHSH, MINOR BY HIS GUARDIAN PUNNO KUAR, AND ANOTHER  
(Defendants) v. LALTA PRASAD (Plaintiff).\*

[8th June, 1886.]

*Mortgage—Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of 1806, s. 8—Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice—Act IV of 1882 (Transfer of Property Act).*

The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh v. Dwarka Lall Mundur* (1) and *Madho Pershad v. Gajadhar* (2) followed.

In a suit for possession of immovable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge.

*Held*, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed.

*Held* also that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law.

[R., 11 A. 164; 20 B. 759.]

THE plaintiff in this case claimed possession of an eight-annas share of a village called Bharauli as the conditional vendee under a deed of conditional sale, dated the 13th December, 1864, which [389] had been foreclosed under Regulation XVII of 1806. He stated in his plaint as follows:—

"An application for foreclosure was presented on behalf of the plaintiff on the 12th June, 1882, regarding an eight-annas zemindari share of the said village, excepting the eight-annas zemindari share owned and possessed by himself, and after deducting Rs. 780 received on account of interest that application was valued at Rs. 20,997-4-0. But the mortgage-money, including principal and interest or any portion thereof, was not deposited on behalf of any defendant, in consequence of which the plaintiff at the end of the usual year of grace, became

\* First Appeal No. 145 of 1885, from a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th January, 1885.

(1) 3 C. 397=5 I.A. 18.

(2) 11 C. 1=11 I.A. 186.

absolute owner, entitled to the proprietary possession of the remaining eight-annas zamindari share, together with all the rights and interests appertaining thereto. The plaintiff acquired that on the 10th July, 1833, the date on which the year of grace expired; but the defendants, who are in possession, have not delivered possession, but have refused to do so, and that is the date on which the cause of action accrued."

The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiff a decree for possession of the property. The defendants Sitla Bakhsh (a minor represented by his mother and guardian) and Sonidha Kuar appealed to the High Court, impugning the decree on grounds which are stated in the judgment of the Court.

Mr. C. H. Hill, Pandit Sundar Lal, Pandit Bishambhar Nath and Pandit Nawal Bihari, for the appellants.

Mr. Habibullah, Pandit Ajudhia Nath and Munshi Kashi Prasad, for the respondent.

### JUDGMENT.

STRAIGHT, Offg. C.J.—This is an appeal from a decision of the Subordinate Judge of Cawnpore, passed on the 15th January, 1885. There were several defendants to the suit, but we are only concerned in the appeal to this Court with one Sitla Bakhsh, a minor, who is represented by his mother, Musammât Panno Kuar, as his guardian *ad litem*, who is the sole appellant. The suit was brought by the plaintiff-respondent, as the proprietor of eight annas in a certain property, to obtain possession of that property, on the basis of a document of the 13th December, 1864, which, the plaintiff contends, amounted to a conditional sale-deed, and certain foreclosure proceedings taken thereon. It is, in fact, upon the strength of a statutory title, which he says that he obtained by the operation of Regulation XVII of 1806, that he claims to be entitled to possession of the property to which he lays claim. Now the relief which is asked in the plaint is that "a decree for proprietary possession of eight annas zamindari share out of the entire [390] sixteen annas zamindari in mauza Bharauli, pargana Bindki, tahsil Kaliyanpur, in the Fatehpur district, with all the rights appertaining to the aforesaid zamindari, may be passed in the plaintiff's favour against all the defendants by actual dispossession of Pahlwan Singh, Sitla Bakhsh, Musammât Chhogar Kuar, and Lala Har Prasad, defendants, and by extinction of the rights of the above-named defendants, by protecting the right of Sheo Ram, defendant, and declaring the want of title of Balmukand, *pro forma* defendant." It is therefore quite clear from the mode in which this suit was presented in the Court below, that it was a suit based upon the statutory title which the plaintiff alleged he obtained under the Regulation I have already mentioned, and it was for the possession of the property upon the strength of that statutory title. Hence it follows that unless it is clearly and satisfactorily established that the provisions of the 8th clause of Regulation XVII of 1806 were satisfied, the plaintiff cannot succeed in the present suit. The case has taken considerable time in argument, but has not been unnecessarily protracted, because the points that have been raised by the learned counsel for the appellant were well worthy of attention. The first contention was, that the father of Sitla Bakhsh, the appellant, having purchased at an auction-sale held in execution of a decree obtained upon a bond of 1859, which was prior in date to the mortgage or conditional sale-deed upon which the plaintiff claims, he therefore had a prior lien

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to the plaintiff, and was entitled to remain in possession of the property as being the owner of a prior charge. I have already indicated that in regard to that contention of the learned counsel for the appellant, it appears to me to turn upon a question of fact, namely, whether the purchase by the father of Sitla Bakhsh was made at a sale in execution of a decree passed upon an instrument which created a prior charge to that of the plaintiff. Now, as a matter of fact, it seems to me that the Subordinate Judge was right in the conclusions at which he arrived, and has correctly held that, regarding all the circumstances, the sale at which the appellant's father purchased the share in this very village was a sale in execution of the simple money-decree, which had been obtained by one Har Dayal and some one else against Gulab Rai and Kisben Dayal. I therefore, as regards this contention, was against the [391] learned counsel for the appellant, and did not require to be addressed on this point by the learned Pandit who appears for the respondent. The next objection taken was that, upon a true construction of this deed of the 13th December, 1864, the instrument was not in the nature of a conditional sale, and that it was nothing more nor less than a simple mortgage, which, under certain circumstances, could and would become a usufructuary mortgage. Of course, if this construction is a well-founded one, it is obvious that this suit, which is a suit for possession of the property under a title created by the foreclosure proceedings of 1882, cannot succeed, and that we have no power to decree possession to the plaintiff as a usufructuary mortgagee. I think, however, it will be best for me, assuming for the purpose that the document constituted a conditional sale, to deal with the case in reference to the third contention of the appellant's learned counsel, which is based upon the informality or rather invalidity of the foreclosure proceedings taken by the plaintiff. I adopt this course in order to avoid the possibility of conflict between two Division Benches of this Court as to the construction to be placed upon the instrument of the 13th December, 1864, for though I do not wish to commit myself definitively to the opinion, I confess I entertain grave doubts as to whether it was correctly held on a former occasion that that document did amount to a conditional sale. I will, however, not dispose of the case upon that ground, because even assuming it to be the instrument contended for by the plaintiff, I think the suit fails by reason of the conditions precedent of the Regulation XVII of 1806 not having been satisfied. It may be taken as undoubted law, which their Lordships of the Privy Council have laid down in the most explicit terms in *Norender Narain Singh v. Dwarka Lall Mundur* (1) and *Madho Pershad v. Gajadhar* (2), that the provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but that strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right; and it is clear, not only by these decisions of their Lordships, but by a long course of decisions of this and other Courts in India, that the various requirements of that [392] section have to be strictly observed in order to entitle a mortgagee to come into Court, and upon the basis of the observance of the requirements of that section to assert an absolute title to the property of the mortgagor. In this case there is no evidence that the requirements of the 8th clause of the Regulation have been complied with. First, there is nothing to show,

(1) 3 C. 397=5 I.A. 18.

(2) 11 C. 111=11 I.A. 186.

except a recital in the application itself, that any "demand" was ever made upon the mortgagors for payment of the mortgage-debt. As to the necessity of this preliminary demand, there are rulings of this Court to be found in *Behari Lal v. Beni Lal* (1) and *Karan Singh v. Mohan Lal* (2), and an unreported ruling of the late Chief Justice and Mr Justice Duthoit in First Appeal No. 50 of 1884. Next, there is no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiffs to establish. Further, there is nothing to show that the notice which was issued was signed by the Judge to whom the application was made. Indeed, it would seem not to have been, nor is it proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. Without referring in detail or dealing at length with the reasons given by their Lordships in the two rulings of the Lords of the Privy Council to which I have referred, it seems to me that, applying the principles of these rulings to the facts before us, we have no alternative but to hold that the provisions of the Regulation have not been satisfied, and that the plaintiff has not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. These observations are sufficient for the purpose of dealing with this appeal.

Before leaving the matter, however, I must refer to the suggestion made by the learned Pandit for the respondent that we should treat this suit as one instituted under the Transfer of Property Act, and that we should allow his client to obtain such relief as he would be entitled to by that Act.

I cannot adopt this suggestion. To do so would be to countenance an entire change in the nature and character of the suit from the shape in which it was originally instituted, and this I do not think is a course sanctioned by law.

[393] The appeal must be, and is, decreed. The plaintiff's suit will stand dismissed with reference to the interests of Sitla Bakhsh and Musammat Sonidha Kuar with costs in proportion in this Court and in the lower Court.

TYRRELL, J.—I entirely concur.

*Appeal allowed.*

8 A. 393=6 A.W.N. (1886) 142=10 Ind. Jur. 467.

#### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

CHAMPAT (*Plaintiff*) v. SHIBA AND ANOTHER (*Defendants*).<sup>\*</sup>  
[16th June, 1886.]

*Hindu Law—Stridhan—Succession.*

Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, S, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted

<sup>\*</sup> Second Appeal No. 1442 of 1885, from a decree of O. W. P. Watts, Esq., District Judge of Sahranpur, dated the 16th July, 1885, reversing a decree of Maulvi Syed Tajammul Husain, Munsif of Shamli, dated the 8th December, 1884.

(1) 3 A. 408.

(2) 5 A. 9.

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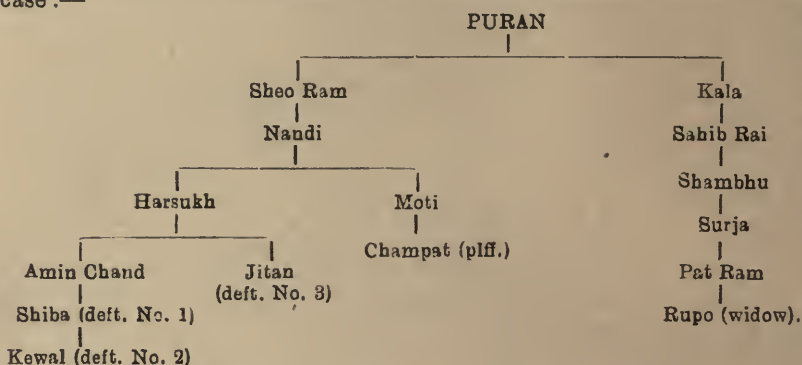


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against S and his son by C, on the allegation that he and J, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up.

Held that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *Thakoor Deyhee v. Baluk Ram* (1) followed. *Munia v. Puran* (2) distinguished.

THE following table shows the relationship of the parties to this case:—



[394] Under a deed of gift dated the 27th April, 1875, Surja, who owned the zamindari property in suit, conveyed it to his son's widow Rupo, who died on the 1st February, 1884. Thereupon Shiba, defendant No. 1, stating that his minor son Kewal, defendant No. 2, had been adopted by the deceased widow, obtained possession of the property and mutation of names in his favour in the revenue records on the 3rd April, 1884. The present suit was instituted by Champat on the allegation that he and Jitan, defendant No. 3, were entitled, under the Hindu Law, to succeed in moieties to the properties left by Mussamat Rupo as her *stridhan*, she having died without issue. The object of the suit was recovery of possession of half of the property left by the widow.

The suit was resisted by Shiba, defendant No. 1, on behalf of himself and his minor son Kewal, defendant No. 2, on the ground that the latter had been adopted by the widow and was therefore entitled to succeed to the whole of her property. Another plea in defence was, that the widow had left a brother of the name of Kurali, who, in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff.

Jitan, defendant No. 3, did not appear to defend the suit.

The Court of first instance (Munsif of Shamli) held that the alleged adoption of Kewal by the widow was not proved; that she having been lawfully married to Pat Ram, the plaintiff was a *sapinda* and near relative of her husband, and could therefore maintain the suit, notwithstanding the existence of Kurali, the brother of the deceased widow. Upon these grounds the Munsif decreed the claim.

Upon appeal the District Judge of Sharanpur reversed this decree. The question of adoption was not insisted upon before him; but he held

that the property, being *stridhan* of the widow, would devolve upon her death on her brother Kurali to the exclusion of the plaintiff.

From this decree the plaintiff appealed to the High Court. It was contended on his behalf that upon the facts found by the lower Courts, he was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu law.

[395] Mr. *Habibullah*, Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

*Lala Juala Prasad* and Pandit *Nand Lal*, for the respondents.

### JUDGMENT.

MAHMOOD, J. (After stating the facts as stated above, continued):— I have no doubt that this contention is perfectly sound and must prevail. It has been found by the Munsif that Musammam Rupo was married to Pat Ram in one of the four approved forms of marriage, and this finding was not disturbed in the lower appellate Court. Indeed, in the Court of first instance, no allegation was made on behalf of the defence to the effect that the marriage of Rupo was in an unapproved form; and this being so, the observations of the lords of the Privy Council in *Thakoor Deyhee v. Baluk Ram* (1) seem to me to dispose of the point raised in this appeal. Their Lordships observed:—"The devolution of *stridhan* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that *Choteh Bebee* was not married according to one of the four approved forms. In that case her *stridhan* would, according to the *Mitakshara* (chap. ii, s. xi, art. 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 *Strange's "Hindu Law,"* pp. 411 and 412, and the comments of Mr. *Colebrooke* and others thereon (2)."

This passage leaves no doubt upon the question now before us, and indeed the learned pleaders for the respondents have not contested it, nor have they contended that the marriage of Musammam Rupo was in one of the inferior forms which would render her *stridhan* heritable by her parental family. All that the learned pleaders have asked us on behalf of the respondents is, that we should remand the case to the lower appellate Court for a finding as to the adoption of Kewal by Musammam Rupo. But the plea was distinctly given up in the lower appellate Court, and, under the circumstances, I do not think we should make a remand for a finding upon the issue, the Munsif, after a careful consideration of the evidence, having recorded a distinct finding against the alleged adoption.

[396] I would decree this appeal with costs, and, reversing the decree of the lower appellate Court, restore that of the Court of first instance.

But I wish to add that the Full Bench ruling of this Court in *Munia v. Puran* (3) which was referred to at the hearing, is clearly distinguishable from this case, because all that was ruled there was that a woman's *stridhan*, being property over which she had absolute control, her husband's relations have no reversionary interest in such property so as to be entitled to set aside any acts of transfer made by her during her lifetime. There is nothing in that case to warrant the conclusion that upon the death of a widow, when the question of devolution arises, her husband's relations would not be her heirs.

OLDFIELD, J.—I concur.

*Appeal allowed.*

(1) 11 M.I.A. 139.

(2) At p. 175.

(3) 5 A. 310.

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8 A. 396=6 A.W.N. (1886) 159.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*AMIR ZAMA (*Plaintiff*) v. NATHU MAL (*Defendant*).<sup>\*</sup> [5th April, 1886.]8 A. 396= Set-off—*Res judicata*—*Civil Procedure Code*, ss. 13, 111—*Court-fee on set-off*.6 A.W.N.  
(1886) 159.

In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

*Held* that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand; and that the claim for such set-off was not barred under the provisions of s. 13.

*Held* also that the Court-fee payable on the claim for set-off was the same as for a claim in a suit.

[*Dis.*, 8 C.W.N. 174; F., 13 B. 673; *Appr.*, 15 M. 29; R., 32 C. 654=1 C.L.J. 364; 16 C.P.L.R. 118; 85 P.R. 1903=130 P.L.R. 1908=80 P.W.R. 1908; 23 T.L.R. 123 (129).]

[397] THIS was a reference by Mr. W. R. Barry, Judge of the Allahabad Small Cause Court. The facts of the case and the points of law referred were stated by him as follows:—

"The defendant Nathu Mal, on the 13th November, 1885, brought a suit against the plaintiff Amir Zama, to recover a sum of Rs. 91-9-9, on the following allegation, namely, that from the 30th November, 1884, to the 16th May, 1885, the plaintiff (present defendant) sold to the defendant (present plaintiff) goods of the value of Rs. 441-7-3; that part of the said value was paid by the defendant and part of the said goods were returned, and that there remained a balance of Rs. 91-9-9 due from the defendant to plaintiff. At the hearing the defendant pleaded that he did not purchase the goods, but had received them to sell on behalf of the plaintiff on commission, and an issue was joined whether the goods were sold and delivered by plaintiff to defendant. The Court found on the facts that the goods were never sold to defendant as alleged by plaintiff, and the plaintiff's suit was dismissed.

"On the 3rd February, 1886, the defendant in the former suit brought a suit against the plaintiff in the former suit for wages, alleging that the defendant had engaged him to sell cloth on his behalf at a remuneration of Rs. 8 per mensem; that the plaintiff had served the defendant accordingly, but the remuneration had not been paid. At the hearing the defendant, among other matters, pleaded a set-off of Rs. 91-9-9 on the averment that he had intrusted certain goods to the plaintiff to be sold by him on behalf of the defendant on commission-sale; that the plaintiff

<sup>\*</sup> Reference No. 179 of 1886, under s. 617 of the Code of Civil Procedure, by W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad.

had sold part of the goods and returned others; and that goods of the value of Rs. 91-9-9 had not been accounted for by the plaintiff. The defendant therefore claimed this sum as a set-off. It is admitted by the defendant that the goods which he now avers to have been made over to the plaintiff on commission-sale, are the same that he alleged to have been sold to plaintiff in the former suit. The claim in the former suit for the price of goods sold and delivered and that now made in the set-off, arise out of exactly the same group of facts; the only difference between the two claims is, that in the former the defendant (then plaintiff) alleged an out-and-out sale to the plaintiff (then defendant), while in the [398] latter the defendant alleges that the goods were made over to the plaintiff on commission-sale. The set-off appears to satisfy the requirements of s. 111, Civil Procedure Code, in every respect except one, namely, that the money now claimed is legally recoverable by the defendant from the plaintiff, and on this point I entertain a reasonable doubt.

"The statement in the plaint of the 13th November, 1885, that the goods were sold and delivered to the defendant in that suit, is doubtless an admission which is relevant against the present defendant; but this admission is not conclusive proof of the matter admitted unless it operates as an estoppel (Evidence Act, s. 31). Now this admission does not amount to an estoppel under Chapter VIII of the Evidence Act, for the other party has not in any way acted on the admission, nor changed his position in consequence thereof. But the decree in the former suit may operate as *res judicata*, so as to make the claim now advanced inadmissible; or, in the language of the English text-books, the decree may operate as an estoppel by record. The arguments in favour of admitting the set-off appear to be briefly as follows:—

"In the former suit the question that was put in issue and determined was—Were the goods sold and delivered by plaintiff to defendant? There was no finding on the issue—Were the goods intrusted to the defendant to be sold on behalf of the plaintiff on commission-sale? This is the point that is in issue in the present suit, and there was no finding on this point in the former suit. The current of English decisions seem to favour the admissibility of the set-off, and the judgment of Lord Westbury in *Hunter v. Stewart* (1) is a strong authority on this side. The allegations and equity of the suit are different from the allegation and equity of the set-off: compare Broom's *Legal Maxims*, 2nd ed., page 250:—"If, however, it be doubtful whether the second action is brought *pro eadem causa*, it is a proper test to consider whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action." It seems clear that the evidence given in the suit, which was directed to prove sale and delivery of the goods, would not sustain the claim made [399] in the set-off, *viz.*, that the goods were intrusted to the plaintiff for sale by him as a commission agent. And numerous other authorities might be adduced in support of this view.

"On the other side—*i.e.*, against the admissibility of the set-off, there are the terms of s. 13, *Explanation II* of the Code of Civil Procedure:—"Any matter which might or ought to have been made the ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit." It may be

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urged that in the former suit the plaintiff should have brought forward his whole title and asserted the two claims in the alternative. A strong authority in support of this view is *Woomatara Debia v. Unnopoorna Dasse* (1) and *Denobundhoo Chowdhry v. Kristomonee Dossee* (2). In the latter of these cases the judgment of Phear, J., seems to show clearly that their Lordships of the Privy Council have deliberately adopted a stricter view than that held by the Courts in England. This view is confirmed by a comparison of the terms of s. 2, Act VIII of 1859 with those of s. 13, Act XIV of 1882. The former section forbids a Civil Court from taking cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, and this section was in force when the judgments quoted above were passed by the Judicial Committee and the Calcutta High Court. The present section would seem to go further than the old section, and to enact as law the proposition affirmed by the Priyy Council.

"It may be argued that these rulings were given in cases in which a plaintiff sought to establish a double title to the same property, and do not apply to a case like the present, where no title is in issue, and the claim is for money and not for possession of immoveable property; also that the frame of the first suit may be due to mistake or negligence on the part of the plaintiff's pleader, and that the plaintiff should not suffer for the pleader's mistake; and it may be replied that the principle affirmed in *Woomatara Debia v. Unnopoorna Dasse* (1) is general in its terms, and may well be held to govern cases where the claim is simply for money, and not to establish a title to property; and that if a plaintiff alleges that he sold goods to a defendant when, in point of fact, he did not sell them, but merely intrusted the goods to him for sale on commission, the allegation is one altogether within the personal knowledge of the plaintiff, and it is not unreasonable that he should be precluded from suing on another and altogether different title for the same relief. My own opinion is that, according to the law in force in British India, the set-off of the defendant is inadmissible, because the sum of money claimed therein is not legally recoverable owing to the fact that the claim is *res judicata*. And I would respectfully ask for a decision as to whether, under the circumstances stated above, the suit bars the set-off.

"I would further ask for a decision on the following point:—What court-fee, if any, is payable on this set-off? I am of opinion that the set-off is chargeable with the same court-fee duty as if the claim made in the set-off had been made in a separate suit. S. 111, Civil Procedure Code, says:—'Such set-off shall have the same effect as a plaint in a cross suit;—and if the set-off is to have the effect of a plaint, it seems reasonable that it should be stamped as a plaint under the provisions of s. 6, Act VII of 1870. On the other hand, the Court Fees Act does not anywhere lay down that a set-off shall be chargeable with stamp duty. A set-off is treated in Chapter VIII of the Civil Procedure Code as of the same nature as a written statement, or even as part of a written statement: and it has been ruled [*Oherag Ali v. Kadir Mahomed* (3)] that no court-fee is payable on a written statement filed by a defendant at the first hearing. It has also been suggested at the bar that the court-fee duty on the set-off cannot exceed the duty payable on the sum by

(1) 11 B.L.R. 158.

(2) 2 C. 152.

(3) 12 C.L.R. 367.

which the set-off exceeds the claim. I am aware of no authority in support of this position, and, on the grounds of general principle, consider that since the set-off has the same effect as a plaint in a cross-suit, the set-off should pay the same court-fee duty as if it were a plaint. But as the Court Fees Act prescribes no fee as payable on a set-off, I have reasonable doubts on the question, and respectfully ask for a decision thereon."

The parties did not appear.

### JUDGMENT.

OLDFIELD and BRODHURST, JJ.—The facts are these. The plaintiff Amir Zama has instituted this suit against the defendant [401] Nathu Mal to recover money due as wages, alleging that the defendant engaged him to sell cloth on his account at a fixed monthly salary.

It appears that the defendant has previously sued the plaintiff to recover Rs. 91-9-9 as due to him for the price of cloth sold and delivered by the defendant to the plaintiff. In that suit the plaintiff (then-defendant) pleaded that there was no sale to him of any cloth, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. Now the defendant claims a set-off of Rs. 91-9-9 against the plaintiff's claims, on the ground that out of it Rs. 87-5-0 are due to him as the price of cloth which the plaintiff had sold on his account on commission,—the rest due for cloth which the plaintiff purchased. In our opinion, under the circumstances stated, the answers to the reference should be (i) that the defendant is entitled, under s. 111, Civil Procedure Code, to set-off this sum of Rs. 87-5-0 claimed as due for cloth sold on commission against the plaintiff's demand, as it is an ascertained sum claimed to be due with reference to the same contract under which the plaintiff's demand arises; (ii) that the claim for the set-off Rs. 87-5-0 is not barred under the provisions of s. 13, Civil Procedure Code. The former suit was brought by the defendant for the price of goods sold and delivered by the defendant to the plaintiff, whereas the defendant's present claim is for money payable by the plaintiff to him for money received by the plaintiff for his (defendant's) use, and as the price of cloth belonging to defendant and sold on his account by plaintiff.

The two claims are founded on different titles, and the issue raised by the latter was not in issue in the former suit, and was not heard and decided. The set-off as to Rs. 4-4-0 price of cloth alleged to have been sold to plaintiff, is not entertainable. Our reply to the remaining question is, that the court-fee payable on the claim for set-off should be the same as for a plaint in a suit.

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6 A.W.N.  
(1886) 189.



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LATE  
CIVIL.

8 A. 402=6 A.W.N (1886) 139.

## [402] APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and  
Mr. Justice Brodhurst.*8 A. 402=  
6 A.W.N.  
(1886) 139.

SAMAR ALI (Plaintiff) v. KARIM-UL-LAH (Defendant).\*

[20th, April, 1886.]

*Mortgage — Usufructuary mortgage — Redemption — Regulation XXXIV of 1803, ss. 9, 10—Act XXVIII of 1855—Act XIV of 1870—Act IV of 1882 (Transfer of Property Act), s. 2.*

A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions :—"Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage money and redeem the property. Until they pay the mortgage-money, neither they nor their heirs, shall have any right in the property." In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s. 62 (b) of the Transfer of Property Act (IV of 1882), and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage money.

*Held* that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest.

*Held* that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with 12 per cent. interest had been realized by the mortgagee from the profits of the property.

[App., 14 B. 319; R., 19 B. 150; 9 C.P.L.R. 57; 9 C.P.L.R. 88; D., 12 A.L.J. 219=36 A. 176=22 Ind. Cas. 933.]

THE plaintiff in this suit claimed to recover possession of one-sixth of certain mortgaged land. The mortgage was for Rs. 100, with possession, and the deed, which was dated the 20th September, 1846, contained the following conditions :—

"The conditions are these:—Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged [403] land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money neither they nor their heirs shall have any right in the property."

\* Second Appeal No. 1254 of 1885, from a decree of H. G. Pearse, Esq., Additional Judge of Moradabad, dated the 1st May, 1885, reversing a decree of Maulvi Muhammad Mazhar Husain, Munsif of Nagina, dated the 24th December, 1884.

The plaintiff represented in title one of the original mortgagors, who owned one-sixth of the land. The equity of redemption of the remaining five-sixths had been purchased by the defendant the mortgagee. The plaintiff alleged that the mortgage-money in respect of one-sixth of the property was Rs. 16-10-8, that is, one-sixth of Rs. 100, and that the defendant had received more than this sum together with interest at the rate of 12 per cent. per annum from the property, but notwithstanding this he would not restore the land. The defendant set up as a defence, *inter alia*, that with reference to s. 62 (b) of the Transfer of Property Act and the terms of the mortgage-deed, the mortgagor had not a right to recover the property until he paid the mortgage-money.

The Court of first instance held that the mortgage in question was not governed by the provisions of s. 62 of the Transfer of Property Act, and that, having regard to the provisions of Regulation XXXIV of 1803, if an account showed that the principal money together with interest at 12 per cent. per annum, had been paid from the profits, the plaintiff had a right to recover the property. The Court having taken an account, found that from the profits of the property, after deducting Government revenue, the principal money together with interest at the rate mentioned above had not only been realized, but a surplus of Rs. 45 was due to the plaintiff; and it gave the plaintiff a decree for joint possession of the property and for Rs. 45.

On appeal by the defendant the lower appellate Court held that the Regulation relied on by the first Court was not applicable, and the plaintiff was not entitled to recover the property until he paid the mortgage-money as provided by the deed of mortgage, and dismissed the suit.

The plaintiff appealed to the High Court, contending that the decision of the first Court was correct, and the lower appellate Court had improperly dismissed the suit.

[404] Mr. G. E. A. Ross, for the appellant.

Mr. C. Dillon, Munshi Hanuman Prasad, and Munshi Madho Prasad, for the respondent.

### JUDGMENT.

STRAIGHT, Offg. C.J.—This is a suit for the redemption of a mortgage dated the 20th September, 1846. The mortgage was of a usufructuary character, and admittedly under it the mortgagee obtained possession of the property. The plaintiff, who is the representative of the interest of the mortgagor to the extent of a sixth, comes into Court and seeks to redeem his share, upon the allegation that the principal amount and interest due upon the mortgage have been satisfied by enjoyment of profits, and he is entitled to a balance of Rs. 45 over and above what was sufficient to discharge the mortgage. The plaintiff's case is, that both upon the construction of the document and by the law which regulates and affects the operation of that instrument, the amount of money which the defendant derived by way of profits from the property was sufficient to pay off the mortgage-money and its interest at 12 per cent. per annum.

Now the terms of that document have been read to me by Mr. Ross, and the learned counsel for the respondent has conceded that they have been accurately rendered. It seems to me that the arrangement between the parties was, that the mortgagee should have possession of the property, and that he should enjoy the profits thereof, so long and until

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the principal sum was paid, in lieu of interest. It is true that the word "interest" was not specifically used; but it appears to me that this is the natural and reasonable construction of the deed; and such being the nature of the instrument, its effect was to place the mortgagee in possession of the profits of this property, which would enable him to realize annually a larger amount of interest than 12 per cent. per annum. By the Regulation issued by the Governor-General in Council, No. 34 of 1803, it was provided in ss. 9 and 10 that the rate of interest to be allowed to the mortgagee was not to exceed 12 per cent. per annum; and that no matter whether the parties made a contract for the payment of a larger amount of interest, the law would not recognize any contract for payment of a larger amount than 12 per cent. Now this Regulation is applicable to this mortgage [405] contract of 1846, which is before us, if its provisions have not been disturbed by the operation of any subsequent legislation. If they have not, the matter stands now as it did in 1846, and we are bound by the rules mentioned in that Regulation. The question then to be considered is, whether by Act XXVIII of 1855, or by Act IV of 1882, the provisions of ss. 9 and 10 of Regulation XXXIV of 1803 have been affected or abrogated. Now I do not think that it can be seriously denied that one of the rights affecting the contract of mortgage is the right of the mortgagor to redeem the property mortgaged. Now, as I have said, the contract of mortgage in the present case being subject to the provisions of the Regulation, the charge would have been redeemed as soon as the principal mortgage-money with 12 per cent. interest had been realized by the mortgagee from the profits of the property. I think that those provisions of the Regulation of 1803 were incidents attached to the mortgagor's right, of which he was, and is, entitled to have the benefit. By Act XXVIII of 1855 all the rights conferred by this Regulation were specifically saved, and the same may be said of Act XIV of 1870.

Then with regard to Act IV of 1882, s. 2 of that Act specifically provides that "rights and liabilities arising out of a legal relation constituted before this Act comes into force" shall be saved. This being the view I take of the matter, the appeal must be allowed, and the decree of the Judge being reversed, the case is remanded under s. 562 to the Court below for disposal on the merits.

The costs hitherto incurred in the litigation are to be costs in the cause.

BRODHURST, J.—I am of the same opinion.

*Appeal allowed.*

8 A. 405=6 A. W. N. (1886) 170.

## APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

KHUDA BAKHSH (*Plaintiff*) v. SHEO DIN AND ANOTHER  
(*Defendants*).<sup>\*</sup> [20th April, 1886.]*Lease—Lease from year to year—Act VIII of 1871 (Registration Act), s. 17 (4)—  
Act III of 1877 (Registration Act), s. 49.*

In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be [406] executed in his favour by the defendants, and dated respectively in January, 1875, and June, 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—"If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum." The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus:—"And if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen day's notice, and we will vacate it without objection." The lower Courts held that the *sarkhats* were not admissible in evidence, as they required registration under s. 17 (4) of the Registration Act, VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent.

*Held* that the two *sarkhats* created no rights except those of tenants-at-will, inasmuch as the clause common to both, to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice.

*Held* therefore that the leases did not fall under s. 17 (4) of Act VIII of 1871; that their registration was not compulsory; and that they could not be excluded from evidence under s. 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory.

[R., 13 N.L.R. 30; 36 Ind. Cas. 378.]

THE plaintiff in this case, Khuda Bakhsh, sued three persons—Sheo Din, Thakur Dayal, and Sital, *Ahirs* by caste—for possession of certain land, and for rent of the same, from the 26th June, 1880, to the 22nd May, 1884, and for the removal of a *charahi*,<sup>\*</sup> a place for feeding cattle. The defendants set up as a defence to the suit, among other things, that the land did not belong to the plaintiff.

The plaintiff produced, in support of his title to the land and his claim for rent, two "*sarkhats*" or "*kabuliyats*," one purporting to be executed in his favour by Sital, son of Sheo Din, and the other by Sheo Din and Thakur Dayal, the former bearing date the 18th January, 1875, and the latter the 26th June, 1876. These documents were not registered.

The first document, after reciting that Sital had taken the land on a yearly rent of Rs. 4 and 4 seers of milk, for a place to live on, and for tethering cattle, from Khuda Bakhsh, set forth the following conditions:—"I promise and agree to pay the Rs. 4 and the 4 seers of milk

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<sup>\*</sup> Second Appeal No. 1154 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 13th June, 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November, 1885.



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yearly to the owner of the land without objection, [407] and will cause the receipt thereof to be indorsed on the *sarkkat*: any objection as to payment which is not so indorsed shall be unlawful \* \* \* \*  
If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum, and I will pay rent at the rate of Rs. 8 per annum without objection."

The second document, after reciting that Sheo Din and Thakur Dayal were in need of land for tethering cattle, and that they had taken the land in front of the door of Khuda Bakhsh, owned and possessed by him, on a yearly rent of eight annas, for six years, set forth the following conditions:—"We promise and agree to pay the rent year by year, without objection to the said Shaikh Khuda Bakhsh, and will cause the receipt thereof to be indorsed on the *sarkhat*. Except payments indorsed on the *sarkhat*, we will claim no other payments, and if we do, it will be invalid and unlawful \* \* \* \* and if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without objection."

The Court of first instance gave the plaintiff a decree for possession of the land, but dismissed the claim for rent and the removal of the "*charahi*," holding that the defendants had acquired by prescription a right to maintain the "*charahi*" on the land. It refused to take the "*sarkhats*" in evidence, holding that under s. 17 (4) of the Registration Act, VIII of 1871, they were leases from year to year and therefore required to be registered, and not being registered, were not admissible in evidence. On appeal by the plaintiff, the lower appellate Court affirmed the decree of the first Court, concurring with it in its view in respect to the "*sirkhats*."

The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *J. Simeon* and *Mir Zahur Husain*, for the respondents.

#### JUDGMENT.

MAHMOOD, J.—I am of opinion that this appeal must prevail, and the decree of the lower appellate Court be set aside, and the case be remanded for disposal on the merits. My reasons for this [408] view are, that the suit was one for possession of a piece of land and for demolition of a "*charahi*" situate thereon. Both the lower Courts have found that the land belongs to the plaintiff, but that the defendants have acquired a right of easement to keep their "*charahi*" thereon. The learned District Judge has expressly stated that the two *kabuliyats*, dated the 18th January, 1875, and 26th June, 1876, were not admissible in evidence, as they needed registration under s. 17 (4) of Act VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent. Both these documents are in the Hindustani language, and I have read them to my brother Tyrrell, and we both look upon these leases as creating no rights except those of tenants-at-will. I speak of them as "leases," because of the definition of that word in s. 3 of the Act of 1871. There is, indeed, a statement in the early part of these leases, that the land was given for more than a year; but the most important clause in them is one common to both of them, namely that *at any time*, at the will and mere wish of the lessor, the lessees were to give up the land only at fifteen days' notice. According to the well-understood

rules of construction, this latter clause governs all the previous clauses. This being so, the defendants could be asked to quit at any time before the lapse of the term. It did not create even the usual lease from month to month, but the lessees could be ejected at fifteen days' notice, which is the ordinary term of notice probably required by the law, even previous to the passing of the Transfer of Property Act, and the principle of which has been incorporated in ss. 106 and 111 of that Act. The leases therefore do not fall under s. 17 (4) of the Registration Act, VIII of 1871, which was in force when the leases were executed.

The clause (which corresponds to s. 17 (d) of the present Registration Act (III of 1877) is thus worded: "Leases of immoveable property from year to year or reserving a yearly rent." The leases before us do not answer this description, and no other clause of the section is pointed out under which they would fall. Their registration was therefore not compulsory, and they could not be excluded from evidence under s. 49 of Act III of 1877. The question whether registration was compulsory is governed by the registration law in force at the time that the deeds [409] were executed; but the question of admissibility being a matter of procedure, would be governed by the present law. The judge has altogether excluded from his consideration the two leases, which are the most important evidence in the case, and without which the merits of the case cannot be considered. We ask him to admit these leases, and reconsider the whole case upon the evidence, and to record a fresh judgment under s. 574, Civil Procedure Code. I would decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court, leaving costs to abide the result.

I may add that in support of the view taken by me of the leases in this case, our attention has been called by the learned pleader for the appellant to an unreported judgment of the Full Bench of this Court (1), which supports the view taken by me, though the interpretation of the law in that case related to the old Registration Act of 1864.

TYRRELL, J.—I am of the same opinion.

*Case remanded.*

8 A. 409=6 A.W.N. (1886) 83.

### APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Mahmood.*

KARAMAT KHAN (Plaintiff) v. SAMI-UD-DIN AND OTHERS (Defendants).<sup>\*</sup>  
[21st April, 1886.]

*Act IV of 1882 (Transfer of Property Act), ss. 41, 48—Transfer by ostensible owner—Sir-land—Act XII of 1881 (N.-W. P. Rent Act), s. 7—Meaning of "held"—Statute, construction of—Retrospective effect—Mortgage of sir-land before passing of Act XVIII of 1873 (N.-W. P. Rent Act)—Sale of mortgagor's proprietary rights while that Act was in force—Right of mortgagee.*

In 1869, A and J, two co-sharers of a moiety of a ten biswas share in a village (F and W being also co-sharers in the same moiety), joined with H, the holder

<sup>\*</sup> Second Appeal No. 1266 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 22nd July, 1885, modifying a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 28th March, 1884.

(1) Since reported in A.W.N. (1886) 115.



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of the other moiety, in giving to *K* a usufructuary mortgage of 87 bighas of land, being the whole of the *sir*-land appertaining to the ten biswas share. The deed of mortgage authorized the mortgagees to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, *F*, *W* and *A* gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of *sir*-land; and it was stated in the deed that half the mortgage-money due to *K* on the mortgage of 1869 was due by the excoautants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In [410] November, 1876, *H*'s five biswas share, together with its *sir*-land, was sold in execution of a decree. Subsequently, *K*, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir*-land, by virtue of his mortgage-deed of 1869. The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F*'s and *W*'s share in the 87 bighas, because they were not parties to the deed of 1869. The lower appellate Court further held that from the date of the execution-sale of November, 1876, *H* became an ex-proprietary tenant of his *sir*-land, and that to give the plaintiff possession thereof would be contrary to the provisions of s. 7 of Act XVIII of 1873 (N.-W.P. Rent Act).

Held that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, *F* and *W* were aware of the transaction which made *K* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A*, *J*, and *H* to appear as if covering the entire zamindari rights in the ten biswas share of the *sir*-land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of *F* and *W* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of the Transfer of Property Act applied to the case, and *F* and *W* had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo v. McQueen* (1) referred to.

Per MAHMOOD, J., with reference to the effect of the execution-sale of November, 1876, in regard to the provisions of s. 7 of Act XVIII of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, *H* who had proprietary rights in the mahal, and held the five biswas share of the *sir* as such (the word "*held*" as used in s. 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as *H* had at the time of the mortgage subject only to *H*'s rights as an ex-proprietary tenant; that the rights of the purchaser of *H*'s share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in s. 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi v. Radha Kishen* (2) referred to.

Per TYRRELL, J., that in 1876, by reason of the execution sale, the *sir* rights and interests of *H*, mortgaged by him in 1869, as such went out of existence, and [411] assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H*, the plaintiff retained his mortgage charge of 1869 over the zamindari interests in the portion of the land acquired by *H*'s vendees.

[R., 24 A. 538.]

THE facts of this case were as follows:—In August, 1869, Fida Husain, Ata Husain, and Jamal Husain, sons, and Wahid-un-nissa, widow, of Ahmad Husain, deceased, were co-sharers in a moiety of a 10-biswas share of a certain village, and Himayat Husain was the holder of the other moiety. The *sir* land appertaining to this 10-biswas share was 87 bighas. On the 2nd August, 1869, Ata Husain, Jamal Husain, and Himayat Husain gave Karamat Khan, the plaintiff in this case, a usufructuary mortgage of the whole 87 bighas of this *sir* land. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage money, and to receive the profits in lieu of interest. On the 17th April, 1872, Fida Husain, Wahid-un-nissa, Ata Husain and Jamal Husain, gave a usufructuary mortgage of their 5-biswas share together with a moiety of the 87 bighas of *sir* land to Sami-uddin, Hidayat Ali, and Inayat Ali. In the deed of mortgage it was stated that half of the mortgage-money due to the plaintiff on the mortgage of the 2nd August, 1869, was due by the executants, and that they accordingly left the same with the mortgagees in order that they might redeem. On the 20th November, 1876, Himayat Husain's 5-biswas share with its *sir* land was sold in the execution of a decree. The plaintiff, alleging that the mortgagees under the mortgage of the 17th April, 1872, and the purchasers under the execution-sale of the 20th November, 1876, had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir* land by virtue of his mortgage-deed of the 2nd August, 1869.

The Court of first instance gave him a decree for possession of the 87 bighas. On appeal, the lower appellate Court held that the plaintiff was not entitled to enforce his mortgagee in respect of the share in the 87 bighas of land in suit of Fida Husain and Wahid-un-nissa, because these persons were not parties to the mortgage-deed. With regard to the *sir* land appertaining to the 5-biswas share of Himayat Husain, the lower appellate Court held that from [412] the date of the execution-sale of the 20th November, 1876, Himayat Husain became an ex-proprietary tenant of his *sir* land, and to give the plaintiff possession of such land would be to enforce a transfer prohibited by Act XVIII of 1873 (N.-W. P. Rent Act). The Court therefore modified the decree of the first Court, by dismissing the plaintiff's suit in respect to the shares in the 87 bighas of land claimed of Fida Husain, Wahid-un-nissa, and Himayat Husain.

The plaintiff appealed to the High Court on the grounds (i) that Fida Husain and Wahid-un-nissa were estopped from disputing the plaintiff's title as mortgagee to their shares of the mortgaged property; (ii) that the mortgage to him was executed by Ata Husain, Jamal Husain, and Himayat Husain for themselves and as agents of Fida Husain and Wahid-un-nissa, and (iii) that the share of Himayat Husain in the mortgaged property was still liable for the mortgage-debt.

Mr. *Amir-ud-din*, for the appellant.

Mr. *J. Simeon*, for the respondents.

### JUDGMENT.

MAHMOOD, J.—I have been asked by my brother Tyrrell to deliver judgment in this case, which, in consequence of the course that has been taken by the learned counsel for the appellant and the learned pleader for respondents, and also in consequence of the manner in which the lower appellate Court has interfered with the first Court's decision, is not very simple. It is therefore advisable briefly to recapitulate the facts, to

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show what the real questions are which we have to determine in second appeal. It appears that certain property, over 87 bighas of *sir* land, is situated in the village of certain co-sharers. Among others, one Kazi Ahmad Husain held *sir* land in proportion to his 5-biswas share of the village, and Himayat Husain, who is said to have been related to Kazi Ahmad Husain, held in proportion to the other 5-biswas share of the zamindari. Upon the death of Ahmad Husain the *sir* land, to the extent of his share, would devolve, according to the Muhammadan law, upon his sons Fida Husain, Ata Husain, and Jamal Husain and his widow Wahid-un-nissa. The devolution would be in certain proportions which it is unnecessary to describe. It appears that on the 2nd August, 1869, Ata Husain, Jamal Husain, and Himayat [413] Husain executed a deed of usufructuary mortgage in favour of present plaintiff, Karamat Khan, and it has been found that they placed him in the entire possession of the 87 bighas representing their *sir* in the village. It has been found that the mortgagee was placed in full possession of the whole area, and one difficulty in dealing with the case arises from the admitted fact that in that area were included the shares of Fida Husain and Wahid-un-nissa whose names were not put to the mortgage-deed of the 2nd August, 1869. On the 17th April, 1872, Fida Husain and Wahid-un-nissa joined with Ata Husain in executing a usufructuary mortgage in favour of three persons named Sami-ud-din, Hidayat Ali and Inayat Ali—Hidayat Ali being now represented by his daughter Ali-un-nissa and his sister Nasib-un-nissa. Another circumstance which should be mentioned is, that on the 20th November, 1876, in the course of certain execution-proceedings, the zamindari rights of Himayat Husain, one of the mortgagors under the deed of the 2nd August, 1869, were sold by auction and were purchased by Wazir Khan, Amin-ud-din, and Inayat Ali, who was one of the mortgagees under the deed of the 17th April, 1872. It has been found that it was not until October, 1879, that Karamat Khan, the plaintiff-appellant, who obtained possession as mortgagee under the deed of 1869, was dispossessed of the land by the various defendants upon various allegations of right and repudiations of his rights under that deed. The object of the present suit is to recover possession of all the lands comprised in the mortgage of 1869, and the parties impleaded as defendants are the executants of that mortgage, also Fida Husain and Wahid-un-nissa, also the mortgagees under the deed of 1872, also the purchasers of Himayat's rights at the auction-sale of the 20th November, 1876. The suit has been resisted upon various pleas which need not be described, except that Fida Husain and Wahid-un-nissa repudiated the mortgage on which the suit was brought, on the ground that they were not parties to it, and it was not binding on them. This plea related only to a  $2\frac{1}{2}$ -biswas share of the *sir* land which is in suit. The other plea was that raised by Himayat Husain, who admittedly was a party to the mortgage of 1869, and whose rights had been sold in the auction-sale of the 20th November, 1876. The Subordinate Judge has decreed the whole suit, except certain money-claims, [414] regarding meene profits, which are not now the subject of appeal, and in reference to which no argument has been addressed to us. The various defendants appealed to the District Judge, and he, in a judgment which went fully into the facts, arrived at a conclusion which, in my opinion, is unsound in law. First, with reference to the  $2\frac{1}{2}$ -biswas share of the *sir* land which would be the share of Fida Husain and Wahid-un-nissa, he dismissed the claim on the ground that they were not parties to the

mortgage of 1869. But it is clear from the findings of the Courts below, that at the time when that document was executed, Fida Husain and Wahid-un-nissa were aware of the transaction which made Karamat Khan the mortgagee, under the deed, of the whole property. It is also clear that, knowing this, they allowed the possession of Ata Husain, Jamal Husain and Himayat to appear as if covering the entire zamindari rights in the 10-biswas share of the *sir*. Under these circumstances this case appears to me to be one to which the equitable doctrine reproduced by s. 41 of the Transfer of Property Act applies. That section runs thus:—"Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." This rule, which in principle is the same as that on which s. 115 of the Evidence Act is based, does no more than reproduce the *dicta* of the Privy Council in *Ramcoomar Koondoo v. McQueen* (1), where their Lordships observed:—"It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if [415] prosecuted, would have led to a discovery of it." Now the circumstances of this case furnish grounds for the application of this doctrine, and, so far, there is force in the argument of Mr. *Annamirudin* for the appellant, that the action of Fida Husain and Wahid-un-nissa, in allowing his clients to obtain a mortgage of the whole 10-biswas share of *sir*, amounted to making the mortgagee alter his position by the omission of these two persons, and that they cannot now turn round and say that at the time of the mortgage of 1869, the apparent parties to that transaction had no authority to mortgage the 2½ biswas. But the case does not rest here: for only three years after the deed of 1869 these two persons, Fida Husain and Wahid-un-nissa, executed a mortgage, dated the 17th April, 1872, in favour of strangers, a mortgage which, being usufructuary, would clash with the rights of Karamat Khan under the mortgage of 1869. It is unnecessary to consider the exact terms of that mortgage, but is contained a distinct statement by Fida Husain and Wahid-un-nissa that, although their names did not appear in the mortgage of 1869, yet they had mortgaged to him through or in the names of Fida Husain's brothers and Wahid-un-nissa's sons—Ata Husain and Jamal Husain. This deed further represents the amount of the money due in respect of their share as a charge which was to be paid off by the second mortgagee. This admission, so solemn and deliberate, not only shows that the second mortgagees of 1872 had notice of the prior mortgage of 1869, but is an admission, the best evidence in such cases, that the mortgage of 1869 was executed with the consent of Fida Husain and Wahid-un-nissa. It therefore appears that these two persons have no defence, either in law or

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equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the consequences of the lien of 1869.

Then, with reference to the 5-biswas share of zamindari rights in the *sir*, that is, of Himayat Husain, the question is what was the effect of the auction-sale of the 20th November, 1876, in regard to the provisions of s. 7 of Act XVIII of 1873. That is to say, did Himayat, by reason of those provisions, acquire any right of the nature therein described so as to prevent Karamat Khan from getting physical possession of the land now in suit, in derogation of the occupancy right? Mr. *Amir-ud-din's* argument at first struck [416] me as a plausible one. He contended that by the general rule of construction—*nova constitutio futuris formam imponere debet, non præteritis*—statutory provisions have ordinarily no retrospective effect. This, I concede; but the question is, does the rule apply to the present case? The argument is that Karamat Khan's rights were acquired under the deed of 1869; that he got actual possession of the land; and that, inasmuch as his rights originated in 1869, they cannot be vitiated by the Rent Act of 1873. Another rule is that where rights are taken away or impaired, the Court must place as strict a construction as they are in the habit of applying to penal statutes. This rule is discussed at pp. 160-161 of Wilberforce's work on *Statute Law* and in Maxwell *On the Interpretation of Statute*, pp. 257-258. It does not, however, apply to the present case. In India, since 1859, the Legislature has interfered in the interests of the agricultural population, by giving tenants the right of occupancy. In Lower Bengal this has been done recently even in a more extensive sense, but in these provinces it was first effected by Act X of 1859, and this was afterwards replaced by the Rent Act of 1873, which was in force when Himayat's proprietary rights in the zamindari mahal were sold. At that time there was no such ex-proprietary right as is provided by s. 7 of that Act, and is maintained in the present Act (XII of 1881). Now it is a rule of interpretation that when the Legislature changes the law, the change itself is an indication of the intentions of the Legislature, and is an element in the construction to be placed upon the latter statute (Wilberforce, p. 108). Applying this rule, and reading this section carefully, I am of opinion that the statute operates to a certain extent in derogation of the rights of Mr. *Amir-ud-din's* clients under the deed of 1869, and effects the advantages which he would otherwise derive thereunder. S. 7 is in the following terms:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants,' and shall have all rights of occupancy [417] tenants." It appears to me that the most important word in the section in connection with the present case is "hereafter." The statute was passed on the 22nd December, 1873. The rights of Himayat were sold on the 20th November, 1876, so there can be no doubt that Himayat, who had proprietary rights in the mahal in question, and held *sir* as such, did lose his proprietary rights and therefore the case comes within the first portion of s. 7. The next important word is "held," which Mr. *Amir-ud-din* argues denotes actual possession. A short time ago, in the case *Tulshi v. Radha Krishan* (1),

(1) A.W.N. (1886) 74.

the present learned Chief Justice laid down, with my concurrence, that the word "held" in this section must not be rigidly construed to refer to manual or physical holding, but land possessed and belonging to a person as his *sir*. I am glad to find that my brother Tyrrell approves of this interpretation. There can be no doubt that Himayat "held" the 5 biswas share of the *sir*. Then, the question is, what is the effect of this view of the law. Although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7, and by reason of the sale of the 20th November, 1876, the nature of his means of benefiting by the mortgage were necessarily changed. Neither the preamble nor s. 1 of the Act contains any saving clause which could justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one. If we were so to hold, in some cases where usufructuary mortgagees are in possession, no such rights as are created by s. 7 could come into existence for sixty years. Moreover, such mortgagees may possibly never be redeemed; and if the fact that a mortgage, such as that of 1869 in the present case, is subsisting, were sufficient to prevent the operation of the statute, the result would be that the object aimed at by the Legislature would be defeated in respect of all *sir*-lands situate in villages which may at that time be in the hands of mortgagees. Such could not have been the intention of the Legislature, and I may add that the interpretation which I have placed is supported by the construction of similar phrases in English statutes, of which illustrations are given by Mr. Wilber-<sup>[418]</sup>force at p. 165 of his work. In the result, I hold that Fida Husain and Wahid-un-nissa did mortgage their rights, or rather rendered their rights subject to the deed of 1869. Secondly, Himayat, by the operation of s. 7 of the Rent Act, became an ex-proprietary tenant of the land belonging to him at the time of the sale of the 20th November, 1876. Under these circumstances, the possession must be given to the plaintiff-mortgagee under the deed of 1869 of such rights as Himayat had at the time of the mortgage, subject to Himayat's right as an ex-proprietary tenant. So far as the purchasers of Himayat's share, under the sale of 20th November, 1876, are concerned, their rights are of course subject to the mortgage of 1869. Again, the rights of the mortgagees under the deed of 17th April, 1872, fall under the rule of the law of mortgage, which constitutes the essence of the rule of priority, and which has been best enunciated in s. 48 of the Transfer of Property Act. Here the mortgage of 1869, and that of 1872, being both usufructuary, the latter must give way to the incidents of the former. I would give effect to these views in the decree of this Court. The first Court gave a decree for possession without qualification as to the statutory rights of Himayat. The lower appellate Court modified the decree. I am of opinion that the decree of this Court should be that the appeal succeeds in part, the lower appellate Court's decree being reversed, and that of the first Court being restored, with this qualification, that the possession which the plaintiff will get under this decree will be subject to such ex-proprietary tenant rights as Himayat may have had in his portion of the *sir* land. With reference to costs, we propose to exercise the discretionary power given to us by s. 220 of the Civil Procedure Code by apportioning the costs as follows:—The plaintiff will recover his costs in all Courts as against Fida Husain and Wahid-un-nissa to the extent of his claim against them. The decree as to costs in reference to the other defendants will be the same. As regards

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Himayat Husain, he and the plaintiff will respectively bear their own costs in all Courts, and, with reference to the costs of the other defendants, they will bear their own costs to the extent of their shares.

TYRRELL, J.—I agree that Musammat Wahid-un-nissa and her son Fida Husain, by their acts and omissions in 1869, as well as [419] by their express admissions in 1872, have furnished sufficient grounds to justify the first Court's finding that they made themselves liable to the appellant in respect of the obligations and liabilities created by the persons who executed the mortgage to the appellant of 1869.

And, as to the question of the retrospective application of the rule of s. 7 of Act XVIII of 1873, I doubt if it be really involved in this case. Himayat Husain mortgaged his *sir* in 1869, and in 1876, his *sir* rights and interests, as such, went out of existence under the operation of the law of 1873 and assumed a different character. Over that tenure in its altered character the appellant still has his mortgage charge, but he has not, in the existing state of the law, a right to physical possession of the actual land, which was formerly Himayat Husain's *sir*, but is now his occupancy tenure.

Subject to this new right of Himayat Husain, the appellant retains his mortgage charge of 1869 over the zamindari interest in this portion of the land acquired by Himayat Husain's vendee. But as the present claim of the appellant is for possession only, it is unnecessary to go further into this aspect of the question.

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#### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

JOKHU RAM AND OTHERS (*Judgment-debtors*) v. RAM DIN AND ANOTHER (*Decree-holders*).\* [14th May, 1886.]

*Execution of decree—Civil Procedure Code, s. 230—Twelve years' old decree—Statute, construction of—General words—Retrospective effect.*

The holder of a decree bearing date on the 15th June, 1872, applied for execution thereof on the 9th February, 1885, the previous application being dated the 27th November, 1883.

*Held* that the application for execution was not barred by s. 230 of the Civil Procedure Code. *Musharraf Begam v. Ghalim Ali* (1) followed. *Golu Chandra Mytee v. Harapriah Debi* (2), *Bhawani Das v. Daulat Ram* (3), and *Sreenath Goocho v. Yusoof Khan* (4) referred to. *Tufail Ahmad v. Sadhu Saran Singh* (5) discussed and dissented from by MAHMOOD, J.

[320] *Per* MAHMOOD, J.—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to s. 230 of the Civil Procedure Code must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or

\* Second Appeal No. 23 of 1886, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 16th February, 1886, reversing an order of Shab Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 11th August, 1885.

(1) 6 A. 189.  
(4) 7 C. 556.

(2) 12 C. 559.  
(5) A.W.N. (1885) 193.

(3) 6 A. 388.

remedies which have already expired before the new Act comes into operation, and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect.

[R., 8 A. 536 (538).]

THE decree of which execution was sought in this case was a decree for money bearing date the 15th June, 1872. The decree-holder applied for execution on the 9th February, 1885, the previous application being dated the 27th November, 1883. The Court of first instance held, relying on *Tufail Ahmad v. Sadho Saran Singh* (1), that the application was barred by limitation, under the provisions of s. 230 of the Civil Procedure Code, 1882. On appeal by the decree-holders the lower appellate Court held, with reference to *Musharraf Begam v. Ghalib Ali* (2), that the application, being the first which had been made under s. 230 of the Civil Procedure Code, 1882, after the decree became twelve years old, was within time. The Court refused to follow *Tufail Ahmad v. Sadho Saran Singh* (1) as that case was, in its opinion, opposed to *Musharraf Begam v. Ghalib Ali* (2) which was a decision of the Full Bench.

The judgment-debtors appealed to the High Court.

Mr. C. H. Hill and Munshi Hanuman Prasad, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondents.

### JUDGMENT.

OLDFIELD, J.—This is an appeal against the order of the lower appellate Court granting an application to execute a decree dated the 15th June, 1872. Applications for executing the decree had been made and granted at numerous dates down to that dated the 27th November, 1883, and the application of the 9th February, 1885, which is the subject of this appeal.

[421] The lower appellate Court has held, following the Full Bench decision of this Court—*Musharraf Begam v. Ghalib Ali* (2)—that this last application is not barred by s. 230 of the Civil Procedure Code.

It is clear that the present application of the 9th February, 1885, was made after the expiry of twelve years from the date of the decree, and after twelve years from all the dates mentioned in s. 230. The last paragraph of this section, giving it the interpretation of the Full Bench ruling referred to, cannot be a bar to the application, because it was made within three years from the coming into operation of the present Code; and though the application would be barred by s. 230 of Act X of 1877, yet that section, under the Full Bench ruling, is not applicable. Under these circumstances the order of the lower appellate Court must be upheld, and this appeal, as well as Nos. 22, 24 and 25 of 1886, must be dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusion as my brother Oldfield, and sitting here as a Division Bench of the Court, we have no alternative but to follow the decision of the majority of the Judges in the Full Bench Case of *Musharraf Begam v. Ghalib Ali* (2). I was not a party to that ruling, and I should probably find it difficult to agree with the prevailing opinion in that case, for I have long entertained views which are in accord with those expressed by my brother Oldfield in his dissentient judgment in that case. Those views have since been unhesitatingly accepted by a Division Bench of the Calcutta High Court in *Goluck Chandra Mytee v. Harapriah Debi* (3); but, as I said before, I am not at liberty to form my own opinion upon the matter

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on account of the opinion of the majority in the Full Bench case. Soon after that the ruling, however, I had occasion in *Bhawani Das v. Daulat Ram* (1) to draw a distinction between the Full Bench ruling and cases in which the decree had already become barred, and, as such, incapable of execution, before the Civil Procedure Code of 1882 became law. That ruling has since been followed in many cases. That ruling, however, does not apply to this case, because the decree here had not become [422] incapable of execution before the present Civil Procedure Code.

The decree with which we are concerned was passed on the 15th June, 1872, and calculating twelve years from that date, it was alive when the present Civil Procedure Code came into operation. After numerous executions, an application for execution was made on the 27th November, 1883, which was granted under the present Code, and the present application was made on the 9th February, 1885, that is, more than twelve years after the decree, but within three years of the passing of the present Code. The question then is, whether, under such circumstances, the execution of the decree is barred; and the question must be answered in the negative with reference to the Full Bench ruling above cited. The exact effect of that ruling is twofold:—

*First*—that the phrase “the law in force immediately before the passing of this Code” in the proviso to s. 230 of the present Code does not include the limitation provisions of s. 230 of the Civil Procedure Code of 1877.

*Secondly*—that the holder of a decree which was not more than twelve years old when the present Code was passed is entitled, under the proviso, to have, after the decree has become older than twelve years, “one opportunity, and only one, to execute it, whether he succeeds in obtaining satisfaction of it or not.”

For this second point the learned Judges of the majority of the Full Bench relied upon the ruling of the Calcutta High Court in *Sreenath Goocho v. Yusoo Khan* (2), and I understand the effect of this to be that execution of a decree older than twelve years can be “granted” only once under the proviso to s. 230 of the present Code.

Now, I need say nothing as to whether, speaking for myself, I am prepared to accept either of these conclusions, for, as I said before, it is my duty to apply them to the present case. Then what we have here is that the decree of the 15th June, 1872, was less than twelve years old when the present Code came into operation, and it became twelve years old on the 15th June, 1884, and is not affected by the twelve years’ rule contained in s. 230 [423] of the Code of 1877. Then the present application for execution, being dated the 9th February, 1885, is the first application made after the decree became older than twelve years, and must be entertained as the only opportunity to execute his decree, which must be allowed to the decree-holder, within the second conclusion of the Full Bench ruling as already indicated by me.

I should have ended my observations here but for the circumstance that a case has been cited by the learned pleader for the appellant as favouring his contention, and it does support his contention. It is the case of *Tufail Ahmad v. Sadhu Saran Singh* (3), which, I frankly confess, has caused me no small amount of surprise. In that case Petheram, C.J., laid down a rule of law which is in conflict not only with the Full Bench ruling in *Musharraf Begam’s Case* (4) and my ruling in *Bhawani Das* (1),

(1) 6 A. 388.

(3) A.W.N. (1885) 193.

(2) 7 C. 556.

(4) 6 A. 189.

but also with some of the most important rules of interpretation which have always been adopted by the Courts of Justice, whether in England or in India. A profound respect for so learned and eminent an authority forces me to examine carefully this ruling, in order to ascertain whether I can possibly adopt the *ratio decidendi* upon which it proceeded. The learned Chief Justice in that case observed:—

“It appears that the decree sought to be executed was passed on the 15th September, 1870, and the present application for execution was made on the 14th March, 1884. From these figures it is clear that the application for execution was made after the expiration of twelve years from the date of the decree. Now, s. 230 of the Civil Procedure Code provides that no application for execution of the decree shall be granted after the expiration of twelve years from the date of the decree. The present application would be barred by s. 230, unless it came within the proviso to that section. That proviso is to the effect that, ‘notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of the Code shall have expired before the completion of the said three years.’ Now the [424] meaning of this rule is that inasmuch as it would be a hardship that a decree which was capable of execution should, by the operation of the twelve years’ rule, become incapable of execution on the passing of the Code, a further period of three years was allowed to enable the decree-holder to execute the decree.”

So far I concur with the learned Chief Justice; but then he goes on to say what seems to me inconsistent with the passage which I have already quoted from his judgment. He goes on to say:—“This proviso applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years’ rule when the Code came into force, by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230. Now the Code came into force in June, 1882, and the decree-holder could have availed himself of the three months up to September, 1882, when the twelve years expired. Under these circumstances the proviso is inapplicable, and the execution of the decree is barred by limitation. The Full Bench ruling brought to our notice is not applicable to the point which arises in this appeal.”

Now, I am anxious to see what this passage actually enunciates. It may be summarized thus:—

*First*—that the proviso to s. 230 is confined to decrees which would be barred by the twelve years’ rule “on the date of the Code coming into force; that is, on the 1st June, 1882 (*vide* s. 1 of the Code)”;

*Secondly*—that the proviso does not apply to, or benefit, decrees which would be not so barred;

*Thirdly*—that in the case of the latter class of the decrees, all the period that they would be entitled to for execution, is the remaining portion of the twelve years upon the Code coming into force;

*Fourthly*—that by the application of these rules in the case before the learned Chief Justice, the decree-holder was entitled to only three months after the Code came into force; and

[425] *Fifthly*—that the case before him was distinguishable from the Full Bench ruling of this Court in *Musharraf Begam v. Ghalib Ali* (1).

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Now, if this enunciation of the law is sound, there can be no doubt whatever that the appellant in this case must succeed; because, with reference to the first two points of the ruling of Petheram, C.J., the proviso to s. 230 would not benefit the decree, it being less than twelve years old when the Code came into force; and with reference to the third and fourth points of that ruling, the respondent here could execute his decree only up to the 15th June, 1884, when it became twelve years old; and it would therefore follow that the execution sought to be obtained on the 9th February, 1885, would be barred by the twelve years' rule. But I respectfully think that all the various points laid down in that ruling are erroneous and opposed to all that has ever been ruled as to the meaning of s. 230 of the Code. I know that this is a strong statement to make in respect of the judgment of so distinguished a legal authority as Petheram, C. J., and the deference due to him from the Court of which he was till lately the Chief Justice requires that I should, with due respect, explain my reasons more fully than would otherwise be necessary. I will therefore take each of the points ruled by Petheram, C.J., in the order in which he ruled them, and in which I have stated them.

Taking the first and second points then, I have to ask what reason is there for holding that the phrase "*any decree*" which occurs in the proviso to s. 230 of the Code is limited to decrees older than twelve years, and does not include decrees less than twelve years' old? The expression is, as I understand the English phrase, a general one, and to use the words of Mr. Wilberforce in his excellent work on *Statute Law* (p. 172), "it is clear that a limited meaning can only be given to general words, where the Act itself, or the legitimate methods of interpreting it, show that such was the intention of the Legislature." Again, Sir William Grant says in *Beckford v. Wade* (1):—"General words in a statute must receive a general construction, unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary [426] addition or retrenchment." Again, we have the *dictum* of Lord Chief Justice Cockburn in *Twycross v. Grant* (2):—"I take it to be a sound canon of construction in the application of a statutory enactment that full effect should be given to general terms, unless from the context, or other provisions of the statute, a limitation on the general language must necessarily be implied, more especially when had such a limitation been intended it might reasonably have been expected to be expressed." And further authority upon the same point which Mr. Wilberforce quotes is the judgment of Williams, J., in *Garland v. Carlisle* (3), where the learned Judge observes:—"When the words of the Act are general and comprehensive and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice which must inevitably ensue from such a construction, can authorize Courts of Law in giving a more confined and limited meaning to such general expressions than they ordinarily and naturally import and bear. What else is restraining by inference or varying by interpretation but to a certain extent recasting and remodelling the statute, or, in other words, invading the province of the Legislature itself?"

Such, then, being the undoubted rule of construction, there must be some reason to be found in the Code itself which would justify limiting

(1) 17 Ves. 91.

(2) L.R. 2 C.P.D. 580 (531).

(3) 4 Cl. and Fin. 726.

the general expression "any decree" only to "those decrees which would be barred on the date of the Code coming into force." Petheram, C.J., in so restricting the meaning of the general phrase, has not stated any reasons, and speaking for myself, I fail to discover any in the Code. On the contrary, the legislative policy, upon which clauses such as the proviso to s. 230 are based, suggests no such restriction. "If the Legislature of a State should pass an Act by which a *past* right of action shall be barred, and without any allowance of time for the institution thereof in future, it would be difficult to reconcile such an Act with the express constitutional provisions in favour of the rights of private property. So if in a State, where six years, for instance, may be pleaded in bar to an action of *assumpsit*, a law should be passed declaring that contracts already in existence, and not barred by the statute, should be construed to be within it, such law, with-**[427]**out doubt, would be deemed unconstitutional" (Angell on Limitation (4th ed.), p. 17). No wise Legislature ignores these fundamental principles of legislation, and we have in India another illustration of their application in the saving-clause in s. 2 of the Limitation Act (XV of 1877), in regard to suits for which the period prescribed by the Act is shorter than that prescribed by the superseded Limitation Act, 1871. Now, it is perfectly clear from the very nature of such saving clauses, that the object of the Legislature is to prevent a sudden disturbance of existing rights in consequence of the new legislation, and to achieve that object the Legislature, in altering the law, allows a period of grace within which existing rights may be enforced without being affected by the new law. In other words, during the period of grace so allowed, the operation of the new law is suspended, so far as it would operate in derogation of existing rights, and the law having given due notice of the change, expects those whose rights would be adversely affected to enforce those rights before the period of grace expires. But it is necessarily beyond the object and scope of such saving-clauses to revive rights or remedies which have already expired and become defunct before the new Act comes into operation. That the Legislature may so revive rights and remedies is undoubtedly true, but the general rule is contained in the maxim of construction: "*Nova constitutio futuris formam imponere debet, non præteritis*," and an equally well-recognized rule of construction requires express words in statutes before they can be construed as taking away existing rights, or reviving those which have already expired before the new enactment comes into operation. No such express words exist in the proviso to s. 230 as would have the effect of reviving barred decrees, and it was upon this principle that my ruling in *Bhawani Das v. Daulat Ram* (1) proceeded. The ruling of Petheram, C.J., however, lays down the very opposite doctrine, because, according to him, the "proviso benefits only such decrees as would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date men-**[428]**tioned in s. 230." This amounts to saying that decrees which were already barred under the Code of 1877 were revived by the new Code—a conclusion which, in the absence of express words in the Code, I am unable to accept.

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(1) 6 A. 388.



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I now proceed to consider whether I can accept what I have enumerated as the third and fourth points of the learned Chief Justice's ruling. Now, I must observe, in the first place, that the Full Bench ruling of this Court in *Musharraff Begam v. Ghalib Ali* (1), which the learned Chief Justice was bound to follow as much as I am, leaves us no room for holding that the phrase "law in force immediately before the passing of this Code" had any reference to the limitation provisions of s. 230 of the Code of 1877, which provided, for the first time in the Indian law, a period of twelve years as the duration for execution of decrees. This being so, I entirely fail to understand how any decrees coming within the purview of the proviso could be restricted to twelve years from this date, if the twelve years expired before the completion of the three years' grace allowed by the proviso. But, as I have already said, the view of the learned Chief Justice was, that the proviso applied only to decrees older than twelve years; and inasmuch as the decree before him—to use his own words—was one of "those decrees which were not barred by the twelve years' rule when the Code came into force," he held, in logical consistency with this view, that the decree before him could be executed only during the three months intervening between the date "when the Code came into force" and the date "when the twelve years expired." But I confess I find it difficult to understand how these *three months* allowed in the case can be reconciled with the *three years* to which the learned Chief Justice referred in an earlier part of the judgment, when he said:—"That inasmuch as it would be a hardship that a decree which was capable of execution should, by the operation of the twelve years' rule, become incapable of execution on the passing of the Code, a further period of three years was allowed to enable the decree-holder to execute the decree." Indeed, the only way to reconcile the various portions of the learned Chief Justice's judgment seems to be to say that he held that, whilst a decree, which would be barred by the twelve years' rule on the [429] passing of the Code, would have the benefit of the proviso to s. 230, and would thus be entitled to a further period of full three years for the purposes of execution, a decree which, on that date, was eleven years, eleven months, and twenty-nine days old, would be allowed only one day for execution. I have put the matter in this strong light because such, indeed, is the effect of the ruling which I am now considering. How the learned Chief Justice distinguished the case before him from the Full Bench ruling of this Court is a matter upon which his judgment is totally silent, and, speaking for myself, I am wholly unable to see any distinction. And this is all I wish to say upon what I have enumerated as the fifth point of the learned Chief Justice's judgment.

But I must add that I have regarded it as my duty to consider the ruling in *Tufail Ahmad v. Sadhu Saran Singh* (2), not only out of the deference which is due by this Court to its late learned Chief Justice, but also because, if I had felt disposed to follow that ruling, I should have asked my learned brother Oldfield to allow this case to go before the Full Bench. But, for the reasons which I have already stated, I respectfully decline to regard the ruling either as sound law in itself or as consistent with the Full Bench ruling which we are bound to follow. My order then is the same as that of my brother Oldfield.

*Appeal dismissed.*

(1) 6 A. 189.

(2) A.W.N. (1885), 193.

8 A. 429 = 6 A.W.N (1886) 153.

## APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*SACHIT AND ANOTHER (*Defendants*) v. BUDHUA KUAR (*Plaintiff*).\*

[20th May, 1886.]

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*Hindu widow—Decree against widow—Fraud—Reversioner.*

Upon the death of *R*, a Hindu, who was separate from his brother *S*, his widow *G* became life-tenant of his estate, and his daughter *B* became entitled to succeed after *G*'s death. In 1882, a suit was brought by *S* and *G* against *V*, to recover the value of a branch of a mangoe tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that *R* was not the owner of the grove, nor was *G* the owner. In 1885 *B* brought a suit against *G*, *S*, *V* and *A*, to whom *V* had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in [430] collusion between *S* and *G* on the one hand and *V* on the other, for the purpose of improperly preventing her from asserting her rights.

*Held* that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though *S* might have been improperly joined as plaintiff, any decision then passed against *G* would be binding upon the present plaintiff, and estop her again litigating questions which were then decided.

*Held* also that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be reopened, the decision in that suit would not be binding on the plaintiff under the circumstances.

*Held* also that if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life tenant; and that such relief could be given upon this form of plaint.

*Katama Natchiar's Case* (1), *Ali Deo Narain Singh v. Dukharan Singh* (2) and *Sant Kumar v. Deo Saran* (3), referred to.

[R., 5 Bom. L.R. 885.]

THE plaintiff in this case was the daughter of one Ramphal Pande, deceased, and his wife Gulabi Kuar. She alleged in her plaint that her father always lived separately from his brother Salik Ram; that he died about seven years before the institution of the suit, and on his death Gulabi Kuar came into possession of his property; that Ramphal owned and possessed a certain grove of mangoe trees with which Salik Ram and one Sachit had no concern, that the plaintiff's mother and Salik Ram, having colluded with Sachit, brought a suit against the latter for the grove and caused a decision to be passed against themselves, in default of prosecution, on the strength of which Sachit had wrongfully taken possession of the grove in July, 1882; that Sachit had sold some trees to one Ramphal Kuar; that the plaintiff was heir to Ramphal Pande and, as Gulabi Kuar was not in possession of the grove, was entitled to possession thereof; and that her cause of action arose in June, 1883, when she became aware of what had happened. On these allegations she claimed a declaration of her right and possession of the grove, making Gulabi Kuar, Salik Ram, Sachit and Ramphal Kuar defendants to the suit.

\* Second Appeal No. 1598 of 1895, from a decree of Rai Raghunath Sahai, Subordinate Judge of Azamgarh, dated the 20th June, 1885, reversing a decree of Munshi Sheo Sahai, Second Munsif of the city of Gorakhpur, dated the 11th January, 1885.

(1) 9 M.I.A. 539 (543).

(2) 5 A. 532.

(3) 8 A. 365.



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The defendants Sachit and Ramphal Kuar defended the suit on the ground that the grove belonged to Sachit and not to Ram-[431]phal Pande, and on the ground that the question whether it belonged to Sachit or Ramphal Pande had become *res judicata* by reason of the decision passed against the plaintiff's mother in the suit referred to in the plaint.

It appeared that that suit was brought by Gulabi Kuar and Salik Ram against Sachit, and the claim was to recover the value of a branch of a mango tree wrongfully taken by Sachit and for maintenance of possession over the grove. That suit was dismissed by the Court of first instance on the 8th February, 1882, and the decree was affirmed by the appellate Court on the 8th July, 1882. It was decided in that suit that the plaintiff's father was not the owner of the grove, nor was Gulabi Kuar the owner.

The Court of first instance held that the plaintiff's suit was barred by the decision in the former suit. On appeal by the plaintiff the lower appellate Court held that the suit was not barred by that decision, on the ground apparently that the same had not been fairly obtained against Gulabi Kuar the plaintiff's mother; and, finding that the grove belonged to Ramphal Pande, gave the plaintiff a decree declaring her right, but refusing to give possession on the ground that the plaintiff's mother was still alive.

The defendants Sachit and Ramphal Kuar appealed to the High Court on the ground (i) that the suit was barred by s. 13 of the Civil Procedure Code; (ii) that the plaintiff was bound by the acts of her mother and could not question the same; and (iii) that the plaintiff's claim for a declaratory decree while her mother was alive was not maintainable, and the decree given her was bad.

Mr. J. E. Howard and Lala Lalta Prasad, for the appellants.

Shah Asad Ali, for the respondent.

### JUDGMENT.

STRAIGHT, Offg. C. J.—This is an appeal preferred by the defendant Sachit under the following circumstances:—The suit was brought by the plaintiff-respondent to recover possession of a grove from the defendant by a declaration of the plaintiff's title as reversioner, on the allegation that Sachit had made a sale of certain trees to the second defendant Ramphal Kuar. The plaintiff was the daughter of one Ramphal Pande, who died seven years ago, leaving a widow, Gulabi Kuar, a brother, Salik, and a daughter, [432] who is the plaintiff in this case. Ramphal was separate from his brother Salik, and his estate therefore was inherited, first, by his widow Gulabi Kuar, who became life-tenant, and the plaintiff is entitled to succeed to the estate upon her mother's death. In 1882 a suit was brought by Salik and Gulabi Kuar against Sachit for declaration of right and possession of the grove to which the present suit relates, and, apparently after contest, the suit was decreed in favour of Sachit, and the claim of Salik and Gulabi Kuar was dismissed. If that was a genuine suit and was properly contested by the then plaintiffs, though Salik may have been improperly joined as plaintiff, still any decision then passed against Gulabi Kuar would be binding upon the present plaintiff, and estop her again litigating questions which were then decided. The authority for this view is the case of *Katama Natchair* (1), and the portion of the judgment in that case to which I more particularly refer, will be found

(1) 9 M.I.A. 539 (543).

at page 608 of the report. The same principle was also recognized by myself in *Adi Deo Narain Singh v. Dukharan Singh* (1). The plaintiff now comes into Court impeaching a transfer of certain trees by Sachit to the other defendant, Musammam Rampahal Kuar, and is met by Sachit with the plea that the question of proprietary title to the grove has already been determined by the suit of 1882 against Gulabi Kuar, the decision of which is binding upon the plaintiff and she cannot re-open it now. The Munsif was of opinion that this plea was good. The Subordinate Judge took a contrary view. But it appears to me that in doing so he has stated very inadequate grounds for his conclusions, and has also lost sight of the real nature of the plaintiff's claim and the language of the plaint. He has apparently not noticed the most essential point in the plaint, namely, that the plaintiff alleges that the proceedings of 1882 were fraudulent and collusive, and were got up between Salik and Gulabi on the one hand and Sachit on the other, and carried on for the purpose of improperly preventing the plaintiff from asserting her rights. This is a specific allegation of fraud and collusion; and if it is established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the present plaintiff under the circumstances I have mentioned. This being so, it appears to me that the Judge has not tried the two main issues, which must be clearly determined before it is possible for us to dispose of this appeal. Before remanding these issues to the lower Court under s. 566 of the Civil Procedure Code, I may observe that, in my opinion, the principle which I enunciated in the case of *Adi Deo Narain Singh v. Dukharan Singh* (1) should be applied to the present claim; and if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she will be entitled in this suit to claim, not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant. It appears to me that we are competent to give such relief upon this form of plaint. I would therefore remand the following issues for determination by the lower appellate Court under s. 566 of the Code:—

1. Did the suit of 1882 finally determine the question of the proprietary title to the grove now in suit between Gulabi Kuar and the present defendant Sachit?

2. Was such suit a genuine and *bona fide* proceeding contested and litigated honestly from beginning to end?

The findings, when recorded, will be returned to this Court with ten days allowed for objections from a date to be fixed by the Registrar.

MAHMOOD, J.—I am of the same opinion. It appears to me that the case cannot be disposed of finally without ascertaining the two points which the learned Chief Justice has just formulated. The main point would be the conduct of Gulabi Kuar in the litigation of 1882; and whether her action was induced by collusion or other fraudulent motives, or by undue influence, the result would be the same. As regards the rule applicable to cases of this kind, I may refer to the judgment in *Sant Kumar v. Deo Saran* (2) in which the ruling of the Privy Council, to which the learned Chief Justice has referred, was applied. I also agree with what the learned Chief Justice has said in reference to the nature of the plaint in this case.

*Issues remitted.*

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8 A. 434=6 A.W.N. (1886) 166.

## [434] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

8 A. 434=

6 A.W.N.

(1886) 166.

MUHAMMAD HASAN (*Plaintiff*) v. MUNNA LAL AND ANOTHER  
(*Defendants*).<sup>\*</sup> [1st June, 1886.]*Pre-emption—Wajib-ul-arz—Evidence of contract and custom—Act XIX of 1873 (N. W. P. Land Revenue Act), s. 91—Regulation VII of 1822, s. 9, cl. (i).*

The *wajib-ul-arz* of a village is a document of a public character, prepared with all publicity, and must be considered as *prima facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the shareholders. Looking to the public character of the document, and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character.

A suit to enforce the right of pre-emption, which was based on contract and custom as evidenced by the *wajib-ul-arz* of a village, was dismissed by the lower Courts on the ground that any contract which might be founded on the *wajib-ul-arz* was not binding on the vendor-defendant as that document did not bear his signature, and the lower appellate Court attached no weight to the *wajib-ul-arz* as proof of the custom of pre-emption, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. The claim was dismissed on the ground that the plaintiff's evidence did not prove the existence of a custom of pre-emption in the village.

*Held* that the lower appellate Court had erred in dealing with the evidence, and that although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to it entries, both as proof of the contract as well as custom, was very strong. *Isri Singh v. Ganga* (1) referred to.

[N.F., 4 O.C. 71; Appr., 12 A. 234 (257); R., 25 A. 90=A.W.N. (1902) 207; 26 A. 549=A.W.N. (1904) 128.]

THE plaintiff in this case sued to enforce the right of pre-emption in respect of the sale of a piece of *maufi* land situate in Kasba Koil, zila Aligarh. The vendor-defendant acquired the property by purchase at an execution-sale on the 24th August, 1871, and he sold it to the vendee-defendant by a deed, dated the 24th June, 1883. The plaintiff was a co-sharer in the mahal, and he claimed on the basis of contract and custom, as evidenced by the following entry in the *wajib-ul-arz*:—"Every sharer may transfer his share as he pleases, but he must offer it to the sharers of his own family; then [435] to other sharers; and if these all refuse, he may transfer it to any one he pleases."

The defendants set up as a defence that the *wajib-ul-arz* was not binding on them, as it had not been attested by the vendor, and that the custom of pre-emption did not exist in Kasba Koil, the vendor denying its existence absolutely and the vendee as affecting *muafi* land. The Court of first instance dismissed the suit, holding that the entry in the

<sup>\*</sup> Second Appeal No. 1233 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 31st July, 1885, confirming a decree of Babu Ganga Prasad, Munsif of Koil, dated the 19th September, 1884.

*wajib-ul-arz* relating to the right of pre-emption did not apply to *muafi* land, and that even if it did, the entry was not binding on the vendor and vendee, as the vendor had not signed the *wajib-ul-arz*. On appeal by the plaintiff, the lower appellate Court held that the entry was not binding on the vendor and vendee as an agreement by the former, as it was not signed by the former, and that the custom of pre-emption in Kasba Koil had not been proved. It was of opinion that, as regards custom, there was no presumption as to the truth of the entry, such as s. 91 of Act XIX of 1873 (N.-W.P. Land Revenue Act) created in respect of such entries, inasmuch as the *wajib-ul-arz* in question had been framed before that Act came into force. On this part of the case it observed as follows :—

“The entry in the *wajib-ul-arz* is no doubt a pretty strong piece of evidence in proving the existence of the custom ; but it was drawn up and attested in 1872, before Act XIX of 1873 came into force. Some witnesses have deposed in general terms that the custom of pre-emption exists in the mahal, but no specific instance have been given in which the custom has been acted on or asserted.

“The inevitable conclusion seems to be that the custom is not proved, unless it can derive assistance from s. 91, Act XIX of 1873, or some corresponding clause in the corresponding enactment which was in force when the record-of-rights was drawn up. A reference to the official settlement report shows that the settlement of the Aligarh district which is now current began from 1868. The operations were begun shortly after that date and the enactment on the subject then in force was Regulation VII of 1882. This enactment, by s. 9, cl. (i), directed the officer who was making the settlement to make a detailed investigation [436] and draw up a record of the landed tenures, rights, interests and privileges of the various classes of the agricultural community. The section goes on to specify the heads of information required, and then enacts that the information be so arranged as to admit of an immediate reference by Courts of Judicature, it being understood and declared that all decisions on the *demands of zamindars* shall be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement, &c. This section seems not wide enough to cover the present claim. The object of the section is clearly to fix and determine the right of zamindars and *tenants*, and the records is not *per se* sufficient to make the entry in it conclusive proof of the existence of a custom of pre-emption.

“It remains to consider whether the entry can derive any confirmation from s. 91, Act XIX of 1873. The record was drawn up and attested in 1872, and the officers who drew it up were acting under Regulation VII of 1822. The settlement was not reported to the Board of Revenue for sanction till 1874, and was not confirmed by the Government till a later date. But when confirmed it took effect from 1868, the year in which the former settlement expired. This record must be taken to be prepared under Regulation VII of 1822, and cannot derive force or validity from an enactment which came into force after it was drawn up.”

The plaintiff appealed to the High Court on the ground (i) that the *wajib-ul-arz* was binding on all co-sharers, and among them on the vendor, and the fact that it was prepared before Act XIX of 1873 was passed did not affect the question ; (ii) that the indorsement on the *wajib-ul-arz* by the settlement officer showed that it was attested by all the co-sharers, and it was for the respondent to show that he had not attested it ;

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and (iii) that the vendor had acquiesced in the terms of the *wajib-ul-arz* for fourteen years, and was thereby precluded from objecting to the term thereof.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellant.  
Babu *Jogindro Nath Chaudhri*, for the respondents.

## JUDGMENT.

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OLDFIELD, J.—This suit has been brought to enforce a right of pre-emption in respect of certain property sold by the defendant Baldeo Das to the defendant Munna Lal. The suit has been dismissed in the Court of first instance, and that dismissal has been [437] affirmed by the lower appellate Court. The suit is based on contract and custom as evidenced by the *wajib-ul-arz*; and the only ground on which the lower Courts have dismissed the suit is, that any contract which may be founded on the *wajib-ul-arz* is not binding on the vendor-defendant, as it does not bear his signature; and so far as the *wajib-ul-arz* was relied on a proof of the custom of pre-emption, the Judge attached no weight to it, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. He dismissed the plaintiff's claim on the ground that the evidence adduced by him did not prove that pre-emption existed in the village by custom. The Judge appears to me to have erred in dealing with the evidence. Although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to entries, both as proof of the contract as well as the custom is very strong, and the observations made by this Court on this subject in the Full Bench case of *Isri Singh v. Ganga* (1) are as applicable here as in that case. The *wajib-ul-arz* is a document of a public character, prepared with all publicity, and must be considered as *prima facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence so as to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the shareholders. Looking to the public character of this document and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character. The grounds therefore, on which the Judge disposed of the appeal before him are not valid. He must re-try the question of the binding effect of this *wajib-ul-arz*, both as to contract and custom as regards pre-emption, and also the other issues that arise.

The case is therefore remanded for re-trial. The costs of this appeal will abide the result.

TYRRELL, J.—I concur.

*Case remanded.*

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## [438] FULL BENCH.

*Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Brodhurst,  
Mr. Justice Oldfield, Mr. Justice Tyrrell and Mr. Justice Mahmood.*

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AMANAT BEGAM AND ANOTHER (*Plaintiffs*) v. BHAJAN LAL AND  
OTHERS (*Defendants*).<sup>\*</sup> [16th June, 1886.]

*Mortgage—Joint mortgage—Suit for redemption—Jurisdiction—Court-fee—Valuation of suit—“Subject-matter in dispute”—Act VII of 1870 (Court-Fees Act), s. 7, art. ix—Act VI of 1871 (Bengal Civil Courts Act), s. 20—Statute, construction of.*

A deed of mortgage was executed by P, T and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of P and T the other mortgagors.

*Held* by the Full Bench with reference to s. 7, art. ix of the Court-Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo v. Nagvekar* (1) referred to.

*Held* also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the “subject-matter in dispute,” in suits of this kind was the amount of the mortgage-debt and the mortgagee’s rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif’s pecuniary jurisdiction.

*Per* MAHMOOD, J.—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction.

[N.F., 11 O.C. 154; F., 8 Ind. Cas. 464 = U.B.R. (1910) 10; 5 L.B.R. 208 (F.B.); R., 31 A. 44 = 5 A.L.J. 713 = A.W.N. (1908) 276; A.W.N. (1887) 262; 14 C.P.L.R. 154; 8 Ind. Cas. 973; 8 N.L.R. 179; 6 O.C. 130.]

THIS was a reference to the Full Bench by Petheram, C.J., and Straight, J. The facts of the case were as follows:—

The plaintiffs sued to recover possession of certain property which had been mortgaged by a deed dated the 1st September, [439] 1863. It appeared that three persons named Pan Kuar, Takht Singh, and Maidan Singh, on the 1st September, 1863, mortgaged one-third of the 20 biswas of a village called Mau for Rs. 4,000, for a term of five years. The mortgage-deed provided *inter alia* that the profits should, during the term of the mortgage, be appropriated in payment of Rs. 1,000 of the principal money, and the mortgages should be entitled to redeem at the end of the term on payment of Rs. 3,000. Three persons named Mohan Singh, Chandan Singh, and Dharam Singh became the

<sup>\*</sup> Second Appeal No. 801 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 21st February, 1885, reversing a decree of Maulvi Muhammad Ismail, Munsif of Bisauli, dated the 23rd December, 1884.



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mortgagees of the property by virtue of a decree for pre-emption. Subsequently to this the rights of these persons under the mortgage were sold to persons named Gopi, Sham Sundar, Ram Prasad, Bhola Nath, and Makund Ram. Ram Prasad, Bhola Nath, and Makund Ram then purchased the equity of redemption of two of the mortgagors, Pan Kuar and Takht Singh, and on the 13th January, 1884, the third mortgagor, Maidan Singh, sold his equity of redemption to the plaintiffs. The plaintiffs brought the present suit against the heirs of Ram Prasad and Makund Ram, and Gopi, Sham Sundar and Bhola Nath, to recover one-third of the mortgaged property, that is to say, the 2 biswas 4 biswansis and 7 kachwansis share of Maidan Singh, on payment of Rs. 1,000, one-third of the principal money due at the end of the mortgage-term. The suit was instituted in the Court of the Munsif of Bisauli, zila Shahjahanpur. The plaintiffs paid an *ad valorem* court-fee on Rs. 1,000 in respect of the plaint. The defendants set up as a defence, amounts other things, that, having regard to the principal amount secured by the mortgage, that is to say, Rs. 4,000, the suit was not cognizable by the Munsif. The Munsif held that as the plaintiffs claimed to redeem on payment of Rs. 1,000, the suit was cognizable by him, and in the event gave the plaintiffs a decree. On appeal by the defendants the Subordinate Judge of Shahjahanpur, held that the suit was not cognizable by the Munsif, the value of the subject-matter of the suit being Rs. 1,333-5-4, one-third of Rs. 4,000, the principal amount secured by the mortgage; and he also held that such value was the value for the purposes of the Court-Fees Act (VII of 1870), s. 7, art. ix, and the plaint was insufficiently stamped. He made an order directing the plaint to be returned to the plaintiffs to be presented to the proper Court.

[440] The plaintiff appealed to the High Court, contending that the suit had been properly valued at Rs. 1,000, one-third of the principal money due at the end of the mortgage-term, both for the purposes of jurisdiction and court-fees.

The appeal came for hearing before Petheram, C.J., and Straight, J., who referred the following questions to the Full Bench:—

- "(i) Had the Munsif jurisdiction to hear and determine the suit? and
- (ii) On what amount should the court-fees be calculated both in the Court of first instance and in the Court of appeal?"

Pandit Nand Lal, for the appellants.—The amount secured by the mortgage-deed is Rs. 3,000, and as the suit relates to one-third of the mortgaged property, it must be taken that one-third of that amount, namely, Rs. 1,000, is the amount secured, within the meaning of s. 7, art. ix, Court-Fees Act—*Balkrishna Dhondo v. Nagvekar* (1). For the purposes of jurisdiction, the value of the subject-matter in dispute is also Rs. 1,000. The subject-matter in dispute is the mortgage-debt and mortgagee's right which is sought to be paid off, which is Rs. 1,000. He cited *Gobind Singh v. Kallu* (2), *Bahadur v. Jawab Jan* (3), *Kubair Singh v. Atma Ram* (4), *Cottorell v. Stratton* (5), *Krishnama Chariar v. Srinivasa Ayyangar* (6).

Pandit Ajudhia Nath (with him, Babu Ratan Chand), for the respondents.—The mortgage is a joint one, and the principal amount secured by it is Rs. 4,000, and court-fees should be paid on the whole of that amount—*Umar Khan v. Mahomed Khan* (7). If the "subject-matter in dispute" is the mortgage money, it is the whole amount of the mortgage-money.

(1) 6 B. 324.

(2) 2 A. 778.

(3) 3 A. 822.

(4) 5 A. 332.

(5) L.R. 17 Eq. 543.

(6) 4 M. 339.

(7) 10 B. 41.

In a suit for redemption the subject-matter in dispute is the property itself, and not the amount in respect of which redemption is claimed.

### JUDGMENT.

STRAIGHT, Offg. C.J.—(After stating the facts and the questions referred to the Full Bench, continued).—These questions have been argued before the Full Bench in inverse order, and it [441] will therefore be most convenient to deal with them in the order in which they have been argued by the learned pleader for the appellants. The first contention urged by the learned pleader is as to the construction to be placed on the instrument of the 1st September, 1863, which he urges was only a mortgage for Rs. 3,000. We have had, by the assistance of my brother Mahmood, the advantage of hearing a literal English translation of the language of the instrument in question, and I entertain no doubt that by it the property was mortgaged for Rs. 4,000, and not Rs. 3,000 and that the mere conditions as to the mode in which Rs. 1,000 of the amount was to be liquidated, did not affect its original character as a mortgage for Rs. 4,000.

The next question relates to s. 7 of the Court-Fees Act; but before considering the precise terms of that section, I may observe that this suit is brought by one of three mortgagors to redeem a particular portion of the mortgaged property. Under ordinary circumstances, this would not only be contrary to all principle, but it would also be contrary to an express rule of law now contained in the Transfer of Property Act. The reason, however, why the plaintiff is entitled to sue for redemption of a portion of the property is that the mortgagees, themselves having become purchasers of a portion of the mortgaged property, that is to say, they having bought up the equity of redemption of two of the mortgagors, have, *pro tan to*, extinguished their mortgage-debt. For by their purchase they cannot make the residue of the mortgaged property responsible for the entire mortgagee debt, nor can they prejudice the right of the other mortgagors to redeem their proportionate share of the mortgaged property. The mortgagees having broken up the integrity of the mortgage, the plaintiff is entitled to assert his equity of redemption, upon payment of so much as represents his interest under the mortgage. This being so, we have to look at art. ix, s. 7 of the Court-Fees Act, which is as follows:—"In suits against a mortgagee for the recovery of the property mortgaged, and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute," the court-fee is to be calculated "according to the principal money expressed to be secured by the instrument of mortgage." Of course, if we [442] are to interpret this language strictly, it is difficult to say that the instrument in question in the present case expresses as secured any other sum than Rs. 4,000, and the extreme contention urged by Pandit *Ajudhia Nath* was that we must make the plaintiff pay court-fees upon that sum. But it appears to me that the defendants-mortgagees, having broken up the mortgage, and so by their own act having empowered the plaintiff to sue for redemption of one-third of the property, that the principal money now secured as between them and the plaintiff must be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly when it is borne in mind that fiscal enactments should, as far as possible, be construed in favour of the subject. My brother Mahmood reminds me of the observations of Melvill, J., in

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*Balkrishna Dhondo v. Nagvekar* (1) where the same principle was adopted. They are as follows :—" In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and as regards the portion of property sued for 'the principal money expressed to be secured' must be taken to be the proportionate amount of the debt for which such portion of the property is liable."

This ruling I adopt and approve, and applying it to the present case, I am of opinion that the court-fee payable by the appellant is payable on Rs. 1,333-5-4, as mentioned in the judgment of the Subordinate Judge.

So much as to the question of court-fee. And now with reference to the first of the two questions referred to the Full Bench, namely, the jurisdiction of the Munsif to try the suit, which depends upon the construction to be placed on the words "subject-matter in dispute" in s. 20 of the Bengal Civil Courts' Act. In the plaint what is alleged is that the plaintiff comes into Court to redeem one-third of the mortgage for Rs. 4,000, and such is the case, as I have already said, he is entitled to make. There is a long current of rulings in this Court to the effect that "the subject-matter in dispute" in suits of this kind is the amount of the mortgage-debt and mortgagee's rights which are sought to be paid off; and whether these rulings are right or wrong, they repre-[443]sent a long current of authority from which, for my own part, I should hesitate to depart. According to the rule of "*stare decisis*," I must assume that they are right, and follow them; and this being so, it follows that the subject-matter in dispute in the present suit is the mortgage-debt and the rights of the mortgagees which the plaintiff seeks to clear off. It is therefore obvious from the terms of the plaint, that in this the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000. Without basing my judgment therefore upon the reasons stated by the Subordinate Judge, who appears to have mixed up fiscal considerations with those relating to jurisdiction, I think that he was right in his conclusion that Rs. 1,333-5-4 was the value of the mortgagee's interest and the subject-matter of the suit, and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. The order of the Subordinate Judge that the plaint should be returned for presentation to the proper Court was correct. My answer to this reference is in the sense indicated by the foregoing observations.

OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

MAHMOOD, J.—The judgment of the learned Chief Justice makes it unnecessary for me to say much, for I have arrived at the same conclusions. He has shown that the exigencies of the case do not require us to rule what I may call the major hypothesis upon which Pandit *Ajudhia Nath's* argument proceeded, namely, that in all suits for redemption, the subject-matter is not the amount which the plaintiff offers to pay to the defendant, the mortgagee in possession, but the suit must be regarded as a claim for possession of immoveable property, to which claim there is a plea resisting such possession. But though we are not bound to decide this large question, I cannot help, with due respect for the rulings cited by Pandit *Nand Lal*, doubting their accuracy. For I am inclined to think that a suit for redemption against a mortgagee in possession, is, on principle, a suit by an owner having for its object realization of the incidents of ownership, and the plea of a subsisting mortgage amounts

to seeking to establish a qualification of that ownership: and in such a dispute the scope of the subject-matter, for purposes of [444] jurisdiction, would seem to be the plaintiff's ownership of the property, and not the qualification which the defendant seeks to set up as a limitation upon that ownership. Again, the allegation of the plaintiff as to the extent of the limitation upon his ownership, would seem to be equally inconclusive as to the pecuniary extent and value of the dispute, for, whilst on the one hand, he may be met by a plea that the mortgage charge is far higher than that stated by him, on the other hand, I think that the learned Pandit for the respondents put the matter very forcibly, when he said that there may be cases in which the plaintiff offers to pay nothing at all, because the whole amount of the mortgage-money has been paid either from the usufruct or otherwise. I have called this last argument forcible, because, if the extent of the money which the plaintiff-mortgagor offers to pay is to regulate the value of the subject-matter in dispute, in the case contemplated there would be no standard for any calculation of the value. Perhaps a more plausible theory would be to say that the value of the subject-matter of a redemption suit is the value of the property *minus* the mortgage charge, that is, the difference between the two. But then the difficulty would arise how to determine the amount of such difference without going into the merits of the defendant-mortgagee's allegation as to the extent of his incumbrance. And of course, apart from the question of the mortgage-money, a redemption suit may be met by the plea that either an account of foreclosure or prescription, the right of redemption no longer exists,—and it is obvious that in such a dispute the whole *corpus* of the property would be at stake, whilst the question of jurisdiction lies at the threshold, and must be disposed of before the real merits of the litigation are entered upon. These observations have been made by me only to illustrate the nature of the considerations which lead me to doubt the rulings upon which Pandit *Nand Lal* relied, and in this I am supported by an unreported judgment of this Court in *Muhammad Dilawar Khan v. Arthur Gardener* [S. A. No. 1039 of 1877, decided on the 18th January, 1878] in which Turner and Spankie, JJ., held that the property mortgaged was the subject-matter in dispute, and, as the *corpus* of the property in that case largely exceeded the Munsif's jurisdiction, they held that he was not competent to try the suit. [445] I must, however, not be understood as laying down any definite rule upon this point, for, as I have already said, the observations of the learned Chief Justice satisfy the exigencies of this particular case.

The question of valuation for purposes of court-fees rests upon very different considerations, for, as pointed out by the Lords of the Privy Council in *Lekraj Roy v. Kanhya Singh* (1), "the stamp duties imposed for fiscal purposes are calculated on a certain rule, fixed by law, but the right of appeal depends on the value, which is a matter of fact." This distinction of principle must never be lost sight of. In the case of *Cotterell v. Stratton* (2), cited by Pandit *Nand Lal*, the judgment of Malins, V.C., is entitled to high respect; but all that he there ruled was that, for purposes of law taxation, a certain standard should be taken as the amount of the subject-matter. No question of jurisdiction was before the Court in that case, and it is therefore not applicable, because, while in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of

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(2) L.R. 17 Eq. 543.



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giving jurisdiction to the highest Court—a view which is in keeping with the principles upon which the Full Bench ruling of this Court in *Nidhi Lal v. Mazhar Husain* (1) proceeded. Therefore, as to the valuation for purposes of court-fees, I agree in all that has fallen from the learned Chief Justice, and also readily adopt the views of Melvill, J., in the case to which the learned Chief Justice has referred. But then the learned Pandit on behalf of the respondent has referred to another case—*Umar Khan v. Mahomed Khan* (2)—which, he contends, has the effect of laying down the rule that in a case such as the present the plaintiff-appellant should be made to pay the court-fees upon the whole mortgage-money expressed to be secured by the mortgage-deed. There may be some difficulty in reconciling the case with the ruling of Melvill, J., and I might, perhaps, with due respect, say that it keeps out of sight the salutary rule of construction adopted by the Courts in England, namely, that statutes imposing burdens upon the subject must, in every case of doubt, be interpreted in favour of the subject. But I think it is [446] unnecessary for me to say anything definite as to whether I concur in, or dissent from, the ruling, because Birdwood, J., who laid down the rule, distinguished it from cases such as the present, where the decree has not been split up or made the subject of more than one appeal.

The ruling, therefore, is not on all fours with the present case, and I need say nothing more about it here.

For these reasons, I concur in the answers proposed by the learned Chief Justice to both the questions before the Full Bench.

8 A. 446=6 A.W.N. (1886) 210.

#### APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Mahmood.*

GANGADHAR AND ANOTHER (*Plaintiffs*) v. ZAHURRIYA AND ANOTHER (*Defendants*).<sup>\*</sup> [22nd April, 1886]

*Landholder and tenant—Suit for the removal of trees—Act XV of 1877 (Limitation Act), sch. ii, No. 32—Jurisdiction—Civil and Revenue Courts—Act XII of 1881 (N.W.P. Rent Act), s. 93 (b).*

*Held*, that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court. *Deodat Tiwari v. Gopi Misr* (3) referred to.

*Held* also that No. 32, sch. ii of the Limitation Act (XV of 1877), applied to the suit. *Raj Bahadur v. Birmha Singh* (4), *Amrit Lal v. Balbir* (5), and *Kedarnath Nag v. Khetturpaul Sritirutno* (6), referred to.

[Over-ruled, 23 A. 486; Appr., 26 C. 564 (568); R., 20 A. 519; A.W.N. (1892) 45; 10 O. C. 188; D., 10 A. 634.]

THE plaintiffs in this case sued the defendants for the removal of certain trees planted by the latter on land held by them as occupancy-tenants, the plaintiffs being the landholders. The suit was instituted in the Court of the Munsif of Shamli, zila Saharanpur. The defendants set up among other defences the defence that the suit was not cognizable in the

<sup>\*</sup> Second Appeal No. 1313 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 3rd July. 1885, confirming a decree of Maulvi Muhammad Tajammul Husain, Munsif of Shamli, dated the 15th January, 1885.

(1) 7 A. 230.

(2) 10 B. 41.

(3) A.W.N. (1862) 102.

(4) 3 A. 85.

(5) 6 A. 68.

(6) 6 C. 34.

Civil Courts, under the provisions of s. 93 (b) of the N.-W.P. Rent Act (XII of 1881). The Court of first instance allowed this defence, relying on *Deodat Tiwari v. Gopi Misr* (1). It found also that the trees, the removal of which was sought, had been planted some eight years [447] before the suit was brought; and that the plaintiffs had acquiesced in the planting of the trees when it became known to them. On appeal by the plaintiffs the lower appellate Court (District Judge of Saharanpur) expressed no opinion on the question of jurisdiction, having regard to the provisions of s. 207 of Act XII of 1881, but held that the suit was barred by limitation applying No. 32, sch. ii of the Limitation Act (XV of 1877). It found that the trees had been planted more than two years before the suit, but did not find when the planting first became known to the plaintiffs.

The plaintiffs preferred a second appeal on the ground that the suit was not governed by No. 32, sch. ii of the Limitation Act.

For the defendants it was objected that the suit was not cognizable in the Civil Courts.

Pandit *Sundar Lal*, for the appellants.

Babu *Ratan Chand*, for the respondents.

#### JUDGMENT.

TYRRELL, J.—This was a very simple suit brought by the plaintiffs-appellants, who are admittedly zamindars of the land in suit, against the defendants, who are occupancy-tenants of the land, seeking to restrain the defendants from converting arable land into a grove or wood. The Courts below have concurred in holding that the suit is barred by limitation. They have applied art. 32, sch. ii of Act XV of 1877, and in my opinion the article has been rightly applied. They have held broadly that some of the trees were planted some seven years ago, and some were planted within a year from the date of the suit. These findings alone are not sufficient for the disposal of the case. The lower Courts have not determined the *terminus a quo* of the period from which the limitation begins to run. Under that clause the limitation begins to run from the date "when the perversion first becomes known to the person injured thereby." It is therefore necessary to have this point determined. And I would therefore remit the following issue for determination by the Court below :—

When did the plaintiff first become aware of the perversion of the land?

The finding when made will be returned to this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

[448] MAHMOOD, J.—I concur in the order proposed by my brother Tyrrell, but I wish to add a few words. The learned pleader for the respondent has contended that the suit was one cognizable by the Revenue Courts, and has relied upon the case of *Deodat Tiwari v. Gopi Misr* (1). The judgment of the Court in that case was delivered by my brother Brodhurst, and I concurred in that judgment. Now, s. 93 (b) of Act XII of 1881 provides that "suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let" lie in the Revenue Court. It was under this section that my brother Brodhurst and myself held in that case that suit was cognizable by the Revenue Court. I have carefully examined

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(1) A.W.N. (1882) 102.



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the remnants of the record that remain in this Court, namely, the judgments of the two Courts in that case, but in the absence of the plaint it is impossible to say how far that ruling applies to this case.

Now, the plaint in this case is not for the ejectment of the tenant, but virtually seeks an injunction, directing the tenant to remove the trees in question. This relief cannot be granted by the Revenue Courts, and the suit is therefore cognizable by the Civil Court. The learned pleader for the appellants has drawn my attention to two rulings of this Court in *Raj Bahadur v. Birmha Singh* (1) and *Amrit Lal v. Balbir* (2). The first of these cases is a Full Bench ruling, and I agree with the learned pleader in thinking that the principle of the rulings in those cases applies to this case. I agree with my brother Tyrrell in holding that art. 32, sch. ii of Act XV of 1877, applies to this case, and that the limitation runs from the date "when the perversion first becomes known to the party injured thereby."

The learned pleader for the appellant has also called my attention to a ruling of the Calcutta High Court in the case of *Kedarnath Nag v. Ketturpaul Sritirutno* (3). I have carefully considered the judgment in that case. The portion which deals with the point now raised occurs at the end and is as follows:—"As to the limitation, we think with the lower appellate Court that art. 32 does not apply to this case. It seems to us to fall under art. [449] 120, which gives a period of six years." No doubt the learned Judges in that case had very good reasons for coming to that conclusion, but I have not had the advantage of considering them, as the report gives no reasons upon this point. Under the circumstances I agree with my brother Tyrrell in remanding the case as proposed by him.

*Issue remitted.*

8 A. 449=6 A.W.N. (1886) 210.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

\* JAWAHAR SINGH (*Plaintiff*) v. MUL RAJ (*Defendant*).  
[5th May, 1886.]

*Arbitration—Powers of arbitrators—Payment by instalments—Appeal—Civil Procedure Code, ss 518, 522.*

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed.

*Held* that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to s. 522 of the Code.

\* Second Appeals Nos. 1483 and 1484 of 1885, from decrees of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 29th May, 1885, modifying decrees of Maulvi Muhammad Muksud Ali Khan, Subordinate Judge of Saharanpur, dated the 27th February, 1885.

*Held* also that as it was clear that the reference to arbitration gave the arbitrators full powers not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed.

*Per* MAHMOOD, J.—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in s. 523 were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518.

[F., 12 O.C. 23 ; R., 74 P.R. 1894.]

THE appellant in these cases, Jawahar Singh, brought two suits against the respondent, Mul Raj, one being to recover Rs. 1,316 due for profits and Government revenue and the other for Rs. 2,687-14 due on a bond. The parties referred the matters in dispute in these suits to arbitration. The majority of the arbitrators, [450] in the suit for profits and Government revenue, awarded the plaintiff Rs. 1,021-9, and in the suit on the bond, Rs. 1,778-7, and directed that both these amounts should be paid by certain instalments, and that each party should pay his own costs in both suits. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and each party to bear his own costs. The Court of first instance accepted the award, except in so far as it directed payment by instalments of the sums, holding that the arbitrators had no power to make such a direction. The defendant appealed from the decree of the first Court in both cases with reference to the question of payment by instalments, and the plaintiff preferred objections to the decree in both cases, under s. 561 of the Civil Procedure Code, with reference to costs.

The lower appellate Court held that the arbitrators were empowered to direct payment by instalments, but it was of opinion that they had not exercised this power with discretion, and it reduced the number of instalments. It dismissed the plaintiff's objections, holding that the arbitrators had full power to make the order they did relative to costs.

The plaintiff appealed to the High Court in both cases, contending that the decree of the first Court was not appealable ; that the arbitrators had no power to order payment by instalments ; and that the lower appellate Court had improperly dismissed his objections relative to costs. The defendant preferred an objection under s. 561 of the Civil Procedure Code, to the effect that "the lower appellate Court was wrong in amending the award passed by the arbitrators as to the time fixed for the payment of the instalments."

Muushis *Hanuman Prasad* and *Madho Prasad*, for the appellant.

Mr. *Carapiet*, for the respondent.

### JUDGMENT.

OLDFIELD, J.—In this case the plaintiff sued to recover a sum of money due for profits and Government revenue. In the Court of first instance the dispute was referred to arbitration, and the majority of the arbitrators gave an award in favour of the plaintiff for Rs. 1,021-9, payable by instalments. The first Court, under s. 518 of the Code, modified the award, so far as it related to the payment of instalments, on the ground that this was not a [451] matter which was referred to arbitration. The defendant appealed to the District Judge ; and the Judge, though allowing the power of the arbitrators to settle the manner of payment of the instalments, reduced the number of the instalments that had been fixed. From this decision the plaintiff has appealed, and

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the defendant has filed objections. The plaintiff's plea that no appeal lay to the Judge is bad, with reference to s. 522 of the Code, which disallows appeals "except in so far as the decree is in excess of, or not in accordance with the award." I am of opinion that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge. With regard to the defendant's objection, it has force. The question before the Judge was, whether the first Court had rightly modified the award under s. 518 of the Code, and from the terms of the reference to arbitration, it is clear that it gave the arbitrators full powers, not only as to the amount to be paid, but also as to the mode of payment. Under these circumstances, it appears to me that the plaintiff's appeal must be dismissed, and the defendant's objection allowed, and a decree will be passed in the terms of the award. Each party will bear their own costs. The defendant will have the costs in this Court.

In the connected case, S. A. No. 1484 of 1885, I am of opinion that the plaintiff's appeal falls, because there was an appeal to the Judge, and as no objections have been taken here to the Judge's decree, it is sufficient to say that the appeal must be dismissed with costs in this Court.

MAHMOOD, J.—I concur in my learned brother Oldfield's judgment in both cases. In S. A. No. 1483 of 1885, the submission to arbitration, dated the 19th November, 1884, refers all the disputes involved by the suit between the parties; in other words, "the reference 'of a cause' and 'of all matters in difference in a cause' means exactly the same thing, and only gives the arbitrators power to decide on the questions raised by the pleadings, which are necessary for the determination of the cause" (Russell on *Arbitration*, p. 117). This shows that the arbitrators cannot go beyond the scope of the suit. Now, in this case, the claim is one for money, and a large part of the argument of the learned Munshi on behalf of the appellant was to the effect that the arbitrators exceeded their powers in fixing the instalments. Again, [452] at p. 391 of Mr. Russell's work, it is said:—"An arbitrator may in general fix the time and place at which payment is to be made, though he need not do so unless he think fit. It seems he may award one party to give the other a promissory note payable at a future day, for that is the same thing in effect as awarding the payment of the money at the future day. So he may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time. He may direct payment to be made by instalments. He may add that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be by instalments, that if one be overdue the whole amount shall be payable at once." This is the general rule which is observed in England, and I see no reason why it should not equally be followed in this country. With reference to the remarks of my learned brother as to s. 518 of the Code, I agree that the word "award" used in the last sentence of s. 522, must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in the former section, were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518, and, in the absence of such a check, a Court of first instance, professing to act under s. 518, might pass a decree far in excess of the powers given by that section.

Under these circumstances I agree with the orders proposed by my learned brother Oldfield in both cases.

8 A. 452—6 A.W.N. (1886) 189.

## APPELLATE CIVIL.

Before Mr. Justice Straight, Offg. Chief Justice, and  
Mr. Justice Mahmood.

MAHRAM DAS (*Plaintiff*) v. AJUDHIA (*Defendant*).<sup>\*</sup>  
[21st May, 1886.]

*Act IV of 1882 (Transfer of Property Act), ss. 10, 11—Vendor and purchaser—Contemporaneous "ikrar-namah"—Condition restraining alienation—Restriction repugnant to interest created—Lambardar and co-sharer—Collection of rents by co-sharer—Suit by lambardar for money had and received—Costs—Suit to recover costs by way of damages.*

*M*, a co-sharer in a village, transferred to *A*, another co-sharer, a two annas share, by deed of sale. Upon the same date, *A* executed an *ikrar-namah* in which [453] he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in *M*. *A* suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrar-namah*, *A*, had collected the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipt given by *A*, on the basis of which the suits were dismissed; and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages from *A*, the amount of these costs and expenses, and also to recover certain sums of money realized by *A* as rent from the tenants, and further, by reason of the *ikrar-namah*, to avoid the sale-deed which preceded it.

*Held*, that the deed of sale and the *ikrar-namah* must be regarded as recording one single transaction, i.e., they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the other by the former; and that, in this view, it was clear from the *ikrar-namah* that the proprietary title created by the sale deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right. *Sital Purshad v. Luchmi Purshad* (1) referred to.

*Held* that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of ss. 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail.

*Holman v. Johnson* (2), *Ananthi Tirtha Chariar v. Nagmuthu Ambalagaren* (3), *Bradley v. Peixoto* (4) and *Hussain Khan Bahadur v. Nateri Srinivasa Charlu* (5) referred to. *Balaji J. Rahalkar v. Narayanbhat* (6) distinguished.

*Held* by MAHMOOD, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not,

<sup>\*</sup> Second Appeal No. 1640 of 1885, from a decree of J. Liston, Esq., Deputy Commissioner of Lalitpur, dated the 2nd June, 1885, confirming a decree of J. Greenwood, Esq., Extra Assistant Commissioner of Lalitpur, dated the 14th April, 1885.

(1) 10 C. 30.  
(3) 4 M. 200.  
(5) 6 M.H.C.R. 356.

(2) 1 Cowper 543, quoted in Leake on Contracts, 970.  
(4) Tudor's Leading Cases on Real Property, 968.  
(6) 3 B.H.C.R.A.C. 63.

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in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place.

*Held* by MAHMOOD, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal [451] with the question of costs, and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulva Raya Mudali v. Thangakhi Ammal* (1), *Jalam Punja v. Khoda Javra* (2), *Kabir v. Mahadu* (3), and *Pranshankar Shivshankar v. Govindhlal Parbhudas* (4), referred to.

[F., 9 A. 474=A.W.N. (1887) 95; 11 C.W.N. colxii; R., 5 A.L.J. 140=A.W.N. (1908) 18; 16 C.P.L.R. 129; U.B.R. (1904), 1st. Qr., Crim. Pro. Code, s. 283; U.B.R. (1905), 2nd. Qr., Crim. Pro. Code, s. 283.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi *Sukh Ram*, for the appellant.

Babu *Ratan Chand*, for the respondent.

### JUDGMENTS.

STRAIGHT, Offg. C.J.—This was a suit brought by plaintiff-appellant under the following circumstances:—The plaintiff is the owner of a nine annas and six pies share in a village, in which the defendant is the owner of a four annas share. Prior to 1880, the defendant sold his four annas share to the plaintiff. On the 24th August, 1880, the plaintiff re-transferred two annas out of the four to the defendant for Rs. 50. This sale was effected by a sale-deed of that date. Concurrently with the sale-deed an *ikrar-namah* or agreement was executed by the defendant, in which, among other things, the defendant undertook that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and would not alienate or mortgage it, or otherwise exercise proprietary rights over it. It was further provided that in the event of the defendant committing any breach of these covenants of the agreement, the sale should be avoided, and the proprietary rights in the two annas should re-vest in the plaintiff. This suit has been brought by the plaintiff on the allegations that, in breach of the covenants of the agreement, the defendant has collected the rents of the shares; that he has sought to obtain partition thereof by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff has been compelled to sue the tenants; that in those suits the tenants have exhibited receipts given by the defendant, on the basis of which his suits have been dismissed; and that he has thus been subjected to various costs and expenses. He therefore claims, by way of damages, from the defendant the amount of these costs and expenses as having been incurred by him in consequence of the defendant's action. He further claims, by reason of [455] the *ikrar-namah* of the 24th August, 1880, to avoid the sale-deed which preceded it. The Courts below have dismissed the claim on the ground of limitation, the lower appellate Court holding that art. 91 of the Limitation Act was applicable, and the suit, having been brought beyond five years from the date of the plaintiff's obtaining knowledge of the defendant's breach of the covenants, was barred by time. It appears to me that neither of the Courts have dealt with the case upon the correct footing. The sole ground upon which I propose to dispose of this appeal and the suit is this: I think, in

(1) 6 M.H.C.R. 192.

(3) 2 B. 360.

(2) 8 B.H.C.R.A.C. 29.

(4) 1 B. 467.

the first place, that the two instruments of the 24th August, 1880, must be regarded as recording one single transaction. That is to say, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the defendant by the plaintiff. In this view, it is clear from the *ikrar-namah* that the proprietary title in the share conferred on the defendant and created by the sale-deed is thereby cut down to *nil*; in other words, limitations are placed upon it which render it useless as a proprietary right. Now the principle embodied in s. 11 of the Transfer of Property Act has been recognised time out of mind by Courts, both of law and equity, in dealing with such agreements; and as the reason for it I do not think that I can do better than refer to the observations of Lord Mansfield in *Holman v. Johnson* (1). He says:—"The objection that a contract is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff."

As I understand it, provisions in a contract of the kind before me, which absolutely debar the person to whom the proprietary rights have passed, from exercising those rights, impose conditions which no Court ought to recognize or give effect to; and that a covenant in a sale-deed, the effect of which is to disable the vendee for ever from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of [456] the principle enunciated in ss. 10 and 11 of the Transfer of Property Act. The agreement, therefore, on the basis of which the plaintiff in this case asks for relief, is one which no Court should, in my opinion, assist him in enforcing, for, as I have already remarked, the sale-deed and *ikrar-namah* must be read as one instrument and as recording a single transaction. I, therefore, uphold the decision of the lower appellate Court, but on grounds different from those which that Court has given, as, upon the point of limitation, I think the Deputy Commissioner was wrong. I am of opinion that the suit failed, the plaintiff not being entitled to have the relief prayed by him, and that this appeal must be, and it is, dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusions as the learned Chief Justice, but as both of the judgments of the Courts below have dealt with the case in an unsatisfactory manner, I am anxious to recapitulate the important facts essential to the determination of the question of law involved. I have read the original record and it appears to me that the case cannot properly be disposed of upon the ground of limitation, as it has been by both the lower Courts. I need say nothing further as to the point of limitation, because I think with the learned Chief Justice that, upon the merits, the suit is unmaintainable. The facts of the case are, that in a village called Dasui, there was a nine annas and six pies share of Mahram Das, the plaintiff in this case, and a four annas share owned by Partab and Ajudhia, the former of whom was the father of the latter, who is the defendant. Early in the year 1880, a sale-deed was executed jointly by Partab and Ajudhia, conveying the four annas share to Mahram Das. Under this deed an area of 15 acres was specially reserved for the vendors. It appears that when *dakhil-kharij* was to be

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(1) 1 Cowper 543, quoted in Leake on Contracts 970.



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effected in the revenue records, the vendors did not, as required by the rules, consent to express their concurrence, and no *dakhil-kharij* was carried out. So matters stood when the vendee Mahram Das, on the 24th August, 1880, executed a deed of sale, whereby he conveyed a two annas share out of the four annas previously purchased by him from Partab and Ajudhia, to the latter. This deed contained a clause to the effect that the covenant as to the 15 acres contained in the former sale-deed was null and void, and that the rights of [457] the parties should in future be governed by the new sale-deed. Contemporaneously with this deed, Ajudhia executed an *ikrar-namah* of the same date in favour of the plaintiff Mahram Das, containing certain specific conditions, which were a reproduction of some of the most important terms of the sale-deed itself. Now, I concur with the learned Chief Justice that these two documents should be treated as if they recorded one and the same transaction, and should be read together in order to ascertain the intention of the parties. If any authority is required for this view, the reports are full of cases on the point in connection with the *bye-bil-wafa* form of mortgages. The Courts in this country have ruled to this effect, when it appears that the deed of absolute sale is accompanied by a contemporaneous *ikrar-namah* by a mortgagee or conditional vendee, providing for the re-conveyance of the property to the mortgagor on payment of the price the mortgagee has paid. This view is borne out by the principle on which the judgment of the Privy Council in *Sital Purshad v. Luchmi Purshad* (1) proceeded. Reading the two documents as one, there is every reason to say that if any part of either is such as the law disallows, it must be treated as invalid to that extent. The sale-deed, after reciting that Mahram Das was the owner of a nine annas and six pies share, and had purchased four annas, sets forth conditions which I need not mention, because they are more fully stated in the *ikrar-namah* executed by Ajudhia upon the same dates. The chief points in the *ikrar-namah* are—(i) that the vendee Ajudhia would never sell or mortgage what he had purchased, and if he did, it would be to Mahram Das himself only, for the same price as he had paid; (ii) the executant Ajudhia would never have the right to ask for partition of his share, and was bound to keep it joint, and Mahram Das was entitled to collect rent therefrom; (iii) the property purchased was to remain in the possession of the vendee, and devolve upon his natural or adopted heirs; but in case neither were alive, no other person could succeed to the property under the ordinary law. There were other conditions as to the rent payable by the vendee for the land cultivated by himself, and the condition as to the 15 acres in the old sale-deed was set aside. Then comes an important clause to the effect that if the vendee should act in breach of the terms of the agreement, the sale-deed of the two [458] annas share executed by Mahram Das to Ajudhia should be treated as "waste paper." Further, the *ikrar-namah* says that this purchase of two annas shall be free from all attachments and sales in execution of decrees, and that if any person should attach the share, then Mahram Das would have the right to pay in Rs. 50, and such person might not bring to sale the property purchased by Ajudhia. The learned Chief Justice has said that the Courts of Equity and of Law in England have never allowed such a transaction, and this rule is based upon fundamental principles of public policy.

After the execution of the two documents, there was a litigation between Mahram Das and Ajudhia in connection with partition. There was a partition by some other co-sharers in the village, and Ajudhia having joined with them, succeeded on the 21st June, 1882, and an order was passed by the Deputy Commissioner that the partition proceedings should go on. On the 8th December, 1884, Ajudhia, in contravention of another condition of the *ikrar-namah*, realized two small items from tenants as rent. In consequence of this the plaintiff, Mahram Das, on the 12th December, 1884, brought a suit in the Rent Court against the tenants for the recovery of rent from them as lambardar. His suit was dismissed on the 14th January, 1885, in consequence of the tenants having proved that they had paid their rents to Ajudhia. Upon this the plaintiff prayed for three reliefs,—first, the cancelment of the deed of sale of the 24th August, 1880, on the ground that, by reason of his breaches of covenant, namely, his action regarding the partition and the collection of rents, the defendant had ceased to be owner; secondly, that the defendant had wrongly received Rs. 30 and again Rs. 10 from the tenants, against the terms of the *ikrar-namah*, and was liable to repay the same to the plaintiff as lambardar, as money had and received to his use; thirdly, a sum of Rs. 9-2, which represented costs incurred by the plaintiff in his unsuccessful litigation in the Revenue Court, and was now claimed by way of damages. I will deal separately with each of the reliefs claimed. As to the nature of the rule formulated by the Legislature in s. 11 of the Transfer of Property Act, I need only say that while at one time it might have been doubtful whether the rule was applicable to transfer by way of sale, or was limited to [459] grants short of absolute transfer, the mode in which the doctrine has been dealt with by the Legislature is applicable alike to transactions of both kinds. In other words, the principle of s. 11 applies as much to mortgages or leases as to gifts or sales. Among the cases on the subject, perhaps the best authority is the judgment of Muttusami Ayyar, J., in *Anantha Tirtha Chariar v. Nagmuthu Ambalagaren* (1), and particularly where it is said:—"It appears to us to be a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant and, as such, inoperative. We think there can be no doubt on general principles that, when property is transferred absolutely, it must be transferred with all its legal incidents, and that it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant." These views are in pursuance of the rule laid down in *Bradley v. Peizoto* (2), and is consistent with many other English cases. The same rule obtains in the Muhammadan law. In the case of *Hussain Khan Bahadur v. Nateri Srinivasa Charlu* (3), Holloway, J., said that the rule of justice and equity in these cases was universal, and that where the main object of the grant is clear, conditions clearly inconsistent with that object, cannot be held valid. There are two ways of dealing with a question of this kind. The first is to regard it as a question of construction, and to ask what the parties mean by first saying

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8 A. 452=  
6 A.W.N.  
1886) 189.

(1) 4 M. 200.

(2) Tudor's Leading Cases on Real Property, 968.

(3) 6 M.H.C.R. 356.



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8 A. 492=  
6 A.W.N.  
(1886) 189.

that ownership is to be transferred, and then saying that what is transferred is not ownership in the proper sense. Of course, in such a case every attempt to reconcile these statements should be made, but where no reconciliation is possible, the Courts say that, under these circumstances, the main object of the parties must be kept in view, and that provisions inconsistent therewith must be treated as void. So the matter stands in this case. The case is not like that with which Couch, C.J., had to deal in *Balaji, J. Rahalkar* [460] v. *Narayanbhat* (1), in which the terms of the document were distinctly capable of being interpreted to the effect that there was "no grant of any interest in the land, except of the personal use of it for the particular purpose specified," and that "it must have been intended by the parties to the grant that it was to expire when the grantee and his kinsmen ceased to occupy the house themselves." In the present case there is no doubt that the deed of sale purports to be a conveyance of ownership, and therefore all provisions inconsistent with that purpose are null and void. For these reasons I concur with the learned Chief Justice in holding that Ajudhia is not bound by any covenant which derogates from the ordinary legal incidents of ownership.

The second question is, whether the Rs. 30 and Rs. 10 realized by Ajudhia as rent can be recovered in a suit of this kind. It must be observed that, whatever may be the rights of a lambardar in reference to the collection of rents, the defendant in this case, being a co-sharer in the village and having, though perhaps irregularly, realized sums of money from the tenants, he cannot, in a Civil Court and in a suit of this nature, be made to re-pay the lambardar. The only remedy of the latter is to deduct the items when the *bujharat* or rendition of accounts between himself and the co-sharers takes place.

The third point relates to the sum of Rs. 9-2, the costs of litigation in the Rent Court. Upon this point I am anxious to state the reasons for my conclusions, because there exists some conflict of authority. In the case of *Chengulva Raya Mudali v. Thangakhi Ammal* (2) the Full Bench of the Madras High Court laid down the rule that an action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document. The *ratio* of this ruling, and in particular of the judgments of Scotland, C. J., and Holloway, J., was that, inasmuch as the Registration Act omitted to provide for cost incurred by a party in the course of obtaining registration, therefore the ordinary Courts were entitled to deal with such costs as ordinary damages. Opposed to this view is a decision of the Bombay High Court in *Jalam Punja v. Khoda Javra* (3), in which Westropp, C. J., [461] held that no action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a Mamlatdar's Court under Bombay Act V of 1864. So also in *Kabir v. Mahadu* (4), where a more reasonable view was adopted. It was there held that an action brought to recover costs of proceedings held under Act XX of 1864, is not maintainable when the Court before which such proceedings were taken has made no order as to the payment of such costs. A similar view was taken in *Pranskankar Shivshankar v. Govindlal Parbhudas* (5), where it was ruled that no action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and

(1) 3 B.H.C.R.A.C. 63.

(4) 2 B. 360.

(2) 6 M.H.C.R. 192.

(5) 1 B. 467.

(3) 8 B.H.C.R.A.C. 29.

probable cause, nor will it lie to recover costs awarded by a Civil Court. This no doubt shows some conflict of authority. My own view is, that the real principle is not limited to damages in tort. Wherever a Court has jurisdiction, and a civil suit is brought for the recovery of costs which might have been dealt with in the former litigation, the question may be made the subject of a plea *in limine* upon a matter of procedure. S. 13 of the Civil Procedure Code lays down the general rule of *res judicata*, and it is possible that this rule would in such a case be applicable by analogy. But whatever view may be adopted, the *ratio* depends upon the same principles. Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may, in my opinion, be made the subject of consideration as to damages in a subsequent suit.

In the present case the Rent Court in the former suits was entitled to deal with the question of costs, and dealt with it, and they cannot be made the subject-matter of fresh litigation. I am therefore of opinion that the costs cannot be claimed in this suit. For these reasons I concur in the order proposed by the learned Chief Justice.

*Appeal dismissed.*

8 A. 462=6 A.W.N. (1886) 214=11 Ind. Jur. 28.

[462] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

SHEOBHAROS RAI AND OTHERS (*Defendants*) v. JIACH RAI  
AND OTHERS (*Plaintiffs*).<sup>\*</sup> [25th May, 1886.]

*Pre-emption—Sale to a co-sharer and stranger—Specification of interest sold to stranger and of price—Right of pre-emption of vendee-co-sharer.*

The principle of denying the right of pre-emption except as to the whole of the property sold, is, that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to those transactions which, whilst contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers.

The *ratio decidendi* of *Bhawani Prasad v. Damru* (1) explained. *Sheodiyal Ram v. Bhyro Ram* (2) distinguished. *Guneshee Lal v. Zaraut Ali* (3) and *Manna Singh v. Ramadhin Singh* (4) dissented from.

A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the lower appellate Court held that although the co-sharers-vendees had a pre-emptive right of the same degree as the plaintiff, nevertheless they, having joined a stranger with them in purchasing the property had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale-deed.

Held that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers-vendees, who had an equal right of purchase to that of the plaintiffs in respect

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<sup>\*</sup> Second Appeal No. 1568 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 1st July, 1885, confirming a decree of Munshi Sheo Sahai, Munsif of Muhammadabad Gohna, dated the 12th January, 1885.

(1) 5 A. 197.

(2) N.-W.P.S.D.A.R. (1860) 53.

(3) N.-W.P.H.C. R. (1870) 343.

(4) 4 A. 252.



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MAY 25.

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LATE

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8 A. 462 =

6 A.W.N.

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of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

[Apr., 19 A. 148.]

THE facts of this case are stated in the judgment of the Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondents.

#### JUDGMENT.

[463] MAHMOOD, J.—The facts of this case may be recapitulated here in order to indicate the point of law which has to be determined.

Tilak Rai (defendant No. 5) executed a deed of sale on the 2nd October, 1884, whereby he conveyed certain specific plots of land constituting an area of 15 bighas 14 biswas and 18 dhurs to—(i) Sheobharos, (ii) Sheo Bhik, (iii) Parkash, (iv) Bali, in lieu of Rs. 250 mentioned in the deed. The deed also conveyed a house No. 1044, which belonged to the vendor, but the covenant of sale expressly states that the conveyance was made according to the specification contained in a schedule at the foot of the deed. That schedule shows that out of the area of cultivated land, plots Nos. 707, 1001 and 1002, constituting 2 bighas 5 biswas and 13 dhurs, was sold to Bali, and the rest of the plots to the other three vendees. As to the house, there is no express mention; but the schedule shows that the price paid by Bali in lieu of all that he purchased under the deed was Rs. 49, whilst the remaining sum of Rs. 201 was the amount of the consideration paid by the other three vendees for what they took under the sale.

The suit from which this appeal has arisen was instituted by Jiach Rai, and others, co-sharers of the same *patti* as the vendor Tilak Rai, and as such entitled to pre-emption under the terms of the *wajib-ul-arz* in respect of the sale above-mentioned. The lower appellate Court has found that, with the exception of Bali, the other three vendees are sharers in the same *thok* as the vendor Tilak, and therefore entitled to a pre-emptive right of the same degree as the plaintiffs. But notwithstanding this finding the learned Judge has upheld the decree of the Court of first instance, decreasing the claim in respect of the whole property covered by the sale-deed, on the ground that the three co-sharers of the *thok* having joined Bali, a stranger, in purchasing the property, they had forfeited their pre-emptive right, and could not resist the plaintiffs' suit, even in respect of such portion as they had bought under the sale.

From this decree the three vendees, Sheobharos and others, who have been found to be co-sharers of the *thok*, have preferred this appeal, and the learned Munshi, who has appeared on behalf of the appellant, has confined his argument to the contention [464] that upon the findings of the lower appellate Court itself the suit should have been dismissed, so far as the portion of the property purchased by the appellants is concerned. On the other hand, the learned pleader for the respondent has relied upon certain rulings which I shall presently deal with.

I am of opinion that the contention pressed upon us by the learned pleader for the appellants has force, and that this appeal must prevail. In the case of *Sheodyal Ram v. Bhyro Ram* (1) it was held by three learned Judges of the late Sudder Dewany Adalat of these provinces, that the sale of a share of an estate to a stranger jointly with a co-sharer of the village was in violation of the terms of the *wajib-ul-arz*, the express

(1) N.-W.P.S.D.A. R. (1860) 53,

object of which was to prevent the intrusion of strangers, and that as the sale was one and indivisible, the claimant of pre-emption was entitled to a decree in respect of the whole property sold. Then in the case of *Guneshee Lal v. Zaraut Ali* (1), a Division Bench of this Court carried the rule further by applying it even to a sale-deed in which the shares purchased by the strangers were separately specified, and the latter ruling was again followed in *Manna Singh v. Ramadhin Singh* (2), where it was held that even an express specification of the shares purchased by each vendee could not alter the joint nature of the sale transaction, or permit of its being broken up and treated as involving separate contracts, so as to entitle the co-sharer who has purchased along with a stranger to resist the pre-emptive suit, even in respect of his own specific share.

The first two of these rulings were referred to by me in *Bhawani Prasad v. Damru* (3), not with the object of agreeing or dissenting from the rule therein laid down, but simply to point out the analogy with the point which was then before me. The exact question with which I had to deal in that case was that a plaintiff-pre-emptor who, in claiming pre-emption, joins a stranger in the suit, cannot succeed, because the very nature of his claim violates the fundamental principle of the pre-emptive right. And because the lower Courts in this case have misunderstood a portion of what I said in that case in giving expression to my *ratio decidendi*, I wish to explain my meaning in saying that a [465] pre-emptor "who, in purchasing property himself, joins a stranger in such purchase," could not subsequently "resist the claim of other pre-emptors, who in suing for pre-emption vindicate the policy of the right." All that I meant by the words which I have emphasized was, that the nature of the joint purchase should be such as to make it as impossible to ascertain the interests acquired by each of the joint purchasers as it would be in the case then before me to ascertain how much the pre-emptor was claiming, and how much of the pre-emptive interests he had made over to the stranger whom he had joined in instituting the joint suit. That in such cases the sale, on the one hand, and the suit on the other cannot be subjected to a division of interests, is obvious; and an illustration of this to be found in the recent case of *Kuran Singh v. Muhammad Ismail Khan* (4), in which Petheram, C.J., laid down a rule which, in the result, has the same effect as the rule laid down by me in *Bhawani Prasad v. Damru* (3). And I wish to add that nothing which I said in the latter case should be so understood as to lay down the broad rule that in every case, regardless of the nature and incidents of the transaction of sale, the mere fact of a stranger having acquired rights under the same sale-deed as a co-sharer entitled to pre-emption under the *wajib-ul-arz*, would entitle the other co-sharers to pre-empt even the separately specified portion of property purchased by a co-sharer entitled to an equal pre-emptive right.

In the present case the sale-deed contains an exact specification of the shares purchased and the price paid by the vendees-appellants, and it contains also an exact specification of the shares purchased and the price paid by the vendee-defendant Bali. The case of *Sheodyal Ram v. Bhyro Ram* (5) is not in point, because the three learned Judges who decided that case adopted as their *ratio decidendi* that the shares sold and sought to be pre-empted were not capable of division, and were not separately

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(1) N.-W.P.H.C. R. (1870) 343.

(3) 5 A. 197.

(5) N.-W.P.S.D.A.R. (1860) 53.

(2) 4 A. 252.

(4) 7 A. 860.



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specified. In the case of *Guneshee Lall v. Zaraut Ali* (1) I respectfully think the rule was carried too far, and so also in *Manna Singh v. Ramadhin Singh* (2). With neither of these rulings am I prepared to agree, because the principle or *ratio decidendi* of denying the right of pre-emption, except as to the whole of the [466] property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. In the two last-mentioned cases, the shares are separately specified, and where such shares are separately specified and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated; and the rule should be so limited, for it would be a very great hardship if the vendee, by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser and the price which he had paid for it or distinctly specified in the sale-deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. Moreover, even under the strict rule of the Muhammadan law of pre-emption, this pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he objects to the intrusion of only one of the purchasers, and wishes to exclude him by pre-empting the specific share which such purchaser has individually acquired. And the principle in its application to the present case shows that the exclusion of the purchaser Bali is all that the pre-emptive terms of the *wajib-ul-arz* necessitate, and he would be subjected to no hardship, such as the breaking up of a single bargain implies, if he has to give up all that he has purchased, and receives the price which he individually paid for his specific share of the property.

For these reasons I hold that the lower appellate Court in dealing with this case should not have decreed the claim for pre-emption against the present appellants, who are co-sharers in the same *thok* as the vendor, and as such had an equal right of purchase to that of plaintiffs in respect of the shares specified in the deed of the 2nd October, 1884, as purchased by them.

I would decree this appeal and set aside the decrees of both the lower Courts, so far as they decree the claim of the plaintiffs-[467] respondents to that portion of the property which was purchased by the appellants, and to the extent of the claim which has been successfully resisted by defendants, the plaintiffs will pay costs in all the Courts. The plaintiffs will be entitled to a decree in respect of the share purchased by Bali, against the vendor-defendant and Bali, defendant, with costs, to that extent incurred in the Court of first instance, on condition of the plaintiffs depositing in that Court the sum of Rs. 49 for payment to Bali, defendant, within one month from the date when this decision reaches that Court, otherwise the suit in this respect also will stand dismissed with costs.

The decree will be prepared in the above terms with reference to s. 214 of the Civil Procedure Code.

OLDFIELD, J.—I concur.

*Appeal allowed.*

(1) N.-W.P.H.C.R. (1870) 343.

(2) 4 A. 252.

8 A. 467=6 A.W.N. (1886) 192.

## APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*DEOKI NANDAN (*Defendant*) v. DHIAN SINGH (*Plaintiff*).\*

[26th May, 1886.]

*Sir land—Ex-proprietary tenant—Nature of the right of occupancy—Act XII of 1881 (N.-W.P. Rent Act), s. 7—Trees.*1886  
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6 A.W.N.  
(1886) 192.

In a suit for recovery of possession of zamindari property conveyed by a sale-deed, including certain plots of land which were the defendant vendor's *sir*, the lower Courts held, with reference to s. 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

*Held* that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed.

*Per* MAHMOOD, J., that the principle of the maxim *cujus est solum ejus est usque ad cælum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed. *Bibee Sohoawa v. Smith* (1), *Narendra Narain Roy Chowdry v. Ishan Chandra Sen* (2), *Gopal Pandey v. Parsotam Das* (3), *Goluck Ram v. Nuba Soonduree Dassee* (4), *Shaikh Mahomed Ali v. Bolakee Bhuggut* (5), *Ram Baran Ram v. Sa lig Ram Singh* (6), and *Debi Prasad v. Har Dayal* (7) referred to.

[468] Also *per* MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights, for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect.

[*Appr.*, 29 A. 484=4 A.L.J. 452=A.W.N. (1907) 150; R., 10 A. 159 (160); 10 C. 231; 22 C. 742; 2 O.C. 283; D., 13 A. 571; 14 A.L.J. 244=33 Ind. Cas. 707; 33 M. 253=5 Ind. Cas. 437=7 M.L.T. 231.]

THE plaintiff in this case sued the defendant for *inter alia* possession of three plots of garden land and the trees thereon situated in a village called Thawan. These plots were numbered in the village papers 1021, 1024, and 1039. He claimed by virtue of the purchase from the defendant, under a sale-deed, dated the 13th September, 1883, of the defendant's proprietary rights in the village to the extent of an 8 gandas share, together with the trees, groves, and all the rights and interests thereto appertaining. The defence to the suit was that the land was the defendant's *sir*-land at the time of the sale to the plaintiff, and he was entitled to retain possession of it, as also of the trees, as an ex-proprietary tenant, under the provisions of s. 7 of the North-Western Provinces Rent Act (XII of 1881). The Court of first instance (Munsif of Allahabad) held that plots Nos. 1021 and 1039 were the defendant's *sir*-land at the time

\* Second Appeal No. 1632 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 12th June, 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November, 1884.

(1) 12 B.L.R. 82.

(2) 13 B.L.R. 274.

(3) 5 A. 121.

(4) 21 W.R. 344.

(5) 24 W.R. 330.

(6) 2 A. 896.

(7) 7 A. 691.



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8 A. 467 =  
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of the sale, and that therefore he was entitled to the possession of these plots, as an ex-proprietary tenant, under the law mentioned above, but that the plaintiff was entitled to the possession of the trees, as the defendant had sold all the trees, and trees did not come within the operation of s. 7 of the Rent Act. The Court accordingly dismissed the plaintiff's claim for possession of land Nos. 1021 and 1039, but directed that "the plaintiff should be put in possession of the trees."

The defendant appealed, and the lower appellate Court (District Judge of Allahabad) held that the defendant was not entitled to retain the trees, having sold them to the plaintiff.

The defendant preferred this second appeal on the ground that the land being *sir*, and being occupied by the trees in dispute, he was entitled to retain possession of such trees as long as they existed.

[469] Lala Jokhu Lal, for the appellant.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the respondent.

### JUDGMENT.

MAHMOOD, J.—In this case I think it is necessary to recapitulate the essential facts in order to indicate the point of law which we are called upon to determine.

The defendant was the owner of a 12-ganda share of the zamindari interests in a village. Out of that property he, on the 13th September, 1883, executed a sale-deed as to an 8-ganda share, which he conveyed to the present plaintiff with all rights appertaining thereto, including *sir*-lands and *sayar* items, in consideration of Rs. 800. It appears, as stated by the plaintiff, that the latter, under the sale-deed, obtained possession on the 30th March, 1884. It is alleged that after this the defendant ousted the plaintiff, this being the cause of the present suit. The object of the suit was the recovery of possession of the whole property conveyed by the deed, including three plots, Nos. 1021, 1026, and 1039, on the ground that these also were included in and covered by the deed.

The Court of first instance framed two issues as to these plots in reference to a plea by the defendant to the effect that these plots were his *sir*, and that he was entitled, under s. 7 of the Rent Act, to hold them as an ex-proprietary tenant. The Court held that out of the three plots, Nos. 1021 and 1039 were found to be the defendant's *sir*-lands, and that, as such, the defendant was entitled to hold possession of them as an ex-proprietary tenant. With respect to the remainder, *i.e.*, the larger portion of the suit, the Court decreed the claim; but with respect to the two plots I have mentioned, the provisions of the statute prevailed, and the plaintiff was held not entitled to oust the defendant from possession. At the same time, as it appeared that these two plots had fruit and other trees upon them, the Court decreed the claim in such a manner as to award the plaintiff possession of those trees. The plaintiff does not appear to have appealed, but the defendant did so to the District Judge. The lower appellate Court has upheld the findings of the first Court upon grounds stated in the judgment, namely, that the nature of an ex-proprietary tenure [470] does not entitle the holder to resist a claim of this kind as to the trees on the land which forms the area of that tenure. The lower appellate Court, therefore, affirmed the first Court's decree, and hence this second appeal has been preferred on the ground thus stated in the memorandum of appeal:—"The decision of the learned Judge is against the principle of ex-proprietary tenancy-right, inasmuch as when the land

in suit is *sir*, and is occupied by trees, the appellant had a right to retain possession of them while the trees exist." The case, as it has been argued, rests upon this single question, and my conclusion is that the contention has force and the appeal should prevail. It seems to me that the question in the case is one of first impression; that is to say, I am not aware of any decision of this or any other Court in which there is a specific ruling on the subject. I consider it my duty, therefore, to express my views as fully as may be necessary for the purpose of settling the law. In the first place, it is necessary to bear in mind the exact nature of the right of occupancy held by an ex-proprietary tenant in these Provinces. That right is regulated by s. 7 of the Rent Act, which provides as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal, shall have a right of occupancy in the land held by him as *sir* in such mahal, at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants.' Here then is a statement in clear terms of what are to be the rights of those who, having once been owners of a mahal in whole or in part, cease to be so; and the section ends by saying that these rights in their *sir*-lands, are to be those which are enjoyed by occupancy-tenants. At this point I think it will be useful to trace the history of the occupancy tenure in the Bengal Presidency. I may first refer to the judgment of Phear, J., in *Bibee Sohodwa v. Smith* (1) in which a question having arisen as to the nature of the occupancy-right, that learned Judge said:—"This right, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zamindar by the Legislature, but is, as I understand, in derogation of, and has the effect of cutting down and qualifying, that right. I may say that in my conception of the matter, the relation between the zamindar's right and the occupancy-ryot's right is pretty much the same as that which obtains between the right of ownership of land in England and the servitude or easement which is termed *profit a prendre*. It appears to me that the ryot's is the dominant and the zamindar's the servient right. Whatever the ryot has, the zamindar has all the rest which is necessary to complete ownership of the land, subject to the occupancy-ryot's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained, there must remain to the zamindar all rights and privileges of ownership which are not inconsistent with or obstructive of them." These observations are fully applicable in principle and by way of analogy to the occupancy-rights existing in these Provinces. The next case I wish to refer to is the decision of the Full Bench of the Calcutta High Court in *Narendra Narain Ray Chowdhry v. Ishan Chandra Sen* (2) in which, though in some respects differing from the conclusions of Phear, J., in the case I have quoted, his *ratio decidendi*, and his views as to the nature of the occupancy-right in Bengal were generally adopted. These rulings are important, because the right of occupancy in these Provinces was created at the same time and by the same legislation as in Bengal. The next case is *Gopal Pandey v. Parsotam Das* (3). I refer to my judgment in that case, because I was in a minority of one, and my observations have not been summarized in

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(1) 13 B.L.R. 82.

(2) 13 B.L.R. 274.

(3) 5 A. 121.



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the head-note of the report. After referring to the two cases cited above, I said (at p. 131) that "in the case of an occupancy-tenant the right which the Legislature has conferred upon him is such as subject to the limitation prescribed by the statute, prevails against all the world. The subject of the right is the land held by the tenant, and whatever changes the ownership of that land may undergo, the occupancy-right subsists in, and goes with, the land."

Then, after referring to a ruling of the Sudder Board of Revenue, I went on to say:—"I confess I am unable to take any such view. It seems to me to be based upon what, I cannot help feel-[472]ing, is a misconception of the nature of the occupancy-right. I have already endeavoured to show, by introducing a comparison between the occupancy-right of an Indian cultivator and the *emphyteusis* of the Romans, that the right, as now defined by the statute, is, subject to its own limitations, as much a real and subsisting right as any other kind of estate carved out of the full ownership of land." The rest of the judgment refers to other matters with which we are not now concerned. I still adhere to the views which I then expressed, and I incorporate them in my present judgment because, in dealing with questions of this kind, I understand that the Mufassal Courts suppose my judgment to have been dissented from, upon all points, by the other members of the Full Bench. My view, as I was not at that time aware, is also supported by the decision in *Goluck Ram v. Nuba Soonduree Dassee* (1), where the Judges again compared one kind of tenure in Bengal to the *emphyteusis* of Roman law. Again, there is the case of *Shaikh Mahomed Ali v. Bolakee Bhuggut* (2) in which the *ratio* of the judgment of Mitter, J., is in keeping with the view which I entertain, for it was there held that the trees were included in the lease relating to the land on which they stood. Again, I may refer to *Ram Baran Ram v. Salig Ram Singh* (3) where the Judges of this Court expressed the view that, by virtue of one incident of the occupancy-right, the trees acceded to the soil, and were liable to be dealt with by the occupancy-tenant, unless something happened to bring his tenure to an end.

No ruling upon the exact point here has been cited before us. The question after all depends mainly upon the interpretation to be placed upon the word "land" in s. 7 of the Rent Act. This is a word which has a very specific legal signification. In the first place, I refer to a passage on p. 420 of Maxwell's work on the "Interpretation of Statutes," where it is said:—"The word 'land' includes messuages, tenements and hereditaments, houses, and buildings of any tenure unless there are words to exclude house and buildings, or to restrict the meaning to tenements of some particular tenure." In India, we have a definition of the expression "immoveable property" in s. 3 of the Transfer of Property Act, [473] in which timber is excluded from the notion of land—an interpretation which is special to the Act, and which would go to show, if anything, that the word "land" was of wider meaning than the framers of the Act intended should be attached to the term "immoveable property." In the Oudh Rent Act, s. 13, the word "land" is again defined very broadly. Again, s. 2, cl. 5 of the General Clauses Act, defines the term "immoveable property" in a manner which, though it tends to support my view, is not conclusive on the question. This being so, I think myself entitled to decide the question by reference to first principles. At

p. 293 of Broom's "Legal Maxims," the following remarks occur:— "Not only has land in its legal specification an indefinite extent upwards, but in contemplation of law it extends also downwards, so that whatever is in a direct line between the surface of any land and the centre of the earth, belongs to the owner of the surface; and hence the word 'land,' which is *nomen generalissimum*, includes not only the face of the earth but everything under it or over it; and, therefore, if a man grants all his lands, he grants thereby all his mines, his woods, his waters, and his houses, as well as his fields and meadows." The author proceeds to say that this general meaning may be varied by special circumstances, such as the terms of a grant, and, I suppose, equally by the provisions of a statute. The maxim is *cujusest solum ejus est usque ad cælum*. It appears to me that this maxim is based on sound principles, which are fully applicable to this country.

I must not be understood as holding that the occupancy-rights of an ex-proprietary tenant is such as to render that maxim, which is of peculiar importance in England, fully applicable in a matter of this kind. All I say is that the principle underlying the maxim is applicable to a case like this by way of analogy; and I am prepared to hold that an ex-proprietary tenant has all the rights assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which creates it. The Rent Act, in s. 34, cl. (c) (1) provides that no tenant (and, *a fortiori*, no occupancy-tenant) is to be ejected from his holding for any act or omission "which is not detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let." Then s. 93 (b) [474] provides for "suits to eject a tenant for any act or omission detrimental to the land in his occupation, or inconsistent with the purpose for which the land was let," implying that even a tenant who has an occupancy-right may be ejected. Further, s. 149 provides that "whenever a decree is given for the ejectment of a tenant, or the cancelment of his lease, on account of any act or omission by which the land in his occupation has been damaged or which is inconsistent with the purpose for which the land has been let, the Court may, if it think fit, allow him to repair such damage within one month from the date of the decree, or order him to pay such compensation within such time, or make such compensation within such time, or make such other order in the case as the Court thinks fit; and if such damage be so repaired or compensation so paid, or order obeyed, the decree shall not be executed." So that even if the occupancy-tenant perverts the land, he is not liable to ejectment if he gives compensation.

I refer to these provisions in order to show that the intention of the Legislature was to make the occupancy-tenure as near as possible to full ownership. In support of this view I may refer to my own judgment in *Debi Prasad v. Har Dyal* (1), in which I said that a mortgage of his holding by an occupancy-tenant was not in defeasance of the occupancy-tenure, the words of the statute referring not to dealings of this kind, but to physical misuse of the property. Subject to these restrictions, I hold that the occupancy-tenant practically enjoys the incidents of the ownership of the land, and if so he is entitled to the trees on the land, and to use them as long as the tenure exists.

In the present case, the defendant pretended to convey his *sir* land. Under s. 9 of the Rent Act the sale would be void so far as it purported

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to operate in defeasance of the occupancy right. Under the circumstances the Courts below were wrong in holding that the trees did not form part of his tenure, and in saying that possession might be given to the plaintiff-vendee as proprietor of the trees without disturbing the defendants ex-proprietary tenure. It would be impossible to give effect to such decree without disturbing the ex-proprietary tenant's rights, because if the plaintiff was entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. Supposing the whole of this land were covered by trees, and possession of the trees was given to the plaintiff, the ex-proprietary tenure would practically be defeated.

For these reasons I would decree the appeal, and direct that the decrees of both Courts be so modified as to dismiss the plaintiff's claim, so far as it seeks possession of the trees within the two plots Nos. 1021 and 1039, which have been found to be *sir*, and that costs in all Courts, as regards this particular part of the subject-matter, be allowed to the defendant-appellant in proportion to the amount involved. Beyond this I would not disturb the first Court's decree.

STRAIGHT, Offg. C.J.—I concur in my brother Mahmood's conclusions as to the proper order to be passed in this case.

8 A. 475 = 6 A.W.N. (1886) 233.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

MANGU LAL AND OTHERS (*Defendants*) v. KANDHAI LAL AND ANOTHER (*Plaintiffs*).\* [27th May, 1886.]

*Act XV of 1877 (Limitation Act), s. 14—"Prosecuting"—"Good faith"—"Other cause of a like nature"—Limitation Act, construction of.*

In October, 1881, an account was struck between Kand M. and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs. 885 was paid. In March, 1885, K sued M for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881.

*Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation.

[476] *Per* STRAIGHT, Offg. C.J.—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

\* Second Appeal No. 1636 of 1885, from a decree of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 17th June, 1885, reversing a decree of Rai Bahal Rai, Munsif of Shahjahanpur, dated the 18th April, 1885.

*Per* MAHMOOD, J.—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as “statutes of repose” and not as of a penal character or as imposing burdens. *Roddam v. Morley* (1), *Syed Ali Saib v. Sri Raja Sanyasiray Peddabaliyya Simhulu Bahadur* (2), *Empress v. Kola Lalong* (3), *Bell v. Morrison* (4), *Shah Keramat Hossein v. Golab Koonwar* (5) and *Mohummud Bahadoor Khan v. The Collector of Bareilly* (6) referred to.

[R., 9 A. 11 ; 10 A. 587 ; 12 A. 79=A.W.N. (1890) 25.]

THE facts of the case are stated in the judgments of the Court.  
 Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.  
 Mr. *Abdul Majid* and Pandit *Nand Lal*, for the respondents.

### JUDGMENTS.

STRAIGHT, Offg. C.J.—This appeal relates to a suit brought by the plaintiff-respondents under the following circumstances:—The plaintiffs, alleging that on the 12th October, 1881, a certain account was struck between them and the defendants, seek to recover the balance of that account, on account of which a certain sum of Rs. 885-15 was then paid, and the cause of action is stated to have arisen on the 24th February, 1885. It appears that for some time before the 12th October, 1881, there were pecuniary relations between the parties, the plaintiffs having from time to time advanced moneys to the defendants, which were duly entered in the books of the former. On the 12th October, 1881, those accounts were, as I have said, made up, and a balance of Rs. 1,457 was found due by the defendants to the plaintiffs, and it was agreed between them that this was the correct balance then due. Rs. 885-15 were paid of this amount, and the debt was reduced in round figures to about Rs. 600, the amount with interest, which the plaintiffs in this suit seek to recover as upon an account stated. I have remarked that in the plaint there is an allegation that the cause of action arose upon the 24th February, 1885, and to explain how this date was arrived at, it is necessary to refer to certain matters in connection with a former suit between the same parties in 1885. It would seem that as far back as 1873, the plaintiffs became the [477] purchasers of the equity of redemption in a zamindari estate, which had been mortgaged to the defendants, and on the 15th November, 1884, a suit was brought by the plaintiffs, as purchasers of that equity, against the defendants for redemption of the mortgaged property. In that suit the plaintiffs put their case in this way; that is to say, after stating the amount of the mortgage-debt due from the original mortgagor to the defendants-mortgagees to be Rs. 1,226, they alleged that by an oral arrangement, which had been come to between the defendants and the plaintiffs on the 4th December, 1881, it had been settled that whenever the latter should claim redemption of the property, they should be allowed to take credit to the extent of Rs. 885, the balance then due from the defendants on the account stated on the 24th October, 1881. I need scarcely point out that this was a very peculiar form in which to present a suit for redemption, though I pronounce no opinion as to its legality; but what it was to was this, that because the defendants owed the plaintiffs the latter sum, they were entitled to redeem the property on paying the difference between

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(1) 1 De G. and J. 1=26 L.J. Ch. 438.  
 (3) 8 C. 214.  
 (5) 3 W.R. 101.

(2) 3 M. H.C. R. 5.  
 (4) 7 Peters (U.S.) R. 360.  
 (6) 1 I.A. 167.



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Rs. 885 and Rs. 1,226, the amount of the mortgage. The Subordinate Judge decided that suit against the plaintiffs and seems to have given good reasons for his conclusions, their effect being that the agreement set up by the plaintiffs was found not to have been established. Their suit was therefore dismissed to the extent that they were not allowed to redeem except on payment of the whole sum of Rs. 1,226 due upon the mortgage. This dismissal took place on the 24th February, 1885. This is how we get at the date which the plaintiff assigns as that on which his present cause of action accrued. That is to say, he treats the Subordinate Judge's dismissal of his claim to be allowed the amount demanded in the former suit as constituting his present right to sue. This, however, is not the true way of looking at the matter ; and the real and only plea with which we are now concerned is that of limitation : because, taking as the starting-point the 12th of October, 1881, when the balance of Rs. 885 was left due by payment on account—unless limitation is saved by some rule under the statute—this suit, which was instituted on the 13th March, 1885, is barred. The question then is whether by s. 14 of the Limitation Act the running of time was suspended from the date the former [478] suit was instituted to the date of its decision, namely, the 24th February, 1885. If we are entitled to make this deduction for him, then the plaintiff is within time.

The contention on behalf of the defendants-appellants before us is, that time is not saved under s. 14 of the Limitation Act, and that the plaintiff's claim is barred. I have therefore to see whether the provisions of s. 14 are applicable. Reading s. 14 of the Act, the first thing I have to ascertain is whether the time the plaintiffs ask to have excluded, was occupied by them in prosecuting with due diligence another civil proceeding against the defendant. As to this I see no reason to doubt that the plaintiff prosecuted the former suit of 1884 with due diligence and in good faith. It was "another civil proceeding," and the question then, according to the further requirement of s. 14, is, was it founded upon the same cause of action as the present suit? I am of opinion that it was not. That part of the plaintiffs' claim in the former suit which sought to have the Rs. 885 treated as an amount paid by the plaintiffs to the defendants, rested on an agreement alleged to have been made on the 12th October, 1881 ; and it was in virtue of such an agreement that the plaintiffs claimed to be entitled to deduct so much from the redemption-money they would otherwise have had to pay, and not upon the strength of the account stated. Further, the Court which tried the former suit was not unable to entertain it by reason of a defect of jurisdiction. On the contrary, the Court was competent to entertain and did entertain it, and came to a decision adverse to the plaintiffs. Hence it cannot be argued that the case was disposed of for a defect of jurisdiction, or for any cause *ejusdem generis*. It seems to me that it cannot correctly be said that in the former suit the plaintiffs were prosecuting a civil proceeding against the defendants on the same cause of action as that on which they rely in the present suit ; and, in my opinion, the rule of s. 14 has no application to the present case. The appeal must be allowed with costs, and the order of the first Court being restored, the suit is dismissed with costs.

MAHMOOD, J.—The facts of the case, so far as they are necessary for the disposal of this appeal, are these :—

The defendants held a mortgage charged upon certain zamindari interest in mauza Ikhtiarpur, which is said to have amounted

[479] to Rs. 1,226, in lieu whereof they were in possession of the mortgaged property. Some time about the year 1873, one Ram Prasad, ancestor of the plaintiffs, purchased the equity of redemption from the original mortgagor, subject to the defendants' lien. It is then stated by the plaintiffs that in respect of certain monetary dealings the defendants were indebted to them for a sum of Rs. 1,457, which, after a statement of account, was found as the balance and signed and acknowledged by the defendants on the 4th December, 1881, when they paid Rs. 885-15 towards the debt, thus reducing the balance to about Rs. 600. Subsequently, on the 15th November, 1884, the plaintiffs instituted a suit against the defendants for redemption of their zamindari interest in mauza Ikbtiarpur, and in that suit they alleged that the amount of the balance due by the defendants to them should be deducted from the mortgage-money under an agreement, entered into by the parties for allowing such deduction. The Court which dealt with that suit did not, however, allow such deduction, and in a judgment, dated the 24th February, 1885, held that the alleged agreement was not proved upon the evidence, and the finding appears to have become final.

The present suit was commenced by the same plaintiffs against the same defendants for recovery of the sum due by the latter on the alleged statement of account dated the 4th December, 1881, which has been found to be the wrong date—the right date being the 9th Kuar Sudi, 1289 fasli, corresponding to the 12th October, 1881. The suit was instituted on the 13th March, 1885, and there is no question that it would be barred by three year's limitation under art. 64, sch. ii of the Limitation Act (XV of 1877), unless the period of the pendency of the former suit is deducted in computing the limitation under s. 14 of the Act. The Court of first instance dismissed the suit as barred limitation, though it also went into the merits of the suit. The lower appellate Court on appeal has reversed the decree, holding the suit entitled to the benefit of s. 14 of the Limitation Act, and finding the merits in favour of the plaintiffs.

The learned Munshi who has appeared on behalf of the appellants, has argued the case upon the solitary ground that the suit [480] was barred by limitation, not being, under the circumstances, entitled to the benefit of s. 14 of the Limitation Act. I am of opinion that the contention urged before us by the learned Munshi on behalf of the appellants has force, and must prevail. This case, indeed, in the manner in which it has been dealt with by the lower appellate Court, affords a good illustration of what has so often come within my notice, namely, that the Mufassal Courts are inclined to regard statutes of limitation as operating in derogation of the rights of the parties by barring investigation of the merits; and in this light they are inclined to place as strict a construction against the operation of the statute as if it belongs to the class of penal statutes encroaching on the rights of, or imposing burdens upon, the subject. And I will take this opportunity of giving expression to views which I have long entertained upon the subject; not only because the present case calls for such a course, but also because some uncertainty seems to exist as to the exact manner in which statutes such as our own Limitation Act should be interpreted.

Mr. Maxwell, in his well-known work on the "Interpretation of Statutes" after referring to statutes which encroach on rights, goes on to say (p. 348):—"It would seem statutes of limitation are to be construed strictly. There may not necessarily be any moral wrong in setting up the defence of lapse of time, but it is the creature of positive law, and is not to

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be extended to cases which are not strictly within the enactment; while provisions which give exceptions to the operation of such enactments are to be construed liberally." This view of the law is enunciated by the author on the authority of a judgment of Lord Cranworth in *Roddan v. Morley* (1), and I shall presently have to express my opinion about the rule, because I cannot help feeling that if the rule of liberal interpretation is to be applied to s. 14 of our Limitation Act, I should be inclined to agree with the lower appellate Court in holding that the plaintiffs are entitled to the benefit of that section, it being, in the words of Mr. Maxwell, a "provision which gives exception to the operation of such enactments, as our Law of Limitation. But is the rule as stated by Mr. Maxwell free from doubt? We have the following passage in another authority upon the construction of Statute Law—[481] (Wilberforce, p. 232):—"The statutes of limitation have given rise to some conflict of opinion. It is said by Heath, J., that these statutes always receive a strict construction from the Courts, and the same view is taken by Mr. Sedgwick. On the other hand, Dallas, C.J., expresses himself thus with regard to the 21 Jac. I., c. 16.—'I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction with a view to the mischief intended to be remedied; and this is pointed out by the very first words of the statute, which are 'for quieting of men's estates and avoiding of suits.' It is therefore that this statute and all others of this description are termed by Lord Kenyon 'statutes of repose.' The same phrase has been employed and similar opinions have been expressed by the Courts of the United States." Now, whilst there is a conflict of decision in the English Courts, as to whether the statutes of limitation are to be construed *liberally* or *strictly* in the sense in which these words are technically understood, we find a learned judge and jurist of such high rank as Holloway, J., saying from the Bench of an Indian High Court in *Syed Ali Saib v. Sri Raja Sanyasiraz Peddabaliyra Simhula Bahadur* (2) with reference to the matter:—"For myself I wholly repudiate interpretations, strict or liberal, according to the object-matter of the law. A barbarous code of penal laws was the parent of these doctrines, and the reason disappearing, we see by no doubtful symptoms that the doctrine is disappearing too." These observations are no doubt original and deserve the highest respect; but with all due deference to the eminent authority from which they proceed, I am unable to accept them, partly because they contradict the almost universally recognized rules of the interpretation of statutes, and partly because our Indian Statute Book is still full of legislative enactments which require an ample application of the principle of interpretation which Holloway, J., repudiated. Moreover, that principle constitutes no infringement of the general rule of placing the ordinary grammatical construction upon the language of statutes, but comes into operation only when there is an ambiguity or indistinctness of meaning; for I suppose no one would maintain that where the language of the statute itself is [482] express and clear, effect is not to be given to the words which indicate the intention of the Legislature. And I am prepared to accept for the interpretation of our Indian enactment the language used by Pollock, C.B., with reference to the distinction which Holloway, J., repudiated, that "it is unquestionably right that the distinction should

(1) 1 De G. and J. 1=26 L.J. Ch. 498.

(2) 3 M.H.C.R. 5.

not be altogether erased from the judicial mind"—a distinction which was recognized by the Calcutta High Court in *Empress v. Kola Lalang* (1) in interpreting a penal statute.

The question which still remains to be disposed of is whether, in this state of authority, our Limitation Act should be subjected to the rule of strict construction against its operation; and I have already said that, according to my view, the application of s. 14 of the Act to this case depends upon the decision of the question which I have just indicated. And because the matter is of such a consequence, I may say that I feel myself justified, as an Indian Judge sitting here, to resort to foreign authorities for the purpose of supporting my views upon a question in regard to which the Indian common law is silent, and which has not yet been made the subject of legislation. Under these circumstances it is necessary for me to refer to American authorities, and in the first place to a passage in Angell on the *Law of Limitation*, p. 17, and then to the *dictum* of Mr. Justice Story in *Bell v. Morrison* (7 Peters (U. S.) R. 360), and another of Mr. Justice M'Lean, both of which are referred to at p. 20 (4th ed.) of the same work:—"A statute of limitation," says Mr. Justice Story, "instead of being viewed in an unfavourable light as an unjust and discreditable defence, should have received such support from Courts of Justice as would have made it, what it was intended emphatically to be, a *statute of repose*." Mr. Justice M'Lean, in giving the opinion of the Supreme Court of the United States in 1830, says:—"Of late years the Courts in England and in this country have considered statutes of limitations more favourably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The Courts do not now, unless compelled by the force of the former decisions, give a strained construction, to evade the effect of those statutes." Again, there is the authority of Story, whose works are [483] universally referred to with respect in English Courts. At s. 576 of his *Conflict of Laws* the following passage occurs:—"In regard to statutes of limitation or prescription of suits and lapse of time, there is no doubt that they are questions strictly effecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense. The object of them is to fix certain periods within which all suits shall be brought in the Courts of a State, whether they are brought by or against subjects or by or against Foreigners. And there can be no just reason and no sound policy in allowing higher or more extensive privileges to foreigners than are allowed to subjects. Laws, thus limiting suits, are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper *forum* within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or neglect of the party himself. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by bringing in one common receptacle all the accumulations of past times which are unexplained, and have now, from lapse of time, become inapplicable. It has been said by John Voet with singular felicity that controversies are limited to a fixed period of time,

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lest they should be immortal while men are mortal:—*Ne autm lities immortales essent, dum litigantes mortales sunt.*" I adopt every word of the rules of substantial justice here laid down as distinguished from merely technical rules of procedure.

Applying these principles, I have no doubt, although the view is somewhat opposed to the doctrine recognized in England, and partly countenanced in this country, in the case of *Shah Keramut Hossein v. Golab Koonwar* (1), that in India, in interpreting Acts of Limitation, we are not bound by the rules established by a balance of authority in England. I may refer to the express provisions of s. 4 of the present Act, which place it beyond the power of the Judge as well as beyond that of the defendant, to ignore or waive [484] the plea of limitation. The policy of that section is different from that adopted in the English law; for in England the law of limitation comes under the category of those rules, whether created by the statutes or by the common law, which exist for the benefit of parties, and which, like the plea of minority, may be waived by the person entitled to the benefit. I am not prepared to accept this view as applicable to India. According to our law, the rule of limitation cannot be waived. If this is so, the Limitation Acts are not to be construed as imposing burdens. They are emphatically "*statutes of repose*," especially where, as in India, the absence of effective registration laws, as to many important incidents (such as births, marriages, deaths, and adoptions), would make the preservation of testimony and the ascertainment of facts in many cases next to impossible. If the case of *Mohummud Bahadoor Khan* (2) the Privy Council would not allow any exception to the general Law of Limitation to operate in favour of a minor at the time whose property had been confiscated during the mutiny. This shows that the interpretation to be placed on such laws must be strict in favour of their operation. How then is s. 14 of the Limitation Act to be understood? The original section on the subject was s. 14 of the Act of 1859, which ran thus:—"In computing any period of limitation, prescribed by this Act the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents, *bona fide* and with due diligence, in any Court of judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which an appeal, shall have been annulled for any such cause, including the time during which such appeal, if any has been pending, shall be excluded from such computation." Here the most important expressions is "*same cause of action*" and also "*defect of jurisdiction or other cause*." These words, however, are ambiguous. The section was reproduced in s. 15 of the Limitation Act of 1871; and while its language was more or less preserved, the expression "*same cause of action*" was changed to "*same right to sue*." The expression "*other cause*" [485] was changed to "*other cause of a like nature*," and the words "*is unable to try it*" were added. This phrasology, however, still created considerable doubt, which was manifested in a number of cases, and finally, s. 14 of the present Act again reverts to the old expression "*same cause of action*" instead of "*same right to sue*," and changes "*is unable to try it*" into "*is unable to retain it*." I venture to say that if ever there was an ambiguous clause it is this. In the first place, "*cause of action*" is a

(1) 3 W.R. 401.

(2) 1 I.A. 167.

phrase which has given rise to more difficulty than almost any other. It may mean the title *plus* the injury, or, as it is often used in England, only *injuria* or the violation of right. Then the words "unable to entertain it" are almost equally vague, and the Legislature might well have added illustrations to make them definite. If I were to interpret s. 14 in a liberal sense, I should hold that the present claim refers to the same cause of action, *i.e.*, relates to the same dispute as the former litigation. This, however, it is not necessary for me to rule. But I base my judgment upon the words "good faith" and "other cause of a like nature." I am of opinion that the former litigation, so far as it related to the item now in suit, was not conducted in *good faith*, because I interpret that expression to mean with due care and caution; and if the plaintiffs had taken proper care, they might easily have known that they could not deduct from the mortgage-money the sum due upon a totally different account. Moreover, in that litigation it was found that the agreement set up by the plaintiffs was not proved. In the second place, having chosen to take the course they did, the plaintiffs were not "prosecuting a claim" as those words are used in s. 14. "Prosecuting" does not mean appropriating payments or accounts, as in this case, but endeavouring to recover by legal proceedings money or other rights which a defendant declines to recognize. Again, the plaintiffs having chosen to bring those items into litigation in that way, the Court in that case did deal with it as a matter subject to its jurisdiction. There is consequently no question as to "any cause of a like nature" as contemplated by s. 14.

For these reasons I am of opinion that the plaintiff is not entitled to the benefit of s. 14. I may before concluding refer to the judgment of Peacock, C.J., in *Chunder Madhab Chuckerbutty v. [486] Bissessuree Debez* (1), where he shows that no defect arising from the plaintiff's ignorance of law constitutes a *bona fide* delay.

Again, my view is supported by the decision of the Calcutta High Court in *Rajendro Kishore Singh v. Bulaky Mahton* (2) and of the Bombay High Court in *Pirjade v. Pirjade* (3). The nearest authority is perhaps *Hafizunnessa Khanton v. Bhyrab Chunder Das* (4), where it was held that the pleading of a set-off by a defendant was not prosecuting a remedy within the meaning of s. 14 of the Limitation Act. I need only add that a plea of set-off is nothing but a plea to bar the plaintiff's decree *pro tanto*, unless, indeed, the set-off exceeds the amount claimed in value. In the present case there was no such set-off pleaded by a defendant, and the plaintiff cannot be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court, which, for want of jurisdiction or cause of a like nature, was unable to entertain the claim.

For these reasons I am of opinion that the first Court was right in dismissing the suit as barred by limitation, and I concur in the order proposed by the learned Chief Justice.

*Appeal allowed.*

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(1) 6 W. R. 184.

(3) 6 B. 681.

(2) 7 C. 367.

(4) 13 C.L.R. 214.



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## APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and  
Mr. Justice Mahmood.*

BISHEN DAYAL AND OTHERS (*Defendants*) v. UDIT NARAIN (*Plaintiff*).<sup>\*</sup>  
[31st May, 1886.]

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*Mortgage—Words creating simple mortgage—Bond—Interest after due date—Measure of damages.*

A suit was brought in 1884 upon a hypothecation-bond executed in April, 1875, in which the obligors agreed to repay the amount borrowed with interest at Re. 1-8 per cent. per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provisions:—"Our rights and property in the aforesaid taluk Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond.

*Held* that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the [487] shares and interests of which it recited at the opening that the obligors were owners.

*Held* that although cases might arise in which a jury or a judge might refuse to give a plaintiff any interest, *i. e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as for example, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke v. Fowler* (1) referred to.

*Held* that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Juala Prasad v. Khuman Singh* (2) referred to.

The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances.

[F., 13 A. 330; *Appr.*, A.W.N. (1888) 220; R., 9 A. 158 (161); 11 A. 416; 12 A. 175; 17 A. 581.]

THE facts of this case are stated in the judgment of the Court.  
Mr. J. E. Howard, for the appellants.

Mr. W. M. Colvin and Mr. Habibullah, for the respondent.

## JUDGMENT.

STRAIGHT, Offg. C.J.—This is a suit brought upon a hypothecation-bond of the 27th April, 1875, for Rs. 462, executed by Nihang Rai, defendant, and Digamber Rai, his brother, in favour of the plaintiff. The amount of the bond, with interest at Re. 1-8 per cent. per mensem, was to be repaid on the 18th June, 1875.

The claim of the plaintiff is for Rs. 462, principal, and Rs. 794-8-6, interest to date of suit,—in all for Rs. 1,256-8-6. The first set of

<sup>\*</sup> Second Appeal No. 876 of 1835, from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 17th February, 1885, reversing a decree of Pandit Kashi Narain, Subordinate Judge of Ghazipur, dated the 20th December, 1884.

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(2) 2 A. 617.

defendants consists of Nihang Rai, one of the obligors, and his son Har Narain Rai, Bishen Dayal Rai, son of Digambar Rai, deceased, and his sons Lachmi Narain Rai, Jang Bahadur Rai, and Mahesh Narain Rai, Kali Charan Rai, also son of Digambar, and his son Lal Bahadur Rai.

The second set of defendants are alienees of the property sought to be brought to sale, but they are not concerned in the appeal, and it is unnecessary to set out their names. I should add, that of the first set of defendants Har Narain Rai, Jang Bahadur [488] Rai, Mahesh Narain Rai, Lal Bahadur Rai, being minors, are represented by Lachmi Narain Rai as guardian *ad litem*. The defendants Bishen Dayal Rai, Kali Charan Rai, and Nihang Rai, pleaded, among other matters, that the consideration of the bond was not paid, that the claim is barred by limitation, and that the plaintiff is not entitled to interest after the due date of the bond at Re. 1-8 per cent. per mensem, because he has allowed it to accumulate owing to his own *laches*, in that he took no proceedings upon the bond until the month of November, 1884. Lachmi Narain Rai, for himself and the minor defendants, pleaded that the bond was not executed by Digambar Rai and Nihang Rai to raise money for the necessary expenses of the joint family, of which they and these defendants and their fathers were members; that they, therefore, are not liable to have their shares in the joint property sold; that all that could be sold could be the share and interest of Digambar Rai and Nihang Rai; and further, that the plaintiff cannot, for the reason urged by the other defendants, recover interest at Re. 1-8 per cent. per mensem. With regard to the pleas put forward by the other set of defendants, it is, for the reasons I have already given, unnecessary to deal. It will be convenient here to state that among the issues fixed by the first Court was one in the following terms:—"For what necessity was the money taken? Were the heirs of the executants in any way benefited thereby?" The Subordinate Judge who tried the case as the Court of first instance, being of opinion that the payment of consideration of the bond in suit was not satisfactorily established, dismissed the plaintiff's claim. From this decision an appeal was preferred to the Judge, who, being of a contrary opinion upon that point, and without reference to any of the other questions raised by the defendants, reversed the decree of the first Court and decreed the plaintiff's claim in full. It is from this decree of the Judge that the appeal before us has been preferred, and the pleas that were urged at the hearing were, to shortly state them, as follows:—*First*, that the terms of the bond by which the property was hypothecated were of so general a character that they did not constitute a legal hypothecation; *secondly*, that the plaintiff was not entitled to any interest after due date; *thirdly*, that in advertence to the plea raised by Lachmi Narain [489] Rai, for himself and the minor defendants, and to the issue fixed thereon by the first Court, the Judge should have tried the question whether the money obtained under the bond was used for family purposes. It was further urged, but no specific plea in appeal was taken to that effect, that as the plaintiff had allowed so long a period of time to elapse from the due date of the bond before bringing his suit, he was not entitled to interest, *post diem*, at the rate mentioned in the bond. With regard to the first of the above contentions, it does not appear to me to have any force. It seems to me that the passage in the bond—"Our rights and property in the aforesaid taluka of Rajapur shall remain pledged and hypothecated for this debt"—is sufficiently clear and explicit to constitute and create a charge upon the shares and interests of which it

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is recited at the opening of the instrument that the obligors are the owners. The first plea, therefore, in my opinion, fails. The contention set up by the second plea, which goes the length of asserting that the plaintiff is entitled to no interest at all for the use of his money, *post diem*, places the position of the defendants too high. It has been settled now by the highest authority in *Cooke v. Fowler* (1) that interest may be claimed after due date, but that such claim is in the nature of one for damages; and further, in the above case it was also ruled by the then Lord Chancellor, Earl Cairns, to the effect that, where parties agree for a certain rate of interest, up to the day of payment the same rate may be, though not necessarily, adopted in assessing the subsequent damages for non-payment, such rate being one that might be fairly presumed to afford a criterion of what the parties valued the use of the money at. With regard to the first of these propositions and to the contention of the plaintiff, I am not prepared to say that cases might not arise in which a jury or a judge might refuse to give a plaintiff any interest, *id est* damages, save a nominal amount, but the circumstances would have to be of a very exceptional character; as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. As to the second proposition, I think that in determining the amount of damages, the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed [490] his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest as the basis on which to assess such damages. I have already expressed a view to this effect in a case which is relied on by the defendants—*Juala Prasad v. Khuman Singh* (2). For it is to be borne in mind that the principle upon which the obligee of the bond may recover interest after due date, does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. It therefore becomes a question by what standard the damages should be measured, and it is obviously impossible upon such a matter to lay down any general rule for guidance, as the decision of the question must in each case turn upon its own special circumstances. In the present case, the original loan of Rs. 462 was made for a very short period, and it might well be that for this short period and for pressing reasons the obligors were willing to pay at the rate of 18 per cent. per annum. But it does not necessarily follow at all that they were willing to continue the loan at that rate or that the use of the money over a protracted period of time was of the same value as for the shorter interval. Nor, under ordinary circumstances, could the obligee have reasonably looked to place his money out for a term of years at more than one rupee per cent. per mensem. Now, it is obvious that all these matters were such as should have been considered by the Judge before determining the amount to which the plaintiff was entitled. It is clear from the terms of the bond of the 27th April, 1875, that the provision as to payment of interest at Re. 1-8 per mensem had reference only to the period up to date of payment, and there was nothing in them from which any contract could be implied to pay interest, *post diem*, at the contract rate. The Judge below has, in fact, never considered or tried

(1) L.R. 7 H.L. 27.

(2) 2 A. 617.

this part of the case, and it will be necessary to remand and issue to him for that purpose. To the extent I have above indicated, the second plea, taken in conjunc-[491]tion with the further plea which, as I have stated, was orally urged at the hearing, must prevail.

In reference to the third plea, the matter raised by it altogether escaped the attention of the Judge, and he has held all the first set of defendants indiscriminately and indistinguishably liable, without first determining the circumstances under which the loan was taken by Digambar Rai and Nihang Rai, and whether it was of a character and nature in respect of which those two persons, being the managing members of the joint family, could bind the other members. Moreover, there is nothing to show what the ages are of the minor defendants, and whether all of them were in existence at the time the bond of 1875 was made. Of course, those of them who were not born at that time would have no right to resist the plaintiff's claim. The third plea therefore must, I think, succeed.

Looking at the case, it appears to me that the most convenient and satisfactory course to adopt in regard to it will be to remand the following issues, under s. 566 of the Civil Procedure Code, to the lower appellate Court for findings :—

1. Under what circumstances, and for what purposes, was the Rs. 462 borrowed by Nihang Rai and Digambar Rai on the 27th April, 1875, and in what character did they borrow it, in what way was the money applied, and did Lachmi Narain Rai and the minor defendants benefit by its expenditure?

In determining this issue the Judge will necessarily have to find which of, if not all, the minor defendants were alive at the date of the loan.

2. In advertence to the remarks made by me in dealing with the second plea, to what amount in the shape of damages is the plaintiff entitled for the use of his money between the due date and the date of the institution of his suit?

The findings, when recorded, will be returned into this Court, and ten days will be allowed for objections from a date to be fixed by the Registrar.

MAHMOOD, J.—I concur.

*Issues remitted.*

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### [492] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

TARSI RAM (*Decree-holder*) v. MAN SINGH AND OTHERS  
(*Judgment-debtors*).\* [21st June, 1886.]

*Execution of decree—Adjudication that execution is barred by limitation—Finality of order—Civil Procedure Code, s. 206—Amendment of decree—Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.*

An application to execute a decree passed in April, 1880, was made on the 19th February, 1884, and rejected on the 26th March, 1884, as being beyond time.

\* Second Appeal No. 13 of 1886, from an order of W. T. Martin, Esq., District Judge of Aligarh, dated the 15th September, 1885, affirming an order of Lala Ganga Prasad, Munsif of Koil, dated the 11th July, 1885.

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This order was upheld on appeal in March, 1885. While the appeal was pending the decree-holder in May, 1884, applied to the Court of first instance to amend the decree under s. 206 of the Civil Procedure Code, and in December, 1884, the application was granted. In April, 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 of the Limitation Act (XV of 1877) applied to the case.

*Held*, that No. 179 and not 178 was applicable, that the order rejecting the application of the 19th February, 1884, became final on being upheld on appeal, that the amendment could not revive the decree or furnish a fresh starting point of limitation, and that the application was therefore time-barred. *Mungal Pershad v. Grija Kant Lahiri* (1) and *Ram Kirpal v. Rup Kuar* (2) referred to.

Observations by MAHMOOD, J., on the amendment of decrees and s. 206 of the Civil Procedure Code.

[F., 20 A. 304; 27 A. 575 = 2 A.L.J. 287 = A.W.N. (1905) 108; R., 11 A. 267 (291); 17 A. 39; 25 A. 385; D., 8 A. 519.]

THE decree, of which execution was sought in this case, was dated the 2nd April, 1880. An application to execute the decree made on the 19th February, 1884, was refused on the 26th March, 1884, on the ground that it had not been made within the time allowed by law. The decree-holder appealed from this order. While the appeal was pending, he applied to the Court which passed the decree to amend it under s. 206 of the Civil Procedure Code. This application was granted on the 6th December, 1884. On the 25th March, 1885, the appeal was dismissed.

On the 2nd April, 1885, the decree-holder again applied for execution. The Court of first instance refused the application and its order was affirmed on appeal by the decree-holder. It was contended before the lower appellate Court, on behalf of the decree-holder, that limitation should be computed from the date of the [493] amendment of the decree, the article of the Limitation Act applying being No. 178.

The decree-holder, in second appeal, raised the same contention.

Mr. *Shiva Nath Sinha*, for the appellant.

*Babu Jogindro Nath Chaudhri*, for the respondents.

### JUDGMENT.

OLDFIELD, J.—The only ground taken in the memorandum of appeal is, that the application is one to which art. 178, and not 179, Limitation Act, applies; but this is not so.

The application is to execute a decree, dated the 2nd April, 1880, and is governed by art. 179. On the 19th February, 1884, the decree-holder applied to execute this decree, and it was held to be then barred by limitation.

He subsequently got the Court to amend the decree under s. 206, Civil Procedure Code, and now seeks to execute it as amended; but his decree had been held by an order to be barred by limitation before the amendment, and that order has become final in the matter of executing the decree.

This appeal is dismissed with costs.

MAHMOOD, J.—I am of the same opinion. The decree sought to be executed was passed on the 2nd April, 1880, and was put into execution by an application dated the 19th February, 1884; but execution was disallowed by an order dated the 26th March, 1884, on the ground that it was barred by limitation, and that order was upheld by the Court of appeal on the 25th March, 1885. The adjudication thus became conclusive.

(1) 8 C. 51 = 8 I.A. 123.

(2) 6 A. 269 = 11 I.A. 37.

and final within the principle of the rulings of the Privy Council in *Mungal Pershad v. Grija Kant Lahiri* (1) and *Ram Kirpal v. Rup Kuari* (2). But in the meantime the appellant decree-holder, during the pendency of his appeal, made an application, on the 12th May, 1884, to the Court of first instance, to amend the decree under s. 206 of the Civil Procedure Code, and the application was granted on the 6th December, 1884.

The present application was made on the 2nd April, 1885, for execution of the *amended* decree, on the contention that limitation [494] should be calculated from the date of the amendment, but both the lower Courts have disallowed the application.

I agree with my learned brother Oldfield in holding that the lower Courts acted rightly in rejecting the application. Irrespective of the merits of the amendment itself, I hold that such amendment could neither revive the decree nor furnish a fresh starting point of limitation, whilst there is of course the further consideration that the question of the decree being barred had passed into *rem judicatam*, as I have already pointed out, with reference to the Privy Council rulings.

I now wish to add that the provisions of the last paragraph of s. 206, Civil Procedure Code, have given rise to some difficulty and doubt, and I cannot help feeling that it would have been conducive to clearness, and accuracy, and uniformity of procedure in the Mufassal Courts, if the Legislature had thought fit to frame the paragraph as a separate section, and to have introduced therein definite restriction and limits as to the time within which, and the stage when, the power of amending decrees might be exercised. For instance, if a decree has already become the subject of appeal, I do not think the first Court should amend it under s. 206, for the Full Bench of this Court in *Shohrat Singh v. Bridgman* (3) has held that the decree of the appellate Court is the only decree susceptible of execution, and the specifications of the decrees of the lower Courts as such may not be referred to and applied by the Court executing such decree. Again, in connection with this same section, I may refer to what I said in *Raghunath Das v. Raj Kumar* (4) and also in *Surta v. Ganga* (5), in both of which cases my judgments were upheld and approved by the Full Bench of this Court (I.L.R., 7 All., pp. 875 and 876). Those cases furnish good illustrations of the manner in which the power conferred by the section may be misapplied in the absence of more definite provisions prescribing rules for guidance. I may perhaps also add that the section should also contain an express provision to say that when a decree-holder has so far accepted a decree as framed as to put it into execution, no amendment should be allowed, and the reason should be that the proper stage for such amendment is [495] passed. I may here quote what Markby, J., said in *Goluck Chunder Mussant v. Gunga Narain Mussant* (6):—"It is the duty of the parties, or rather of their pleaders when, they obtain a decree, to see that it is drawn up in the proper form, and it has been ordered by a circular order of this Court of the 19th July, 1867 (8 W. R. Civ. Cir. 2), that the Judges should obtain the signatures of the pleaders before the decree is finally signed. If the parties chose to allow so long a time as that allowed in this case to elapse, before they take any steps upon the decree, without taking any precaution to see that the decree is properly drawn up, it seems to us that it may be fairly

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(4) 7 A. 276.

(2) 6 A. 269=11 I.A. 37.

(5) 7 A. 411.

(3) 4 A. 376.

(6) 20 W.R. 111.



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presumed that they acquiesced in the decree, and that no alteration ought to be made subsequently." The rule laid down by Couch, C.J., in *Prince Muhomed Ruhm-ood-din v. Babu Beer Protap Suhai* (1) has almost a stronger tendency in the same direction.

Again, a Division Bench of this Court, in *Gaya Prasad v. Sikri Prasad* (2) held that an application for an amendment of decree under s. 206, Civil Procedure Code, was governed by three years' limitation under art. 178, sch. ii of the Limitation Act. But I respectfully doubted the accuracy of the rule in the case of *Raghu Nath Das*, to which I have already referred; and my view was supported by the principle upon which the rulings of the other High Courts proceed—*vide Roberts v. Harrison* (3), *Kylasa Goundan v. Ramasami Ayyan* (4), *Vithal Janardan v. Rakmi* (5).

These observations may possibly prove of some service to the Legislature when considering the question of the amendment of the Civil Procedure Code.

*Appeal dismissed.*

8 A. 493=6 A.W.N. (1886) 154=11 Ind. Jur. 31.

#### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

BALBHADAR AND OTHERS (*Defendants*) v. BISHESHAR (*Plaintiff*).<sup>\*</sup>  
[22nd June, 1886.]

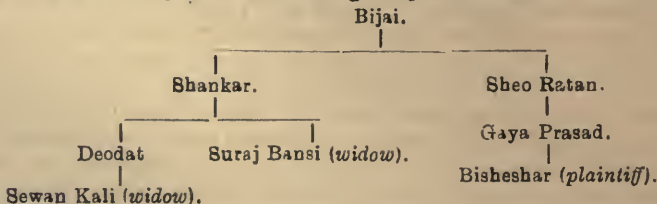
*Hindu Law—Joint and undivided Hindu family—Joint and undivided property—Debts of deceased member—Liability of his interest.*

J, a member of a joint Hindu family, left two sons, R and S. S borrowed money upon a simple bond, and after his death, the obligee sued his [496] widow and daughter-in-law upon the bond, obtained a decree against them, and, in execution thereof, brought to sale S's interest in the property. B, the grandson of R, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of S and himself, and could not be attached and sold in satisfaction of S's debt.

Held that on the death of S, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of S when he had not obtained judgment against S, and taken out execution by attachment against him. *Suraj Bansi Koer v. Sheo Persad Singh* (6) and *Rai Bal Kishen v. Rai Sita Ram* (7) referred to.

[Appr., 11 A. 302; R., 6 C.P.L.R. 60.]

THE following table throws light upon the facts of this case :—



\* Second Appeal No. 1469 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 16th May, 1885, confirming a decree of Maulvi Abdul Razak, Munsif of Bansi, dated the 15th November, 1884.

(1) 18 W.R. 303. (2) 4 A. 23. (3) 7 C. 333. (4) 4 M. 172.  
(5) 6 B. 586. (6) 5 C. 148=6 I.A. 88. (7) 7 A. 731.

Deodat died in the lifetime of his father Shankar, leaving a widow Sawan Kali. On the 11th March, 1877, Shankar executed a bond in favour of Ram Sahai defendant, the payment of which was not secured by the mortgage of property. Subsequently Shankar died, leaving a widow, the defendant Suraj Bansi. It appeared that Ram Sahai then sued Suraj Bansi and Sawan Kali, as the legal representatives of the deceased Shankar, on the bond mentioned above. The suit was decreed on the 8th March, 1881, and in execution of the decree the rights and interests of Shankar in the property now in suit, were sold on the 20th June, 1884, and were purchased by the defendant Sheo Sewak.

The plaintiff brought the present suit to be maintained in possession of the property purchased by Sheo Sewak, alleging that he, as the grandson of Shankar's brother Sheo Ratan, was a member of a joint Hindu family with Shankar up to the time of his death; that the deceased, as a matter of fact, did not die indebted at all; that the bond of the 11th March, 1877, had been fraudulently executed by Suraj Bansi; that the decree of the 8th March, 1881, passed on the aforesaid bond, was likewise collusively obtained by [497] confession of judgment; that the sale of the 20th June, 1884, could not therefore affect the share of Shankar, which it purported to convey to the purchasers, the property being the undivided estate of a joint Hindu family, of which the plaintiff was the surviving member.

The Court of first instance gave the plaintiff a decree. On appeal by the sons of Sheo Sewak, who had died, the lower appellate Court decided that the plaintiff and Shankar were members of a joint and undivided Hindu family; that the question of Shankar's indebtedness under the bond of the 11th March, 1877, was not important, because the share of a member of a joint Hindu family could not be brought to sale in this manner after his death; and that the question of *bona fide* did not need determination in the case, as the plaintiff, who did not stand in the relation of lineal descent from Shankar, was not bound to pay his debts; and it accordingly upheld the decree of the Court of first instance.

In second appeal by the sons of Sheo Sewak it was contended on their behalf that the finding of the lower appellate Court as to the joint nature of the estate of Shankar with the plaintiff was erroneous; that the Court was bound to determine the *bona fides* of the bond of 1877; that the decree of the 8th March, 1881, was properly obtained by impleading Shankar's widow Suraj Bansi, who, according to the Hindu law, was a proper legal representative of her deceased husband, for the purposes of such a suit; and that the auction sale of the 20th June, 1884, therefore, duly conveyed Shankar's share to the appellants.

Munshi *Hanuman Prasad* and *Lala Jucla Prasad*, for the appellants.  
Mr. C. H. Hill and Munshi *Kashi Prasad*, for the respondent.

### JUDGMENT.

MAHMOOD, J.—I may at once state that I am not at all disposed to disturb in second appeal the concurrent findings of the Courts below as to the joint and undivided nature of the family and of the property in suit. Nor do I think it is necessary for us to investigate the *bona fides* of the debt which the bond of 1877 purported to secure, because the case for the defence has all along been that the debt was a personal debt of Shankar, who [498] was separate and divided from the plaintiff. There is absolutely no plea to the effect that the money was borrowed by Shankar as a managing member of a joint Hindu family, for the joint purposes of such

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family ; and no such question having been raised, I think the learned Judge acted rightly in not entering into the merits of the *bona fides* of the bond, for the simple reason that the Hindu law imposes no liability upon the plaintiff to pay off the debts of his grand-uncle under such circumstances. Nor do I think it is necessary for us in this case to consider whether Musammat Suraj Bansi, the widow of Shankar, was rightly impleaded, as the representative of her deceased husband, in the suit which ended in the decree of the 8th March, 1881. For I think that the whole question in the present case, is, whether, after the death of Shankar, any such estate was left by him as could be made liable for the payment of his debts, such as the one for which the auction-sale of the 20th June, 1884, took place.

In *Appovier v. Rama Subha Aiyar* (1) Lord Westbury, in delivering the judgment of the Privy Council, observed that " according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided Hindu family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided " (p. 90). Such being the nature of the rights [499] and interests of a member of a joint Hindu family in the joint property, it was for a long time an unsettled question, whether such rights and interests could, on the one hand, be alienated by private sale by any individual member ; and on the other hand, whether they could be brought to sale for his personal debts in execution of a decree. The former part of this question would seem to be still unsettled by the highest authority, unless the ruling of the Privy Council in *Lakshman Dada Naik v. Ramchandra Dada Naik* (2) be taken to afford a settlement of the matter ; for the Lords of the Privy Council in *Phoolbas Koonwur v. Jogeshar Sahoy* (3) only referred to it, but abstained from giving any ruling. The question was again referred to by their Lordships, but not determined, in *Deendyal Lal v. Jugdeep Narain Singh* (4), which, however, settled the latter part of the question enunciated by me. In that case their Lordships drew a distinction between the power of private alienation possessed by a member of a joint Hindu family and the power of a Court to seize his share, at the instance of a judgment-creditor, in execution of a decree for personal debts. And I take that case to have finally decided the question in the affirmative, and to have ruled that the share of a member of a joint Hindu family possesses a seizable character for purposes of execution, and that when it is brought to sale, the purchaser at such execution-sale possesses the right

(1) 11 M. I. A. 75.

(3) 1 C. 226 = 3 I. A. 7.

(2) 5 B. 48 = 7 I. A. 181.

(4) 3 C. 198 = 4 I. A. 247.

of compelling the other members of the joint family to separate the debtor's share by partition. The same I understand to be the effect of a more recent ruling of their Lordships in *Hardi Narain Sahu v. Ruder Perakash Misser* (1). But the case which needs special reference here is the ruling of their Lordships in *Suraj Bunsu Koer v. Sheo Persad Singh* (2), which carried the rule somewhat further, inasmuch as it was there held that seizure by attachment in execution is sufficient to constitute, in favour of a judgment-creditor, a valid charge upon property to the extent of a joint member's undivided share and interest, and that such charge could not be defeated by his death subsequent to such attachment, though antecedently to the actual sale. In laying down this rule their Lordships disapproved of the [500] ruling of this Court in *Goor Pershad v. Sheo Deen* (3), so far as that ruling ignored the seizable character of an undivided share in joint property, which had since been established by the ruling of the Privy Council in the case of *Deendayal Lal v. Jugdeep Narain Singh* (4), to which I have already referred. But the exact question here is not the same as in that of *Suraj Bunsu Koer* (2). Here, during the lifetime of Shankar, the bond of the 11th March, 1877, was never even sued upon: the decree of the 8th March, 1881, and the sale of the 20th June, 1884, took place when Shankar was no longer in existence. And in such circumstances the exact question before us is, whether Shankar left behind him any such rights at all as could either be seized in execution or be made the subject of an execution.

Fortunately this question needs no reference to original authorities, because I hold that the doctrine of the Lords of the Priyy Council in the case of *Suraj Bunsu Koer* (2), is conclusive upon this point. Their Lordships observed:—"It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts, and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands."

These observations are, in my opinion, fully applicable to this case, and, indeed go beyond the exigencies of what we have got to determine here, the plaintiff not being a son of the deceased Shankar, for whose personal debts his share was purported to be sold on the 20th June, 1884. And I hold that upon that date Shankar having died even before the litigation which terminated in the decree of the 8th March, 1881, his share had already vanished and been taken by the plaintiff by right of survivorship, without being subject to the payment of Shankar's personal debts. I may perhaps also add that the family being joint, Musammatt Suraj Bunsu, the widow of Shankar, could have no such rights in her husband's share as could be affected by the sale in execution of the decree against her; whilst the fact of Musammatt Sawan [501] Kali having also been impleaded in that suit, cannot, of course, help the defendants-appellants, purchasers of the execution-sale, she being the widow of Shankar's son who had pre-deceased his father.

For these reasons I would dismiss this appeal with costs.

OLDFIELD, J.—This suit relates to property left by one Bijai. He was succeeded by his sons Sheo Ratan and Shankar; the plaintiff

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(1) 10 C. 626.

(3) N.-W.P.H.C.R. (1872) 137.

(2) 5 C. 148=6 I.A. 88.

(4) 3 C. 195=4 I.A. 247.



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represents the former. Shankar before his death borrowed money on a simple bond from one Ram Sahai, who after the death of Shankar sued his widow and daughter-in-law, and obtained a decree against them, and in execution brought to sale Shankar's interest in the property, and it was purchased by defendant-appellant.

The plaintiff is the grand-nephew of Shankar, and sues to recover the property sold at auction, on the ground that it was the joint property of Shankar and himself, and could not be taken and sold in execution of Shankar's debt.

The Courts have allowed the claim and the defendant has appealed. The objection to the finding that the property was joint undivided property of Shankar and the plaintiff is not one which can be entertained in second appeal, the finding on this point by the Courts below being one of fact; and when it has been found that the property was undivided the appeal must fail. On the death of Shankar, his interest passed to plaintiff by survivorship, and was not liable after his death for any personal debt which he had incurred. No charge had been made on the property, and the creditor could not recover his money from the joint property after the death of Shankar, when he had not obtained judgment against Shankar, and taken out execution by attachment against him. I may refer on this point to the case of *Suraj Bansi Koer v. Sheo Persad* (1) and *Rai Bal Kishen v. Rai Sita Ram* (2). The appeal will be dismissed with costs.

*Appeal dismissed.*

8 A. 502 = 6 A.W.N. (1886) 149.

[502] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

DEO DAT (Defendant) v. RAM AUTAR (Plaintiff).\*

[22nd June, 1886.]

*Mortgage—Usufructuary mortgage—Pre-emption—Redemption—Interest—Act IV of 1882 (Transfer of Property Act), ss. 51, 83, 84.*

Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as trespasser, who would have no right to enjoy the usufruct of the property which he has purchased.

*Udan Singh v. Muneri Khan* (3) dissented from *Manik Chand v. Rameshur Rae* (4), *Buldeo Pershad v. Mohun* (5) and *Ajudhia v. Baldeo Singh* (6) followed.

In February, 1893, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August, 1883, the decree-holder executed his decree by depositing the principal amount

\* Second Appeal No. 1755 of 1885, from a decree of J. M. C. Steinbelt, Esq. District Judge of Azamgarh, dated the 7th August, 1885, confirming a decree of Babu Nihala Chander, Munsif of Azamgarh, dated the 21st March, 1885.

(1) 5 C. 148 = 6 I.A. 88.

(2) 7 A. 731.

(3) 2 Cal. S.D.A. R. 85.

(4) N.-W.P.S.D.A.R., (1865), vol. ii, 171.

(5) N.-W.P.H.C.R. (1866) Rev. Ap. 30.

(6) 7 A. 674.

of the mortgage-money, and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884.

*Held*, that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August, 1882, he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883.

*Semle* that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali v. Mathura Kandu* (1) referred to.

[503] *Held* with reference to s. 84 of the Transfer of Property Act (IV of 1882) that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff to his knowledge deposited the whole money due on the mortgage.

*Held*, with reference to the last paragraph of s. 51 of the same Act that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were out.

THE plaintiff in this case sued to recover possession of certain mortgaged property. The property, a share in mauza Chak Chaube, was mortgaged by the plaintiff on the 30th August, 1882, by way of conditional sale, to one Har Prasad for Rs. 699, for a term of two years ending on Jait Sudi 15th, 1291 fasli. Under the terms of the mortgage, the mortgagor delivered possession to the mortgagee and authorised him to receive the profits, which amounted to Rs. 40, per annum, in lieu of a part of the interest, which was fixed at one per cent. per annum; and in respect of the balance of interest, namely, Rs. 44, it was agreed that the mortgagor would pay the same in cash along with the principal on taking an account at the time of the redemption.

Under the terms of the *wajib-ul-arz* of the mauza the defendant Deo Dat brought a pre-emptive suit in respect of the conditional sale, and obtained a decree on the 5th February, 1883, which was finally upheld in appeal on the 14th February, 1884. In the meantime, on the 23rd August, 1883, the defendant executed his decree by depositing Rs. 699; the principal amount of the mortgage-money, and obtained possession of the property, being thus substituted for the original mortgagee. Matters stood thus, when the plaintiff, proceeding apparently under the provisions of s. 83 of the Transfer of Property Act (IV of 1882), deposited in Court on the 6th June, 1884, the sum of Rs. 699, being the principal sum of the mortgage-money, claiming the same to be adequate for redemption. Upon the objection of the defendant to accept the money on the ground that the deposit fell short of the amount of interest due on the mortgage, the plaintiff's case was struck off on the 15th August, 1884, the deposit remaining in Court. Subsequently the plaintiff made a further deposit of Rs. 44 on account of interest on the 21st August, 1884, thus making the whole

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deposit amount to Rs. 743. The defendant again, by an application made on the [504] 16th September, 1884, refused to accept the deposited money, on the ground that it fell short of the entire sum due on the mortgage. The proceedings under s. 83 of the Transfer of Property Act came to an end on the 28th November, 1884, when the Court rejected the plaintiff's application for summary redemption, but allowed the sum of Rs. 743 to remain a deposit in Court.

The present suit was instituted on the 26th January, 1885, having for its object recovery of possession of the property by redemption of the mortgage, on the ground that the deposited sum of Rs. 743 was all that was due on the mortgage. The suit was resisted upon the ground that the plaintiff did not properly tender the mortgage-money to the defendant, nor did he make an adequate deposit in Court, and that the defendant having cultivated the land, he could not be ejected till the crops were cut and taken away.

The Court of first instance held that the sum of Rs. 743, to which the deposit amounted on the 21st August, 1884, was all that was due to defendant on the mortgage on that date; and that the defendant, having executed his pre-emptive decree, by depositing Rs. 699, the consideration of the conditional sale, on the 23rd August, 1883, was entitled to remain in possession till he had gathered and carried away the crops which he had sown.

The defendant appealed, contending that he was entitled to an additional sum of Rs. 61-10-0 as interest on the mortgage-money, and to Rs. 37-15-0 as costs, making a total sum of Rs. 99-9-0, which had been disallowed by the first Court. The lower appellate Court dismissed the appeal.

The defendant appealed to the High Court.

Mr. J. Simeon, for the appellant.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the respondent.

### JUDGMENT.

MAHMOOD, J.—The contention urged before us on the defendant's behalf raises three main points for determination:—

1. Whether the defendant was entitled to claim interest on the mortgage-money for the period between 30th August, 1882, the date of the mortgage, and the 23rd August, 1883, when he enforced his pre-emptive decree by depositing Rs. 699, the principal consideration-money of the conditional sale in respect of which he enforced his pre-emption.

2. Whether the defendant was entitled to claim any interest after the 21st August, 1884, when the deposit by the plaintiff, under s. 83 of the Transfer of Property Act, amounted to Rs. 743.

3. Whether, under the circumstances of this case, the defendant was entitled to costs.

I will dispose of each of these points in the order in which I have mentioned them. The first of these questions depends upon the determination of a very important point of the law of pre-emption. That a successful pre-emptor stands in the shoes of the original vendee in respect of all the rights and obligations arising from the sale under which he has derived his title, is a question which stands upon an undoubted basis, for the right of pre-emption is nothing more or less than the right of substitution. This was pointed out by me at considerable length in *Gobind*

*Dayal v. Inayatullah* (1), where the Full Bench of this Court generally accepted my conclusions as to the nature of the pre-emptive right. This, however, is not a point which is contested on either side in the argument of the learned pleaders for the parties. All that the learned pleader for the appellant contends for here is, that his client, having succeeded to, or rather been substituted for, the original conditional vendee, Har Prasad, is entitled to claim the benefit of all the conditions of the mortgage, and is, therefore, entitled to claim interest even for the period antecedent to the 23rd August, 1883, when he enforced his pre-emptive decree, by deposit of the consideration of the conditional sale under the decree of the 5th February, 1883. I am of opinion that this contention is wholly unsound. It is perfectly true that a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer. But it is equally true, and stands to reason, that those benefits cannot be claimed for any period antecedent to such substitution itself. The right of pre-emption as based upon the *wajib-ul-arz* partakes of the nature of those obligations which fall short of an interest in immoveable property, though they [506] are annexed to the ownership of such property. The nature of such obligations is well described in s. 40 of the Transfer of Property Act, which I refer to only by way of analogical comparison. A pre-emptor, therefore, before his pre-emption is *actually* enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is only entitled to take by substitution, but has not yet actually taken. On the other hand, the original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price should be entitled to the profits of the property, which he can take only upon duly making such payment.

This view of the law is supported by some cases to be found in the reports. There is a very old ruling—*Uodan Singh v. Muneri Khan* (2), where it was held that if *A* transfer lands to *B* by sale, and *C* afterwards come forward and establish his right of *shufa* or pre-emption, he will be entitled to the lands at the price paid for them by *B*, who will be compelled to refund the profit accrued during the period of his possession to *C*, receiving himself the purchase-money back from *A*. That was a case decided so long ago as 1813, and seems to have depended entirely upon the Muhammadan law of pre-emption. The judgment, however, contains no authority for the rule there laid down; and there can be no doubt that the ruling was erroneous, being opposed to the most authoritative texts of the Muhammadan law itself. Such indeed seems to be the view taken by the Sudder Court of these Provinces in *Manik Chand v. Rameshwar Rae* (3), which was a suit based upon the *wajib-ul-arz*, and where the learned Judges held that the “pre-emptor could have no preferential right till he had tendered the full price, and therefore the defendant’s intermediate possession could not be regarded as illegal.” This ruling was followed by this Court in *Buldeo Pershad v. Mokun* (4), where the learned Judges, after referring to the rule of Muhammadan law of pre-emption, held it to be equitable, and then went on to say:—The purchaser has in most instances paid the purchase-money; is he [507] to lose all interest and

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(1) 7 A. 775.

(3) N.-W.P.S.D.A.R (1865), vol. ii, 171.

(2) 2 Cal. S.D.A.R. 85.

(4) N.-W.P.H.C.R. (1866) Rev. Ap. 30.



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profits because, at some subsequent time, the contingency occurs that a pre-emptor claims and exercises his right of pre-emption? and is the pre-emptor, who has kept his money in his pocket till it suited his purpose to exercise his right, to obtain profit, which will be the greater in proportion to his delay?"

The same rule was laid down by Straight, J., in *Ajudhia v. Baldeo Singh* (1), which is the latest case upon the subject. I entirely concur in the principle upon which these rulings proceed; and if the exigencies of this case needed it, I would, by reference to the original texts of the Muhammadan law, have shown that the principle is a necessary consequence of the very nature and incidents of the right of pre-emption itself.

Applying the principle to this case, it seems to me perfectly clear that till the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing Rs. 699—the consideration of the conditional sale of the 30th August, 1882—he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom. And it follows that my answer to the first question in the case must be that the defendant is not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883. This view, however, raises a subsidiary question, namely, that if the defendant is not entitled to interest for that period, who else is entitled to it? This is a question which we are not bound to determine in this case, but I think I may safely say, as a necessary consequence of the *ratio decidendi* adopted by me, that the proper person entitled to receive the interest for that period was Har Prasad, in whose favour the *bye-bil-wafa* mortgage of the 30th August, 1882, was originally executed, and who was dispossessed under the defendant's pre-emptive decree: and I think I may add that in passing that decree, the Court should have allowed the amount of interest above mentioned in addition to the principal mortgage-money. This view is based upon the same principle as my ruling in *Ashik Ali v. Mathura Kandu* (2), where it was held that the pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such [508] mortgage at the time it became absolute. Here the "price" which should have been allowed to Har Prasad under the decree of the 5th February, 1883, should have been the principal mortgage-money *plus* such amount of interest as might have been due on the mortgage up to the period fixed by the Court for enforcement of the pre-emptive decree. That decree, having now become final, cannot of course be interfered with in this case: but its effect was to enable the defendant to pre-empt on payment of less money than he was entitled to. And I have no doubt that his present claim for interest antecedent to the 23rd August, 1883, when he executed the decree, is wholly unconscionable and opposed to equity.

The next question in the case is a very simple one, because the rule contained in s. 84 of the Transfer of Property Act (IV of 1882) furnishes a clear guidance. The section says that when a mortgagor has duly made deposit under the preceding section of all that is due on the mortgage, the interest on the mortgage money is to cease. Here the plaintiff deposited the principal sum of the mortgage-money on the 6th June, 1884, but that deposit was clearly inadequate and would scarcely entitle him to the benefit of s. 84 of the Act, even *pro tanto*. I will, however, not determine this point, because it is not raised here, and the plaintiff himself made a

further deposit of Rs. 44 on account of interest on the 21st August, 1884, thus making the whole deposit amount to Rs. 743, which has been found by the Court below to be all that was due on the mortgage on that date, and of which the defendant had due notice. The amount so deposited of course left out of account the interest for the period antecedent to the 23rd August, 1883, and to which, as I have already shown, the defendant was not entitled. The Courts below were, therefore, in my opinion, right in not allowing interest to the defendant after the plaintiff had, with due knowledge of the defendant, deposited the whole money due on the mortgage to the defendant. And I may also add, with reference to a subsidiary question in the case, that the Courts below did not act rightly in rendering the decree subject to the condition that the defendant was not to be evicted till the crops he had sown were cut. The rule applicable to such cases is clearly enunciated in the last paragraph of s. 51 of the Transfer of Property Act, which creates no bar to eviction in such a case, but only lays down that the transferee [509] is entitled to the crops sown by him, and to free ingress and egress to gather and carry them. The decree in this case should have been framed accordingly, but I need say nothing more about the matter, because that part of the decree has not been made the subject of complaint before us by the plaintiff-respondent.

Then as to the question of costs, which has been made the subject of a separate ground of appeal by the defendant-appellant before us. S. 220 of the Civil Procedure Code gives ample power and discretion to the Court in connection with costs, and in the present case the defendant, having all along acted wrongly in declining to accept the plaintiff's deposit, and in giving up possession to him, was properly made liable for the plaintiff's costs by the Courts below.

I would dismiss this appeal with costs.

OLDFIELD, J.—I concur in the proposed order.

*Appeal dismissed.*

8 A. 509 = 6 A.W.N. (1886) 176.

### APPELLATE CRIMINAL.

*Before Mr. Justice Straight, Offg. Chief Justice.*

QUEEN-EMPRESS v. BALDEO AND OTHERS. [28th June, 1886.]

*Accomplice—Corroboration—Dacoity—Possession of stolen property.*

Criminal Court dealing with an approver's evidence in a case where several persons are charged should require corroboration of his statements in respect of the identity of each of the individuals accused. *Queen-Empress v. Ram Saran* (1), *Queen-Empress v. Kure* (2), and *Reg v. Mullins* (3) referred to.

A, B, M, R and N were tried together on a charge under s. 460 of the Penal Code. The principal evidence against all of them was that of an approver. Against A, B and M there was the further evidence that they produced certain portions of the property stolen on the night of the crime from the house where the crime was committed. With regard to R, it was proved that he was present when B pointed out the place where some of the property was dug up, but he did not appear to have said anything or given any directions about it.

*Held*, with reference to A, B and M, that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the

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6 A.W.N.  
(1886) 149.

(1) 8 A. 306.

(2) A.W.N. (1886) 65.

(3) 3 Cox. C. C. 526.



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APPEL-  
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CRIMINAL.

8 A. 503=

6 A. W. N.

(1886) 176.

crime as entitled the Court to act upon his story in regard to those particular persons.

[510] *Held* that, inasmuch as there was no sufficient material to warrant the inference of guilty knowledge on *R*'s part, and, with regard to *N*, no property was found with him or produced through his instrumentality, both *R* and *N* ought to have been acquitted.

THESE were appeals from convictions by Mr. G. H. Pearse, Sessions Judge of Meerut, dated the 14th April, 1886. The appellants, Baldeo, Ram Bakhsh, Mir Singh, Amir Bakhsh and Amman were convicted, under s. 460 of the Indian Penal Code, of house-breaking by night, in the course of the commission of which offence one Bahal Singh was murdered by some of them.

The appellants were jointly tried with three other persons called Masita, Mohsam Khan and Jamna, who were acquitted, the last mentioned being charged under s. 411 of the Penal Code.

Bahal Singh was a man reputed to be possessed of considerable wealth in coin and ornaments. On the night of the 4th January, 1886, his house was broken into, and he was murdered and the house plundered. The only direct evidence against the appellants was the evidence of an accomplice called Ghariba. He stated that a dacoity on Bahal Singh had been contemplated for some time; that Baldeo, appellant, told him that he had five or six good men at his disposal, the three chaukidars Amman (appellant), Amir Bakhsh (appellant) and Masita, Mohsam Khan and his son, Ram Bakhsh (appellant), and asked him to get one or two men; that he enlisted Mir Singh Jat (appellant) a very powerful man; that Baldeo, who was a neighbour of Bahal Singh's, fixed the 4th January, as he found the house would be empty; that the gang assembled at about 7 or 8 p.m., after dark, and fixed the rendezvous for midnight, the three chaukidars going off meanwhile on their rounds; that five men, Baldeo, Ghariba, Mir Singh, Amir Bakhsh and Mohsam Khan, escalated the wall; that Baldeo had brought a rope, with which they let down Mohsam Khan into the courtyard, that he opened the door of the staircase and they all got down, opening for the other three; that Baldeo was the guide entirely that Mir Singh was told off to overpower Bahal Singh, which he did by leaping on him on his charpai and smothering him; that the property was in a room close to where Bahal Singh was sleeping; and that it was quickly removed and carried off to Baldeo's house and divided.

[511] The nature of the evidence corroborating that of the accomplice, Ghariba, appears from the following extract from the Sessions Judge's judgment:—

"The corroborative evidence against Baldeo is that of the Sub-Inspector Narain Prasad, Rukha and Sohan Pal, as to his pointing out certain silver articles buried on the Jamna bank. This is also the evidence against his son, Ram Bakhsh. They both went together to point these things out. Fakir Chand and Harnam prove that Amir Bakhsh produced some 'kharas' and a piece of wire from a ruined house. After Amman had denounced Ghariba, and Mir Singh and Ghariba, who had been swindled by Mir Singh and Baldeo in the division of the property, had made a clean breast of it, two Gujars, Jit and Sawant, were employed if possible to trace the property. Baldeo, as shown above, produced certain small things and Mir Singh also admitted that he had some things which his uncle, Jamna, could give up. It may here be noted that Jit said he made promises to the different accused if they would disgorge, but those promises were in private conversation, and certainly carried none of the authority specified

ins. 24, Evidence Act. Mir Singh named five articles, an 'arsi', 'chilas', 'gindas', 'balis' and a 'polchi' all of silver. Jit and Sawant went with a third man to mauza Behari and told Jamna that Mir Singh had sent for these articles. Jamna gave them up all except 'polchi.' When the things were shown to Mir Singh in presence of the Inspector, he at once said that the 'polchi' had not been sent."

The Sessions Judge further observed as follows:—"While the inquiry was on, there was apparently a competition among most of the accused to give a certain amount of information in the hope of securing impunity for themselves. Nothing of course in the nature of a confession made during the police inquiry can be put in evidence except so far as anything was elicited from it. Fakir Chand, for instance, proves that not only was Amman constantly frequenting Baldeo's house before the murder but that Amman gave the first information concerning the complicity of Ghariba and Mir Singh to the two outside Jats. In consequence of this certain property was recovered from Mir Singh, and Ghariba was sufficiently alarmed to turn Queen's evidence, besides disgorging some of his share."

[512] The Sessions Judge was of opinion, referring to *Empress v. Kure*, that the circumstances which appear above were sufficient corroboration of the evidence of Ghariba to warrant the conviction of Baldeo, Ram Bakhsh, Amman, Amir Bakhsh and Mir Singh, the appellants, under s. 460 of the Penal Code. He acquitted Masita and Mohsam Khan, there being no corroborative evidence against them; and he also acquitted Jamna, who had been charged under s. 411 of the Penal Code in respect of the property delivered by him to the two Jats, Jit and Sawant.

Mr. W. M. Colvin, for Baldeo, Mir Singh and Ram Bakhsh, appellants.

The appellants Amir Bakhsh and Amman were not represented.

The Public Prosecutor (Mr. C. H. Hill), for the Crown.

### JUDGMENT.

STRAIGHT, Offg. C.J.—These are five appeals from a decision of the Judge of Meerut, passed on the 14th of April last, convicting the appellants under s. 460 of the Penal Code, and sentencing Baldeo and Mir Singh to transportation for life, and Amman, Ram Bakhsh and Amir Bakhsh to seven years' rigorous imprisonment. The five appellants were tried, along with three other persons, by name Masita, Mohsam Khan and Jamna, who were acquitted, for having, on the night of the 4th January last, been jointly concerned in the breaking into the dwelling-house of one Bahal *bania* of Kutana, in the course of the commission of which offence the said Bahal was murdered. The only direct evidence against the appellants is that of an approver, by name of Ghariba, but as to Baldeo, Mir Singh and Amir Bakhsh there is the further proof that they produced, or caused to be produced, certain portions of the property stolen on the night of the crime from the house of Bahal. I have already, in the case of *Queen-Empress v. Ram Saran* (1), entered at length into the question of the nature and extent of the corroboration to be required to make it safe or proper to act upon the evidence of an accomplice, and it would be a useless waste of time to repeat the remarks I then made. I entirely adhere to each and every one of them, and the learned Judge is in error in supposing that the view I took in the case of *Queen-Empress v. Kure* (2) was in any sense at variance with the [513] rule I had already laid down, namely, that Criminal Courts, dealing with an approver's evidence

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8 A. 509=  
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(1886) 176.

in a case where several persons are charged, should require corroboration of his statements in respect of the identity of each of the individuals accused. In this connection I cannot do better than refer to the observations of one of the wisest and most practical minded Judges that ever sat on the English Bench, Mr. Justice Maule, in *Reg. v. Mullins* (1), which are singularly apposite to this country, where those who have to administer justice unfortunately know what a perverted ingenuity there is for concocting false charges, and supporting them by the most elaborately fabricated network of perjured testimony.

Says that learned Judge:—"I quite agree that the confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial, unless the fact of the prisoner being connected with it is proved. It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates. Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected, if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime."

In the present case, upon careful consideration of all the facts as to Baldeo, Mir Singh and Amir Bakhsh, I am not prepared to say that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of Ghariba's evidence of their participation in the dacoity as entitled the learned Judge to act upon his story in regard to those particular persons. But as to Ram Bakhsh, although he was present when his father Baldeo pointed out the place where some of the property was dug up, he does not appear to have said any-[514] thing or given any directions about it; and there is, in my opinion, no sufficient material to warrant the inference of guilty knowledge on his part. So with regard to Amman, no property was found with him or produced through his instrumentality, and under these circumstances I think that both he and Ram Bakhsh ought to have been acquitted.

I dismiss the appeals of Baldeo, Mir Singh and Amir Bakhsh, but, allowing those of Ram Bakhsh and Amman, acquit them and direct that they be released.

8 A. 514—6 A.W.N. (1886) 177.

CRIMINAL REVISIONAL.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS v. RAM NARAIN AND ANOTHER. [1st July, 1886.]

*Appeal, summary rejection of—Judgment of criminal appellate Court—Criminal Procedure Code, ss. 367, 421, 424, 439—High Court's powers of revision—Delay in applying for exercise.*

The powers conferred by s. 421 of the Criminal Procedure Code should be exercised sparingly and with great caution and reasons, however concise, should be given for rejecting an appeal under that section.

Where a Sessions Judge rejected an appeal summarily under s. 421 of the Code, by an order consisting merely of the words "appeal rejected", and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that the Judge was wrong in rejecting the appeal without assigning his reasons for so doing,—*held* that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere.

THIS was an application for revision of an order of Mr. H. M. Bird, Joint Magistrate of Cawnpore, dated the 4th July, 1885, and of the order of Mr. W. Blennerhassett, Sessions Judge of Cawnpore, dated the 4th September, 1885, summarily rejecting, under s. 421 of the Criminal Procedure Code, an appeal from the Joint Magistrate's order. The facts of the case are stated in the judgment of the Court.

Pandit *Moti Lal*, for the appellants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

#### JUDGMENT.

[515] BRODHURST, J.—In this case Ram Narain and Ganeshi were convicted by the Joint Magistrate of Cawnpore under s. 342 of the Indian Penal Code, and were sentenced to pay fines of Rs. 200 and Rs. 100 respectively, or, in default of payment, to be rigorously imprisoned for three months. From these convictions and sentences, Ram Narain and Ganeshi each preferred an appeal. The Sessions Judge rejected the appeals summarily, his order, in each instance, consisting merely of the two words "appeal rejected".

Ram Narain and Ganeshi have now applied to this Court for revision of the orders of the lower Courts, and the 5th and last ground taken by them is "because the learned Sessions Judge was wrong in rejecting the appeal summarily without assigning his reasons for so doing".

This objection, if taken within a reasonable time, would, in my opinion, have been valid. The law, I consider, requires that a lower appellate Court in disposing of an appeal, and even in summarily rejecting an appeal under the provisions of s. 421 of the Criminal Procedure Code, should give reasons for so doing; and so far as I am aware, no Criminal Appellate Court of these Provinces, other than that the proceedings of which are now objected to, is addicted to disposing of any appeal without giving reasons for doing so. It is laid down in s. 367, Chapter XXVI of the Criminal Procedure Code, that the judgment of a Criminal Court of original jurisdiction "shall contain the point or points for determination, the decision thereon, and the reasons for the decision;" and by s. 424 of the same Code—a section in the same chapter with s. 421, and only three sections after it—it is enacted that "the rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate Court other than a High Court." The powers conferred by s. 421 of the Code should, I consider, be exercised sparingly and with great caution, and reasons, however concise, should be given for rejecting an appeal under that section.

Under the circumstances stated above, I should have reversed the orders of the Sessions Judge, and should have directed him to [516] rehear the appeals and dispose of them in accordance with law had I not found that the application for revision was made with very great delay, that is, after the expiration of nearly nine months from the date of a lower appellate Court's orders. On this ground, and also because I think that valid reasons might have been given for dismissing or rejecting the appeals, I decline to interfere in this revision case and reject the application.

*Application rejected.*

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6 A.W.N.

(1886) 177.



8 A. 516. (P.C.)

PRIVY COUNCIL.

PRESENT :

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PRIVY  
COUNCIL.

*Lord Blackburn, Lord Monckswell, Lord Hobhouse, and Sir Richard Couch.*  
[On appeal from the High Court for the North-Western Provinces.]

8 A. 516.  
(P.C.)

MUHAMMAD ISMAIL KHAN (*Defendant*) v. FIDAYAT-UN-NISSA AND  
OTHERS (*Plaintiffs*). [10th February, 1886.]

*Family custom—Wajib-ul-arz—Muhammadan Law—Appeal to Her Majesty in Council—Question of fact.*

It having been alleged that an estate, by custom, descended to a single heir in the male line, the High Court, concurring with the Court of first instance, found that this custom had not been proved to prevail in the family.

On an appeal contesting this finding, it was argued, among other objections, that the High Court had not given sufficient effect to an entry in the *wajib-ul-arz* of a zamindari village, the principal one comprised in the family estate now in dispute; the last owner of that estate who held all the shares in the village having caused an enquiry to be made to the effect that his eldest son should be his sole heir, the others of the family being maintained.

*Helā* that, though termed an entry in a *wajib-ul-arz*, the document was not entitled to the name, but was rather in the nature of a testamentary attempt to make a disposition contrary to the Muhammadan law of descent.

The appeal was not taken out of the rule as to the concurrent findings of two Courts, primary and appellate, on a question of fact.

APPEAL from a decree (21st April, 1881) of the High Court, confirming a decree (14th July, 1880) of the Subordinate Judge of Meerut.

Ghulam Ghaus Khan, of an ancient Biluch family in the Bulandshahr district, died in 1879, leaving one son, the appellant, and three daughters, the respondents, besides certain illegitimate children. Upon his death, his son took possession, and alleged a sole title to the inheritance by the custom of the family. Between the brother and the sisters, the question on this appeal was whether [517] it had been proved that, by custom, the ancestral estate descended to a single heir in the male line, instead of to sharers according to the Muhammadan law of the Sunni sect to which the parties belonged. In the Court of first instance, when the respondents brought this suit, other children of Ghulam Ghaus Khan were joined as plaintiffs; and, altogether, the claim was made for 82 sahamas as portions, out of 96 sahamas, representing the whole estate.

All obtained a decree in their favour, which, however, was maintained in the High Court only in favour of the three daughters, now respondents; the other plaintiffs being found to be of illegitimate birth. The latter did not appeal against the decision; but the defendant, the brother, appealed; and the principal question now raised related to the proofs given by him of the alleged family custom. Among these was an extract from the *wajib-ul-arz* of village Jhagir, pargana Dankaur, tahsil Sikhandrabad, zila Bulandshahr, in which village Ghulam Ghaus Khan, in his lifetime, was the recorded proprietor of all the 20 biswas. This contained an entry dated the 12th September, 1870, to the effect that, after his death, his eldest son should be heir to, and should manage, all his estate; it being declared that two other sons, who, however, both died in their father's lifetime, should receive only maintenance.

Mr. C. W. Arathoon, appeared for the appellant.

Reference was made to *Lekraj Kuar v. Mahpol Singh* (1) in which it was held that *wajib-ul-arz*, or village administration papers, properly

prepared and attested, were admissible to prove a custom of inheritance stated therein.

The respondents did not appear.

# JUDGMENT.

Their Lordship's judgment was delivered by

SIR R. COUCH.—The appellant in this case is the only surviving son of Ghulam Ghaus Khan, who died on the 6th November, 1879, and the respondents are his three daughters, who, it is not disputed, were legitimate. The suit was brought by the three respondents, together with one Nanhi Begam, who was alleged to be a wife of Ghulam Ghaus Khan, and her children, who were [518] alleged to be legitimate. It has been found by the High Court that Nanhi Begam was not the wife of Ghulam Ghaus Khan; and that her children were illegitimate, and there is no question as to them in this appeal.

The plaint claimed on the part of the plaintiffs that they were entitled to 82 parts of the estate of the deceased, the whole being divided into 96 parts, that being the shares which they would be entitled to under the Muhammadan law, supposing all were entitled. The Subordinate Judge gave a decree in favour of all the plaintiffs for the 82 parts. The only part of the defence set up by the present appellant which it is now material to consider was that there was a family custom by which the eldest son was entitled to succeed to the whole of the property of the deceased. The Subordinate Judge found this custom was not proved. The present appellant, who was defendant, appealed to the High Court. The High Court, coming to the conclusion that Nanhi Begam and her children were not entitled to any share of the property, modified the decree of the lower Court and made a decree in favour of the appellant and the three respondents, dividing the property, as it then became necessary to do, in a different way. The property was divided into 35 parts, and 21 of these were given to the respondents, the plaintiffs, and the remainder to the present appellant, the defendant, the property being divided according to the Muhammadan law. The High Court also found, as the Subordinate Judge had found, that the family custom had not been proved.

The defendant has appealed to Her Majesty in Council, and the ground of appeal taken is that the High Court was wrong in finding that the custom was not proved. Objections have been taken to the judgment of that Court, but when they are examined they appear to their Lordships to amount only to this, that they contest the propriety of the finding of the Court on the construction of the evidence. The principal argument turns upon the contents of what is called a *wajib-ul-arz*, which does not appear properly to be a document entitled to that name, but rather a document in the nature of an administration or testamentary paper, by which Ghulam Ghaus Khan indicated the way in which he [519] should like the property to be enjoyed after his death. It seems to be rather an attempt on his part to make a disposition of his property contrary to the Muhammadan law.

The case appears to their Lordships to come within the rule that when there is a concurrent judgment of the two lower Courts upon a question of fact, it ought not to be disturbed; and their Lordships will therefore humbly advise Her Majesty to dismiss the appeal and affirm the decision of the High Court. There will be no order as to costs.

*Appeal dismissed.*

Solicitors for the appellant:—Messrs. Barrow and Rogers.

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6 A.W.N.  
(1886) 182.

8 A. 519=6 A.W.N. (1886) 182.

## CIVIL REVISIONAL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*DHAN SINGH (*Judgment-debtor*) v. BASANT SINGH AND OTHERS  
(*Decree-holders*).<sup>\*</sup> [1st July, 1886.]*High Court's powers of revision—Civil Procedure Code, s. 622—Meaning of "Jurisdiction"—Amendment of decree—Civil Procedure Code, s. 206—Act XV of 1877 (Limitation Act), sch. ii, No. 178.*

In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May, 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond the jurisdiction in amending it.

*Held* that the application for revision must be rejected.

*Per* OLDFIELD, J., that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (1), and of the Full Bench in *Badami Kuar v. Dinu Rai* (2), and further that, upon the facts stated, the Court ought not to interfere.

*Per* MAHMOOD, J., that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hassan Khan* [520] v. *Sheo Baksh Singh* (1), *Badami Kuar v. Dinu Rai* (2), *Raghunath Das v. Raj Kumar* (3), *Surtia v. Ganga* (4), *Magni Ram v. Jiwa Lal* (5), *Har Prasad v. Jafar Ali* (6) referred to. *Bhagwant Singh v. Jageshar Singh* (7), and *Abu Said Khan v. Hamid un-nissa* (8) dissented from.

The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe v. Edwards* (9) and *Crepps v. Durden* (10) referred to.

*Held* also *per* MAHMOOD, J. that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622. *Lucas v. Stephen* (11), *Omanund Roy v. Maharajah Suttish Chunder Roy* (12), *Zuhoor Hossein v. Syedun* (13), and *Goluck Chunder Mussant v. Ganga Narain Mussant* (14) referred to.

<sup>\*</sup> Application No. 98 of 1886 for revision under s. 622 of the Civil Procedure Code, of an order of Mauli Mazhar Husain, Munsif of Nagina, dated the 5th May, 1885.

(1) 11 O. G.	(2) 8 A. 111.	(3) 7 A. 276.
(4) 7 A. 411.	(5) 7 A. 336.	(6) 7 A. 345.
(7) A.W.N. (1886) 57.	(8) A.W.N. (1886) 39.	(9) L.R. 3 P.D. 103.
(10) 1 Smiths L.C. 8th ed. 711.	(11) 9 W.R. 301.	(12) 9 W.R. 471.
(13) 11 W.R. 142.	(14) 20 W.R. 111.	

Under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or had to perform *suo motu*. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *Robarts v Harrison* (1), *Vithal Janardan v. Rizmi* (2), and *Kylasa Goundan v. Ramasami Ayyar* (3), referred to.

THE facts of this case are stated in the judgments of the Court.

Munshi *Hanuman Prasad*, for the petitioner.

Babu *Rattan Chand*, for the opposite party.

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### JUDGMENTS.

[521] OLDFIELD, J.—This is an application to revise, under s. 622 of the Civil Procedure Code, an order passed under s. 206, amending a decree.

The decree is dated the 10th July, 1872; it was for partition of immoveable property, and it appears that applications to execute were made on the 20th June, 1875, on the 10th June, 1876, and on the 9th June, 1879, when a dispute arose as to the execution in reference to a portion of the property, and the Court held that the decree was defective in its description of the property, and therefore incapable of execution. The final order was made by this Court on the 13th July, 1881. On the 8th February, 1882, the decree-holder sought to execute the decree in respect of other property, but execution was refused under an order by this Court, dated the 17th March, 1884.

The decree-holder then applied, on the 23rd February, 1885, to amend the decree, and the amendment was made on the 5th May, 1885. It is not disputed that the amendment has reference to an arithmetical error, and is one which could properly be made under s. 206.

The application, therefore, was properly one coming under the provisions of the section, and which the Court had jurisdiction to entertain under s. 206.

The Court's order, therefore, is not open to any objection on the score of want of or excess of jurisdiction, and there is, therefore, no power in this Court to entertain this application under s. 622 of Civil Procedure Code with reference to the Privy Council decision in *Amir Hassan Khan* (4), and that of the Full Bench of this Court in *Badami Kuar v. Dinu Rai* (5). In the last, the meaning of the Privy Council in the case above-mentioned was fully considered, and it was thus expressed by Petheram, C.J.—“I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it either of fact or of law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its finding as to facts.” That view was taken by the Full Bench [522] of this Court of the scope and powers of the Court under s. 622, and is binding on us for dealing with cases coming under s. 622. The Court, in the case before us, was within its jurisdiction in amending the decree under s. 206; and whether or not erred in entertaining the application on the ground of its being barred by limitation or other grounds, these are questions which do not affect the jurisdiction of the Court, so as to enable this Court to interfere under s. 622.

(1) 7 C. 333.

(4) 11 C. 6.

(2) 6 B. 596.

(3) 4 M. 172.

(5) 8 A. 111.



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I may add, however, that, on the facts stated to us, this is not a case in which, having regard to the facts I should be inclined to interfere. The application is dismissed with costs.

MAHMOOD, J.—I confess I am wholly unable to accept the preliminary objection urged on behalf of the respondent, to the effect that s. 622 of the Civil Procedure Code does not empower us to interfere in revision with any kind of orders passed by the lower Courts under s. 206 of the Code. This is not the first time that such a question has been raised before me, for I had to consider the matter on two former occasions. The first was the case of *Raghunath Das v. Raj Kumar* (1), and the other was *Surta v. Ganga* (2), and on both those occasions I stated the reasons in my dissentient judgment why the revisional powers of this Court should be exercised under s. 622 of the Civil Procedure Code. In both those cases my view of the law was upheld by the Full Bench of this Court (I.L.R., 7 All., pp. 875 and 876), and in both those cases the amending order was set aside as *ultra vires*.

But, then, it is argued that the Full Bench ruling of this Court in *Magni Ram v. Jiwa Lal* (3), which followed the Privy Council ruling in *Amir Hassan Khan v. Sheo Baksh Singh* (4), is decisive upon the point, and restricts the revisional jurisdiction of this Court to pure questions of jurisdiction. Farther, it is argued that the rule has been narrowed even further by a more recent Full Bench ruling of this Court in *Badami Kuar v. Dinu Rai* (5), where the view of Petheram, C.J., was adopted by the whole Court, though Straight, J., delivered a separate judgment not consistent with the opinion of the learned Chief Justice, but surrendered [523] his own views, as he regarded the question as simply one of practice. With all the learned Judge said on that occasion in illustrating the effect of s. 622 of the Civil Procedure Code, I entirely concur, but I respectfully think that the matter before the Court was not one of practice, but a matter affecting the revisional jurisdiction of this Court—a jurisdiction the importance of which I cannot express in better language than in the words of Straight, J., himself:—"I need only add that, in my opinion, if there is one power which it is of the first importance that the Court should possess, it is the power of sending for the record in Civil cases where no appeal lies. Experience shows that in a very great many such cases grave illegalities and material irregularities do occur in the proceedings of the Courts below; and it is essential that in such cases the High Court should have the power of interference."

The ruling of Petheram, C.J., however, in which the rest of the Court concurred, is expressed in these words:—

"The section has been considered by the Privy Council in the case of *Amir Hassan v. Sheo Baksh Singh* (4) and the Full Bench of this Court in the case of *Magni Ram v. Jiwa Lal* (3), and the result of those cases, in my opinion, is that the questions to which s. 622 applies are questions of jurisdiction only. To make my meaning plain, I understand the Privy Council to mean that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it either of fact or of law; and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts, but that, when no appeal is provided, its decision on question of both kinds is *final*."

(1) 7 A. 276.  
(4) 11 C. 6.

(2) 7 A. 411.

(3) 7 A. 336.  
(5) 8 A. 111.

And perhaps the best way to illustrate how these words have been understood by two of the learned Judges themselves who were parties to the last Full Bench ruling, is to cite the case of *Bhagwant Singh v. Jageshar Singh* (1), the effect of which I understand to be, that a Court having jurisdiction to hear a suit may say that it has no jurisdiction to hear it, and that its view as to [524] the want of jurisdiction, though erroneous, must be accepted as final and beyond the revisional jurisdiction of this Court under s. 622 of the Code. The same I understand to be the effect of the ruling of the same learned Judges in *Abu Said Khan v. Hamid-un-nissa* (2), in which the last Full Bench ruling was expressly cited as an authority for not interfering.

Now, I must say with all due respect that I find it impossible to agree in the rule laid down in either of these two cases, and the best manner in which I can state my reason for this view is to go back to the Full Bench ruling in the case of *Magni Ram* (3), to which I was a party, and in which I concurred in the somewhat laconic judgment which Petheram, C.J., delivered in that case. Soon after I found it necessary—because the ruling was being constantly misunderstood—to state by reasons why I had concurred in that ruling, and I did so in *Har Prasad v. Jafar Ali* (4), which has been fully reported. In that case I stated at considerable length by way of illustration the class of cases to which the provisions of s. 622 of the Civil Procedure Code would apply, and I also explained how I understood the words “questions relating to the jurisdiction of the Court” as used in the Full Bench case of *Magni Ram* (3) and the manner in which I interpreted the meaning of the word “jurisdiction” as used by their Lordships of the Privy Council in the case of *Amir Hassan Khan* (5). But it is contended that the last Full Bench ruling of this Court in *Badami Kuar's Case* (6), has overruled all the previous rulings, including the three cases in which I had delivered separate judgments, and in two of which, as I have already stated, my view of the law was unanimously accepted by the Full Court. Now, if those judgments of mine have been actually overruled by the Full Court, I should, of course, bow to the decision. But I find from the report of *Badami Kuar's Case* (6) that none of the rulings of this Court to which I have referred were considered, with the exception of the Full Bench ruling of this Court in *Magni Ram's Case* (3), where in the judgment the word “jurisdiction” occurs, and, as I showed in the case of *Har Prasad* (4) is the turning point of the interpretation of that ruling. Yet the exact application of the word to such cases [525] was, I respectfully think, not explained in the last Full Bench ruling in the case of *Badami Kuar* (6), and the result is that, as I understand that ruling, it has left the matter exactly where the former Full Bench case of *Magni Ram* (3) had left it. At least, this is the only manner in which I can understand the ruling of Petheram, C.J., in the case of *Badami Kuar*, for I find it impossible to conceive that the learned Chief Justice was either unaware of my rulings in the case of *Har Prasad* (4), of *Surta* (7) and *Raghunath Das* (8), or that he intended to overrule them without expressly referring to them in his judgment. Indeed, he could not have overruled two of them without having overruled two Full Bench judgments to which he himself was a party and which judgments had not only accepted my conclusions, but also the reasons upon which they proceeded.

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(1) A.W.N. (1886) 57.

(4) 7 A. 345.

(7) 7 A. 411.

(2) A.W.N. (1886) 39.

(5) 11 C. 6.

(8) 7 A. 276.

(3) 7 A. 336.

(6) 8 A. 111.



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In this condition of the case-law of this Court, I decline to accept the contention that the last Full Bench ruling in the case of *Badami Kuar* (1) has swept away the whole of the antecedent case-law of this Court and all I feel myself bound to do is to interpret the judgment of Petheram, C.J., in that case as best I can. And in doing so the word "jurisdiction" as used by his Lordship is again the turning-point of the exact meaning to be attached to his ruling. I fully agree with him when he says "that the questions to which s. 622 applies are questions of jurisdiction only." But then the question is, what does jurisdiction mean? The learned Chief Justice went on to say that the effect of the Privy Council ruling was "that if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or of law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final." I have no hesitation whatsoever into accepting this enunciation of the law, provided that the word "jurisdiction," wherever it occurs in this passage, is to be understood in the sense in which I interpreted it in the case of *Har Prasad* (2). The learned Chief [526] Justice's ruling gives no information as to whether that interpretation was right; so long as there is no authoritative ruling binding upon me, which says that my interpretation was wrong, I have no reason to think so. On the contrary, considering that in two of the cases which proceeded upon the same interpretation, the Full Bench has approved my judgments which judgments again have never been overruled, I think I am justified in saying, notwithstanding the case of *Badami Kuar* (1), that my interpretation of what constitutes question relating to jurisdiction is right, and I still adhere to that interpretation. At any rate, as I have already said, with due respect, I am unable to accept the view taken by two learned Judges of this Court in the cases of *Bhagwant Singh* (3) and *Abu Said Khan* (4) which go the length of laying down that even wrongful assumption of jurisdiction, or wrongful refusal to exercise jurisdiction, are matters which fall beyond the scope of s. 622. According to my humble opinion, such a view is not only not deducible from, but opposed to, the judgment of Petheram, C.J., in the last Full Bench ruling in the case of *Badami Kuar* (1), and that the effect of such a view would be to abrogate the whole s. 622 itself. For the view comes to this, that a Court having jurisdiction may wrongly say that it has no jurisdiction; and a Court having no jurisdiction may wrongly say that it has jurisdiction; and yet such erroneous refusal or assumption of jurisdiction could not be interfered with under s. 622 of the Code, because—to use the language employed in one of the judgments—"the Court had jurisdiction to decide, and was bound to decide, whether the suit was or was not within its cognizance." Yet in the last Full Bench Case of *Badami Kuar* (1) itself the Court interfered because the Munsif had wrongly declined to exercise jurisdiction.

I have dwelt upon this matter at such length because I cannot help feeling, with profound respect, that neither the Full Bench ruling in the case of *Magni Ram* (5) nor the last Full Bench ruling in the case of *Badami Kuar* (1) is sufficiently explicit to place the exact scope of s. 622 beyond

(1) 8 A. 111.

(4) A.W.N. (1886) 39.

(2) 7 A. 345.

(3) A.W.N. (1886) 57.

(5) 7 A. 336.

doubt, and the doubt has all along arisen over the exact manner in which the word "jurisdiction" as used by their Lordships of the Privy Council in the case of *Amir* [327] *Hassan Khan* (1) is to be understood. In the case of *Har Prasad* (2), I think I said enough to show from the judgment of their Lordships themselves that they employed the word not in the narrow sense in which it is sought to be interpreted here, limiting it to territorial or pecuniary limits, and to questions relating to the nature of the suit, but in the comprehensive sense in which that word is understood as a term of English law. Now it is not for me, to whom English is a foreign tongue, to interpret the meaning of the English word, and I have, therefore, referred to Wharton's "Law Lexicon" in order to ascertain the exact meaning in which the word is used in its legal sense, and that work explains "jurisdiction" to mean "legal authority; extent of power; declaration of the law," and it is in this sense that I understand it as used by the Lords of the Privy Council in the case of *Amir Hassan Khan* (1), and I said so in the case of *Har Prasad* (2). Further, if there is any doubt about the matter, I would refer to the judgment of Lord Penzance in the celebrated case of *Combe v. Edwards* (3) where the word "jurisdiction" constantly occurs, not only in his Lordship's own judgment, but in the passages to which he refers from earlier cases, and I think I may safely say that the word is used throughout in the comprehensive sense in which Wharton has explained it. And, indeed, if any further authority is required for my view, I will resort to no less an eminent authority than Lord Mansfield himself, whose use of the word in the leading case of *Crepps v. Durden* (4) seems to me to be wholly consistent with the meaning which I humbly think the word has, and in which sense I understand it to have been used by the Lords of the Privy Council in *Amir Hassan Khan's Case* (1). But because the interpretation of the Privy Council ruling depends upon the exact interpretation of the word, and also because much divergence of opinion apparently prevails both among the members of the Bench and of the Bar, I think it will not be out of place to quote a whole passage from the judgment of Lord Mansfield in the case above referred to, in order to illustrate the exact manner in which his Lordship understood and used the word "jurisdiction" as a term of law. His Lordship said:—

[528] "The first question is, whether any objection can be made to the legality of the convictions before they were quashed." In order to see whether it can, we will state the objection: it is this—that here are three convictions of a baker for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the Act of Parliament the offence is 'exercising his ordinary trade upon the Lord's Day,' and that without any fractions of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consists of one or a number of particular acts, the penalty incurred by this offence, is five shillings. There is no idea conveyed by the Act itself, that if a tailor sews on the Lord's Day every stitch he takes is a separate offence; or if a shoemaker or carpenter works for different customers at different times on the same Sunday, that those are so many separate and distinct offences.

(1) 11 C. 6.  
(3) L.R. 3 P.D. 103.

(2) 7 A. 345.  
(4) 1 Smith's L.C. 8th ed. 711.

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There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence, but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here repeated offences are not the object which the Legislature had in view in making the statute, but simply to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had *no jurisdiction whatever* in respect of the three last convictions."

Having read this passage with the greatest care, I find it wholly impossible to doubt that Lord Mansfield, in saying that "the justice had no jurisdiction whatever in respect of the three last convictions," meant that the statute, then under consideration, did not *empower* the justice to convict more than once for trading on one Sunday, and that therefore the other three convictions were opposed to the Act, were *ultra vires*, and therefore made "without jurisdiction." Is it possible to conceive that the word would have been employed in such a manner and in such a case if its meaning were confined to territorial or pecuniary limits, or to the nature of [529] the class to which the case belongs? The case was undoubtedly of a nature cognizable by the justice, and the only question was whether the law authorized him to convict a person more than once for trading on the same Sunday. Lord Mansfield found that the statute did not so authorize the justice, that his action went beyond the authority of the law; it was therefore *ultra vires*, and his Lordship denominated such an action to be without any jurisdiction whatever.

This is the sense in which I understand the use of the word by the Lords of the Privy Council in *Amir Hassan Khan's Case* (1), and by Petheram, C.J., in the Full Bench cases of *Magni Ram* (2) and *Badami Kuar* (3), and this is the sense in which I interpreted it in the case of *Har Prasad* (4). And to what I said in that case I may add the two very apt illustrations given by Sraight, J., in *Badami Kuar's Case* (3) of what would constitute a question relating to the exercise of jurisdiction "illegally and with material irregularity" within the meaning of s. 622 of the Code, and I may add that the case of *Surta* (5) and *Raghunath Das* (6), which have received the approval of the Full Bench of this Court, furnish further illustration of cases to which the revisional power of this Court under s. 622 would apply. I do not think any further illustration are necessary, and I need only summarize the effect of all that I have said in this and the preceding cases as to the exact manner in which I understand what constitutes questions relating to the exercise of jurisdiction for purposes of revision. Such questions may refer to the following points:—

- (i) Territorial limits of jurisdiction.
- (ii) Pecuniary limits of jurisdiction.
- (iii) Jurisdiction with reference to the nature of the class to which the case belongs.
- (iv) Presence or absence of positive authority or power conferred by the law upon tribunals in cases which satisfy the three preceding conditions.

The last is really the only point upon which my views have been doubted, but for such doubt no room is left after reading what I [530] have

(1) 11 C. 6.  
(4) 7 A. 345.

(2) 7 A. 336.  
(5) 7 A. 411.

(3) 8 A. 111.  
(6) 7 A. 276.

already quoted from Lord Mansfield's judgment. If a conviction wholly unauthorised by law furnishes a case of want of jurisdiction, I fail to conceive why an action by a civil tribunal, in a manner equally unauthorised, or may be, positively prohibited by law, should not be held to be a question relating to the want of, or the illegal and irregular exercise of jurisdiction. I entirely fail to see any difference in principle between the two kinds of cases here contemplated. For instance, take the provisions of s. 111, which authorizes the Court to allow a set-off only in a certain limited class of cases and subject to certain specific restrictions. The suit must be "*for the recovery of money*," and the subject of set-off must be an "*ascertained sum of money legally recoverable*" from the plaintiff. The power conferred by the section is denominated throughout in Courts of Chancery as one kind of "equity jurisdiction"—a phrase which would be unintelligible if the fourth point enumerated by me was not included within the meaning of the word *jurisdiction* (Story, "Eq. Juris.," 11th Ed., ss. 1430—34). Again Mr. Justice Story's work is full of phrases in which he uses the word *jurisdiction* in the sense of authority and power. For example, in s. 1431 he has the following:—"And, in the first place, let us consider the subject of *set-off* as an original source of equity jurisdiction. It is not easy to ascertain the true nature and extent of this *jurisdiction*." Now, if the power to allow set-off is a matter of "*jurisdiction*," I should say that where the action of a Court which allows set-off is in direct contravention of the restrictions, imposed upon its authority by s. 111, which creates that authority, the matter would be a proper subject for revision under s. 622 of the Code.

I have thus the authority of Lord Mansfield, Lord Penzance and Mr. Justice Story for the comprehensive meaning which I attach to the use of the word "*jurisdiction*," as a legal term, in the English language. Nor am I aware of any authority which has used the word in any other sense. And so long as I understand the word in the sense in which such eminent authorities have understood and used it, so long shall I hold that the Legislature, in framing s. 622 of the Civil Procedure Code, gave us the authority, the power and the jurisdiction to interfere in the action of the tribunals subordinate to this Court in cases where there is no remedy either by appeal or otherwise, and where those tribunals [531] have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. And I humbly say, understand the word "*jurisdiction*" in the judgment of the Lords of the Privy Council in *Amir Hussan Khan's Case* (1) as a legal expression having a definite meaning in the language and in the country in which their Lordships delivered the judgment, and no difficulty or inconsistency arises between what their Lordships said and the express letter of the statute. The case before their Lordships was one in which two tribunals having full jurisdiction to deal with the case, and in the exercise of such power and authority as that jurisdiction conferred upon them, had come to the definite conclusion that the property which was then in litigation had not been the subject of any such previous adjudication as would furnish a basis for the plea of *res judicata*. The judgments of the two tribunals were concurrent, and under the Oudh Civil Courts Act they were final. The Judicial Commissioner interfered with them under s. 622, as the High Court of

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that province; and their Lordships of the Privy Council declared that "the Judicial Commissioner had no *jurisdiction* in the case." Surely not in the limited sense to which the word is sought to be confined here, but in the broad sense of want of authority and power under the law; in other words, in the sense in which it is understood in England. The effect of that ruling, as I have once before fully explained in *Har Prasad's Case* (1), is not to divest this Court of its revisional power of interference in cases where the subordinate tribunals have totally disregarded, either in the affirmative or in the negative, the limits of the authority and power conferred upon them by law, or have acted in contravention of a positive prohibition. For instance, the law says an immoral contract shall not be enforced, because it is opposed to public policy, and if a Court, in direct contravention of this prohibition, enforces such a contract, there would, of course, be no question relating to any of the first three points which I have above enumerated in connection with jurisdiction; but the action of the Court would relate to the fourth point, and this Court could [532] interfere in revision, because the Court below had no legal authority and no power under the law to enforce a contract which the Legislature in its wisdom had said shall not, under any conditions, be enforced.

Such, then, are my views in connection with the scope of s. 622 of the Civil Procedure Code; such is my interpretation of the ruling of the Privy Council in *Amir Hassan Khan's Case* (2); and such also is my interpretation of the Full Bench rulings of this Court in the case of *Magni Ram* (3) and *Badami Kuar* (4), and in the cases of *Surtia* (5) and *Raghunath Das* (6). And reading these various cases as I have done, I do not find myself precluded from entering into this case for the purpose of satisfying myself, whether the jurisdiction assumed in this case by the lower Court, purporting to act under s. 206 of the Civil Procedure Code, was rightly assumed; and if so, whether its action in amending the decree did not exceed the authority and power which that provision of the law conferred upon that Court, and also whether that Court has not acted against some positive prohibition of the law. I therefore entertain this petition in revision, and I will dispose of it upon what can be shown on either side in the case. And I proceed to consider what actually happened here.

The original decree in the case was passed on the 10th July, 1872, in a suit for partition of certain pieces of land. The decree, *inter alia*, declared the plaintiff entitled to land, 27 yards by 25 yards in length and breadth. This would yield an area of 675 square yards, but the decree described it to be 925 square yards, apparently in accordance with the statement in the plaint.

The decree does not appear to have been appealed from; but the inconsistency of the figures above stated was detected, apparently for the first time, on the 16th February, 1880, by the Amin who was deputed, during the course of the execution of the decree, to measure the land. The Munsif who dealt with the execution case held, in the order dated 10th April, 1880, that the measurement of the length and breadth of the land was accurately entered in the decree, but that the area, 925 square yards, had been [533] erroneously entered instead of 675, and he allowed execution accordingly. But upon appeal the Judge set aside the order on the 24th December, 1880, and pointed out the boundaries of the land which

(1) 7 A. 345.  
(3) 8 A. 111.

(2) 11 C. 6.  
(5) 7 A. 411.

(3) 7 A. 336.  
(6) 7 A. 276.

was to be allotted to the decree-holder under the decree. From this order a second appeal was preferred to this Court, and Tyrrell and Duthoit, JJ., held that "the decree, execution whereof has been attempted, is, as it stands, by reason of inherent errors and inconsistencies, unsusceptible of execution, and it was for the decree-holder to have procured from the Court such amendment as would cure these defects, without which amendment the decree cannot be executed." The order of this Court was made on the 13th July, 1881, and its effect was to annul the proceedings of both the Courts. The decree-holder thereupon made an application to the Munsif, under s. 206 of the Civil Procedure Code, for amendment of the decree, and the Munsif, by an order dated the 5th May, 1885, granted the application, and amended the decree so as to allot to the decree-holder an area of only 675 square yards, which, according to the opposite party's own contention, was the extent of land decreed.

For the revision of this order this application has been made by the judgment-debtor under s. 622 of the Civil Procedure Code, and the contention urged before us raises two points for determination. In the first place, it is urged, relying upon the ruling of this Court in *Gaya Prasad v. Sikri Prasad* (1) that art. 178, sch. ii of the Limitation Act applies to this case, and that the amendment of the decree was barred by limitation. It is contended, in the second place, that the decree of the 10th July, 1872, being barred by limitation and finally pronounced by this Court to be incapable of execution, the Munsif acted beyond jurisdiction in amending such a decree.

As to the first of these points, all I have to say is that on a former occasion, in the case of *Raghunath Das v. Raj Kumar* (2), I respectfully expressed my inability to accept that ruling, holding, as I did then, and still do, that under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may, or has to, perform *suo motu*. And [534] I think that this view is supported by the principle upon which the rulings in *Robarts v. Harrison* (3), *Vithal Janardan v. Rakmi* (4) and *Kylasa Goundan v. Ramasmi Ayyar* (5) proceeded. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not, in my opinion, render the action of the Court subject to the rule of limitation.

As to the next point, I decline to enter into the question whether the decree of the 10th July, 1872, was barred by limitation when the amendment was made. The question properly appertains to the stage when execution of the decree is prayed for, and, moreover, the record of the case now before us furnishes no material for any adjudication upon the point. Nor do I think that the order of this Court, dated the 13th July, 1881, stood in the way of the amendment. On the contrary, it suggested such amendment, and at any rate cannot be understood to have terminated all future proceedings, whether for securing the amendment or for executing the amended decree. This being my view, the matter stands clear enough. The Munsif had jurisdiction to entertain the application under s. 206 of the Code; he did so entertain it, and in making the amendment his action cannot be regarded as *ultra vires*, beyond the limits of his legal power and

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8 A. 519—  
6 A.W.N.  
(1886) 182.

(1) 4 A. 23.  
(4) 6 B. 586.

(2) 7 A. 276.

(3) 7 C. 333.  
(5) 4 M. 172.



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authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity" within the meaning of s. 622 of the Civil Procedure Code. In laying down this rule I have used the word "jurisdiction" in the sense in which I have explained it. To use the words of Phear, J., in *Lucas v. Stephen* (1), it is a right "incident to every Court to correct its formal records in such way, if needed, as will make them represent truly the decision which was intended to be judicially expressed when the decision was delivered. In this way blunders of the pen may be set right." This, indeed, is the scope of the last paragraph of s. 206 of the Civil Procedure Code, and the Munsif in this case only corrected what was obviously a "clerical or arithmetical error" in the decree. In the cases of *Oomanund Roy v. Maharajah [535] Suttish Chunder Roy* (2), *Zuhoor Hossein v. Syedun* (3), and *Goluck Chunder Mussant v. Gunga Narain Mussant* (4), the Calcutta High Court, even under the old Code, allowed such amendments, even though the decree had been made the subject of appeal; and the last of these cases is so far similar to the present case that there, as here, the decree was found incapable of execution because it did not contain any clear direction as to the payment of costs, and the High Court had suggested the amendment. All these cases support my view, and indeed go beyond it. But I must state that I am not prepared, in view of the Privy Council ruling in *Kistokinker Ghose Roy v. Burrodaunt Singh Roy* (5) and the Full Bench ruling of this Court in *Shohrat Singh v. Bridgman* (6), to accept the proposition that the power of amending a decree continues in the Court making it after it has become the subject of appeal. Maikhy, J., in the case of *Goluck Chunder Mussant v. Ganga Narain Mussant* (4), doubted the proposition, and, speaking for myself, I would accept the rule laid down by Couch, J., in *Bhanu Shankar Gopal Ram v. Raghunath Ram Mangal Ram* (7). But the point does not arise in this case as it has been presented to us.

For these reasons I would dismiss this application with costs; but before concluding I wish to point out that this case is distinguishable from our recent ruling in *Tarsi Ram v. Man Singh* (8) where the amendment of decree was made after it had been held by a final adjudication to have been barred by limitation, and where the application, with which we had to deal, was in consequence also barred by limitation.

*Application dismissed.*

(1) 9 W.R. 301.  
(4) 20 W.R. 111.  
(7) 2 B.H.C.R. 106.

(2) 9 W.R. 471.  
(5) 10 B.L.R. 101.  
(8) 8. A. 492.

(3) 11 W.R. 142.  
(6) 4 A. 376.

8 A. 536 = 6 A.W.N. (1886) 168.

## [536] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

RAMADHAR (Decree-holder) v. RAM DAYAL (Judgment-debtor).\*

[1st July, 1886.]

*Civil Procedure Code, s. 230—Twelve years' old decree—Execution of decrees—Meaning of "granted."*

A decree passed in April, 1872, was kept alive by various applications for execution up to 1893. In February and December of that year, two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November, 1894, the decree holder again applied for execution, the application being the first made after the decrees had become twelve years old, and being made within three years from the passing of the Civil Procedure Code, 1892.

*Held* that the application must be entertained in accordance with the ruling of the Full Bench in *Musharraf Begam v. Ghalib Ali* (1). *Tufail Ahmad v. Sadho Saran Singh* (2) dissented from. *Jokhu Ram v. Ram Din* (3) referred to.

*Per* MAHMOOD, J., that the previous execution proceedings initiated by the applications of February and December, 1893, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s. 230 of the Civil Procedure Code. *Paraga Kuar v. Bhagwan Das* (4) referred to.

THE decree of which execution was sought in this case was passed on the 29th April, 1872, and two or three applications for execution were made before the year 1893. Then, on the 2nd February, 1893, an application for execution was made, and notice was issued and served upon the judgment-debtor, who raised objections to the execution on the 10th March, 1893, and a reply to those objections was filed by the decree-holder on the 18th April, 1893. On the 9th July, 1893, the parties asked the Court to allow time for an amicable settlement, but no such settlement having been notified to the Court, the application was struck off on the 19th July, 1893, without any money being realized under the decree. The next application for execution was made on the 10th December, 1893, and notice was issued to the judgment-debtor, but as he could not be found it was affixed to his house under the provisions of the Code; but the decree-holder took no further [537] action, and his application was again struck off on the 19th May, 1894, without any money being realised under the decree.

The next application for execution of the decree was made on the 24th November, 1894, and notice having been issued to the judgment-debtor, the latter, on the 2nd February, 1895, objected to the execution upon the ground, among others, that the decree was barred by the twelve years' rule under s. 230 of the Civil Procedure Code. This objection was allowed by the first Court on the 15th April, 1895, and the order was upheld in appeal by the lower appellate Court on the 22nd December, 1895; and from this order this second appeal was preferred.

It was contended for the appellant that, under the circumstances of this case, the application was not barred, being entitled to three years'

\* Second Appeal No. 46 of 1886, from an order of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 22nd December, 1885, affirming an order of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 15th April, 1885.

(1) 6 A. 189.  
(3) 8 A. 419.

(2) A.W.N. (1885) 193.  
(4) 8 A. 301.

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(1886) 168.

grace from the passing of the present Code (17th March, 1882), under the proviso to s. 230, with reference to the Full Bench ruling of this Court in *Musharraff Begam v. Ghalib Ali* (1), and that neither the application of 2nd February, 1883, nor that of 10th December, 1883, having been "granted" within the meaning of s. 230 of the Code, the limitation of twelve years contained in that section, was not applicable to the present application. In support of this last contention *Paraga Kuar v. Bhagwan Din* (2) was cited.

Mr. Simeon, for the appellant.

Mr. Carapiet, for the respondent.

### JUDGMENT.

MAHMOOD, J.—The exact effect of the Full Bench ruling was recently discussed and summarized by me in *Jokhu Ram v. Ram Din* (3). It is clear from the report of the Full Bench ruling that the application, which was under consideration in that case, was the first made under the present Code after the decree had become twelve years old, and in view of this circumstance the learned Judges constituting the majority of the Full Bench observed:—"In the execution proceedings to which this reference relates, the respondent-decree-holder's application to execute the decree of November, 1870, was not only the first preferred by him under s. 230 of Act XIV of 1882, but the first he had made after the expiration of [538] twelve years from the date of the decree, and as such was, we think, entertainable." That this was not a mere *obiter dictum*, but formed a part of the *ratio decidendi*, is apparent from the judgment itself, and the same conclusion is derivable from what Straight, Offg. C.J., one of the learned Judges of the majority of the Full Bench, has said in *Paraga Kuar v. Bhagwan Din* (2):—"Looking at the provisions of s. 230 of the Civil Procedure Code, it would appear that, after a decree is twelve years old, there is a prohibition against its being executed more than once; that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section." There can therefore be no doubt that, according to the opinion of the majority of the Full Bench in the case of *Musharraff Begam* (1), the holder of a decree more than twelve years old was to be allowed *only one* opportunity to execute his decree under that section, and indeed the application with which the Full Bench was dealing was the first application after the decree had become twelve years old, and also the first under the present Code.

Such is not exactly the case here, for both the application of the 2nd February, 1883, and that of the 10th December, 1883, were made under the present Code, but on neither of those occasions was the decree more than twelve years old. The present application, which was made on the 24th November, 1884, is, therefore, the *third* application made under the present Code, but it is the first made after the lapse of twelve years from the date of the decree. It must therefore be entertained within the principle of the ruling of the Full Bench; because the twelve years' limitation provided by s. 230 of the Code of 1877 cannot, according to that ruling, be read as included in the proviso to that section. The only authority for the respondent's contention, that this decree is barred, is the ruling of Petheram, C.J., in *Tufail Ahmad v. Sadho Saran Singh* (4); but in the case of *Jokhu Ram v. Ram Din* (3), I have already stated my reasons for being unable to adopt that ruling.

(1) 6 A. 189.  
(3) 8 A. 419.

(2) 8 A. 301.  
(4) A.W.N. (1885) 193.

Then again I agree in what Straight, Offg. C. J., has said in *Paraga Kuar v. Bhagwan Din* (1) as to the meaning of the word "granted" as used in s. 230 of the Civil Procedure Code. Here [539] the previous execution proceedings under the present Code initiated by the applications of the 2nd February, 1883, and 10th December, 1883, terminated in these applications being struck off, and these results cannot be construed to mean that these applications were "granted" within the meaning of s. 230 of the Civil Procedure Code.

I would decree this appeal, and setting aside the orders of both the lower Courts, remand the case to the Court of first instance for disposal according to law, with reference to the other objections raised by the judgment-debtor. Costs to abide the result.

OLDFIELD, J.—This is an appeal from an order disallowing an application to execute a decree. The decree bears date the 20th April, 1872. Applications to execute the decree have been made and granted under Act X of 1877 and under the present Code of Civil Procedure, and the present application is dated the 24th November, 1884. The question is, whether it is barred under the provisions of s. 230.

This application is made more than twelve years after the date mentioned in the section, and a previous application for execution has been made and granted under this Code; consequently it would be barred by time, unless it comes under the proviso in the last paragraph of the section, which is as follows:—"Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years of the passing of this Code, unless when the period prescribed for taking such proceedings, by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years."

Now this application is within three years of the passing of this Code, and we have to see if the period prescribed for taking proceedings to enforce the decree by the law in force immediately before the passing of this Code has expired. The decree, no doubt, has become time-barred under the provisions of s. 230, Act X of 1877; but it has been held by the majority of the Full Bench of this Court that the law referred to in the proviso is not s. 230, Act X of 1877, but the Limitation Act; and with reference alone to the Limitation Act the decree cannot be held to be time-barred.

[540] I dissented from the majority of the Full Bench in the ruling referred to, but I am bound to decide this case in accordance with it. A decision of a Division Bench of this Court has been cited to the effect that "that the proviso in s. 230 applies to those decrees which would be barred on the date of the Code coming into force, and does not apply to those decrees which were not barred by the twelve years' rule when the Code came into force, and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230"—[*Tufail Ahmad v. Sadho Saran Singh* (2)].

According to this ruling, the decree we are dealing with would not be saved by the proviso, which would not apply to it.

But I am unable to concur in the interpretation of the proviso taken by the learned Judges in that case.

I would set aside the orders and remand the case for execution. Appellant will have costs in all Courts.

*Case remanded.*



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JULY 2.

8 A. 340=6 A.W.N. (1886) 174.

## APPELLATE CIVIL.

APPEL-  
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CIVIL.*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*8 A. 340=  
6 A.W.N.  
(1886) 174.RAM AUTAR (*Plaintiff*) v. DHANAURI AND OTHERS (*Defendants*).<sup>\*</sup>  
[2nd July, 1886.]*Mortgage—First and second mortgages—Registered and unregistered documents—Act III of 1877 (Registration Act), s. 50—Fraudulent transfer—Act IV of 1882 (Transfer of Property Act), s. 53.*

Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank v. Barry* (1) where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV of 1882) is applicable to such a transaction. In such a condition of circumstances *quoad* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a [341] transaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforceable. *Rahmut-ulla v. Sariut-ulla* (2) referred to.

In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage.

*Held* that, under these circumstances, the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act III of 1877).

THE plaintiff in this case claimed possession of certain land, by virtue of a registered instrument of mortgage dated 20th June, 1883. Part of the land was in the possession of one of the defendants under an unregistered instrument of mortgage dated the 17th January, 1881. Both the instruments of mortgage were instruments the registration of which was not compulsory. It was found as a fact that at the time of the execution and registration of his mortgage-deed, the plaintiff was aware that the first mortgagee, defendant, was in possession under his mortgage. Both the lower Courts held that, under these circumstances, the fact that the plaintiff's deed was registered, did not entitle him to dispossess the first mortgagee.

In second appeal the plaintiff contended that his registered deed should have priority over the defendant's unregistered deed.

<sup>\*</sup> Second Appeal No. 1629 of 1885, from a decree of C. Donovan, Esq., District Judge of Benares, dated the 28th July, 1885, confirming a decree of Pandit Rajnath, Munsif of Benares, dated the 19th February, 1885.

(1) L.R. 7 H.L. 135.

(2) 1 B.L.R. F.B. 58.

Mr. Niblett, for the appellant.

Lala Juala Prasad, for the respondents.

### JUDGMENT.

STRAIGHT, J.—It has been found as a fact by both the lower Courts, and the appellant's pleader admits it to have been so found, that the plaintiff took his mortgage of the 20th June, 1883, with notice of the defendant's possessory mortgage of the 17th January, 1881. Both these instruments were for sums of money below Rs. 100, and both were optionally registrable, that of the 20th June, 1883, being, in fact, registered, and that of the 17th January, 1881, being unregistered.

The question then arises whether the plaintiff, having taken his document of the later date with knowledge of the prior title [542] of the defendant and of his possession, in virtue of it, of the land to which the suit relates, is entitled to enforce the provisions of s. 50 of the Registration Act, 1877? In support of the contention that he is, his pleader referred to *Nallappa Goundan v. Ibram Sahib* (1), *Madar Sahib v. Subbarayalu Nayudu* (2), and *Kota Muthanna Chetty v. Ali Beg Sahib* (3). On the other side our attention was called to *Fuzl-ud-deen Khan v. Fakir Mahomed Khan* (4), *Dinonath Ghose v. Auluck Moni Dabee* (5), *Narain Chunder Chuckerbutty v. Dataram Roy* (6), *Nani Bibee v. Hafiz-ullah* (7), and *Bhalu Roy v. Jakhu Roy* (8). Putting aside any question of equitable estoppel, such as is so forcibly described by Lord Cairns in the *Agra Bank v. Barry* (9), it seems to me that where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith (see Story's Equity by Grigsby, s. 397, and 2 White and Tudor, pp. 45, 46), and that the principle enunciated in s. 53 of the Transfer of Property Act is applicable to such a transaction. In other words, in such a condition of circumstances, the condition of things is that *qua* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law, to give preference to an instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*. In this respect of the matter, such document would not be a "document" in the sense of s. 50 of the Registration Act, which term, as therein used, I understand to mean a document legally enforceable, and I am confirmed in this opinion by the remarks of Sir Barnes Peacock, C.J., in *Rahmat-ulla v. Sarait-ulla* (10). This being the view I take of the question raised by the second [543] plea in appeal, the Courts below were, in my opinion, right in giving effect to the defendant's deed, and I dismiss this appeal with costs.

MAHMOOD, J.—I concur.

*Appeal dismissed.*

(1) 5 M. 73.

(2) 6 M. 88.

(3) 6 M. 174.

(4) 5 C. 336.

(5) 7 O. 759.

(6) 8 C. 597.

(7) 10 C. 1073.

(8) 11 C. 667.

(9) L.R. 7 H.L. 135. (10) 1 B.L.R. F.B. 58.



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APPEL-

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6 A.W.N.

(1886) 179.

8 A. 543=6 A.W.N. (1886) 179.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*BEHARI DAS (*Plaintiff*) v. KALIAN DAS (*Defendant*).<sup>\*</sup> [8th July, 1886.]*Arbitration—Making award after the time allowed by Court—Civil Procedure Code, s. 521.*

Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless "made" within the period fixed by the Court, is equivalent to a rule that the award must be "delivered" within that period.

Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September on which day it was filed. It had been agreed that the opinion of the majority should carry the decision.

*Held* that the award was not "made within the period fixed by the Court" within the meaning of s. 521 of the Civil Procedure Code.

THE facts of this case are stated in the judgment of the Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Nand Lal*, for the respondent.

## JUDGMENT.

TYRRELL, J.—This case is one in which a reference to arbitration was made when the suit was in the Court of first instance.

The question at issue was referred to three arbitrators, namely, Nand Kishore, Jit Mal and Beni Ram, and the order of the Court was, that the award made by these arbitrators should be filed, that is to say, made and delivered, on or before the 19th September, 1885. As a matter of fact, the award of the three arbitrators was not filed on that date, but was signed by two of them on that date and by Beni Ram, the third arbitrator, on the 20th September. Both parties objected to the propriety and correctness of the arbitrators' award, but their objections were overruled, and a decree based on the award was passed.

[544] On appeal by the defendant, the lower appellate Court set aside this decree, holding the award to be invalid, and remitted the case to the first Court for trial on its merits. This order of the lower appellate Court is the subject of the present appeal. The learned pleader for the appellant, while admitting that the award was not signed, filed and delivered within the period allowed by the Court, contends notwithstanding that the award was "made" on the 19th September, in the sense of the last paragraph of s. 521, and therefore was valid. He bases his argument mainly on the terms of s. 515 of the Code, which provides that when an award has been made, the parties shall sign it, the argument being that an award, though unsigned, may still, in the sense of that section, be considered to have been "made." He also contends in an oral plea that the award of two out of three arbitrators having been made and signed on the 19th September, the award was a good one, inasmuch as it had been agreed that the opinion of the majority should carry the decision, I would not allow these contentions. Looking to s. 508 of the Code, I find that it is the duty of the Court to fix the time for "delivery" of the award, and under

\* First Appeal No. 97 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 10th May, 1886.

s. 514, if the award cannot be completed within the time so fixed, the Court may enlarge the time for its "delivery." These are the only provisions referring to the period to be fixed by the Court; and as they both contemplate the *delivery* of the award, which necessarily pre-supposes the *making* and signing of such award, it follows that, under s. 521, the rule that no award shall be valid unless "made" *within the period fixed by the Court*, is equivalent to a rule that the award must be "delivered" within that period. In the case before us it is to be noted that the order to file or deliver the award before the 19th September was as precise as it could be. The award, therefore, in the case which was signed by two arbitrators only within the time fixed for its delivery in a completed state, and was not filed till the day after the expiry of the limit fixed by the Court, was not "made within the period fixed by the Court." As to the oral plea, it is sufficient to say that the Court's order was, that the award of the three arbitrators, and not the award of the majority, should be filed on or before the 19th September; and even the award of the majority was not delivered or filed on that day. I am, therefore, [545] of opinion that the pleas in appeal are not sound, and that this appeal must be dismissed with costs.

OLDFIELD, J.—I concur.

*Appeal dismissed.*

8 A. 545=6 A.W.N. (1886) 178.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

NAND RAM (*Plaintiff*) v. SITA RAM AND ANOTHER (*Defendants*).<sup>\*</sup>  
[8th July, 1886.]

*Execution of decree—Decree enforcing the right of pre-emption—Non-payment of purchase-money decreed by appellate Court—Restitution of purchase-money paid under lower Court's decree—Civil Procedure Code, s. 583—Application for restitution—Revival of application—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4).*

A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139 and in July, 1890, the plaintiff paid the amount into Court, and it was drawn out by the defendant in August, 1891. Meanwhile, in July, 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May, 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted and the defendant ordered to refund, and this order was confirmed on appeal in January, 1885, and by the High Court in second appeal in May, 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December, 1884, removed the application temporarily from the "pending" list. In February, 1895, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation.

*Held* that this application was only a revival of the application of May, 1893, which was within time.

*Held* also that the plaintiff was, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the

<sup>\*</sup> Second Appeal No. 52 of 1886, from an order of M. S. Howell, Esq., District Judge of Aligarh, dated the 12th April, 1886, reversing an order of Babu Abinash Chander Banarji, Subordinate Judge of Aligarh, dated the 6th February, 1886.

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High Court of July, 1881; that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the lower appellate Court; that he was competent under s. 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits;" that he did this in May, 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act; and that his present application to the same effect being within three years from that application was within time.

[546] THE facts of this case were as follows:—

The plaintiff in a suit to enforce the right of pre-emption obtained a decree in the Court of the Subordinate Judge of Aligarh for possession of the property claimed, conditionally on the payment of Rs. 1,098-11-0. The defendants-vendees appealed to the District Judge by whom the purchase-money was increased to Rs. 1,139-15 6. On the 6th July, 1880, the plaintiff paid this sum into Court, and it was taken out by the defendants on the 19th August, 1881. The defendants having preferred a second appeal to the High Court, that Court, on the 27th July, 1881, increased the purchase-money to Rs. 2,400, directing that this sum should be paid into Court within six weeks from the date of its decree, that is, by the 7th September, 1881, or the plaintiff's suit should stand dismissed. The plaintiff did not pay the money, and consequently his suit stood dismissed. On the 25th May, 1883, he applied to the Subordinate Judge for the restitution of the money he had paid into Court under the decree of the District Judge, asking for the arrest of the defendants. The application was allowed on the 4th July, 1883; but the defendants having preferred an appeal to the District Judge against the order granting it, the Subordinate Judge on the 4th December, 1884, struck off the application pending the decision of the appeal. On the 15th January, 1885, the District Judge affirmed the order of the 4th July, 1883, and dismissed the appeal. On the 19th February, 1885, the plaintiff applied again to the Subordinate Judge for the restitution of the money, asking for the attachment and sale of property belonging to the defendants. On the 25th May, 1885, the defendants having in the meantime appealed from the District Judge's order of the 15th January, 1885, that order was affirmed by the High Court.

The defendants contended that the application of the 19th February, 1885, was barred by limitation. The Subordinate Judge disallowed this contention, holding that limitation would run from the order of the High Court dated the 25th May, 1885, and that the application was only a revival of the one made on the 25th May, 1883.

On appeal by the defendant the District Judge held that the application was an independent one, and not a revival of the one [547] of the 25th May, 1883; that it was one for refund of money paid under the District Judge's decree and therefore governed by No. 178, sch. ii of the Limitation Act; that the right to apply accrued on the 7th September, 1881; and the application was therefore barred by limitation.

The defendant appealed to the High Court, contending, *inter alia*, that the application was within time, being a revival of the one of the 25th May, 1883.

Pandit Nand Lal, for the appellant.

Babu Jogindro Nath Choudhri, for the respondents.

#### JUDGMENT.

OLDFIELD and TYRRELL, JJ.—The appellant was a successful plaintiff in a pre-emption suit, the first Court having decreed the property to

him on condition of his paying for it the price of Rs. 1,098-11-0. The first appellate Court raised this sum to Rs. 1,139-15-6; and on the 6th July, 1880, the plaintiff paid this sum into Court. The defeated party drew it out on the 19th August, 1881. But meanwhile the High Court in second appeal decreed the enhanced sum of Rs. 2,400 to be the true price payable by the pre-emptor, who, finding it more than he cared to give, let the time limited for payment of the excess difference elapse without paying it. On the 25th May, 1883, the plaintiff applied to the Subordinate Judge in the department of execution of the decree for the refund of his deposit, which had been drawn and retained by the other side. His application was granted, and the defendant was ordered to refund on the 4th July, 1883. But the latter carried the case in appeal to the District Judge, who, on the 15th January, 1885, confirmed the Subordinate Judge's orders. Meantime the latter had suspended execution of the order, pending the result of the appeal; and the order of the 4th December, 1884, removed the application temporarily from the "pending" list. On the 19th February, 1885, the plaintiff applied to the Subordinate Judge to enforce the refund, and an appeal by the defendant in the last resort to the High Court was dismissed on the 25th May, 1885, the orders of the local Courts being confirmed. But the Aligarh District Judge has now pronounced the plaintiff's remedy to be barred by limitation. Hence this appeal. It is argued that the application of the 19th February, 1885, is only a revival of [548] the application of the 25th May, 1883, which was within time; and the contention appears to be sound and sustainable. But apart from this consideration, it is clear that the application for the refund is not time-barred. The plaintiff applicant is, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the appellate Court made on the 27th July, 1881. It was a necessary incident of that decree, which declared the plaintiff's deposit of Rs. 1,139-15-6 to be insufficient to purchase the property under pre-emption, that he was entitled in consequence to restitution of this sum, which he had paid as the sufficient price under the decree of the lower appellate Court, and the plaintiff was competent to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits"—s. 583, *supra*. This he did in May, 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act. And his present application to the same effect made on the 19th February, 1885, being within three years of that application, is within time. The order of the Subordinate Judge therefore, directing execution to be made in the plaintiff's favour, must be restored, that of the District Judge being set aside, and this appeal is allowed with all costs.

*Appeal allowed.*

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JULY 9.

APPEL-  
LATE  
CIVIL.8 A. 548=  
6 A.W.N.  
(1886) 179.

8 A. 548=6 A.W.N. (1886) 179.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*CHUHA MAL (*Plaintiff*) v. HARI RAM (*Defendant*).\*  
[9th July, 1886.]

*Arbitration—Making award after the period allowed by Court—Order fixing time, or enlarging time fixed, for the delivery of award requisite—Civil Procedure Code, ss. 508, 514, 521, 522—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.*

The law contained in ss. 508 and 514 of the Civil Procedure Code requires that there shall be an express order of the Court fixing the time for delivery of the award or for extending or enlarging such time and the mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.

An award which is invalid under s. 521 of the Civil Procedure Code because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award [549] is not a decree in accordance with an award from which no appeal lies, with reference to the ruling of the Full Bench in *Luchman Das v. Brijlal* (1).

Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court, *held*, that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.

THE plaintiff in this case claimed possession of certain land. In the course of the suit in the Court of first instance the parties agreed to refer the case to the arbitration of one Amba Prasad. The Court of first instance (Munsif of Farukhabad) made an order referring the case to the arbitrator, and fixing the 10th July, 1885, for the delivery of the award. On the application of the arbitrator the time for the delivery of the award was extended to the 9th August, 1885, and then to the 24th September, 1885. The arbitrator delivered his award (which was in plaintiff's favour, and awarded him possession of the land claimed and costs of the suit) on the 26th September, 1885, or two days beyond the time allowed. The defendant took certain objections to the award, but did not take the objection that the award was invalid as it had not been made within the time allowed by the Court. The Court of first instance disallowed the objections, and passed a decree in accordance with the award. The defendant appealed on the ground that the award was invalid, as it had not been delivered within the time allowed; and the lower appellate Court (District Judge of Farukhabad) allowed the appeal on this ground, and, setting aside the award, remanded the case to the Court of first instance for trial on the merits.

The plaintiff appealed from the order of remand, the 1st and 2nd grounds of appeal being (i) that the decree of the Court of first instance was not appealable, having been passed in accordance with the award; (ii) that the objection with reference to which the lower appellate Court had reversed that decree had not been taken in the Court of first instance, and was therefore not entertainable in the appellate Court.

\* First Appeal No. 78 of 1886, from an order of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 24th March, 1886.

Babu Ram Das Chakrabati, for the appellant.  
Pandit Sundar Lal, for the respondent.

## JUDGMENT.

[550] OLDFIELD, J.—This is an appeal from the decree of the Judge setting aside the decree of the Court of first instance made on an award of arbitrators.

The matter in dispute had been referred to arbitration under s. 506 and following sections, Civil Procedure Code, and a time fixed for submission of the award, which was extended: the award, however, was not submitted till two days after the expiry of the time allowed.

Objections were taken to the award by the defendant, which did not include any as to its invalidity by reason of its being submitted after the time allowed. The objections were disallowed, and the Court made a decree in accordance with the award.

The defendant appealed to the Judge on the ground that the award was invalid, and the Judge, allowing the plea, has set aside the decree. The plaintiff now appeals to this Court, and contends that under s. 522, Civil Procedure Code, no appeal lay to the Judge, and that the defendant is estopped from raising the objection, as he failed to raise it in the Court of first instance. S. 521 enacts that no award shall be valid unless made within the period allowed by the Court. The award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid, that is, there was no award on which the Court could make a decree. I think the law (ss. 508 and 514) requires that there shall be an express order of the Court fixing the time for delivery of the award, or for extending or enlarging such time; and the mere fact that the Court has passed a decree in accordance with the award, cannot be taken as affording a presumption that an extension of time was given; nor do I think that the defendant is estopped from raising this particular ground of objection because he did not raise it in the first Court; it is not shown that he was then aware of the defect, or had done anything to imply consent to extension of the time.

As the award was invalid, the decree of the first Court is not a decree in accordance with an award from which no appeal lies, with reference to the Full Bench ruling of this Court (1). I would dismiss the appeal with costs.

[551] BRODHURST, J.—I entirely concur in dismissing the appeal with costs, and in the reasons given by my brother Oldfield for so doing.

*Appeal dismissed.*

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CIVIL.

8 A. 548=  
6 A.W.N.  
(1886) 179.



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JULY 22.

8 A. 551 = 6 A.W.N. (1886) 220.

CIVIL REVISIONAL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

CIVIL  
REVI-  
SIONAL.

MAKTAB BEG AND OTHERS (*Defendants*) v. HASAN ALI (*Plaintiff*)\*  
[22nd July, 1886.]

8 A. 551 =  
6 A.W.N.  
(1886) 220.

*Civil Procedure Code, s. 561—Objections by respondent—Withdrawal of appeal.*

Where an appeal was dismissed upon the application of the appellant himself made before the hearing,—*held* that the respondents, who had filed objections to the decree of the Court of first instance under s. 561 of the Civil Procedure Code, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *Coomar Puresh Narain Roy v. Watson and Co.* (1) and *Dhondi Jagannath v. The Collector of Salt Revenue* (2) referred to.

THE facts of this case are stated in the judgment of Oldfield, J.

Mr. Niblett, for the applicants (defendants).

Munshi Kashi Prasad, for the plaintiff.

JUDGMENT.

OLDFIELD, J.—This is an application, under s. 622 of the Civil Procedure Code, to revise an order of the lower appellate Court passed in an appeal from a decree of the Munsif of Manammadabad. The plaintiff brought a suit against the applicants before us for damages for breach of contract. The Munsif decreed a portion of the claim and dismissed the remainder. The plaintiff preferred an appeal, and the applicants before us, who were respondents, filed objections under s. 561 of the Code. Before the hearing began the plaintiff-appellant applied to withdraw his appeal, and it was dismissed, and the applicants' objections were at the same time dismissed, without the lower appellate Court going into them. It is this order of the Judge we are asked to revise. I am of opinion that the applicants had no claim, under the circumstances, to have their objections heard when the appeal itself was not heard. The terms of s. 561 are, that a respondent may, upon the hearing, support the decree on any grounds decided against him in the Court [552] below, or take any objection to the decree which he could have taken by way of appeal, but he can only do so upon the hearing that is, if the appeal comes to be heard. This view is supported by *Coomar Puresh Narain Roy v. Watson & Co.* (1) and *Dhondi Jagannath v. The Collector of Salt Revenue* (2), the latter decision proceeding upon the same *ratio decidendi*. This application must therefore be dismissed.

MAHMOOD, J.—I am entirely of the same opinion, and would add that the principle of this decision is in accord with that which the Procedure Code and the law recognizes as applicable in cases where the action of one party to a suit is dependant on that of the other. It proceeds upon the hypothesis that had the applicants really desired to object to the lower Court's decision, they would themselves have preferred a separate appeal. The right of a respondent to have his objections heard as if he had appealed must, I think, depend on the appellant's appeal, and should only be allowed when the appellant proceeds with his appeal to a hearing. In my

\* Application No. 217 of 1885 for revision under s. 622 of the Civil Procedure Code of an order of J.M.C. Steinbelt, Esq., District Judge of Azamgarh, dated the 21st July, 1885.

experience these objections are generally filed long after the time allowed for appealing has expired, and the hearing of them is subject to the condition of the appellant proceeding with his appeal to a hearing. The right to have these objections heard vanishes when the condition upon which they depend vanishes, and this upon general principles. In this case the appeal itself was never heard.

*Application dismissed.*

8 A. 552—6 A.W.N. (1886) 221.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

WARIS ALI (*Defendant*) v. MUHAMMAD ISMAIL AND OTHERS ○  
(*Plaintiffs*).<sup>\*</sup> [22nd July, 1886.]

“*Rent free grant*” — “*Rent*” — *Services—Jurisdiction—Civil and Revenue Courts—Act XII of 1881 (N.-W.P. Rent Act), ss. 3 (2), 30, 95 (c)—Act XIX of 1873 (N.-W.P. Land Revenue Act), ss. 3 (4), 79-89, 241 (h).*

A suit was brought for the ejectment of the defendant from certain land, on the allegations that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on [553] condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the N.-W.P. Rent Act (XII of 1881), but the application was rejected. In answer to the suit, the defendant pleaded that it was not cognizable by the Civil Court.

*Held* by OLDFIELD, J., (MAHMOOD, J., dissenting) that the suit could not be held to be one to resume a rent free grant, inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit.

*Held* by MAHMOOD, J., that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that under these circumstances the suit was not cognizable by the Civil Court.

*Per* OLDFIELD, J.—The definition of the term “rent” in s. 3 of the Rent Act was intended to include services or labour rendered for the use of land, and the grantee in the present case was a tenant who rendered rent in this sense on account of the use of the land. Further, there was no such grant as is contemplated by s. 30 of the Rent Act, inasmuch as that section refers to grants for holding land exempt from the payment of rent alluded to in s. 10 of Regulation XIX of 1793, and that Regulation, assuming it to refer to grants free from payment of rent as well as of revenue, contemplated grants not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. A tenure such as in the present case, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act. *Mutty Lal Sen Gywal v. Deshkar Roy* (1) and *Puran Mal v. Padma* (2) referred to.

*Per* MAHMOOD, J.—The services connected with the grant in this case did not constitute “rent” within the meaning either of the N.-W.P. Rent Act, or of the N.-W.P. Land Revenue Act (XIX of 1873), and the word “render” in s. 3 of the former Act does not include or imply the rendering of services or labour. The word “rent” is probably used as the equivalent of the Hindustani words *lagan* or *poth*, representing the compensation receivable by the landlord for letting the

<sup>\*</sup> Second Appeal No. 1749 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 30th August, 1885, confirming a decree of Babu Ganga Prasad, Munsif of Koil, dated the 5th January, 1885.

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(1886) 221.

land to a cultivator, and s. 3 of the Rent Act, where it uses the expressions "paid, delivered or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisalment or valuation of the produce. The grant in the present case was a rent-free grant of the nature of *chakran* or *chakri*, i.e., service-tenure, to which s. 41 of Regulation VIII of 1793 related. The incidents of the tenure would be governed by s. 30 of the Rent Act and ss. 79-84 of the Land Revenue Act, being matters outside the jurisdiction of the Civil Court. The scope of s. 10 of Regulation XIX of 1793 is not limited to permanent rent-free grants, and the present suit was in respect of a matter falling within s. 95 (c) of the Rent Act, and "provided for in ss. 79 to 89, both inclusive," of the Land Revenue Act, within the meaning of s. 241 (h) of the latter [554] Act. *Puran Mal v. Padma* (1), *Tika Ram v. Khuda Yar Khan* (2) and *Forbes v. Meer Mahomed Tuquee* (3) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Munshi *Kashi Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

### JUDGMENT.

OLDFIELD, J.—This suit has been brought by the plaintiff to eject the appellant-defendant, Waris Ali, from one bigha of land in mauza Burhausi.

The plaintiff's case is that this is rent-paying land which had been granted to Nasiba by the plaintiff's father many years ago, free from payment of any rent, on condition that certain services as a mimic should be performed; that these services continued to be performed till lately, when Nasiba discontinued them, and has sold the land to the appellant.

The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the Rent Act: but the application was disallowed on the ground that the Revenue Court had no jurisdiction, there being no rent-free grant as contemplated in the Act.

The defence was, that the land had been bestowed unconditionally on Nasiba, who enjoyed it as the proprietor.

The Court of first instance found that the land had, up to 1264 Fasli, been recorded as paying cash rent, and in 1274 Fasli it was recorded that the said rent was remitted in lieu of services rendered, and it found that the land had been held by Nasiba on these conditions; that there was no rent-free grant in the sense of s. 30 of the Rent Act, and no bar to entertaining the suit for ejectment, since the conditions of service had ceased, and Nasiba had wrongfully alienated the land.

Waris Ali, appealed to the Judge, who has substantially come to the same conclusion as the first Court.

Waris Ali, defendant, has appealed on three grounds:—

(i) That this suit is not cognizable by the Civil Court; (ii) that the proceedings in the Revenue Court operate to bar the claim, as [555] the matter was finally decided there, and the question now raised is *res judicata*; (iii) that the finding as to the nature of the tenure is not supported by the evidence.

The last plea cannot be entertained, so far that we cannot in second appeal interfere with the finding that the land was granted to, and held by, Nasiba in lieu of services to be performed, which were rendered instead of a cash rent payment.

Whether or not this suit is cognizable by the Civil Court, depends on whether it can be held to be a suit to resume a rent-free grant in the

(1) 2 A. 732.

(2) 7 A. 191.

(3) 13 M.I.A. 438.

sense of s. 30 of Act XII of 1881, or has for its object to eject a tenant, and so deals with matters in which the Revenue Court has exclusive jurisdiction under ss. 93 and 95 of the Rent Act.

Now, it is found that this land was land for which rent used to be paid in cash, and it was given to Nasiba on the condition that he rendered to the zamindar certain services in lieu of paying a cash rent for the land. Now rent in the Rent Act is defined to be "whatever is paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land," and it seems to me clear that Nasiba was a tenant who rendered certain services on account of his use of the land. It has been pressed on us that the term "rent" as used in the Rent Act cannot mean services rendered to the landlord for the use of land, but is confined to that which is paid or delivered or rendered in cash or kind; because the provisions of the Act are only operative in respect of remedies in regard to rent of that character, and inoperative in respect of rent in the shape of services rendered. But the argument is not conclusive; for whether or not all the provisions of the Act can be brought into force only in respect of rent taken in one shape is no ground for assuming that the term "rent" may not include something taken in another shape. Now the definition of "rent" in s. 3 seems to me expressly intended to include services or labour rendered for the use of land, and in point of fact the word "rent" has always been so understood.

Blackstone defines it:—"The word rent, or render, *re litus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal hereditament. It is defined to be a certain profit issuing yearly out of lands [556] and tenements corporeal. It must be a profit, but there is no occasion for it to be, as it usually is, a sum of money, for spurs, capons, horses, corn, or other matters, may be rendered by way of rent. It may also consist in services or manual operations, as to plough so many acres of ground, to attend the king or the lord to the wars, or the like, which services in the eye of the law are profits."

I have no doubt the Legislature had this meaning of rent in view, and it seems clear from s. 8 (c) of the Act that "rent" was intended to include services rendered for the use or occupation of land.

S. 8 (c) contemplates the case of a tenant holding land in lieu of wages, that is, holding it for services rendered, remunerated by the profits of the land instead of wages. But a tenancy implies the relation of landlord and tenant between the holder of the land and the receiver of the services, and as landlord is defined in the Act to be the "person to whom a tenant is liable to pay rent," it follows that in such a case the services rendered constitute rent under the Act.

I therefore hold that the tenure in this case is that of a tenant paying rent to the landlord.

But a further question would arise whether there has been such a grant as is contemplated by s. 30 of the Rent Act. That section refers to grants for holding land exempt from the payment of rent alluded to in s. 10, Regulation XIX of 1793.

Now it appears to me very clear that the grant in this case is not one of those to which the Regulation refers. The Regulation has reference to grants of land free from payment of revenue; but, assuming that it refers to grants free from payment of rent also, it contemplated grants of land not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. This was pointed out by Norman, J.,

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in a very important case decided by the Calcutta Court, where the whole question of these grants was exhaustively discussed—*Mutty Lall Sen Gywal v. Deshkar Roy* (1).

Norman, J., remarked that what was contemplated was a grant of land to hold in absolute proprietary right, not only free from [557] payment of any rent in money, but without any dependence on, or duty to, the zamindar, and that when the grantor holds subject to the performance of any duty or conditions, the Regulations appear to treat him as a leaseholder; and he pointed out that s. 7, Regulation VIII of 1793, shows that persons holding land subject to performance of conditions stipulated for, are to be considered as lease-holders only. The same view was taken by this Court in *Puran Mal v. Padma* (2). S. 30 of the Rent Act deals with such grants as are contemplated in s. 10, Regulation XIX of 1793, and we must see what they were, and I think the view expressed by Norman, J., and by Spankie, J., in the case of *Puran Mal* (2) is correct, and that a tenure, such as the one we are now dealing with, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act.

There was therefore no rent-free grant at all in the sense contemplated by s. 30 of the Rent Act, and this cannot be held to be a suit to resume a rent-free grant, in which matters the Revenue Court has exclusive jurisdiction. It is, in fact, a suit to eject the appellant as a trespasser, between whom and the plaintiff there is no relation whatever of landlord and tenant, and it does not concern itself with any dispute or matter such as are referred to in s. 93 or s. 95 of the Rent Act as exclusively cognizable by the Revenue Court. From what has already been stated, it is scarcely necessary to add that the plea of *res judicata*, with reference to anything done in the Revenue Court, has no force whatever. I would dismiss the appeal with costs.

MAHMOOD, J.—The only question of significance raised in this appeal relates to the jurisdiction of the Civil Court in a suit of this nature, and on that question depends also the determination of the plea of *res judicata* which has been raised in this case. In deciding the question some difficulty, no doubt, is created by two rulings of this Court, one being *Puran Mal v. Padma* (2) and the other a ruling of my own in *Tika Ram v. Khuda Yar Khan* (3). In the former of these cases the plaintiffs, as zamindars, sued for certain land in their village, on the allegation that it had been [558] assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of *balahar* or village watchman, and that the defendant, having ceased to perform those duties, was holding as a trespasser, and as such was liable to eviction. The defendant's plea was that he and his predecessors, having held the land rent-free for two hundred years, had acquired a proprietary title which could not be defeated by the plaintiff. Spankie, J., who delivered the judgment of the Court in that case, held that such assignment of land was not a "grant" within the meaning of Regulation XIX of 1793; that the operation of ss. 30 and 95 (c) of the Rent Act (XVIII of 1873) and ss. 79 and 241 (h) of the Revenue Act (XIX of 1873), so far as they oust the jurisdiction of the Civil Court, was limited to grants contemplated by that Regulation; and that therefore the dispute raised in that suit was cognizable by the Civil

Court. In the course of his judgment the learned Judge observed:—  
 "What the plaintiff desires in this case is full possession of a plot of land which, he says, has hitherto been held without payment of rent by defendant, the village 'balahar' or watchman. He was allowed to occupy the land for his support, and, in point of fact, whatever he derived from the land constituted his wages. But there was no permanent grant of the land to him or his predecessors. He would continue to occupy it as long as he continued to give his services as watchman." In the other case, the facts before me were not altogether dissimilar to the case just referred to, but it had been found that "the defendant and their ancestors have been in possession of this land for more than fifty or sixty years," and that they "are in possession as *muafi*-holders, and have never paid any rent." The duties for which the land was originally assigned were those of *kherapati* of the village, such duties being the performance of certain annual religious ceremonies, and the ground upon which the eviction of the defendant was claimed was that the defendant, having wrongly planted a grove on the land, had been dismissed by the plaintiff zamindar from the office of *kherapati*. Upon this state of things I held that the grant, whatever its origin may have been, was admittedly a rent-free grant, and being proved to be older than sixty years, during which time the defendant or his ancestors never paid any rent, as was found by the Courts, the [559] nature of the dispute there was beyond the jurisdiction of the Civil Court, because it could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the Rent Act (XII of 1881), and therefore the provisions of cl. (c) of s. 95 of that Act, and for similar reasons of cl. (h) of s. 241 of the Land Revenue Act, were applicable. Whether there is any distinction in principle, for the purposes of this question of jurisdiction, between the temporal functions of a *balahar* or village watchman and those of a *kherapati* or the village priest, is open to doubt, though I may observe that in the case of *Raghubardyal v. Gyadin* (cited at page 16 of Mr. Teyen's edition of the Rent Act), the Sudder Board of Revenue held that religious grants which involve more or less the performance of some religious rite or ceremony, do not fall under the head of, '*khidmati*' grants, and the provisions of s. 30 of the Rent Act are therefore applicable to them (Board's File No. 802 of 1881). I, however, think that the learned Judge of the lower appellate Court was right in thinking that the two rulings of this Court already referred to are not fully reconcilable in their *ratio decidendi*, and I may add, as supporting the view of Spankie, J., that the Sudder Board of Revenue in *Ghanga Dhar v. Baldeo* (1) held that an assignment of land, on condition that certain services are performed by the assignee (*haqqul-khidmat* grants), is not a rent-free grant within the meaning of s. 30 of the Rent Act, since the service is equivalent to rent.

It might perhaps have been possible, with reference to the rulings above mentioned, to distinguish my ruling in *Tika Ram v. Khuda Yur Khan* (2) by saying that the duties of a *kherapati* were of a spiritual nature, and could not therefore be regarded as rent within the meaning of the definition contained in cl. (2) of s. 3 of the Rent Act, or cl. (4) of s. 3 of the Land Revenue Act. But this was not the *ratio decidendi* upon which my ruling in that case proceeded, and, moreover, here the services for which the grant is alleged to have been made were those of a mimic or drollery, which

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(1) 1 N.W.P. Legal Remembrancer, Revenue and Rent Series, 118.

(2) 7 A. 191.



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it would not be easy to classify either under the head of spiritual for substantial temporal services. At any rate, the exigencies of the present case require me to decide whether such services are "*rent*" [560] within the meaning of cl. (2), s. 3 of the Rent Act, or cl. (4), s. 3 of the Land Revenue Act, the words employed in both the enactments in defining rent being identical. The words are:—" *Rent* ' means whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use or occupation of land." It is contended that the word "*rendered*" is used in this definition as applicable only to services, and that cl. (c) of the proviso to s. 8 of the Act, which lays down that no tenant shall acquire a right of occupancy "in land held by him in lieu of wages," supports this interpretation.

Having given the question the best consideration I can, I find myself forced to arrive at the conclusion that the services attributed to the grant in this case did not constitute "*rent*" within the statutory definition. The whole argument in favour of the contention really rests upon the exact interpretation of the word "*render*"—a word which, in the English language, possesses many meanings, and which in one sense would undoubtedly include or imply the rendering of service or labour. But the primary meaning of the word is "to return, to pay back, to restore," and among other meanings the word simply means "to give on demand, to give, to assign, to surrender." The last and most approved edition of *Webster's Dictionary* is my authority for these meanings, and I am inclined to adopt this interpretation in preference to limiting the word to services. I shall presently show that this is the only manner in which the definition of "*rent*" in the interpretation clause can be rendered intelligible and consistent with the use of the word throughout the remaining provisions of these enactments. It is contended, with reference to cl. (c) of the proviso to s. 8 of the Rent Act, that a tenant holding land "in lieu of wages" renders service as "*rent*" within the meaning of the definition. But I do not think such a conclusion necessarily follows. The word "*tenant*" is not exhaustively defined in either of these enactments, and if the word is understood in its general sense, it does not, on the one hand, necessarily follow that every tenant pays rent, or delivers anything in lieu thereof; nor, on the other hand, does it necessarily follow that every service performed by such tenant for the zamindars constitute rent. Thus, a tenant who is in possession of land, "in lieu of wages," [561] need not be liable to payment of any "*rent*" within the meaning of the Act.

I shall now show that this is the only consistent interpretation required by that rule of construing statutes, which says that when words are specially defined in an enactment, they must throughout be interpreted in that same sense. The scope of the Rent Act includes among its most important provisions, as the preamble shows, rules "relating to the recovery of rent," and indeed this [might perhaps be said to be the whole province of the enactment. Now, if I can show from the enactment itself that there is not a single provision in it which can possibly be construed as laying down a rule for the "recovery of rent," if services such as those in this case are understood as rent, I think I shall have shown that "rendered" must be understood as I have interpreted it, and that rent must not be understood to include such services.

The first provision, then, to which I would refer is s. 24 of the Rent Act, which confers a general right upon all tenants to claim a lease from the landlord, defining, *inter alia* matters as to the amount of "annual rent

payable," "the instalments in which, and the dates on which, such rent is to be paid." These are the words of clauses (b) and (c), and it is clear that neither of them can possibly apply to such services as in this case. Then comes cl. (e), which, in enumerating the contents of the lease, says—"If the rent is payable in kind, or is calculated on a valuation of the produce, the proportion of produce to be delivered, the mode of valuation, and the time, manner, and place of delivery." In my opinion, it is impossible to hold that mimicry can be regarded either as rent "payable in kind," or covered by any other portion of this clause. And if this is so, then we have the necessary inconsistency in the Act that whilst the section confers the right upon "*every tenant*," a tenant who holds land in lieu of the performance of mimicry cannot claim the benefit of the law. Then comes s. 34, which lays down that "when an arrear of rent remains due from any tenant, he shall be liable to pay interest on such arrear at one per cent. *per mensem*; and if the arrear remains due on the 30th day of June, to be ejected from the land in respect of which the arrear is due." It is obvious that in this clause "rent" cannot be understood to include [562] services of the mimicry. I could go through the whole Act, and show that in no part of it can such services be possibly understood to mean "rent." But I will go at once to the remedial part of the statute and refer to s. 56, which, after stating that the produce of all land in the occupation of a cultivator is to be deemed as hypothecated for rent, goes on to say that "when an arrear of rent is due from any cultivator, the person entitled to receive rent immediately from him may, instead of suing for the arrear as hereinafter provided, recover the same by distress and sale of the produce of the land in respect of which the arrear is due, under the rules contained in this chapter." How is it possible to hold that this provision applies to rent of the nature which is said to constitute rent in this case? And if distress is not the mode of recovering such rent, is there a single provision of the Act which provides a remedy for the landlord to recover such rent? there is, indeed, another provision to be found in cl. (a), s. 93, which relates to "suit for arrears of rent, or, where rent is payable in kind, for the money equivalent of rent, on account of land or on account of any rights of pasturage, forest rights, fisheries or the like." This clause is equally inapplicable to such services as mimicry, and I am wholly unaware of any provision in the Act which would enable the landlord to enforce the recovery of such rent. The matter therefore stands thus: that a statute which in the preamble states its object to be to provide rules for the "recovery of rent," defines rent in such a broad manner as to include the performance of mimicry, and then defeats its own whole object by providing absolutely no rule for recovery of such rent. Sooner than accept this necessary consequence, I am prepared to say that the word "*rent*," as it occurs in the definition of "rent" must not be so understood as to include such services. Similar reasons *mutatis mutandis*, satisfy me that the word "rent" as used in the Land Revenue Act, must not be understood in any sense other than that which I have interpreted it in the Rent Act.

What I have already said is sufficient to show that upon the case as set up by the plaintiff himself, the grant in this case was free of "*rent*," in the sense in which that word must be understood both in the Rent Act and in the Land Revenue Act. But I will go further and show how the definition of the word in those [563] two enactments may be accepted in an intelligible sense without involving the inconsistencies to which I have referred. The truth seems to me to be that the word "rent" which has

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found its way into the two enactments above referred to from the old Regulations of the East India Company, is used probably as the equivalent of the Hindustani words *lagan* or *poth*, which are well understood in the country as representing the compensation receivable by the landlord for letting the land to a *kashikar* or cultivator. It is equally well known that such compensation, ever since the reign of the Emperor Akbar, when his Revenue Minister, Raja Todar Mal, introduced his system, payments of *lagan* were made in three ways. The first of these was *batai* or division of the produce in kind, of which the zamindar, or where such rights did not exist, the Government took a certain proportion. When cash payments were introduced instead of *batai*, one method was to make an estimate or appraisal of the crops, and to take in cash what would represent the due proportion as the *lagan*. The third method was cash payments of fixed *lagan* agreed upon by the *kashikar*, and irrespective of the nature, quality or quantity of the produce. This last was perhaps the most recent outcome of Mabaraja Todar Mal's powerful administrative intellect, and this is the system which has received encouragement all over India under the British rule. But neither the old Regulations nor our present Land Revenue and Rent Acts force the zamindar to adopt the system of pure cash payments in preference to the other two methods. I am unaware of any further kind of "rent" or *lagan* which went beyond the principle of the three main methods which I have thus described, though there were mixed methods of paying rent. At any rate, so long as the law does not make the matter so clear as to place it beyond doubt, I shall not be willing to interpret the word "rent" as used in the Revenue and Rent Acts in any such way as would operate in defeasance of the rights of the agricultural population.

But what do those two Acts themselves indicate? I have already shown that they cannot, without involving immense inconsistency, be taken to use the word "rent" as including the services of a mimic. And I will now show that there is every indication that the Rent Act uses the word in no sense which [564] goes beyond the principle of the three old methods of receiving *lagan* from *kashikars* or cultivators. And once this interpretation of the word "rent" is accepted, the whole Act becomes consistent and intelligible. We have then s. 24, cl. (b), relating to purely cash payments, and cl. (c) relating to the instalments of such payments. Then comes cl. (e), which distinctly relates to the other two kinds of *lagan*, namely, "rent payable in kind" or "calculated on a valuation of the produce"—the former being *batai*, and the latter being usually called *kankut* in most parts of the country. The three methods of receiving rent are kept in view throughout by the Act, and whilst in connection with purely cash payments no great difficulties as to the amount of rent can arise, we have the whole of s. 43 devoted to providing rules in respect of the other two methods of realising *lagan* or *rent*, with the object of providing a remedy both for the landlord and the tenant. The provisions, then, both in respect of distress and suits for recovery of rent, become intelligible, and the body of the Act presents no contradiction of its preamble. And in this light the definition of "rent" in cl. (2), s. 3 of the Act, when it uses the three words "paid, delivered or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisal, the native words for the three methods being "*naqad*," "*batai*," and *kankut*."

I may here add that lands held under any other system, that is to say, lands granted either for past or continuing services, or for personal merit or worth (as in the case of religious or charitable grants), which

involved no rent in any of the three forms above described, were all known under the generic name of *muafi* or "rent free"—a term having many subdivisions (such as *shankalap*, &c.), and one of them is well known as *chakran* or *chakri*, that is, service tenure, to which s. 41, Regulation VIII of 1793, related, rendering them liable to redemption and assessment. All these were regarded as "rent-free," simply because they were not subject to anything which could be called "*rent*," whatever the origin, the motive, the object or the conditions of the grant, may have been. In the present case, according to the plaintiff's own allegation, "the father of the plaintiff remitted the rent of the land in suit to the ancestors of Nasiba, defendant, on the occasion of the birth of [566] Muhammad Ismail Khan, plaintiff, on the condition of his performing the services of *naqqal* (mimic). The ancestors of Nasiba and Nasiba himself continued to perform the services in lieu of the rent of the land, and they were recorded in the settlement papers to be in possession as servants." This, taken at its best, would go to show that no "*rent*" in the sense in which I have explained the word as taken for the land. There is indeed no allegation to this effect, and the finding of the lower appellate Court is the same. The grant then, putting the plaintiff's case at its best, was a rent free grant of the nature of *chakri*.

This being so, the question arises whether such rent-free grants fall under the purview of s. 30, the Rent Act, or of ss. 79-89 of the Revenue Act, so as to oust the jurisdiction of the Civil Courts under s. 95, cl. (c), of the former, or under s. 241, cl. (h), of the latter Act. The answer to this question, as I have already shown, has been given in two different ways in the two rulings of this Court, to which I have already referred. In *Puran Mal v. Padma* (1) the first point in the *ratio decidendi* was that the operation of s. 30 of the Rent Act, as well as of s. 79 of the Revenue Act, must be restricted to such grants as were contemplated by s. 10 of Regulation XIX of 1793. I am willing to concur in this proposition. But then what was the scope of that section of the Regulation? The answer given by the ruling is, that it is limited to "permanent grant," and would not include grants under which the grantee "would continue to occupy it as long as he continued to give his services." With due deference, I am unable to accept this limitation of the scope of that Regulation or of the sections of the present Rent and Revenue Acts already referred to. A grant for 999 years (a not unusual term of an English lease) is not a *permanent* alienation, and I do not think such a grant would be excluded from the operation of the Regulation and the Acts to which I have referred. To impose a restriction upon general expressions special reasons or express words are necessary, and whilst there is nothing in those enactments to justify the restriction, the principle upon which they proceed clearly indicates that the policy on which the prohibition as to such grants proceeds would be applicable as much to permanent grants as to grants for a term of years.

[566] The policy of the law, as indicated by the preamble of the Regulation, seems clear enough. In India, what would be called free-hold in England, vests in the State till it itself alienates its rights to private individuals. The ultimate ownership of the soil thus rests in the State, but upon the soil, in this part of the country, exists two classes of interests. The first is that of the cultivator, who makes that soil yield produce; the second is that of the zemindar, who standing in the position of the middle-

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man, facilitates the recovery by the State of its share of the produce. The share of the State is called *revenue* as distinguished from *rent* which is the share of the zamindar in the produce of the soil. He takes the rent from the cultivator, and out of such rent pays over the share of the State. He is called proprietor; but his proprietorship is qualified by the great incident that if he does not pay the Government revenue his proprietorship ceases, much in the same manner as non-payment of a mortgage results in foreclosure or sale of the property. Such being the nature of the zamindari rights, it is then that upon the maxim that no one can give more than he has, any alienation of land by the zamindar, purporting to make it free of its liability to Government revenue, would be void. Upon general principles he may indeed alienate his own right to take rent; but even in respect of such alienations the State is so far interested that the zamindar thereby reduces his own pecuniary means to meet the Government demand of revenue. Such alienations, whether permanent or temporary, have this tendency in effect *pro tanto*.

Regulation XIX of 1793 was passed to obviate both these evils *inter alia*, and s. 10 has this double aspect. On the one hand, it declared the invalidity of "all grants for holding land exempt from the payment of revenue," and "on the other hand, it required and authorized persons possessing "the proprietary right in any estate" "to collect *rents* from such lands at the rates of the pargana, and to *dispossess* the grantee of the proprietary right in the land, and to re-annex it to the estate or *taluk* in which it may be situated." These two aspects of the Regulation appear in other parts of it also, and the sections of the present Rent and Revenue Acts (above referred to) aim at the same two results. Under certain conditions they authorize proprietors "to resume [567] such grants or to *assess rent* on the land"—the former right involving eviction of the grantee, the latter implying that he is left in possession, but is made liable to payment. But both these remedies, as I have already indicated, have for their ultimate aim the security of the Government revenue, which the law declares is the first charge upon land, and s. 83 of the Revenue Act declares that "no length of rent-free occupancy of any land, nor any grant of land made by the proprietor, shall release such land from its liability to be charged with payment of Government revenue."

I have described these matters at such length because they show the whole policy of the law, and afford indications of the principles which regulate questions of jurisdiction. It may be stated as a general rule that all matters affecting or regulating Government revenue are placed by the Legislature beyond the jurisdiction of the Civil Courts, for reasons of policy which it is beyond my province to question. S. 241 of our Revenue Act justifies this observation, whilst s. 95 of the Rent Act indicates the same conclusion. And if this interpretation is right the present suit could not lie in the Civil Court.

But what is the nature of the suit? It begins by stating facts which mean a "rent-free grant" according to my interpretation of the term. Then the reason for resumption is stated to be that "the defendant (Nasiba) having acquired the knowledge of Persian does not now perform the services of a *naqqal* (mimic), and he has sold the land to Waris Ali, defendant, for Rs. 150, on the 26th May, 1883. As the defendant has discontinued performing the services, he has no right to the land, nor was he competent to make the sale, nor could the vendee (Waris Ali) acquire any valid title." The defence of Nasiba was that the land was given to his ancestors rent-free "hundreds of years ago" as a reward, and that

"the *naqqal* has to perform no services, nor was this land given to the ancestors of the defendants subject to any condition." The defence of the vendee, Waris Ali, was in keeping with that of his vendor, Nasiba, in whom he set up a proprietary title. Such being the dispute, it seems to me that it was "a matter provided for in ss. 79 to 89 (both inclusive)" of the Revenue Act, within the meaning of cl. (h) [568] of s. 241. And for similar reasons it would fall under cl. (c) of s. 95 of the Rent Act. And this conclusion is supported by the only finding of fact at which the lower appellate Court has arrived. The learned Judge says:—"As far as the evidence on the record goes, it seems to prove that occupation of the land by Nasiba's predecessors *free of rent* had its origin in services rendered by those persons to the zamindars. They were mimics, and doubtless followed their calling, and amused the company at marriages and festivals. Nasiba has ceased to follow the calling of a mimic, and the plaintiff wishes to *eject* him from the land or *assess rent* upon it. This is the best finding on the facts at which this Court can arrive."

Upon this finding, which we are bound to accept in second appeal, it seems to me clear that no rent, either in kind or in cash by valuation of the crops, or in cash by fixing the amount, was ever paid for the land. And if this is so, that land constituted a rent-free grant, and the claim amounts to nothing more or less than resumption of such grant or subjecting it to assessment of rent.

The exact terms of the grant do not appear from any document or any specific oral evidence. All that has been said or proved is, that the grant was made on the occasion of the birth of a son in lieu of services as a mimic or *naqqal*. But there is nothing to establish that the continued performance of such services was the condition upon which the grant was to be held. To use the words of the Lords of the Privy Council in *Forbes v. Meer Mahomed Tuquee* (1), "there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands." And their Lordships went on to say:—"Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that, the service ceasing, the tenure should [569] determine." And no such conditions being proved, their Lordships said:—"Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services." Whether the grant in this case was of this nature or of the other, it was a rent-free grant all the same; and in calling it "rent-free" I am only using the expression as employed by the Lords of the Privy Council in the case just referred to. And this being so, the incidents of the tenure as to resumption or assessment of rent would be governed by s. 30 of the Rent Act and ss. 79-84 of the Revenue Act, being matters which lie beyond the jurisdiction of the Civil Court. Whether the defendant Nasiba had, under those provisions, acquired a proprietary title under cl. (d) of s. 30 of the Rent Act, or under s. 82 of the Revenue Act, is a question which, for want of jurisdiction of the Civil Court, I am not called upon to determine in this case. For it is admitted that such rights as Nasiba had have

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been sold by him to Waris Ali, appellant, under the sale-deed of the 26th May, 1883, and the latter therefore stands in the shoes of the former, for purposes either of resumption or of assessment of rent. Nor do I, under this view, feel myself called upon to decide the question of *res judicata*, or to enter into the merits of the case, and the only ground upon which I base my judgment is the want of jurisdiction of the Civil Court. For these reasons, I regret I am unable to concur with my learned brother Oldfield, in the conclusions at which he has arrived, and I would decree this appeal, and, setting aside the decrees of both the lower Courts, dismiss the suit with costs in all the Courts.

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### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.*

GAYA (Defendant) v. RAMJIAWAN RAM (Plaintiff).<sup>\*</sup> [24th July, 1886.]

*Lease—Istimrari patta—Hereditary title—Construction of patta.*

In an instrument described as a perpetual lease (*patta istimrari*) the lessor covenanted as follows:—"So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it [570] may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 36 of the N.W.P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

Held that the mere use of the word *istimrari* in the instrument did not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshi Pershad Singh v. Ramnarain Singh* (1) followed. *Lakhu Kowar v. Harikrishna Singh* (2) dissented from.

THE plaintiff in this case, on the 24th July, 1873, gave two persons called Jag Lal and Har Prasad a lease of certain land, the terms of which were as follows:—

"I, Ramjiawan, \* \* \* \* do hereby declare as follows:—I have given a perpetual lease (*patta istimrari*) of 24 bighas of land, bearing numbers as given below, situated in mauza Raghunathpur, otherwise called Bilauripur, pargana Shadiabad, on a rent of Rs. 48 a year, at the rate of Rs. 2 per bigha, besides the acreage and the patwari's fee, to Jag Lal, *Jati*, and Har Prasad, *Jati*, residents of Raghunathpur in equal shares, and do hereby stipulate and covenant in writing that they may get into possession and cultivate the land from 1281, fasli, and pay me its rent every year, and at due instalments, and obtain receipts bearing my signature. They should never make a default. In case of the rent falling in arrears, I shall have the power to oust them without the assistance of the Court. They shall not

<sup>\*</sup> Second Appeal No. 1215 of 1885, from a decree of Pandit Kashi Nath, Additional Subordinate Judge of Ghazipur, dated the 22nd May, 1885, reversing a decree of Maulvi Syed Muhammad Ashgar Ali, Munsiff of Saidpur, dated the 17th January, 1885.

(1) 12 C. 117.

(2) 3 B.L.R. 226.

make an objection on the score of whether contingencies, or of any act of the Sovereign, and pay the rent without any objection. So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the lands in any way. I have, therefore, executed these few words by way of a perpetual lease, that it may be used when needed."

The lessees being dead, the defendant, who was in possession of the land, claimed, as heir to Har Prasad, to be the lessee of a [571] moiety of the land under the lease, asserting that the lease was one creating a heritable interest. This claim was allowed by the Settlement Officer, and the plaintiff accordingly brought this suit to have it declared that he was entitled to issue a notice of ejectment to the defendant, under the provisions of s. 36 of the N.W.P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the Settlement Officer's order.

The Court of first instance dismissed the suit for reasons which it is not necessary to mention. On appeal by the plaintiff the lower appellate Court held, on the construction of the lease, that it did not create a heritable interest, but a life interest only, and decreed the claim. The defendant appealed to the High Court.

Mr. *Amir-ud-din* and *Lala Lalta Prasad*, for the appellant.

Mr. *Howell* and *Munshi Sukh Ram*, for the respondent.

#### JUDGMENT.

STRAIGHT, Offg. C.J.—I think this appeal fails. The Subordinate Judge, having regard to the language of the lease of the 24th July, 1873, was of opinion that its proper interpretation was that it was not, as alleged by the defendant-appellant, a lease in perpetuity, or one that created any heritable interest. Now no doubt the word "*istimrari*" is used in several places in this document, and it was contended by the learned counsel for the appellant that the use of this word was sufficient of itself to show that what the parties intended was, that the lease should continue binding, not only so long as the fixed rent was paid, and that the interest granted by the plaintiff was not a mere life but a heritable interest. He supported this contention by referring us to the case of *Lokhu Kowar v. Harikrishna Singh* (1), and no doubt if that authority is correct in law, it favours his view. But our attention has been called by the learned pleader for the plaintiff-respondent to a ruling of their Lordships of the Privy Council in the case of *Tulshi Pershad Singh v. Ramnarain Singh* (2), which appears to be directly apposite to the present case. Their Lordships here remark that "the words *istimrari* and *muqarrari* in a patta do not, *per se*, convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned ("*bafazandan*" [572] or "*naslan bad naslan*"), as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." Now as I understand these observations of their Lordships, the mere use of the word *istimrari* in the instrument with which we are dealing, does not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee. Their Lordships, as I understand them, also say that the words "from generation

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(1) 3 B.L.R. 226.

(2) 12 C. 117.



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to generation." "*naslan bad naslan*," must not necessarily be inserted in an instrument of lease in order to constitute a grant in perpetuity, and that the word *istimrari*, accompanied by other words and illustrated by the subsequent conduct of the parties, and in acting upon the instrument, may show that an estate of inheritance was intended. The learned counsel urges that the words used in the lease before us, namely, "so long as the rent is paid I shall have no power to resume the land," are sufficient to show that the lease was one in perpetuity; but I confess that those words do not convey to my mind any such meaning or intention. Had the lease been clearly expressed as one for the life of the lessee, or for the joint lives of two lessees, or have been a lease for five or ten years, those words might equally as well have been used.

I cannot, therefore, hold that the construction put upon the lease by the lower appellate Court is erroneous. Its decision that the defendant-appellant (even should he be, as he claims to be, the legal heir and representative of one of the lessees) is not a person who can resist the plaintiff's claim, is correct, and its finding appears to me to be quite in accord with the terms of the document and the facts of the case as evidencing the intention of the parties. The appeal therefore fails, and must be dismissed with costs.

TYRRELL, J.—I am entirely of the same opinion.

*Appeal dismissed.*

8 A. 573=6 A.W.N. (1886) 237.

### [573] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

NUR-UL-HASAN (*Judgment-debtor*) v. MUHAMMAD HASAN AND OTHERS (*Decree-holders*).<sup>\*</sup> [30th July, 1886.]

*Execution of decree—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (2).*

Art. 179, cl. (2), of the Limitation Act (XV of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.

A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March, 1882. The last mentioned defendants alone appealed, and their appeal was dismissed in May, 1882. In May, 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree.

*Held* that art. 179, cl. (2), of the Limitation Act was applicable, and that the application, being made within three years from the date of the appellate Court's decree, was not barred by Limitation.

*Hur Proshaud Roy v. Enayet Hossein* (1) and *Sangaram Singh v. Bujharat Singh* (2) distinguished. *Mulick Ahmed Zumma v. Mahomed Syed* (3) and *Ram Lal v. Jagannath* (4) relied on.

THE decree-holders in this case, Muhammad Hasan and Miyan Muhammad, having brought a suit to enforce the right of pre-emption in

<sup>\*</sup> Second Appeal No. 62 of 1886, from an order of T. Benson, Esq., District Judge of Saharanpur, dated the 2nd April, 1886, reversing an order of Maulvi Tajammal Husain, Munsiff of Shamli, dated the 27th June, 1885.

(1) 2 O.L.R. 471. (2) 4 A. 36. (3) 6 C. 194. (4) A.W.N. (1884) 138.

respect of the sale of certain property, two persons named Amir Chand and Khurshed Husain brought a suit claiming a similar right in respect of the same sale. These persons were added as defendants in the suit of Muhammad Hasan and Miyan Muhammad. On the 7th March, 1882, Muhammad Hasan and Miyan Muhammad obtained a decree in respect of a moiety of the property in dispute against the vendors, the purchaser, and Amir Chand and Khurshed Husain, the rival claimants to the right of pre-emption. The vendors and the purchaser did not appeal from this decree, but the rival claimants to the right of pre-emption, Amir Chand and Khurshed Husain, did, and the decree of the 7th March, 1882, was affirmed by the Court of first appeal on the 12th [574] May, 1882. Amir Chand and Khurshed Husain then preferred a second appeal to the High Court, but the appeal was dismissed and the decree of the Court of first appeal affirmed.

On the 12th May, 1885, Muhammad Husain and Miyan Muhammad, decree-holders, applied for delivery of possession in execution of decree. This application was objected to by the purchaser judgment-debtor, Nur-ul-Hasan, on the ground that it was barred by limitation. He contended that it should have been made, so far as he was concerned, within three years from the date of the original decree, the 7th March, 1882, from which he had not appealed, and that not having been so made, it was made beyond time.

This contention the Court of first instance allowed, and dismissed the application. On appeal by the decree-holders the lower appellate Court held that limitation began to run from the date of the High Court's decree, and the application having been made within three years from that date was within time, and directed that execution should issue.

The judgment-debtor appealed to the High Court, again contending that limitation should be computed from the date of the original decree.

Mr. *Amir-ud-din* and *Munshi Hanuman Prasad*, for the appellant.  
*Pandit Ajudhia Nath*, for the respondents.

### JUDGMENT.

OLDFIELD, J.—The matter in this appeal relates to the execution of a decree obtained for a right of pre-emption. It appears there were two sets of pre-emptors. The first set are respondents before us. They brought a suit against the vendors, the vendee (who is the appellant before us), and the other set of pre-emptors, and obtained a decree for a moiety of the property. This decree is dated the 7th March, 1882. Out of the defendants, the second set of pre-emptors alone appealed, and their appeal was dismissed on the 12th May, 1882. The decree-holders (respondents) applied to execute their decree on the 12th May, 1885, and this application, being objected to by the purchaser, the appellant before us, was disallowed by the Munsif, but on appeal to the lower appellate Court the Munsif's order was reversed, and execution granted against Nur-ul-Hasan, the purchaser of the property. He has now [575] preferred this appeal on the ground that the application for execution is barred, having been filed more than three years after the passing of the decree. In my opinion the appeal fails, because Art. 179, cl. (2), being the limitation law applicable, the time should run from the date of the decree of the appellate Court. It is contended that that law is inapplicable because the appellant did not appeal from the original decree; and so far as he is concerned, the respondents ought to have executed the decree irrespectively of the fact that an appeal had been preferred by some of the defendants.

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On this point certain decisions have been brought to our notice.—*Hur Proshaud Roy v. Enayet Hossein* (1); *Sangram Singh v. Bujharat Singh* (2). I think those cases are distinguishable from the present case; as in this case, although only one set of defendants appealed against the original decree, the grounds of such appeal imperilled the rights of the plaintiffs-respondents which they had obtained by a decree against all the defendants. Had the appeal of the second set of pre-emptors succeeded, the property decreed to the respondents would have passed away from them, and there would have been no decree for them to execute against the present appellant. I think this circumstance marks the distinction between the present case and the cases cited; but for my own part I think the terms of Art. 179, cl. (2), are so clear and distinct that they scarcely admit of any such distinction being drawn. Under that law the period for the execution of a decree will begin to run, where there has been an appeal, from the date of the final decree or order of the appellate Court. It contains nothing as to whether the appeal shall have been made by all the parties, or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. It seems to me to give a plain and clear rule that in all cases where there has been an appeal, the date of the final decision of the appellate Court shall be the date from which the time for execution will begin to run. In support of the view I am taking that in the present case limitation should run from the date of the appellate Court's decree, I may refer to *Mullick Ahmed Zumma v. Mahomed Syed* (3) and *Ram Lal v. Jagannath* (4).

I would dismiss the appeal with costs.

[576] MAHMOOD, J.—I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is, to my mind, very clear. The present case is not necessarily inconsistent with what was ruled there. In the 2nd clause of Art. 179, there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed; the clause as framed must be looked upon as intended to apply, without any exceptions, to decrees from which an appeal has been lodged by any of the parties to the original proceedings; and I should say the clause should certainly be applied to cases such as the present, where the whole decree was imperilled by the appeal.

I think the decree-holders in this case might, as a consequence of the appeal by the rival pre-emptors, claim, by analogy, the same footing with reference to limitation for executing their decree as a decree-holder who has taken a step in-aid of execution, which is another ground for extending the time for execution, as provided in the 4th clause of the same article. This I mention only by way of analogy, and regarding it as such, I think it was sufficient to justify the decree-holders not applying for execution before the appeal was decided.

Under these circumstances the application for execution is within time, and I agree with my learned brother's order dismissing this appeal with costs.

*Appeal dismissed.*

(1) 2 C.L.R. 471.  
(2) 6 C. 194.

(2) 4 A. 36.  
(4) A.W.N. (1884) 138.

8 A. 576-6 A.W.N. (1886) 195.

## FULL BENCH.

*Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield,  
Mr. Justice Mahmood and Mr. Justice Tyrrell.*

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JADU RAI AND ANOTHER (*Defendants*) v. KANIZAK HUSAIN AND OTHERS  
(*Plaintiffs*).<sup>\*</sup> [2nd August, 1886.]

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*Hearing of suit—Trial—Death or removal of Judge during suit—Procedure to be followed  
by new Judge—Power of new Judge to deal with evidence taken by his predecessor—  
Civil Procedure Code, s. 191.*

The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument. At this [377] point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor. The District Judge having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below.

Held by the Full Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of first instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagran Das v. Narain Lal* (1) and *Afsul-un-nissa Begam v. Al Ali* (2) disallowed.

Per STRAIGHT, Offg. C.J., that as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticised on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain.

Per OLDFIELD, J., that where a Judge takes up a trial begun by another, although the law permits him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself; and in every case it has to be seen whether, as a matter of fact, there has been a real trial and hearing of the entire case by the Judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it, and the entire case fully heard and tried, there has been no trial in the legal sense of the words, and the proceedings must be set aside. *Jagran Das v. Narain Lal* (1) and *Afsul-un-nissa Begam v. Al Ali* (2) followed.

Per MAHMOOD, J., that although it is true that "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a trial heard on the original date; that the Civil Procedure Code does authorise a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity; that the new Judge

<sup>\*</sup> Second Appeal No. 1155 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 19th July, 1885, confirming a decree of Babu Abinash Chander Banarji, Subordinate Judge of Allahabad, dated the 24th June, 1884.



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is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as it had been commenced before himself; that the Code does not recognise such procedure as amounting to separate trials; that the Judge who succeeds another after a trial which has partly proceeded [578] before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is *ipso facto*, evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;" that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge, that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited by s. 564 of the Code, to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record; that where further issues are directed to be tried, or additional evidence is to be taken, the Court of Appeal is bound to act according to the provisions of ss. 566, 568 and 569 of the Code, but cannot order a new trial; that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.

*Jagram Das v. Narain Lal* (1) and *Afzul-un-nissa Begam v. Al Ali* (2) dis-sented from.

*Per* TYRRELL, J., that in reference to the Full Bench the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *Jagram Das v. Narain Lal* (1) and *Afzul-un-nissa Begam v. Al Ali* (2) followed and explained.

THIS was a reference to the Full Bench by Straight, Offg., C.J., and Mahmood, J., of the following question:—"Whether, with reference to the first and second grounds of appeal, and having reference to the circumstances disclosed in the proceedings of the Court of first instance, that Court, or the officer presiding therein who passed the decree, had jurisdiction to deal with and determine the suit in the mode in which he did." It was further stated that the reference was made for the special purpose of considering the effect of the judgment of the Court in *Jagram Das v. Narain Lal* (1) and *Afzul-un-nissa Begam v. Al Ali* (2). The first and second grounds of appeal mentioned in the question referred to the Full Bench were as follows:—"First, because, there exists a substantial defect in the procedure followed by the learned [579] Subordinate Judge who decided this case, which renders the proceedings in this case void, inasmuch as no evidence was taken before the learned Subordinate Judge who passed the decision referred to, and that officer's judgment is based solely on evidence recorded by his predecessor; second, because the learned Subordinate Judge cannot be said to have tried the case."

The proceedings in the Court of first instance and the mode in which the judicial officer who passed the decree dealt with and determined the suit, were as follows:—The suit was filed in the Court of Babu Ram Kali Chaudri, Subordinate Judge of Allahabad, on the 31st March, 1883. A written statement of defence was filed, issues were framed, witnesses were examined on both sides, and various adjournments took place, up to the

3rd March, 1884. Upon that date the examination of witnesses was concluded, and an order was passed by the Subordinate Judge in these terms:—"As this case is complete, it is ordered that the 14th March, 1884, be fixed for hearing arguments. Pleaders to be informed." As this point Babu Abinash Chandar Banarji succeeded Babu Ram Kali Chaudhri as Subordinate Judge of Allahabad. On the 10th May, 1884, he passed the following order:—"In this case Munshi Ram Prasad stated to-day that Lala Raj Bahadur, plaintiff's pleader, was not present, and as he was fully acquainted with the facts of the case, it could not be argued in his absence. Ordered that the case be adjourned to-day, and that the 13th May, 1884, be fixed for decision." On the 13th May there was a further adjournment to the 16th June, and ultimately, on the 24th June, 1884, the Subordinate Judge delivered judgment after hearing what he desired as "very able and lengthy arguments on both sides." Judgment was in favour of the plaintiff, and the defendants appealed to the District Judge of Allahabad, who, on the 18th July, 1885, affirmed the first Court's decree.

No objection appeared to have been raised in the first Court, or taken as a ground of appeal before the District Judge, to the course adopted by Babu Abinash Chandar Banarji. The defendants preferred a second appeal from the decision of the District Judge to the High Court, the only grounds which need be mentioned being those already set forth.

[580] Mr. W. M. Colvin, Babu Dwarka Nath Banarji, Munshi Hanuman Prasad, Munshi Ram Prasad and Lala Juala Prasad, for the appellants.

Mr. G. E. A. Ross and Mr. Shivanath Sinha, for the respondents.

### JUDGMENT.

STRAIGHT, Offg. C.J.—In my opinion the question put by this reference must be answered in the affirmative. It is not contested that the learned Subordinate Judge has jurisdiction territorially and pecuniarily to try the suit, and the single point appears to be, did he try it, or, in other words, did he hold a legal trial? It is conceded by the appellants' learned counsel that no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the way that he did; on the contrary, he is admitted to observe correctly in his judgment, where he says—"I have heard very able and lengthy arguments on both sides. *The evidence has been minutely dissected and criticized*, and many probabilities urged upon both sides." It is obvious from this passage that, if there could have been a waiver on the part of the appellants in reference to the action of the Subordinate Judge, of which they seek now to complain in special appeal, there was such waiver. In short, their position is this, that having appeared before the Subordinate Judge and consented to his doing what he did, and thus taking their chance of succeeding on the merits, they are nevertheless now to be allowed to turn round and say all that was done was illegally done, and there was no trial at all. I presume it would hardly be seriously contended that if a Court issue a summons to a defendant to appear on a certain date for the mere settlement of issues, and the defendant appears on that date and consents to the suit being then and there disposed of, and makes his defence, such defendant can afterwards be permitted to object that the summons to him was for settlement of issues only and not for final disposal of the suit. I confess I see no serious distinction between such a case and the present, where the Subordinate Judge having undoubted jurisdiction to try the suit, the parties consented

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to his trying it by waiving certain rules of procedure enacted in the interests of suitors personally, and not for any public object. I cannot think that the late learned Chief Justice of this Court, in the decisions quoted by the appellants' [581] learned counsel, ever intended to lay down that, under circumstances such as these, the Subordinate Judge must be held to have acted without jurisdiction, and that his proceedings, adopted on consent of parties, were void. If he did, I can only say with the most profound respect that I dissent from such a view, the inconvenience and hardship of giving effect to which would be strikingly illustrated by the particular case out of which the reference has arisen.

For these reasons, as stated at the outset of my remarks, I answer the reference in the affirmative.

OLDFIELD, J.—This reference raises a question in regard to the scope and intent of the provisions of s. 191, Civil Procedure Code by which, when the Judge taking down any evidence or causing any memorandum to be made under Chapter XV dies, or is removed from the Court before the conclusion of the suit, his successor may, if he think fit, deal with such evidence or memorandum as if he himself had taken down or caused it to be made.

The question has already been before this Court in the case of *Jagram Das v. Narain Lal* (1) and *Afzal-un-nissa Begam v. Al Ali* (2), and in the exposition of the law given by Petheram, C.J., relating to trial of cases, when the trial had been begun by one Judge and taken up by another, I entirely concur.

PETHERAM, C.J., observes:—"His business (that of the Judge taking up the trial of a case begun by another) was to try the case according to law; and if he did not so try it, he had no jurisdiction to try it at all. All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing under Chapter XV of the Code. He should have fixed a day for the entire hearing of the suit before himself, and in that case the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191, Civil Procedure Code, which enacts that a Judge, in the hearing of [582] a cause which was partly heard by another, may allow the evidence which was previously taken to be used before himself. If he had taken that course, the trial would have been perfectly regular; and if, upon the day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff, and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection." And in *Afzal-un-nissa Begam v. Al Ali*, he observes:—"The question then arises:—What was the duty of Maulvi Zain-ul-abdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But by the act of fixing a date he would have avoided the danger of making it appear possible that he was deciding a case which he

himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived the trial would proceed in the ordinary way, as if the day were the first day on which the case had ever come on for hearing, except that the parties should be allowed, by s. 191 of the Civil Procedure Code, to prove their allegation in a different way. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

In the above observations I entirely concur.

The law permits a Judge taking up a trial begun by another Judge, to deal with the evidence taken by his predecessor as if he himself had taken it down; but this permission does not relieve him of the duty of dealing with it judicially, of trying the cause as though it had come before him in the first instance. The trial is, in fact, begun *de novo* before him; he may deal with the evidence already taken as if he himself had taken it, but he must deal with [583] it judicially by allowing counsel to put in the evidence and hearing argument on it. In fact, there must be a hearing of the entire case before himself. The proper procedure, and the safest, to pursue is no doubt that pointed out by Petheram, C.J.

In every case, however, we have to see whether, as a matter of fact, there has been a real trial, a hearing of the entire case by the Judge; whether, looking to what has taken place, the evidence previously taken was judicially dealt with, counsel heard upon it, and the entire case fully heard and tried. If this has not been done, there has been no trial in the legal sense of the word, and the proceedings must be set aside.

In the case referred to us, I find that the Judge fixed a day for hearing and having heard counsel on the case, delivered judgment. There is no reason to suppose that the trial was other than sufficient and proper, and that there was not an entire hearing of the cause.

MAHMOOD, J.—The question referred to the Full Bench in this case is—"Whether, with reference to the first and second grounds of appeal, and having regard to the circumstances disclosed in the proceedings of the Court of first instance, that Court, or the officer presiding therein who passed the decree, had jurisdiction to deal with and determine the suit in the mode in which he did." The two grounds of appeal referred to in this question are—"First, because there exists a substantial defect in the procedure followed by the learned Subordinate Judge who decided this case, which renders the proceedings in this case void, inasmuch as no evidence was taken before the learned Subordinate Judge who passed the decision referred to, and that officer's judgment is based solely on evidence recorded by his predecessor; and secondly, because the learned Subordinate Judge cannot be said to have tried the case."

Neither of those grounds was taken in the lower appellate Court, and there can be no doubt, as was intimated by the learned counsel for the appellant, that these grounds have been taken owing to the practice which has sprung up in this Court, during the last year, in consequence of two rulings of Petheram, C.J., the late learned Chief Justice of this Court. The first of these rulings is the [584] case of *Jagram Das v. Narain Lal* (1), the effect of which can be best summarized in the words of the

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head-note in the report. In that case a Subordinate Judge having taken all the evidence in a suit before him, and having completed the hearing of the suit, except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree. It was held that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides and the arguments on behalf of both, and then, finally, decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor, to be put in; and that, in neglecting to take this course and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities. This ruling—to use the words of Petheram, C.J., himself—"led to some confusion as to the mode in which cases of this kind should be dealt with;" and the learned Chief Justice in a later ruling—*Afzal-un-nissa Begam v. Al Ali* (1)—took opportunity to point out what appeared to him the course which should have been adopted in that case, which he regarded as "a fair illustration of what commonly happens." The head-note of the report in that case summarizes the effect of the ruling, and it appears that what happened in that case was, that a Subordinate Judge, having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed. It was held by the learned Chief Justice that the trial, so far as it had gone [585] before the first Subordinate Judge, was abortive, and, as a trial, became a nullity; and it was also held that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner.

These two rulings constitute the exposition of the law upon which Mr. Colvin has relied, and it will be my duty to consider the *ratio decidendi* upon which these two rulings proceed. But the learned counsel has also relied upon certain unreported cases which were submitted at the hearing. One is the case of *Malik Fakir Bakhsh v. Chauharja Bakhsh Singh*—(F. A. No. 88 of 1884, decided on the 7th July, 1885)—in which Petheram, C.J., made certain observations, which may be quoted here as affording indications of the view which he entertained:—"It appears to be a general opinion in this country that it is in the power of a new Subordinate Judge to take up a case which has been partly heard by his predecessor, and to continue the same trial; and so in this case the parties appear to have given a sort of consent to the adoption of this course. But

I am of opinion that this view of the law is wrong. A trial must be one, and must be held before one Court only. There are provisions which enable evidence taken by one Judge to be put in and used as evidence by his successor; but there is nothing to authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off. He could only allow the evidence previously taken to be used as evidence under s. 191 of the Civil Procedure Code, in a case wholly tried by himself. I have already fully explained my views on this subject in the case of *Jagram Das v. Narain Lal*; and for the reasons which I there stated, I am of opinion that this trial must be treated as a nullity, that therefore all proceedings subsequent to fixing the issues must be set aside, and that the Subordinate Judge must reinstate the case upon his file, and try it according to law." The next [586] unreported case which has been cited is *Sah Kirpa Dayal v. Musammat Rani Kishori*—(F.A. No. 108 of 1884, decided on 3rd November, 1885)—to which Petheram, C.J., was again a party, and in which the ruling in the case of *Jagram Das* was again followed, with the result of annulling all the proceedings, and directing a fresh trial of that case and also of another connected case "according to law." Again, another unreported case is *Musammat Jasodha Kuar v. Lal Ishri Prasad Narain Singh* (F. A. No. 127 of 1884, decided on 3rd February, 1886)—in which the ruling in *Afzal-un-nissa Begam's Case* was simply followed, and the whole trial was declared to be bad in law, and the proceedings being annulled, the case was remanded to the Court below, to be placed on the register of original suits and disposed of "according to law." The same was the view followed in another unreported case—*Shaikh Ghulam Iman v. Shaikh Jafar Ali* (S.A. No. 980 of 1885, decided on 26th March, 1886)—and this is the last of the unreported cases which have been cited by Mr. Colvin as having regulated the practice of this Court since the two rulings of Petheram, C.J., which have been reported and already referred to.

As there has been much difference of opinion as to the exact meaning and effect of these rulings, I think it is necessary to analyze the various steps of reasoning upon which the judgments of Petheram, C.J., seem to proceed according to my interpretation. The various points which indicate the line of his Lordship's argument are:—

- (1).—"A trial must be one, and must be held before one Court only."
- (2).—"When a suit is tried the "original date would be the date of hearing, and all subsequent dates would be those of adjournments;" so that where a trial goes on for more than one day, every hearing after the original date "would be a proceeding held by adjournment in the trial heard on the original date."
- (3).—"There is nothing to authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off."
- [587] (4).—"Where the Judge who had partly heard a case died or was removed, "the trial, so far as it has gone before him, was abortive, and, as a trial, became a nullity, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial heard before him."
- (5).—"The new Judge must, therefore, "fix a day for the entire hearing of the suit before himself," and must "re-hear it from beginning to end;" for the law does not "enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

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(6).—There would thus be two separate trials and two different hearings of the cause; and "the law nowhere says that the two hearings may be *linked together* and virtually made one."

(7).—Every succeeding Judge, who is appointed before the conclusion of the trial, must therefore fix a new day for commencing the trial *de novo*, and when the time arrived "the trial would proceed in the ordinary way, as if the day were the *first* on which the case had ever come on for hearing."

(8).—The evidence taken by the preceding Judge would not, by the mere fact of being upon the record, be evidence in such new trial, nor could it be dealt with as material upon which a judgment might proceed.

(9).—But in the trial before the new Judge "the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner;" that is, "by putting in the depositions which had been taken before his predecessor."

(10).—But if the depositions are not so "put in" that is, proved as evidence in the new trial, the Judge using them would be deciding "a case upon materials which are not before him," because such Judge had not "taken the evidence" himself.

(11).—The former trial having already become a nullity, and the evidence taken therein not being put in as evidence in the new trial, the judgment and decree which may proceed upon such evidence would be "absolute nullities;" because a Judge who, in trying a case, adopts such a procedure, "had no jurisdiction to try it at all."

[588] (12).—And when such judgment or decree is passed, the appellate Court, regarding the whole proceeding in the case as nullities, should set them aside and remand the case for a new trial.

These seem to me to be the various points laid down in the rulings to which I have referred, so far as I can understand them, and I have stated each proposition, as closely as I could, in the words of Petheram, C.J.

In this state of things is it important, for realizing the full bearing and effect of these cases, to observe that all of them whether reported or unreported (with the exception of that last mentioned), were more or less heavy first appeals involving complicated questions of fact and troublesome questions of law; and also that in none of those cases did the appellant object in the Court of first instance to the course which that Court adopted, nor did he complain of the course in his grounds of appeal by taking the point upon which this Court set aside all the proceedings of the Court below and ordered trials *de novo*. Indeed, in the case of *Malik Fakir Bakhsh*—to use the words of Petheram, C.J.—"the parties appear to have given a sort of consent to the adoption of this course"—the very course which the learned Chief Justice declared, apparently, *suo motu*, to be so null and void in law as to render the whole trial a nullity, and to necessitate the case being remanded to the first Court to begin the trial anew. The reason why I mention this circumstance is, that it is only in very exceptional cases that this Court, ever since I have had the honour of being associated with it, either as a member of the Bar or as a temporary Judge, allows parties appellants to obtain reversals of the decrees of the Courts below upon grounds not taken either as objections in the Court below or as grounds in the memorandum of appeal. And it is only in equally exceptional cases that this Court exercises the power which, as a Court of appeal, it undoubtedly possesses, of basing its judgment upon grounds which the parties do not urge, and which do not form part of the *ratio decidendi* upon which the judgment of the Court below proceeds. Further,

this Court, so far I am aware, has been accustomed, till the new practice introduced by Petheram, C.J., during the [589] last year, to bear in mind the enormous delay and expense which fresh trials involve, and the usual course has been to abide by the express mandate of the Legislature as contained in s. 564 of the Civil Procedure Code, which prohibits the remand of cases for second decision, except under conditions covered by s. 562 of the Code.

The policy of the law, as apparent from these sections, is obvious. Delay in the disposal of litigation and the expense to the parties, are considerations which the Legislature has not ignored, and the appellate Court, at least in first appeals, is invested with authority, under s. 566 of the Code, to remand issues for trial, if those issues have never been duly framed or tried; and s. 568 empowers the Court of appeal to take further evidence itself, or to order such further evidence to be taken by the lower Court when necessary. It is only when the erroneous view of the lower Court upon a preliminary point has prevented it from taking the evidence in the case, within the meaning of s. 562 of the Code, or where there is want of jurisdiction or absolute illegality, that trials *de novo* are ordered, and it must therefore be taken that in the heavy first appeals above referred to, in which such fresh trials were directed, the only *ratio* could have been that the proceedings of the first Court in those cases were taken without jurisdiction and amounted to absolute nullity.

Now, in the case of *Jagrum Das*, what happened was, that Maulvi Sami-ul-la Khan was the presiding Judge of the Court in which the suit was instituted, and a day was fixed for hearing of the case. Then, to use the language of Petheram, C.J., "the plaintiff's counsel opened his case, and called witnesses to prove it, who were cross-examined by counsel for the defendant. After this the defendant's counsel called his witnesses, and they were cross-examined by the other side. All that remained was for the plaintiff's counsel to sum up and for the defendant's counsel to reply. At this point Maulvi Sami-ul-la Khan was sent on a special mission to Egypt and another Subordinate Judge, named Rai Cheda Lal, was appointed to officiate in his place, and the present case came before him among others which were pending in his Court." Under this state of things the learned Chief Justice, referring to the new Subordinate [590] Judge, went on to say:—"His business was to try the case according to law; and if he did not so try it, he had no *jurisdiction*, to try it at all." I am bound to hold that the learned Chief Justice, in using the word "*jurisdiction*," duly realized the meaning of that expression as a term of law as distinguished from "*irregularity*," another term of law. Then the learned Chief Justice went on to say, with reference to the new Subordinate Judge:—"All that he could properly do was to take up the case at the point which it had reached before the commencement of the hearing, under Chapter XV of the Code. He should have fixed a day for the *entire hearing* of the suit before himself, and, in that case, the regular course would have been for the plaintiff's counsel to have opened his case and proved it by evidence, and for the defendant's counsel to have followed him. The Subordinate Judge should then have heard arguments on both sides, and should finally have decided the case which he had himself heard and tried. He might have called in aid the provisions of s. 191 of the Civil Procedure Code, which enacts that a Judge, in the hearing of a cause which was partly heard by another, may allow the evidence which was previously taken to be used before himself. If he had taken that course, the trial would have been perfectly regular; and if, upon the

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day fixed for the hearing, he had first heard the opening statement on behalf of the plaintiff and then allowed the plaintiff to prove his case by putting in the depositions which had been taken before his predecessor, his proceedings would not have been open to objection. But he did nothing of the kind. He fixed no date for the hearing of the case as for a *new trial*; but he practically arranged that it should be heard from the point at which his predecessor left off. In my opinion this was an *absolutely illegal* course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code."

Now, with profound respect for the eminent legal authority from whom these observations emanate, I cannot help feeling that they proceed upon some misapprehension of the procedure of the Courts of first instance in the Mufassal; and that the procedure taken by the Subordinate Judge, which was characterized by the learned Chief Justice as "one which cannot be justified by any system of law," was scarcely liable to such condemnation.

[591] I think in dealing with a question of this kind it is important to consider first principles, and they are nowhere discussed better than in a whole chapter in the "*Rationale of Judicial Evidence, specially applied to English Practice*," by Jeremy Bentham, who has been justly called the father of English Jurisprudence, and upon whose writings are undoubtedly based the modern doctrines of judicial evidence and trials, not only in England, but in the neighbouring countries of Europe. The chapter is the VIIth of Book III in that celebrated work, and in dealing with the question whether the evidence should be collected by the same person by whom the decision is to be pronounced, shows the *pros* and *cons* of the matter, leaving the result, on the whole, to be that delay and expense in the disposal of litigation is a worse evil than that of having judgments pronounced by persons who have not themselves taken the whole oral evidence in the case. But it is almost unnecessary to refer to such an eminent authority who deals with first principles of jurisprudence, because Petheram, C.J., might have been referred to a Full Bench ruling of the Bombay High Court, in which the judgment of Couch, C.J., now one of the Lords of the Privy Council, was concurred in by the rest of the Court, and in which that learned Chief Justice expressed the view that there is "no rule of jurisprudence which requires that the evidence in the suit shall be taken by the Judge who pronounces the judgment, and the practice in many Courts being, as is well known, to the contrary." This was said in the case of *Naranbhai Vrijbhukandas v. Naroshankar, Chandroshankar* (1), to which I shall have to refer again in the course of this judgment.

I make these observations with all the respect which is due to one who, till lately, occupied the position of Chief Justice of this Court; and I make them because the rest of the judgment in the ruling which I am now considering uses expressions which, I humbly think, are not clearly intelligible to the Mufassal Courts of this country, and which, speaking for myself, I can but faintly, understand from the little that I may claim to know of English technical law. The learned Chief Justice said in his judgment that "the law nowhere says that the two hearings may be linked together and virtually made one." I frankly confess I find it [592] difficult to understand what this sentence exactly means; for I am unable to realize that when there are two hearings what the *link* between

them can be. The only way in which I can respectfully render this intelligible to myself, is to say that the learned Chief Justice, in delivering that judgment, was thinking of those technicalities of special pleading in English Common Law procedure which no longer find favour, even in the Courts of justice in England, at least since Lord Selborne's Judicature Acts, amalgamating the jurisdiction of Courts of Equity with those of Common Law, were passed. The learned Chief Justice probably had in his mind trials by jury in civil cases—trials which have a historical origin of their own in England, and the principles of which such points are wholly inapplicable to the administration of justice in British India. In cases of trials by jury, it is of course important that the whole evidence upon which the parties rely should be produced before the jury which has to deal with it, and it is only in this sense that I can understand what the learned Chief Justice meant when he referred to two hearings being "linked together and virtually made one." And I may respectfully and frankly say that in no other sense is the phrase intelligible to me. Yet that phrase is the turning point of the whole effect of the ruling; for it was upon that ground that the learned Chief Justice declared himself to be of opinion that the judgment and decree in that case were "*absolute nullities*," which opinion constituted the reasons for trial *de novo*.

But the learned Chief Justice went further, and in delivering his judgment, gave expression to views as to sound policy in such matters, and indicated the distinction which he drew between the duties of the Court of first instance and those of the Court of appeal, as to evidence not taken before the Court which deals with such evidence. He observed:—I am glad to have an opportunity of expressing my disapproval of any system which makes it possible for a man to decide a case upon *materials which are not before him*. It may be said that these observations are applicable to the proceedings of an appellate Court, which is obliged to decide questions of fact upon evidence which it has not itself heard. But it must be remembered that the appellate Court has the advantage of the judgment of the Judge of first instance who [593] had the evidence before him. It is probable that the Subordinate Judges themselves will be glad to be told that they are not to decide questions upon which they have not themselves taken the evidence; and it is obvious that such a course is not in accordance with the interests of justice."

Now because considerations of justice have been referred to in this passage, I feel it my duty, as the only native Judge presiding in this Court, to express, as respectfully as I can, a protest against any such assumption. The cases before the learned Chief Justice were more or less heavy first appeals, in which the parties had produced all the evidence that they had to produce, and neither party took the objection that because the Judge deciding it was not the Judge who took the evidence in the case, the trial was an absolute nullity. The contention was not urged in the grounds of appeal, and it could scarcely be either the interests of justice or of the parties that all the proceedings in the Court below should be declared an absolute nullity. The legal aspect of these observations I shall presently consider; but I think I may, with propriety, say here that the parties are not likely to gain but lose by the delay and expense of new trials ordered in the manner in which they were done in those cases, on grounds which neither party made the subject of objection in the Court below or took before this Court as a ground of appeal.

A few days before I had the honour of coming to this Court as an Officiating Puisne Judge, I held the substantive appointment of District

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Judge of Rae Bareilly, in Oudh, which required me to act as the Judge of the Court of first instance in all the important litigations of that division. Two cases were then, in the ordinary course, put up before me, in which my predecessor, who had been officiating for me, had recorded the evidence of a considerable number of witnesses, and I should have proceeded with the trial of those suits but for the two rulings of Petheram, C.J., which have been reported. These rulings were cited to me as authorities for the proposition that I could not go on with the trial, but that I should—in the words of the learned Chief Justice—"fix a day and re-hear it from beginning to end;" because the learned Chief Justice, who presided over the administration of [594] justice in these Provinces, had declared that any judgment or decree by me would be a "nullity," unless I fixed another date for the trial, and gave the parties another opportunity of re-summoning their witnesses and having them re-examined before me. It was also urged before me that the depositions recorded by my predecessor could be made evidence only by being put in as documentary evidence containing the depositions of witnesses examined in a former trial which had proved *abortive*, and had become a *nullity*, and that if those depositions were not so put in, I could not refer to them, although they already existed upon the record which was then before me. Sitting there as the Judge of an inferior Court, I felt, out of respect, bound to accept this enunciation of the law, coming as it did from the Chief Justice of this Court; but I felt then, as I respectfully do now, that for me to regard the proceedings of my predecessor as "absolute nullities" would have been in those cases a pure waste of time, and cause unnecessary delay and expense to the parties. Yet, though not bound as a Judge in Oudh to accept the ruling of this Court upon all questions of this nature, I deferred to the eminent authority of Petheram, C.J., and resumed the witnesses whose evidence had already been taken by the Court. I did so because of what the learned Chief Justice had said in the case of *Afzal-un-nissa Begam*: "The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and as a trial, *became a nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial heard before him." Then my attention was called to another passage in the same learned judgment, which contains the conceptions of the learned Chief Justice as to the requirements of our law of Civil Procedure. After stating that the appointment of a new Judge had rendered all the proceedings taken by his predecessor a "*nullity*"—I suppose in the legal sense—the learned Chief Justice went on to indicate how that "*nullity*" might be cured, for the *nullity* having already occurred according to the former part of the judgment, it could, of course, not be avoided. I will quote the whole passage because it contains the latest enunciation of the law by so eminent a legal authority. The learned Chief Justice said:—

[595] "The question then arises—What was the duty of Maulvi Zain-ul-abdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing; that is to say, for the *entire hearing* and trial of the case before him. He might, at the request of the pleaders, have *fixed the same day*, the 9th December, and proceeded to try the case *at once*. But by the act of fixing a date he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way as if the day

were the first on which the case had ever come on for hearing, except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself."

With reference to this learned passage and the earlier portions of the judgment, it was suggested to me by one side of the Bar, in the cases which I had before me, that I should record an order, saying, in the words of the learned Chief Justice, that as "the Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was *abortive*, and, as a trial, *became a nullity*," it was my duty to "fix a day and re-hear it from *beginning to end*;" that in order to achieve this result I might "try the case at once" on the same day by fixing that very day, because, as the learned Chief Justice had said in the case before him, the new Judge, by "the act of fixing a date, would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard." And it was argued that these enunciations of the requirements of the law would be fully satisfied if, taking up the case at 11 A.M., I fixed the same day for the new trial to take place at five minutes after 11, and it was said that by this interpretation of the two learned rulings with which I had to deal, I might utilize all the [596] proceedings which my predecessor had taken in the case, and proceed with the trial as I should otherwise have done. This is the manner in which these two learned rulings have been understood in the Mufassal, and so far as I am concerned, as I have respectfully said before, they leave but a vague and uncertain impression upon my mind as to the principles on which they exactly proceed. It would be almost a want of due respect to point out what constitutes a *nullity* in law, and that to speak of a trial which, "so far as it had gone, was abortive, and, as a trial, became a *nullity*," as capable of becoming anything other than a *nullity*, would be to violate the elementary principles of general jurisprudence and of English law itself. A "*nullity*" is a "*nullity*," and cannot become anything else either by the consent of the parties or by the desire of the Judge. The proposition is too clear to require any authorities, and out of respect for the learned Chief Justice, I cannot but hold that, in using the expression that the trial, so far as it had proceeded, had become a "*nullity*," he was not using the expression in the strictly legal sense in which it is understood in the English law itself.

Our Civil Procedure Code repudiates all technicalities of special pleading at one time so favoured by the English Common law. And what is the method of trial which the principal sections of that Code indicate? I must answer these questions with special reference to such phrases as were used by Petheram, C.J., in the two reported rulings, to the effect that the new Judge had "fixed no date for the hearing of the case as for a *new trial*;" that "this was an *absolutely illegal* course and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code;" that the trial before the former Judge was an "*abortive*" trial; that "the law nowhere says that two hearings may be *linked* together and virtually made one;" and that the judgment and decrees passed on evidence recorded by his predecessor were therefore *absolute nullities*."

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The last, of course, is an expression of strength and positiveness as to the exact rule of law laid down in those cases, and words to the same effect are repeated in the second reported case, which, it is contended, by lucidity of exposition, mitigates the rigour of the rule laid down in the first reported case.

Now, under the Civil Procedure Code (s. 48), a suit commences with a plaint, and thereupon follow certain processes for the [597] appearance of the parties and other subsidiary matters, such as the filing of written statements, the examination of the parties by the Court. S. 138 imperatively directs the parties to keep their documentary evidence in readiness "at the first hearing," which clearly means as s. 146 indicates, the day on which the issues are settled. Then follows Chapter XII of the Code, authorizing the Court, under certain conditions, to dispose of the suit at such first hearing. The next Chapter (XIII) relates to adjournments of the hearing of the suit. Chapter XIV lays down rules as to the summoning and attendance of witnesses, and then follows Chapter XV, to which Petheram, C.J., has attached so much importance, for, according to him, the trial begins at the stage when the examination of the witnesses is taken under that chapter. According to the learned Chief Justice, all proceedings taken by a Judge under that chapter are not available for his successor, because "the Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was *abortive*, and, as a trial, became a *nullity*, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him." The duty of the succeeding Judge under these circumstances would, according to Petheram, C.J., be to fix "a day for the *entire hearing* of the suit before himself" though, "at the request of the pleaders," he might fix "the same day," and proceed "to try the case at once." But if this technical formality is not gone through, the learned Chief Justice's reasoning is, that because by the removal of the preceding Judge, the trial, so far as it had gone before him, had become a "*nullity*," therefore the judgment and decrees passed by the succeeding Judge upon the result of such a nullity would themselves be "*absolute nullities*;" for, as the learned Chief Justice argues, "the law nowhere says that the two hearings may be *linked together* and virtually made one," but regards every second or subsequent hearing to be "a proceeding held by adjournment in the trial heard on the original date." These observations are in keeping with the observations made by the same learned Chief Justice in *Queen-Empress v. Pershad* (1), and, though they related to criminal procedure, throw light upon his way of regarding such matters of procedure. The learned Chief Justice observed :—

[598] "As I understand the law, a case is supposed to be tried on the day the trial commences, and after that day the case proceeds by adjournment. The only date to be looked at as the date of trial is the date of the first day of trial."

These observations may no doubt be sound English technical law, but no attempt was made to show that those technicalities had been imported into our law of procedure, and the rest of the Full Bench which heard that case, including myself, were unable to accept the learned Chief Justice's conclusions to be such as were warranted by our Criminal Procedure Code. Here the case is very analogous, for the *ratio decidendi* adopted by the learned Chief Justice upon this point, as to the trial dating from the

original date, and as to what he calls the linking of hearings, is identical with the one to which the above quoted observations related.

The question then is, whether there is anything in the Civil Procedure Code to warrant the conclusion that the first, second or third bearing of a suit, held by a Judge having jurisdiction to hear it, ceases to be first, second or third hearing by the simple fact of another judge having succeeded the one who had held those hearings. The learned Chief Justice has ruled that under such circumstances the trial, so far as it had gone, becomes a "*nullity*"; but I think I may respectfully say that there is nothing in the whole Code to justify such a conclusion. For what does the argument amount to? It amounts to saying that many hearings may have taken place in the suit, and those hearings are perfectly valid up to the forenoon of a day when the Judge who held them may be still presiding in the Court; in the afternoon, when the succeeding Judge takes his seat, all those proceedings become *ipso facto* "*nullities*." Surely, express words in the Code itself are required to sustain this proposition; and upon general principles, which show that the identity of the Court does not change by the change of persons. I shall say that very strong authority indeed is required to reduce that which is admittedly a valid proceeding, when taken, into a mere *nullity* by a circumstance which lies out of, and is foreign to, the proceeding itself. The learned counsel who argued this case before the Full Bench in support of [599] the appeal, confessed himself wholly unable to cite any authority, even of the English technical law, which would go to support this proposition, and I respectfully confess I am unable to accept it either as good law or sound jurisprudence. And I think this is the appropriate place for pointing out, as supporting my view, that our own Civil Procedure Code, wherever it attaches significance to the identity of individuals in the person of the Judge presiding in a Court, it expressly mentions it obviously as an exception to the general principle of jurisprudence, that the identity of the Court is not altered by a new Judge being appointed. Of this a good illustration is afforded by s. 624 of the Code, which lays down that, except under certain conditions no application for a review of judgment shall be made to any Judge other than the Judge who delivered it." The Code says now here that a Judge shall not deliver a judgment upon evidence taken by his predecessor. On the contrary, the Code contains express provisions indicating that such a rule as to the identity of the Judge is not applicable to taking or recording of evidence in the course of civil trials.

This brings me to the most important point in the case, namely, the exact interpretation of s. 191 of the Civil Procedure Code.

It must, in the first place, be observed that the section occurs in Chapter XV of the Code, which lays down rules relating to the hearing of the suit and examination of witnesses. The first section of the chapter is 179, which lays down that "on the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." This section clearly shows that the "hearing of the suit" may take place either on the original day fixed for such hearing, or on any subsequent adjourned date; and I suppose no one would maintain that if the Judge before whom the case came on for hearing on the original date dies or is transferred, and the case then comes on for hearing before his successor on the adjourned date, it would be necessary for the new Judge to fix another date for the first hearing on the hypothesis of Petheram, C.J., that the trial must be understood to have

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been "heard on the original date." Then comes s. 180, which relates to the statement of his case by the other party and the [600] production by him of his evidence. S. 181 provides that witnesses should be examined in open Court, and the next section (182) lays down that "in cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence, and under the personal direction and superintendence, of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it." The next eight sections deal with minor details which need not be noticed, but they leave no doubt that the evidence of the witnesses so taken becomes part of the record. Then follows s. 191 itself, which lays down that "where the Judge taking down any evidence, or causing any memorandum to be made under this chapter, dies or is removed from the Court before the conclusion of the suit, his successor may, if he thinks fit, deal with such evidence or memorandum as if he himself had taken it down or caused it to be made."

Now, to use the language of Parke, B., in *Becke v. Smith* (1), 'it is a very useful rule in the construction of a statute to adhere, to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.' This indeed, is one of the principles of what has been called the "*golden rule*" for the construction of statutes. It is as old as the time of Lord Coke, and Mr. Wilberforce in his useful work on *Statute Law* (pp. 112-115) has cited numerous cases to support the rule laid down by Parke, B. And applying that rule to the interpretation of s. 191 of the Civil Procedure Code, it may well be asked why the words which I have emphasized in quoting the section are not to be understood in the sense which they naturally convey. That those words clearly mean that the Judge pronouncing the judgment need not be the same as the Judge recording or taking the evidence [601] seems to me, so far as I can understand the English language, wholly beyond doubt. For if in the two above-mentioned cases which I had before me at Rae Bareilly, I could deal with the evidence taken and recorded by my predecessor, as if I myself had taken down or recorded such evidence. I fail to see why the trial so far as it had gone before my predecessor, should have been treated by me as a "*nullity*."

It must be remembered, that to put any interpretation other than the natural one upon s. 191 of the Code, it must be shown that such interpretation leads to a "manifest absurdity or repugnance to be collected from the statute itself." Parke, B., has said so in the case to which I have just referred, and his ruling being supported by numerous other authorities, I have looked in vain for any provision in the Civil Procedure Code which would show that the natural meaning of s. 191 is not to be adopted. Indeed, the "manifest absurdity or repugnance" seems to me to lie in interpreting that section in any sense other than that conveyed by the simple English words which I have emphasized in quoting that section. Nor do the judgments of Petheram, C.J., satisfy me that he discovered anything in the Code, which would justify the view that the evidence of witnesses

taken down by a Judge cannot be dealt with by his successor as part of the record and as if such successor himself had recorded such evidence. And I cannot help feeling with due respect that the learned Chief Justice, in delivering those judgments which have been reported as to the interpretation of s. 191 of the Code, was all along thinking of trials by jury in the English Courts of Common Law; and starting with the hypothesis that no rule of jurisprudence justified a Judge to pass judgment upon evidence not taken by himself, held that such judgment or decree must, *ipso facto*, be null and void, because "this was an absolutely illegal course, and one which cannot be justified by any system of law, and certainly not by the Civil Procedure Code."

That this view cannot be accepted, but is rather contradicted by the general principles of jurisprudence, appears from what I have already said with reference to Jeremy Bentham and the *dictum* of Couch, C.J., which I have already quoted. And it will now [602] be useful to examine whether our own Civil Procedure Code does not in itself contain many provisions which proceed upon the principle that the Judge taking the evidence need not, in all cases, be the same as the one who has to pronounce the judgment upon such evidence.

Now, in the first place, it appears to me clear that the whole system of first appeals provided by Chapter XLI proceeds upon the principle just enunciated; for it is obvious that the Judge presiding in the appellate Court has to decide questions of fact, both as to admissibility and weight of the evidence taken by the Judge of the Court below. Petheram, C.J., in the case of *Jagram Das* (1), in drawing a distinction of principle, went on to say:—"It must be remembered that the appellate Court has the advantage of the judgment of the Judge of first instance, who had the evidence before him." But I respectively think that these observations seem to ignore some of the most important provisions of the Code relating to appeals, because the express words of s. 565 make it imperative upon the appellate Court to decide the case itself upon the evidence on the record, even though the judgment of the Court below may have proceeded solely upon a preliminary point (such as limitation, &c.) and have been wholly silent as to the weight of evidence. The section no doubt operates as throwing labour upon the appellate Court, but it has always been so understood as to prevent unnecessary remands of cases by the appellate Court. The case of *Bandi Subbayya v. Madalapalli Subanna* (2) is only one of many other reported cases which go to support what I have said; and the practice of this Court in first appeals has not been different in this respect, unless it has been altered during the last year. There is thus a clear instance of the Code requiring the appellate Judge to decide questions of fact upon evidence not taken by himself, and in regard to which evidence the Judge who took it has never expressed any opinion. Then again, apart from the provisions of s. 566, which contemplates a finding upon the remanded issue by the Judge taking the evidence, there are ss. 568 and 569, which lay down rules for the taking of additional evidence, and the latter section provides that:—"Whenever additional evidence is allowed to be received, the appellate Court may either take such evidence, or direct the [603] Court against whose decree the appeal is made, or any other subordinate Court, to take such evidence, and to send it, when taken, to the appellate Court." The section does not contemplate any expression of opinion upon the evidence taken by such subordinate Court, and yet the

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appellate Court has to decide the case upon such evidence. S. 390, relating to the examination of witnesses by commission, is another illustration of the principle that the Judge deciding the case may found his judgment upon evidence not taken by himself; and I have failed to find any provision in the Civil Procedure Code which would justify the view that in all cases where a Judge passes a judgment and decree upon evidence taken by his predecessor, such judgment and decree are "*absolutely nullities*."

This brings me back to s. 191 of the Code which I have already quoted. I have before now said, sitting as a Judge of this Court, that the general principles of Lord Coke's celebrated *dictum* in *Heydon's Case* are applicable to the interpretation of our own Indian enactments, and that in construing the rules of such departments of law as Civil Procedure, which has repeatedly been the subject of repealing, amending, and consolidating legislation, it is important to consider the previous state of law, the mischief and defect which that law did not provide for, the remedy which the Legislature adopted to remove the mischief, the true reason of the remedy, and (to use Lord Coke's own words) "then the office of all the Judges is always to make such construction as will suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico*."

I respectfully think that these principles of construction, which have never been doubted in England, but have passed almost into maxims of law, were not kept in view in the rulings which have necessitated this reference to the Full Bench. For whilst those cases afford no indication of any attempt being made to consider the previous state of the law, either as represented by the old Civil Procedure Code of 1859, or by the case-law upon the subject, the conclusions at which those rulings have arrived are, in my opinion [604] such as continue the mischief which s. 191 was clearly intended to remove, and that their practical effect is to encourage in the Mufassal what Lord Coke has called "subtle inventions and evasions for continuance of the mischief."

Now the rule contained in s. 191 of the present Code was totally absent from the old Civil Procedure Code of 1859, and whilst that Code was in force considerable difficulty and doubt arose as to whether, in cases where a Judge had partly taken the evidence in a case, his successor was bound to re-call and examine the witnesses *de novo*, as if the trial commenced anew. This is indicated by many cases to be found in the Reports, and the general effect of them may be stated to be that, under circumstances such as those contemplated by s. 191, the new Judge was bound by law to take the evidence *de novo*, unless the parties waived such right and assented to the evidence taken by the former Judge being dealt with as evidence taken by the new Judge. The same is the effect of two unreported rulings of this Court in *Shaikh Jalal-ud-din v. Damodar Das* (S.A. No. 972 of 1869, decided on 1st December 1869), and *Nasirud-din v. Thakori* (S.A. No. 315 of 1869, decided on 31st May, 1869), to which Mr. Colvin has called our attention. So stood the law when the Code of 1877 was passed, and it was in s. 191 of that Code that the Legislature for the first time gave expression in explicit words to the rule which has been enunciated in s. 191 of the present Code, which I am now discussing. To say that the new section did not alter the law is to say that the new section was wholly a superfluous action on the part of the Legislature. But it seems to me impossible, upon a comparison of the state of the law

antecedent to the Code of 1877, to hold any such view. There was clearly a mischief created by the difficulty and uncertainty which the words of the old Code did not remove, and it seems obvious that the new section aimed at suppressing the evil. Yet the effect of the two rulings of this Court, which I am now considering, is to interpret the law as if s. 191 of the Code had never been passed.

Indeed, the effect of those rulings is almost retrogressive, for whilst under the old law the action of a Judge, in pronouncing a judgment upon evidence taken by his predecessor, was regarded as an *irregularity*, capable of being cured by the assent of the parties, in the rulings which have given rise to this reference such action [605] has been denominated as a "*nullity*," which of course neither the consent of the parties nor the desire of the Judge can cure. Indeed, in the cases of *Malik Fakir Bakhsh* and *Afzal-ul-nissa Begam* such consent was actually given in the Court below, and yet the trials were set aside as absolute nullities. I have already said with due respect that there is absolutely no warrant in the Civil Procedure Code to justify the view, and the learned counsel who appeared in support of that view confessed himself unable to cite any principle of jurisprudence or any rulings of the English or the Indian Courts which would even approximately support the rule which Petheram, C.J., laid down in those cases.

On the contrary, even under the law as it stood under the Code of 1859, which, as I said before, contained no rule such as s. 191 of the present Code, we have the authority of a Full Bench ruling of the Bombay Court in *Naranbhai Vrijbhukandas v. Naroshankar Chandroshankar* (1), where four learned Judges concurred in the judgment of Couch, C.J., from which I have already quoted a passage to show that there is no rule of jurisprudence which requires that the evidence of the suit shall be taken by the Judge who pronounces the judgment, and the practice in many Courts is, as is well known, to the contrary. I will, however, at the risk of prolixity, quote further from that judgment, in order to make clear the distinction between a *nullity* and an *irregularity*, and to show that what Petheram, C.J., denominated as "*absolute nullities*" were regarded by Couch, C.J., and the four learned Judges who concurred with him, as mere *irregularity*, even when s. 191 did not exist as a rule of our law of procedure. Couch, C.J., observed:—

"The plaintiff has appealed to this Court, stating as one of the grounds that the suit has been illegally decided by a different Judge upon evidence recorded by the Principal Sadr Amin. Now, the evidence taken by the Principal Sadr Amin, even if taken in a former suit between the same parties, and not, as this was, in the same suit, would have been admissible as secondary evidence, if the witnesses had been incapable of being called; and the use of it by the Munsif was, in my opinion, only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be again examined, and proceeding with the suit, and producing other [606] witnesses to be examined in support of his claim. The plaintiff now asks this Court to reverse not only the decree of the District Court, which is against him, but also the decree of the Munsif, which was in his favour, and was founded on the evidence which he now contends was inadmissible. I think he is not entitled to this." The judgment then went on to consider the effect of s. 350 of the Code of 1859 (which corresponds to s. 578 of the present Code), and held that that section covered

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the irregularity, disentitling the appellant to obtain reversal of the decree of the Court below. And then the judgment went on to say as indicating the proper and sensible course to be adopted in such cases:—  
"Whenever it is practicable, the witnesses should be examined before the Judge who is to pronounce the judgment; and care should be taken, in the transfer of suits, and in the disposal generally of the business of the lower Courts, to prevent the necessity of re-summoning witnesses; but where a deposition taken by another Judge is read, instead of the witness being examined, I think it is only an irregularity, which may be waived by the parties, and which would not be a ground for reversing the decree on special appeal, unless it appeared that the appellant had been prejudiced by it."

These observations, as well as those which precede them, command the highest respect from the Indian tribunals, because they proceed from an eminent Judge, who, after having acted as a Puisne Judge of the Bombay Court, was made Chief Justice of that same Court, and afterwards became Chief Justice of the High Court of Bengal, and is now one of the Lords of the Privy Council. And I am bound to say that I accept the authority of such an eminent Judge, though it is wholly inconsistent with the rulings which have regulated the practice of this Court during the last year in connection with such cases. For I find that in every one of those cases the parties had never objected to the action of the Judge in the Court below as to his reading the evidence recorded by his predecessor, nor was the question urged in the grounds of appeal. So that it could only have been by the exceptional exercise of power granted by s. 542 of the Code that Petheram, C.J., decided those cases upon grounds which were never taken in the memorandum of appeal before him, and which never formed the subject of objection in the Court below.

[607] Now, there is another aspect of the matter, namely, the one to which Couch, C.J., referred and which is now regulated by s. 33 of the Evidence Act. That section lays down that evidence taken in a former judicial proceeding or "in a later stage of the same judicial proceeding" may, under certain conditions, be admitted in evidence. And Couch, C.J., has pointed out that where such conditions are not fully satisfied, the admission of such evidence does not amount to a "*nullity*," but only to an "*irregularity*." He further points out, relying upon the practice of the English Courts as indicated in s. 1681 of Taylor's celebrated work on Evidence, that where evidence is allowed by a party without objection to be used in a trial, such party "would not be at liberty afterwards to object to its being used, or obtain a new trial on that ground, even if the original decree had been against him." In the cases before Petheram, C.J., the parties evidently raised no such objection in the Court below, and indeed they did not raise it here in their grounds of appeal.

Again, even if it be granted for a moment that, notwithstanding s. 191 of the present Code, the manner in which the succeeding Judge dealt with the evidence taken by his predecessor amounted to an irregularity, there was surely no authority to declare the whole trial as a *nullity*, and to remand those cases for trial *de novo*. No attempt appears to have been made to consider whether s. 578 of the Civil Procedure Code affected the question. The terms of that section are imperative, and it lays down that "no decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court." To

similar effect are the terms of s. 167 of the Evidence Act, which prohibits, in express language, new trials being ordered for rejection or improper reception of evidence.

But if I am right, following the view of Couch, C.J., in thinking that the action of the Court below in the case before Petheram, C.J., could at its best be regarded as an *irregularity*, it may well be asked where the authority was for setting aside the decrees in [608] those cases and remanding them for trial *de novo*. S. 562 of the Civil Procedure Code is the only authority available to the first appellate Court for such an action, and that section was clearly inapplicable to all those cases. Then there were also the provisions of ss. 564 and 565, giving clear indications of the policy of the law that the delay and expense of new trials must, as far as possible, be avoided; but those sections do not seem to have been either cited or considered in the rulings which have given rise to this reference. And I think I may here say, with profound respect, that those rulings can be understood only as proceeding upon technicalities foreign to our Civil Procedure Code, and which, so far as I can understand the exigencies of the administration of justice in India, are not calculated to promote either the interests of the parties or the interests of justice. For, to use the words of Lord Penzance in *Combe v. Edwards* (1) "the spirit of justice does not reside in formalities or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, but the hand maid of justice; and inflexibility, which is the most becoming robe of the latter, often serves to render the former grotesque."

I now proceed to consider whether the present case is in any manner distinguishable from the rulings to which I have referred at such length, and in order to answer this question, I have examined the records of those cases. In the unreported case of *Malik Fakir Bakhsh v. Chauharja Bakhsh Singh* (F.A. No. 88 of 1884, decided on 7th July, 1885), I find that the parties had—to use the words of Petheram, C.J.—"given a sort of consent to the adoption of this course;" that is, the course which induced the learned Chief Justice to hold "that this trial must be treated as a nullity, that therefore all proceedings subsequent to fixing the issues must be set aside, and that the Subordinate Judge must reinstate the case upon his file and try it according to law." Again, in the case of *Afzal-un-nissa Begam v. Al Ali* (2), which is supposed to have mitigated the rigour of the rule laid down in the earlier case of *Jagram Das v. Naran Lal* (3), I find that the Subordinate Judge, whose judgment was treated as a *nullity*, necessitating a trial *de novo*, had, [609] before recording his judgment, expressly put down upon the record the following observations:—

"I found this case complete in every way; the evidence on both sides has already been filed. I therefore proceed to try the case, as requested by the pleaders for the parties, on the existing evidence after hearing the arguments on both sides, and perusing all the papers on the record and the evidence produced by both parties."

These observations appear at page 11 of the printed English record which was before Petheram, C.J., and they are important as furnishing reasons for realizing the length to which the ruling in that case has gone. In the present case the facts are exactly similar, and indeed not so strong as they were in the case just referred to. What happened here was that the

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(2) 8 A. 35.

(3) 7 A. 557.



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suit was filed on the 31st March, 1883, written statement in defence was filed and issues were framed on the 15th January, 1884, one witness was examined on the 18th and 19th of the same month, and the case was postponed to the 22nd of the same month. On that day another witness was examined, and the examination of other witnesses continued up to the 29th of that month, when the defendants applied for proceedings being taken, under s. 170 of the Civil Procedure Code, against a witness, and the 12th February, 1884, was fixed for further hearing of the case. Upon that day the witness in question did not appear, and the 3rd March, 1884, was fixed, and the case coming on for hearing on that day, some more witnesses were examined, and the Subordinate Judge then recorded an order saying—"As this case is complete, it is ordered that the 14th March, 1884, be fixed for hearing arguments. Pleaders to be informed." The Subordinate Judge who made this order (Babu Ram Kali Chaudhri) then ceased to be the Judge of the Court, and was succeeded by another Judge (Babu Abinash Chandar Banarji), who on the 10th May, 1884, recorded the following proceeding:—

"In this case Munshi Ram Prasad stated to-day that Lala Raj Bahadur, plaintiff's pleader, was not present, and he was fully acquainted with the facts of the case, it could not be argued in his absence. Ordered that the case be adjourned to-day, and 13th May, 1884, be fixed for decision."

[610] Upon the day so fixed another proceeding was recorded, referring to the witness who had not appeared in Court, and the case came on for hearing on two more occasions; and on the 24th June, 1884, the judgment was delivered by the Judge after the final hearing of the case, which, according to the Mufassal practice, of course, includes the hearing of the arguments of the parties or their pleaders.

No objection of any sort appears to have been raised in the Court of first instance to the course which the Judge of that Court adopted, nor was the question urged as a ground of appeal before the lower appellate Court. Indeed, for the first time in this Court it is argued, upon the authority of the two reported cases to which I have already referred, that the judgment in this case must be treated as a nullity.

I cannot help holding that the circumstances of this case are not distinguishable in principle either from the unreported case of *Malik Fakir Bakhsh* or from the reported case of *Afzal-un-nissa Begam* (1) in which the previous ruling in the case of *Jagram Das* (2) was followed. And further I hold that if in those cases the judgments and decrees of the Courts below were nullities, as was there held, the judgments and decrees in this case are also nullities *a fortiori*. But I have already stated the reasons why I am unable to accept the rule of law laid down in those cases, and I must, with reference to the various points already enumerated by me as the effect of the rulings which have given rise to this reference, now summarise the view which I take of the law under the present Civil Procedure Code. As I understand that Code, I hold—

(i)—that although it is true that "a trial must be one and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court;

(ii)—that when a trial goes on for more than one day, each day constitutes a separate hearing and that such hearings cannot be treated as a "trial heard on the original date;"

(iii)—that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor, [611] and to continue it from the point at which his predecessor left off ;

(iv)—that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity ;

(v)—that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself ;

(vi)—that the Code does not recognise such procedure as amounting to separate trials ;

(vii)—that the Judge who succeeds another after a trial which has partly proceeded before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing ;

(viii)—that the evidence recorded by the preceding Judge, by the mere act of being upon the record, is, *ipso facto*, evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;"

(ix)—that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record ;

(x)—that such depositions must be dealt with as materials of evidence before the new Judge ;

(xi)—that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction ;

(xii)—that when such judgment and decree are passed, the Court of first appeal is prohibited, by s. 564 of the Code, to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence in the record ;

(xiii)—that where further issues are required to be tried, or additional evidence is to be taken, the Court of appeal is bound [612] to act according to the provisions of ss. 566, 568, and 569 of the Code, but cannot order a new trial ;

(xiv)—that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial unless the irregularity affects the merits of the case or the jurisdiction of the Court.

Such being my view of the law as it now stands, I hold, with due respect for the rulings which have given rise to this reference that in none of those cases could a new trial be ordered. And I think I must say that I have regarded it my duty to deal with this matter at such elaborate length, partly because I understand that the Legislature is contemplating the amendment of the Civil Procedure Code, but mainly because I have very little doubt that the two reported rulings of Petheram, C.J., which I have had to consider at such length, have practically resulted in retarding the administration of justice in all parts of India where those rulings are respected, as they were by me at Rae Bareilly in Oudh. Indeed, the very cases in which those judgments were passed afford good illustrations of what I have just said. For example, in the case of *Malik Fakir Bakksh*,

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the litigation began on the 18th March, 1882, in the Court of the Sudordinate Judge of Allahabad; proceedings in the case were taken by two or three Subordinate Judges in the Court of first instance; the litigation did not come to an end in that Court till the 24th December, 1883, and the order of Petheram, C.J., in this Court, on the 7th of July, 1885, declared that all that had taken place in the Court of first instance "must be treated as a nullity." Similar were the facts in the case of *Afsal-un-nissa Begam* and the other cases, and I cannot help feeling that such a view of the law, though it may tend to reduce the labour of the appellate Court in dealing with cases which have been pending in the Court of first instance for a lengthened period and in which more than one Judge has taken the evidence, is not calculated to reduce either the expense or the dilatoriness of litigation. And I think I may add that if my view of the law, as it now stands, is inaccurate, the Legislature, in considering the amendment of the Civil [613] Procedure Code, might consider the principal results of the rulings from which I have ventured to differ, and which have tended to throw back the administration of justice in this part of the country, wherever, by death or transfer, new judicial officers have been appointed.

I have no hesitation in answering the question referred to the Full Bench in the affirmative.

TYRRELL, J.—The order of reference is as follows:—

"In this case, which has been taken up as bringing forward in a more cogent form the question referred in F. A. No. 52 of 1885, we refer the following question to Full Bench:—Whether, with reference to the first and second grounds of appeal, and having regard to the circumstances disclosed in the proceedings of the Court of first instance, that Court or the officer presiding therein who passed the decree had jurisdiction to deal with and determine the suit in the mode in which he did. This reference has been made for the special purpose of considering the effect of two judgments of this Court, reported in I. L. R., 7 All., 857, and I. L. R., 8 All. 35."

My learned brother Oldfield, in his answer to the former portion of the reference, has given a precise and succinct exposition of the law laid down by Sir Comer Petheram on the procedure to be followed in the trial of a suit or appeal, when the Judge who began the hearing is removed from the Court before the conclusion of the suit or appeal. I fully concur in that exposition and in its application to the second appeal referred to us. And I am of opinion that the question relating to this second appeal, which is a pending case in our Court, is the only matter we can legally attend to in this reference. We are not competent, I think, to review or pronounce judicial opinions on our judgments in cases finally decided by us, unless they are brought before us by, or on behalf of, the parties in any of the modes provided by the law. It would be certainly unprecedented on our part to review or consider our judgments behind the backs of the parties at the invitation only of some of ourselves.

It was for this reason that at our sitting in Full Bench in regard to the Second Appeal No. 1155 of 1885 we abstained from going [614] into the latter or subsidiary part of the order of reference. I am unable therefore to follow my learned brother Mahmood into his discussion of this Court's judgments given in cases not the subject of this reference. But perhaps it may not be irregular to remark, with reference only to the literary aspect of his criticisms on the phraseology used by Sir Comer Petheram and me in those judgments, that when he said that the Court in question "had not jurisdiction" to follow the procedure we disapproved,

and therefore its proceedings were "null," we meant and said the same as my learned brother Mahmood recently did when he annulled the trial of a first appeal, and remanded the case for new trial, because the Judge, having unquestionable jurisdiction in the case, had omitted to formulate his judgment in the mode required by s. 574 of the Civil Procedure Code [*Mahadeo Prasad v. Sarju Prasad* (1).] The proceedings were treated as null and void, the judgment and decree were pronounced "illegal," and a new trial in first appeal was ordered. We did the same in our cases and in similar language, but for different irregularities. In all the cases alike—in those remanded by us and in that remanded by my learned brother Mahmood—the Courts had unquestionable jurisdiction, but they had not jurisdiction, that is to say, power, in the popular use of the phrase, to try them and decide them as they did.

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### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

DHARUP NATH (*Defendant*) v. GOBIND SARAN (*Plaintiff*).  
GOBIND SARAN (*Plaintiff*) v. DHARUP NATH (*Defendant*).\*  
[22nd May, 1886.]

*Hindu Law—Daughter's son—Missing person—Act I of 1872 (Evidence Act), ss. 107, 108.*

Ss. 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.

[615] In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son.

Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1894, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it.

*Held*, that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 108 of the Evidence Act; that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed.

\* Second Appeals Nos. 1622 and 1750 of 1885 from decrees of R. G. Leeds, Esq., District Judge of Gorakhpur, dated the 26th May, 1885, modifying decrees of Munshi Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 22nd December, 1884.

(1) A.W.N. (1886) 171.



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*Mazhar Ali v. Budh Singh* (1), *Janmajay Muzumdar v. Keshab Lal Ghose* (2), *Guru Das Nag v. Matilal Nag* (3), and *Parmeshar Rai v. Bisheshar Singh* (4) referred to.

ON the 10th October, 1882, Musammat Sheo Kuaria, the surviving widow of one Hanuman Dat, died. On the 24th December, 1882, Gopal Saran, the daughter's son of Hanuman Dat, sold certain landed property to the plaintiff, to which he alleged himself to be entitled as the sole heir of Hanuman Dat. The plaintiff's claim to possession of the property was resisted by Dharup Nath, the son of Gobind Saran, Gopal Saran's brother, and daughter's son of Hanuman Dat, and the plaintiff accordingly sued him for possession. The defendant defended the suit as to a portion of the property, on the ground that it had, on the death of Sheo Kuaria, descended on his father and Gopal Saran, the plaintiff's vendor jointly, and Gopal Saran was not competent to alienate it; and as to the rest, that it formed no portion of Hanuman Dat's estate and Gopal Saran had no title to it.

[616] It appeared that Gobind Saran, the defendant's father, was missing. The plaintiff alleged that Gobind Saran had not been heard of for seven years prior to the death of Sheo Kuaria, and contended that it must be presumed that at that time he was dead. The defendant alleged that his father had been heard of within that period, and contended that the presumption relied on by the plaintiff did not arise.

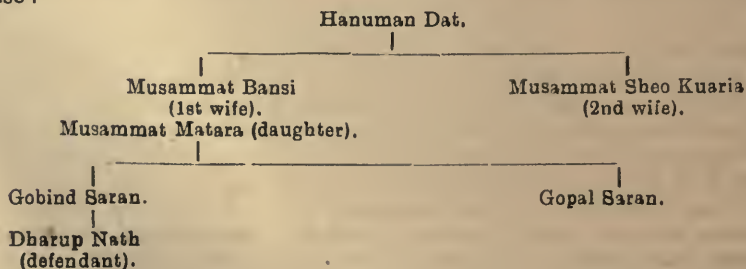
The Court of first instance (Subordinate Judge of Gorakhpur) held that it was proved that the defendant's father had not been heard of for seven years prior to the death of Sheo Kuaria, and it must be presumed that he was dead at the date of her decease; and it gave the plaintiff a decree as claimed. On appeal by the defendant the lower appellate Court (District Judge of Gorakhpur) affirmed the decree of the Court of first instance, except as regards the property which the defendant contended did not form part of the estate of Hanuman Dat. As to this property the Court held that it did not form part of that estate, and discussed the plaintiff's claim. The plaintiff and defendant both preferred second appeals to the High Court, the defendant's appeal being numbered 1622, and the plaintiff's 1750, of 1885.

Mr. J. Simeon, for the defendant.

Lala Lalta Prasad, for the plaintiff.

#### JUDGMENT.

MAHMOOD, J.—These two connected appeals, numbered 1622 and 1750 of 1885, can be disposed of together, as they arise out of one and the same decree and suit; and the following pedigree shows the relative position of persons whose rights have to be considered in this case:—



(1) 7 A. 297.

(3) 6 B.L.R. Ap. 16.

(2) 2 B.L.R. A.C. 134.

(4) 1 A. 53.

Hanuman Dat had two wives, one of whom was Musammat Bansi, who gave birth to Matara, a daughter, who had two sons, [617] Gobind Saran and Gopal Saran. Gobind Saran had a son named Dharup Nath, who is the defendant in the suit.

The property in suit to which S. A. No. 1622 relates has been found to have formed the estate of Hanuman Dat, and upon his death without a son, it would, by the usual course of Hindu law, devolve upon his two widows, who would take together as a single heir with the right of survivorship, and no part of the estate would pass to any more distant relation till both were dead. This is shown by Mr. Mayne in s. 468 (2nd ed.) of his work on Hindu law, where he has cited numerous authorities in support of the proposition. And it has been found in this case that, after the death of Musammat Bansi, the other widow, Musammat Sheo Kuaria, came into sole possession of the property, and continued as such till 10th October, 1882, when she died. The main question in this case is—On whom did the property devolve upon the death of Musammat Sheo Kuaria?

It is a principle of Hindu law, as Mr. Mayne has stated in s. 422 (2nd ed.) of his work, that "the right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot, under any circumstances, remain in abeyance. And the rightful heir is the person who is himself the next of kin at that time. No one can claim through or under any other person who has not himself taken, nor is he disentitled because his ancestor could not have claimed. For instance, under certain circumstances a daughter's son would be heir, and would transmit the whole estate to his issue. But if he died before his grandfather, his son would never take."

One of the sons of Musammat Matara, namely, Gopal Saran, was alive at the time of Musammat Sheo Kuaria's death in October, 1882; but his brother, Gobind Saran, father of the defendant, was admittedly missing; and it has been found by the learned Judge of the lower appellate Court that neither the brother nor the son of Gobind, nor any one else, had heard of him ever since he left home fifteen years ago; and the learned Judge has fortified this conclusion by the fact that on the 24th February, 1882, the defendant Dharup Nath himself stated on oath that his father Gobind had gone away ten years before, and had not since been heard of. And upon this state of things the learned Judge, applying the provisions [618] of ss. 107 and 108 of the Evidence Act (I of 1872), held that the missing Gobind Saran, father of the defendant, could not be regarded as having been alive at the time of Musammat Sheo Kuaria's death in 1882, and that the whole estate which she held by inheritance from her husband Hanuman Dat, devolved entirely upon Gopal Saran, to the exclusion of the defendant Dharup Nath.

Now, upon these findings of fact, which we are bound to accept in second appeal, the first point which has to be considered is, whether the provisions of ss. 107 and 108 of the Evidence Act are applicable to the present case with reference to the missing Gobind Saran. The learned Judge has applied those sections to this case by parity of reasoning deduced from the Full Bench ruling of this Court in *Mazhar Ali v. Budh Singh* (1), where it was held that the rule contained in s. 108 of the Evidence Act governs the case of a Mubammadan who has been missing for more than seven years, when the question of his death arises in cases to which,

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under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act), the Muhammadan law is applicable. That ruling would not by itself be applicable to this case, which is governed by Hindu law, though the principle laid down in that case would apply, if the question of the death of a missing person is simply a question of evidence and not of succession. In the case of *Janmajay Mazumdar v. Keshab Lal Ghose* (1), it was held by the High Court of Calcutta that when a Hindu disappears and is not heard of for a length of time, no person can succeed to his property as heir until the expiry of twelve years from the date on which he was last heard of, and a similar rule appears to have been adopted by the same Court in *Guru Das Nag v. Matilal Nag* (2). But both these rulings are antecedent to the Evidence Act which now regulates all questions of evidence; and the ruling which seems to come nearer to the present case than either of the other two cases in the Full Bench ruling of this Court in *Parmeshar Rai v. Bisheshar Singh* (3), where it was held that in a suit by a reversioner next after a missing reversioner the death of such missing reversioner might, for the purposes of such a suit, be presumed under the provisions of s. 108 of the Evidence Act, though the learned Judges [619] doubted whether, in a suit for the purpose of administering the estate of a missing Hindu, the rule contained in the above-mentioned section of the Evidence Act would be applicable.

In the present case the learned pleader who has appeared in support of the appeal, has made no attempt to show that the rule which I am now considering is regarded by the authorities of Hindu law as a rule of succession and inheritance, to which the provisions of s. 24 of the Civil Courts Act (VI of 1871) would be applicable; and under such circumstances I must hold that the question, whether the missing Gobind Saran was alive in 1882, at the time of Musammat Sheo Kuaria's death, is a simple question of evidence governed by ss. 107 and 108 of the Evidence Act; specially as the question in this case does not relate to the admitted property of the missing Gobind Saran; but the point is, whether Gobind Saran was alive at the death of Musammat Sheo Kuaria, so as to inherit any portion of the estate of his maternal grandfather after the death of the widow.

Now, ss. 107 and 108 of the Evidence Act may be read together, because, the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. The sections are thus worded:—

"When the question is, whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." The rule so enunciated has obviously been borrowed, with hardly any modification, from the English law of evidence as stated in Taylor's celebrated work (s. 157, 2nd ed.), from which I may quote the following passage:—"In such case, after the lapse of *seven years*, the presumption of life ceases and the burden of proof is devolved on the other party. This period was inserted, upon great deliberation, in the statutes respecting bigamy, and the statute concerning leases for lives, and has since been adopted, by analogy, in other cases. But although

(1) 2 B.L.R.A.C. 134.

(2) 6 B.L.R. Ap. 16.

(3) 1 A. 53.

a person who has not been heard of for seven [620] years is presumed to be dead, the law raises no presumption as to the time of his death; and therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the presumption of the continuance of life."

I am prepared to accept this as a good explanation of the rule contained in ss. 107 and 108 of the Evidence Act, and I do not think that those sections, taken together, lay down any rule as to the *exact time* of the death of a missing person. So that whenever the question as to the *exact time* of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. In the present case the Court of first instance, upon the evidence before it, found that "the plaintiff's witnesses fully prove that he (Gobind Saran) has not been heard of for fifteen years," and the Court went on to discredit the allegation of the defendant that his father disappeared only ten years ago. This finding, as I have already said, was accepted by the lower appellate Court as justified by the evidence and circumstances of the case; and that Court found that the missing Gobind Saran was dead at the time when, by the death of Musammatt Sheo Kuaria in 1882, the estate of her deceased husband, Hanuman Dat, would devolve upon his daughter's sons, the widow's estate having then terminated.

I accept this finding, which I regard as one of fact and not open to any objection, on the ground of illegality or irregularity, and I take it that Gobind Saran was not alive when Musammatt Sheo Kuaria died on the 10th October, 1882. This being so, Gopal Saran was the only daughter's son of Hanuman Dat upon whom the estate of his maternal grandfather would devolve, to the exclusion of the defendant. The Hindu law upon the subject seems to me to be perfectly clear; and I may refer to ss. 477-479 (2nd ed.) of Mr. Mayne's valuable work as enunciating the principles upon which a daughter's son inherits the property of his maternal grandfather. What is regarded in Hindu law as *woman's estate* is described by Mr. Mayne in ss. 536 and 537 of his work, and the nature of such estate is applicable alike to a widow and a daughter, both [621] being a sort of *life-tenant*—a phrase which I use only by way of analogy. In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates. And I may here quote a passage from s. 479 (2nd ed.) of Mr. Mayne's work, which, in principle, is fully applicable to the rights of the defendant Dharup Nath; for even his father Gobind Saran's right of inheritance could not initiate till after the death of not only the widows of Hanuman Dat, but also of any daughters, if such were in existence at the time of the death of the widow Sheo Kuaria. Mr. Mayne says:—

"A daughter's son, on whom the inheritance has once actually fallen, takes it as full owner, and thereupon he becomes a new stock of descent, and on his death the succession passes to his heir, and not back again to the heir of his grandfather. But until the death of the last daughter capable of being an heiress, he takes no interest whatever, and therefore can transmit none. Therefore if he should die before the last of such daughters, leaving a son, that son would not succeed, because he belongs

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to a completely different family, and he would offer no oblation to the maternal grandfather of his own father."

This passage, which is fully supported by authority, shows that the death of a daughter's son, antecedent to the death of a daughter, would prevent the estate from devolving upon the son of such daughter's son; and this rule applies *a fortiori* to a case such as the present, where Gobind Saran, the father of the defendant, namely, the grandson of Hanuman Dat, has been found to have died before the death of Hanuman Dat's second widow, Musammatt Sheo Kuaria. Gopal Saran was therefore the only existing son of a daughter of Hanuman Dat when the latter's widow, Sheo Kuaria, died in 1882; and upon this state of things, I have no doubt that the whole estate of Hanuman Dat devolved, upon the death of the widow, on Gopal Saran. But Gopal Saran, by a deed of sale of the 24th December, 1882, conveyed his rights and interests in the estate of his maternal grandfather to the plaintiff-respondent, and that deed has been found by the lower Courts below to have been genuine and valid.—a finding which we cannot [622] disturb in second appeal. And this being so, the plaintiff is entitled to all that his vendor conveyed to him, and for these reasons I would dismiss this appeal No. 1622 with costs.

The cross-appeal No. 1750 of 1885 relates to the property which has been found, as a question of fact, by the lower appellate Court not to have belonged to the estate of Hanuman Dat; and that being so, it could not devolve upon the plaintiff's vendor, Gopal Saran, and the latter had no title to convey. The finding being one of fact, cannot be disturbed in second appeal, being open to no legal objection, and for this reason I would also dismiss the plaintiff's appeal No. 1750 with costs.

BRODHURST, J.—I concur in dismissing these two appeals with costs.

*Appeals dismissed.*

8 A. 622=6 A.W.N. (1886) 250.

APPELLATE CRIMINAL.

*Before Mr. Justice Straight, Offg. Chief Justice, and  
Mr. Justice Brodhurst.*

QUEEN-EMPRESS v. MOHAN. [26th June, 1886.]

*Murder—Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 (Penal Code), ss. 300, Exception 1, 302, 304.*

Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person, that one night the deceased, thinking that her husband was asleep, stealthily left his side, that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her.

*Held* that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation," within the meaning of s. 300, Exception 1 of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder.

*Queen-Empress v. Damarua* (1) distinguished by Straight, Offg. C.J.

THIS was an appeal from a judgment and order of Mr. H.P. Mulock, Sessions Judge of Shabjahanpur, dated the 4th January, 1886, convicting

the appellant of murder and sentencing him to transportation for life. The facts of this case are stated in the judgment of Brodhurst, J.

The appellant was not represented.

[623] The *Public Prosecutor* (Mr. C. H. Hill), for the Crown.

### JUDGMENT.

BRODHURST, J.—The prisoner, Mohan, was committed to the Sessions on alternate charges under ss. 302 and 304 of the Indian Penal Code; that is, for the offences of murder and culpable homicide not amounting to murder. The assessors, for reasons stated by them, were of opinion that Mohan was guilty of culpable homicide not amounting to murder. The Sessions Judge convicted Mohan of the offence of murder, and sentenced him to transportation for life. From this conviction and sentence Mohan preferred an appeal which came before me for disposal, and I referred it to a Bench of two Judges for consideration of two points of law; first, whether the confession of the accused before the Assistant Magistrate was, owing to certain defects in recording it, inadmissible in evidence; secondly, whether the offence committed was murder or culpable homicide not amounting to murder. The case then came before the Officiating Chief Justice and myself, and we remanded it for certain evidence under s. 533 of the Criminal Procedure Code. That evidence has now been received, the confession is duly proved, and is, I consider, true. The second point of law remains to be disposed of.

The facts of this case are briefly as follows:—

The accused suspected that his wife had, during his absence, formed a criminal intimacy with one Fakruddin, and the latter person has admitted that the accused's suspicions were well-founded. It appears that on the night in question the deceased woman, thinking that her husband was asleep, stealthily left his side with the intention of going to her paramour; that the accused took up an axe and followed her, found her in conversation with Fakruddin, and immediately killed her. Fakruddin meanwhile had run away to the room he occupied in his employer's compound; the accused followed him there, entered the room and struck him, but without seriously injuring him. Fakruddin effected his escape from the room, and the accused then fastened the door and made a desperate attempt on his own life by cutting his throat. Two of the assessors were of opinion that accused found his wife in the act of criminal intercourse with Fakruddin. Were that proved, Mohan's offence would be reduced to culpable homicide not amount- [624] ing to murder, but even Mohan did not in his confession urge as much in his own favour. He alleged that he had reason to believe that his wife had an intrigue with Fakruddin, that seeing her stealthily leave his bed at night, he armed himself, followed her and found her sitting and conversing with Fakruddin, and he therefore immediately killed her. I have now had the advantage of consulting the learned Officiating Chief Justice and of referring to certain English and American cases bearing on this point of law.

In "Bishop's Commentaries on the Criminal Law," Vol. II, 6th ed., p. 711, is the following:—A man suspecting adultery followed his wife, and found her talking with her paramour; she ran off, but the latter remained. He fell on him with a stone and knife, inflicting wounds which produced death, and it was held that the offence was murder—*The State v. Avery*, 64 N.C. 608;" and in *Kelly's Case* referred to on page 786, Vol. I, 4th ed., "Russell on Crimes and Misdemeanours," Rolfe, B., in summing up, observed:—"It is said that if a man finds his wife in the act of committing

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adultery and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder: however strongly you may suspect it, it would most unquestionably be murder; and if I were to direct you, or you were to find otherwise, I am bound to tell you, either you or I would be most grievously swerving from our duty." I am now satisfied that Mohan is guilty of murder, and I concur in dismissing his appeal.

At the same time I think that, with reference to the circumstances of the case, transportation for life is too severe a sentence. Natives of this country, in cases of this description, appear to be generally unable to exercise that control over themselves that Europeans usually succeed in doing. The prisoner, moreover, is an ignorant man, and, in my opinion, he received provocation, though not such as to bring his case within *Exception 1*, s. 300 of the Indian Penal Code. I therefore concur with the learned Chief Justice [625] in recommending that his sentence be commuted to ten years' rigorous imprisonment.

STRAIGHT, Offg. C.J.—I have had an opportunity of reading the observations of my brother Brodhurst in reference to the case of this appellant, and it is unnecessary for me to recapitulate the facts which are clearly and fully set out in his judgment. I entirely approve of the order he proposes, and from the moment that I had an opportunity of perusing the evidence against the appellant, I never entertained any doubt that the Judge of Shahjahanpur was right in law in the view he took as to the legal quality of the act committed by the appellant. That act was most undoubtedly one that constituted the crime of murder, and I think that had the learned Judge countenanced the view that, looking to the facts, there was enough by reason of grave and sudden provocation, to reduce the offence to that of culpable homicide not amounting to murder, he would have been improperly construing and applying the law applicable to such cases. I have already, in the case of *Damarua* (1), gone to the extreme limit that I am prepared to go in case of this description, in holding upon the facts there disclosed, that the husband's offence in killing his wife or her paramour, or both, was, by reason of grave and sudden provocation, reduced from murder to manslaughter. In that case the circumstances were of such a character and description that there were reasonable grounds for the accused man believing or imagining that an act of adultery had been committed immediately before he saw his wife with her paramour; and I therefore, though not without doubt and with some elasticity, applied the principle which has been sanctioned in cases of this description by the rulings of the most eminent English Judges. In the present instance, none of those circumstances exist. On the contrary, it is clear that the appellant, having first armed himself with a weapon, followed his wife some distance, and all that he saw taking place before his attack upon her, was a meeting between her and the man with whom she had improper relations, and some conversation passing between them. That state of things was wholly inadequate to the resentment with which it was met on the part of the appellant, and his act was altogether out of proportion [626] to the provocation given. The law does not sanction or approve a man taking into his own hands the duty of punishing his wife in the mode

adopted by the prisoner, and it would be most dangerous to society if the Courts of this country were to adopt the doctrine that he might. "No man under the protection of the law is to be the avenger of his own wrongs. If they are of the nature for which the laws of society will give him an adequate remedy, thither he ought to resort"—"Russel on Crimes and Misdemeanours," Vol. I, 4th ed., p. 725. The conduct of the deceased woman in meeting her paramour was, no doubt, most improper; but the meeting took place in a public place and under circumstances that, while they might arouse the appellant's anger, they cannot be regarded of such a character that they can properly be held to have deprived him of his self-control to the extent and degree required by the law, before the nature of his crime can be reduced from murder to culpable homicide.

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I approve of the order of my brother Brodhurst that this appeal should be dismissed, and I also agree in the recommendation that he proposes. While it is essential that in cases of this kind the true legal nature of the act, of which the person has been guilty, should be recorded against him, the question of punishment, may, I think, with propriety, be brought to the notice of His Honor the Lieutenant-Governor, in whose hands resides the exercise of the prerogative of mercy. I agree with my brother Brodhurst that there are circumstances in this case which show it to be of a somewhat exceptional character, and I therefore concur in his recommendation.

*Appeal dismissed.*

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#### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

BAHORI LAL (*Appellant*) v. GAURI SAHAI (*Respondent*).<sup>\*</sup>  
[2nd August, 1886.]

*Civil Procedure Code*, ss. 244 (c), 278, 283—*Question for Court executing decree—Separate suit*—"Representative" of judgment-debtor.

The decree-holder under a decree for enforcement of lien against the zamindari rights and interests of *K*, applied for execution by attachment and sale of [627] certain shares, one of which was recorded in the *khewat* in the name of *K*, and two others in the name of *B*, his brother's widow. The shares having been attached, the judgment-debtor died, and *J*, his brother, and *L*, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of *J* and *L*, as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this *B* objected under s. 281 of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objections she died, and *L* applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by *B*, *L* appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to *L*'s claim, as the heir of *B*, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to *L*'s bringing a suit to establish his right. On the other side, it was contended that, *L* being the representative of the

<sup>\*</sup> First Appeal No. 112 of 1886, from an order of Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 7th December, 1885.



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deceased judgment-debtor *K*, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie.

*Held* that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as *L*'s claim which was rejected by it was nothing more than to come in as *B*'s representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filled as the legal representative of his deceased father. Because *L* happened, for the purpose of the execution proceedings, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution proceedings.

*Wahed Ali v. Jumae* (1), *Ram Ghulam v. Hazara Kuar* (2), *Sita Ram v. Bhagwan Das* (3), *Shankar Dial v. Amir Haidar* (4), *Nath Mal Das v. Tajam. mal Husain* (5) and *Kanai Lal Khan v. Sashi Bhuson Biswas* (6), referred to.

THE facts of this case are stated in the judgment of Straight, Offg. C.J.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellant.  
Mr. *Carapiet*, for the respondent.

## JUDGMENT.

STRAIGHT, Offg. C.J.—In order to make the questions that have been raised in this appeal intelligible, it is necessary to state the [628] following facts, and the accompanying table may facilitate the doing so:—

Jawahir.	Kashi Ram.
<div style="text-align: center;"> </div> <div style="text-align: center;">—————</div> <div style="text-align: center;"> </div>	<div style="text-align: center;"> </div> <div style="text-align: center;">—————</div> <div style="text-align: center;"> </div>
Kalian Singh, married Musammat Janki.	married (1) Bhagirathi, (2) Bijai Kuar.
<div style="text-align: center;"> </div>	
Bahori Lal (appellant).	

On the 2nd January, 1875, Kalian Singh executed a bond in favour of Gauri Sahai, respondent, hypothecating his zamindari rights and interests in mouza Deva Kanchan. He was at that time recorded in the *khewat* as proprietor of a 5 biswas share in that mauza, and Musammats Bhagirathi and Bijai Kuar, the widows of his deceased uncle, Kashi Ram, were respectively described therein as owners each of a 5 biswas share. On the 28th September, 1883, Gauri Sahai obtained a decree for enforcement of lien against the entire zamindari rights of Kalian Singh in mauza Deva, hypothecated in the bond of the 2nd January, 1875, but his claim against the person and other property of the obligor was dismissed. Owing to some antecedent litigation that had taken place between Bijai Kuar on the one side, and Kalian Singh and Musammat Janki on the other, in reference to the 5 biswas share recorded in Janki's name, a compromise was arrived at between them, by which it was agreed "that mutation of names in respect of the property in dispute should be effected in favour of Musammat Bijai Kuar, and that she should remain as heretofore in possession of the said property and other properties situate in mauza Deva and mauza Ghasita, and that the said property shall be responsible for any debts due from us Kalian Singh and Musammat Janki." On her side Bijai Kuar said:—"I shall have no right to transfer any property, nor shall the said property be liable for any debt due from me. I shall

(1) 11 B.L.R. 149.

(4) 2 A. 752.

(2) 7 A. 547.

(5) 7 A. 36.

(3) 7 A. 733.

(6) 6 C. 777.

have a life-interest in all the estate left by my deceased husband." This arrangement was given effect to by the removal of Janki's name from the *khewat* as to the 5-biswas share, and the substitution of Bijai Kuar's, who thus stood entered in respect of two shares of 5 biswas each.

On the 14th April, 1884, Gauri Sahai made his first application or execution by attachment and sale of the hypothecated rights and interests of his obligor, which he described as "5 biswas entered in [629] the name of Kalian Singh, judgment-debtor, and 5 biswas in the name of Janki and 5 biswas in that of Bijai Kaur, in mauza Deva, of which Kalian Singh is the owner." As I have already stated, Janki's name had been expunged and no share stood in her name at all. On the 23rd April, 1884, the Court issued an attachment against the whole 15 biswas, and on the 11th of May following they were attached. On the 8th June, 1884, Kalian Singh, the judgment-debtor, died, and Janki, his widow, and Bahori Lal, his son, were substituted as his representatives on the 18th of the same month.

On the 29th of November, 1884, the Subordinate Judge transferred the execution-proceedings to the Collector of the district, and on the 20th June, 1885, the Collector put up and sold only the 5 biswas share which had stood recorded in the name of the deceased judgment-debtor, and which was in the possession of Janki and Bahori Lal as his representatives. Subsequently, Gauri Sahai applied for sale of the 5 biswas which he described as entered in the name of Janki and the 5 biswas in the name of Bijai Kuar. On the 19th September, 1885, Bijai Kuar filed objections, stating that Janki had no interest in the property, that she (Bijai Kuar) was the owner, and that any interests derived by Janki from her deceased husband had already been sold by the decree-holder. The 14th November, 1885, was fixed for the hearing of these objections, but before that date Bijai Kuar died, and on the 11th November Bahori Lal, under the guardianship of his mother, applied to have his name brought on the record in her place with the object of supporting her objections. This was done subject to anything that might hereafter be urged by the decree-holder. On the 5th December, 1885, he in his turn put in objections to the effect that any interest Bijai Kuar might have had in the property died with her, and that she left no rights that could pass to Bahori Lal as her heir; on the contrary, that anything she had was in reality the property of Kalian Singh, that it was hypothecated in the bond of the 2nd January, 1875, and that by the terms of the compromise between Bijai Kuar and Kalian Singh and Janki, the first-named had agreed that the property should be liable for the debts of Kalian Singh. These objections were heard and disposed of by the Subordinate Judge on the 7th December, 1885; and he held that [630] "no specified share of Kalian Singh has been charged under the decree sought to be executed and under the bond dated the 2nd January, 1875, the basis of the decree; on the contrary, a charge was created on the whole right and interest in mauza Deva Kanchan; therefore the share of Kalian Singh in the property, standing in the name of Bijai Kuar, should also be considered hypothecated. The objection that the property of Bajai Kuar had been exempted should not have been allowed. She might have perhaps continued in possession during her life, but she died while the suit was pending. The son of Kalian Singh, the heir of the judgment-debtor, wishes to become the representative of Bijai Kuar, but the Court thinks none can become her representative, her interest having been merely life interest; ordered that the claim be disallowed with costs."

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It is obvious therefore, from the terms of the order of the Subordinate Judge, that the proceeding before him had reference to the objections which had been filed by Bijai Kuar, and supported by Bahori Lal, through his guardian, pursuant to the order granted on the application of the 11th November, 1885. The decision of the Subordinate Judge was appealed from by Bahori Lal to the Judge, and among the pleas was the fourth to the following effect:—"As applicant is the representative of Kalian Singh, judgment-debtor, and the execution is taken out against him, all the objections raised by him *should have been set at rest under s. 244 of the Civil Procedure Code*, and he should not be made to prefer a claim." The Judge disposed of the case upon a preliminary point of jurisdiction, holding that as "the decree, in the execution of which the objection is taken, is over Rs. 5,000 in amount," this Court, and not his Court, was the proper appellate tribunal. He accordingly returned the memorandum of appeal for presentation here, and this is the mode in which the matter comes before us. When the case came on for hearing, Pandit Bishambar Nath, for the respondent, took a preliminary objection to the effect that the proceeding before the Subordinate Judge having taken place in reference to the claim of Bahori Lal, as the heir of Bijai Kuar, to have the 10-biswas share released from attachment, his order must be regarded as passed under s. 281 of the Civil Procedure Code, and such being the case, and it being conclusive, [631] subject to Bahori Lal's bringing a suit to establish his right, no appeal lay to this Court. In reply for the appellant, it was urged that the proceeding before the Subordinate Judge must be regarded as held under s. 244, Bahori Lal being the representative of Kalian Singh and in support of this contention a ruling of the Privy Council—*Wahed Ali v. Jumae* (1)—and one of this Court—*Ram Ghulam v. Hazaru Kuar* (2)—were referred to.

I think that the preliminary objection urged for the respondent is a valid one and must prevail. It is clear that the objections filed by Bijai Kuar on the 19th September, 1885, were put in under s. 278 of the Code, and that, whether rightly or wrongly, she claimed to be entitled to the two shares of 5 biswas each, and on that ground to have the decree-holder's attachment released. Had she survived, those objections would have had to be considered and disposed of in the manner provided in ss. 280 and 281, and had the decision been adverse to her, her remedy, and her only remedy, would have been a suit of the kind mentioned in s. 293. All that Bahori Lal sought to be allowed to do was to come in as the representative of Bijai Kuar for the purpose of supporting those objections, and it was his claim to do this that was rejected by the Subordinate Judge, and nothing more. It was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct and apart from that he filed as the legal representative of his deceased father, in which capacity he had been cited after the passing of Gauri Sahai's decree. No application had been put in by the decree-holder, which would have made the second paragraph of s. 234 applicable, and in my opinion it is impossible to hold that the question decided by the Subordinate Judge which is sought to be impeached on appeal here, was one that fell within the purview of cl. (c), s. 244; on the contrary, if any section covers the Subordinate Judge's order, it must be s. 281. I do not think that because Bahori Lal happens, for the purpose of the execution-proceedings under Gauri Sahai's decree, to be the legal representative

(1) 11 B.L.R. 149.

(2) 7 A. 547.

of his father Kalian Singh, and to be liable to satisfy it to the extent of any assets which may have come to his hands, that any rights claimed by him through a third person must be [632] dealt with, and can only be dealt with, between him and the decree-holder in the execution-proceedings, in which, be it observed, only for the property of the deceased which has come to his hands, and has not been duly disposed of, can any personal responsibility attach to him. I do not understand the Privy Council ruling, or the judgment of this Court referred to by the appellant's learned pleader, to lay down the proposition that the legal representative of the judgment-debtor, brought in after decree, is constrained to have his title, possibly to a large property, determined by the summary method adopted in execution-proceedings, and that because he is another man's legal representative, he is placed in a worse position than other people, and has no remedy by suit. Both the cases had reference to persons who had been cited in the suit as representatives of a deceased person before decree, and so far as the ruling of their Lordships of the Privy Council was concerned, its direct object was to determine that such persons were parties to the suit for the purpose of s. 11 of Act XXIII of 1861, and their remarks referred to by my brother Oldfield in *Ram Ghulam v. Hazaru Kuar* (1) are directed to that point and that point only. I allow the preliminary objection, that the order here was not passed under s. 244 of the Code, and dismiss the appeal with costs.

MAHMOOD, J.—I confess that I have had considerable doubts upon the question of law raised in this case, and the difficulty is considerably enhanced by the fact that there exists a long conflict of decisions in the published reports as to how far the representative of a judgment-debtor can be dealt with as a party to the suit for purposes of execution-proceedings relating to the questions under s. 244 of the Civil Procedure Code. The most important case upon the subject is *Wahed Ali v. Jumae* (2), where the Lords of the Privy Council held that a party sued in a representative character, against whom a decree is obtained, is a party to the suit for purposes of execution of such decree. The same is the effect of *Oseem-un-nissa Khatoon v. Ameer-un-nissa Khatoon* (3). The rule appears to have been carried further by a Division Bench of the Calcutta High Court in *Ameer-un-nissa Khatoon v. Meer Muzuffer Hossein Chowdhry* (4), where the same rule was applied to the case of a person [633] who was not a party to the decree, but had been brought upon the record as representative of the deceased judgment-debtor in the execution proceedings. The view is in accord with a much older ruling of the Madras High Court, in *Buddu Ramaiya v. C. Venkaiya* (5), where it was held that questions arising between the parties to the suit cannot be limited to questions arising between those who were parties to the suit at the date of the decree; but after decree the representative of a decree-holder, or the representative of a defendant against whom an execution is sought, become parties to the suit for the purposes of execution. The same is the effect of a later ruling of the same Court in *Kuriyali v. Moyan* (6). On the other hand, the rulings of this Court in two cases—*Abdul Rahman v. Muhammad Yar* (7) and *Awadh Kuari v. Raktu Tiwari* (8) seem to proceed upon a *ratio decidendi* which appears to be inconsistent with the rulings above referred to. Indeed, in *Nimba Harishet v. Sita Ram Paroji* (9), Sargent, C. J.,

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(1) 7 A. 547.

(4) 12 B.L.R. 65.

(7) 4 A. 190.

(2) 11 B.L.R. 149

(5) 3 M.H.C. R. 263.

(8) 6 A. 109.

(3) 20 W.R. 162.

(6) 7 M. 255.

(9) 9 B. 458.



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referring to the former of these cases, declined to follow it, regarding it to be inconsistent with the Privy Council ruling, and he adopted the ruling of the Madras Court in *Arundadhi Ammyar v. Natesha Ayyar* (1). Again, the rulings of this Court in *Ram Ghulam v. Hazaru Kuar* (2) and *Sita Ram v. Bhagwan Das* (3), in both of which I concurred with my brother Oldfield, laid down the rule that the representative of the judgment-debtor who had objected that the property attached had been acquired by himself, and not inherited from the judgment-debtor, and was therefore not liable in execution, must be treated as a party to the suit within the meaning of s. 244 of the Civil Procedure Code, and the objection must be dealt with in execution of the decree. I must also here point out that whilst in the latter of these cases the representative of the judgment-debtor was brought upon the record in the execution proceedings subsequent to the decree, in the former case the representatives were themselves impleaded in the original suit in that capacity, and the decree had been obtained against them. In delivering my judgment in the case, whilst concurring with my brother Oldfield, I expressed the view that the turning point upon which the application of the rule contained in s. 244 of the Civil [634] Procedure Code, harring adjudication in a regular suit, depends, is, whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. And I also held that this view was consistent with the *ratio decidendi* which had been adopted by my brother Oldfield in *Sankar Dial v. Amir Haidar* (4), and which I followed in *Nath Mal Das v. Tajanmul Husain* (5), and at the same time I expressed my dissent from the ruling of a Division Bench of the Calcutta Court in *Kanai Lall Khan v. Sashi Bhuson Biswas* (6), which goes the length of holding that even where a person, upon the death of a Hindu widow, is made a party to the suit as reversionary heir to the estate, and a decree is passed against him, he may in a subsequent suit claim to establish that the decree covered only the life-interest of the widow. The *ratio decidendi* adopted in the ruling seems to be that, although the plaintiff was impleaded in the decree as the representative of the widow, the nature of his claim was such as to exclude it from the operation of s. 244 of the Code—a view which I could not reconcile with the ruling of the Lords of the Privy Council in *Wahed Ali v. Jumae* (7). These are not the only reported cases which complicate the question; and in this state of the case-law, I felt inclined to ask the learned Chief Justice to refer this case to the Full Bench. But I am not prepared to dissent from him in the distinction which he has drawn between this case and the rulings to which I have referred. The present appellant was no party to the original decree of the 28th September, 1883, and he was impleaded in execution-proceedings as the representative of the original judgment-debtor, Kalian Singh, and in that capacity he might, according to the rulings to which I have already referred, be treated as a party to the suit for purposes of s. 244 of the Code. But the case, as it has come before us, does not, as the learned Chief Justice has shown, relate to such capacity. In the execution-proceedings a third party, Musammat Bijai Kuar, who could under no conditions be regarded as the representative of the judgment-debtor, Kalian Singh, raised objections on the 19th September,

(1) 5 M. 391.

(2) 7 A. 547.

(3) 7 A. 738.

(4) 2 A. 752.

(5) 7 A. 36.

(6) 6 C. 777.

(7) 11 B.L.R. 149.

1885, to the attachment of the property, and her objections were undoubtedly such as are contemplated by ss. 278, 281 of the Civil Procedure Code. The 14th November, 1885, was fixed for the hearing of the objections; but the objector died in the meantime, and the present appellant had his name substituted as the representative of the objector, and the objections were disposed of on the 7th December, 1885, and this is the order from which this appeal has been preferred.

Upon this state of things, I am not prepared to dissent from the learned Chief Justice in the view that the case is not on all fours with the Privy Council ruling in *Wahed Ali's Case* (1), and that it is distinguishable from the other rulings to which reference has been made. Nor am I prepared to dissent from him in the view that the mere circumstance of the representative of a deceased judgment-debtor becoming the representative also of a deceased third party, who was objector in the execution-proceedings, will not preclude him from prosecuting those objections, and that the adjudication upon such objections falls beyond the scope of s. 244 of the Code. Indeed, as the learned Chief Justice has pointed out, the matter was dealt with in the Court below as objections by a third party, and there can be little doubt that the order of the 7th December, 1885, now under appeal, was passed under s. 281 of the Code, as it disallowed the objections upon the ground that the appellant had inherited nothing from the original objector, Musammât Bijai Kuar. And this being so, I am not willing to disagree with the learned Chief Justice in holding that, under the circumstances of this case, the proper remedy for the appellant would be a suit such as is contemplated by s. 283 of the Code.

For these reasons I concur in the order which the learned Chief Justice has made.

*Appeal dismissed.*

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#### CRIMINAL REVISIONAL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

QUEEN-EMPRESS v. LOCHAN. [2nd August, 1886.]

*Murder—Culpable homicide not amounting to murder—Grave and sudden provocation—Act XLV of 1860 (Penal Code), ss. 300, Exception 1, 302, 304.*

An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence [636] showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour, and killed her with the chopper.

*Held* that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed it could not be said that he was deprived of self-control by grave and sudden provocation. *Queen-Empress v. Damarua* (2) and *Queen-Empress v. Mohan* (3) referred to.

THIS was a case the record of which was called for by Straight, Offg. C.J., in the exercise of the High Court's powers of revision. The

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(1) 11 B.L.R. 149.

(2) A.W.N. (1885) 197.

(3) 8 A. 622.



**1886** case was one in which one Lochan had been convicted by Mr. R. J. Leeds, Sessions Judge of Gorakhpur, of culpable homicide not amounting to murder, and sentenced to five years' rigorous imprisonment, the Sessions Judge's order being dated the 11th March, 1886.

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The facts of the case are stated in the order of the Court. Neither the prisoner nor the Crown was represented.

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### ORDER.

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**(1886) 252.**

**STRAIGHT, Offg. C.J.**—This is a case of revision in reference to a decision of the Judge of Gorakhpur, convicting the accused Lochan of culpable homicide not amounting to murder, and sentencing him to five years' rigorous imprisonment. The case was called up by me, on perusal of the Gorakhpur Sessions statement for March, and we have had notice issued to the accused to show cause why the conviction recorded against him should not be altered to one of murder under s. 302 of the Penal Code, and why his sentence should not be enhanced to that provided for that offence.

The circumstances of the case are shortly these. The accused Lochan, son of Janki, Sainthwar by caste, aged 25, resided at the village of Balohi in the Tarkalwa Police circle. Along with him lived Musammat Jadni, deceased, aged about 25, the widow of his deceased first cousin Ramphal. On the evening of Thursday, the 10th of December last year, about 8 o'clock, the accused was near his house, cutting up sugar-cane with a *gandasa*, and near by him were two men, Wali *Julaha* and Musa *Ahir*. According to the evidence of these persons the deceased, Musammat Jadni, passed [637] close to them alone, going in a southerly direction, and soon after she had gone on her way, the accused followed, taking his *gandasa* with him. As to what then happened we learn from the evidence of one Beni Madho, a caste-fellow of the accused, who says that on the night of the 10th the accused came to him and stated that Musammat Jadni was lying dead in the *arhar* field. "She was committing fornication with Phul, Panthwar. I went up, and Phul ran away. I then killed her with my chopper." The body of Musammat Jadni was found on the 11th lying under a mango tree, with a number of wounds upon the neck, head, and arms, and it was obvious that death must have supervened almost immediately upon the infliction of these injuries. Complaint was lodged at the Tarkalwa Police station on the morning of the 12th, and the accused was, in due course, arrested. Before the Magistrate Phul, the man referred to by the accused in his statement to Beni Madho, deposed to the effect that he was in the act of having connection with Musammat Jadni under the mango tree when he was surprised by the accused; that he there upon jumped up and ran away, and as he ran he turned round and saw the accused striking the deceased woman. In the Sessions Court he denied that he was in the act of having connection with Musammat Jadni when the accused came up, and stated he was only conversing with her. The assessors did not believe the evidence for the prosecution, but such reasons as they gave for not doing so appear to be quite insufficient. The learned Judge was of opinion that the guilt of the accused, of having caused the death of Musammat Jadni, was fully established; but he considered that, having regard to all the facts, the act of the accused in doing so was, by reason of grave and sudden provocation, reduced to culpable homicide not amounting to murder. He therefore convicted him of that lesser offence, and sentenced him to five years' rigorous imprisonment. With regard to this decision, all I have to say, in the first place is, that the evidence and

all the surrounding circumstances, to my mind, place it beyond doubt that the hand of the accused did the unfortunate act which caused the deceased woman's death. I see no reason whatever for distrusting the testimony of Beni Madho, and I think the learned Judge gives a reasonable explanation of his somewhat singular conduct in not at once reporting what the [638] accused had said to him on the night of the commission of the crime. No doubt there is the contradiction to which I have already adverted in Phul's two depositions; but the learned Judge has preferred that made in the first instance before the Magistrate, and it was in the prisoner's interest that he did so, for the purpose of measuring the nature of his offence; and though he may have so far discredited his later statement, I do not think this discrepancy should invalidate the rest of his evidence. But I think the learned Judge was wrong in holding that there was grave and sudden provocation of the kind that reduced the offence of the accused from murder, with which he was charged, to culpable homicide not amounting to murder. I have already, in the case of *Queen-Empress v. Damarua* (1) stated the rule, as I believe it to be, which governs the matter, and my brother Brod-hurst and I have recently acted on the same view in *Queen-Empress v. Mohan* (2).

In the first place, the relation in which the accused stood to the deceased was not that of a husband, though it is quite possible, from her living in the house with him, that they were on intimate terms, and that his act may have been animated by jealousy. But there is no proof of this, and I must take the accused's own version of the matter; and even adopting the learned Judge's view that he caught Musammatt Jadni in the very act of connection, I am of opinion that there was no grave and sudden provocation proved of the character that a Court of Justice ought to accept as reducing the crime of murder to that of culpable homicide. The accused taking the chopper with him, and thereby indicating that he contemplated resorting to violence, followed the deceased woman a considerable distance, obviously, to my mind, with the belief that she was going to keep an assignation, and with the deliberate purpose of detecting her in doing so. He neither called her to come back, nor remonstrated with her, nor sought to induce her to return, but silently pursued her, and marked her down at the spot where he killed her. In other words, he went deliberately in search of the provocation, which is now sought to be made the mitigation of his offence. As I have already observed, he was not the husband of the woman, and there was no moral obligation upon him to constitute himself her executioner for her transgression. I cannot for a moment hold that, under the circumstances disclosed, he was deprived of self-control by grave and sudden provocation, for (to quote a passage cited from *Oneby's Case*, 2 Lord Raymond, 1485, in "Russell on Crimes and Misdemeanours," Vol. I, 4th ed., p. 725) "in cases of this kind the immediate object of the inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty." Such being the view I take of the case here, the conviction of the accused must be altered to one of murder under s. 302

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6 A.W.N.

(1886) 252.

(1) A.W.N. (1885) 197.

(2) 8 A. 622.



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(1886) 252.

of the Penal Code, and in accordance with s. 439 of Criminal Procedure Code, the sentence will also be altered to that provided for the offence, namely, transportation for life. I think, however, that, having regard to the facts, and making allowance for the peculiarities of native character in reference to the misconduct of woman of their families, especially among the less advanced and more ignorant residents of the rural districts, I may properly recommend the Government to commute the sentence to fourteen years' transportation.

MAHMOOD, J., concurred.

8 A. 639 = 6 A.W.N. (1886) 238.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

HARDEO DAS (*Appellant*) v. ZAMAN KHAN (*Respondent*).<sup>\*</sup>  
[3rd August, 1886.]

*Execution of decree—Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss. 253, 545, 546.*

S. 253 of the Civil Procedure Code<sup>\*</sup> contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

[640] The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety.

*Held* that the Court executing the High Court's decree had no jurisdiction to execute it against the surety.

THE facts of this case are stated in the judgment of the Court.  
Munshi *Kashi Prasad*, for the appellant.  
Shah *Asad Ali*, for the respondent.

### JUDGMENT.

OLDFIELD, J.—One Dwarka Prasad obtained a decree against the respondent Muhammad Sahib Zaman Khan, and it was affirmed in appeal by the District Court on the 10th December, 1881. After this he took out execution to recover costs awarded. The respondent applied to stay execution on the ground that he proposed to file an appeal to the High Court.

Execution was not, however, stayed and the costs were deposited by the respondent and paid to Dwarka Prasad, and the appellant gave a bond, by which he undertook to refund the amount to the respondent, in the event of the latter succeeding in his appeal to the High Court and of Dwarka Prasad failing to re-pay to him the amount. The respondent subsequently filed an appeal to the High Court and was successful; and he then applied in the execution department to recover the sum from the

<sup>\*</sup> Second Appeal No. 58 of 1886, from an order of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 15th April, 1886, reversing an order of Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 6th January, 1886.

appellant, and his application was disallowed by the Court of first instance, but has been allowed in appeal by the Judge. The appellant appeals to this Court on the ground that the Court executing the decree had no jurisdiction in the matter. I think the plea is valid. Ss. 545 and 546, and 253, Civil Procedure Code, have been referred to as enabling the Court to deal with the respondent's application, but they do not appear to be applicable. S. 545, Civil Procedure Code, contemplates proceedings to stay execution of decree on security being given by the applicant, and s. 546 is a provision for staying execution when an appeal is pending, but the security given in the case before us was not made under circumstances to which the provisions of that section are applicable.

[641] S. 253 provides that whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. But this section contemplates that there shall be a suit pending at the time security is given for its performance, and would not seem to apply to a case like this, where no suit can be said to have been pending, as the litigation in the Court of first instance and Court of appeal had ended, and no second appeal had been instituted in the High Court when security was given.

I do not therefore think that s. 253 will apply so as to allow the decree of the High Court to be executed against the surety.

I would decree the appeal, and set aside the order of the Court below with costs, and restore the order of the Court of first instance.

MAHMOOD, J.—I agree.

*Appeal allowed.*

8 A. 641=6 A.W.N (1886), 242.

# APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

ACHOBANDIL KUARI (*Defendant*) v. MAHABIR PRASAD (*Plaintiff*).<sup>\*</sup>  
[6th August, 1886.]

*Vendor and Purchaser—Non-payment of consideration-money—Burden of proof.*

In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1881. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

*Held* that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

[642] *Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed.

THE facts of this case are stated in the order of remand.

Babu Baroda Prasad, for the appellant.

<sup>\*</sup> Second Appeal No. 1509 of 1885, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 3rd August, 1885, modifying a decree of Rai Raghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 20th December, 1884.

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(1886) 238.



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8 A. 641=

6 A. W. N.

(1886) 242.

Mr. J. Simeon, for the respondent.

TYRRELL, J.—The plaintiff brought this suit as heir to his brother, who, in January, 1876, is said to have purchased from the appellant and her mother and other persons a two annas and eight pies share in mouza Nagpur. The plaintiff alleges that his brother got possession after the purchase, and held possession until his death, and after his death, he held possession until (Asarh 1288) 1881, when he was forcibly ejected by the vendors, of whom appellant is one. He therefore sued for reinstatement and for mesne profits. The appellant defended the suit, admitting that the deed of January, 1876, had been executed and registered by the vendors, but alleging that the transaction stopped there, no consideration having been received, and no possession transferred, the plaintiff's allegation as to his possession being untrue. The first Court gave the plaintiff-respondent a decree, and the defendants appealed to the District Judge, who found that the appellant's allegation was true as to possession never having been given to the plaintiff-respondent or to his brother, the original vendee. On the plea as to consideration, the Judge found that execution of the sale-deed being admitted by the defendants, who also had acknowledged receipt of consideration before the Registrar, the burden of proving non-payment of consideration rested on them, and that they had failed to prove its non-payment. The Judge thereupon decreed the suit against the appellant in favour of the plaintiff, exempting Musammat Chundar Bali on the ground of minority.

It is doubtless true that the party to a deed duly executed and registered, who alleges non-payment of consideration, is ordinarily bound to prove his allegation; but we think the Judge has overlooked the peculiar circumstances of this case. He had found that possession had never been transferred, and that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years.

[643] This state of things, combined with the continuous possession of the vendors, favoured their allegation that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff-vendee to give evidence that consideration had in fact passed.

In order that an inquiry may be made on this point, we must remand this case for trial on the following issue:—

Did the brother of the respondent pay the consideration of the sale-contract to the appellant and the other vendors under the deed of January, 1876; and if he did, how does it come to pass that he has been kept out of possession till the present time?

On return of the finding, ten days will be allowed for objections.

OLDFIELD, J.—I concur.

The lower appellate Court found on this issue against the respondent, as he produced no evidence to prove payment of the purchase-money. On the return of its finding the High Court delivered the following judgments:—

#### JUDGMENT.

OLDFIELD, J.—We must decree this appeal. It was for the plaintiff-respondent, under the circumstances of this case, to prove that consideration-money passed on the sale-deed of January, 1876, and to account for being out of possession of the property since the alleged purchase. No

evidence was adduced by him on this point in the first Court, nor in the lower appellate Court, although we remanded the case for that purpose. The Judge says that the respondent had ample opportunity afforded him of adducing evidence, but no evidence of any kind was adduced by him, and as he has not established that any consideration was paid, the suit fails.

The decisions of both the lower Courts must be set aside and the plaintiff's suit dismissed with costs in all the Courts.

TYRRELL, J.—I am quite of the same opinion. We remanded the case in the interest of the respondent, to enable him to adduce proof of payment of consideration and explain the fact of being out of possession. In the absence of any evidence, the Judge was obliged to find the issue against him, and under these circumstances we have no alternative than to hold that his suit fails.

*Appeal allowed.*

8 A. 644=6 A.W.N. (1886) 232.

[644] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

BASDEO (*Defendant*) v. GOPAL (*Plaintiff*).<sup>\*</sup> [6th August, 1886.]

*Limitation*—*Suit to obtain a declaration that an alleged adoption is invalid or never took place*—*Suit for possession of immoveable property*—Act XV of 1877 (*Limitation Act*), sch. ii, Nos. 118, 141.

Art. 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance.

*Held*, that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation.

THE facts of this case are stated in the judgment of the Court.

Babu Jogindra Nath Chaudhri, for the appellants.

Babu Ratan Chand, for the respondents.

#### JUDGMENT.

OLDFIELD and TYRRELL, JJ.—The plaintiff claims certain immoveable property by right of succession to one Bhagirath, on the death of the latter's widow, Musammatt Rajo. The defendant Basdeo attached the property as belonging to his judgment-debtor, Chatarbhuji, defendant, and the plaintiff's objection was disallowed by the Court executing the decree, under s. 281 of the Civil Procedure Code. The plaintiff has brought his suit to set aside the order, remove the attachment, and obtain possession.

<sup>\*</sup> First Appeal No. 134 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 31st May, 1886.

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6 A.W.N.  
(1886) 242.



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APPEL-

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8 A. 644=

6 A. W. N.

(1886) 232.

The defendant set up a title based on the adoption of Chatarbhuji by Musammat Rajo.

[645] The question before us is whether the suit is barred by limitation.

The suit has been brought within one year of the order of the Court under s. 231 of the Civil Procedure Code, and is not barred with reference to art. 11 of the Limitation Act, but the Court of first instance held that it was barred by art. 118, treating it as a suit to obtain a declaration that an alleged adoption is invalid or never took place. The lower appellate Court, on the other hand, held that it was a suit for possession of immoveable property, governed by art. 141, and was within time.

We are of opinion that the Subordinate Judge is right. The suit is not to obtain any declaration that the alleged adoption set up is invalid, but it is for recovery of possession of immoveable property, for which there is a special limitation. Art. 118 only applies to suits where the relief sought is of a purely declaratory nature; it is discretionary in a Court to grant this sort of relief, and the suit for a declaration is distinct from a suit for possession of property, and it is instituted on a stamp of much smaller value, and the suit for possession of property cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption.

The Privy Council decision in *Jagadamba Chowdhurani v. Dakhina Mohun* (1) has no application. That decision dealt with the limitation in art. 129 of the old Act IX of 1871, which referred to suits to set aside an adoption, and their Lordships held that the terms "to set aside an adoption" referred to and included suits which bring the validity of an adoption into question, and applied indiscriminately to suits to have an adoption declared invalid and for possession of land, when the validity of an alleged adoption is brought into question.

But that decision had peculiar reference to the terms in which art. 129 was framed. The present law of limitation has made an alteration. It contains no such article as 129. On the other hand, we have arts. 118 and 119, the former for suits to obtain a declaration that an alleged adoption is invalid or never took place, and the latter to obtain a declaration that an adoption is valid; [646] and the period of limitation is reduced to six years, and the time from which it will run is altered, and the Act provides separately for suits for possession of property by art. 141.

There is no ambiguity about art. 118 as there was about art. 129 of the old law, and it can be held only to refer to suits purely for a declaration that an alleged adoption is invalid or never, in fact, took place; and where the suit is for possession of property, to which another limitation law is applicable, it will be governed by it, although the question of validity of adoption may arise. As already observed, it is discretionary in a Court to grant relief by declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

It is observable that, in the case we have referred to, their Lordships of the Privy Council remarked upon the difference between the language of art. 129 of Act IX of 1871, which they designate as being of a loose kind, and the precise terms of arts. 118 and 119 of Act XV of 1877, which we have described above. We dismiss the appeal with costs.

*Appeal dismissed.*

(1) Decided, 9th April, 1886.

S. A. 646 = 6 A. W. N. (1886) 243.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*GOPI CHAND AND ANOTHER (*Defendants*) v. SUJAN KUAR  
AND OTHERS (*Plaintiffs*).<sup>\*</sup> [9th August, 1886.]*Hindu Law—Sadhs—Partition between widow and mother, both claiming life interest—Alienation by mother—Reversioner—Declaratory decree.*

Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration; and an award was made dividing the property between the disputants. It did not appear that either of them claimed the property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it, having under the Hindu law a life-interest only in the property. The parties were Sadhs.

[647] Held that the Hindu law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the Sadhs, having the force of law, prevailed opposed to the Hindu law.

Held that inasmuch as the donor was in any circumstances entitled to maintenance, and the decision came to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners.

Held also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death.

THE facts of this case are stated in the judgment of the Court.

Mr. G. T. Spankie and Mr. Sinha, for the appellants.

Mr. W. M. Colvin and Babu Ram Das Chakarabati, for the respondents.

## JUDGMENT.

OLDFIELD and TYRRELL, JJ.—This suit has been brought to set aside a gift of certain property made by one Rani Bai, defendant, in favour of the co-defendants, her nephews. The property belonged to Gur Bakhsh; from him it passed to his son Kuar Chand, and at his death his heir was his widow Musammat Anandi. He left also a daughter, the plaintiff, and her sons, also plaintiffs. They sue as reversioners to set aside the gift.

It appears that on Kuar Chand's death, his mother, Rani Bai, and his widow Anandi, disputed as to the property, and the dispute was referred to arbitration. An award was made, by which the property left was divided between Rani Bai and Anandi. This was in 1868, and a decision given on the award, and the property, the subject of the gift, was part of what came to Rani Bai. The plaintiffs assert that Rani Bai had no power to give the property, having only a life-interest under Hindu law.

The parties are Sadhs, and the defence is that Hindu Law does not govern the succession to the estate of Kuar Chand; that Musammat Rani

<sup>\*</sup> Second Appeal No. 1847 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 19th September, 1885, confirming a decree of Munshi Rai Chedi Lal, Subordinate Judge of Farukhabad, dated the 17th June, 1885.

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(1886) 243.



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(1886) 243,

got the property absolutely in 1868, and has held adversely to the heirs and reversioners; that the plaintiffs are remote reversioners and have no right of suit, and have no right as reversioners to Rani Bai, so as to be able to contest her acts.

These were the substantial defences which were set up, and were disallowed by the Courts below which decreed the claim, and [648] the defendants in second appeal have raised the same contentions.

We do not consider any of them to be valid. Presumably the Hindu law of inheritance is applicable to the parties, and the defendants have not shown that any custom among the Sadhs, having the force of law, prevails opposed to Hindu Law. Under Hindu Law, on the death of Kuar Chand, Musammat Anandi Bai would succeed to a life-interest as his widow; but a dispute arose between her and her mother-in-law, Rani Bai, and the property was divided by award of arbitrators. It does not appear that either Rani Bai or Anandi claimed to take the property absolutely, but only disputed as to who was to have a life-interest in it; and it was the latter that was the subject of dispute and of the arbitration. Rani Bai was, under any circumstances, entitled to maintenance, and the decision came to was to put her in possession of half the property, but only on the footing of a woman's interest for life; and this being so—and it is the view taken by the Courts below of the arbitration award—we are of opinion that the defendants cannot set up any title by adverse possession on Rani Bai's part to defeat the claim of reversioners.

There remains the question whether the plaintiffs can maintain this suit. We think they can as reversioners to Anandi Bai. The arbitration award only settled a dispute between Anandi and Rani Bai, and it gave Rani Bai no higher title than Anandi Bai could bestow; that is, an interest in the property rightfully belonging to Anandi, so long as Anandi lived, but no longer. So far as reversioners are concerned, Rani Bai's act is the act of Anandi; and the plaintiffs, as reversioners to Anandi, can sue to set it aside. The gift is the act of one whom Anandi has put in a position to deal with the property, and who has dealt with it injuriously to plaintiff's reversionary interest.

The decree of the Courts below is in effect to render the gift operative so long as Rani Bai lives; but in the view we take of the case, the decree will be made for a declaration that the gift shall not affect any rights of the plaintiffs as reversioners after the death of Anandi Bai. We dismiss the appeal with costs.

*Appeal dismissed.*

8 A. 649 = 6 A.W.N. (1886) 253.

[649] APPELLATE CRIMINAL.

*Before Mr. Justice Straight, Offg. Chief Justice.*

QUEEN-EMPRESS v. ISMAIL KHAN AND OTHERS. [9th August, 1886.]

*Act XLV of 1860 (Penal Code), ss. 459, 460.*

SS. 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a "lurking house-trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking.

THIS was an appeal from a judgment and order of Mr. T. R. Wyer, Sessions Judge of Meerut, dated the 8th June, 1886, convicting the appellant Ismail Khan under ss. 459 and 511 of the Penal Code, and the other two appellants under ss. 460 and 511 of the same enactment.

The facts of this case are stated in the judgment of the Court.

The appellants were not represented.

The *Government Pleader* (*Ram Prasad*), for the Crown.

### JUDGMENT.

STRAIGHT, Offg. C.J.—In this case the evidence against the appellants was, that on the early morning of the 13th April last, they were disturbed by a *chaukidar* while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted to make their escape, the appellant Ismail Khan firing off a pistol, in what manner and direction it does not appear from the evidence, and the other two appellants attempting to prevent their apprehension by using their *lathis*. It is not suggested that these latter two appellants inflicted any serious hurt upon the police officers, and I do not think that any grave importance attaches to that part of the case. The learned Sessions Judge has convicted the appellant Ismail Khan of attempting to commit the offence provided for in s. 459, Indian Penal Code, and he has convicted the other two appellants of an attempt to commit the offence provided for in s. 460 of the same Act. I am very clearly of opinion that neither of these convictions can stand. Ss. 459 and 460 provide for a compound offence, the governing incident of which is that either "a lurking house-[650] trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. In other words, the causing of the grievous hurt, or the attempt to cause death or grievous hurt, must be done in the course of the commission of the offence of lurking house-trespass or house-breaking, and at the time when such lurking house-trespass or house-breaking is being committed. The provisions of these sections being of a highly penal nature, and inflicting very severe punishment upon conviction, it is necessary that they should be construed strictly; and in my opinion it was not contemplated that where the principal act done by the accused person amounts to no more than a mere attempt to commit the offences of lurking house-trespass or house-breaking, the section should be applicable. The convictions as recorded by the Judge are quashed, and I direct that they be recorded under ss. 452 and 511 of the Indian Penal Code, that is, for attempted house-breaking by night. The sentence passed on the prisoner Ismail Khan will be altered to transportation for the term of seven years. Inayat and Gullarh will be rigorously imprisoned for the term of five years. Such sentences to commence from the date of their conviction in the Sessions Court.

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(1886) 253.



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6 A.W.N.  
(1886) 249.

8 A. 650 = 6 A.W.N. (1886) 249.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*PARAM SUKH AND OTHERS (*Decree-holders*) v. RAM DAYAL  
(*Judgment-debtor*).<sup>\*</sup> [12th August, 1886.]*Privy Council decree—Execution for costs—Rate of exchange—Civil Procedure Code, s. 610—Meaning of "for the time being."*

Under the last paragraph of s. 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed.

The decree-holders under a decree passed by Her Majesty in Council having taken out execution for a sum of £119-11, under s. 610 of the Civil Procedure [651] Code,—held that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to.

THE appellants, in whose favour a decree had been made by Her Majesty in Council, dated the 12th December, 1884, which awarded them £119-11 as costs, applied, on the 6th January, 1886, to the High Court, under s. 610 of the Civil Procedure Code, for transmission of the decree to the Court of first instance for execution. This application was granted, and the decree was transmitted accordingly to the Subordinate Judge of Aligarh. In their application for execution the appellants, with reference to s. 610 of the Civil Procedure Code, estimated the sum of £119-11 at the rate of exchange current at the date of the application, and they claimed pleader's fees in respect of the application and also in respect of the application to the High Court.

The respondent—the judgment debtor—objected that the sum of £119-11 should be estimated at the rate of exchange current at the date of the decree, and that no pleader's fees were chargeable under the existing practice in respect of applications for execution of decrees.

The Subordinate Judge held that the rate of exchange prevailing at the date of the decree, and not that prevailing at the date of the application for execution, was applicable, and further, that pleader's fees should not be allowed. On the latter point the Subordinate Judge observed as follows:—"I hold that the pleader's fee for execution of the decree should not be allowed separately to the decree holders on account of this Court and the High Court. The fee received, at the rate of 5 per cent. at the time of the institution of the suit or appeal, was sufficient; for under para 67, Circular Order No. 7 of 1882, a pleader, already engaged, is bound to prosecute the suit till the end of it, and to make an application for execution of the decree; and the order of the High Court does not provide that the pleader's fee for the application, which was filed in the High Court on the 6th January, 1886, under s. 610 of the Code of Civil Procedure, should be awarded."

The appellants contended that the Subordinate Judge was wrong in applying the rate of exchange prevailing at the date of [652] the decree, and that costs of execution incurred in the High Court and the Court below ought to have been awarded.

<sup>\*</sup> First Appeal No. 132 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 6th April, 1886.

With reference to the latter contention, the Court (Oldfield and Tyrrell, JJ.) called for a report from the office as to the practice in allowing pleaders' fees on applications for execution made to the High Court of decrees of that Court and of the Privy Council, with reference to rule 67, p. 287, General Rules and Circulars (Civil), N.-W.P.

The Registrar reported that "it is not the practice to allow any fees in cases of execution of—(i) decrees of this Court on its original side, (ii) decrees of the Privy Council. The orders in the former case and the decrees in the latter instance are merely transmitted to lower Courts for execution."

Babu Jogindro Nath Chaudhri, for the appellants.

The respondent did not appear.

### JUDGMENT.

OLDFIELD, J.—This appeal is preferred against the order of the Subordinate Judge of Aligarh passed upon objections of the judgment-debtor, against whom a decree of the Privy Council was being executed. The decree-holders took out execution for a sum of £119-11 awarded to them and the question is, at what rate of exchange that sum should be made available to the decree-holders in rupees.

It appears to me that, under the last paragraph of s. 610, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and that the words "for the time being" mean the year in which the amount is realized, or paid, or execution taken out, and not the year in which the decree was passed. The rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to. On this point, therefore, this appeal succeeds.

The appellants' pleader gives up the other plea as to the decree-holder's right to costs of execution.

The lower Court must be directed to proceed with the application for execution of decrees in accordance with the view of the law recorded above.

[653] The decree-holders, appellants, are entitled to the costs of this appeal, which are fixed at one gold mohur or Rs. 16.

TYRRELL, J.—I concur.

*Appeal allowed.*

8 A. 653 = 6 A.W.N. (1886) 264.

### APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice.*

QUEEN-EMPRESS v. GIRDHARI LAL. [24th August, 1886.]

Act XLV of 1860 (Penal Code), ss. 24, 25, 218, 464, clause 3—*Forgery*—"Dishonestly"—"*Fraudulently*"—*Public servant framing incorrect record.*

A treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs. 500 which was in the Treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner

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then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as a revenue deposit, and that it was to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-muharrir, which, as originally drawn up, related to the sum of Rs. 500, already mentioned. The signature of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court, as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to.

*Held*, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the Rs. 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the First payee's Rs. 500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside.

*Held* also that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code.

[654] *Held* further that as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code.

THIS was an appeal from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 10th May, 1886, convicting the appellant of an offence under s. 465, and two offences under s. 218 of the Penal Code.

The appellant, Girdhari Lal, in August, 1882, was employed as Treasury Accountant in the Etah Collectorate. On the 19th August, 1882, a sum of Rs. 500, "decree-money payable to Sewa Ram of Janera, pargana Marehra," was paid into the Treasury by one Balwant Singh, and the name of the depositor, the date of receipt, and the nature of the deposit, as quoted above, were duly entered opposite Deposit No. 214 in the Revenue Deposit Register of the Etah Treasury. This money, payable to Sewa Ram, was subsequently all drawn and paid away to persons other than Sewa Ram by means of three forged cheques or repayment orders  $\frac{40}{1137}$ ,  $\frac{70}{332}$  and  $\frac{48}{1150}$ . These payments were duly entered on the right-hand page for "details of repayment" of the Deposit Register already mentioned. These repayments appeared to have been made at the same time that the forged cheques were drawn and the money was paid. Cheque or repayment order No. 49 of book 1137 was dated the 3rd July, 1884; cheque No. 70 of Book 332 was dated the 8th September, 1884; and cheque No. 48 of Book 1150 was dated the 30th January, 1885. Thus on the 30th January, 1885, the whole of Deposit No. 214, amounting to Rs. 500, and due to Sewa Ram, had been paid away to persons other than Sewa Ram or his representatives.

On the 20th April, 1885, another sum of Rs. 500 was paid into the Treasury, and was duly entered in the Revenue Deposit Register of that

date as received from Muhammad Itafat Husain, Vakil, decree-money, in re *Musammatt Chunni v. Makbul Alam* of Salehpur, Rs. 500, Deposit No. 20.

[655] In the meantime, on the 30th June, 1884, Sewa Ram asked that intimation in respect of his money might be sent to the Munsif of Etah and the Subordinate Judge of Mainpuri; and after various formalities Rs. 500 were transferred to the Civil Courts. This case arose out of the manner this money was transferred.

With reference to this money, Puran Mal, sale-muharrir, made a report on the 23rd April, 1885, suggesting that the Rs. 500, which his own file showed to be due to Sewa Ram, should be transferred to the Civil Courts in certain proportions. Upon this followed the usual report from the appellant, the Treasury Accountant, dated the 25th April, 1885, that the Rs. 500, Deposit No. 214, paid in by Balwant Singh on the 19th August, 1882, stood at the credit of Sewa Ram in the Treasury as a revenue deposit. This report was in the handwriting of the appellant and was false.

After this report was written, an order signed by the Treasury Officer for the transfer of the money was written on the 28th April, 1885, and cheque No. 45 of Book 1162 was drawn up by Muran Mal. As originally drawn the cheque related to the deposit of Rs. 500 made in favour of Sewa Ram on the 19th August, 1882. Babu Jainti Prasad, the Treasury Officer, went on leave on the afternoon of the 28th April, 1885, and did not return till the 28th July, 1885. In ordinary course the cheque should have been signed by the Treasury Officer that day or the next. No steps, however, were taken to present it to Babu Jainti Prasad's successor, and it was not presented until after the return of Babu Jainti Prasad on the 28th July, 1885. On that day a petition was presented by Ram Prasad Singh to the effect that his father, Sewa Ram, was dead, and asking that the Rs. 500 due in the case of Sewa Ram v. Phula Kuar might be given to him. The usual order was made by the officer acting for Babu Jainti Prasad for an office report. This was written by Puran Mal on the 3rd August, 1885, to the effect that applicant would get him money from the Civil Court. On the same date the appellant added a further report to the effect that this money was in the Treasury as a revenue deposit, but would be transferred to the Civil Court. This was followed by an order to the effect that no order could be given regarding applicant's right to the money, but that it was about to be sent to the Civil Court. This report by the appellant [656] was false, as the whole of the money due to Sewa Ram had been entered as repaid as mentioned above.

On the 5th August the cheque No. 45 of Book 1162 was presented to the Treasury Officer, Babu Jainti Prasad, for signature, and was signed by him. It then had been altered so as to relate to the Rs. 500 deposited on the 28th April, 1885, in favour of Chunni Kuar.

The appellant was tried for forging this cheque No. 45 of Book 1162, and with preparing the two false reports mentioned above, marked at the trial as exhibits O and Q and was convicted in respect of the first charge under s. 465 of the Penal Code, and in respect of the other two charges under s. 218.

It was contended on behalf of the accused before the Court of Session that to support the charge of forgery a dishonest or fraudulent intent must be proved; and to support the charge under s. 218, the intent of the accused to cause, or his knowledge that he was likely to cause, loss or injury to the public must be proved.

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Upon this contention the Sessions Judge observed as follows :—  
" To take the second and third charges first, I do not think it necessary to follow in detail the decisions which have been appealed to, because it is necessary to admit that the law has been framed and interpreted in a manner so favourable to persons in the position of the accused, that even if it were proved that he had written false reports by the hundred to conceal his own malpractices, he would not be liable under s. 218 of the Indian Penal Code, unless it could be shown that he intended to cause or knew it to be likely that he would cause loss or injury to some one. It has also been contended that as the main intention of the accused was to conceal his own fault, this is the only intention that should be looked to. But this seems to be going a good deal further than our lenient laws warrant, and it is necessary to decide whether in the case of the accused there was the intention of causing loss, or the knowledge that such loss or injury was likely to follow. In order to form a judgment on this point it is necessary to follow the dates of the different transactions :—

30th January, 1885.—The last portion of Sewa Ram's Rs. 500 was paid away.

[657] 20th April, 1885.—The payment of a sum of Rs. 500 rendered the temporary concealment possible.

23rd April, 1885.—Report by Puran Mal to the effect that Sewa Ram's Rs. 500 should be sent to the Civil Court.

25 April, 1885.—Report by Girdhari Lal to the effect that Sewa Ram's Rs. 500, which had been totally paid away, was still in deposit (revenue).

28th April, 1885.—Preparation of cheque in sale department with a view to transfer Sewa Ram's Rs. 500 to the Civil Court.

29th April, 1885, to 28th July, 1885.—Absence of Babu Jainti Prasad, Deputy Collector, on leave.

3rd August, 1885.—Report by Girdhari Lal to the effect that Sewa Ram's Rs. 500 was still in the Treasury as a revenue deposit.

5th August, 1885.—Preparation of altered cheque and transfer of Rs. 500 due to Chunni Kuar to Civil Court deposit.

The fact that the first false report followed so closely the payment of the money due to Chunni Kuar, and still more that the second false report of the 3rd August so immediately preceded the transfer of that money—only one day having intervened—seems to justify the conclusion that both false reports were made with the intention of making use of the Rs. 500 due to Chunni Kuar to fill the place of the Rs. 500 due to Sewa Ram, which had already been disposed of. The effect of this accused must have known would be to render the prompt payment of Chunni Kuar's money impossible, and that person must now trust to a civil suit for her remedy or appeal to the justice of Government. And even if the money is eventually recovered, Chunni Kuar has suffered wrongful loss, for, according to s. 24 of the Indian Penal Code, 'a person is said to lose wrongfully when such person is kept out of any property, as well as when such person is wrongfully deprived of property.' It must therefore be decided that Chunni Kuar has suffered wrongful loss by the transfer of her money, which in consequence of such transfer has been, as is shown by exhibit T, partially made over to Sewa Ram's representatives. And even if principal and interest should eventually be refunded [658] by Government, the wrongful loss will only be transferred to Government."

The accused appealed to the High Court.

Pandit *Ajudhia Nath* (with him *Babu Jogindro Nath Chaudhri*), for the appellant. The conviction under s. 465 of the Penal Code

is bad. "Forgery" means the making of a "false document" (s. 463), and the false document must be made "fraudulently or dishonestly" (s. 464). "Dishonestly" means with the intention of causing wrongful gain to one person or wrongful loss to another (s. 24), and "fraudulently" implies an intent to defraud (s. 25). Here it is not contended that the appellant assuming him to have made the alterations in the cheque, did so with the intention of causing wrongful gain to any person. It is said that his intention was to cause wrongful loss. But the evidence shows no such intention on his part. His intention, assuming for the sake of argument that the act is proved, was merely to conceal the previous withdrawal of the Rs. 500 standing at Sewa Ram's credit. Such an intention is not fraudulent or dishonest within the meaning of s. 464:—*Queen v. Jungle Lall* (1), *Queen v. Lal Gumul* (2), *Queen-Empress v. Fateh* (3), *Queen-Empress v. Jiwanaud* (4) and *Queen-Empress v. Shankar* (5).

Further, the conviction under s. 218 is also bad. That section applies only to a public servant who is charged "as such public servant" with the preparation of the record or other writing which he is said to have framed incorrectly. Here there is no evidence that the appellant was charged with the preparation of the reports dated the 25th April and 3rd August, 1885, respectively, or that the preparation of such reports was one of his duties. He therefore did not prepare them "as such public servant" within the meaning of s. 218. *Queen-Empress v. Mazhar Husain* (6) is in point.

The *Offg. Public Prosecutor* (Mr. A. Strachey), for the Crown. The conviction is good, because the appellant, in altering the [659] cheque, acted dishonestly and fraudulently within the meaning of ss. 24 and 25 and 464 of the Penal Code. His intention must be inferred from the nature of his act, and from his knowledge of its natural consequences. The inevitable consequence was that when Musammât Chunni Kuar applied for payment of the Rs. 500 due to her she would certainly be delayed and might conceivably fail altogether in obtaining it. Her right to such payment, instead of being recognised as of course, would be disputed, and her success might be contingent upon the result of a suit for recovery of the money. Under the last sentence of s. 24 of the Penal Code, this amounts to "wrongful loss" being caused to Chunni Kuar. This being the necessary consequence of his act, the prisoner must be presumed to have intended it. His position in the Treasury and his knowledge of the course of business therein make it certain that, when he altered the cheque so as to transfer Chunni Kuar's Rs. 500, he knew that her subsequent application for payment of the same would be delayed if not defeated. If he knew that, this would be the result he intended.

[EDGE, C. J.—I do not think that was his intention. I think that the possible loss to Chunni Kuar was not in his mind at all at the time when he altered the cheque. His intention was merely to conceal the fraud which had already been committed in the payment of Sewa Ram's Rs. 500 to other persons. That is not the kind of intention which s. 465 refers to.]

That no doubt was also his intention, but a more immediate intention is not inconsistent with a more remote one. He in fact intended both

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(1) 19 W.R. Cr. 40.

(3) 5 A. 217.

(5) 4 B. 657.

(2) N.-W.P.H. C. R. (1870) 11.

(4) 5 A. 221.

(6) 5 A. 553.



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results. He must have expected both consequences as necessarily resulting from his acts, and intention is nothing more than the expectation of particular consequences at the moment of action. "The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct."—Stephen's History of the Criminal Law, vol. ii, p. 111. This agrees with Austin's analysis of "intention" which has been generally accepted. No doubt a common notion prevails that there is something more in intention than the expectation of consequences at the moment of action. This, however, is not correct.

[660] [EDGE, C. J.—The question is always one of the evidence in the particular case. I think you should distinguish between what a man would have in his mind if he adverted to the matter, and what he actually has in his mind. If the appellant had adverted to the matter, he probably must have known that his act would lead to delay in the payment of Chunni Kuar's money to her, but you must show that this consequence was actually in his mind, and was the actual intention with which he acted. No jury would find that the appellant intended to cause loss to Chunni Kuar.]

It must be presumed not only that the appellant knew what were the natural consequences of his act, but also that what he knew was present to his mind. The nature of the presumption of an "intent or fraud" in cases of forgery is shown in Stephen's Digest of the Criminal Law, art. 355. This intent is not disproved by showing that the principal object of the prisoner was his own or some other person's advantage, and not loss to the prosecutor. It is proved by showing that he intended "to deceive in such a manner as to expose any person to loss or the risk of loss"—Stephen's History of the Criminal Law, vol. iii, p. 187. See also vol. ii, p. 122.

[EDGE, C.J.—With great respect for Mr. Justice Stephen, I do not remember any case in which his History has been cited in a Court of Justice.]

It was cited as an authority in *Queen v. Dudley and Stephens* (1) before the Court for Crown Cases Reserved, both in the argument and in the judgment.

The cases referred to on the other side are distinguishable. In most of them there were not sufficient grounds for supposing that there was any knowledge on the prisoner's part that loss or risk of loss was a probable result. They prove only that mere deceit is not fraud.

The conviction under s. 218 is also good. *Queen-Empress v. Parmeshar Dat* (2) applies.

[EDGE, C.J.—You need not argue that point].

Babu Jogindro Nath Chaudhri, in reply.

#### JUDGMENT.

[661] EDGE, C. J.—The prisoner in this case has been convicted of offences described in two sections of the Indian Penal Code, namely, s. 465 and s. 218. Against these convictions he has preferred this appeal, and in order to deal with the same, it will be convenient if I deal first with the convictions under s. 465 for forgery. It appears to me that the offence, if committed, comes under the third clause of s. 464 of the Penal Code. It is clear that an offence under s. 464 cannot be made

(1) L.R., 14 Q.B.D. 273,

(2) 8 A. 201.

out unless the act was dishonestly or fraudulently done; and in order to see how these words are to be construed, it is necessary to refer to ss. 24 and 25 of the Indian Penal Code. S. 24 defines the word "dishonestly" as follows:—"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly." S. 25 in like manner defines "fraudulently" thus:—"A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

Here, in the arguments which have been addressed to me, it has not been suggested that the prisoner made the alterations in the cheque to cause wrongful gain to any one, but it is contended that he did it to cause wrongful loss.

Mr. *Strachey*, the acting Government Prosecutor, contends that the prisoner's intention was to cause wrongful loss to Musammat Chunni Kuar by delaying the payment of the Rs. 500 due to her. The question of intention is one for a jury or for a Judge sitting as a jury. Of two probable intentions, the one immediate and more probable and the other remote and less probable, I do not think we should attribute to the prisoner the remoter intention.

In my opinion his intention was to conceal a fraud which had been previously committed. A sum of Rs. 500, due to Sewa Ram, and after his death to his representative, had been fraudulently withdrawn. Sewa Ram's representative had applied for payment, and it became an immediate consideration how to provide for this Rs. 500. The only way was to have another Rs. 500 ready. We find that two reports (which will be referred to presently), dated the 25th April and 3rd August, 1885, represented that Sewa Ram's money was in deposit. Ought I to infer from this that Girdhari [662] Lal's object and intention was to cause wrongful loss to Musammat Chunni Kuar? No doubt had the amount of the cheque been paid to Sewa Ram's representative, it would probably have caused a loss to her by causing the payment to her to be delayed, I cannot conceive that that was his intention. The intention was to stave off the evil day when the fraudulent withdrawal of Sewa Ram's money should be found out. That is not the intention referred to in s. 24. Although the act might have caused loss, the intention in reference to this cheque was to meet the claim of the representative of Sewa Ram. Under these circumstances, in my opinion, it cannot be said that the prisoner acted "dishonestly" within the meaning of s. 24. Then did he act "fraudulently" within the meaning of s. 25? He may have known that the probable consequence of his act would be to delay payment of the money due to Musammat Chunni Kuar, but it cannot be said that his intention was to defraud. Any loss that the Government could sustain had already been sustained by the fraudulent withdrawal of Sewa Ram's money. S. 464 of the Penal Code, therefore, which may be read as part of s. 465 under which the prisoner has been convicted, is not made out; and I must allow the appeal in this respect, and so far set aside the conviction and sentence.

Now we come to the other part of this case, namely, the prisoner's conviction and sentence in respect of the second and third charges under s. 218 of the Penal Code. This section reads as follows:—"Whoever, being a public servant, and being, as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the

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public, or to any person, or with intent thereby to save or knowing it to be likely that he will thereby save any person from legal punishment, &c."

The first argument addressed to me by Pandit *Ajudhia Nath* for the prisoner was that this section did not apply, because he contended the prisoner *Girdhari Lal* did not frame the writing, the subject of the charge, "as such public servant." Now we find the prisoner, who was a public servant in fact, making these [563] two reports, and assuming to make them in due course and as a part of his duty; and, in fact, holding out these reports as reports which were made by the proper officer. There is also the fact that when the two witnesses from the office were being examined, no question was put to them which suggested that it was not the prisoner's business to make these reports. From all this I am bound to infer that the prisoner made the reports because it was his business to do so; and as nothing was elicited from the two witnesses to the contrary, I hold there was evidence that he made these two reports as a public servant within the meaning of s. 218.

It is then urged that, allowing that he made these false reports as a public servant, he did not make them with intent to cause loss. How far this contention can avail the prisoner will be seen. When *Sewa Ram's* representative applied to have the sum standing to his credit paid, there was an officer of the Government Treasury to whom the prisoner was subordinate, named *Jainti Prasad*. This officer called for a report, and *Girdhari Lal* made the first of these reports to the effect that there was a sum of Rs. 500 standing to the credit of *Sewa Ram*. The report is dated the 25th April, 1885. The two witnesses above referred to were asked what the report meant, and they said that it meant that this sum stood in deposit to *Sewa Ram's* credit, and *Girdhari Lal* did not say at his trial, though every opportunity was given him, that the report had any other meaning. It is only here that it is suggested that the report does not mean what until now it has been taken to mean. Was it a false report, or was it incorrect to his knowledge? It is asserted that he looked at one side of the account only, and therefore reported incorrectly; but for myself I do not believe he was misled. With what intention then did he make that report? If he had had no intention to defraud or deceive any one, he could, within a week, have caused *Musammatt Chunni Kuar's* money to be transferred to the Civil Court deposit, instead of waiting until the Treasury Officer, *Babu Jainti Prasad*, had returned to his duties. Now *Jainti Prasad* was not a person, as it appears to me, who looked carefully into the papers put before him. He left on the 28th April, and returned to his duties on the 28th July, 1885. His place was filled during that time [664] by another officer. The cheque, which was prepared on the 28th April, was not put before the officiating officer. Instead of putting it before this officer, *Girdhari Lal* waits, and why does he do that? The reason for delay no doubt was because the prisoner knew that *Babu Jainti Prasad* was a person who did not carefully look at the papers he signed. Does not this show intention? In August, 1885, he makes another incorrect report. He again reported that *Sewa Ram's* money was in deposit. He must have had some intention, and now what was his intention? I have no moral doubt that what he wanted and what was in his mind was to stave off the evil day of the discovery of the previous fraud, and to have himself or the actual perpetrator of that fraud from legal punishment, and for that purpose and with that intention he made these false reports. I come to the conclusion therefore that the prisoner

did frame those reports in a manner which he knew to be incorrect, with intent within the meaning of s. 218 of the Penal Code.

It only remains to consider whether the punishment awarded by the lower Court for the two offences under s. 218 is sufficient. I think not. The Sessions Judge has convicted the prisoner of three charges. The conviction and sentence for forgery has been quashed here, and the convictions under s. 218 of the Code sustained.

The Sessions Judge passed two sentences of three months' rigorous imprisonment in respect of the latter offences. If I allow these sentences to stand, they would not, in my opinion, adequately represent the punishment that should be awarded, for these two offences of which the prisoner has been found guilty. It has been very ably urged by the prisoner's junior counsel, Babu *Jogindro Nath Chaudhri*, that I ought to consider his youth, his loss of all chance of future Government employment, and the time that this case has been under investigation. I do not know what the prisoner's age may actually be. His age, as shown on the record, was 29 years, and he was apparently of sufficient age to be intrusted with the duty of an accountant, and as to the argument of loss of employment and loss of social position, it is sufficient to say that had Girdhari Lal not been of good character he would not have been employed and trusted by his superiors as he is [665] shown to have been, and would not have had the opportunity of perpetrating the offences. Under these circumstances, the sentences passed by the lower Court in respect of the second and third charges must be increased as follows:—Six months' rigorous imprisonment and a fine of Rs. 500 in respect of the second charge and conviction; in default of payment of the fine, six months' rigorous imprisonment in addition. In respect of the third charge, six months' rigorous imprisonment to commence at the expiry of the sentence in respect of the second charge. This will make altogether twelve months' rigorous imprisonment and Rs. 500 fine, and in default of payment of the fine, six months' rigorous imprisonment in addition.

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#### APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice.*

QUEEN-EMPRESS v. KHARGA AND OTHERS. [30th August, 1886.]

*Sessions Court—Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it—Criminal Procedure Code, ss. 28, 226, 236, 237, 537.*

Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session.

Three persons were jointly committed for trial before the Court of Session, two of them being charged with culpable homicide not amounting to murder of J. and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to C and convicted them upon both the original charges and the added charge. The assault upon C took place either at the same time as or immediately after the attack which resulted in the death of J.

*Held* that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state-

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of things, but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case.

Held also that the Sessions Judge had power, under s. 28 of the Code, to try the charge assuming that he had power to add it.

THESE were appeals from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 23rd June, 1886, convicting the appel-[666]lants, Kharga and Kuar Sen, of culpable homicide not amounting to murder and of causing hurt, and Nanhua of abetment of the former offence and of causing hurt.

Kharga, Kuar Sen, and Nanhua were jointly committed for trial before the Sessions Judge—Kharga and Kuar Sen charged with culpable homicide not amounting to murder of one Jaisukh, and Nanhua with the abetment of that offence. At the trial the Sessions Judge added a charge against all the appellants of causing hurt to one Chiddu, and he convicted them of the charges on which they were committed and on the charge which he added.

The main facts of the case, as found by the Sessions Judge, were as follows :—The deceased Jaisukh and the three appellants were near relatives, living in houses opening into a common court-yard. The deceased Jaisukh, his brother Chiddu, his cousin Nanhua, and some other *Kachis*, had gone to a wedding feast at a place about two miles from their home. On the way back there was some jesting about Nanhua having over-eaten himself and having been sick. When Jaisukh and his brother got home, the former told his own wife and Nanhua's wife the jest against Nanhua. On Nanhua's coming home his wife repeated the jest, and gave Jaisukh as her authority. Jaisukh came in about the time, and the dispute between the two resulted in Jaisukh being knocked down by a blow, which killed him. It appeared that Nanhua laid hold of Jaisukh's hands, and upon some abuse by Nanhua, Nanhua's brother Kharga hit Jaisukh over the head with the side-piece of a charpai, and Kuar Sen struck him also on the head with the end-piece of a charpai. Upon this Chiddu came down from the roof and was struck on the head by Kharga, and thrown down by Nanhua and Kuar Sen. Jaisukh died from the effect of the blows.

It was contended on behalf of the appellants that the Sessions Judge had no power to add the charge of causing hurt to Chiddu, or try them on that charge, and the convictions on that charge were therefore illegal.

Babu Baroda Prasad Ghose, for the appellants.

The Government Pleader (Munshi Ram Prasad), for the Crown.

#### JUDGMENT.

[667] EDGE, C. J.—The appellants here have been convicted under ss. 304 and 304/109 of the India Penal Code, and they have also been convicted of an offence under s. 323 of the same Code. They were committed to the Sessions Court—Kharga and Kuar Sen under s. 304 and Nanhua under s. 304/109, but at the trial the Judge added the charge under s. 323, in respect of an assault upon a man called Chiddu. This assault took place at the same time, as, or at any rate immediately after, the attack which resulted in the death of Jaisukh. It was objected, both here and in the Sessions Court, that the Sessions Judge had no power to add the charge under s. 323; and it is further argued that even if he had such power, he had no power to try such a charge. The first objection is

met by the Government Pleader by referring to s. 226, Criminal Procedure Code, under which section he argues the Sessions Judge would be empowered to add such a charge. I very much doubt whether, under the circumstances, the Judge had power to add this charge under s. 323. In this case the prisoners were not committed "without a charge," for they were sent up on a charge on which they have been actually convicted. Nor can it be said that the charge was an "imperfect" charge, for it disclosed a separate offence. Nor yet is it an "erroneous" charge, for the evidence shows that the offence, as charged, was established. I therefore consider that this case does not come within the terms of s. 226 of the Criminal Procedure Code, and I consider that the adding of this charge was an irregularity in the proceedings. I do not think that it is covered by ss. 236 and 237 of the same Code. Those sections apply to different state of things entirely. As to the second point taken in argument, I am of opinion that the Sessions Judge had power, under s. 23 of the Criminal Procedure Code, to try the charge, supposing he had power to add it. This section is a general section, which, subject to the other provisions of the Code, gives power to the High Court and the Court of Session to try any offence under the Indian Penal Code; and it also enacts that any offence under the Indian Penal Code may be tried "by any other Court by which such offence is shown in the eighth column of the second schedule to be triable." The provision as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Now, if it [668] could be shown to me that the action of the Sessions Judge had caused a failure of justice and had prejudiced the accused in their defence, I should without hesitation set aside so much of the proceedings as related to the charge under s. 323. That a party might in some cases be so prejudiced is quite clear; but in this particular case the Sessions Judge was addressed by the gentleman who appeared for the prisoners, and he heard all the objections raised, and, if the pleader had so desired, he might have called fresh witnesses as to this charge. This being so, I do not think that the objections now urged are of sufficient weight, and I consider that the provisions of s. 537 of the Code meet the case. As to the merits, I am of opinion that there is ample evidence to support the findings, and I do not see how the Judge could have come to any other conclusion than that the men were guilty. The appeals are dismissed.

*Appeals dismissed.*

8 A. 668=6 A.W.N. (1886) 260.

#### CRIMINAL REVISIONAL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT.

[20th September, 1886.]

*Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness—Criminal Procedure Code, ss. 291, 540.*

Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists, the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that

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there were no reasonable grounds for believing any evidence that he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector [669] applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it,

*Held* that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.

*Per* STRAIGHT, J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witness by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate.

THIS was an application for revision of an order passed by Mr. W. Martin, Sessions Judge of Mirzapur, on the 11th September, 1886, directing the Deputy Magistrate to summon the applicant, the Rajah of Kantit, as a witness in a case committed for trial before the Sessions Judge.

The applicant stated in his application as follows:—

"1. That on the 24th August, 1886, certain persons, Lallu Singh, Sheo Singh, and others, were committed by the Deputy Magistrate of Mirzapur for trial by the Court of Session upon charges under ss. 147, 436 and 436/114 of the Penal Code.

"2. That under s. 211 of the Criminal Procedure Code, the said Lallu Singh and Sheo Singh each gave in a written list of the persons whom they wished to be summoned to give evidence at the trial, and that on each of the said lists the name of your petitioner was entered.

"3. That on the 24th August, 1886, a petition was filed in the Court of the Deputy Magistrate on behalf of your petitioner, under s. 216 of the Criminal Procedure Code, objecting to the summoning of your petitioner on the ground that his name had been entered in the said lists for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material.

[670]"4. That on the same date the Deputy Magistrate passed an order, requiring the said Lallu Singh and Sheo Singh to satisfy him that there were reasonable grounds for believing that your petitioner's evidence was material, and on the 25th August, having heard arguments on both sides, passed an order refusing to summon your petitioner.

"5. That on the 2nd September, an application was filed on behalf of the said Lallu Singh and Sheo Singh in the Court of the Sessions Judge of Mirzapur, praying that your petitioner might be 'summoned to give evidence for the defence,' and stating generally that

his evidence was 'important,' but setting forth no grounds for the belief that it was material.

"6. That on the 11th September, the Sessions Judge passed an order, directing that a copy of the application should 'be sent to the Criminal Court in order to summon Rajah Bhupendra Bahadur Singh as a witness,' and in pursuance of this order a summons has been served upon your petitioner by the Deputy Magistrate.

"7. That the above-mentioned order of the Sessions Judge assigns no reason for reversing the decision of the Deputy Magistrate, and was passed in the absence of your petitioner, and of any person representing him, and without any notice being issued to him, or other opportunity afforded to him of showing cause against the passing of such order.

"8. That the trial in the Court of Session has not yet begun, and the 21st September, 1886, is fixed for its commencement.

"9. That under the circumstances above set forth, your petitioner humbly submits that the Sessions Judge had no jurisdiction to make the above-mentioned order of the 11th September, 1886.

"10. That for the reasons contained in the affidavits hereto annexed, your petitioner believes that the inclusion of his name among the witnesses desired to be summoned is purely vexatious, and that no evidence which he could give would be material to the case.

"11. Your petitioner therefore prays that this Hon'ble Court may be pleased to set aside the Sessions Judge's order of the 11th September, 1886, and to exempt him from appearing under the summons issued in pursuance thereof."

[671] Mr. A. Strachey, for the petitioner.

#### JUDGMENT.

EDGE, C.J.—I am of opinion that this application must be dismissed. I am not satisfied that the Sessions Judge did not act within his powers in passing the order he did. Under s. 216 of the Criminal Procedure Code, a Magistrate is not entitled to require an accused to satisfy him, the Magistrate, that there are reasonable grounds for believing that the evidence of a witness, whom the accused desires to be summoned and be included in the list, is material, unless the Magistrates think that such witness "is included in the list for the purpose of vexation or delay, or of defeating the ends of Justice." When a Magistrate does refuse under this section to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material. The only ground stated by the Magistrate for refusing to summon the witness appears, from the uncertified copy of the Magistrate's order before me, to be that he thought the reasons assigned for the application to have the Rajah summoned as one of the defendant's witnesses were insufficient. This does not show that the Rajah's evidence was not material. Even if I thought the Sessions Judge had not jurisdiction to make the order complained of, which I do not, I should not interfere in this case. I think it desirable that it should be generally understood that these objections to appearing to give evidence in a Criminal Court cannot be entertained. It is the duty—and it should be a cheerful duty—of every one to attend a Court of Justice when summoned to give evidence as a witness, particularly on behalf of an accused.

STRAIGHT, J.—I am of the same opinion. It appears that the Sessions Judge, having to try certain persons committed by the Magistrate,

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and having been satisfied that the Rajah of Kantit was a material witness for the defence, ordered the Magistrate to summon him as a witness, and a summons was issued to that distinguished personage. I think the order of the Judge was right. The suggestion of the learned counsel for the applicant, that s. 540 alone confers powers on a Sessions Judge, appears to me an incorrect contention, and I am not prepared to adopt it; for to lay down any such rule might lead to great inconvenience and possible injustice to accused persons. It is clear to my mind, under s. 291 of the [672] Criminal Procedure Code, that though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of "right," yet that the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. It is impossible for me to say, upon the affidavits before me, that the Rajah will not be a material witness to the defendant's case, and though it may be distasteful and unpleasant to him to appear as a witness in a Criminal Court, it is his duty, as one of Her Majesty's subjects, living under the protection of the law, to obey that law, and attend before the Judge in obedience to the summons. I have no doubt the Judge will make every arrangement to make such attendance as convenient and unobjectionable as is possible and consistent with the interests of the accused.

*Application rejected.*

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### APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

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QUEEN-EMPRESS v. ISHRI SINGH. [21st September, 1886.]

*Criminal Procedure Code, s. 512—Act I of 1872 (Evidence Act), ss. 33, 157—Witness, threatening—Duty of Magistrate.*

In 1874, five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner.

*Held* that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses.

[673] *Held*, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code.

*Per* STRAIGHT, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner.

In cross-examination before the Court of Session, a witness stated, that, when she was before the committing Magistrate, that officer, addressing her, said :—  
 "Recollect, or I will send you into custody."

*Held* that if the Magistrate did so address the witness, he exceeded his duty.

THIS was an appeal from an order of Mr. J. C. Laupolt, Sessions Judge of the Bijnor-Budaun Division, dated the 18th August, 1886, convicting the appellant of murder and sentencing him to death.

The facts of the case appeared to be as follows :—

On the 19th March, 1874, one Fakir Chand was murdered at Gohta, in the Budaun district, and six persons, named Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh, were accused of the offence. Of these all except Ishri Singh, who had absconded, were arrested and, after an inquiry by the Magistrate of the District, were committed for trial by the Court of Session by which they were convicted. Among the witnesses examined both before the committing Magistrate and the Court of Session were Musammatt Durga, Musammatt Chittan, Shera, Imami, and Kanhai Lal, and before the committing Magistrate Dr. Rutledge, Civil Surgeon. The deposition of the last named was dated the 2nd April, 1874, and he deposed to having examined the dead body of Fakir Chand and to the injuries which he found thereon. The deposition of Musammatt Durga before the Court of Session was dated the 29th April, 1874. The depositions of Musammatt Chittan, Shera, Imami, and Kanhai Lal, before the committing Magistrate, who examined each of them on three different occasions, were dated in March, 1874, and before the Court of Session the 29th April, 1874. Musammatt Durga and Musammatt Chittan deposed to Ishri Singh having taken part in the murder with Pahlad Singh, Moti Singh, Umrao Singh, Fauji Singh and Mansukh. Shera deposed to seeing Pahlad Singh, Moti Singh, Umrao Singh, Mansukh, and a man [674] whose name he did not know, but whom he could identify, striking Fakir Chand. Imami deposed to have seen two men, whose faces were covered with cloth, running away in an easterly direction from the place where Fakir Chand had fallen down, and a little way behind them Umrao Singh also running in the same direction, and to have also seen Moti Singh, Fauji, and Mansukh running from the same place in a westerly direction. Kanhai Lal, son of Fakir Chand, deposed to have arrived on the spot while his father was still alive, but insensible, and to have heard at that time from Chittan and Shera that Pahlad Singh, Ishri Singh, Moti Singh, Umrao Singh, Fauji Singh, and Mansukh were the murderers.

In May, 1886, the appellant was produced before the Magistrate of the District, and was subsequently committed for trial by the Court of Session for the murder of Fakir Chand. He denied that he was the Ishri Singh who had been accused of being concerned in that offence.

The Sessions Judge, referring to s. 33 of the Evidence Act (I of 1872), admitted in evidence against the appellant the depositions mentioned above of Chittan, Shera, Imami, and Kanhai Lal, who were all dead. He also admitted in evidence, with reference to the same section, the deposition of Dr. Rutledge mentioned above. He also admitted in evidence the deposition of Musammatt Durga before the Court of Session in April, 1874, apparently in order to corroborate her testimony against the appellant in this case. He convicted the appellant and sentenced him to death.

The appellant was not represented.

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The Offg. Public Prosecutor (Mr. A. Strachey), for the Crown.

## JUDGMENT.

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EDGE, C.J.—In this case I am of opinion that on the evidence of Musammat Durga and that contained in the deposition of Musammat Chittan taken before the Magistrate, there can be no doubt that one Ishri Singh took part in the murder of Fakir Chand, deceased. I have also no doubt on the evidence that the Ishri Singh who took part in the murder of Fakir Chand is the prisoner who has now been convicted.

Besides Musammat Durga, Lal Singh, who says he knew him for 20 years, Sita Ram, *Ahir*, who knew him for 12 or 13 [675] years, Ganga *Brahman*, who says he taught him fencing—all speak to his identity. This is enough to say in reference to the appeal of the prisoner, which is dismissed and the conviction affirmed. As regards the sentence, considering the time that has elapsed, I think the ends of justice will be sufficiently met by reducing the sentence to one of transportation for life.

I have a few words to add regarding the proceedings and the evidence admitted in the case. It is said by Musammat Durga that the Magistrate addressing her, said :—"Recollect, or else I will send you into custody." Her statement in this respect may be true or false. If the Magistrate did speak to the Musammat in this manner, he exceeded his duty. It is the duty of a Magistrate to protect a witness from coercion of that kind.

With regard to the depositions of the witnesses who were examined before the Magistrate in 1874, and who were proved to have died, I am clearly of opinion that these depositions were not admissible under s. 33 of the Evidence Act. In order to be admissible under that section, the proceedings in which the same evidence was given must have been between the parties or their representatives in interest, and the person against whom such depositions could be heard must have had an opportunity of cross-examining the witnesses.

Now the accused was not present when the evidence was given, nor was he a party to the proceeding. Does s. 512 of the Criminal Procedure Code make it admissible? The evidence of Musammat Chittan did come within the terms of the section, because we find it recorded by the Magistrate that the accused Ishri Singh was an absconder, and the Magistrate did record the depositions of the witnesses, and he was a Magistrate who was competent to try or commit for trial such absconder, if he had been present, for the offence complained of; and consequently, in my opinion the deposition of Musammat Chittan before the Magistrate came within the terms of s. 512, and was admissible against the accused. As to the evidence given at the time before the Judge, that evidence was not taken as evidence against the absconder. It was recorded against the persons then being tried. Excluding, therefore, this inadmissible evidence, there is, as I have already pointed [676] out, ample evidence that the prisoner was one of those who took part in the murder of Fakir Chand in 1874.

STRAIGHT, J.—I am anxious to state the facts in this case which lead me to the same conclusion as the learned Chief Justice.

On the 19th March, 1874, one Fakir Chand was undoubtedly murdered by some persons, and shortly after the murder, the parties who were named as the perpetrators were six individuals, namely—(1) Pahlad Singh, (2) Ishri Singh, (3) Moti Singh, (4) Umrao Singh, (5) Fauji Singh, (6) Mansuk Chamar. Five of these persons, namely, Nos. (1), (3), (4), (5) and (6), were at once arrested, and taken before the Magistrate who held the inquiry, and on the 2nd April, 1874, these were all committed for trial

to the Sessions Court. Nos. (1), (3), (4) and (6), were subsequently convicted and hanged, while Fauji escaped with a sentence of transportation for life. At the time of the inquiry before the Magistrate, the person named as Ishri Singh absconded, as was then proved, and through the proceedings in that officer's Court he was distinctly mentioned as one of the participators in the crime charged against the others, and the statements of the witnesses to that effect were, as the depositions show, fully recorded. I therefore do not think it will be placing a strained interpretation on the language of s. 512 of the present Criminal Procedure Code, read in conjunction with s. 327 of the old Act, to hold that, *qua* Ishri Singh, those depositions were recorded for the purposes and within the meaning of that provision of the law, and were admissible at the trial out of which the appeal before us arises. I quite agree with the learned Chief Justice, however, in the limitation he would impose, by which he would exclude the evidence given in the sessions trial of 1874, as under the circumstances being inadmissible in the present case, though I am by no means prepared to say that such a limitation would invariably apply. It is clear that the Judge, from whose decision, the appeal before us is preferred, was in error in receiving the despositions taken in the former proceedings under s. 33 of the Evidence Act as proof on the trial held by him, and he either did not carefully read the section in conjunction with the provisos, or, if he did, he failed to understand its meaning. The appellant was no party to the former proceedings, and he had no [677] opportunity of cross-examining the witnesses, which circumstances removed the case from the operation of s. 33. But, as I have said, s. 512 of the present Criminal Procedure Code, taken in conjunction with s. 327 of the old law, meets the difficulty, and at least made the deposition of Musammat Chittan evidence at the trial. I also think that, under the special circumstances, the deposition of Musammat Durga, taken in 1874, was admissible, in advertence to the terms of s. 157 of the Evidence Act. I agree with the Chief Justice that there was good evidence before the Judge to show, first, that Ishri Singh was one of the persons who took part in the violence that led to the death of Fakir Chand, and secondly, that the appellant is that Ishri Singh. I concur therefore in dismissing his appeal, as also in the mitigation of the sentence to one of transportation for life. I can only add that if the statement of the girl Durga in the Court below, in cross-examination, as to the action of the committing Magistrate, is correct, the conduct of that officer was not only most improper, but absolutely illegal, and a repetition of it will involve very serious consequences.

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8 A. 677=6 A.W.N. (1886) 267.

CRIMINAL REVISIONAL.

*Before Mr. Justice Straight.*

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QUEEN-EMPRESS v. YUSUF KHAN. [25th September, 1886.]

Act XV of 1885 (N.-W P. and Oudh Municipalities Act), ss. 69, 71—*Municipal Rules—Infringement of rules—Prosecutions—N.-W.P. Government Notification, No. 865, dated, the 3rd November, 1869. Rule VI, legality of.*

Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal Rules, care is taken that the requirement of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied.

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A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal Rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government N.-W.P. Notification No. 865, dated the 3rd November, 1869, read with s. 45 of Act XV of 1873 (N.-W.P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N.-W.P.), which authorized the making of "rules as to the persons by whom, and the manner [678] in which any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes."

*Held* that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883 (N.-W.P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf.

*Held* that the position of the Magistrate of the District in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside.

THIS was an application for revision of an order of Mr. J. Clarke, Deputy Magistrate, Bulandshahr, dated the 2nd April, 1886, and of the order of Mr. H. G. Pearse, Sessions Judge of Meerut, dated the 12th May, 1886, affirming the Deputy Magistrate's order.

It appeared that Mr. Addis, Magistrate of the Bulandshahr District, having, as Chairman of the Municipal Board of Bulandshahr, received information from one Chintaman that the applicant, Yusuf Khan, had evaded the payment of octroi duty on certain cloth at Bulandshahr, directed the Tahsildar to report in the matter. On receiving the Tahsildar's report, the Magistrate made the following order:—"I think that the case against Yusuf Khan should be investigated criminally for breach of Municipal law. It is obviously unfitting that I should conduct the inquiry myself, as I am Chairman of the Board. I therefore make over the case to Mr. Clarke, Deputy Magistrate."

The Deputy Magistrate accordingly tried Yusuf Khan for evading the payment of octroi duty, under a rule made by the Lieutenant-Governor of the North-Western Provinces under s. 12 of Act VI of 1868—(Rule 6, Government N.-W.P. Notification No. 865, dated the 3rd November, 1869), read with s. 45, Act XV of 1873, and convicted and punished him with a fine of Rs. 50.

[679] That rule runs as follows:—"Any person evading or abetting the evasion of the octroi duties imposed in the schedule, shall be deemed to have committed an infringement of a bye-law."

Yusuf Khan having applied to the Sessions Judge of Meerut for revision of the order of the Deputy Magistrate, the Sessions Judge rejected the application, but modified the conviction so as to make it one under the rule quoted, read with s. 71 of Act XV of 1883.

It was contended before the Sessions Judge that the Deputy Magistrate acted contrary to law in taking cognizance of the offence, as there had

been no complaint by the Municipal Board or any person authorized by the Board in that behalf as required by s. 69 of Act XV of 1883. As to this contention the Sessions Judge observed as follows:—

"In the absence of any definite rule as to who is to be considered a 'person authorized by the Board' under s. 69 of Act XV of 1883, this Court considers that on every assumption of common sense the President must be considered such a person. The alternative would be the deadlock of every minor prosecution for breaches of Municipal rules, standing over it might be for a month till the meeting of the Board for a solemn consideration and sanction by the whole collective wisdom."

Mr. G. T. *Spankie*, for the applicant, contended that the rule, with reference to which the applicant had been convicted, was not legally made under s. 12 of Act VI of 1868, that section only authorizing the Lieutenant-Governor to make rules as to the persons by whom, and the manner in which, any assessment of taxes should be confirmed, and for the collection of such taxes, and the rule in question was not such a rule; and being illegal that it was not saved by Act XV of 1873, s. 2. It was also contended that the Deputy Magistrate had no jurisdiction, as no complaint had been preferred by the Municipal Board or any person authorised by it in that behalf, within the meaning of s. 69 of Act XV of 1883.

The *Offg. Public Prosecutor* (Mr. A. *Strachey*), for the Crown, contended that the rule under which the applicant had been convicted might reasonably be considered a rule relating to the collection of taxes, within the meaning of s. 12 of Act VI of 1868. Even if it could not be so construed, and was consequently invalid in [680] its inception, s. 2 of Act XV of 1873, confirmed and legalized all rules whatever theretofore made and approved by the Local Government, irrespective of their validity or otherwise under Act VI of 1868. The rule must therefore be regarded as thenceforth a rule "made under the North-Western Provinces and Oudh Municipalities Act of 1873" within the meaning of s. 71 of Act XV of 1883, and consequently must be deemed to have been made under the latter Act, and to continue in force until repealed by new rules made thereunder. The conviction was therefore good under s. 64 of Act XV of 1883. Upon the question of jurisdiction, he submitted that the objection should be treated upon the same principle as objections on the ground of a defective sanction to prosecute, and that the conviction should not be set aside, unless it could be shown that there had been a failure of justice.

#### JUDGMENT.

STRAIGHT, J.—Assuming the rule, in advertence to which the conviction of the petitioner was had, to have been legally made under s. 12 of Act VI of 1868, which is far from clear, and that it was saved by Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883, continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act. Its operation was therefore, in my opinion, subject to the provisions of Act XV of 1883; and among them, to that contained in s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf. It is not pretended or suggested that the Magistrate of the District acted other than entirely of his own motion and authority in causing proceedings to be taken against the petitioner, which, he had no right to do; and, for aught, that appears to the contrary, every other member of the Board never so much as heard that a prosecution was to be

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instituted. The words of s. 69 are mandatory, and as the petitioner from the outset urged this objection to the legality of the proceedings, I think he is entitled to the benefit of it now. The position of the Magistrate of the District in connection with the terms of s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorised by the Board as a Board, he had no more "*locus standi*" to cause a prosecution to be instituted personally than [681] any other individual member. The Judge's remarks on this point are quite erroneous and very misleading. It is as well that Municipal Boards and the Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 are satisfied. Those rules encroach on the ordinary rights of the public, and where their enforcement is directed by the statute to be attended by a certain safeguard, that safeguard must be respected and observed.

The conviction of the petitioner is quashed, and the fine will be refunded.

*Conviction set aside.*

# I. L. R., 9 ALLAHABAD.

9 A. 1=13 I.A. 100=4 Sar. P.C.J. 726.

## [1] PRIVY COUNCIL.

PRESENT :

*Lord Watson, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.*  
[On appeal from the High Court for the North-Western Provinces.]

GENDA PURI AND ANOTHER (*Plaintiffs*) v. CHATAR PURI  
(*Defendant*). [8th, 9th, 25th June, 1886.]

*Succession to the office and property of a deceased Mahant—Custom of the math or institution.* 13 I.A. 100=4 Sar. P.C.J. 726.

In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be found in custom and practice, which must be proved by evidence.

On the death of a *Mahant* the right to succeed to his land and other property was contested between two *goshains* : *Held* that the claimant; in order to succeed, must prove the custom of the *math* entitling him to recover the office and the property appertaining to it. The evidence showed the custom to be that the title to succeed to the office and property was dependent on the successor's having been the *chela* approved, and nominated, as such, by the late *Mahant*; and also, after the death of the latter, installed or confirmed as *Mahant* by the other *goshains* of the sect : *Held*, that a claimant who failed to prove his installation or confirmation was not entitled to a decree for the office and property against a person alleging himself to have been a *chela*, who, whether with or without title, was in possession.

[F., 13 A. 256; U. B.R. (1892—1896) (Civ.) 420; 6 Ind. Cas. 709 (711); 13 Ind. Cas. 225 (226)=5 S.L.R. 107; R., 10 M. 375; 13 M. 293; 23 B. 131; 7 C.W.N. 145; 5 C.L.J. 360; 10 Ind. Cas. 824 (869)=8 A.L.J. 286.]

APPEAL from a decree (1st April, 1882) of a Divisional Bench of the High Court, reversing a decree (25th August, 1879) of the Subordinate Judge of Mainpuri.

The principal question on this appeal was whether the custom regulating the succession in a *math*, or religious institution, in the Mainpuri district, allowed a claim to the office and property of the deceased *Mahant* to be sufficiently supported by proof only of the claimant's having been the *chela* appointed by the late *Mahant* as successor, without proof of his subsequent installation or [2] confirmation in the office, by the religious brotherhood, or *goshains*, assembled at the *math*.

Genda Puri, the first plaintiff, claimed the proprietary right in, and possession of villages, groves, and houses in Shikohabad, also a declaration of his right in money, ornaments, bonds, and other property, as well as of his right of suit upon decrees, which had belonged to Kapur Puri, *goshain* and *Mahant* of the said *math*, who died in 1873. It was alleged that the deceased, shortly before his death, made a will (according to the evidence an oral nomination) as to the future installation of the plaintiff upon the *gaddi*; that after his death the *goshains* at the *math* had duly installed the plaintiff, who performed the *shradh* of the late *guru*: but that the defendant, who was of bad character and unfit for the office, had wrongfully obtained possession of the property.

Chatar Puri, the defendant, by his written statement, denied that Genda Puri was ever a disciple of Kapur Puri, and asserted that he himself, being a *chela* of the deceased, had been installed on the *gaddi*, and had performed the *shradh* of the deceased, and was therefore entitled. Issues were fixed as to whether the plaintiff or the defendant, or neither

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of them, was *chela* of Kapur Puri, the deceased *goshain*; whether the latter made a will respecting the succession to the *gaddi*; and whether the *goshains* had installed the plaintiff. Also as to what were the usages and customs among the *goshains* regarding the installation to the *gaddi*, the qualifications necessary in a disciple for his succession to the *gaddi*, and as to the character of the defendant.

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The Subordinate Judge of Mainpuri, holding that "the right of succession was dependent on the will of the owner and the qualifications of his successor," found that the plaintiff, as *chela* of Kapur Puri, had been designated by him, before his death, as his successor. The defendant, on the other hand, was found by the Subordinate Judge to have been of bad character, while it was doubtful whether he was a *chela* at all. A decree was therefore given in favour of the plaintiff.

On an appeal to the High Court, a Divisional Bench [OLDFIELD and BRODHURST, JJ.] reversed this decree, and dismissed the suit with costs. They said:—"The claim rests on the ground that [3] plaintiff, Genda Puri, was a disciple of the deceased and appointed by his will to succeed him and was duly installed."

"Now the custom which regulates the succession among the sect of *goshains* under consideration, as it has been explained in the evidence, does not appear to us to support a right of appointment by a deceased *Mahant* irrespectively of confirmation by the members of the fraternity."

The Judges, then, without going into the question of the defendant's title, found that the general effect of the evidence was to show that, by the custom of the *math*, only a *chela* could succeed; and that on the *guru*'s nominating a *chela* as his successor, such nominee was, as a rule, installed. But the Judges did not understand the general effect and meaning of the evidence to be that the *guru* had an absolute power to point his successor independently of the wishes of the brotherhood. On the contrary, they said that the evidence established the necessity of confirmation or installation by the brotherhood of *goshains* to make a complete title. They added:—"It is plain from the evidence of the plaintiff's witnesses that no such confirmation or installation has in this case been made."

The Judges found that the suit on the part of Hazari Lal, the co-plaintiff, was a speculative one. He had first obtained a bond from Genda Puri for Rs. 10,000, payment being contingent on the success of the latter in this suit, and afterwards taken on assignment of part of his interest in the property claimed.

Their suit having been dismissed with costs, both the plaintiffs appealed to Her Majesty in Council.

Mr. J. Graham, Q.C., and Mr. R. V. Doyne appeared for the appellants.

Mr. C. W. Arathoon and Mr. Omar Bakhsh, for the respondent.

For the appellants it was argued that the nomination of Genda Puri by the late *Mahant*, whose approved *chela* he was, entitled him to succeed, regard being had to the evidence as to the custom and practice of the *math*. It had been held that "the only law as to these *Mahants* and their offices, functions, and duties was to be found in custom and practice to be proved by testimony." See *Greedharee Doss v. Nundokissore Doss* (1). [4] [SIR R. COUCH referred to *Janoki Debi v. Gopal Acharjia* (2).] Here the evidence was consistent with the right to succeed depending on the late *Mahant*'s choice of a successor. The installation or confirmation by

the brotherhood was not so important to the title, being only ceremonial. The choice of the *Mahant* of one among his *chelas* was essential. There was enough similarity in the customs to suggest one general theory, derived perhaps from the ancient Hindu law as to succession among *goshains*, viz., that the succession depended on the relation of *chela* to *guru*; the relation of the *goshain* to the brotherhood being apparently less regarded in this matter. Genda Puri's title was therefore complete.

For the respondent, it was argued that as the appellant could only recover on complete proof of his own title, the High Court had rightly dismissed the suit in the absence of such proof. There were considerable doubts as to Genda Puri's ever having been the *chela* of Kapur Puri; and there was certainly no evidence of his having been installed or confirmed by the brotherhood as such successor. [LORD WATSON observed that the evidence on the record tended to show that the sect of *goshains* could, at all events, turn out a *Mahant* of the *math* in question.] The High Court had correctly held installation or confirmation to be, according to the custom of this institution, essential to a *Mahant's* title.

Reference was made on either side to the following:—

*Dhun Singh v. Maya Gir* (1), a contention between two *sunias* of Benares, in which, on proof that the defendant had been installed as *Mahant* upon the *gaddi*, having been appointed by the late *Mahant*, and having been his principal *chela*, he was supported in the succession.

*Ramrattan Das v. Bunmalee Das* (2), where a *chela*, declared successor according to the intention of the deceased *Mahant*, and elected by the *goshains* at his *shradh*, was maintained in possession against other *chelas*.

*Ganes Gir v. Amrao Gir* (3), where no successor having been nominated by a deceased *Mahant*, at an assembly of *Mahants* of the same sect, the plaintiff, a *suniasi*, who had been  *khas chela* of the deceased, was installed by them.

[5] *Surabnand Parbat v. Deo Singh Parbat* (4) where a successor having been nominated by the late *Mahant* was installed after a *panchayat* of *goshains* had been held.

*Narain Das v. Brindaban Das* (5), where the office having been shown to be, by usage, elective, it could go no other way and could not be alienated by elected *Mahant*.

*Ramanooj Das v. Debraj Das* (6), *Janoki Debi v. Gopal Acharjia* (7), in which last were cited—

*Greedharee Doss v. Nundokissore Doss* (8).

*Muttu Ramalinga Setupati v. Perianayagan Pillai* (9).

*Vurmah Valia v. Vurmah Kunhi Kutty* (10) was also referred to as showing the practice among *goshains* in Lower Bengal, and the 158th, 159th, and 160th paras, in Chapter II, Section I of the *Vayavastha Darpana*, by Shama Churn Sircar, were referred to.

Mr. Graham, Q.C., replied.

#### JUDGMENT.

Their Lordships' judgment was delivered on a subsequent day (25th June) by

SIR R. COUCH.—The suit in this case was brought by the first of the appellants for a declaration of right in respect of the moveable property

(1) 1 Macnaghten's Sel. Ca. 153.

(3) 1 Macnaghten's Sel. Ca. 218.

(5) 2 Macnaghten's Sel. Ca. 151.

(7) 9 C. 766=10 I.A. 32.

(9) 1 I.A. 209.

(2) 1 Macnaghten's Sel. Ca. 170.

(4) 1 Macnaghten's Sel. Ca. 246.

(6) 6 Macnaghten's Sel. Ca. 262.

(8) 11 M.I.A. 428.

(10) 1 M. 239=4 I.A. 76.

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and for possession of the immoveable property of one Kapur Puri, *goshain*, the *Mohant* of a religious establishment in mauza Godha, in the district of Mainpuri, who died on the 21st December, 1873, which Genda Puri claimed as his disciple appointed to succeed him. At the time of his death Kapur Puri had two disciples, Genda and his brother Ramjit. Their Lordships think this was proved, and that the reasons given by the Judges of the High Court in their judgment for not being satisfied with the evidence of it, contrary to the finding of the Subordinate Judge, are not of any weight. The respondent, Chatar Puri, had also become a disciple of Kapur Puri before the year 1868, but it was alleged by Genda Puri that he had some time before January, 1872, been expelled by Kapur Puri for misconduct and had ceased to be a disciple. A *wajib-ul-arz*, dated the 4th February, 1872, of mauza Ghaaspur, part of the property in dispute, which was [6] proved to have been verified by Kapur Puri, was relied upon by the plaintiffs. It contained a statement that he was the present lambardar of the village, and that any person whom he might make a *chela* (disciple) would succeed him as lambardar after his death. As yet he had made no *chela*. In case he made no *chela*, his ablest and nearest relation would be lambardar after his death.

The statement that he had made no *chela* is not only inconsistent with Chatar Puri being then a disciple, but also with the evidence as to the time when Genda and Ramjit became disciples, which would seem according to some of it to have been before the date of the *wajib-ul-arz*. It was proved by Mathura Puri, a *goshain*, that Kapur Puri, about 20 days before his death, being then ill, called a meeting of the *goshains* and householders of the neighbourhood, and in their presence said, "I am sick, there is no hope of my recovery; after my death, instal Genda Puri on the *gaddi* and appoint Ramjit Puri as house-steward (*bhandari*); both of them are my disciples." According to Tikam Puri, another witness, his words were, "You are all my brethren. I have no hope of my life. If anything happens to me, place Genda Puri on the *gaddi* and make Ramjit Puri *bhandari*." Another witness, Shib Lal Puri, said the words were, "I have made two disciples, *viz.*, Genda Puri and Ramjit Puri. I am ill. There is no certainty of life. Should I die and a dispute arise (between the disciples), you all should give the *gaddi* to Genda Puri and make Ramjit *bhandari*." Several other witnesses gave similar evidence.

Immediately upon his death disputes arose as to the succession, and by an order of the Magistrate of Mainpuri, dated the 2nd of March, 1874, in which it is stated that a considerable body of men, taking advantage of the absence of the heir in possession, Chatar Puri, forcibly entered the house, turned out the servants, and kept possession against all comers until a strong body of police had been sent to dislodge them; eleven men were directed to enter into recognizances to keep the peace until the succession was lawfully decided. And by another order of the Magistrate, dated the 10th of March, it was ordered that both the parties should apply to the Civil Court for a certificate of heirship. On the 28th March, 1874, the *Tabsildar* of Shikohabad, having made an investigation and taken the statements of residents and zemindars in the neighbourhood, [7] made a report that Chatar Puri was in possession and Genda Puri was not, whereupon the Deputy Collector of Mainpuri, by an order without any date, ordered that Chatar Puri's name should be substituted in lieu of that of Kapur Puri in the revenue records.

There was no installation of either Genda Puri or Chatar Puri. The

latter being in possession, Genda Puri brought a suit against him *in forma pauperis*, claiming as heir to Kapur Puri according to the Hindu law and the custom prevailing in the *goshain* sect. The claim to sue *in forma pauperis* was disallowed, and he and Ramjit then brought a suit for a declaration of right, with a Court-fee of Rs. 10, which was dismissed, on the ground that it ought to have been for possession, a suit which required a much higher Court-fee. The present suit was then brought, the appellant, Hazari Lal, having been made a co-plaintiff after its institution in respect of an interest which he had acquired.

The Subordinate Judge of Mainpuri dismissed the suit for the declaration of right to the moveable property, on the ground that the persons in possession of it should be sued, and made a decree in the plaintiff's favour as to the immoveables. This was reversed by the High Court of the North-Western Provinces, and the suit was dismissed with costs. That Court was of opinion that the claim rested on the ground that Genda Puri was a disciple of the deceased, and appointed by his will to succeed him, and was duly installed, and that the appeal must prevail with reference to the first and fifth grounds of appeal. The first ground was that the plaintiff's title, as alleged in the plaint, was not established by reliable evidence, and the fifth that the plaintiff, having failed to prove his own title to succeed, the title of the defendant required no scrutiny. The plaint stated that, after the death of Kapur Puri, the *goshains* installed the plaintiff on the *gaddi*. If the evidence had proved that the title to succeed depended solely upon the nomination or appointment by Kapur Puri, and the installation was only the giving effect to it, their Lordships would not have considered the failure to prove that averment in the plaint as fatal to the plaintiff's case. The plaint is very informal, and might possibly be read as stating a title by the appointment of Kapur Puri.

[8] In determining who is entitled to succeed as *Mahant* in such a case as the present, the only law to be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled, according to the custom, to recover the office and the land and property belonging to it. This has been laid down by this Committee in several cases. The infirmity of the title of the defendant, who is in possession, will not help the plaintiff as the Subordinate Judge seems to have thought. The witnesses for both the plaintiff and the defendant deposed as to the custom. Some said that the choice or election was made by the *goshains*, others (and these are a majority) that they instal on the *gaddi* the disciple whom the *guru* (*Mahant*) recommends. One said that the *guru* nominates his successor, and they give the *gaddi* to him; and another that when a *Mahant* becomes ill, he leaves directions as to who would become the *Mahant*. There is no finding of the Subordinate Judge as to the custom. In the judgment of the High Court the whole of the evidence upon it appears to be quoted, and they say:—"The general result of this evidence seems to show that a disciple only can succeed, and that the *guru* can nominate his successor, who, as a rule, is appointed; but we do not understand the evidence in the sense that the *guru* has an absolute power of appointment; the evidence points to the necessity of confirmation and instalment on the *gaddi* to make a complete title; otherwise the ceremony of installation, on which much stress is laid, would be but an idle form." It is unnecessary to quote the evidence here. It appears to their Lordships to fail in proving that the *Mahant* had power to appoint his successor, and the *goshains* were bound to instal the

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disciple that he appointed. What was done by Kapur Puri, which in the plaint and judgment of the Subordinate Judge is called his will, was not, according to the custom, proved sufficient to entitle Genda Puri to recover the property. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The costs of it will be paid by the appellant.

*Appeal dismissed.*

9 A. 2=6 A.W.N. (1886) 292.

### [9] APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Mahmood.*

MUHAMMAD HUSAIN KHAN (*Judgment-debtor*) v. RAM SARUP AND ANOTHER (*Decree-holders*).<sup>\*</sup> [12th July, 1886.]

*Execution of decree*—Certificate by decree-holder of payment out of Court—Act XV of 1877 (*Limitation Act*), sch. ii, No. 179 (4)—“*Step-in-aid of execution*”—*Civil Procedure Code*, ss. 257, 258.

*Held*, following *T. D. Bandyopadhyaya v. B. L. Mukhopadaya* (1) (TYRRELL, J., doubting), that an application made by a decree-holder, the object of which is that the receipt of certain sums of money paid out of Court may be certified, is a “step-in-aid of execution,” such as will keep the decree alive, within the meaning of the Limitation Act (XV of 1877), sch. ii, No. 179 (4). *Gansham v. Mukha* (2), referred to.

[F., 20 C. 696; Cons., 12 A. 399 (F.B.); R., A.W.N. (1888) 23.]

THE decree of which execution was sought in this case was one for money, date the 6th August, 1878. The decree-holder applied for execution in 1879 and in 1880. The application made in 1880 resulted in the realization of Rs. 1,500, and in the judgment-debtor agreeing to pay the balance of the amount of the decree within one year. On the 2nd March, 1882, the decree-holder made an application to the Court, stating that Rs. 600 had been paid. On the 26th April, 1883, a similar application was made by the decree-holder's heirs, stating that Rs. 400 had been paid. On the 1st July, 1884, the decree-holders applied for execution by attachment and sale of the judgment-debtor's property; and on the 17th July, 1884, the decree having been transferred by sale, the purchasers of the decree presented an application, together with the sale-deed, dated the 9th July, 1884, with the object of getting the transfer to them recognized.

The Court of first instance held that neither the application of the 2nd March, 1882, nor that of the 26th April, 1883, was an application within the meaning of clause 4 of the 3rd column of No. 179, sch. ii of the Limitation Act (XV of 1877), and the decree was time-barred. It was of opinion that those applications, the object of which was that the receipt of certain sums of money [10] paid out of Court might be certified, could not be regarded as steps in aid of execution within the meaning of that article. The lower appellate Court reversed this decision, holding that those applications were steps in aid of execution.

<sup>\*</sup> Second Appeal, No. 14 of 1886, from an order of J. Sladen, Esq., District Judge of Bareilly, dated the 27th November, 1885, reversing an order of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 27th January, 1885.

(1) 12 C. 608.

(2) 3 A. 320.

The judgment-debtor appealed to the High Court, impugning the decision of the lower appellate Court.

Shah Asad Ali, for the appellant.

Babu Ratan Chand, for the respondents.

### JUDGMENT.

MAHMOOD, J.—[The circumstances of this case, so far as it is necessary to state them, are simple and easily set forth. The decree is dated the 6th August, 1878, and the question is whether it is a subsisting decree or whether it is time-barred. Execution was taken out in 1879 and in 1880. Rs. 1,500 were realised, and the remainder being agreed to be paid within a certain time, the case was struck off upon the decree-holder's application. On the 2nd March, 1882, the decree-holder made an application to the Court, stating that Rs. 600 were realized, and asking that the execution-case might be struck off. On the 26th April, 1883, a similar application was made by the decree-holder's heirs, stating that Rs. 400 had been realized. Nothing more was done until July, 1884, and on the 17th July, 1884, the purchaser of the decree presented an application, together with his purchase-deed dated the 9th July, 1884, with the object of getting the transfer to him recognised. The Court of first instance held that neither the application of the 2nd March, 1882, nor that of the 26th April, 1883, was an application within the meaning of clause 4 of the 3rd column of art. 179 of the Law of Limitation. It held that the decree-holder's applications that the receipt of certain sums of money paid out of Court might be certified, could not be regarded as steps in aid of execution. The lower appellate Court reversed this decision, holding that these applications of the decree-holder were steps-in-aid of execution, and this is the sole question we have here to deal with.]\*

We must, I think, hold that the *ratio decidendi* of the case of *Gansham v. Mukha* (1), where it was held that when the application was made by the judgment-debtor it was a "step-in-aid of execution," justifies us in the view that when the application is made by the decree-holder, that is equally a step-in-aid of execution, such as will keep the decree alive. S. 257 of the Code shows that a payment out of Court to the decree-holder may be regarded as a payment under a decree; and s. 258 shows how the judgment-debtor and the decree-holder can each take proceedings to have payment out of Court recognized by the Court. The case of *T. D. Bandhyopadhyaya v. B. L. Mukhopadaya* (2) seems to me to be exactly applicable to the facts of the present case. I must, however, frankly say that if the matter was *res integra*, and a matter to be decided on first impression, I should be inclined to consider whether a payment out of Court is more than what its English phraseology denotes. I might, under some circumstances, have considered that matter; but the ruling of this Court and that of the Calcutta Court, that a payment certified by the decree-holder or judgment-debtor is a "step-in-aid of execution," from which I am not prepared to dissent, renders it unnecessary for me to enter into the question more fully. I hold therefore that the applications of the 2nd March, 1882, and the 26th April, 1883, if the information in them contained was true, were steps in aid of execution within the meaning of art. 179, cl. 4, col. 3 of the Limitation Act. But the judgment-debtor raised a distinct plea that the allegations of payment contained in those applications were wholly untrue. The question whether they were true or

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\* This portion of the judgment has not been reported in the I.L.R.

(1) 3 A. 320.

(2) 12 C. 608.



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untrue has not been tried in the Courts below. Giving the Calcutta ruling above referred to its full force, [11] it is now necessary to ascertain whether the payments notified to the Courts by the decree-holder on the 2nd March, 1882, and the 26th April, 1883, were, in fact, payments by the judgment-debtor, and the case must be remanded to the lower appellate Court under s. 566 of the Code for a finding on the above points.

Upon a return of the findings, ten days will be allowed to the parties for objections.

TYRRELL, J.—I am by no means satisfied that the applications of March, 1882, and April, 1883, can be considered as "steps-in-aid of execution" in the sense of cl. 4, art. 179 of the Limitation Act; but the view of the lower appellate Court being supported by the authority of a Calcutta ruling, I am unwilling to interfere with its decision so far. The truth of the statements of the decree-holder as to these payments must be ascertained. I concur therefore in the order of remand proposed by Mr. Justice Mahmood.

*Issues remitted.*

9 A. 11=6 A.W.N. (1886) 245.

### APPELLATE CIVIL.

*Before Mr. Justice Tyrrell and Mr. Justice Mahmood.*

HUSAINI BEGAM (*Plaintiff*) v. THE COLLECTOR OF MUZAFFAR-NAGAR AND OTHERS (*Defendants*).<sup>\*</sup> [13th July, 1886.]

*Appeal—Admission after time—Act XV of 1877 (Limitation Act), s. 5—"Sufficient cause"—Poverty—Purdah-nashin—Civil Procedure Code, s. 220—Costs.*

In February, 1884, the High Court dismissed an application by a Muhammadan *pardah nashin* lady, under s. 592 of the Civil Procedure Code, for leave to appeal as a pauper from a decree passed in September, 1882, on the ground that it was barred by limitation. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the said order to stand over pending the decision of a connected case which had been remanded for re-trial under s. 562 of the Code. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. On the 18th June, 1885, an order was passed *ex parte* by PETHERAM, C.J., allowing the applicant, under s. 5 of the Limitation Act (XV of 1877), to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution-fees, presented her appeal, which was admitted provisionally by a single Judge.

*Held* by TYRRELL, J., (MAHMOOD, J., dissenting) that the appellant had made out a sufficient case for the exercise of the Court's discretion under s. 5 of the Limitation Act, and that the Court should proceed to the trial of her appeal.

*Held* by MAHMOOD, J., that the *ex parte* order of the 18th June, 1885, was one which the Civil Procedure Code nowhere allowed and was *ultra* [12] *vires*, and that the Bench before which the appeal came for hearing was competent to determine whether the order admitting the appeal should stand or be set aside. *Dubey Sahai v. Ganeshi Lal* (1), referred to.

*Held* also by MAHMOOD, J. (TYRRELL, dissenting) that the circumstances were such as to require the Court to set aside the order admitting the appeal and to dismiss the appeal as barred by limitation, inasmuch as it was presented more than two years beyond time, and neither the facts that the main reason why it was presented so late was that the appellant was awaiting the result of the connected case, and that the appellant was a pauper and a *pardah-nashin* lady, nor the orders of the 16th August, 1884 and the 18th June, 1885, constituted

<sup>\*</sup> First Appeal, No. 139 of 1885, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 16th September, 1882.

"sufficient cause" for an extension of the limitation period, within the meaning of s. 5 of the Limitation Act. *Moshauallah v. Ahmedullah* (1) and *Mangu Lal v. Kandhai Lal* (2), referred to.

Held further by MAHMOOD, J., that although, but for the erroneous order of the 18th June, 1885, the appellant would neither have borrowed the money required to defray the institution-fees nor preferred the appeal, and this was a circumstance to be considered in the exercise of the discretionary power conferred by s. 220 of the Code, it could not be said that the error of a Court of Justice which leads a party to initiate proceedings against another is sufficient to exonerate the losing party from paying the costs incurred by the opposite party, and that the appeal should therefore be dismissed with costs.

[F., 10 A. 524; R., 1 L.B.R. 32; 34 C. 216=5 C.L.J. 380; 103A. 587; 12 A. 79= A.W.N. (1890) 25; U.B.R. (1892—1896) 452; 34 C. 216=5 C.L.J. 380].

This appeal had been admitted after time by Tyrrell, J., sitting for the admission of appeals, &c. At the hearing of the appeal it was objected that there was no sufficient cause for presenting the appeal after time, and it should be dismissed. The causes alleged by the appellant for not presenting the appeal within time are stated in the judgments, in which are also stated the other facts of the case.

Mr. N. L. Paliologus and Pandit *Sunder Lal*, for the appellant.

Babu *Ram Das Chakarbaty*, Pandit *Bishambar Nath*, Munshi *Hanuman Prasad*, Shah *Asad Ali*, Babu *Baroda Prasad Ghose*, Mr. *Simeon*, and Lala *Datt Lal*, for the respondents.

### JUDGMENT.

TYRRELL, J.—A preliminary objection has been taken on behalf of the respondents that this appeal is barred by limitation. It is true that it has been preferred a long time after due date, but our power of admitting an appeal under s. 5 of the Limitation Act is large, and is not fettered by considerations of time, provided only the Court be satisfied that the appellant had sufficient cause for not presenting her appeal within the period prescribed therefor. I think that such [13] cause has been shown by the learned vakil for the appellant. She is a *parda-nashin* Muhammadan lady, obviously too impecunious to pay the preliminary charges for this appeal, who, having failed under the bar of limitation only in an attempt to appeal as a pauper, spent a considerable time in efforts to obtain a review of that order, and having finally been refused this remedy, she borrowed funds, at an enormous sacrifice we are informed, and affixed the necessary stamps (Rs. 655) to the memorandum of appeal she had presented to this Court in March, 1883, with her application made under S. 592 of the Civil Procedure Code. This appeal was admitted by me, provisionally of course, on the 17th July, 1885. A good deal was made at the hearing yesterday of an application made to the late learned Chief Justice in June, 1885, reciting all the steps taken theretofore by the would-be pauper-appellant, and laying before Sir Comer Petheram the memorandum of appeal (unstamped of course) filed in March, 1883, and practically asking his Lordship for a month's time to file the necessary stamps. An order allowing this petition was made, and no more. The appeal was not thereby admitted, nor was any order whatever made which would affect the question of its admissibility, either by the Judge sitting out to admit appeals or by the Bench hearing the appeals. This application, and the order made on it by Sir Comer Petheram, may therefore be left altogether out of the question. There remains only then the single issue, whether this particular appellant has made out a sufficient case for the exercise of our discretion in this behalf;

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and I hold that she has, and that we ought to proceed to the trial of her appeal.

MAHMOOD, J.—I very much regret that in this case I am unable to agree in the order which my learned brother Tyrrell has made, and that I hold that this appeal cannot be entertained by us because it is barred by limitation. The facts of the case are, that the decree from which this appeal has been preferred was passed by the Court below on the 16th September, 1882, and no appeal was preferred from it up to the 22nd March, 1883. Upon that day an application was made for leave to appeal as a pauper, but it was then more than two months beyond the period of limitation. The application then came on for hearing before a Bench consisting of the present learned Officiating Chief Justice and my learned brother [14] Tyrrell, who dismissed the application on the 14th February, 1884, holding that under the law they had no power to admit the application, which was obviously barred by limitation. Then it appears that some time in May, 1884, the present appellant prepared an application for review of the order just mentioned, and presented the application on the 10th June, 1884, and the application was allowed to remain pending, pursuant to an order dated the 16th August, 1884, on account of the pending of a cognate case, being First Appeal No. 21 of 1883. The application then appears to have stood over until the 24th April, 1885, when it came on for hearing before a Divisional Bench, consisting of the present learned Officiating Chief Justice and my brother Tyrrell, who dismissed the application for reasons which it is not necessary to refer to here. Then followed an application of a very unusual character, presented on the 18th June, 1885, to the late learned Chief Justice of this Court. The application, after reciting the previous orders in the litigation, went on to say "that on the 8th April, 1885, the said First Appeal, No. 21 of 1883, was heard and decreed, and on the 24th April, 1885, your petitioner's application for review was rejected; that if this Honourable Court will be pleased to grant this petition, your petitioner will be in a position to file appeal regularly. Your petitioner therefore humbly prays that she might be allowed to file her appeal under the provisions of s. 5, Act XV of 1877, on full stamp paper." I have called this application one of a very unusual character, because I am not aware of any provision of the law which contemplates such an application. The object of the application was to ask the Court to decide upon the admissibility of an appeal which had not yet been preferred to the Court, and the prayer in the application sought to obtain an order which would in a manner bind the Court to the admission of the contemplated appeal. It was an application admittedly made in order that the petitioner might, by obtaining an order which would afford a sort of guarantee as to the admissibility of a future appeal, be able to have an opportunity of raising money to file an appeal on full stamp, though such appeal would be more than two years and a half beyond the time allowed by the law for such appeals, the provision being found in art. 156, sch. ii of the Limitation Act. Under these circumstances I should have thought there would [15] scarcely be any reason for departing from the ordinary course observed in this Court of issuing notice to the other side to show cause, the practice being only an illustration of the well-known maxim *audi alteram partem*. The usual practice of this Court was, however, not followed in that case, and the late learned Chief Justice of this Court simply granted the prayer in the application, directing that the memorandum of appeal, duly stamped, was to be presented within one month. The order was made on the 18th June, 1885; but with profound respect

for the legal authority of Petheram, C.J., I cannot help holding that the order, considering the nature of the application, was one which our law of procedure in India nowhere allows, and I find myself unable to hold that, in determining the point now before me, I am bound by that order. The law in s. 592 of the Civil Procedure Code does, indeed, allow a pauper to present an application to be allowed to appeal as a pauper; but even such application must be accompanied by a memorandum of appeal as the section requires; but I am not aware of any authority conferred by the Code, or any other law, which would empower the Court to entertain an application such as the one in the case, or to make an order such as Petheram, C.J., made in this case, without apparently hearing the other side, and without having the grounds upon which the anticipated appeal was to be made before him. With all due deference, I cannot but hold that the order was *ultra vires*, and I cannot help feeling that its practical effect has been regrettable. For it is urged by the learned pleader for the appellant that it was in consequence of this order that the appellant was able to borrow money on very onerous terms for the purpose of defraying the expenses of this appeal, and he contends that this circumstance is sufficient to induce us to admit this appeal under the exceptional provisions of s. 5 of the Limitation Act. The appeal was, as a matter of fact, admitted by my learned brother Tyrrell on the 17th July, 1885, but subject, of course, to any objection on the ground of being barred by limitation, which might be made by the respondents at the hearing of the appeal before a Bench. There can be no doubt that the order admitting the appeal, made by a single Judge, is not conclusive upon the question, and indeed the Full Bench ruling of this Court in *Dubey Sahai v. Ganeshi Lal* (1) leaves no room for doubt upon the point. [16] The kind of objection contemplated in that ruling has been taken by the respondents now, and I hold that under the circumstances this Bench is entitled to determine whether the order admitting the appeal should stand or be set aside.

I am of opinion that the circumstances of this case are such as require the Court to set aside the order admitting the appeal, and to dismiss it as barred by limitation. This is not a case in which the appeal has been presented two or three months beyond time, but the period here far exceeds two years, and it is apparent from the petition on which Petheram, C.J., passed the order of the 18th June, 1885, that this appeal would not have been preferred but for that order, and that the main reason why the appeal has been preferred so late is, that in the cognate case, First Appeal, No. 21 of 1883, this Court had remanded the case to the Court below for trial *de novo*. The order of remand in that case was made on the 7th April, 1885, apparently under s. 562 of the Civil Procedure Code, though the evidence in the case appears to have been on the record. It is not necessary for the purposes of this case to decide whether, with reference to the provisions of ss. 564 and 565 of the Code, that case could have been remanded for trial *de novo*, because, according to my view, whatever the result of that new trial may be, it cannot operate in such a manner as to extend the period of limitation which the law has prescribed for such appeals. For I hold that, however similar two litigations may be, the circumstance that one litigant has prosecuted his case diligently, and has partly succeeded, is not any reason for allowing the litigant in the other litigation to seek his remedy long after the lapse of the period which the law of the limitation prescribes. Indeed, any other view of the law would render the statutes of limitation anything but "*statutes of repose*," as

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Mr. Justice Story or Lord Plunket has called them somewhere; and if the argument of the appellant in this case is to be accepted, there could be no logical reason why this appeal should not be admitted after the lapse of another two or three years, when the cognate case (F.A. No. 21 of 1883) would be decided finally by this Court or by the Privy Council. I have recently dwelt at considerable length upon the policy of the laws of limitation, the manner in which they should be interpreted, and the exact effect of the imperative provisions of s. 4 of our Limitation Act, and my [17] observations are to be found in my judgment in the case of *Mangu Lal v. Kandhi Lal* (1).

In this case the exact point involved is different as a matter of detail, but not as a matter of principle, regarding the construction of the statutes of limitation. The exact point here is—whether, even if the Limitation Act is to be strictly construed in favour of its operation, the present appeal should not be allowed to be admitted long after the prescribed period, by reason of the power which the second paragraph of s. 5 of the Act entrusts to the discretion of the Court as a proviso to the stringent rules contained in s. 4 of that enactment. The second paragraph of s. 5 runs as follows:—

“Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.”

I confess that the expression most important in this paragraph is the phrase “*sufficient cause*,” and that the phrase is capable of a great deal of difference of opinion. I also concede that the phrase must be understood with due reference to the circumstances of each case, and I may add that I would have deferred to the view of my brother Tyrrell if I had been able to hold that the discretionary power as to admitting appeals beyond time could possibly be exercised in this case. Because, what is contended here is that the appellant, being a *pardah-nashin* and a pauper, did not apply for leave to appeal as a pauper within time under art. 170, sch. ii of the Limitation Act; that her application was therefore dismissed; that she applied for a review of the order of dismissal, but that application also was dismissed; that her attempts therefore to have her case heard in appeal *in forma pauperis* were unsuccessful; that having exhausted her remedy in that form, she waited till this Court disposed of the cognate case by remanding it for new trial; that thereupon she obtained an order from the late learned Chief Justice of this Court on the 18th June, 1885, giving her permission to file her appeal on full stamp within a month; that by virtue of that order she was enabled to raise money and present [18] her appeal on payment of the Court-fees, and that the appeal was admitted; and then the argument is pressed upon us, that because the appellant duly obeyed the order of the late learned Chief Justice, therefore we are bound to reject the respondent's preliminary objection that the appeal is barred by limitation.

This represents the whole line of argument which has been pressed upon us by the learned pleader for the appellant, but I find myself unable to accept it. So far as the question of poverty is concerned, I am perfectly prepared to adopt the rule laid down by Prinsep and Trevelyan, JJ., in *Moshauila v. Ahmed-ul-lah* (2), and I agree with them in the view that “if such ground be accepted as sufficient cause for a special order of this description, there would be no limit to the period for extending the

usual term of limitation to presenting an appeal." Applying that rule to the present case, the main ground on which the appellant relies is untenable, nor do I think that her being a *pardah-nashin* woman should be allowed to operate as a reason for relaxing the rules of limitation to the extent sought in this case. The fact of an appellant being a *pardah-nashin* may, no doubt, in some cases furnish grounds for applying the discretionary power contained in the latter part of s. 5 of the Limitation Act; but in my opinion that ground can be available only where the fact has prevented a party from presenting the appeal herself, or from retaining counsel to do so. Here the contention practically amounts to saying that whenever an appellant is a *pardah-nashin*, there should be no practical limit to the period during which her appeal must be presented. The condition of being a *pardah-nashin* is far more lasting than even the condition of being a pauper; and if, as the learned Judges of the Calcutta Court have held, poverty is not a sufficient cause within the meaning of s. 5 of the Limitation Act, I should say that being a *pardah-nashin* is not, *ipsc facto*, sufficient cause for the application of that section. The other grounds upon which the learned pleader for the appellant relies are, firstly, the order of the 16th August, 1884, directing that the application of the appellant for reviewing the order of the 14th February, 1884, dismissing her application to be allowed to appeal as pauper, should stand over, pending the decision in First Appeal, No. 21 of 1883; [19] secondly, the order of the 18th June, 1885, which gave a sort of guarantee that the contemplated appeal, namely, the present one, would be admitted if presented on full stamp within a month of that order. I am of opinion that neither of those orders which I have already described constitutes a "sufficient cause" within the meaning of the latter part of s. 5 of the Limitation Act, so as to admit this appeal after such a long period beyond the limitation. The appellant has had two adjudications against her in regard to her application to appeal *in forma pauperis*; and whilst it is clear that this appeal would not have been preferred but for the order of the 18th June, 1885, I cannot hold that the appellant's utilizing that order as a means of borrowing money for payment of the Court-fees on her appeal, will enable her to claim the benefit of the latter part of s. 5 of the Limitation Act. Moreover, I cannot doubt—and, indeed, it is apparent from the appellant's own petition, on which the order last mentioned was passed—that she has delayed so long in presenting the appeal because she and her advisers were waiting for the result of the cognate case already referred to. I hold therefore that the latter part of s. 5 of the Limitation Act is not available to the present appellant, and that the appeal is therefore barred by limitation.

The only thing remaining to be considered is—whether, under the peculiar circumstances of this case, the appellant should be ordered to pay the respondent's costs. I have already said enough to indicate that but for the order of the late learned Chief Justice of this Court, passed on the 18th June, 1885, the poor lady-appellant would neither have borrowed the money required to defray the institution fees of this appeal, nor would she have preferred this appeal. This, no doubt, is a circumstance which I am bound to consider in connection with the discretionary power conferred by s. 220 of the Civil Procedure Code; but I am unable to lay down the rule that the error of a Court of Justice, which leads a party to initiate proceedings against another, is sufficient to exonerate the losing party from paying the costs incurred by the opposite party. I would therefore dismiss this appeal with costs.

*Appeal dismissed.*

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## [20] PRIVY COUNCIL.

PRESENT :

*Lord Watson, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.**[On appeal from the High Court for the North-Western Provinces.]*

MANSUR ALI KHAN (*Plaintiff*) v. SARJU PRASAD (*Defendant*).  
 [13th July, 1886.]

*Regulation XVII of 1806, ss. 7, 8—Mortgage by conditional sale—Redemption.*

In the part of India where Bengal Regulation XVII of 1806 (1) is in force, the right to redeem a mortgage by conditional sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest.

Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this, according to the mortgagor's contention, was, by the terms of the condition, treated as a separate debt.

*Held*, that, as the mortgagor had not deposited the interest due on the sum lent required, according to s. 7 of the Regulation, where, as here, the mortgagee had not obtained possession, and as the year of grace had expired, the conditional sale had become conclusive under s. 8, involving the dismissal of the mortgagor's suit for redemption.

[R., 103 P.R. 1893.]

APPEAL from a decree (23rd January, 1883) of a Divisional Bench of the High Court, reversing a decree (9th April, 1881) of the Subordinate Judge of Gorakhpur.

This appeal raised a question of the right to redeem a mortgage by way of conditional sale, upon which the mortgagee had not been put into possession of the property mortgaged. The term of the mortgage having expired, application was made for foreclosure by the mortgagee, whereupon the mortgagor paid into Court, during the year of grace allowed by Regulation XVII of 1806, a sum equal to the principal debt and one year's interest. Interest for prior years had not been paid. Nevertheless, the mortgagor in the suit out of which this appeal arose claimed the right to redeem, insisting that the application for foreclosure was contrary to, and that his deposit was sufficient according to, the terms of the deed of conditional sale, which treated the other interest as recoverable by separate suit.

The respondent, Sarju Prasad, a banker in Gorakhpur, lent money to Zahir Ali Khan, since deceased, and now represented by [21] his brother, Mansur Ali Khan, the appellant. Zahir Ali Khan, to secure Rs. 11,200, executed on 14th March, 1868, a deed of conditional sale of villages in the district to Sarju Prasad for the term of seven years. Default having been made in payment of the interest for three years, the mortgagee, in 1871, obtained a decree for it. This was satisfied in November of that year, and in the following year the mortgagee obtained a second decree for another year's interest, with interest thereon. On 23rd April, 1875, the period of the conditional sale having then expired, the

(1) "For a general extension of the period fixed by Regulations I of 1798 and XXXIV of 1803 for the redemption of mortgages and conditional sales of land, under deed of bai-bil-wafa, katkabala, or other similar designation."

mortgagee, under s. 8 of Regulation XVII of 1806, petitioned for foreclosure. In the following year Zahir Ali Khan died. In January, 1881, the appellant deposited in the District Court Rs. 12,881, a sum made up of the principal debt of Rs. 11,200 and interest for the last year of the term of the conditional sale, which, as he submitted, was all that, under the conditions of the contract, he was bound to deposit in order to redeem; and on the 21st of the same month, to establish his right so to do, he filed the present suit. The defendant, by his written statement, alleged that the plaintiff was bound to deposit, in addition to the above, the whole interest due, viz., for the two preceding years of the mortgage term, and for the year in which the foreclosure was pending; contending that, as this had not been done, the foreclosure had become absolute and final.

The Court of first instance, the Subordinate Judge of Gorakhpur, held that the deposit made by the mortgagor was sufficient to satisfy the requirements of the condition contained in the instrument of mortgage, and gave a decree in favour of the plaintiff for redemption. The High Court, on appeal, held that the terms of the condition, on its true construction, were not satisfied by this deposit and directed that the suit should be dismissed with costs in both Courts.

On this appeal, Mr. *T. H. Cowie*, Q.C., and Mr. *R. V. Doyne* appeared for the appellant.

Mr. *W. A. Raikes* and Mr. *Dunlop Hill*, for the respondent.

For the appellant it was argued that, on the true construction of the terms of the condition in the instrument of 1868, the mortgagor, to entitle himself to redeem, needed only to deposit in Court the [22] amount of the principal debt, together with the interest due for the last year of the specified term. Reference was made to the judgment in *Forbes v. Amee-roonissa Begam* (1) as fully stating the law applicable to cases falling under Regulation XVII of 1806. Here, however, it was contended that the special terms of the condition of the instrument determined the rights of the parties, and that the Regulation did not establish a right to redeem uncontrolled by the contract made between them.

Counsel for the respondent were not called upon.

Their Lordships' judgment was delivered by

#### JUDGMENT.

SIR R. COUCH.—The suit which is the subject of this appeal was brought by the appellant for the redemption of a mortgage made by his deceased brother, Zahir Ali Khan, to whose estate the appellant had succeeded by inheritance. The mortgage was by a conditional sale to the respondent, dated the 14th of March, 1868, to secure the payment of Rs. 11,200, which had been borrowed by the mortgagor, and interest thereon, at the rate of Re. 1-4-0 per cent. per mensem, being Rs. 1,680. The condition was that the interest should be paid annually for seven years, with compound interest if it was not paid at the stipulated periods, to be realized from the person and property of the mortgagor, and the principal sum of Rs. 11,200 and Rs. 1,680 on account of interest for the last year was to be paid on 6th badi Chait (28th March, 1875). On the 23rd of April, 1875, after the expiration of the time fixed, the mortgagee filed a petition under the Bengal Regulation XVII of 1806, in which he claimed Rs. 17,304-7-0 as due for principal and interest, being the principal sum and three years' interest and compound interest thereon. A notification was thereupon issued by the Judge according to the Regulation, but the

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service of it was not effected till the 20th January, 1880. On the 17th of January, 1881, the mortgagor deposited in the Judge's Court Rs. 12,881, the principal sum and interest for the last year, with a petition alleging that the interest for the previous years was, according to the condition, to be recovered by a separate suit, and on the 20th of January, 1881, he brought this suit.

The lower Courts have given judgments at considerable length upon the construction of the mortgage-deed; the Subordinate Judge [23] holding that the appellant was entitled to redeem, and the High Court reversing that decision and dismissing the suit. It does not appear to their Lordships to be necessary to consider the construction of the deed. In the part of India where the Regulation is in force, the right to redeem depends entirely upon it. The words of s. 7 are, that where the mortgagee has not been put in possession of the mortgaged property (which was the case in this mortgage), the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor to the redemption of his property before the mortgage is finally foreclosed in the manner provided by the 8th section. That section gives the mortgagor one year from the date of the notification to redeem the property, and says that if he does not do so in the manner provided by the 7th section, the mortgage will be finally foreclosed and the conditional sale will become conclusive. It could not be denied by the appellant's counsel that much more than one year's interest was due. Indeed, the arrear of interest had continued to increase from the 23rd April, 1875, till the date of the deposit. The mortgagor had clearly not done what was necessary by the terms of the Regulation to entitle him to the redemption, and for that reason their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The appellant will pay the costs of it.

*Appeal dismissed.*

Solicitors for appellant: Messrs. T. L. Wilson and Co.

Solicitors for respondent: Messrs. Oehme and Summerhays.

9 A. 23=6 A.W.N. (1886) 279.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

CHUNNI LAL (*Defendant*) v. BANASPAT SINGH (*Plaintiff*).\*

[2nd August, 1886.]

*Lease—Mortgage for securing payment of rent—Decree by Revenue Court for arrears of rent—Decree time-barred—Effect of decree on mortgage—Suit for sale of mortgaged property—Civil Procedure Code, s. 43.*

In 1874, the plaintiff leased certain immoveable property to the defendant, and the latter executed a deed by which he covenanted to pay the annual rent and [23] fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. In 1874, the plaintiff obtained decrees in the Revenue Court for arrears of rent, and the decrees were partially satisfied, and then became barred by limitation. In 1884, the plaintiff brought a suit to recover the balance due by enforcement of the mortgage security against the purchasers of the mortgaged property.

*Held* that the plaintiff had two separate rights of action, one on the contract to pay rent, and the other on the mortgage security; that he could only enforce the first by a suit in the Revenue Court for arrears of rent, and the second by

\* Second Appeal, No. 1156 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 1st June, 1885, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 23rd January, 1884.

suit in the Civil Court; and consequently there could be no bar to the latter suit by reason of the suit instituted in the Revenue Court, with reference to s. 43 of the Civil Procedure Code.

*Held* also that when the plaintiff obtained his decrees for rent the mortgage security did not merge in the judgment-debts, nor did he lose his remedy on it; that the two rights were distinct, and the right of action on the mortgage security was not lost because the execution of the decrees for rent was time-barred, the only effect of which was that the debt was not recoverable in execution, but the debt existed nevertheless so far as to enable the amount secured by mortgage to be recovered by suit in the Civil Court, so long as such suit were not barred by limitation. *Emam Momtaz-ood-deen Mahomed v. Rajcomar Dass* (1) referred to.

*Held* also that the amount which the plaintiff could recover by enforcement of the mortgage-security was limited to Rs. 3,000.

[R., 103 P.R. 1893.]

THE facts of this case are stated in the judgment of the Court.

Mr. *W.M. Colvin* and *Lala Juala Prasad*, for the appellant.

Mr. *J. E. Howard*, Mr. *C. Ross Alston*, and *Munshi Ram Prasad*, for the respondent.

### JUDGMENT.

OLDFIELD and TYRRELL, JJ.—The plaintiff leased three villages to the defendant, Ram Pathak, for two years, 1279 and 1280 fasli, at a rent of Rs. 3,000 a year, and the latter executed a deed, dated the 26th August, 1871, by which he covenanted to pay the annual rent and fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. He fell into arrears, and the plaintiff instituted suits in the Rent Court, and in 1874, obtained three decrees for arrears of rent. He took out execution of these decrees, and payment was arranged to be made by instalments, and the decrees were partially satisfied, and thus further execution is now barred by limitation. The plaintiff has now brought the present suit to recover the balance due by enforcement of the mortgage security under the deed dated the [25] 26th August, 1871, against Ram Pathak and Chunni Lal, who, on the 22nd August, 1878, purchased the mortgaged property.

We are only in this appeal concerned with the claim so far as it refers to Chunni Lal. He pleaded that the suit was barred under the provisions of s. 43; that since the rent decrees had become time-barred, the claim could not be maintained; and he also pleaded fraud and collusion between the plaintiff and Ram Pathak. The Court of first instance did not consider s. 43 was a bar, but that the decrees for rent being time-barred, a suit to enforce the mortgage security could not be maintained. The Judge, in appeal, admits that the rent decrees are time-barred, but considers that this affords no ground for not enforcing the claim on the mortgage security, and he overruled the plea of fraud and collusion and decreed the claim in full. The defendant Chunni Lal has appealed.

In our opinion the decree should be affirmed, and the several pleas on the part of appellant are invalid.

Under the deed dated the 26th August, 1871, Ram Pathak gave collateral security to the amount of Rs. 3,000 by a mortgage on certain immoveable property of his for the payment of the rent. The plaintiff had two separate rights of action—one on the contract to pay rent, the other on the mortgage security. He could only enforce the first by a suit in the Revenue Court to recover arrears of rent; the other he could only enforce by suit in the Civil Court. Consequently there can be no bar to the latter suit by reason of the suit instituted in the Revenue Court, with reference

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to the provisions of s. 43 of the Civil Procedure Code. Further, it is not the case, as was contended by appellant's counsel, that when the plaintiff obtained decrees for rent, the mortgage security merged in the judgment-debts, and he lost his remedy on it. The rights are distinct. The plaintiff's right of suit to enforce the mortgage arises by reason of there being an existing debt for rent, and remains till it is satisfied, or so long as he can institute a suit to enforce the mortgage. The mere taking of a money-decree does not extinguish the creditor's lien—*Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (1). Nor is the further contention valid [26] that the right of action on the mortgage security is lost because the execution of the decrees for rent of the Revenue Court is timebarred. The right which the plaintiff has to recover the sum of Rs. 3,000, secured by mortgage, is distinct from the right to recover arrears of rent. The last is based on a contract to pay rent, arrears of which are recoverable exclusively in the Revenue Court; the former on a contract securing a certain sum to plaintiff by a mortgage of property in the event of rent becoming due.

The recovery of the arrears of rent may be time-barred as a judgment-debt, but the debt is not necessarily extinguished. The only effect of the decrees being time-barred is that the rent is not recoverable in execution, but the debt exists nevertheless, so far as to enable the amount secured by mortgage to be recovered by suit in the Civil Court. The right to recover on the mortgage security can be enforced in the Civil Court so long as a suit for its enforcement in the Civil Court is not time-barred under the Limitation Act.

The amount which the plaintiff can recover is limited to Rs. 3,000, and that sum is decreed against the appellant by enforcement of the mortgage. The decree of the lower appellate Court is modified accordingly. The respondent will have his costs in all Courts in proportion against the appellant.

*Decree modified.*

9 A. 26 = 6 A.W.N. (1886) 284.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.*

SOHAWAN AND ANOTHER (*Defendants*) v. BABU NAND (*Plaintiff*).<sup>\*</sup>  
[6th August, 1886.]

*Appeal from appellate decrees—Applicability of provisions as to first appeals—Remand—Judgment of first appellate Court—Civil Procedure Code, ss. 564, 565, 574, 578, 584, 587.*

The judgment of a lower appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal, concluded, with general observations, as follows:—"The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. This Court, having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court.....The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration."

<sup>\*</sup> Second<sup>nd</sup> Appeal, No. 1 of 1886, from a decree of Pandit Rattan Lal, Additional Subordinate Judge of Ghazipur, dated the 11th September 1885, confirming a decree of Munshi Kalwant Prasad, Munsif of Ballia, dated the 17th June, 1885.

(1) 15 B.L.R. 408.

[27] Held that this was in law no judgment at all, inasmuch as it did not satisfy the requirements of s. 574 of the Civil Procedure Code, and that the decree of the lower appellate Court must therefore be set aside, and the record returned to that Court for a proper adjudication, in accordance with the provisions of that section. *Mahadeo Prasad v. Sarju Prasad* (1) referred to.

Observations by Mahmood, J., upon the distinction between the duties of the Courts, of first appeal and those of the Courts of second appeal in connection with the provisions of ss. 574 and 578 of the Civil Procedure Code, and with the remand of cases for trial *de novo*. *Ram Narain v. Bhawanidin* (2) and *Sheoambar Singh v. Lallu Singh* (3) referred to.

[F., 15 M.C.C.R. 61 (68) ; R., 1 L.B.R. 204 ; 8 O.C. 290.]

THE respondents in this case, the plaintiffs in the suit, obtained a decree in the Court of first instance (Munsif of Ballia). From this decree the appellants, defendants in the suit, appealed. The appeal came for hearing before the Additional Subordinate Judge of Ghazipur. The judgment of the Subordinate Judge, after setting forth the claim, the defence, the nature of the decree of the Munsif, and the effect of the pleas in appeal, continued as follows :—

"The point to be determined on appeal is, whether or not the decision is consistent with the merits of the case.

"This Court, having considered the evidence in the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court. The witnesses allege the possession of their respective parties. The disputes in the Revenue Courts (the plaintiff has filed copies) afford evidence favourable to the plaintiff and injurious to the defendants. The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration."

The appellants contended that the judgment of the lower Court was not in accordance with the provisions of s. 574 of the Civil Procedure Code, and should be set aside.

Mr. Niblett, for the appellants.

Lala Juala Prasad, for the respondent.

#### JUDGMENT.

STRAIGHT, Offg. C.J.—I am of opinion that the so-called judgment of the lower appellate Court, to which exception is taken was in law no judgment at all, because it does not satisfy the [28] requirements of s. 574 of the Civil Procedure Code, in not stating the points for determination raised by the pleas in appeal, the decision upon them, and the reasons for that decision. The remarks made by me in the recent case of *Mahadeo Prasad v. Sarju Prasad* (4) apply, *mutatis mutandis*, to that now before me, and no useful purpose would be served by repeating to-day the grounds stated therein by me for holding that decisions, like that of the Subordinate Judge here, are neither within the letter nor the spirit of the law declared in that behalf.

I decree the appeal and setting aside the decree of the lower appellate Court, direct that the record be returned to the Subordinate Judge, in order that he may adjudicate upon it in accordance with the provisions of the Civil Procedure Code. Costs of this appeal to be costs in the cause.

MAHMOOD, J.—I have arrived at the same conclusion as the learned Offg. Chief Justice ; but I am anxious to explain my reasons, because in the

(1) 8 A. 614.

(2) A.W.N. (1882) 104, see 9 A. 29, foot-note.

(3) A.W.N. (1882) 158, see 9 A. 30, foot-note.

(4) 8 A. 614.

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recent Full Bench ruling of this Court in *Jadu Rai v. Kanizak Husain* (1) a great deal of what I said in my judgment in connection with the remand of cases for trial *de novo* by the Court of first appeal has been understood by my learned brother Tyrrell as if it related also to the powers of this Court in second appeals. I am led to this conclusion on account of the observations which that learned Judge made in the Full Bench case which reference to *Mahadeo Prasad v. Sarju Prasad* (2), in which the present Offg. Chief Justice delivered the judgment in which I concurred. That case was not a first appeal, and had to be dealt with by us as a Court of second appeal, and the exact point which we had to consider was, whether the judgment of the lower appellate Court in entirely ignoring the provisions of s. 574 of the Civil Procedure Code, was such as we could accept, or it constituted such an irregularity as could not be covered by the provisions of s. 578 of the Code. My judgment in that case neither dealt with the question of *nullity*, nor can it be understood to relate to the question which had to be dealt with in the Full Bench case to which I have referred. But because the misapprehension has occurred, I must state my views in regard to the distinction which [29] exists between the duties of the Court of first appeal and those of the Court of second appeal in dealing with such matters.

Now, speaking generally, the whole of our Civil Procedure Code may be said to consist of four main departments of procedure: one relating to the ordinary procedure to be adopted by the Courts of first instance; another relating to the ordinary procedure of the Court of first appeal; another to the ordinary procedure in second appeals; and then there are rules as to incidental and miscellaneous matters which apply more or less to all the three departments which I have first described. Part VI of the Code deals with the subject of appeals, and Chapter XLI, which occurs in that part, relates to first appeals; and it is in that Chapter that ss. 562, 564, and 565 occur, as also s. 574, with which we are here concerned. These various sections are not primarily applicable to second appeals, to which Chapter XLII of the Code relates, but they, along with other rules, are made applicable to the second appellate Court, "as far as may be," on account of s. 587 of the Code. The phrase which I have just emphasized is an important expression in that section; and I have had to consider its effect in *Ram Narain v. Bhawanidin* (3); and again in *Sheoambar Singh*

(1) 8 A. 576.

(2) 8 A. 614.

(3) In this case the lower appellate Court erroneously disposed of the suit upon a preliminary point. It was contended on behalf of the respondent that, as the evidence upon the record was sufficient to enable the High Court to pronounce judgment and no essential evidence of fact had been excluded, the High Court was not competent to remand the case under s. 562 of the Civil Procedure Code, but must determine it itself.

Lala Jokhu Lal, for the appellant.

Munshi Kashi Prasad, for the respondent.

MAHMOOD, J.—I am of opinion that this contention cannot be allowed to prevail. Chapter XLI of the Civil Procedure Code lays down the procedure to be observed by the Courts in disposing of "appeals from original decrees," and the terms of s. 587 render the provisions of that Chapter applicable "as far as may be" to "appeals from appellate decrees"—*vis.*, second appeals under Ch. XLII. The wisdom of the Legislature in framing the Code in this manner is quite clear. It was obviously unnecessary to repeat all over again in Ch. XLII rules which, in all essentials, must necessarily be the same as those provided in Ch. XLI in regard to appeals from original decrees. The sole object of s. 587 seems to have been to avoid incurring the Code with superfluity and repetition of rules. In Ch. XLI itself is to be found s. 582, which is a similar illustration of the same policy. But it is equally clear to me that the provisions of Ch. XLI cannot be applied absolutely, literally, to appeals from appellate decrees, without causing a confusion which the Legislature can never have intended. The words "as far as may be" become meaning-

v. *Lallu Singh* [30] (1); and on both those occasions I expressed views to which I still adhere—views which are in keeping with the opinion of

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less if they are not to be taken to mean, as in my judgment they obviously do, that the rules contained in Ch. XLI are to be applied to second appeals *mutatis mutandis*. Thus, in applying s. 562 to second appeals like the present, the word "suit must be taken to mean appeal;" the words "so as to exclude any evidence of fact" must be read to signify "so as to exclude the consideration of any evidence of fact." For in applying the rules of Ch. XLI to appeals under Ch. XLII, the provisions of the most important section of the latter chapter—viz., s. 584, cannot be lost sight of. Otherwise in many cases like the present in which the lower appellate Court erroneously disposes of an appeal on a preliminary point of law, it would devolve upon this Court to determine in second appeal questions of the weight of evidence and other matters which are assigned by the Code to the first appellate Court.—In other words, the error of the district appellate Courts would have the effect virtually of converting second appeals into appeals from original decrees. This I am of opinion the law does not contemplate, and it follows from what I have already said that neither s. 565 or s. 566 is applicable to the present case. . . . The appellant is entitled to an adjudication of his rights by the lower appellate Court on the evidence and merits of the case.

(1) In this case the Court of first instance dismissed the suit on the merits. The plaintiffs appealed to the District Judge, whose judgment was as follows:—"The suit appears to me to be a bit of wanton litigation. I cannot find anything tangible upon which the claim is grounded; the appeal is dismissed with costs." In second appeal by the plaintiffs it was contended on their behalf that the judgment of the lower appellate Court could not be regarded as a judgment within the meaning of s. 574 of the Civil Procedure Code. On behalf of the respondent it was contended that the judgment of the lower appellate Court must be regarded as one confirming the views of the Court of first instance; and that, even if it were defective, the High Court could only remand the case under s. 566 for the trial of the issues arising in the case and could not set aside the decree of the lower appellate Court as s. 562 did not warrant such a course and s. 564 prohibited a remand for a fresh decision by the lower appellate Court.

*Lala Lalla Prasad*, for the appellants.

*Pandit Bishambar Nath*, for the respondent.

MAHMOOD, J.—I am of opinion that this contention (respondent's) is unsound, and that the appeal must prevail. In a recent case, *Ramnarain v. Bhawanidin*, I have explained how the provisions of s. 562 are controlled by the language of s. 587, which renders the provisions of Chapter XLI applicable to appeals from appellate decrees under Chapter XLII. The rules contained in the former Chapter were intended to be applicable in the first instance, to appeals from original decrees, and those rules are not capable of being literally applied to appeals from appellate decrees. The Court of second appeal can apply those rules only, *mutatis mutandis*, as the Legislature intended, by using the words "as far as may be" in s. 587, Civil Procedure Code. In the case above cited it was held that in applying s. 562, Civil Procedure Code, to judgments of the Court of first appeal, the words "so as to exclude any evidence of fact," used in that section, must be read to signify "so as to exclude the consideration of any evidence of fact." In the present case the argument upon which the contention of the learned pleader for the respondent is based is, that under s. 562 the power of the Court of second appeal to remand a case to the Court of first appeal for decision of the case *de novo*, is limited to case in which the lower appellate Court has erroneously disposed of the appeal upon a preliminary point." And it is contended that, however defective the judgment of the lower appellate Court in the present case may be, it has not disposed of the case on a "preliminary point," and s. 562 is therefore not applicable. It is further argued that there is no other provision in the Code which would enable us to remand the case for disposal *de novo* by the lower appellate Court. But it seems to me that if such a narrow interpretation is to be adopted, this Court must, in all cases in which the lower appellate Court declines to exercise its jurisdiction, or fails to perform its functions properly, undertake the duty of disposing of such cases on the merits. But it is clear to me that our functions, in appeals from appellate decrees are regulated by the provisions of s. 584 and the only ground upon which we can interfere with the decrees of lower appellate Courts are those enumerated in clauses (a), (b), and (c) of that section. Those clauses are, however, wide enough to justify our setting aside the decree of the lower appellate Court in this case and remanding the case to that Court for a decision *de novo*. The judgment of the lower appellate Court, in my opinion, is no judgment at all, for it fails to comply with each and every one of the requirements of the Civil Procedure Code. S. 574 enumerates the essential elements of which the judgment of the appellate Court should consist, and every one of those elements is wanting



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Straight and Tyrrell, JJ., in *Sheoratan Rai v. Lappu Kuar* (1), where those learned Judges held that s. 565 of the Code does not apply to second appeals.

I have referred to these cases as drawing a clear distinction between the duties of the Court of first appeal and those of the Court of second appeal, both in connection with the provisions of s. 574 and s. 578, as well as in connection with the remand of cases for trial *de novo*. Now, all my observations in the Full Bench case, referred to by me, expressly related to the impropriety of remands for new trials in the cases which I there discussed, and which were before this Court in its jurisdiction as the Court of first appeal—a jurisdiction which must be regulated by Chapter XLI of the Code. But the jurisdiction of this Court in second appeals under Chapter XLII of the Code is limited to the matters provided for by the three clauses of s. 584; and it is only by reason of s. 587 that, "as far as may be," we have to apply here in second appeal to this case

in the judgment of the lower appellate Court in this case. The judgment neither states "the points for determination" nor "the decision thereupon" and of course "the reasons for the decision" are totally wanting. According to my view of the law, s. 574 is a *resume mutatis mutandis*, of the provisions of the Code applicable to the judgments of the Courts of first instance, and the object of the section is to impose upon the Courts of first appeal duties similar to those imposed upon the Courts of first instance in respect of judgments. S. 146 lays down that "at the first hearing of the suit, the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to the Court to depend." Again s. 204 lays down that "the Court shall state its finding or decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit." Now, supposing a case in which the Court of first instance, without framing any issues and without taking any evidence, records a judgment in which it fails to state its finding or decision, or the reasons thereof, and dismisses the suit, the question would arise whether the Court of first appeal could not set aside such a decree and remand the case for trial *de novo*. It seems to me that the answer to this question must be the same as the answer to the question raised in this appeal; for I hold that (subject to the provisions of s. 584) in matters of this kind the provisions of s. 587 give us the same powers, *mutatis mutandis*, in regard to the judgments and decrees of the Court of first appeal as the latter possesses in regard to the decisions of the Court of first instance. And, in my opinion, in a case such as I have supposed the Court of first appeal would be perfectly justified by law in setting aside the decree of the Court of first instance, and remanding the case to that Court for trial *de novo*, the authority for such procedure being the provisions of s. 562, Civil Procedure Code. According to my view the expression "preliminary point" used in that section is not confined to such legal points only as may be pleaded in bar of suit, but comprehends all such points as may have prevented the Court from disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact. As an illustration of the latter, a finding by a Court of first instance, that the plaintiff is not the son and heir of the deceased mortgagor, though a question of fact, would be a preliminary point in a suit for redemption; and if on that finding the Court has dismissed the suit without entering into the merit of the various pleas relating to the mortgage, and without trying the issues arising from such pleas, the Court of appeal, reversing that finding, can remand the case under s. 562. In the present case the erroneous view taken by the lower appellate Court has prevented it from considering the case at all on the merits; and the "preliminary point" (so to say) on which the decree of that Court is based, is that the suit is a "bit of wanton litigation" and that there is nothing "tangible upon which the claim is grounded." As there is no rule of law by which such considerations can bar the disposal of a case on the merits, I would decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court under s. 562 for a proper adjudication on the merits; the costs of this appeal to abide the result.

BRODHURST, J.—The Judge in disposing of the appeal has certainly not complied with the provisions of the law, and I therefore concur in remanding the case to the Judge to dispose of the pleas raised in appeal, and to write a judgment in accordance with the provisions of s. 574, Civil Procedure Code.

(1) 5 A. 14.

the provisions of s. 578 of the Code. In my opinion that section cannot be so applied as to throw upon [31] this Court, as a Court of second appeal, duties which the law imposes only upon the Courts of first appeal, and which duties would obviously go beyond the limits of s. 584 of the Code.

Such being my view of the law, I cannot but hold that s. 574 of the Code contains one of the most salutary provisions of the law; and that considering that this Court in second appeal is bound to accept the findings of fact arrived at by the lower appellate Courts, we must insist upon a due obedience by those Courts of the mandate of the Legislature contained in that section. I must not be taken to say that any kind of irregularity will by itself operate to reduce the judgment of the lower appellate Court to a nullity, or necessarily require a case to be sent back to such Court for being tried *de novo*. For, in the case before us, the learned Judge of the lower appellate Court, in defining the exact question which he had to determine, simply says:—"The point to be determined on appeal is, whether or not the decision is consistent with the merits of the case." This the learned Judge of the lower appellate Court regarded as the only point which he had to deal with; but the point is an issue which might, if recognized as correct, apply absolutely to every kind of litigation that might [32] come before a Court of first appeal. But the fact is, that a proposition so roundly worded is no issue at all, because it does not specify the exact questions which arise in the case and required determination, within the meaning of s. 574 of the Code. Then [33] again, the substantial part of the judgment of the lower appellate Court consists of the following:—

"The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration."

I cannot regard an expression of sentiments of this character, as a judgment within the meaning of s. 574 of the Code, and because, as I have already indicated, s. 564 and s. 565 are not in their integrity applicable to the Court of second appeal, and also because s. 584 of the Code prohibits us from dealing with this case, as if we were the Court of first appeal and had to deal with the evidence, I agree with the learned Chief Justice in holding that the only course open to us as a Court of second appeal is to set aside the decree of the lower appellate Court, and to remand the case to that Court for a proper adjudication upon the merits, with reference to the specific provisions of s. 574 of the Civil Procedure Code. Costs to abide the result.

*Case remanded.*

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AUG. 6.  
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APPEL-  
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9 A. 26=  
6 A.W.N.  
(1886) 283.



9 A. 33=6 A.W.N. (1886) 248.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*MANSA DEBI (*Decree-holder*) v. JIWAN LAL AND OTHERS  
(*Judgment-debtors*).<sup>\*</sup> [10th August, 1886.]1886  
AUG. 10.  
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APPEL-  
LATE  
CIVIL.  
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9 A. 33=  
6 A.W.N.  
(1886) 248.*Decree for maintenance—Decree directing payment of a certain sum every month for life—Execution of decree—Declaratory decree.*

Where a decree ordered the defendants to pay to the plaintiff the sum of Rs. 15 per mensem by way of maintenance during her lifetime, and directed that such maintenance should be charged on certain zemindari property—held that the decree-holder could obtain the amount ordered in execution of the decree, which was more than a mere declaration of right, and which, by allowance of a fixed rate per mensem, stood exactly on the footing of a decree ordering payment by instalments. *Peareenath Brohmo v. Juggesure* (1) referred to.

[Appr., 19 C. 139; R., 13 C.P.L.R. 156; D., 15 O.C. 99 (105)=15 Ind. Cas. 389.]

THE facts of this case are stated in the judgment of the Court.  
Pandit *Nand Lal*, for the appellant.  
The respondents did not appear.

## JUDGMENT.

[34] OLDFIELD, J.—This appeal raises a question as to the proper interpretation, for the purposes of execution, to be given to a decree dated the 19th July, 1884, modifying a decree of the Subordinate Judge dated the 18th July, 1883. The suit in which those decrees were passed was brought to have an allowance, by way of maintenance, awarded to the plaintiff, payable by the defendants. The decision of the Subordinate Judge directed that a sum of Rs. 15 per mensem should be paid by the defendants to the plaintiff, and this Court affirmed that portion of the decree, but modified the remainder by directing that such allowance should be charged on certain zemindari property. The decree-holder has taken out execution of decree for a sum of money as maintenance at Rs. 15 per mensem, from the 28th October, 1882, to the 28th May, 1885, and costs. The Subordinate Judge has allowed execution to proceed for the costs, but disallowed it for the remainder of the decree on the ground that the decree must be looked upon as a declaratory decree merely, and the decree-holder's remedy is to bring suits for arrears of maintenance as they fall due. An appeal has been filed by the decree-holder, and in my opinion the plea that the decree sought to be executed has been misconstrued by the lower Court is valid. The decree directed defendants to pay every month, during the lifetime of the plaintiff, the sum of Rs. 15, and I see no reason why that sum cannot be obtained by the decree-holder in execution thereof. The decree is more than a mere declaration of right, and in this view I am supported by *Peareenath Brohmo v. Juggesure* (1), Norman, C. J., giving judgment in that case, said that in the Court's opinion a decree for maintenance, by payment of a fixed rate per mensem, stands exactly on the footing of a decree ordering payment by instalments. Concurring in this view, I would modify the order of the Subordinate Judge dated the 1st August, 1882, and direct that the decree-holder's application be dealt with in accordance with these remarks.

MAHMOOD, J.—I am entirely of the same opinion.

<sup>\*</sup> First Appeal No. 170 of 1885, from an order of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 1st August, 1885.

(1) 15 W.R. 128.

9 A. 35=6 A.W.N. (1886) 248.

## [35] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*PROSONNO MAI DEBI (*Plaintiff*) v. MANSA (*Defendant*).\*

[11th August, 1886.]

*Landholder and tenant—Suit by landholder for removal of trees planted by tenant—Jurisdiction—Civil and Revenue Courts—Act XII of 1881 (N.-W.P. Rent Act), s. 93 (b), (c), (cc).*

*Held that a suit by a landholder against his tenant for the removal of certain trees planted by the latter on land let to him for cultivating purposes by the former did not fall within s. 93 of the N.-W.P. Rent Act (XII of 1881), and was cognizable by the Civil Courts. Deodat Tewari v. Gopi Misr (1) questioned.*

[Overruled, 23 A. 486 ; R., 10 O.C. 188.]

THE plaintiff in this case sued the defendant for the removal of certain trees planted by the latter on land let to him for cultivating purposes by the former. Both the lower Courts held that the Civil Courts were debarred from taking cognizance of the suit by the provisions of s. 93 of Act XII of 1881 (N.-W.P. Rent Act), inasmuch as the matter in dispute was one in which a suit of the nature mentioned in clauses (b), (c), or (cc), of that section might be brought in the Revenue Court. The lower appellate Court relied on *Deodat Tewari v. Gopi Misr* (1).

In second appeal the plaintiff contended that the lower Courts erred in holding that the Civil Courts were not competent to entertain the suit.

*Babu Jogindro Nath Chaudhri*, for the appellant.

*Lala Datti Lal*, for the respondent.

## JUDGMENT.

EDGE, C.J.—I am of opinion that this case must be remanded to the Court of first instance, to be tried and disposed of according to law. I think the lower Court has taken an incorrect view of the effect and scope of s. 93 of the Rent Act. This suit was not one for ejectment ; it was a suit brought by a landlord who, so far as appears, was not asking for the ejectment of his tenant, but was seeking to compel him to remove trees which, we must assume for the purposes of the present case, the plaintiff was in a position to show had been planted upon land contrary to custom on the terms of the tenure. Now, with all due deference to the opinion of the Judges who decided the case of *Deodat Tewari v. Gopi Misr* (1), I have much doubt whether in that case I should have come [36] to the same conclusion. It might possibly be said that this was a suit to prohibit an act or breach mentioned in cl. (cc) of s. 93 of the Rent Act. The suit, however, is one to obtain a mandatory injunction not to prohibit a person from planting trees, but to uproot trees which have already been planted. Without expressing any view on the merits, I would remand the case to the first Court under s. 562 of the Code.

The defendant must bear the costs of the litigation hitherto, for he has prevented the plaintiff from having had his suit tried, and has put him to the cost of going to the Judge and coming to this Court.

OLDFIELD, J.—I am entirely of the same opinion. *Case remanded.*

\* Second Appeal No. 125 of 1886, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 19th November, 1885, confirming a decree of T. R. Wyer, Esq., Judge of the Small Cause Court at Allahabad, exercising the powers of a Subordinate Judge, dated the 11th June, 1885.

(1) A. W. N. (1882) 102.

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6 A.W.N.  
(1886) 248.



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SEP. 13.

APPEL-

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CIVIL.

9 A. 36-6 A.W.N. (1886) 293.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice.*AMIR HASAN (*Decree-holder*) v. AHMAD ALI (*Judgment-debtor*).\*

[13th September, 1886.]

9 A. 36.

6 A.W.N.

(1886) 293.

*Civil Procedure Code*, ss. 545, 546, 547—*Execution of decree*—*Review of judgment*—*Stay of execution pending application for review*—*Jurisdiction*—*Civil Procedure Code*, s. 623—"Any other sufficient reason."

S. 647 of the *Civil Procedure Code* provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with ss. 545 and 546, give no power to the Court or a Judge, after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree. No such power exists under the Code.

S. 623 gives a more extensive right of review than existed in England, where a review could only be obtained by showing that there was apparent on the record error in law, or that new and relevant matter had been discovered after the judgment which could not possibly have been used when the judgment was given, or that judgment was obtained by fraud. The words "or for any other sufficient reason" mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases "any other sufficient reason" may depend on a question of law, or a question of fact, or a mixed question of law and fact. *Reasut Hosein v. Hadjee Abdoolah* (1) referred to.

In case where a stay of execution or an injunction is granted on an *ex parte* application, liberty to apply to the Judge to vary or set aside his order must be implied, if not expressed. *Fritz v. Hossin* (2) referred to.

[37] On the 29th July, 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree dated the 18th March, 1886, for review of judgment. On the 28th August, the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex parte* granting this application. Subsequently, the opposite party applied under s. 623 of the *Civil Procedure Code* for a review of the *ex parte* order on the grounds (i) that the Court had no jurisdiction to make it, and (ii) that the application of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review.

Held that the Court had power, under s. 623 of the Code, to review the *ex parte* order of the 28th August, and that such order had been made without jurisdiction, and ought to be reviewed.

Held that the decree of the 18th March being final and unappealable, and no application for review of judgment having been granted within the meaning of s. 630 of the Code, the application for stay of execution did not fall within s. 545 or s. 546 nor did s. 647 apply to it, nor any other provision of the Code.

Held that, having regard to the circumstances that the order of the 28th August was made without jurisdiction, and upon an *ex parte* application of which the opposite party had no notice, and interfered perhaps indefinitely with his right to obtain the money in Court under the final and unappealable decree in his favour, as to which no application for review had been granted, and that the application for review of judgment was made after the statutory period of ninety days had expired and contained no explanation of the delay, sufficient reason for reviewing the order of the 28th August had been shown.

[R., U.B.R. (1892-1896) Civil 153; 11 C.P.L.R. 41.]

\* Application for review of an order of Sir John Edge, Kt., Chief Justice, dated the 28th August, 1886.

(1) 3 I.A. 221.

(2) L.R. 14 Ch. Div. 542.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Sundar Lal*, for the applicant.

Mr. *Amiruddin*, for the opposite party.

### JUDGMENT.

EDGE, C.J.—This is an application to me, under s. 623 of the Civil Procedure Code, for a review of an order made by me on the 28th of August last, staying the execution of a decree in the Court of the Subordinate Judge, Allahabad, in the case of *Ahmad Ali v. Amir Hasan Khan*.

It appears that the suit, out of which the application on which I made the order to stay arose, was one brought by Ahmad Ali against Amir Hasan Khan for malicious prosecution. The action came on for trial before Mr. Abinash Chander Banerji, Subordinate Judge, who, on the 30th June, 1884, decreed Rs. 500 [38] against the defendant with proportionate costs and interest at 6 per cent. per annum. Against this decree each side appealed to the Judge of Allahabad, with the result that on the 6th May, 1885, the defendant's appeal was dismissed with costs, and the Judge, on the plaintiff's appeal, made a decree in his favour for Rs. 2,835, with costs proportionate to that sum in both Courts. By a judgment of this Court in appeal the decrees of the Judge of Allahabad and the decree of the Subordinate Judge were set aside, and the appeal of Amir Hasan Khan to this Court decreed with costs. It appears that Amir Hasan Khan, on the 22nd August, 1884, to save execution being taken out against him on the decree of the Subordinate Judge, deposited in Court Rs. 711-3-6 (being the decretal amount with cost), praying that that amount should be kept in deposit until his appeal should be decided. Notwithstanding this prayer, that amount was paid out to Ahmad Ali. It also appears from the petition of Amir Hasan Khan in this application, that after the decree of the Judge of Allahabad on appeal Ahmad Ali took out execution for the sum of Rs. 2,883-3, in consequence of which Amir Hasan Khan deposited the latter amount in Court on the 11th July, 1885. On the 29th July, 1886, Ahmad Ali applied to my brother Tyrrell for an order for a review of the judgment of this Court of the 18th March, 1886, and my brother Tyrrell ordered that the petition should be laid before the Bench concerned, with the office report. This application for a review of the judgment of the 18th March last has not yet been granted.

On the 28th August last Mr. *Amiruddin*, on behalf of Mr. *Reid*, counsel for Ahmad Ali, applied *ex parte* to me, sitting as vacation Judge, for the order in question on this application. The petition on which Mr. *Amiruddin* applied was as follows:—

"Whereas the above-mentioned petitioner (that is, Ahmad Ali, has filed an application for review of the judgment of the Honourable Court in the above suit, and an order has been passed referring the application to the Bench which delivered the judgment, petitioner prays that execution of the decree now pending in the Court of the Subordinate Judge, Allahabad, be stayed pending the disposal of the application, on the ground that the decree-holder's circumstances are such that petitioner apprehends that he may be unable to recover the amount payable under the decree of the [39] Honourable Court from the decree-holder, in the event of the application for review of judgment being granted."

The object of this application was to prevent Amir Hasan Khan obtaining payment out of the Court to him of the Rs. 2,883-3, which he had deposited in Court under the circumstances above mentioned.

I assumed, without, asking any question on the point, that the

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application for review of the judgment of the 18th March last had been made within time. It appears that had I asked the question Mr. *Amiruddin* could not have given me any information on the point. I merely mention this incidentally, as my judgment does not depend on whether or not the application for review of the judgment of the 18th March was in fact made within time. On the 3rd instant Mr. *Sundar Lal*, on behalf of Amir Hasan Khan, applied to me to review my *ex parte* order of the 28th August, and on the 8th of this month Mr. *Amiruddin* appeared for Ahmad Ali to show cause why the application for a review of my order should not be granted, and my order reviewed and set aside. He contended that if I had not jurisdiction under s. 545 or 546 of the Civil Procedure Code to make the order in question—which at first he did not admit—I had in any event jurisdiction to make the order under s. 647 of the same Code; and in support of his contention he cited the case of *Tara Chand Ghose v. Anund Chander Chowdry* (1). He further argued that I had no power to review my order, contending that under s. 623 of the Civil Procedure Code, an applicant was not entitled to a review of an order unless he showed that he desired to obtain such review from the discovery of new and important matter or evidence which, after the exercise of the due diligence, was not within his knowledge, or could not have been produced by him at the time the order was made, or on account of some mistake or error apparent on the face of the record. In this argument he put no construction upon, and offered no explanation of, the words "or for any other sufficient reason," which are found in that section, and which cannot be held to be limited to the discovery of new or important matter or evidence, or the occurring of a mistake or error apparent on the record.

On the other side Mr. *Sundar Lal* argued that I had power to review my order; that my order was made without jurisdiction; [40] that ss. 545, 546, and 647 of the Civil Procedure Code did not, nor did any of them, apply; and in any event that as the application for review of the judgment of the 18th March last was not made until the 29th July, that application was out of time, and consequently there could be no review and no order to stay pending such review; and also that I ought to have been informed that that application for review was out of time. Mr. *Amiruddin* stated that when he made the application to me of the 28th August, he had no information as to the date of the judgment of the Court of the 18th March, and objected that it was for the Bench to which my brother Tyrrell referred the application for review of the judgment of the 18th March, and not for me, to decide whether the application for review of the judgment was not within time, and stated that he was not sufficiently instructed as to the cause of the delay to enable him to argue that point before me. I took time to consider my judgment.

I am of opinion that this is a case in which I have power to review, and in which I ought to review, my order of the 28th August last. In my opinion, s. 623 of the Civil Procedure Code gives a much more extended right of review than that contended for by Mr. *Amiruddin*. If his contention were correct, parties here would not have as extended a right to claim a review as parties to actions in England had. In England an action to review a judgment could be maintained by showing that there was apparent on the record error in law, or that new and relevant matter had been discovered after the judgment, which could not possibly have been used when the judgment was made, or that judgment was obtained by fraud. Effect must be given to the words "or for any other sufficient

reason" in s. 623, and by those words I understand that the reason must be one sufficient to the Court or the Judge before whom application for review is made, subject probably to an appeal. Whether or not there is in such cases "any other sufficient reason" may, in my opinion, depend on a question of law, or upon a question of fact, or upon a mixed question of law and fact. If it was intended to limit the right to a review to cases in which such a right extended in England, it would have been easy for those who framed the Civil Procedure Code (Act XIV of 1882), instead of using the words "or for any other sufficient reason," [41] to have inserted some such words as "or on the ground of the judgment or order having been obtained by fraud."

In the case of *Reasut Hosien v. Hadjee Abdoollah* in the Privy Council (1), an appeal from the High Court of Bengal, their Lordships said, when discussing the somewhat similar provisions of Act VIII of 1859, that they were not prepared to say that there was an absolute want of jurisdiction (to review) whenever the parties failed to show that there was either positive error in law or new evidence to be brought forward which could not have been brought forward on the first hearing. Whether or not there is any sufficient reason for this application to review, I shall discuss presently, after I have dealt with the question of my jurisdiction or want of jurisdiction to make the order of the 28th of August.

The Judgment in appeal of this Court of the 18th March last was final and not appealable, and at the date of my order and at present no application for a review of that judgment had or has been granted within the meaning of s. 630 of the Civil Procedure Code. This was consequently not a case of an application for a stay of execution of an appealable decree before the expiry of the time allowed for appealing therefrom under s. 545 of the Civil Procedure Code. Much less is it a case within s. 546. There is no appeal pending in this case. Now, does s. 647 of the Civil Procedure Code apply? I think it does not. I think that section was probably intended to apply to such matters as applications for the appointment of guardian, and for the custody of infants, and to proceedings under the Divorce Act, and to matters of procedure in the Revenue Courts of these Provinces not specially provided for, and to the recording of evidence in probate cases, and many other similar matters other than suits and appeals. I think that if it had been intended that the Court or a Judge should have power, after a final unappealable decree and before the granting of an application to review, to order a stay, that power would have been given by the introduction into the Civil Procedure Code of distinct, specific, and appropriate words, such as we find in ss. 545 and 546, which deal with the power to stay execution in appealable decrees. The absence of any such words in the Civil Procedure Code, and particularly in Chapter XLVII, [42] which deals with the subject of the review of judgments and orders, leads me clearly to the conclusion that it was not intended that the Court or a Judge should have the power which I assumed to have when I made the order in question.

I consequently come to the conclusion that I had no jurisdiction to make that order. Is there, then, sufficient reason for Amir Hasan Khan desiring to obtain a review of my order? I think there is. That order I hold was made by me without jurisdiction. It was made on an *ex-parte* application, of which Amir Hasan Khan had no notice, and on which consequently he had no opportunity of being heard. That order interfered, possibly

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indefinitely, with his clear right to obtain the money in Court as the result of the final and unappealable decree of the Court in his favour, as to which no application for review had been granted. It is an order which I think I may say I would not have made (even if I had jurisdiction to make it) had I been aware that the decree of this Court was made on the 18th March last, and no application for a review made or filed until the 29th of July, and that in the petition for a review, which was placed before my brother Tyrrell, no explanation of the delay was attempted to be given, and no grounds stated, showing any reason for suggesting that the statutory period of ninety days had not expired. Had Amir Hasan Khan been heard on the application for my order, all these matters would have been brought to my attention and fully discussed. For myself, until set right—if I be wrong—I am also prepared to hold that in cases where a stay of execution or an injunction is granted on an *ex-parte* application, liberty to apply to the Judge to vary or set aside his order must be implied, if not expressed, otherwise hardship, expense, and delay might result to the opposite side from the granting of an *ex-parte* application, for the granting of which, in the first instance, a *prima facie* case was made out. I find that Mr. Justice Fry in *Fritz v. Hobson* (1) held that in every order of the Court in England, liberty to apply to the Court is implied without its being expressly reserved. Holding the opinions above expressed, I allow this application, and I review and set aside my order of the 28th August last with cost (2).

9 A. 43=6 A.W.N. (1886), 289.

#### [43] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Oldfield.*

NATHU MAL (*Purchaser*) v. LACHMI NARAIN (*Decree-holder*).<sup>\*</sup>  
[21st October, 1886.]

*Civil Procedure Code, ss. 313, 320—Transfer of execution of decree to Collector—Jurisdiction of Civil Courts to entertain application under s. 313—Rules prescribed by Local Government under s. 320—Notification No. 671 of 1880, dated the 30th August.*

*Held* that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree which had been transferred for execution to the Collector in accordance with the rules prescribed by the Local Government was entertainable by the Civil Courts, and the Collector had no jurisdiction under the Code or under Notification No. 671 of 1880 to entertain it. *Madho Prasad v. Hansa Kuar* (3) referred to.

[D., 11 A. 94.]

THIS was an appeal from an order of the Subordinate Judge of Bareilly, dated the 10th April, 1886, rejecting an application under s. 313 of the Civil Procedure Code. It appeared that under the rules prescribed by the Local Government under s. 320 of the Civil Procedure Code (Notification No. 671 of 1880, dated the 30th August), the execution of a decree was transferred by the Subordinate Judge to the Collector.

\* First Appeal No. 82 of 1886, from an order of Lala Banwari Lal, Subordinate Judge of Aligarh, dated the 10th April, 1886.

(1) L.R., 14 Ch. Div. 542.

(2) In reference to the construction placed by Edge, C.J., upon s. 647 of the Civil Procedure Code, see *Naigappa v. Gangawa*, 10 B. 433.

(3) 5 A. 314.

The Collector sold the property ordered to be sold, a share in a village, on the 20th January, 1886, and it was purchased by the appellant, Nathu Mal. The sale was subsequently confirmed by the Collector under the rules mentioned above. After this Nathu Mal applied to the Subordinate Judge, under s. 313 of the Civil Procedure Code, to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. This application was opposed by the decree-holder, and the Subordinate Judge rejected it on the ground that it was not entertainable by him. He observed as follows :

"In my opinion the application of the purchaser (applicant) is not entertainable under s. 313 of the Civil Procedure Code, because the landed share was not sold by this Court, but the execution of the decree was transferred to the Collector. S. 313 applies to sales made by the order of the Court, and not to sales made by the Collector under decrees transferred to his file. A sale like the present cannot be set aside except on the application of the decree-holder or the judgment-debtor whose property has been sold. The Court is bound to obey these rules, and these rules relate especially [44] to sales effected by the order of the Collector. Rule 13 of the Notification provides for the confirmation of sales as regards the parties to the suit and the purchaser. Objection to the confirmation of the sale is made cognizable by the Revenue Court, and there is nothing in the order to enable the purchaser to question the sale by an application to the Civil Court. The proceedings of the Revenue Court adopted in selling this land, in pursuance of Notification No. 671 of 1880, dated the 30th August, cannot be questioned in this miscellaneous proceeding, when there is no provision allowing the purchaser to make an application of this kind."

The purchaser appealed to the High Court, contending that the lower Court had improperly refused to entertain the application.

Mr. G.E.A. Ross and Babu Rattan Chand, for the appellant.

Pandit Sundar Lal, for the respondent.

#### JUDGMENT.

EDGE, C.J.—In this case a decree, ordering the sale of certain immoveable property, had been transferred to the Collector, who, in accordance with the direction, sold. The purchaser alleges that it was after such sale he discovered that the judgment-debtor had no saleable interest in the property sold by the Collector. Thereupon he applied to the Judge to set aside the sale under, I presume, s. 313, Civil Procedure Code.

The learned Judge was of opinion that, inasmuch as the sale had been transferred to the Collector, he had no jurisdiction in the matter, and declined to entertain the application, from which order an appeal has been preferred before us. The only question before us is, had the Judge jurisdiction to entertain the application made to him? It is contended by Pandit Sundar Lal that when once execution of a decree has been transferred to the Collector, the Civil Courts thenceforth become divested of all jurisdiction, and the only thing they can do is to see to the application of the money, the proceeds of such sale, on its being handed over by the Collector, and has relied on *Madho Prasad v. Hansa Kuar* (1) as an authority for that proposition. Now, assuming that the execution of the decree had never been transferred to the Collector, let us for a moment consider what is the reason for the introduction of s. 313 into the Code of Civil Procedure.

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(1) 5 A. 314.



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[45] It was introduced in order that a speedy, quick, and inexpensive remedy might be provided by which a purchaser could get out of his difficulty in cases in which he, buying property at a sale under a decree, found that the judgment-debtor had no saleable interest in the property. For certain reasons it was decided that certain of these sales should be transferred to the management of Collector; and accordingly s. 320 was introduced into the Code, and the Local Government had thereunder power to declare by notification that the execution of certain kinds of decrees should be transferred to the Collector. But there is nothing to show that the Local Government had power to make any rule enabling the Collector to deal with questions of title. I can well understand why such a power should not have been delegated to the Collector. Questions of title are sometimes the most difficult ones to deal with, and they should be left in the hands of the constituted Courts of this country. Further, the Notification by the Local Government, No. 671, dated the 30th August, 1880, specially provides that the Collector shall not before sale exercise any jurisdiction whatever on an objection raised to the sale. If any question of sale arises, it may be brought before the Court which made the decree, and that Court may deal with it. It can also be brought before the Collector, but with the only result that he must send it on for disposal to the Civil Courts. It is obvious that it was never intended by the framers of the Notification of 1880, or of the Civil Procedure Code, that the Collector should have jurisdiction to deal with matters relating to title. Let us consider whether, according to the wording of these sections of the Code, the Civil Courts have not power to entertain applications such as this one in the present case. In s. 313, Civil Procedure Code, it is provided that the purchaser at "any such sale" may apply to the Court. "Any such sale" must refer to a sale under Chapter XIX, s. 311. Consequently, if this is a sale under Chapter XIX, and there is no express provision taking away the power of the Civil Courts to deal with it, it follows that jurisdiction still remains with us. That it is a sale under Chapter XIX is admitted by Pandit *Sundar Lal*. It is a sale in pursuance of a decree. It is a sale which has its very existence by reason of the provisions of Chapter XIX of the Civil Procedure Code. I have therefore no hesitation in saying [46] that this case comes within s. 313, and that the Civil Courts had jurisdiction to entertain the application.

The appeal will therefore be allowed with costs, and the Judge below is directed to hear the application on its merits.

OLDFIELD, J.—I concur.

*Appeal allowed.*

9 A. 46 = 6 A.W.N. (1886) 287.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*GULZARI LAL (*Plaintiff*) v. DAYA RAM AND ANOTHERS (*Defendants*).<sup>\*</sup>  
[21st October, 1886.]*Execution of decree—Transfer of decree—Civil Procedure Code, ss. 232, 244—Appeal—Act III of 1877 (Registration Act), s. 28.*

THE words of s. 28 of the Registration Act (III of 1877), "some portion of the property" should not be read as meaning some *substantial* portion. *Sheo Dayal Mal v. Hari Ram* (1) dissented from.

The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently *M* transferred the decree to other persons, and the co-transferees applied under s. 232 of the Civil Procedure Code to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the grounds that *M*'s name had not been substituted for the names of the original decree-holders who had transferred to him, and that the transfers to *M* were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate, in accordance with s. 28 of the Registration Act (III of 1877). It appeared that no notice had been issued to *M*, under s. 232 of the Civil Procedure Code, that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below.

*Held* that the matter involved questions arising between the parties to the decree or their representatives within the meaning of s. 244 (c) of the Code, and that the order allowing the application was therefore a decree within the definition of s. 2, and was appealable as such.

*Held* that, even assuming that the judgment-debtor had a *locus standi* to raise the objection that notice had not been issued to the applicant's transferor, he had no possible interest in the question, and could not be prejudiced by the passing of the order; that it was not necessary to cite the representatives of the transferor; and that the order not being one upon which execution of the decree could issue, but merely for a transfer of names, the objection that the transferor had not been cited under s. 232 was not a substantial one.

[47] *Held* that the objection in reference to s. 28 of the Registration Act could only properly be raised between the transferor and the transferee, and not by the judgment-debtor, and moreover had no force.

*Held* that it could not be said that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder was a condition precedent to the assignor's passing title under the assignment.

[F., 16 A. 483; R. 5 M.L.T. 278 = 34 M. 442 (448) = 1 Ind. Cas. 535.]

On the 30th September, 1882, Hayat Begam and Amanat Ali obtained a decree against Sheo Narain and Gulzari Lal for the sale of certain mortgaged property. On the 2nd October, 1882, Hayat Begam transferred her rights and interests in the decree by sale to Muhammad Raza Khan; and on the 7th October, 1882, Amanat Ali similarly transferred his rights and interests in the decree to the same person. These transfers were made by instruments which were registered at Bareilly, where a small portion only of the mortgaged property, worth Rs. 15, was situated. The remaining and larger portion of the mortgaged property was situate in the Pilibhit

\* Second Appeal No. 77 of 1886, from an order of G. Lang, Esq., District Judge of Bareilly, dated the 14th July, 1886, affirming an order of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 1st May, 1886.

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district. Subsequently Muhammad Raza Khan transferred the decree by sale to Daya Ram and another person. In December, 1885, these transferees applied to have their names inserted in the decree as holders of the same in the place of the original decree-holders. Gulzari Lal, judgment-debtor, objected to this application, contending, amongst other things, that Daya Ram and his co-transferee were not entitled to have their names substituted for the original decree-holders, and to execute the decree, as the name of Muhammad Raza Khan, who had transferred to them, had not been substituted for the names of the original decree-holders, who had transferred to him; and that the transfers to Muhammad Raza Khan were inoperative, as the deeds of transfer had not been registered in accordance with the provisions of s. 28 of the Registration Act (III of 1877). These and the other objections raised by the judgment-debtor were disallowed by the Court of first instance (Subordinate Judge of Barielly), which directed "that the application for transfer be allowed." The judgment-debtor appealed to the District Judge of Barielly, who rejected the appeal.

The judgment-debtor appealed to the High Court, on the grounds taken by them in the Court of first instance which have been mentioned above, and on the further ground that the [48] proceedings were irregular, as the heirs of Muhammad Raza Khan, the transferor, had not been cited as required by law.

A preliminary objection was taken on behalf of the respondents that the appeal would not lie.

Mr. *Pogose* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondents.

#### JUDGMENT.

In respect of the preliminary objection, the Court delivered the following judgments:—

EDGE, C. J.—A preliminary objection has been taken by the pleader of the respondents, namely, that no appeal lies from the order made by the Judge.

It is admitted by Pandit *Bishambhar Nath* that the appellant before us is a representative of the judgment-debtor, who was one of the parties to the original suit, under s. 244, Civil Procedure Code. So we need not inquire further as to what his position was. It is also admitted that the appellant did, on the application under s. 232, oppose the transfer, and on the ground that the respondent was not entitled to have execution of decree. There was thus distinctly a question arising between the parties or their representatives. In order to see if it comes under s. 244, let us see what it was about. The application by the assignee of the decree was made under s. 232 for transfer and execution, made with the object of having the fruits of the decree transferred to him. Under these circumstances there were questions raised between the parties to the suit or their representatives, and those questions related to the execution of the decree.

Is this order therefore appealable? Under s. 2 of the Civil Procedure Code, "decree" is defined as an "order determining any question mentioned or referred to in s. 244." It is perfectly obvious that when the order was made for this transfer, it determined questions which were raised between the present appellant and the respondent.

Under these circumstances I am of opinion that an appeal does lie.

[49] OLDFIELD, J.—I concur.

The appeal was then heard. The points urged on behalf of the appellant are stated in the judgment of Edge, C.J.

EDGE, C. J.—In this case an application under s. 232, Civil Procedure Code, was made by the respondent for the purpose of obtaining execution of a decree, of which he was the assignee.

A decree had been originally obtained by Hayat Begam and another in September, 1882, and had been assigned by them to Hasan Raza Khan, who assigned to the respondent before us.

Three objections have been taken by Mr. *Pogose* to the order made in this case :—

1. That the transferor had no notice issued to him under s. 232, Civil Procedure Code.

There are two points to consider in this objection:—

First, is the present appellant a person who can raise the objection? The present appellant is neither the original decree-holder nor the intermediate decree-holder, but a judgment-debtor. It is admitted by Mr. *Pogose* that if the present assignee of the decree were to obtain execution of the decree against his client, the original or intermediate decree-holder could not obtain execution. How then could the present judgment-debtor be prejudiced by the passing of this order? It is not suggested that the judgment-debtor could have raised any stronger objections to the execution being issued to Hasan Raza Khan, than he could have to its being issued to the present assignee. Consequently, I fail to see how the judgment-debtor can have any possible interest in the question as to whether the transferor had notice under s. 232, even assuming that the judgment-debtor had a *locus standi* to raise the objection. Secondly, the objection arises under the proviso to s. 232, Civil Procedure Code. The penalty imposed by the proviso is that there should be no power to execute, if the proviso be not complied with. The transferor appears to be dead. But Mr. *Pogose* argues that if he were dead, it should be ascertained who his representatives are, and that the notice should have been served on them. I am bound to say that that would be imposing difficulties which I do not think it was intended to impose. Further, it is contended that where there [50] are more transferors than one, they should all be cited. It may be so. But the order appealed against is not an order for the execution of the decree, but merely for a transfer of names. Whether the order of the Subordinate Judge was meant to have been an order on which execution was to issue, I cannot say; but execution clearly cannot issue until an application has been made. If there is anything in point, it may be urged when the application in execution has been made. I seriously doubt if Mr. *Pogose's* client can avail himself of the fact that these transferors were not cited. I accordingly hold that there is nothing substantial in the first objection that the transferor was not cited under s. 232.

The second objection raised is that the deed of assignment in favour of the first assignee was invalid in consequence of its not having been registered at the proper place for registration, and that the assignment by the first assignees to the respondent is consequently null and void: that is to say, although a but, admittedly a portion of the property comprised in the deed of assignment, was situate at Bareilly, where the deed of assignment was registered, the registration was not one contemplated by s. 28 of the Registration Act, and the learned counsel relies on *Sheo Dayal Mal v. Hari Ram* (1), in which it is held that some portion of the property should be construed to mean "some substantial portion." I doubt whether the judgment-debtor is a party who can raise the objection. It seems to me

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that that objection is one which should properly be raised between the transferor and transferee. However that may be, I am of opinion that there is nothing in the objection raised. Under s. 28 of the Registration Act it is provided: "Save as in this part otherwise provided, every document mentioned in s. 17, clauses (a), (b), (c) and (d), and s. 18, clauses (a) (b) and (c), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate." Admittedly some portion of the property was and is still situate at Bareilly. It would cause endless law-suits if we were to read into the proviso "substantial portion of the property." For who is to decide what is a substantial portion of the property? One Judge may hold it to be 1/3rd, another 1/5th, and so on. I should therefore be very loth [51] to read the section as if it were to mean "some substantial portion." No loss or injury can be caused by the assignee registering at Bareilly and not elsewhere; for we find ss. 64 and 65 of the Registration Act laying down that "every Sub-Registrar, on registering a document relating to immoveable property not wholly situate in his own sub-district, shall make a memorandum thereof and of the endorsement and certificate thereon, and send the same to every other Sub-registrar subordinate to the same Registrar as himself in whose sub-district any part of such property is situate, and such Sub-Registrar shall file the memorandum in his Book No. I."

"Every Sub-Registrar, on registering a document relating to immoveable property situate in more districts than one, shall also forward a copy thereof and of the endorsement and certificate thereon, together with a copy of the map or plan (if any) mentioned in s. 21, to the Registrar of every district in which any part of such property is situate other than the district in which his own sub-district is situate."

This would clearly prevent any case of fraud arising.

The third objection is, that Hasan Raza Khan's name was not substituted for that of the decree-holder, the argument being that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder is a condition precedent to the assignor's passing title under the assignment. Mr. *Pogose* does not refer us to any section of the Civil Procedure Code which lays this down. The Calcutta case—*Greesh Chunder Sein v. Gudadhur Ghose* (1)—which has been cited does not appear to apply.

Under these circumstances, I am of opinion that this appeal must be dismissed with costs.

OLDFIELD, J.—I concur and agree with the Chief Justice on the several points raised, especially on the question raised under s. 28 of the Registration Act.

*Appeal dismissed.*

9 A. 52 (F.B.) = 6 A.W.N. (1886) 281.

## [52] FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight,  
Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

QUEEN-EMPRESS v. CHOTU. [22nd October, 1886.]

*Criminal Procedure Code, s. 437—"Further inquiry"—Practice—Notice to show cause.*

Held by the Full Bench that when a Magistrate has discharged an accused person under s. 253 of the Criminal Procedure Code, the High Court or Court of Session, under s. 437, has jurisdiction to direct further inquiry on the same materials, and a District Magistrate may, under like circumstances, himself hold further inquiry or direct further inquiry by a Subordinate Magistrate. *Queen-Empress v. Dorabji Hormasji* (1) referred to. *Empress v. Bhole Singh* (2), *Queen-Empress v. Hasnu* (3), *Chundi Churn Bhattacharjia v. Hem Chunder Banerjee* (4), *Jeebun Kristo Roy v. Shub Chunder Dass* (5), *Darsun Lall v. Januk Lall* (6) and *Queen-Empress v. Amir Khan* (7), dissented from.

In exercising the powers conferred by s. 437, Sessions Judges and Magistrates should, in the first place, always allow the person who has been discharged an opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and, next, they should use them sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact.

As to the mode in which their discretion should be regulated under such circumstances, the remarks of STRAIGHT and TYRRELL, JJ., in *Queen-Empress v. Gayadin* (8), in reference to appeals from acquittals, are applicable.

[F., 5 C.P.L.R. 20 (23); 14 M. 334 (336) = 2 Weir 557; P.L.R. (1900), 33 (34); Appl. 15 C. 602 (621); Appr., Rat. Un. Cr. C. 328 (330); R., 6 C.P.L.R. 11; L.B.R. (1893-1900) 169 (174); 14 C.P.L.R. 161 (162); 29 P.R. 1885; 20 A. 339 (340); 20 A. 459 (461); 21 A. 122 (126); U.B.R. (1897-1901) 100, (102); 17 C.P.L.R. 75 (85); 8 A.L.J. 45 (46) = 9 Ind. Cas. 274; 9 Ind. Cas. 277 = 12 Cr. L.J. 46.]

THIS was a reference to the Full Bench by Straight, J. The facts of the case and the point of law referred are stated in the referring order, which was as follows:—

STRAIGHT, J.—This is an application by one Chotu for revision of an order of the Judge of Saharanpur of the 27th July last, summarily dismissing an appeal by the applicant from his conviction by the Joint Magistrate of the same place, dated the 7th July, under s. 414 of the Penal Code. The following are the facts material to the question of law raised on behalf of the applicant:—On the 16th February last, he was brought before Pandit Hargian Singh, Deputy Magistrate, charged, under s. 411 of the Penal Code, with being in dishonest possession of certain stolen jewellery. Some eleven witnesses, including one Samai, were examined in [53] support of the case, but in the result the Deputy Magistrate discharged the accused under s. 253 of the Criminal Procedure Code, for reasons which were fully recorded by him in his decision. He, however, put the witness Samai upon his trial for an offence in regard to the same property, and, after taking evidence for the prosecution and defence at great length, he ultimately convicted the accused Samai and

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(1) 10 B. 131.

(4) 10 C. 207.

(7) 8 M. 336.

(2) A.W.N. (1883) 150.

(5) 10 C. 1207.

(3) 6 A. 367.

(6) 12 C. 522.

(8) 4 A. 149.



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sentenced him to one year's rigorous imprisonment and a fine of Rs. 25, or in default to be further imprisoned for three months. Samai appealed from this conviction to the Judge, but his appeal was dismissed on the 27th of May. On the same date the Judge directed notice to issue to Chotu in the following terms:—"As it would appear that Chotu has been improperly discharged, a notice will issue to him to appear and show cause why an order for re-trial shall not pass under s. 437—fixed for 3rd June." On the 3rd June, the Judge, after expressing himself substantially to the effect that Chotu ought to have been convicted and not discharged, recorded the following order:—"I, therefore, under s. 437, Criminal Procedure Code, direct that the District Magistrate, by himself, or some Magistrate subordinate to him, make further inquiry into the case of Chotu accused, under ss. 411 and 414, Indian Penal Code." In obedience to this order, the Joint Magistrate of Saharanpur proceeded to re-try and convict Chotu upon what I consider, and what, for the purpose of this reference, must be taken, to be the same evidence on which he had already been tried and discharged by the Deputy Magistrate. This conviction was appealed to the Judge, who summarily rejected it on the 27th July, and, as I have already said, this order of the Judge, along with that of the Joint Magistrate, afford the subject-matter of this application for revision.

Before dealing with the objection that is raised on behalf of the applicant, I think it right to observe that, looking to the peculiar circumstances above disclosed, the Judge acted unwisely, not only in summarily rejecting Chotu's petition, but in not forwarding to this Court a recommendation that the appeal should be transferred to some other Judge for hearing and disposal. It is patent from the remarks made by him in dismissing the appeal of Samai on the 27th May, and in his order of the 3rd June with regard to Chotu, that he had preconceived a very strong opinion [54] as to the guilt of such last-mentioned person which could not but prejudice his mind unfavourably as to any appeal that might be preferred. I should, under the circumstances, have considered it incumbent upon me to quash the Judge's summary order of dismissal, but that it would be premature for me to do so, having regard to the contention which has been urged before me for the applicant, that the Judge acted *ultra vires* in making his order of the 3rd June, and that he was not empowered by s. 437 of the Criminal Procedure Code to do so. It is clear, as I have said, from the terms of the Judge's notice to Chotu to show cause, and from the language of his order of the 3rd June, that he was of opinion that the evidence taken before the Deputy Magistrate established that person's guilt, and that what he intended, and, in fact, ordered, was that Chotu should be re-tried upon the same materials before another Magistrate. He does not pretend to say that he was informed, or had reason to believe, that any fresh evidence was likely to be forthcoming which would elucidate that already given, or reasonably lead to a conclusion different to that already arrived at; on the contrary, his orders were apparently passed and issued entirely upon the materials as they already stood. It was in this sense that the Joint Magistrate obviously understood the order and tried the case, and I cannot help saying, as it seems to me, with less patience and care than was exhibited by the Deputy Magistrate in the original trial. Had the Judge then power to do this under s. 437 of the Criminal Procedure Code? Hitherto I have inclined to the opinion, and have expressed myself to that effect in two cases—*Empress v. Bhole Singh* (1),

*Queen-Empress v. Hasnu* (1)—that he had not the power, and a like view has been enunciated by several Judges of the Calcutta Court—*Chundi Churn Bhattacharjia v. Hem Chunder Banerjee* (2); *Jeebun Krishto Roy v. Shib Chunder Dass* (3); *Darsun Lall v. Jamak Lall* (4); Sir Charles Turner, in *Queen-Empress v. Amir Khan* (5), in a lengthened judgment, also places a similar interpretation on the section in question. There is, however, a ruling of Nanabhai Haridas, J., in *Queen-Empress v. Dorabji Hormasji* (6), the other way, which very ably and exhaustively [55] discusses the point, and as it is one of great importance and relates to a matter of practice, I think it very desirable it should be settled by the Court at large once and for all. I therefore refer to the Full Bench the following question :—

“When a Magistrate has discharged an accused person under s. 253 of the Criminal Procedure Code, has the High Court or Court of Session, under s. 437, jurisdiction to direct further inquiry on the same materials, or may a District Magistrate, under like circumstances, himself hold further inquiry or direct further inquiry by a Subordinate Magistrate?”

Mr. *Pogose*, for the applicant.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

#### JUDGMENT.

EDGE, C.J., and STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ.—We are of opinion that the words “further inquiry” used in s. 437 of the Criminal Procedure Code do not limit the power of this Court, the Court of Session, or the District Magistrate, in regard to the case of an accused who has been discharged, nor do they necessarily prohibit a direction being given or action taken thereunder upon the record, called for and examined, as it stands. By the old Code of 1872, this Court alone had authority to disturb an order of discharge passed under s. 215 or s. 195 of that Act, which was limited to directing the accused person improperly discharged “to be tried or be committed for trial,” and the jurisdiction of the Sessions Judge and District Magistrate in respect of discharges under s. 215 was confined to reporting the proceedings to this Court for orders. But in s. 439 of the present Code, which re-places s. 297, the revision section of the repealed Act, neither in specific terms nor inferentially is the setting aside an order of discharge provided for, and apparently for the best of all reasons, namely, that s. 437 has already dealt with the subject. It is nowhere apparent, nor indeed is it likely, that the Legislature intended to cut down the powers of this Court in that behalf, and it seems to us that in using the expression “further inquiry” they contemplated conferring a wider discretion than was comprehended in the mere power given by the old Act to order a discharged accused “to be tried,”—i.e., to be put on his trial by having a charge drawn up and to be tried thereon. “Further [56] inquiry,” moreover, gives the Magistrate directed to make it much greater latitude, and still leaves it open to him when he has made it, if he thinks fit to do so, to pass an order of discharge under s. 253, and no obligation, as was the case under the old Act, rests upon him to frame a charge and proceed as pointed out in s. 254 and following sections. We think that in determining the effect to be given to s. 437, it is important to bear in mind the distinction obviously recognised in the Code between the preliminary proceedings in warrant cases that precede the drawing up of a charge which may be terminated by an order of discharge that does

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(4) 12 C. 522.

(3) 10 C. 207.  
(5) 8 M. 336.

(3) 10 C. 1027.  
(6) 10 B. 131.



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not amount to an acquittal, nor bar a second prosecution at the instance of the complainant, and those that ensue after charge framed and plea pleaded, which can only be concluded by an acquittal or a conviction, whereof the accused can afterwards avail himself under s. 403 of the Code. So long as the case continues in the stage of inquiry, the duty of the Magistrate is confined to ascertaining whether there is anything that the person accused ought to be called upon to answer. When once the charge has been framed and a plea has been taken, the inquiry is turned into a trial, and the evidence in support of the charge already recorded becomes evidence on that trial, subject to the right of the accused as declared in ss. 256 and 257. It therefore comes to this, that the power conferred upon this Court, the Sessions Court, and the District Magistrate, by s. 437, to direct "further inquiry," amounts to no more than an authority to set aside an order of discharge, which is no protection to an accused against a second proceeding at the instance of the complainant himself on the same facts in another Court before another Magistrate, so as to enable the Magistrate who passed it, or some other Magistrate, to re-open the matter or look further into it, and determine whether the accused should be put on his trial.

In regard to the question put by this reference, therefore, we cannot say that there is an absolute defect of jurisdiction either in this Court, or the Sessions Court, or the District Magistrate to direct, or in the District Magistrate to make, the further inquiry mentioned in s. 437 on the same materials as were before the Magistrate who passed the order of discharge. It is within the bounds of possibility that cases may and will occur in which a Magistrate has taken so wholly erroneous a view of the law applicable to the [57] facts proved, or has formed such absurd and irrational conclusions from those facts, or has conducted his inquiry in so slipshod and perfunctory a fashion that to leave the matter as he has left it would be to countenance a positive miscarriage of justice. We must credit the Legislature with having foreseen that such a state of things might arise; and when we turn to the Code to find the remedy, if any, provided to meet such a contingency, s. 437 at once naturally presents itself. Why, then, should we insist upon giving a narrow and limited construction to the governing words of that section which will make it operative in only a very limited number of cases within the mischiefs it was provided for, whereas a more liberal interpretation will include all? It is observable, also, that in s. 437 the word "improperly" to be found in s. 436 is dropped, and its omission seems to us to indicate that, far from limiting the scope and effect of the section, it was intended to confer a very wide discretion, so as to meet not only cases in which an improper discharge had been made, but those in which, upon the facts as they stand, the discharge is proper, but further inquiry is necessary. By way of illustration of what we have been saying, let us take a case in which *A* charges *B* with cheating, and proves that on a particular date *B* made certain representations to him, on the strength of which he parted with so many rupees, and that such representations were false to the knowledge of *B*. The Magistrate making the inquiry, after hearing the witness for the prosecution, erroneously holds that though the representations are satisfactorily proved to have been made, they are insufficient in law to sustain a charge of cheating within the meaning of the Penal Code, and accordingly discharges the accused. Here there is no need for the prosecutor to produce further evidence, as there is ample on the record already, and yet justice requires that the matter should be set

right. Or take a case in which a complainant has preferred (say) a charge of assault, and has named a number of witnesses to give evidence for him ; but the Magistrate only thinks it necessary to summon a few of them, and thereupon proceeds with his inquiry, and, after hearing them, discharges the accused upon the ground that the story for the prosecution is so improbable and the demeanour of the witnesses was so unsatisfactory as to make [58] him believe the charge a false one. Here his order might be a perfectly good and defensible one on the materials before him. But the complainant says :—" If the other witnesses I wished to call had been summoned, they would have put a very different complexion on the case." This Court, or the Sessions Court, or the District Magistrate, might find it very difficult to hold that the Subordinate Magistrate had improperly exercised the discretion given him by the second paragraph of s. 252, or that his order of discharge was improper, and yet it might be felt in regard to the peculiar and particular facts of the case that, in the interests of justice, it was right the inquiry should be re-opened and the other persons named summoned to give their evidence. We put these two cases as extreme instances in the one direction or the other, which it is obviously right and proper there should be some provision in the law to meet, and which we think fall within the mischiefs which s. 437 was intended to cure. If it does not provide for them, then no remedy is to be found in any other section of the Code ; and the position would seem to be reached that the Legislature, while taking away an important and necessary power possessed in terms by this Court under the old Act, imposed on themselves the labour of framing a separate section to confer a discretion of a very limited kind, and one which the Magistrate, who passed the order of discharge, might, at the instance of the complainant, himself exercise without direction from any superior authority. This we cannot believe to have been the case, and with the greatest deference to the opinions of the learned Judges of Calcutta, Madras and this Court, in the cases mentioned in the referring order, we cannot but think that the considerations of which we have been speaking were not pressed upon their attention or present to their minds when their judgments were delivered, and if they were, they were not discussed and answered. We agree in the main with Nanabhai Haridas, J., in *Queen-Empress v. Dorabji Hormasji* (1), and hold, for the reasons given, that the question put by this reference must be replied to in the affirmative. In doing so, however, we feel bound to impress on Sessions Judges and Magistrates that in exercising the powers conferred by s. 437, they should, in the first place, always allow the person who has been discharged an [59] opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and next, that they should use them sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact. As to the mode in which their discretion should be regulated under such circumstances, we think the remarks of Straight and Tyrrell, JJ., in *Queen-Empress v. Gayadin* (2), in reference to appeals from acquittals, may appropriately apply and should be consulted.

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9 A. 52  
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6 A. W N.  
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(1) 10 B. 131.

(2) 4 A. 148.



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NOV. 12.

APPEL-  
LATE  
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9 A. 59=6 A.W.N. (1886) 297.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*EZID BAKSH (*Defendant*) v. HARSUKH RAI  
(*Plaintiff*).<sup>\*</sup> [12th November, 1886.]9 A. 59=  
6 A.W.N.  
(1886) 297.*Malicious prosecution, suit for—Application for sanction to prosecute—Cause of action.*

*Held*, that an unsuccessful application under s. 195 of the Criminal Procedure Code for sanction to prosecute for offences under the Penal Code, in which the only loss or injury entailed on the party against whom such application was directed, was the expense he incurred in employing counsel to appear in answer to such application, such appearance being due to the fact not that he had been summoned, but that he had applied through counsel for notice of the application, anticipating that it would be made, afforded no cause of action in a suit for recovery of damages on account of malicious prosecution.

THE facts of this case are stated in the judgment of the Court.

Mr. *Habib-ullah*, Pandit *Ajudhia Nath*, and Pandit *Sunder Lal*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

## JUDGMENT.

OLDFIELD and BRODHURST, JJ.—The plaintiff-respondent has instituted this suit for damages against the defendant-appellant on account of a malicious prosecution with reference to certain proceedings he took against him in the Magistrate's and Sessions Judge's Courts.

The appellant found the respondent's cattle trespassing in his field and drove them off. The respondent's servants complained [60] to the police, charging the appellant with theft of the cattle. The charge was dismissed by the Magistrate, who gave sanction to the appellant to prosecute certain persons, namely, Lal Muhammad, servant of the respondent, and the witnesses who had given evidence. On this, on the 3rd October, 1883, the appellant charged the respondent and others in the Magistrate's Court for offences under ss. 193 and 211 of the Penal Code. The charges were dismissed on the 3rd December, 1883.

In the meantime, and before disposal of the charges, the Judge, on the 1st December, cancelled the sanction to prosecute as not given in explicit terms, but intimated that the appellant might renew his application to the Magistrate for sanction. On the 10th December, 1883, the appellant again applied to the Magistrate for sanction to prosecute the respondent and others under ss. 193 and 211, notwithstanding that his charges had already been dismissed by the Magistrate on the 3rd December, 1883. The Magistrate refused sanction, and the appellant appealed to the Judge, who, on the 5th April, 1884, refused sanction in regard to charges against the respondent, but gave it in respect of Lal Muhammad.

It is in respect of these proceedings on the part of the appellant that this action has been brought by the respondent.

The Courts below have dealt with the case under two aspects—the plaintiff's right of action in respect of the criminal prosecution which closed on the 3rd December, and his right of action in respect of the appellant's subsequent proceedings, in which he applied to the Courts for sanction to prosecute the respondent. The claim has been disallowed in

<sup>\*</sup> Second Appeal No. 1653 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 20th August, 1885, modifying a decree of Maulvi Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 21st May, 1885.

regard to the first, on the ground that it is barred by limitation, and we are not concerned with this part of the case in appeal.

But the lower appellate Court has passed a decree in the respondent's favour in regard to the second part, and decreed damages for Rs. 350, modifying in this respect the decree of the first Court.

The defendant has appealed. We have to consider whether the proceedings taken by the appellant in applying to the Criminal Court for sanction to prosecute the respondent, and in which sanction was not allowed, afford a sufficient cause of action for this suit.

[61] In our opinion they do not. They clearly do not amount to a criminal prosecution of the respondent; but they are proceedings preliminary to it, which are necessitated under the provisions of the Criminal Procedure Code, but which need not, and did not, result in a prosecution. There has been no loss and injury, and no loss was entailed on the respondent by the act of the appellant in applying for leave to prosecute the respondent. The only loss which the respondent can show he suffered was in the expense he was put to in employing counsel to appear in the Court in answer to the applications. But this did not necessarily result from the appellant's applications. The appellant did not cause him to be summoned, and any appearance he put in was due to the fact that he had through his counsel asked that he should have notice of any such application, anticipating that it might be made. We are of opinion that under these circumstances, the plaintiff-respondent cannot recover damages.

We set aside the decrees of the lower Courts and dismiss the suit with all costs.

*Appeal allowed.*

9 A. 61 (F.B.) = 6 A.W.N. (1886) 296.

### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

GHANSHAM SINGH (*Applicant*) v. LAL SINGH (*Opposite party*).<sup>\*</sup>  
[15th November, 1886.]

*Review of judgment—Omission to serve notice of hearing of appeal upon applicant—Civil Procedure Code, s. 623—"Any other sufficient reason"—Practice—Notice to show cause—Right to begin.*

An appeal which was referred to the Full Bench for disposal was heard and determined by the Full Bench and judgment given in favour of the appellant in the absence of the respondent. Subsequently the respondent applied for a review of judgment and proved that his absence at the hearing before the Full Bench was due to a mistake which had been made in not serving him with notice of the reference.

Held by the Full Bench that, under the circumstances, the applicant's absence at the hearing came within the words "any other sufficient reason" in s. 623 of the Civil Procedure Code, and the review should be granted and the appeal re-heard.

[62] Upon the hearing of an application for review of judgment upon which an order has been passed directing the opposite party to show cause why the application should not be granted, counsel for the opposite party should begin.

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\* Application No. 68 of 1886 for review of judgment in S.A. No. 1468 of 1884.



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(F.B.)=  
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(1886) 296.

THIS was an application for review of a judgment of the Full Bench of the Court by the respondent in S. A. No. 1468 of 1884. The applicant stated as follows:—

"1. That on the 26th October, 1885, the said second appeal (No. 1468 of 1884) was heard by a Division Bench of this Honourable Court consisting of the then Chief Justice and Mr. Justice Brodhurst. Judgment was reserved, and on the 12th November, 1885, owing to a difference of opinion, the appeal was referred to the Full Bench for decision.

"2. That no notice of such reference was given to your petitioner, and he did not therefore instruct counsel to appear for him.

"3. That on the 21st January, 1886, the said appeal was disposed of by the Full Bench in the absence of your petitioner, and judgment was given, reversing the two concurrent decrees of the lower Courts.

"4. That your petitioner is advised that the judgment of this Honourable Court is erroneous upon the following (among other) grounds:—

"(a) That the suit is barred by the Limitation Act.

"(b) That independently of the evidence on the record referred to in the judgment of this Honourable Court, there is other evidence on the record which goes to support the case of the defendant-respondent, to which (owing to the petitioner not being represented by counsel at the hearing of the appeal) the attention of this Honourable Court, would seem not to have been directed.

"Your petitioner therefore prays that, with reference to the provisions of s. 622 of the Civil Procedure Code, this Honourable Court will review its judgment of the 21st January, 1886, and restore the decrees of the lower Courts, or pass such other order in the premises as to this Honourable Court may seem fit."

[Q.] On the 5th November, 1886, the Full Bench ordered that notice should issue to the opposite party to show cause why the application should not be granted. On the 15th November, the application came before the Full Bench for disposal.

[63] Mr. G. E. A. Ross and Mr. T. Conlan, for the applicant.

Pandit *Ajudhia Nath*, for the opposite party.

Upon the case being called on for hearing, Pandit *Ajudhia Nath* claimed to be entitled to begin, on the ground that notice had been issued to him to show cause against the application.

Mr. G. E. A. Ross said that the practice of the Court in reference to this point was not definitely settled. He left the matter, without argument upon it, in the hands of their Lordships.

The Court said that Pandit *Ajudhia Nath* had better begin.

The application for review of judgment was then heard.

Pandit *Ajudhia Nath*, for the opposite party.—The applicant cannot apply for a review of judgment, as the remedy provided is an application for the re-hearing of the appeal. The application must be treated as one for the re-hearing of an appeal heard *ex-parte* in the absence of the respondent. As such it is barred by limitation, having been made more than thirty days after the date of the decree in appeal. If the application is taken to be one for review of judgment, then the absence of the applicant at the hearing of the appeal is not a "sufficient reason" for granting the review, within the meaning of s. 623 of the Civil Procedure Code.

He referred to *Kishna Ram v. Rukmin Sewak* (1) and *Sheo Ratan v. Lappu Kuar* (2).

Mr. Ross, for the applicant, contended that the mere fact that the applicant had not received notice of the reference and the appeal had been decided in his absence was "sufficient reason." He referred to *Bibi Mutto v. Nahi Begam* (3) and *Ajudhia Prasad v. Balmukand* (4), contending that the applicant might apply for review of judgment, and was not bound to apply for a re-hearing of the appeal.

#### JUDGMENT.

EDGE, C.J.—The applicant for review of judgment in this case was absent at the hearing before the Full Bench, and we are satisfied that his absence is accounted for by a mistake which was made in not serving him with notice of that hearing. We are of opinion that, under the circumstances, the applicant's absence at the hearing comes within the words "any other sufficient reason" used in s. 623 of the Civil Procedure Code. The review of [64] judgment is granted, and the appeal will be restored to the file of pending appeals and heard before the Full Bench. Let next Saturday week be fixed for the hearing and notices issue to the parties.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

*Application granted.*

9 A. 64=6 A.W.N. (1886) 300.

#### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

JANKI (*Appellant*) v. THE COLLECTOR OF ALLAHABAD  
(*Respondent*).<sup>\*</sup> [15th November, 1886.]

*Pauper suit—Court-fees, recovery of, by Government—Execution of decree—Cross-decrees—Cross-claims under same decree—Civil Procedure Code, ss. 244 (c), 246, 247, 411.*

*Held* that a Collector applying on behalf of Government under s. 411 of the Civil Procedure Code, for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in forma pauperis*, might be deemed to have been a party to the suit in which the decree was passed, within the meaning of s. 244 (c) of the Code, and that an appeal would, therefore, lie from an order granting such application.

A plaintiff suing *in forma pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1,439. The Court, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that the plaintiff should pay Rs. 1,196 as the amount of Court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross-suit in the same Court, should be set-off against the Rs. 1,439 payable by her to him, with reference to ss. 246 and 249 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his Rs. 1,439, or by the defendant for her costs. In appeal from an order allowing the Collector's application, it was contended that the "subject-matter of the suit" in s. 411 of the Code meant the sum which the successful pauper-plaintiff is entitled to get as a result of his success in the suit; but that in the

<sup>\*</sup> First Appeal No. 154 of 1886, from an order of Pandit Bansidhar, Subordinate Judge of Allahabad, dated the 15th March, 1886.

(1) A.W.N. (1892) 102.  
(3) 6 A. 65.

(2) 5 A. 14.  
(4) 8 A. 354.

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suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether.

*Held* that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favour for Rs. 1,439, so as to [65] bring into operation the special rules of ss. 246 and 247 of the code between him and the defendant.

*Held* also that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it, in the same way as costs are ordinarily recoverable under the Code.

*Held* that the decrees in the suit and the cross-suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained.

[F., 13 A. 326; Cons., 23 M. 73; R., 18 M. 439; 18 B. 237.]

ONE Chedi Lal sued as a pauper to recover from Musammat Janki the moveable and immoveable property of a certain deceased person, valued at Rs. 60,000. The decree in this suit, which was numbered 359, directed Janki to pay Chedi Lal Rs. 1,439-2-6 and Rs. 22-0-9 costs, and Chedi Lal to pay Janki Rs. 879-5-9 costs. It also, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that Rs. 1,225-8, the amount of Court-fees which would have been paid by Chedi Lal if he had not been allowed to sue as a pauper, should be paid by him and Janki in the following proportions, that is to say, Rs. 1,196-1-6 by Chedi Lal and Rs. 29-6-6 by Janki.

The Collector, on behalf of Government, applied to recover the Rs. 1,196-1-6 payable by Chedi Lal in respect of court-fees by the attachment and sale of the Rs. 1,439-2-6 payable by Janki to him, and the Rs. 29-6-6 payable by Janki in respect of court-fees by the attachment and sale of the Rs. 879-5-9 payable by Chedi Lal to her. In the course of the proceedings Janki paid to the Collector the Rs. 29-6-6.

With reference to the application that the Rs. 1,196-1-6 payable by Chedi Lal to Government should be recovered by the attachment and sale of the Rs. 1,439-2-6 payable by Janki to him, Janki objected to the same, contending that the amount of costs payable under the decree by Chedi Lal to her, viz., Rs. 879-5-9, should, under the provisions of s. 247 of the Civil Procedure Code, be set-off against the Rs. 1,439-2-6 payable by her to him, which would leave a balance of Rs. 559-12-9 due by her to Chedi Lal, and that a sum [66] of Rs. 558-13-0 payable by Chedi Lal to her under a decree which she had obtained against him in a suit brought by her, numbered 445, should, under s. 246, be set-off against this balance, and thus nothing would remain due by her to Chedi Lal which the Government could recover.

The lower Court disallowed this contention, and directed execution to issue as prayed by the Collector.

Janki appealed to the High Court.

Mr. C. H. Hill and Pandit *Sundar Lal*, for the appellant.

The *Government Pleader* (Munshi *Ram Prasad*), for the respondent.

#### JUDGMENT.

TYRRELL and BRODHURST, JJ.—A preliminary objection was taken to the hearing of this appeal by the learned pleader for the respondent,

on the ground that the case does not come within the provisions of clause (c) of s. 244 of the Civil Procedure Code, and therefore no appeal lies under that section, none also being allowed under s. 588 *id.* We held that, having regard to s. 411 of the Code, the respondent may be deemed to have been a party to the suit in the sense of s. 244, *supra*. We therefore entertained the appeal. The facts of the case are fully and correctly given by the Subordinate Judge, whose order is under appeal before us. Briefly stated, the case stands thus :—In suit No. 359 the Subordinate Judge of Allahabad practically made three decretal awards ; (a) he decreed to the plaintiff Chedi Rs. 1,439-2-6 with costs thereon against the defendant Musammat Janki, now appellant here ; (b) he decreed to the same defendant her costs on the large portion of Chedi's claim which stood dismissed ; and (c) he awarded to the Government—respondent here—Rs. 1,225-8-0, costs in the sense of s. 411 of the Civil Procedure Code, of which Rs. 1,196 were payable by Chedi and Rs. 29-6-6 by Musammat Janki. The latter has paid this claim. No application for execution was made by Chedi on the one hand, or by Musammat Janki on the other.

But on the 11th April, 1885, the Government applied for and obtained attachment of Chedi's claim against Musammat Janki for Rs. 1,439-2-6, and an order was served on Musammat Janki forbidding her to pay to Chedi, and on him restraining him from recovering from Musammat Janki, the decretal amount just mentioned. Musam-[67]mat Janki objected to this order, but her objection was disallowed. The Subordinate Judge ruled that the Government had a first and paramount claim on the sum decreed to Chedi by reason of his partial success in his suit against Musammat Janki, and that no step in execution having been taken by Chedi to realize this debt from Janki, and consequently no counter-claim against the same on the part of Janki having come into existence in the modes contemplated in ss. 246 and 247 of the Civil Procedure Code, and the Government being in these proceedings *not* the representative of Chedi, the decree-holder but an independent party holding a decretal order apart from, and even adverse to, the said Chedi, this first claim must be allowed, and could not be defeated by the cross-claim of Musammat Janki under the decree in suit No. 359, or in her cross-suit against Chedi No. 445. We think that this decision was right. It was argued for the appellant that the " subject-matter of the suit " (s. 411) means the sum which the successful pauper-plaintiff is entitled to get and can obtain as a result of his success in his suit ; but that in the suit No. 359 and in the cross-suit between the same parties, No. 445, decreed together by the same Court, Chedi ultimately stands to lose a small sum, Musammat Janki being, on the combined results of the two suits, the holder of the larger sum awarded altogether. Now, whatever force there might be in this contention, if execution had been initiated or taken out by Chedi or by Musammat Janki, or by both of them, we think that it has none in the state of affairs presented in these proceedings. For it cannot be conceded that the Government has been trying to execute Chedi's decree, or is a representative of Chedi as holder of this decretal order that Musammat Janki should pay him Rs. 1,439-2-6, in such a sense or mode as to bring into operation the special rules of ss. 246 and 247 between those two persons.

It also seems to us to be clear that when Chedi, claiming to recover by his pauper suit Rs. 60,000 from Musammat Janki, alleged to be wrongfully kept from him by her, gained a decree against her for Rs. 1,439-2-6 of that money, he is a plaintiff in the sense of s. 411, Civil Procedure Code,

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who has succeeded in respect of part of the "subject-matter" of that suit, and on that part, therefore, a first charge is by the law reserved and secured to [68] the Government-respondent, which is justified in recovering it in these proceedings, under the circumstances of this case mentioned above from Musammat Janki, who was ordered by the decree to pay it, in the same way as costs are ordinarily recoverable under the Code. Holding, then, that the decrees in the cases Nos. 359 and 445 had not reached a stage in which the provisions of ss. 246 and 247 would come into play, we are of opinion that no question of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against Musammat Janki as payable by her to Chedi have arisen or can be entertained. Therefore the pleas of this appeal are irrelevant to the case, and we dismiss the appeal with costs.

*Appeal dismissed.*

9 A. 68 (F.B.)=6 A.W.N. (1886) 298.

### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

PARSOTAM SARAN BY HIS GUARDIAN CHIRANJI (*Plaintiff*) v. MULU AND OTHERS (*Defendants*).<sup>\*</sup> [22nd November, 1886.]

*Mortgage—Right to sale—Death of sole mortgagee leaving several heirs—Sale of mortgagee's rights by one of such heirs—Suit by purchaser for sale of mortgaged property—Act IV of 1882 (Transfer of Property Act), s. 67.*

Upon the death of a sole mortgagee of zamindari property, his estate was divided among his heirs, one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage.

*Held* by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined; that moreover he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. *Bishan Dial v. Manni Ram* (1), *Bhora Ray v. Abilack Roy* (2), and *Bedar Bakht Muhammad Ali v. Khurram Bakht Yahya Ali Khan* (3) referred to.

[R., 3 O.C. 8.]

[69] THIS was a reference to the Full Bench by Oldfield and Mahmood, JJ. The order of reference, in which the facts and the points of law referred are stated, was as follows:—

"The facts of the case may be briefly recapitulated so far as they are necessary for the disposing of the question of law raised in this appeal. The two first defendants, Musammat Mulu and Poshaki Lal, executed a mortgage of their zamindari rights to Ahmad Yar Khan on the 23rd October, 1877. Under the terms of the mortgage the mortgagee was to be placed in possession, and the redemption was to take place at the end

<sup>\*</sup> Second Appeal No. 1765 of 1885, from a decree of H. G. Pearse, Esq., District Judge of Moradabad, dated the 22nd July, 1895, confirming a decree of Mr. H. David, Munsif of Billari, dated the 9th February, 1885.

(1) 1 A. 297.

(2) 10 W.R. 476.

(3) 19 R.W. 315.

of two years on payment of the principal sum, the profits of the property during the mortgagee's possession being appropriated as interest. But by a contemporaneous agreement the mortgagee leased the mortgaged property to the mortgagors, who thus remained in possession on payment of Rs. 120 per annum as the net profits to the mortgagee.

"Ahmad Yar Khan died about four years ago, leaving as his heirs a widow named Amani Begam, a son, Zia Khan, and two minor daughters; and according to the Muhammadan law of inheritance, his estate being divided into 32 *sahams*, the right of the widow would be 4 *sahams*, the son would get 14 *sahams*, and each of the daughters would get 7 *sahams*. But it appears that, on the 23rd November, 1880, Amani Begam and Zia Khan entered into an agreement, whereby certain rights of inheritance were purported to be relinquished by her on behalf of herself and of her minor daughters in favour of Zia Khan. It has, however, been found by both the Courts below that Amani Begam did not consent to that agreement either on her own behalf or on behalf of her daughters, and this finding cannot be disturbed in second appeal.

"On the 17th March, 1881, Zia Khan executed a sale-deed, whereby he conveyed the mortgagee's rights, under the deed of 23rd October, 1877, to one Kesho Saran, who is now represented by the plaintiff. The object of the suit was to enforce lien created by that mortgage on the allegation that that mortgage entitled the plaintiff to seek the remedy by sale of the mortgaged property.

"Upon the findings of the lower Courts it must be held that the plaintiff has, under the sale-deed, acquired only the rights of [70] Zia Khan in the mortgage of 23rd October, 1877, though the sale-deed 17th March, 1881, purported to be an assignment of the whole mortgage. The question then is, whether the plaintiff has acquired any such right as would entitle him to maintain the present suit, either in respect of the whole or part of the mortgage charge.

"We refer this question to the Full Bench for determination, and in doing so would invite attention to a recent Full Bench ruling of this Court in *Kandhiya Lal v. Chandar* (1), where a cognate question was considered, and also the observations of the Lords of the Privy Council in *Bedar Bakht Muhammad Ali v. Khurram Bakht Yahya Ali Khan Bahadur* (2). The question is one of considerable importance; as, on the one hand, the provisions of the Contract Act (IX of 1872), such as ss. 42 and 45, do not seem to be exactly applicable to the present case; and, on the other hand, it may be necessary to decide whether, upon the death of a Muhammadan who holds a mortgage, such as the one in this case, the rights of heirs in such mortgage are several or joint in their character, so as to enable any one of them to enforce the whole obligation; and if so, whether such heir can convey the right by sale as in this case.

"Further, it may be necessary to consider the exact effect of s. 2 of Act XXVII of 1860 upon a case such as the present, that is whether the provisions of that Act render such a suit unmaintainable without the certificate provided for by that Act.

Munshi Hanuman Prasad and Mir Zahur Husain, for the appellant, the legal representative of Kesho Saran, plaintiff.

Pandit Bishambar Nath, for the respondents.

#### JUDGMENT.

EDGE, C.J.—In this case all the material facts appear to be set forth

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in the order of reference. There are three questions which are raised by that order and they are stated in its last three paragraphs.

One of these questions is—"Whether the plaintiff has acquired any such rights as would entitle to maintain the present suit, either in respect of the whole or part of the mortgage-charge." Now one part of this question is really involved in the [71] last paragraph but one of the referring order. In order to answer it properly, I must explain what appears to me to be the rights which the plaintiff has acquired. For this purpose the second paragraph of the referring order must be looked at. I find there that it is found as a fact by the Courts below that Amani Begam did not consent to the agreement with Zia Khan, either on her own behalf or on behalf of her daughters. The fact that Zia Khan professed to sell the whole interest which his father had—that is, his own interest and the interests, of his mother and sisters—could not give his assignee rights greater than he himself possessed. Upon this point the findings of the Courts below are conclusive, namely, that Amani Begam did not consent to the agreement which the plaintiff alleged that he had entered into. Under these circumstances, I come to the conclusion that the plaintiff acquired, under the deed of sale, only the interest which Zia Khan took on his father's death, *i.e.*,  $\frac{1}{3}\frac{1}{2}$  of his father's estate. This being so, the question is, whether the plaintiff can maintain the present suit in respect of either the whole or a part of the mortgage-charge.

In the first place, I am of opinion that he cannot maintain the suit in respect of the whole of the mortgage-charge. He is only the representative of the son of the mortgagees. He does not represent even the interest of one of two or more joint mortgagees. He represents only a part of the interest of a sole mortgagee which has been split up on the sole mortgagee's death. He could not give the mortgagor a good discharge for the whole mortgage-debt, and therefore he could not maintain a suit in respect of the whole of the mortgage-charge. That, I think, is substantially what was pointed out in *Bishan Dial v. Manni Ram* (1). The head-note to the report of that case is as follows :—"Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person entitled only to one moiety of the debt foreclosed the mortgage as to that moiety and sued the different mortgagors for possession—*held* that the foreclosure was invalid and the suits were not maintainable." At p. 300 of the report the learned Judges say :—"A common objection was urged in the Courts below and in this Court that the foreclosure was invalid, in that a person entitled to one moiety of [72] a mortgage-debt cannot require the mortgagees to pay off one moiety of the mortgage-debt or to stand foreclosed of one moiety of the mortgage-money. We must allow the validity of this plea. The whole of the mortgage-debt is due to the persons claiming under the original mortgagees jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this case." I agree in the broad principle that the mortgagors would be entitled to a joint receipt—that is, in cases where this law applies, and it is not apparent that a different state of things was intended here.

The case which I have just quoted appears to me an authority on both

points, and to show that a person in the plaintiff's position cannot sue for foreclosure or sale either in respect of the whole of the mortgage-charge or in respect of his particular share. The ruling in *Bhora Roy v. Abilack Roy* (1) is to the same effect. The material portion of the head-note in that case is as follows:—"Where several parties have an interest in a mortgage, it is not competent for one of them to foreclose in respect of his fractional share." In the 4th paragraph of the judgment the following observations occur:—"In the first place, it appears that there has been no foreclosure of the mortgaged property as required by law. The plaintiff, as he alleges, was one of certain parties having an interest in the mortgage. We are not aware of any authority to show that any one of such parties is at liberty to foreclose in respect of his fractional share. That is all the plaintiff has done in the present case, and it seems to us, therefore, that, no valid foreclosure having taken place, he is not entitled to sue for possession." There the plaintiff had actually foreclosed, and it was subsequently held that, being only the owner of a fractional share, he could not sue for possession even of that particular share.

Again, in the case of *Bedar Bekht Muhammad Ali v. Khurram Bakht Yahya Ali Khan* (2) mentioned in the order of reference, the Lords of the Privy Council laid down this broad proposition:—"It [73] cannot be contended that a debtor to a Muhammadan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt." Practically, if in this case we allowed the representatives of the different shares into which the mortgagee's interest split up at his death to maintain separate suits for foreclosure or sale, we should be ruling what their Lordships of the Privy Council say could not be contended for.

For these reasons I come to the conclusion upon the authorities, so far as they go, that the plaintiff is not entitled, in respect of his own share, to maintain this suit for sale against the whole property, the other parties interested not having been joined. I am also of opinion that he is not entitled to succeed, even in an amended action, in claiming sale of a portion of the property in respect of his own share. I am justified in this view by the manner in which the subject of the mortgagee's rights was considered at the time when the Transfer of Property Act was passed. In that Act one series of sections deals with the rights of the mortgagor and another series with the rights of the mortgagee. S. 67, which is the first section of the latter series, contains the following provision:—"Nothing in this section shall be deemed.....(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage." This provision, so far as I can see, merely lays down that such a person shall not be authorized to do under the Act what he could not have done under the law previously in force, and this view appears to be borne out by sub-sections (a), (b), and (c) of the same section.

I am therefore of opinion that the answer to the reference upon this point should be that the suit is not maintainable. Upon another question raised by the order of reference relating to the effect of s. 2 of Act XXVII of 1860, as to which no argument has been addressed to us, holding the views I have above expressed, it is not necessary for me to make any observations.

STRAIGHT, OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

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[74] APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

LALLI (*Defendant*) v. RAM PRASAD AND OTHERS (*Plaintiffs*).\*  
[20th July, 1886.]9 A. 74=  
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(1886) 313.*Bond—Interest—"Dharta"—Illiterate agriculturist—Unconscionable bargain.*

The High Court as a Court of Equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary prudence would enter into, and which, from their nature and the relative positions of the parties, raise a presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money-lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws. *Chesterfield v. Jansen* (1), *O'Rorke v. Bolingbroke* (2), *Earl of Aylesford v. Morris* (3), *Nevill v. Snelling* (4), and *Beynon v. Cook* (5) referred to.

An illiterate *Kurmi* in the position of a peasant proprietor executed a mortgage-deed in favour of a professional money-lender to whom he owed Rs. 97, by which he agreed to pay interest on that sum at the rate of 24 per cent. per annum at compound interest. He further agreed that "*dharta*," or a yearly fine, at the rate of one anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, a six pies zamindari share was mortgaged for a term of eleven years. The effect of the stipulation as to "*dharta*" was that one anna per rupee would be added at the end of every year, not only to the principal mortgage-money but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of the mortgage, the mortgagor brought a suit for redemption on payment of only Rs. 97 or such sum as the Court might determine as due to the mortgagee. At that time the accounts made up by the mortgagee showed that the debt of Rs. 97, with compound interest, had swollen to Rs. 873, of which the "*dharta*" alone amounted to Rs. 211.

*Held* that the stipulation in the deed as to "*dharta*" was not of the kind referred to in s. 74 of the Contract Act (IX of 1872), and that there was no question of penalty, but that, looking to the relative positions of the parties, and the unconscionable and oppressive nature of the stipulation, the benefit thereof should be disallowed to the mortgagee, and the mortgagor permitted to redeem on payment of the mortgage-money and interest, no appeal having been preferred [75] by him from the decree of the first Court making redemption subject to the payment of interest.

**Appr.**, 9 A. 228; 25 A. 284=A.W.N. (1903) 44; R., 11 A. 57; A.W.N. (1888) 220; 32 P.R. 1890; 26 C. 315; 1 N.L.R. 76; 32 B. 208=9 Bom. L.R. 1296.]

THE facts of this case were as follows:—The plaintiff, Ram Prasad, was an illiterate *Kurmi* in the position of a peasant proprietor of some land in the Jalaun district of the Jhansi Division. The defendant, Lalli, appeared to be a professional money-lender. On the 9th July, 1875, a sum of Rs. 97 having been found to be due to the defendant by the plaintiff, the latter executed a mortgage-deed, by which he agreed to pay interest on that sum at the rate of 24 per cent. per annum at compound interest. He further agreed that "*dharta*" or a fine, at the rate of one

\* Second Appeal No. 1721 of 1885, from a decree of G. E. Ward, Esq., Commissioner of Jhansi, dated the 17th July, 1885, modifying a decree of W.R. Tucker, Esq., Assistant Commissioner of Orai, dated the 4th February, 1885.

(1) 1 White and Tudor's Leading Cases in Equity, 4th ed., 541; 2 Ves. 155.

(2) L.R. 2 App. Cas. 814.

(3) L.R. 8 Ch. App. 484.

(4) L.R. 15 Ch. D. 679.

(5) L.R. 10 Ch. App. 389.

anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. There was also a provision that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, the plaintiff mortgaged a six pies zemindari share, the term of the mortgage being eleven years. The effect of the stipulation as to the fine or *dharta* was that one anna per rupee would be added at the end of every year, not only to the principal of the mortgage-money, but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. The account made up by the mortgagee showed that for a period of ten years and seven weeks (*i.e.*, from the 9th July, 1875, to the 29th August, 1884), the *dharta* alone amounted to a sum of Rs. 211-8-6 on Rs. 97, the principal mortgage-money.

The present suit was instituted by Ram Prasad for redemption of the mortgaged property on payment of only Rs. 97, or such sum as the Court might determine as due to the mortgagee, alleging that, under the terms of the mortgage, the mortgagee was placed in possession of certain plots of land in lieu of interest, and the mortgage was redeemable on payment of only the principal sum of money due on the mortgage, and that the clauses in the mortgage-deed relating to compound interest and *dharta* were inserted dishonestly by the defendant, and without the plaintiff's knowledge. The Court of first instance (Assistant Commissioner of Orai) found that "the evidence shows that Ram Prasad was quite aware of the clauses in the deed relating to interest and penalty; [76] and, since the terms of the deed have been acted up to, it may reasonably be presumed that his declaration of ignorance is false." Upon this finding the Court allowed to the defendant not only the full amount of the compound interest, but also the *dharta* and costs, thus making the decree for redemption subject to the payment of Rs. 1,002-1-7. From this decree the plaintiff appealed to the Commissioner of Jhansi, who modified the first Court's decree. The Commissioner observed that the bond was of the most extortionate character, although the security was good. "The loan was of Rs. 97, and notwithstanding that the appellant has paid Rs. 157-8, the account against him at the end of ten years and a few weeks stands at Rs. 990-12. I do not see how the terms of the bond in respect of the interest can be evaded; but the additional yearly fine called *dharta* is, I think, of a penal nature, and may be set aside." The effect of this was to make the decree for redemption subject to payment of Rs. 456-14-3 instead of Rs. 1,002-1-7, which the first Court had allowed the defendant.

The defendant appealed to the High Court. It was contended on his behalf that the Commissioner was wrong in law in holding that the *dharta* agreed to be paid by the respondent was a penalty, and as such could not be awarded.

Babu Ratam Chand, for the appellant.

Mr. N. L. Paliologus for the respondent.

### JUDGMENT.

MAHMOOD, J. (after stating the facts of the case and the plea of the appellant as above, continued) :—I am of opinion that this contention is only plausible, but has no real force, and cannot prevail under the circumstances of this case. It is perfectly true that there is no real question of penalty, in its strict sense, involved in this case, and the law upon the subject has been consolidated for us in s. 74 of the Contract Act (IX of

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1872). I also concede the obvious proposition that ever since the repeal of the usury laws, Courts of Justice will not interfere with private contracts in regard to the rate of interest on pecuniary obligations. But the case presented here does not seem to me to rest upon any such principle, for I hold that the nature of the transactions is such as calls for interference of that equitable jurisdiction which the Courts of Chancery possess in England, and which the Courts of Justice in India [77] are also entitled to exercise by the nature of their constitution. We in India are no doubt bound by the rules of the statutory law ; but to use the language of Mr. Justice Story, "law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by Courts of Equity upon the broad ground of public policy, or the pure principles of natural justice.....The whole system of equity jurisprudence proceeds upon the ground, that a party having a legal right, shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."—(Story's Equity Jurisprudence, 11th ed., s. 1316.)

These observations, though they were made in connection with penal clauses in contracts, are applicable in principle to cases like the present, which require the exercise of equitable jurisdiction, and I am prepared to adopt them in connection with Indian Cases.

Now, the expression "fraud" is one of the most important terms in connection with the exercise of equity jurisdiction, and Lord Hardwicke in a celebrated case—*Chesterfield v. Janseen* (1)—after remarking that a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to enumerate its different kinds, and after stating actual fraud (*dolus malus*) went on to enumerate others which have been summarised in Mr. Justice Story's celebrated work (s. 188) in the following terms:—

"Secondly : It may be apparent from the intrinsic nature and subject of the bargain itself ; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other ; which are inequitable and unconscientious bargains, and of such even the common law has taken notice.

[78] "Thirdly : Fraud, which may be presumed from the circumstances and conditions of the parties contracting ; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Courts of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance."

It appears to me that the Court of first instance in this case, in dealing with the allegations of the plaintiff as to the compound interest and "*dharta*," ignored these two important aspects of *fraud* as understood in equity, for the mere fact of the plaintiff, an illiterate and ignorant *Kurmi* agriculturist, who could not even write his own name, for he made a mark, and another person wrote his name as the bond shows, being aware of the entry of the clause as to "*dharta*," would not deprive

him of the benefit of the principles of equity applicable to such cases. For while Courts bound by the technical rules of common law require specific proof of fraud or undue influence, Courts of Equity act upon inferences derived from the circumstances of the case in "bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud to which Lord Hardwicke alluded, in the passage already cited, when he said, that they were such bargains that no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other, being inequitable and unconscientious bargains. Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For Courts of Equity, as well as Courts of Law, act upon the ground that every person who is not, from his peculiar condition or circumstances under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for Courts of Justice, but for the party himself to deliberate upon."—(Story's Equity Jurisprudence, 11th ed., s. 244). "Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; [79] and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."—(Story's Equity Jurisprudence, 11th ed., s. 246.)

Now, in this case, the circumstances furnish ample reason for the view that the plaintiff, Ram Prasad, could not, by reason of being an ignorant and illiterate agriculturist, understand the exact effect of the stipulation as to *dharta*, coupled with compound interest, which, by a complicated arithmetical calculation, has swollen a debt of Rs. 97 to more than ten times its amount in the course of a little over ten years, as the decree of the first Court shows. A man of ordinary prudence would never enter into such a bargain, for, as the learned Commissioner observes, the loan was not advanced without adequate security, and there was no reason to stipulate such an exorbitant rate of interest. "And here we may apply the remark that the proper jurisdiction of Courts of Equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of law or of positive rules. Hence it is that even if there be no proof of fraud or imposition, yet if, upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, Courts of Equity will sometimes interfere and grant relief, although they certainly are very cautious of interfering unless upon very strong circumstances."—Story's Equity Jurisprudence, 11th ed., s. 331.)

I am of opinion that the "strong circumstances" contemplated in this passage do exist in this case, and require the application of the doctrines of equity, to which reference has already been made at such length. I am aware that "the mere fact that the bargain is a very hard or unreasonable one is not, generally, sufficient, *per se*, to induce the Courts to interfere."

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But "one of the most striking cases in which the Courts interfere is in favour of a very gallant, but strangely improvident, class [80] of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem from their habits to require guardianship during the whole course of their lives, having at the same time great generosity, credulity, extravagance, heedlessness, and bravery. Of course, it will be at once understood that we here speak of common sailors in the mercantile and naval service. Courts of Equity are always supposed to take an indulgent consideration of their interests, and to treat them in the same light with which young heirs and expectants are regarded. Hence it is that contracts of seamen respecting their wages and prize-money are watched with great jealousy, and are generally relieviable whenever any inequality appears in the bargain, or any undue advantage has been taken. It has been remarked by a learned Judge that this title to relief arises from a general head of equity, partly on account of the persons with whom the transaction is had, and partly on account of the value of the thing purchased. And, he added, that he was warranted in saying that they were to be viewed in as favourable a light as young heirs are, by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered them as a class of men, loose and unthinking, who will, almost for nothing, part with what they have acquired, perhaps, with their blood."—(Story's Equity Jurisprudence, 11th ed., s. 332.)

I have quoted the whole of this passage because, in my opinion, it is entirely applicable, *mutatis mutandis*, to the agricultural population of India, and especially to peasant proprietors, such as the plaintiff, Ram Prasad, in this case. The conditions of all parts of India are sufficiently homogenous to make these observations almost universally applicable, and by a curious coincidence the tendency of recent legislation in India, as represented by the Dekkhan Agriculturists' Relief Act (XVII of 1879) and by the Jhansi Encumbered Estates Act (XVI of 1882), has been in the same direction as that indicated by the passage which I have quoted from Mr. Justice Story's celebrated work. And I may add that I shall always be willing as an Indian Judge to apply to the contracts of the agricultural population of India, where the circumstances of the case justify such a course, the principles enunciated in the passages which I have quoted.

[81] Applying those principles to the present case, I have no doubt that the learned Commissioner acted rightly in disallowing to the mortgagee in this case the benefit of the unconscionable stipulation as to the "*dharta*" or fine which increased the debt by one anna per rupee, not only upon the principal sum but also upon interest calculated at the compound rate.

I will say nothing as to whether the principle might not have been carried further, because no appeal of objections in the nature of appeal have been preferred to us on behalf of the plaintiff, Ram Prasad, and the other plaintiffs, who, as purchasers of a portion of his rights, have joined in the suit for redemption.

It is enough to say that, upon general principles of equity, the interference of this Court is not called for in a case such as this. But I wish to add that I have considered it my duty to deliver such an elaborate judgment in this case, because I am aware that a general notion prevails in the mufassal that ever since the repeal of the usury laws, the Courts of Justice are bound to enforce contracts as to interest, regardless of the circumstances of the case, the relative conditions of the parties, and irrespective of the unconscionableness of the bargain. Courts of Justice in

India exercise the mixed jurisdiction of the Courts of Law and Equity, and in the exercise of that jurisdiction, whilst bound to respect the integrity of private contracts, they must not forget that cases which furnish adequate grounds for equitable interference must be so dealt with, not because such a course involves any the least contravention of the law, but because by reason of undue advantage having been taken of the weak and the ignorant, the contract itself is tainted with *fraud* in the broad sense in which that term is understood in the Courts of Equity in England and in America—a remark which seems to me fully justified by the rule of justice, equity, and good conscience, which we are bound to administer in such cases.

For these reasons I do not think this is a case in which we should interfere. I would dismiss this appeal with costs.

STRAIGHT, Offg. C.J.—I entirely concur in the construction placed by my brother Mahmood upon the terms of the instrument of 9th July, 1875. I agree with him that the condition therein as to payment of *dharta* is not of the kind mentioned in s. 74 of the [82] Contract Act, and that the question of penalty does not arise. The contract made between the parties on that date, therefore, comes to this: that for an old debt of Rs. 97, and no present cash payment, Ram Prasad agreed to pay interest at the rate of 24 per cent., compound interest on default of payment of interest and *dharta*, and as security mortgaged a 6 pies zemindari share, with a further provision that if interest were not paid for two years, the mortgagee was to obtain possession of certain *malikana* land of the mortgagor. The term of the mortgage was eleven years. The *dharta* was payable thus—at least, so I understand it: if interest were regularly paid, then at the end of each twelve months one anna in the rupee, calculated on Rs. 97, was to be added to the amount to bear interest thereafter; if interest were not paid, then to be calculated on the Rs. 97 *plus* the interest or compound interest, and then added. The effect of this arrangement has been, that in ten years the debt of Rs. 97, with compound interest, has swollen to Rs. 873, or nine times the original sum, of which the *dharta* supplies Rs. 211-8-6. The practical result is, that for the Rs. 97, Ram Prasad is sought to be made liable to pay interest at the rate of Rs. 77 per annum. I then have to ask myself, is it within reason or conscience that this Court or any other Court of Justice should be made the medium for enforcing such one-sided and unconscionable terms? No doubt I have no right to usurp jurisdiction, that is to say, I must not assume a power not vested in me: but has not this Court, as a Court of Equity, authority to do what the Courts of Equity in England have over and over again done, namely, to relieve the party who has been grievously disadvantaged by another from the strict letter of his contract? I think that it has.

The principle which was enunciated by the Court of Chancery in *Chesterfield v. Jansen* (1), as applied in that case, no doubt had reference to "catching bargains with heirs, expectants, and reversioners," but as the passage from Lord Hardwicke's judgment therein, which my brother Mahmood has quoted from Story, shows, there was no declaration that the equity then applied was to be limited to that class of persons only, as the following remarks [83] of Lord Hatherley in *O'Rourke v. Bolingbroke* (2) exemplifies:—"It sufficiently appears that the principle on which Equity originally proceeded to set aside such transactions was for the protection of family property but this principle being once established, the Court

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(1) 1 White and Tudor's Leading Cases in Equity, 4th. ed., 541; 2 Ves. 155.

(2) L.R. 2 App. Cas. 814.



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extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage, or contrivance has been resorted to on either side; but in the case of the 'expectant heir' or of persons under pressure without adequate protection, and in the case of dealings with *uneducated, ignorant persons*, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract." So Lord Selborne, in *Earl of Aylesford v. Morris* (1), referring to the presumption of fraud mentioned by Lord Hardwicke in the judgment already adverted to, observes:—Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it, in point of fact, fair, just, and reasonable." These views were given effect to by Denman, J., in *Nevil v. Snelling* (2), and the principle enunciated by them was fully recognized by Jessel, M. R., in *Beynon v. Cook* (3).

I gather therefore, according to the rule of equity laid down by Lord Hardwicke, that equitable relief of the kind described by him may be extended to the cases of "persons under pressure without adequate protection," or to transactions with "uneducated, ignorant persons," and that it lies upon him who seeks to fix them with a liability, which, upon the face of it, appears unconscionable, to establish that the contract out of which it arises was "fair, just, and reasonable." Now, what is the state of things here? The plaintiff, an uneducated, ignorant countryman of one of the most rural districts within our jurisdiction, found himself unable to pay Rs. 97 to his creditor. The creditor, an astute Brahman money-lender, knowing that in their [84] relative positions, one to the other, he can dictate almost any terms, proceeds to put forward the agreement, the onerous conditions of which I have explained at the outset of my judgment. It is obvious that in reality the debtor had little or no choice but to accept them, and that much in the same way as a young spendthrift will give his promissory note for a large amount, so long as he gets a small sum of present cash, the plaintiff in his case was willing to consent any proposal to escape from his immediate embarrassment. It is equally clear to my mind that the object the defendant had in view, knowing the plaintiff's pecuniary capabilities, was to put him under such terms that, unless he obtained funds from foreign sources, he would never be able to redeem his share, and it would thus inevitably fall into his hands.

It is bargains of this description between the small village-proprietors and the money-lenders that are gradually working the extinction of the former class in many of the country districts, and producing results which are not only a serious scandal, but a positive mischief. For it is to be borne in mind that the pecuniary difficulties of the persons I have mentioned are as often as not the result of misfortune rather than improvidence, and that bad seasons have as much to do with causing them as waste or extravagance. Whichever way it be, this is certain that the money-lenders, as anyone who sits in this Court must see, are to an alarming extent absorbing proprietary interests in the village communities, and that the body of ex-proprietors is enormously on the increase. It is, of course, not

(1) L.R. 8 Ch. App. 484.

(3) L.R. 10 Ch. App. 389.

(2) L.R. 15 Ch.D. 679.

my business here to discuss the policy that should govern the action of the State in dealing with this state of things, but as a Judge having power to enforce equitable principles, I am resolutely determined, until I am set right by higher authority, to give effect, in cases of this kind, to the principles propounded by the eminent lawyers, to whose utterances I have referred, and to see that justice is done. It may be said that the repeal of the usury laws prohibits me from adopting the course I propose to take. As to this, it is enough to say that Lord Selborne, Lord Hatherley, and Sir George Jessel, in the judgments to which I have adverted, remarked in the clearest and most emphatic language that the repeal of the usury laws in [85] England had in no way touched or affected the power claimed by the Court of Chancery to grant relief in such matters. I entirely concur in, and approve, the order proposed by my brother Mahmood.

*Appeal dismissed.*

9 A. 85=6 A.W.N. (1886) 307.

### REVISIONAL CRIMINAL.

*Before Mr. Justice Brodhurst.*

QUEEN-EMPRESS v. PURAN AND OTHERS. [15th November, 1886.]

*Complaint, dismissal of—Revival of proceedings — Criminal Procedure Code, Ss. 203, 437.*

A complaint was made, before a Magistrate of the first class, of an offence punishable under s. 323 of the Penal Code. The Magistrate recorded a brief statement by the complainant, but did not ask him if he had any witnesses to call. An order was passed directing that "a copy of the petition of complaint should be sent to the Police-station, calling for a report on the matter," and on receipt of the report the Magistrate dismissed the complaint under s. 203 of the Criminal Procedure Code. There was nothing in the Magistrate's original order to show that he saw reason to distrust the truth of the complaint, nor did he direct any local investigation to be made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint. Subsequently to the dismissal of the complaint, the same complainant brought a fresh charge upon the same facts against the same persons in the same Court, and upon this charge the accused were tried, convicted, and sentenced.

*Held* that the Magistrate had not complied with the provisions of s. 202 of the Criminal Procedure Code, and ought not, merely on the report he had received, to have dismissed the first complaint under s. 203.

*Held*, also that the Magistrate in ordering a further inquiry, on receiving the complainant's second petition, did not act contrary to any provision of the law, and that, considering the circumstances under which the first complaint had been dismissed, a further inquiry was necessary.

[*Dis.*, 28 C. 652 (672); *F.*, 1 N.L.R. 18 (20); 29 M. 126 (135) (*F.B.*)=1 M.L.T. 31=16 M.L.J. 79; 10 P.R. 1911=24 P.W.R. 1911=11 Ind. Cas. 132=12 Cr. L.J. 364; *R.*, 28, C. 211=5 C.W.N. 169 (171); 9 P.R. 1902=50 P.L.R. 1902; 2 L.B.R. 27; 10 A.L.J. 531 (532)=18 Ind. Cas. 146; *D.*, 23 C. 983 (989); 22 P. 106 (108).]

THIS was a case reported to the High Court for orders by Mr. W. Crooke, Officiating Magistrate of Aligarh. The Magistrate stated as follows in reporting the case:—

"The facts of this case are as follows:—On the 28th May, 1886, the complainant Tika Ram laid a charge under s. 323, Penal Code, against Kapuriya, Puran, Choteh, Jhanda, Behari, Asa, Ram Ratan, Pema, and Buddha. The charge was laid in the Court of Munshi Intizam-ud-din, Deputy Magistrate, who referred the matter to the police for enquiry, and on receipt of the police report, which was to the effect that the evidence

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against the defendants was [86] insufficient, dismissed the charge under the provisions of s. 203, Criminal Procedure Code, by his order dated the 30th June, 1886.

"Again, on the 10th July, 1886, the complainant laid a charge on the same facts under the same section in the same Court against eight out of the above nine defendants.

"Owing to the transfer of Munshi Intizam-ud-din from the district, the case came before his successor Sardar Lachman Singh, who finally, on the 30th August, 1886, decided the case, and sentenced the applicants Pema, Choteh, and Puran to ten days' rigorous imprisonment under s. 352, Penal Code.

"The question now is, was the revival of the case in this way legal? I believe that the order is illegal. Mr. Prinsep, in his edition of the Procedure Code, under s. 203, lays down the law as follows:—'The dismissal of a complaint under s. 203, is not an acquittal (s. 403, Explan.), but a complaint so dismissed cannot be re-heard, except on an order made under s. 437, which provides that the High Court or Court of Session may direct the District Magistrate, by himself or by any of the Magistrates subordinate to him, to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged.' The same view of the law seems to have been taken by the Madras Court in their proceedings of the 28th March, 1878, quoted by Mr. Prinsep under s. 203.

"It would appear, then, that the revival of this case under the above circumstances, without an order under s. 437, Criminal Procedure Code, was illegal, and this can only be set right by an order from the Honourable Judges of the Court directing a re-trial of the case. I may add that the appellants served five days of their sentence in jail. I have admitted them to bail on Rs. 50 each, and it is a question whether the punishment which they have already suffered is not sufficient to meet the justice of the case, and whether they may not now be finally released."

#### JUDGMENT.

BRODHURST, J.—This case has been referred merely because the officiating Magistrate of the District is of opinion that the Magistrate of the first class, who originally received the complaint, and [87] who dismissed it under s. 203 of the Criminal Procedure Code, was not empowered to re-open the case on the mere application of the complainant, and without a further inquiry having been directed by the District Magistrate, the Court of Session, or the High Court, under s. 437 of the Code. The first complaint was made on the 25th May, 1886. In this petition the complainant stated that the accused had given him a severe beating, had then falsely charged him with theft, and had taken him to the police-station. He added that the thanadar had made an inquiry, had obtained no proof to support the charge of theft, and had therefore released him. His evidence was very briefly recorded by the Magistrate on the 28th May. He deposed to the same effect as stated in his petition, and he referred to *lathi* marks as the result of the assault that had been committed upon him. The Magistrate ordered that a "copy of the petition be sent to the police-station, calling for a report on the matter." The Magistrate apparently passed this order because the complainant alleged that the thanadar had already made the inquiry above referred to. There is nothing in the order to show that the Magistrate saw

"reason to distrust the truth of the complaint." He did not record any "reasons for distrusting the truth of the complaint," nor did he "direct a local investigation to be made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint." The Magistrate did not comply with the provisions of s. 202 of the Criminal Procedure Code, and he ought not, merely on the report he received, to have dismissed the complaint under s. 203 of the Code.

Sardar Lachman Singh, Magistrate of the first class, referred to a note under s. 437 in Mr. Prinsep's edition of the Criminal Procedure Code as supporting his view. The note is as follows:—"If, however, fresh evidence be forthcoming there would apparently be no objection to the Magistrate who passed the order of discharge re-opening the case." The note is represented to be based on three rulings of High Courts in India.

The Magistrate of the district has not made any allusion to the note and rulings relied upon by his subordinate, but has referred to a note under s. 203 of the same edition, and to a Madras High Court ruling of the 28th March, 1878. The note is to the effect [88] that a complaint dismissed under s. 203, Criminal Procedure Code, "cannot be re-heard except on an order made under s. 437." All of the four judgments above referred to under either s. 203 or s. 437 were apparently delivered before the present Criminal Procedure Code came into force. Neither of the Madras rulings is obtainable here, and in all probability neither of the lower Courts has had an opportunity of perusing either of them. Neither of the two judgments appear to be precisely in point. In the present case the complainant was not, on the first occasion, asked if he had any witnesses to call, and beyond his own brief statement no evidence whatever was recorded.

I think that when the Magistrate who had dismissed the original complaint ordered a further inquiry, on receiving the complainant's second petition, he did not act contrary to any provision of the law, and considering the circumstances under which the complaint had been dismissed, a further inquiry was, in my opinion, necessary.

I see no reason for interference. The applicants will work out the unexpired portions of their short sentences, and the record will be returned to the District Court.

9 A. 88 (F.B.) = 6 A.W.N. (1886) 320.

#### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

JUGAL (*Judgment-debtor*) v. DEOKI NANDAN (*Decree-holder*).\*  
[15th November, 1886.]

*Ex-proprietary tenant—Trees—Sale in execution of decree—Act XII of 1891 (N. W. P. Rent Act), ss. 7, 9.*

Held by the Full Bench that an ex-proprietor, who under s. 7 of Act XII of 1891 (N.-W.P., Rent Act) gets occupancy-rights in his *sir*-land, obtains analogous rights in the trees upon such *sir*-land.

\* Second Appeal No. 43 of 1886, from an order of M. S. Howell, Esq., District Judge of Aligarh, dated the 24th February, 1886, reversing an order of Babu Madho Das, Munsif of Aligarh, dated the 25th September, 1885.

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A purchaser of proprietary rights in zamindari property at a sale in execution of a decree for money held by himself applied in execution of the decree for the attachment and sale of certain trees growing on the judgment-debtor's exproprietary holding.

[89] Held by the Full Bench, with reference to the provisions of ss. 7 and 9 of Act XII of 1881 (N.-W.P. Rent Act), that the trees were not liable to attachment and sale in execution of the decree.

*Per* STRAIGHT, J.—When a proprietor sells his rights and becomes entitled, under s. 7 of the Rent Act, to the rights of an ex-proprietary tenant, he holds all rights in the land, *qua* such tenant, which he formerly held in his character as proprietor, and paying rent in his capacity as tenant. Where there are trees upon the *sir* land held by him at the time when he lost his proprietary rights, neither the purchaser of those rights nor he himself can cut down or sell them *in invitam* to each other. Short of cutting the trees down, he has the same right to enjoy the trees as he originally had.

[Rel. on, 9 A.L.J. 672 (674)=14 Ind. Cas. 592; R., 10 A. 159; 7 C.P.L.R. 7.]

THE appellant in this case, one Deoki Nandan, obtained a decree for money against the respondent Jugal, and in execution thereof caused to be sold, and himself purchased, the rights and interests of the judgment-debtor in certain zamindari property. The judgment-debtor having thus become the decree-holder's ex-proprietary tenant in the land held by him as *sir*, the decree-holder brought a suit against him for profits in respect of certain trees growing on the *sir*-land. He obtained a decree in the Court of first instance and the lower appellate Court, but that decree was reversed on appeal by the High Court, which held that he was not, in that suit, entitled to recover damages or profits.

The appellant then fell back upon his former decree, and in execution thereof applied for the attachment and sale of certain trees on the judgment-debtor's ex-proprietary holding. The Court of first instance (Munsif of Hathras) passed the following order:—"I think that the trees are not liable to be sold by virtue of the provisions of s. 9 of Act XII of 1881. I therefore reject the decree-holder's application, so far as it relates to the sale of the trees."

From this order the decree-holder appealed to the District Judge of Aligarh, who gave judgment as follows:—

"There is no ex-proprietary right in trees, that right being restricted by s. 7 of Act XII of 1881 to 'land.' Consequently, s. 9 does not forbid a transfer of the trees in question. I reverse the Munsif's order rejecting the application for attachment and sale of the trees."

"The judgment-debtor appealed to the High Court on the ground that the trees, being part and parcel of an ex-proprietary tenant's holding, cannot be sold in execution of a decree."

[90] The appeal came for hearing before Oldfield and Brodburst, JJ., who passed the following order:—

"We refer to the Full Bench the question raised in this case, whether the trees growing on the land of the judgment-debtor are liable to attachment and sale in execution of the decree."

Mr. Niblett, for the appellant.

Munshi Hanuman Prasad, for the respondent.

#### JUDGMENTS.

The following judgments were delivered by the Full Bench:—

EDGE, C J.—The order of reference in this case is as follows:—"We refer to the Full Bench the question raised in this case, whether the trees growing on the land of the judgment-debtor are liable to attachment and sale in execution of the decree." We are informed that the judgment-

debtor is an ex-proprietary tenant within the meaning of s. 7 of the N.-W.P. Rent Act, and also that the judgment-creditor is the person who has purchased his proprietary interest and made him the ex-proprietary tenant he is. This being so, we have both landlord and tenant before us. Munshi *Hamman Prasad*, on behalf of the landlord, the judgment-creditor, states that these trees do not belong to the landlord, but remain with the ex-proprietary tenant as part of his holding. Assuming, for the purposes of this case, that this admission is well-founded, the question is, can the trees be taken in attachment and sale under the decree?

It appears to me that this question must be answered in the negative. The object of the Rent Act was that these ex-proprietary tenants should be protected in their holdings, and that if any one should sell them up, they should remain and cultivate their tenancies. S. 9 of the Act provides that "no other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom, as co-sharers, such right originally arose, or who have become by succession co-sharers therein." This must be read with s. 7; and what we are asked to say is, that one of the rights enjoyed by the judgment-debtor as an ex-proprietary tenant—namely, the right to the trees growing on his holding and to the benefit of their fruit—shall be taken away from him for the benefit of his judgment-creditor, who happens in this case to be his landlord. This appears to me to be contrary to [91] ss. 7 and 9. Further, with reference to s. 7, itself, when a person becomes an ex-proprietary tenant, the section provides that the rent shall be fixed upon this general principle: "a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages." In many cases trees may be of advantage to a holding, and possibly a higher rent might often be got for land which has trees upon it than for the same land when despoiled of those trees, particularly if the trees were fruit-trees, as they are in the present case. If the trees in question were cut down by the judgment-creditor, the result would be that the holding of the ex-proprietary tenant would be deprived of its advantages as compared with similar land with the advantages of fruit-trees. By cutting them down the judgment-creditor would be diminishing the landlord's rent, because if he were entitled to cut the trees, such action would be lawful as against both landlord and tenant, and a reduction would follow. For these reasons my answer to the reference is in the negative.

STRAIGHT, J.—I am of the same opinion, but as I base my judgment upon somewhat broader grounds than those of the learned Chief Justice, I wish to state one or two additional facts. The plaintiff originally sued the judgment-debtor and obtained a decree and himself purchased in execution thereof the rights of the judgment-debtor in certain zamindari lands. Naturally he assumed that the entire proprietary rights of the judgment-debtor in all the land short of what belong to the ex-proprietary tenant's right had passed to him, and he brought a suit against the judgment-debtor for profits in respect of certain trees growing on the land. He obtained a decree in both the Courts below, but in appeal in this Court, a Division Bench held that he was not entitled to recover damages or profits in that suit.

In the result he fell back upon his decree in the former suit, and he now seeks the attachment of certain trees growing on the ex-proprietary holding of the judgment-debtor.

I am of opinion that he is not legally entitled to do this. It appears

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to me that when a proprietor sells his rights, and by operation of law becomes entitled, under s. 7 of the Rent Act, to the [92] rights of an expropriatory tenant, he holds all rights in the land, *qua* such tenant, which he formerly held in the character of proprietor, short of the actual proprietorship, and of course paying rent in his capacity as tenant; and where there are trees upon the *sir*-land held by him at the time when he lost his proprietary rights, neither the purchaser of those right nor he himself can cut down or sell them *in invitum* to each other. He has a right to enjoy the trees as before, and, short of cutting them down, the same right remain in him that he originally had. It is clear, therefore, that in this case the decree-holder has no right to sell something in which he himself has no separate or divisible interest; and though he no doubt has a proprietary interest, that is subject to the ex-proprietary tenant's right to use and enjoy the trees as heretofore. My answer to the reference is in the negative.

OLDFIELD, J.—I concur in the judgment of the learned Chief Justice. I think that any other answer to the reference than that which he proposes would defeat the object of s. 9 of the Rent Act. An ex-proprietor, who under s. 7 gets occupancy-rights in his *sir*-land, obtains rights of an analogous nature in the trees upon such *sir*-land. If the decree-holder has no power to sell the tenant's rights in the land, I cannot see how he can sell the rights in the trees upon the land as separate from the land, and for this reason I also would answer the reference in the negative.

BRODHURST, J.—I also concur in the answer proposed by the learned Chief Justice.

TYRRELL, J.—The appellant was formely the zemindar of the land on which the timber stands, but it has passed from him by sale for debt to the respondent. The latter seeks to execute a decree which he holds against the former by bringing to sale some trees standing on the appellant's holding, which the respondent regards as the property of the appellant. But they can be so, as the respondent puts his case and claim, in no other way and under no other right than that of the occupancy-tenancy of the respondent, and as such the appellant's interests in the timber would not be liable to the transferred in execution of the respondent's decree. They would be protected by the provisions of s. 9 of the Rent Act. I do not of course lay down this proposition as one of general law but only in [93] regard to the peculiar circumstances of the plaint and pleadings as appellant has chosen to put them in this case. I concur in the negative answer to the reference.

On the case being returned to the Divisional Bench, the following judgment was delivered:—

OLDFIELD and BRODHURST, JJ.—With reference to the opinion of the Full Bench of this Court on the point referred, we set aside the order of the Judge and restore that of the first Court with costs.

*Appeal allowed.*

9 A. 93 (F.B.) = 6 A.W.N. (1886) 302.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

SUNDAR BIBI (Plaintiff) v. BISHESHAR NATH AND OTHERS  
(Defendants).<sup>\*</sup> [15th November, 1886.]

*Appeal to Her Majesty in Council—Civil Procedure Code, ss. 574, 596, 632, 633—  
“Substantial question of law”—Judgment of High Court—Contents of Judgment  
—Rules made by High Court under s. 633 for recording judgments.*

The intention of the Legislature as expressed in s. 633 of the Civil Procedure Code was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing, or according to any mode which might appear to it best in the interests of justice. The section does not merely give the High Court power to direct that judgments shall be recorded in a particular book, or with a particular seal.

Rule 9 of the rules made under s. 633, in March, 1885, is therefore not *ultra vires* of the Court, and it modifies the provisions of s. 574 in their application to judgments of the High Court.

With reference to the terms of Rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgment of the Court below, to go through the formality of re-stating the points at issue, the decision upon each point, and the reason for the decision.

*Per* EDGE, C.J.—Apart from Rule 9, it never was intended that s. 574 of the Code should apply to cases where the High Court, having heard the judgment of the Court below and arguments thereon, comes to the conclusion that both the judgment and the reasons which it gives are completely satisfactory, and such as the High Court itself would have given.

Assuming the provisions of s. 574 to be applicable, a judgment of the High Court stating merely that the appeal must be dismissed with costs and the judgment of the first Court affirmed, and that it was unnecessary to say more than that the Court agreed with the Judge's reasons, is a substantial compliance with those provisions.

[94] The judgment of the High Court in a first appeal was as follows:—“This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judge's reasons.” The appellant applied for leave to appeal to Her Majesty in Council on the ground that the requirements of s. 574 of the Civil Procedure Code had not been complied with.

*Held* by the Full Bench that the objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected.

THIS was an application by the legal representative of the deceased appellant in F. A. No. 99 of 1884 for leave to appeal to Her Majesty in Council from the decree of the High Court dated the 8th December, 1885, dismissing the appeal and affirming the decree of the lower Court (District Judge of Cawnpore). The judgments of the High Court were as follows:—  
O. J. PETHERAM, C.J.—This appeal must, in my opinion be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judge's reasons.

“OLDFIELD, J.—I am of the same opinion.”

The first of the grounds upon which the application for leave to appeal to Her Majesty in Council was made was as follows:—

“Because the requirements of s. 574 of the Civil Procedure Code have not been complied with.”

The application came on for hearing before Oldfield and Mahmood, JJ., who referred it to the Full Bench for disposal.

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Mr. *G. T. Spankie*, for the applicant, contended that, with reference to s. 632 of the Civil Procedure Code, the provision of s. 574, relating to the contents of the judgments of appellate Courts, applied to the High Court, there being no exception of these provisions to be found in Chapter XLVIII. S. 633 only empowered the Court to make rules as to the "recording" of judgments and orders, and therefore Rule 9 of the rules made in March, 1885, was *ultra vires*, so far as it purported to qualify s. 574, relating to the contents of judgments, in its application to judgments of the High Court in appeal. The neglect to comply with the requirements of s. 574 was a "substantial question of law" within the meaning of s. 596, such neglect having on many occasions been treated by [95] the High Court as a sufficient ground of second appeal within s. 584 (c). S. 652 did not apply to cases of this kind.

The Hon. *T. Conlan* and the Hon. Pandit *Ajudhia Nath*, for the opposite parties, were not called upon.

### JUDGMENT.

EDGE, C. J.—I am of opinion that this application must be rejected. It is an application for leave to appeal to Her Majesty in Council, and although four grounds were originally put forward in support of it, the first of them only is now before us. This is thus stated:—"Because the requirements of s. 574 of the Civil Procedure Code have not been complied with." Now s. 574 provides that "the judgment of the appellate Court shall state—(a) the points for determination; (b) the decision thereupon; (c) the reasons for the decision and (d) when the decree appealed against is reserved or varied, the relief to which the appellant is entitled." In the first place, I cannot conceive that it was intended that this section should apply to cases where the High Court, having heard the judgment of the Court below and argument upon that judgment, comes to the conclusion that it is right, and agrees with the reasons which it gives. It can never have been intended that where both the judgment and its reasons are completely satisfactory to the High Court, and such as the Court itself would have given, the Judges should be compelled to write out again "the points for determination," the "decision thereupon," and "the reasons for the decision." In this case the Judges have stated their decision, and have also stated their reasons by saying they agree with the reasons given by the Court below. Is it possible to maintain that in these circumstances the Judges of this Court, agreeing with all the substantial reasons contained in the judgment of the lower Court, should sit down and again write out these reasons at length? I further think that even if the rules framed by the Court in March, 1885, did not modify the provisions of s. 574, and if that section does apply to a case like the present, the judgment of Sir Comer Petheram and my brother Oldfield did substantially comply with these provisions. Their judgment which was delivered by the Chief Justice, was in the following terms:—"This appeal must, in my opinion be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judge's reasons." The Judge's reasons [96] include the ground work on which they are based; and the Judges of this Court virtually adopt and make their own his statement of the issues, his findings, and his reasons.

In the next place, this Court, in March, 1885—before the date of the judgment in question,—framed rules under s. 633 of the Code, which provides that "the High Court shall take evidence and record judgments.

or orders in such manner as it by rule from time to time directs." These words give us the widest discretion as to the mode of taking evidence in cases tried before the Court; and the taking of evidence is the most important step before judgment can be arrived at, because the judgments, both of this Court and of the Privy Council, might be materially affected by the mode in which it is done. It has been said that the expression "record judgments or orders" merely gives us the power of saying that judgments or orders shall be recorded in a particular book or with a particular seal. I entirely dissent from that contention. The intention of the legislature, as expressed in s. 633, was that the Judges might frame rules as to how their judgments should be given, so that they might give them orally or in writing, or adopt any mode which might appear to them best in the interests of justice. I am therefore of opinion that there is nothing in that argument that these rules are *ultra vires*. Now, Rule 9 is as follows:— "The record of judgments or orders shall be, as far as possible, *verbatim*, and it shall state, as far as may be necessary for the purposes of the particular case, the points for determination, the decision thereupon, the reasons for the decision, and, when the decree appealed against is reversed or varied, the relief to which the appellant is entitled." The important words are "as far as may be necessary for the purposes of the particular case." How can it possibly be contended that, in a case where this Court substantially adopts the whole judgment of the Court below, it is necessary to go through the formality of re-stating the points at issue, the decision upon each point, and the reasons? It has been said that in cases where this Court disagrees with the Court below, these observations would not apply; but I can only say that I cannot conceive that, in such cases, this Court would set aside the decree without stating its reasons fully. I am of opinion that this application must be refused with costs.

[97] STRAIGHT, J.—The only point put forward as the substantial question of law involved, which would entitle the petitioner to appeal to Her Majesty in Council, is that taken by the first ground of the memorandum of appeal. I am of opinion that, rules having been framed under the Civil Procedure Code in that behalf, this Court's judgments are not governed by s. 574 of the Civil Procedure Code, but by these rules, and therefore I do not think the objection relied on by the petitioner raises any substantial question of law. The application must be refused with costs.

OLDFIELD, J.—I entirely concur in the opinion of the learned Chief Justice.

BRODHURST, J.—I concur with the learned Chief Justice that there is no ground for granting the application for leave to appeal to Her Majesty in Council, and I would refuse the certificate, and dismiss the petition with costs.

TYRRELL, J.—I concur.

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## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*BHAGWAN SAHAI (*Defendant*) v. BHAGWAN DIN AND OTHERS (*Plaintiffs*).<sup>\*</sup>  
[16th November, 1886.]*Mortgage—Sale of mortgagee's rights and interests for the recovery of arrears of revenue—Suit for redemption—Act XV of 1877 (Limitation Act), Sch. ii, No. 134—Regulation XI of 1822, s. 29—Regulation XVII of 1806.*

It was not intended that property which would pass on the sale by a mortgagee of his interest should come within the scope of art. 134, schedule II of the Limitation Act (XV of 1877). That article was intended to protect, after the expiration of twelve years from the date of a purchase, a person, who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor had the power to convey and was conveying to him an absolute interest, and not merely the interest of a mortgagee. *Radanath Doss v. Gisborne and Co.* (1), *Piarey Lal v. Saliga* (2), *Kamal Singh and Batul Fatima* (3); referred to.

Contemporaneously with the execution of a registered deed of sale of zamindari property in 1835 for Rs. 4,000 the vendee executed a deed in favour of the [98] vendors, which also was registered, and by which he agreed that if within ten years the vendors should pay Rs. 4,000 in a lump sum without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. This transaction admittedly amounted to a mortgage by conditional sale. The mortgagee remained in possession, and his name was entered as that of proprietor in the Collector's register, in which no allusion was made to a mortgage. In 1840 his rights in this property were sold by auction for arrears of Government revenue due by him on account of other land, and apparently no notice was given by any one at or prior to the sale that it was the mortgagee's interest only which was about to be or was being sold. The property was purchased for Rs. 3,000 by S, who took possession, and in 1845 sold it for Rs. 3,000 to T, who took possession and in 1847 sold it for the same sum to C. On the occasion of each transfer, the name of the transferee was entered in the Collector's register as that of proprietor. No application for foreclosure was made at any time. In 1885, the representatives of the mortgagors brought a suit against the representative of C for redemption of the mortgage, and for mesne profits. The defendant pleaded (i) that the suit was barred by limitation under art. 134, sch. ii, of Act XV of 1877, (ii) that the several transferees were innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was, with the consent, express or implied, of the persons for the time being interested, the ostensible owner, and had in each case, prior to the purchase, taken reasonable care to ascertain that the transferor had power to make the transfer, and had acted in good faith.

*Held* that art. 134 of the Limitation Act did not apply to the case, inasmuch as that article referred only to persons purchasing what was *de facto* a mortgage, having reasonable grounds for the belief, and believing that it was an absolute title; and that, having regard to s. 29 of Regulation XI of 1822, to the presumption that the several transferees knew the law and made inquiries as to the interest they were purchasing, and examined the register in which the deed constituting the transaction of 1835 a mortgage was registered, and also having regard to the fact that Rs. 3,000 only were paid as purchase-money in each case, and to the circumstance that it was doubtful whether a purchaser at a formal auction sale such as that in question could be said to have purchased without notice an absolute interest from the mortgagee, it must be inferred that the transferees knew, or might, or ought to have known, unless they wilfully abstained from inquiry, that the interest which they respectively were purchasing was merely that of a mortgagee.

<sup>\*</sup> First Appeal No. 177 of 1885, from a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 2nd August, 1886.

(1) 14 M.I.A. 1.

(2) 2 A. 394.

(3) 2 A. 460.

*Sobhag Chand Gulab Chand v. Bhai Chand* (1) referred to.

Held that as by Regulation XVII of 1806 mortgagors in such a case as the present were entitled to redeem within sixty years, the plaintiffs were entitled to a decree for redemption,

[F., 2 A.L.J. 234=A.W.N. (1905) 56; 20 A. 471=4 A.L.J. 275=A.W.N. (1907) 133; Appc., 12 M. 316; 15 M. 331; R., 15 B. 583; 9 M.L.J. 93; 2 C.L.J. 546; 9 O.C. 373; 9 Ind. Cas. 1013 (1017)=8 A.L.J. 389; Cons., 19 B. 140.]

THE facts of this case are stated in the judgment of the Court.

The Hon. T. Conlan, Mr. Habibullah, and the Hon. Pandit Ajudhia Nath, for the appellant.

[99] Pandit Bishambar Nath, Munshi Hanuman Prasad, and Lala Jokhu Lal, for the respondents.

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### JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This is an appeal by Bhagwan Sahai, one of the defendants in the Court below, from the judgment of the Subordinate Judge of Cawnpore, dated the 2nd August, 1885, by which he decreed the claim of the plaintiffs, the now respondents, for possession of the property in suit on their paying to the defendant, the now appellant, Rs. 4,000, principal mortgage-consideration. The Subordinate Judge ordered that the parties should bear their respective costs. From this judgment the plaintiffs have not, nor have the defendants, other than Bhagwan Sahai, appealed. The plaintiffs' claim in the action was for the redemption of an alleged mortgage and for mesne profits; and their case was, that Alam Singh, Chandi Singh, Bhawani Din, Manna Singh, Durjan Singh, Ghasi Singh, Siva Din, Ishri Singh, Pranu, Dina, and Gulam, sold the entire 16 annas zemindari interest in mauza Haribaspur, pargana Gatampur, zila Cawnpore to one Ganga Din, for the sum of Rs. 4,000, by executing a sale-deed in his favour on the 20th February, 1835, and causing its registration on the following day. The execution and registration of the sale-deed were admitted. The plaintiffs also alleged that Ganga Din contemporaneously with the execution of the sale-deed executed a deed in favour of the vendors, which we shall refer to as the "contemporaneous deed," by which he, amongst other things, agreed that if the vendors should, within ten years from the 20th February, 1835, pay Rs. 4,000 in a lump sum and without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. The fact that Ganga Din had contemporaneously with the execution of the sale-deed executed the "contemporaneous deed" in question, a copy of which appears at page 12 of the appellant's book, was not contested on behalf of the appellant before us.

The plaintiffs contended that the sale was a conditional sale or a mortgage by conditional sale. The correctness of this contention was admitted on behalf of the appellant. The plaintiffs also alleged that Ganga Din went into possession as mortgagee, and subsequently in 1840, the right of Ganga Din "as mortgagee" in mauza Haribaspur was sold by auction for arrears of revenue due by him in [100] respect of mauza Sumerpur, zila Banda, to one Sukh Din who took possession of the property in suit: and that the fact of the property being subject to the mortgage was proclaimed at the auction-sale. It was common ground that from 1835 until Sukh Din's name was substituted in the register, Ganga Din appeared as the proprietor in the Collector's register, in which no allusion was made to a mortgage. The appellant contended that at or



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prior to the auction-sale no notice was given that the property was subject to a mortgage, or that Ganga Din's rights and interests were those only for a mortgagee, or that Ganga Din was anything else than the proprietor, which so far as the Collector's register was concerned, he appeared to be, and that Sukh Din was a purchaser for valuable consideration and without notice of the mortgage. It was also common ground that in 1845 Sukh Din sold the property for Rs. 3,000 to one Thakur Prasad, who took possession, and two years subsequently sold it for Rs. 3,000 to one Husain Ali, who, in 1852, sold it for Rs. 3,000 to one Sheo Charan, deceased, who was succeeded by the appellant as his son and heir, and that the appellant is in possession; and that on the occasion of each transfer the name of the transferee was entered in the Collector's register as that of the proprietor.

It was alleged by the respondent that at the time of each transfer by sale a notice on behalf of those claiming the equity of redemption in the mortgaged premises was given to each purchaser, including Sukh Din. This was denied by the appellant. It was also common ground that no application for foreclosure had been made. The plaintiffs—Bhagwan Din, Kampta, Mathura, Lochi, Bhairon Singh, Prayag, Gulab, Bhawani Din, Manna Singh, Ratwan, Hira Lal, Badalu, Puran, Ganga, Anganu, Lalman, and Lala—are the representatives of the vendors-mortgagors. The plaintiffs Durga Prasad and Madho Prasad, eight days before the institution of this suit purchased from the other plaintiffs an 8 annas  $7\frac{1}{2}$  pies and 4 krants share of the interest (if any) which such other plaintiffs had or alleged they had in the entire 16 annas Zamindari interests of mauza Haribasapur. Musammam Mathura, one of the defendants below, is the daughter and heiress of Ganga Din. She admitted the plaintiffs' claim. The defendants, Jaur and Khushal, who were heirs of Siva Din, one of the vendors-mortgagors, party to the sale-deed of [101] 1835, did not join in the suit. It has not been proved that any one gave notice at, or prior to, the auction-sale that the property was mortgaged or that it was the mortgagee's interest only which was about to be, or was being sold. It was contended on behalf of the appellant, and denied on behalf of the respondents, that the suit was barred by art. 134, sch. ii of the Limitation Act,—Act XV of 1877—that the agreement contained in the "contemporaneous deed" had been abandoned; and that Sukh Din, Thakur Prasad, Husain Ali, and Sheo Charan, were respectively innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was, with the consent, express or implied, of the persons for the time being interested, the ostensible owner of the property; that the transferee in each case had, prior to his purchase, taken reasonable care to ascertain that his transferor had power to make the transfer, and had acted in good faith.

The appellant relied upon the cases of *Piarey Lal v. Saliga* (1), and the case of *Kamal Singh v. Batul Fatima* (2). It is sufficient to say that, holding the views which we do of the facts of the present case, the cases cited do not appear to us to be authorities on the points of law which we have to decide.

These contentions, which involve issues of law and of fact, we shall deal with in their order. As to the question of limitation we find that in the case of *Radanath Doss v. Gisborne & Co.* (3) their Lordships of the Privy Council had under their consideration s. 5 of Act XIV of 1859, which

(1) 2 A. 394.

(2) 2 A. 460.

(3) 14 M.I.A. 1.

with the exception that it contained the words "*bona fide*" and "purchaser," which do not appear in art. 134, sch. ii of the Limitation Act, 1877, was practically the same as art. 134 above referred to. Their Lordships held there that a defendant, in order to claim the benefit of s. 5 of the Act of 1859, had to show three things:—"First, that he is a purchaser according to the proper meaning of that term; second, that he is a *bona fide* purchaser; and third, that he is a purchaser for valuable consideration." They say further:—"Now, what is the meaning of the term 'purchaser' in this section? It cannot be a person who purchases a mortgage as a mortgage, because [102] that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief, that it is not a mortgage, but an absolute title." Can the omission of the word "purchase" from art. 134 cause any essential difference in this respect between the construction which we should place upon art. 134? We think not. In our opinion it could not have been intended that property which would pass on the sale by the mortgagee of his interest, should come within the meaning of art. 134. That article was, we believe, intended to protect, after the expiration of twelve years from the date of a purchase, a person who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor, who professed by the conveyance to convey, had the power to convey, and was conveying to him, an absolute interest and not merely the interest of a mortgagee. Otherwise it is difficult to conceive why sixty years should be the period of limitation under art. 148, and twelve years the period under art. 134. Under art. 148 the term "mortgagee," having regard to the sixty years' period of limitation, must be held to include an assignee of a mortgage. Construing as we do art. 134, we come to the conclusion on the facts as we find them, that art. 134 does not apply in this case. By s. 29 of Regulation XI of 1822, it is provided that in "cases in which any land belonging to a defaulter or his surety may be sold for the recovery of an arrear of revenue, not being the land on account of which the arrear may have accrued, then whether the said land sold be *malguzari*, or *lakhiraj*, the purchaser shall only be held to have acquired the rights, interests, and title possessed by the said defaulter or surety, in like manner as if the land had been sold by private sale or under a decree of Court in liquidation of a private debt." Consequently the interest of Ganga Din, which was sold to Sukh Din at the auction, was that of mortgagee. Further, Sukh Din, the auction-purchaser, who must be presumed to have known the law, must also be presumed to have made inquiries as to the interest which Ganga Din had in the property, unless he [103] wilfully shut his eyes and abstained from all reasonable inquiry. An inquiry at the auction-sale must have disclosed what Ganga Din's interest was; and although Ganga Din appeared in the Land Register as proprietor, still an examination of the local Registrar's books would have disclosed the fact that the "contemporaneous deed," which constituted the transaction of 1835 a mortgage transaction, had been registered, which we find it had been within a few hours of the execution and registration of the sale-deed. Besides this, it is open to doubt whether a person who purchased at a formal auction-sale such as that in question, could be set to have purchased without notice an absolute interest from the mortgagee—see

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the case in the Privy Council above referred to and the judgments in *Sobhag Chand Gulab Chand v. Bhai Chand* (1). We also draw an inference from the fact that Sukh Din paid only Rs. 3,000 for the interest that he purchased, that he must have known that he was purchasing merely the mortgagee's interest in a property liable to be redeemed at any moment. It is practically inconceivable that Thakur Prasad who purchased in 1845, Husain Ali who purchased two years later, or Sheo Charan who purchased in 1852, made no reasonable inquiry as to Sukh Din's title or omitted to examine the register to ascertain whether or not any incumbrances had been registered affecting the property which they were buying; and it is to be noticed in each of the cases that the purchase-money was Rs. 3,000. We come to the conclusion that Sukh Din, Thakur Prasad, Husain Ali, and Sheo Charan knew, or might, or ought to, have known, unless they wilfully abstained from inquiring, that the interest which they respectively were purchasing was that of a mortgagee merely.

There is no evidence that the mortgagors or their representatives intended to abandon, or did in fact abandon, their rights, or allowed any one to believe that they had abandoned them. On the contrary, we find it proved that Chedi Din, on behalf of himself and his co-sharers in the equity of redemption, from time to time took such steps as a needy man acting for needy co-sharers had it in his power to take, to assert his and their right to the equity of redemption. As to the other points raised by the appellant, we, consistently with the views which we have already expressed on the [104] facts, hold that Sukh Din, Thakur Prasad, Husain Ali, and Sheo Charan, were not innocent purchasers without notice; that if they were not aware of the interest which they respectively purchased as we believe they must have been, they respectively took no reasonable care to ascertain what their respective vendors' titles were, and that if they assumed to purchase more than a mortgagee's interest they did not act in good faith. As by Regulation XVII of 1806 mortgagors in such a case as the present were entitled to redeem within sixty years, we hold that the respondents were entitled to redeem. We dismiss this appeal with costs, and as the respondents have not appealed from the judgment or order below, the respondents have the opportunity of redeeming on the terms decreed.

*Appeal dismissed.*

9 A. 104 (F.B.)=6 A.W.N. (1886) 309.

#### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

MUHAMMAD SULEMAN KHAN AND OTHERS (*Applicants*) v. FATIMA (*Opposite party*).<sup>\*</sup> [17th November, 1886.]

*Stat. 24 and 25 Vic., c. 104, s. 15—Revision of judicial proceedings—Jurisdiction of High Court—Civil Procedure Code, s. 622.*

*Held* by EDGE, C.J., and OLDFIELD and BRODHURST, JJ., that under s. 15 of 24 and 25 Vic., c. 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a Subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with

<sup>\*</sup> Misc. Application No. 242 of 1885.  
(1) 6 B. 193.

and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction.

Held by STRAIGHT and TYRRELL, JJ., that the word "superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or quasi-judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final.

[105] *Tej Ram v. Harsukh* (1), *Girāhari Singh v. Hurdeo Narain Singh* (2) and *In the matter of the petition of Mathra Parshad* (3) referred to. The judgment of PETHERAM, C.J., in *Badami Kuar v. Dina Rai* (4) explained,

[F., 9 A. 486; 15 A.L.J. 227=38 Ind. Cas. 828; R., 18 A. 4=A.W.N. (1895) 124; 30 C. 155 (189); 31 A. 59=A.W.N. (1908) 279=6 A.L.J. 52.]

THIS was an application to the High Court for the exercise of its powers under s. 15, Stat. 24 and 25 Vic., c. 104. The applicants prayed for revision of an order of the Subordinate Judge of Aligarh, dated the 20th July, 1885, amending, under s. 206 of the Civil Procedure Code, a decree made on the 24th December, 1878. The grounds on which revision was sought were (i) that the application for amendment was barred by limitation; (ii) that s. 206 of the Civil Procedure Code was not applicable to the case, and the decree could not be amended; (iii) that the Subordinate Judge could not amend the decree of his predecessor; (iv) that the decree could not be amended at the stage at which it was amended; and (v) that there was no valid reason for amending the decree in the manner in which it had been amended.

The application came for hearing before Straight and Brodhurst, JJ., who referred to the Full Bench the following question:—

"Whether, having regard to the ruling of this Court, reported at p. 296, 1st Allahabad Series, Indian Law Reports (3), and to the terms of s. 15 of 24 and 25 Vic., c. 104, there resides in this Court a power of a judicial superintendence over the subordinate Courts, which enables it to entertain judicially applications for revision or interference with the orders of such subordinate Courts."

The Hon. Pandit *Ajudhia Nath* and *Lala Harkishan Das*, for the applicants.

Mr. C. H. Hill and Pandit *Sundar Lal*, for the opposite party.

#### JUDGMENT.

EDGE, C.J.—I consider that under s. 15 of the Charter Act it is "competent to the High Court, in the exercise of its power of superintendence, to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a subordinate Court on the ground that the order of the subordinate Court [106] has proceeded on an error of law or an error of fact." *Tej Ram v. Harsukh* (1).

In saying that the High Court has this power to direct a subordinate Judge to do his duty, I do not limit the power to cases in which the

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(1) 1 A. 101.  
(3) 1 A. 296.

(2) 3 I.A. 230.  
(4) 8 A. 111.



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subordinate Judge declines to hear or determine a suit or application within his jurisdiction. I prefer not to use the words "Administrative authority" or "judicial powers" found in the Full Bench judgment in *Tej Ram v. Harsukh* (1), or "judicial superintendence" in the question before the Court; as without giving exhaustive definitions of the words, which I might fail to do, I might, by using them, lead to future difficulty. Each case must be considered as it arises. I do not consider that the decision of the Lords of the Privy Council in *Girdhari Singh v. Hurdeo Narain Singh* (2) conflicts with the view above expressed.

Although the question as to the powers of the High Court under s. 622 of the Civil Procedure Code is not before us, the case of *Badami Kuar v. Dina Rai* (3) has been alluded to in argument, and in my opinion an erroneous construction has been put during the argument on the judgment of Sir Comer Petheram in that case. The late Chief Justice was dealing with the case before him, and although he used the words "questions of jurisdiction" in his judgment, he took pains in the last sentence of his judgment to explain his meaning; and it is obvious that he was not then considering the latter words of s. 622, "or to have acted in the exercise of its jurisdiction illegally or with material irregularity," which in fact did not apply to the case then under consideration. So far as can be seen from the report of the case of *Amir Hasan Khan v. Sheo Bakhsh Singh* (4) it was also one which did not involve the consideration of that portion of the section above quoted.

STRAIGHT, J.—Looking to the rulings of the Calcutta and Bombay Courts, and to *Girdhari Singh v. Hardeo Narain Singh* (2), I think that the word "superintendence" used in s. 15, Charter Act, contemplated and now includes powers of a judicial or quasi-judicial character, apart from those conferred on the Court by [107] s. 622 of the Civil Procedure Code. At the same time it appears to me that the last-mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the finding of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. These are the only terms in which I am able to answer this reference.

I desire to add that I am glad to hear the interpretation placed by the learned Chief Justice, and, as I understand it, approved by my brother Oldfield, on the remarks of the late Chief Justice in *Badami Kuar v. Dina Rai* (3). This construction goes far to meet the views I expressed in that case, in which my brother Tyrrell concurred, and to give effect to what I have always believed were the intentions of the Legislature as expressed in s. 622 of the Civil Procedure Code.

OLDFIELD, J.—I concur in the opinion expressed by the learned Chief Justice as his answer to this reference, so far as regards s. 15 of 24 and 25 Vic., c. 104. It appears to me substantially to express the opinion already given by the Full Bench in *Tej Ram v. Harsukh* (1). I have no objection to omitting from the rulings in that case the paragraph which refers to the High Court having "administrative" and not "judicial" powers under s. 15, because the use of words of this kind, which are not capable of very exact definition, is apt to lead to difficulties and doubts.

(1) 1 A. 101,  
(3) 8 A. 111.

(2) 3 I.A. 230.  
(4) 11 C. 6=11 I.A. 237.

With reference to the observations of the learned Chief Justice upon the ruling of the Full Bench in *Badami Kuar v. Dina Rai* (1), as to s. 622 of the Civil Procedure Code, I was a party to that ruling, and in subscribing to the judgment of the late Chief Justice, I understood it not to exclude cases coming under the last portion of s. 622, referring to the action of a Court "in the exercise of its jurisdiction illegally or with material irregularity."

BRODHURST, J.—I concur with the learned Chief Justice in his answer to the question which has been referred to us.

[108] TYRRELL, J.—I concur in the views expressed by my brother Straight and with the exception of the *dictum* in the Full Bench judgment in *In the matter of the petition of Mathra Parshad* (2), that "s. 15 of the Charter Act appears to confer administrative authority and not judicial powers," which may not be of the essence of that judgment, I think that judgment does not necessarily preclude an affirmative answer to the question referred to us, while the terms of the section are sufficiently large to justify such an answer.

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FULL  
BENCH.

9 A. 104

(F.B.)=

6 A.W.N.

(1886) 309.

9 A. 108 (F.B.)=6 A.W.N. (1886) 310.

#### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

JIWAN ALI BEG (*Defendant*) v. BASA MAL AND OTHERS (*Plaintiffs*).\*  
[19th November, 1886.]

*Act III of 1877 (Registration Act), S. 17 (b) and (c)—Mortgage bond—Indorsements of part payment—Receipt—Registration.*

The strictest construction should be placed on the prohibitory and penal sections of the Registration Act, which impose serious disqualification for non-observance of registration.

An instrument to come within s. 17 (b) of the Registration Act (III of 1877) must in itself purport or operate to create, declare, assign, limits, or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property. To come within S. 17 (c), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such a right, title, or interest.

In a suit by a mortgagee for the sale of immoveable property mortgaged in certain simple mortgage bonds for amounts severally exceeding Rs. 100, the defendant pleaded that he had made certain payments in respect of the bonds, and in support of his plea relied on indorsements of payment upon them, one of which was as follows:—"Paid on the 21st December, Rs. 3,000." The other indorsements were in similar terms.

*Held*, by the Full Bench (STRAIGHT, J., doubting) that the indorsements, even if assumed to be receipts, did not fall within s. 17 (b) of the Registration Act, inasmuch as a receipt, unless so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property (which the indorsements did not), could not come within the section, and what ordinarily operated to limit or extinguish a mortgagee's interest in the mortgaged property was not the paper receipt, but the actual part payment of the mortgage-debt.

*Held*, also that the indorsements did not fall within s. 17 (c) of the Act, inasmuch as taken by themselves they were merely memoranda made by the

\* First Appeal No. 133 of 1885 from a decree of Maulvi Zainul-ab-din, Subordinate Judge of Moradabad, dated the 16th April, 1885.

(1) 8 A. 111.

(2) 1 A. 296.



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(F.B.)=  
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(1886) 310.

[109] mortgagee, and could not be treated as acknowledgments, nor, even if assumed to be such, did they show, upon their face, that they were acknowledgments of the receipt or payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the mortgaged property.

Held, therefore that the indorsements did not require to be registered in order to make them admissible in evidence of the payments to which they related.

*Mahadoji v. Vyankaji Govind* (1), *Basawa v. Kalkapa* (2), *Foki v. Khotu* (3), *Waman Ram Chandra v. Dhondiba Krishnaji* (4), *Futeh Chand Sakco v. Leelumber Singh Doss* (5), and *Imdaa Eusain v. Tasadduk Husain* (6), distinguished. *Dulip Singh v. Durga Prasad* (7), referred to.

[F., 11 C.L.J. 551 (554)=37 C. 589 (535)=6 Ind. Cas. 159 (161)=42 C. 546=30 Ind. Cas 804; Rel. on, 16 Ind. Cas. 179 (180)=10 A.L.J. 25=34 A. 528; R., 23 C. 450=28 M.L.J. 423=17 M.L.T. 300=(1915) M.W.N. 274=28 Ind. Cas. 625; 12 C.P.L.R. 96; 24 P. 609; 134 P.L.R. 1902; 71 P.R. 1906=111 P.L.R. 1907; 89 P.R. 1908=145 P.W.R. 1903.]

THE plaintiffs sued the defendant for Rs. 11,905-7 due on certain bonds, claiming the sale of the immoveable property mortgaged therein. Among these bonds, were bonds, dated the 1st March, 1877, for Rs. 5,000, the 24th June, 1879, for Rs. 800, and the 21st March, 1881, for Rs. 2,000. These three bonds severally contained simple mortgages of immoveable property. The defendant pleaded that he had paid Rs. 5,700 in respect of these bonds, that is to say, Rs. 3,500 in respect of the first in December, 1881, Rs. 700 in respect of the second in March, 1883, and Rs. 1,500 in respect of the third in July, 1882. In support of this plea he relied on certain indorsements of payment on the bonds. The indorsements on the bond dated the 1st March, 1877 was in these terms:—"Paid on the 21st December, 1881, Rs. 3,500." The indorsement on the bond dated the 24th June, 1879, was in these terms:—"Paid on the 25th March, 1883, Rs. 700." The indorsement on the third bond was in similar terms. The lower Court gave the plaintiffs a decree as claimed, holding that the defendant had not proved the payment of Rs. 5,700.

The defendant appealed to the High Court, contending that he had proved such payment. On behalf of the plaintiffs-respondents it was contended that the indorsements set out above were instruments within the meaning of s. 17, Act III of 1877, which required registration, and not being registered were inadmissible in evidence. The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) referred the question raised by this contention to the Full Bench.

[110] The Hon. T. Conlan and the Hon. Pandit Ajudhia Nath, for the appellant,

Mr. C. H. Hill, Munshi Hanuman Prasad, and Mir Zahur Husain, for the respondents.

### JUDGMENT.

EDGE, C.J.—In this case the question arises whether certain entries, which appeared on the mortgage-bonds in suit, could be admitted in evidence, they not having been registered, it being contended that those entries or indorsements came within the provisions of clauses (b) and (c) of s. 17 of the Registration Act III of 1877, and were documents which affected immoveable property comprised in the bonds within the meaning of s. 49 of that Act, and that the object of tendering them in evidence was to affect immoveable property.

(1) 1 B. 197.

(2) 2 B. 489.

(3) 4 B. 590.

(4) 4 B. 126.

(5) 14 M.I.A. 129.

(6) 6 A. 335

(7) 1 A. 442.

Now, firstly, it may be observed that there are only two of such entries or indorsements set out in the printed book, and they are set out at page 17, and read as follows:—"Paid on the 21st December, 1881, Rs. 3,500." "Paid on the 25th March, 1883, Rs. 700."

I infer that the third entry or indorsement was in similar terms.

These indorsements were found written upon the mortgage-bonds, which were produced and filed by the plaintiff. Clearly they were not instruments, receipts or acknowledgments given, or intended to be given, to the mortgagor. Taken by themselves, they could be nothing more than entries by the mortgagee as to payments of money from time to time.

Under these circumstances the first question is whether these (I wish to call them by a neutral name) entries or indorsements come within s. 17, sub-s. (b), that is, are they "non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property."

It appears to me that even if one looks at these indorsements as receipts, and even if they were receipts handed to the mortgagor, it could not be successfully contended that they were within the terms of sub-s. (b). A receipt may certainly be framed [111] and worded so as to profess or purport expressly to limit or extinguish a right or interest in immoveable property, in which case it would be regarded as coming within the section. But unless, on the face of them, receipts operate or purport to create, declare, assign, limit, or extinguish, in present or future, some right, title, or interest, vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property, they, in my opinion, would not come within sub-s. (b) of s. 17. The entries in the present case, assuming them to be receipts, as it is contended they are, do not, in my opinion, purport or operate to limit any such right, title, or interest. It is not contended that they purport or operate to create, declare, assign, or extinguish any such right, title, or interest.

Now, what is a receipt ordinarily beyond an acknowledgment of a payment. A receipt is not the payment. It is the actual part-payment of the mortgage-debt, and not the paper receipt, which operates to limit the interest of the mortgagee in the property in mortgage. I come therefore to the conclusion that these indorsements do not come within sub-s. (b) of s. 17 of the Act.

Then we have to consider whether sub-s. (c) applies to these indorsements, that is to say, whether they are "non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the limitation or extinction of any such right, title, or interest." In support of the contention that they come within sub-s. (c) of s. 17 of the Act, five authorities, apart from those decided by this Court, have been cited which I propose to consider *seriatim*. The first is *Mahadaji v. Vyankaji Govind* (1). There it was held that the document in that case did come within the section. Although the document is not set out, we have the reporter's statement as to its nature and description at page 198. As to it, Sir Michael Westropp, C. J., in his judgment, says:—"We are clearly of opinion that Exhibit 17 falls within clauses 2 and 3 of this 17th section—within clause 2, because it purports to extinguish the right, title, and interest of Qazi Muhammad in the land—and within clause 3,

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9 A. 108  
(F.B.)—  
6 A.W.N.  
(1886) 310.



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9 A. 108  
(F.B.)=  
6 A.W.N.  
(1886) 310.

because it acknow-[112]ledges the receipt of Rs. 350 as consideration on account of the extinction of his right, title and interest in the land."

I should have thought it would have been impossible to have decided otherwise if the document was as it is described.

This is very different to a mere receipt or indorsements such as those in the case now being considered.

The next case is that of *Basawa v. Kalkapa* (1). It is sufficient to say in regard to this authority that the document, though not set out, is stated in the judgment to have been tendered in evidence to prove that a mortgage had been released, and that it was expressed to that effect, so that it was in that case expressly on the face of it a release of interest in immoveable property.

Next we come to the two cases reported in the 4th volume of the Bombay Series, Indian Law Reports, at pp. 126 and 590. I will deal first with the last of these cases, namely, *Faki v. Khotu* (2). At the bottom of page 592, the instrument or its material parts are set out. The document appears to have been a receipt, and also an acknowledgment that nothing more remained due in respect of the produce of the fields; at any rate, it in express terms referred to an interest in immoveable property, and might be held to be a declaration of a right or interest in such property, and was a totally different document from the indorsements or entries in the case now before us.

The words "your fields \* \* are entered in my name \* \* \* I will cause the aforesaid two fields to be entered in your name. Nothing remains due, &c.," show plainly why the document was given, and brought it within the terms of s. 17, when used as evidence of title.

The other case is that of *Waman Ram Chandra v. Dhondiba Krishnaji* (3), and refers to the admissibility in evidence of an unregistered document which, as set out at page 136, was as follows:—

"Bombay, 27th May, 1874. Received from Dhondiba Crustnaji Patel the sum of Rs. 1,000 only, being in part payment of the sum of Rs. 14,000, the amount for which the said Dhondiba Crust-[113]naji Patel has agreed to purchase the Hafiz Bagh Estate at Junnar of the widow and administratrix of the late Mr. J. C. Dickinson, deceased.—*Hearn, Clevelanā, and Peile.*"

I should have thought that there could be no doubt that this receipt was an acknowledgment within the terms of sub-s. (c).

In *Futteh Chund Sahoo v. Leelumber Singh Doss* (4) decided by their Lordships of Her Majesty's Privy Council, the document then in question, as far as can be ascertained from that report, was in fact an agreement for the sale of immoveable property.

Then there is a case decided by this Court (Duthoit and Mahmood, JJ.) on the 6th May, 1884—*Imdad Husain v. Tasadduk Husain* (5), which my brother Tyrrell informs me, after looking into the record, was very different from the one we are considering, inasmuch as the document then tendered in evidence came clearly within the purview of s. 17, as it in fact purported to extinguish an interest in immoveable property.

Such being, with the exception of the case to which I shall presently refer, the reported cases cited by Mr. Hill on behalf of the respondents, I think it is clear that in each of those cases the documents held to be inadmissible in evidence, because of their being unregistered, were very

(1) 2 B. 489.

(4) 14 M.I.A. 129.

(2) 4 B. 590.

(3) 4 B. 126.

(5) 6 A. 335.

unlike the indorsements in the present case, and I hold that they do not affect and do not apply to the present case.

Having said so much as to the above-mentioned authorities which have been cited by Mr. *Hill*, and which I consider to be inapplicable to the present case, I come to the case of *Dalip Singh v. Durga Prasad* (1). It is difficult to say whether that case applies or not, as the document then in question is not set out, and I am unable to surmise what were the reasons of the learned Judges for holding that the document or acknowledgment referred to by them was not admissible in evidence by reason of its being unregistered. If it was an indorsement or entry such as is described in the present case, which, so far as I can gather, it might have been, then I must declare my dissent from that ruling.

[114] Now what construction should be placed on these prohibitory and highly penal sections, which impose such serious disqualifications for non-observance of registration? The only proper answer, to my mind, is that we must see that the strictest construction be placed on them, and that the document objected to comes within the four corners of these provisions.

I have said that these indorsements are not, in my opinion, within the terms of s. 17, clauses (b) and (c), and if I might deal with the question as to what the instrument should contain, in order to be within the section, I should say that, in my judgment, an instrument to come within sub-section (b) must in itself purport or operate to create, declare, assign, limit, or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property; and to come within sub-section (c), it must be on the face of it an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such an interest as is referred to.

It is perfectly obvious that the mortgagee who made these entries or indorsements did so just as any one would, who was making an entry in his private memorandum books. Taken by themselves, these indorsements are memoranda, and cannot be treated as acknowledgments. Nor do they, if they come within the meaning of acknowledgments, show that they are acknowledgments of the receipt or payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the property in mortgage.

In these cases I should be inclined to hold that the document sought to be excluded must show itself that it comes within the principle of the decision of Her Majesty's Privy Council referred to above, and I cannot believe that it was the intention of the Legislature to make compulsory the registration of memoranda or indorsements such as those in this case. Take the case which has been put to us in the course of the arguments by the learned Pandit, and which has been elaborated by my brother Straight: say the entries or indorsements are made in the mortgagee's own account-books. Is every entry to be considered an instrument within the meaning of s. 17, and of no value as evidence without registration, although the mortgagee made the entries himself as [115] memoranda? I cannot think it was intended that entries made simply to serve as memoranda should be treated as falling within s. 17 of the Act, and requiring registration before being used in evidence. How, in such a case, is the mortgagee, whose interest it might be to put such entries in evidence, to get the custody of the mortgagee's books in order to have the entries registered?

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(1) 1 A. 442.



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(F.B.)=  
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(1886) 310.

He probably would not even know of such entries until he obtained discovery in an action. These indorsements are not, in my opinion, within the four corners of s. 17, and therefore cannot be objected to on the ground that registration was necessary before they could be admitted in evidence.

STRAIGHT, J.—I cannot say I am altogether without doubt in regard to the question put by this reference and to what the answer to it should be. But as it has been very fully threshed out in the course of the arguments, and as the rest of the Court are quite clear upon the point, no useful purpose would be served by my delaying a reply to the reference, in order to enable me further to consider the matter.

OLDFIELD, J.—I concur with the learned Chief Justice in holding that the indorsements referred to are not such as required to be registered, in order to make them admissible in evidence.

BRODHURST, J.—I concur with the learned Chief Justice in the answer he has given to this reference.

TYRRELL, J.—I am of the same opinion as the learned Chief Justice.

9 A. 115 (F.B.) = 6 A.W.N. (1886) 306.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

NAUBAT RAM (*Defendant*) v. HARNAM DAS (*Plaintiff*).<sup>\*</sup>  
[20th November, 1886.]

*Appeal under s. 10, Letters Patent—Limitation—Rules of practice of High Court.*

It must be assumed that Rule I of the " Rules of Practice adopted by the High Court for the North-Western Provinces on the 21st May, 1873, regarding the admission of appeals under s. 10 of the Letters Patent," which provides that such appeals must be presented to the Assistant Registrar within ninety days of the judgment appealed from, had a legal origin, and was not *ultra vires* of the Court.

[116] *Harraik Singh v. Tulsi Ram Sahu* (1) and *Fazal Muhammad v. Phul Kuar* (2), referred to.

[R., 32 B. 14 = 9 Bom. L. R. 1138 = 2 M.L.T. 410.]

THE plaintiff in this case, Harnam Das, sued for a declaration that the transfer of a decree by the defendants 1 and 2 to him was valid, and that he was entitled to execute the decree. The Court of first instance (Subordinate Judge of Bareilly) gave a decree in accordance with this prayer. From this decree one of the defendants, Naubat Ram, a minor, under the guardianship of one Dharam Das, appealed to the High Court on a court-fee of Rs. 10. Upon the memorandum of appeal the Registrar, as taxing officer, passed the following order, dated the 29th January, 1886:—

"The decree in respect of which the transfer was made was for Rs. 20,000, and there can be no doubt that the prayer amounts to a claim for a decree involving consequential relief; such relief as prayed being the execution of the transferred decree. This relief was valued in the lower Court by the plaintiff at Rs. 20,000, and court-fees were paid on that amount, and the defendants, who now appeal against this consequential

<sup>\*</sup> Appeal No. 2 of 1886 under s. 10, Letters Patent.

(1) 5 B.L.R. 47.

(2) 2 A. 192.

relief, must pay a similar amount in this Court. They have paid only Rs. 10, and must make good the difference (Rs. 765) within one month."

On the 13th March, 1886, an order was passed by Brodhurst, J., concurring in the opinion expressed by the Registrar, and allowing one month to make good the deficiency. On the 17th April, 1886, Brodhurst, J., passed the following order:—

"The deficiency not having been made good up to this date the appeal is rejected."

On the 26th May the appellant filed an application for a certificate under s. 600 of the Civil Procedure Code that the case was a fit one for appeal to Her Majesty in Council. On the 24th June the application came for hearing before Brodhurst, J., who, observing that the appellant could appeal from the judgment of the 17th April to the Full Bench, under s. 10 of the Letters Patent, passed an order granting a request made by the appellant's pleader for leave to withdraw the application.

On the 29th July the appellant filed his appeal under s. 10 of the Letters Patent from the judgment of the 17th April to the [117] Full Bench. The following report was made by the office upon the memorandum of appeal:—

"As regards limitation, I beg to submit that if calculation is made from the date of the rejection of the appeal, this appeal, which has been filed after 102 days, is beyond time. If, under s. 14 of the Limitation Act, the appellant be allowed 29 days' deduction, during which time he was prosecuting his application for leave to appeal to the Privy Council, this appeal will be in time."

On the 4th August the appeal was admitted by Straight, J., subject to any objection that might be taken at the hearing.

The appeal came on for hearing before the Full Bench on the 20th November.

*Lalla Jokhu Lal*, for the appellant.

*Pandit Sundar Lal*, for the respondent.

A preliminary objection was taken on behalf of the respondent that the appeal had been preferred beyond the period allowed by Rule I of the "Rules of Practice adopted by the High Court for the North-Western Provinces on the 21st May, 1873, regarding the admission of appeals under s. 10 of the Letters Patent."—" (Appeals to the High Court under s. 10 of the Letters Patent shall be presented to the Assistant Registrar within ninety days after the date of the judgment appealed from, unless the Court in its discretion, on good cause shown, shall grant further time)."

In reply to this objection it was contended on behalf of the appellant that the above Rule was *ultra vires* of the Court, which had no power to frame rules of limitation as to the filing of appeals, and that the hearing of the appeal was therefore not barred by the rule.

### JUDGMENT.

EDGE, C.J.—A preliminary objection to the hearing of this appeal has been taken by *Pandit Sundar Lal*, and we are of opinion that it must prevail. The objection is, that the appeal has not been filed within the period of ninety days required by the rule of this Court. No reason has been shown why the rule in question should not be construed strictly, but it has been suggested that the rule is *ultra vires* of the Court. Now this Court, in framing the rule in question, appears to have followed the practice of the [118] Calcutta High Court, and a case arose there—*Hararak Singh*

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9 A. 115  
(F.B.)=  
6 A.W.N.  
(1886) 306.



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FULL  
BENCH.

9 A. 115  
(F.B.)=  
8 A.W.N.  
(1886) 305.

*v. Tulsi Ram Sahu* (1)—first before the Division Bench, and afterwards before the Court in appeal, in reference to the number of days within which an appeal would be in time. In that case it was never suggested that the Calcutta High Court had no power to make the rule applied there. Again, in 1879, *Fazal Muhammad v. Phul Kuar* (2), the Full Bench of this Court had to consider what was the period of limitation which should be computed according to this rule, and in that case also it was never suggested that the rule was *ultra vires*. No such question was raised, and under the circumstances, although the ultimate origin of the rule cannot be traced, we must assume that it had a legal origin, and was not *ultra vires* of the Court. The appeal must be dismissed with costs.

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ., concurred.

*Appeal dismissed.*

9 A. 118 = 6 A.W.N. (1886) 305.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

BALDEO (*Plaintiff*) *v.* BISMILLAH BEGAM AND OTHERS (*Defendants*).<sup>\*</sup>  
[25th November, 1886.]

*Appeal—Death of defendant-respondent—Civil Procedure Code, ss. 368, 582—Act XV of 1877 (Limitation), sch. ii, No. 171-B.*

Art. 171-B, sch. ii of the Limitation Act (XV of 1877), applies to applications to have the representative of a deceased-defendant-respondent made a respondent.

[Overruled, 10 A. 265 (F.B.).]

THIS was a second appeal from a decree of the District Judge of Aligarh, affirming a decree of the Subordinate Judge dismissing the plaintiff-appellant's suit. While the appeal was pending the respondent died, and, upon the application of the appellant, the representatives of the deceased, namely, his widow and minor children, were made respondents in his place. This application was not made until after sixty days from the date of the respondent's death.

At the hearing of the appeal a preliminary objection was taken on behalf of the respondents, that the appellant's application to have them substituted for the deceased as his representative had [119] not been made within the time prescribed for such applications by art. 171-B, sch. ii of the Limitation Act, and that the appeal should therefore be dismissed.

Mr. C. Dillon, for the appellant.

Munshi Hanuman Prasad and Mir Zahur Husain, for the respondents.

In support of the preliminary objection reference was made to the judgment of Mahmood, J., in *Narain Das v. Lajja Ram* (3), and it was contended that as art. 171-B of the Limitation Act referred to applications "under s. 368" of the Civil Procedure Code, "to have the representative of a deceased defendant made a defendant," and s. 582 of the Code

<sup>\*</sup> Second Appeal No. 1597 of 1885, from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 20th May, 1885, confirming a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 20th April, 1885.

(1) 5 B.L.R. 47.

(2) 2 A. 192.

(3) 7 A. 693.

provided that in Chapter XXI the word "defendant" should be held, as far as may be, to include a respondent, the period of limitation prescribed by art. 171-B, must be regarded as applying to applications to have the representative of a deceased respondent added as respondent in his place.

For the appellant it was contended that the scope of art. 171-B was limited to applications for making the representatives of a deceased defendant a defendant, and that the article did not refer to the substitution of a deceased respondent's representatives. The cases of *Lakshmi v. Sri Devi* (1) and *Udit Narain Singh v. Hari Gauri Prasad* (2) were cited; and it was contended that the only provision of the Limitation Act which applied to the case was art. 178 of sch. ii.

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9 A. 118=  
6 A.W.N.  
(1886) 305.

### JUDGMENT.

OLDFIELD, J.—We must give effect to the preliminary objection of the defendants-respondents, and hold that the application for substituting the names of the respondents was barred by art. 171-B of the Limitation Act. That article refers to applications under s. 368 of the Civil Procedure Code, to have the representative of a deceased defendant made a defendant, and the time runs from the date of death. In the case before us the respondent who died is the defendant, and I think the article referred to applies in his capacity of defendant. On this ground I would dismiss this appeal with costs under s. 368 of the Civil Procedure Code.

TYRRELL, J.—I concur.

*Appeal dismissed.*

9 A. 120=6 A.W.N. (1886) 316.

### [120] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

KASSA MAL (*Defendant*) v. GOPI (*Plaintiff*).<sup>\*</sup> [27th November, 1886.]

*Partnership—Partners—Accounting—Suit by partner to recover from co-partner share of losses and advances.*

It is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution.

A suit was brought by the widow of a partner in an indigo concern against her deceased husband's co-partner in respect of certain alleged losses of the concern, and to recover a moiety of moneys expended by her husband in advances made to indigo cultivators on behalf of the partnership. At the time when the suit was brought, the partnership had not been dissolved.

Held that, the partnership not having been dissolved, the plaintiff was not entitled to an account, and the suit must therefore fail. *Brown v. Tapscott* (3) and *Helme v. Smith* (4) distinguished.

[F., 110 P.R. 1901=4 P.L.R. 1903.]

THE plaintiff in this case was one Musainmat Gopi, the widow of one Nanak Chand, who, on the 4th July, 1881, had entered into partnership

<sup>\*</sup> Second Appeal No. 1923 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Fatehgarh, dated the 17th November, 1885, affirming a decree of Rai Cheda Lal, Subordinate Judge of Farukhabad, dated the 8th June, 1885.

(1) 9 M. 1. (2) 12 C. 590. (3) 6 M. and W. 112. (4) 7 Bing. 709.



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with one Kassa Mal in respect of an indigo factory. The material portion of the deed of partnership was as follows :—

"The factory business shall be carried on in partnership, and we shall share equally in the profit and loss. As I, Kassa Mal, have no means to expend money on account of my share, I execute this deed of partnership, and agree that Nanak Chand shall in future lay out his money in respect of the factory; that the indigo cakes shall remain in the possession of Nanak Chand when ready; that Nanak Chand shall have power to sell the indigo either in this district or in Calcutta, or elsewhere as he pleases; that he shall have power to deduct the amount spent by him, with interest at 10 annas per cent. per mensem, from the amount of the price of the half share; that he shall pay the surplus of the profits of my share to me, if there is any surplus, and take the loss to the extent of my share from me; that he shall manage the factory and employ servants according to his will and choice; that if any shareholder wishes to sell his share, then he shall not sell it to any stranger, if another sharer purchases it for proper price; that he shall keep accounts of the expenses, the price, and of other expen-[121]ses in each year, and the account of loss and profit shall be made according to it; that this deed of partnership shall remain with Nanak Chand; that if there arises ill-feeling on account of partnership between us, and I and the said Lala wish to separate the shares, then the separation will be effected in the month of November, and no separation shall be effected after the month of November."

The present suit was brought by Musammat Gopi in January, 1885, against Kassa Mal for a sum of Rs. 3,900-11-9, which represented one-half of the alleged losses of the partnership concern, and one-half of moneys advanced by Nanak Chand to indigo cultivators on behalf of the partnership.

The Court of first instance (Subordinate Judge of Farukhabad) gave the plaintiff a decree for Rs. 2,808-0-10½, being Rs. 1,738-9-7½ in respect of losses of the partnership concern, and Rs. 1,069-7-3 in respect of advances made by Nanak Chand to cultivators. On appeal by the defendant, the District Judge of Farukhabad affirmed the Subordinate Judge's decree.

The defendant presented a second appeal to the High Court. It was contended on his behalf that the suit as brought would not lie.

Mr. G. E. A. Ross and the Hon. Pandit Ajudhia Nath, for the appellant.

The Hon. T. Conlan and Bahu Jogindro Nath Chaudhri, for the respondent.

### JUDGMENT.

EDGE, C. J.—In this case the plaintiff, who is the widow of one Nanak Chand, sued the defendant in respect of certain alleged losses of a partnership concern, and to recover a moiety of moneys expended in advances made to indigo cultivators by Nanak Chand on behalf of the partnership. Now, it is only under exceptional circumstances that partners can bring such actions against their co-partners, except when the action is for a dissolution of partnership, in which case they may claim an account and payment over of moneys that may be found to be due to them on the account being taken. So far as I am aware, actions between partners, which involve the taking of partnership accounts prior to dissolution, are almost unheard of.

[122] Our attention has been directed by Mr. Conlan to two cases, the first of which is *Brown v. Tapscott* (1). I have not seen the report of that case, but it is cited in *Lindley on Partnership*, vol. ii, p. 913. In that case "several persons agreed to share the profits arising from running a steamer between London and Ramsgate. One of them was to charter and have the management of the boat, and each agreed to pay £10 per cent. on the amount of his subscription, and such further instalments, in proportion to their respective subscriptions, as might be necessary if the earnings of the boat were not sufficient to defray her expenses, which, in fact, they were not. The partner to whom the management of the boat was entrusted paid all the expenses incurred by running her, and sued one of his co-partners for the share which he ought to have contributed towards paying such expenses. The plaintiff obtained a verdict, and the Court refused to disturb it, although the Court was of opinion that the plaintiff and the defendant were partners: for it considered that an action would clearly lie on the promise by the defendant to contribute to a common fund for defraying the expenses of the boat." In that case there was a specific agreement that if the earnings were not sufficient to cover the expenses, each partner should provide the necessary funds in definite proportionate shares. Also there was appointed as manager a person who sued really for money expended by him as the agent of his co-partners. It was held that an action lay for breach of the promise to provide contributions. With regard to that case, it is not necessary for me to say more than that, in my opinion, the principle of it does not apply to the present case. The suit there was for breach of an undertaking to provide definite funds for the carrying on of the partnership.

The second case referred to by Mr. Conlan was *Helme v. Smith* (2) where it was held that a part owner and managing owner of a ship, who, as ship's husband, had incurred the expense of the outfit of the ship for several voyages, could maintain an action against his co-owner for a proportionate contribution due to him in respect of the management of the vessel. I do not think that cases relating to managing owners of a ship have any bearing on the question whether one partner is competent to sue another. The [123] part owners of a ship are not, properly speaking, partners at all. They are partners only in the sense that they have certain undivided shares in a specific chattel. It may or may not be that they are partners *quoad* a particular adventure which the ship undertakes upon a particular voyage, and as such liable to the public. This would depend upon the facts in each case; but it has never been suggested, so far as I am aware, that a part owner, who is also the managing owner, could not maintain an action for contribution in respect of the money necessarily expended by him as such managing owner. He is the person appointed by the co-owners to have the management for the benefit of all concerned. Under these circumstances I am of opinion that the cases which I have referred to do not apply.

Mr. Conlan has asked us to put upon this contract a construction which, in my opinion, it does not bear. He says that the contract, dated the 4th July, 1881, was one by which, so long as this business continued, there were to be definite partnerships between these persons only for the period ending at each November. In other words, that there was to be a partnership for one year certain—so far I agree with him—and at the end of that year another partnership ending at the next November, and again

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another ending at the November following. He has asked us to regard this action in this way, so as to avoid the difficulty he would have in contending that his client can bring this action for an account, and recover a share of the losses and expenses without asking for a dissolution, because his contention is that in each year there has been an actual dissolution of partnership. This appears to me to be a most violent construction to put upon the agreement, and one to which the agreement, upon the face of it, is diametrically opposed. It is true that it is provided that there is to be a contract of partnership for a year certain, but the contract was not to be determined at the end of the year unless the partners then wished to separate their shares; so that the partnership was only one which could be determined in any November upon the parties then agreeing to a dissolution. It comes to this, that the parties agree there shall be no dissolution before November year, and if in the future any dissolution is desired, it shall take place only in November of the year.

[124] I therefore place different construction upon the contract from that contended for by Mr. *Conlan*. The learned counsel then says, it is peculiar that under this contract his client should have to provide the whole of the working capital. The explanation of this appears to me to be that this property belonged to Kassa Mal, who was owner of the concern, whatever it was worth, and it was agreed that Nanak Chand should become a partner, and be entitled to a moiety of the assets at the time of starting the partnership. Then Mr. *Conlan* says the case is an exceptional one, because Nanak Chand was to have all the indigo and the management of the business. I think that this is not by any means an exceptional state of things, but one to be expected in cases where one partner has no interest except a share in the original plant; and that it is only natural that the man who is to provide the working capital should keep in his own hands the power of making the contracts out of which profit or loss to the concern may arise. This is what it was agreed Nanak Chand might do. Then Mr. *Conlan* argues that the words "and take the loss to the extent of my share from me" amount to a covenant, on behalf of Kassa Mal, to pay at the periodical settlements his amount of the loss. I do not think that the words mean this. In the first place, I do not think that the part of the agreement providing for the taking of the account was intended to be read as providing for the taking of the accounts for the purpose of Kassa Mal paying up any losses which might then be ascertained. The stipulation is of a kind which is usual in partnership contracts, namely, that accounts are to be taken periodically, and that these accounts are to form the basis of the profit and loss account between the partners themselves. That is all that was meant by this provision in the contract before us. Again, Mr. *Conlan* contended that the words "take the loss to the extent of my share from me" mean that Kassa Mal was to pay over in such circumstances that an action might be brought during the pendency of the partnership for any loss. I do not agree with this. I think the words mean this: One man was to provide the capital of the concern. By way of extra precaution he thought it should be made apparent that if the expenses exceeded the profits, he should not bear the whole loss, and when an ultimate settlement was arrived at the expenses should be taken into account. The [125] provision only expresses what is implied in every partnership agreement, namely, that the partners must contribute to payment of the losses of the concern. I have never heard of an action being held maintainable between partners upon an implied

agreement that the partners are to contribute to the losses where dissolution of partnership is not claimed.

Under these circumstances I am of opinion that the plaintiff is not entitled to an account, and therefore that this part of his claim must be dismissed and the appeal allowed.

There is one other observation I have to make regarding the claim as to the outstanding loans to cultivators. It appears to me that upon this point Mr. Conlan is in this difficulty. If he argues that these loans should be regarded as capital, then that is what his client agreed to provide, because Kassa Mal had no money with which to furnish capital as appears by the agreement. If he argues that they should be taken into the profit and loss account, it is obvious that there is no November in which there could be taken an account of profit and loss including them.

For these reasons I am of opinion that the action must be dismissed, and this appeal allowed with costs.

BRODHURST, J.—I concur.

*Appeal allowed.*

9 A. 125 = 6 A.W.N. (1886) 318.

APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

MUHAMMAD SAMI-UD-DIN (*Defendant*) v. MAN SINGH (*Plaintiff*).<sup>\*</sup>  
[4th December, 1886.]

*Mortgage—First and second mortgages—Second mortgagee not made party to suit by first mortgagee for sale of mortgaged property—Effect of decree—Act IV of 1882, Transfer of Property Act, s. 85—Notice.*

Certain immoveable property was mortgaged in 1865 to H. in 1871 to G, and in 1873 again to H. In 1893 the property was purchased by M, the representative of G, in execution of a decree obtained in 1877 by G in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873, was not a party. In 1895 M sued the representatives of H for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to [126] that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court.

*Held*, with reference to the terms of s. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party; and that, under the circumstances, he should be placed in the same position as he would have held if the decree of 1877 had never been passed.

*Held* also that, although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet, the defendant having pleaded that he ought to have been

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<sup>\*</sup> First Appeal No. 197 of 1885 from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 9th June, 1885.



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afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such a matter, where the defendant had the undoubted right now asserted by him, and where the result of not recognizing such right would be to extinguish his security.

The Court therefore passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree, for redemption on payment of the amount due on the mortgage of 1865 would stand.

[F., 10 A. 520; R., A.W.N. (1889) 91; 13 A. 315; 20 B. 390; 9 Ind. Cas. 513 (519)=21 M. L.J. 213=(1911) 1 M.W.N. 165=9 M.L.T. 421.]

THIS was a suit for redemption of two usufructuary mortgages, and was brought under the following circumstances:—The property to which the suit related was situated in a village called Pulwa, and was usufructuarly mortgaged by two deeds, dated respectively in October and December, 1865, and executed by Syed Ihu Imam and Syed Ali Muhammad in favour of Muhammad Hidayat Khan and Muhammad Sadr-ud-din Khan. On the 12th June, 1871, the same mortgagors executed a mortgage of the same property to Gaj Singh for Rs. 15,000; and in March and June 1873, two further mortgages of the same property in favour of Muhammad Hidayat Khan and Muhammad Sadr-ud-din Khan, the holders of the mortgages of October and December, 1865. These deeds were duly registered.

On the 17th March, 1877, Lachhman Singh, son of Gaj Singh, having brought a suit upon the mortgage of 12th June, 1871, against the mortgagors for the sale of the mortgaged property, obtained [127] a decree for the sale of the same. To this suit and decree the mortgagees under the deeds of March and June, 1873, were not made parties. On the 22nd June, 1883, the property was put up for sale, and was purchased by Man Singh, the grandson of Gaj Singh. In January, 1885, Man Singh brought the present suit against the representatives of Muhammad Hidayat Khan and Muhammad Sadr-ud-din Khan to redeem the two prior usufructuary mortgages of October and December, 1865. The mortgagees-defendants set up as a defence to the suit that the plaintiff was liable to redeem the two subsequent mortgage-bonds of March and June, 1873, respectively. One of the defendants, Muhammad Sami-ud-din, further contended as follows:—

"After the execution of the documents of the 27th June and the 25th March, 1873, the plaintiff brought a suit on his document of the 12th June, 1871, and did not give an opportunity to the defendant for protecting his rights and interests, and thus the plaintiff has forfeited his prior right. If there be any such rule, it would be contrary to the rules of justice that the first mortgagee, having a small demand against a property of large value, which was sufficient, not only for meeting the debt due under the first mortgage, but also the debts due under the subsequent mortgage, should, in satisfaction of his small demand, destroy the right of subsequent mortgagees in their absence and without their consent, or giving them an opportunity of protecting their rights by payment of the prior mortgage money."

The Court of first instance (Subordinate Judge of Mainpuri) did not frame any issue with reference to this contention, nor notice it in its judgment. It held that the plaintiff was not liable to redeem the mortgages of 1873, as he had purchased the property in satisfaction of a prior incumbrance, and gave him a decree for redemption on payment of the amount due on the bonds of 1865.

The defendant Muhammad Sami-ud-din appealed from this decree to the High Court, his fourth ground of appeal being as follows :—

"That the present appellant is ready to pay off all the charges on the property, provided that he be allowed to keep it in his possession as it is now."

[128] Mr. *W. M. Colvin* and Mr. *Habibullah*, for the appellant.

The Hon. *T. Conlun* and Mr. *Abdul Majid*, for the respondent.

#### JUDGMENT.

STRAIGHT and TYRRELL, JJ.—The only plea relied upon by the learned counsel in his argument for the appellant is the fourth, and his contention, to put it into clear terms, is that as the defendant-appellant was a puiſne incumbrancer in the village of Pulwa, now sought to be redeemed by the plaintiff-respondent, at the date of the suit brought by the latter against the mortgagors in 1877, and was not made a party thereto, he ought by any decree passed in the present litigation to have reserved to him right to pay off the plaintiff's charges and retain possession of the property.

It almost goes without saying that had the plaintiff desired to bind the defendant by proceedings in this suit of 1877, it was incumbent on him, if he had notice of the latter's mortgages, to make him a party thereto; and this principle, which is really not disputed by the plaintiff's learned counsel, has not only been recognized by all the Courts in India in a long course of rulings, but has now found expression in s. 85 of the Transfer of Property Act. Not having done so, the defendant stands in no better nor worse position than he would have stood had he been a party to that suit, and his right as a puiſne incumbrancer to pay off any prior mortgage is untouched by the decree of the 17th March, 1877. It was contended for the respondent that the defendant had not in the Court below, either in his written statement of defence or orally, expressed his willingness to redeem the plaintiff's mortgage, and that the suggestion to that effect has been made for the first time in this Court. It is true that this matter does not appear to have been pressed on the learned Subordinate Judge's attention, for no reference to it occurs in the course of his judgment; but upon examining the sixth paragraph of the written statement of defence, the defendant undoubtedly did say that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money. No doubt it would have been more regular had the defendant asked in terms to be allowed to redeem the plaintiff's mortgage, and brought into Court what he alleged to be due [129] under it, or expressed his willingness to pay such amount as might be found to be due on taking the accounts; but we are not disposed to be too technical in a matter of this kind, where the defendant has the undoubted right which he now asserts, and on which, if we did not recognize such right, but upheld the decree of the Court below *simpliciter*, the effect of our doing so would be to extinguish his security. We think that, under the circumstances, the defendant should be placed in the same position he would have held if the decree of the 17th March, 1877, had never been passed: for, looking to the facts that he was in possession of the village of Pulwa at the time of the suit, and that his mortgages were registered instruments, it must be presumed that the plaintiff had notice of their existence, and should therefore have made him a party thereto.

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The appeal is decreed to this extent, and the decree of the Subordinate Judge will be so far modified that the defendant will be declared entitled to retain possession of mauza Pulwa, if within ninety days from the date of our decree he pays into this Court the amount of the plaintiff-respondent's mortgage-debt, with interest, otherwise the decree as passed by the Subordinate Judge will stand.

The costs of the plaintiff-respondent throughout will be paid by the defendant-appellant.

*Decree modified.*

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9 A. 129 = 6 A.W.N. (1886) 321.

### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

BALDEO AND OTHERS (*Defendants*) v. GULA KUAR (*Plaintiff*).  
[6th December, 1886.]

*Suit in forma pauperis—Application for permission to sue as a pauper—Rejection of application on the ground that it had been withdrawn—Civil Procedure Code, s. 2—"Decree"—Appeal.*

*Held* that an order rejecting an application for permission to sue as a pauper, and striking the case of the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, was a "decree" within the meaning of s. 2 of the Civil Procedure Code, and appealable as such.

[Diss., 21 A. 133; R., 20 B. 86.]

THE appellant in this case, Musammat Gula Kuar, made an application to the Subordinate Judge of Cawnpore for permission [130] to sue her deceased husband's relatives for maintenance in *forma pauperis*. Subsequently a petition was presented, apparently by her pleader on her behalf, withdrawing the application, and thereupon the case was struck off the Court's file without any inquiry having been made into the alleged poverty of the applicant. After this Gula Kuar presented a petition to the Subordinate Judge, praying that her application for permission to sue in *forma pauperis* might be restored to its original number on the Court's file and proceeded with, alleging that she had never made or authorised any petition for withdrawal.

The Subordinate Judge found that the petition withdrawing the application for permission to sue in *forma pauperis* had been made by the applicant upon the faith of some promise to her by the defendants, which had not been carried out; and the Court held that the proper procedure for the applicant to adopt would be to sue on the basis of this promise. The order of the Court was as follows:—"That the case be struck off; the petitioner is at liberty to bring a maintenance suit on the contract, if she wishes to do so."

The applicant appealed from this order to the District Judge of Cawnpore, who was of opinion that it was not proved that she had made the petition withdrawing her original application, and directed that the application should be restored to the file of the Court of the Subordinate Judge, and re-heard on the merits.

\* First Appeal No. 191 of 1886 from an order of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 7th August, 1886.

The defendants appealed from the District Judge's order to the High Court, on the ground that "the Judge had no jurisdiction to entertain the appeal from the order of the Subordinate Judge, inasmuch as that order was not appealable under s. 588 of the Civil Procedure Code."

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Moti Lal*, for the respondent.

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### JUDGMENT.

OLDFIELD, J.—In this case the respondent before us made an application to be allowed to sue *in forma pauperis*. This application was, by a petition put in by her, withdrawn; she subsequently repudiated the petition and desired to proceed with her application.

The first Court did not deal with the application on the merits, but dealt only with the question whether she did really withdraw, [131] and on that question the Court held that she had withdrawn and entered into another contract. The order of the Court was "that the case be struck off; the petitioner is at liberty to bring a maintenance suit on the contract if she wishes to do so." This order was appealed to the Judge, who set it aside, and directed the lower Court to restore the application of the respondent to its file and hear it on its merits. Against this order of the Judge an appeal has been preferred to this Court on the ground that the Judge had no jurisdiction to make it. It appears to me the Judge had jurisdiction, and that the question depends on whether the first Court's order was a decree within the meaning of s. 2 of the Civil Procedure Code, so as to allow of an appeal to the Judge. I think it was. The matter disposed of by the Court was, in fact, whether the plaintiff had a right to institute the suit, and the effect of the order was to negative that right and to strike the case off the file, and I think it was an adjudication in respect of a right within the meaning of s. 2; and I may add that it might also be recorded as analogous to an order rejecting a plaint, the application, by s. 410 of the Code, in the event of its being granted being to be deemed in the suit.

On these grounds I would affirm the Judge's order and dismiss this appeal with costs.

BRODHURST, J.—I entirely concur.

*Appeal dismissed.*

9 A. 131 (F.B.) = 6 A.W.N. (1886) 322,

### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

MUHAMMAD HUSAIN AND OTHERS (*Defendants*) v. KHUSHALO  
(*Plaintiff*).<sup>\*</sup> [11th November, 1886.]

*Appeal—Abatement of suit—Suit to recover share of joint family property sold in execution of decree—Death of plaintiff-respondent—Survival of right to sue.*

In a suit for the recovery of a share of ancestral family property which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather, the plaintiff obtained a decree in the lower appellate Court, from which

<sup>\*</sup> Second Appeal No. 1800 of 1885 from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June, 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 30th June, 1883.



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[132] the defendant appealed to the High Court. While the appeal was pending the plaintiff died, and, on her application, his widow was made respondent in his place. At the hearing of the appeal, the appellant contended that, upon the plaintiff's death, the right to sue did not survive, and the appeal should therefore be decreed by the suit being dismissed.

Held by the Full Bench that, judgment having been obtained before the plaintiff's death, the benefit of the judgment, or the right to sue, would survive to his legal representative, though whether the deceased plaintiff's representative could enforce the whole of the judgment in this case was a different matter, *Phillips v. Homfray* (1) and *Padarath Singh v. Raja Ram* (2) referred to.

When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added.

[F., 26 B. 597 ; Rel. on, 20 M.L.J. 760 (763)=7 M.L.T. 195 (197)=5 Ind. Cas. 937 (939)=34 M. 76 (78) ; R., 19 M. 345 ; 62 P.R. 1915=83 P.L.R. 1915=137 P.W.R. 1915=28 Ind. Cas. 455, 9 K.L.R. 251.]

THE plaintiff in this case, Dipchand, a member of a joint Hindu family, claimed a one-sixth share of certain ancestral family property, namely, a three biswas share of a village, which was in possession of the defendants. The defendants had purchased the rights and interests of the plaintiff's grandfather in the property as a sale in execution of a decree. The plaintiff alleged that this decree "was not for a debt contracted for the benefit of the family, and therefore the sons and grandsons were not bound to satisfy it, nor were their shares in the ancestral property transferable in satisfaction thereof." It appeared that this decree, which was dated the 19th March, 1860, was a simple money-decree. The plaintiff was born about three months after the passing of the decree, and the ancestral property was sold about fifteen months after the plaintiff's birth. The Court of first instance (Subordinate Judge of Aligarh), on the 30th June, 1883, dismissed the suit on the ground, among others, that the debt for which the property had been sold was one in respect of which the whole family property was liable. On appeal by the plaintiff, the District Judge of Aligarh, on the 15th June, 1885, held that the plaintiff's interest in the property did not pass by the sale to the defendants, and gave him a decree for possession of the share claimed.

The defendants appealed to the High Court. While the appeal was pending the plaintiff Dipchand died, and his widow Khushalo was, on her application, made respondent in his place.

The appeal came for hearing before Oldfield and Mahmood, JJ., when it was contended for the appellants that the appeal should be [133] decreed and the suit dismissed, as on the death of Dipchand the right to sue did not survive. With reference to this contention, the Division Bench referred the case to the Full Bench for the decision of the questions stated in the following order:

"Dipchand, plaintiff, instituted this suit on the allegation that his grandfather owed money to the defendants, who sued him and obtained a decree against him, and in execution brought to sale joint ancestral property in which plaintiff had an interest, and purchased it themselves, and he sued to recover his share of the property.

"The Court of first instance dismissed the suit; the lower appellate Court decreed it; and the defendant instituted an appeal in this Court. While this appeal was pending, plaintiff Dipchand died, and, on her application, his widow, Mussummat Khushalo, was made respondent in his

(1) L R. 24 Ch. D. 439.

(2) 4 A. 235.

place. On the appeal coming on for hearing, the appellants contended that, on the plaintiff Dipchand's death, the right to sue did not survive, and in consequence their appeal should be decreed by the suit being dismissed; and they refer to a decision of this Court—*Padarath Singh v. Raja Ram* (1) which would appear to support their contention.

"As we are doubtful of the correctness of the ruling referred to, we think it desirable to refer the following questions to the Full Bench:—

"1. Whether the right to sue in this case by Dipchand was a personal right, which could not survive to his legal representative after his death?

"2. If so, whether the suit should be dismissed by reversal of the lower appellate Court's decree, by reason of the death of Dipchand plaintiff?"

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Mr. *C. H. Hill*, for the respondent.

### JUDGMENT.

The following judgments were delivered by the Full Bench:—

[134] *EDGE, C.J.*—I have always understood the law to be that in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative. Whether the deceased plaintiff's representative can enforce the whole of the judgment in this case is a different matter—see *Phillips v. Homfray* (2). When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added.

*STRAIGHT, J.*—I concur in the view expressed by the learned Chief Justice, and I am not aware that it is at variance with anything said by me in the case mentioned in the referring order.

*OLDFIELD, J.*—I concur. I think the answer to this reference should be that the right to sue in this case is not a personal right only, but one which would survive to the legal representative of the plaintiff.

*BRODHURST, J.*—I concur with the learned Chief Justice.

*TYRRELL, J.*—I concur with the learned Chief Justice.

[See *Chapman v. Day*, (49 L. T. 436).—Rep.]

9 A. 134 (F.B.) = 6 A.W.N. (1886) 322.

### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

QUEEN-EMPRESS v. BALWANT. [25th November, 1886.]

*Criminal Procedure Code, ss. 423 (a), 439—Order of acquittal—High Court's powers of revision—Order by High Court for re-trial after acquittal on appeal.*

The High Court has power under s. 439 of the Criminal Procedure Code to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction.

(1) 4 A. 235.

(2) L.R. 24 Ch. D. 439.



1886

NOV. 25.

FULL

BENCH.

9 A. 133

(F.B.)=

6 A.W.N.

(1886) 322.

In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under s. 439, reverse such order and direct a re-trial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal, or such other Court of equal jurisdiction as the High Court may entrust, under s. 526 of the Code, with the trial of the appeal.

[F., 6 C.P.L.R. 15; 157 P.L.R. 1908=22 P.W.R. 1908; R., 14 B. 331 (341); U.B.R. (1892—1896) 11; 23 C. 975 (979); U.B.R. (1897—1901) 91 (92); 5 N.L.R. 4 (6); 6 A.L.J. 262 (263); 37 M. 119=22 Ind. Cas. 756=15 Cr. L.J. 180; D., 110 P.L.R. 1904=12 P.R. 1904.]

THIS was a reference to the Full Bench by EDGE, C.J., and STRAIGHT, J., of the following questions:—

"1. Has the Court power, under s. 439 of the Criminal Procedure Code, to revise an order of acquittal?

[135] "2. If it has, in reference to orders of acquittal passed on appeal, what has it power to order to be done?"

The Hon. Pandit *Ajudhia Nath*, for the applicant.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

### JUDGMENT.

The following judgment was delivered by the Full Bench:—

EDGE, C. J., and STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—We are of opinion that the first question put to us by this reference must be answered in the affirmative.

By the first paragraph of s. 439 of the Criminal Procedure Code, which confers revisional jurisdiction on the High Court, it is in terms declared, among other matters, that in its exercise we may use any of the powers entrusted to a Court of appeal by s. 423 *id.* Now, by cl. (a) of this section,—a clause, be it observed, which concerns High Courts alone,—we can in appeal from orders of acquittal, either (i) reverse the order and direct that further inquiry be made, or (ii) that the accused be tried, or (iii) committed for trial, or (iv) find him guilty and pass sentence according to law. The terms of s. 439, paragraph (1) therefore, unless barred or limited by anything to be found in the latter portion of that section, or in any other part of the Act, leave no room for doubt that this Court may revise orders of acquittal, and may do on the revision side exactly what it can do in its appellate jurisdiction. By the last paragraph of s. 439, however, one limitation is placed upon our powers, which has reference to the fourth of those mentioned above: that is to say, we are forbidden to "convert a finding of acquittal into one of conviction." It was argued before us that this is a clear and conclusive intimation that the Legislature intended to restrain us from entertaining applications to revise orders of acquittal. But it appears to us that the presence of these words in the section indicates that, short of determining the questions of fact in the case when revising such orders, as we may do when sitting as a Court of appeal, all the other powers conferred by clause (a) of s. 423, read in conjunction with the first paragraph of s. 439, are left unimpaired. We are then of opinion that the High Court has power to revise an order of acquittal made by any of the Courts exercising original or appellate jurisdiction subordinate to us.

[136] Proceeding to the second branch of the reference, we are asked what order can be made with reference to a person convicted by a Magistrate, but acquitted by the Court of Session in appeal, such order of acquittal being reversed by the High Court under s. 439 of the Criminal

Procedure Code. Clearly, the order must be one directing the re-trial of the proceedings wherein the final order has been found to be bad, and has in consequence been reversed. And as to the Court to which our order of re-trial should be sent, the scope for selection is limited to three tribunals, that is to say, the High Court, the Sessions Court of appeal, or the Magistrate.

It cannot be the High Court, because the limitation imposed by the last clause of s. 439 would restrict the result to a re-affirmation of the finding of acquittal. Similarly, it would be idle, as well as unreasonable, to direct a re-trial by the Magistrate, whose proceedings, the order of the appellate Court having been reversed, so far stand good, and who would, presumably, as a matter of course, re-affirm the conviction.

The Sessions Court of appeal then is the proper tribunal for re-trial of the appeal, or such other Court of equal jurisdiction as we might entrust, under s. 526 of the Code, with the trial of the appeal. This is our answer to the second question.

9 A. 136=6 A.W.N. (1886) 327.

# APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

MUHAMMAD ABDUL KADIR (*Defendant*) v. KUTUB HUSAIN (*Plaintiff*).  
KAMAL-UD-DIN AHMAD (*Defendant*) v. KUTUB HUSAIN  
(*Plaintiff*).\* [2nd December, 1886.]

*Sale in execution of decree—Sale of rights and interests in mauza consisting of two mahals—Submersion of mahal at time of sale—Sale certificate not specifically mentioning submerged mahal—Passing of rights in submerged mahal to purchaser.*

The rights and interests of certain judgment-debtors in a mauza consisting of two separate mahals, respectively known as the *Uparwar Mahal* and the *Kachar Mahal* were brought to sale in execution of the decrees. At the time of the sale, the *Kachar Mahal* was submerged by the river Ganges, and in the sale-[137] notification the revenue assessed upon the *Uparwar Mahal* only was mentioned, and there was no specific attachment of the *Kachar* or submerged land, but the property was sold as that of the judgment-debtors in the mauza. Subsequently, the river having receded, the auction-purchaser attempted to obtain possession of the *Kachar* land, but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale, but only their rights and interests in the *Uparwar Mahal*.

*Held* that either the whole rights of the judgment-debtors in both mahals were sold, or, if not, their rights in the *Uparwar Mahal*, with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mahal; and the mere fact of the mention in the sale-notification of the revenue of the *Uparwar Mahal* did not affect what passed by the sale.

*Held*, also that the attachment of the judgment-debtors' entire proprietary rights in the mauza included their interests in both mahals, and the sale certificates clearly showed that all their rights in the village were passed to the purchaser. *Mahadeo Dubey v. Bhola Nath Dichil* (1) and S. A. No. 818 of 1885 referred to, *Fida Husain v. Kutub Husain* (2) dissented from.

\* Second Appeals Nos. 154 and 155 of 1886 from decrees of F. E. Elliot, Esq., District Judge of Allahabad, dated the 24th September, 1885, confirming decrees of Pandit Indar Narain, Munsif of Allahabad, dated the 22nd December, 1883.

1886  
NOV. 25.  
—  
FULL  
BENCH.  
—  
9 A. 134  
(F.B.)=  
6 A.W.N.  
(1886) 322.



1886

DEC. 2.

APPEL-  
LATE  
CIVIL.

9 A. 136=

6 A.W.N.

(1886) 327.

THE facts of this case are stated in the judgment of the Court.

Mr. *Amir-ud-din*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondent.

## JUDGMENT.

STRAIGHT, J.—These two appeals, Nos. 154 and 155 of 1886, relate to two suits which were instituted by the respondent, plaintiff, against the two defendants-appellants on the 3rd August, 1883.

Both the Courts below have found in favour of the plaintiff, and two separate appeals are preferred by the two defendants to this Court, which may conveniently be disposed of in a single judgment. The case upon which the plaintiff came into Court is shortly this. He said that on the 20th September, 1877, one Salamat Ali purchased certain rights and interests at an auction-sale in mauza Mustafabad, pargana Chail, in the Allahabad District. These rights and interests were brought to sale by one Badri Nath, and they were sold as the property of Muhammad Abdul Kadir and Kamal-ud-din Ahmad, in mauza Mustafabad, parganna Chail, Allahabad District. Subsequently, in March, 1879, or 1286 Fasli, Salamat Ali transferred what he had purchased to Kutub Hussain, the present plaintiff, who, therefore, is entitled to [138] have whatever was purchased by Salamat Ali at the sale of the 20th September, 1877.

Now, it appears that the village of Mustafabad is situated on the banks of the river Ganges, and that from time to time land has accreted, and does accrete, to that mauza owing to the receding of the river, which in the rainy season gets covered with water and again temporarily disappears. Such land, thus from time to time covered with water, has been known as the *kachar* land of the village, and prior to 1875 it has so frequently made its re-appearance that the Revenue authorities in that year, for greater convenience in assessing it for revenue, treated it as a separate mahal. Accordingly, therefore, it may be taken that mauza Mustafabad contained two mahals, that is to say, two revenue-paying divisions, respectively known as the *Uparwar Mahal* and the *Kachar Mahal*. It also appears that in 1877, at the time of the auction-sale to Salamat Ali, the *Kachar Mahal* was submerged, and the contention which subsequently to that sale was made by the defendants before the Revenue authorities, whose decision led to the present suit, and is maintained here, is that these submerged lands, that is, the *Kachar Mahal*, could not and did not pass to the auction-purchaser under his purchase of the 20th September, 1877, but only the *Uparwar* land.

The learned counsel for the appellant here has vigorously maintained that position, and in support of it has referred to a ruling of Mahmood and Duthoit, JJ., in *Fida Husian v. Kutub Husain* (1); and he further contends that as, in the sale-notification, only the revenue assessed upon the *Uparwar* land was notified, and as there was no distinct or specific attachment of the *Kachar* land, the sale, as regards the first point, did not carry these lands; and next, that the sale as regards them was a void sale, because there having been no attachment, the sale was void *ab initio*; and we are referred to a Full Bench ruling as to the last contention—*Mahadeo Dubey v. Bhola Nath Dichit* (2). With regard to the ruling in *Fida Husian v. Kutub Husain* referred to above, I must say it appears to

(1) 7 A. 38.

(2) 5 A. 86.

be directly applicable to the present case, and I confess that I fail to see the distinction sought to be drawn by the learned pleader for the respondent.

[139] I need scarcely say that for any decision written by Mr. Justice Mahmood I naturally have a high respect, and I should not, except for strong reasons, refrain from following it; but I regret to say that in the present instance I cannot adopt the views expressed by that learned Judge therein, and, with every deference, they do not commend themselves to my better judgment.

I think when the rights and interests of a judgment-debtor as proprietor in a village are put up and sold, without any restriction of any kind, and the sale-certificate, which is granted to the purchaser, transfers, or purports to transfer, those rights and interests, without any limitation or reservation, that the entire rights of the judgment-debtor pass to the purchaser as they exist in the whole mauza at the date of the sale taking place. In the present case, the proprietary rights of the judgment-debtors in Mauza Mustafabad were sold without limitation or restriction of any kind, and the mere fact of the mention in the sale-notification of the revenue of one of the mahals, namely, the *Uparwar Mahal*, did not, in my opinion, affect what passed by the sale, more especially as, at the time, this was the only mahal from which revenue was recoverable by Government, the other being submerged. Whichever way the matter is looked at, it seems to me that either the whole rights of the judgment-debtors in both Mahals were sold, or, if not, their rights in the *Uparwar Mahal*, with the accessory and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mahal.

As regards the point about the attachment, it seems to me beyond doubt that the entire proprietary rights of the judgment-debtors were attached, which included their interests in both mahals, and the sale-certificate clearly shows that all the judgment-debtors' rights in the village Mustafabad were passed to the purchaser.

For these reasons I regret I cannot follow the ruling of Mahmood and Dathoit, JJ., already referred to. I may add that in a similar case decided by the late Chief Justice, Sir Comer Petheram, and Tyrrell, J., on the 16th March, (S.A. No. 818 of 1885), those learned Judges have held, as I hold, in a case of lands called *Uparwar* and *Kachar* subject to similar incidents as the village [140] lands in the present dispute, that a sale of the proprietary rights in a village covers both.

This being the view I take, both these appeals Nos. 154 and 155 must be dismissed with costs.

BRODHURST, J.—I entirely concur in dismissing both these appeals with costs.

*Appeals dismissed.*

1886  
DEC. 2.

APPEL-  
LATE  
CIVIL.

9 A. 136=  
6 A.W.N.  
(1886) 327.



1886

DEC. 6.

REVI-  
SIONAL.  
CIVIL.

9 A. 140—6 A.W.N. (1886) 328.

## REVISIONAL CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

DURGA PRASAD (*Plaintiff*) v. RACHLA KUAR AND OTHERS (*Defendants*).<sup>\*</sup>  
[6th December, 1886.]

9 A. 140—  
6 A.W.N.  
(1886) 328.

*Suit for declaration that property is liable to sale in execution of decree—Valuation of suit—Jurisdiction.*

In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution of the plaintiff's decree for Rs. 1,500—*held* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *Gulsari Lal v. Jadaun Rai* (1) distinguished.

[*Contra*, 15 C. 104; D., 17 A. 69 (72); R., 15 C.P.L.R. 161 (162); 11 K.L.R. 263.]

THE plaintiff stated in his plaint that on the 4th April, 1877, one Sheo Dat Rai who owned a 5½ gundas share in a certain village, gave a simple mortgage of 2 gundas to Mahipat Rai, his first cousin, and that this mortgage was a collusive transaction. He then, on the 13th July, 1877, gave a simple mortgage of the 5½ gundas to Hira Rai and Ram Charan Rai. Subsequently he caused a suit to be instituted against himself in respect of the mortgage of the 4th April, 1877, and this resulted in Mahipat Rai obtaining, on the 20th September, 1877, a decree against him for Rs. 121-15. On the 15th December, 1883, Hira Rai sold to the plaintiff two-thirds of the rights and interests of the mortgagees under the mortgage of the 13th July, 1877, and the plaintiff subsequently sued to enforce that mortgage, and obtained a decree for Rs. 1,505-7-9, and for the sale of two-thirds of the 5½ gundas share in satisfaction of the decretal amount. On the 1st September, 1885, the plaintiff learnt that Rachla Kuar, widow of [141] Mahipat Rai, had caused 2 gundas to be attached and proclaimed for sale in execution of the decree obtained by her deceased husband.

Upon these allegations the plaintiff brought this suit to establish his right to bring to sale the 5½ gundas share as the property of Sheo Dat Rai, "by protecting the 2 gundas from being sold in execution of the Musammat's decree." The value of the 2 gundas was stated to be Rs. 400. The Court of first instance (Munsif), referring to *Gulsari Lal v. Jadaun Rai* (1), held that the value of the subject-matter in dispute in the suit, for the purposes of jurisdiction, was the amount of the plaintiff's decree, Rs. 1,505-7-9, and as that amount exceeded Rs. 1,000 it could not take cognizance of the suit. It therefore made an order returning the plaint to be presented to the proper Court. The plaintiff appealed from this order, and the appellate Court affirmed it.

The plaintiff then applied to the High Court for revision, contending that the value of the subject-matter in dispute should in this case be determined with reference to the value of the 2 gundas in dispute.

<sup>\*</sup> Application No. 198 of 1886, for revision of an order of J. M. C. Steinbelt, Esq., District Judge of Asamgarh, dated the 31st July, 1886, affirming an order of Maulvi Muhammad Amin-ud-din, Munsif of Muhamdabad, dated the 10th May, 1886.

Munshi *Kashi Prasad*, for the plaintiff.

Munshi *Hanuman Prasad*, for the defendants.

### JUDGMENT.

OLDFIELD, J.—This is an application for revision of an order of the Court below, passed under s. 57 of the Civil Procedure Code, returning a plaint because the value of the subject-matter appeared to be beyond the Munsif's jurisdiction.

The claim of the plaintiff was to have certain property declared liable to sale in execution of his decree for Rs. 1,505-7-9, the value of such property not exceeding Rs. 400, and the question for decision was whether the suit, for jurisdiction purposes, should be valued at the latter or the former amount. I am of opinion that the value of the property which the decree-holder seeks to have sold, determines the jurisdiction in this suit, and it is immaterial whether the amount of the decree is higher than the limit of the Munsif's jurisdiction.

The case referred to by the lower Court, *Gulzari Lal v. Jadaum Rai* (1), is clearly distinguishable from this; for in that case the value of the property in suit was higher than the amount of the [142] decree, and the valuation was rightly limited to the amount of the decree, that being all that was recoverable in the event of the plaintiff being successful.

I would set aside both the decretal orders of the lower Courts, and direct that the plaint be accepted as regards the value of the subject-matter of the suit, and that it be dealt with according to law. The costs of the plaintiff-appellant in all three Courts will follow the result.

BRODHURST, J.—I am of the same opinion, and concur in the proposed order.

*Appeal allowed.*

3 A. 142 = 6 A.W.N. (1886) 323 = 11 Ind. Jur. 267.

### REVISIONAL CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

BALBIR SINGH (*Plaintiff*) v. AJUDHIA PRASAD AND OTHERS  
(*Defendants*). [7th December, 1886.]

JAGRAJ SINGH (*Plaintiff*) v. AJUDHIA PRASAD AND OTHERS  
(*Defendants*).\*

*Hindu Law—Joint Hindu family—Mortgage of family property by father—Decree against father enforcing mortgage—Decree for money against father—Sale in execution of decrees—Rights of sons.*

The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from such sale. One of these decrees was for enforcement of a hypothecation by the plaintiff's father of the property in suit. It was admitted on behalf of the plaintiffs, in connection with this decree, that, although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other

\* First Appeals Nos. 16 and 149 of 1885, from decrees of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 18th May, 1885.

1886

DEC. 6.

REVI-

SIONAL.

CIVIL.

9 A. 140 =

6 A.W.N.

(1886) 328.



1886

DEC. 7.

REVI-  
SIONAL  
CIVIL.

9 A. 142=

6 A.W.N.

(1888) 323=

11 Ind. Jar.

267.

purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest.

*Held* that the plaintiffs were not entitled to any declaration in respect of the execution proceedings under the decree for enforcement of hypothecation.

The second of the decrees above referred to was a simple money decree for the principal and interest due upon a *hundi* executed by the father in favour of the decree-holder. The suit terminating in that decree was brought against the father alone, and the debt was treated as his separate debt.

*Held* that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which he could execute against the family property and not against the father's interest only, and if he could maintain such suit, either against those members of the family against whom he desired to execute his decree, or against [143] the father as head of the family, expressly or impliedly suing him in that capacity; but that, not having taken this course, his decree was not enforceable against the plaintiffs' rights and interests in the attached property.

*Muttian Chettiar v. Sangali Virapandia Chinatambiar* (1) distinguished; *Nanomi Babuasiu v. Mozun Mohun* (2) and *Basa Mal v. Maharaj Singh* (3) referred to.

[F., 12 A. 209 (213); R., 16 A. 449 (463); 16 C.P.L.R. 19 (21).]

THE facts of these cases appear from the judgment of the Court.

The Hon. Pandit *Ajudhia Nath*, for the appellant.

Mr. C. H. Hill, Munshi *Hanuman Prasad*, Munshi *Madho Prasad*, and Munshi *Sukh Ram*, for the respondents, in F. A. No. 16.

The Hon. T. Conlan and the Hon. Pandit *Ajudhia Nath*, for the appellant.

Mr. C. H. Hill, Munshi *Hanuman Prasad*, Pandit *Nand Lal*, and Munshi *Madho Prasad*, for the respondents, in F. A. No. 149.

#### JUDGMENT.

EDGE, C.J.—These are two appeals against the judgments of the Subordinate Judge of Mainpuri, passed on the 18th May, 1885, dismissing the respective claims of the plaintiffs, who respectively prayed for decrees that their respective proprietary rights in certain ancestral property be declared, and their interests in such property, which were about to be sold in execution of two decrees against their father, Harbans Singh, protected and exempted from such sale.

The sale of the ancestral property was advertised to take place on the 20th September, 1884, in satisfaction of two decrees—one being in respect of a sum of Rs. 7,080 in favour of the third defendant, and the other of Rs. 1,724-5-3 in favour of the first and second defendants. The two plaintiffs, the sons of the judgment-debtor, separately brought suits against the decree-holders and their father, with the object of protecting their rights in the attached property.

With regard to the question as to whether the execution-creditor, in respect of the decree for Rs. 7,080, was entitled to realize by sale of the property, that is a question which may be very shortly [144] dealt with. In that case the father had hypothecated the property in suit. It was attempted to be shown by his sons, the plaintiffs, that the debt was not one for which he could hypothecate any property except his own. It was, however, candidly admitted by Mr. Conlan, who appeared for the appellant in one case, and by Pandit *Ajudhia Nath*, who appeared for the appellant in each case, that although the plaintiffs' father was a person of immoral character, the creditor had no means of knowing that the monies

(1) 9 I.A. 128=6 M. 1.

(2) 13 C. 21.

(3) 8 A. 205.

advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest. It appears to me therefore that the plaintiff's claims in respect of this part of the case were rightly dismissed in the lower Court, and that they are not entitled to any declaration in respect of the execution proceedings under the decree for Rs. 7,080.

The next question is, whether they can maintain these suits in respect of the execution proceedings under the decree for Rs. 1,724-5-3.

The father borrowed Rs. 1,100 originally on a *hundi* from the defendants 1 and 2, who sued for the principal and interest due to them, and obtained a simple money decree. There was no hypothecation of property as security for their debt.

It was said by these two defendants that this money was borrowed for family purposes to pay a debt due by the plaintiff, Balbir Singh, and to build certain shops at Cawnpore. It matters little, in our opinion, for what purpose the money borrowed was obtained. If borrowed by Harbans Singh for family purposes, it was open to these two defendants to have sued the members of the family they wished to bind, or to have sued the father Harbans Singh, as representative of the family. In either of these events they would have obtained a decree enforceable against the whole of the ancestral family property. They sued the father alone, and treated this as his separate debt. It is quite true the father alone borrowed the money, but that did not prevent these defendants from suing the other members of the family, or suing the father in his capacity of head of the family, if the debt was one incurred on account of the family. It is therefore a question of law whether the decree obtained by these defendants affects the family interest, and can be executed against the family property.

I am of opinion that it cannot. The cases to which the counsel for the respondents have referred us, are all, except the last, cases in which the Courts had to decide a somewhat similar point arising after a sale had taken place. So far as those cases are concerned, it is sufficient, for the purpose of the present case, to say that this is not a case in which the question arises after a sale has taken place.

Now the last case referred to and cited by Pandit *Nand Lal* as in his favour is, in my opinion, nothing of the kind. I refer to the case of *Muttayan Chettiar v. Sangili Virapandia Chinnatambiar* (1). In that case the property proceeded against was property inherited by the son from his father, which, in the son's hands, was liable to be sold in satisfaction of the father's debt.

In my opinion, the creditor's remedy in the present case was to have brought his suit, if he desired to obtain a decree which he could execute against the family property, and not against the father's interest only, if he could maintain it, either against those members of the family against whom he desired to execute his decree, or against the father as head of the family, expressly or impliedly suing him in that capacity. In the case of *Nanomi Babuasin v. Modum Mohun* (2), lately decided in the Privy Council, their Lordships, referring to the rights of the father-debtor and the creditor in that case, say:—If his (the father's) debt was of a nature to support a sale of the entirety, he (the father) might legally have sold it

1886  
DEC. 7.

REVI-  
SIONAL  
CIVIL.

9 A. 142=

6 A.W.N.

(1886) 323=

11 Ind. Jur.  
267.



1885  
DEC. 7.

REVI-  
SIONAL  
CIVIL.

9 A. 142=  
6 A.W.N.  
(1886) 323=  
11 Ind. Jur.  
267.

(the property) without suit, or the creditor might legally procure a sale of it by suit." The creditor here has brought no such suit.

For these reasons we are of opinion that the decree for the sum of Rs. 1,724-5-3 is not enforceable against the rights and interests which these plaintiffs, the sons of Harbans Singh, have in the ancestral property sought to be sold by defendants Nos. 1 and 2.

The case of the defendants Nos. 1 and 2 put forward before us by Pandit *Nand Lal* is strangely inconsistent. At first he contended that the appeal ought to be dismissed as against his clients on [146] the ground that they had not, and did not, claim to sell anything except the father's interest in the property. In support of this contention, he pointed to the sixth paragraph of their defence. On our asking him to explain why, in that view of the case, the allegations in the eighth paragraph of the defence were made, he volunteered no explanation, but proceeded to argue that his clients were entitled to bring to sale the interests, not only of the father, but of the respective appellants in the family property. It appears to me that the statement of defence of defendants Nos. 1 and 2 is a tricky one, and was framed so that they might raise whichever of the above contentions they might find most convenient in the Court below or on appeal. They wanted apparently to sail between wind and water, and having these contradictory pleadings to go upon, they were able to adopt the one or the other, as circumstances might arise.

I wish, in conclusion, to say, as to *Basa Mal v. Maharaj Singh* (1) that I agree with what is stated in the last paragraph but one of that judgment, which was passed on the 6th March last by the learned late Chief Justice Sir Comer Petheram and by Mr. Justice Straight. That part of the judgment to which I refer is as follows:—

"It seems to us that two broad rules are deducible from the foregoing authorities, and they are these:—First, that when a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property, without any limitation, as to the rights and interests sold, the rights and interests of all the co-parceners is to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, chapter xi, s. 48, and *Manu*, chapter viii, sloka 159, and one which it would not be their pious duty as sons to discharge. Next, that if, however the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone, and personal to himself, and all that is, put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, that is, the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares, upon the basis of the terms.

of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder."

Our order in these two appeals, therefore, is that, so far as the plaintiffs' claim to exempt their rights and interests in the attached property under the decree of the third defendant, Bhataile Hurbans Rai, the appeals must be dismissed.

The remainder of the plaintiffs' claim to exemption must be decreed. The decrees of the Subordinate Judge will therefore be varied in both cases, so as to exempt the rights and interests of the plaintiffs from execution proceedings under the decree of defendants Nos. 1 and 2 for Rs. 1,724-5-3.

The costs, both in this and the lower Court, will be in proportion to the claim decreed and dismissed in both suits.

TYRRELL, J.—I concur.

*Appeals partly allowed and partly dismissed.*

9 A. 147 (F.B.)=6 A.W.N. (1886) 325=11 Ind. Jur. 154.

# FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

GIRDHARI LAL (Plaintiff) v. W. CRAWFORD (Defendant).<sup>\*</sup>  
[20th November and 10th December, 1886.]

*Husband and wife—Agency—Authority of wife to pledge husband's credit—Civil Procedure Code, ss. 565, 566, 587—Second appeal—Determination of issues of fact by High Court.*

*Held* by the Full Bench that s. 587 of the Civil Procedure Code, does not make ss. 565 and 566 applicable to second appeals, so as to enable the High Court [148] in cases where the lower appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record; but the High Court in such cases must remit issues for trial to the lower appellate Court. *Bal Kishen v. Jasoda Kuar* (1) and *Deokishen v. Bansi* (2) overruled on this point.

*Held* by the Division Bench that the liability of a husband for his wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done.

In a suit by a creditor to recover from his debtor and her husband the amount of money lent by the plaintiff to the former on her notes of hand, it appeared that the defendants had always lived together, that the wife had an allowance wherewith to meet the household expenditure and all her personal expenses, and that the money had been borrowed without the husband's knowledge and not to meet any emergent need, but to pay off previous debts, and had been raised by successive borrowings over a considerable period, the debt having increased by high rates of interest. It was also found that it had not been shown that the plaintiff looked to the husband's credit, or that the husband had ever previously paid his wife's debts for her.

*Held* that under these circumstances no agency on the wife's part for her husband had been established, and that the husband was therefore not liable to the claim.

THIS was a suit for recovery of Rs. 589-2-9, principal and interest, due upon certain *ruqqas* or notes of hand given by Mrs. W. Crawford, defendant No. 1, and wife of Mr. W. Crawford, defendant No. 2, to the

<sup>\*</sup> Second Appeal No. 1468 of 1885, from a decree of W. Blennerhassette, Esq., District Judge of Cawnpore, dated the 1st June, 1885, modifying a decree of Babu Bepin Behari Mukerji, Munsif of Cawnpore, dated the 15th September, 1884.

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9 A. 142=6 A.W.N. (1886) 323=11 Ind. Jur. 267.



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plaintiff Girdhari Lal. The rate of interest claimed was half an anna per rupee per mensem. The *ruggas* dated from the 5th April, 1882, to the 9th October, 1883. The defendant No. 1 pleaded that she had borrowed Rs. 223 only from the plaintiff, and had fully repaid that amount. The defendant No. 2 pleaded that he had no knowledge of the plaintiff's monetary dealings with his wife, the defendant No. 1, and that he was not liable in respect of the plaintiff's claim.

With reference to the plea of defendant No. 2, there was evidence to the following effect:—The two defendants were married in 1855, and had always lived together. At the time when the debts were contracted, Mr. W. Crawford was employed in the Ordnance Department on a salary of Rs. 375 a month. Out of this he gave an allowance to his wife of Rs. 220 a month, with which she had to meet the household expenditure and all her own expenses. The defendants had a large family, but Mrs. Crawford deposed that the [149] allowance of Rs. 220 would have been sufficient for all purposes if she had not had to pay heavy interest upon monies borrowed by her from time to time. She further stated that for nine or ten years past she had been borrowing money in her own name; that the *ruggas* held by the plaintiff represented borrowings for the purpose of paying interest on old debts; that one of the loans was applied to the payment of the first debt, which was incurred for payment of medicine; that her husband knew nothing about these loans; and that he never authorized her to borrow money. Mrs. Crawford was the only witness who gave evidence upon these points.

The Court of first instance decreed the claim, but allowed interest at the rate of 6 per cent. per annum only. Upon the issue of the husband's liability, the Court observed:—"There cannot be the least doubt that the defendant No. 1 acted as the agent of her husband, the defendant No. 2, and that she had to borrow the money in order to meet the household expenditure. She admits that she was never extravagant, and that the first debt was incurred by her in order to pay for medicines during her illness. I am therefore of opinion that the husband of the defendant No. 1 is liable for the debts incurred by her, and I decide this issue in favour of the plaintiff."

The defendants appealed to the District Judge of Cawnpore. The Judge dismissed the appeal of Mrs. Crawford. With respect to the appeal of Mr. W. Crawford on the point of his liability to the plaintiff's claim, the Court observed:—"The husband in this case contends that he is not liable for his wife's debts. It is contended that, being a Government servant, his family could have got medical advice without paying for it, and that Mrs. Crawford was not justified in borrowing without her husband's knowledge to pay off previous debts. I think the transactions are merely simple loan transactions, and no implied agency on the part of the wife can be proved in this case. It is not shown that plaintiff looked to the husband's credit, or that the husband ever paid his wife's debts for her on any previous occasion. It does not appear that Mr. Crawford was to be called on to execute the bond in favour of plaintiff. I therefore dismiss the appeal of Mrs. Crawford and accept the appeal of Mr. Crawford, and find him not liable for this debt."

[150] The plaintiff appealed to the High Court from the part of the Judge's decree which was adverse to him, upon the following grounds:—

1. "Because, according to law and the custom of European families, the respondent's wife must be held to have been acting as the agent of the respondent.

2. "Because, with reference to the nature of the debts as admitted by Mrs. Crawford and as shown by the evidence, the respondent is liable to pay the debt due to the appellant.

3. "Because the *onus* of proof was upon the respondent, but he has failed to prove that his wife was not acting as his agent."

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Mr. *A. Strachey*, for the respondent.

Upon the hearing of the appeal before Oldfield and Mahmood, JJ., their Lordships were disposed to regard the findings of the District Judge upon some of the issues of facts raised by the case as insufficient, and to remit these issues to him for determination under s. 566 of the Civil Procedure Code. The issues in question related to the fact of the two defendants living together, the objects of the various loans, and the allowance made by the respondent to his wife. It was objected by Mr. *Strachey* for the respondent that, with reference to the decisions of the Full Bench in *Bal Kishen v. Jasoda Kuar* (1) and *Deokishen v. Bansī* (2), the Court had no power to remit the issues to the District Judge, but must itself determine them upon the evidence on the record. Their Lordships passed the following order:—

"We refer to the Full Bench the question whether, with reference to the decisions of the Full Bench in *Bal Kishen v. Jasoda Kuar* (1) and *Deokishen v. Bansī* (2), the Division Bench is competent to refer to the lower appellate Court issues of fact for decision in this case, or is bound to determine the same on the evidence on the record."

Mr. *A. Strachey*, for the respondent.—It is impossible to distinguish this reference from those which were answered in *Bal [151] Kishen v. Jasoda Kuar* (1) and *Deokishen v. Bansī* (2). The first of these cases was decided on the 4th June, 1885, and the second, which was referred to the Full Bench for the express purpose of reconsidering the first, on the 20th January, 1886. Upon both occasions the matter was fully discussed, and it would be highly inexpedient to disturb two such recent Full Bench rulings by raising again for the third time the question which they decided. By s. 587 of the Civil Procedure Code, the provisions of Chapter XLII, including ss. 565 and 566, are made applicable, "as far as may be" to second appeals; and this no doubt means so far as may be consistent with Chapter XLII, and in particular with s. 584, specifying the grounds on which second appeals lie to the High Court. But although in general it is true that the determination of issues of fact in second appeal would be inconsistent with those provisions, it is not true in all cases; and the common impression that the High Court is under an invariable and absolute disability to deal with such issues in second appeal is erroneous. No doubt, where as usually happens, the Courts below do not omit to determine the necessary issues of fact, the High Court cannot interfere with the findings upon those issues, because the Legislature obviously intended that in regard to findings of fact there should be one appeal only. S. 584, moreover, limits the grounds of second appeal to error in substantive law or procedure, and where the necessary issues have been determined, no such error may exist. But where they have not been determined, the case is different, because this amounts to an error in procedure within the meaning of s. 584 (c), and therefore gives the High Court jurisdiction to interfere in second appeal. In such a case

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the question is not whether the appeal lies, but what the Court may do; and there is nothing in Chapter XLII which warrants the inference that in this particular class of cases at all events the High Court may not determine issues of fact. The reasons which in ordinary cases prevent the High Court from determining issues of fact do not here apply; for the Legislature's intention that two Courts only should be competent to determine such issues is duly complied with. It is unlikely that in such cases, where the High Court has before it all the materials which the lower appellate Court could have, the Legis-[152]lature should have intended the parties to be subjected to the expense and delay involved by a remand. [He referred to *Hinde v. Brayen* (1).]

The Hon. Pandit *Ajudhia Nath*, for the appellant.—I am not concerned to oppose the course advocated by the other side; but until *Bal Kishen v. Jasoda Kuar* (2), the practice of the Court was uniformly opposed to that which has since been followed. [He referred to *Ramnarain v. Bhawanideen* (3) and *Sheoambar Singh v. Lall Singh* (4).]

Mr. A. Strachey, in reply.

### JUDGMENT.

OLDFIELD, J.—The answer to this reference depends on whether the provision in s. 565 of Chapter XLI of the Civil Procedure Code is to be followed by the High Court in disposing of second appeals, by which, when the evidence on the record is sufficient to enable the appellate Court to pronounce judgment, the appellate Court shall, after resettling the issues if necessary, finally determine the case. If it is, it would be incumbent on this Court to try issues and determine questions of fact essential to the right decision of the suit, in all cases when the evidence on the record is sufficient to enable the Court to do so, and it could only refer issues when the case falls under s. 566, that is, when the evidence on the record was not sufficient.

But the provisions of Chapter XLI are by s. 587 to be applied in second appeal only "as far as may be." Those words may, I think, be taken to mean so far as the provisions are consistent with the due discharge of the functions of the High Court as a Court of second appeal. Now, looking to the provisions of Chapter XLII, which deals with second appeals, it was not the intention of the Legislature that the High Court, sitting as a Court of second appeal, should determine questions of fact on the evidence. The only grounds on which second appeals are cognizable, are those mentioned in s. 584, which relate to errors of law or usage having the force of law, or substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits. Those are the only grounds of which notice [153] can be taken, and I do not think it was contemplated that after an appeal has been admitted on such grounds the whole case would be opened, so as to enable the High Court to deal with it under s. 565. The Court would be constituting itself a Court of first appeal.

I am of opinion therefore that, in the cases referred to, this Court is at liberty to remit issues for determination by the Court below. Such, too, has been the practice of this Court for years, and it is undesirable to alter it. I am constrained therefore to modify the opinion I expressed in *Deokishen v. Banssi* (5).

(1) 7 M. 52.  
(4) 9 A. 30.

(2) 7 A. 765.

(3) 9 A. 29.  
(5) 8 A. 172.

EDGE, C.J.—If the practice in this Court had not invariably been that the Division Benches in second appeals should not determine issues of fact, I might have thought it a matter of some doubt whether or not s. 566 of the Code applied to second appeals. But as I find that this has been the practice of the Benches of this Court for many years, during which the Court has been composed of many Judges of great eminence and experience, I think that the prevailing practice should guide us as to the construction to be placed on s. 587. The question has practically been raised only recently, and if the practice had been wrong in the opinion of the Bar and the Court, it would, I assume, have been raised before, and the practice would not have become established. Moreover, I find that the practice of Calcutta High Court is the same, and I infer from a judgment which was mentioned during the argument yesterday that there is the same practice at Madras also (1). Under these circumstances, I do not feel myself justified in differing from my brother Oldfield or in expressing any doubt in the matter.

STRAIGHT, J.—It is with much satisfaction that I have heard the remarks of my brother Oldfield with reference to the decision of the Full Bench in *Deokishen v. Bansi* (2) to which he was a party, and in regard to which he now says that he has modified his former opinion. I think that, in a matter of this kind, the maxim *optimus interpret rerum est usus* is applicable, and that what has been the unvarying practice of the Court in regard to s. 566 of the Code, at all events since I have been a member of the Court, should continue to be followed until it has been shown [154] that it is so unreasonable and unsatisfactory that injustice is caused by following it. I adhere entirely to all that I said in the case of *Bal Kishen v. Jasoda Kuar* (3), which, in the case of *Deokishen v. Bansi* (2), I re-affirmed; and I cannot but again express any satisfaction that, in accordance with the opinion of my brother Oldfield, we are about to return to our old practice.

BRODHURST, J.—I adhere to the opinion I expressed on a former occasion, and I concur in the judgment of my brother Oldfield.

TYRRELL, J.—The Court's practice being now settled in the matter, I have nothing further to say on the subject.

[The case again came before a Division Bench, which consisted of Oldfield and Brodhurst, JJ., and Brodhurst, J., not having been a member of the Bench before whom it was originally heard, it was re-argued.]

Munshi *Kashi Prasad*, for the appellant.—The lower appellate Court should, upon the evidence, have held that the respondent's wife in contracting the debts in question acted as his agent. The parties were cohabiting together, the household management was in the wife's hands, and the debts appear to have been contracted for the purpose of obtaining money to be applied in the purchase of medicines and other necessities. Although at common law it has been held that there is a distinction between debts contracted for necessary purposes and loans taken for the purpose of paying such debts, no such distinction obtains in equity.

Mr. *A. Strachey*, for the respondent.—This case is governed by the principle laid down by the house of Lords in *Debenham v. Mellon* (4), namely, that the liability of a husband for debts contracted by his wife depends upon the general principles of agency, and that whether agency

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(1) *Hinde v. Brayan*, 7 M. 52.

(3) 7 A. 765.

(2) 8 A. 172.

(4) 6 App. Cas. 24 = L.R. 5 Q.B.D. 394.



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has or has not been proved in a particular case is always a question of fact. This is so, even where the husband and wife are living together, and where the debts are contracted for necessary purposes. If, however, it is merely a question of fact, the lower appellate Court has recorded a distinct finding upon that question, and there is no ground for interference in second appeal. Further, it has not been shown that the debts in this case were [155] contracted for necessary purposes, and the action of the respondent in giving his wife an allowance sufficient for necessary purposes excludes the supposition that he intended to authorize her to contract debts on his account.

Munshi *Kashi Prasad* in reply.

OLDFIELD and BRODHURST, JJ.—This suit has been brought to recover the amount of money lent by the plaintiff to the defendant, Mrs. Crawford, on her notes of hand, and has been brought against her and her husband. The lower appellate Court has disallowed the claim against the husband, and hence this second appeal. The appeal in our opinion must fail. The Judge has rightly held that the liability of a husband for his wife's debts depends on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In the present case, the Judge has held that there is no express or implied agency, and the circumstances under which the debts were contracted support this view. It is not a case where agency might be implied, as for instance, of money lent to a wife to meet some emergent need, but of successive borrowing over a considerable period, the debt having increased by high rates of interest. We dismiss the appeal with costs.

*Appeal dismissed.*

9 A. 155=7 A.W.N. (1887) 5.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

KUDRAT AND OTHERS (*Defendants*) v. DINU AND OTHERS (*Plaintiffs*).\*  
[10th December, 1886.]

*Civil Procedure Code, s. 13—Suit dismissed "as brought"—Res judicata.*

In a suit in which the plaintiffs claimed exclusive possession, and, in the alternative, joint possession of certain land, evidence was taken upon the issues raised; but the Court, without discussing the evidence, held that the alternative claims were "contradictory," and the plaintiff's claim, therefore, "uncertain," and accordingly ordered "that the plaintiff's claim as brought, be dismissed with [156] costs." The plaintiffs did not appeal from this decision, but subsequently brought a suit against the same defendants, claiming joint possession of the same property.

Held that the suit was barred by s. 13 of the Civil Procedure Code, the Court in the former suit not having reserved to the plaintiffs the right to bring a fresh action.

*Ganesh v. Kalka Prasad* (1), *Mahammad Salim v. Nabian Bibi* (2), and *Watson v. The Collector of Rajshaye* (3) referred to by Tyrrell, J.

[F., 9 A. 690 (697); Appr., 11 A. 187 (191).]

\* Second Appeal No. 117 of 1886 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 14th November, 1885, confirming a decree of Babu Nihal Chandar, Munsif of Azamgarh, dated the 26th June, 1885.

(1) 5 A. 595.

(2) 8 A. 282.

(3) 13 M.I.A. 160.

THE plaintiffs in this case, in 1884, brought a suit against the defendants, in which they asked that they might be given exclusive possession of certain land, or, if it were found that the parties were entitled to joint possession of the land, that they might be given possession jointly with the defendants. The third issue framed by the Court (Munsif of Azamgarh) was in effect whether the plaintiffs could properly claim the alternative reliefs which they had claimed. The Court dismissed the suit with reference to this issue, holding upon it as follows:—

"I propose to record my finding first on the third issue. As regards this issue, I observe that, with reference to the allegations contained in the petition of plaint, the plaintiffs are not entitled to ask for joint possession; for when they say that they were in exclusive possession of the land in dispute, how can they be allowed, by asking for the other relief, to say that they were in joint possession? for, unless they say so, they cannot get the other relief. The effect, therefore, of adding the other relief is that the plaintiffs make two contradictory statements, and thus come to the Court with an uncertain case. The plaintiffs' pleader was asked as to whether he would apply for the second part of the relief being expunged from the plaint, but his reply was that he would rather ask for the expungement of the first of the reliefs. This, I think, he cannot be allowed to do, for the remaining relief would then be quite contrary to the allegations made in the plaint. The plaintiffs, therefore, having come to Court with an uncertain claim, as has been said above, cannot get any decree from the Court, for it does not know which of the two allegations is correct. It is therefore (without recording any finding on the other issues, because it is unnecessary) ordered that the plaintiffs' claim, as brought, be dismissed with costs."

[157] The plaintiffs did not appeal from this decision, but in 1885 brought the present suit against the defendants, claiming joint possession of the land.

One of the defences to the suit was that it was barred by s. 13 of the Civil Procedure Code, with reference to the decision in the former suit.

This contention the Court of first instance disallowed, and it gave the plaintiffs a decree, which was affirmed on appeal by the defendants.

In second appeal the defendants again raised the plea of *res judicata*.  
Munshi *Kashi Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

#### JUDGMENT.

EDGE, C.J.—This is a suit brought to assert a joint interest in land. The defence to the suit was estopped under s. 13 of the Civil Procedure Code. The respondents, in 1884, brought a suit against the appellants in respect of the same land, in which they then claimed exclusive possession and, alternatively, joint possession. The questions raised in that suit having been brought into issue and evidence having been taken, the action was dismissed by the Munsif on grounds with which we would probably not agree if that suit had been made the subject of appeal. The Munsif, in dismissing the suit, did not reserve to the respondents the right to bring a fresh action. In the present suit we cannot go into the question whether the former suit was properly dismissed or not. It is sufficient to say that the judgment in that suit has not been appealed and that it is a bar to the respondents' claim in this action. We allow the appeal with costs, setting aside the decrees of the Courts below.

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9 A. 158=  
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TYRRELL, J.—I fully concur, and would only add that this suit is exactly similar to *Ganesh v. Kalka Prasad* (1). The ruling in that case has been questioned subsequently by Mr. Justice Mahmood—*Muhammad Salim v. Nabian Bibi* (2)—who dissented from the law as laid down therein. But the learned Judge did not discern that the case of *Ganesh v. Kalka Prasad* (1) was essentially distinguished from the three cases he had to determine. In *Ganesh v. Kalka* [158] *Prasad* (1) the Court had heard the parties, framed issues after taking evidence, and proceeded to judgment. In the cases before Mahmood, J., the plaintiff was non-suited on the preliminary ground of misjoinder. The radical principle of the cases is insisted on in the Privy Council ruling in *Watson v. The Collector of Rajshahye* (3) and in conformity with their Lordships' views expressed in that case, as well as with the plain provisions of the present Civil Procedure Code on this question, it was held in *Ganesh v. Kalka Prasad* (1), as we have held in this appeal to-day, that the decree in the former suit, which was allowed to become final, bars the second suit.

[Appeal allowed.]

9 A. 158=7 A.W.N. (1887) 15.

#### APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAMSIOH PANDE (*Plaintiff*) v. BALGOBIND AND OTHERS  
(*Defendants*).<sup>\*</sup> [13th December, 1886.]

*Charge*—Suit for money charged upon immovable property—Instrument purporting in general terms to charge all the property of obligor—*Maxim* "certum est quod certum reddi potest"—Act IV of 1882 (*Transfer of Property Act*), ss. 98, 100—Act XV of 1877 (*Limitation Act*), Sch. ii, No. 132.

The obligor of a bond acknowledged therein that he had borrowed Rs. 153 from the obligee at the rate of Re. 1-8 per cent. per mensem, and promised to pay the principal with interest at the agreed rate upon a date named. The bond continued thus:—"To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason, I have of my free will and consent executed this hypothecation bond that it may be of use when needed." The amount secured by the bond became due on the 6th May, 1879. The bond was registered under the Registration Act as a document affecting immovable property, and the obligor was a party to such registration. On the 9th May, 1885, the obligee sued the heir of the obligor to recover the principal and interest due upon the bond by enforcement of lien against and sale of immovable property belonging to the defendant.

*Held*, that the bond showed that the intention of the parties was to create by it charge upon all the property of the obligor for the payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate. *Najibulla Mulla v. Fusir Mistri* (4) referred to.

[159] *Held*, also, that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and

<sup>\*</sup> Second Appeal No. 188 of 1886 from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 13th November, 1885, reversing a decree of Maulvi Imam-ul-Haq, Munsif of Ballio, dated the 2nd July, 1885.

(1) 5 A. 595.

(3) 13 M.I.A. 160.

(2) 8 A. 282.

(4) 7 O. 196.

certain to include, and were intended to include, all the property of the obligor; that, this being so, the maxim, "*certum est quod certum reddi potest*" applied; that, the bond created a charge upon the immoveable property of the obligor in respect of the principal and interest in question; that such principal and interest where monies charged upon immoveable property within the meaning of sch. ii, No. 132 of the Limitation Act (XV of 1877); and that, so far as the claim was to enforce payment of such principal and interest by recourse to the immoveable property of the obligor, the suit was brought within time. *Ram Din v. Kalka Prasad* (1), *Gauri Shankar v. Surju* (2), and *Tadman v. D' Epineuil* (3).

[F., 22 Ind. Cas. 566; R., 14 A. 162 (163); 18 M. 364 (367); 8 O.C. 227 (231); 16 Ind. Cas. 337 (338) = 10 A.L.J. 33; D., 12 A. 175 (178); 43 C. 332 = 36 Ind. Cas. 321.]

THE facts of this case are stated in the judgment of the Court.

Mr. J. E. Howard, for the appellant.

Mr. G. T. Spankie, for the respondents.

### JUDGMENT.

EDGE, C.J., and TYRRELL, J.—This is an action which was brought in the Court of the Munsif of Ballia on the 9th May, 1885, to recover Rs. 340-9, principal and interest, by enforcement of lien against and sale of a house described in the plaint, and hypothecation of other property belonging to the defendant. The plaintiff alleged that he had lent Rs. 153-12, at interest at the rate of Rs. 1-8 per centum per mensem, to one Amari Koeri, deceased, who was the father of the defendant, and that Amari Koeri, in consideration of the loan, had executed in his, the plaintiff's, favour the bond sued upon, which, as translated, is as follows:—"On 6th Badi Sawan, 1935 Sambat, an auspicious day, I, Amari Koeri, son of Pahlu Koeri, deceased, inhabitant of Ahchora, pargana Kharid, zila Ghazipur, borrowed of Ramsidh Pande, banker, resident of Ahchora, tappa Mahatapal, pargana Kharid, in the district of Ghazipur, the total sum of Rs. 153-12, consisting of a balance due by me to the said banker, amounting to Rs. 133-12 and Rs. 20 cash, taken and appropriated by me, of the '*lath shahi*' coin, which is current, at interest Rs. 1-8 per mensem. The amount together with interest, calculated at the said rate, will be paid on 15th Baisakh Sudi, 1286 year, positively and without any objection. To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, all should be available to the said banker. If, without discharging the debt due [160] to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason I have, of my free will and consent, executed this hypothecation bond, that it may be of use when needed. Dated 6th Sawan Badi, 1285. Signed Bhuran Lal, inhabitant of Haripur of Chhata. Name of creditor—Ramsidh Pande. Name of debtor—Amari Koeri. Amount—Rs. 153-12. Nature of document—Bond hypothecating house and other property, moveable and immoveable."

The Munsif made a decree, with costs, against the defendants, holding them liable to the extent only of the assets of their father which have come to their hands.

From the decree of the Munsif the defendants appealed to the Judge of Ghazipur. The first of the grounds stated in their memorandum of appeal was the following:—

"Seeing that there is no hypothecation in the bond, nor does the general context of the said bond create hypothecation, the said bond is

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deemed to be a simple one, and the claim is barred by limitation, for the amount entered in the bond became due on the 6th May, 1879. The lower Court paid no heed to it."

The Judge of Ghazipur, on the appeal, held that the wording of the bond was so vague as to make the bond inoperative as a document of hypothecation, and, apparently considering that six years was, under such circumstances, the period of limitation applicable to the case, and holding that the period of limitation had begun to run on the 6th May, 1879, decided that the suit was barred by limitation, and allowed the appeal with costs, setting aside the decree of the Munsif.

From this judgment of the Judge of Ghazipur the plaintiff has brought this appeal.

The Judge of Ghazipur did not deal with any of the other questions of law or fact arising in the appeal to him.

For the purposes of our judgment, we assume, but do not decide, that the statements as to facts of Mr. *Howard* who appeared for the plaintiff-appellant when the appeal came on for hearing before us on the 11th instant, are correct. Mr. *Howard's* statements referred to, so far as they are material to our judgment, were that [161] the bond was proved to have been, and had, in fact been executed by Amari Koeri, the defendant's father, who died before the suit, and that it had been registered in due time under the Indian Registration Act as a document affecting immoveable property in the district of Ghazipur, and that Amari Koeri was a party to the bond being so registered.

Mr. *Howard*, on behalf of the plaintiff-appellant, contended that the bond in question created a claim upon, if it was not a mortgage of immoveable property, and consequently that art. 132 of the second schedule to the Indian Limitation Act (XV of 1877) applied, and the action was brought within the twelve years' period of limitation prescribed for the bringing of actions to enforce payment of money charged upon immoveable property, and in support of his contention referred to the case of *Bishen Dayal v. Udit Narain* (1), to s. 100 of the Transfer of Property Act (IV of 1882), and ss. 21 and 22 of the Registration Act.

On the other side, Mr. *Spankie*, for the respondents, contended that there was no specific immoveable property mentioned in the bond as the subject of the alleged hypothecation; that the wording of the bond was so vague as to render it inoperative as a mortgage of, or as creating a charge upon, immoveable property, and that art. 132 did not apply, and consequently that the action was not brought within time. Mr. *Spankie*, in support of this contention, referred to s. 58 of the Transfer of Property Act of 1882, to the cases of *Gauri Shankar v. Surju* (2) and *Najibulla Mulla v. Nusir Mistri* (3), to Macpherson's *Law of Mortgage*, pp. 137 and 138, 7th edition, and to s. 129 of the Succession Act.

In reply, Mr. *Howard* referred to the judgment of Oldfield, J., in the case of *Shib Lal v. Ganga Prasad* (4).

During the course of the arguments the case of *Ram Din v. Kalka Prasad* in the Privy Council (5) was also referred to.

On the conclusion of the argument we took time to consider our judgment.

Having regard to the fact that the only question disposed of by the Judge of Ghazipur was, as we read his judgment, the ques-[162]tion as

(1) 8 A. 486.  
(4) 6 A. 551.

(2) 3 A. 276.

(3) 7 C. 196.  
(5) 7 A. 502.

to whether or not art. 132 of the second schedule to the Indian Limitation Act of 1877 applied to any part of the claim of the plaintiff, we shall confine our judgment to a consideration of that question. In the view which we take of the bond, it is not necessary to decide whether or not it was a mortgage of immoveable property within the meaning of s. 58 of the Transfer of Property Act of 1882, and we express no opinion on that point.

In our opinion, a Court, as a general rule, should, in construing a written document, so construe it as to give effect, if possible, to the intention of the parties, if such intention can be ascertained from an examination of the document. In this case, can the intention of the parties be ascertained by an examination of the bond in question? We think it can.

Amari Koeri by his bond acknowledged that he had borrowed from the plaintiff Rs. 153-12 (consisting of Rs. 133-12, balance then due, and Rs. 20, cash then advanced) at interest at the rate of Rs. 1-8 per centum per mensem, and promised to pay the plaintiff the principal, together with interest at the agreed rate, on a date named. If it was intended by the parties that the bond should operate as a simple money bond only, and should not create a charge upon the moveable or immoveable property of Amari Koeri, there was no necessity to say more. We find, however, that the bond as translated for us continues thus: "To secure this money I pledge voluntarily and willingly my wealth and property in favour of the said banker: Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason I have of my free will and consent executed this hypothecation-bond, that it may be of use when needed."

The bond is written in Hindi, is obviously a very inartificial document, and most probably was prepared by the parties themselves without the assistance of legal advice.

We are clearly of opinion that the bond shows that the intention of the parties was to create by it a charge upon all the property of Amari Koeri for the payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate. If we are [163] entitled, on this question of intention, to take into consideration the manner in which the bond was registered, as was done by Pontifex and Field, JJ., in the case of *Najibulla Mulla v. Nusir Mistri* (1), our conclusion as to what was the intention of the parties is still further confirmed.

The next question is, did the bond effect the object intended by Amari Koeri and the plaintiff? In considering this question, it is necessary to refer shortly to some of the authorities cited. The case of *Ram Din v. Kalka Prasad* (2) and that of *Gauri Shankar v. Surju* (3), so far as it is consistent with the judgment of their Lordships of the Privy Council in the case of *Ram Din v. Kalka Prasad* (2) above referred to, apply so far only as the question of limitation may arise on the claim of the plaintiff, if any, to establish a personal liability against the defendants. The case of *Najibulla Mulla v. Nusir Mistri* (1), referred to above, was decided before the Transfer of Property Act of 1882 came into force, and consequently the learned Judges who decided that case had not before them s. 98 or s. 100 of the Transfer of Property Act, 1882, which relates to charges upon immoveable property not amounting to mortgages.

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(1) 7 C. 196 (198-199).

(2) 7 A. 502.

(3) 3 A. 276.



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They appear from their judgment to have treated the question before them as if it were simply one of a mortgage or no mortgage, and to have relied to some extent on the manner in which the bond in that case was registered. In the case before them the plaintiff relied upon the agreement against alienation contained in the bond upon which he sued. In the present case the plaintiff is entitled to rely, not only upon that portion of the bond which relates to the event of subsequent alienation, but also to the antecedent and subsequent words to be found in the bond, which in our judgment are much more certain and specific than the words which were before Pontifex and Field, JJ., in the case referred to.

It does not appear to us that the passages at pp. 137 and 138 of Macpherson's *Law of Mortgage* throw any light upon the effect which we must give to the bond in this case, as we are not here considering whether the bond was or was not a mortgage, or how the possession might be affected by the intervention of a purchaser for value without notice. There is nothing, so far as we see, in [164] any of the other cases which have been cited, inconsistent with the opinion which we have formed as to the effect of the bond in question. It is said that the bond cannot be treated as creating a charge upon the property which was of Amari Koeri, because it does not describe by metes and bounds or by name the immoveable property which it may have been intended to hypothecate. We are satisfied that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and certain to include, and were intended to include, all the property of Amari Koeri. This being our view as to the construction of the bond, the maxim "*certum est quod certum reddi potest*" applies, and we hold that the bond did create a charge upon the immoveable property of Amari Koeri in respect of the principal and interest in question, that such principal and interest were monies charged upon immoveable property within the meaning of art. 132 of the Indian Limitation Act of 1877, and that, so far as the claim is to enforce payment of such principal and interest by recourse to the immoveable property which was of Amari Koeri, the action was brought within time. In confirmation of the opinion above expressed as to the effect of the bond, we may refer to the judgment of Mr. Justice Fry in the case of *Tadman v. D'Epineuil* (1).

This appeal is allowed. The case will go back to the Judge of Ghazipur, to be disposed of by him according to law upon the other questions of law and upon the questions of fact involved in the appeal from the decree of the Munsif. Costs will be costs in the cause.

*Appeal allowed.*

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(1) L. R. 20 Ch. D. 758.

9 A. 164 = 7 A.W.N. (1887) 7.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*THAKUR DAS AND ANOTHER (*Plaintiffs*) v. KISHORI LAL (*Defendant*).<sup>\*</sup>  
[16th December, 1886.]*Civil Procedure Code, s. 549—Security for costs—Amount of security notified—Dismissal of appeal—Practice.*

Section 549 of the Civil Procedure Code contemplates an order by which some ascertained amount of security is required.

[168] The last paragraph of the section seems to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security.

Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge such security at any time before the hearing. This order purported to be made under s. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing of the appeal, no security having been lodged, the respondent objected that, with reference to the terms of s. 549, the Court had no option but to dismiss the appeal.

*Held* that the objection had no force, no such order as was contemplated by s. 549 having been made.

*Held* also that the proper course was to have applied to the Judge who passed the order for security, at any time before the case came on for hearing, for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal.

[Overruled, 18 A. 101.]

THIS second appeal was filed on the 24th December, 1885. Notice was issued to the respondent on the 9th January, 1886. On the 19th April, 1886, the respondent applied to Tyrrell, J., sitting to take applications, etc., that the appellants should be required to furnish security for the costs of the appeal. This application did not state the amount of security which should be required. Notice to show cause why this application should not be granted was issued to the appellants. On the 13th May, 1886, the appellants having appeared, Tyrrell, J., made the following order:—"I am satisfied that the respondent is justified in asking for an order under s. 549 of the Civil Procedure Code, and it is ordered accordingly. The security may be lodged at any time before hearing."

The appeal was ready for hearing on the 5th June, 1886, and came on for hearing before Oldfield and Brodhurst, JJ., on the 14th December, 1886.

On behalf of the respondent, it was objected that the appeal should be dismissed, as the appellants had not furnished security for costs within the time fixed, and the Court, therefore, had no option but to dismiss it. Reference was made to *Haidri Bai v. The East Indian Railway Co.* (1) and *Budri Narain v. Sheo Koer* (2)

<sup>\*</sup> Second Appeal No. 1936 of 1885, from a decree of O. W. P. Watts, Esq., District Judge of Saharanpur, dated the 20th August, 1885, confirming a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 16th June, 1885.

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[166] Mr. J. Simeon, for the appellants.  
Mr. A. Strachey, for the respondent.

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(1887) 7.

### JUDGMENT.

OLDFIELD, J.—A preliminary objection to the hearing of this appeal has been preferred by the respondent, which has reference to s. 549 of the Code. The respondent, it appears, on the 19th April last, applied for an order that the appellants should be required to give security for the costs of the appeal. No amount was stated as the security required, and on the 13th May following, a Judge of this Court made an order on this application in the following words:—"I am satisfied that the respondent is justified in asking for an order under s. 549 of the Civil Procedure Code, and it is ordered accordingly. The security may be lodged at any time before hearing."

The case has now come on for hearing to-day, and the respondent objects to the hearing, and urges that in consequence of security not having been lodged, this Court should reject this appeal.

In my opinion the objection has no force. I do not find that any order, such as is contemplated in s. 549, has been made. That section contemplates an order by which some ascertained amount of security is required. In this order no amount of security was named which the appellants had to provide, the amount being probably left to be fixed on further application, and therefore it became impossible for appellant to furnish security. This arose from the remissness of the respondent in not moving the Court to fix the amount. Further, the respondent, in my opinion, should have obtained an order for rejecting the appeal from the Court which directed security to be furnished under s. 549. The last paragraph of s. 549 seems to contemplate that an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security, and I am inclined to think that the proper course was to have applied to the Judge who passed the order at any time before the case came on for hearing, and it seems to me to be too late when the case is called on for hearing to ask this Court to reject the appeal. The object of furnishing security is, I suppose, that the respondent should not run the risk of loss by incurring costs, but on the day the appeal comes on for hearing [167] those costs have been incurred, or the greater portion of them. On the above ground, I would reject the application.

BRODHURST, J.—I entirely concur with my brother Oldfield that this preliminary objection must be rejected.

[This appeal was then heard and dismissed.]

*Appeal dismissed.*

9 A. 167=7 A.W.N. (1887) 6.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*SANT LAL AND ANOTHER (*Objectors*) v. RAMJI DAS AND OTHERS  
(*Decree-holders*).<sup>\*</sup> [15th December, 1886.]*Scale in execution of decree—Setting aside sale—Incumbrance—"Saleable interest"—  
Civil Procedure Code, s. 313.*

The fact that property sold in execution of a decree is incumbered, even when the incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold had no saleable interest therein. S. 313 of the Civil Procedure Code contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell; and the fact that the property may fetch little or nothing if sold does not affect the question. *Naharmul v. Sadut Ali* (1) distinguished. *Pratap Chunder Chuckerbutty v. Panioty* (2), referred to.

[Rel. on, 21 Ind. Cas. 774; R., 5 L.B.R. 58 (67).]

THE facts of this case are stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Pandit *Nand Lal*, for the appellants.The Hon. *T. Conlan*, Mr. *Abdul Majid*, and Munshi *Hanuman Prasad*, for the respondents.

## JUDGMENT.

OLDFIELD, J.—This is an appeal from an order refusing to set aside a sale, and made with reference to s. 313 of the Civil Procedure Code.

The sale was of half a house belonging to the judgment-debtors, which was sold in execution of a decree for Rs. 8,937, and was bought by the appellants for Rs. 5,751. The appellants ask that the sale be set aside, on the ground that the judgment-debtors had no saleable interest in the property, there being a mortgage on the property amounting to a sum exceeding its market value.

In my opinion this is no ground for setting a sale aside under s. 313. The fact that the property is incumbered, even when the [168] incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold, has no saleable interest in the property under s. 313. There is always the equity of redemption remaining. What I understand that section to contemplate is, that either the judgment-debtor had no interest at all, or that the interest was not one he could sell. The fact that the property may fetch little or nothing if sold, does not affect the question.

We have been referred to *Naharmul v. Sadut Ali* (1) but that case is not on all fours with the case before us, which is more in accord with a subsequent case—*Pratap Chunder Chuckerbutty v. Panioty* (2) which the Judges distinguish from *Naharmul v. Sadut Ali* (1).

For these reasons I would dismiss this appeal with costs.

BRODHURST, J.—I concur.

*Appeal dismissed.*

<sup>\*</sup> First Appeal No. 195 of 1886 from an order of Babu Brijpai Das, Subordinate Judge of Meerut, dated the 28th August, 1886.

(1) 8 C. L.R. 468.

(2) 9 C. 506.



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## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*SHEOAMBAR AND OTHERS (*Defendants*) v. DEODAT (*Plaintiff*)\*.

[17th December, 1886.]

*Arbitration—Agreement to refer—Order under s. 506 of the Civil Procedure Code to refer matters in dispute in action then pending—Order under s. 373 pending the reference, granting plaintiff permission to withdraw with liberty to bring fresh suit—Act I of 1877 (Specific Relief Act), s. 21.*

The wording of s. 21 of the Specific Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court.

The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the premission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877).

[169] *Held*, that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by s. 510 of the Code; that consequently the Court's order under s. 373 was *ultra vires* if involving such revocation, or if not involving it, left the order of reference still in force; that in either alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action.

*Per TYRRELL, J.*—that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision.

[*Diss.*, 115 P.R. 1912=191 P.W.R. 1912=6 P.L.R. (Sup.) 1912=15 Ind. Cas. 140; F., 27 A. 53 (55)=A.W.N. (1904) 160; R., U.B.R. (1897—1901) 284; U.B.R. (1897—1901) 541; D., 1 A.L.J. 257; 4 O.C. 17 (20).]

THE plaintiff in this case claimed possession of a one anna share of a village on the allegation that it formed part of the joint family property of himself and the defendants, who were his first cousins, and had dispossessed him of the share. The defendants denied these allegations, and asserted an exclusive right to the property in question. They also pleaded that the suit was barred by the provisions of s. 21 of the Specific Relief Act (I of 1877).

This plea arose out of the following circumstances. The plaintiff had, previously, in December, 1884, instituted a suit against the defendants in respect of the same matter and upon the same grounds as the present, in the Court of the Munsif of Basti. While the suit was pending, the parties agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court, on the 31st January, 1885, for an order of reference under s. 506 of the Civil Procedure Code. This application was granted, and arbitrators were appointed, and it was ordered

\* Second Appeal No. 246 of 1886 from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 11th January, 1886, confirming a decree of Munshi Raj Nath Prasad, Munsif of Basti, dated the 24th September, 1885.

that they should make their award within one week. Before the week had expired, and before any award had been made, the plaintiff made an *ex parte* application under s. 373 of the Code, for leave to withdraw from the suit, with liberty to bring a fresh suit in respect of the same subject-matter. This application was granted on the 3rd February, 1885, and the suit was struck off, and the present suit was instituted by the plaintiff in pursuance of the permission thus granted to him.

The Court of first instance (Munsif of Basti) was of opinion that the suit was not barred by s. 21 of the Specific Relief Act, on the ground that the Court in the former suit had power to grant the plaintiff permission to withdraw from the suit with liberty to sue again, and had properly exercised such power, and that the result of [170] its order was to cancel the suit, and consequently the arbitration proceedings, which formed part of it. Upon the merits of the case the Court gave the plaintiff a decree. The defendants appealed to the Subordinate Judge of Gorakhpur, who dismissed the appeal, agreeing with the reasons stated by the Munsif. The Court observed:—"I am of opinion that an agreement to nominate arbitrators was entered into between the parties during the pendency of the former suit. This application was made to the Court in which that suit was instituted, but when the suit, on the application of the plaintiff under s. 373 of the Code of Civil Procedure, was withdrawn, the arbitration proceedings were nullified, and the agreement to nominate the arbitrators fell through. In my opinion such applications, which are made to the Court under s. 506 of the Code, form part of the original suit; and when, on the plaintiff's application, the suit itself is cancelled, the application for nomination of arbitrators also becomes null and void.....I hold that the order of the Court in the former suit, giving the plaintiff permission to withdraw from the suit, is final. Whatever this order might have been, it cannot be questioned in the subsequent suit. In the case of *Abdul Rahman v. Lal Behari* (1), the High Court has ruled that in a subsequent suit no argument regarding the exercise of the power under s. 373 of the Code of Civil Procedure, when such former order has become final, can be discussed."

The defendants preferred a second appeal to the High Court, on the ground that the order passed under s. 373 of the Civil Procedure Code had not avoided the agreement to refer the matters in difference between the parties to arbitration; that the plaintiff, had, by his conduct, refused to perform the agreement, and that the suit was therefore barred by s. 21 of the Specific Relief Act.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellants.

Munshi *Sukh Ram*, for the respondents.

### JUDGMENT.

EDGE, C.J.—The first question in this case is whether s. 21 of the Specific Relief Act applies to a contract to refer to arbitration on an action already pending. It appears to me that the wording of the section is wide enough to cover contracts to refer any matter which [171] can legally be referred to arbitration. One of such matters is a suit which is proceeding in Court. That being my view of the scope of s. 21, the next question is, was there in this case a contract to refer a matter to arbitration which the plaintiff has refused to perform?

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7 A.W.N.

(1887) 13.

This question depends to some extent upon the facts of this case. The first suit was brought in December, 1884. Before it came on for trial, the parties agreed or contracted to refer the whole action to arbitration, and on the 31st January, 1885, in pursuance of that agreement, applied for and obtained from the Munsif an order for reference. We have been informed that it was part of this order that the arbitrators should make their award within one week. However, before the week expired, the plaintiff made an application not by consent but adversely, for leave to withdraw the action under s. 373 of the Civil Procedure Code, and to bring a fresh one. The Munsif, on the 3rd February, 1885, granted the application, and made an order to the effect that the plaintiff might withdraw and bring a fresh action, so far as the law allowed. The fresh action has now been brought. The Court below have held that s. 21 of the Specific Relief Act does not apply, that there is and was no agreement to refer, and that the effect of the Munsif's order was to cancel the order of reference. We asked Munshi *Sukh Ram* to point out any power which the Court has to revoke an order referring an action or matter in an action, except in the events referred to in s. 510 of the Code, but he has admitted that he cannot do so. The Court had, no doubt, power to deal with cases of partiality or other misconduct; but this power would only arise after the award had been made. Why this should be so I cannot say. It would appear advisable that the Court should be able to revoke a submission before award, if satisfied that the arbitrators were acting corruptly, though of course strong evidence of this would be required. Munshi *Sukh Ram* cannot show any power to revoke a submission to arbitration in a case of this kind, and we can find nothing in the Civil Procedure Code enabling the Munsif to revoke the order of reference in this case. If there is no such power, it appears to us that there must be one of two results: either the Munsif had no power to act under s. 373 of the Code, if the effect of such action would be a revocation of the order of reference, or, if the permission [172] to withdraw would not involve such revocation, then the order to refer the action is still in force: so that the Munsif's order was either *ultra vires* or else inoperative as a revocation. In either alternative, the case falls within s. 21 of the Specific Relief Act. But Munshi *Sukh Ram* contends that the period of time within which the award was to be made expired before the bringing of the second action. To my mind that does not answer the defendant's point. S. 21 is in positive terms, and provides that "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." Now, this refers to a person refusing performance of a contract while it is still operative. In this case, within the prescribed week, and while the agreement was still in force, Munshi *Sukh Ram's* client did refuse performance, and showed such refusal effectively by applying for leave to withdraw.

Under these circumstances, I am of opinion that s. 21 of the Specific Relief Act applies to the case and affords an answer to the suit, and that this appeal must be allowed with costs.

TYRRELL, J.—I concur with the learned Chief Justice, and would only add that, in my opinion, this suit is barred by the second clause of s. 373 of the Civil Procedure Code, as it appears to me that the Munsif had no jurisdiction to give the plaintiff permission to withdraw from the

former suit and bring a fresh one for the same subject-matter. Under the circumstances which have been stated by the learned Chief Justice, the Munsif had delegated his authority in connection with the suit to an arbitrator appointed by him on the nomination of both parties; and, under the circumstances described in the plaintiff's *ex parte* application, the Munsif was not competent to restore the suit to his file, and treat it as one awaiting his decision. The action of a Court referring a suit to arbitration under Chapter XXXVII of the Code is limited expressly by the provisions of that chapter to dealing with the award. It may remit or otherwise interfere with the award, but it may not otherwise treat the suit as one which has remained upon its own file.

[173] I concur with the learned Chief Justice in decreeing this appeal with costs.

*Appeal allowed.*

9 A. 173 = 7 A.W.N. (1887) 9.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Brodhurst.*

GANGIA (*Petitioner*) v. RANGI SINGH (*Objector*).<sup>\*</sup> [20th December, 1886.]

Act XXVII of 1860, s. 6—*Grant of certificate by District Court—Petition to High Court, by objector for fresh certificate—Supersession of certificate granted by District Court.*

S. 6 of Act XXVII of 1860 contemplates two different proceedings which may arise under different circumstances. One of these proceedings is an appeal, which has the effect of suspending the "granting," i.e., the *issuing* of the certificate; and the intention of the Legislature was that, upon the adverse order being made, the person objecting to it might thereupon appeal, and the effect of this would be to oblige the District Judge to hold his hand, and not to issue the certificate until the decision of the appeal. The other proceeding is by way of petition to the High Court, after the certificate has been granted by the District Court, to grant a fresh certificate in supersession of the first; and the latter portion of s. 6 shows that the person who obtains the fresh certificate need not be the person who obtained the first, and there is nothing to limit the powers of the Court on petition to grant a fresh certificate to any person, including the person who opposed the granting of the original certificate, who may prove himself entitled thereto, or to confine the exercise of such powers to cases where the first certificate was defective in form.

THIS was an application to the High Court under s. 6 of Act XXVII of 1860 for the grant of a certificate for the collection of the debts due to a deceased person in supersession of a certificate granted by the District Judge of Mirzapur. The facts are sufficiently stated in the judgment of the Court.

Lala Juala Prasad, for the petitioner.

Munshi Hanuman Prasad, for the opposite party.

#### JUDGMENT.

OLDFIELD, J.—The matter before us relates to the grant of a certificate for collection of debts under Act XXVII of 1860. There were two

<sup>\*</sup> Application No. 172 of 1886, under s. 6 of Act XXVII of 1860, for supersession of certificate granted by W. T. Martin, Esq., District Judge of Mirzapur, dated the 7th July, 1886.

1886  
DEC. 17.  
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APPEL-  
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9 A. 168 =  
7 A.W.N.  
(1887) 13.



1886  
DEC. 20.  
—  
APPEL-  
LATE  
CIVIL.

9 A. 173 =  
7 A.W.N.  
(1887) 9.

parties who applied, namely, Musammat Gangia, the petitioner before us, and Rangī Singh, the respondent. The Court below refused to grant a certificate to the petitioner, and granted it to the respondent. Musammat Gangia has filed an [174] application, the object of which is to set aside the order granting to Rangī a certificate and to obtain a certificate herself.

A preliminary objection has been raised on the part of the respondent that this Court has no jurisdiction to entertain the petition. In my opinion the objection is valid. The provision in Act XXVII of 1860, upon which the petitioner relies, is that contained in s. 6. By that provision, the granting of a certificate "may be suspended by an appeal to the Sadr Court, which Court may declare the party to whom the certificate should be granted, or may direct such further proceedings for the investigation of the title as it shall think fit. The Court may also upon petition, after a certificate shall have been granted by the District Court, grant a fresh certificate in supersession of the certificate granted by the District Court."

Thus there are two courses of procedure—first, by appeal before the certificate is granted by the District Court, with a view to obtaining this Court's order that the grant of a certificate shall be suspended pending the order of this Court; and secondly, by petition after certificate is granted, with a view of this Court's granting a certificate in supersession of that granted by the District Court. It is clear that the object of the present petition is not an appeal of the nature alluded to in s. 6, nor, in my opinion, can the applicant succeed by a petition such as is contemplated in s. 6. The object is really to set aside the order granting the certificate and to question the propriety of that order on the merits, which can really only be properly done by way of appeal, and an appeal is not allowed on that ground by the Act.

The remedy contemplated by s. 6 is not given for the purpose of questioning the validity or propriety of the order granting a certificate on its merits, but its object is to enable a fresh certificate to be granted in supersession when rendered necessary by a new state of things. The Act seems to contemplate the finality of an order passed under this section for granting a certificate, leaving a party to resort to a suit to prove title, and this appears to be the view taken by a Full Bench decision of the Sadr Diwani Adalat, N.W.P., as far back as 1862.—*Gossayn Dheer Geer's Case* (1).

I would on these grounds dismiss this application with costs.

[175] BRODHURST, J.—I regret that I am unable to concur in the judgment of my brother Oldfield, for I take a different view, not only of the law—s. 6 of Act XXVII of 1860—but also of the Full Bench ruling on which he relies.

The section abovementioned is almost word for word the same as s. 5 of the repealed Act XX of 1841. What may be called the marginal note of s. 5 is as follows:—The grant of certificate may be suspended by appeal to Sadr Diwani Adalat, which Court may direct to whom certificate shall be granted, etc., and may supersede certificate already granted, and grant fresh certificate."

The High Court now has exactly similar powers under s. 6 of Act XXVII of 1860 as the Sadr Diwani Adalat had under s. 5 of Act XX of 1841. When there are rival applicants for a certificate the High Court

is, I think, competent either on appeal or upon petition, to interfere with the District Judge's order at any time. It may, on appeal, suspend the granting of a certificate, and "may declare the party to whom the certificate should be granted, or may direct such further proceedings for the investigation of the title as it shall think fit. The Court may also upon petition, after a certificate shall have been granted by the District Court, grant a fresh certificate in supersession of the certificate granted by the District Court," and such fresh certificate "shall entitle the person named therein to receive all monies that may have been recovered under the first certificate from the person to whom the same may have been granted.

In the Full Bench case above alluded to, there was only one applicant for a certificate under Act XXVII of 1860, to collect debts due to the estate of one Surdha Geer. The District Judge refused to grant the certificate, "as it appears that there is now no property belonging to the estate of the deceased Surdha Geer, and the applicant has failed to show that the deed of gift executed by Surdha Geer in favour of Deo Geer is not a genuine document, and as he has also failed to show that there are any sums due to the deceased Surdha Geer, his application for a certificate is hereby rejected." The judgment of four Judges of the Full Bench is as follows:—"The Court, with the exception of Mr. Roberts, who has recorded separately his reasons for dissent, are of opinion that Act [176] XXVII of 1860 admits of an appeal from the decision of the lower Court only in the two cases set forth in s. 6 of that enactment, in which section the course to be followed by the Sadr Court in disposing of the appeal is prescribed; and the Court, with the exception of Mr. Roberts, are of opinion that no appeal lies from an order of the Judge rejecting an applicant's claim for a certificate, and that such order is final, the applicant, if dissatisfied therewith, having his remedy by instituting a suit in the Civil Court for the recovery of the property of the deceased whose estate he claims to administer to." Mr. Roberts went further and observed: "I would adhere to the Calcutta precedent cited above (1). In my opinion the Sadr Court may, under s. 6 of Act XXVII of 1860, grant a certificate to a party who has been wrongfully denied the same, though there has been no certificate granted to an opposing petitioner by the District Court."

From the whole of the proceedings, it is obvious that the Judges of the Full Bench had under consideration a case in which a certificate had not been granted to anyone, and the petition of the sole applicant had been rejected. The majority of the Judges held that, under such circumstances, the order of the District Judge was final; but they also observed that Act XXVII of 1860 "*admits of an appeal*" from the decision of the Court "*in the two cases*" set forth in s. 6 of that enactment. One of these two cases is obviously that referred to in paragraph 1 of the section, but the other apparently must be that comprised in paragraph 2; and if so, the learned Judges must have considered the petition therein alluded to to be a petition of appeal. The section under consideration has, I think, been unskillfully drawn. Proceedings under Act XXVII of 1860 are as a rule brief. In the majority of such cases, it would be possible for a District Judge to record the evidence and grant and issue the certificate on a single day. It is difficult to imagine a case in which it would be possible for the High Court to suspend granting of a certificate. Moreover, it is not

1886  
DEC. 20.

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APPEL-  
LATE  
CIVIL.

9 A 173=

7 A.W.N.  
(1887) 9.

(1) *Anand Moyee Chowdhraim v. Sheeb Chunder Roy*—21st March, 1852.



1886  
DEC. 20.  
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APPEL-  
LATE  
CIVIL.  
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9 A. 173=  
7 A.W.N.  
(1887) 9.

apparent why the High Court should be empowered to suspend the granting of a certificate, and to declare the party to whom the certificate should be granted, and should not be authorized to exercise similar powers, perhaps only a day or two later, when the certificate had been granted and had [177] or had not been issued; but however that may be, I entertain no doubt that the High Court is competent under s. 6 of Act XXVII of 1860, either by appeal or upon petition, before and after the certificate may have been granted, to decide which of the rival applicants should be granted the certificate, and to order accordingly. Other judgments, besides the Full Bench ruling above mentioned, have been referred to. The only one, however, which I consider it necessary to notice is by Straight and Oldfield, JJ., in F. A. from Order No. 72 of 1879. In that judgment which apparently is unreported, is the following passage:—"In the case before us, the proper form of procedure was by petition; but assuming that we are at liberty to regard the application before us as a petition, we do not consider that the petitioners have shown sufficient grounds for superseding the certificate granted to Musammatt Nabli." From this it may fairly be presumed that the learned Judges would have superseded the certificate, and have granted a fresh certificate in favour of the petitioners, the rival applicants, had the petitioners shown sufficient grounds to the Court for the passing of such orders.

For the reasons given above, I am of opinion that the preliminary objection taken on behalf of the certificate-holder, Rangî, is not valid.

In consequence of this difference of opinion, the case was referred to and reargued before a Bench consisting of Edge, C.J., and Oldfield and Brodhurst, JJ.

The parties were represented as before. The Court gave judgment, first, upon the preliminary objection raised by the respondent to the hearing of the petition.

EDGE, C.J.—We think it will be better first to dispose of the preliminary objection as to the petitioner's right to apply for supersession of the certificate already granted, and for the grant of a fresh certificate to herself. For the purpose of dealing with this point, it should be stated that the petitioner applied for the grant of a certificate under Act XXVII of 1860, and the respondent opposed her application, and applied on his own behalf for the grant of a certificate to himself. The Judge made an order granting a certificate to the respondent, and it appears that the certificate was [178] issued. No appeal was preferred under s. 6 of the Act. It has been contended on behalf of the respondent that the petition would not lie in this case, and that the only remedy of a person who originally opposed the granting of a certificate under the Act, is an appeal from the Judge's order to be brought prior to the actual issue of the certificate. I am of opinion that this would be placing an incorrect interpretation upon the provisions of s. 6. It appears to me that the section contemplates two different proceedings which may arise under different circumstances. It contemplates an appeal which is to have the effect of suspending the granting—which I take to mean the *issuing*—of the certificate, and I interpret the word "granting" in this manner, because, until there has been an order for granting the certificate to a particular person, it is difficult to see how any one would have a *locus standi* to bring an appeal in the matter. The intention of the Legislature appears to me to have been that, upon an adverse order being made, the person objecting to it might thereupon bring his appeal, and the effect of this would be to oblige the Judge to hold his hand, and not to issue the certificate until the decision of the appeal. My reason

for this opinion is that, on the appeal, the Court would have power to declare the party to whom "the certificate" (to use the words of the Act) should be granted, and might also, in lieu of so declaring, direct further inquiries to be made as to the title—I presume with the object of enabling the Court to ascertain to whom the certificate should be granted. There is no provision in s. 6 for the event of a certificate having been already granted and monies collected under it, and the Court afterwards deciding in appeal that the certificate should be set aside and granted to another person. But if we look at the provisions of the section as to a petition for the granting of a fresh certificate, we find it is provided that, in the event of the Court granting a fresh certificate in supersession of the one already granted, all the payments made *bona fide* to the person holding the original certificate shall be valid payments; and further, that the person obtaining the fresh certificate on petition shall be entitled to recover from the holder of the superseded certificate all monies which had been collected by him. This latter portion of the section plainly shows that it was contemplated that the person who obtained the fresh certificate may not be the person who obtained the first [179] certificate, and disposes of the learned Munshi's contention that a fresh certificate would only be granted on petition in cases where the first certificate was defective in form. Now, there is nothing in the section to limit the powers of the Court on petition to grant a fresh certificate to any petitioner who may show himself to be entitled thereto. There is nothing to show that such fresh certificate is not to be granted to the person who was dissatisfied with and opposed the granting of the original certificate; and I see no reason for placing on the terms of the section the narrow construction contended for by the learned Munshi. I am therefore of opinion that we have power to entertain the petitioner's application for grant of a certificate to her by supersession of the original certificate granted to the respondent, and that the preliminary objection consequently fails.

OLDFIELD, J.—Upon further consideration, I concur with the learned Chief Justice. At first I doubted whether it was intended that by means of a petition the propriety of the order granting the first certificate should be questioned. My reason for this doubt was that such a power would ordinarily be exercised by way of appeal, and that, while an appeal is given by s. 6 of the Act, it is not given for this purpose. There may, however, be a good reason for this. Had this question been taken up in appeal, the effect would have been to cancel the first order and to invalidate the original certificate, and all acts that might have been done under it. That was probably not intended by the Legislature, which therefore gave a power on petition of superseding the certificate only, leaving valid what had been done under it. This being so, my difficulty is construing s. 6 has to a great extent been removed, and I concur in the opinion expressed by the learned Chief Justice.

BRODHURST, J.—For the reasons I have already stated, I concur with the learned Chief Justice in holding that the preliminary objection is not valid, and that this application can be entertained by this Court under the second paragraph of s. 6 of Act XXVII of 1860.

[The application was then heard and granted.]

*Application allowed.*

1886  
DEC. 30.  
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APPEL-  
LATE  
CIVIL.  
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9 A. 172=  
7 A.W.N.  
(1887) 9.



1886

DEC. 1.

MISCELLANEOUS CIVIL.

9 A. 180=7 A.W.N. (1887) 7=11 Ind. Jur. 270.

## [180] MISCELLANEOUS CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Brodhurst.*9 A. 180=  
7 A.W.N.  
(1887) 7=  
11 Ind. Jur.  
270.IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.  
[1st December, 1886.]*Company—Winding up—Transfer of winding up from District Court to High Court—Act VI of 1882 (Indian Companies Act), s. 219—Civil Procedure Code, ss. 25, 647—Stat. 24 and 25 Vic. (High Courts Act), c. 104, s. 15—Letters Patent, s. 9—Creditor's vakil acting as liquidator—Practice—Barrister or Pleader appearing as litigant in person.*

There is nothing in the Indian Companies Act (VI of 1882) or the High Courts Act (24 and 25 Vic., c. 104) or the Letters Patent, which prevents the High Court from calling for the record of the proceedings in the winding up of a company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25 of the Civil Procedure Code.

Where, in the proceedings in the winding up of a company under Act VI of 1882, an order was passed admitting the proof of a particular creditor of the company before any liquidator had been appointed,—*held*, that this was an irregularity which by itself would justify the High Court in sending for the record.

Where the District Judge conducting the proceedings in the winding up of a company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to re-consider if the matter again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the District Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with windings up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other,—*held* that, under these circumstances, the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding up proceedings to its own file.

A person who has been appointed liquidator of a company, ought not, after such appointment, to continue to act as vakil of a creditor whose right to prove against the company is in dispute in the liquidation.

In cases where a Barrister or Pleader appears before the Court as a litigant in person, he must not address the Court from the advocates' table or in robes, but from the same place and in the same way as any ordinary member of the public.

[R., 148 P.R. 1907 ; 8 Ind. Cas. 444=3 Bur. L.T. 49.]

THIS was a petition by C. J. Vansittart, H. D. Vansittart, R. Vansittart, K. T. Vansittart, and E. L. Walsh, in which it was set forth that on the 11th March, 1886, the Delhi and London [181] Bank, a creditor of the West Hopetown Tea Company, Limited, applied to have the said Company wound up under the Indian Companies Act (VI of 1882) ; that on the 6th July, 1886, the Official Liquidator of the Company applied to have the petitioners, together with certain other persons named, declared contributories to the Company's assets ; and that the application was pending in the Court of the District Judge of Saharanpur. The prayer of the petitioner was that the High Court would remove the proceedings from the District Court to its own file, the chief grounds stated being that the case involved intricate questions of law, in dealing with which the District Court would not have the assistance of any rules framed by the High Court under

Act VI of 1882, and would probably not have access to the principal authorities on the subject, and that at Saharanpur the petitioners would be unable to obtain the services of counsel, as the only counsel practising there would be required as a witness.

The Hon. T. Conlan, Mr. C. H. Hill, and Mr. H. Vansittart, for the petitioners.

Mr. W. Quarry, the Official Liquidator, appeared in person to oppose the petition. He appeared in robes as a pleader of the High Court, and addressed the Court from the Bar.

During the course of the argument, Edge, C. J., addressing Mr. Quarry, said that, in future, in cases where a barrister or pleader appeared before the Court as a litigant in person, he must not address the Court from the advocates' table or in robes, but from the same place and in the same way as any ordinary member of the public. This was the universal practice in England and Ireland, and it should be followed here. Upon this occasion, however, Mr. Quarry, might continue as he had begun.

The facts of the case are sufficiently stated in the judgment of Edge, C. J.

### JUDGMENT.

EDGE, C. J.—This is a petition on behalf of the persons on the list of contributories of the West Hopetown Tea Company now in liquidation in the Court of the District Judge of Saharanpur, asking us to call up the record in the winding up of the company from Mr. Benson's Court and to proceed with the case here. A preliminary objection has been taken by Mr. Quarry, the Liquidator that this Court has no power to call up the record and transfer the winding up proceedings to its own file. His main contention is that the Indian Companies Act (VI of 1882) is itself a Procedure Code, which must be followed in the winding up of companies, and impliedly excludes any other procedure, and prevents this Court from exercising the power of interference it possesses in other cases, otherwise than by way of appeal. He argues that this must be the inference from s. 219 of the Act, because that section expressly gives power to the High Court to transfer the winding up from one District Court to another, and he contends that this is by implication a negation of the power to transfer such cases from the District Courts to this Court. I must say that I am unable to follow this contention. The section was probably intended to be enabling, but unless there is something in the Act which expressly limits the control which this Court was obviously intended to exercise in the interest of justice over the Subordinate Courts, we ought not to infer from a section enabling transfers from one Subordinate Court to another, that this Court has no power to transfer cases from those Courts to itself. I asked Mr. Quarry if he could point out any provision in the Act which distinctly prohibits us from exercising this jurisdiction, but he failed to do so. The question is, there being nothing in the Companies Act to prevent us, have we power under the Letters Patent, or the High Courts Act, or the Civil Procedure Code, to accede to the prayer of the petition? I do not think it necessary to consider whether we have such power under s. 15 of the High Courts Act, or s. 9 of the Letters Patent, though, if a case should arise in which it was necessary to do so, I should require very strong argument to convince me that the word "suit" in the latter provision should not be construed in the broadest possible sense, so as to provide against any possible miscarriage of justice. It is not necessary, however, to consider either of those

1886

DEC. 1.

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9 A. 180 =

7 A.W.N.

(1887) 7 =

11 Ind. Jur.

270.



1886

DEC. 1.

MISCELLANEOUS  
CIVIL.

9 A. 180=

7 A.W.N.

(1884) 7=

11 Ind. Jur.

270.

provisions, because s. 647 of the Civil Procedure Code makes applicable to all miscellaneous proceedings not specifically provided for the general procedure prescribed by the Code for suits and appeals. Now, in this view of the matter, which has before now been held by this Court, I am of opinion that s. 25 of the Code is applicable to cases of winding up companies, and that we have under that section [183] ample power to call up such proceedings and transfer them to the file of this Court. The only question therefore is whether we ought to exercise this power in the present case. In the observations which I am about to make, I wish it to be distinctly understood that the last thing I should be disposed to do would be to cost any reflection upon Mr. Benson. It is not because we have any doubt as to his capability and integrity, or that he would bring his best judgment to bear upon the matters before him, that we propose to remove the proceedings to this Court. I say this to prevent any possible misapprehension on the part of Mr. Benson or any other person. Let us consider how the case stands. It arises out of the winding up of the West Hopetown Tea Company. The application for winding up was made early in March, 1886, and it was signed by Mr. *Quarry* as vakil for the Delhi and London Bank. After this application, and I suppose after some preliminary order had been made, an application was made on behalf of the Bank for the appointment of Mr. *Quarry* as liquidator of the company. It appears that at a meeting at which some of the contributories were present, and I suppose some of the creditors were represented, and at which Mr. *Quarry* was in the chair, his appointment as liquidator was proposed, and he was in fact appointed by the meeting. I presume that this appointment was sanctioned by Mr. Benson. So far I see no objection to anything that was done. Mr. *Quarry* might, if he chose to do so, have ceased to represent the Bank as its advocate, and it was perfectly open to him to act as liquidator of the Company. But after his appointment as liquidator, he still continued to act as the Bank's vakil. I make no suggestion against his integrity or his intention to do justice to his client and to those whom he represented in his capacity as liquidator. I desire to treat this matter as a dry legal question between A and B, and to make no imputation upon Mr. *Quarry*. But we find as a fact that after his appointment as liquidator he still acted as vakil of the principal creditor whose debt was in dispute in the liquidation. As I understand, the amount of the debt may not be in dispute, but whether this particular creditor is entitled to prove against the Company or not, is a question as to which there is a contention in law. For my own part, I cannot understand how any liquidator, no matter how honestly disposed [184] he may be—and I assume Mr. *Quarry's* complete *Bona fides*—can possibly do his duty to a client who is claiming to rank on the estate as a creditor, and at the same time to do his duty to the estate and the contributories—the other creditors—when his client's claim to rank as a creditor is in dispute. I do not understand how he can put forward his client's proof, and then administer even-handed justice by admitting in his capacity of liquidator the proof which he put forward in his capacity of vakil. The position is an anomalous one, which ought to be avoided. It appears from the statement made by Mr. *Quarry* that before any liquidator was appointed, the proof of the Bank was admitted. I do not understand under what law the order by which this was done could have been made, and it was, I think, an irregularity which by itself would justify this Court in calling for the record; but further, after notice of this petition went to the District Court, the Judge, who is an officer for whom

I entertain the greatest respect, drafted an order, for which he gave several reasons, and placed it upon the file of the proceedings. I cannot ascertain or even surmise the Judge's object in taking this step. It may have been that he wanted to keep a record of the matter for himself in the event of the case coming back to him while it was still fresh in his recollection, but I think that he committed an error in judgment in passing an order after he had notice that proceedings had been taken, and had been to some extent sanctioned, by this Court for the removal of the winding up from his Court. This circumstance would not affect my mind in any way, because I have perfect confidence in Mr. Benson; but it may have weight in this manner—that Mr. Benson has made an order which it might be difficult for him to re-consider if the matter again came before him. Again it is obvious from the statement which has been made by the learned counsel for the petitioners, that this case is one in which serious questions of law are likely to arise, which it would probably be difficult to discuss adequately at Saharanpur in the absence of the authorities upon the subject to which they relate. Mr. Benson might perhaps not have an opportunity of consulting these authorities, and the case appears to me to be one which even if he proceeded to deal with it, would in all probability ultimately come before this Court in a variety of appeals from orders brought by one side or [185] the other. Moreover, this Court has not framed any rules, such as those framed by other High Courts, for dealing with windings up under the Companies Act, no doubt because such proceedings are not very frequent in this part of the country. This again might leave the Judge in a position of some difficulty in dealing with many of the applications that might come before him. The case is of a kind which is perhaps unfamiliar to most of the District Judges, and involves in its earliest stages the question whether the principal creditor is entitled to prove against the estate, and other serious questions of law. Under these circumstances I am of opinion that this is a proper case for the exercise of our jurisdiction by calling up the winding up proceedings to the file of this Court, and we order accordingly. Costs will be paid out of the estate.

OLDFIELD, J.—I am of the same opinion.

BRODHURST, J.—I also concur.

*Application allowed.*

9 A. 185=7 A.W.N. (1887) 12.

#### APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

RADHA PRASAD SINGH (*Plaintiff*) v. JUGAL DAS (*Defendant*).<sup>\*</sup>  
[22nd December, 1886.]

*Land-holder and tenant—Determination of rent by Settlement Officer—Suit for arrears of rent for period prior to order—Jurisdiction in such suit to determine rent for such period—Civil and Revenue Courts—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 72, 77—Act XII of 1881 (N.W.P. Rent Act), s. 95 (l).*

The jurisdiction to determine or fix rent payable by a tenant is given exclusively to the Revenue Court, either by order of the Settlement Officer or by application under s. 95 (l) of the N.W.P. Rent Act (XII of 1881), and such rent

<sup>\*</sup> Second Appeal No. 171 of 1886 from a decree of G. J. Nicholls, Esq., District Judge of Ghazipur, dated the 29th September, 1885, modifying a decree of Munshi Ganpat Rai, Assistant Collector of Ballia, dated the 24th April, 1885.

1886

DEC. 1.

MISCELLANEOUS  
CIVIL.

9 A. 180=

7 A.W.N.

(1887) 7=

11 Ind. Jur.

270.



1886  
DEC. 22.

APPEL-  
LATE  
CIVIL.

9 A. 185 =  
7 A.W.N.  
(1887) 12.

cannot be determined in a suit by a land-holder for arrears of rent in the Revenue Court, in which the appeal lies to the District Judge or High Court.

In March, 1884, the rent payable by an occupancy tenant was fixed by the Settlement Officer under s. 72 of Act XIX of 1873 (N.-W.P. Land Revenue Act). In 1885, the land-holder brought a suit to recover from the tenant arrears of rent at the rate so fixed for a period antecedent to the Settlement Officer's order, as well as for the period subsequent thereto. The lower appellate Court dismissed the claim for rent prior to the 1st July, 1884, and decreed such as was due subsequently to that date, but without interest.

[186] Held that the Court could not decree any amount as arrears due until the rent payable had been fixed by private contract or by a competent Court; that under s. 77 of the N.-W.P. Land Revenue Act, the rent fixed by the Settlement Officer was payable from the 1st July following the date of his order, but not before; that for the period prior to the 1st July, 1884, no rent had been fixed; that it could not be fixed in the present suit, neither the Court of first instance nor the High Court having jurisdiction to fix it; and that the claim for rent for the period in question must therefore be dismissed.

*Mahadeo Prasad v. Mathura* (1) distinguished; *Ram Prasad v. Dina Kuar* (2), S. A. 914 of 1879, and *Phulahara v. Jeolal Singh* (3), referred to.

Held also that the plaintiff was entitled to interest at one per cent. on the sum decreed from the date of the institution of the suit.

[F., 20 A. 296; R., 16 A. 209; 2 A.L.J. 1.]

THE facts of this case are sufficiently stated for the purpose of this report in the judgment of the Court.

The Hon. *T. Conlan* and *Lalta Prasad*, for the appellant.

Mr. *J. E. Howard*, for the respondent.

#### JUDGMENT.

OLDFIELD and BRODHURST, JJ.—This suit has been brought to recover arrears of rent alleged to be due by defendant on some land accreted to the tenure of the defendant. The plaintiff prior to instituting this suit had not recognised any tenancy on the part of the defendant, but treated him as a trespasser; but by a decree of the Civil Court the tenant-right of defendant was established, and this suit has been brought for arrears of rent for 1289 to 1292, a period subsequent to the date of the decree of the Civil Court.

No rent, however, was fixed as payable on the land either by private contract or by the Revenue Court, until March, 1884, when rent was fixed by the Settlement Officer under s. 72 of the Revenue Act, and the plaintiff now claims arrears of rent at the rate so fixed. The lower appellate Court has dismissed the claim for rent prior to the 1st July, 1884, and decreed such as was due subsequently, but without interest, and hence this appeal by the plaintiff. It is contended that there is an implied contract to pay rent, and the Court should allow rent at the rate fixed by the Settlement Officer, and should not have withheld interest.

We are of opinion that the lower appellate Court is right to disallow the claim prior to the 1st July, 1884.

[187] There may be an implied contract on defendant's party to pay rent when he occupied the land, but this Court cannot decree any amount as arrears due until the rent payable has been fixed by a competent Court. The rent was fixed by the Settlement Officer no doubt, but, under s. 77 of the Revenue Act, the rent so fixed is payable from the 1st July following the date of the order of the Settlement Officer, and not before. That order cannot be held to have fixed the rent payable for any period prior to 1st July, 1884.

(1) 8 A. 189.

(2) 4 A. 515.

(3) 6 A. 52.

We were referred to a decision of the Full Bench of this Court. In that case—*Mahadeo Prasad v. Mathura* (1)—the question was as to rent payable by an ex-proprietor under s. 7 of the Rent Act, the amount having been fixed on an application under the provisions of s. 14 and s. 95 of the Rent Act, and it was held that the tenant was liable to pay rent so fixed from the date he became a tenant by loss of his proprietary rights, although such date was prior to that of the decree fixing the rent.

But there is no provision, such as is found in s. 77 of the Rent Act, by which rent fixed under an application under s. 95 (1) of the Rent Act, shall be payable from a particular date, and in the case of a tenant who becomes a tenant on *sir* land under s. 7 of the Rent Act, he is by that section liable to pay rent at a certain rate from the date he loses his proprietary rights and becomes a tenant. It was proper in that case that the rent fixed should be taken to apply to the commencement of the tenancy. That case is therefore distinguishable.

But it is contended that the rent fixed by the settlement officer should be presumed to be a fit standard for assessing rent for years prior to the date of the Settlement Officer's decree.

This might be so if the Court before which this suit has been brought had jurisdiction to fix rent.

But this case stands thus : for the period prior to the 1st July, 1884, no rent has been fixed either by private contract or by a competent Court, and until so fixed the plaintiff cannot have a decree for arrears of rent.

If in this suit the rent could be determined he might possibly succeed. But it seems to us we have no jurisdiction to fix the rent.

[188] The jurisdiction to determine or fix rent payable by a tenant is given exclusively to the Revenue Court, either by order of the Settlement Officer or by application under s. 95 of the Rent Act.

It cannot be done by suit in the Revenue Court, such as this suit is, in which the appeal lies to the Judge or High Court.

It is a matter in which these Courts have exclusive jurisdiction, the appeal either from the order of the Settlement Officer or of the Revenue Court on an application under s. 95 (1) going to the Superior Revenue authorities and not to the Judge and High Court.

In support of this view, we may refer to *Ram Prasad v. Dina Kuar* (2), and the unreported case referred to in it, S. A. No. 914 of 1879, and *Phulahra v. Jeolal Singh* (3). The plea in regard to interest is valid. The plaintiff is entitled to interest at 1 per cent. per mensem on the sum decreed from the date of institution of suit. Decree modified accordingly.

The appellant will pay costs of this appeal.

*Decree modified.*

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DEC. 22.

APPEL-  
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CIVIL.

9 A. 188 =  
7 A.W.N.  
(1887) 12.



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DEC. 23.

APPEL-  
LATE  
CIVIL.

9 A. 188 =

7 A.W.N.

(1887) 17.

9 A. 188 = 7 A.W.N. (1887) 17.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*THE MUSSOORIE BANK, LIMITED (*Plaintiff*) v. BARLOW  
(*Defendant*).<sup>\*</sup> [23rd December, 1886.]*Civil Procedure Code, s. 53—Suit by Bank for money against executrix—Plaint—Description of parties—Order returning plaint for amendment—Form of suit.*

A suit was brought by the manager of the *M Bank* against the executrix of *B* to recover a sum of money as due upon a bond executed by *B* in favour of the Bank. The plaint described the defendant as "Mrs. Sarah G. Barlow of Mussoorie," and stated that she was executrix of the deceased *B*. It began thus:—"George Henry Webb, manager of the above-named plaintiff's business, states as follows," and proceeded to state that the deceased was, at the time of his death, "indebted to the plaintiff," and to set forth the cause of action in detail. It was signed and verified thus—"For the *M Bank, Limited*, G. H. Webb, Manager." The Court of first instance returned the plaint for amendment under s. 53 of Civil Procedure Code (i) because the defendant was not properly described, (ii) because the plaint was set out as made by George Henry Webb as manager, and not as on the part of the Bank, and (iii) because the suit should not have been brought in the form in which it was brought, but in the form referred to in s. 213 and No. 105 of Sch. IV of the Code.

*Held*, that the first of these grounds failed because it was clear that the defendant was stated to be the executrix of the deceased, and the suit was brought against her in that capacity.

[189] *Held* that the second ground did not come within s. 53 of the Code, as it was clear that the circumstances set out in the plaint applied to the case of the plaintiff Bank, and the plaintiff sufficiently fulfilled the requirements of the Code that the facts which the plaintiff considers essential should be concisely and clearly set out and that the verification should be made by some one acquainted with these facts.

*Held*, with reference to the third ground, that the plaintiff was at liberty to bring a suit for money against any person administering to or representing an estate; and if such suit should be found with reference to the facts in evidence not maintainable, it should be dismissed; but there was no authority for returning a plaint for amendment when it was found that the suit was not maintainable in the form in which it was brought, in order to amend it so as to convert the suit into one of a different character.

THE plaintiff in this case was the Mussoorie Bank, Limited, and the defendant, Mrs. Sarah G. Barlow, was the executrix of one Colonel Charles Grant Barlow, who died on the 18th May, 1885. The claim was to recover a sum of Rs. 39,553 as due on a bond executed by the deceased in favour of the plaintiff Bank. The plaint began thus:—"George Henry Webb, Manager of the above-named plaintiff's business, states as follows." The defendant was described as "Mrs. Sarah G. Barlow of Mussoorie." The plaint proceeded to state that the defendant was executrix of the deceased Charles Grant Barlow, and that the deceased was at the time of his death "indebted to the plaintiff" and to set forth the cause of action in detail, and it was signed and verified thus:—"For the Mussoorie Bank, Limited—G. H. Webb, Manager."

In reference to the terms in which the plaint was drawn up, the Court of First instance (Subordinate Judge of Dehra Dun) observed:—"The Court requires to hear what the plaintiff states, and not what Mr. Webb as Manager states, although Mr. Webb as manager may

<sup>\*</sup> First Appeal No. 178 of 1886 from an order of E. Galbraith, Esq., Judge of Small Cause Court, Dehra Dun, dated the 11th October, 1886.

verify the plaint." The Court was also of opinion that the defendant was not properly described. In reference to the form in which the suit was brought, the Court made the following observations:—"The executrix is bound to deal fairly with all the creditors under the Succession and Probate Acts, and this she cannot do if the suit is allowed in its present form, unless the assets are equal to the liabilities. The Court will not assume this. The Bank virtually contends that the executrix has not properly administered the deceased's estate. If so, the proper remedy is to ask to have the estate properly administered, and a suit, in the form of an administration [190] suit, is the proper form—s. 213 of the Court and form 105. If the present course were allowed, the whole object of the Succession and Probate Acts would be defeated." The Court ordered that the plaint should be returned to the plaintiff for amendment within fifteen days, and that the plaintiff should pay the costs of the adjournment. The plaintiff appealed from this order to the High Court.

Mr. C. H. Hill, for the appellant.

The Hon. T. Conlan, for the respondent.

# JUDGMENT.

OLDFIELD, J.—This is an appeal from an order under s. 53 of the Civil Procedure Code, returning a plaint for amendment. The plaintiff was the Mussoorie Bank, Limited, and the defendant was described as Mrs. Sarah G. Barlow, Mussoorie. The plaint goes on in the following words:—

"George Henry Webb, Manager of the above-named plaintiff's business, states as follows:—

"1. The defendant is executrix of the late Charles Grant Barlow who died on the 18th day of May, 1885.

"2. Colonel Barlow was at the time of his death indebted to the plaintiff"—and so on, giving a detailed account of the several causes of action and the plaint is signed and verified as follows:—"For the Mussoorie Bank, Limited, G. H. Webb, Manager."

The Court below returned the plaint for amendment on the following grounds:—First, because the defendant has not been properly described in the plaint. I think this ground fails, as from what I have extracted from the plaint above, it is clear that the defendant is stated to be the executrix of the late Colonel Barlow, and the suit is brought against her in that capacity. The next ground is that the plaint is bad, as the claim is set out as made by George Henry Webb, Manager, and not as on the part of the bank, but the words should have been:—"The Mussoorie Bank, Limited," or "the plaintiff" states as follows:—"As to this, I do not think this is a ground for returning the plaint. It does not, in my opinion, come within the restrictive grounds mentioned in s. 53. The intention and meaning of the plaint is very clear, that the circumstances and facts set out apply to the case of the plaintiff Bank, and the words are not capable of any other meaning. The [191] object of the sections relating to plaints, as far as the present point is concerned, is that the facts which the plaintiff considers essential should be concisely and clearly set out, and that the verification should be made by some one acquainted with these facts, and in this respect the plaint sufficiently fulfils the requirements of the Procedure Code.

The third and last ground which the lower Court has thought sufficient to justify its order is that the suit should not have been brought in the form it was brought, but in the form referred to in s. 213 and art. 105 of

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(1887) 17.

schedule iv of the Procedure Code. But the plaintiff is quite at liberty to bring a suit for money against any person administering to or representing an estate. If such suit be found with reference to the facts in evidence not maintainable, it should be dismissed; but there is no authority for returning a plaint for amendment when it is found that the suit is not maintainable in the form in which it is brought, in order to amend it so as to convert the suit into one of a different character.

For these reasons I would set aside the order of the lower Court with costs to be paid by the defendant-respondent, and we direct the lower Court to restore the case to its file of pending suits, and to deal with the same according to law.

BRODHURST, J.—I concur in holding that there was no sufficient ground for the return of the plaint, and in the proposed order of my brother Oldfield.

*Appeal allowed.*

9 A. 191 (P.C.) = 13 I.A. 134 = 4 Sar. P.C.J. 741 = 10 Ind. Jur. 471.

### PRIVY COUNCIL.

#### PRESENT :

*Lord Watson, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.*

*[On appeal from the High Court of the North-Western Provinces.]*

LEDGARD AND ANOTHER (*Defendants*) v. BULL (*Plaintiff*).  
[7th, 8th, and 21st July, 1886.]

*Jurisdiction under Act XV of 1859, s. 22—Objection to suit not competently brought—Civil Procedure Code, ss. 25, 562, 564—Withdrawal, transfer, and remand of suits—Effect of consent of parties as regards jurisdiction—Particulars of infringement required by Act XV of 1859, s. 34—Sufficiency of statement to satisfy that requirement.*

An order for the transfer of a suit from one Court to another, under s. 25 of the Code of Civil Procedure, cannot be made unless the suit has been brought in [192] a Court having jurisdiction. The judgment in *Peary Lall Mosroomdar v. Kamal Kishore Dassia* (1) entirely approved.

When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process; although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision.

On the other hand, in a suit tried by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.

A suit, having been instituted in a Court not of competent jurisdiction, was transferred, with the consent of parties, to a Court which was competent; but the defence of jurisdiction was set up before the issues were fixed, and was afterwards insisted on throughout.

*Held*, that in the single fact that the defendant had personally concurred in the transfer, there had been no waiver of the right to maintain this defence, and that the suit must be dismissed on the ground that it was not competently brought,

A Court of appeal, having set aside the whole of the proceedings, including the plaint, directed that a new plaint be presented in the proper Court.

*Held*, that this order, equivalent to directing the plaintiff to institute a new suit, was wrong; and that, with only the alternative of having leave to withdraw the suit and bring a new one, his suit should have been dismissed.

The sole object of s. 31 of Act XV of 1859, "An Act for granting exclusive privileges to inventors," (substantially the same as s. 41 of the English Act of 1852, 15 and 16 Vic., c. 82) is to compel the plaintiff to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information is given in the plaint itself or in a separate paper. *Talbot v. La Roche* (1) and *Needham v. Oxley* (2) referred to and followed.

Particulars of breaches, upon an alleged infringement, are distinguished from particulars of objection for want of novelty in this, that, in the latter case, instances of use may not be within the knowledge of the patentee, and therefore must be specified, while, in the former, the defendant must himself know whether, and in what respects, he has infringed the patent.

The plaintiff had three patents relating to one article, a brick-kiln; the second and third being for improvements upon the invention specified in the first. The plaintiff indicated a kiln, constructed and used by the defendant, showing as to each of his patents, the distinctive features of invention alleged to have been appropriated. *Held*, a sufficient compliance with s. 34.

[Not Appl., 16 C.W.N. 444 (447); F., 11 M. 26 (P.C.); P.L.R. (1900), 354 (356); 22 P.L.R. 1902; 13 Ind. Cas. 898 (900)=15 C.L.J. 142; Appr., 9 C.W.N. 956=2 C.L.J. 384; R., 13 B. 650; 13 M. 211; 13 M. 273; 1 M.L.J. 537; 118 P.R. 1892; 8 C.P.L.R. 90; 21 B. 351 (367); 25 C. 39; 23 M. 314=10 M.L.J. 51; U.B.R. (1897—1901) 443; 36 P.R. 1902; 37 P.R. 1903; 40 P.R. 1903=69 P.L.R. 1903; 31 C. 849=8 C.W.N. 705; U.B.R. (1905), 3rd Qr., C.P.O., s. 25; 28 M. 437=15 M.L.J. 236; 2 L.B.R. 117; 8 C.L.J. 266; 7 C.L.J. 152; 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320 (F.B.); 36 C. 196=5 C.L.J. 611 (622); 2 S.L.R. 37 (41); 6 A.L.J. 483; 13 Cr. L.J. 35 (37)=10 M.L.T. 563=(1912) M.W.N. 3=13 Ind. Cas. 275=22 M.L.J. 141; 38 C. 639 (669)=12 Ind. Cas. 464; 39 C. 353 (373)=14 C.L.J. 552=16 C.W.N. 817=13 Ind. Cas. 353; 16 C.W.N. 34 (43)=11 Ind. Cas. 457; 5 Ind. Cas. 454 (455); (1917) M.W.N. 318=5 L.W. 467 (468)=37 Ind. Cas. 906; 36 Ind. Cas. 980; D., 17 C. 155; 6 C.L.J. 547 (553); 36 M. 39 (44)=2 M. W.N. (1911) 519=10 M.L.T. 483=22 M.L.J. 193; 33 M. 323=6 M.L.T. 121 (F.B.).]

[193] CONSOLIDATED appeal and cross-appeal from a decree (23rd February, 1883) of the High Court (3), reversing a decree (22nd May, 1882) of the District Judge of Cawnpore.

The principal questions raised by this appeal were whether the suit, which was for damages for infringement of exclusive rights under Act XV of 1859 ("An Act for granting exclusive privileges to inventors,") had been heard in a Court of competent jurisdiction in regard to s. 22 of that Act; also, whether the plaintiff had in effect complied with the requirements of s. 34 of that Act, in regard to notifying to the defendant the particulars of the alleged infringement.

The plaint stated that in June, 1872, the plaintiff obtained exclusive rights under Act XV of 1859 for making, using, and selling flame kilns for burning bricks, as to which the specification was, (a) the obtaining a continuous flame in a kiln by using moveable iron chimneys which caused a draught, and (b) placing the kutcha bricks in concentric circular walls, round the kiln, with parallel open spaces, causing a draught of air between the walls. This patent was supplemented by another in 1879, on a specification of an improvement in the above, effected by having holes in the concentric walls, whereby fuel could be put into the top of the kiln and lowered into the furnace. And it was followed in the same year by a further patent in the mode of making the kiln, viz., as a trench dug in the

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earth instead of building it up as a superstructure. In regard to these patents, the plaintiff notified to the public that Rs. 5,000 would be charged as a royalty for each set of operations in the unlicensed use of his inventions. The plaintiff, lastly, alleged that the defendant had in two sets of operations, without the plaintiff's license, used a kiln in Cawnpore similar to his. He therefore claimed Rs. 10,000.

The first of the above questions arose in consequence of the filing of the plaint (2nd February, 1882) in the Court of the Subordinate Judge of Cawnpore, which, in regard to the enactment in s. 22 of Act XV of 1859, was not of competent jurisdiction to dispose of the suit. Within thirteen days the District Judge, on an application made by the plaintiff and consented to by the defendant, transferred (15th February, 1882) the suit to his own Court, purporting to act under s. 25 of the Code of Civil Procedure.

[194] However, upon the cause coming on for settlement of issues (2nd March), the defendant objected that the suit not having been instituted in the principal Court of original jurisdiction in civil cases in the district, as required by s. 22, the order of transfer, was, notwithstanding the consent of parties thereto, void and of no effect (1). He also objected that the plaint was not accompanied by "the particulars of the breaches complained of" as required by s. 34 of the same Act,<sup>2</sup> alleging that he was not bound to make any answer thereto. This gave rise to the second of the above questions, relating to the sufficiency of the particulars of infringement (2). The District Judge gave a preliminary judgment (2nd March, 1882), holding that the power of withdrawal in s. 25 of the Code of Civil Procedure, as well as the general control conferred on the District Judge by s. 11 of Act VI of 1871 (the Civil Courts Act) had enabled him, at that early stage of the suit, to rectify the error which had occurred in the institution of the suit in the wrong Court; and that the irregularity, not having been such as to act prejudicially to either party, had, with reference to their mutual consent, ceased to be. With regard to the objection to the particulars of infringement, he held that the plain and concise statement in the plaint was a sufficient compliance with the requirements of s. 34.

[195] The defendant thereupon petitioned the High Court to send for the record of the suit under s. 622 of the Code of Civil Procedure and to set aside the Judge's order as having been made by a Court exercising a jurisdiction not vested in it by law, the order not being appealable under s. 588. He also petitioned the High Court to interfere under s. 15 of the

(1) The section relating to this point is as follows :—

Act XV of 1859, s. 22 : "An action may be maintained by an inventor against any person who, during the continuance of any exclusive privilege granted by this Act, shall, without the license of the said inventor, make, use, sell, or put in practice the said invention, or who shall counterfeit or imitate the same: provided that no such action shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue or the defendant shall reside as a fixed inhabitant."

(2) Act XV of 1859, s. 34, enacts as follows :—

"In any action for the infringement of such exclusive privilege the plaintiff shall deliver with this plaint particulars of the breaches complained of; and the defendant shall deliver a written statement of the particulars of the grounds, if any, upon which he means to contend that the plaintiff is not entitled to an exclusive privilege in the invention." The section prohibits evidence being given in support of any alleged infringement which shall not be contained in the particulars. It also empowers the Court to allow amendments in the particulars upon such terms as shall seem fit.

Charter Act of 1861. The High Court held (20th March, 1882) that s. 622 was inapplicable to the case, and rejected the petition. The defendant then filed his written statement (6th April, 1882), in which he stated his objections to the transfer of the suit, and to evidence being given in the absence of due particulars of infringement. He denied any infringement of the plaintiff's rights, having "burned bricks on his own processes." The issues raised questions whether the transfer by consent of parties had corrected the error in the institution of the suit and could be accepted as equivalent to institution in the District Court; also whether there had been a sufficient compliance with the requirements of s. 34; and the main question was made an issue, *viz.*, whether the defendant had in any way infringed the rights declared in the plaint.

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On the case coming on for hearing, the defendant objected to the whole of the evidence bearing on the latter point, on the ground that "a distinct and specific statement of" the various points on which infringement was alleged should have been given in the manner required by s. 34. This objection was overruled, and the evidence of the plaintiff and of Mr. Walter Butler, a Civil Engineer, was taken as to the construction and working of the defendant's kiln.

At the adjourned hearing, the defendant presented a petition which stated that his counsel had at the former hearing protested in vain that by the admission of evidence as above stated the Court had allowed the plaintiff to make up for the absence of particulars of breaches not filed with the plaint as required by law to the prejudice of the defendant's rights as claimed by him in his written statement. The petition asked for leave and time for the defendant to file a defence supplemental to his written statement, giving particulars on which he rested his rights. It also prayed that the Court would admit evidence to prove that he had made bricks on his own [196] processes, patented by him in 1873 and 1876, and that his modes of brick-making were no infringement of the plaintiff's exclusive rights. This petition was rejected.

The District Judge having held that in the plaint the special points of alleged infringement had been clearly set forth, found as a fact that the method used in the defendant's kiln was almost identical with that described in the specification of the plaintiff's patent and on the plaint. He not only referred to the specifications as well as to the plaint, but he defined in his judgment the principal points of infringement as consisting of the mode of stacking the bricks, the feeding at the top, the division of the kiln into transverse sections (where dampers and chimneys were placed), and the trench, as well as the use of moveable chimneys and dampers to stop back draughts.

The claim was accordingly decreed. The defendant appealed to the High Court, raising both the questions of jurisdiction and of the absence of particulars of infringement, besides appealing on the merits. A Divisional Bench (Stuart, C.J., and Tyrrell, J.) maintained the decision of the District Judge as to the transfer having been effectively made by consent of parties, and having remedied the original defect. But they were of opinion that there had been no sufficient compliance with the requirements of s. 34 of Act XV of 1859. They referred to the words of that section, observing that the plaintiff came into Court without having done that which alone could enable him to have his case heard. They added:—

"But we will allow the plaintiff another opportunity of a hearing on the merits, and for that purpose we direct that the plaint be amended and



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presented in the proper Court, *viz.*, the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by s. 34 be duly delivered. As to the costs, these, under the circumstances, had better be reckoned as costs in the cause, and we order accordingly."

Against this judgment the defendant appealed to Her Majesty in Council, on the ground, amongst others, that the suit ought to have been dismissed as having been brought in a Court not having jurisdiction. The plaintiff filed a cross-appeal, with a view to [197] maintaining the decree of the first Court. The defendant having died pending these proceedings, two of his executors became appellants by revivor.

On this appeal,

Mr. *Aston*, Q. C., and Mr. *Herbert Cowell*, for the appellant, argued that there was error in the direction of the High Court that the plaint be amended and presented to the proper Court. The suit should have been dismissed, with or without leave to bring a new one, under s. 373 of the Code. The Court had no power in such a case to remand—see s. 564—it not falling under s. 562; but should have dismissed the suit, as having been brought in a Court having no jurisdiction to hear it.

The transfer assumed to have been made under s. 25 of the Code was *ultra vires*; and the consent of the defendant, though given, did not preclude his objecting to the exercise of a jurisdiction which did not belong to the Court under s. 22 of Act XV of 1859. That the transfer was ineffectual appeared from the law as declared in *Peary Lal Mozoomdar v. Komal Kishore Dassia* (1); and the objection had been taken in due time and had been maintained throughout.

The High Court, however, had been right in holding the delivery of particulars of breaches under s. 34 to be a necessary preliminary to giving evidence of such breaches. This suit, brought as it had been upon three patents, as to which, if any infringement could be made out, it could only be by taking part of the process specified in one patent and part of that specified in another, showed the necessity of having the particulars duly stated. The defendant was entitled to know what was the precise combination imputed to him as an infringement. No sufficient information on these points had been offered to the defendant; and, as an instance, it was impossible to say that the evidence which had been given of infringement by the use of a reversible chimney was covered by, and rendered admissible by, any particulars delivered by the plaintiff. [LORD WATSON:—The specific kiln constructed and used by the defendant is indicated as an infringement. Is not that sufficient information to the defendant of the case set up? He referred [198] to *Needham v. Oxley* (2) and *Talbot v. La Roche* (3); *Hull v. Bollard* (4) was also cited.] No: the particulars are not sufficiently indicated by the plaint. On an allegation of public use prior to the filing of the specification, non-delivery of particulars as to the plan of such use has been held to exclude evidence on that point: *Sheen v. Johnson* (5). And on the same principle, evidence of breaches without particulars having been delivered would be inadmissible.

Mr. *R. S. Wright* and Mr. *A. Phillips*, for the respondent and cross appellant, contended that the suit having been immediately upon its institution in the wrong Court transferred to a Court having jurisdiction with the consent of both parties, must be treated as if it had been

(1) 6 C. 30  
(4) 1 H. and N. 134.

(2) 1 H. and M. 248.

(3) 15 Com. B. 310.  
(5) 2 A. 368.

originally filed in the latter Court. The original defect no longer remained after the consent had been acted upon. The objection was, moreover purely technical, and as such (the trial on the merits not having been affected) should not be allowed to prevail; reference being made to *Girdharee Singh v. Kolahul Singh* (1) where this Committee declared that, as regards proceedings in India, the essential justice of the case must be looked to, without considering whether matters of form had been fully regarded.

Upon the other ground taken for the appellant, the insufficiency of the particulars of breaches, the District Court was right in holding that the plaint contained sufficient particulars. The time, place, and manner of the infringement were clearly set forth in the plaint. The mode of manufacture employed, and imputed as an infringement, was specified; also the defendant's kiln was indicated, as to which he could not fail to know in what respects the processes were indetical.

Mr. Aston, Q. C., replied.

On a subsequent day, July 21st, their Lordships' judgment was delivered by LORD WATSON.

### JUDGMENT.

LORD WATSON:—These appeals are taken in an action of damages for the alleged infringement of certain exclusive rights secured to Mr. Bull, the plaintiff, by three Indian patents; and the whole controversy between the parties depends upon two pleas [199] maintained by the defendant, the late Mr. Petman, who is now represented by his testamentary executors.

In his written statement, filed in answer to the plaint, before the District Judge of Cawnpore, the defendant pleaded that the Judge had no jurisdiction to entertain the suit, in respect that it had not been regularly brought into Court, and to that plea he has adhered throughout all the subsequent stages of the litigation. The defendant also pleaded that the plaintiff had failed to comply with the provisions of s. 34 of the Indian Patent Act, XV of 1859, inasmuch as no particulars of the breaches complained of had been delivered with the plaint; and that, in the absence of such particulars, he could not be called upon to state a defence to the action upon its merits.

The District Judge, by an order, dated the 2nd March, 1882 (the day appointed for adjustment of issues), overruled both pleas and adjusted issues for the trial of the cause. The first and second issues raised these two pleas; but the defendant, not being satisfied with the decision of the District Judge, on the 7th March, 1882, presented an application to the High Court under s. 622 of the Civil Procedure Code, with the view of obtaining an alteration of the order of the 2nd March, in so far as it related to these pleas. That petition was rejected, as irregular, by the High Court on the 20th March, 1882; and the District Judge then proceeded with the trial of the issues adjusted by him. On the same day on which the plaintiff's evidence was concluded, the defendant presented a petition in which he reiterated his pleas, and for the first time stated certain particulars of objections to the validity of the plaintiff's patents, which he desired to prove. The learned Judge held that the notice of particulars came too late, and negatived the defendant's right to lead evidence in support of them; and thereafter he found, upon the plaintiff's evidence, that the alleged infringement had been established, and assessed

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**1886** damages at Rs. 10,000. That sum was fixed, on the footing that it was a fair consideration for the defendant to pay for a license to use the plaintiff's inventions; but in the argument upon this appeal the plaintiff's counsel admitted that the principle of assessment was erroneous, and that the damages due (if any) must be limited to the loss occasioned to the patentee by reason of the defendant's infringement.

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**9 A. 191** [200] Upon an appeal by the defendant, the High Court for the  
**(P.C.) =** North-Western Provinces, consisting of Sir Robert Stuart, C.J., and  
**13 I. A. 134 =** Tyrrell, J., agreed with the Court below that the defendant's plea of no  
**4 Sar. P.C.J.** jurisdiction was not well founded. They held, however, contrary to the  
**741 =** finding of the District Judge, that there had been an entire failure on the  
**10 Ind. Jur.** part of the plaintiff to observe the requirements of s. 34 of the Patent Act,  
**471.** and consequently "that the plaintiff came into Court without any case which could possibly be tried." Being of opinion, in these circumstances, that the plaintiff ought to be allowed another hearing on the merits, the learned Judges directed "that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by s. 34 be duly delivered." The costs were ordered to "be reckoned as costs in the cause."

Their Lordships are of opinion that it is impossible, in any view which can be taken of the defendant's pleas, to sustain the operative decree of the High Court. It sets aside, or at least ignores, the whole previous proceedings, including the plaint in which the suit originated; and it directs a new and amended plaint to be presented to the Court, which is simply equivalent to directing a new suit to be instituted. Assuming that the defendant's pleas were rightly disposed of by the High Court, what the Court ought to have done was to give the plaintiff the alternative of having his suit dismissed, or of withdrawing it, with leave to bring a new action.

Their Lordships are of opinion that the defendant's plea, founded on s. 34 of the Patent Act, was rightly disposed of by the District Judge. It appears to them that the learned Judges of the High Court have misconstrued the enactments of that section which refer to the particulars of breaches to be delivered by a plaintiff complaining of infringement. The sole object of these enactments is to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself or in a separate paper. In so far as it relates to particulars of breaches, s. 34 of the Indian Act is expressed in substantially the same terms with [201] s. 41 of the English Patent Act of 1852 (15 and 16 Vic., c. 83). In *Talbot v. La Roche* (1), which was an action for violation of a patent "for improvements in obtaining pictures or representations of objects," the plaintiff merely alleged that, during a certain period of time and at a certain place, the defendant had infringed "by making, using, and selling pictures and portraits according to the plaintiff's invention;" and that was held, by the Court of Common Pleas, to be sufficient compliance with s. 41. Chief Justice Jervis, distinguishing between particulars of breaches and particulars of objection, to be delivered by the defendant, said in that case (p. 321):—"Under a plea of want of novelty, the Court requires the particulars to condescend upon the particular instances. But that is very different from this case; the matter there is not in the knowledge of the

patentee. But the defendant must know whether and in what respects he has been guilty of infringement." In *Needham v. Oxley* (1) the plaintiff simply pointed to certain machines used by the defendant, and stated in general terms that they infringed his patent. Lord Hatherley held that sufficient particulars had been delivered, and he accordingly refused the defendant's motion for an order on the plaintiff to specify in what respects his machines infringed the patent. There are other authorities to the same effect, but it is unnecessary to refer to them.

In the present case all three of the plaintiff's patents relate to one article, a kiln for burning bricks, and the second and third in date are for improvements upon the invention specified in the first. The plaintiff points to a particular kiln constructed and used by the defendant, and in his plaint he not only refers to his patents, but indicates in the case of each of them the distinctive features of his invention which he alleges to have been appropriated by the defendant in the construction and use of the kiln. It is therefore impossible to accept the views of the High Court upon this branch of the case without disregarding the authoritative construction which has been put upon the corresponding section of the English Act,—a construction which appears to their Lordships to be just and reasonable.

There only remains for consideration the objection stated by the defendant to the jurisdiction of the Court. The circumstances [202] in which the plea was taken are these:—The plaint was originally filed in the Court of the Subordinate Judge at Cawnpore on the 2nd February, 1882, whereas s. 22 of Act XV of 1859 provides that no action for infringement "shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue, or the defendant shall reside as a fixed inhabitant." The principal Court of original jurisdiction was the Court of the District Judge. On the 15th February, 1882, the defendant personally signed, along with the plaintiff and his pleader, a petition praying the District Judge to withdraw the case from the Court of the Subordinate Judge and to try the suit in his own Court. On the same day an order was made in the District Court in these terms:—"That the case be transferred from the Subordinate Judge's Court to the file of this Court, and the date will be fixed hereafter." It is admitted that the District Judge had no authority to issue that order, unless such authority was given him by Act X of 1877, s. 25. The suit was entered in the file of the District Court, and has since proceeded as a transferred suit, originally instituted in the Court of the Subordinate Judge.

In the argument addressed to their Lordships it has not been disputed, and it does not appear to admit of doubt, that a suit for infringement could not be competently instituted in the Court of the Subordinate Judge. S. 22 of the Patent Act expressly provides that no such suit shall be maintained before that Court, and the first and an essential step in the maintenance of a suit is its due institution. In the opinion of their Lordships, the transference of the suit to the District Court was equally incompetent. It was decided by the High Court of Calcutta on the 10th June, 1880 (*vide* I. L. R. 6 C. 30), that the superior Court cannot make an order of transfer of a case under s. 25 of the Civil Procedure Code, unless the Court from which the transfer is sought to be made has jurisdiction to try

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it. Having regard to the terms of s. 25, their Lordships entirely approve of that decision. Apart, therefore, from any question of estoppel affecting the defendant, there was no competent suit depending at the plaintiff's instance on the 6th April, 1882, when the defendant raised the plea of no jurisdiction in his written statement of defence.

[203] But then it is said that the defendant must be held, by reason of his conduct in the suit, to have waived all objection to the irregularities of its institution before his statement of defence was lodged. It is not said that the defendant has done anything to waive that objection since it was stated in his written answer to the plaint. On the contrary, he has taken every possible opportunity to insist on it. The result is, that the defendant must now have the same judgment upon his plea of no jurisdiction which ought to have been given by the District Judge when the plea was first disposed of by him on the 2nd March, 1882.

The defendant pleads that there was no jurisdiction, in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the defendant's plea was stated before issue was joined on the merits, and, in reliance on that plea, he objected to the case being tried and withheld his objections to the validity of the patent. It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause should be tried on its merits by the District Judge.

Great stress was laid by the plaintiff's counsel upon the terms of a petition, prepared by the defendant's native pleader, which [204] was filed before the District Judge on the 24th February, 1882. It is a singular fact that this petition, now said to be so very important, is one of the documents which neither of the parties considered of sufficient importance to be forwarded along with the other papers in these appeals. But taking the account given of it by the District Judge, it must have been prepared by the defendant's pleader, before the transference of the suit on the 15th April, with the view of informing the Subordinate Judge that the defendant was about to leave for England, in consequence of ill-health and moving that Judge to have the cause heard and determined with the least possible delay. The petition states the plea of no jurisdiction in the Subordinate Judge, so that one of the points which the pleader, at the time when it was originally prepared, desired the Subordinate Judge to hear and determine at once, was the plea against his own jurisdiction. Accordingly the plaintiff's argument as to waiver really rests upon the

single fact that the defendant personally concurred with the plaintiff and his pleader in petitioning the District Judge to transfer the suit in terms of s. 25 of the Procedure Code. The grounds of that petition had nothing to do with want of jurisdiction in the lower Court, but were ordinary grounds of convenience, which would justify the removal of a suit to the higher Courts from the lower, assuming it to have been properly instituted there. Their Lordships are unable to hold that such a consent to a transfer operates as a waiver of the defendant's preliminary pleas or of any of his pleas. It is professedly and in substance nothing more than a consent that these pleas shall be disposed of by another than the Subordinate Judge. They are consequently of opinion that the District Judge, instead of repelling, ought to have sustained, the defendant's plea.

Their Lordships regret that, in accordance with the opinion which they have formed, the suit must be dismissed, on the ground that it was not competently brought; but they cannot dispense with the requirements of the Patent Act and Procedure Code, and the result is due to the plaintiff himself, who has shown no less obstinacy than the defendant in perilling the issue of the case upon his own views of the law. Nothing would have been easier than for the plaintiff to obviate the objections to the regularity of the procedure urged by the defendant in his written statement. On the other [205] hand, the defendant might, with perfect propriety and without difficulty, have stated his particulars of objections to the plaintiff's patent, notwithstanding the prejudicial pleas which he was maintaining. If the suit had been competently brought, their Lordships would certainly not have thought it right to indulge the defendant with a new trial of the cause, and would have given judgment for the plaintiff, with damages assessed upon a proper principle. As the case stands, they must humbly advise Her Majesty that the judgment of the High Court, except in so far as it recalls the decision of the District Judge, must be reversed, and the suit dismissed, with costs in both Courts below. The executors of the defendant, Mr. Petman, will have their costs in the original and cross appeals.

*Appeal allowed. Decree reversed. Suit dismissed with costs.*

Solicitors for the appellant—Messrs. *Barrow and Rogers*.

Solicitors for the respondent—Messrs. *Sanderson and Holland*.

9 A. 205=6 A.W.N. (1886) 279.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

BHUP SINGH AND ANOTHER (Plaintiffs) v. ZAIN-UL-ABDIN AND OTHERS (Defendants).\* [19th October, 1886.]

*Mortgage—First and second mortgages—Sale of mortgaged property in execution of money decree obtained by first mortgagee—Effect on second mortgagee's rights—Purchase by one of several joint mortgagees of mortgaged property—Extinguishment of mortgage debt—Principal and surety—Liability of surety—Limitation—Costs—Suit for sale of mortgaged property.*

In January, 1866, B obtained a simple money decree only in a suit for enforcement of lien created by a bond executed by the wife of Z, and, at a sale

\* First Appeal No. 52 of 1885 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 17th December, 1884.

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in execution of such decree, a 10 biswas share hypothecated in the bond was sold and purchased by *Z*, in November 1872. On the 3rd May, 1872, two bonds were executed in favour of *B* and *H* jointly, the first by *Z* and *I* jointly, hypothecating  $6\frac{1}{2}$  out of the above-mentioned 10 biswas, and the second by *S*, in which the obligor promised to pay the obligees the amount of the bond given by *Z* and *I* in the event of such amount not being paid by them, and mortgaged certain property as security for such payment by him. In December, 1872, *Z* gave another bond to *B*, hypothecating the same 10 biswas, and in execution of a decree obtained by *B* upon this bond the 10 biswas were sold and purchased by *B* himself in 1877, and in 1883 were sold by him to *D*. Subsequently, *B* and *H* brought a suit against *Z* and *I*, the joint obligors under the bond of the 3rd May, 1872, the heirs of their surety [206] *S*, a purchaser from those heirs of the property mortgaged in the security bond, and *D*, in which they claimed to recover the money due on the bond by sale of the property mortgaged therein and also by the sale of the property mortgaged in *S*'s security bond.

*Held*, that inasmuch as *B*'s decree of January, 1866, was a simple money decree only, *Z*'s purchase thereunder in November, 1872, could not be regarded as operating in defeasance of the joint bond of the 3rd May, 1872, executed by *Z* and *I*, and that the sale of November, 1872, therefore, left the rights of the parties wholly unaffected *quoad* that instrument.

*Held* also, that the effect of *B*'s purchase of the 10 biswas in 1877 upon the joint bond of the 3rd May, 1872, was as effectually to extinguish the joint incumbrance thereon as if *H* had been associated with him in buying it; that consequently when *B* sold the 10 biswas to *D* in 1883, they were free of all incumbrance under the joint bond; and that he passed to her a clean title which she could assert as a complete answer to the present suit in regard to the  $6\frac{1}{2}$  biswas.

*Held* further, that inasmuch as the bond executed by *S* was only a guarantee for the personal obligation created by the joint bond of *Z* and *I*, and a cause of action could only accrue as against him in respect of the personal default of the joint obligors to pay the bond money, and such default occurred beyond the period of limitation within which a suit to enforce the personal obligation to pay the money could have been maintained, it followed that, had there been a claim in the plaint to obtain a decree personally against the joint obligors, the plea of limitation by which such a claim could have been defeated would have been equally efficacious as regards the heirs of *S*; but no such claim had been made, and the obligation of the surety under his bond of the 3rd May, 1872, being confined to the personal default of *S*, his heirs had been wrongly imported into the present litigation, which alone sought to enforce the hypothecation of the joint bond against the hypothecated property.

*Held* also, that one set of costs was enough for the heirs of *S* and the purchaser from them of the property mortgaged in the security-bond, as their defences were identical, and that *D*'s costs should be calculated on the value of the  $6\frac{1}{2}$  biswas, the decree of the Court of first instance being modified to this extent.

[D., 7 A.L.J. 99 (101)=32 A. 164 (166)=5 Ind. Cas. 129.]

On the 3rd May, 1872, *Zain-ul-abdin* and *Ismail Husain* gave a bond for Rs. 2,000 to *Bhup Singh* and *Har Dayal Mal*, in which they mortgaged, amongst other property, a  $6\frac{1}{2}$  biswas share of a village called *Tahirpur*. On the same date, *Siraj-ud-din Husain* gave *Bhup Singh* and *Har Dyal Mal* a security-bond, in which he promised to pay them the amount of the bond given them by *Zain-ul-abdin* and *Ismail Khan*, if those persons did not pay the same, and mortgaged a share in a village called *Amirpur Gangu* as security for such payment by him. *Bhup Singh* and *Har Dyal Mal* now sued *Zain-ul-abdin* and *Ismail Husain*, the obligors of the bond of the 3rd May, 1872, the heirs of *Siraj-ud-din Husain*, [207] the surety for those persons, of one *Karim Bakhsh*, and one *Musammat Dewa*, for Rs. 6,000, the principal and interest due on that bond. *Musammat Dewa* was made a defendant because she had purchased the  $6\frac{1}{2}$  biswas of *Tahirpur* mortgaged in that bond, and *Karim Bakhsh* because he had purchased the property mortgaged in the security-bond. The

plaintiffs claimed to recover the money by the sale of the property mortgaged in the bond, and also by the sale of the property mortgaged in the security-bond.

The lower Court (Subordinate Judge of Moradabad) dismissed the suit in respect of the heirs of Siraj-ud-din and the share of Amirpur Gangu mortgaged in the security-bond, and in respect of Musammat Dewa's  $6\frac{1}{4}$  biswas of Tahirpur, and decreed the rest of the claim.

The plaintiffs appealed to the High Court.

The other material facts of the case are stated in the judgment of the Court.

Pandit *Bishambar Nath*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

### JUDGMENT.

STRAIGHT and TYRRELL, JJ.—The following are the facts material to the determination of the questions raised by this appeal:—

On the 19th September, 1863, Musammat Ulfat-un-nissa, wife of Zain-ul-abdin, defendant No. 1, executed a bond in favour of Bhup Singh, plaintiff-appellant No. 1, hypothecating thereby 10 biswas of the village Tahirpur, which, for convenience, we will call bond No. 1.

On the 3rd May, 1872, Zain-ul-abdin and his son Ismail Husain made a bond for Rs. 2,000 in favour of Bhup Singh and Har Dyal Mal, plaintiff-appellant No. 2, hypothecating  $6\frac{1}{4}$  biswas of Tahirpur. This we will call the "joint bond." On the same date Siraj-ud-din Husain, the deceased husband of defendant No. 3, executed a surety-bond, guaranteeing Zain-ul-abdin's payment of the principal and interest borrowed, and as security charged certain mortgagor rights in mauza Amirpur Gangu.

On the 2nd December, 1872, Zain-ul-abdin made another bond in favour of Bhup Singh, plaintiff-appellant No. 1, in which he [208] hypothecated 10 biswas of Tahirpur, and this we will call bond No. 2.

On bond No. 1, Bhup Singh obtained a decree on the 16th January, 1866, and in execution of it, he, on the 20th November, 1872, brought the 10 biswas to sale, and they were bought by Zain-ul-abdin with money lent him by Bhup Singh.

On bond No. 2, Bhup Singh got a decree on the 6th February, 1877, and on the 20th July of the same year 10 biswas of Tahirpur were sold and purchased by Bhup Singh. On the 11th April, 1883, Bhup Singh sold those 10 biswas to Musammat Dewa, defendant-respondent.

The only questions with which we are concerned in the present appeal relate to  $6\frac{1}{4}$  biswas of the 10 biswas of Tahirpur in the hands of Musammat Dewa, and the right of the plaintiffs to enforce the surety-bond given by Siraj-ud-din against the 10 bis was of Amirpur Gangu; and a point as to costs. As to the former of these two matters, it may be convenient, first, to consider what effect the sale of the 20th November, 1872, under bond No. 1, and Zain-ul-abdin's purchase, had upon the joint bond of May, 1872. Now, though the suit of Bhup Singh, in 1866, was for enforcement of the lien created by bond No. 1, the decree he obtained was, as we read it, a simple money-decree, and Zain-ul-abdin's purchase under it, therefore, cannot be regarded as operating in defeasance of the joint bond. We think, therefore, that the sale of the 20th November, 1872, left the rights of the parties wholly unaffected *quoad* that instrument.

It next becomes necessary to consider the effect of the sale of the 20th July, 1877, under bond No. 2, and of Bhup Singh's purchase thereof

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of the 10 biswas of Tahirpur upon the joint bond. At that date 6½ biswas out of the 10 biswas were undoubtedly subject to the charge created by the joint bond; and we do not think it can seriously be denied that had Bhup Singh been the sole obligee of the instrument of the 3rd May, 1872, his purchase in enforcement of his subsequent charge of the 2nd December, 1872, would have satisfied and extinguished the earlier incumbrance. The question then is, does the fact of Har Dayal Mal being jointly interested with him under the joint bond alter the position? This [209] involves the point of how far one of two joint obligees is bound, in regard to the joint rights under a bond, by the acts of the other in respect to the joint contract. According to the terms of the instrument of the 3rd May, 1872, it is clear that the rights of the two obligees were joint and indivisible, and it cannot be denied that, in the absence of fraud, had the obligors, or either of them, paid the whole debt in cash to either of the obligees, such payment would have satisfied the bond, and could have been successfully pleaded in answer to any suit brought upon it. We cannot see that any distinction can properly be drawn between satisfaction obtained in this way and that secured, as in the present case, under the circumstances stated in regard to Bhup Singh's purchase of the 20 July, 1877. If, in the one instance, he can rightly be regarded as the agent of his co-obligee, and, as such, binding him equally, so is the principle applicable in the other; and we have no hesitation whatever in holding that the effect of Bhup Singh's purchase of the 10 biswas of Tahirpur upon the joint bond of the 3rd May, 1872, was as effectually to extinguish the joint incumbrance thereon as if Har Dayal Mal had been associated with him in buying it. It follows, as a necessary consequence, that when Bhup Singh sold the 10 biswas to Musammatt Dewa on the 11th April, 1883, they were free of all incumbrance under the joint bond, and that he passed to her a clean title which she can assert as a complete answer to the present suit in regard to the 6½ biswas of Tahirpur. We are of opinion, therefore, that as to the first question raised by this appeal, the Subordinate Judge was right, and the contention urged before us fails.

As to the second point, namely, the liability of the heirs of Siraj-ud-din to have the 10 biswas of Amirpur Gangu brought to sale, it is clear that that document was a guarantee for Zian-ul-abdin alone, and for any personal obligation by him under the joint bond. The present suit does not seek the enforcement of any such personal obligation against Zain-ul-abdin, probably for the best of all reasons, that any claim of that kind would be barred by limitation. But the prayer alone is for enforcement of lien, against the hypothecated property. The only right Bhup Singh and Har Dayal Mal had against Siraj-ud-din under his surety-bond was in respect of the personal default of Zain-ul-abdin to pay the bond [210] money; and it was only as to much personal default of their principal debtor that a cause of action could accrue to them as against the surety. That default, as we have said, occurred beyond the period of limitation within which a suit could have been maintained against Zain-ul-abdin for his personal failure to pay the money, and, being time-barred as to the principal debtor, is also barred in respect of the surety. This being so, had there been a claim in the plaint to obtain a decree personally against Zain-ul-abdin, the plea of limitation by which he could have defeated it would have been equally efficacious as regards the heirs of Siraj-ud-din. But no such claim is made in the plaint, and the obligation of the surety under this bond of the 3rd May being confined to the personal default of Siraj-ud-din, his heirs have been wrongly imported into the present

litigation, which alone seeks to enforce the hypothecation of the joint bond against the hypothecated property.

The only other matter which was incidently urged by the appellants' pleader had reference to the question of costs, and as to this we think there is some room for objection to the Subordinate Judge's decree. We consider that one set of costs was enough for the heirs of Siraj-ud-din Husain and the auction-purchaser from them of Amirpur Gangu, as their defences were identical, and that with regard to Musammat Dewa, the amount of her costs should be calculated on the value of the 6½ biswas of Tahirpur. We therefore to this extent decree the appeal with costs in proportion, and modify the decree of the Court below. As to the residue the appeal is dismissed with costs.

*Decree modified.*

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### CRIMINAL REVISIONAL.

*Before Sir John Edge, Kt., Chief Justice.*

QUEEN-EMPRESS v. RAHAT ALI KHAN. [30th November, 1886.]

Act I of 1879 (General Stamp Act), ss. 11, 16, 17, 18, 62, 69—*Instrument requiring to be stamped before or at time of execution—Non-cancellation of adhesive stamp—Sanction to prosecution.*

The first paragraph of s. 11 of the General Stamp Act (I of 1879) applies to cases in which the instrument chargeable with duty may be stamped after execution.

[211] A bill for the monthly salary of a Government official was sent to the Treasury for payment, when it was discovered that the one-anna receipt stamp affixed thereto was not cancelled, and a prosecution was thereupon instituted by the Collector against the official in question, who had executed the instrument, under s. 62 of the General Stamp Act. The accused was convicted under that section by the Deputy Magistrate, and the District Magistrate on appeal, holding that, upon the evidence, the conviction should have been for abetment and not for the principal offence, altered the finding accordingly to a conviction under s. 109 of the Penal Code, read with ss. 11 and 62 of the General Stamp Act.

*Held* that the receipt to the salary bill in question was an instrument which was required to be stamped before or at the time of execution, and was not of the kind contemplated by the first paragraph of s. 11 of the General Stamp Act; that consequently there was no abetment of any offence under ss. 11 and 62 of the Act; that the offence which appeared to have been committed was one under the 2nd paragraph of s. 61; but that, no sanction having been given by the Collector under s. 69 for a prosecution under s. 61 it was not advisable to interfere further than by setting aside the conviction and sentence.

[R., 1 L.B.R. 281 (283).]

THE petitioner for revision in this case was Rahat Ali Khan, the Assistant Commissioner and Deputy Collector of Kheri. On the 19th July, 1886, he sent his salary bill for June, amounting to Rs. 250, to the Moradabad Treasury, for payment, through his nephew, Alimud-din Khan. The bill was presented to a clerk, who discovered that the one anna receipt stamp affixed thereto was not cancelled, and he reported the matter to the Collector, who instituted a prosecution against the petitioner under s. 62 of Act I of 1879 (General Stamp Act). The case was tried by the Deputy Magistrate of Moradabad. The defence was, that the accused did not affix the stamp on the bill, and was therefore not responsible for its not being cancelled; but that, having executed the instrument, he made

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it over to his nephew without the stamp being affixed, for the purpose of cashing it at the Treasury, at the same time directing his nephew to affix a stamp before presenting the bill. Alim-ud-din Khan deposed that he was directed by the accused not to cancel the stamp until he had ascertained from the Treasury that the bill was drawn up in proper form, so that if the bill were not in proper form the stamp should not be spoiled.

The Deputy Magistrate convicted the accused of an offence under s. 62 of the General Stamp Act, observing as follows:—"The chief thing is to see—(i) as to who executed the instrument in question, and (ii) at what time it was required by the law to be stamped. As to the first, it has been fully admitted by the defence itself that [212] the accused himself executed it; and as to the second point, s. 16 of Act I of 1879, clearly provides that "all instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution." From the above it is quite evident that the stamp should have been affixed at the execution of the bill, and cancelled then and there as required by s. 11 of Act I of 1879, and for any deviation from this rule the accused himself is responsible." The Magistrate inflicted a fine of Rs. 25.

The accused appealed to the District Magistrate of Moradabad. The District Magistrate was of opinion that, upon the evidence, the accused should have been convicted of abetment, and not as a principal, and altered the finding accordingly to a conviction under s. 109 of the Penal Code, read with ss. 11 and 62 of the General Stamp Act, reducing the fine to Rs. 15.

The accused applied to the High Court for revision of this order. It was contended on his behalf that there was no evidence of abetment of any offence made punishable by s. 62 of the General Stamp Act.

Mr. *W. M. Colvin*, for the petitioner.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

### JUDGMENT.

EDGE, C. J.—By s. 16 of the Stamp Act, 1879, it is provided that "all instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution."

Ss. 17 and 18 provide for the stamping of documents executed or drawn out of British India.

It appears to me that the first paragraph of s. 11 applies to cases in which the instrument chargeable with duty may be stamped after execution.

The receipt to the salary bill in question in this case was an instrument which required to be stamped before or at the time of execution, and was not an instrument contemplated by the first paragraph of s. 11. I am consequently of opinion that there was no abetment of any offence under ss. 11 and 62 of the Act.

The offence which appears to have been committed was one under the second paragraph of s. 61. As it does not appear that [213] any sanction was given under s. 69 by the Collector for a prosecution under s. 61, I do not consider it advisable to interfere further than by setting aside the conviction under s. 109 of the Penal Code and s. 62 of the Stamp Act, and directing that the fine, if realized, be refunded. It does not appear to me that Rabat Ali Khan contemplated the commission of any offence.

*Conviction set aside.*

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## APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

SAHIB-UN-NISSA BIBI (*Defendant*) v. HAFIZA BIBI (*Plaintiff*).\*HAFIZA BIBI (*Plaintiff*) v. SAHIB-UN-NISSA BIBI (*Defendant*).\*

[3rd and 5th January, 1887.]

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*Pension—Act XXIII of 1871 (Pension Act), s. 7—Pension for land held under grants in perpetuity—Assignment—Suit against drawer of pension to establish right to share—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 127, 131—Muhammadian law—Gift—"Musha"—Undivided part—Ascertained share—Transfer of possession—Mutation of names—Delivery of title-deeds—Act VI of 1871 (Bengal Civil Courts Act), s. 24.*

A pension of the nature described in Act XXIII of 1871 (Pensions Act), s. 7, clause (2), was drawn by a Muhammadian, in whose name alone it was recorded in the Government registers, for himself and the other members of his family, who, up to the time of his death, received their shares from him. Shortly before he died, he executed a deed of gift in favour of his wife, which purported to assign to her the whole pension. No mutation of names was effected in the Government registers, but the deed of gift and the *sanads* in respect of which the pension had originally been granted were handed over to the donee. After the death of the donor, one of his sisters brought a suit against his widow to establish her right (i) to receive the share in the pension which she had inherited from her father and received up to her brother's death, and (ii) as heir to her brother himself, to the share which he had inherited. It was contended on her behalf that the deed of gift was in any case ineffectual as an assignment of more than the donor's own interest, and further that it was invalid even as an assignment of his own share, inasmuch as under the Pensions Act the pension could not be made the subject of gift, and under the Muhammadian law it was "*musha*" and not transferable, and actual delivery or transfer of possession was, under the same law, essential to the completion of the gift, but no such delivery or transfer had been effected. In defence it was pleaded (*inter alia*) that the suit was barred by limitation.

[214] Held that it was doubtful whether in such a case and as between such parties the Limitation Act would be applicable at all; but that, assuming it to be so, either art. 127 or art. 13 of the 2nd schedule should be applied, and, the plaintiff having received her share within twelve years, the suit was brought in time.

Held that the deed of gift was not a good assignment in law of the interest of the plaintiff, who was not a party thereto, and the defendant could take nothing more than the donor's own interest.

Held that, whatever might be the Muhammadian law apart from the Pensions Act, under s. 7 of the Act the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid.

Held that there was no force in the contention that the gift became void because the right was not divided, inasmuch as in the case of a right to receive a pension the rights of the individuals who are the heirs become at once divided and separate at the death of the sole owner; and in this case the share were definite and ascertained and required no further separation than was already effected upon the sole owner's death.

Held that the rule of the Muhammadian law as to the invalidity of gifts purporting to pass more than the donor was entitled to, was based upon the principle of *musha* or undivided part, and had no application to cases where the donor's interest itself was separate; and that even if it were the strict Muhammadian law that where a man having a definite ascertained interest in a pension,

\* Second Appeals Nos. 262 and 367 of 1886, from the decrees of F. E. Elliot, Esq., District Judge of Allahabad, dated the 29th September, 1885, confirming the decrees of Babu Abinash Chandra Banerjee, Subordinate Judge of Allahabad, dated the 8th September, 1884.



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and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, he failed to give her any interest at all, s. 24 of the Bengal Civil Courts Act (VI of 1871) did not make it obligatory to apply the strict Muhammadan law as to gifts in transactions of modern times. [N.W.P. H.C.R. 1874, p. 2, R.]

Held that although, according to the Muhammadan law, possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, possession of a right to receive pension could only be given by handing over the documents of title connected with the pension, or assigning the right to receive the pension; that the gift in this case was perfect as soon as the deed was executed and handed over with the other papers to the donee; and that the mutation of names was merely a thing which would follow on the perfection of the title, and did not in itself go to make or form part of the title.

[R., 5 Bom. L. R. 355; D., 11 A. 1.]

THESE were two second appeals from a decree of the District Judge of Allahabad, dated the 29th September, 1886, the appellant in one case being the defendant in the suit Sahib-un-nissa Bibi, and in the other the plaintiff Hafiza Bibi. The suit was brought by the plaintiff to establish her right to receive a share in a pension which was payable by Government, and which had originally been granted by the Kings of Delhi to the ancestors of the plaintiff's father, Waji-ullah, as an indemnity for loss sustained by the resumption of lands held under *sanads* purporting to grant them in perpetuity. [215] Waji-ullah had two daughters, one of whom was the plaintiff, and two sons, named respectively Abdullah and Abdul Rahman. The defendant, Sahib-un-nissa, was Abdul Rahman's widow. After the death of Waji-ullah, the pension was drawn by his sons, and after the death of Abdullah by Abdul Rahman, in whose name it was recorded in the Government registers. On the 22nd April, 1878, Abdul Rahman executed a deed of gift in favour of his wife, the defendant, purporting to assign to her the whole pension. No mutation of names in respect of the pension was effected in favour of the defendant, but the deed of gift and the *sanads* were handed over to her. Abdul Rahman died in May, 1879, and the present suit was instituted in December, 1883.

The plaintiff alleged that, although the pension was recorded in the Government registers in the name of Abdul Rahman only, she and the other heirs of Waji-ullah used to receive their shares from him, up to the time of his death, but that since that time they had received nothing. It was contended on her behalf that the deed of gift of the 22nd April, 1878, was not only ineffectual as an assignment of the shares of the heirs of Waji-ullah other than Abdul Rahman, but was wholly invalid even as an assignment of Abdul Rahman's own share. It was urged that, under the rules of the Muhammadan law, the pension was "*musha*" and could not be made the subject of gift, and that, under the same law, actual delivery or transfer of possession was essential to the completion of the gift, and no such delivery or transfer on the part of the donor had been effected. Upon these grounds the plaintiff claimed to establish her right (i) to the share in the pension which had devolved upon her as an heir of Waji-ullah, and (ii) as heir to her brother, Abdul Rahman, in respect of the share which had devolved upon him. The defendant maintained the entire validity of the deed of gift, and alleged that Abdul Rahman had been in sole and exclusive enjoyment of the whole pension for more than twelve years and the suit was therefore barred by limitation.

The Court of first instance (Subordinate Judge of Allahabad) found that the plaintiff had received and enjoyed her share of the pension up to the death of Abdul Rahman, and accordingly held that the suit was

within time. It also held that the deed of gift of the 22nd April, 1878, was ineffectual so far as concerned the rights [216] of Waji-ullah's heirs other than the donor. To the extent, therefore, of declaring the plaintiff's right as one of such heirs to receive a share in the pension, the Court decreed the suit. So far, however, as concerned Abdul Rahman's own share, it held that the deed of gift was valid, that the share passed to the defendant, and that the plaintiff had no claim by inheritance in respect of that share. To this extent therefore the suit was dismissed.

Both parties appealed to the District Judge of Allahabad, who dismissed both appeals. Each preferred a second appeal to the High Court. That of the defendant was first heard and judgment upon it first given.

The Hon. Pandit *Ajuāhia Nath*, Mr. *J Simeon*, and Lala *Lalta Prasad*, for the appellants.

The Hon. *T. Conlan* and Mr. *Amiruddin*, for the respondents.

EDGE, C. J.—This is an appeal against the judgment of the Judge of Allahabad, who confirmed the decree of the Subordinate Judge. The action was one for the establishment of the plaintiff's right to receive a share in a pension which is payable by the Government, and which was originally granted by the Kings of Delhi to particular persons. A portion of the case of the defendant was that Abdul Rahman, in 1879, was in receipt of the whole pension, although only entitled to receive a portion of it; and was, *de facto*, receiving the whole of it, and that he assigned the whole to his wife. It is contended that the assignment was a good assignment in law of the interest of the plaintiff who was not party to that assignment. I do not understand that contention. The Judge is quite right in holding that Abdul Rahman could assign nothing more than his own interest. He had no power to assign, and his assignee could take nothing more than, his interest.

As regards the statute of limitation, I feel considerable doubts whether in a case of this kind, and between parties such as are here, that statute would apply at all. This is not a sum of money which was payable by one person to another. It is merely a right of several persons to draw their respective shares of pension from the Government. It appears to me that if the statute were applicable, it would be applicable in the hands of the person who had to pay. Even if it does apply to the present parties, then of all the [217] articles enumerated in sch. ii of the Limitation Act, we should apply either art. 127 or art. 131, in which the period is twelve years. The Judge in his judgment has found that the plaintiff did receive her share within that time, and that finding of fact is sufficient to take this case out of the Limitation Act. For these reasons I am of opinion that the appeal should be dismissed with costs.

BRODHURST, J.—I entirely concur with the learned Chief Justice in dismissing the appeal with costs.

The appeal of the plaintiff was then heard. The grounds stated in the memorandum of appeal were as follows :—

"1. The gift of pension alleged to have been made by Abdul Rahman to his wife Sahib-un-nissa is void under the Muhammadan law—

"(a) Because it is a gift of '*musha*.'

"(b) Because there was no delivery or *seisin*.

"(c) Because the donor had not entirely relinquished his right in the pension.

"(d) Because the gift included shares which did not belong to the donor.

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"2. The right to receive a pension from the Government is not transferable by gift under the Muhammadan law.

"3. The assignment of pension is void under the provisions of Act XXIII of 1871."

The Hon. *T. Conlan* and Mr. *Amiruddin*, for the appellant.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the respondent.

#### JUDGMENT.

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EDGE, C.J.—This is an appeal from the judgment of the Judge of Allahabad, who decided that Abdul Rahman's share in the pension which had been given by the Native Government had passed to the defendant, Musammât Sahib-un-nissa Bibi.

In appeal every possible point has been taken by Mr. *Amiruddin*. He has alleged that a pension cannot be a subject of gift; he says also that the gift became void because the subject-matter of it was not divided, *i.e.*, the right to receive pension was not divided. He also says the gift was bad because Abdul Rahman [218] purported to give the whole right to receive the pension when he was only entitled to receive a portion of it; and that the gift was not perfect, and was invalid according to Muhammadan law, because Abdul Rahman did not cause mutation of names in the Government register. Mr. *Amiruddin* further argued that the mutation of names was essential to the validity of the alleged gift. I think, broadly speaking, the points I have mentioned above cover all the points of law which Mr. *Amiruddin* has raised before us.

Now, to deal with them in the order I have just mentioned, it is necessary to consider whether a pension can be a subject of gift between the Muhammadans. With regard to that, we ought to see what this pension was. It was, to use the language of the words of s. 7 of the Act XXIII of 1871, "an indemnity for loss sustained by the resumption by a Native Government of lands held under *sanads* purporting to confer a right in perpetuity." It was not a pension in the ordinary acceptance of the term, but it was what was contemplated by s. 7 of the Indian Pensions Act. By that section, which enacts the law for the Muhammadans as well as the Hindus, it is enacted that "every such pension shall be capable of alienation and descent." A "gift" is an "alienation" as much as is a "sale." Therefore I am of opinion, whatever the Muhammadan law may be apart from the Pensions Act, that under that section this pension, or any interest in it, was capable of being alienated by Abdul Rahman by way of gift. I also might say that if Mr. *Amiruddin's* arguments were correct, there could be no gift of the right to take tolls at bridges and ferries. According to his contention, until the cash was payable or paid, there could be no gift of the tolls. In my judgment, it is the right to have the pension paid which was the subject of the gift in a case of this kind, and not the cash. So much, therefore, for the contention that a pension cannot be a subject-matter of gift.

The next point which Mr. *Amiruddin* takes is that the gift becomes void because the right was not divided. I really do not understand what the meaning of that is. That contention arises from confusing the case of this kind of a right to receive a pension with the case of a bale of cloth, or a piece of land, or a house. In the case of a right to receive a pension, the rights of the individuals [219] who are the heirs become at once divided and separate at the death of the sole owner. Thus, if there were three heirs entitled to one-third each, one becomes entitled at once to his share, namely, one-third, on the death of the ancestor, and there arises

no necessity of partition in such a case. That argument fails because, as a matter of fact, in my opinion, the subject-matter of the gift was already divided.

Mr. *Amiruddin* also contends that the whole gift was void because Abdul Rahman purported to give more than he was entitled to. He has cited the *Tagore Law Lectures* for 1884, p. 84, and Macnaghten's *Principles of Muhammadan Law*, Chapter IV, in support of that contention. Mr. Amir Ali, at page 84 of his *Lectures*, says:—"If one should give a mansion, of which possession is taken, and a right then established in a part of it, the gift is void. And if one should give land with the crop on it, or a tree with the fruit on it, and make delivery of both, and a right should then be established in the crop or the fruit, the gift in the land or tree is void. A person makes a gift of his land with the crop on it, and cuts and delivers the crop, after which a right is established in one of them, the gift is void as to the other." Now with regard to the above cases, it has been correctly pointed out by Pandit *Sundar Lal* that the text lays down no such proposition of Muhammadan law as that contended for by Mr. *Amiruddin*. He really tries by arguing from those cases to establish a novel principle in Muhammadan law not found in the text. What seems to have been before the learned lecturer was the question of a gift vitiated by *musha*, and the cases which were cited by Mr. *Amiruddin* were merely the cases of *musha*. Therefore I consider, so far as that is concerned, they do not establish Mr. *Amiruddin*'s point. He relies also open Chapter IV of Macnaghten's *Principles of Muhammadan Law*. He refers us to the marginal note to reply No. 2 at page 200:—"A gift of more than the owner's right is void, but a sale is void to the extent of the right." That note appears to me to be framed in very confused language, and, looking at it cursorily, one would take it as laying down that where a man gives more than he is entitled to give, the whole gift is void. The text of the question No. 2, to which this reply relates, is:—"If any one of the widows or their heirs should dispose of a portion of the land which belonged to their deceased husband, by [220] gift or sale, would such sale or gift be valid to any extent?" That reply, therefore, relates to the special persons referred to in the above question, and does not lay down a general proposition of law. Then again it seems to me to be based upon the same principle as is referred to in the *Tagore Law Lectures*, i.e., the principle of *musha* or undivided part, and not to cases like this, where the interest itself is separate. Even if it were the strict Muhammadan law that in a case such as this, where a man gives more than he is entitled to, the whole gift becomes void, there is a ruling of this High Court—*Shumshool-nissa v. Zohra Beebee* (1), to the effect that s. 24 of the Bengal Civil Courts Act (VI of 1871) does not compel us to apply the strict Muhammadan law in cases of gift in transactions of modern times. I should be very loth to hold in a case of this kind, in which a man having a definite ascertained interest in a pension and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, that he failed to give her any interest at all.

The last point which Mr. *Amiruddin* contends is, that the gift was not perfected by possession. It appears to me quite clear that, according to Muhammadan law, possession is necessary to make a gift perfect, where the nature of the transaction is such that possession is possible. But how can possession be given of a right to receive pension unless it

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is by handing over the documents of title connected with the pension, or assigning the right to receive the pension? In this particular case it is admitted that Abdul Rahman did execute a deed of gift, assigning certainly the whole pension, but which was quite sufficient to cover his own interest. In addition, it might be mentioned that he was actually in receipt of the whole pension, and he seems to have had in his possession certain papers or *sanads* and coupons that would be presented to Government at the time of receiving the pension. He handed over to his wife the deed and the papers or *sanads*, and it appears to me that he there and then made a perfect gift, and gave a perfect title to the right to receive the pension, so far as his interest in it extended. Mr. *Amiruddin* is forced to contend, for the purposes of his case, that the gift was not perfect, as there was no mutation of names in the treasury register; and that in a case of this kind the effecting [221] of a mutation of names in the registers would be equivalent to giving possession. I asked him to point out any law from which such a proposition could be inferred, and he failed to do so. The gift, it appears to me, was perfect as soon as the deed was executed and handed over with the papers to the donee. The mutation of names was merely a thing that would follow on the perfection of the title, and does not in itself in any way go to make the title or form part of the title. In my opinion Abdul Rahman did comply with all the requirements of the Muhammadan Law by making the deed and handing it over to his wife. In connection with this, I may also refer to Baillie's *Digest of Muhammadan Law*, p. 517:—"The confusion that invalidates a gift is one that is original, not supervenient, as, for instance, when one has given the whole of a thing, and subsequently revokes a half or other undivided share of it, or a right is established to a half or other undivided share of it, the gift is not invalidated as to the remainder." In this particular case those shares were definite and ascertained, and did not require any further separation than was already effected upon the death of the sole owner.

Under these circumstances, I think the judgment of the Court below is right, and the appeal must be dismissed with costs.

BRODHURST, J.—I entirely concur with the learned Chief Justice in dismissing the appeal with costs.

*Appeals dismissed.*

9 A. 221=7 A.W.N. (1887) 31.

#### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

KISHNA RAM (*Plaintiff*) v. RAKMINI SEWAK SINGH AND OTHERS  
(*Defendants*)\*. [5th January, 1887.]

*Joint liability—Contribution—Joint tort-feasors—Misjoinder—Civil Procedure Code, s. 44, r. b.*

An objection to the attachment and sale of certain immoveable property, raised by one who claimed to have purchased the same at a sale in execution of a prior decree, was disallowed on the ground that, under the prior decree, the rights of one only of the present judgment-debtors had been sold and purchased by the objector. In accordance with this order, two-thirds of the property under attachment were sold; and the objector thereupon brought a regular suit

\* Second Appeal No. 244 of 1886 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 15th September, 1885, confirming a decree of Babu Nihal Chandra, Munsif of Azamgarh, dated the 19th May, 1885.

for a declaration of his right as a purchaser of the whole property in execution of the prior decree. To this suit he impleaded as defendants the decree-holder and the judgment-debtors. [222] The suit was decreed, and in the result the decree-holder alone was compelled to pay the whole of the costs. Subsequently he brought a suit for contribution in respect of these costs, making defendants to the suit (i) *R*, one of his co-defendants in the previous suit, personally and as heir of *A*, who was another of those co-defendants (ii), *N*, and (iii) *S*, these two being sued in the character of heirs of *A*.

*Held* that inasmuch as the rule preventing one wrong-doer from claiming contribution against another was confined to cases where the person seeking relief must be presumed to have known that he was acting illegally, and in this case there was no evidence to show that the plaintiff in attaching and advertising the property for sale in execution of his decree knew he was doing an illegal act, but the inferences were all the other way, he was fully entitled in law to maintain the suit, and to recover from the defendants the proportionate amount of the costs which he had to pay for them. *Merryweather v. Nizan* (1), *Adamson v. Jarvis* (2), *Dizon v. Fawcus* (3), and *Supul Singh v. Imrit Tewari* (4), referred to.

*Held*, with reference to a plea of misjoinder within the terms of rule (b) of s. 44 of the Civil Procedure Code, that even if there were misjoinder of parties, the first Court, having proceeded to trial of the suit, and not having rejected the plaint or returned it for amendment, or amended it, should have disposed of it upon the merits, and found what *A*'s share in the amount paid by the plaintiff was, and whether assets to that amount had come to the hands of the defendants as her heirs.

[*R.*, 13 C.P.L.R. 23; 11 C.L.J. 503 (506) — 14 C.W.N. 849 (853) = 37 C. 559 (567).]

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of the Court.

Munshi *Sukh Ram*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

### JUDGMENT.

STRAIGHT and BRODHURST, JJ.—On the 16th September, 1880, Hingu Lal and others sued—(1) Kishna Ram, plaintiff in the present suit, (2) Rai Rakmini Sewak Singh, (3) Musammat Ati Kuar, (4) Musammat Rajuat Kuar, for declaration of their right as auction-purchasers at sale in execution of a decree obtained by them on the 12th March, 1874, upon a bond made in their favour by one Ajudhia Prashad Singh, ancestor and manager of the joint property of himself and Rai Rakmini Sewak Singh, Musammat Ati Kuar, and Musammat Rajuat Kuar. On the 28th August, 1874, Kishna Ram, plaintiff in the present suit, got a decree on a bond made in his favour by Ajudhia Prasad Singh, Narsingh Sewak, Musammat Ati Kuar, and Musammat Rajuat Kuar, and, in execution, advertised for sale four of the immoveable properties which Hingu Lal and others had bought in execution [223] of their decree. Consequently these latter persons objected in the execution department, but their objections were disallowed on the 17th September, 1879; and it being held that only the right of Ajudhia Prasad Singh had been brought to sale and passed to them at the sale under the decree of the 12th of March, 1874, Kishna Ram was allowed to sell two-thirds, which represented the interests of Musammats Ati Kuar and Rajuat Kuar. It was upon the basis of these last-mentioned facts and certain action taken by Musammats Ati Kuar and Rajuat Kuar in the mutation of names department that Hingu Lal and others brought the suit of the 16th September, 1880. Their claim was decreed by the Subordinate Judge of Azamgarh, and his decree, with a modification upon the matter of costs, was upheld by this Court. In the result, Kishna Ram was compelled to pay the

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(1) 2 Smith's L.C. 5th Ed., p. 456.

(3) 30 L.J. Q.B. 137.

(2) 4 Bing. 66.

(4) 5 O. 720.



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whole of the costs, amounting to Rs. 822-5, and he now sues—(1) Rakmini Sewak Singh for himself and as heir of Musammatt Ati Kuar, (2) Rai Narsingh Sewak, and (3) Ramanuj Sewak, in the character of heirs of Ati Kuar, for two-thirds of that amount, namely, Rs. 548-3-4 and interest Rs. 101-11-8, or in all Rs. 649-15.

The only objections with which we need concern ourselves in appeal that were taken by the defendants were—*first*, that the claim against the defendants had been misjoined, looking to the terms of rule *b* of s. 44 of the Civil Procedure Code; and *secondly*, that Kishna Ram and the defendants having been joint tort-feasors in respect of the matters out of which the suit of Hingu Lal and others, and in which the costs were recovered, arose, he could not require a contribution from them. The first Court found for the defendants on the plea of misjoinder, but did not specifically dispose of the other questions, and dismissed the suit. The plaintiffs appealed, and the Judge disposed of the case in these terms:—"In this Court the decree in the former suit has been produced, and as it turns out to have been, as defendants say, for trespass, plaintiff cannot obtain contribution. Besides this, I agree with the lower Court that there is misjoinder of defendants." This is a very summary and far from satisfactory method of dealing with two difficult legal questions, and it has not unnaturally led to an appeal to this Court. The first point to be determined is whether the suit, upon the facts we have stated, lies; and next, if it does, whether [224] it is bad for misjoinder. With regard to the former of these two questions, it is, no doubt, a well-known legal truism that "no action for contribution is maintainable by one wrong-doer against another, although the one who claims contribution may have been compelled to satisfy the whole damages arising from the tort committed by them both."—*Merryweather v. Nixan* (1). But this rule has this limitation, that it "is confined to cases where the persons seeking redress must be presumed to have known that he was doing an unlawful act."—Best, C.J., in *Adamson v. Jarvis* (2). A case which illustrates the method in which the principle is to be applied is that of *Dixon v. Fawcus* (3), a reference to which is to be found on page 170 of Smith's L. C. Adapting it to the circumstances of the present case, it is obvious that there is no evidence to show that the plaintiff, in attaching and advertising the four villages for sale in execution of his decree against Ajudhia Prasad, knew he was doing an illegal act—indeed, the inferences are all the other way. Consequently he was, in our opinion, fully entitled in law to maintain the present suit, and to recover from the defendants the proportionate amount of the costs which he had to pay for them—*Suput Singh v. Imrit Tewari* (4). In using the term defendants, we mean as against Rakmini Sewak personally and as heir of Ati Kuar, and against Narsingh Sewak and Ramanuj Sewak as heirs of Ati Kuar.

As to the second question, even if there was misjoinder of parties, the Munsif, having proceeded to trial of the suit, and not having rejected the plaint or returned it for amendment, or amended it, should have disposed of it upon the merits, and found what Ati Kuar's share in the amount paid by the plaintiff was, and whether assets to that amount had come to the hands of the defendants as her heirs. As the learned Judge in appeal eventually disposed of the case on a preliminary point, we remand it to him under s. 562 of the Code for determination on the merits with advertence to our remarks. Costs will be costs in the cause.

*Cause remanded.*

(1) 2 Smith's L. C. 5th Ed., p. 456.  
(3) 30 L.J. Q.B. 137.

(2) 4 Bing. 66.  
(4) 5 C. 720.

9 A. 225=7 A.W.N. (1887) 39.

## [225] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*SHEOPARGASH DUBE (*Defendant*) v. DHANRAJ DUBE AND  
OTHERS (*Plaintiffs*).<sup>\*</sup> [6th January, 1887.]*Pre-emption—Purchase-money—Evidence—Burden of proof.*

In suits for pre-emption, where the amount of the consideration for the sale is in dispute, the rule as to the burden of proof is that, in the first instance, the plaintiff who alleges the price stated in the deed of sale to be fictitious must give some *prima facie* evidence leading to the presumption that the price so stated was not the true price. Having done that, it then lies upon the vendor and vendee to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. In the majority of cases the only *prima facie* evidence which the plaintiff pre-emptor could produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious, or else evidence showing that the market value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged price was not the real price.

Where the price stated in the deed of sale was nearly five times the market value of the property sold, and the purchaser gave no explanation showing why he was willing to buy the property at a price apparently so extravagant—held that there was sufficient evidence upon which to find that the price alleged in the contract was fictitious.

*Bhagwan Singh v. Mahabir Singh* (1) followed.

[F., 29 A. 618=A.W.N. (1907) 202=4 A.L.J. 531; R., 9 A. 471.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Edge, C.J.

The Hon. Pandit *Ajudhia Nath* and *Lala Juala Prasad*, for the appellant.

Mr. *G. T. Spankie* and Mr. *Habib-ullah*, for the respondents.

## JUDGMENT.

EDGE, C.J.—This is an appeal from the judgment of the Judge of Gorakhpur, dated the 22nd December, 1885, by which he modified the judgment of the Court below. This was a pre-emption suit, and the Judge of Gorakhpur, in appeal, held that the value of the property is only Rs. 250, and that the price set out in the sale-deed was a fictitious price. In second appeal we have to consider whether there was evidence upon the record from which the Judge of Gorakhpur could have arrived at that conclusion. On the question of burden of proof in these cases I have one or two observations to make. It appears to me that in these [226] cases the rule expressed in the judgment delivered by my brother Brodhurst and Mr. Justice Mahmood in *Bhagwan Singh v. Mahabir Singh* (1) is a correct rule to follow. That rule is that, in the first instance, the plaintiff, who alleges the price to be fictitious, must give some *prima facie* evidence which would lead to the presumption that the price mentioned in the sale-deed was not the real or true price. Having done that, it lies upon the vendor and vendee, who set up the price as true and genuine, to

<sup>\*</sup> Second Appeal No. 280 of 1886 from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 22nd December, 1885, reversing a decree of Moulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 24th June, 1885.

(1) 5 A. 184.

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give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. As a general rule, how can that be done? The plaintiff in a case of this kind would not be a party to the transaction out of which the sale to the stranger arose. He would not, as a rule, have any actual knowledge of what the real price was. In the majority of cases, the only *prima facie* evidence which the plaintiff-premptor could produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious, and this could only happen in rare cases, or evidence showing that the market-value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged contract price was not the real price. In this particular case, assuming that the Judge of Gorakhpur was right in finding that the market-price was Rs. 250; we find that the contract price was very nearly five times that amount; in other words, that instead of this property being sold at about sixteen years' purchase, it was alleged to have been sold at something like eighty years' purchase. I think these circumstances would naturally lead the Judge to infer that the defendant-purchaser should be called upon to give some reason why he was willing and prepared to sacrifice his money in order to buy this property at a price apparently so extravagant. The defendant-purchaser might possibly have shown that there was some special reason why he was willing to give so large a price in order to buy a share in that particular village, as, for instance, that he was, from the propinquity of other property of his, desirous of obtaining the status of a co-sharer in that particular village; or that he was doubtful of the stability of his debtor, the vendor, and so purchased this property, even at a heavy sacrifice, in order to [227] obtain something tangible in the way of payment. In fact, many other reasons might possibly be given to satisfy the Judge that the transaction, although *prima facie* a questionable and doubtful one, was a genuine transaction. In this particular case the defendant relied simply upon two bonds. It appears to me that those bonds did not re-shift the burden of proof upon the plaintiff, and that the production of the bonds was only one of the steps the purchaser should have taken in attempting to satisfy the Judge that the alleged price was the real one. He ought to have explained how it was that he was willing to forego some twelve hundred and odd rupees in order to obtain a property worth Rs. 250 only.

In my opinion, looking to the fact that the defendant gave no explanation at all of the circumstances under which he was willing to give five times its market-value for the property, there was sufficient evidence before the Judge of Gorakhpur upon which to find that the alleged contract price was a fictitious and not a genuine price. As to the market price there was certainly evidence before the Judge. It appears that, with the consent of the parties, the *pattidari* statements and other documents put in evidence in one case were to be treated as evidence in all the cases. It appears from them that a two pies share is equal to eight bighas, the value of which, calculated at Rs. 30 per bigha, will be about Rs. 240. In confirmation of this the plaintiff produced two sale-deeds, one of 1881, in which another sharer in this village had sold is two and one-third pies share for Rs. 199, and the other of March, 1884, by which a one and a half pies share of this village, being valued at Rs. 200, was exchanged. If I had decided the case, I would not have solely relied upon these deeds, but they were confirmatory evidence of the conclusion at which the Judge had arrived from the *pattidari* statements.

I am therefore of opinion that there was sufficient evidence before the Judge to entitle him to come to the conclusion he did. The appeal is dismissed with costs.

BRODHURST, J.—For the reasons stated by the learned Chief Justice I concur with him in dismissing the appeal with costs.

*Appeal dismissed.*

9 A. 228 = 7 A.W.N. (1887) 19.  
[228] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

MADHO SINGH AND OTHERS (*Defendants*) v. KASHI RAM  
(*Plaintiff*).<sup>\*</sup> [10th January, 1887.]

*Bond—Compound interest—Unconscionable bargain.*

In a suit for the recovery of a principal sum of Rs. 99 due upon a bond, with compound interest at 2 per cent. per mensem, it was found that advantage was taken by the plaintiff of the fact that the defendant was being pressed in the tahsili for immediate payment of revenue due, to induce him to execute the bond, charging compound interest at the above-mentioned rate, notwithstanding that ample security was given by mortgage of landed property. It was also found that although, under the terms of the bond, the plaintiff had power to enforce the same at any time by bringing to sale the mortgaged property, he had wilfully allowed the debt to remain unsatisfied, in order that compound interest at a high rate might accumulate.

*Held* that the bargain was a hard and unconscionable one, which the Court had undoubted power to refuse to enforce, and which, under all the circumstances, it would be unreasonable and inequitable for a Court of justice to give full effect to; and that, under the circumstances, compound interest should not be allowed. *Kamini Sundari Chaudhrani v. Kali Prosunno Ghose* (1), *Beynon v. Cook* (2), and *Lalli v. Ram Prasad* (3) referred to.

The Court decreed the principal sum of Rs. 99, with simple interest at 24 per cent. per annum up to the date of institution of the suit.

[*Dis.*, 31 C. 233; *R.*, 32 P.R. 1890; 8 O.C. 193 (195); 25 A. 284; 29 A. 303 = A.W.N. (1907) 55 = 4 A.L.J. 222; 7 A.L.J. 591 (597) = 6 Ind. Cas. 203 (204); 32 B. 208 = 9 Bom. L.R. 1296; 17 C.L.J. 221 = 18 Ind. Cas. 965; *D.*, 29 C. 823.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Munshi *Hanuman Prasad* and Munshi *Madho Prasad*, for the appellants.

Babu *Ram Das Chakarbaty*, for the respondent.

JUDGMENT.

OLDFIELD and TYRRELL, JJ.—This suit was instituted on the 27th July, 1885, to recover a sum of Rs. 679-14, due on a mortgage-bond of the 15th August, 1876.

The Courts below have decreed the claim, and the question in appeal is how far the defendant is liable for interest on the principal sum.

The principal sum lent was Rs. 99, with compound interest at 2 per cent. per mensem, and we are of opinion that, under the circumstances, compound interest should not be allowed. We understand that the defendant was being pressed in the tahsili for [229] immediate payment of

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\* Second Appeal No. 357 of 1886 from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 19th November, 1885, confirming a decree of Maulvi Muhammad Abdul Ghafor, Munsif of Pilhar, dated the 13th August, 1885.

(1) 12 C. 225. (2) 10 Ch. App. 339. (3) 9 A. 74.



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9 A. 228=  
7 A.W.N.  
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revenue due, and advantage was taken of this circumstance to induce him to execute the bond, charging compound interest at the high rate of Rs. 24 per cent. per annum, notwithstanding that ample security was given by mortgage of landed property for the small sum advanced. Moreover, under the terms of the bond, the plaintiff had power to enforce the bond at any time by bringing to sale the mortgaged property. Instead of doing so, he has wilfully allowed the debt to remain unsatisfied, in order that compound interest at this high rate should accumulate.

The bargain seems to us a hard and unconscionable bargain, which, under all the circumstances, it would be unreasonable and inequitable for a Court of justice to give full effect to.

That a power lies in the Court to refuse to give effect to such transactions is undoubted and rests on authority, and we may refer to the case of *Kamini Sundari Chaodhrani v. Kali Prosunna Ghose* (1) decided by the Privy Council, and the case therein cited of *Beynon v. Cook* (2). A similar principle was laid down in the decision of a Bench of this Court in *Lalli v. Ram Prasad* (3).

We modify the decree of the Courts below, and decree the principal sum of Rs. 99, with simple interest at Rs. 24 per cent. per annum up to the date of institution of the suit, with proportionate costs.

*Decree modified.*

9 A. 229=7 A.W.N. (1887) 19.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*

MOHIBULLAH (*Plaintiff*) v. IMAMI AND OTHERS (*Defendants*).<sup>\*</sup>  
[11th January, 1887.]

*Compromise of suit awarding the plaintiff more than amount claimed—Consent of Parties—Execution of decree limited to amount claimed—Suit for larger amount awarded in compromise—Question for Court executing decree—Civil Procedure Code, s. 244.*

By consent of the parties and the leave of the Court a suit may be amended to cover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land than that originally asked for.

[230] The parties to a suit agreed upon a compromise the result of which was that the plaintiff obtained by the decree a greater quantity of land than he had originally claimed, and a decree was drawn up in accordance with the compromise. In the execution proceedings the defendant raised an objection that the plaintiff could not have execution for a greater quantity of land than he had claimed originally, and the Court executing the decree allowed the objection. No appeal from the Court's order was made, but the plaintiff brought a suit to recover possession of the larger amount of land mentioned in the compromise.

*Held* that the order of the Court executing the decree was erroneous in law and might properly be reconsidered upon an application for review; but that the present suit came within s. 244 of the Civil Procedure Code, and therefore could not be maintained.

[R., 5 P.R. 1907=23 P.L.R. 1908=40 P.W.R. 1907; 30 M. 421=17 M.L.J. 255=2 M.L.T. 349.]

<sup>\*</sup> Second Appeal No. 158 of 1886 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 1st October, 1885, reversing a decree of Mirza Kamr-ud-din, Munsif of Sambhal, dated the 19th August, 1885.

(1) 12 C. 225.

(2) 10 Ch. App. 389.

(3) 9 A. 74.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Babu *Ratan Chand*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

### JUDGMENT.

EDGE, C.J.—This was an action brought to obtain possession of certain land which, under the terms of an agreement of compromise, the defendant had agreed should be decreed to the plaintiff in a previous action. In the previous action the result of the compromise was that the plaintiff obtained a greater quantity of land by the decree than he had originally claimed—*i.e.*, the parties had agreed, in order to put an end to the suit, that the plaintiff should obtain a greater quantity in a certain plot than he had originally claimed. It appears that the Munsif raised an objection to the drawing up of that decree, in accordance with the terms of the compromise, on the ground that the plaintiff was getting more than he claimed, and that the pleaders of the parties there and then admitted that the plaintiff was to have the decree which he was claiming. On that the decree, in accordance with the compromise, was properly drawn up by the Munsif. I know of no law which prevents the parties to an action enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land than originally claimed. By consent of the parties and the leave of the Court an action may be amended to cover an increased claim. It was competent to the parties, with the consent of the Munsif, to have a decree prepared, as was done in this case. So far, they acted *bona fide*.

[231] When the plaintiff proceeded to get execution under this decree, the defendant, to my mind most unfairly, raised an objection that the plaintiff could not have execution for a greater quantity of land in the particular plot than he had originally claimed. The Munsif being misled, in my judgment, as to the law, declined to make an order for the larger amount of land mentioned in the decree. Unfortunately the order was not appealed against, but the present suit was brought. It appears to me, so far as this suit is concerned, that it comes within s. 244 of the Civil Procedure Code, which prohibits a separate suit in a case of this kind. Therefore I am of opinion that the present suit cannot be maintained. I, however, throw out this suggestion, that the Munsif, having made an error in law, and having been misled into that error by an objection which had been improperly taken by the defendant, may properly, in an application for review, reconsider the order of the 9th April, 1885, and give the present plaintiff the benefit of the compromise, so that no injustice and hardship may occur.

The appeal is dismissed with costs.

OLDFIELD, J.—I concur.

*Appeal dismissed.*

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## APPELLATE CIVIL.

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CIVIL.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*NAURANGI KUNWAR (*Applicant*) v. RAGHUBANSI KUNWAR  
(*Objector*).<sup>\*</sup> [11th January, 1887.]9 A. 231=  
7 A.W.N.  
(1887) 20.*Act XXVII of 1860, s. 6—Appeal to High Court—"Fresh certificate."*

The fresh certificate contemplated by s. 6 of Act XXVII of 1860 means a certificate granted to a person other than the person to whom the first certificate was granted.

Where, therefore, a person to whom the District Court had granted a certificate under Act XXVII of 1860 appealed to the High Court and prayed for a fresh certificate, on the ground that the District Court should not have made the grant of certificate conditional upon her giving security to another person,—held that no appeal lay to the High Court in the case.

IN this case Naurangi Kunwar, the widow of a deceased Hindu, applied to the District Judge of Azamgarh for the grant of a certificate under Act XXVII of 1860 for the collection of debts [232] due to her husband. The application was opposed by Raghubansi Kunwar, daughter of the deceased. The District Judge passed an order as follows:—"Certificate granted to Musammat Naurangi on condition of her giving security to Musammat Raghubansi."

From this order Naurangi appealed to the High Court and applied for a fresh certificate, on the ground that the District Judge should not have made his grant of the certificate to her conditional upon her giving security to Raghubansi.

Babu Jogindro Nath Chaudhri, for the appellant.

Lala Juala Prasad, for the respondent.

A preliminary objection was taken on behalf of the respondent that no appeal lay in the case to the High Court under s. 6 of Act XXVII of 1860.

## JUDGMENT.

EDGE, C. J.—I agree with the contention of Mr. Juala Prasad that no appeal lies in this case to this Court. The fresh certificate contemplated by s. 6 of Act XXVII of 1860 means a certificate granted to a person other than the person to whom the first certificate was granted. The appeal is dismissed with costs.

OLDFIELD, J.—I concur.

*Appeal dismissed.*

\* First Appeal No. 221 of 1886 from an order of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 28th August, 1886.

9 A. 232=7 A.W.N. (1887) 20.

## CIVIL REVISIONAL.

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*PARAS RAM (*Petitioner*) v. KARAM SINGH AND OTHERS  
(*Opposite parties*).<sup>\*</sup> [11th January, 1887.]*Execution of decree—Order of attachment—Judgment-debtor declared insolvent—Appointment of receiver—Vesting of insolvent's property in receiver—Objection to attachment—Jurisdiction to entertain objection—Civil Procedure Code, ss. 278, 351, 354.*

Where property has been made the subject of attachment under Chapter XIX of the Civil Procedure Code, the right of an objector to assert his claim to be the true owner of the property under s. 278, and the jurisdiction of the Court to entertain the objection, are not ousted by the mere circumstance that the judgment-debtor has been declared an insolvent, and his property vested in a receiver under Chapter XX. It is the judgment-debtor's property only, not that of the objector, that is thus vested.

[233] THIS was an application for revision of an order of the District Judge of Meerut, refusing to entertain an objection made by the applicant under s. 278 of the Civil Procedure Code. It appeared that certain property was attached in execution of a decree held by certain persons against one Ude Singh. An order was subsequently passed under s. 351 of the Civil Procedure Code, declaring the judgment-debtor an insolvent and appointing a receiver of his property, in whom thereupon all his property vested under s. 354. After this, an application was made under s. 278 by one Paras Ram, objecting that the property was not liable to attachment, on the ground that it belonged to him and not to the judgment-debtor. Upon this application the District Judge of Meerut passed the following order:—

"So far as I can understand the provisions of the Civil Procedure Code, I have no jurisdiction to entertain this objection. If the receiver wrongly converts the property in question, he will be liable to the objector, who can proceed by regular suit. This objection should be certified to the receiver, who will after inquiry act as he thinks fit, and on his own responsibility. He can apply to have the property released—i.e., made over to the objector—if he finds that the judgment-debtor's claim to the property is not made out; or he can convert it. If the objector applies, I am willing to postpone the sale of the property in dispute, pending application for revision of this order, for three months."

The objector applied to the High Court for revision of this order, on the ground that the District Judge had erroneously declined to exercise his jurisdiction.

Munshi Kashi Prasad, for the applicant.

Munshi Ram Prasad, for the opposite parties.

## JUDGMENT.

BRODHURST and TYRRELL, JJ.—The Judge was wrong in refusing to entertain the applicant's objection under s. 278 of the Civil Procedure Code. If the property had been made the subject of an attachment under Chapter XIX of the Code, the right of the objector to assert his claim to

<sup>\*</sup> Application No. 223 of 1886 for revision of an order of T. R. Wyer, Esq., District Judge of Meerut, dated the 13th August, 1886.

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be the true owner of the property would not be ousted by the mere circumstance that the judgment-debtor had been declared insolvent, and that his property had been vested in a receiver under Chapter XX. It would be insolvent's [234] property only, not that of the objector, that would become thus vested. The application must be entertained, and if it be found that the property in question had been attached in execution of a decree against the insolvent, the Court below will have next to determine the issue of fact raised by the objector under s. 278, and determine the case accordingly. The case is remanded under s. 562 to be disposed of as above indicated, and the costs so far will be costs in the cause.

*Cause remanded.*

9 A. 234=7 A W N. (1887) 24.

### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

SHIAM SUNDAR (*Plaintiff*) v. AMANANT BEGAM (*Defendant*).\*  
[12th January, 1887.]

*Pre-emption—Wajib-ul-arz—Co-sharers—Effect of perfect partition—Act XIX of 1873 (N.-W.P. Land Revenue Act), s. 19—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No 10—“Physical possession”—Purchase of equity of redemption by mortgagee in possession—Acquiescence—Equitable estoppel.*

The *wajib ul arz* of three villages which originally formed a single mahal gave a right of pre-emption to co-sharers in case of transfers of shares to strangers. Afterwards the shares in these villages were made the subject of a perfect partition, and divided into separate mahals. Subsequently, by two deeds of sale executed on the 13th January, 1884, and registered on the 17th January, 1884, some of the original co-sharers sold to strangers their shares in all three villages. At the time of the sale, the shares in two of the villages were in possession of the vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in the third village was, at the time of the sale, in possession of another of the original co-sharers under a possessory mortgage. On the 17th January, 1885, this last mentioned co-sharer brought a suit against the vendors and the vendees to enforce his right of pre-emption under the *wajib-ul-arz* in respect of the shares sold in the three villages.

*Held* that, notwithstanding the partition of the village into separate mahals, the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and govern the separate mahals, until it was shown that a new one had been made. (7 A. 772, R.)

*Held* that in the case of the sale of an equity of redemption by the mortgagor to the mortgagee in possession, which has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagee, it cannot [235] properly be said that any property is sold which is capable of “physical possession” within the meaning of art. 10, sch. ii, of the Limitation Act. In a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word “physical” implies some corporeal or perceptible act done which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. An equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and a pre-emptor impeaching such a sale has one year from the date of registration of the instrument of sale within which to bring his suit.

\* First Appeal No. 185 of 1885 from a decree of Maulvi Mirza Abid Ali Beg, Subordinate Judge of Shahjahanpur, dated the 17th June, 1885.

Held, therefore, that the period of limitation began to run from the date of the registration of the deed of sale, and that the suit was within time.

Held also that the Court below was wrong in holding that the plain'iff, by reason of his having omitted in a suit previously brought against him for redemption of his mortgage and dismissed for want of jurisdiction, to set up in defence any right of pre-emption or to express any desire to purchase, was equitably estopped by acquiescence in the sale from asserting his pre-emptive right.

[R., A.W.N. (1907) 83=4 A.L.J. 210; 160 P.R. 1889; 37 P.R. 1908=30 P.W.R. 1908; 2 O.C. 9 (11); 3 O.C. 184 (187); U.B.R. (1903), 1st Q., Limitation, p. 7; Cons., 22 A. 1; D., 17 A. 226.]

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of three villages, Kamalpur, Muhammadpur Mai, and Kalupur. The clause of the *wajib-ul-arz* relating to pre-emption was as follows:—

"In the event of a share-holder wishing to sell or mortgage his share, or, if a mortgagee, wishing to sub-mortgage his mortgagee right, he should, at the time of such transfer, give notice to his co-sharer, and, on his refusal, to another sharer in the village, and sell or mortgage it for a proper price. On the latter's refusal to take the share or pay the proper price, the former shall be at liberty to transfer it to any one he likes, and after that no claim for pre-emption will be entertainable."

At the time when the *wajib-ul-arz* was made the plaintiff was a co-sharer with the vendors in the three villages which then formed a single mahal. In 1879, the shares of the plaintiff were made the subject of a perfect partition and formed into a distinct and separate mahal.

The sale in respect of which the suit was brought, took place on the 13th January, 1884, in favour of strangers, and was effected by two deeds of sale, which were registered on the 17th January, 1884. It related to the shares held by the defendants-vendors in all three villages, and the consideration expressed on the face of the [236] deeds amounted to Rs. 17,000. At the time of the sale, the shares in Kamalpur and Kolapur were in possession of the defendants-vendees under a possessory mortgage, the amount due upon which was set-off against the purchase-money. The share in Muhammadpur Mai was at the time of the sale in the possession of the plaintiff under a possessory mortgage.

The suit was instituted on the 17th January, 1885. The defendants pleaded that the provisions of the *wajib-ul-arz*, and among them that which gave a right of pre-emption, ceased to have effect after the perfect partition of the property to which they related. It was also pleaded that the suit was barred by limitation under sch. ii, No. 10 of the Limitation Act (XV of 1877), and that the plaintiff had lost his right of pre-emption (assuming it to have been otherwise valid), by refusal to purchase and acquiescence in the sale. It was alleged by the plaintiff that the consideration was wrongly stated in the deed of sale.

Upon the first point, the Court of first instance (Subordinate Judge of Shahjahanpur) observed:—"The villages in dispute were joint at the time the contract was entered into. The Court must now see how long was this contract intended to remain in force. It is true that the complete partition which took place in respect of the villages in dispute does not affect the meaning of the word 'mauza.' The partnership and the nature of the co-parcenary which existed at the time of the contract are no longer in existence, and the state of co-parcenary has changed; but according to a judgment of the High Court—*Gokal Singh v. Mannu Lal* (1)—which must be respected, the contract which was made before the partition should

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be considered applicable to the state of things remaining after the partition. The Court therefore admits the plaintiff's right under the *wajib-ul-arz* contract."

Upon the question of limitation the Court drew a distinction between the sale of the shares in Kamalpur and Kalupur on the one hand and of the share in Muhammadpur Mai on the other. It was of opinion that the defendants-vendees, who were previously in possession of the former shares under a mortgage, should be deemed to have acquired "physical possession" in their character [237] of vendees at the time of the sale. So far, therefore, as these villages were concerned, the Court held that limitation ran from the 13th January, 1884, and that the suit was consequently barred by limitation. In regard, however, to the share in Muhammadpur Mai, the Court held that as the plaintiff was in possession thereof as mortgagee at the time when it was sold, the defendants could not obtain "physical possession" of it until the mortgage had been redeemed, that the share sold, therefore, did not admit of "physical possession" in the sense of sch. ii, No. 10 of the Limitation Act, and that as consequently time must run from the 17th January, 1884, when the instrument of sale was registered, the suit for pre-emption, so far as it related to Muhammadpur, was within time.

Upon the question of the plaintiff's acquiescence in the sale, the Court found that the evidence of his having refused to purchase was untrustworthy, but that in a suit for redemption of his mortgage, which was brought against him in 1884 and dismissed for want of jurisdiction, he did not in his defence set up any right of pre-emption or express any desire to purchase, and that under the circumstances his conduct must be treated as a relinquishment of the right. The Court accordingly dismissed the suit.

The plaintiff appealed to the High Court. It was contended on his behalf that limitation should have been calculated from the 17th January, 1884, the date of registration, and therefore no portion of the claim was barred; and that the facts mentioned by the Court below in its judgment did not prove any relinquishment on his part of his pre-emptive right.

The Hon. Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the respondent.

#### JUDGMENT.

STRAIGHT and TYRRELL, JJ.—There are four questions raised in regard to this appeal, the first of which relates to the right of the plaintiff to maintain the suit at all. Assuming this to be answered in the affirmative, then we must determine whether the Subordinate Judge was right in holding the suit out of time, *quoad* the share in Kamalpur, and wrong in his view that he is estopped [238] by conduct as to the share in Muhammadpur Mai; and lastly, what was the actual consideration paid by the vendees to the vendors in respect of the shares in those villages.

As to the first point, it is admitted that the plaintiff was, prior to 1879, a co-sharer with the vendors in the villages of Kamalpur, Muhammadpur Mai, and Kalupur, jointly answerable along with them for the Government revenue, and subject, in common with them, to the conditions of the *wajib-ul-arz* applicable thereto. It is also conceded that the shares of the plaintiff in those villages have been made the subject of a perfect partition, and that they have been divided off into a distinct and separate mahal, of which he is the sole proprietor. It is also a fact that the sale he now seeks to impeach was made upon the 13th January, 1884.

long after such partition, and the point that arises is whether, this partition having taken place, the conditions of the *wajib-ul-arz* which subsisted prior thereto, and which has not been re-placed by another, are still effectual and binding on all the persons who were originally co-sharers in the villages. The question is by no means without difficulty, and, were it *res integra*, we should have had some doubts in deciding it. There are, however, two rulings of Division Benches of this Court—one *Gokal Singh v. Mannu Lal* (1), and the other, an unreported case—F.A. No. 69 of 1882—the former of which has been followed in the present suit by the Court below, that are directly in point. We are not prepared, as at present advised, to re-consider the rule therein laid down, to the effect that, despite the partition of the village into separate mahals, the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and given the separate mahals until it is shown that a new one has been made. We may add that this view is supported by the terms of the second paragraph of s. 191 of the Revenue Act of 1873. With regard to the second question, the point to be determined is, whether a mortgagee in possession, who purchases the equity of redemption of his mortgagor, purchases anything which is capable of physical possession in the sense of art. 10 of the Limitation Law; and if so, whether such physical possession is complete when the contract of sale is executed, or whether the case falls within the alternative provision of the article which makes the date of registration of the instrument of sale the point from which time begins to run.

[239] Now, an equity of redemption is the right now defined by statute, which entitles the mortgagor, at the proper time and place, upon satisfaction of the mortgage-debt, either by payment of the amount to the mortgagee in possession, or after his realization of it from the usufruct of the mortgaged estate, to require him to deliver up possession to the mortgagor, and to execute an instrument re-transferring it, or to have registered an acknowledgment in writing that the mortgage has been extinguished. It follows therefore that when, as in the case before us, the mortgagee is in possession, the sale by the mortgagor to the mortgagee of such right to redeem has the effect of extinguishing such right; or, in other words, there is a merger of the two estates in the mortgagee, who therefore became proprietor of the property mortgaged. We do not think, in a transaction of this description, it can properly be said that any property is sold which is capable of "physical possession" within the meaning and intension of art. 10 of the Limitation Law.

It seems to us that in a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word "physical" implies some corporeal or perceptible act done, which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. We are of opinion that an equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and that for the purposes of pre-emption a pre-emptor impeaching such a sale has one year from the date of registration of the instrument embodying it within which to bring his suit. As the sale contract in the present case was registered on the 17th of January, 1884, the present suit was in time,

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and we differ from the Subordinate Judge for these reasons, by holding that it was not barred by limitation. Upon the third point, we dissent from the view of the Subordinate Judge, that the plaintiff should fail as regards the share in Muhammadpur Mai. He is undoubtedly in time, so far as limitation is concerned, in respect of that share; and in the absence of any proof that it was offered to him and that he refused to purchase it, we see nothing to warrant us in holding that he is equitably estopped by [240] acquiescence in the sale from asserting his right. There remains the question, which formed the fourth issue in the Court below, namely—"What is the actual price of the property in dispute, and what sum has passed between the vendor and vendee, and whether any fraud has been practised on the sale-deed as regards consideration?"

The Court below did not determine these matters, having dismissed the suit on preliminary grounds. But this treatment of the case has not excluded evidence on these questions. All the evidence of the parties is on the record, and it is therefore incumbent on us to try this issue and decide it on the materials before us. The plaintiff tendered no evidence as to the actual value of the property or of the fraudulent exaggerations he imputed to the sale-deed. The defendants, on the other hand, gave evidence, which has not been questioned or contradicted, in support of the correctness and good faith of the recitals of the instrument of sale. This being so, we have no alternative but to determine the issue of price in favour of the respondents. The appellant therefore will get a decree, entitling him to purchase the shares sold in the villages mentioned above, on condition of his paying for them the sale-deed prices within thirty days from the date when this decree shall have been certified in the Court below. Failing to make such payment, his suit will stand dismissed.

The appeal thus stands decreed, with costs proportionate to the success of the parties respectively.

*Appeal allowed.*

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9 A. 240=7 A. W. N. (1887) 54=11 Ind. Jur. 230.

### CRIMINAL REVISIONAL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Oldfield.*

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QUEEN-EMPRESS v. NARAIN. [15th January, 1887.]

*Maintenance—Wife—Criminal Procedure Code, s. 488—Breach of order for monthly allowance—Warrant for levying arrears for several months—Imprisonment for allowance remaining unpaid after execution of warrant—Act I of 1868 (General Clauses Act), s. 2 (18)—"Imprisonment."*

Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate, acting under [241] s. 488 of the Criminal Procedure Code, has no power to pass a heavier sentence in default than one month's imprisonment as if the warrant only related to a single breach of the order.

*Per* EDGE, C.J.—S. 488 contemplates that a separate warrant should issue for each separate monthly breach of the order. (6 M.H.C.R. App. xxiii, *Appl.*)

*Per* STRAIGHT, J.—The third paragraph of s. 488 ought to be strictly construed, and, as far as possible, construed in favour of the subject. Under the section, a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance,

and where, after distress has been issued, *nulla bona* is the return. The section contemplates one warrant, one punishment, and not a cumulative warrant and cumulative punishment.

Also *per* STRAIGHT, J.—With reference to s. 2, cl. (18) of the General Clauses Act (I of 1863), “imprisonment” in s. 488 of the Criminal Procedure Code may be either simple or rigorous.

*Per* OLDFIELD, J.—A claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding and arrears levied under a single warrant.

[Diss., 20 M. 3 (5)=2 Weir 638; F., Rat. Un. Cr. C. 801; 15 Cr. L.J. 434=24 Ind. Cas. 170=7 Bur. L.T. 225; Appl., 22 C. 291 (294); R., L.B.R. (1893—1900) 316 (317); U.B.R. (1892—1896), 70.]

THIS was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Benares. It appeared that on the 10th April, 1882, one Narain was ordered, under s. 488 of the Code, to make and pay a monthly allowance of Rs. 2 for the maintenance of his wife. He took no steps to have this order set aside. In November, 1886, arrears of maintenance for seven months having become due, a warrant was issued against him, under the third paragraph of s. 488, by Mr. W. R. Partridge, the officiating Joint Magistrate of Benares, for levying the aggregate amount of such arrears. On the 18th November, 1886, the Joint Magistrate passed an order to the effect that arrears of maintenance for seven months having accrued, and nothing having been realized under the warrant, the defendant must be sentenced to one month's rigorous imprisonment in respect of each monthly breach of the order for maintenance, or in all to seven months' rigorous imprisonment.

The Sessions Judge of Benares, being of opinion that the Joint Magistrate's order was illegal, referred the case to the High Court for orders, with the following observations:—

“In a note under s. 488 in Prinsep's annotated edition of the Criminal Procedure Code, p. 456, I find it stated on the authority of certain rulings of the Madras High Court that, although fifteen months' arrears of maintenance might be levied by [242] one warrant, yet only *one month's* imprisonment can be awarded in default of realization. The sum here concerned is only Rs. 14, and if a fine of that amount had been awarded, only two months' imprisonment would have been adjudged in case of failure to pay. But if the Joint Magistrate's order be legal, it is obvious that for failure to pay arrears of maintenance of his wife, a man might be subjected to very prolonged incarceration. Again, although the word ‘imprisonment’ is, under s. 488, without any qualification of ‘simple’ or ‘rigorous,’ I should think that only ‘simple’ imprisonment is contemplated. I would recommend that the said order be quashed.”

The case came on for hearing before Straight, J., who directed that it should be laid for disposal before a Division Bench.

### JUDGMENT.

EDGE, C.J.—I am of opinion that the principle enunciated in the ruling reported in the Madras High Court Reports, Vol. 6, p. xxiii (Appendix), is applicable to a case arising under s. 488 of the present Criminal Procedure Code. In my opinion the section contemplates that a separate warrant should issue for each separate monthly default, and where that is done, the maximum punishment can be one month's imprisonment. If a warrant is issued for an accumulation of arrears for several months, the Magistrate has no power to pass a greater sentence in such a case than if the warrant in that case only related to one

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particular breach. To hold otherwise would raise a very great difficulty in regard to the manner in which the amount of punishment would have to be arrived at. For instance, an order is made for the payment of Rs. 10 monthly, and default is made for six months, from January to June. On this a warrant is issued for Rs. 60 arrears and returned by levy of Rs. 30. It would be difficult to say how the Magistrate should ascertain for which month's default he was to inflict punishment—whether he was to spread the payment over six months, or whether he was to apply it to three months; and, if so, whether in discharge of the first three months, or the last three months, or the intermediate three months. I am of opinion that the regular proceeding is that only one warrant should issue for each separate monthly breach, and that a Magistrate cannot inflict a greater punishment than one month on each such occasion.

[243] STRAIGHT, J.—I am of the same opinion. It appears to me that the provisions contained in the third paragraph of s. 488 of the Criminal Procedure Code, being distinctly of a penal character, ought to be strictly construed, and, as far as possible, construed in favour of the subject. As I interpret that section, a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance, and where, after distress has been issued, *nulla bona* is the return. I am borne out in this view by the language of the latter portion of the section, which says that the punishment which is to be inflicted under this section is to be inflicted in respect of the "whole or any part of each month's allowance remaining unpaid after the execution of the warrant." That is to say, a warrant shall be issued in respect of each separate individual breach of the order of maintenance. I am not prepared to say, having regard to the ruling of the Madras High Court (1), that if by an informality one warrant may have been issued in respect of several breaches, and it appears that after the issue of that warrant distress has been made and there is still money unpaid by the party against whom the order has been made, it might not be within the competence of the Magistrate to inflict a sentence of imprisonment. But that sentence would have to be regarded as applicable for a single breach, and could only extend to one month. But, in my opinion, the section contemplates one warrant, one punishment, and does not contemplate a cumulative warrant and cumulative punishment. I think, therefore, that in the present case the proper course will be to direct that the term of imprisonment ordered by the Magistrate be reduced to one month's simple imprisonment. Looking to the terms of s. 2, cl. 18 of the General Clauses Act, "imprisonment" in s. 488 may be either simple or rigorous.

OLDFIELD, J.—I think that a claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding and arrears be levied under a single warrant. At the same time I quite concur in the opinions expressed, that, where this is done, the term of imprisonment inflicted in default must be limited to a term of one month.

*Sentence reduced.*

9 A. 244=7 A.W.N. (1887) 29.

## [244] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*FATIMA BEGAM (*Plaintiff*) v. HANSI (*Defendant*).\*

[20th January, 1887.]

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*Limitation—Act XV of 1877 (Limitation Act), s. 5—"Sufficient cause" for not presenting appeal within time—Admission of appeal—Discretion of Court—Landholder and tenant—Mortgage by ex-proprietary tenant—Act XII of 1881 (N.-W.P. Rent Act), ss. 9, 56, 93 (b)—Act "inconsistent with the purpose for which land was let."*

The policy of the framers of the N.-W.P. Rent Act (XII of 1881) was not to protect the interest of the purchaser of the proprietary rights, but that of the person whose proprietary rights have been sold, and who has become an ex-proprietary tenant.

It would be straining the law as laid down in s. 93 (b) of the Act to hold that a mortgage of his holding granted by an ex-proprietary tenant was an act "inconsistent with the purpose for which the land was let" within the meaning of that provision. The words quoted have reference to something which may alter the character of the land, or cause injury to the land, and thus to the landholder. In the case of a mortgage by an ex-proprietary tenant, the landholder would not be damaged by being unable, in the event of his rent being in arrear, to distrain the crops grown upon the land by the so-called mortgagee, s. 56 of the Rent Act giving the landholder a right to distrain any crops growing upon the land, by whomsoever grown, in respect of which the arrear arises. (7 A. 691, *F.*; A.W.N. (1883) 166, *R.*)

In a suit for ejectment instituted in the Revenue Court under s. 93 (b) of the N.-W.P. Rent Act (XII of 1881), the Court gave judgment decreeing the claim on the 15th September, 1884. The value of the subject-matter exceeded Rs. 100, and an appeal consequently lay to the District Judge; but there was nothing upon the face of the record to show that the value exceeded Rs. 100 and that the decree was appealable. The period of limitation for the appeal expired on the 15th October, and the defendant, being under the impression that the decree was not appealable, applied to the Board of Revenue on the 8th January, 1885, for revision of the first Court's decree. The proceedings before the Board lasted until the 24th April, when the defendant for the first time was informed that the value of the subject-matter being over Rs. 100, the decree was appealable, and that the application for revision had therefore been rejected. On the 23rd May, the defendant filed an appeal to the District Judge, who, under s. 5 of the Limitation Act, admitted the appeal and reversing the first Court's decision, dismissed the claim.

[245] *Held*, on appeal by the plaintiff, that, under the circumstances, the High Court ought not to interfere with the discretion exercised by the District Judge in admitting the appeal under s. 5 of the Limitation Act after the period of limitation prescribed therefor.

*Per* EDGE, C.J., that, under the circumstances above stated, he would not himself have held that the defendant had shown "sufficient cause," within the meaning of s. 5, for the admission of the appeal; but that the Court ought not to interfere with the discretion of the Judge when he had applied his mind to the subject-matter before him, unless he had clearly acted on insufficient grounds or improperly exercised his discretion.

[*Diss.*, 12 A. 461; *F.*, 24 A. 127; *R.*, 10 A. 15 (19); 12 A. 419; 23 B. 512; 159 P.L. R. 1901; 8 A.L.J. 793 (494)=11 Ind. Cas. 814.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Edge, C.J.

Pandit *Sunder Lal*, for the appellants.

\* Second Appeal No. 422 of 1886 from a decree of F. E. Elliot, Esq., District Judge, dated the 6th October, 1885, reversing the decree of Pandit Kedar Nath, Deputy Collector of Allahabad, dated the 15th September, 1884,



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Munshi Ram Prasad, for the respondent.

## JUDGMENT.

EDGE, C.J.—This is an action which was instituted in the Revenue Court against an ex-proprietary tenant, and a person who had been put in possession by that ex-proprietary tenant under a document purporting to be a mortgage of the ex-proprietary tenancy. The Revenue Court decreed possession as against the ex-proprietary tenant, and it appears to have given no decree as against the person whom we may call the mortgagee, possibly because the suit against the mortgagee might not have been maintainable in the Revenue Courts. Against that decree in the Revenue Court an appeal was brought to the Judge of Allahabad, who reversed the decision of the Revenue Court and dismissed the claim. The so-called mortgagee was not a party to the appeal before the Judge of Allahabad, or to the appeal which is before us from the decision of the Judge of Allahabad. In this case a preliminary question has been raised as to whether the Judge of Allahabad exercised his discretion properly in admitting the appeal to him after the time for appeal from the decree of the Revenue Court had expired. On this point it is necessary to mention a few dates. The judgment of the first Court was delivered on the 15th September, 1884. Thirty days for appeal to the Judge expired on the 15th October, 1884. Now it appears that the defendant in the action applied to the Court of first instance on the 12th November, 1884, for a copy of the decree, and an order on that was made on that date, and on the 5th December, 1884, a copy of [246] the decree was given to the defendant. On the 8th January, 1885, she filed an application for revision of the decision of the Court of first instance to the Board of Revenue. It appears that on the 30th March, 1885, the Revenue Board rejected that application on the ground that the value of the subject-matter of the suit was more than Rs. 100. On the 16th April, 1885, the Revenue Board made an order that the papers should be returned to the defendant, and on the 24th April, 1885, the papers were actually returned to her. The appeal to the Judge was filed on the 23rd May, 1885. I may at once say that if I had been sitting as the Judge of Allahabad, I would not have held that the defendant had shown "sufficient cause" within the meaning of s. 5 of the Limitation Act. The Judge of Allahabad, to whom the application to admit the appeal was made, exercised his discretion and admitted it. In my opinion we ought not to interfere, unless when the Judge has clearly acted on insufficient grounds or has improperly exercised his discretion. We ought not to interfere with the discretion of the Judge when he has applied his mind to the subject-matter before him. However, as I have said before, under these circumstances I would not have admitted the appeal, but I do not see my way to hold that the Judge has so improperly exercised his discretion as to say that the appeal ought not to have been admitted. That disposes of the preliminary point.

Then comes the question as to whether the Judge of Allahabad was right or not in refusing the remedy sought for by the plaintiff. Now, with regard to that part of the case, it appears that the defendant-respondent here was a proprietor of the land in question. In the early part of 1882 her proprietary rights were sold by auction-sale to the present appellant. Further, it appears that on the 11th September, 1882, the respondent, who was then an ex-proprietary tenant, purported to mortgage a portion of the holding to the person whom we have called the mortgagee, and let him into possession. This action was brought on the 4th February,

1884, to eject the ex-proprietary tenant and the so-called mortgagee. The plaintiff alleges in her plaint that she knew of the mortgage on the 13th July, 1883. It does not appear whether she had received any rent after she became aware of the so-called mortgage. Under these circumstances, what is the law? The [247] plaintiff contends that she is entitled to eject the ex-proprietary tenant, contending that the granting of this mortgage came within clause (b) of s. 93 of the Rent Act, and was an act inconsistent with the purpose for which the land was let. In support of that contention the case of *Wajiha Bibi v. Abhiman Singh* (1) is quoted. That case, I may say, is a case in point, and his in favour of the plaintiff's contention. Looking, however, to the report of that case, I observe this fact as throwing probably some light on the judgment of the learned Judges in that appeal, that the respondents there were not represented and did not appear; so practically the attention of the learned Judges would only be directed to the case put forward on behalf of the appellants. On the other side, however, Mr. *Ram Prasad* has relied upon a later decision of 1885—*Debi Prasad v. Har Dayal* (2), in which Mr. Justice Mahmood held that the granting of a mortgage by an ex-proprietary tenant was not an act inconsistent with the purpose for which the land was let. I am bound to say that I agree with the judgment of Mr. Justice Mahmood in that case. I think myself that the words "inconsistent with the purpose for which the land was let" must have reference to something which may alter the character of the land, or cause injury to the land or the landlord: for instance, turning *sir* land into a building-land, or excavating it for a tank, or, probably, cutting down a valuable grove. In fact, I think that something of that kind was intended by the Legislature when they used the word "inconsistent." In all the above cases, it is obvious that the act of the tenant would alter the character of the land or might damage the land, and thus cause damage to the landlord. Therefore in such cases the law provides that the landlord should have his remedy by turning the tenant out of possession of the land. I fail to see how, in the case of a mortgage by an ex-proprietary tenant, the landlord could be damnified.

It is said by Pandit *Sundar Lal* that the landlord would be damnified in this way: that, if his rent was in arrear, he would not be entitled to distrain the crops grown upon the land by the so-called mortgagee. With that contention I do not agree. It appears to me that s. 56 of the Rent Act gives the landlord a right to distrain any crops growing upon the land, by whomsoever [248] grown, in respect of which the arrear arises. I cannot see how, in a case like this, the landlord could be in any way damnified or injured by the mortgage.

Now, further, it appears to me also that the policy of the framers of the Rent Act was not to protect the purchaser's interest, but that of the person whose proprietary rights had been sold, and who had become an ex-proprietary tenant. And I think we should be straining the law if we were to hold that a mortgage granted by an ex-proprietary tenant was an act which was contemplated by the Legislature as coming within the words "inconsistent with the purposes for which the land was let."

Under these circumstances, I am of opinion that the appeal should be dismissed with costs.

OLDFIELD, J.—I have only to say, with regard to the question of limitation, that I would not interfere with the discretion of the Judge.

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(1) A.W.N. (1889) 166.

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The defendant, after the decree was passed against her, went to the Board of Revenue in revision under the impression that the decree was final and no appeal lay to the Judge. And whether an appeal would lie or not was entirely dependent on the value of the subject-matter in dispute. There is nothing on the face of the record which would lead necessarily to the conclusion that the value of the subject-matter was over Rs. 100, and therefore that the decree was appealable. These considerations undoubtedly actuated the Judge in admitting the appeal after time. Then we find that the proceedings before the Board of Revenue appear to have lasted up to the 24th of April, 1885, when the result was intimated to the defendant. There is nothing to show that she was aware of that result before, and after that time she did not delay in filing the appeal. These are the circumstances, I think, which actuated the Judge in admitting the appeal after time. I therefore think that I should not interfere with the discretion exercised by the Judge.

On the other point, I entirely concur with what has fallen from the learned Chief Justice and with the order he proposes to pass.

*Appeal dismissed.*

9 A. 249 = 7 A.W.N. (1887) 27.

#### [249] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*

AUTU SINGH (*Defendant*) v. AJUDHIA SAHU (*Plaintiff*).\*  
[21st January, 1887.]

*Bond*—Verbal assignment of rent of land in satisfaction of interest—“Jamog”—Mutation of names in favour of assignee not effected—Suit on bond—Claim for interest notwithstanding assignment—Act IV of 1882 (*Transfer of Property Act*), s. 131—*Evidence*—Subsequent oral agreement rescinding or modifying contract registered according to law—Act I of 1872 (*Evidence Act*), s. 92, proviso (4).

Subsequent to the execution and registration of a bond, a *jamog* was made orally between the creditor and the debtor by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the *jamog*.

*Held* that whether or not the plaintiff could maintain a suit on the *jamog* against the tenants for the rent assigned to him in the Revenue Court, he could do so in the Civil Court, and the fact that the *jamog* was not in writing did not affect the question. (7 A. 256, R.)

*Held* also that the *jamog* was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force within s. 92, proviso (4) of Act I of 1872 (*Evidence Act*).

*Held* that the effect of the *jamog* or novation was that the plaintiff's right to recover interest from the defendant was gone, and that the plaintiff was therefore not entitled to maintain his suit against the defendant in respect of the interest which was payable under the bond.

[Not F., 12 A.L.J. '98 = 22 Ind. Cas. 337; R., 129 P.W.R. 1908; 10 Ind. Cas. 196 (199); 18 Ind. Cas. 324 (325).]

\* Second Appeal No. 423 of 1886, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 10th November, 1885, modifying a decree of Babu Nihal Chundra, Munsif of Azamgarh, dated the 16th June, 1885.

THE facts of this case are stated in the judgment of Edge, C.J.  
 Lala Juala Prasad, for the appellant.  
 Munshi Sukh Ram, for the respondent.

## JUDGMENT.

EDGE, C.J.—This is an action to recover the principal, with interest, agreed to be paid under a bond by enforcement of lien. There is no defence to the claim for the principal. The defendant, as to the claim for interest, in effect, alleges that, subsequent to the making of the bond, a *jamog* was come to, by which the plaintiff agreed to take the rents of certain tenants in satisfaction of the interest, and those tenants agreed to pay those rents to the plaintiff, [250] and in consequence of that the defendant agreed to release those tenants from the payment of the rent to him. That I understand to be the meaning of the defendant's pleadings. If that be the state of facts, it will be necessary to consider how far it would affect the plaintiff's claim to recover interest on the bond.

Now the Court of first instance found that the *jamog* was agreed to, and allowed the plaintiff's claim for the principal only. In the lower appellate Court it appears, from the judgment of Mr. Steinbelt, that the agreement as to the *jamog* was not disputed, but that the plaintiff said that he had never received any of the rent under that *jamog*. Mr. Steinbelt, taking the view that the *jamog* would be inoperative unless there were mutation of names in the revenue registers, so as to enable the plaintiff to sue the tenants in the Revenue Courts, held that the plaintiff was entitled to the interest which he claimed.

Now, the effect of the *jamog*, as I understand it, was this, that it was in fact a *novation*, by which the landlord—the defendant here—agreed with his creditor and with his tenants that the liability of the tenants for their rent should be transferred from him to the creditor—that is, he in effect assigned, so far as he could, the rent to the creditor, and the tenants, being parties to that arrangement, agreed that they would pay their rent to the creditor, and not to the landlord, and the creditor on his part agreed to accept that agreement in satisfaction of the interest which would otherwise be payable under the bond.

Two points have been urged before us. One is based on the judgment of Mr. Steinbelt—that is, that the plaintiff cannot maintain an action, either in the Civil or the Revenue Courts, on that *jamog* against the tenants. We are of opinion that it is not necessary for us to consider whether the plaintiff could maintain an action on the *jamog* in the Revenue Court or not. He can maintain an action in the Civil Court. It has been so held by this Court in the case of *Ganga Prasad v. Chandrawati* (1). In that case, in which a tenant had, by writing and with the consent of the landlord, agreed to pay rents to a person other than his landlord, it was held that such other person could maintain an action against the tenant in the Civil Courts [251] for the rents which he agreed to pay to him. I agree with that judgment. It is only necessary to consider whether the fact that the *jamog* in the present case was not in writing makes any distinction between that case and the present. On that point I have asked the learned pleader for the respondent to show any authority that a novation or assignment of rents, such as in this case, must necessarily be in writing. No authority has been suggested on the point, and certainly s. 131 of the Transfer of Property Act does not contemplate that

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an assignment of a debt should be in writing to enable the assignee to sue. Therefore I am of opinion that there is no practical distinction between the case to which I have just referred and the present case.

It has also been urged that the *jamog* in question falls within s. 92 of the Indian Evidence Act—that is, that it was a subsequent oral agreement, rescinding or modifying a contract which was registered according to the law in force at the time. In the view which I take of the transaction, I do not think it was an agreement in that sense which rescinded or modified a contract. It was an agreement by which the plaintiff accepted, in satisfaction of interest, a *jamog* which bound the tenants to pay the rents to him. It would modify the contract no further than if the plaintiff had accepted, for instance, a present cash payment in discharge of all the interest payable on the bond. It is quite clear that the defendant could give oral evidence that the plaintiff had accepted a present cash payment in satisfaction of all the interest that might become payable in future on the bond. For these reasons I am of opinion that the plaintiff is not entitled to maintain his action against the defendant in respect of the interest which was payable under the bond.

There is only one further observation which I should like to make: that assuming, as I must assume here, that there was this *jamog* or novation, the effect of deciding otherwise would be that the plaintiff could still maintain his action for the interest, although in satisfaction of the interest the defendant had parted for the time with his right to recover rents from the tenants. The effect of the novation is that the right of the creditor to recover interest from the defendant is gone.

[252] Under these circumstances the appeal must be allowed and the decree of the Court of first instance confirmed with costs.

OLDFIELD, J.—I entirely concur.

*Appeal allowed.*

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9 A. 252=7 A.W.N. (1887) 42.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*

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PARSHOTAM LAL AND ANOTHER (*Defendants*) v. LACHMAN DAS  
(*Plaintiff*).<sup>\*</sup> [21st January, 1887.]

*Court-fees—Suit on hundis—Distinct causes of action—Distinct subjects—Act VII of 1870 (Court Fees Act), s. 17.*

In a suit upon three different *hundis* executed on the same date by one of the defendants in favour of the other three defendants and by them assigned to the plaintiff, and not paid on maturity—*held* that each *hundi* afforded a separate cause of action, that the suit embraced three separate and distinct subjects, and that the memorandum of appeal by the first defendant was chargeable with the aggregate amount of the court-fees to which the memoranda of appeal in suits embracing separately each of such subjects would be liable under the Court Fees Act.

[R., 7 O.C. 152]

THE facts of this case, which was referred to the Court by the Registrar under s. 5 of the Court Fees Act, are sufficiently stated in the judgment of the Chief Justice.

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<sup>\*</sup> Reference under s. 5 of the Court-Fees Act.

Mr. C. Dillon, for the appellant.

### JUDGMENT.

EDGE, C.J.—In this case the defendant No. 1 executed three different *hundis* on the same date, in favour of the defendants Nos. 2, 3 and 4 who constituted a firm. They were all payable at the same time. The first *hundi* was for Rs. 1,133-7, and the second and third were for Rs. 1,054-5 respectively. These three *hundis* were assigned by the defendants Nos. 2, 3 and 4, to the plaintiff, and not having been paid on maturity, the plaintiff brought this action upon them.

The defendant No. 1, who is appealing here, has paid court-fees calculated upon the total amount of the three *hundis*. The question is whether the amount of the court-fees as calculated is sufficient, or whether the defendant No. 1 is not bound, under s. 17 of the Court Fees Act, to pay a court-fee based on the amount of each of the *hundis* separately.

[253] Now it is argued that these three *hundis* only make one cause of action. That I cannot understand. It is admitted that the plaintiff might bring three separate actions on these *hundis*, and each *hundi* would afford a separate cause of action. The suit embraces three separate and distinct subjects, and I am of opinion that the memorandum of appeal is chargeable with the aggregate amount of the fees to which the memoranda of appeal in suits embracing separately each of such subjects would be liable under the Court Fees Act. Therefore my answer to the reference is, that as the proper amount of court-fees has not been paid in this case, the appeal cannot be admitted unless the proper fee is paid. A fortnight will be allowed for making up the deficiency.

OLDFIELD, J.—I concur.

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### APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Mahmood.

GANGA SAHAI (Defendant) v. LEKHRAJ SINGH (Plaintiff).\*

[2nd August, 1886.]

*Hindu Law—Adoption—Dattaka form—Gotraja relationship—Mazim, quod fieri non debuit factum valet—Limit of age within which person may be adopted—Ceremony of upanayana—Suit for declaration that alleged adoption is invalid—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 118—Arbitration—Civil Procedure Code, s. 521, cl. (a)—“Misconduct” of arbitrator.*

The sources of Hindu law described and their comparative authority discussed. The various schools of Hindu law, and their divisions and sub-divisions, enumerated and classified.

The ruling of the Privy Council in *Mahashoya Shoshinath Ghose v. Srimati Krishna Soondari Dasi* (1), has no application to a case in which there is ample evidence, both oral and documentary, to prove the *factum* of adoption.

In a suit to obtain a declaration that an alleged adoption was null and void, the plaintiff based his own title upon an alleged adoption of himself. He was related to his alleged adoptive father as father's father's brother's son's son's son's son. It was contended on behalf of the defendants, who was related to the

\* First Appeal No. 67 of 1885 from a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 18th April, 1885.

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plaintiff's adoptive father as brother's son's son, that the plaintiff's relationship was too remote to admit of his being validly adopted in preference to the defendant and other near relatives.

*Held* that the plaintiff, by reason of his natural relationship towards his adoptive father, belonged to the same *gotra* as the latter, and although such relationship [254]ship, compared with that of the defendant, was remote, that circumstance could not *ipso facto* vitiate his adoption. (13 M.I.A. 373; 5 I.A. 40, R.)

The maxim *quod fieri non debuit factum valet* is applicable not only in the Dayabhaga school of Hindu law which prevails in Lower Bengal, but also in the various sub-divisions of the Mitakshara school. Its authority does not depend upon any rule of Hindu law alone, but upon the principles of justice, equity and good conscience. There is no authority to show that it is to be applied to cases governed by the Hindu law in a manner exceeding the limits recognized by the Roman civil law in which it originated. Its application in cases of adoption should be confined to questions of formalities, ceremonies, preference in the matter of selection, and similar points of moral or religious significance, and which relate to what may be termed the *modus operandi* of adoption, but do not affect its essence. There may be cases where matters which in other systems would be regarded as merely formal are, by the express letter of the texts made matters affecting the essence of the transaction, and such texts may be sufficiently imperative to vitiate an adoption in which they have been disregarded; but, unless their meaning is undoubted, the doctrine of *factum valet* should be restricted to adoptions which, having been made in substantial conformity to the law, have infringed minor points of form or selection. Adoption under the Hindu law being in the nature of a gift, it contains three elements—capacity to give, capacity to take, and capacity to be the subject of adoption—which are essential to the validity of the transaction, and, as such are beyond the scope of the doctrine of *factum valet*. (5 I.A. 40; 2 A. 164; 4 M.H.C. 164; 10 B. 80; 12 B.H.C. 364; 3 B. 273, R.) See, also, 1 M.H.C.R. 54; 4 B.H.C.R.A.C. 191; 6 B. 524; 10 W.R. 347.

In dealing with questions of the Hindu law of adoption, it is unsafe to resort to analogical arguments derived from the *arrogatio* or the *adoptio* of the Roman civil law, and where it is necessary to recur to first principles, they should be sought for in the approved authorities of the Hindu law itself, and not in foreign systems of law. (8 M.I.A. 529; 13 M.I.A. 373; 14 M.I.A. 570, R.)

According to Manu, in the case of the three "twice-born" classes, the turning point of the "second birth," which means purification from the sin inherent in human nature, is represented by the ceremony of *upanayana* or investiture of the sacred thread hallowed by the *gayatri*; and until the performance of this ceremony, the person concerned, though born of twice-born parents, remains on the same level as a Sudra. The ceremony is, moreover, the beginning of his education in the duties of his tribe, as prescribed by Manu.

As understood in the Hindu law, adoption is itself a "second birth," proceeding upon the fiction of law that the adoptee is "born again," into the adoptive family. [255] The existence of male issue being favoured mainly for the sake of the parent's beatitude in the future life, adoption is a sacrament justified under certain conditions when the natural male offspring is wanting. It is effected by a substantial adherence to ceremonies, but principally by the acts of giving and taking. Having taken place, its effect is the affiliation of the adoptee as if he had been begotten by his adoptive father, thus removing him from his natural into his adoptive family. In this manner, he is "born again" into the adoptive family by the rites of initiation.

According to the Hindu law as observed by the Benares school, the ceremony of *upanayana*, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, is also the ultimate limit of time when a valid adoption in the *Dattaka* form can take place. Adoption in that form implies that the second birth has taken place in the adoptive family; and it cannot be effected after the boy's place in his natural family has become irrevocably fixed by the *upanayana* representing his second birth therein. The age of the boy is material only as determining the term at which the *upanayana* may be performed. *Kerutnarain v. Mussummut Bhoobunesree* (1) and *Ramkishore Acharj Chowdree v. Bhoobunmoyee Debea Chowdrain* (2) referred to. *Dharma Dagu v. Ram Krishna Chinnaji* (3) dissented from.

(1) S.D.A., L.P.Sel. Cas. vol. I, 161.  
(3) 10 B. 80.

(2) S.D.A., L.P. (1859), part I, 229.

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According to the Kalika-purana as interpreted by the Dattaka Mimamsa of Nanda Pandita, an adoption in the Dattaka form is wholly null and void if made after the adoptee has completed the fifth year of his age. It is a mistake to hold that according to the Dattaka Mimamsa, so long as an adoption takes place while the adoptee is under six years of age, it is valid. The mistake arises from supposing that the word "panchvarshiya" used in paragraphs 48 and 53 of the Dattaka Mimamsa necessarily indicates that the person referred to has passed the fifth anniversary of his birth. It indicates, on the contrary, that he is in his fifth year. *Thakoor Oomrao Singh v. Thakooranee Metab Koonwer* (1) dissented from.

The dictum of the Lords of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Chathupathy* (2) that the duty of European Judges administering the Hindu law, is not so much to inquire whether a disputed doctrine is deducible from the earliest authorities as to ascertain whether it has been received by the particular school governing the district concerned, and has there been sanctioned by usage, does not prohibit the Court from considering the question of fact whether a particular passage of the Kalika-purana upon which an argument in the Dattaka Mimamsa is based is authentic, by reference to other authoritative works of Hindu law. In that case no inflexible rule was laid down assigning supreme and infalible authority to the Dattaka Mimamsa in questions connected with the law of adoption as followed by the Benares school of Hindu law.

The authenticity of the text of the Kalika-purana, which lays down that a child must not be adopted whose age exceeds five years is extremely doubtful. The interpretation given to that text in the Dattaka Mimamsa was not necessarily intended to be universally applicable, and admits of a construction which would confine the application of the text to Brahmans intended for the priesthood; and various other equally plausible interpretations have been adopted by other authorities. This being so, it would be unsafe to act upon the text in question and upon the interpretation placed upon it in the Dattaka Mimamsa, so as to set aside an adoption which took place many years ago, which had ever since been recognized as valid, and under which the adoptee had ever since been in possession of his adoptive father's estate, upon the single ground that at the time of the adoption, the adopted son was more than five years of age. In such a case, the onus of proof is upon the person who alleges the adoption to be invalid. *Raja Haimun Chull Singh v. Koomer Gunzheem Singh* (3) referred to.

In a case where the validity of an adoption was in dispute, and the parties to the suit were Chatriyas,—held that even if it had been established that five years was the rigid and inflexible limit of age for the validity of all adoptions among the "twice born" classes, so as to be applicable even to Chatriyas, in the circumstances of the case it would be necessary to have a full investigation of the question whether, among the clan of the Chatriyas to which the parties belonged, any such rigid rule prevailed.

Where, in a suit brought in 1885, for a declaration that an adoption alleged to have taken place in 1871 was null and void, the factum of adoption was disputed and it was not shown that the alleged adoption became known to the plaintiff before 1881,—held, with reference to art. 118 of sch. ii of the Limitation Act (XV of 1877), that the suit was within time. *Jagadamba Chaoohrani v. Dakhina Mohun Roy Chaoohri* (4) distinguished.

The word "misconduct" as used in s. 521, cl. (a) of the Civil Procedure Code should be interpreted in the sense in which it is used in English law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of justice expect from them before allowing finality to their awards.

An arbitrator to whom the matters in difference in a suit were referred under s. 508 of the Civil Procedure Code, and who was directed by the order of reference to deliver his award by the 22nd September, applied on the 17th September for an extension of time, on the ground that a very full investigation was necessary, which it was not possible to make within the prescribed period. On the 20th September, without waiting for the order of the Court, he notified the parties that he proposed to hold an inquiry in the case on the 24th, and it appeared that he did not expect this intimation to reach them before the 21st or 22nd. On the 23rd, he informed the plaintiff's pleader that a new date would be fixed

(1) N.-W.P. H.C.R. (1868) 103 a.

(2) 12 M.I.A. 397 (on appeal from 2 M.H.C.R. 206). See 1 M.H.C.R. p 420.

(3) 5 W.R. (P.C.) 69.

(4) 13 O. 303.



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for the inquiry, of which notice would be given to the parties. Notwithstanding this, on the 23rd, the arbitrator took evidence for the defendant in the absence of the plaintiff and his pleader. All these proceedings were held before the arbitrator received an order of the Court extending the time for delivery of the award up to the 26th October. On the 27th September he directed the parties to be informed that the investigation would be held on the 5th October. On the 4th October the plaintiff presented a petition praying the arbitrator to summon witnesses and to take documentary evidence, and upon this nothing definite was settled at the [257] time; but, after the pleaders had left, the arbitrator passed an order rejecting the petition, on the ground that the evidence sought to be produced was unnecessary. On the same date, and on the 5th and 6th October, he took evidence for the defence in the absence of the plaintiff and his pleader. On the 10th he rejected a petition by the plaintiff praying for further time to produce evidence, and complaining of his having taken evidence in the plaintiff's absence and having received in evidence a fabricated document. On the 25th October, the arbitrator delivered his award in favour of the defendant. Subsequently, upon objections made by the plaintiff, the Court set aside the award, and directed that the trial of the suit should proceed.

*Held*, that although no case of "corruption" within the meaning of s. 521, cl. (a) of the Civil Procedure Code had been made out against the arbitrator, the circumstances above stated amounted to, "misconduct" and the award was therefore bad in law, and had rightly been set aside. *Soobut Thakur Opadeeah v. Punchunund Tikha* (1), *Reedoy Kristo Mijoomdar v. Puddo Lochun Mijoomdar* (2), *Sada Ram v. Beharee* (3), *Parus Dass v. Khoobee* (4), *Howard v. Wilson* (5), *Bhagirath v. Ram Gulam* (6), *Wazir Mohlon v. Lulit Singh* (7), *Nainsukh Rai v. Umadai* (8), and *Pestonjee Nussurwanjee v. Manockjee* (9), distinguished.

[*Appl.*, 13 B. 160 (165); R., 10 A. 289 (240); 11 A. 194 (205); 12 A. 328; 17 A. 294 (351); 24 A. 195=A.W.N. (1902) 10; 29 A. 457=4 A.L.J. 455=A.W.N. (1907) 117; 7 A.L.J. 927 (932)=7 Ind. Cas. 418; 16 B. 91 (109); 21 B. 159; 21 B. 376; 24 B. 260=1 Bom. L.R. 799 (F.B.); 14 Bom. L.R. 1007 (1016)=17 Ind. Cas. 696; 25 C. 354; 11 C.W.N. 147=4 C.L.J. 537; 11 C.P.L.R. 49 (56); 11 C.P.L.R. 56 (60).]

[*N.B.*—See in this connection 5 A. 293 and 6 A. 211.]

THE facts of this case, the arguments, and the authorities cited upon the questions of law involved, are fully stated in the judgment of Mahmood, J.

The Hon. Pandit *Ajudhia Nath* (with him Mr. *Habibullah* and Pandit *Sundar Lal*), for the appellant.

Mr. C. H. Hill, Mr. G. E. A. Ross, and Babu *Jogindro Nath Chaudhri*, for the respondent.

### JUDGMENT.

MAHMOOD, J.—The dispute which has given rise to this litigation has two main branches: one relating to the validity of an alleged adoption of the plaintiff Lekhraj by Chandan Singh, Zamindar of the Gabhana estate, and the other relating to an alleged adoption of the defendant Ganga Sahai by Musammatt Khusbal Kuar, one of the widows of Hira Singh, who was the zamindar of Birpura, another estate of considerable extent. Both these branches of the litigation raise important questions of fact and difficult questions of law which require disposal. But, independently of these questions, some further complication has been introduced by the course which the proceedings in this case took in the Court below. It will be convenient to [258] dispose of the last-mentioned matters before going into the merits of the litigation itself, for these

(1) S. D. A. L. P. (1848), 115.

(3) S.D.A.N.W.P. (1864), vol. ii, 399.

(5) 4 C. 231.

(8) 7 A. 273.

(2) 1 W.R. 12.

(4) S.D.A.N.W.P. (1861), vol. ii, 199.

(6) 4 A. 283.

(7) 7 C. 166.

(9) 12 M.I.A. 112.

matters are of a preliminary nature, and formed the subject of the first part of the argument addressed to us by the learned Pandit who has appeared on behalf of the appellant in this Court.

The suit was instituted on the 2nd July, 1881, and the principal part of the relief prayed for, was to obtain a declaration that the alleged adoption of the defendant Ganga Sahai by Khushal Kuar be declared null and void, as also such proceedings as the latter may have taken in the nature of alienations of her deceased husband Hira Singh's estate to the prejudice of the plaintiff, who claimed to be presumptively entitled to succession to the estate upon the widow's death. The parties impleaded as defendants to the suit were Khushal Kuar and Ganga Sahai under the guardianship of his natural mother Bhawani Kuar, who, however, by an application of the 25th July, 1881, declined to act as guardian of her minor son.

The Court below, however, did not allow her to withdraw, but directed that both she and the alleged adoptive mother Khushal Kuar should be appointed to act as guardians *ad litem*. Bhawani Kuar does not, however, appear to have taken any further action in the matter; for we find that on the 19th August, 1881, Khushal Kuar by herself filed a written defence on her own behalf, and also as guardian *ad litem* of the minor Ganga Sahai. Issues were settled on the same day, and the 10th of September, 1881, was fixed for the decision of the case; but on that day the parties, acting under the provisions of Chapter XXXVII of the Civil Procedure Code, applied to the Court to refer the matter to the arbitration of Raja Lachman Singh, a gentleman who had been summoned as a witness in the case, and in whom the parties appear to have had confidence; for the submission, in somewhat general terms, goes on to say:—"We do hereby agree that the award in this case, which the arbitrator shall conscientiously deliver, and as regards the costs also, shall be accepted by us as a decision of Court." The order of reference was thereupon made, and was issued on the 15th September, 1881, and reached the arbitrator the same day together with the papers of the case, the 22nd September being fixed by the Court for delivery of the award.

[259] It is now important to consider the exact nature of the arbitrator's proceedings, because the award which was made by him has been set aside by the lower Court, and the first ground of appeal before us impugns that part of the judgment of the Court below. But upon this point we have already intimated our opinion that there was no reason to call upon the respondent to reply, and in dealing with this part of the case we are relieved of the necessity of going into any very minute examination of the evidence, on account of the exhaustive order which the learned Judge of the Court below passed on the 24th April, 1882, setting aside the arbitration award. With all the main conclusions arrived at in that order I fully concur, and I do not think it is necessary for me to do more than state the principal points which the evidence upon this part of the case established.

The order of reference reached the arbitrator on the 15th September, 1881, giving him a week, that is, up to the 22nd of that month, for the delivery of the award. Considering the nature and difficulties of the case, the time was undoubtedly not "reasonable" within the meaning of s. 508 of the Civil Procedure Code, and I think the arbitrator acted with perfect propriety in writing, on the 17th September, 1881, that "as this case refers to a very extensive property, and the points at issue are such as require a full investigation, which it is impossible to make within the time

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allowed, and as an extension of time is necessary, therefore request should be made to the Subordinate Judge to grant him time up to the Dasehra vacation." Whatever may be said as to this method of addressing a Court of justice, there can be no doubt that the application for the extension of time was justified by the circumstances of the case, and indeed it was granted on the 22nd September, 1881, extending the time for the delivery of the award up to the 26th October, 1881.

But in the meantime, on the 20th September, the arbitrator, without waiting for the order of the Court, recorded the following in his proceedings:—"As I will institute an inquiry in the case on the 24th September of the current year let the parties be informed that I shall be at Somna station on the 24th September, and shall make inquiries in this case."

This proceeding, if open to no technical objection, was certainly improper; partly because the arbitrator could not hold an inquiry [260] on the 24th if the Court had not allowed extension of time, but mainly because, as the Court below has pointed out, the arbitrator in his evidence has admitted that he did not expect the intimation to reach the parties before the 21st or 22nd, thus leaving only two days to the parties for production of evidence—a period extremely inadequate under the circumstances of the case, as the arbitrator himself might have realized with reference to what he said in his proceeding of the 17th September already referred to.

But what followed is open to much more serious objection. The plaintiff, notwithstanding the short notice, sent Babu Jogindro Nath, a pleader, from Aligarh to Somna, and he arrived there on the 23rd and met the arbitrator, and found him there trying to induce some other members of the family to appoint him arbitrator in respect of some anticipated dispute which was wholly beyond the scope of the present litigation. The pleader has been examined as a witness, and his evidence on the main points agrees with that of the arbitrator himself, and, taken with it, establishes the following points:—

*First.*—That the arbitrator had no intention of holding any inquiry either on the 23rd or 24th September.

*Secondly.*—That he told the plaintiff's pleader that a new date would be fixed for the inquiry, of which notice would be given to the parties.

*Thirdly.*—That, upon this intimation being given, the pleader returned to Aligarh.

*Fourthly.*—That, notwithstanding this, the arbitrator went to Birpura on the 23rd September, to visit Khushal Kuar, the alleged adoptive mother of Ganga Sahai, and on the next day, the 24th, at 9 P.M., he took down the evidence of Khushal Kuar, and of Bhawani Kuar, in the absence of the plaintiff or his pleader, though one Kalian Singh, a servant of the plaintiff, happened to be present only when the former lady was examined.

All these proceedings were taken, as the arbitrator in his evidence admits, before he received the order of the Court extending the time for the delivery of the award, and they are certainly open to the criticism to which the learned Judge of the Court below has subjected them. And it appears from the evidence of the arbitra-[261]tor himself that they had the effect of depriving him of the plaintiff's confidence. The arbitrator, being a Government officer, was required by some rules to obtain the sanction of Government before acting as arbitrator, and we find that between the 24th September, and 5th October, representations were made to the arbitrator on behalf of the plaintiff by his *Karinda*, Kalian Singh, that the arbitrator should return the case to the Court without any

award. Further, the arbitrator was aware that efforts were made on behalf of the plaintiff to prevent, if possible, the requisite sanction being granted by Government to the arbitrator. But the latter refused to return the case, and insisted upon making an award.

These circumstances would not in themselves have been of much consequence had the further proceedings of the arbitrator been free from even more serious objections. On the 27th September the arbitrator directed the parties to be informed that the investigation would be held on the 5th October, and that "whatever proof they may have in their possession they should produce at Bulandshahr." Soon after, either on the same day or the next, the arbitrator went away to his home at Agra, and did not return till the 4th October, when two pleaders, Maulvi Ghulam Sibtain and Muhammad Nur Khan, were employed by the plaintiff to present a petition to the arbitrator, praying him to summon witnesses and to take documentary evidence. Nothing very definite appears to have been settled at that time, for the evidence of the pleaders shows that one of them understood that the case would be taken up the next day as fixed, and the other thought that the application had been granted; yet we find that after the pleaders had departed, the arbitrator passed an order rejecting the application, on the ground that the evidence sought to be produced was not necessary. What happened then was that, on the 8th October, 1881, the plaintiff made a written application to the arbitrator, complaining of his having examined Khushal Kuar when the plaintiff was not present or represented, and also of having received a fabricated document, which purported to be an authority to Khushal Kuar from her deceased husband to adopt a son. The petition went on to pray for further time to enable the plaintiff to produce evidence, but it was rejected by the arbitrator on the 10th October, 1881. To use the language of the learned Subordinate Judge:—"On the 4th October, 1881, and the [262] 5th and the 6th October, the arbitrator took down the depositions of the witnesses adduced by the defendant in the absence of the plaintiff and his pleader, and afterwards, up to the 24th October, he did not record any award: on the 25th he made an award."

Into the terms of that award it is not necessary to enter in detail. It is enough to say that its effect is to hold that the defendant Ganga Sahai was duly adopted by Khushal Kuar under an authority given to her by her deceased husband Hira Singh, that the adoption being therefore valid, the adopted son had a good title to the estate, which could not be impugned by the plaintiff. Into the case set up against the validity of the plaintiff's adoption by Chandan Singh the arbitrator considered it unnecessary to enter, and he dismissed the suit upon the ground already indicated.

The award having arrived, the Court below on the 26th October, 1881, allowed the usual ten days to the parties for objections, and the plaintiff on the 1st November filed a petition of objections, complaining of the whole proceedings of the arbitrator. The Court, by the order to which reference has already been made, set aside the award on the 24th April, 1882, and directed the trial to proceed as if no arbitration award had been made.

This order, it has been argued on behalf of the appellant, was illegal, as, under the circumstances of the case, it was not open to any of the objections contemplated by s. 521 of the Civil Procedure Code. And in support of this contention, among the cases cited is *Soobul Thakur Opadeeah v. Punchunund Tikha* (1) to show that the examination of

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witnesses by the arbitrator, in the absence of one of the parties, would not vitiate the award. It is enough to say that the case was decided under Regulation XVI of 1793, which has long since been repealed, and I decline to accept its authority as applicable to this case. Again, the next case cited, *Reedoy Kristo Majoomdar v. Puddo Lochun Mujoomdar* (1), seems to me to be wholly inapplicable to this case. So are also *Sada Ram v. Beharee* (2) and *Parus Das v. Khoobe* (3) where no question of misconduct was ruled upon and which were passed under the old law no longer in force. Nor do the most recent cases, *Howard Wilson* (4) and [263] *Bhagirath v. Ram Ghulam* (5) which have been relied on, touch the present case, and I consider it wholly unnecessary to point out the obvious distinction. Equally useless is *Wazir Mahton v. Lulit Singh* (6) for the purposes of the appellant's case, for what was ruled there was the question whether an appeal would lie, in the circumstances of that case, under the Code of 1859. Indeed, the only case cited on behalf of the appellant upon this point which requires any observations is *Nainsukh Rai v. Umadai* (7) to which I was a party, and concurred in the judgment of my brother Oldfield. Having carefully read the report of the case, I am of opinion that it is distinguishable from the present case, and does not support the appellant's contention. The main point ruled in that case, following the ruling of the Privy Council in *Pestonjee Nussurwanjee v. Munockjee* (8), was that a purely arbitrary revocation of submission to arbitration cannot be allowed, and that the award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial. This is all that was ruled in that case, and the headnote in the report gives due effect to it. But what the learned pleader for the appellant contends is that the judgment goes further, and lays down that the arbitrator's refusal to take evidence would not amount to misconduct. But it is clear from the report of the case itself that there the defendant himself did not produce the account books, though required to do so, a state of things very different to the proposition contended for in this case.

For these reasons I am of opinion that none of the cases cited by the learned Pandit on behalf of the appellant helps this part of his argument, and because the matter has evidently created some misapprehension, I will state my views as to the rules of law which, in my opinion, govern cases like the present.

It is a well understood rule of law that arbitrators being, as Mr. Justice Story somewhere calls them, "the chosen Judges of the parties," their awards are final and conclusive judgments, subject of course to certain rules and restrictions. The principle is recognized by our Civil Procedure Code in s. 522, whilst the grounds for setting aside the arbitration award are specified in s. 521, of which clause (a) mentions "corruption or misconduct of the arbitrator or [264] umpire" as a sufficient reason for vitiating the award. And the question here is, whether the clause does apply to the proceedings of the arbitrator in this case.

No case of corruption has been made out, and the determination of the question therefore depends upon the interpretation of the word "misconduct" with reference to the circumstances of this case. That word is a well-recognized term of English law with reference to arbitration proceedings, and I can see no reason why the word, as it occurs in

(1) 1 W.R. 12.

(3) S. D.A.N.W.P. (1861) Vol. I, 199.

(5) 4 A. 283.

(7) 7 A. 273.

(2) S.D.A.N.W.P. (1864) Vol. II, 399.

(4) 4 C. 231.

(6) 7 C. 166.

(8) 12 M.I.A. 112.

our Code, should be interpreted in any other sense. There is nothing in the Code to give the expression any other meaning; and, speaking for myself, I am perfectly willing, sitting here as an Indian Judge, to adopt the language of Mr. Russell in his well-known work *On the power and duty of an Arbitrator* (4th Ed., p. 646) and the cases on which he relies, when he says:—"There may be ample misconduct in a legal sense to make the Court set aside an award, even where there is no ground for imputing the slightest improper motive to the arbitrator. Thus the award will be set aside, if the arbitrator refuse to postpone a meeting for the purpose of allowing a party time to get counsel on his part, where the other side unexpectedly appears by counsel; so if he receives affidavits instead of *viva voce* evidence when he is directed to examine the witnesses on oath; but not if he omit to swear the witnesses, and the party at the meeting do not request him to administer the oath, or, after objecting, subsequently acquiesce in the mode of examination. The award may be impeached if the arbitrator make his award without having heard all the evidence, or having allowed the party reasonable opportunity of proving his whole case. So also, if, contrary to the principles of natural justice, he examine a witness or a party privately, or in the absence of his opponent, unless the irregularity be consequently waived by the parties. If the arbitrator proceed *ex parte* without sufficient cause, or without giving the party absenting himself clear notice of his intention so to proceed, the award will be avoided. So, likewise, if he refuse to hear evidence on a claim within the scope of the reference, on a mistaken supposition that it is not within it; but not if he erroneously reject admissible or receive inadmissible evidence. His refusing to hear additional evidence tendered, when the whole case is referred back to him by the Court, is fatal; but not so when [265] the award is sent back with a view to a particular amendment only being made."

I think that nearly the whole of this passage applies to the circumstances of this case, relating to the arbitrator's proceedings. Then, with reference to the rest of the facts proved by the plaintiff against the validity of the award, and especially with regard to the manner in which the arbitrator refused the plaintiff's petition of the 4th October, 1881, to be allowed to produce evidence, I cannot do better than quote another passage from Mr. Russell's work (pp. 181, 182):—"An arbitrator can hardly be too scrupulous in guarding against the possibility of being charged with not dealing equally with both parties. Neither side can be allowed to use any means of influencing his mind which are not known to, and capable of being met and resisted by, the other. As much as possible, the arbitrator should decline to receive private communications from either litigant, respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side. Except in the few cases where exceptions are unavoidable, as where the arbitrator is justified in proceeding *ex parte*, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent. If he err in this respect, he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award. Where some witnesses attended before the arbitrator to give evidence on behalf of the defendant, and he, notwithstanding the parties, pursuant to

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his recommendation, have agreed to produce no more evidence, received the testimony of these witnesses, the parties and solicitors on both sides being absent, Lord Eldon, C., set aside the award on the ground that the evidence had been improperly admitted, although the arbitrator swore that the evidence thus received had had no effect on his award, the learned Judge being of opinion that no Court should permit an arbitrator to decide so delicate a matter as whether a witness, examined in the absence of one of the parties, had an influence on him or not."

[266] Now these passages, whilst they show that the term "misconduct," when applied to the proceedings of arbitrators, does not necessarily imply moral turpitude, also show what the duties and responsibilities of arbitrators are, and what Courts of justice expect from them before allowing finality to their awards. And I may add that I have dwelt upon this subject at such length because the learned pleader for the appellant pressed his argument upon this part of the case at considerable length, and also because the matter does not seem to be fully understood in the mufassal. In the result, I have no hesitation in holding that the arbitration award in this case was bad in law, and that the learned Judge of the Court below acted rightly in setting it aside under s. 521 of the Civil Procedure Code.

The other facts relative to the proceedings in this case, which I need mention here, are that during the pendency of the objections to the award, Khushal Kuar died on the 8th December, 1881, whereupon one Chatter Singh applied to be appointed Ganga Sahai's guardian *ad litem*, on the ground that Bhawani Kuar was taking no interest in the case. The application was granted, and Bhawani Kuar's name was removed from the record. Chatter Singh was therefore acting as the guardian of Ganga Sahai when the award was set aside by the order of the 24th April, and he applied to this Court, under s. 622 of the Civil Procedure Code, for revision of that order, but the application was rejected on the 1st February, 1883, by an order of Oldfield and Brodhurst, JJ.—See *Chatter Singh v. Lekhray Singh* (1). The case having already been so long delayed, further proceedings were impeded by the action of the plaintiff, who, on the 23rd June, 1883, made an application to the lower Court, under s. 373 of the Civil Procedure Code, to be allowed to withdraw from the suit with liberty to bring a fresh suit. The grounds of the application were, that the suit was mainly declaratory in its nature, as the plaintiff's right of possession could not accrue during the life-time of Khushal Kuar, whose death altered the circumstances which would render the matter fit for a subsequent suit, in which possession and mesne profits of the property in suit might be claimed. The reasons appear to have been accepted by the lower Court, which granted [267] the application, but the order was set aside by this Court in the exercise of its revisional powers under s. 622 of the Civil Procedure Code, on the 4th February, 1884. The judgment which was delivered by Oldfield, J., and concurred in by Brodhurst, J., has been reported (2), and its effect was to direct the Court below to proceed with the case on the merits. Meanwhile, one Kalian Singh (who must be distinguished from the plaintiff's *karinda* of that name) had been appointed Ganga Sahai's guardian, and the case was tried on the merits by the Court below, ending in a decree in favour of the plaintiff on the 18th April, 1882. And it is from this decree that Ganga Sahai has preferred this appeal through his guardian Kalian Singh,

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(1) 5 A. 293.

(2) *Kalian Singh v. Lekhray Singh*, 6 A. 211.

Having so far stated the nature of the proceedings, and disposed of the preliminary questions as to the validity of the arbitration award, I think it proper, before entering into the merits of the litigation itself, to say that no other objection *in limine*, as to the form of the suit, has been urged before us, either in the grounds of appeal or in the course of argument, on behalf of the defendant-appellant. The main relief prayed for in the suit is of the nature contemplated by s. 42 of the Specific Relief Act (I of 1877), and my judgment will proceed upon the assumption that there is no contention as to the suit being maintainable in its present form notwithstanding the death of Khushal Kuar. Indeed, I take the matter as settled by the order passed by this Court on the 4th February, 1884, to which reference has already been made. But in view of a very recent ruling of the Lords of the Privy Council in *Jagadamba Chaudhri v. Dakhina Mohun Roy Chaudhri* (1), it seems desirable to dispose of the question of limitation, which we are bound to notice under s. 4 of the Limitation Act (XV of 1877). In my opinion the ruling is wholly inapplicable to this case, and much need not be said to distinguish it from the present case. In the first place, in the case before their Lordships of the Privy Council, the adoptions sought to be set aside as invalid were admitted facts, the *factum* being not matter of contention. To use their Lordships' own words:—"The plaintiffs have recognized the adoptees as such for many years in formal instruments and proceedings, and even those parts of the property now sued for have been recovered from the plaintiffs in suits instituted on behalf of the adopted sons by the manager of their estate during their minority." Further remarks made by their Lordships show that the contention proceeded entirely upon the legal validity of adoptions which had actually taken place, and were for many years within the knowledge and cognizance of the plaintiffs. Here the very fact of the defendant's adoption is disputed, and the plaint in paragraph 8 distinctly states that for the first time on the 5th April, 1881, in a document called a will of Musammatt Khushal Kuar "it was falsely given out that she had adopted the aforesaid Ganga Sahai (defendant) under the will of her husband after the death of Rukam Kuar, and made him her husband's successor." Again, the next paragraph in the plaint distinctly states that "the plaintiff was informed of all these particulars after the registration of the said document, and that is the time the cause of action arose." It is true that the statement was met by an allegation contained in paragraph 4 of the written defence, which says:—"Ganga Sahai was adopted in April, 1871, and the plaintiff is aware of it. Hence this claim is beyond time. The plaintiff's allegation, that the 5th April, 1881, is the date on which the cause of action arose, is wrong." But notwithstanding this plea, it has not been shown that either the plaintiff's adoptive father Chandan or the plaintiff himself, who was admittedly a minor at the time of the alleged adoption, ever heard of such a ceremony before April, 1881, when Khushal Kuar's will was registered. These circumstances alone are sufficient to distinguish this case from that before the Lords of the Privy Council. But there is even a more cogent reason why that ruling does not apply to the present case. The case before the Privy Council was governed by art. 129, sch. ii of the Limitation Act (IX of 1871), which has been materially altered and superseded by art. 118 of the present Limitation Act (XV of 1877), which applies to the present case. And their Lordships themselves have taken

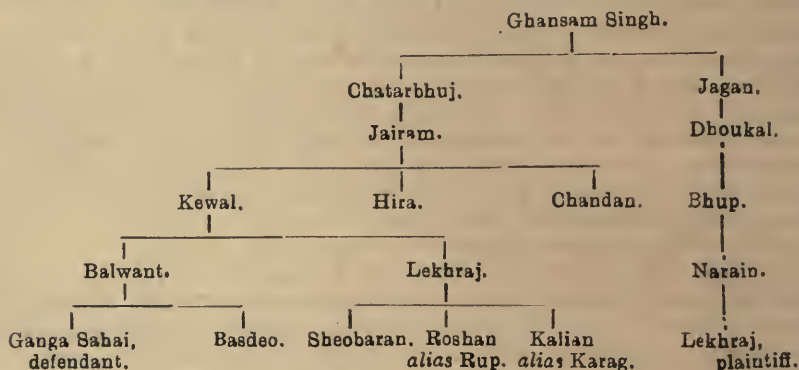
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occasion to point out the change of law, for they say "it is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 118 of 1877, which corresponds to art. 129 of 1871, so far as regards setting aside adoptions, speaks of a suit [269] 'to obtain a declaration that an alleged adoption is invalid or never in fact took place,' and assigns a different starting point to the time that is to run against it." That starting point under the present Act is, "when the alleged adoption becomes known to the plaintiff," and here there is nothing to show that the plaintiff had such knowledge more than six years before the suit, which is the period of limitation provided for such suits in the law by which the suit was governed.

I now proceed to deal with the merits of the case itself, and in doing so, it will be convenient to recapitulate the facts or allegations which gave rise to the main questions upon which the decision of the case depends. And the following table, which, omitting unimportant names, has been extracted from the pedigree given in the lower Court's judgment, indicates the relative natural positions of the parties and some other persons to whom reference is necessary, as held to be proved by the Court below:—



Ghansam and his descendants belong to the Chatriya or military class who admittedly rank among "the twice-born classes" as second only to Brahmans in the division of the human race under the ordinances of Manu, and it may be stated at the outset that the names of Ghansam and his sons Chatarbhuj and Jagan, as well as of the latter's descendants, are of consequence in this pedigree for the sole object of showing the relationship by blood which the plaintiff claims with Chandan, whose adopted son he alleges himself to be. But the persons with whom the facts of this case are really concerned, are Jairam and his descendants, whose names are important in stating the history of the case.

[270] Jairam was possessed of a large zamindari estate called taluka Somna, in the district of Aligarh, and upon his death his property devolved upon his three sons, Kewal, Hira and Chandan, who would, as the normal state of things in Hindu families, remain joint and undivided. The plaintiff's case is that, upon the death of Kewal some time in 1827, a partition took place in the family, whereby their shares and residences were separated and commensality ceased; and that in this division the property left by Jairam was divided into three shares; Kewal's sons, Balwant and Lekhraj, getting the Somna estate, and Hira receiving the Birpura estate, whilst the Gabhana estate fell to the share of Chandan. So far there is

no definite contradiction of the plaintiff's case, nor does anything very much turn upon the question, because throughout this litigation, Hira and his brother Chandan have been regarded as admittedly separated—a fact which is, moreover, perfectly clear from the circumstances of the family.

Lekhraj (son of Kewal) died some time before 1864, leaving the three sons whose names appear in the pedigree. Hira Singh died childless on the 6th June, 1864, leaving two widows, Khushal Kuar and Rukam Kuar, and for the present it is enough to say that notwithstanding some objections raised by his brother Chandan, the names of both the ladies were entered in the Government revenue records as in possession of his estate as childless Hindu widows. This was done by the order of Raja Jeykishen Das, Deputy Collector, dated the 23rd May, 1865, which, after saying that, if "Thakur Chandan Singh has any claim in respect of the entire mahal, such right can be decided by the Civil Court," goes on to say:—"Whereas Musammat Khushal Kuar, the first wife of Thakur Hira Singh, deceased, wishes her name inserted in the column of pattidars, and the name of Musammat Rukam Kuar in the column of lambardars, by mutual consent, and actual transfer of the possession has been effected, it is ordered that the name of deceased (Hira Singh) be struck off and that of Musammat Rukam Kuar be inserted in the column of lambardars, and that of Khushal Kuar in that of pattidars." Their succession as such does not appear to have been contested by Chandan in any regular litigation, and I think it may be taken, as indeed it has been all along assumed in this suit, that their position was that of widows succeeding to their husband's estate together [271] as a single heir with rights of survivorship which the Hindu law provides, and in this manner they appear to have continued in joint possession. While matters stood thus, it is alleged by the plaintiff, and wholly denied by the defendant, that Chandan, being childless, duly adopted the plaintiff Lekhraj, on the 22nd November, 1866. Chandan died on the 14th December, 1870, leaving two widows, Bhawani Kuar and Nem Kuar, whose names are referred to in the evidence.

Similarly, it is alleged on behalf of the defence, but denied by the plaintiff, that on the 22nd April, 1871, Khushal Kuar, with the concurrence of Rukam, adopted Ganga Sahai, in conformity with an authority conferred upon her by her husband. This point, however, belongs to a later part of the case and need not be gone into here. But it may be added here that Balwant, the other son of Kewal, died in 1872, leaving two sons, one of whom is Ganga Sahai, defendant-appellant.

The next important fact is that, on the 25th December, 1874, Rukam Kuar died, and by right of survivorship the whole estate remained in possession of Khushal Kuar, who was then recognized as the lambardar, and her name was entered as such in the revenue records on the 18th May, 1875, after some objections had been preferred on behalf of the present plaintiff.

The next important fact to be mentioned is that not very long after the end of the dispute between the plaintiff and Khushal Kuar as to the entry of her name in the Government records, that lady executed a will on the 7th March, 1877, in which she recited that she had adopted Ganga Sahai under an authority given to her by her deceased husband. What followed was that, on the 5th April, 1881, she executed a codicil, in which, after repeating the recital as to the adoption of Ganga Sahai, she went on to say,—“He has, since the period of adoption, been living with me in mauza Birpura as the representative of Thakur Hira Singh,” her deceased

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husband. Then follows a somewhat significant passage, which may appropriately be quoted here :—"The aforesaid Ganga Sahai is the great-grandson of Thakur Jairam, the common ancestor, and under the provisions of the Hindu law, he is entitled, in his own right also, to get the estate of Thakur Hira Singh and Thakur Chandan Singh; [272] and it is possible that the said Kuar Ganga Sahai may bring a claim to get the estate of Thakur Chandan Singh, deceased, taluqdar of Gabhana." The document was registered on the 7th of April, 1881.

Such are the main facts and allegations which preceded this litigation and have given rise to it. The plaintiff states that he came to know of these facts after the registration of Khushal Kuar's will, which, he contends, virtually amounts to a deed of gift in favour of Ganga Sahai; and upon this allegation he prays the aid of the Court to declare that the defendant Ganga Sahai, as a matter of fact, was never adopted; that even if Khushal Kuar did ostensibly go through any ceremonies of adoption, they were legally null and void; and that all proceedings of the widow in the nature of transfer of her husband's estate will be invalid as to the plaintiff's rights after her death.

The suit was resisted by Khushal Kuar on behalf of herself and Ganga Sahai, on many grounds; of which such as were technical pleas, *in limine*, have since been abandoned, and are not urged here either in the grounds of appeal or in the course of the argument. But one of such pleas it is necessary to mention, as will presently appear. The second plea on the part of the defence is thus stated in the written statement :—"The plaintiff is not fully twenty-one years old as yet, and therefore he cannot bring a suit in his own right." Some evidence was taken upon this point in the Court below, and the plaintiff was found to be *sui juris* when he instituted the suit, the question of majority in his case being governed by the rule of 21 years provided by s. 3 of the Indian Majority Act (IX of 1875), as his adoptive mother, Nem Kuar, subsequent to the death of her husband Chandan, had obtained a certificate of his guardianship under Act XL of 1858. The plea of the plaintiff's minority has not been repeated here, but the evidence taken upon it has been utilized as affording ground for the contention pressed upon us by the learned Pandit in support of the second ground of appeal, that the plaintiff must be held to have been more than five years of age at the time of his alleged adoption by Chandan on the 22nd November, 1866, and that the adoption was therefore invalid under the Hindu law.

[273] The main pleas in defence, however, in the Court below were that, as a matter of fact, the plaintiff was never adopted; that even if he was adopted, "Chandan Singh had no authority to adopt the plaintiff, a stranger, or any one else, in presence of his nephews and their descendants;" that, independently of a valid adoption, the plaintiff had no right of succession to the estate of Hira Singh; that "Ganga Sahai is the natural heir and entitled to the property in question, and was adopted lawfully, with the permission and under the will of Thakur Hira Singh, by the performance of religious ceremonies and the observance of the rules of the Hindu law, and became Thakur Hira Singh's successor, with the consent of the nearest heirs of the family."

This state of the pleadings, and the manner in which the case has been presented to us in the argument at the bar, divide the case into the two main branches which I have indicated at the outset; one relating to the title of the plaintiff-respondent, and the other to that of the defendant-

appellant. And dealing with the case in this manner, the points at issue which require our determination may be conveniently analyzed.

As to the plaintiff's title, the points are—

(1) Was the plaintiff, as a matter of fact, adopted by Chandan ?

(2) If so, was he a total stranger to the family so as to preclude him from being adopted by Chandan in the presence of near relations descended from Jairam ?

(3) If not, was the plaintiff above five years of age on the 22nd November, 1866, when he was adopted ? and

(4) If so, was his adoption null and void under the Hindu law applicable to the case ?

It is perfectly clear to me that, with the exception of the third point above-mentioned, if any of the other points are decided against the plaintiff, his suit must be dismissed for want of *locus standi*, and without entering into the validity of the defendant's title, who has been represented by Khushal Kuar as the rightful owner, and who, at least since the death of that lady on the 8th December, 1881, has been in possession of the property in suit. Nor can there be any doubt that, irrespective of his adoption by Chandan, the plaintiff, even if his descent from Ghansam be admitted as stated by [274] him, would have no right whatsoever to inherit Hira Singh's estate. On the contrary, the defendant, Ganga Sahai, would be among the heirs of Hira Singh, even if his alleged adoption is held to be null and void. This being so, the defendant's title needs no adjudication if the validity of the plaintiff's adoption is not fully established. But if that is established, it will be necessary to enter into the second branch of the case, which relates to the defendant's title. The questions then will be:—

(1) Was Ganga Sahai, defendant, as a matter of fact, adopted on the 22nd April, 1871, by Khushal Kuar, with or without the concurrence of the other widow, Rukam Kuar ?

(2) If so, was such adoption made under an authority given by Hira Singh ? and

(3) If not, is such adoption valid under the Hindu law applicable to this case ?

And I may here say that if the plaintiff's adoption is held to be valid, the failure of the defendant-appellant to establish his title by adoption will prove fatal to his case, and the decree of the lower Court must be upheld. And I have considered it necessary to say so in order to express the comparative significance which I attach to the various points in the case, and I will deal with them in the order in which I have stated them.

First, then, as to the *factum* of the plaintiff's adoption, which, of course, is a pure matter of the weight of evidence. And the evidence produced is both oral and documentary. The date of the adoption is stated to be Kartik Sudi 15, Sambat 1923, corresponding to the 22nd November, 1866, and the oral evidence on the point may be classified under two heads, that is, witnesses who depose as to their having been present at, or taken part in, the actual ceremony, and those who were invited on the occasion as guests to join the celebration and festivity which usually takes place on such occasions.

Among the first class of these witnesses, I think the testimony of Narain Singh, the natural father of the plaintiff, is the most important. He naturally would be a person who would have the most vivid recollection of the circumstance of giving his own son away to be the son of another, and his evidence goes into somewhat [275] minute details, and

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I think has very well stood the cross-examination to which he was subjected. I will here quote a whole passage from his deposition (correcting the mis-spelling of names), as his statement is supported in all the essential and main features by the other witnesses of the ceremony. And I may here state that the expression "mother of Lekhraj," is used by the witness because, according to Hindu customs and manners, a husband does not mention the name of his wife:—"The mother of Lekhraj was, with Nem Kuar, the wife of Chandan Singh, sitting beside Chandan Singh, with the corner of her sheet tied with the corner of sheet of her husband. When I reached there, my wife was sent for from inside the house, and the corners of our sheets were tied together. When this was done, the Pandit said the Lala (boy) should be sent for. Durga, *parohit*, brought Lala Lekhraj Singh from the Kachari. Lekhraj Singh came and sat on my lap. The Pandit commenced to perform the "*Homa*." At the performance of the *Homa*, Thakur Chandan Singh and I were then made to do *pūja* (worship); water and betel-nut were then put in my hand, and I was told to put the water and nut in the hand of Chandan Singh, and then to place the boy on his lap. I and my wife lifted up Lekhraj Singh. My wife placed her hand in contact with mine. The Thakur Sahib and the Thakurain Sahib said, "Give us the boy." Both of them took the boy, keeping their hands in contact with one another's. The Pandits had told me to hold the water and the nut so long as they recited the sacred texts and to hand them over to Chandan Singh after they had done reciting. I did as desired. When Thakur Chandan Singh and Nem Kuar placed the boy on their laps, the Pandits told me that the boy was no longer mine, but of Chandan Singh. The *Homa* continued till after this. The sheets of Chandan Singh and Nem Kuar remained tied, while the sheets of me and my wife were untied. My wife went into the zenana, while I came away to the Kachari of Chandan Singh where I was putting up. Chandan Singh and Nem Kuar remained sitting there and the *Homa* was proceeded with. In respect of Lekhraj Singh, Chandan Singh told Nem Kuar that 'he was her son'."

The testimony of Narain Singh on this and other really essential points is supported by Priya Lal, the Brahman,—one of those priests who performed the religious ceremony on the occasion. [276] The other witnesses of the ceremony are Fateh Singh, who belongs to the same clan as the deceased Chandan Singh, and was also a connection of the family, and a respectable witness. Another member of the clan summoned as a witness was Lachman Singh, an old man of sixty years of age, but his evidence, though supporting the plaintiff's case, relates to another occasion. But the evidence of Kallu, a barber by caste and an old servant of Chandan Singh, is reliable to establish the fact of the adoption, and is supported by the testimony of Murlidhar, who, though a Sarogi, swears to having been present on the occasion. The learned Pandit, who argued the case on behalf of the appellant, devoted a great deal of his argument in pointing out minute matters in the statements of these witnesses which were not fully consistent. But in dealing with the evidence of witnesses who depose to events which took place so many years ago, a too critical standard of accuracy is scarcely possible. Nor should such testimony be put down as wholly untrue because on small questions of detail the witnesses are not absolutely consistent. And as I believe these witnesses on the main points, I need only add that the evidence of those who were invited as guests, *viz.*, Kazi Latafat Husain and Ganga Sahai, pleaders, and, having as such professional relations with Chandan Singh, deserves enough

weight to render the plaintiff's case independent of the evidence of Jan Ali Khan, to which I attach no significance.

But the plaintiff's case does not rest here, for there is an unusually large amount of documentary evidence in the case, upon the *factum* of his adoption by Chandan Singh. And on this part of the case, I think that the remarks of the learned Judge of the Court below are very pertinent. "The fact of Lekhraj Singh's adoption became fully known in the life-time of Chandan Singh, and it was given out by Chandan Singh himself in a positive manner. The evidence fully establishes that there was no affection between the other near members of the family and Chandan Singh, and this is the reason why Chandan Singh did not adopt any one from the branch of Kewal Kishen. This circumstance was especially resented by the descendants of Balwant Singh and Lakhranj Singh. For this reason, Chandan Singh did not content himself merely with performing the ceremonies of Lakhranj Singh's adoption, but on [277] the 13th March, 1867, he executed a *will*, which he deposited, duly sealed, in the office of the Registrar of the Aligarh district. On the 29th March, 1867, this *will* was deposited through the general attorney of Chandan Singh. It is clearly mentioned in the *will* that Lakhranj is his adopted son, and that the said adopted son will, on his death, be the owner of his property, &c. At the same time, Chandan also wished to make it known to the Revenue Court in a clear and distinct manner. Accordingly, he presented an application to the Collector on the 14th March, 1867, that the name of his adopted son Lakhranj Singh might be entered in the column of ownership, regarding the entire estate, with himself as *sabarakar*. An order was passed upon it that the petitions should be filed with reference to each village, and under this order petitions were filed."

The will of the 13th March, 1867, has been produced and its genuineness has not been doubted, though some attempt has been made to argue that Chandan Singh was not fully cognizant of its contents, for the plea in respect of the document is contained in paragraph 8 of the written defence, which runs as follows:—"Thakur Chandan Singh was under the control of his second wife, Thakurian Nem Kuar. The will of Thakur Chandan Singh and the plaintiff's adoption have been given out falsely and collusively at the instance of Narain Singh, the plaintiff's father, with a view to defeat the title of the rightful heirs."

But the case so set up has not been made out. The evidence of Kazi Latafat Husain, pleader, proves that he, at the request of Chandan Singh, and in consultation with another pleader, prepared the draft of the will. The evidence of Bansidhar proves that Chandan Singh signed and sealed the will. It was deposited by way of registration on the 29th March, 1867, by Partab Rai, who was in the service of Chandan Singh, and, under a *mukhtarnama* dated the 1st January, produced in evidence, was empowered to register documents on behalf of his master. The will was kept at the registration office in a cover which was not opened till the 16th January, 1871, that is, after Chandan Singh's death. The will, in my opinion, stands above doubt, and its terms are so reasonable that they afford no *indicia* of undue influence. On the other hand, the will places the fact of the plaintiff's adoption [278] beyond question—a conclusion fully borne out by what followed.

It is admitted that on the 14th March, 1867, (the day following the will) an application was made on behalf of Chandan Singh to the Revenue authorities in respect of the entry of Lekhraj's name in the Government records. The petition is unfortunately not on the record, but this defect

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does not do much to injure the plaintiff's case. For soon after, on the 9th April, 1867, Chandan Singh made another application to the revenue authorities praying "that the name of the adopted son be entered as proprietor for Gabhana, and that my name be removed from the column of proprietor and be entered as *sarbarakar* or manager."

It must be here observed that Gabhana was the central village of Chandan's estate, and the place where he resided. A similar application was made on the 15th April, 1867, in respect of another village, and both these applications were verified by Chandan himself under the usual practice of revenue authorities, as is shown by the evidence of Ram Prasad and the record itself. On the 9th July, 1867, the name of Lekhraj was actually entered in respect of one village. The other application was opposed by Balwant (the defendant's natural father) and his nephews the sons of Lekhraj, by their petition of the 25th June, 1867, and to this a reply was filed on the 28th June, 1867, on behalf of Chandan, in full terms, which state the history of the family property and affirm the plaintiff's adoption. Yet the objections of Balwant and others prevailed on the 10th July, 1867, on the ground that the transfer of possession in favour of Lekhraj was not proved.

But the documentary evidence does not stop here. When the new settlement began, Chandan Singh again, by an application dated the 21st November, 1867, repeated his request as to the entry of Lekhraj's name in respect of Gabhana, stating him to be the adopted son, and made a similar application on the 10th December, 1867. Both these were again opposed by Balwant and others by a petition dated the 31st January, 1868, which again elicited a written reply from Chandan in an application dated the 10th February, 1868. The objections again prevailed, and the mutation of [279] names was disallowed by the assistant settlement officer on the 6th March, 1868, partly upon the ground that the will of Chandan did not transfer ownership to Lekhraj (plaintiff), and partly because "a dispute is pending between the petitioning party and the objector, and the whole matter will not improbably go before a Civil Court."

The main point of the argument addressed to us against these pieces of evidence was that Chandan himself may have never understood the contents of the applications. But it is an argument too feeble to deserve much notice. It is wholly inconceivable to me that in a state of such disagreement between Chandan and his near relations by blood, the former could have continued ignorant of what was being done in his name in the Revenue Court. I accept these applications as representing the statements and wishes of Chandan, and, once they are so regarded, the question of the plaintiff's adoption is placed beyond the possibility of a doubt. This is a conclusion borne out by what happened afterwards. Chandan died on the 14th December, 1870, and his widow, Nem Kuar, applied to the revenue authorities on the 21st January, 1871, for the entry of the plaintiff's name, on the ground of his being the adopted son of the deceased. The application was again objected to by Balwant and his nephews, but the objections were disallowed by the settlement officer on the 24th February, 1871, and the plaintiff's name was entered as the heir and successor of Chandan. Again, on the 18th of March following, Balwant and others made another application to the revenue authorities, in which, as the learned Subordinate Judge points out, the *factum* of the plaintiff's adoption was assumed, though its legal validity was questioned. In connection with some of the petitions above mentioned, the deposition of Juala Prasad, pleader, may be consulted with advantage.

The whole of this oral and documentary evidence, when taken together, leaves absolutely no doubt in my mind that, as a pure question of fact, Chandan Singh did adopt the plaintiff Lekhraj. But against this conclusion the learned Pandit, on behalf of the appellant, has cited *Mahashoya Shosinath Ghose v. Srimati Krishna Soondari Dasi* (1) which, in my opinion, is wholly inapplicable to this case. What was ruled there was that the mere fact of the [280] execution of certain deeds of gift and acceptance of a child, which were not shown to have been intended by the parties to operate as a complete adoption, would not amount to an adoption in the absence of proof that such an adoption actually took place. The ruling might, perhaps, with some plausibility, be relied upon, if Chandan Singh's will were the only evidence of the plaintiff's adoption, and no evidence as to the actual adoption had been adduced. But here, as I have already shown, there is ample evidence, both oral and documentary, to prove the *factum* of the adoption. Whether that adoption was valid under the Hindu law has next to be considered with reference to the remaining three points of the plaintiff's branch of the case as stated by me.

And the first of these points is, whether the plaintiff had any relationship by blood with his adoptive father Chandan, and, if not, whether his adoption would on that account have been void. The question has arisen from the plea urged in paragraph 5 of the written defence, which runs as follows :—"The plaintiff is not, according to his allegation, a descendant of Thakur Jairam Singh, and therefore, in presence of the grandson of Kewal Kishen (the real brother of Hira Singh) the plaintiff, a stranger, cannot be a reversioner, or entitled to succeed to the estate of Hira Singh, nor can he offer cakes or libations to Hira Singh as against Ganga Sahai."

Much importance was not attached to this part of the case by the learned Pandit, who has argued it on behalf of the appellant, but I think a few observations are required to dispose of the point. The pedigree given in the lower Court's judgment is sworn to by Narain Singh, the natural father of the plaintiff, and also by another witness, Lachman Singh, another descendant of Ghansam, through his son Sada Ram. The evidence of these witnesses as to the pedigree has not seriously been disputed, and I adopt the language of a note in Mr. Justice Field's work on the *Law of Evidence in British India* (p. 182) in saying that the testimony of Hindus as to the history of their family during preceding generations is occasionally more valuable than similar testimony given by persons of other races, certain castes of the Hindus observing it as a rule, in the education of their children, to teach them to repeat and keep in remembrance the names of their ancestors. At all events, the learned [281] Judge of the Court below has believed the pedigree on the evidence before him, and I agree with his conclusions; and I may add that this particular point has not been specifically taken in the grounds of appeal. Bearing in mind, then, the abstract of the pedigree already stated by me, we have to consider the relative positions of the parties to the deceased Chandan, by relationship of blood; because an endeavour has been made on behalf of the appellant to contend that, even if the pedigree be accepted, the relationship of the plaintiff-respondent would be too remote to admit of his being validly adopted in preference to the respondent and other near relations. Before considering the legal aspect of the matter *qua* adoption, I am of opinion that the plaintiff, by reason of his natural relationship

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with Chandan, belonged to the same *gotra* as the latter. "Gotraja relationship is the connection or relation of persons descended from the same stock or common ancestor. It includes lineal or collateral consanguinity. It not only includes male kinsmen, but also includes female ancestors from whom the deceased is descended."—(Sarvadhikari's *Hindu Law of Inheritance*, p. 593). This passage is in accord with the observations of the Lords of the Privy Council in *Bhyah Ram Singh v. Bhyah Ugur Singh* (1) where their Lordships, in considering the rights of inheritance possessed by remote kinsmen, went on to say:—"Family union or connexion derived from a common head, the founder of the family, may reasonably be regarded amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males who, for the same reason, may obtain a constant preference. The text of the whole of the fifth and sixth sections of the second chapter of the Mitakshara is in the strictest conformity to these principles. The gentiles or *gotraja* from the *gotra*, are described as descending from one common stock—a male—and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the *gotra*. These conditions are all that are stated as necessary to the constitution of the class of gentiles." There can, therefore, [282] be no doubt that the plaintiff belongs to the same *gotra* as Chandan, and it is equally beyond question that the natural relationship of the defendant to Chandan is much nearer than that of the plaintiff. In the table of succession given by Mr. Justice Cunningham at page 115 of his *Digest of Hindu Law* the plaintiff would stand at No. 32, being Chandan's father's father's son's son's son's son, and the defendant would stand at No. 11, being Chandan's brother's son's son.

Fortunately, the question whether the remoteness of the plaintiff's relationship to his adoptive father Chandan, in comparison to the descendants of Chandan's brother Kewal, would *ipso facto* vitiate the plaintiff's adoption, is a matter which has been fully settled by a recent ruling of the Lords of the Privy Council in *Srimati Uma Deyi v. Gokoolanand Das Mahaptra* (2), which, indeed, goes far beyond the exigencies of the present case; but in dealing with the question I cannot do better than cite a passage from the judgment of their Lordships:—"The plaintiff relies mainly upon certain texts of the Dattaka Mimamsa and the Dattaka Chandrika of which the former is considered by the Benares school to be the more authoritative treatise on the subject of adoption. The texts chiefly insisted upon are the 28th, the 29th, 30th, the 31st and the 67th slokas or paragraphs of the second section of the Dattaka Mimamsa; and the 20th, the 21st, the 22nd, the 27th, the 28th paragraphs of the first section of the Dattaka Chandrika. It is unnecessary to set out these at length, because it may be conceded that they do, in terms, prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a *dwyamushyayana*, or son of two fathers. The grave

question, however, that arises in this case is, whether the injunctions just referred to are merely binding upon the consciences of pious Hindus as defining what they ought to do, or are so imperative as to have the force of law, the violation whereof should be held in a Court of justice to invalidate an adoption which has otherwise been regularly made."

[283] Their Lordships then went on to say :—"Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of justice has so decided." Their Lordships then proceeded to consider the various authorities on the subject, and adopting the opinions of Sir William Macnaghten and Sir Thomas Strange, laid down the general principle of law that where the Hindu Shastras contain provisions directory in their nature with reference to the specification of certain relations as eligible for adoption in preference to others, the doctrine of *factum valet* applies, and that even in the Benares school the adoption of a very distant relation not included within the *sapindas* of the adoptive father, made in violation of the preferential right of the son of a brother of the whole blood, will be valid. I shall have something more to say upon the doctrine of *factum valet* in considering a later part of the plaintiff's case; but I think that what I have already said as to the effect of the Privy Council ruling is fully sufficient to dispose of the appellant's contention as to the invalidity of the plaintiff-respondent's adoption, so far as that contention rested upon the remoteness of his relationship with his adoptive father.

The next question in the plaintiff's case (namely, that which stands as third among the points enumerated by me) is, whether the plaintiff was above five years of age on the 22nd November, 1866, when he was adopted by Chandan. This, of course, is a pure question of fact, and would be wholly insignificant but for the important question of law which the next point involves; for it has been contended with considerable emphasis by the learned pandit on behalf of the appellant, that the adoption of a boy above the age of five years is, *ipso facto* null and void under the Benares school of Hindu law, which admittedly governs the present case. The legal question I shall consider later on, but in the meantime it is important to see how the question of fact as to the plaintiff's age stands with reference to the evidence upon the record.

I have already stated that among the pleas *in limine* which have been abandoned by the defence, was one which stated that the [284] plaintiff had not attained the age of 21 years, and was therefore not *sui juris* on the 2nd July, 1881, when he instituted the suit. The plea formed the second paragraph of the defendant's written statement. It may at once be said that the language of the plea could in no sense be understood to raise the question that by any rule of law or custom the plaintiff's adoption would be a nullity if he was older than five years at that time. Nor was any specific evidence taken with reference to the exact age of the plaintiff at the time of his adoption. But, as already observed, the general question as to his age being above 21 years at the time he instituted this suit, formed the subject of the second issue in the Court below. And upon that issue the Court below found that the plaintiff could maintain the suit *sui juris* on the 2nd July, 1881. The matter therefore stands thus, either the plaintiff was a major (that is 21 years old) or not, when he instituted the suit. If he was a minor, the suit was not main-

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tainable by him *sui juris*. On the other hand, if he had attained the age of 21 when he instituted the suit, it follows, by necessary inference, that he must have been born some time before the 2nd July, 1860, and would be more than five years of age on the 22nd November, 1866, when he was adopted. Indeed, by this calculation his age at the time of his adoption would exceed six years. Again, if the plaintiff's age on the 22nd November, 1866, the date of his adoption, be assumed to have been below five years, it would necessarily follow that he was not *sui juris* on the 2nd July, 1881, when the suit was instituted, for he would not by this calculation attain the age of 21 years before the 22nd November, 1882.

But, indeed, the question of the plaintiff's age does not rest entirely upon this inferential reasoning. The general question of age was clearly before the lower Court, and the parties had ample opportunity to produce evidence upon the point. And this being so, I think the learned Pandit was perfectly right in resisting Mr. Hill's contention before us, to the effect that if we attached importance to the question of the exact age of the plaintiff at the time of his adoption, we should remand the case to the Court below for the trial of the issue under s. 566, Civil Procedure Code, or take further evidence here under s. 568. The Lords of the Privy Council have on more than one occasion expressed the view that cases [285] should not be remanded simply to enable the parties to produce any evidence which they might very well have produced at the proper time in the Court of first instance, the question upon which the further evidence is sought to be produced being clearly before the Court of first instance. And I think there was considerable force in the argument of the learned Pandit on behalf of the appellant when he said that the mere circumstance that the evidence as to the plaintiff's age is now sought to be utilized for a purpose other than that for which it was produced, will not entitle either party to claim a remand or a re-trial of the issue. I accept this contention, and now proceed to consider the evidence already on the record, with the object of deciding the specific question whether on the date of his adoption, *viz.*, the 22nd November, 1866, the plaintiff was above or below the age of five years.

And upon this question I think the circumstances of the case and the evidence upon the record leave no doubt. We find, among the documentary evidence produced by the plaintiff-respondent himself, an application made by his adoptive mother, Nem Kuar, to the Judge of Aligarh, praying that a certificate of guardianship, under Act XL of 1858, might be granted to her in respect of the person and property of her minor adopted son Lekhraj, plaintiff. The application was made sometime before the 21st January, 1871, (for it bears an order of that date) and therein the age of the plaintiff is stated to be ten years, and it is clear from the order of the Judge, dated the 13th February, 1871, that it was upon that assumption that the application was granted, after some objections made by Balwant Singh and others, descendants of Chandan's brother Kewal. Another document produced by the plaintiff is an order of Mr. Watson, Judge of Aligarh, dated the 19th September, 1877, from which it appears that an application had been made by the plaintiff "on the 5th January, 1877, in which he represented himself to have arrived at his majority, having, as he said, attained the age of 18 years." It also appears that upon that application the certificate of guardianship was either cancelled or re-called, and Mr. Watson's order just referred to restore the certificate of guardianship to Nem Kuar, treating the plaintiff's age as having been ten years when the certificate was originally granted in 1871. Nor does the documentary

evidence stop here, for there is upon the record an order of Mr. [286] Moore, Judge of Aligarh, dated the 2nd January, 1880, from which it appears that shortly before that date the plaintiff applied again to be declared a major, and upon the admission of his adoptive mother, Nem Kuar, the plaintiff's application was granted by the Judge, and the certificate of guardianship cancelled. Now all these documents relate to proceedings taken under Act XL of 1858, in a Court of justice, authorized by law to deal with questions of minority in respect of the guardianship of infants. The question of the minor's age in such proceedings is necessarily the subject of consideration; and in view of the fact that the plaintiff himself has relied upon them to establish his right to institute this suit *sur juris* on the 2nd July, 1881, I am of opinion that their general effect is to show that the plaintiff was older than five years on the 22nd November, 1866, when he was adopted. Again, there is the best possible oral evidence to support the same conclusion, for the plaintiffs natural father stated on oath in the Court below that the plaintiff was six years old when adopted by Chandan Singh—a statement which would go to show that he was then in his seventh year. Mr. Hill has, indeed, argued that his statement must be accepted with caution because, according to the idiom of the people of this country, a boy will be called six years old when he is in his sixth year, and has not yet entered in his seventh year.

I am willing to allow this contention; but for the reasons already stated by me, I do not think it frees the plaintiff's case from the difficulty of age with reference to the question of adoption. For the contention urged upon us with so much emphasis by the learned Pandit on behalf of the appellant is, that a boy who has passed the fifth anniversary of his birth ceases, *ipso facto*, to be a fit subject of adoption among the "twice-born" classes under the Benares school of Hindu law. And for this contention it is a matter of no significance whether the plaintiff was in his sixth or seventh year when he was adopted on the 22nd November, 1866. Further, I may add that, in his own deposition, taken by the lower Court on the 20th November, 1884, the plaintiff stated on oath that he was about 25 years of age, and went on to say:—"I was born in Sambat 1917, 1918, or 1916; but I do not know about it for certain. My anniversary takes place in summer season, but I do not recollect the month." This statement is somewhat vague, and would not perhaps in itself deserve much weight, had it not [287] been supported by all the proceedings relative to the certificate of guardianship which I have already described, and in which the plaintiff in his deposition admitted himself to have taken part. But the most favourable interpretation of the plaintiff's evidence would go to show that he was born in the summer of Sambat 1918, that is, about the middle of 1861 of the Christian era. And even this calculation would show that in the winter of 1866, that is, on the 22nd November of that year, the plaintiff had passed the fifth anniversary of his birth when he was adopted. That is all that the learned Pandit on behalf of the appellant has sought to establish, and I find that upon the evidence on the record he has fully succeeded in doing so. And in saying this I am indeed only upholding the finding of the Court below, which held that "it is proved satisfactorily that at the time of adoption he (plaintiff) was certainly more than five years old."

And having decided this I must proceed, at the learned Judge of the Court below had to do, to consider and decide the important and difficult question of Hindu law which stands as the last question in the plaintiff's case as stated by me, namely, whether under the Benares school of Hindu

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law, which admittedly governs this case, the adoption of the plaintiff Lekhraj on the 22nd November, 1866, was null and void by force of the simple reason that he was then above five years of age.

The question so enunciated is one of considerable gravity, and is *res integra*, having never before been adjudicated upon by any authoritative ruling under the Benares school of law. Indeed, in the very able argument addressed to us by the learned Pandit on behalf of the appellant, as well as in the reply which Mr. Hill has with so much ability addressed to us on behalf of the respondent, the question has been treated as one of first impression. Nor have the learned counsel on either side been able to cite any case which would help us in determining this grave question. Under these circumstances, the consideration of this point has been with me a matter of great anxiety; for I feel that the conclusions at which we arrive in this Court upon this point will affect one of the most solemn rights which the Hindu law confers upon childless Hindus, whose religious feelings have given rise to the institution of adoption itself. And I have considered it necessary to make this obser-[288] vation, in order to justify the elaborate manner in which I purpose to deal with this question.

The difficulties of the question now before us are considerably enhanced by the circumstance that, in connection with the proper age and period for adoption, great divergencies prevail in the various sub-divisions of the Mitakshara school of Hindu law itself. And because in deciding the question it will be my duty to discuss the comparative authority of the various texts which have been cited in this case, I consider it necessary to express the general view which I entertain of the authoritative sources of Hindu law, the schools into which that system of jurisprudence is divided, the sub-divisions of each school, and I shall have to name some of the principal books of authority prevailing in each school, to which reference has to be made in dealing with this case.

It is a proposition of undoubted authority that the original fountain-head of the Hindu system of jurisprudence are the *Vedas* denominated as *Sruti*, or "that which has been heard," being supposed to be the *ipsissima verba* of the divine revelation. Next in order of authority come the *Smritis* or "that which is remembered," being regarded as the expression of the divine will conveyed to mankind by inspiration through the agency of human beings. Both these propositions are supported by the ordinances of Manu, which lay down:—"No doubt, that man who shall follow the rules prescribed in the *Sruti* and in the *Smriti* will acquire fame in this life and, in the next, inexpressible happiness. By *Sruti*, or *what was heard from above*, is meant the *Veda*, and by *Smriti*, or *what was remembered from the beginning*, the body of law: those two must not be oppugned by heterodox arguments, since from those two proceeds the whole system of duties. Whatever man of the three highest classes, having addicted himself to heretical books, shall treat with contempt those two roots of law, he must be driven, as an atheist and a scorner of revelation, from the company of the virtuous."—(Manu by Jones, Chap. II, ss. 9, 10 and 11).

The supreme authority of these two sources of Hindu law is therefore absolute and above question, though it may be added here that, by an inflexible rule of Hindu jurisprudence, the *Smritis* are never taken to be in discord with the *Vedas*; and I may use the [289] language of a Hindu lawyer himself in saying that, although the *Vedas* are held to be the ultimate sources of law, for all practical purposes the *Smritis* are treated as the sources of absolute authority upon all legal matters:—"The authors of *Smritis* are human beings, but in the opinion of the orthodox

the Rishis knew the Vedas better than any man, in these degenerate days, can. Anyhow, the Smritis are now quite as authoritative as the Vedas in the estimation of orthodox Hindus." (Siromani's *Hindu Law*, p. 14). Somewhere in the order of precedence, either between the Srutis and the Smritis, or more probably after them, come the Puranas, which the celebrated Colebrook states "are reckoned as a supplement to the scripture, and as such, constitute a fifth Veda." (Misc. Essays, vol. i, page 12). And this view is supported by a passage of the sage Yajnavalkya, which lays down that "the Vedas, along with Puranas, the Nyaya, the Mimamsa, the Dharmasastras, and the Angas are the fourteen seats (sources) of knowledge and duty," (Mandlik, p. 158). I mention this in respect of the authority of the Puranas, because one of these, the Kalikapurana, is the ultimate source of authority on which the learned Pandit on behalf of the appellant has relied in support of the whole of his contention upon the point now under consideration. Next in the rank of authority are the Vyakhyaṇa or Tika, being glosses or commentaries upon the Smritis; and last of all come the Nivandhana, or, as Mr. Morely has described them, digests "either of the whole body of the law or of particular portions thereof, collected from the text-books and their commentators." (Morely, *On the Administration of Justice in British India*, p. 203).

Such, then, according to my conceptions, are the sources of Hindu law and the comparative authority to which they are respectively entitled. And I may here add that by far the most authoritative of the Smritis is the Institute of Manu, and next in rank to him is the institute of Yajnavalkya, for which we are indebted to the labours of Rao Sahib Vishvanath Narayan Mandlik, the distinguished Sanskrit and Hindu lawyer of Bombay, who has published an English translation of the work. Further, by far the most authoritative commentary on the Institutes of Yajnavalkya is the Mitakshara of Vijñānesvara, which in all legal matters possesses the highest authority throughout the whole of India with [290] the exception of Lower Bengal. (Mayne, *Hindu Law and Usage*, s. 26).

I now proceed to state how the Hindu Law has divided itself into various schools and sub-divisions. The Dharmasastra, or law in its ordinary sense, includes religious observances as well as rules of law which are based upon religious tenets. The Dharmasastras have in the end resulted in a divergence of schools on account of the fact that Hindu theology, law, and metaphysics are commingled with each other, and the tendencies of the method of reasoning which are held to be applicable to one are allowed to influence the interpretation of the other branches of knowledge. And we have the authority of Colebrook that there are various systems of analogical reasoning recognized in Hindu philosophy, theology and law. The most important of these systems are the Mimamsa and Nyaya, of which we have the following account:—

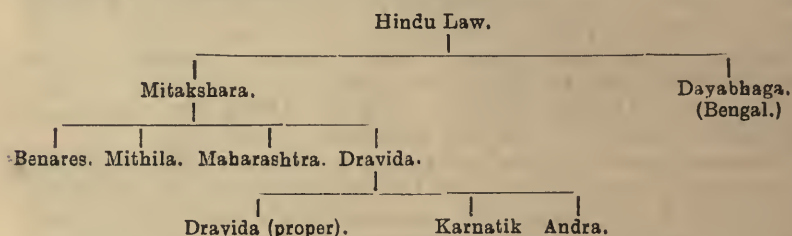
"The two Mimamsas (for there are two schools of metaphysics under this title) are emphatically orthodox. The prior one (*purva*) which has Jaimini for its founder, teaches the art of reasoning with the express view of aiding the interpretation of the Vedas. The latter (*Uttara*) commonly called Vedānta and attributed to Vyasa, deduces from the text of the Indian Scriptures a refined psychology which goes to a denial of a material world. The Nyaya, of which Gotama is the acknowledged author, furnishes a philosophical arrangement, with strict rules of reasoning, not unaptly compared to the dialectics of the Aristotelian school." (Misc. Essays, vol. 1, p. 227). That these systems of philosophical reasoning have led to the establishment of different schools of law, appears from

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another passage of the same author, to be found at page 316, vol. 1, of Sir Thomas Strange's celebrated work on Hindu law:—"The written law, whether it be *Śruti* or *Smṛiti*, direct revelation or tradition, is subject to the same rules of interpretation. These rules are collected in the *Mīmāṃsā*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy, and is properly the *logic of the law*. In the eastern part of India, *viz.*, Bengal and Behar, where the Vedas are less read, and the *Mīmāṃsā* less studied than in the south, the dialectic philosophy or *Nyāya* is more consulted, and is there relied on for rules of [291] reasoning and interpretation upon questions of law as well as upon metaphysical topics. Hence have arisen two principal sects or schools, which, construing the same text variously, deduce upon some important point of law different inferences from the same maxims of law. They are sub-divided by further diversity of doctrine into several more schools or sects of jurisprudence which, having adopted for their chief guide a favourite author, have given currency to his doctrine in particular countries, or among distinct Hindu nations, for the whole Hindu people comprise divers tongues, and the manners and opinions prevalent among them differ not less than their language." The result of this method of legal development has been the establishment of two main divisions of Hindu law, which can be most conveniently described as the *Mitākshara* school and the *Dayabhaga* school, the former being again sub-divided into four minor divergencies of doctrine. One of the writers has suggested even a further sub-division, and the best way to indicate the various schools and their divisions, is to state them in a tabular form:—



This division and arrangement of the various schools has been mentioned by Mr. Morley and has been generally accepted, with the exception of the subdivision of the *Dravida* school, which has incurred the criticism of Dr. Burnell, who "agrees with Mr. Colebrook in thinking that the only distinction of real importance is between the followers of the *Mitākshara* and the followers of the *Dayabhaga*." (Mayne, s. 33). At the same time it must be remembered, as Mr. Mayne has pointed out, that in the *Ramnād* adoption case, in the *Madras High Court* (1) as well as the *Privy Council* (2) a distinction between the *Benares* and the *Dravida* schools was recognized and a somewhat similar distinction has been made between the *Andra* and the *Dravida* sub-divisions in *Narasammal v. Balaramacharlu* [292] (3). Mr. Mayne (s. 35) then goes on to say that "any one who compares the *Dayabhaga* with the *Mitākshara* will observe that the two works differ in the most vital points, and that they do so from the conscious application of completely different principles." There is thus an accidental similarity between the divisions of the Hindu law and the manner in which the various schools of the Muhammadan law are

(1) 2 M.H.C. 206.

(2) 12 M.I.A. 397.

(3) 1 M.H.C. 420.

arranged, the two main divisions being the Sunni and Shia schools, and the former, like the Mitakshara school, being sub-divided into the four minor divergencies of Hanafi, Shafai, Maliki and Hanbali.

Such being the divisions and sub-divisions of the schools of Hindu law, I think it will be convenient, before entering into the consideration of the various texts which have been cited, to deal with that portion of the argument addressed to us on behalf of the parties which relates to the application of the doctrine of *factum valet* to cases of Hindu adoption. For it was argued by the learned counsel for the respondent, that even if the authorities relied upon by the learned Pandit on behalf of the appellant be taken to be conclusive as imposing the limitation of the age of five years upon the adoption of a boy, the irregularity or defect in the case of the plaintiff would be covered by the doctrine *quod fieri non debuit factum valet*. It seems to me, therefore, advisable to clear the case of the complication which this contention has introduced. In the case of *Srimati Uma Deyi v. Gokoolanund Das Mahapatra* (1) to which reference has already once been made, and which was governed by the Benares school of Hindu law, the Lords of the Privy Council made the following observations.—“It was urged at the bar that the maxim *quod fieri non debuit factum valet*, though adopted by the Bengal school, is not recognized by other schools, notably by that of Benares. That it is not recognized by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal, is a proposition which is contradicted not only by the passage already cited from Sir William Macnaghten's work, but by decided cases. The High Court of Madras in *Chinna Gaundun v. Kumara Gaundun* (2) and the High Court of Bombay in *Raje Vyankatray Anandray Nimbalkar v. [293] Jayavantrav bin M. Ranadive* (3) acted upon it, and did so in reference to the adoption of an only son of his natural father on which the High Court of Calcutta in *Rajah Opendur Lall Roy v. Ranees Bromo Moyee* (4) has refused to give effect to it, considering that particular prohibition to be imperative.” To the cases cited by their Lordships may be added *Hanuman Tiwari v. Chirai* (5) where the majority of a Full Bench of this Court applied the doctrine to the adoption of an only son, relying in some measure on *V. Singamma v. Vinjamuri Venkatacharlu* (6) which, however, only went to the length of saying that the omission to perform the ceremony of *Datta Homam* would not vitiate an adoption which had actually taken place. But the rule has perhaps never been carried to a greater extent than in the recent case of *Dharma Dagu v. Ramkrishna Chinnaaji* (7) in which a Division Bench of the Bombay High Court held that even the adoption of a married *asagotra* Brahman, in violation of the ordinary rule that adoption should take place before the *upanayana*, would be covered by the doctrine of *factum valet*. On the other hand, in the case of *Laksh-mappa v. Ramava* (8), it was held by the Bombay Court that a gift by a Hindu widow of her deceased husband's only son is invalid in the absence of an express authority conferred upon her by him during his life-time, and that such an adoption, being null and void *ab initio*, cannot be supported by the maxim *quod fieri non debuit factum valet*. And upon the same principle, the same Court in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (9) declined to apply the doctrine to the adoption of a daughter's or sister's son.

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(1) 5 I A. 40.

(4) 10 W.R. 347.

(7) 10 B. 80.

(2) I M H.C., 54.

(5) 2 A. 164.

(8) 12 B.H.C. 364.

(3) 4 B.H.C. A. O. 191.

(6) 4 M.H.C. 164.

(9) 3 B. 273.



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Again, there is a learned note at p. 909 of Mr. Justice West's celebrated work on Hindu law, which I wish to quote here before proceeding any further.

"Jagannatha, followed by Strange and Macnaghten, brings the principle of *factum valet* to bear upon the prohibition to adopt an only (or an eldest) son. (See Coleb. Dig. Bk. V. T. 273, Comm.) The adoption, he says, is valid, however improper. The Mitakshara does not recognize this distinction. It ranks the unfit with the void gift (see 2 Str. H. L. 423) and it pronounces against the adoption [294] without reserve (Mit. Chap. 1, sec. XI., paras 11, 12). Jagannatha himself points out that according to the Mithila law the gift of an only son is illegal, even though he consent to the donation (Coleb. Dig. Bk. V. T. 275, Comm.; 1 Str. H.L. 87; 1 Macn. H.L., 67." And as an illustration the learned author cites the case of *Somasekara Raja v. Subhadramaji* (1), where an adoption was held to be invalid on the ground, *inter alia*, that the mother had no authority to give the boy in adoption, because he was the only son of her deceased husband at the time of adoption. Another authority on Hindu law—Mr. Mayne—has the following:—

"It is usual to speak of the doctrine of *factum valet* as one of universal application in the Bengal school. But this is a mistake. When it suits Jimuta Vahana, he uses it as a means of getting over a distinct prohibition against alienation by a father without the permission of his sons (Dayabhaga ii § 30.) I am not aware of his applying the doctrine in any other case. No Bengal lawyer would admit of any such subterfuge as sanctioning, for instance, the right of any undivided brother to dispose of more than his own share in the family property for his private benefit, or as authorising a widow to adopt without her husband's consent, or a boy to be adopted after *upanayana* or marriage. The principle is only applied where a legal precept has been already reduced by independent reasoning to a moral suggestion." (s. 35.)

I have referred to these various authorities in illustration of the manner in which the doctrine of *factum valet* has been dealt with in connection with adoption under the various schools of Hindu law, and I think I may add that it would not be easy to reconcile the various rulings in matters of detail. But the exigencies of this case do not necessitate the consideration of the question whether, in all the cases which I have cited, the doctrine was properly applied by the Indian Courts. It seems to me enough to say that the authorities which I have quoted place the proposition beyond doubt, that not only in the Dayabhaga school, which prevails in Lower Bengal, but also in the various sub-divisions of the Mitakshara school, the doctrine of *factum valet* has been held to be applicable. Limitations upon the scope of that doctrine have been sought in the provisions of books of authority in the various schools of Hindu [295] law, and it has been said that whilst the Dayabhaga school countenances the doctrine, the Mitakshara school repudiates it altogether.

I am of opinion that the application of the doctrine by the Courts of Justice in British India need not depend for its authority upon any rule of Hindu law any more than upon any rule of Muhammadan law. The maxim, which owes its origin to Roman Jurisprudence, rests upon those principles of justice, equity and good conscience, which we are bound to administer even in dealing with questions of this nature, whenever the substantive rules of the native law furnish no clear,

and unmistakeable guide. It has been said and, as Mr. Mayne has pointed out, said erroneously, that the Dayabhaga in saying that "a fact cannot be altered by a hundred texts" (s. 30, chap. II), countenances an unlimited application of the doctrine of *factum valet*, and the authority of Sir Thomas Strange is invoked to show that the maxim of civil law prevails in no code more than in that of the Hindus (vol. II, p. 87). Be this as it may, there is no authority whatsoever to show that the maxim is to be applied to cases of Hindu law in a manner which would exceed the limits of the maxim as recognized in the civil law itself, "although warm advocates of that maxim," to use the words of Westropp, C.J., "seem to have laid it down somewhat wildly and as if it were applicable in every case in which the regular form of adoption had been gone through."

Holding these views, it is unnecessary for me either to discuss the exact meaning of the sentence in the Dayabhaga which I have quoted, or to search the texts of the Mitakshara school for authority regarding the application of the principle upon which the doctrine of *factum valet* proceeds. For I am content with the maxim as it is understood in the civil law, and I am willing to apply it to cases of Hindu adoption, in the manner in which the maxim itself should be properly understood. And in connection with this matter, no one has explained the doctrine better than that eminent Judge Sir Michael Westropp in *Lakshmappa v. Ramava* (1) where, speaking of the doctrine, he said,—"To us it appears that its application must be limited to cases in which there is neither want of authority to give or accept, nor imperative interdiction of adoption. [296] In cases in which the Shastra is merely directory, or only points out particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded." The same is the effect of what was said by the same distinguished Judge in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (2), where he pointed out that the ruling of the Privy Council in *Srimati Uma Deyi v. Gokoolanund Das Mahapatra* (3) did not go any further.

It appears to me that in all systems where juristic notions have at all been carefully classified, a distinction exists between rules which regulate matters of form and as such are directory in their nature, and those rules which go to the very essence of the matter, and violations of which, if allowed, would be destructive of the rule itself. The distinction is analogous to that which exists between adjective law and substantive law, between matters which go to the remedy, *ad litem* *ordinationem*, and those *ad litem* *decisionem*. I make this comparison only by analogy, for it helps me to explain my opinion in regard to the exact scope and application of the doctrine of *factum valet* in connection with this case. And I think the matter was never put better than by Westropp, C.J., in the two cases already referred to, when he said that, in the maxim *quod fieri non debuit factum valet*, on the one hand, "*factum*" must not be understood to mean a transaction which is a mere nullity; nor, on the other hand, should "*debuit*" be read as if it were "*potuit*." And this statement indeed indicates the whole scope of the doctrine, and the limitations to which its application is subject. Now, in the case of adoption there are of course questions of formalities, ceremonies, preference in the matter of selection, and other points, which amount to moral and religious suggestions. Such matters, speaking generally, are dealt

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(1) 12 B.H.C. 364.

(2) 3 B. 273.

(3) 5 I.A. 40.



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with in the texts in a directory manner, relating to what I may perhaps call the *modus operandi* of adoption. To such matters, which do not affect the essence of the adoption, the doctrine of *factum valet* would undoubtedly apply upon general grounds of justice, equity and good conscience, and irrespective of the authority of any text in the Hindu law itself. There may, indeed, be cases where the express letter of the texts renders that which would in other systems be regarded as a matter of form, a [297] matter of imperative mandate or prohibition affecting the very essence of the transaction. An analogical illustration of this is to be found in the rules of the English law as to the attestation of a will by two witnesses as essential to its validity; and in our own statute law we have s. 54 of the Transfer of Property Act, which renders a registered instrument essential to the validity of the sale of immoveable property exceeding a certain amount in value. So also there may, of course, be definite texts of the Hindu law of adoption itself which, though relating to matters of form, would be sufficiently imperative to vitiate an adoption in which they have been disregarded. But unless such texts are express and undoubted in their meaning, I would apply the doctrine of *factum valet* to adoptions which, having been made in substantial conformity to the law, have infringed only minor matters of form or selection.

Having so far explained how I understand the general scope of the doctrine of *factum valet*, I proceed to define upon what points of Hindu adoption I would hold it to be inapplicable. Adoption under the Hindu law being in the nature of gift, three main matters constitute its elements, apart from questions of form. The capacity to give, the capacity to take, and the capacity to be the subject of adoption, seem to me to be matters essential to the validity of the transaction, and, as such, beyond the province of the doctrine of *factum valet*. And I may at once say that if any of these three capacities is wanting in this case, I shall hold the plaintiff's adoption to be altogether invalid.

This brings me to the consideration of the most important point in what I have called the plaintiff's branch of the case, namely, whether the fact of the plaintiff's age being above five years at the time of his adoption was open to the objection of any of the three incapacities to which I have just referred. Amid the conflict of authorities with which I shall presently have to deal, it seems to me supremely important to explain briefly the exact origin, reasons, and nature of adoption under the Hindu law, for it is with reference to these that the point now under consideration must ultimately be decided. That the Hindu law itself recognizes this method of dealing with such questions is apparent from the text of Manu (chap. XII, s. 106). "He alone comprehends the system of duties, religious and civil, who can reason by rules of logic agree-[298]able to the Veda, on the general heads of that system as revealed by the holy sages." And a further confirmation of this mode of deciding doubtful questions is to be found in the same *Smriti*: "If it be asked how the law shall be ascertained, when particular cases are not comprised under any of the general rules, the answer is this: 'That which well-instructed Brahmins propound shall be held incontestible law,' (chap. XII, s. 108). I regard these passages as justifying the Courts of justice in British India in seeking in the approved authorities of the Hindu law itself reasons for hard-and-fast rules which, having the appearance of being arbitrary, have been left by those authorities themselves in a doubtful condition.

Mr. Hill, on behalf of the respondent, made an endeavour to deduce analogical arguments in favour of his client, by drawing a comparison

between the Hindu law of adoption and the *arrogatio* and *adoptio* of the Roman Civil Law, with reference to the question of age, and he contended that there was nothing unreasonable in imposing no limit of age upon the subject of adoption. The comparison is no doubt interesting, and there is a great deal of valuable information upon the subject in Colquhoun's celebrated work on Roman Civil Law (ss. 625, 683, 708), as also in Mr. Hunter's *Roman Law*, where he deals with the subject of *patria potestas*. But I think that it would be unsafe in dealing with this case to draw even analogical inferences from a system which, though remotely connected with the Hindu law by the ethnological affinity of a common Aryan descent, has been developed in a country and among a people far removed from India and the followers of Brahmanism. And in saying this I am only obeying the *dictum* of the Lords of the Privy Council in *The Collector of Masulipatam v. Kavalu Vencata Narainapah* (1) where their Lordships pointed out that great confusion arises from applying analogies derived from foreign systems to the doctrines of the Hindu law, and that such analogies are "more likely to mislead than to direct the judgment aright."

To the same effect are the observations made by their Lordships in *Bhyah Ram Singh v. Bhyah Ugur Singh* (2) where their Lordships said:—"The Hindu law contains in itself the principles of its [299] own exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should the Courts interpret the text by the application to the language of strained analogies." I am all the more unwilling to resort to the Roman Civil Law for assistance in this case, because I am not satisfied that either the *arrogatio* or the *adoptio* of that system was an institution of a sacramental nature in the sense in which I take an adoption to be in Hindu jurisprudence. To that system alone I shall therefore confine my attention, but as I shall frequently have to resort to the sacred text of Manu, I may here cite the *dictum* of their Lordships of the Privy Council in *Ramlakshmi Ammal v. Sivanantha Perumal Sethurayar* (3) that "many of the precepts of Manu have undoubtedly been altered and modified by modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law."

Under the Hindu system the beatitude of a deceased Hindu in future life depends upon the "performance of his obsequies and payment of his debts by a son as the means of redeeming him from an instant state of suffering after death. The dread is of a place called *put*, a place of horror to which the *manes* of the childless are supposed to be doomed; there to be tormented with hunger and thirst for want of those oblations of food and libations of water, at prescribed periods, which it is the pious and indeed indispensable duty of a son (*putra*) to offer." (Strange's Hindu Law, vol. 1, p. 73). And this proposition is supported, *inter alia*, by the authority of Manu:—"By a son a man obtains victory over all people; by a son's son he enjoys immortality; and afterwards by a son of that grandson he reaches the solar abode. Since the son (*trayate*) delivers his father from the hell named *put*, he was therefore called *putra* by Brahma himself." (Chap. IX, ss. 137, 138.) It was, no doubt, on account of this doctrine that the earliest texts of the Hindu law enumerate no less than twelve kinds of sons (Manu, chap. IX, ss. 158, 160), and Dr. Jolly cites some authorities to show that the number has been increased to

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(1) 8 M.I.A. 529.

(2) 13 M.I.A. 373.

(3) 14 M.I.A. 570.



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fifteen classes—(Tagore Law Lectures, 1883, p. 145). And the same learned author, [300] after enumerating the various classes of sons whose filial relation arises from natural descent, real or assumed, goes on to say:—"All the other sorts of sons owe their being styled as such to a legal fiction which is either adoption itself or at least closely allied to that ancient contrivance for supplying the want of natural heirs and satisfying the craving of primitive times for male descendants." We have, then, the authority of Mr. Mayne (s. 94) that the whole law of adoption has been evolved from two texts and a metaphor. One of the two texts is from Manu (chap. IX, s. 168) "He whom his father or mother, with her husband's consent, gives to another as his son, provided that the donee has no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water." The other text is from Vasishtha (3 Dig. 242) which is fuller than the preceding one:—"A son formed of seminal fluids and of blood proceeds from his father and mother as an effect from its cause. Both parents have power to sell or to desert him. But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord. He who means to adopt a son must assemble his kinsmen, give humble notice to the king, and then, having made an oblation to fire with the words of the Veda, in the midst of his dwelling house, he may receive as his son by adoption a boy nearly allied to him or (on failure of such) even one remotely allied. But if doubt arise, let him treat the remote kinsman as a Sudra. The class ought to be known, for through one son the adopter rescues many ancestors." Then the metaphor to which Mr. Mayne has referred is to be found in the Caunaka Smṛiti and referred to in the Dattaka Mimamsa (s. 5, p. 15) to the effect that the boy to be adopted must be "the reflexion of a son," or, as Dr. Buhler has translated the original:—"He then should adorn the child, which (now) *resembles a son of the receiver's body*;" that is, which has come to resemble a son by the previous ceremony of giving and receiving—(Journal, As. Soc. Bengal, 1866, art. *Caunaka Smṛiti*).

Both these texts and the metaphor refer to the Dattaka form of adoption, which is admittedly the one under which the plaintiff's adoption was made; and I may add here in passing, that no question is raised in this case as to the exact nature of the ceremo-[301]nies requisite to establish the adoption. Dr. Jolly (p. 157) maintains that "Dattaka form consists of the solemn adoption of a boy, who has been voluntarily consigned by his natural to his adoptive parents. The ceremonies to be performed on this occasion are described in the Vasishtha Smṛiti (XV, i, ii), in Caunaka's *Putrasangrahaśāstrī* and in a *Paricishta* in the *sūtra* style, to Baudhayana's *Grihyasūtra*. The texts of Caunaka and Baudhayana have been published and translated by Dr. Buhler." And Mr. Mayne (s. 93) has stated that among the formalities according to the last-mentioned authority, the adopter receives the child with the words:—"I take thee for the fulfilment of religious duties. I take thee to continue the lines of my ancestors:" and Sir Thomas Strange (vol. i, p. 95) in summing up the essentials of the ceremonials of adoption, goes on to say:—"there must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary." Then, as to the effect of adoption, the same eminent authority (vol. i, p. 97) states the law to be that—"adoption being a substitution for a son begotten, its effect is, by transferring the adopted from

his own family, to constitute him son to the adopter, with a consequent exchange of rights and duties. Of these the principal are the right of succession to the adopter on the one hand, with the correlative duty of performing for him his last obsequies, on the other. The right attaches to the entire property of the adopter, real and personal; and in the form under consideration (the Dattaka) it operates lineally and collaterally." Among the authorities upon which the learned author relies is the *dictum* of Jagannatha (3 Dig. 149, 150):—"When he who has procreated a son, gives him to another, and the child so given is born again by the rites of initiation, then his relation to the giver ceases, and a relation to the adopter commences."

Now, from the authorities which I have thus enumerated, I deduce the following conclusions:—

*First*.—That the existence of male issue being favoured by the Hindu law mainly for the purpose of the parent's beatitude in the future life, adoption is a sacrament justified by a fiction of law under conditions when the natural male offspring is wanting.

[302] *Secondly*.—That a substantial adherence to ceremonials, but principally the act of giving and taking, is sufficient to establish the adoption.

*Thirdly*.—That when such adoption has duly taken place, its effect is the affiliation of the boy, as if by a feigned parturition he had been begotten by his adoptive father, thus removing the boy from the family of his natural to that of his adoptive parents.

*Fourthly*.—That the boy so adopted (to use the words of Jagannatha) "is born again by the rites of initiation, and his relation to the giver ceases, and a relation to the adopter commences"—(*vide* Manu, chap. IX, s. 142; Dattaka Mimamsa, s. 6, p. 8; Dattaka Chandrika, s. 2, p. 19).

The question, then, with regard to these four main conclusions, is, adoption being a *second birth*, at what period may such *second birth* take place, that is, with reference to the age of the boy, or with reference to the initiatory ceremonies enjoined by the Hindu law in the case of the three "twice-born" classes?

In order to render my conclusions upon this question intelligible, it is necessary for me, as briefly as I can, to refer to the origin of the four castes under the Hindu system. And upon this subject much information is contained in Muir's Sanskrit Text (vol. i) from which I extract only so much as is based directly upon Manu's Institutes, and is necessary for the purpose of explaining my views in this case. Referring to the Creator, Manu says:—"That the human race might be multiplied, he caused the Brahman, the Cshatriya, the Vaisya and the Sudra (so named from the scripture—protection, wealth and labour) to proceed from his mouth, his arm, his thigh and his foot," (chap. i, v. 31). "For the sake of preserving this universe, the Being, supremely glorious, allotted separate duties to those who sprang respectively from his mouth, his arm, his thigh and his foot. To Brahmans he assigned the duties of reading the Veda, of teaching, of sacrificing, of assisting others to sacrifice, of giving alms if they be rich, and, if indigent, of receiving gifts. To defend the people, to give alms, to sacrifice, to read the Veda, to shun the allurements of sensual gratification, are, in a few words, the duties of a Cshatriya. To keep herds of cattle, to bestow largesses, to sacrifice, to read the Scripture, to carry on trade, to lend at inter-[303]est and to cultivate land, are prescribed or permitted to a Vaisya. One principal duty the Supreme

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Ruler assigns to a Sudra, namely, to serve the before-mentioned classes, without depreciating their work." (Manu, chap. I, vv. 87—91).

Having so far described the origin of the four classes of mankind and the duties assigned to each of them, Manu devotes a whole chapter to the subject of education. As preparatory to this it seems that certain ceremonies (*vide* Colebrook's note cited under para. 23, s. iv of the Dattaka Mimamsa) are necessary for the purposes of purification. "By oblations to fire during the mother's pregnancy, by holy rites on the birth of the child, by the tonsure of his head with a lock of hair left on it, by the ligation of the sacrificial cord, are the seminal and uterine taints of the three classes wholly removed." (Chap. II, v. 27.) A fuller account of these rites and ceremonies then follows, and ends with the following declaration:—"Such is the revealed law of institution for the twice-born, an institution in which their *second birth clearly consists*, and which causes their advancement in holiness." (Chap. II, v. 68.) The sacred author then, after giving a further detail, goes on to draw a distinction between natural birth, and the second or divine birth:—"Of him who gives natural birth, and him who gives the knowledge of the whole Veda, the giver of the sacred knowledge is the more venerable father; since the second or divine birth ensures life to the twice-born in this world and hereafter eternally. Let a man consider that as a mere human birth which his parents gave him for their mutual gratification, and which he receives after lying in the womb; but that birth which his principal *Acharya*, who knows the whole Veda, procures for him by his divine mother the *Gayatri*, is a true birth; that birth is exempt from age and from death." (Chap. II, vv. 146-148.) A fuller account of the significance of the "*second birth*" is contained in the following verses:—"The first birth is from the natural mother, the second from the *ligation of the zone*, the third from the due performance of the sacrifice. Such are the births of him who is usually called twice-born, according to a text of the Veda. Among them his divine birth is that which is distinguished by the ligation of the zone and *sacrificial cord*: and in that *birth* the *Gayatri* is his mother, and the *Acharya*, his father: sages call the *Acharya*, father, [304] from his giving instruction in the Veda; nor can any holy rite be performed by a young man before his investiture. *Till he be invested with the signs of his class*, he must not pronounce any sacred text, except what ought to be used in obsequies to an ancestor, since he is on a level with a *Sudra* before his new birth from the revealed Scripture." (Chap. II, vv. 169-172.) Then the following verse shows the distinction between the three twice-born classes and the *Sudra* or servile class. "The three twice-born classes are the sacerdotal, the military and the commercial; but the fourth or servile is once-born, that is, *has no second birth from the Gayatri, and wears no thread*, nor is there a fifth pure class." (Chap. X, 4.)

From these texts of undoubted authority, I conclude that what is called the "*second birth*" in the case of the three "*twice-born classes*" is represented by the solemn rite of the investiture of the sacred thread hallowed by the *Gayatri* as the insignia of such second birth; that, till then, a boy, though born of twice born parents, remains on the same level as a *Sudra*; and that regeneration is held to be complete when the ceremony has been duly performed. Further, that ceremony represents the beginning of the boy's education in the duties of his class. The ceremony which in Sanskrit is called *upanayana* has thus a very significant place, and represents the turning point of the regeneration. The ceremony of tonsure which precedes the *upanayana* is also significant; and the following

verses of Manu describe the ages at which these ceremonies should be performed: "By the command of the Veda, the ceremony of tonsure should be legally performed by the three *first* classes in the first or third year *after birth*. In the eighth year from the conception of a Brahman, in the eleventh year from that of a Kshatriya, and in the twelfth year from that of Vaisya, let the father invest the child with the mark of his class. Should a Brahman or *his father for him* be desirous of his advancement in sacred knowledge, a Kshatriya of extending his power, or a Vaisya of engaging in mercantile business, the investiture may be made in the fifth, sixth, or eighth years respectively. The ceremony of investiture hallowed by the *Gayatri* must not be delayed in the case of a priest beyond the sixteenth year; nor in that of a soldier beyond the twenty-second; nor in that of a merchant [305] beyond the twenty-fourth. After that, *all youths* of these three classes, who have not been invested at the proper time, become *Vratyas* or out-castes, degraded from the *Gayatri* and condemned by the virtuous." (Chap. II, vv. 35, 39.) The exact bearing which these ceremonies have upon the subject of adoption is best explained in the words of Sir Thomas Strange (vol. 1, pp. 88-89):—

"Not only are the Hindus impressed with the certainty of a future state (upon a conviction and dread of which the practice of adoption is founded), but they also consider sin to be so inherent in our nature as to require distinct and specific means of expiation. Hence the institution of a series of initiatory ceremonies, commencing previous to conception, and producing, all together, in the superior classes, *regeneration*. It is by the performance of these in the family and name of the adopting father, that filiation is considered to be effectually accomplished. Accordingly, the fewer of them that have been performed in the family of the adopted, previous to adoption, the better; and that adoption, therefore, is in this respect preferable which takes place the soonest after the birth of the child to be adopted. These are *tonsure*, or the shaving of the head (*chudakarna*), and (*upanayana*), the *investiture of the cord*. The affiliation of one 'whose coronal locks have not been reduced to the form of his patriarchal tribe' is constantly inculcated. The age for this operation is the second or third year after the birth; but it may be extended to the eighth, which, with Brahmins, is the general period for the investiture; excepting, for such as are destined for the priesthood, upon whom it is performed at five. *The stipulation therefore of five, as the extreme age for adoption, may have reference to Brahmins of this description.*"

The learned author then goes on to say that, considering that the *upanayana* is the appointed season for the commencement of a boy's education, the most reasonable conclusion seems to be that that ceremony should be the turning point of the period of adoption. And he adds: "With regard to the other two regenerated classes (the Kshatriya and Vaisya) the time for the performance of them varies: while, with reference to the Sudra, the doctrine has no application, for him as for woman generally, there existing no ceremony but that of marriage."

[306] The learned Pandit who has appeared for the appellant, however, argues that in the Benares school of law, by which this case is governed, the *upanayana* ceremony does not represent the extreme limit of the period of adoption, but that by a rigid and inflexible rule, a boy, however nearly related to the adopter, ceases to be a fit subject of adoption, not only in the case of Brahmins, but also in the case of the other two regenerate classes. For this proposition the learned Pandit has referred us to various authorities which must now be considered. Foremost among

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them is a text of the Kalika-purana, which has been quoted with approval by Nanda Pandita in his Dattaka Mimamsa (s. iv, p. 22):—"Another special rule is propounded in the Kalika-purana—'Sons given, and the rest though sprung from the seed of another, yet being duly initiated under his own family name, become sons. O Lord of the earth, a son having been initiated under the family name of his father, unto the ceremony of tonsure inclusive, *does not become the son* of another man (*anyatas*). The ceremony of tonsure and other rites (*chudadya*) of initiation being indeed performed, under his own family name, sons given and the rest may be considered as issue, else they are termed slaves. *After their fifth year, O King, sons given and the rest are not sons.* (But) having taken a boy five years old, the adopter should perform the sacrifice for male issue." In order to fortify his argument the learned Pandit has produced a copy of the original Sanskrit Dattaka Mimamsa published at Benares by Pandit Dhundiraj, a lineal descendant of Nanda Pandita himself (Jolly's Tagore Law Lectures, 1883, p. 15), and it is useful for clearing up certain doubtful expressions in the English of Mr. Sutherland's translation, especially as the same passage of the Kalika-purana has been differently translated at p. 329 of vol. ii, Colebrook's Digest. There the translation is:—"But after the fifth year, O king ! sons given and the rest *must not be adopted* ; let the adopter take a boy five years old, and first perform the sacrifice for male offspring." The passage of the Kalika-purana has also been quoted in the original Sanskrit in Siromani's Hindu law (p. 129) and is the same as quoted in the original Dattaka Mimamsa. The most important point evolved by comparison with the original is, that Mr. Sutherland's translation "*are not sons*" is correct, and that the expression "*must not be adopted*" used in Colebrook's Digest [307] is not correct. The original expression is '*urd wantu panchamadvarshatna dattadyah suta nirpa,*' which clearly shows that the interdiction is not directory, addressed to the adopter, but a rule incapacitating a boy above five years of age from being the subject of a valid adoption. This interpretation is supported by the conclusion of Shama Charn Sircar in his Vyavastha Chandrika (vol. ii, p. 87, s. 290) and by the manner in which the passage has been rendered by Mr. Mandlik in (p. 50) his translation of the Mayukha (IV, s. 20). Taking this passage of the Kalika-purana, the learned Pandit has further relied upon paras 41, 42, 43, 44, 45, 46, 51 and 52 of the Dattaka Mimamsa. Of these the most important are paragraphs 41, 42 and 43, which may be quoted here:—

"Since the filial state is produced from ceremonies, in the same manner as the being a sacrificial post and so forth, it is established that one uninitiated is to be adopted. A limited period for adoption being necessary, the author adds, '*after their fifth year, etc.*' One though uninitiated is not to be adopted after the fifth year : for, the time having gone by, he cannot become a son. By this it is declared that the five (first) years only are the season for adoption. Now, the propounding this position negatively is for the purpose of showing that an age beyond five years is not even a secondary season ; for otherwise by the rule ('every season ulterior to the appropriate season is pronounced secondary') it would follow that any time beyond the fifth year were secondary."

The effect of these and the following few paragraphs of the Dattaka Mimamsa has been well summarized in Siromani's Hindu Law, p. 130, to be the following :—

"(i) The relationship of father and son is created by the due performance of the initiatory ceremonies.

(ii) A boy for whom none of the initiatory ceremonies have been performed by his natural father is most eligible for adoption.

(iii) A boy for whom the initiatory ceremonies prescribed before *chudra* have been performed, but whose *chudra* has not been performed, may be taken in adoption, though one whose initiatory ceremonies have not been performed is preferable.

(iv) A boy whose *chudra* has been performed by his natural father, but whose age does not exceed five years, may be taken [308] in adoption, but he would be a *Dwyamushyayana*, or son of two fathers.

(v) A boy whose age exceeds five years cannot be adopted at all."

These conclusions are in accord with those arrived at by Mr. Mayne in s. 123 of his work, and he adds that "if no other is procurable, a boy on whom tonsure has been performed may be received. In that case, however, the previous rites must be annulled by the performance of the *putreshti*, or sacrifice for male issue. As regards other rites, those previous to tonsure are immaterial, the performance of the *upanayana* is an absolute bar."

I have cited these passages because they represent the whole line of argument addressed to us by the learned Pandit on behalf of the appellant. He has also relied upon a note by Mr. Colebrook to p. 13, chapter 1, s. ix of the *Mitakshara*, and the note leaves no doubt that, according to Mr. Colebrook, the followers of Raghunandana, referring to the *Kalika-purana*, "construe the passage as an unqualified prohibition of the adoption of a youth or child whose age exceeds five years, and especially one whose initiation is advanced beyond the ceremony of tonsure." The same is the effect of a note to be found at page 329, vol. ii of Colebrooke's *Digest*, and of another at page 222 of vol. ii of *Strange's Hindu Law*; and the same interpretation has been accepted by Mr. Macnaghten (p. 72), and Dr. Jolly (p. 161), and indeed by other authorities also. And I think it may be conceded at once that according to the passage of the *Kalika-purana* as interpreted in the *Dattaka Mimamsa*, five years is the extreme limit of age for adoption; that a boy exceeding that age is incapacitated from being a proper subject of adoption; that such incapacity amounts to a sufficiently imperative prohibition to place it beyond the application of the doctrine of *factum valet*, as explained by me. Whether the rule of *Dattaka Mimamsa* is intended to apply only to special cases where early initiation is necessary, is another matter which I shall presently consider; but there can be no doubt that if the rule is rigidly applied to this case, the plaintiff's adoption must be held to be null and void. This, indeed, is the whole scope of learned Pandit's contention on behalf of the appellant, for whilst on the one hand no question as to the performance either of [309] the ceremony of tonsure (*chudakarna*) or of that of the sacred thread (*upanayana*) has been raised in this case, on the other hand, it has not been contended that either the incapacity to give in the natural father, or the incapacity to take on the part of the adoptive father, existed in connection with the plaintiff's adoption. Indeed, it is shown by the evidence of Narain Singh, the natural father of the plaintiff, and has been assumed throughout the argument, that the plaintiff was younger son, and that both the *chudakarna* and the *upanayana* of the plaintiff were performed in the family of his adoptive father. The question of the proper age for adoption is therefore the only point which needs determination.

But before proceeding any further I must notice a sentence in Mr. Sutherland's *Synopsis*, Note XI, on which the learned counsel for the

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respondent relied for showing that the effect of the Dattaka Mimamsa itself is inconsistent and doubtful. Mr. Sutherland says:—"It is to be observed that Nanda Pandita in the abstruse gloss noticed, seems to have betrayed himself into an inconsistency. According to his explanation, if the boy proposed to be adopted has not been initiated in the rite of tonsure by his natural father he cannot be adopted after having attained his fifth year; if, however, he has been so initiated, he may be affiliated (provided he be under six years of age), a sacrifice and so forth being observed as already noticed." Mr. Sutherland is the original translator of Nanda Pandita's Dattaka Mimamsa, and any observation from him is undoubtedly entitled to respect. But there can be very little doubt that the criticism which I have just quoted proceeds upon a misconception of Nanda Pandita's meaning. The question of age begins at paragraph 22, s. iv of the Dattaka Mimamsa, and in that paragraph the passage from the Kalika-purana is quoted. What follows in the succeeding paragraphs up to paragraph 56 is simply a commentary explaining the various points of the text of the Kalika-purana. In paragraph 31 the consideration of the words of the Kalika-purana: "*having taken a child of five years,*" is referred to, but postponed for a latter paragraph. Paragraphs 42 and 43 leave no doubt that, for the untensured, five years is the extreme limit of age. In paragraph 44 it is explained that the expression "tonsure" must be understood to signify the third year of age, in order to avoid the inconsistency of meaning [310] which would result if more than five years were allowed for the adoption of the tonsured. Then comes paragraph 48, which explains that in case of an uninitiated boy being unprocurable, one who has been tonsured may be taken, so long as he is "five years old;" and the subject is reverted to and more fully explained in paragraph 53 which has been rendered by Mr. Sutherland in the following words:—

"If this is the case, then the passage should only recite:—'Having taken one initiated (unto tonsure inclusive).' What occasion is there to use the expression 'a boy five years old'? Should this be objected, it is erroneous; for the passage intends this restriction—'a boy five years old only (i.e. *under six*); and the restriction is for the sake of securing an investiture of the characteristic thread conducive to that holiness resulting from the study of scripture, which is preceded by the previous acquisition of letters."

Now it is clear that Mr. Sutherland's criticism as to the inconsistency of Nanda Pandita is based upon paragraphs 48 and 53, in both of which the expression '*five years old*' occurs, and which in the latter paragraph the learned translator had interpreted as meaning one who has already attained five years, but is below six years of age. This appears from the words between brackets employed by the learned translator. The original expression in Sanskrit which has been rendered "*five years old*," is *panchvarshiya* whilst the words '*under six*' which occur between brackets in Mr. Sutherland's translation of paragraph 53, are an interpolation of the translator, as a comparison with the original Sanskrit text shows. Now the word *panchvarshiya* has been explained in Professor Monier William's Dictionary (p. 523, col. 3) as meaning *five years old*;" but I do not think this expression is to be understood in the manner in which human age is spoken of among the English people. The words "*five years old*" would probably mean one who has passed the fifth anniversary of his birth. Such, however, is not the idiom of the Indian people, for they speak of a boy being five years old, when he is only in his fifth year. And I think that it is in this manner that the expression

*panchvarshiya* must be interpreted. The word itself is a compound consisting of *panch* which means five, *varsh*, which means year, and the termination *iyah* is an adjectival affix indicating the relation which [311] "five years" has to the person in respect of whom the whole word is employed. And I hold that the word does not indicate that such person has attained the age of five years. This interpretation seems to me to be clear from the text of the *Dattaka Mimamsa* itself, because throughout it speaks of five years as the ultimate limit of age for adoption, and paragraphs 48 and 53 are devoted to explaining that the rule is not to be infringed in the case of an untensured boy, any more than in the case of one who has already been tonsured—tonsure as explained in paragraph 44 being taken to refer to the third year of age. There is thus no such inconsistency in Nanda Pandita's reasoning as Mr. Sutherland conceives, an inconsistency which no other authority has recognized, and which owes its origin to Mr. Sutherland's own misinterpretation of paragraphs 48 and 53 of the *Dattaka Mimamsa*. The effect of Nanda Pandita's meaning as already shown by me, by quoting from a Hindu Sanskrit lawyer Mr. Siromani, and from Mr. Mayne, is that tonsure incapacitates a boy for being a subject of adoption in the *Dattaka* form, but that he may be adopted in the *Dwyamushyayana* form even after the tonsure, so long as he has not attained the age of five years, which is the ultimate limit. (Siromani, p. 130; Mayne s. 123; Jagannatha, 3 Dig.; 148, 249-251, 263.) With reference to the interpretation of *panchvarshya*, which occurs in several paragraphs of *Dattaka Mimamsa*. I may add that Mr. Sutherland himself has rendered it in paragraph 31 as meaning "a child of five years," and Mr. Mandlik, the eminent Sanskrit scholar and Hindu lawyer of Bombay, has translated the same expression of the *Kalika-purana* by the phrase "a boy of five years," in paragraph 20, s. v, chapter IV of the *Mayukha*. Whether the latter phrase is distinguishable from the expression "five years old" may be doubtful, but I think the diversity of meanings indicates that *panchvarshya* must not be understood as necessarily meaning a boy who has passed the fifth anniversary of his birth. The expression in the text of the *Kalika-purana* quoted in paragraph 22 of the *Dattaka Mimamsa* and in paragraph 20, s. v, chapter IV of the *Mayukha*, must not be understood without reference to the imperative injunction which immediately precedes it:—"After their fifth year, O King, sons given, and the rest are not sons," which I take as everybody else has understood it, to be the general rule governing what follows in the text, and thus applicable to tonsured and untensured [312] boys alike. The original Sanskrit of the sentence which have just quoted is "*urdhwantu panchmadvarshatna dattadyah suto nirpa*," and literally rendered would be "above the fifth year the given and other are not sons, O King," which leaves no doubt that the age referred to is below the fifth anniversary of a boy's birth; and "*panchvarshiya*," which occurs in the sentence immediately afterwards, must by reasonable interpretation, and with due regard to consistency, be understood to mean "a boy in his fifth year," and not one who has exceeded that age, and has not yet attained the sixth anniversary of his birth.

I have dwelt upon this matter at such length, for I find that the only authority in the shape of a ruling on this point, cited on behalf of the respondent, *Thakoor Oomrao Singh v. Thakooranee Mehtab Koonwer* (1) proceeds, as appears from the judgment, upon the error of Mr. Sutherland

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to which I have referred in the preceding observations; for it was held in that case by Roberts, J., that under the Dattaka Mimamsa the age of five years is not the ultimate limit of adoption, and that according to that authority, as so long as an adoption takes place whilst the boy is below six years, it is valid. The same mistake—and I say this with profound respect—appears to be the basis of the observation in West and Buhler's work—(p. 1059, 3rd ed.)—that “the Dattaka Mimamsa seems to allow adoption after tonsure to six years of age.” The judgment shows that the authority relied upon for this proposition was paragraph 53, s. iv of the Dattaka Mimamsa, in translating which, as I have already shown, the words “*under six*,” between brackets have been interpolated by Mr. Sutherland by way of explaining “*panchvarshiya*,” but which words do not exist in the original Sanskrit text. The judgment, however, so far as it relates to the exact question of age, is *obiter dictum*, and I may say with due respect that the *dictum* is erroneous with reference to the Dattaka Mimamsa. And I may repeat here that, in my opinion, that authority leaves no doubt that an adoption in the Dattaka form is wholly null and void if made after the adopted boy has completed the fifth year of his age—(see Macnagthen, p. 72). And it is equally clear that the conclusions of Nanda Pandita in his Dattaka Mimamsa are not accepted by other authorities.

[313] It seems to me, therefore, desirable to quote a passage in which Dr. Jolly (p. 161) has summarised the state of authorities of Hindu law upon the exact point now under consideration:—“The restrictions in regard to the age of the person to be adopted have been partly dropped in Western India, but as they are being strictly maintained elsewhere, it will not be out of place to examine the state of authorities on the subject. The principal text is from the Kalika-purana. It states that no boy should be adopted on whom the ceremony of tonsure has been performed in his natural family or who is more than five years old. However, this text is declared to be spurious, or otherwise explained away, in Mayukha (iv, s. 20), Dattaka Chandrika (ii, 20-23), and other works; and few writers go the length of rigidly enforcing either of these two restrictions as to the age of the person to be adopted. Thus the two rules are fully recognized in the Dattaka Mimamsa. On the other hand, the Nirayasinidhu permits the adoption of one more than five years old, provided that the ceremony of investiture or initiation (*upanayana*) has not been performed for him in his natural family. Dattaka Mundi admits initiated persons even to adoption, but states that such a person becomes the son of two fathers—(*Dwyamushyayana*),—in consequence of his adoption; and that uninitiated persons are more fitted to be adopted than the initiated. The Dattaka Tilaka does not consider marriage even as a bar to adoption, in case the person to be adopted belongs to the same *gotra* as the adopter: only the author of this work is careful to add, that one more than five years old must not be adopted against his will. The Dattaka siddhan-tarnanjari declares that it is not lawful to adopt a married man, but that one initiated, or more than five years old, may be adopted, though adoption before that age is preferable. The Samskara-kaustubha does not recognize any restriction as to age, even in the case of those who belong to a different *gotra* from the adopter. Modern practice in the native states seems to correspond to this.”

In this state of authority, the course which the argument in this case has taken suggests the consideration of the question under the three following heads:—

1st—Whether the passage of the Kalika-purana is itself authentic:

[314] 2nd—If so, whether it is capable of any such interpretation as would render the rigid limit of five years inapplicable to this case; and (as a corollary)—

3rd—Whether the authority of the Dattaka Mimamsa is so binding upon us as to preclude our adopting any other interpretation than that of Nanda Pandita.

In considering the first of these points, it must at once be premised that the Kalika-purana besides its religious and moral authority, is universally recognized as one of those ancient sources of law which precede the formation of the various schools in which the Hindu law has since divided itself by the process succinctly described by the Lords of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (1). "The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose."

Further, their Lordships go on to say,—“The duty, therefore, of a European Judge who is under the obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law.” These observations are undoubtedly binding upon us in this Court; and relying upon them the learned Pandit, in support of the appeal, has argued that the authority of the Dattaka Mimamsa is so supreme in the Benares school, that we are not at liberty to depart from it, even in matters of the smallest detail. But the first point which I am now considering seems to me to be virtually one of fact, because it has to be considered whether the passage of the Kalika-purana, upon which the whole argument of Nanda Pandita proceeds, is in itself a genuine [315] and authentic text of that *purana*. And I think the *dictum* of the Lords of the Privy Council, which I have just quoted, does not prohibit us from ascertaining a question such as this by reference to other authoritative works of Hindu law, which hold the authority of the Kalika-purana in as high an estimation as Nanda Pandita himself.

Mr. Morley and Mr. Siromani (p. 43) have stated in a tabular form the various authoritative law books which prevail in each school of Hindu law, and the former goes on to say,—“It must be distinctly remembered that no work of the Bengal school can be considered to be concurrent or interchangeable with the writings which prevail in the other schools or of any authority out of the limits where the Bengali is the language of the people, with the exception, however, already noticed, regarding the law of adoption; and that although the works above enumerated, not being according to the Bengal school, are for the most part only quoted in those schools under which they are arranged, there seems to be no reason why such works might not be received as authorities indiscriminately in Mithila, Benares and the Mahratta and Dravida countries; but, of course being of greater or less weight according to the custom of the countries.”

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(Morley, Dig. I, p. ccxxii). These observations, which, I think deserve weight, may well be supplemented by what Mr. Mayne has said (s. 37) with special reference to the divergencies in the law of adoption:—

"The more closely we study the works of the different so-called schools of law other than those of Bengal, the more shall we be convinced that the principles of all are precisely the same. The local usages of the different districts vary. Some of these usages the writers struggle to bring within their rules. Others they silently abandon as hopeless. What they cannot account for they simply ignore."

It will thus be observed that whilst upon other subjects the Mitakshara and the Dayabhaga schools are divergent, upon the particular subject of adoption the same authorities are recognized in the main, though upon questions of minor detail each school has a favourite authority of its own. And it is important to remember that even the Dayabhaga school, which on some significant points [316] is in conflict with the Mitakshara school, has no special work of its own on the subject of adoption.

I now proceed to consider whether the passage of the Kalika-purana, upon which so much has been said, is in itself an authentic text; and the best way to consider this question would be to enumerate the various authorities for and against its authenticity. And in doing so, I must first of all quote a passage from Macnaghten's Hindu Law (p. 74) where he says,—“The limitation to the age of five years is founded on a passage in the Kalika-purana, and the authenticity of that passage is doubtful. The Dattaka Chandrika makes no mention of it, though the Dattaka Mimamsa does.” This sentence, so far as it states that the Dattaka Chandrika makes no mention of the passage of the Kalika-purana, is clearly inaccurate, because that passage is referred to by that authority in paragraph 25, s. 2, and there it is said, after quoting a considerable portion of the passage: “As for what they thus read as from the *puranas*, that is unauthentic.” These words are understood by Dr. Jolly (from whom I have already quoted) and by Mr. Siromani (p. 130) to refer to the passage in question, and a comparison of the original of the Dattaka Chandrika with paragraph 22, s. 4 of the Dattaka Mimamsa suggests the same conclusion. These two great authorities are thus in conflict with each other as to the authenticity of the passage of the Kalika-purana, and of them Macnaghten says that in questions relative to the law of adoption they are equally respected all over India (Prel. Rem., p. xxv), being the two special works on adoption. The next great authority which does not accept the authenticity of the passage is the Mayukha, which belongs to the Maharashtra sub-division of the Mitakshara school; and in paragraph 20, s. 5, chap. IV, after quoting the whole of the passage of the Kalika-purana goes on to say,—“But much reliance is not to be placed on this passage; for it is not to be found in two or three copies of the Kalika-purana.” (Stokes, p. 65; Mandlik, p. 58). Thus out of these three great authorities, which all belong to the Mitakshara school, the Dattaka Mimamsa is the only one which accepts the passage of the Kalika-purana as authentic, and the other two reject it as spurious. It is important, therefore, to consider the respective periods when these various authoritative works were composed. The authorship of the Dattaka Chandrika is apparently involved in considerable doubt [317] (Mayne, s. 30; Mandlik, Int. 73); but it is admittedly a work of older date than the Dattaka Mimamsa. Then in regard to Mayukha, Mr. Mayne (s. 28) says,—“It is written by Nilakantha, whose family appears to have been of Mahratta origin, but settled in

Benares. He lived about 1600 A.D., and his work came into general use about 1700." And the same authority (s. 30) goes on to say,— "Nanda Pandita, the author of the Dattaka Mimamsa, was a member of a Benares family, whose descendants of the ninth generation are stated by Mr. V.N. Mandlik to be still flourishing in upper India. He must, therefore, have lived about 250 or 300 years ago." On the other hand, Mr. Siromani (p. 29), a Hindu writer, assigns as late a period as the year 1869 A.D. to Nanda Pandita. Another name of consequence in connection with the authenticity of the passage of the Kalika-purana is Raghunandan, the author of Udvahatatva to whom Siromani (p. 28) assigns 1499 A.D., as the period when he flourished. This name is of consequence because Mr. Colebrook in a note to paragraph 13, s. 11, chap. I, of the Mitakshara has said :—

"Raghunandan, in the Udvahatatva, has quoted a passage from the Kalika-purana, which, with the text of Vasistha, constitutes the ground work of the law of adoption as received by his followers. They construe the passage as an unqualified prohibition of adoption of a youth or child whose age exceeds five years, and especially one whose initiation is beyond the ceremony of tonsure. This is not admitted as a rigid maxim by writers in other schools of law: and the authenticity of the passage itself is contested by some, and particularly by the author of the Vyahara Mayukha, who observes truly, that it is wanting in many copies of the Kalika-purana." (Stoke, p. 417). This note is quoted with approval by Macnaghten (vol. II, p. 177): and another note of Colebrook's is to be found in Strange's Hindu Law (vol. II, p. 222):—

"The genuineness of the text as a passage of that *purana* has been questioned by some authors; it is apparently not authentic, being wanting in many copies of the Kalika-purana, and bearing the look of an interpolation in those which do contain it, as it does not connect well with the context. But being quoted by most of the compilers on the subject of adoption, many of whom are writers of great authority, it must be received (whatever may be thought of [318] its authenticity) as the expression of a doctrine that has their sanction."

This note is quoted by the author of a very recent English work on Hindu law (vol. II, p. 88), the Vyavastha Chandrika of Shama Charn Sircar, who points out the names of some other works in which the passage of the Kalika-purana has been accepted as genuine. And upon this ground the learned Pandit who has appeared in support of the appeal, argues that we are not at liberty to question the authenticity of the passage. But, as I have already said, the question is practically one of fact; and if Colebrook himself entertained serious doubts as to the authenticity of the passage (as is apparent from his two notes already quoted), I do not think we are bound to accept his opinion that, because certain authorities have accepted the passage, therefore it should be dealt with as authentic. At any rate, I think I should be justified in holding that the authenticity of the passage is extremely doubtful, and that it would not be safe to act upon it in the present case by setting aside an adoption which has actually taken place and been recognized ever since 1866.

It is perfectly true, as the learned Pandit on behalf of the appellant has pointed out, that under such conditions the observations of their Lordships of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sethupathy* (1) direct us "not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to

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ascertain whether it has been received by the particular school which governs the district with which we have to deal, and has there been sanctioned by usage." We are, of course, bound by this *dictum*, and if the question here were confined only to the interpretation of the passage of the Kalika-purana, and the deducing of a doctrine out of it, I should have been ready to accept the doctrine of the Dattaka Mimamsa: the more so, if that doctrine was clearly set forth. But here the authenticity of the passage itself is doubtful, and, so far, the question is not whether a doctrine is deducible therefrom, but whether the passage itself is a genuine text of the Kalika-purana. And in this light the question virtually resolves itself into a matter of the collation of ancient manuscripts of the *purana*; and it is [319] perfectly possible that the copy which Nanda Pandita had before him, and on which his whole argument proceeds, was an inaccurate one. At least, as I have already said, the authors of the Dattaka Chandrika and the Mayukha solemnly declare that such a passage does not exist in the *purana*; and this view is favoured not only by minor original Hindu authorities, but also by the conclusions of Mr. Colebrook himself, as shown by the passages which I have already cited. And under such circumstances, I think the conclusion at which I have arrived is not only justifiable but the safest.

This leads me to the second head of the inquiry in this part of the case, namely whether, even if the passage of the Kalika-purana is genuine, it is capable of any such interpretation as would show that the adoption in this case was not null and void by the simple fact of the plaintiff being older than five years at that time. And in considering this question, the first thing to be discussed is whether the interpretation of the Dattaka Mimamsa itself is intended to be universally applicable to all classes and all cases alike. This specific question was reserved by me for this part of the case, in enunciating the exact effect of the various paragraphs of that authority. Now, I think it may be safely said that the specific point is left open by Nanda Pandita himself, and leaves room for the opinion of Sir Thomas Strange (vol. 1, p. 90), that the stipulation as to five years being the extreme age for adoption, may have reference only to Brahmans destined for priesthood; and he draws this conclusion from the text of paragraph 53, s. 4, of the Dattaka Mimamsa itself, which, after prescribing five years as the limit of age for adoption, goes on to say that,—“The restriction is for the sake of securing an investiture of the characteristic thread conducive to the holiness resulting from the study of Scripture, which is preceded by the previous acquisition of letters.” A note to that paragraph further explains the matter in the same light, and the conclusion is fortified by what is said in paragraph 30, s. 2 of the Dattaka Chandrika which, accepting the passage of the Kalika-purana for the sake of argument, goes on to say, with reference to the limit of five years, “this regards a Brahman seeking the fruit of holiness resulting from the study of Scripture. For since the fifth year only is the principal season for the investiture of the [320] characteristic thread of one desirous of holiness, as is shown by this text,—‘for a Brahman desirous of holiness, resulting from the study of Scripture, the fifth year, &c.’—the passage in question has the same foundation. But for one not so desirous, ‘after the eighth year, the adopter, &c.’ A note to this paragraph further explains the matter; but without reference to any commentary, I think it is clear enough that once we restrict Nanda Pandita’s interpretation of the passage in the Kalika-purana to priests only, there is no necessary conflict of interpretation between the Dattaka Mimamsa and the Dattaka Chandrika—the two greatest

authorities upon the Hindu law of adoption. Sir Thomas Strange (vol. 1, p. 90) favours such reconciliation and calls it "a conclusion that appears the more forcible, considering that the *upanayana* is the appointed season for the commencement of education." I, too, am prepared to accept the conclusion. And what has convinced me of its accuracy is no less an authority than the *Smṛiti* of Manu himself, where the sacred writer, after describing the age when the ceremony of tonsure (*chudakarna*) and the investiture of the sacred thread (*upanayana*) should be usually performed in the case of the three "twice-born classes," goes on to say,— "Should a *Brahman*, or *his father for him*, be desirous of his advancement in sacred knowledge, a *Cshatriya* of extending his power, or a *Vaisya* of engaging in mercantile business, the investiture may be made in the fifth, sixth or eighth years, respectively" (chap. ii, v. 37). In this case, the plaintiff being a *Cshatriya*, the sixth year would be the proper season for investiture, even if he were desirous of "*extending his power*," but there is nothing to show that he, or rather his father, was anxious for any extension of power such as is contemplated in the sacred text:—and I should say that to him the ordinary rule would be applicable, and that the eleventh year from the date of conception would be the proper period for his "investiture with the mark of his class." (Manu, chap. ii, v. 36.) But, because the interpretation of the passage in the *Kalika-purana* as adopted by Nanda Pandita in his *Dattaka Mimamsa* is not clear, it will be justifiable and advantageous to consider how other authorities have interpreted the passage, especially as the *Mitakshara* and the *Viramitrodaya* are totally silent upon the point. And in doing so, I cannot do better than quote, at the risk of prolixity, a passage [321] from a celebrated Sanskrit scholar and Hindu lawyer, Rao Sahib Vishvanath Narayan Mandlik, C.S.I., of Bombay, in his annotation on the *Mayukha* (p. 471):—

"As regards age, there is no restriction whatever. The only text restricting age is one said to be from the *Kalika-purana*; but Nilakantha considers the said passage to be spurious. Anantadeva, in the *Samskara-kaustubha*, also disbelieves their genuineness. But he goes further and, assuming them to be genuine, shows how they are to be applied in support of the adoption. He concludes thus:—"Therefore, a boy above five years of age, whose ceremonies have been performed, can become a *Dattaka* (given); this is established. The *Dattaka Mimamsa* favours the genuineness of the above passage—(see pages 20-25, *Dattaka Mimamsa*). The *Dattaka Chandrika*, like the *Samskarakaustubha*, doubts their authenticity, but shows that when properly interpreted, they contain no restriction of age—(see *Dattaka Chandrika*, page 54, line 5, and page 56, line 15). Kamalakara in the *Nirnayasindhu* says that a boy of more than five years may be given, if he be willing to be given, in adoption. This shows that he upholds such adoptions in spite of the *Kalika-purana*, on the authority of the Vedic texts. In his *Vivada Tahdava*, the *sapinda* relationship of one so adopted is laid down; and this assumes the adoption as being duly made. Kamalakara thinks, however, that the *samskaras* (ceremonies) of the adopted should not have been made before the adoption. Krishna-bhatta, however, in his commentary on the *Nirnayasindhu*, clears up the whole question, and decides in favour of all such adoptions, on general grounds. He shows that the passage from the *Kalika-purana*, as above noted, is spurious, but, even if it were genuine, he points out that, as it is given by some writers, it is incomplete. He supplies the omissions, and gives the complete passage as he found it, and states that it refers to a son to be adopted by a king as a successor in his sovereignty, and not to

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an ordinary son. Such a son should, he says, have his *samskaras* (ceremonies) performed by the adopter."

Similar is the effect of what Dr. Jolly has said (p. 311) as to the doctrine of the Dattaka Tilaka. "The restriction as to age, as stated in the Kalika-purana, refers to adopted sons other than *sago*-[322]*tras*. After having attained the age of five years, those only can be given in adoption who wish it."

In this state of authority I do not think we should be justified in applying the rigid rule of five years to this case, upon the authority of the doubtful passage of the Kalika-purana, especially as Colebrook himself in the note which has already been partly quoted (Mitakshara, chap. 1, sec. ii, para. 13) goes on to say:—"Others, allowing the text to be genuine, explain it in a sense more consonant to the *general practice*, which permits the adoption of a *relation*, if not of a stranger, more advanced both in age and in progress of initiation." And the same conclusion is supported by Macnaghten (p. 71, vol. i), who, being aware of the divergence of authorities upon the subject, has thus summarized the result:—"The question as to the proper age for adoption has been much discussed, and the most correct opinion seems to be that there is no defined and universally applicable rule as to the age beyond which adoption can take place, so long as the initiatory ceremony of *tonsure*, according to one opinion, and of *investiture* according to another, has not been performed in the family of the natural father."

In regard to the third head of inquiry, namely, the exact footing of authority which the Dattaka Mimamsa holds in the Benares school, we have been referred on behalf of the appellant to a passage which occurs in Macnaghten's Hindu Law:—"In questions relative to the law of adoption, the Dattaka Mimamsa and Dattaka Chandrika are equally respected all over India, and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares." (p. 25.) A similar expression is to be found in another part of the same work (p. 74) and the Lords of the Privy Council in referring to the same matter in *The Collector of Madura v. Mootoo Ramalinga Sethupathy* (1) observed:—"Of the Dattaka Mimamsa of Nanca Pandita and the Dattaka Chandrika of Davanda Bhatta, two treatises on the particular subject of adoption, Sir William Macnaghten says that 'they are respected all over India, but that when they differ the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and [323] Benares.'" The learned Pandit argues that because the Privy Council have referred to the phrase "infallible guide," therefore we cannot, even on points of detail, decline to adopt the interpretation or the opinion of Nanda Pandita's Dattaka Mimamsa. Now if the Lords of the Privy Council did actually intend to assign such supreme authority to the work, we should of course be bound by such recognition. But I understand their Lordships to lay down no such inflexible rule, and it is clear that the phrase "*infallible guide*" was used by their Lordships as referring to what Sir William Macnaghten had said, and not to any rule which they themselves were laying down. This being so, I think we are entitled to refer to other works of authority to inquire whether the authority of Dattaka Mimamsa is so supreme as is sought to be given to it. The latest authority on the subject is the eminent Sanskrit

scholar Dr. Jolly, whose researches into the original texts of Hindu Law have received publicity in his work on Hindu Law, one portion of which is devoted to the subject of adoption. The learned author, after going into various authorities, summarizes the result of the whole chapter in the following words :—

"The result of this brief review of some of the principal doctrines of the Indian law of adoption may be summed up in a single sentence. It is simply a misfortune that so much authority should have been attributed in the Courts all over India to such a treatise as Nanda Pandita's *Mimamsa*, which abounds more in fanciful distinctions than, perhaps, any other work on adoption; and it is high time that the numerous other treatises on adoption should be thoroughly examined and given their due weight. Even hitherto, in spite of the pressure exercised by the authority of Nanda Pandita, the prevailing tendency of decisions has been in favour of divesting adoption of arbitrary restrictions which have no foundation in equity and justice. The history of adoption in some of those European countries where adoption has been sanctioned by legislation offers a parallel to this."

This strong expression of opinion is fully borne out by what another eminent Sanskritist and Hindu lawyer, Mr. Mandlik, has said upon the same subject :—

"I shall only give one more example of a similar misapprehension and confusion. This is in regard to the *Dattaka Mimamsa* of Nanda Pandita and the *Dattaka Chandrika* of Kabera, miscalled [324] *Davanda Bhatta*. The first is the work of Nanda Pandita of Benares. Mr. Colebrook calls it an excellent treatise on adoption. Of the author he says nothing beyond a general remark that biographical notices of all Hindu authors must be "very imperfect." If sufficient inquiry had been made, Nanda Pandita's history could have been easily found. Not one of the thirteen works of Nanda Pandit are authority in any part of this presidency. Indeed, except the first two, the others are not even known. As regards the *Dattaka Mimamsa* of Nanda Pandita, it was not known in Poona in 1826. . . . Nanda Pandita is nowhere even mentioned as an authority on this subject in the *Kaustubha* or the *Nirnayasindhu* or the *Dharma Sindhu* and the *Mayukhas*, while the authorities on which Steele bases his summary of law as regards adoption are *Kaustubha*, *Mayukha*, *Aditya Purana*, *Nirnayasindhu*, *Manu*, *Mababharatha* and *Ramayana*. The reader will now be able to see how far the remarks of Mr. Sutherland in 1819, that the *Dattaka Mimamsa* is the most celebrated work extant on the Hindu law of adoption, is warranted by facts. In this presidency it was not even known to the people in original for many years after the publication of its translation under the auspices of Government. And now the people are guided by the *Nirnayasindhu*, the *Viramitrodaya*, the *Kaustubha*, the *Dharma Sindhu*, the *Mayukhas*, and not by the *Mimamsa* or *Chandrika*. There are other works, too, on the subject of adoption, such as *Dattaka Manjari*, *Dattaka Nirnaya*, *Dattaka Darpana*, and others which are consulted in these parts, but they are not accessible to English readers. The opinions of Nanda Pandita are speculative, and are more indicative of *Ganda* doctrines than of the usages or opinions of the South." (Int. p. lxxii.)

To sum up the results of my conclusions upon this part of the case, I hold that the passage of the *Kalika-purana*, upon which the limitation of five years age for adoption is entirely founded, is not proved to be authentic; that even if it be taken to be authentic, the interpretation

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adopted by Nanda Pandita in his Dattaka Mimamsa is not shown to be universally applicable; that the interpretation may be restricted only to Brahmans intended for priesthood; that this interpretation would bring the Dattaka Mimamsa in accord with the Dattaka Chandrika; that various other equally plausible interpretations of the passage have been adopted by other authorities; that such authorities may be referred to for the purposes of this question; and that the matter being so dealt with by those authorities, it would be unsafe to set aside the plaintiff's adoption upon the solitary ground that he was older than five years at that time. The adoption took place as long ago as 1866; it has ever since been recognized to be valid; and the plaintiff has ever since been in possession of his adoptive father's estate. I entirely concur with Mr. Hill when he urged that to such a state of things the remarks of the Lords of the Privy Council in *Raja Haimun Chull Sing v. Koomer Gunsheam Sing* (1) are applicable,—“It may also be admitted, on the assumption of the proof of undisputed possession for a long space of time, that every presumption of fact should be made in favour of the validity of the act by virtue of which it took place, and that the onus of proving those circumstances which render it invalid in point of law, if the nature of the case requires such proofs, ought to be on the other side.” “The other side” in this case, upon whom the burden of proving the invalidity of the plaintiff's adoption would rest, is the defendant-appellant, and though the question of *onus probandi* is a rule applicable more to matters of fact than to questions of law, I think the *dictum* of the Lords of the Privy Council is wide enough to be applicable to this case, and that because the appellant has failed to show undoubted authority against the validity of the plaintiff-respondent's adoption, we must hold that adoption to be valid. Any other view would indeed most probably disturb many titles in the territories within the jurisdiction of this Court. And I think it proper to add that if, in my opinion, the defendant-appellant had, by reference to undoubted authorities of Hindu law, established the proposition that five years is the rigid and inflexible limit of age for the validity of all adoptions among the “twice-born” classes, so as to be applicable even to Cshatriyas in the circumstances of the present case, I should have regarded it as my duty to remand the case for full investigation of the question whether, among the clan of the Cshatriyas to which the parties belong, any such rigid rule prevails. And I may here observe that whilst on the one hand, in the written defence, no [326] objection to the validity of the plaintiff's adoption on the specific ground of the rigid limit of five years was taken in the Court below, on the other hand, the evidence of Narain Singh, the natural father of the plaintiff, coupled with the action of Chandan Singh, has a very strong tendency to show that no such rigid limit of age is observed among the Thakur Cshatriyas to which the parties belong.

I might end my observations here, but almost all that I have said so far is only destructive criticism of the case set up by the appellant against the validity of the plaintiff's adoption. And in order to guard myself against being misunderstood as imposing no limit upon the age of adoption, and also because it would be more satisfactory to the parties, I shall, at the risk of saying what would, perhaps, amount to *obiter dicta*, express the conclusions at which I have arrived after the best consideration I have been able to give to the subject as to the ultimate period of adoption under the Benares school of Hindu law. I have already dwelt at

considerable length upon the texts of Manu, which constitute the best authority on the conceptions of Hindu jurisprudence as to the origin of the four classes of mankind. I have also shown that, according to that sacred authority, the first three classes are called "twice-born," because of the "*Gayatri*," which hallows the sacred thread, the characteristic mark of the second birth. I have also shown that the investiture of the sacred thread is the turning point of such second birth, and that the hypothesis upon which adoption itself proceeds is the fiction of law that the adoptee is born in the adoptive family. "If the primary object of adoption was to gratify the *manes* of the ancestors by annual offerings it was necessary to delude the *manes*, as it were, into the idea that the offeror really was their descendant. He was to look as much like a real son as possible, and certainly not to be one who could never have been a son. Hence arose that body of rules which were evolved out of the phrase of Caunaka, that he must be 'the reflex of a son.' He was to be a person whose mother might have been married by the adopter; he was to be of the same class; he was to be so young that his ceremonies might all be performed in the adoptive family; he was to be absolutely severed from his natural family and to become so completely a part of his new family as to be unable to marry [327] within its limits." (Mayne, s. 92.) What the matter really comes to, then, is that adoption, at least in the *Dattaka* form, proceeds upon a theory not dissimilar to that of a feigned parturition, and implies that the second birth has taken place in the adoptive family. And once this theory is conceded and the passages in the *Dattaka Mimamsa* as to the limit of five years are restricted to special cases, no conflict between that authority and the *Dattaka Chandrika* continues to exist, and the second birth, as represented by the *upanayana* or the investiture of the sacred thread hallowed by the *Gayatri*, becomes the turning point of the proper period of adoption. The more so, as it is then that the boy, from being on the same level as a *Sudra*, rises to the position of being twice-born (Manu, chapter V). Both these authorities concur in holding that after the *upanayana* an ultimate bar is placed in the way of an adoption in the perfect form of *Dattaka*. Thus the age of the boy, as Mr. Mayne has pointed out (s. 123), is only material as determining the term at which the *upanayana* may be performed: a result which stands to reason, because if the second birth has already taken place in the natural family, it would be a violation of legal fiction itself to say that the same second birth takes place again in the adoptive family. Further, the *upanayana* being, as I have already shown, the beginning of the education of a boy in the duties of his tribe, it might well represent the ultimate limit when the boy might be adopted into another family. Such is the conclusion of Sir Thomas Strange when, in speaking of adoption, he says:—"Where a child not related by blood is to be adopted, as may be the case where one so related is not to be had, it may be consistent to depend for the confirmation of the tie upon the performance of the initiatory rites in the adopting family by means of which the adopted is considered to be in effect *born again*, thus becoming more essentially the son of his adopting parent: a conclusion that appears the more forcible, considering that the *upanayana* is the appointed season for the commencement of his education." (Vol. 1, p. 90.) What the exact period for the *upanayana* may be depends upon the circumstances as to the class to which the boy belongs and the objects in life which he has in view (Manu, chap. ii, vv. 35, 39) and the time for it may in consequence vary within certain specified limits. This, I think, is the only way in which the *Dattaka Mimamsa* and [328] the *Dattaka Chandrika* may be read

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together in a consistent and intelligible manner; and I would adopt the conclusion, not because of this reason alone, but also because, on going back to ultimate principles of Hindu law, this is the only way to read both these authorities consistently with the *Smriti* of Manu. Both these authorities belong to the category of *Nivanda*, or the lowest source of Hindu law, being commentaries or digests on special subjects of Hindu law by modern writers. Their authority is thus far below that of the *Smritis*, and I think that the Courts of justice in British India are entitled in dealing with them to place such an interpretation upon them as would be consistent with the whole theory of Hindu jurisprudence as indicated by the undoubted doctrines of the *Smritis* themselves. Thus the broad conclusion at which I have arrived is that, according to the Hindu law of adoption as prevalent in the Benares school, the performance of the *upanayana*, or the ceremony of the investiture of the sacred thread, hallowed by the *Gayatri*, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, as prescribed by Manu, is the ultimate limit when a valid adoption in the *Dattaka* form can take place. This doctrine, as pointed out by Sir Thomas Strange (vol. I, p. 91) has no application to the *Sudras*; for in their case the only ceremony of consequence in its theological and legal aspect in Hindu law is the ceremony of marriage. And it is hardly necessary to add that what I have said is enough to show that, so far as the Benares school of the Hindu law is concerned, I cannot adopt the recent ruling of the Bombay Court in *Dharma Daga v. Ramkrishna Chinnaji* (1) where the adoption of a married *asagotra* Brahman was upheld, and where the doctrine of *factum valet* was carried almost further than in any case with which I am acquainted. But it is well known that in Western India the Hindu law of adoption is very lax, and if I have referred to the ruling, it is only to guard myself against being misunderstood as holding that those lax doctrines are applicable to the Benares school also.

I may add that the conclusion at which I have arrived as to the *upanayana* being the limit of the age for adoption is supported by the principle upon which the rulings of the late Sadar Adalat of Calcutta proceed in *Kerutnarain v. Mussummut Bhoobunesree* (2) and [329] in *Ramkishore Acharj Chowdree v. Bhoobunmoyee Debea Chowdrain* (3), both of which I cite by way of reference without necessarily accepting all that was said in those cases.

[His Lordship proceeded to discuss in detail the evidence bearing on the two questions previously stated with reference to the defendant's title, viz., (i) whether the defendant was in fact adopted on the 22nd April, 1871, by Khushal Kuar, with or without the concurrence of the other widow, Rukam Kuar; and (ii) if so, whether such adoption was made under an authority given by Hira Singh. In the result, his Lordship found, first, that there was no trustworthy evidence to show that Hira Singh had ever given permission to his widow to adopt a son; and secondly, that the fact of the defendant's adoption was not proved. The judgment concluded thus:—]

Having given my best consideration to the whole evidence in the case, I agree with the lower Court in holding that the defendant Ganga Sahai's adoption by Khushal Kuar, in 1871, is not proved; and that upon the evidence produced it is impossible to find that any adoption took place at any other time. This finding renders it unnecessary to enter into the

(1) 10 B. 80.

(2) S.D.A. L.P. Sel. Cas. vol. i, p. 161.

(3) S.D.A.L.P. (1859), part I, p. 229.

question of law enumerated by me as the third question in the defendant's case, namely, whether an adoption by a widow without any authority from her husband or the consent of his nearest heirs would be valid under the Benares school of Hindu law, which admittedly governs this case.

In my opinion, the appeal should be dismissed with costs.

STRAIGHT, J.—I concur in the judgment of my brother Mahmood, and he has discussed the case so exhaustively that any observations on my part are unnecessary. The appeal is dismissed with costs.

*Appeal dismissed.*

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### [330] PRIVY COUNCIL.

PRESENT:

*Lord Hobhouse, Sir B. Peacock and Sir R. Couch.*  
*[On appeal from the High Court of North-Western Provinces.]*

AJUDHIA PRASAD AND ANOTHER (*Plaintiffs*) v SIDH GOPAL AND OTHERS (*Defendants*) [15th, 16th and 18th December, 1886.]

*Arrangement between firm and its creditors—Giving time—Mortgage security.*

A firm, in difficulties, executed a mortgage, securing debts due to creditors named in the deed, it being understood that all the creditors should refrain from suing the firm until the expiration of a certain period.

Notwithstanding this, two creditors, named in the deed, immediately sued for their debts, and obtained decrees.

Other creditors, named in the deed, afterwards bringing the present suit to enforce their rights under the mortgage, it appeared that the intention and agreement was that the deed should not take effect, unless all the creditors came in and were bound by it.

*Held* that the suits abovementioned having been brought before the expiration of the period agreed upon, the consideration for the mortgage had failed, and the creditors could not sue the firm on the mortgage deed.

[N.B.—See 5 A. 392 whereon this appeal has arisen.]

Consolidated appeal from decrees (14th March, 1883) of the High Court reversing decrees (19th July, 1881) of the Subordinate Judge of Cawnpore.

THE appellants were bankers of Cawnpore, trading under the name of Phundu Mal, Ganga Prasad; and the respondents were Kanha Mal, Banarsi Das, and Sidh Gopal, three sons of Dwarka Das, deceased, who, with one Radhe Lal, carried on a family business, as bankers, in Generalganj in Cawnpore, under the style of Dwarka Das, Kanha Mal.

On the 22nd June, 1875, the latter firm, without Sidh Gopal, who did not sign, executed the document giving rise to the present question.

Each creditor was named in the document, and opposite his name was set down the amount due to him. To secure these amounts, aggregating Rs. 30,700, the firm mortgaged their shop in Generalganj and its belongings, *dakhili* and *khariji*, under the following specified conditions; *viz.*, that three months' time was to be allowed for payment; monthly interest at 10 per cent. per mensem being agreed upon; and that the mahajans or creditors were to be at liberty to sue for the sums due to them, and to realize them [331] from the debtors' persons or property, either individually or collectively. The deed is not set forth here at length, as



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it appears in the report of this case on the appeal to the High Court; see *Sidh Gopal v. Ajudhia Prasad* (1).

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Notwithstanding this arrangement, immediately after the execution of the mortgage, Debi Charan, the creditor twelfth on the list contained in the deed, sued the firm on the 24th June, 1875, on a *hundi* for Rs. 600, on which he obtained an *ex parte* decree on the 11th August following. Also on the 17th July, then next, the firm of Chaube Sidhari Lal and Baldeo Prasad, creditors twelfth on the list, sued on a *hundi* for Rs. 1,500, the amount set down against their names, and obtained a decree for that amount, on the defendant's admission. More than four years afterwards, on the 27th November, 1880, the claim to which the present proceedings related, was brought by Ajudhia Prasad and his partner in the Court of the Subordinate Judge.

The plaintiff stated that the firm, Dwarka Das, Kanha Mal, having had dealings with the plaintiffs, and other bankers of Cawnpore, owed the principal sum of Rs. 6,600, to the plaintiffs' firm, and Rs. 24,100, to the others. After adjustment of accounts, a mortgage deed for the above sums was executed; the deed was annexed to the plaint, which prayed judgment for Rs. 6,600, principal and Rs. 2,688 interest, total Rs. 9,288, together with costs, and future interest up to date of payment, by enforcement of the mortgage lien against, and auction-sale of, the mortgaged property entered in the mortgage-deed, to the extent of the plaintiffs' right; and also by holding liable the persons of the defendants and their other property.

Sidh Gopal denied that he was a party to the deed; and Kanha Mal, among other defences, alleged that the deed having for its consideration the promise of the mortgagees to postpone their rights of suit on the *hundis*, some of them had sued the defendants before the expiration of the term agreed upon, so that the deed had become inoperative. Issues having been fixed on these and other points, the Subordinate Judge decreed the plaintiffs' claim, to be realized from the sale of the property mortgaged, and also from the defendants personally, or from their other property.

[332] On appeal to the High Court, Straight, J., and Tyrrell, J., stating that the plaintiffs came into Court claiming upon a mortgage, and holding that Sidh Gopal, as a member of a joint Hindu family trading in partnership, was bound by his brothers' act, expressed the principal point as follows:—

"The second and main question, however, raised for the appellants is, assuming the appellant, Sidh Gopal, to be liable under the instrument of the 22nd of June, 1875, in conjunction with his three brothers, was the consideration for which the houses were pledged in that deed, a joint and common undertaking and promise of all the creditors of the firm of Dwarka Das, Kanha Mal, whose names are recited therein, personally, or by the respondent, Ajudhia Prasad, on their behalf, to forbear from enforcing payment of their debts for three months; and, if such was the consideration, did the institution of the suits by Debi Charan on the 22nd of June, 1875, and by Chaube Sidhari Lal on the 17th of July following, vitiate the contract and discharge the appellants from liability? In other words, and to put it shortly, was the forbearance of the whole of the creditors mentioned in the deed, a condition precedent to liability attaching to the defendants-appellants under the contract?"

The opinion of the High Court upon the question so stated was that the deed, in its entirety, indicated that the consideration for which the defendant firm had hypothecated its property, was the promise of all the creditors mentioned in the instrument, to forbear to sue for a period of three months. The value of an executory consideration of this kind could only be its value as a whole, and according as that was or was not forthcoming, would the contract stand or fall. The condition precedent to liability attaching to the defendants, under the deed of 22nd June, 1875, was broken when the suit of Debi Charan, and of Sidhari Lal, were instituted within the three months. Hence there was, in the Court's opinion, such a failure of consideration as discharged the defendants from their liability. The three suits, accordingly, stood dismissed.

On this appeal,

Mr. T. H. Cowie, Q.C., and Mr. C. W. Arathoon, for the appellants, argued that they were entitled to sue on the deed of 22nd June, 1875. Sidh Gopal came within the rule as to acts of necessity done on behalf of the members of a Hindu family by the manager or managers. The respondents' liability to the other creditors, setting aside Debi Charan and the other creditors named in the deed who had brought their suits in 1875, remained subsisting, notwithstanding that the arrangement had not been adhered to by the latter. The mortgage deed was explicit as to the right of a creditor to institute this suit without joining the remaining creditors.

Mr. J. Graham, Q.C., and Mr. J. H. A. Branson, for the respondents, argued that the consideration for the mortgage as shown by the deed, and confirmed by the evidence on the record, was that time should be given by all the creditors. All the latter had not given time, but by some decrees had been obtained immediately after the execution of the deed of 22nd June, 1875. The understanding between the firm executing the mortgage and the creditors was that it should operate only upon all joining; for, otherwise, the object of it would have been defeated. Thus, the mortgage security could not be treated as subsisting. Reference was made to the Indian Contract Act, IX of 1872, s. 28.

Mr. C. W. Arathoon replied, showing from the evidence how far the deed had been acted upon. On the 18th December, their Lordships' judgment was delivered by SIR R. COUCH.

# JUDGMENT.

SIR R. COUCH.—The appellants in this appeal, who are the plaintiffs in the suit, are bankers at Cawnpore. The respondents are a joint Hindu family consisting of four brothers, the sons of Dwarka Das, and carried on business at Cawnpore, Calcutta, and Lucknow, the business at the different places being managed by some members of the family. It was a family business apparently founded by Dwarka Das, the father; and the evidence was that the joint expenses of the family were paid out of the profits of the business. Indeed, on the argument of the appeal, it was not disputed by counsel for the respondents that the members of the family would be bound by the deed upon which the suit was brought if it were valid and binding in other respects. In June, 1875, the Calcutta firm of the respondents stopped payment, and that brought the firm at Cawnpore into financial difficulties. *Hundis* had become due, and other *hundis*, for which the Cawnpore firm was liable, [334] were becoming due. It appeared to be the object of the creditors of the Cawnpore firm to prevent a stoppage of payment, and, by giving time to that firm, to tide them over the difficulties in which they were placed. For that purpose

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it seems to have been arranged by some of the creditors that a meeting should take place to see what could be done.

The evidence with regard to this is as follows:—The first witness to whom it is necessary to refer is Kakai Mal, who was one of the creditors. He said:—"Five or six days before the execution of the mortgage deed I had a conversation with Ajudhia Prasad"—that is the appellant and plaintiff in the suit—"at his house, to the effect that, if all the creditors were willing, a deed may be obtained from Kanha Mal"—the defendant, who appeared to have the management of the business at Cawnpore—"regarding the property. Kanha Mal was then sent for. He said that though the *hundis* had not fallen due, yet he would pay half of the amount of the *hundi* which would fall due, and give a *hundi* for the other half. I and Ajudhia Prasad asked Kanha Mal to give a mortgage of his property for three months, and that we would settle with the creditors. I had made mention of my Rs. 8,000. It was agreed at the time that all the money due to me would be entered. When I came from Lucknow I then learnt that only Rs. 300 of the amount due were entered. I got very much displeased with Kanha Mal for Rs. 300 only being entered as due to me. Kanha Mal had asked me to obtain the consent of all the creditors, and that then he would execute a deed. He had told this to me and Ajudhia Prasad. Both of us had agreed to this, that we would obtain the consent of all the creditors." The next witness is Madho Ram, who was also a creditor. He said:—"The amount due to me was Rs. 1,500. I said that I was not agreeable"—that is, with reference to their asking him to join in giving time. "Ajudhia Prasad, Puran Chand, and others, said that I should get my money included in the bond which was to be executed in favour of all persons. Afterwards I said that I was agreeable to what all proposed. Afterwards Kanha Mal was asked to execute the deed. He said that as some were agreeable and some not, let the dates of the bills of exchange expire, and he would pay the money as each date [335] expired. Ajudhia Prasad told him to execute the deed, and that he would obtain the consent of all."

Another witness was Lalman, who was the gomastha of Kanha Mal. He said:—"Five, six, or four days before execution of the deed there was some conversation between Ajudhia Prasad and Kanha Mal at 10 or 11 o'clock at the new house. The former told the latter to write an agreement to all his creditors that they would be paid in proportion to each one's share from the income of the Benares and Lucknow firms. Kanha Mal then replied that the amounts of expired dates would be paid first, and those of unexpired dates would be paid from time to time as their dates of payment expired. Ajudhia Prasad then said:—"This arrangement might lead some one to institute a suit whereby you will be put to a loss. I will make them understand that I will pay them proportionately when the money is received." Kanha Mal answered that those who had amounts of expired dates still outstanding would hardly agree to this: whereupon Ajudhia Prasad said that he would make settlement with them all. Kanha Mal then said:—"If you take the responsibility upon yourself I will execute the agreement, Kanha Mal then executed the agreement, and pledged his property therein."

Kanha Mal was also called as a witness, and after speaking as to the firms at Cawnpore and Calcutta, he said:—"Five or six days prior to the execution of the document the creditors began to make their demands. Radhe Prasad, Puran Chand, and Parmeshri Das made demands in respect of *kutchas* and *pucca hundis*. No other creditors made demands. The

request made was to have the property made over to them, lest we should hereafter deny, as others had done, and that a suit should be brought, and a proportionate division of any moneys be paid. Ajudhia Prasad and others said that all would be settled up, and I asked how those were to be settled whose dates for payment had fallen due. The first day the conversation was held with me alone, and the next day Behari Das was also with me. Ajudhia Prasad said that he had prevailed on all to take a proportionate share." Further on he made a statement to which the Subordinate Judge who tried the suit seems to have attached some importance. He said :—[336] "There was no stipulation as to what would be the result if any creditor complained after the document had been written."

There was some evidence given on the part of the plaintiff which was not altogether in agreement with that which has been read, but the Subordinate Judge took no notice of that evidence, and the High Court appears not to have thought it to be trustworthy. It is to be observed that the principal part of Ajudhia Prasad's debt was upon *hundis* which had not become due. He had, therefore, a strong interest in promoting an arrangement which would place him in the same position as the creditors whose *hundis* were due.

It is true that Kanha Mal made the statement that there was no stipulation, but the whole of the evidence shows that the parties from the first appeared to have contemplated that all the creditors would join ; and it would not be necessary that there should be an express stipulation if, from the nature of the transaction, and their conduct, it is apparent that this was the understanding of the parties, and that they all acted upon the faith that all creditors would join in the arrangement.

Upon that the deed which is the subject of the suit was executed. It is dated the 22nd of June, 1875, and is in these terms :—"Hypothecation deed, dated 22nd June, 1875, executed by Kanha Mal and others. We, Kanha Mal, Benarsi Das, Radhe Lal, and Sidh Gopal, the sons, of Dwarka Das, and proprietors of the firm known as that of Dwarka Das, Kanha Mal, in Old Generalganj, City Cawnpore, by caste Khattri, and residents of Cawnpore, do hereby declare that, being sound in both body and mind, we agree that a balance of Rs. 30,700 is due by us on account, book accounts and *hundis* to the following creditors." Here follow the names of all the creditors, with the sums due to them, as in a list given in by Kanha Mal, the whole amounting to, Rs. 30,700. Then it says :—"And at the present time we cannot arrange to meet these liabilities. Therefore, in lieu of the Rs. 30,700 due to the aforesaid mahajans, we mortgage to them collectively three pucca masonry houses, together with the shop in which the business of Kanha Mal, Dwarka Das, is carried on in Old Generalganj, together with all its rights and appurtenances." Then follow some conditions and particulars which need not be read, one being a provision that [337] Ajudhia Prasad's firm should collect the debts due to the firm, and divide the money amongst the creditors.

Shortly after the mortgage was executed, two of the creditors named in it, namely, Sidhari Lal and Debi Charan, brought suits against the respondents' firm, and obtained decrees. It does not appear that from the time of the execution until the suit of the appellants was brought, anything was done under the deed, or that any of the debts due to the firm were collected by Ajudhia Prasad's firm, and apparently the deed was not acted upon in any way.

The present suit was not brought until November, 1880. It was brought to enforce the claim of the appellants under the mortgage. In

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their plaint they treated the deed as a mortgage to them for Rs. 6,600, the amount of their debt, and they prayed:—"A judgment to recover the Rs. 6,600, principal and interest, with costs of suit, by enforcement of the mortgage lien against, and auction sale of, the mortgaged property entered in the mortgage deed, to the extent of the plaintiffs' right, and also by holding liable the persons of the defendants, and the other property owned and held by them."

The Subordinate Judge made a decree in their favour to the effect of what was prayed for in the plaint.

Some questions have been raised upon the form of this decree, and the form of the suit, being not upon the whole mortgage and for the benefit of all the mortgagees and creditors, but for the benefit of the appellants alone. It is not necessary for their Lordships to say anything upon those questions.

The main ground of defence in the case is that, in consequence of the two creditors who brought their suits and obtained decrees not assenting to the deed, it cannot be enforced; that the intention and agreement was that the deed should not take effect unless all the creditors came in and were bound by it. Now it appears to their Lordships, upon the evidence in the case, that this was the intention of the parties, and that, although there was no express stipulation to that effect, it is obvious from all that took place that this is what they meant, and is the agreement which was come to between them. The deed would not have been executed unless [338] there had been that agreement. If the object of the arrangement is looked at, it would appear that this must have been their understanding. What all parties desired was, that time should be given by the creditors to the Cawnpore firm in order that they might not be obliged to stop payment. If any creditor was at liberty to disregard the deed, and to bring a suit and obtain a decree, and get execution of it, he would be able to gain a preference over the other creditors, and in effect to oblige the Cawnpore firm to stop payment. It would be proper and right for them, if one creditor was endeavouring to obtain a preference over the others, to stop payment, and to see that their property was equally divided amongst their creditors. In fact they did stop payment upon the suit being brought by the two dissentient creditors and the decrees obtained, and the effect was that the mortgage was not acted upon. Nobody appears to have sought to enforce it until this suit was brought; and the conclusion which their Lordships draw from the evidence is much strengthened by the conduct of the parties. The High Court, upon an appeal from the decision of the Subordinate Judge, were of the opinion here expressed, and accordingly they reversed his decree and dismissed the suit. Their Lordships think that was the proper conclusion from the evidence which was given in the case, and that under the circumstances the mortgage did not take effect. They will therefore humbly advise Her Majesty to dismiss the appeal, and affirm the decree of the High Court, and the appellants will pay the costs.

*Appeal dismissed.*

Solicitors for the appellants:—*Messrs. T. L. Wilson and Co.*

Solicitors for the respondents:—*Messrs. Watkins and Lattey.*

9 A. 339=7 A.W.N. (1887) 61.

## [339] APPELLATE CIVIL.

*Before Mr. Justice Straight.*KHUDA BAKHSH AND OTHERS (*Defendants*) v. IMAM ALI<sup>2</sup> SHAH  
(*Plaintiff*).<sup>\*</sup> [22nd December, 1886.]*Practice—Dismissal of suit by first Court without examining defendants' witnesses—  
Reversal of decree on appeal—Duty of appellate Court to direct examination of  
witnesses before reversing decree.*

Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal,—*held* that before doing so, the lower appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court, by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants.

The Court directed the first Court to examine the defendant's witnesses, and, having done so, to return their depositions to the lower appellate Court, which was to re-place the appeal upon its file and dispose of it.

[F., 22 B. 253.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Mr. W. M. Colvin and Munshi Kashi Prasad, for the appellants.  
Mr. Abdul Majid, for the respondent.

## JUDGMENT.

STRAIGHT, J.—This was a suit brought by the plaintiff-respondent, to have his title declared to certain land, and to have demolished certain erections which he alleged the defendants had placed thereon. A body of oral and documentary evidence was recorded by the Munsif, and, in respect of oral evidence, four witnesses were examined on behalf of the defendants. Upon the 18th May, 1885, the Munsif recorded in a *rubkar* that it was unnecessary that any other witnesses should be examined on the part of the defendants, and therefore a large number of witnesses who had been summoned by the defendants were not called or examined in the Munsif's Court. He dismissed the plaintiff's claim, and the plaintiff appealed to the Subordinate Judge. The Subordinate Judge, after an examination of all the oral and documentary evidence upon the record, came to the conclusion that the [340] plaintiff had established his claim, and therefore, decreeing his appeal, reversed the Munsif's decision and decreed the plaintiff's claim. In the course of his judgment the learned Subordinate Judge refers to the evidence of the witnesses called for the defendants, and apparently disbelieves their statements for reasons stated in his judgment, *viz.*, that they appear all to be the creatures of the defendants, who are the zemindars of the mauza. Whether the learned Subordinate Judge's attention was called to the fact that the Munsif had made a *rubkar* on the 18th May, 1885, does not appear from the record. But it seems to me that before reversing

\* Second Appeal No. 457 of 1886, from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Azamgarh, dated the 22nd December, 1885, reversing a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad Gohna, dated the 31st August, 1885.

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the decision of the Munsif, and discrediting the evidence on the record presented by the defendants, the Subordinate Judge should have taken pains to afford the defendants an opportunity to supplement the evidence which they had given in the first Court by the testimony of those witnesses whom the Munsif had declared it unnecessary to hear. I think the case must be regarded, and should have been so regarded by the learned Subordinate Judge, as one in which the first Court had refused to examine the witnesses tendered by the party. I think the first plea taken in appeal and, in fact, the only plea which was urged by the learned counsel for the appellants has force, and should be allowed to prevail. What I am now going to do, and what the Subordinate Judge should have done before, is to direct the Munsif to examine the defendants' witnesses, and, when he has done so, return their depositions to the Court of the Subordinate Judge, who will then re-place the appeal on his file of pending appeals, and dispose of it according to law, and with regard to all the evidence appearing on the record. The costs incurred will be costs in the cause.

*Cause remanded.*

9 A. 340 = 7 A.W.N. (1887) 62.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

GIRRAJ BAKHSH (*Defendant*) v. KAZI HAMID ALI (*Plaintiff*).<sup>\*</sup>  
[23rd December, 1886.]

*Guardian and minor—Muhammadan mother—Act XL of 1858 (Bengal Minors Act), s. 18—Mortgage by certificated guardian without sanction of District Court—Mortgage money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Act IX of 1872 (Contract Act), s. 65—Obligation of person receiving advantage under void agreement—Restitution.*

S. 18 of the Bengal Minors Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian [341] without the sanction of the Civil Court, is illegal and void *ab initio*; but the proviso means that in the absence of such sanction the certificated guardian, who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. If any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction is on the basis of no certificate having been granted.

S. 65 of the Contract Act (IX of 1872) should not be read as if the person making restitution must actually have been a party to the contract, but as including any person whatever who has obtained any advantage under a void agreement.

In a suit brought by the guardian of a Muhammadan minor for a declaration that a mortgage deed executed by the minor's mother was null and void to the extent of the minor's share and for partition and possession of such share, it was found that a considerable proportion of the monies received by the mortgagor had been applied for the benefit of the minor's estate by discharging incumbrances imposed on it by his deceased father. It appeared that, at the time of the mortgage, the mother held a certificate of guardianship under the Bengal Minors Act, and that she had not obtained from the Civil Court any order sanctioning the mortgage, under s. 18 of that Act.

<sup>\*</sup> First Appeal No. 123 of 1885 from a decree of Maulvi Muhammad Sayyid Khan, Subordinate Judge of Agra, dated the 18th March, 1885.

*Held* that the omission to obtain such sanction did not make the mortgage illegal or void *ab initio*, but relegated the parties to the position in which they would have been if no certificate had been granted, i.e., that of a transaction by a Muhammadan mother affecting to mortgage the property of her minor son, with whose estate she had no power to interfere.

*Held* that this fell within the class of cases in which it has been decided that if a person sells or mortgages another's property, having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate.

*Held* that even if mortgages executed by a certificated guardian without the sanction required by s. 18 of the Bengal Minors Act were void, the section did not make them illegal; and with reference to s. 65 of the Contract Act, the plaintiff could not obtain a decree for a declaration that the mortgage was inoperative as against his share, except on condition of his making restitution to the extent of any monies advanced by the defendant under the mortgage deed which had gone to the benefit of the plaintiff's estate, or had been expended on the maintenance, education, or marriage.

*Mauji Ram v Tara Singh* (1), distinguished. *Shurrut Chunder v. Rajkissen Mookerjee* (2), *Mirza Pana Ali v. Saïad Sadik Hossein* (3), *Lahee Ram v. Mahomed Abdul Rahman* (4), *Hamir Singh v. Zakia* (5), and *Gulshere Khan v. Naubey Khan* (6), S.A. No. 197 of 1855 referred to.

[F., 18 A. 373, R., 22 M. 289; 28 A. 30=A.W.N. (1905) 176=2 A.L.J. 507; 10 O.C. 321; 15 C. 40 (47); 25 A. 59; 3 C.L.J. 260; 9 Ind. Cas. 377 (379)=13 C.L.J. 277; 14 Ind. Cas. 14 (15); 17 Ind. Cas. 987 (988)=23 M.L.J. 652=12 M.L.T. 579; D., A.W.N. (1894) 89.]

[342] THE facts of this case are stated in the judgment of Edge, C. J. The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad* for the appellants.

Mr. *Habibullah* and Pandit *Nand Lal* for the respondent.

The following authorities were cited during the argument, in addition to those referred to in the judgment :—Act IX of 1872 (Contract Act), s. 1, cl. (g), *Seshaiya v. Kandaiya* (7), *Debi Dutt Sahoo v. Subodra Bibee* (8) *Siker Chand v. Dulputty Singh* (9), Act XXXV of 1858 (Estates of Lunatics Act), s. 14, *The Court of Wards v. Kupulmun Singh* (10), and *Surut Chunder Chatterjee v. Ashootosh Chatterjee* (11).

### JUDGMENT.

EDGE, C. J.—This was an action brought by the guardian of a minor for the purpose of obtaining a declaration that a mortgage-deed executed on the 24th December, 1877, by the minor's mother in favour of one Kashi Ram, father of the defendant, was null and void to the extent of the plaintiff's share. There was also a prayer for a decree for proprietary possession of the properties detailed in the plaint to the extent of 14 out of 16 annas, and also that the minor's share might be partitioned off the property to the extent of the 14 annas share, and also that mesne profits might be awarded. The Subordinate Judge of Agra, by a judgment dated the 18th March, 1885, decided most of the issues arising in the case in favour of the defendant, but held that the mortgage-deed was invalid so far as the plaintiff's share in the property was concerned, on the ground that the mortgagor party to the deed was the minor's certificated guardian

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(1) 3 A. 352,  
(3) N.W.P. H.O. (1875), 201.  
(5) 1 A. 57.  
(7) 2 M.H.C.R. 249.  
(9) 5 C. 563.  
(11) 24 W.R. 46.

(2) 15 B.L.R. 350.  
(4) N.W.P. H.C. R. (1874) 268.  
(6) A.W.N. (1881) 16.  
(8) 2 C. 283,  
(10) 19 W.R. 164.



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under Act XL of 1858, and she had not obtained under s. 18 of that Act an order from the District Judge sanctioning the mortgage. The Subordinate Judge accordingly decided that the plaintiff was entitled to the property in dispute and to its partition. The defendant has appealed from this decision, and we have to consider how far it is right, and what our own judgment should be.

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There are two or three facts to be considered before stating our views as to the law. It appears that in 1869, Kazi Ahmed Ali, the father of the plaintiff minor, who, I should mention, is now of [343] age, died. It has been proved to us that, during his life-time, he executed three mortgages, which were unsatisfied when he died. We are also satisfied that out of the monies received by his widow, the plaintiff's mother, in consideration of the mortgage in dispute in this action, a proportion, at all events, between Rs. 3,800 and Rs. 4,000, was applied by her to satisfying the debt, as it then stood, which originated in the three mortgage transactions of the father. Whether any further portion of the Rs. 6,000 advanced on this mortgage was borrowed or applied for the benefit of the minor's estate, or for his support, education, or marriage, the evidence on the record does not enable us to decide; but we consider it proved that out of the Rs. 6,000 a large proportion was applied for the benefit of the minor's estate by discharging the incumbrances imposed on it by the father. It is admitted that the mother, at the time of the mortgage of the 24th December, 1877, held a certificate of guardianship under Act XL of 1858, and that she had not obtained any order or consent from the District Judge sanctioning the mortgage which is the subject of dispute in this case. It is contended on behalf of the plaintiff that, under these circumstances, not only is the mortgage void *ab initio*, but the plaintiff is entitled to have the decree which he asks for, without making any restitution to the mortgagee's representative. In support of this contention several cases have been cited, including rulings by the Calcutta High Court, and the case of *Mauji Ram v. Tara Singh* (1), decided by this Court.

With reference to this last-mentioned judgment, I observe that what the learned Judges apparently had present to their minds was the question whether a minor could ratify such a contract as this which has been made without the District Judge's sanction having been first obtained by the certificated guardian. That is not the point which has to be decided in this case. It is true that it was said in that case that such a contract was void *ab initio*, but it is right to remember that one of those learned Judges, though he did make use of that expression, in a subsequent unreported case, *Narotam Singh v. Ram Chander* (F. A. No. 4 of 1883), based his judgment on considerations which are inconsistent with such a view. In the subsequent case, it is obvious that the Judges considered the [344] case to be one to which s. 18 of Act XL of 1858 applied. For the purpose of passing the decree, they must have considered that the property in suit was immoveable property of the minor which had been dealt with, and which was within the scope of s. 18, and in the judgment we find the law laid down in terms which we entirely adopt. At p. 13 of that judgment, the following passage occurs:—"The plaintiff therefore was entitled to have the mortgage of the 20th December, 1872, avoided on this ground, and his objection to the decision of the Court below, with reference to the lease, must likewise prevail. The matter then stands thus: the

defendants-appellants are in possession of property belonging to the plaintiff-respondent as trespassers, and their document of title being declared invalid, the natural and legal consequence is that he may oust them. But then comes the question as to whether, assuming the monies advanced to Musammatt Sita by the defendants to have been spent for the benefit of the plaintiff or his estate during his minority, we ought not, as a Court of equity, to make his obtaining possession by the machinery of the Court contingent on his re-paying to the defendant the amount of such monies with reasonable interest." The Court in that case acted upon the view that whether the contract were called void or invalid or anything else, a plaintiff going to the Court for relief was bound to submit to the Court's right to order restitution by him. There is another similar judgment of Oldfield and Brodhurst, JJ., (1) which also relates to s. 18 of the Act. The Judges in that case were of opinion that the plaintiff could not claim possession of the property in suit without making restitution of the monies which had been received and had gone to the benefit of his estate. Again, the same view was expressed in *Shurrut Chunder v. Rajkissen Mookerjee* (2). In that case, Macpherson, Offg., C.J., said:—"The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence. As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate."

[345] These authorities appear to us to be directly in point, and to show that, whether the contract is void or voidable, the minor seeking to set it aside cannot claim the interference of a Court of law or equity without making restitution. It has been contended that s. 18 makes a difference between cases where the person who has made the mortgage is the certificated guardian of the minor, and other cases where a person acting as a guardian without authority to sell or mortgage, has sold or mortgaged. I cannot see how the section has the force which Pandit *Nand Lal* suggests. To my mind, all that it does is this: It does not provide that a sale or mortgage or a lease for more than five years, and executed without sanction, shall be treated as illegal, but the proviso means that the certificated guardian who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. In other words, if any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction would be on the basis of no certificate having been granted. *Qua* certificated guardian, the vendor or mortgagor or lessor could have no power, without sanction, to sell or mortgage, or grant a lease for more than five years. This view of the meaning of Act XL of 1858 is supported by the following considerations. If the Legislature had intended to make contracts, if entered into without sanction, illegal and void *ab initio*, it would have been easy to express that intention by using the words "but no such person shall sell or mortgage any immoveable property, or grant a lease thereof for any period exceeding five years, without an order of the civil Court previously obtained." If these words had been used, there would

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(1) S.A. No. 197 of 1885, not reported.

(2) 15 B.L.R. 350.



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have been an absolute prohibition of such contracts if entered into without sanction. But the words are "no such person shall have power to sell or mortgage," &c., and this places any certificated guardian who does sell or mortgage without sanction in the position of one who had no power to do so. In the view which I take of s. 18, there is no reason why this case should not be treated as falling within the class of cases in which it has been decided that if a person sells or mortgages another's property, having no legal or equitable and right to do so, and that other benefits by the transaction, the latter cannot have it set aside without [346] making restitution to the person whose money has been applied for the benefit of the estate. That these cases are applicable to a transaction which is impugned under s. 18 of Act XL of 1858 is shown by *Shurrut Chunder v. Rajkissen Mookerjee* (1) and to two decisions of this Court to which I have referred. The section merely relegates the parties to the position in which they would be if no certificate had been granted. That position is this: a Muhammadan mother on her own behalf, and as guardian of her minor son, proposes to mortgage his estate. It is clear that a Muhammadan mother is not the guardian of her son's estate, and has no power to interfere with it. Nevertheless, we find that in the three cases which have been cited, a transaction of sale or mortgage by a Muhammadan widow mother was challenged, and that in each case the successful heir was held to be not entitled to relief without making restitution of the monies which had gone to benefit his estate—see *Mirza Pana Ali v. Saiad Sadik Hossein* (2), *Sahee Ram v. Mahomed Abdul Rahman* (3) and *Hamir Singh v. Zakia* (4). In all these cases the transaction had been effected by the mother, who had no title in law or equity to sell or mortgage, and yet the Court held that the plaintiff must take the estate subject to repayment of the monies which had been paid by the purchaser or mortgagee, and which had gone to the benefit of the estate. A similar and a very strong case was decided by this Court in *Gulshere Khan v. Naubey Khan* (5). In that case, two Muhammadan brothers having sisters who were co-sharers in certain property, and acting adversely to them, sold the property, purporting to sell it as belonging to themselves alone. It was held that the sisters were bound to make restitution before they could get a decree for possession of their shares. That was a case where the vendor did not even profess to act on behalf of the other persons entitled, and still those other persons were held bound to do equity with regard to any monies which had gone to the benefit of the estate from the innocent purchaser.

Under my view of s. 18, therefore, I am of opinion that the parties in this case are in the same position as that illustrated in [347] the cases which have been cited, namely, where a Muhammadan mother has affected to deal with the property of her minor son; and I therefore hold that the plaintiff must make restitution before he can take the benefit of any decree which we may make in his favour.

But if we assume that I am wrong in the view which I take of s. 18, and if it is assumed that that section does make these contracts void, what then is the result? The section still does not say that such agreements are *illegal*, but only that they are *void*, and cannot be enforced. Upon this point we must look at s. 65 of the Contract Act, to see whether

(1) 15 B.L.R. 350.

(2) N.-W.P.H.C. R. (1875) 301.

(3) N.-W.P.H.C. R. (1874) 268.

(4) 1 A. 57.

(5) A.W.N. (1881), 16.

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a plaintiff who comes to this Court and says that an agreement is void by reason of s. 18 of Act XL of 1858, can claim a decree for possession of the property without making restitution. It appears to me that in this view of s. 18, the provisions of s. 65 of the Contract Act would apply. That section provides that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it, to the person from whom he received it." It has been suggested that this section should be read as if the person making restitution should actually have been a party to the contract; but the section is expressed in the widest terms, and includes any person whatever who has obtained any advantage under a void agreement. So that even if s. 18 had the effect of making the agreement of mortgage in this case void, I should still hold that, with reference to s. 65 of the Contract Act, the plaintiff could not have the benefit of our decree except on condition of his making restitution to the extent of any monies advanced by the defendant under the mortgage-deed which had gone to the benefit of the plaintiff's estate, or were expended on his maintenance, education, or marriage.

This is all that I need say in reference to the legal bearings of the case. Then how are we to apply these principles to the facts before us? We are not in a position to ascertain what actual proportion of this Rs. 6,000 went to the benefit of the plaintiff's estate or was reasonably borrowed and expended on his personal uses for what may be called necessities. Under these circumstances, before a decree can be drawn up for a declaration that this mortgage is imperative as against the plaintiff's 14 annas share, it is necessary [348] to ascertain, by an issue to be determined by the Court below, or by agreement between the parties, what proportion of these monies have been expended for the benefit of the plaintiff's estate or for his support, education, or marriage. It should also be ascertained what has been the net income during these years, from the 24th December, 1877, to the present, of the property of which possession has been taken. To ascertain these matters, it would be necessary to make an order of remand under s. 566 of the Civil Procedure Code; but as we understand that there is some chance of the amount being settled by agreement between the parties, we suspend the making of such an order for a fortnight. The result is that if the figures are ascertained either by remand or by agreement, there will be a decree for the plaintiff conditional upon his paying the monies so ascertained within a time to be fixed by the decree. In ascertaining the amount of the monies which have been applied for the benefit of the plaintiff's share, it should be borne in mind that his interest in the estate is only 14/16. The question of costs is reserved.

TYRRELL, J.—I concur. In reference to the learned Chief Justice's reading of s. 18 of Act XL of 1858, I will only add that it seems to me unreasonable to hold that the public, in dealing with a person who represents or professes to represent a minor's estate, should be in a worse position if that person is a widow or a mother who has obtained a certificate of guardianship from the District Court, than if the person so acting were an absolute outsider.

[On the 10th January, 1887, the following order was passed by Edge, C. J., and Tyrrell, J.—"The order referred to in the judgment is made. Ten days will be allowed for objections on the return of the findings."]

*Issues remitted.*



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## CRIMINAL REVISIONAL.

*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. NIHAL. [7th January, 1887.]

Res nullius—*Bull set at large in accordance with Hindu religious usage*—"Stolen property"—*Act XLV of 1860 (Penal Code), ss. 410, 411.*

A Hindu who, upon the death of a relative, dedicates or lets loose a bull, in accordance with Hindu religious usage, as a pious act for the benefit of the soul of [349] the deceased, thereby surrenders and abandons all proprietary rights in the animal, which thereafter is not "property" which is capable of being made the subject of dishonest receipt or possession within the meaning of ss. 410 and 411 of the Penal Code. *Queen-Empress v. Bandhu* (1) and *Queen-Empress v. Jamura* (2) referred to.

[R., 17 B. 852 (857) ; 18 B. 212 (214).]

THIS was an application for revision of an order of the Sessions Judge of Meerut, rejecting an appeal from an order of Mr. Gladwin, first class Magistrate, by which the petitioner, Nihal, was convicted of an offence punishable by s. 411 of the Penal Code, and sentenced to one year's rigorous imprisonment. It appeared that the complainant Phundan, after the funeral of his brother, about eighteen months previously, had (in accordance with Hindu religious usage) branded a bull and set it at large in the village of Mohinipur, where he had some lands, as a pious act, for the benefit of the soul of the deceased. The Magistrate found that "although permitted to roam about freely on the complainant's land, the animal was not entirely abandoned." It did not, however, appear in on what respects the complainant retained any control or exercised any supervision over the animal. In August, 1886, the bull was suddenly missed from the village, and, about the end of the month, it was found at the house of one Baldeo at Gola in the Muzaffarnagar district. The result of inquiry showed that Baldeo had purchased the bull at market from the prisoner Nihal, an inhabitant of Mohinipur. Subsequently, Nihal was tried, convicted, and sentenced for an offence punishable by s. 411 of the Penal Code, as above stated.

In the course of his judgment convicting the prisoner, the Magistrate made the following observation:—"The only point for consideration is, can the complainant be held to have retained a proprietary right in the bull, with the dishonest reception of which Nihal is charged; or in other words, was the bull the complainant's 'property' in the sense in which the expression has been used in s. 410 of the Penal Code? The definition given by Sheo Dial, one of the witnesses for the prosecution, of the rights and interests inherent in the person thus setting at liberty a bull sacred to the memory of a deceased, clearly shows that the act does not in itself involve a renunciation of ownership. The only modification that takes place is that he cannot dispose of it to his own advantage [350] and appropriate it to his own use. From this it is obvious that the original owner's title is not completely annihilated. He is restricted to the exercise of such rights of ownership only as would not militate against the special purpose for which the animal was set apart. This being so, the bull, in this case, must be held to have belonged to, and to have been stolen from, the possession of the complainant."

(1) 8 A. 51.

(2) A.W.N. (1884), 87.

The Sessions Judge, on appeal, merely observed :—"The evidence in this case fully sustains the conviction. I cannot find the slightest ground for interference. The appeal is dismissed."

The petitioner was not represented by counsel or pleader.

The *Government Pleader* (Munshi Ram Prasad) for the Crown.

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# JUDGMENT.

STRAIGHT, J.—The case, decided by me, of *Queen Empress v. Bandhu* (1) was determined after very full and careful discussion and prolonged consideration. Munshi Kashi Prasad in that case was good enough to lay before me all the information that was obtainable in reference to the practice and procedure among the Hindus in the matter of dedication or setting loose these bulls upon the death of a relative, and from that information it was placed beyond doubt that, as understood among men of that religion, the person letting loose the animal, by the act of so doing, surrendered and abandoned all proprietary rights therein. My brother Brodhurst in the case of *Queen-Empress v. Jumara* (2) obviously adopted this view, which I hold to correctly represent the real condition of things. This being the case, I am not disposed in any shape to depart from my ruling referred to by me, or to modify the opinion I then expressed. This application for revision, therefore, must be allowed, upon the ground that there was no property capable of being made the subject of dishonest receipt or possession within the meaning of s. 411 of the Indian Penal Code, and, acquitting the petitioner, I direct that he be released.

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*Conviction set aside.*

9 A. 351 = 7 A.W.N. (1887) 49.

## [351] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight,  
and Mr. Justice Oldfield.*

BALBHADAR PRASAD (*Plaintiff*) v. THE MAHARAJA OF BETIA  
(*Defendant*).<sup>\*</sup> [17th January, 1887.]

*Evidence—Contract—Promissory note executed by way of collateral security—Unstamped document—Admissibility of evidence of consideration aliunde—Suit for money lent—Act I of 1872, Evidence Act, s. 91.*

A decree-holder agreed with the employer of his judgment-debtor who had been arrested in execution of the decree, to discharge the latter from arrest upon the condition that his master would pay the amount of the debt. Accordingly, the master executed a document the material portion of which was as follows :—  
"Be it known that I have borrowed Rs. 986-15 from you in order to pay a decree which was due to you by D. P., so I write this in your favour to say that I will pay the said amount to you in six months with interest at 12 annas on every hundred rupees every month, and then take back this *parwana* from you." This was written upon plain unstamped paper. Subsequently, the amount due not having been paid, the decree-holder sued the executant of the document for its recovery. It was objected that the suit was not maintainable without the document being put in evidence, but that, being a promissory note and not stamped

<sup>\*</sup> Second Appeal No. 386 of 1886, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 29th September, 1885, confirming a decree of Babu Abinash Chander Banerjee, Subordinate Judge of Allahabad, dated the 26th May, 1885.

(1) 8 A. 51.

(2) A.W.N. (1884) 87.



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as required by art. 11 of sch. i of the General Stamp Act (I of 1879), it was inadmissible in evidence, with reference to s. 34.

*Held* that the document, though it was a promissory note, was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendants fulfilment of its promise to pay the debt, and that under the circumstances the plaintiff was entitled to give evidence of the consideration, and to maintain the suit as for money lent, apart from the note altogether.

[F., 4 Bom. L.R. 912; R., U.B.R. (1897—1901), 391; U.B.R. (1907) 3rd Qr., Evidence 91=14 Bur. L.R. 179.]

THE plaintiff in this case, Balbhadar Prasad, held a money-decree of the Court of the Munsif of Benares, against one Dumber Pandey, a servant of the late Maharajah of Betia. This decree was transferred for execution to the Court of the Munsif of Allahabad, and a warrant was issued by that Court for the arrest of the judgment-debtor. At that time the Maharajah had come to Allahabad for the purpose of certain religious observances, and was accompanied by Dumber Pandey. On the 15th January, 1882, Dumber Pandey was arrested under the warrant. The Maharajah, on hearing of the arrest, sent for the decree-holder and asked him to obtain the discharge of the judgment-debtor from arrest, stating that he (the Maharajah) was willing to pay the amount due under the [352] decree. It was agreed that Dumber Pandey should be released in consideration of the Maharajah giving the decree-holder a *parwana* or note for Rs. 986-15, that being the amount of the debt, and interest at six months. This note was in the following terms:—"My blessing to Balbhadar Prasad *alias* Bahaddi Mal. Be it known that I have borrowed Rs. 986-15 from you in order to pay a decree which was due to you by Dumber Pandey; so I write this in your favour to say that I will pay the said amount to you in six months, with interest at 12 annas on every hundred rupees every month, and then take back this *parwana* from you, 11th Magh, 1289 fasli."

This document did not bear any stamp, as required by the provisions of the General Stamp Act (I of 1879), but was a plain unstamped paper. Upon receipt of the document the decree-holder obtained the release of Dumber Pandey, stating that, having received from the Maharajah a note for the amount due, he did not desire to enforce the decree. Accordingly satisfaction was entered upon the decree, and the case was struck off the file of the Court. The Maharajah did not pay the amount due under the *parwana* or note, and the present suit to recover that amount was brought after his decease by the plaintiff against the present Maharaja of Betia, as his son and legal representative. The suit was instituted in the Court of the Subordinate Judge of Allahabad, the total amount claimed being Rs. 1,253-6. The principal plea of the defendant was that the *parwana* produced by the plaintiff was a promissory note, and, being unstamped, was inadmissible in evidence, and that the suit, being based upon this document, was unmaintainable.

The Court of first instance (Subordinate Judge of Allahabad) held that the document in question was a promissory note within the meaning of s. 4 of the Negotiable Instruments Act (XXVI of 1881) and not being stamped according to art. 11, sch. i of the General Stamp Act, was, under s. 34 of that Act, inadmissible in evidence. The judgment of the Court continued as follows:—

"If the document be not receivable in evidence, can we admit other evidence to prove the transaction? The learned pleader for the plaintiff

contents that we can do so, and he relies on the following precedents—*Golap Chand Marwaree v. Thakurani Mohakoom* [353] *Kooree* (1), *Clay v. Crowe* (2), and *Wain v. Bailey* (3). It was, no doubt, ruled in those cases that under certain circumstances, although a promissory note might not be receivable in evidence, the plaintiff might fall back on the original consideration and give other evidence of it. In what cases that may be done, and in what cases it may not be done, has been clearly explained by Garth, C.J., in the case of *Sheikh Akbar v. Sheik Khan* (4). His Lordship says:—"When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor *on account of the debt*, and if it is not paid at maturity, the creditor may disregard the bill or note, and sue for the original consideration...But when the original cause of action is the bill or note itself, and does not exist independently of it, as, for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such cases the note is the only contract between the parties, and if for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money." See also *Anukr Chunder Roy Chowdhry v. Madhub Chunder Ghose* (5) and *Prossunno Nath Lahiri v. Tripoora Soonduree Dabee* (6). The facts mentioned above show clearly that the promissory note in this case is the plaintiff's original cause of action against the defendant. It was by that document that the defendant's father bound himself to pay the money due on the decree the plaintiff had against Dumber Pandey. The defendant's father was not a judgment-debtor under the decree. Simply to prove the decree would prove nothing against him. It is only by proving the promissory [354] note that the plaintiff can prove that the defendant's father undertook the liability of paying that debt. There was no contract by the defendant's father separate from and independent of the promissory note. It was not a case in which, on the verbal contract of the Maharajah to pay the money, the plaintiff released Dumber Pandey, and afterwards the Maharajah gave the promissory note in addition to his verbal contract for the satisfaction of the plaintiff. Here the negotiations terminated in the granting of the note by the Maharajah to the plaintiff, and the plaintiff accepted no verbal promise of the Maharajah, but released Dumber Pandey on receipt of the note. If the note be inadmissible in evidence, the plaintiff cannot prove his case against the defendant in any other way.....The plaintiff's suit is dismissed. Each party will bear his own costs."

The plaintiff appealed from the Subordinate Judge's decree to the Sessions Judge of Allahabad, the material portions of whose judgment were as follows:—

"The appellant seeks to show that his case rests not on this document but on the verbal agreement made by the late Maharajah. But, as the lower

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(1) 3 O. 314.  
(4) 7 C. 256.

(2) L.R. 8 Exch. 295.  
(5) 21 W.R. 1.

(3) 10 A. and E. 616.  
(6) 24 W. R. 88.



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Court has observed, there was no contract by the defendant's father separate from and independent of the promissory note. The arrested judgment-debtor was not released until the note had been executed. According to the plaintiff-appellant's own showing, when the late Maharajah said he would be responsible for the debt, the judgment-debtor was taken to his lodging, but retained in custody until the note had been signed. It is not necessary to detail the authorities quoted, though they have received attention. The facts are simple. Had the appellant released the judgment-debtor on the Maharajah's verbal promise to pay, he could then have rested his claim on the verbal promise. But as he would not release him until the written guarantee had been executed, his claim can only rest on the written guarantee. The contract was, under such circumstances, incomplete until the execution of the written guarantee. I therefore dismiss the appeal with costs."

The plaintiff appealed to the High Court.

Munshi *Sukh Ram*, for the appellant.

The Hon. *T. Conlan*, Pandit *Bishambar Nath*, and Munshi *Madho Prasad*, for the respondent.

#### JUDGMENT.

[355] EDGE, C.J.—This was an action by which the plaintiff sought to recover from the representative of the Maharajah of Betia a sum of Rs. 1,253-6. The action arose in this way: It appears that the deceased Maharajah, when on a visit to Allahabad for the purpose of religious observances, was accompanied by a servant or retainer against whom the plaintiff had obtained a money-decree. After the arrival of the Maharajah in Allahabad, the present plaintiff, the decree-holder, arrested the retainer of the Maharajah. On that the Maharajah requested the plaintiff to discharge his servant from arrest, offering to pay the amount of the debt. The plaintiff consented to release the retainer upon the Maharajah becoming liable for the amount of the debt, and insisted on having the Maharajah's promissory note at six months for the debt and interest. On this the Maharajah executed the promissory note, which is found to be not stamped. Under these circumstances the two Courts below held that this action was not maintainable, taking the view that the action could not be maintained without the note being put in evidence, and the plaintiff was prohibited by the Stamp Act from putting it in evidence on account of the want of stamp.

In my opinion this action can be maintained apart from the note altogether. It is said by Mr. *Conlan* that the note is the sole evidence of the contract; that the contract which was entered into between the Maharajah and the plaintiff was reduced into writing in all its essentials and embodied in that note. Now it is admitted what the contract was. We also have the promissory note before us, and, if it were necessary, we find that the note does not express what the real contract was.

The contract was that the Maharajah undertook to pay this debt on condition of the plaintiff releasing his debtor. That is a contract not embodied in the note. The note, in my opinion, is merely a collateral security for the fulfilment by the Maharajah of the promise to pay this debt, and does not form in any sense the contract between the parties. I am of opinion, consequently, that the note cannot be considered as the contract between the parties. Of course the promissory note is a contract, but it cannot be considered as the contract out of which the defendant's liability arose.

Under these circumstances it appears to me that in this case it is open to the plaintiff to show what the verbal contract was,—i.e. [356] to prove what was the consideration for the note, in the same way as if he had lent money or delivered goods to the Maharajah. In the latter case it has been held here that the lender of the money and the vendor of the goods could maintain his action on the consideration for the note. Under these circumstances this appeal must be allowed, and the case must go down to the first Court to be tried on the merits. The appeal is decreed with all the costs.

STRAIGHT, J.—I think the plaintiff was entitled to resort to the consideration, and to maintain the suit against the defendant for money lent. I fully agree with the learned Chief Justice in the proposed order of remand.

OLDFIELD, J.—I think that the document of the 11th Magh 1289 fasli is a promissory note, and, as such, required to be stamped to be admissible in evidence. But I agree with the learned Chief Justice in holding that the claim of the plaintiff may be proved by other evidence. I think the question is one of the admissibility of evidence, and ought to be governed by s. 91 of the Indian Evidence Act, which says :—"When the terms of a contract or of a grant or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible, under the provisions hereinbefore contained." I think that refers to cases where the contract has by the intention of the parties been reduced to writing. The following extract from Best's *Principles of Evidence*, second edition, page 282, puts very well what is meant :—"Where the contents of *any document* are in question, either as a fact in issue or a subaltern principal fact, the document is the proper evidence of its *own contents*, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it ..... So, although where the *contents* of a marriage register are in issue, [357] verbal evidence of those contents is not receivable, yet the *fact* of the marriage may be proved by the independent evidence of a person who was present at it." If, therefore, in this case this document was intended to embody the contract of the parties, I should hold that the evidence of its contents would not be admissible. But in my opinion there is nothing whatever to show this. The claim has been brought upon the promise by the plaintiff, and he states in his plaint that in execution of his decree he arrested the retainer of the Maharajah, upon which "the master of the judgment-debtor, having taken upon himself the responsibility of the decree-money, had the said Dumbar released from arrest, and made a promise to the plaintiff to pay the said sum of Rs. 986-15, with interest at 12 annas per mensem, within a period of six months ; that by virtue of the said promise of the Maharajah the plaintiff had his decree against Dumbar Pandey struck off as wholly satisfied." The promissory note is merely used, and was taken, as has been observed by the learned Chief Justice, as collateral security for the debt. Under these circumstances I

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see no reason whatever why the claim cannot be proved *aliunde* by other evidence. I might also refer, as entirely in point, to an unreported case decided by this Court on the 15th March, 1882, from a reference from the Judge of the Small Cause Court at Benares (1). I therefore concur in the order proposed (2).

*Cause remanded.*

9 A. 357=7 A.W.N. (1887) 32.

# APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

WAZIR JAN (*Defendant*) v. SAIYYID ALTAF ALI (*Plaintiff*).<sup>\*</sup>  
[28th January, 1887.]

*Muhammadian Law—Gift in contemplation of death—Will—Disposition in favour of heir—Consent of other heirs.*

A Muhammadan executed in favour of his wife an instrument which purported to be a deed of gift of all his property. At the time when he executed this instrument he was suffering from an illness likely to have caused him to apprehend an early death, and he did, in fact, die of such illness upon the same day. There was no evidence that any of his heirs had consented to the execution of the deed. After his death, his brother sued the widow to set aside the deed as invalid.

*Held* that the instrument, though purporting to be a deed of gift, constituted, by reason of the time and other circumstances in which it was made, a death-bed [338] gift or will, subject to the conditions prescribed by the Muhammadan law as to the consent of the other heirs, and, those conditions not having been satisfied, it not only fell to the ground, but the parties stood in the same position as if the document had never existed at all.

THE facts of this case are stated in the judgment of Straight, J.

Mr. C. H. Hill, Munshi Hanuman Prasad, Shah Asad Ali, and Mir Zahur Husain, for the appellant.

Pandit Nand Lal, for the respondent.

## JUDGMENT.

STRAIGHT, J.—The suit to which this appeal relates was brought by the plaintiff-respondent to avoid an instrument, dated the 24th November, 1884, which purported to have been executed by his brother, one Saiyyid Imdad Ali, C.S.I., in favour of the defendant, Musammat Wazir Jan, his then wife and now widow.

By the plaint the plaintiff alleged that, with the view of depriving him of his right of inheritance under the Muhammadan law as residuary of the estate of his deceased brother, the defendant, Musammat Wazir Jan *alias* Mukhtar Begam, had caused this instrument "to be illegally executed by Saiyyid Imdad Ali, deceased, without his wish and consent, when the deceased was in agony and not in his senses, and suffering from a mortal disease."

The question in broad terms before the Subordinate Judge was whether the instrument, in fact and in law, was a good instrument so as to bind the heirs of Imdad Ali, and such as to obstruct the right which the plaintiff otherwise would have had to a portion of the property left by the deceased.

<sup>\*</sup> First Appeal No. 194 of 1885 from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Agra, dated the 14th September, 1885.

(1) *Gopi Nath v. Hurrish Chandar*, Misc. No. 35 of 1882, Oldfield and Brodhurst, JJ.

(2) See *Pothi Reddi v. Velayudasivan*, I.L.R., 10 Mad. 94.—REP.

The Subordinate Judge, however, practically treated the case as set up by the plaintiff as one in which he alleged that the deed of the 24th November, 1884, was a forged deed, and that the signatures appearing thereon as professedly made by the deceased Imdad Ali, were not in his handwriting but were fraudulently put there for the purpose of fraud. In other words, the Subordinate Judge regarded it as one in which he charged the defendant and her witnesses with either causing the instrument to be forged, or using it knowing it to be forged, and with giving false testimony in support of it. He has, no doubt, after elaborately comparing and examining the signatures of the deceased on various admittedly genuine documents with those to be found on the deed of gift, and [359] stating his own views as to the manner of signing documents ordinarily adopted by native gentlemen in the position of the deceased, come to the conclusion that Imdad Ali did not write the three signatures to be found on the instrument of the 24th November, 1884.

As I said yesterday, so I say now, I do not think the reasons of the Subordinate Judge, however attractive they may appear on the surface, are sufficient to warrant the conclusion he came to. I do not think that because in one of the signatures to this instrument Saiyyid Imdad Ali describes himself as "Maulvi and C.S.I.," or in another as "Maulvi Imdad Ali Khan, Bahadur, C.S.I.," it necessarily follows that he could not have written it because such a mode of inserting titles and descriptions is not usual among native gentlemen, and is in bad taste. No doubt the remarks of the Subordinate Judge on this head are entitled to consideration; but I do not think it would be safe, on the grounds adopted by him, to arrive at a conclusion that the document was fabricated. A part from a discussion of the point of good taste, which even the most discreet people sometimes forget, this document, if made by Imdad Ali, was one which he knew would most likely provoke discussion and litigation at the instance of his excluded brother, and probably attract public notice, and be questioned in a public Court. Consequently it is quite possible that, either of himself or at the suggestion of his friend, he signed the document, in the manner it purports to be signed, in order that those who might hereafter have to read it, should be duly impressed with the position and importance of the person whose act and deed it professed to be. I cannot adopt the judgment of the Subordinate Judge in this respect therefore, nor, in face of the evidence of the defendant's witnesses, can I say that it has been satisfactorily made out by the plaintiff, if such was the case in which he came into Court, which I doubt, that the signatures of Imdad Ali Khan to the deed of the 24th of November, 1884, are false or forged. Indeed, to my eye, from their form and character they look rather like the genuine signatures of a man who was in a reclining position, and enfeebled by sickness, at the time he wrote them, and whose hand was guided owing to weakness. I cannot bring myself to believe that if the supporters of the defendant had resolved to forge this document they would have gone to [360] work in such a bungling fashion, or have caused the donor's handwriting to be imitated in such a way as to act once provoke suspicion. Having regard to all the evidence, I think the safest course to follow is to hold that the deed was signed by Saiyyid Imdad Ali Khan, and, such being my view, the question then arises what is the precise nature and effect of the instrument. Taking it as it stands, and giving its terms their ordinary meaning, it undoubtedly *prima facie* constitutes a deed of gift, because, to quote them, Saiyyid Imdad Ali, "made a gift" to the defendant of all his property, as therein mentioned, "worth Rs. 25,000."

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have therefore executed this deed of gift, in order that it may serve as evidence and be of use when needed."

But though it thus on the face of it is a deed of gift, its effect and operation, according to Muhammadan law, are governed by the further consideration of the circumstances and time at which it was made, and if the donor was in his death-illness when he executed it, that fact has a direct bearing on its validity as a gift. The law bearing on this point is succinctly stated by Mr. Amir Ali in his *Tagore Law Lectures*, page 444, in the following terms:—

"Under the Muhammadan Law, the acts of disposition by a person suffering from an illness which induces the apprehension of death, and which eventually causes death, have only a qualified effect given to them. For example, when a person suffering from such an illness makes a gift or *wagf*, such disposition, though an act of immediate operation, takes effect like a will, and is valid only so far as a *wasilat* may be valid."

I have no doubt whatever—and my brother Tyrrell informs me he is of the same opinion—that from the evidence of Dr. Makand Lal, a gentleman practising medicine, of high repute and long experience, in Agra, it is established as an unquestionable fact that the deceased Imdad Ali was, at the time he signed this paper, suffering from sickness likely to cause him to apprehend an early death, and that he did succumb to such sickness on the very day of its execution.

Dr. Makand Lal's evidence leaves no doubt in my mind—and he is corroborated by the Muhammadan physician Hakim Rajab Ali, [361]—that Imdad Ali Khan was, on the 24th November, 1884, a dying man, suffering from the fatal disease of a tumour in his stomach, and wasting away from inability to take any nourishment.

It seems to me that on the 24th of November, Imdad Ali Khan was well aware that his condition was so perilous that it was necessary for him to make a disposition of his property, and that this instrument was then made in apprehension of death. This being so, although on the face of it it is a deed of gift, by the operation of the Muhammadan law it falls into the category of wills, and the gift made by it must be regarded as a bequest, and must be treated in that light with all the legal incidents attaching thereto.

Now, there can be no doubt that the defendant, Musammat Wazir Jan, was an heiress of her deceased husband. This being so, no bequest made in her favour is binding, even to the extent of the one-third over which a Muhammadan ordinarily has disposing power, without the consent of all his other heirs.

There is no suggestion in this case that the document in question was made with the consent of such heirs. On the contrary, it appears that the plaintiff on the very day of its execution, and when it was about to be registered, himself filed in the office of the Registrar of Deeds a protest against the registration of it. As stating the rule of Muhammadan Law above referred to, I may quote again from Mr. Saiyyid Amir Ali's *Tagore Law Lectures*, pages 464, 465 and 466:

"All the schools agree in holding that a bequest in favour of an heir is invalid.....A legacy, says the author of the *Multika*, in favour of one heir is valid if the other heirs consent thereto." "Under the Sunni Law, apparently, the assent must be a free and voluntary act on the part of the heirs, &c."

There is also a Calcutta ruling—*Mussumat Baroda Koory v. Ashruffunnissa* (1) in support of this view, in which it was laid down that a *tamlaknama* could not, "in any event stand higher than a will, or be of operation except as to one-third of the estate of the deceased;" and having been executed while the deceased "was suffering from her last and fatal illness," and made "in favour of one who is an heir of the deceased," was inoperative [362] "without the consent of the other heirs."—Macnaghten's *Muhammadian Law*, 2nd edition, pages 51, 198 and 245.

This being so, although I do not agree with the grounds upon which the Subordinate Judge refused to give effect to the instrument of the 24th November, 1884, and decreed the plaintiff's suit, I nevertheless come to the same conclusion as he did, namely, that the plaintiff must succeed in his claim, not because the instrument referred to was not signed by the deceased, but because by reason of the time and circumstances under which it was made it constituted a death-bed gift or will, subject to the conditions prescribed by Muhammadian Law as to the consent of the other heirs, and those conditions not being satisfied, it not only falls to the ground, but the parties stand in the same position as if the document in question had never existed at all. This appeal is therefore dismissed with costs.

TYRRELL, J.—I agree.

*Appeal dismissed.*

9 A. 362 = 7 A.W.N. (1887) 64.

CRIMINAL REVISIONAL.

*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. SHERE SINGH. [12th January, 1887.]

*Practice—Revision—Criminal Procedure Code*, ss. 439, 439—*Reference by District Magistrate of proceedings of Sessions Judge.*

A District Magistrate who considers that there has been a miscarriage of justice in the Court of Session, should not report the case to the High Court for orders under s. 439 of the Criminal Procedure Code, but should communicate with the Public Prosecutor as to the case in which he thinks such miscarriage has occurred, and invite his assistance to move the Court with regard to it.

[R., 2 N.L.R. 149 = 4 Cr. L.J. 422; 2 A.L.J. 589 (590) = A.W.N. (1905) 198 = 28 A. 91; 1 Sind. L.R. 40 (43); 8 M.L.T. 88.]

IN this case the District Magistrate of Allahabad, being of opinion that an order passed by the Sessions Judge on appeal was erroneous in law, reported the case to the High Court for orders under s. 439 of the Criminal Procedure Code. The facts of the case need not be stated, as the judgment of the High Court relates only to the method adopted by the Magistrate of directing the Court's attention to the matter. The following passage occurred in the Magistrate's letter to the Court:—

"It may be urged that District Magistrates are not competent to invoke the High Court as a Court of revision because they [363] disapprove of the order of the Sessions Judge as a Court of appeal, and this has, I believe, been laid down by the Calcutta High Court—in the matter of *A. David* (2); but this ruling was under the old Act X. of 1872. In the

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present Act the powers of District Magistrates have been considerably increased under Chapter XXXII, and I would respectfully draw the Court's attention to the words 'which otherwise come to its knowledge' in s. 439 of the Criminal Procedure Code. A case of this nature in which, I may be pardoned for saying so, there would appear to have been an obvious miscarriage of justice, could hardly be brought to the notice of the Court unless reported by the District Magistrate. As such, I deem it my duty to report it for such notice as the High Court may be pleased to take."

## JUDGMENT.

STRAIGHT, J.—Without in the least degree expressing any opinion upon the views enunciated by the District Magistrate in his referring letter with regard to the case of Shere Singh, I have, after consulting the learned Chief Justice on the matter, come to the conclusion that the Registrar should return the reference to the Magistrate, with an intimation that this Court is of opinion that the method he has adopted of calling the attention of the Court to the case is an inconvenient one, which, if it received sanction, might lead to difficulties and complications, and possible friction between District Magistrates and Judges. I think the practice to be followed in these matters should be for the Magistrate, if he considers there has been a miscarriage of justice, to communicate with the Public Prosecutor as to the case in which he thinks it has occurred, and to invite his assistance to move the Court with regard to it. This course will secure the two fold advantage (i) of enabling the Magistrate to be well advised as to the propriety of a motion being made, and (ii) of ensuring that it will be laid before the Court in its strongest aspects. Moreover, the Public Prosecutor will be able to communicate with the Judge whose decision is impeached, and thus at first hand be in a position to lay before us all the materials which are ordinarily required by us before dealing with revision cases of this character.

*Reference returned.*

9 A. 364=7 A.W.N. (1887) 79.

## [364] APPELLATE CIVIL.

*Before Mr. Justice Oldfield.*

DARBO (*Petitioner*) v. KESHO RAI (*Objector*).<sup>\*</sup> [31st January, 1887.]

*Amendment of decree—Limitation—Civil Procedure Code, s. 206—Act XV of 1877 (Limitation Act), sch. ii, No. 178.*

Art. 178 of schedule ii of the Limitation Act (XV of 1877) applies only to applications made to a Court to exercise powers which, without being moved by such application, it is not bound to exercise, and not to applications to a Court to do acts which it has no discretion to refuse to do. It does not govern an application under s. 206 of the Civil Procedure Code, for amendment of a decree so as to bring it into conformity with the judgment, it being the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments and to correct them if necessary. *Gaya Prasad v. Sikri Prasad* (1) dissented from. *The petition of Kishan Singh* (2), *Kylasa Goundan v. Ramasami Ayyan* (3), and *Vithal Janardan v. Vithojirav Putlajirav* (4) referred to.

[R., 17 A. 39; 6 C.W.N. 190; 28 M. 127=14 M.L.J. 437; 11 O.C. 209.]

<sup>\*</sup> Miscellaneous Application No. 224 of 1886.

(1) 4 A. 23.

(2) A.W.N. (1883) 262.

(3) 4 M. 172

(4) 6 B. 586.

THIS was an application under s. 206 of the Civil Procedure Code, by the holder of a decree of the High Court, dated the 13th August, 1879, for amendment of the decree, by bringing it into conformity with the judgment. It was alleged in the application that although, according to the judgment, recovery of possession of certain immoveable property was awarded to the applicant, no such relief was mentioned in the decree. The application was dated the 13th August, 1886. On behalf of the judgment-debtor it was not denied that the decree was at variance with the judgment, but it was contended that the application under s. 206 of the Code was barred by limitation, with reference to art. 178 of the second schedule of the Limitation Act (XV of 1877). It appeared that the decree itself had been kept alive, but that, owing to the omission in the decree, the decree-holder had been unable to obtain possession of a portion of the property to which the judgment declared him entitled.

Munshi Kashi Prasad, for the applicant.

Pandit Bishambhar Nath, for the respondent.

### JUDGMENT.

OLDFIELD, J.—The petitioner asks the Court to amend the decree of this Court of the 13th August, 1879, so as to bring it into conformity with the judgment of this Court. There is no [365] doubt, and it is admitted by the opposite party, that the decree requires amendment in the manner asked for; but it is contended that the application is governed by art. 178 of the Limitation Act, as it is one of those applications for which no period of limitation is provided elsewhere in the schedule or by the Code of Civil Procedure, s. 230.

If this article be applicable, there is no doubt that the application is barred, and, in support of the respondent's contention, I have been referred to a decision of a Bench of this Court—*Gaya Prasad v. Sikri Prasad* (1). It is possible, however, that this case may be considered as overruled by *Kishan Singh's* case (2) as opposed to the principle therein laid down. I entertain some doubts whether the article does apply, because it appears to me that the article applies only to applications made to a Court to exercise powers which, without being moved by such application, it is not bound to exercise, and not where a Court is asked to do an act which it has no discretion to refuse to do. This has been held by the Madras Court in *Kylasa Goundan v. Ramasawmi Ayyan* (3), by the Bombay Court in *Vithal Janardan v. Vithojirav Putlajirav* (4), and by this Court in *Kishan Singh's* case (2).

The question in those cases was whether an application for a certificate made by a purchaser at an auction-sale to the Court ordering the sale was governed by art. 178, and it was held not to be so. The principle on which the Courts proceeded would appear to be equally applicable to the case of an application for amendment of a decree under s. 206 of the Civil Procedure Code, because it is the bounden duty of a Court to see that its decrees are in accordance with the judgments, and to correct them if necessary.

Under any circumstances, however, whatever may be the effect of art. 178 of the Limitation Act upon the petitioner's application, I consider that, as the matter has come to the notice of the Court, the Court is bound of its own motion to bring the decree into conformity with the judgment (5).

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(1) 4 A. 23. (2) A.W.N. 1883, 262. (3) 4 M. 172. (4) 6 B. 586.

(5) See *Shivapa v. Shivpanch Lingapa*, 11 B. 284.—REP.



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There is no sufficient reason in this case for not doing so with reference to the time that has expired since the decree was passed. [366] For the decree is not barred by limitation, and it has been explained that although the decree-holder has by amicable arrangement obtained possession of most of the property he is entitled to, he is still kept out of a part, owing to the judgment-debtor's insisting on the terms of the decree.

The decree will be amended so as to make it a decree for establishment of possession in respect of the house, and for recovery of possession of the other immoveable property mentioned in the plaint.

I make no order as to costs.

*Application granted.*

9 A. 366=7 A.W.N. (1887) 34.

### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Oldfield.*

RAM DAS CHAKARBATI (*Defendant*) v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY, LIMITED, CAWNPORE, (*Plaintiff*).\* [31st January, 1887.]

*Close holiday Proceeding on civil side of District Court during vacation—Act VI of 1871 (Bengal Civil Courts Act), s. 17—Jurisdiction—Irregularity—Consent of parties—Waiver—Company—Winding up—Contributories—Shareholders—Notice of allotment—Secondary evidence of notice—Press copy letter—Evidence of original letter having been properly addressed and posted—Act I of 1872 (Evidence Act), ss. 16, 114—Act IX of 1872 (Contract Act), ss. 3, 4—Register of members—Presumption of membership—Act VI of 1882 (Indian Companies Act), ss. 45, 47, 60, 61, sch. I, Table A (97)—Appeal—Fresh evidence—Civil Procedure Code, s. 568.*

S. 17 of the Bengal Civil Courts Act (VI of 1871) was framed in the interests of the Judges and officials of the Courts, and probably also in the interests of the pleaders, suitors and witnesses, whose religious observances might interfere with their attendance in Court on particular days. On a close holiday, a Judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his Court; and any party to any judicial proceeding could successfully object to any such inquiry being proceeded with, and, in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. But, at the furthest, the entertaining and deciding upon a matter within the ordinary jurisdiction of the Court on a close holiday, is an irregularity the right to object to which can be waived by the conduct of the parties; and a party who, on a close holiday, does attend, and without protest takes part in a judicial proceeding, cannot afterwards successfully dispute the jurisdiction of the Judge to hear and determine such [367] matter. *Bennett v. Potter* (1), *Andrews v. Elliot* (2) and *Bisram Mahton v. Sahib-un-nisa* (3) referred to.

An appellant who had ample opportunity of giving evidence in the Court below, and elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed at the stage of appeal to give evidence which he could have given below.

A letter of acceptance to a proposer, not correctly addressed, could not, although posted, be said to have been "put in a course of transmission" to him, within the meaning of s. 4 of the Contract Act (IX of 1872). *Townsend's Case* (4) referred to.

\* First Appeal No. 181 of 1886, from an order of W. Blennerhasset, Esq., District Judge of Cownpore, dated the 4th October, 1886.

(1) 2 C. and J. 622. (2) 5 E. and B. 502; 6 E. and B. 338; 25 L.J.Q.B. 336.  
(3) 3 A. 333. (4) L.R. 13 Eq. 148.

Upon the settlement of the list of contributories to the assets of a Company in course of liquidation under the Indian Companies Act, one of the persons named in the list denied that he had agreed to become a member of the Company, or was liable as a contributory. The District Court admitted as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector, for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record; but at the hearing of the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had been in fact given. There was no evidence as to the posting of the original letter, or of the address which it bore; but the press-copy was contained in the press-copy letter-book of the Company, and was proved to be in the handwriting of a deceased secretary of the Company, whose duty it was to despatch letters after they had been copied in the letter-book. The objector denied having received the letter or any notice of allotment.

*Held* that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter was inadmissible in evidence; and that there was no proof of the communication of any notice of allotment.

The evidence adduced by the official liquidator to show that the defendant was a member of the Company and so liable as a contributory, consisted of the register of members, a letter written by the objector, a reply thereto written by a managing director of the Company, and the oral testimony of the director himself. The objector adduced no evidence at all.

*Held* that the official liquidator might, if he had chosen to do so, have put the register in evidence, and waited, before giving any further evidence, until the objector had given some to displace the *prima facie* evidence afforded by the register, or to impugn the character of the register; but his case must be looked at as a whole, and having taken the line which he did, he must take the consequences of his other evidence contradicting or impugning the *prima facie* evidence of the register, and, notwithstanding that the objector gave no evidence, the register was not conclusive.

[R., 29 A. 562=A.W.N. (1907) 168; 7 C.L.J. 251 (259); 13 Ind. Cas. 463 (465)= (1912) M.W.N. 65=11 M.L.T. 84=22 M.L.J. 212.]

THIS was an appeal from an order of the District Judge of Cawnpore, dated the 4th October, 1886, declaring the appellant, [368] Babu Ram Das Chakarbati, a contributory to the assets of the estate of the Cawnpore Cotton Ginning Company, Limited, then in process of liquidation, to the extent of ten shares. The respondent was S. M. Johnson, the official liquidator of the Company. The order under appeal was passed under s. 147 of the Indian Companies Act (VI of 1882).

The Company was registered under the Act in 1883, as a limited liability Company, with a capital consisting of Rs. 1,00,000 in a thousand shares of Rs. 100 each. Under s. 240 of the Act, Table A in the first schedule was adopted by special resolution. On the 3rd July, 1886, an order for the winding-up of the Company was made by the District Judge of Cawnpore, who then proceeded, in accordance with s. 147, to settle the list of contributories. The appellant's name appeared on the list as proposed by the official liquidator. On the 24th August, 1886, notice was issued to all the persons named as contributories to appear and state their objections if any, upon the 27th and 28th September, the dates fixed for the settlement of the list. These and the following days were in the Long Vacation, and were included in the list prepared by the High Court under s. 17 of the Bengal Civil Courts Act (VI of 1871) of days to be observed as close holidays in the Courts subordinate to the High Court. Upon the dates notified, the appellant and others included in the list of contributories appeared in the Court of the District Judge for the hearing of objections, and, on the 29th September, the case of the appellant was reached. The appellant was personally present in Court at the hearing.

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and he was also represented by a pleader. No objection was made on his behalf at any time to the hearing of the case on the ground that the day of hearing was a close holiday.

The evidence produced on behalf of the official liquidator was as follows. The appellant's name was entered in the register of members as a holder of ten shares numbered from 659 to 668. His name and address were correctly given, and the date of the entry was stated to be the 19th May, 1884. He was also entered as having paid a call on his capital account of Rs. 251, on the 15th June, 1884. In addition to this there was a press-copy of a letter dated the 19th May, 1884, purporting to be addressed by the Secretary of the Company, Debendra Chander Bose, to the appellant, [369] and to notify the allotment to him of ten shares, numbered from 659 to 668, in consequence of an application for shares received through one Charu Chandra Mittra of Allahabad. Besides this, there was a press-copy of a letter dated the 14th August, 1884, also purporting to be addressed by the Secretary to the appellant and to call upon the latter to pay the sum of Rs. 749, as being the balance due from him in respect of ten shares purchased on the 19th May. The appellant denied having received the originals of these letters, but the press-copies were admitted in evidence by the District Judge. No notice to the appellant to produce the originals was on the record. In a postage account book, also admitted, there appeared, under the dates of the 19th May, and the 14th August, 1884, entries of charges for postage stamps for letters to the appellant. There was no evidence to show by whom this account book was kept. Only one witness was examined on behalf of the official liquidator, namely Manohar Chandra Chakarbati, who had been a managing director of the Company. The material portions of his deposition were as follows :—

“ Debendra Chandar Bose, Secretary of the Company is dead. I recognize letter-copy book. It was the Secretary's duty to despatch letters after being copied. The letter of the 19th May, 1884, is in Debendra Chandar's handwriting. In the ordinary course of business it would be printed on page 363. The letter is written and signed by Debendra Chandar Bose.....In May and August there were Manager, Secretary, and Clerk. The clerk had to do time-keeping and register-keeping, and what he was ordered. I believe the Secretary despatched letters. I can't swear the clerk did not. I remember once seeing a postage book for stamp account. As far as I am aware, Ram Das did not personally apply to the Company. Application came through Charu Chandra. I do not remember Charu Chandra making a written application. He told me he was going to take the shares for Babu Ram Das, and I understood he went to the office. I cannot remember any application being produced with entry in register. The prospectus stated that ten per cent. was to accompany applications. It was not adhered to. There was a printed form of application. I wrote the letter of the 19th May, 1886, (produced) for shares brought after time prescribed for payment of all calls. The practice was to demand the whole price at once. No immediate demand for payment was made, as far as the letter-book shows. I saw no written authority from Ram Das. Charu Chandra paid something on account of the shares. The Secretary could allot shares.”

Two other letters were put in evidence on behalf of the official liquidator. The first, dated the 28th April, 1886, was admittedly [370] written by the appellant to Manohar Chandra Chakarbati, and was as follows :—

“ My dear Manohar Babu.—Charu had told me that he has purchased ten shares in the Cotton Ginning Company for me, viz, shares Nos. 558 to 567, and has paid Rs. 328 to my credit, but I am sorry to say that I received no scrips nor certificates, nor any receipt for the sum of Rs. 326 paid by Charu to my account, so please let me know what is the real state of affairs. If he has really purchased those shares for me and paid Rs. 326, why should I not get a receipt for the sum received by the Company (Rs. 326) through Charu Chandra Mittra? I have got no scrips nor receipt, nor do I know if those shares were purchased for me. So do please reply, as I am entirely in the dark as to the real state of affairs with regard to these shares. A receipt for the sum is

also solicited, as I was entitled to it on the very day the payment was made to my credit. Certainly this state of affairs is not very satisfactory at all, and shows great negligence on the part of the managers of the Company. Further, what are the future prospects of the Company? Is it to be wound up and liquidated, or to be carried on in the next season? What steps have been taken by Messrs. Cave and Chakarbatī since the management is in their hands? An early reply is solicited and anxiously expected rather, on these subjects. Hoping you are all right in peace and health, I remain, yours faithfully, (Sd.) Ram Das Chakarbatī. Vakīl, High Court, Allahabad."

On the 19th May, 1836, a reply to this letter was sent my Manohar Chandra Chakarbatī, and was admittedly received by the appellant. It was in the following terms:—

"My dear Ram Das Babu,—I have to acknowledge receipt of your letter of the 28th ultimo, and your post card of 15th instant. I was away from the station lately, and so you did not get a reply. Yes; Charu did subscribe some shares for you in the Ginning Company, and paid something on account, a receipt for which he must have got. I shall, however, let you know the full particulars of the case after consulting the books of the Company. You cannot have the scrips until you pay up in full. So you will see for yourself that your accusation against the manager is groundless. Trusting you are quite well, yours truly, Manohar Chandra Chakarbatī."

No further communication appeared to have taken place between the parties until the Company went into liquidation in July, 1886.

In reply to the case set up by the respondent, the appellant filed a written statement denying that he had purchased any shares in the Company, or had authorized Charu Chandra Mitra to purchase them on his account. No evidence was given on his behalf, but it was alleged during the argument in appeal that he had answered certain questions put to him by the District Judge, though no regard had been made of either questions or answers. This was denied by the respondent.

[371] The order of the District Judge, dated the 4th October, 1886, was as follows:—

"This is an objection by Babu Ram Das Chakarbatī to his being held a contributory for ten shares. The shares were taken for him by his friend Babu Charu Chandra, and his name was entered in the register, and Rs. 251 paid for him by Babu Charu Chandra. From the objector's letter dated the 28th April, 1886, it is clear that the objector believed himself to be a sharer, and had heard from Charu Chandra the specific number of his shares. The creditors had every reason to believe the same, for his name is still on the register. Babu Ram Das has produced no sworn testimony to rebut the register. He is declared a contributory for ten shares, and he will pay the official liquidator's costs."

From this order Babu Ram Das Chakarbatī appealed to the High Court.

Mr. C. H. Hill, the Hon. T. Conlan, Pandit Sundar Lal, and Munshi Ram Prasad, for the appellant.

Mr. G. T. Spankie, Mr. A. Strachey, and Mr. T. Strachey, for the respondent.

Mr. C. H. Hill, for the appellant:—The proceedings of the District Judge were held without jurisdiction. The effect of s. 17 of the Bengal Civil Courts Act is that no civil case can be tried or determined on a close holiday. The 29th September, 1886, on which date the present case was tried, was a close holiday, and the parties could not, by their consent, confer jurisdiction upon the Judge to enter upon the inquiry on such a day.

Upon the merits, before the appellant's liability as a contributory can be established, it must be shown that he was a "present or past member" of the Company (ss. 124 and 61 of the Companies Act). He was not a

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member unless he agreed to become one, and unless his name is entered on the register—s. 45. Now, although his name is entered on the register, there is no proof that he ever agreed to become a member. To establish membership, it is necessary to prove (i) an agreement to take shares, (ii) allotment of such shares by the Company, (iii) notice of such allotment communicated to the applicant.—Buckley on the Companies Acts, 4th ed., p. 52, and the cases there collected. Here none of these [372] conditions have been proved. In the first place, it is not alleged that the appellant himself applied for the shares: it is alleged that Charu Chandra Mitra applied for them on his behalf. But there is no evidence that the appellant constituted Charu Chandra his agent either to purchase the shares or to receive notice of allotment, or that Charu Chandra did in fact purchase ten shares. It cannot be said that the letter of the 28th April, 1886, was an admission of Charu's purchase on the appellant's behalf: it was a profession of complete ignorance as to all that had occurred, and a request for particulars, which, moreover, were never furnished. It shows, received upon its face, that the appellant had no notice of allotment, for the numbers of the shares which it mentions do not correspond with those given in the register, and it incorrectly states the amount paid by Charu Chandra for the shares as Rs. 326 instead of Rs. 251. It shows ignorance even as to whether or not there had been a purchase of the shares in fact. Nor can it be regarded as in itself an application for the shares mentioned. Even if it were such an application, it was conditional upon certain specified particulars being furnished by the Company as to the number of shares purchased by Charu Chandra and the amount paid for them, and these particulars were never furnished. Manohar Chandra Chakrabati's reply of the 19th May, 1886, gave no definite information, and though it promised that full particulars should be supplied, the promise was not fulfilled. The first element of the contract, therefore, the application for shares, has not been proved. Secondly, there is no evidence that any notice of allotment was ever communicated to the appellant or to Charu Chandra. Even if notice to Charu Chandra were proved, and it were held that he was the appellant's agent for the purpose of applying for the shares, that would not make him an agent for the purpose of receiving notice of allotment for the appellant: *Robinson's Case* (1). The press-copy letters of the 19th May, 1884, and the 14th August, 1884, are inadmissible as evidence of notice of allotment. No notice to produce the originals was issued to the appellant, and no foundation was laid for secondary evidence by proving their existence and explaining the cause of their non-production. It was for the Company to prove notice of allotment: *Reidpath's Case* (2). In the absence of such [373] proof there is no contract; *Gunn's Case* (3), *Wallis's Case* (4), *Ward's Case* (5), *Reidpath's Case* (2) Such notice must be communicated to the allottee within a reasonable time; *Gunn's Case* (3), and consequently Manohar Chandra Chakrabati's letter of the 19th May, 1886, two years after the alleged allotment, was not a good notice. Such a notice must, moreover, specify the particular shares allotted, and it is not sufficient to say, as in the letter of the 19th May, 1886, that "some shares" had been purchased.

It is true that, in *Household Fire Insurance Company v. Grant* (6), it was laid down that a notice contained in a letter which was posted but

(1) L.R. 4 Ch. 330.

(4) L.R. 4 Ch. 325.

(2) L.R. 11 Eq. 86.

(5) L.R. 10 Eq. 659.

(3) L.R. 3 Ch. 40.

(6) L.R. 4 Eq. D. 216.

never received, was a good notice of allotment; but here there is no evidence of any letter of allotment having been even posted. That case is distinguishable from the present on the further ground that the application for shares was there made by post, and the applicant thereby assented to the post-office being made the medium of communication with him, and consequently was held to have accepted the risks incidental thereto. But here it is not alleged that the application was made by post, and it follows that the appellant never authorized the use of the post-office for the communication of the notice of allotment, and so accepted the risk of the non-delivery of such notice.

Next, the fact of allotment of shares is not proved. It is true that s. 60 of the Companies Act makes the register *prima facie* evidence of the possession of shares, but here the evidence is discredited by the testimony of Manohar Chandra Chakarbaty, the respondent's own witness, to the effect that the shares were purchased not by the appellant himself, as the register suggests, but by Charu Chandra, and it is also discredited by the letters of the 28th April and 19th May, 1886. Lastly, the fact that the appellant took no steps to have his name removed from the list of contributories, does not constitute laches on his part: *Shewell's Case* (1) *Fyfe's Case* (2), Buckley, pp. 120, 121. There can be no question of laches on the ground of omission to apply for rectification of the register in a case where there has been no agreement to take shares at all, and where the registration has been effected through fraud. [374] The reason why the appellant took no steps after receiving the letter of the 19th May, 1886, is that he was waiting for the particulars therein promised.

Should your Lordships not see your way to decreeing the appeal on the materials on the record, I apply, under s. 568 of the Civil Procedure Code, that the appellant be examined in this Court. His evidence was not taken in the District Court in consequence of an erroneous view of his position taken by his advisers: ordinarily this would not be a reason for taking his evidence in the appellate Court, but practitioners in the mufassal seldom have occasion to refer to the Companies Act, and are therefore not familiar with its provisions, or acquainted with the proper mode of applying them.

Mr. A. Strachey, for the respondent:—No cause has been shown for allowing the appellant to be examined in this Court. He had ample opportunity of giving evidence in the Court below, and he elected not to do so.

The trial of the case upon a close holiday was, no doubt, an irregularity, but it did not affect the merits of the case, nor has it been shown to affect the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code. S. 17 of the Bengal Civil Courts Act does not provide that the subordinate Courts have no jurisdiction, upon a close holiday, or that proceedings held on such a day are null and void. The irregularity, therefore, does not amount to absence of jurisdiction and it was covered by the consent of the parties. See *Bisram Mahton v. Sahib-un-nissa* (3) and *in the matter of the petition of E. D. Sinclair* (4)

Upon the merits, it can be proved that the appellant agreed to take ten shares in the Company; that the shares were allotted; and that notice of the allotment was communicated to him. Under s. 60 of the Act

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(1) L. R. 2 Ch. 387.  
(2) 3 A. 333.

(2) L. R. 4 Ch. 768.  
(4) N.-W. P. H. C. R. (1874) 177.



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the register is *prima facie* evidence of everything that constitutes membership, and the onus therefore lay upon the appellant to prove that he was not a member. He gave no evidence whatever, he never made application under s. 58 of the Companies Act for a rectification of the register, even after receiving Manohor [375] Chandra Chakarbaty's letter of the 19th May, 1886, which informed him of all the material facts. His own letter of the 28th April, 1886, is a clear admission of Charu Chandra's authority to buy the shares, and that he had been informed of the purchase of ten shares; the fact that he had been misinformed as to the precise numbers of the shares is immaterial, as he knew how many shares he held: *Ind's Case* (1). Whether or not Charu Chandra had originally any authority to purchase the shares, the appellant ratified the purchase. The fact of allotment of the shares is sufficiently proved by the register, which is uncontradicted. The communication of notice of allotment is proved by the letter of the 19th May, 1884. The press-copy of this letter is admissible as secondary evidence. Although no notice to produce the original can be found on the record, such notice was in fact given to the appellant through the Court, under s. 131 of the Civil Procedure Code. Even if notice had not been given, the appellant must have known that he would be required to produce the letter, and, moreover, it is always within the Court's discretion to dispense with notice: s. 66 of the Evidence Act.

[EDGE, C. J.—How do you show that there was an original letter of which this was a copy, or that if there was such a letter, it was ever sent to the appellant?]

By the evidence of Manohar Chandra Chakarhathi read with ss. 16 and 114 of the Evidence Act. The witness proves the existence of a particular course of business, *viz.*, that the press-copies of which the copy in question was one, were taken from original letters which it was then the Secretary's duty to despatch. He proves that this document is a copy of an original letter, and that the course of business was for such originals to be despatched after being copied. Mr. Justice Cunningham in his commentary on the Evidence Act suggests that the illustrations to s. 16 were intended to supply the place of ss. 50 and 51 of Act II of 1855, the former of which provided that when a letter-book duly kept is produced, and it is proved that a letter copied into it was despatched in the ordinary course, the Court may presume its despatch. This being the course of business, the Court may, under s. 114, illustration (f) of the Evidence Act, presume that it was followed in this particular case.

[376] [EDGE, C. J.—You ask us to make a double presumption; first, from the course of business, that the letter was despatched, and secondly, from the fact of despatch, that it was received.]

[OLDFIELD, J.—S. 114 of the Evidence Act leaves it to our discretion to presume that the course of business has been followed: we are not bound to presume it.]

In *Wall's Case* (2) the fact that a letter was despatched was held to raise a presumption of its receipt so strong that the denial of the recipient on oath was not sufficient to rebut it. Here there is no denial upon oath. But it is unnecessary for me to prove that the letter was received by the appellant, if I can prove that it was despatched. The other side have not distinguished *Household Fire Insurance Company v. Grant* (3) from the present case, though of course that applies only if I have proved the

(1) L.R. 7 Ch. 485.

(2) L.R. 15 Eq. 18.

(3) L.R. 4 Ex. D. 216.

despatch of the letter. The doctrine that an unreceived acceptance sent by post cannot bind the proposer unless he has expressly or impliedly assented to the post-office being used as the medium of communication with him, and to the risks contingent on such use, is not recognized by the law of India. S. 3 of the Contract Act shows that the communication of an acceptance is deemed to be made by any act by which the acceptor intends to communicate it or (not "and") which has the effect of communicating it. The despatch of a letter containing an acceptance is such an act. S. 4 shows that the communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the acceptor's power. From that moment, the proposal cannot be revoked (s. 5). It follows from this that a notice of allotment, which is the acceptance of the offer to purchase shares, is communicated to the allottee when it is despatched, and from that moment there is a complete contract for him. Whether or not he receives the letter is absolutely immaterial. This is the effect of the case last cited.

[EDGE, C. J.—Assuming that the letters of the 19th May and the 24th August, 1884, were despatched, what evidence is there that they were properly addressed?]

The address mentioned in the press copy is correct, and it ought to be presumed under s. 114 of the Evidence Act that the [377] same address would be written on the envelope containing the letter. In *Townsend's Case* (1) a letter posted to a wrong address was held to be a good notice of allotment.

In the next place, communication of the notice of allotment may be inferred from conduct of the allottee showing knowledge of the allotment: *Crawley's Case* (2). In this case such knowledge is shown by the appellant's letter of the 28th April, 1886, and his receipt of the letter of the 19th May, 1886. The former letter taken with the conduct of the appellant amounts to a waiver of more formal notice. The application for scrip and for a receipt for the money paid by Charu Chandra were acts without meaning unless the appellant was a shareholder.

[EDGE, C. J.—How do you distinguish *Gunn's Case* (3) from the present? The facts seem very similar. The Court there refused to act on the *prima facie* evidence afforded by the register.]

It was there held that the mere entry of a person's name upon the register was insufficient to make him a shareholder, if he had no notice of the allotment. There, however, the alleged shareholder gave evidence contradicting the register. There is no case in which, the register being supported by some evidence and not contradicted by any, the alleged shareholder's name was held to have been improperly placed upon it. Even if the copies of the letters of the 19th May and 14th August, 1884, are inadmissible, and there is no specific proof of communication of the notice of allotment, still the register is *prima facie* evidence of that and of all the other elements of the contract, and, in the absence of evidence to the contrary, it must prevail.

[OLDFIELD, J.—The evidence of Manohar Chandra Chakarbati, the respondent's own witness, appears to me to discredit the register.]

The register merely states the fact of shares having been purchased: it is necessarily silent as to how the purchase was made, or other particulars not required by s. 47 of the Act. The witness explains how the purchase was made.

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(1) L.R. 13 Eq. 148.

(2) L.R. 4 Ch. 322.

(3) L.R. 3 Ch. 40.



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Mr. C. H. Hill, in reply.—The Company having adopted Table A of the first schedule of the Act, cl. 97 applies, which shows that [378] proof must be given that notices sent through the post were properly addressed and put into the post-office. No such proof has been given in connection with the alleged letter of the 19th May, 1884, and consequently the service of notice of allotment is not proved. The appellant's offer to purchase the shares, if ever made, was revoked by the lapse of a reasonable time, without communication of the acceptance,—s. 6 of the Contract Act. His letter of the 28th April, 1886, could not be a valid ratification of Charu Chandra's acts, because it shows that his knowledge of what had happened was materially defective—s. 198. The respondent might, if he had chosen, have relied on the *prima facie* evidence afforded by the register; but, instead of doing so, he produced oral evidence as to the purchase of the shares, and so raised the question whether that register was correct. This evidence is unsatisfactory, and raises a counter inference that there was no purchase of shares by the appellant, and no notice of allotment communicated to him.

### JUDGMENT.

EDGE, C.J. (OLDFIELD, J., concurring).—This is an appeal from an order of the Judge of Cawnpore, dated the 4th of October, 1886, declaring the appellant a contributory in respect of ten shares in the Cotton Ginning Company, Limited, of Cawnpore, and ordering him to pay the official liquidator's costs.

The Company was registered in 1883 as a limited liability Company, under the Indian Companies Act, 1882, with a capital consisting of Rs. 100 shares. Table A in the first schedule to the Act was adopted by the Company. An order for the winding up of the Company was made in July, 1886. The respondent was appointed the official liquidator of the Company.

On the settlement of the list of contributories, the appellant objected to being placed on the list in respect of ten shares which appeared by the register of the Company to have been allotted to him in 1884. The Judge of Cawnpore appointed the 27th September, 1886, and following days, for the hearing of objections and the settlement of the list of contributories. Of this appointment a notice was, on the 24th of August, 1886, duly sent to the appellant.

On the 27th, 28th, and 29th September, 1886, the appellant, with a vakil instructed by him, attended the Judge's Court, and on [379] the 29th September, 1886, his case was reached. The 27th, 28th, and 29th of September, 1886, were days which were included in the list prepared by this Court in accordance with s. 17 of the Bengal Civil Courts Act, 1871, of days to be observed as close holidays in the Courts subordinate to this Court, of which the Court of the Judge of Cawnpore was one. On the hearing of the appellant's objection on the 29th September, 1886, the register of the Company was put in evidence, and one witness was examined on behalf of the liquidator. The Judge also admitted as evidence on behalf of the liquidator press-copies of two letters or notices addressed on behalf of the Company to the appellant, dated respectively the 19th May, 1884, and the 14th August, 1884. These press-copies were contained in a press-copy letter-book, which was proved by Manohar Chandra Chakarbaty, the liquidator's witness, to be the copy letter-book of the Company. This witness proved that the press-copy letter of the 19th

May, 1884, including the signature, was in the writing of a deceased Secretary of the Company, and that it was the duty of the Secretary to despatch letters after they were copied. A book was also produced and admitted in evidence by the Judge, which appears to have been a postage account-book of the Company, but by whom kept was not proved, which, under the dates of the 19th May, 1884, and the 14th August, contained entries of charges for postage stamps for letters to the appellant. These press-copy letters we have, for reasons which we shall state presently, considered inadmissible in evidence, and have not admitted them in evidence before us.

Manohar Chandra Chakarbati, who had been a managing director of the Company, and was the liquidator's witness, in addition to the evidence above referred to, stated, according to his deposition before us, so far as is material, as follows:—"In May and August there was manager, secretary, and clerk. The clerk had to do time-keeping and register-keeping, and what he was ordered. I believe the Secretary despatched letters. I cannot swear the clerk did not. I remember once seeing a postage book for stamp account. As far as I am aware, Ram Das did not personally apply to the Company. Application came through Charu Chandra. I do not remember Charu Chandra making written application. [380] He told me he was going to take ten shares for Bahu Ram Das, and I understood he went to the office. I cannot remember any application being produced with entry in register. The prospectus stated that ten per cent. was to accompany application. It was not adhered to. There was a printed form of application. I wrote the letter of 19th May (produced) for shares bought after time prescribed for payment of all calls. The practice was to demand the whole price at once. No immediate demand for payment was made as far as the letter-book shows. I saw no written authority from Ram Das. Charu Chandra paid something on account of the shares. I cannot say if Charu Chandra said he was authorized to take the shares. The Secretary could allot shares."

The other evidence on behalf of the liquidator consisted of two letters, one written by the appellant to the witness Manohar Chandra Chakarbati, dated the 28th April, 1886, and the reply of the witness, dated the 19th May, 1886.

The appellant and his vakil took part in the inquiry. The appellant answered some questions which were put to him by the Judge. Neither the questions nor answers are recorded. The appellant did not give any evidence, nor was any tendered on his behalf. The appellant, who is a vakil on the rolls of, and practising in, this High Court, did not, nor did his vakil, make any protest or objection to the Judge proceeding with the inquiry on a close holiday. In the result, the Judge made the order, the subject of this appeal.

The first point which was raised on the argument before us was as to the jurisdiction of the Judge to hold the inquiry on a close holiday. Mr. Hill, on behalf of the appellant, contended that, by reason of s. 17 of the Bengal Civil Courts Act, 1871, the Judge had no jurisdiction, and the parties could not, by consent or otherwise, give him, as a Judge, jurisdiction to enter upon the inquiry, or to hear or determine the matter which was before him, or, in fact, any matter on the civil side of his Court, upon a day which was one of those included in the list prepared by this Court of days to be observed as close holidays in the Courts subordinate to this Court. S. 17 of the Bengal Civil Courts Act, 1871, is as follows:—"Subject to such orders as may from time to time be issued by the

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Governor-General in Council the High Court shall [381] prepare a list of days to be observed in each year as close holidays in the Courts subordinate thereto. Such list shall be published in the local official Gazette, and the said days shall be observed accordingly."

This section, it appears to us, was framed in the interests of the Judges and the officials of the Courts, and probably also in that of the Hindu and Muhammadan pleaders, suitors, and witnesses, whose religious observances might interfere with their attendance in Court on particular days.

There are, so far as we are aware, few authorities, from the consideration of which we can obtain any assistance as to the construction and effect of the section above set out. Cases in which the subject-matter in dispute was one outside the Judge's jurisdiction, do not assist us. In such cases the Judge would not, even with the consent of the parties, have jurisdiction, as a Judge, to enter upon the inquiry at any time. Here an inquiry and determination as to the persons who are liable to be placed upon the list of contributories in the winding up of a Company in liquidation, are within the jurisdiction of a District Judge; and the want of jurisdiction, if any, arises, not from the nature of the subject of the inquiry, but from the nature of the procedure. The cases which have been decided upon the construction of s. 6 of the 29 Car. II, cap. 7, commonly known as the Lord's Day Act, do not, in our opinion, afford any assistance to us in the present case; but the difference between the wording of that section and the section in question in this case is striking. That section provides that no person or persons upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree (except in cases of treason, felony or breach of the peace); and by that section it is specifically enacted that "the service of any such writ, process, warrant, order, judgment, or decree shall be void to all intents and purposes whatsoever." In the section under consideration there are no such specific words as those above quoted. If it had been intended by the Legislature that a Judge should have no jurisdiction or power to enter upon a judicial proceeding or inquiry on a close holiday, and that if the Judge did on a close holiday hold a judicial inquiry the proceedings should be void, it would have been easy for the Legislature to have [382] expressed such intention by the use of apt words, such as we find in s. 6 of the Lord's Day Act.

By the Rules of Hilary Term, 6 Will. IV, it was ordered that certain days "shall be observed or kept as holidays in the several offices belonging to the said Court." With reference to the days mentioned in the rules, we find it stated in note (1) at page 50 of Petersdorff's *Abridgment of Common and Statute Law*, vol. 5, 2nd Ed.:—"These are not *dies non*, but periods of vacation for the Courts and offices. The proceedings are not suspended." And again in the same note:—"The offices may be opened at any time when regularly they are shut. They are closed on a holiday for the benefit of the officers, and if they think fit to attend they may, and if open, judgment may be signed.—*Bennett v. Potter* (1)." Unfortunately we have not the opportunity here of examining the authority cited in Serjeant Petersdorff's note.

We are of opinion that on such a close holiday as that in question, a Judge might properly decline to proceed with any inquiry, trial or other matter on the civil side of his Court; and any party to any judicial proceeding, if present, could successfully object to any such inquiry being

proceeded with ; and in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. In this case the question arises whether a party who, on a close holiday, does attend, and without protest takes part in a judicial proceeding, can subsequently successfully dispute the jurisdiction of the Judge to hear and determine the matter on such close holiday.

It appears to us that at the furthest the entertaining on a close holiday, and deciding upon a matter within the ordinary jurisdiction of the Court, is an irregularity the right to object to which can be, and was in this case, waived by the conduct of the parties. The case of *Andrews v. Elliott* (1) affirmed in the Exchequer Chamber is an authority for the proposition that consent takes away error. If we were to hold, as it has been contended that we ought to hold, that in no case could a District Judge exercise on a [383] close holiday any judicial function on the civil side of his Court, cases of great hardship might arise. Take, for instance, the case of a judgment-debtor applying, at the commencement of the Dasehra holidays of last year, to be discharged from jail, on the ground that the decree was fully satisfied within the meaning of cl. (b) of s. 341 of the Civil Procedure Code. To obtain his discharge an order of the Court would be necessary, and before the Judge could make such an order, it would be necessary that he should satisfy himself by admission of the judgment-creditor, or by inquiry, that the decree had, in fact, been satisfied. In such a case it surely could not have been the intention of the Legislature that the Judge should be compelled to abstain from holding any such inquiry, or granting an order of discharge until the termination of the Dasehra holidays, which last year lasted for twenty-eight consecutive days. In the course of the argument on this point, the case of *Bisram Mahtan v. Sahib-un-nissa* (2) was cited.

Mr. Hill, on behalf of the appellant, applied to us to allow him to be examined before us. Mr. Arthur Strachey, on behalf of the liquidator, opposed this application, which we rejected on the ground that the appellant, having had ample opportunity of giving evidence in the Court below, and having elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed at this stage to give evidence which he could have given below.

Before considering the effect of the evidence which has been admitted by us, it will be convenient to state our reasons for rejecting as evidence the two press-copy letters already referred to.

It was alleged on behalf of the liquidator and denied on behalf of the appellant, that a notice to produce the originals of the two press-copy letters had at the hearing been given to the appellant through the Court, under s. 131 of the Civil Procedure Code. In the view which we take, it is unnecessary to consider whether or not such notice was in fact given. There is no evidence of it on the record before us, nor is it necessary for us to consider whether, having regard to the fact that the inquiry was taking place at Cawnpore whilst the appellant's residence was at Allahabad, such notice, if given, was a reasonable one. Mr. Hill, on behalf of the appellant, objected to the press-copy letters being admitted in [384] evidence, on the grounds that there was no evidence that the appellant had assented to the post-office being used as the medium of

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(1) 5 E. and B. 502 ; 6 E. and B. 338 ; 25 L.J.Q.B. 336.

(2) 3 A. 333.



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communication with him; and further, that there was no evidence that the originals had ever been properly addressed or posted. He drew our attention to paragraph 97 of schedule I, Table A of the Indian Companies Act, 1882. On the other side, Mr. *Strachey* referred to ss. 16 and 114 of the Indian Evidence Act, 1872, and contended that there was evidence in that already referred to, that in the ordinary course of business of the Company the letter in question would have been posted; and that we ought to infer that they had been posted properly addressed. He also contended that if we inferred that the letters had been posted, it was immaterial whether or not they had been properly addressed; and in support of this latter contention he relied upon *Townsend's Case* (1) and referred to ss. 3 and 4 of the Indian Contract Act, 1872. We are of opinion that there is no evidence whatsoever that the letters, if posted, were properly addressed, and we decline to draw, and do not draw, the inference that the letters in question were properly addressed or posted. To hold that such an inference ought to be drawn on the evidence in this case would, in our opinion, be opening the door to fraudulent persons in other cases putting in evidence copies of letters which were never posted, or, if posted, were fraudulently misaddressed. There is here no evidence that the letters, if posted, were not returned to the Company through the Dead Letter Office. In fact, we infer from the appellant's letter of the 28th April, 1886, that he had not received either of the letters referred to. It is possible that the letters in question may have been handed to Charu Chandra for delivery to the appellant; or it is possible, having regard to the apparently loose manner in which the business of the Company was conducted, that the letters may have gone into the waste paper basket in the office; or that the peon who may have been entrusted with the posting of the letters, may have appropriated the stamps and destroyed the letters; or that the letters may have been incorrectly addressed and returned to the Company through the Dead Letter Office. S. 4 of the Indian Contract Act, 1872, appears to us to support the contention of Mr. *Hill*, and to be against that of Mr. *Strachey*, for it is there [385] enacted that "the communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him," etc. A letter to a proposer not correctly addressed could not, although posted, be said to have been "put in a course of transmission" to him.

*Townsend's Case* (1) decided that a notice of allotment sent to the allottee to the address given by him was sufficient, although, owing to the insufficiency of the address the notice never reached him. In that case it would appear that the insufficiency of the address arose from the negligence of the allottee. It does not appear to us to have any bearing on the question whether the press-copy letters in this case are admissible in evidence. Besides, paragraph 97 of schedule A of the Indian Companies Act, 1882, contemplates that proof should be given that notices sent through the post by companies which adopted that schedule, were properly addressed and put into the post-office. As we have said, there is no evidence before us that either of the letters was properly addressed or put into the post-office, and we decline to draw, and do not draw, the inference that the letters were properly addressed or posted, and we accordingly exclude the press-copy letters in question from the evidence in this case.

It has been contended by Mr. *Strachey*, that there was evidence that Charu Chandra was the authorized agent of the appellant to obtain an allotment of the ten shares in question; that the appellant had ratified the acts of Charu Chandra; that the appellant had had notice of the allotment; and that the appellant having taken no action after the receipt of Manohar Chandra Chakarbati's letter of the 19th May, 1886, until after the Company went into liquidation, to repudiate the acts of Charu Chandra, he could not now be heard to say that he was not liable in respect of the ten shares. Mr. *Strachey* also contended that a notice of allotment of shares may be waived, and need not necessarily be in writing. With this latter contention we agree. Mr. *Strachey* also contended that there was no evidence to rebut the *prima facie* evidence that the appellant was a member of the Company in respect of the ten shares afforded by the section in the register, and that as the appellant had given no evidence on [the inquiry to rebut this [386] *prima facie* evidence afforded by the register, the register was conclusive. The oral evidence in this case does not support any of the contentions of Mr. *Strachey* so far as they depend on questions of fact. There is nothing in the oral evidence to show that the appellant ever authorized or ratified the acts of Charu Chandra, or that he had ever received any notice that the ten shares in question had been allotted to him. The other evidence now before us consists of the letters of the 28th April, 1886, and the 19th May, 1886, and the register. No doubt the register affords *prima facie* evidence that the appellant was the holder of the ten shares and a member of the Company in respect of them in 1884. The liquidator might, if he had chosen so to do, have put the register in evidence and waited, before giving any further evidence, until the appellant had given some to displace the *prima facie* evidence afforded by the register, or to impugn the character of the register. But this course was not that which the liquidator adopted. The liquidator, instead of standing, in the first instance, upon the *prima facie* evidence afforded by the register, called, as a witness, Manohar Chandra Chakarbati, whose evidence, in our opinion, went far to throw discredit on the register, and to raise more than reasonable doubts in our minds as to the liability of the appellant. In addition to this oral evidence, the liquidator put in evidence the letters of the 24th April and the 19th May, 1886, which for reasons which we shall presently state, displaced the presumption which the register afforded. The liquidator's case must be looked at as a whole, and having taken the line which he did, he must take the consequence of his other evidence contradicting or impugning the *prima facie* evidence afforded by the register, and this notwithstanding that the appellant gave no evidence.

The appellant's letter of the 28th April, 1886, was as follows :—[His Lordship read the letter, and proceeded :—]

After careful consideration, we have come to the conclusion that this letter *bona fide* expressed the appellant's views and intention at the time it was written, and the extent of his knowledge, such as it was, of what had taken place prior to that date. We know as an admitted fact that Charu Chandra had not paid Rs. 326 in respect of the shares, and that the total amount paid by him, and for which credit was given in respect of the shares was Rs. 251 only. [387] We also know as an admitted fact that the shares which, according to the register, had been allotted to the appellant, did not correspond with the numbers mentioned in the letter. The latter fact is, we think, only material as showing the inaccuracy of the information upon which this letter was written,—an inaccuracy which we would

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not expect to have found in this letter if the appellant had received a notice of allotment of the shares. The inference which we draw from this letter is, that the appellant had received from Charu Chandra some inaccurate information as to the purchase of these shares; that he had received no notice of allotment; that he did not know whether or not the shares had in fact been allotted, or how far he could depend on the information which he had received from Charu Chandra; and that he was willing to take shares if they had in fact been allotted to him, and Rs. 326 been paid in respect of them; and that he had never authorized Charu Chandra to obtain the shares for him, and would not take them unless the Company gave him a valid receipt for the Rs. 326. To this letter no reply was sent until the 19th May, 1886. That reply was as follows:—[His Lordship read the letter, and proceeded:—]

That reply did not give the appellant any material information as to what had taken place. It did not state what number of shares had been allotted, and—what would be most material—the amount which had been paid in respect of them. The particulars which were promised in that reply were never sent to the appellant until the Company went into liquidation. The receipt for Rs. 326 was never sent to the appellant—we presume for the good reason that Rs. 251 only having been paid by Charu Chandra, the Company could not have given a valid receipt for Rs. 326. Under these circumstances no question of laches on the part of the appellant can arise. The appellant could not be held to have ratified the acts of Charu Chandra when the information in the possession of the appellant was materially incorrect, and incorrect to the knowledge of an official of the Company through whom the Company acted, and upon the correspondence with and by whom the liquidator as representing the Company relied.

In the course of the arguments before us several cases have been cited, including *Gunn's Case* (1); *Wall's Case* (2); *Reidpath's* [388] *Case* (3); *Ward's Case* (4); *Robinson's Case* (5); *Wallis's Case* (6); *Shewell's Case* (7); *Fyfe's Case* (8); *Ind's Case* (9); *Crawley's Case* (10); and *Household Fire Insurance Company v. Grant* (11).

This case has if we may say so, been argued with very great ability by Mr. *Hill* and Mr. *Strachey*.

In the result, we find that the appellant had not authorized Charu Chandra to obtain any shares in the Company for him, and never ratified the acts of Charu Chandra, and had not received any notice of allotment, and that it is not proved that any notice of allotment, properly addressed, was posted to the appellant, and that there was no contract or ratification of a contract by or on behalf of the appellant, to take any shares in the Company, and that he never acted as a shareholder of the Company. Under these circumstances, the appeal must be allowed with costs, and the order below set aside, and the appellant's name must be removed from the list of contributories. The liquidator's costs, including those which he may have to pay to the appellant, will come out of the estate (12).

*Appeal allowed.*

(1) L.R. 3 Ch. 40.

(2) L.R. 15 Eq. 18.

(3) L.R. 11 Eq. 86.

(4) L.R. 10 Eq. 659.

(5) L.R. 4 Ch. 330.

(6) L.R. 4 Ch. 325.

(7) L.R. 2 Ch. 387.

(8) L.R. 4 Ch. 768.

(9) L.R. 7 Ch. 485.

(10) L.R. 4 Ch. 322.

(11) L.R. 4 Ex. D. 216.

(12) As to the cases in which the official liquidator is personally liable for costs, see the judgment of Kekewich, J., in *Fraser v. Province of Brescia Steam Tramways Company (Limited)*, decided on May 2, and reported in the *Times Law Reports* for May 4, at page 587—REP.

9 A. 388=7 A.W.N. (1887) 53.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Brodhurst.*AMIR SINGH AND OTHERS (Plaintiffs) v. NAIMATI PRASAD (Defendant).\*  
[3rd February, 1887.]*Partition—Question of title—Act XIX of 1873 (N.-W.P. Land Revenue Act), ss. 113, 114—Irregular procedure—Civil Procedure Code, s. 13—Res judicata.*

Upon an application made under Chapter IV of the N.W.P. Land Revenue Act (XIX of 1873) for partition of common land in which the owners of six *pattis* were interested, into six equal parts, an objection was raised that the land should be divided into parts proportionate to the size of the different *pattis*. The Assistant Collector, before whom the objection was made, disallowed it with reference to the provisions of the *wajib ul-arz* in which the custom of the village was recorded, and made the partition in the manner prayed. No appeal was preferred by the objectors to the District Judge. The Collector confirmed the partition, and after [389] an appeal to the Commissioner, the Assistant Collector's decision was upheld. The objectors then brought a suit in the civil Court for a declaration that the defendants were only entitled to a share of the common land proportionate to the area of their *pattis*.

*Held* that the objection which was raised in the Revenue Court was one which raised a question of title or of proprietary right in respect of the common land within the meaning of s. 113 of the N.-W.P. Land Revenue Act; that the decision of the Assistant Collector was a decision within the meaning of s. 114 of the Act; and that consequently the suit was barred by s. 13 of the Civil Procedure Code.

*Held* also that the question was not affected by any mistake in procedure that had been made in the Revenue Courts.

[R., 17 C.P.L.R. 10; 17 C.P.L.R. 129 (132); D., 16 A. 464.]

THE parties to this suit were co-sharers in the village of Ganeshpur, which consisted of six *pattis* of unequal areas. In November, 1884, the defendants applied to the Revenue Court under chapter IV of the N.-W.P. Land Revenue Act (XIX of 1873) for partition of certain *shamilat* or common land into six equal shares. On receiving this application, the Assistant Collector issued the notification required by s. 111 of the Act, and thereupon the plaintiffs objected to partition being made in the manner proposed, contending that the common land should be divided, not into equal shares, but into shares proportionate to the areas of the different *pattis*. The Assistant Collector considered this objection, and disposed of it by an order in the following terms:—

"An objection is made to the partition of the *shamilat* as claimed, on the ground that the applicants have claimed to share without regard to the area of the different *pattis*. The objectors claim that regard should be had to the area. The entry in the *wajib-ul-arz* is that regard is only to be had to the *pattis*, not to the area, *i.e.*, the *shamilat* is entered as *maurosi*. It is also said that expenses are borne equally by all the *pattis*. The *wajib-ul-arz* was signed by the present objectors. The objection is dismissed."

The Assistant Collector accordingly made a partition of the common land in the manner prayed by the applicants, and the partition was confirmed by the Collector under s. 131 of the Land Revenue Act. The

\* Second Appeal No. 506 of 1886 from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 15th December, 1885, confirming a decree of Maulvi Jafar Husain, Munsif of Meerut, dated the 9th September, 1885.

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objectors made no appeal to the District Judge under s. 114, but they appealed to the Commissioner of the Division, who remanded the case to the Collector, who recorded a proceeding affirming the Assistant Collector's decision. This proceeding was dated the 19th May, 1885.

[390] The present suit was brought by the plaintiffs in June, 1885, for a declaration that the defendants (the successful parties in the proceedings before the Revenue Court) were only entitled to a share of the common land proportionate to the extent of their *pattis*. The suit was instituted in the Court of the Munsif of Meerut. In defence it was pleaded that the suit was barred by s. 13 of the Civil Procedure Code, inasmuch as the objection raised in the Revenue Court involved a question of title or proprietary right within the meaning of s. 113 of the Revenue Act, and the order of the Assistant Collector dismissing the objection was a decision of a Court of Civil judicature within the meaning of s. 114, and not having been made the subject of appeal to the District Court under the same section, was final.

The Court of first instance dismissed the claim. On appeal, the District Judge of Meerut affirmed the Munsif's decree. In the course of his judgment, the learned Judge made the following observations :—

"Now the question is whether the Assistant Collector's proceedings were under ss. 113 and 114 of Act XIX of 1873. The Court is of opinion that they were. There is no question that the objection was inquired into and the evidence of the *wajib-ul-arz* and *khewat* considered, and these proceedings were held before the order for partition was made. On the documentary evidence, the Assistant Collector found against the objector. *Bateshar Nath v. Faiz-ul-hasan* (1) is referred to by the respondents. For the appellants, *Ashgar Ali Shah v. Jhanda Mal* (2) is referred to ; but in that case there was no inquiry : the Assistant Collector held that the matter at issue had already been disposed of by a competent Court. In this case, evidence was considered, *viz.*, that of the *wajib-ul-arz* and *khewat*, and a proceeding was recorded disallowing the objection, and finding that the *shamilat* land should be partitioned equally among the six *pattis*.

"If the objection was, as the Court holds, disposed of under ss. 113 and 114 of Act XIX of 1873, then the finding could only be called in question by appeal to the Judge. Irregularities of procedure could have been called in question in appeal, if such there have been ; but because the appellants neglected to take the [391] proper course of appealing is no reason why they should institute a suit to obtain what they should have obtained by an appeal.

"The Court, holding that the objection was disposed of under ss. 113 and 114 of Act XIX of 1873, finds that the present suit will not lie. The appeal is dismissed. The appellants will bear all costs. Interest as usual."

From this decree the plaintiffs appealed to the High Court.

Munshi Hanuman Prasad and Pandit Nand Lal, for the appellants.

Pandit Bishambhar Nath, for the respondent.

#### JUDGMENT.

EDGE, C.J.—It appears that on the partition of common land in which the owners of six *pattis* were interested, the question arose as to how the common land should be allotted. The present plaintiffs said that

(1) 5 A. 280.

(2) 2 A. 839.

it should be allotted in proportion to the size of the *pattis*; the owners of the other *pattis* said that it should be partitioned in proportion to the number of the *pattis*, i.e., into six equal shares. That objection was raised by the present plaintiffs before the Assistant Collector, who heard the evidence, examined the *wajib-ul-arz*, and decided that the plaintiffs were not entitled to have more than a one-sixth share in respect of their *patti*. From that decision an appeal was made to the Collector, and again to the Commissioner, and the Assistant Collector's decision was upheld. In the result this action was brought in the civil Court in order to ascertain what the rights of the plaintiffs were in the common land. An objection is raised on behalf of the defendants on the ground that the proceedings in the Revenue Courts came within s. 113 of the Revenue Act (XIX of 1873), and in that the decision of the Assistant Collector was a decision within the meaning of s. 114 of the same Act, consequently the present action was barred by s. 13 of the Civil Procedure Code. I think the whole thing turns upon the decision of the question whether the objection which was raised in the Revenue Court, was an objection which raised a question of title or proprietary right? I think that the question involved there, in the objection taken before the Assistant Collector, must necessarily have raised a question of title or proprietary right. It is true that the title and proprietary right of the plaintiffs in their own *patti* was not questioned, nor [392] were the titles and the proprietary rights of other *pattidars* in their own *pattis* ever questioned. The question was, how was the common land to be divided, and what were the rights of the parties as to the *quantum* of common land to which they were entitled? That question must necessarily be decided by some custom or rule of law, and if it is to be decided by custom or by rule of law, it must involve a question of title or proprietary right. The plaintiffs, in order to succeed, must have said that by custom or rule of law they were entitled to a larger area in the common land than was allotted to them. I cannot see how this could have been determined without a question of title or proprietary right being raised between the owners of the various *pattis*, not in respect of their *pattis*, but in respect of the common land. That being so, I think this case falls within s. 13 of the Civil Procedure Code, and this action is barred. I agree with the Judge below in the observation made by him that any mistakes of procedure did not affect this question. The appeal is dismissed with costs.

BRODHURST, J.—In my opinion the suit has been properly dismissed by the lower appellate Court, and I concur in dismissing the appeal with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

RAM BAKHSH (*Plaintiff*) v. DURJAN AND OTHERS (*Defendants*).<sup>\*</sup>  
[5th February, 1887.]

*Evidence—Bond—Contemporaneous oral agreement providing for mode of repayment—Act I of 1872 (Evidence Act), s. 92.*

In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of execution of the bond, it was orally agreed that the obliges should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents; that, in accordance with this agreement, the plaintiff obtained possession of the land; and that he had thus realized the whole of the amount due.

*Held* that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence.

[F., 18 A. 168=A.W.N. (1896) 16; 11 C.L.J. 39 (41); R., 16 C.W.N. 137 (139)=11 Ind. Cas. 713=14 C.L.J. 507.]

THE plaintiff in this case, one Ram Bakhsh, sued to recover a sum of money, principal and interest, due on a bond executed in [393] his favour by Durjan and others, on the 12th November, 1871. The amount secured by the bond was Rs. 1,200, and it was stipulated that this should be repaid by instalments, as follows:—Rs. 100 to be paid at the end of Magh Sambat 1928, and Rs. 25 in Baisakh and Katik of every year, and interest on unpaid instalments to be charged at Re. 1 per cent. per mensem. In the event of default in payment of four instalments, the whole amount due under the bond was to be recoverable in a lump sum with interest at Re. 1 per cent. The bond further contained a hypothecation of immoveable property. The plaintiff alleged that nothing had been paid under the bond, and he claimed Rs. 1,300 from the defendants by enforcement of lien against the hypothecated property.

The defendants pleaded that at the time of the execution of the bond an oral agreement was made that the plaintiff was to have possession of certain land which was included in the hypothecation, until the amount due on the bond should have been liquidated from the yearly rent of the land, which was fixed at Rs. 50; that, under this agreement, the plaintiff obtained possession of the land and received the rents; and that in this way the whole amount due had been realized.

The Court of first instance (Subordinate Judge of Aligarh) decreed the claim. The lower appellate Court (District Judge of Aligarh) set aside the decree and dismissed the suit, finding that the arrangement alleged by the defendants as to the mode of repayment had been proved, and that the conditions of the bond had been satisfied by a payment of Rs. 100 in January, 1872, and by the receipt of rents equivalent to the yearly instalments of Rs. 50. The plaintiff appealed to the High Court.

<sup>\*</sup> Second Appeal No. 570 of 1886 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 8th January, 1886, reversing a decree of Maulvi Muhammad Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 31st January, 1884.

Mr. *Habib ul-lah* and *Babu Jogindro Nath Chaudhri*, for the appellant.

*Munshi Ram Prasad* and *Lala Durga Charan Banerji*, for the respondents.

### JUDGMENT.

EDGE, C.J.—In this case the only question is, the action being in respect of a bond payable by instalments, and the defendants in answer to the action saying that at the time of the giving of this bond it was orally agreed to let the creditor have possession in lieu of instalments, whether the evidence of that contract, which [394] was not in writing, is admissible. I think it is. It was a contract which did not detract from, add to, or vary the original contract. It was only providing for the means by which the instalments were to be paid. The appellant got possession in accordance with the oral agreement. The appeal is dismissed with costs.

TYRRELL, J., concurred.

*Appeal dismissed.*

9 A. 394=7 A.W.N. (1887) 79.

### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Brodhurst.*

GOBIND RAM (*Defendant*) v. NARAIN DAS (*Plaintiff*).\*

[8th February, 1887.]

*Landholder and tenant—Suit for rent where the right to receive it is disputed—Third person who has received rent made party—Jurisdiction of Rent Court to pass decree for rent against such party—Question of title—Act XII of 1881 (N.-W.P. Rent Act), s. 148.*

In a suit by a landholder for recovery of rent in which a third person alleged to have received such rent is made a party under s. 148 of the N.-W.P. Rent Act (XII of 1881), the question of title to receive the rent cannot be determined between the plaintiff and such person, but can only be litigated and determined in a subsequent suit in the Civil Court. The only question between the plaintiff and the person so made a party which can be determined in the Rent Court under s. 148 is the actual receipt and enjoyment of the rent.

A party who is brought in under s. 148 of the Rent Act cannot be made subject to the decree for rent so as to allow execution to be taken out against him, whether his *bona fide* receipt and enjoyment of the rent is proved or not. The only person against whom such a decree can be passed is the tenant. *Madho Prasad v. Ambar* (1) referred to.

*Per* EDGE, C.J., *semble*, that the intention of the Legislature in allowing a third person who claims under s. 148 of the Rent Act to be made a party to the suit may possibly have been that, by bringing him in, he may be bound by a declaration in the suit that he had in fact received the rent, so as to prevent him in the civil suit from denying the fact that he had received it.

In a suit by a landholder for recovery of rent, the defendants pleaded that they had paid the rent to a co-sharer of the plaintiff. The co-sharer made a deposition in which he alleged that he was entitled to the rent, not only as a co-sharer, but also as the appointed agent of the plaintiff. The Court thereupon made him a party to the suit under s. 148 of the Rent Act, and passed a joint decree against him and the tenant for rent.

\* Second Appeal No. 504 of 1886 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 25th November, 1885, reversing a decree of Maulvi Muhammad Usman, Assistant Collector of Moradabad, dated the 19th March, 1885.



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Held that the Court was justified in making him a party under s. 148 of the Rent Act, but was not competent to pass a decree for rent against him.

[F., 13 A. 364; R., 12 C.P.L.R. 1.]

[395] THE facts of this case are stated in the judgment of Edge, C.J. Munshi *Hanuman Prasad*, for the appellant. Pandit *Bishambhar Nath*, for the respondent.

## JUDGMENTS.

EDGE, C. J.—In this case one Narain Das sued two tenants for rent which was in arrear. They pleaded that they had paid the rent to Gobind Ram, one of the shareholders of the village. Gobind Ram did allege in his deposition, before he was made a party to the suit, that he had received this rent, and alleged that he was entitled to receive the rent, not only as a shareholder, but also as the appointed agent of Narain Das. On that the Judge in the Rent Court made Gobind Ram a party to the suit, professing to act under s. 148 of the Rent Act. It appears to me that he was justified in making Gobind Ram a party to the suit under that section, because obviously the defence of the tenants and the deposition of Gobind Ram was that Gobind Ram was a shareholder in the village, and did receive the rent, of which, as a shareholder, he was entitled to enjoy some portion. As a matter of fact, the defence of the tenants and the statement of Gobind Ram must have led to the inference that the transaction between Gobind Ram and the tenants was a *bona fide* one. After Gobind Ram was made a party to the suit in the Rent Court, the case was heard by the Judge in the Rent Court, and he came to the conclusion that the rent in question had been paid to Gobind Ram, as had been alleged by him and the tenants, and on that he dismissed the suit. From that dismissal of the suit in the Rent Court the plaintiff, who was found to be the lambardar, brought his appeal to the District Judge. It is not clear from the judgment of the District Judge whether he, in fact, found that the rent had been paid to Gobind Ram, and whether Gobind Ram did receive and enjoy the rent, within the meaning of s. 148 of the Rent Act. However, what he did was to pass a joint decree against Gobind Ram and the tenants for the amount of this rent.

Against that decree the tenants have not appealed, and therefore we need not concern ourselves with the question whether or not the decree was justified as against them. Gobind Ram has, however, appealed, and one of his grounds of appeal is that there was no power in the Court below to join him as a third party to [396] the suit, and no jurisdiction in the Court to pass a decree against him. The decree which is in appeal before us is one on which, if there was jurisdiction to pass it, execution might issue, and therefore we have to see whether either the Rent Court or the Court in appeal could pass against a person added under s. 148 a decree upon which execution might issue. That depends upon the construction to be put upon s. 148 of the Rent Act. I take it as undoubted law that before a decree for rent upon which execution can issue can be passed, the right of the person obtaining the decree to receive such rent must be established, because if he did not establish his right, or his right were not admitted, he would have no more right to receive the rent than a stranger. Therefore, in this case, in order to support the decree, we must see whether the lower appellate Judge had power to determine a question of title to receive the rent as against the third party. I think it is plainly provided in s. 148 of the Rent Act that that is a question which cannot be decided in what may be called a rent suit, i.e.,

a suit in which rent is claimed in the Rent Court. It is a question of title which, by the proviso of that section, must be litigated and determined in a subsequent suit in a Civil Court. On that ground I am of opinion that, in this particular case, whether Gobind Ram was rightly or wrongly made a party in the rent proceedings, there was no power in the lower appellate Court to pass a decree against him in respect of the rent upon which execution could issue. I think I am supported in that view by the decision of my brothers Straight and Brodhurst in the case of *Madho Prasad v. Ambar* (1). In that suit it was held that even where a third person had actually and in good faith received the rent sued for, the claim should not have been decreed against him but should have been dismissed. I think that is an authority for the view of s. 148 which I have expressed.

There is only one word more to be added. In saying this, I do not wish to express any decided judicial opinion on the point. We have only to deal with the decree before us, which, I think, was in excess of the jurisdiction of the Court which passed it. The question may arise as to the object of making a third person, who claims under s. 148 of the Rent Act, a party to the suit. It may [397] possibly have been the intention of the Legislature that, by bringing him in, he may be bound by a declaration in the suit that he had, in fact, received the rent, so as to prevent him in the civil suit from denying the fact that he had actually received the rent. That may be the object of making him a party to the suit.

Under these circumstances this appeal should be allowed, but inasmuch as the line of defence taken by Gobind Ram was one likely to lead to confusion in the minds of the Judges below, and has given us a great deal of difficulty in understanding what was the position he took up, his appeal will be allowed without costs.

OLDFIELD, J.—I concur. I have only to add a few words. On looking to the pleadings of the tenants and Gobind Ram in this suit, I think a question did arise under s. 148 of the Rent Act, and, that being so, it was the duty of the Judge to decide, in the first instance, whether Gobind Ram had been actually and in good faith receiving and enjoying the rent before and up to the time when the right to sue accrued. Had he decided in the affirmative, the plaintiff's claim would necessarily have been dismissed, and of course no decree would be passed against Gobind Ram, and in that case his appeal would be entitled to succeed. If, on the other hand, that question had been decided in favour of the plaintiff, then the decree would be made against the tenants for the rent, but not against Gobind Ram. S. 148 of the Rent Act provides that "the question of such receipt and enjoyment of the rent by such third person may be inquired into, and the suit shall be decided according to the result of such inquiry." I think this means that in that case the decree the plaintiff would be entitled to would be a decree against the tenants for the rent thus claimed. I do not think it was contemplated that a party who was brought in under s. 148 of the Rent Act should be made subject to the decree for rent, so as to allow execution to be taken out against him. The only question between him and the plaintiff contemplated for trial is the receipt and enjoyment of the rent, and the last portion of s. 148 provides that "the decision of the Court shall not affect the right of either party entitled to the rent of such land to establish his title by suit in the Civil Court, if instituted within one year from

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the date of the decision." That seems to me to show that, as between the plaintiff and Gobind Ram, the question was left open to be decided [398] by a subsequent suit in the Civil Court, and a Revenue Court could not pass a decree for rent against the intervenor, who does not occupy the position of a tenant. With these remarks, I concur in the decision of the learned Chief Justice.

BRODHURST, J.—The lower appellate Court obviously should not have decreed the claim both against Gobind Ram—a co-sharer, made a defendant under s. 148 of the Rent Act—and the tenants. With reference to the ruling of a Bench of this Court in *Madho Prasad v. Ambar* (1), the lower appellate Court should, under no circumstances, have decreed the claim against Gobind Ram, a defendant under s. 148, and on its finding that the rent had not been paid to any one but was still due to the plaintiff lambardar, it should have passed a decree against the tenants, and against them alone.

Gobind Ram only has appealed. As the lower appellate Court's decree against him is wrong, I concur in allowing his appeal, and in modifying the decree of the lower appellate Court to that extent, and in ordering that each party pay his own costs.

*Appeal allowed.*

9 A. 398=7 A.W.N. (1887) 44.

CIVIL REVISIONAL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

SHIELDS (Defendant) v. WILKINSON (Plaintiff).\* [10th February, 1887.]

*Bailment—Hiring—Accident—Negligence—Evidence—Burden of proof—Act I of 1872 (Evidence Act), s. 106—Act IX of 1872 (Contract Act), ss. 150, 151, 152—High Court's power of revision—Civil Procedure Code, s. 622.*

A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree, it is liable to be set aside in revision under s. 622 of the Civil Procedure Code. *Maulvi Muhammad v. Syed Husain* (2) and *Sarnam Tewari v. Sakina Bibi* (3) referred to.

The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, [399] from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence.

S hired a horse from W, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over exertion on a full stomach. In a suit by W against S to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence

\* Application No. 242 of 1886, for revision of a decree of Babu Promoda Charan Banerji, Judge of the Court of Small Causes, Allahabad, dated the 16th September, 1886.

(1) 5 A. 503.

(2) 3 A. 203.

(3) 3 A. 417.

offered as to how the horse came to runaway. There was evidence that the horse was a quiet one, that, for some time previously, it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property; that he must have used his whip freely, or done something else which caused the horse to bolt; and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim.

*Held* by EDGE, C.J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under s. 622 of the Civil Procedure Code.

*Per* BROADHURST, J., that as the decree was not only unsupported by proof but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of s. 622.

*Collins v. Bennett* (1) *Byrne v. Boadle* (2), *Gee v. The Metropolitan Railway Company* (3), *Scott v. The London Dock Company* (4), *Manzoni v. Douglas* (5), *Cotton v. Wood* (6), *Davey v. The London and South Western Railway Company* (7), and *Hommack v. White* (8), referred to.

[F., 10 C.W.N. 14; R., U.B.R. (1897—1901) 337; 22 A. 164 = A.W.N. (1900) 3.]

THIS was an application, under s. 622 of the Civil Procedure Code, for revision of a decree of the Judge of the Court of Small Causes at Allahabad, dated the 16th December, 1886. The judg-[400]ment of the Judge in which the material facts of the case were stated, was as follows:—

"On the 6th November last the defendant hired a mare belonging to the plaintiff for a ride. When the mare was in his possession, she died. The plaintiff claims Rs. 400 as the value of the mare.

"The defendant pleads non-liability on the ground that the death of the mare was a pure accident, and that he took as much care of her as a man of ordinary prudence would take of his own property under similar circumstances. He also objects to the value claimed.

"Under s. 152 of the Contract Act, the defendant, who was a bailee for hire, would not be responsible for the death of the mare if he took such care of her as a man of ordinary prudence would have done of his own animal. The burden of proving the exercise of proper care is on the defendant. Beyond his own statement there is no evidence whatever on his behalf on the point.

"The defendant states that he rode the mare quietly at first, that after going a short distance, he urged her into a trot, that she thereupon plunged a good deal and galloped for a little distance, that he pulled her up and got her to walk quietly as far as Mr. Porter's gate, that she tried to back into the gate, and plunged, and then bolted off, that he had no control over her, that she galloped furiously for about two miles, and then collapsed, fell down and died.

It has been proved by the evidence of Mr. Blenkinsop, a Veterinary Surgeon, that death was caused by rupture of the diaphragm, and that the cause of the rupture was over-exertion with a loaded stomach. That the mare over-excited herself there can be no doubt, as she admittedly galloped

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(1) 46 New York Reports.

(3) L.R. 8 Q.B. 161; 42 L.J. Q.B. 105.

(5) 6 Q.B.D. 145.

(7) 12 Q.B.D. 70.

(2) 2 H. and C. 722; 33 L.J. Exch. 13.

(4) 3 H. and C. 596; 34 L.J. Exch. 320.

(6) 8 C.B. N.S. 569; 29 L.J. C.P. 333.

(8) 11 C.B. N.S. 588; 31 L.J. C.P. 129.



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furiously at the rate of 25 miles an hour for about two miles. It is evident that the mare was in a healthy and sound condition when she was thus ridden by the defendant, and it has not been proved that she had any vice. The evidence is rather the other way. The plaintiff and his witnesses have sworn that the animal was not given to bolting, and that she was a quiet animal to ride or drive. There is no evidence whatever to prove the contrary. Such being the case, something must have occurred to excite her, and to induce her to bolt off furiously at a gallop. The probabilities of the existence of a cause to excite the mare seem to have been the greater in this case, inas-[401]much as we have the evidence of Mr. Blenkinsop to the effect that a horse with a full stomach (which the plaintiff's mare is stated to have been) would not be inclined to bolt without an exciting cause.

"Now, what was the cause in this case to excite the mare? The defendant does not say that anything occurred on the road to excite her. He admits that when the mare became frisky and plunged near the bridge on the Papamhow road, he could manage her and walk her quietly as far as Mr. Porter's gate. It was at this place that she plunged again, and it was from this place that she bolted off furiously at a gallop. Something then must have occurred at this place, and what was that thing? It is not stated that she saw anything on the road to excite her. Something then must have been done to her by the defendant to excite her. He says that he may have used the whip at this place, and it is very likely that he did so and did so freely, in such manner as to excite the mare inordinately. Otherwise the conduct of the mare is inexplicable. I do not think there was any justification for the free use of the whip. The defendant was under the impression that the mare had a hard mouth. He had seen that she had plunged and galloped, and that she was in all probability an excitable animal. A person of ordinary prudence ought not to have done anything to excite her, and therefore the free use of the whip was improper. I of course assume that the whip was used freely, as it is not likely that a single cut or a gentle cut could have excited the mare. Even if it be granted that the whip was not used freely, the cause for exciting the mare must have been something done to her by the defendant himself, and in doing that thing the defendant could not have acted with due care and caution. He has therefore failed to establish that he took that care of the animal which a man of ordinary prudence would have done in the case of his own property, and he is liable for the value of the mare.

"As for the value, the evidence adduced by the plaintiff shows that he got an offer of Rs. 350, and that he refused that offer. The value he himself put on it was Rs. 400, and the evidence of the witness Ahmad Shah shows that it was not unfair or excessive. I hold the value of the mare to have been Rs. 400, and I accordingly decree the claim with costs."

The plaintiff appealed to the High Court for revision of this decree.

[402] Mr. J. D. Gordon, for the petitioner.

Mr. C. H. Hill, for the respondent.

A preliminary objection was taken by Mr. Hill that the Court had no jurisdiction to entertain the application. He referred to *Muhammad Suleman Khan v. Fatima* (1).

Mr. J. D. Gordon, for the petitioner.—The Judge's finding that the petitioner had used his whip freely or done something else which caused

the mare to bolt is a mere assumption not based on any evidence. He had no jurisdiction to pass a decree founded on no evidence at all. The case therefore falls within s. 622 of the Civil Procedure Code.

In the next place, the Judge has improperly laid the burden of proof upon the defendant. It was for the plaintiff to prove negligence on the part of the defendant. Negligence is not sufficiently proved by the mere happening of an accident: *Hammack v. White* (1). That case is closely in point. See also *Manzoni v. Douglas* (2), and in particular the observations of Lindley, J., who said that to hold that the mere fact of a horse bolting was *per se* evidence of negligence, would be mere reckless guess-work.

Mr. C. H. Hill, for the respondent.—The question is whether the petitioner took as much care of the mare as a man of ordinary prudence would under similar circumstances take of his own property (Contract Act, s. 151). Unless he can show this, he is liable under s. 152. The rule of the burden of proof contained s. 106 of the Evidence Act applies to the case. It was for the Judge to decide whether the petitioner had discharged the burden or not, and he had jurisdiction to decide this in the negative, if he considered the petitioner's evidence untrustworthy. *Collins v. Bennet* (3), referred to in Story On Bailments, p. 413, and *Byrne v. Boadle* (4), are authorities which show that the defendant must give evidence to account for the happening of the accident, and so to show that it was not due to his negligence. The Judge was fully competent to regard the petitioner's explanation as unsatisfactory, and hence there are no grounds for revision under s. 622 of the Civil Procedure Code.

[403] Mr. J. D. Gordon, in reply, referred to *Cotton v. Wood* (5), *Maulvi Muhammad v. Syed Husain* (6), and *Sarnan Tewari v. Sakina Bibi* (7).

### JUDGMENT.

EDGE, C. J.—This was an application to this Court to exercise its powers of revision under s. 622 of the Civil Procedure Code in respect of a judgment and decree passed by the Judge of the Small Cause Court of Allahabad on the 16th December last. The action in the Small Cause Court was one in which the plaintiff sought to recover damages against the defendant for an alleged breach of a contract of bailment. The facts shortly were these. On the 6th November last the plaintiff let a horse on hire to the defendant for the purpose of being ridden by the defendant on the afternoon of that day. That horse was not returned to the plaintiff, and it was ascertained that the horse, while in the custody of the defendant and while being ridden by him, had died from rupture of the diaphragm. The evidence on behalf of the plaintiff in the Small Cause Court was that the horse was a quiet horse, which he had had for several years, during which time it had not holted with him, and that the horse had had some exercise on the day in question prior to its being sent to the defendant's house. The plaintiff denied that the horse was fed immediately before it was let out for hire to the defendant. On the other hand, there was the evidence of the defendant, of Mr. Blenkinsop and of another witness. The defendant's statement was that, shortly after he started on his ride, the horse became restive and jumped about, that he brought it under control, and that shortly afterwards it began again to jump about

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(1) 11 C.B.N.S. 588; 31 L.J.C.P. 129.

(2) 6 Q.B.D. 145,

(3) 46 New York Reports.

(4) 2 H. and C. 722; 33 L.J. Exch. 19.

(5) 8 C.B. N.S. 569; 29 L.J. C.P. 333.

(6) 3 A. 203,

(7) 3 A. 417.



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and tried to back into the gateway of Mr. Porter's compound. The defendant then goes on to say that he may have then touched the horse with his riding cane. Whether he did so or not is not quite certain, and if he did use the cane moderately it was nothing more than what a man of ordinary prudence and care would have done under the circumstances. According to the defendant, the horse after jumping about at Mr. Porter's gateway, bolted with him and ran away, and he lost control over it, and after the horse had gone about two miles he got it under control, when it trotted for a short distance, and then fell down and died.

[404] Mr. Blenkinsop's evidence was that the horse's stomach contained undigested food eaten by the horse shortly before it was taken out for the ride, and that the horse died from rupture of the diaphragm, the result of over-exertion on a loaded stomach. Mr. Blenkinsop also stated that a quiet horse was not likely to bolt after a meal without an exciting cause.

The evidence of the defendant's other witness was that he went to the plaintiff's table to order the horse, and found the horse eating grain. This was substantially the evidence given below.

The Judge of the Small Cause Court came to the conclusion that the defendant had used the whip freely, or done something else which caused the horse to bolt, and that the defendant, in freely using the whip, had not taken such reasonable care of the horse as a man of ordinary prudence would, under similar circumstances, have taken of his own horse, and that the death of the horse had resulted from such want of care, and gave the plaintiff a decree for Rs. 400 and costs.

Under these circumstances the first question that arises is whether we have power, under s. 622 of the Civil Procedure Code to entertain this application for revision. That depends, I think, upon the consideration whether there was any evidence upon which the Judge of the Small Cause Court might make the decree which he did. It appears to me that no Judge of the Small Cause Court, any more than a Judge of the High Court or any other Court, has any power, or in other words jurisdiction to pass in a contested suit a decree adversely to a defendant where there is no evidence or admission before him to support the decree. I am not speaking of cases in which there is a balance of evidence or some evidence to support the finding upon which a decree is based, but of cases in which there is no evidence at all which the Judge should take into consideration or submit to a jury if the case was before a jury. In such a case the provisions of s. 622 of the Civil Procedure Code will apply. For the Judge, in passing a decree which is not supported by any evidence on the record, has taken upon himself a jurisdiction not vested in him by law. The Judge is bound to pass a decree only in accordance with the law; and if he passes a decree [405] which the law does not give him any power to pass, such as a decree adverse to a defendant in a contested suit when there is no evidence and no admission to support the decree, he exercises a jurisdiction not vested in him by law. In saying this I am not alluding to cases in which, from the nature of the case, the whole burden of proof was, and continued to be, upon the defendant, of which the present case is not, in my opinion, one.

It is contended by Mr. Hill on behalf of the plaintiff that the onus of proof in this case was upon the defendant. He contends that although in this case if it had been tried in England, the onus of proof might have been upon the plaintiff, s. 151 and the subsequent section of the Indian Contract Act cast the burden of proof upon the defendant. For this it is necessary to see what those sections are. S. 151 says:—"In all cases of

bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed." S. 152 says:—"The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in s. 151." Mr. *Hill* has contended that it was for the defendant to show that he had taken as much care of the horse as a man of ordinary prudence would have taken of his own horse under similar circumstances. What these circumstances were must depend in this case upon the contradicted evidence of the defendant. The development of Mr. *Hill's* contention is that it was for the Judge to consider whether the defendant's evidence was reliable, and whether he had established that he had taken such care as is referred to in s. 151 of the Indian Contract Act, and that the Judge's finding on that question is conclusive. Mr. *Hill* cited the case of *Collins v. Bennett* (1) referred to by Story in his work on Bailments, page 413. He also referred to the case of *Byrne v. Boadle* (2) where the plaintiff, while walking in a street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window, and where it was held that the mere fact of the accident without any proof of the circumstances under which it occurred was evidence of negligence. That class of authorities [406] shows that in some cases, from the nature of the accident, it lies upon the defendant to account for the happening of the accident, and thus to show that he had not been guilty of negligence. That is a proposition which I do not dispute. Each case, must, however, be looked at from its own particular circumstances. In some cases the very happening of the accident may be *prima facie* evidence that some want of care or some negligence must have taken place to cause the accident, as was held by Brett, J., in *Gee v. The Metropolitan Railway Co.* (3). In *Scott v. The London Dock Company* (4) Erle, C.J. said: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." It appears to me that the two cases referred to by Mr. *Hill* were examples of the class of cases which were referred to by Erle, C.J., in the passage from his judgment which I have quoted. The mere fact of a barrel of flour coming out of an open window was, until accounted for, *prima facie* evidence that there was some want of care in those who had the control of the barrel, because the barrel could not have fallen out of the window of its own accord, there must have been something to have put it in motion. In such a case it lies upon the defendant to show how the accident actually happened.

In the case of *Collins v. Bennet* (1) which is more like the present case, the horse when delivered to the defendant was sound, and when returned was found to be foundered. In that case it was held that it was for the defendant to show how the horse, which was perfectly sound when taking out, was foundered when returned. That is a case which probably

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(1) 46 New York Reports.

(2) 2 H. and C. 722; 33 L.J. Exch. 13.

(3) L.R. 8 Q.B. at p. 175; 42 L.J. Q.B. 105.

(4) 3 H. and C. 596; 34 L.J. Exch. 220.



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would come under s. 106 of the Indian Evidence Act, as an 'example of a case in which the burden of proof lies on the person who has special knowledge of the facts. These cases to my mind only show this, that in such cases it is for the defendant to give a *prima facie* explanation in order to shift the burden of proof on the other side.

[407] What we have to consider here is whether such a *prima facie* explanation was given. The only evidence as to how this happened, that is how the horse happened to run away, was the evidence of the defendant himself. The defendant's evidence is not contradicted on any point; it is not inconsistent with what ordinarily happens in the life of every one accustomed to ride or drive horses; there is nothing improbable in his statement; and under these circumstances is a Judge justified in holding that the defendant did not act as a reasonable man would have acted, and that he must have done something to cause the horse to bolt? What is the evidence upon which the Judge below has founded his judgment? He assumes that the horse undoubtedly must have been freely whipped to such an extent as to cause it to run away, or that there must have been some other cause within the knowledge of the defendant for the horse running away. His finding is based purely and solely upon speculation and assumption. In my judgment no Judge has any right to make or act upon such an assumption where there is no evidence to support it, and the evidence of the defendant on this point is uncontradicted, and is not within our common knowledge improbable. There was no evidence to contradict the defendant's evidence. There was nothing to show that it was even improbable that the horse had bolted and run away under the circumstances deposed to by him; still the Judge makes the assumption that something must have happened which had not been deposed to. If the burden of proof was upon the defendant, I think that burden was shifted on to the plaintiff by the defendant's uncontradicted and not *prima facie* improbable evidence. I must say that I thoroughly agree with the opinion expressed by Lindley, J., in *Manzoni v. Douglas* (1), when he said:—"To hold that the mere fact of a horse bolting is *per se* evidence of negligence, would be mere reckless guess-work." What the Small Cause Court Judge had to find was whether the defendant had or had not taken as much care of the horse as a man of ordinary prudence would have taken of his own horse under similar circumstances. He found that the defendant had not taken such care. What was there on the evidence here which showed that the defendant had not taken such care? There is nothing to support that finding, except per- [408] haps the mere fact that the horse was a quiet horse. I think this case falls exactly within the words of Lindley, J., above quoted. It does not cease to be anything less than mere reckless guess-work because the Judge has, contrary to the evidence and without any evidence, come to the conclusion that the defendant had freely used the whip. It appears to me that that is an assumption which is unsupported by evidence, and is mere reckless guess-work.

If I were trying the case with a jury, it is quite clear to me that there was no evidence here which would justify me in leaving the case to the jury. If there is in a case tried by a Judge with a jury no evidence which the Judge ought to submit to the jury as against the defendant, it is the duty of the Judge to direct the jury to find a verdict for the defendant, and that would be a direction which the jury would be bound to act

upon. Similarly, when the Judge is trying such a case without a jury, as was the case here, he is bound in law to find for the defendant. The cases to which I am going to refer show the principles on which a Judge is or is not justified in leaving a case of this kind to a jury. In *Cotton v. Wood* (1), Gill, C.J., said—"To warrant a case being left to the jury it is not enough that there may be some evidence; a mere scintilla of evidence is not sufficient, but there must be proof of well-defined negligence." In *Davey v. The London and South Western Railway Co.* (2), it was held that if there is no reasonable evidence of negligence occasioning the injury, the Judge is bound to direct a verdict for the defendant. In *Hammack v. White* (3) it is said:—"The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but the plaintiff must give some affirmative evidence of negligence on the part of the defendant."

It was also held in that case that the mere bolting of a horse in itself was no evidence of the negligence of the person who had care of the horse, nor was it evidence that the horse was improperly brought into the street.

As I have said, there was in this case no evidence of any want of care within the meaning of s. 151 of the Indian Contract Act. There is no evidence which would have entitled the Judge of the Small Cause Court to submit this case to the jury had he been [409] trying the case with a jury. In fact he would have been bound to withdraw the case and direct the jury to find a verdict for the defendant. On the evidence before the Judge of the Small Cause Court, he had, in my opinion, no jurisdiction or authority in law to make the decree which he did. It is not necessary, in the view which I take of this case, to consider whether the Small Cause Court Judge should not have taken into consideration the effect on this case of s. 150 of the Indian Contract Act. Under the circumstances it appears to me that in this case it is our duty to exercise our jurisdiction under s. 622 of the Civil Procedure Code. Under that section of the Code we may pass such order as we think fit: *Maulvi Muhammad v. Syed Husain* (4), *Sarnam Tevari v. Sakina Bibi* (5). The order which I propose to make in this case is that the judgment and the decree of the Small Cause Court be set aside, the plaintiff's suit be dismissed, and judgment be entered for the defendant with costs below and costs here.

BRODHURST, J.—The learned counsel for the plaintiff, opposite party, has taken a preliminary objection that there is no ground either under s. 9 or s. 15 of the Royal Charter Act, or under s. 622 of the Civil Procedure Code, for entertaining the defendant-petitioner's application. I, however, concur with the learned Chief Justice in overruling this objection, for in my opinion the finding of the lower Court is not only unsupported by any proof, but it is, moreover, opposed to the evidence on the record, and I therefore consider that the lower Court has "acted in the exercise of its jurisdiction illegally," so as to bring the application within the meaning of s. 622 of the Civil Procedure Code.

The statement of the defendant-petitioner was recorded on oath. It may be said to be unrefuted, and it is in my opinion reliable. The plaintiff's mare was ridden by the defendant on the evening of the 6th November, 1886, and then died. It is admitted by the plaintiff that he

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(1) 8 C.B. (N.S.) 568 : 29 L.J.C.P. 333.  
(3) 11 C.B. (N.S.) 588 : 31 L.J.C.P. 129.  
(5) 3 A. 417.

(2) 12 Q.B.D. 70.  
(4) 3 A. 203.



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left Allahabad for Hamirpur about four days before the 6th November, that he returned to Allahabad on the morning of the 6th, that when he started for Hamirpur he left orders that the mare was merely to have walking exercise during his absence, and that on the 6th, prior to her being sent to the defendant, she was not worked at all beyond being driven between the railway [410] station and the plaintiff's house. The plaintiff's witness and relative, H. M. Gordon, deposed that he had often ridden the mare, and that she had neither a hard nor a soft mouth; but from the evidence of the defendant, it is, I think, clearly proved that the mare had a hard mouth, and that she ran away with him for two miles or more in spite of his utmost endeavours to restrain her.

Admittedly, the mare had been out of work for about four days prior to the 6th November, and had had very little work on the latter date, and, as might be expected, she was very fresh when ridden by the defendant on the evening of the 6th November. Almost immediately after she was mounted, she became restive and plunged, and after galloping for a short distance and then being pulled up, she again plunged and tried to back into the Collector's compound. If under these circumstances the defendant hit her with his riding-cane, he did nothing more, in my opinion, than he should have done. There is proof that the defendant was not wearing spurs. There is not a particle of evidence that he made "free use of the whip," there is no ground for assuming that he even made use of his riding-cane otherwise than in a moderate and proper manner; and from such evidence as there is on the record I see every reason to believe that the defendant took as much care of the mare as a man of ordinary prudence would, under similar circumstances, have taken of her had she been his own property.

Mr. Blenkinsop, of the Army Veterinary Department, who held a *post mortem* examination of the mare, deposed that there were no external marks of violence on the body; that, on opening the carcase, he found that the diaphragm was ruptured; that the stomach contained undigested food; that the mare must have eaten shortly before she died; that the stomach was distended with undigested food; and if a horse gallops with a full stomach the probabilities are that he would have some internal injury such as rupture of the diaphragm; that the cause of the mare's death was rupture of the diaphragm; and that in his opinion, the animal was not in a fit state to be galloped or ridden fast. In addition to the above evidence there is the deposition of the witness Ram Prasad, who deposed that when he went to Mr. Wilkinson for the mare, she was at the time (4-10 or 4-20 P.M.) eating gram.

[411] It is, I think, obvious that the mare was restive owing to want of a proper amount of work for some days prior to the time that she was let to the defendant for hire; that she consequently plunged and backed and then ran away with the defendant in spite of all his efforts to restrain her; and that the cause of death was rupture of the diaphragm owing to the mare having galloped when her stomach was distended with food which had been given her in the plaintiff's stables shortly before she was let to the defendant for hire. Under these circumstances, the plaintiff alone was, I consider, responsible for the mare's death; and I therefore concur in allowing the application and in reversing the decree of the lower Court with all costs.

*Application granted.*

9 A. 411=7 A.W.N. (1887) 58.

## APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*BALDEO SINGH (*Judgment-debtor*) v. KISHAN LAL AND ANOTHER  
(*Decree-holders*).<sup>\*</sup> [11th February, 1897.]*Execution of decree—Civil Procedure Code, ss. 311, 312—Objection to sale—Limitation—Legal disability—Act XV of 1877 (Limitation Act), s. 7—Order confirming sale before time for filing objections has expired—Appeal from order.*

Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute.

An application under s. 311 of the Civil Procedure Code, on behalf of a judgment-debtor who was a minor was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which no proper application of objection had been filed. From this order the judgment-debtor appealed.

[412] *Held* that the appeal must be considered to be one from an order under the first paragraph of s. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would therefore lie.

*Held* that, assuming the first application on the minor's behalf to have been rightly rejected, the second was made by a duly authorized guardian, and, with regard to s. 7 of the Limitation Act (XV of 1877), was not barred by limitation; and the judgment-debtor had therefore a right to make it, and the Court should have entertained and dealt with it before proceeding to confirm the sale or grant a sale-certificate.

The order disallowing the application and the order confirming the sale were set aside, and the case remanded for disposal of the appellant's objections,

<sup>\*</sup> *Phoolbas Koonwur v. Jogeshur Sahay* (1) referred to.

[F., 5 P.L.R. 1910=118 P.W.R. 1910=6 Ind. Cas. 488; D., 5 N.L.R. 1.]

THE facts of this case are stated in the judgment of the Court.

Munshi Kashi Prasad, for the appellant.

Kunwar Shivanath Sinha, for the respondents.

## JUDGMENT.

OLDFIELD and BRODHURST, JJ.—This appeal is instituted by Baldeo Singh, a minor, through his guardian Balwant Singh, against an order of the Subordinate Judge of Aligarh, refusing to set aside a sale of immoveable property. The appellant was a judgment-debtor represented by Balwant Singh, his guardian, who was also himself a judgment-debtor under the decree. Execution was taken of the decree by the respondents-decree-holders, and the property put up to sale, and sold on the 20th September, 1885, and purchased by the decree-holders. The mother of Baldeo Singh filed objections to the sale under s. 311 of the Civil

<sup>\*</sup> First Appeal No. 205 of 1886 from an order of Maulvi Sayyid Muhammad, Subordinate Judge of Aligarh, dated the 2nd August, 1886.

(1) I. C. 226.

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Procedure Code, but the application was rejected on the ground that she did not legally represent the minor. The order was made on 11th January, 1886. On the following day, the 12th January, objections were filed by Balwant Singh on the minor's behalf, and on the 2nd August following, the Subordinate Judge rejected the application, on the ground that he had, on the 11th January, confirmed the sale, and was precluded from entertaining objections under s. 311 after such confirmation, prior to which no proper application of objection had been filed. It is from this order that the present appeal is lodged.

It was objected that no appeal will lie to this Court, but we overrule this objection, as the appeal must be considered to be one from an order under the first paragraph of s. 312 confirming the [413] sale after disallowing the appellant's objection to the sale. The material point is whether the order is one we should interfere with. Now, assuming that the first application made on the minor's behalf by his mother was improperly made, as she did not legally represent him, and that the Subordinate Judge was right in refusing to entertain it, the second application of objection to the sale was made by a duly authorized guardian, Balwant Singh; and with regard to s. 7 of the Limitation Act it must be held not to be barred by limitation—on this point there is the authority of the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy* (1). It was therefore an application which the judgment-debtor-appellant had a right to make, and which it was the duty of the Subordinate Judge to have entertained and dealt with before he proceeded to confirm the sale or grant a sale-certificate. No doubt s. 312 contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, but if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not the Court below could entertain such objections after it had confirmed the sale, we are of opinion that this Court, when the case has come before it in appeal, is bound to interfere, and to see that objections which by the law the appellant is empowered to make, are heard and determined before a sale of his property shall be confirmed or become absolute.

We set aside the order of the Court below of the 2nd August and the order confirming the sale, and remand the case in order that the objections of the appellant be heard and determined, and the case disposed of according to law.

Costs to be costs in the cause.

*Case remanded.*

9 A. 413=7 A.W.N. (1887) 48.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*GHERAN (*Plaintiff*) v. KUNJI BEHARI AND OTHERS (*Defendants*).<sup>\*</sup>  
[2nd February, 1887.]*Act I of 1872 (Evidence Act), s. 115—Equitable estoppel—Decrees, priority of.*

A decree-holder at a sale in execution of his decree purchased a zamindari share belonging to his judgment-debtors. Afterwards, in execution of a subsequent decree held by another person, the same with other property was again put up for sale. Prior to the sale, the subsequent decree-holder applied to the officer conducting it, stating the fact of the sale and purchase under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtor's interest which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decree-holder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn, and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decree-holder did not bid again. Afterwards the prior decree-holder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction-sale in execution of the subsequent decree.

*Held* that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale. *Rai Seeta Ram v. Kishun Dass* (1), *McConnell v. Mayer* (2), *Agarwal Singh v. Foujdar Singh* (3), and *E. Solano v. Ram Lall* (4) distinguished.

A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces.

[R., 9 A. 690; D., A.W.N. (1907) 276=4 A.L.J. 709.]

THIS was a suit which was brought under the following circumstances. The plaintiff, Gheran, held a money-decree against Kunj Behari, Ram Salik, and Ganesh, who, with their brother Rajkumar, owned a 1 anna 6½ pies zamindari share; and, in execution of the decree, the interest of the judgment-debtors, *i.e.*, 1 anna 1⅞ out of the 1 anna 6½ pies share, was sold by auction, and purchased by the decree-holder, on the 20th January, 1880. Subsequently to this sale and purchase, the whole 1 anna 6½ pies share was advertised for sale in execution of a later decree obtained by one Jolpi against all four brothers in respect of a debt incurred by their deceased father, but, on the 20th April, 1880, Jolpi made an application to the officer conducting the sale, in which he stated that a 1 anna 1⅞ pies share had already been sold to and purchased by the plaintiff, and prayed that the interest of Rajkumar only, *i.e.*, a 4⅝ pies share, might be sold in execution. This application was disallowed, and the entire 1 anna 6½ pies share was put up for sale by auction. The plaintiff was present at the sale and made one bid. Ultimately, the officer conducting the sale withdrew the 6½ pies, and put up for sale [415] a one-anna share only, apparently because it was found that this would

<sup>\*</sup> Second Appeal No. 501 of 1886 from a decree of Maulvi Shah Ahmadullah, Subordinate Judge of Gorakhpur, dated the 10th February, 1886, reversing a decree of Maulvi Abdul Razzak, Munsif of Bansi, dated the 3rd December, 1885.

(1) N.-W.P.H.C. R. (1869) 402.  
(3) 8 C.L.R. 346.

(2) N.-W.P.H.C. R. (1870) 315.  
(4) 7 C.L.R. 481.



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be sufficient to satisfy Jolpi's decree. The plaintiff did not again bid. The purchaser was one Abdul Baki, who, on the 20th May, 1880, conveyed his rights and interests to another; and this gave rise to a suit for pre-emption brought by one Indar Dat, who obtained a decree, and, on the 4th February, 1882, took possession of the one-anna share.

The present suit was brought by the plaintiff for a declaration that the 1 anna  $1\frac{7}{8}$  pies share which he had purchased on the 20th January, 1880, was not affected by the sale of the 20th April, 1880. To this suit Indar Dat and Kunj Behari, Ram Salik, Ganesh and Rajkumar were joined as defendants. The suit was defended by Indar Dat principally upon two grounds. The first ground was that the plaintiff by his conduct in bidding at the auction-sale of the 10th April, 1880, and concealing the fact of his prior purchase, was estopped from disputing the validity of Abdul Baki's purchase. The second was that inasmuch as the decree obtained by Jolpi and under which Abdul Baki had purchased, was in respect of a debt incurred by the father of the judgment-debtors, who were a joint Hindu family, and such a debt would have precedence over the debt incurred by the judgment-debtors to the plaintiff after their father's death, the decree of Jolpi, though subsequent in date to that of the plaintiff had priority, and consequently the possession of the defendant thereunder should not be disturbed.

The Court of first instance (Munsif of Bansi) decreed the claim. On appeal, the Subordinate Judge of Gorakhpur reversed the first Court's decree. The material portion of the judgment of the Subordinate Judge was as follows:—

"The Munsif is clearly wrong in holding that the rule of estoppel is not applicable to the case. It is admitted that at the second sale, which took place on the 20th April, 1880, after the plaintiff's purchase, the plaintiff made bids, concealing the fact of his purchase.....By his conduct he caused it to be believed that he had acquired no right in the share by virtue of his previous purchase. Therefore, the plaintiff-respondent cannot, under s. 115 of the Evidence Act, sue for possession of the share by virtue of his purchase at the sale of the 20th January, 1880.....The [416] rule of estoppel will, in a case like this, operate as between the plaintiff and the subsequent auction-purchaser, and not as between the plaintiff and the decree-holder. The purchaser at the second sale, who purchased the share in good faith, and in ignorance of the first sale, and who was led to believe from the plaintiff's act or omission that there was no risk in purchasing the property, cannot be deprived of his right in consequence of the plaintiff's present action. The plaintiff is by all means estopped."

The plaintiff appealed to the High Court.

The Hon. Pandit *Ayudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

*Lala Juala Prasad* and Munshi *Sukh Ram*, for the respondents.

#### JUDGMENT.

EDGE, C. J.—In this case the plaintiff, under a decree against three out of four brothers, brought to sale a 1 anna and  $1\frac{7}{8}$  pies share, which was the share of those three brothers in a 1 anna  $6\frac{1}{2}$  pies share which belonged to those three brothers and the fourth. On the 20th January, 1880, the plaintiff purchased at the auction-sale the 1 anna  $1\frac{7}{8}$  pies share. Subsequently, another person obtained a decree against all the four brothers, and under that decree he got execution against the property of

the four brothers. The 20th April, 1880, was the day fixed for the sale of the 1 anna  $6\frac{1}{2}$  pies share under the latter decree. On the 20th April, 1880, this subsequent decree-holder made an application to the officer conducting the sale, requesting him to sell only a  $4\frac{1}{2}$  pies share, which was the share of the fourth brother, whose interest had not been already sold to the plaintiff, stating also in that application the fact of the previous sale of the 1 anna and  $1\frac{7}{8}$  pies share to the plaintiff. The officer conducting the sale ordered that application to be filed, being of opinion that he could not comply with the request or order of the decree-holder, but was bound to execute the decree which had come to him, and he proceeded to sell the 1 anna  $6\frac{1}{2}$  pies share. The plaintiff, who was present, on that made a bid for the 1 anna and  $6\frac{1}{2}$  pies share. Ultimately, however, the officer conducting the sale, finding, I assume, that sufficient money would be realized by the sale of a 1 anna share, withdrew the  $6\frac{1}{2}$  pies, and put only a one-anna share up for sale. After that the plaintiff did not bid. That one-anna share was purchased by the [417] predecessor in title of the defendants in this action. That purchaser subsequently dealt with this one-anna share, and any interest which he obtained became vested in the defendants.

Now, under these circumstances, the plaintiff has brought his action for a declaration that his 1 anna and  $1\frac{7}{8}$  pies share was not affected by the auction-sale of the 20th April, 1880. The lower appellate Court has found in favour of the defendants, its finding being, in effect, that the plaintiff had given bids, and had concealed the fact of his purchase; and then, after giving some of the facts of the case, he says:—"The rule of estoppel will, in a case like this, operate as between the plaintiff and the subsequent auction-purchaser, and not as between the plaintiff and the decree-holder. The purchaser at the second sale in the execution of decree, who purchased the share in good faith and in ignorance of the first sale, and who was led to believe from the plaintiff's act or omission that there was no risk in purchasing the property, cannot be deprived of his right in consequence of the plaintiff's present action." I have no hesitation in saying that there is no evidence on the record—at least none has been brought to our notice—to support any one of those conclusions to which the lower appellate Court has arrived.

It is contended here, in the first instance, that this is a case which falls within s. 115 of the Indian Evidence Act, and that an estoppel arises in this case. That section provides that "when a person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief," he shall not subsequently deny the truth of that thing. Now, in order to bring this case within that section, it would be material that there should be evidence that the plaintiff by bidding at the sale in which the decree-holder had already given a notice that a portion of the property had previously been purchased by the plaintiff, intentionally permitted or caused another person to assume that the plaintiff had no title in the property. Of any such intention I can see no possible evidence. The intention of the plaintiff in bidding must have been this, that as notice had already been given of the previous sale of greater portion of the property to him, very few persons were likely to purchase it, and so he would acquire the whole of this property in which he had already purchased an interest, and get it cheap. I cannot conceive that by bidding he [418] meant to show that he had no title to the property. I put that point to Mr. *Juala Prasad*, one of the learned pleaders for the respondents, and he very

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candidly admitted that the predecessor in title of his clients must have known of the objection raised to the sale by the decree-holder and of the previous purchase by the plaintiff. But he contends that the subsequent conduct of the plaintiff in bidding misled the purchaser, who thought the plaintiff had waived his title. I, however, cannot agree with that contention. This not being, therefore, a case under s. 115 of the Indian Evidence Act, is there any other authority to show that an estoppel arises in this case? Mr. *Sukh Ram*, on behalf of the respondents, has cited three of four cases, of which the first is *Rai Seeta Ram v. Kishun Dass* (1). In that case the plaintiff actually was the person who had negotiated the loan, and had actively concealed from the defendant, who was advancing money on the security of the property, the fact that he, the plaintiff, had a lien upon the property. That is a very different case. There a fraud was perpetrated upon the defendant, the lender of the money, and the plaintiff there would have obtained the benefit of the fraud if he had been allowed to say that he had a good prior subsisting lien.

The next case is that of *McConnell v. Mayer* (2). In that case it was very rightly held that when a person who claimed an interest in the property which was being sold, upon inquiry by the intending purchaser, gave an evasive answer, he could not afterwards be allowed to say that he had such interest. This evasive answer was in effect a deliberate falsehood, which misled the purchaser.

The next case is that of *Agrawal Singh v. Foujdar Singh* (3). It is only an authority to show that a man may so act as to make evidence against himself. It does not say that what was so done would create an estoppel.

The next case is that of *E. Solano v. Ram Lall* (4). That is a case very dissimilar to the present case. In that case the defendant had previously become the purchaser of an interest in the property, and subsequently he obtained a decree against the person, a portion of whose interest in the property he had previously pur-[419] chased and he put up to sale the whole property without mentioning that he had previously purchased a portion of it. There also was a direct representation by the vendor in execution that the whole was being sold without any incumbrance.

The only other authority is the statement in paragraph 385 of Story's *Equity Jurisprudence*, vol. I, that "in many cases a man may innocently be silent, for, as has often been observed, *aliud est tacere, aliud celare*. But in other cases, a man is bound to speak out, and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale, and knowing his title stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by, and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase." In that case it says—if a man stands by and encourages the sale. The plaintiff in this case did nothing of the kind. There was already a notice showing what title the judgment-debtors really had in the property. It cannot be said that by bidding

(1) N.-W.P.H.C.R. (1868) 402.  
(3) 8 C.L.R. 346.

(2) N.-W.P.H.C.R. (1870) 315.  
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the plaintiff encouraged another person to purchase. I cannot see what necessity there was for the plaintiff to forbid the sale. He had no power to forbid the sale, and the decree-holder who had power, had already forbidden it. Under these circumstances, I am of opinion that no case of estoppel has been made out here.

There is only one other point to be considered. Mr. *Sukh Ram* asks us to remand this case for the decision of a certain issue. He alleges that the decree under which his client's predecessor in title purchased, although subsequent to the plaintiff's decree, was in respect of a debt incurred by the father of the judgment-debtors who were living as a joint Hindu family, and he says that that decree therefore, by reason of its being in respect of a prior debt incurred by the father, took precedence over the decree under which the plaintiff purchased, which was in respect of a debt incurred by the sons after the father's death. I have asked him for any authority for such a proposition, and he has not shown any. My belief is that a decree takes priority in respect of the date on [420] which it was passed, and does not depend upon the priority of the debt. I decline therefore to remand this case. For the above reasons, the appeal is allowed, the decision of the lower appellate Court is reversed, and that of the Court of first instance is restored and confirmed with costs.

BRODHURST, J.—I concur.

*Appeal allowed.*

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#### CRIMINAL REFERENCE.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

QUEEN-EMPRESS v. MCCARTHY. [7th February, 1887.]

Act III of 1884 (*Criminal Procedure Code Amendment Act*), s. 8 (6)—*European British subject—Trial by District Magistrate with a jury—Procedure "in a trial by jury"*—*Criminal Procedure Code*, s. 307—*Power of District Magistrate dissenting from verdict to submit the case to High Court—Powers of High Court under s. 307—Criminal Procedure Code*, ss. 418, 423 (b)—*Defamation—Act XIV of 1860 (Penal Code)*, s. 499, *Explanation 4—Words per se defamatory.*

The effect of cl. 6 of s. 8 of Act III of 1884 (*Criminal Procedure Code Amendment Act*), is to confer upon the District Magistrate precisely the same authority as the Sessions Judge has, under s. 307 of the *Criminal Procedure Code*, to submit to the High Court a case in which he disagrees with the verdict of a jury so completely that he considers a reference necessary. The expression "trial by jury" as used in cl. 6 of s. 8 does not only refer to proceedings up to the time when the jury pronounce their verdict, but refers generally to cases triable with a jury as contra-distinguished from cases tried with the help of assessors or in any other manner mentioned in the *Criminal Procedure Code*.

No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the *Criminal Procedure Code* remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal, and causing conviction and sentence to be entered against the accused.

The provisions of s. 307 of the *Criminal Procedure Code* are not in any way out down by ss. 418 and 423; and the High Court has power, under s. 307, to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right,

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The power of the High Court is not limited to interference on questions of law, i.e., misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law.

Explanation 4 of s. 499 of the Penal Code does not apply where the words used and forming the basis of a charge are *per se* defamatory; though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a [421] particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied.

[R., 14 B. 160 (163).]

THIS was a trial by the District Magistrate of Mussoorie and a jury, of a European British subject, Mrs. Anne McCarthy, under s. 8 of Act III of 1884 (Criminal Procedure Code Amendment Act) for defamation. The complainant was one H. G. Scott, Vice-Chairman of the Municipal Board of Mussoorie. At a meeting of the Board on the 12th November, 1886, which was presided over by the complainant, a resolution was passed, calling on the defendant to pay certain taxes due by her to the Municipality, and was signed by the complainant as Vice-Chairman. A copy of the resolution, signed by the Secretary, was sent to the defendant, who returned it after writing upon it the following words:—"Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either."

These words were the subject of the charge of defamation brought by Mr. Scott against the defendant, and tried by the District Magistrate with a jury consisting of seven persons. The jury, by a majority of four to three returned a verdict of acquittal. Upon this the District Magistrate made the following order:—"The Court differs from the majority of the jury, and considers Mrs. McCarthy has committed the offence of defamation as defined in s. 499 of the Penal Code, and punishable under s. 500. The Court cannot see that any of the Exceptions mentioned in s. 499 are applicable to this case. The records of the case will be submitted to the High Court under s. 307 of Act X of 1882 for orders." The District Magistrate did not record the heads of his charge to the jury, as required by s. 367 of the Criminal Procedure Code.

The *Public Prosecutor* (Mr. C. H. Hill) supported the reference.

Mr. A. Strachey, for the defendant.

Two preliminary objections were taken on behalf of the defendant to the hearing of the reference. The first was that the District Magistrate had no power, under s. 8, cl. (6) of Act III of 1884, read with s. 307 of the Criminal Procedure Code, to submit the case to the High Court, inasmuch as proceedings subsequent to the verdict were not proceedings "in a trial by jury" to which [422] s. 8, cl. (6), applied, but fresh proceedings, in the nature of appeal or rehearing, and taken after the "trial by jury," properly so called, had been concluded. In support of this objection it was argued that s. 295 of the Code clearly implied that the delivery of the verdict was "the conclusion of the trial." The second objection was that, assuming the District Magistrate to be competent to submit the case, references under s. 307 would lie only on a point of law, and the High Court could not reverse the verdict except on the ground of misdirection by the Judge, or of misunderstanding on the part of the jury of the law as laid down by him. It was contended that this followed from the words in s. 307, "in dealing with the case so submitted the High

Court may exercise any of the powers which it may exercise on an appeal ;" these powers, in cases of trial by jury, being defined and limited by s. 418 and s. 423 (d) of the Code. Reference was made to s. 263 of the Code of 1872 and the difference between the wording of the last paragraph of that section (1) and that of the last paragraph of s. 307 of the present Code.

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## JUDGMENT.

STRAIGHT, J.—This is a reference made by the Magistrate of Mussoorie, under s. 8 of Act III of 1884, read in conjunction with s. 307 of the Criminal Procedure Code. The respondent, Mrs. McCarthy, was charged before him with defamation in respect of a person of the name of H. G. Scott, and she claimed the privilege accorded to European British subjects by Act III of 1884, to have the charge against her tried by the Magistrate with the assistance of a jury. The case was heard and tried in the manner provided in s. 8 of Act III of 1884, and the result was that four out of seven jurors were of opinion that Mrs. McCarthy did not defame Mr. Scott, and the charge was not sustained, the other three holding that the charge was proved. The Magistrate, considering that the case had not been brought within any of the Exceptions to s. 499 of the Indian Penal Code, and being of opinion that the defendant ought to have been convicted, has suspended judgment, and reported the case to this Court, for such orders as it may think proper to [423] make under s. 307 of the Criminal Procedure Code. The learned counsel for the respondent has taken two preliminary objections before us,—first, to our jurisdiction to entertain this matter at all, or, putting it more correctly, to the jurisdiction of the Magistrate to refer the case to this Court; and secondly, to the extent of the authority conferred upon us under s. 307 of the Criminal Procedure Code; the effect of the learned counsel's contention being, shortly, that we have no authority whatever to deal with the findings of fact, but our jurisdiction is limited to interfere only upon questions of law. Now, as to the first contention, the learned counsel has laid great stress, and indeed his whole argument rests upon the language of cl. 6 of s. 8 of Act III of 1884, and he contends that, reading the words in cl. 6 of that section, which confers upon the District Magistrate exercising his powers under that Act, powers analogous to those of a Sessions Judge trying with the aid of jurors, the expression "in a trial by jury" as used in the section means proceedings down to the time when the jury have delivered their verdict, and not afterwards, and therefore the Magistrate had no power under the statute to refer to this Court a verdict of a jury with which he disagreed, to be dealt with by us by virtue of the jurisdiction conferred upon us under s. 307 of the Criminal Procedure Code in regard to his disagreement on a matter of fact. This argument of the learned counsel for the respondent was very ingeniously put, but from the first I entertained no doubt that what was contemplated by cl. 6 of s. 8 of Act III of 1884, was to confer upon the District Magistrate precisely the same authority as the Sessions Judge has under s. 307 of the Criminal Procedure Code; and that if, as in the present case, he disagreed with the verdict of a jury so completely that he considered it necessary to submit

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(1) "The High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law without reference to the particular charges as to which the Court of Sessions may have disagreed with the verdict, and, if it convict him, shall pass such sentence as might have been passed by the Court of Session."



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the case to this Court, he ought to do so, and this Court would deal with that reference by the Magistrate in exactly the same way as it could upon a reference by a Sessions Judge, pure and simple, under s. 307 of the Criminal Procedure Code. Now, it has never been doubted that, under s. 307 of the Criminal Procedure Code, a Sessions Judge has clear authority, if he disagrees with the verdict of a jury on questions of fact alone, to submit the case to this Court, and this Court has under the last paragraph of s. 307 of the Criminal Procedure Code, full power of completing the trial, either by [424] upholding the acquittal and directing it to be entered, or setting aside the acquittal and recording a conviction and sentence. The learned counsel, as I have before said, sought to induce us to limit the expression "trial by jury" as used in cl. 6 of s. 8 to that period of time at which the jury pronounced their verdict, and no further. I pointed out at the beginning of the argument that the expression "trial by jury" is one which is used in the Criminal Procedure Code so as to generically refer to the class of cases triable by a Sessions Judge with the help of a jury, and their trial, as contra-distinguished from those tried with the help of assessors, or in any other manner mentioned in the Code. S. 307 of the Criminal Procedure Code, to which reference has been made, occurs in Chap. XXIII of the Code, providing for trial before High Courts and Courts of Session, and comes under *F*, headed "Conclusion of trial in cases tried by jury." I do not think that trial by jury or any trial can be, legally speaking, concluded until judgment and sentence are passed; and I am of opinion that in those cases in which the Sessions Judge trying with the help of a jury differs from the verdict of the jury and, suspending judgment, refers the case to this Court under s. 307, the trial cannot be said to have concluded, but remains open for this Court upon the reference by the Judge to conclude and complete it, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal and causing conviction and sentence to be entered against the accused. For this reason I do not accept the contention of the learned counsel for the respondent upon his first objection, and I did not require Mr. *Hill*, who represents the appellant, to reply to this part of the argument on behalf of the respondent (1).

Then Mr. *Strachey* contends that, looking to the terms of s. 307 in conjunction with ss. 418 and 423 of the Criminal Procedure Code, in hearing a reference made by a District Magistrate, our hands are tied, as far as facts are concerned, and we can only deal with the reference if there has been error in law in the proceedings below. For one moment speaking as to the policy of this provision, I have no doubt it was felt by the Legislature [425] that in this country, wherever the jury system was introduced, such system being a novel one and its application being likely to be attended in its infancy at least by considerable difficulties, it was imperatively necessary to provide some safeguard against miscarriage of justice, so that in cases where the jury delivered a perverse or obtuse verdict, the District Judges should be afforded an opportunity of reporting to this Court, as the ends of justice required that such perverse

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(1) See *The Queen v. Castro*, L.R. 9 Q.B. 350, where it was held, dissenting from the opinion of the Judges in *O'Connell v. The Queen*, 11 Cl. & F. at p. 250, that the word "trial" includes passing sentence.—REP.

finding should be set right by this Court. This Court, in my opinion, has distinct power to interfere in such cases under s. 307, and I do not think that this power is in any way affected by s. 418, or anything that appears in the appeal chapter. That section solely and entirely relates to appeals, either by the accused who has been convicted, or by the local Government who are impeaching an order of acquittal. Mr. Hill in his argument conceded, what I pointed out, namely, that on an appeal from an acquittal by a jury by Government, such an appeal would probably be governed by cl. (d) of s. 423, and it would have to be limited to questions of law; *i.e.*, misdirection by the Judge or misapprehension of the directions of the Judge by the jury on points of law. But this is not so here; this is a case directly falling within s. 307, and I do not think that the clear provisions of that section are in any way curtailed or cut down by ss. 418 and 423; and, though a reference by a Magistrate under s. 307, read in conjunction with s. 8 of Act III of 1884, it stands on an identical footing with cases where the District Judge disagrees with the verdict of a jury; and I hold that we can question the verdict of the jury and disturb it, if it is proper to do so. Now, whether in a reference by a Judge (which under s. 8 of Act III of 1884 would also include a District Magistrate), it is proper that we should interfere with a verdict of acquittal, I have before this taken occasion to say from this Bench that except under strong circumstances, where the facts of the case coerce me to disturb it, or where there is obvious misapprehension of law applicable to the facts, I am strongly opposed to touching the unanimous decision of the tribunal appointed by law to determine the guilt or innocence of accused persons; and I do myself, and as far as I am aware my brother Judges also, religiously recognise this principle. In the present case, however, four jurors acquitted the respondent, and three were in favour of conviction, [426] and if we can for a moment treat the Magistrate's view of the case as the voice of a jurymen, his opinion, adverse to the respondent, makes four of one opinion, and four of another as to the guilt of the accused. In the present case there is and can be no real controversy as to the facts, and the only question is whether the words "Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either," written by the respondent upon a copy of the resolution of the Municipal Board, were defamatory, within the meaning of s. 499 of the Indian Penal Code, and were published by her. Now, although we had addressed to us some remarks, by the learned counsel for the respondent, founded on good sense as to the operation of Explanation 4 of s. 499, they are answered by the observation that that Explanation does not apply where the words used and forming the basis of a charge are *per se* defamatory. When an expression, used verbally or in writing, is doubtful as to its significance, and some evidence is necessary to decide what the effect of that expression will be, and whether it is calculated to harm a particular person's reputation, it is possible that the principle enunciated in Explanation 4 of s. 499 might, and would with propriety, be applied. But in this case there is no question as to the significance or meaning of the words written. They are distinctly defamatory, within the meaning of s. 499, and as such, whether they were written in haste or in anger, the respondent is clearly responsible, and unless she can show that her case falls within any of the exceptions to the section, it was and is impossible for her to resist a verdict of guilty. Looking to the cross-examination of Mr. Scott, I find nothing there to show any justification or excuse within the Exceptions

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to s. 499, nor has anything of the kind been established by her own statement in the Court below.

[His Lordship proceeded to discuss the evidence, and came to the conclusion that the verdict of acquittal must be quashed, and the defendant convicted of defamation; but that, taking all the circumstances into consideration, a fine of Rs. 10 would meet the justice of the case.]

TYRRELL, J.—I concur.

9 A. 427 = 7 A.W.N. (1887) 66.

[427] APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice Tyrrell.*

ABLAKE AND ANOTHER (*Plaintiffs*) v. BHAGIRATHI  
(*Defendant*).<sup>\*</sup> [12th February, 1887.]

*Appeal—Dismissal of suit for non-appearance of plaintiff—Civil Procedure Code, ss. 102, 103.*

S. 103 of the Civil Procedure Code, does not take away the remedy of appeal from a decree dismissing a suit under s. 102. *Lal Singh v. Kunjan* (1), *Ajudhia Prasad v. Balmukand* (2), and *Partab Rai v. Ram Kishen* (3) referred to.

[*Dis.*, 31 M. 157 = 3 M.L.T. 336; *Ap.*, 16 B. 23; *R.*, 1 M.L.J. 385; 5 O.C. 294; 1 L.B.R. 183; 8 C.W.N. 313; 121 P.R. 1907 = 51 P.W.R. 1907.]

THE plaintiffs in this case brought a suit in the Court of the Munsif of Ballia for possession of immoveable property. Issues were fixed by the Munsif, who then adjourned the case, fixing the 10th June, 1886, for final disposal. Upon that date the Munsif took up the case, and passed the following order:—"This case has come on to-day. Neither the plaintiff is personally present, nor has he entered his appearance through his pleader. The Court has waited for more than an hour, but no evidence has been produced. It is ordered that the claim be dismissed, and the defendant's costs, with interest at 8 annas per cent. per mensem, charged to the plaintiffs."

The plaintiffs appealed to the Subordinate Judge of Ghazipur. The Subordinate Judge dismissed the appeal on the following grounds:—"Although it is not mentioned under what section the above decision has been passed, because the non-production of the evidence has been referred to, yet in reality it has been passed in consequence of the plaintiff's absence, under s. 102 of the Civil Procedure Code, the remedy for which is prescribed by s. 103, *viz.*, an application should be made to the same Court for restoring the case to its number. In this case the provisions of s. 103 have not been acted upon, but an appeal has been preferred. This appeal is not valid. It is ordered that the appeal be dismissed. The costs of both Courts will be charged to the appellants."

In second appeal by the plaintiffs it was contended that the lower appellate Court was wrong in holding that the Munsif had [428] dismissed the suit under the provisions of s. 102 of the Civil Procedure Code; and

<sup>\*</sup> Second Appeal No. 1840 of 1885 from a decree of Pandit Ratan Lal, Additional Subordinate Judge of Ghazipur, dated the 8th September, 1885, confirming a decree of Munshi Kalwant Prasad, Munsif of Ballia, dated the 10th June, 1885.

(1) 4 A. 387.

(2) 8 A. 351.

(3) A.W.N. (1883) 171.

that even if the Court was right in so holding, it was wrong in supposing that s. 103 of the Code took away the remedy of appeal from a decree dismissing a suit under s. 102.

Mr. J. E. Howard and Lala Lalta Prasad, for the appellants.

Munshi Sukh Ram, for the respondent.

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### JUDGMENTS.

OLDFIELD, J.—In this case a decree was passed by the Court of first instance, dismissing the plaintiffs' claim by default. The plaintiffs filed an appeal in the lower appellate Court, and that Court has dismissed the appeal on the ground that the plaintiffs have no remedy by appeal in this case, but they can proceed only under s. 103 of the Civil Procedure Code, and have the order dismissing the suit for default set aside. The plaintiffs have appealed to this Court, and contend that the lower appellate Court could entertain the appeal according to law. I think this appeal must be allowed. It seems doubtful whether the Court of first instance has, as a matter of fact, disposed of the case under s. 102 of the Civil Procedure Code. But assuming that it did, I think that the plaintiffs had their remedy, not only by proceeding under s. 103 of the Civil Procedure Code, but by appeal also, as s. 103 does not in any way appear to take away such a remedy. The only authority which might be taken to be opposed to this view is a decision of a Full Bench of this Court—*Lal Singh v. Kunjan* (1). But that decision deals with the case of a defendant against whom an *ex parte* decree has been made, and I am not prepared to accept it as binding in the case before us. In view of a later decision of a Full Bench of this Court,—*Ajudhia Prasad v. Balmukand* (2)—I think I am justified in holding that an appeal to the lower appellate Court would lie. I therefore set aside the decree of the lower appellate Court, and direct it to restore the case and try it on the merits. Costs to follow the result.

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TYRRELL, J.—I concur in the above view and order, and it seems to me that the suit may have been dismissed under s. 155 of the Civil Procedure Code, and therefore there are still stronger [429] reasons for holding that the plaintiffs had their remedy by way of appeal. A ruling of this Court in *Partab Rai v. Ramkishan* (3) decided by Straight, J., and myself, is in point in this respect.

*Cause remanded.*

(1) 4 A. 387.

(2) 8 A. 354.

(3) A.W.N. (1883) 171.



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9 A. 429=

7 A.W.N.

(1887) 81.

9 A. 429=7 A.W.N. (1887) 81.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*MUHAMMAD ABDUL KARIM (*Defendant*) v. MUHAMMAD SHADI  
KHAN AND OTHERS (*Plaintiffs*).<sup>\*</sup> [23rd February, 1887.]*Partition of mahal—Application by co-sharer for partition—Notice by Collector to other co-sharers to state objections upon a specified day—Objection raised after day specified by original applicant—Question of title—Distribution of land—Jurisdiction—Civil and Revenue Courts—Act XIX of 1873 (N.-W.P. Land Revenue Act), ss. 111, 112, 113, 131, 132, 241 (f)—Civil Procedure Code, s. 11.*

Reading together ss. 111, 112, and 113 of the N.-W.P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by s. 111 is to be served, i.e., a person who is a co-sharer in possession, and who has not joined in the application for partition.

So far as ss. 111, 112, 113, 114, and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under s. 113, or an appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under s. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings or on the partition after the time specified in the notice published under s. 111. S. 132 is not to be read as making the Commissioner the Court of appeal from the Assistant Collector or the Collector upon such questions, nor does s. 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them.

Where, therefore, after the day specified in the notice published by the Assistant Collector under s. 111, and after an Amin had made an apportionment of lands among the co-sharers of the mahal, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under s. 131,—*held* that the objection was not one within the meaning of s. 113, that the remedy of the objectors was not an appeal from the Collector's decision under s. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not [430] barred by s. 241 (f), and, with reference to s. 11 of the Civil Procedure Code, was maintainable.

*Habibullah v. Kunji Mal* (1) distinguished. *Sundar v. Khuman Singh* (2) referred to.

[Overruled, 23 A. 291 (F.B.) ; R., 13 A. 309 (312) ; D., 18 A. 210.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu Jogindro Nath Chaudhri and Munshi Hanuman Prasad, for the appellant.

The Hon T. Conlan and Pandit Nand Lal, for the respondents.

## JUDGMENT.

EEGE, C. J., and BRODHURST, J.—This is an appeal by the defendants in the suit from a decree of the Judge of Meerut, dated the 17th December, 1885, by which he decreed the appeal to him of the plaintiffs,

<sup>\*</sup> Second Appeal No. 448 of 1886 from a decree of H.A. Harrison, Esq, District Judge of Meerut, dated the 17th December, 1885, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bulandshahr, dated the 29th September, 1885.

(1) 7 A. 447.

(2) 1 A. [613.]

and declared the plaintiff's proprietary right to the land in suit, and declared that the defendant should bear all costs in his Court and in that of the Munsif of Bulandshahr.

The present action arises out of certain partition proceedings in the Revenue Court. The plaintiffs, who were the proprietors of two out of three portions of *patti* which had been previously partitioned, applied to have some common lands partitioned between their respective portions of their previously partitioned *patti*. The defendant was the owner of the remaining portion of the previously partitioned *patti*. The Assistant Collector of the District, on receiving the application, published the notifications, and caused to be served the notices, prescribed by s. 111 of the N.-W.P. Land Revenue Act, XIX of 1873. Then notice was served upon, amongst others, the defendant, who was a co-sharer in the mahal, who had not joined in the application. No objection within the meaning of ss. 112 and 113 of the Act was taken within the time specified by the notice. It appears that the Amin, in preparing the apportionment, allocated the land in suit, which was a portion of the common land to which the application for partition referred, to the defendant in respect of his portion of the previously partitioned *patti*. On this the plaintiffs raised an objection before the Assistant Collector on the ground that the common land in question had in the previous partition been allotted to their portion of the *patti*, and that the defendant had no title to any of the common [431] land in question, or to have any of it allocated to his portion of the *patti*. The Assistant Collector declined to entertain the objection, on the ground that the plaintiffs had not made this objection within the time specified in the notices, and made the partition allocating the land in suit to the defendant.

Upon this, on the 6th May, 1885, the plaintiffs brought the action in which this appeal has arisen for a declaration of title to the land so allocated to the defendant. On the 26th June, 1885, and after the commencement of this action, the Collector of the District, under s. 131 of the Act, sanctioned and confirmed the partition so made by the Assistant Collector, and duly published a notification of the fact in accordance with the provisions of s. 131. No appeal against the decision of the Collector was brought. The Judge of Meerut in the appeal before him found that the plaintiffs had established their title to the land in suit, and the only question before us is whether or not this action is, under the circumstances, maintainable in the Civil Court.

Mr. Chaudhri, on behalf of the defendant-appellant, contended that the remedy of the plaintiffs, was by an appeal from the decision of the Collector under s. 132 of the Act, and that the action related to the distribution of land of a mahal by partition within the meaning of cl. (f) of s. 241 of the Act, and was not maintainable in the Civil Court. In support of his contention he cited *Habibullah v. Kunji Mal* (1). This case does not appear to us to support Mr. Chaudhri's contention. The point there was whether the allotment in partition was a reasonable distribution of the land partitioned, and did not involve a question of title. Pandit Nand Lal, on behalf of the plaintiffs-respondents, contended, on the other hand, that s. 241 did not apply, and that questions of title arising in partition could not be raised and determined by action in the Civil Courts unless they were disposed of by the Collector in accordance with the provisions of s. 113 of the Act. In support of his contention

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be cited *Sundar v. Khuman Singh* (1), which authority, we think, supports the contention.

It appears to us that the objection raised by the plaintiffs to the partition in question was not one within the meaning of s. [432] 113. "The objection" referred to in that section must be an objection made to the partition "on or before the day specified" as provided by s. 112. In order to see what is the day referred to as the "day specified" we must look at s. 111. We find that it is enacted by s. 111 that the Collector "shall serve a notice on all such of the recorded co-sharers in the mahal as have not joined in the application, requiring any co-sharer in possession, who may object to the partition, to appear before him to state his objection, either in person, or by a duly authorised agent, on a day to be specified in the notice, not being less than thirty or more than sixty days from the date on which such notice was issued." Reading ss. 111, 112 and 113 together, as we think they must be read, it is obvious that the objection contemplated in each of those sections is an objection to be made by the person upon whom the notice required by s. 111 is to be served, that is, a person who is a co-sharer in possession who had not joined in the application for the partition, and consequently not an applicant for the partition. Besides, the question of title in this case did not and could not have arisen "on or before the day specified," in the notice served by the Collector, as it could not be intended that the Collector shall proceed to make the partition until after the expiration of the time specified in the notice for making objection to partition. If an Assistant Collector or Collector does not proceed to inquire into the merits of an objection as to title or proprietary right coming within s. 113, he should decline to grant the application for partition, "until the question in dispute has been determined by a competent Court." The competent Court referred to must be a Civil Court having jurisdiction to adjudicate upon questions of title. It is important to bear in mind that in those cases in which the Collector or Assistant Collector adjudicates upon questions of title or proprietary right under s. 113, a right of appeal is given, and that appeal is not from an Assistant Collector to a Collector or from a Collector to a Commissioner, but from an Assistant Collector or Collector, as the case may be, to the Civil Court. The result, so far as ss. 111, 112, 113, 114 and 115 are concerned, is that a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right either in an original action in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of such an [433] objection under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon questions of title or proprietary right raised by an objection made under s. 112. The remaining sections relating to partition do not appear to provide for or to bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings, or on the partition after the expiration of the time specified in the notice to be served by the Collector under s. 111, unless s. 132 is to be read as making the Commissioner the Court of appeal on questions of title, or unless s. 241 (f) is to be construed as barring the jurisdictions of the Civil Courts to deal with such objections. We can see no reason why it should be assumed that in the cases where

questions of title arise subsequently to the "day specified" in the notice, the Legislature intended by s. 132 that those questions should be for the final or other determination of the Commissioner of the District, whilst it is expressly provided by s. 113 that the Civil Court as to questions of title raised by an objection made at an earlier stage under s. 112, should have either original or appellate jurisdiction.

It appears to us that the appeal provided for by s. 132 is an appeal on any questions other than questions of title or proprietary right arising on or out of the partition made or sanctioned or confirmed by the Collector, and that the Commissioner would have no jurisdiction to adjudicate upon questions of title arising during the proceedings prior to the making of the partition, or out of or upon the partition when made. If this be the correct interpretation of s. 132, there would be no Court or officer with jurisdiction to adjudicate upon questions of title arising in or on the partition of a mahal subsequently to the "day specified" in the Collector's notice under s. 111, if, as is contended by Mr. *Chaudhri*, s. 241 (f) bars the jurisdiction of the Civil Courts to entertain or adjudicate upon such questions. This would be a result which the Legislature could not have intended. It is true that in one sense the determination of title by a Civil Court may affect the distribution of land of a mahal by partition, but it would affect such distribution so far only as the distribution of the land depended on title, but it would not affect the distribution on all or any of the other various questions or considerations which the Assistant Collector or Collector would have to deal with in [434] making the partition. In our opinion s. 241 of the Act does not bar the jurisdiction of the Civil Court to adjudicate upon questions of title or proprietary right in cases such as that under consideration.

Under these circumstances s. 11 of the Code of Civil Procedure applies. We are of opinion that this action is maintainable, and this being the only question which arose before us in appeal, we dismiss this appeal and confirm the decree of the Judge of Meerut with costs.

*Appeal dismissed.*

9 A. 434=7 A.W.N. (1887) 82=11 Ind. Jur. 428.

### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

FATEHYAB KHAN AND OTHERS (*Plaintiffs*) v. MUHAMMAD YUSUF  
AND ANOTHER (*Defendants*).\*

MUHAMMAD YUSUF AND ANOTHER (*Defendants*) v. FATEHYAB KHAN  
AND OTHERS (*Plaintiffs*).\* [24th February, 1887.]

*Easement—Private right of way—Obstruction—Acquiescence—Suit for removal of obstruction—Decree for plaintiff qualified by declaring that parties retain rights exercised prior to obstruction.*

In a suit for the removal of a building which the defendants had erected and which was an obstruction to the plaintiff's right to use a courtyard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the *mohulla* had from time

\* Second Appeals Nos. 364 and 433 of 1886 from the decrees of Maulvi Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 24th November, 1885, modifying the decrees of Babu Ganga Saran, Munsif of Saharanpur, dated the 24th June, 1885.



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immemorial exercised a right of way over it to and from their houses. It also appeared that on a part of the same land, there had formerly stood a thatched building used as a "sitting place" by the residents of the *mohulla*. The lower appellate Court, while decreeing the claim, observed that the defendants, if they liked, could construct and use a shed "according to the old state of things", and "without offering obstruction to" the right of the plaintiffs to "use it as a sitting-place when necessary."

*Held* that this was not a declaration of a right in the defendants to build, but merely a statement that the decree would not operate as an interference with the rights of the parties to have a similar thatched building set up as had existed in former time. *The Official Trustee of Bengal v. Krishna Chander Mozoomdar* (1) distinguished.

*Held* also that the right which was alleged to have been obstructed was not a public right of way, but a right which was confined to the people dwelling in the *mohulla* and going to and from the houses in the *mohulla*; and that the suit, being brought in respect of an interference with a private easement, was maintainable [435] without proof of special damage. *Karim Baksh v. Budha* (2), *Gehanaji v. Ganpati* (3), and *Uda Begum v. Imam-ud-din* (4) distinguished.

*Held* also that there was no principle of acquiescence involved in the case, inasmuch as there was no evidence that the plaintiffs has given their actual consent to the building, and the only evidence of their acquiescence could be that they did not immediately protest, and the defendants must have known that they were building upon a courtyard which their neighbours had a right to use. *Uda Begum v. Imam-ud-din* (4), and *Ramsden v. Dyson* (5) referred to.

[F., 7 P.R. 1899; R., 103 P.L.R. 1901.]

THE plaintiffs in this case sued for the removal of a building erected by the defendants upon certain land over which the plaintiffs alleged that all the residents of the *mohulla*, where the parties lived, had from time immemorial exercised a right of way to and from their residences, besides using it for social gatherings and other common purposes. It was alleged that the building in question obstructed the plaintiffs in their exercise of these rights. On the other hand, the defendants pleaded that the land was their exclusive property, that the other residents of the *mohulla* had no right of way over it, and that the plaintiffs, by making no opposition when the building was in course of erection, had acquiesced in the acts which they now complained of.

The Court of first instance (Munsif of Saharanpur) decreed the claim, observing as follows:—"There is ample evidence to show that the people of this *mohulla* have been in the habit of using the land freely for social gatherings and for other common purposes, and as the defendants have failed to show any exclusive title to the land, I must find on both the first and second issues for the plaintiffs. The plaintiffs have proved that the defendant built the *kotha* with undue haste, in about forty-eight hours... ..there was no acquiescence on the part of the plaintiffs."

On appeal by the defendants, the lower appellate Court (Subordinate Judge of Saharanpur) found that the land "had been left unoccupied to serve as a courtyard of the *mohulla*, and does not belong to either party." The Court also found that, upon the part of the land occupied by the building in suit, there had formerly stood a thatched building which was used as a "sitting place" by the residents of the *mohulla*. The conclusion arrived at was thus stated:—"I am therefore of opi-[436]nion that the defendants had no right to enclose the entire disputed land, and they, in building the new *pacca kotha*, have gone beyond the old *chappar*, and have included one yard of the eastern passage. The construction should be

(1) 12 I.A. 166.

(2) 1 A. 249.

(3) 2 B. 469.

(4) 1 A. 82.

(5) L.R. 1 H.L. 129; 21 Jur. N.S. 506; 14 W.R. 926.

demolished in the following manner :—The back wall of the *kotha* will be demolished, and one yard of land included in the passage. On the western side land three yards, east to west, and the entire breadth of the enclosure wall, south to north, will be left unoccupied for the passage of the plaintiffs and others by demolition of the walls of the enclosure. The defendants, if they like, can, according to the old state of things, construct a shed or *kotha*, seven yards, east to west, in length, and five yards, north to south, in breadth, in the south-eastern corner, and use it without offering obstruction to the plaintiffs, that is to say, the plaintiffs may be competent to use it as a sitting place when necessary. The rest of the land shall be unoccupied. In this manner the appeal is partially decreed."

Both parties appealed from this decision to the High Court. The principal ground of appeal taken by the plaintiffs was that "the lower appellate Court had no power to make any declaration as to the right of the defendants respondents to construct a shed of the disputed land." On behalf of the defendants it was urged (i) that that action being brought in respect of an alleged public right, the plaintiffs were not entitled to a decree unless they could prove special damage, and this had not been proved; and (ii) that the lower appellate Court ought to have determined the issue as to the plaintiffs' acquiescence in the building of the shed.

Mr. *Amir-ud-din*, for the plaintiffs, in both appeals.

Munshi *Kashi Prasad*, for the defendants.

#### JUDGMENT.

EDGE, C.J.—In this case the plaintiffs, whose residences adjoin or are close to the place which has been found to be a court-yard, brought their action against the defendants to obtain the removal of a building which had been erected by the defendants, and which was an obstruction to the right to use the court-yard which the plaintiffs had enjoyed. The lower Appellate Judge has found that the land in question on which this building was erected, had been left unoccupied to serve as the court-yard of the *mohulla*, and did not belong either to the plaintiffs or the defendants. The lower Appellate [437] Judge decreed the claim; and it is said now that in the decree he incorporated a decree in favour of the defendants, and on that ground the present appeal is brought by the plaintiffs. They rely upon the judgment of the Privy Council in the case of *The Official Trustee of Bengal v. Krishna Chunder Mozoomdar* (1).

In order to understand that decree it is necessary to bear in mind certain facts. It appears that on a part of the land where this building is erected, there had formerly stood a thatched building which had been used by all those persons entitled to use the court-yard of the purpose of sitting under. As I read the decree of the Court below, that portion of the decree which is complained of is not meant to be a declaration of a right in the defendants to build. The Judge merely says he decrees the claim, but qualifies his decree by saying that the decree will not operate as an interference with the rights of the parties to have a similar thatched building set up as had existed in former times. I do not think this case comes within the rule laid down by the Privy Council in the case referred to. It appears to me for that reason that this appeal of Mr. *Amir-ud-din's* clients must fail, and the decree of the Court below must be affirmed; that decree being that the court-yard must be brought back to the same condition which it was in before, and the defendants to be prevented from building a *pacca* erection. The appeal is dismissed with costs.

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In the cross-appeal, S.A. No. 433 of 1886, in which the defendants are the appellants, several points have been raised by Mr. *Kashi Prasad*. He has referred us to *Karim Baksh v. Budha* (1), *Gehanaji v. Ganpati* (2), Indian Penal Code, s. 268, the Criminal Procedure Code, s. 133 and *Uda Begam v. Imam-ud-din* (3). His first contention is that this action cannot be maintained. He contends that the obstruction complained of is an obstruction of a public right, and that the plaintiffs had not shown such special damage as would entitle them to bring their action in a Civil Court; and he relied on the fact that, under the Criminal Procedure Code, a remedy was provided for cases where a public right is interfered with. In my opinion the court-yard was a public place only in this sense, that it was the court-yard of the persons who dwelt in [433] the *mohulla*. As I read the judgment of the lower appellate Court, there was not here what is known as public right of way. It was public only with regard to the people dwelling in the *mohulla*, and for persons going to and from the houses in the *mohulla*. It appears to me that no other people had a right to go there and use it. It was more like a place over which certain persons had a right of way as appurtenant to their dwellings. There is nothing in the law to prevent a civil action being brought in respect of an interference with a private easement.

Mr. *Kashi Prasad's* other point is that there was in issue here which was not disposed of by the lower appellate Court. That was as to whether there had been acquiescence on the part of the plaintiffs so as to disentitle them from bringing the suit. I think that the law of acquiescence is very ably explained in the case of *Uda Begam v. Imam-ud-din* (3) and there I find it stated, with reference to the judgment of Lord Chancellor Cranworth and Lord Wensleydale in *Ramsden v. Dyson* (4), that "if a stranger builds on the land of another, supposing it to be his own, and the owner does not interfere, but leaves him to go on, equity considers it dishonest in the owner to remain passive, and afterwards to interfere and take the profit." So far as that passage is concerned, it is obvious that it turns upon the question as to whether or not the person building had reasonable grounds for supposing that the place was his own land. The passage continues:—"But if a stranger builds on the land of another knowingly, there is no principle of equity which prevents the owner from insisting on having back his land with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the same thing, he cannot insist on refusing to give up the estate at the end of the term. It was his own folly to build."

It appears to me that acquiescence cannot possibly arise here. It is not suggested that there was any evidence that these plaintiffs had given their actual consent to the building; and the only evidence of the acquiescence can be that they did not immediately protest. It appears to me that the defendants in creating this building must have known perfectly well that they were building [439] upon a court-yard which their neighbours had a right to use. I cannot see that there is any principle of equity as to acquiescence involved in this case. This is not a case in which we should send back an issue as to whether there was acquiescence or not. I concur with the view of the lower appellate Court, and I think that this appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing both the appeals with costs.

*Appeals dismissed.*

(1) 1 A. 249.

(2) 2 B. 469.

(3) 1 A. 82.

(4) L.R. 1 H.L. 129; 121 Jur. N.S. 506; 14 W.R. 926.

9 A. 439 = 7 A.W.N. (1887) 75.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*1887  
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CIVIL.JHUNA (*Defendant*) v. BENI RAM (*Plaintiff*).<sup>\*</sup> [24th February, 1887.]

*Sale of immoveable property—Covenant by vendor of good title—Suit and decree on a previous mortgage against purchaser—Suit by vendor to set aside mortgage and decree as fraudulent—Vendor not competent to maintain the suit—Act I of 1877 (Specific Relief Act), s. 39.*

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7 A.W.N.  
(1887) 75.

A vendor of land who had covenanted with his vendees that he had a good title, and who, after the sale, had no interest remaining in the property, brought a suit in which he claimed to set aside as fraudulent a mortgage on which the defendant had obtained a decree against the vendees, and the decree itself. He based his right to maintain the suit upon his liability under his covenant. The vendees were not parties to the suit.

*Held* that, as the defendant's mortgage had merged in his decree, the suit could only be maintained if the plaintiff could show himself entitled to have the defendant's decree set aside, and that he had shown no interest which would entitle him to maintain a suit for such a purpose.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Chief Justice.

Babu *Ratan Chand*, for the appellant.

Babu *Ram Das Chakrabati* and *Munshi Madho Prasad*, for the respondent.

## JUDGMENT.

EDGE, C. J.—In this action, the plaintiff, who had sold a shop to persons called Ram Chand and Raghubar Dial, claimed to have a mortgage on which the defendant had previously brought an action and obtained a decree against Ram Chand and Raghubar Dial, set aside, and the decree for the enforcement of lien on that mortgage against this shop also set aside, or to have the shop [440] exempted from the effect of that decree. Now, in the previous action, the plaintiff's—the present defendant's—claim was as mortgagee. In that action, his mortgage was established, and a decree was given as against the shop in question and Ram Chand and Raghubar Dial, who were in possession and apparently the owners of the shop. Before that action, the present plaintiff had sold the shop, or any interest he had in it to Ram Chand and Raghubar Dial, and he had covenanted with them that he had a good title. In the present action, to which Ram Chand and Raghubar Dial were not parties, the plaintiff claims to set aside that mortgage and the decree obtained in the previous action on the ground that the mortgage, the subject-matter of the previous action, was fraudulent and did not bind him, and on the ground that, as he was liable on his covenant, he was entitled to maintain this action.

The first Court dismissed the claim, on the ground that the plaintiff had no interest, and, for the reasons to be stated hereafter, I think the first Court was right. The lower appellate Court went into the matter and came to the conclusion that the mortgage was a fraudulent one, and that the plaintiff was entitled to maintain, under s. 39 of the Specific Relief Act, the present action.

<sup>\*</sup> Second Appeal No. 596 of 1886 from a decree of Rai Chhetra Lal, Subordinate Judge of Farakhabad, dated the 17th December, 1835, reversing the decree of Maulvi Zaki Hussain, Munsif of Farakhabad, dated the 15th April, 1884.



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7 A.W.N.

(1887) 75.

We must see how far the latter conclusion was justified. That section gives to any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument if left outstanding may cause him serious injury, a right to bring an action for the cancellation of the instrument. With regard to this, my first observation is that the instrument in question had merged in the decree, and practically this action can only be maintained if Mr. *Chakarbat*i could satisfy us that his client was entitled to have the decree, in the prior suit set aside. The present plaintiff has no interest in the property in question, he parted with all his interest before the suit, and it is admitted that the hypothecation bond cannot be enforced as against the plaintiff himself. Under these circumstances, can this action be maintained? I am clearly of opinion that the plaintiff has shown no interest which would entitle him to maintain this action. He has shown no authority for the proposition that he can question the decree which was passed in a properly instituted suit in a previous litigation, and against parties interested at the time. The conclusion I come to on this [441] point is that the plaintiff had no interest, and consequently cannot maintain his action; and in my opinion this appeal must be allowed, and the judgment of the first Court affirmed with costs.

BRODHURST, J.—I am of the same opinion.

*Appeal allowed.*

9 A. 441=7 A.W.N. (1887) 91=11 Ind. Jur. 431.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

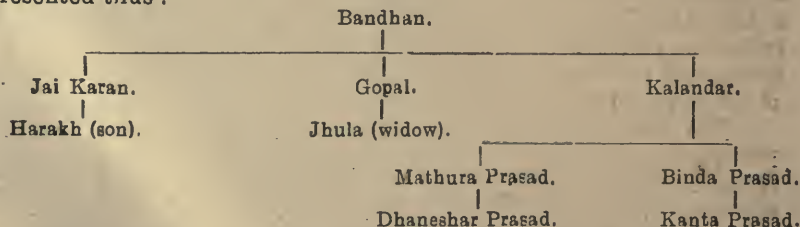
JHULA AND ANOTHER (*Defendants*) v. KANTA PRASAD AND ANOTHER (*Plaintiffs*).\* [25th February, 1887.]

*Hindu Law—Hindu widow—Alienation—Suit by reversioner to set aside alienation—Nearest reversioner—Collusion.*

The only person who can maintain a suit to have an alienation by the widow of a childless Hindu declared inoperative beyond the widow's own life interest is the nearest reversioner who, if he survived the widow, would inherit; unless it is shown or found that he refused without sufficient cause to sue, or precluded himself by his own act from suing, or colluded with the widow, in which case only can the more remote reversioners maintain such a suit. *Rani Anund Koer v. The Court of Wards* (1) and *Raghunath v. Thakuri* (2) referred to. *Ramphal Rai v. Tula Kuari* (3) and *Madan Mohan v. Puran Mal* (4), distinguished.

[R., 13 A.L.J. 196=26 Ind. Cas. 737.]

THE parties to this suit were related in a manner which may be represented thus :—



\* Second Appeal No. 521 of 1886 from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 8th February, 1886, modifying a decree of Babu Ishri Prasad, Subordinate Judge of Mirzapur, dated the 3rd September, 1885.

(1) 8 I.A. 14.

(2) 4 A. 16.

(3) 6 A. 116.

(4) 6 A. 298.

On the 29th January, 1885, Jhula, the widow of Gopal, a childless Hindu, between whom and the other members of his family a partition had been effected, executed a deed of gift of certain moveable and immoveable property left by her husband, and in her possession as his widow, in favour of Harakh. The present suit was brought by Kanta Prasad and Dhaneshwar Prasad as reversioners for a declaration that the gift was inoperative, so far as concerned their interest in the property, on the ground that the donor, as a Hindu [442] widow, had no power to alienate the estate, or to deal with more than her own life interest therein. The defendants Jhula and Harakh pleaded that the plaintiffs were not competent to maintain the suit in the life-time of Jai Karan, who was the nearest reversionary heir, and who was not a party to the suit.

The Court of first instance allowed the claim in part, on grounds which it stated as follows:—"It is evident that Jai Karan the father of the defendant No. 2 is in collusion with the Mussamat, and he did not object to the deed of gift. Under these circumstances, according to *Ramphal Rai v. Tula Kuari* (1), the plaintiffs, who are reversioners, are entitled to claim the cancellation of the deed of gift. The point to be considered is, to what extent should the deed be cancelled, and in respect of what property? The deed conveys immoveable property, such as zamindari rights, and also moveable property, such as bullocks and buffaloes. After a careful consideration of the merits of the case, and the precedents, and the Hindu law, I am of opinion that the deed of gift cannot be cancelled so far as it relates to the moveable property, which the Mussamat had every right to deal with. As regards the immoveable property, the Mussamat could alienate only her life interest in it, and so the transferee would remain in possession of the immoveable property during the life-time of the Mussamat. At her death the property will be inherited by the rightful heirs who may then be in existence. In support of this view, I refer to *Madan Mohan v. Pura Mal* (2)."

The Court passed the following decree:—"That the deed of gift, so far as it purports to convey an absolute right to the two annas eight pies zamindari, be declared void. The donor's life-interest only has passed to the vendee, without any prejudice to the reversionary rights and interests which the defendants might prove. The claim with regard to the moveable property is dismissed. As a part of the claim is decreed and a part of it is dismissed, each party will bear his own costs."

From this decree the plaintiffs appealed to the District Judge of Mirzapur, on the ground that the Court was in error in holding the deed of gift to be valid in regard to the moveable property which it purported to convey. The defendants filed objections to the decree [443] under s. 561 of the Civil Procedure Code, to the effect that the Court was in error in holding that the plaintiffs were competent to maintain the suit in the life-time of the nearest reversioner Jai Karan, and that there was no proof of collusion between Jai Karan and the donor.

The District Judge gave judgment to the following effect:—"In my opinion the Full Bench ruling quoted by the Subordinate Judge—*Ramphal Rai v. Tula Kuari* (1) permits any reversioners to set aside an alienation effected by a Hindu widow beyond her life estate. The other objection of the defendants-respondents, that Jai Karan the next reversioner was not in collusion with the donor does not affect the facts. Accordingly, I dismiss the defendants' objections. As regards the

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9 A. 441-

7 A. W.N.

(1887) 91-

11 Ind. Jur.

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9 A. 441—  
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(1887) 91—  
11 Ind. Jur.  
431.

plaintiffs' ground of appeal, the question is whether a Hindu widow has a larger disposing power over moveable property than she has over immoveable property. Mayne (*Hindu Law and Usage*, ed. 1883, 553) says: 'It is now finally settled, as regards cases governed by the law of Bengal and Benares that there is no difference, and that the same restrictions apply in each case.' In accordance with this opinion, I find that the deed of gift should be set aside *in toto*, as well in respect of moveable as in respect of immoveable property, so far as it exceeds the life interest of the donor, defendant-respondent No. 1, and that the plaintiffs-appellants are entitled to all their costs from both defendants. Accordingly I extend the decree of the Subordinate Judge so as to set aside the deed of gift entirely so far as it exceeds the life interest of the donor Mussamat Jhula, defendant-respondent No. 1. The defendants-respondents will pay their own costs in both Courts, and pay all the plaintiffs-appellants' costs in both Courts."

The defendants appealed to the High Court.

The Hon. T. Conlan and the Hon. Pandit Ajudia Nath, for the appellants.

Mr. Abdul Majid, for the respondents.

#### JUDGMENT.

EDGE, C.J.—In this action the plaintiffs sue for a declaration that a deed of gift made by the widow of one Gopal, their paternal grand-uncle, in favour of a nephew of Gopal should be declared not to be binding upon their interest in the property. It appears that [444] the donee Harakh is the son of one Jai Karan, a brother of Gopal, who was alive at the commencement of the action, and is still alive, and who was not made a party to the action. The Judge in the first Court held that Jai Karan colluded with the widow, and decreed the relief asked for in the action. On appeal, the Judge of Mirzapur, putting, in my opinion, a wrong interpretation upon the Full Bench ruling in the case of *Ramphal Rai v. Tula Kuari* (1) came to the conclusion that it was not necessary to consider whether Jai Karan was in fact in collusion with the widow, and decided in favour of the plaintiffs without considering the question whether Jai Karan was in collusion or not. It appears to me that, inasmuch as Jai Karan was the presumptive heir, as I may say of this property—at any rate the nearest person who, if he survived the widow, would inherit—he was the person to bring this action, unless it was shown or found that he refused without sufficient cause to sue, or had precluded himself by his own act from suing, or had colluded with the widow: and, unless that was shown, the present plaintiffs, who were not the nearest heirs, could not maintain this action. I think that proposition of law is fully supported by the Full Bench ruling to which I have referred, and by the judgment of the Privy Council in the case of *Rani Anund Koer v. The Court of Wards* (2), and by the judgment of this Court in the case of *Raghunath v. Thakuri* (3). Mr. Abdul Majid has referred to another case as an authority in his favour—*Madan Mohan v. Puran Mal* (4). It appears to me that that case does not support the contention of Mr. Abdul Majid at all. That was an action brought by the donee to establish his right. In that case, as appears from the report, the widow had made a gift with the consent of the next presumptive heir. I think it was very rightly held in that case that the defendant, who disputed the gift, was entitled to do so under the circumstances of the case. I am of opinion

(1) 6 A. 116.

(2) 8 I.A. 14.

(3) 4 A. 16.

(4) 6 A. 288.

that this case must be remanded in order that the Judge may find on the issues which are material in the case, and to which I have referred. Ten days will be allowed for objections.

BRODHURST, J.—I concur in the order of remand proposed by the learned Chief Justice.

*Cause remanded.*

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9 A. 445=7 A.W.N. (1887) 76.

[446] APPELLATE CIVIL.

*Before Mr. Justice Straight.*

9 A. 441-  
7 A.W.N.  
(1887) 91-  
11 Ind. Jur.  
431.

TOTA RAM AND ANOTHER (*Defendants*) v. ISHUR DAS AND  
OTHERS (*Plaintiffs*).\* [26th February, 1887.]

*Jurisdiction—Civil and Revenue Courts—Partition of mahal—Order for partition by Assistant Collector confirmed by Collector—Objection subsequently made to mode of partition—Question of title—Act XIX of 1873 (N. W. P. Land Revenue Act), s. 113.*

Upon an application made under s. 108 of the N. W. P. Land Revenue Act (XIX of 1873), for partition of a share in a mahal, no question of title or proprietary right of the nature contemplated by s. 113 was raised, nor any serious objection made by any of the co-sharers, and the Assistant Collector recorded a proceeding setting forth the rules which were to govern the partition, and this proceeding was confirmed by the Collector under s. 131. An Amin was ordered to carry out the partition, and, in taking steps to do so, stated the principle upon which he proposed to distribute the common land. An objection was then for the first time raised by two of the co-sharers in the Court of the Assistant Collector to the inclusion of a particular piece of land in the partition, on the ground that it appertained exclusively to their share. This objection was disallowed by the Assistant Collector, and on appeal, by the District Judge.

*Held* that, at the state of the proceedings when objections were taken, it was too late to determine questions of title under s. 113 of the Act; that accordingly the Assistant Collector could not be said to have done so; that the objections could therefore only be regarded in the light of objections to the mode in which it was proposed to make the partition; and that consequently there was no appeal from the order of the Assistant Collector to the District Judge, or from the District Judge to the High Court.

THE facts of this case were as follows:—On the 22nd March, 1883, the respondents filed a petition in the Court of the first class Assistant Collector of Aligarh for partition of a share in mauza Gonhara in which they, together with the appellants and others, were co-sharers. This petition was presented in accordance with s. 108 of the N. W. P. Land Revenue Act (XIX of 1873), and the notification was duly issued in the manner prescribed by s. 111, and notice served on all the recorded co-sharers. No serious objection was made by the appellants to the partition, and no question of title or proprietary right was raised of the nature contemplated by s. 113 of the Land Revenue Act, nor was any proceeding of the kind mentioned in that section taken. Accordingly the Assistant Collector proceeded to determine the question whether a [446] partition should or should not be ordered. He recorded a proceeding, setting forth the rules which were to govern the partition, and which, he intimated, be approved; and subsequently his proceeding and sanction were confirmed

\* Second Appeal No. 343 of 1886 from a decree of W. T. Martin, Esq., District Judge of Aligarh, dated the 7th September, 1885, confirming a decree of Maulvi Muhammad Karim Khan, Assistant Collector of Aligarh, dated the 3rd October, 1884.



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7 A.W.N.  
(1887) 76.

by the Collector, under s. 131 of the Act. All that remained was for the Assistant Collector himself or some person duly empowered by him to give practical effect to that proceeding by distributing the lands of the mauza in the manner therein directed. An Amin was ordered to carry out the partition, and, in taking steps to do so, intimated that he proposed to follow the condition of things recorded in the *khewat* so far as concerned the distribution of the *shamilat* lands. Upon this, the appellants raised two objections in the Court of the Assistant Collector. The first objection was that a five-biswas share in the mauza which was in the possession of a co-sharer named Ishur Das under a mortgage, and the equity of redemption of which the appellants had purchased, should not be included in the same mahal as the shares held by Ishur Das in his own right, but made a separate mahal. The second objection was that the *abadi* of a certain hamlet appertained exclusively to the appellants' five-biswas share, and ought not to be partitioned among the co-sharers of the mauza generally.

The Court of first instance allowed the first, but rejected the second, of these objections. The appellants appealed to the District Judge of Aligarh, who confirmed the first Court's decree. The appellants preferred a second appeal to the High Court.

Babu *Ratan Chand*, for the appellants.

Mr. *A. Carapiet*, for the respondents.

#### JUDGMENT.

STRAIGHT, J., (after stating the facts as above, continued):—I need scarcely say, and indeed it was admitted by the vakil for the appellant, that unless the power of appeal is conferred in terms by the statute, no such power exists. And therefore if, within the four corners of the Revenue Act, power is not conferred on the parties to go in appeal to the District Judge and from his decision to this Court, there is no appeal. It cannot be contended that the objections which have now been taken by the appellants were taken at a stage of the Revenue Court proceedings in the matter of partition which would have made s. 113 applicable. As the [447] objections were not taken until after the scheme of partition had been approved by the Assistant Collector and confirmed by the Collector of the District, consequently they can only be regarded in the light of objections to the mode in which it was proposed to make the partition. And if these objections were to the *form* of partition, an appeal would undoubtedly have lain to the Commissioner. As I have already said, and desire to emphasize, at the stage of the proceedings when objections were taken, it was too late to determine questions of title. Accordingly the Assistant Collector cannot be said to have done so; and if the proprietary rights of the appellants have been interfered with, the Civil Court is open to them. The result of these observations is, that there was no appeal from the order of the Assistant Collector to the District Judge; and it necessarily follows, therefore, that no appeal lies to me from the order of the District Judge. The appeal is dismissed with costs.

*Appeal dismissed.*

9 A. 447 = 7 A.W.N. (1887) 89.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*HAR NARAIN SINGH (*Plaintiff*) v. KHARAG SINGH AND ANOTHER (*Defendants*).\* [3rd March, 1887.]

*Appeal—Death of plaintiff respondent during pendency of appeal—Application by defendant appellant for substitution of deceased's legal representative—Application by third person claiming to be such representative and to be substituted as respondent—Civil Procedure Code, s. 32—"Questions involved in the suit"—Civil Procedure Code, ss. 365, 367, 368, 682—Unappealed miscellaneous order set aside on appeal from decree—Civil Procedure Code, s. 591.*

The "questions involved in the suit" referred to in the second paragraph of s. 32 of the Civil Procedure Code, are questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or co-plaintiffs *inter se*. The section does not apply to questions which are not involved in the suit but crop up incidentally during the pendency of an appeal, such as the question whether one person or another is the legal representative of a deceased plaintiff-respondent.

S. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. *Goglee Sahoo v. Prem-lall Sahoo* (1), referred to.

[448] During the pendency of an appeal, the plaintiff-respondent died, and, on the application of the appellant, the name of *H* was entered on the record as respondent in the place of the deceased. Subsequently *K* applied to be substituted as respondent, alleging that he and not *H* was the legal representative of the plaintiff. The Court passed an order making *K* a joint respondent with *H*. To this *H* objected, but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents.

*Held* that s. 32 of the Civil Procedure Code did not apply to the case so as to authorize the Court below to add *K* as a respondent; that the only other section under which he might possibly have been brought was s. 365; that even assuming s. 365 to apply to such a case, the Court had no power to make *K* a respondent jointly with *H*, but should have taken one or the other of the courses specified in s. 367, so as to determine who was the legal representative of the deceased plaintiff; and that the course adopted by the Court was an exceedingly inconvenient one which ought not to have been taken even if the Court had power under the Code to take it.

*Held* also that, on appeal from the decree of the Court below, *H* was entitled to object to the order adding *K* as a respondent, though he had not appealed from the order itself.

[R., 118 P.R. 1890; 10 A. 223; 12 A. 510; 14 B. 232; 15 B. 145; U.B.R. (1897—1901) 310; D., 12 A. 200.]

THIS was a suit to recover Rs.168-6-9 as lambardari dues and arrears of Government revenue, under s. 93 (g) of the N.-W.P. Rent Act (XII of 1881). The facts of the case are stated in the judgment of Edge, C.J. Besides the authorities referred to in the judgment, the cases of *Lakshmibai v. Balkrishna* (2) and *Naraini Kuar v. Durjan Kuar* (3), were cited during the argument.

\* Second Appeal No. 1331 of 1885, from a decree of W. T. Martin, Esq., District Judge of Aligarh, dated the 29th May, 1885, confirming a decree of Babhu Narain Singh, Assistant Collector of Koel, dated the 23rd June, 1881.

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Pandit *Sundar Lal*, for the appellants.  
Munshi *Ram Prasad*, for the respondents.

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## JUDGMENT.

9 A. 447 =  
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EDGE, C.J.—In this case Rani Sahib Kuar, the widow of one Rajah Gobind Singh, brought an action against Badri Prasad to recover money alleged to be due by the defendant. Rani Sahib Kuar succeeded in the suit in the Collector's Court, her suit having been dismissed in the second class Assistant Collector's Court. From the decree in the Collector's Court, the defendant appealed to the District Judge, and, pending that appeal, Rani Sahib Kuar died some time prior to the 11th September, 1883. On the 11th September, 1883, Rajah Har Narain, the appellant here, was added to the record as respondent in that appeal in the place of the Rani Sahib Kuar, on the application of the defendant, who alleged that Rajah Har Narain was the adopted son of Rajah Gobind Singh, the [449] husband of Rani Sahib Kuar, and the legal representative of the deceased plaintiff.

On the 6th of December following, Kharag Singh, one of the respondents here, made an application to the Judge, alleging that he was the heir of Rajah Gobind Singh, and that the adoption of Rajah Har Narain was informal, and asked to be substituted for Rajah Har Narain. On the 15th January, 1884, the Judge passed an order by which he made Kharag Singh a joint respondent with Rajah Har Narain. Rajah Har Narain objected to Kharag Singh being made a joint respondent with him, but, however, he preferred no appeal from that order of the Judge, dated the 15th January, 1884.

The appeal proceeded, with the result that the District Judge dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the then two respondents on the record, Rajah Har Narain and Kharag Singh. From that decision one of those respondents, Rajah Har Narain, has brought this appeal, making the other respondent Kharag Singh and Badri Prasad, respondents in this appeal. He alleges that the Judge had no authority to make Kharag Singh a respondent in this case.

The first thing to be observed is that Rajah Har Narain was a respondent, who, if s. 368 of the Civil Procedure Code applies to this case, had been properly made a respondent. It is said that s. 368 was the section under which he was appointed, because by s. 582 of the Civil Procedure Code, the procedure laid down in s. 368 is made applicable to cases in appeal. It is contended on behalf of Kharag Singh, who is the only one of the respondents represented here by counsel, that there was power to appoint him under s. 32 of the Civil Procedure Code.

Now, when we look to s. 32, we find that the second paragraph of that section only applies, so far as the adding of a plaintiff or defendant is concerned, to cases where the adding of the person will enable "the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." I do not think there can be any doubt that all the questions above referred to must be questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or between [450] co-plaintiffs *inter se*. What then was the question that was involved here between the plaintiff and the defendant? The only question was whether, at the time of the institution of the suit, Rani Sahib Kuar was in a position to maintain this action. It so happened that she died pending the appeal, but still the cause of action was not whether one person or another was the legal representative of Rajah

Gobind Singh, but whether she had established a good cause of action against Badri Prasad, so that the dispute between these two parties, Rajah Har Narain and Kharag Singh, is not, in my opinion, a question which is involved in this suit. It is a question which has cropped up incidentally during the pendency of the appeal. For that reason I think that s. 32 does not apply to this case. Kharag Singh was not brought in under s. 368 of the Civil Procedure Code, nor, under s. 32 of the Code, in my opinion, was there any power to add him as a respondent. The only section under which he might possibly have been brought in is s. 365 of the Code. It is contended by Mr. *Sundar Lal* on behalf of the appellant that s. 365 does not apply, as it is not incorporated by reference in s. 582. That is, that s. 365 only applies to an actual plaintiff as plaintiff, and not to an appellant or respondent. That is a point which I do not want to decide. It appears to me that if s. 365 does apply to a case like this, still the Judge below had no power to do what he has done in this case. If that section applies, it was necessary for the Judge in that event, there being a dispute as to who was the legal representative of the deceased, to adopt one or other of the courses specified in s. 367. He ought either to have stayed the appeal until the fact as to who was the legal representative of Rani Sahib Kuar had been determined in another suit, or he ought to have decided at or before the hearing of the appeal as to who should be admitted to be such legal representative for the purpose of prosecuting the suit. The Judge adopted neither of these courses. He did not decide who was the legal representative. Moreover, Kharag Singh, if he made his application under s. 365 of the Code, was clearly beyond time by twenty-six days, as Rani Sahib Kuar died prior to the 11th September, 1883, and Kharag Singh did not make his application till the 6th December, when the sixty days required by art. 171 of the second schedule of the Limitation Act had already expired.

[451] It appears to me that in this particular case the Judge has adopted a procedure which is not contemplated or provided for by any section of the Code to which my attention has been drawn. If, however, the Judge had any such power under the Code, the course which he took was an exceedingly inconvenient course, and one which he ought not to have taken; because it will leave this case in this position, that, if on appeal the decision of the Court below was affirmed, Kharag Singh would practically be in a position to make useless any decree which might be passed on appeal. The decree being a joint one in favour of Raja Har Narain and Kharag Singh, neither of them could under s. 231 of the Code take out execution separately, unless he applied for the execution of the whole decree for the benefit of both. It may be assumed from the position taken up by Kharag Singh that he will not be a consenting party to Raja Har Narain's obtaining execution in his own favour; and Raja Har Narain, to be consistent with his position, will not apply for execution on behalf of himself and Kharag Singh. I think, therefore, that even if the Judge had authority to make the order of the 15th January, 1884, he ought not to have made any such order.

It is contended that this is a matter which we cannot deal with in this appeal; that there ought to have been an appeal against the order of the 15th January. I think that point is made quite plain by s. 591 of the Code of Civil Procedure, which enables this Court when dealing with an appeal from a decree to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case. The Court must have such power,

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7 A.W.N.  
(1887) 89.

because s. 591 provides that an objection to such order may be made a ground of objection in the memorandum of appeal. I think that this point has also been decided by the case of *Googlee Sahoo v. Premall Sahoo* (1).

Under these circumstances I am of opinion that this order of the 15th January ought not to have been made, and I fail to see what power the District Judge had to make the order; and I think it is one which, if allowed to stand, will create great inconvenience and possibly make any decree obtained by the representative of Rani Sahib Kuar inoperative. Therefore this appeal, so far as [452] that point is concerned, should be allowed, and the decree of the Court below will be put right by setting aside the order of the 15th January, 1884, and dismissing Kharag Singh from this appeal. I think this appeal ought to be allowed with costs against Kharag Singh. As Badri Prasad has not appeared to contest this appeal, so far as he is concerned, each party will bear his own costs. This decision does not affect the rights of the parties in the other cases.

BRODHURST, J.—I concur in the opinion expressed by the learned Chief Justice, and in decreeing the appeal with costs against Kharag Singh.

*Appeal allowed.*

9 A. 452 = 7 A.W.N. (1887) 111 = 11 Ind. Jur. 467.

### CRIMINAL REVISIONAL.

*Before Mr. Justice Mahmood.*

QUEEN-EMPRESS v. ABDUL KADIR AND ANOTHER. [15th July, 1886.]

*Security for keeping the peace—Criminal Procedure Code, ss. 107, 112, 117, 118, 239—“Show cause”—Burden of proof—Joint inquiry—Opposing factions dealt with in one proceeding—Nature and quantum of evidence necessary before passing order for security.*

Upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified, to insist that his case shall be tried separately from the cases of other persons similarly circumstanced.

Where an order has been passed under s. 107 of the Criminal Procedure Code requiring more persons than one to show cause why they should not severally furnish security for keeping the peace, the provisions of s. 239 read with s. 117 are applicable, subject to such modifications as the latter section indicates, and to such procedure as the exigencies of each individual case may render advisable in the interest of justice. A joint inquiry in the case of such persons is therefore not *ipso facto* illegal; and even in cases where one and the same proceeding taken by the Magistrate under ss. 107, 112, 117 and 118 improperly deals with more persons than one, the matter must be considered upon the individual merits of the particular case, and would at most amount to an irregularity which, according to the particular circumstances, might or might not be covered by the provisions of s. 537. *Queen-Empress v. Nathu* (2), and *Empress v. Batuk* (3) referred to.

An order passed by a Magistrate under ss. 107 and 112 of the Criminal Procedure Code, requiring any person to “show cause” why he should not be [453] ordered to furnish security for keeping the peace, is not in the nature of a rule nisi implying that the burden of proving innocence is upon such person. The onus of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security. *Dunnee v. Hem Chandra Chowdhry* (4), and *Queen v. Nirunjum Singh* (5) referred to.

(1) 7 O. 148.

(4) 4 B.L.R. (F.B.) 46.

(2) 6 A. 214.

(3) A.W.N. (1884) 54.

(5) N.-W.P.H.C.R. (1870) 431.

Where, according to the information received by the Magistrate, there were two opposing parties inclined to commit a breach of the peace,—*held*, applying by analogy the principles relating to the trial of members of opposing factions engaged in a riot, that the Magistrate acted irregularly in taking steps against both parties jointly, and in holding the inquiry in a single proceeding. Such a procedure is not *inso facto* null and void, but only where the accused have been prejudiced by it. *Empress v. Lochan* (1), and *Hossein Buksh v. The Empress* (2) referred to.

In proceedings instituted under s. 107 of the Criminal Procedure Code against more persons than one, it is essential for the prosecution to establish what each individual implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. In holding such an inquiry it is improper to treat what is evidence against one of such persons as evidence against all, without discriminating between the cases of the various persons implicated. *Queen-Empress v. Nathu* (3) referred to.

Although in an inquiry under s. 117, the nature or *quantum* of evidence need not be so conclusive as is necessary in trials for offences, the Magistrate should not proceed purely upon an apprehension of a breach of the peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated which would lead to the conclusion that an order for furnishing security is necessary. What the nature of the facts should be depends upon the circumstances of each case, but, where the nature of the Magistrate's information requires it, overt acts must be proved before an order under s. 118 can be made, and such an order cannot be passed against any person simply on the ground that another is likely to commit a breach of the peace. *Queen v. Abdol Huq* (4), *Goshin Luchmun Pershad Pooree v. Pohopp Narain Pooree* (5), *Rajah Run Bahadoor Singh v. Ranee Tillessuree Koer* (6), and in the matter of *Kashi Chunder Doss* (7) referred to.

[R., 16 Cr. L. J. 46=26 Ind. Cas. 638; 16 Cr. L. J. 235=27 Ind. Cas. 907=8 S. L. R. 207; Rat. Un. Cr. C. 557; 3 L.B.R. 52 (53); 12 A.L.J. 1246; A.W.N. (1895) 241; U.B.R. (1897—1901) 16 (18); F., 8 C.W.N. 180 (183).]

THE facts of this case are stated in the judgment of Mahmood, J.

Mr. W. M. Colvin, for the petitioners.

The Public Prosecutor (Mr. C. H. Hill), for the Crown.

### JUDGMENT.

MAHMOOD, J.—This case has been argued before me at considerable length by Mr. Colvin on behalf of the petitioners, and by the learned Public Prosecutor on behalf of the Crown. The case [454] is one in which the interference of this Court is prayed for in revision under s. 439 of the Criminal Procedure Code.

The facts of the case may be briefly stated to be that, on account of some question relating to the killing of cattle, the police, being under an apprehension of breach of the peace, made a report to the Magistrate, to the effect that certain persons, both Hindus and Muhammadans, should be called upon to give security for keeping the peace, in accordance with the provisions of s. 107 of the Criminal Procedure Code. The report appears to have been made on the 24th October, 1885, and it contains the names of fifteen Hindus and an equal number of Muhammadans as the persons who were likely to commit breach of the peace and were the leaders of the two opposite factions in the town of Ghosi in the district of Azamgarh. Upon receiving the information contained in the report, the Magistrate who had to deal with the case passed an order in the following terms:—

"Whereas, from perusal of the record of the local inquiry conducted by Ahmad Hosain, D.C., into certain points of dispute between the Hindu

(1) A.W.N. (1881) 28.

(3) 6 O. 96.

(5) 6 A. 214.

(4) 20 W.R. Cr. 57

(5) 24 W.R. Cr. 30.

(6) 22 W.R. Cr. 79.

(7) 10 B.L.R. 441=19 W.R. Cr. 47.

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and Muhammadan communities of Ghosi regarding the right to kill cows, claimed by the Muhammadans and opposed by the Hindus, and to celebrate the Ram Lila festival, claimed by the Hindus and opposed by the Muhammadans, and also from perusal of the report made by Chotey Khan, Sub-Inspector of Ghosi, dated 24th October, it seems probable that a breach of the peace will occur between parties of both denominations named in the said report,—order is hereby passed for issue of summons, under s. 107 of the Criminal Procedure Code, directing each of the parties enumerated in the said report to appear on the 4th proximo and show cause why they should not execute a bond in a sum of Rs. 300, and find two sureties, each in a sum of Rs. 100, to keep the peace for one year."

The order, which is dated the 26th October, 1885, appears to have been duly obeyed, and the fifteen Hindus and the fifteen Muhammadans appeared before the Magistrate to show cause accordingly. Although these parties were represented as belonging to one or the other of the two opposite factions, all the thirty persons were tried together, the same evidence being taken against them [455] all, and their cases being disposed of by one and the same order, which runs as follows:—

"Having due regard to the condition and means of each of the defendants, I direct, under the provisions of s. 118 of the Criminal Procedure Code, that the defendants, (1) Abdul Kadir, (2) Muhammad Nasir, (3) Muhammad Latif, (4) Daokinandan Lal, (5) Koleshar Lal and (6) Har Prasad, do furnish each a bond in a sum of Rs. 300 and two sureties, each in a sum Rs. 150, to keep the peace for one year. I direct that (7) Ghulam Imam, (8) Malik Ali Abbas, (9) Hafiz Kuddoos, (10) Danial, (11) Shere Ali Khan, (12) Ghura Khan, (13) Wazir Khan, (14) Musharraf Husain Khan, (15) Muhammad Raza Khan, (16) Makdum Baksh *alias* Mukhi, (17) Hurri Khan, (18) Lal Muhammad, (19) Bishan Pande, (20) Sheoratan, (21) Gokal, (22) Kailowan, (23) Sheoambar, (24) Hansraj, (25) Naik, (26) Chedi, (27) Sukhhasi, (28) Bikram Rai, (29) Ram Raj Rai and (30) Partab Ra, do each furnish a bond, without sureties, in a sum of Rs. 300, to keep the peace for one year. Any of the defendants failing to comply with the terms of the above order will undergo a term of simple imprisonment for one year under s. 123 of the Criminal Procedure Code."

Of these thirty persons, only Abul Kadir and Muhammad Nasir have applied to this Court for the exercise of its revisional jurisdiction on their behalf; but when the case came up before me for the first time on the 25th ultimo, I intimated to the learned Public Prosecutor that, under the circumstances of this case, I could not regard the case of the petitioners put before me by Mr. *Colvin* as distinguishable in principle from that of the other twenty-eight persons to whom the Magistrate's order related: and in view of the fact that some important questions of law were involved, I, at the request of the Public Prosecutor and with the consent of Mr. *Colvin*, postponed the case; and I have heard the arguments yesterday, both on behalf of the petitioners represented by Mr. *Colvin*, and on behalf of the Crown represented by the learned Public Prosecutor, Mr. *Hill*.

The first point of law which has been argued before me is, whether the joint trial of all these persons was illegal. Mr. *Colvin* has rightly argued that the trial cannot be regarded as one for [456] an offence, because the very nature of the powers conferred by part IV of the Criminal Procedure Code upon Magistrates relates to the *prevention* of offences, and therefore proceedings initiated under s. 107, and inquired into under s. 117 of the Code, stand upon a footing of their own, which is

distinguishable from that of trials for offences, for which the Code has provided specific rules. The first part of this contention seems to me to be perfectly sound, and I may say at once that the matter is settled by the *ratio decidendi* in *Queen-Empress v. Kandhaia* (1), where I concurred with Duthoit, J., in holding that a person called upon to furnish security for keeping the peace or good behaviour cannot be regarded as a person charged with any offence, and cannot be dealt with as an offender. I do not feel inclined to depart from the view in which I concurred in that case, and the learned Public Prosecutor has indeed conceded that the present case cannot be regarded as a trial for an offence. But then he argues that the Code itself furnishes authority for the joint trial of persons against whom the Magistrate takes proceedings under s. 107 and s. 112 of the Code. The learned Public Prosecutor relies upon s. 117 of the Code, which, after laying down that "the Magistrate shall proceed to inquire into the truth of the information upon which he has acted, and to take such further evidence as may appear necessary," goes on to say "such inquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials in summons-cases." Mr. Hill then contends further that s. 239 of the Code is applicable to summons-cases, being a general rule applicable to all classes of cases, and authorises a joint trial or rather inquiry in cases such as the present.

I confess I have had some doubt and difficulty in dealing with this part of the argument in the case, the more so, as the exact point is one upon which the case-law is practically silent, though here, and there *dicta* of learned Judges are to be found, indicating the tendency of their views upon the subject. The right of Her Majesty's subjects in India to liberty and freedom may be said to be founded upon almost as stable and constitutional a basis as the right of Her Majesty's subjects in England or any other part of [457] the vast empire of Britain. And if this is so, it is a matter of no small consequence to decide whether persons who have not transgressed the law should, simply because the Magistrate (to use the words of s. 107) "receives information that any person is likely to commit a breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace," be placed for purposes of inquiry into the truth of the information, under exactly the same rules as those which regulate the trial of actual offenders and criminals. Further, it seems to me clear upon general principles, that each individual member of the community is, in the absence of exceptional authority conferred by the law to the contrary effect, entitled, when required by the judiciary either to forfeit his liberty or to have that liberty qualified, to insist that his case shall be separately tried. In the eye of the law, each individual citizen is a separate integer or unit of the common wealth, and his rights of liberty cannot, without express authority in the law, be dealt with jointly with those of a crowd of other persons with whom, far from having a community of interests, he may have incompatibility of interests in matters of a nature such as this case presents.

That these general principles are not ignored by our Criminal Procedure Code, is obvious to my mind from the very s. 239 on which the learned Public Prosecutor has relied; for it is only "when more persons than one are accused of the same offence, or of different offences, committed in the same transaction, or when one person is accused of

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committing any offence, and another of abetment of, or attempt to commit, such offence, they may be charged and tried together;" and the section goes on to say that, even under such conditions, the Court possesses the discretion to try each person separately. In this case, as I have already shown, there is no "*offence*," and the question resolves itself into the interpretation of the provision of s. 117, to the effect that, in such cases, "the inquiry shall be made *as nearly as may be practicable*.....in the manner hereinafter prescribed for conducting trials in summons-cases." And this, indeed, is the provision of the law upon which the learned Public Prosecutor has relied for applying s. 239 to the present case. The phrase "*as nearly as may be practicable*" seems to me to be almost stronger than the phrases "*as far as may be*" and [458] "*mutatis mutandis*," which frequently occur in our codified statute law.

Such being my interpretation of the language of the Legislature in s. 117 of the Code, I am not prepared, notwithstanding the considerations which I have already stated, to hold that the joint trial or inquiry held in this case was illegal, and, as such, null and void, by the simple fact that more persons than one were dealt with by the Magistrate in one and the same proceeding. The Madras High Court, as stated in a note in Messrs. Agnew and Henderson's edition of the Code (p. 70), appears to have laid down the rule that "separate proceedings should be taken against each person ordered to find security, unless it is clear that there is such a connection between the parties as indicates the necessity of a contrary course." And this seems to be the whole scope of the *dicta* to be found in the judgments of Straight, J., in some of the reported cases. The strongest case is *Queen-Empress v. Nathu* (1) in which no less than sixty-nine different persons were dealt with by the Magistrate in a single proceeding, and his action was denominated by Straight, J., not as an illegality or nullity, but as creating an "*obvious inconvenience*." Then after dealing with some of the circumstances of that case, the learned Judge went on to say:—

"Every person to whom a summons is issued calling on him to show cause why he should not find security, is entitled to proper information as to the materials upon which process has been granted against him, and to a reasonable interval within which to prepare himself to meet such information by evidence or otherwise, as the matter may require. Moreover, his case should be considered by itself and on its own merits, and, except in rare instances, it should not be mixed up with, and should never be prejudiced by, that of other persons."

Now, if these observations are to be understood as laying down the general rule that a joint inquiry of this nature in which mere persons than one are concerned, when held by the Magistrate in one and the same proceeding is, *ipso facto*, null and void, I must say that I should have felt inclined in the absence of express words in the Code, to adopt the rule out of the high respect which every [459] exposition of the law by Straight, J., upon matters affecting the rights and liberties of the people, commands from me. But I do not understand that learned Judge to have laid down any such general rule, and indeed his judgment, in setting aside the order of the Magistrate, did not proceed upon any ground of illegality or nullity, as distinguished from irregularity, under the circumstances of that case. Similar conclusions are derivable from the observations of the same learned Judge in other cases, and are consistent with the view taken by Oldfield, J., in *Empress v. Batuk* (2) where one and the

same proceeding dealt with more than one person, and the procedure was regarded only as an irregularity under the circumstances of that case.

I am not prepared to go beyond the rule laid down in these cases, and I hold that the provisions of s. 239 of the Criminal Procedure Code, read with s. 117, are applicable to cases such as the present, subject to such modifications as the latter section indicates, and subject also to such procedure as the exigencies of each individual case may render advisable in the interests of justice. Further, I hold that even in cases where one and the same proceeding taken by the Magistrate under ss. 107, 112, 117 and 118, improperly deals with more than one person, the matter must be considered upon the individual merits of that particular case, and it would, at its best, amount to an irregularity, which may or may not be covered by the somewhat broadly worded provisions of s. 537 of the Code, according to the circumstances of each case.

Now the next question which the argument of the learned Public Prosecutor has raised is also one of principle, and almost as important as the one which I have just disposed of, though it presents to my mind no difficulty. He contended that inasmuch as, in proceedings initiated by the Magistrate under s. 107 of the Code, consistently with the following two or three cognate sections, the Magistrate is authorised to require any person to "*show cause*" against the order made under s. 112, such an order must be regarded as in the nature of a rule *nisi*, and as such implying that the burden of proving innocence in such cases would be upon the person against whom such an order has been issued. I am wholly unable to accept this contention, nor am I able to understand the [460] English phrase "*to show cause*" as implying that the Legislature intended that all the fundamental principles of jurisprudence in connection with criminal cases, should, by dint of such an ambiguous phrase, be reversed. It is not for him who is free and who has not transgressed the law to show why he should remain free and why his freedom should not be qualified: it is for him who wishes to take away that freedom or wishes to qualify it, to establish circumstances which, by the force of law, would operate either in defeasance of, or in derogation of, that freedom. Such has been the rule of the criminal law of all civilized nations, pre-eminently of the English people: and words of the most undoubted and express import are required before I can be convinced that the British rule, in legislating for the Indian people, intended to alter a principle of criminal law which it may be presumed to have brought with it from England, and which, indeed, it found in full force extant in India itself as a doctrine of the Muhammadan criminal law, which constituted the common law of the land at the advent of the British rule, and which, till comparatively recent times, was maintained as almost the only available guide in criminal cases.

The view which I have thus expressed on general principles is supported by no less eminent an authority than Sir Barnes Peacock, Chief Justice of Bengal, to whom we in India are so much indebted, not only for the introduction of important principles of jurisprudence into our case-law, but also for a great deal of beneficial legislation. In the case of *Dunnee v. Hem Chandra Chowdhry* (1), which was considered by a Full Bench of the Calcutta High Court along with another cognate case, *Peacock, C.J.*, with the concurrence of all the learned Judges, with the exception of Glover, J., laid down that the *onus probandi* in such cases clearly

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lies upon the prosecution to establish circumstances which would justify the action of the Magistrate in calling upon persons to furnish security for keeping the peace. The same view of the law was taken by Spankie, J., in this Court in *Queen v. Nirunjun Singh* (1), and for the reasons which I have already stated I follow these rulings. And I hold that, in proceedings taken by a Magistrate under Chapter VIII of the Criminal Procedure Code, for the purpose of taking security for keeping the peace, the usual rule of [461] law in criminal cases, that the prosecution has to discharge the burden of proof, cannot be disregarded; and that, speaking in more general terms, the rule which undoubtedly applies to the trial of the persons for offences, cannot be impaired in proceedings which aim at the prevention of offences.

It must, therefore, be taken that the burden of proof in this case rested entirely upon the prosecution, and that neither the two petitioners who have come up to this Court for revision, nor the other twenty-eight persons who were dealt with in the same proceeding, can be prejudiced by the fact that they produced no evidence to disprove the information upon which the Magistrate initiated the proceedings against them under s. 107 of the Criminal Procedure Code. And viewing the case in this light, I now proceed to consider whether there was any such evidence against any or all of them, which would justify the order of the Magistrate which is now the subject of revision before me.

It appears to me that the evidence produced before the Magistrate showed these main circumstances in connection with the subject of inquiry. The first of these is that, some time in August last, the petitioner Abdul Kadir sent for a Pandit to teach Sanskrit. The Pandit accordingly came with some pupils, and the petitioner placed a house at his disposal for the school. Then it appears that after a few days the Pandit began reading the *Bhagwat*, and as a part of the ceremonial he sounded a *sankh* (or shell) which caused some kind of annoyance to the Muhammadans, who, through the other petitioner Muhammad Nasir, a brother of Abdul Kadir, remonstrated, and, a *panchayat* being held, the petitioner Abdul Kadir consented to dismiss the Pandit, who then went to put up with Deokinandan, one of the defendants, and there also began to perform *Bhagwat* and to sound the *sankh*. The Muhammadans appear to have protested again, and, to use the words of the Magistrate, "reports made at the *thana*, and recorded in the station diary on the 25th August, by Birju, servant of Deokinandan, on the 4th September, by Salaran on the 7th September, by Jori, chaukidar, and on the 10th, by Lachman, all refer to opposition offered by the Muhammadans to the Hindus sounding the *sankh* within the town, which the Pandit finally had to leave under escort of the police."

[462] The next circumstance found by the Magistrate is that, on the 12th September, Salaran, a butcher, was reported to have been threatened by Lachman and some other Hindus if he killed cows. Then on the 9th October, Abdul Latif and Ali Abbas presented a petition complaining of Deokinandan's intention to hold the festival of Ram Lila, and on the 13th October, Muhammad Latif presented a petition complaining of Deokinandan having threatened him.

These are all the circumstances, which the Magistrate has found as justifying the conclusion that a breach of the peace was imminent between the Hindus and the Muhammadans in the Town of Ghosi, and the Magistrate adds in confirmation of his view that "a system of boycotting has been

adopted by one side towards the other, whereby the Hindu baniahs refuse to sell grain to Muhammadans, and Muhammadan sweepers to serve Hindu masters, or Muhammadan ekka boys to drive Hindu fares."

Upon this state of the case, the first observation which I have to make is that, according to the theory of the information received by the Magistrate, there were two contending parties opposed to each other and inclined to commit breach of the peace, and this being so, I think that the Magistrate acted irregularly in taking steps against both parties jointly, and in holding the inquiry in one and the same proceeding. In a case of this nature, the principles which apply to the trial of members of two opposing factions in a riot, are, in my opinion, applicable by analogy. In *Empress v. Lochan* (1) Straight, J., pointed out the impropriety and inconvenience of trying several persons jointly for rioting, when it was obvious that all of them could not have had a common object. To the same effect is the rule laid down by the Calcutta High Court in *Hossein Buksh v. The Empress* (2), though of course neither of these rulings goes the length of laying down the rule that a joint trial of opposite factions would, *ipso facto*, be null and void. The question would probably depend upon the merits of each case, as to whether the accused had been prejudiced or not, and do not wish to go beyond the rule so laid down.

Another matter which seems to me to be far more serious in this case, in connection with the joint inquiry as to all the thirty persons implicated, is that the circumstances proved before the Magistrate as affording ground for apprehension of breach of the peace were so multifarious that it is impossible to suppose, and indeed the evidence does not prove that all the thirty persons were concerned in the various facts established. Taking, for instance, the case of the two petitioners whom Mr. Colvin represents, *viz.*, Abdul Kadir and Muhammad Nasir, all that the evidence goes to prove is that, so far back as August, the former sent for a Pandit to come and start a school for teaching Sanskrit. Considering that Abdul Kadir is a Muhammadan Maulvi, as the record shows, his action in starting a school for teaching Sanskrit, seems to me a laudable act of enlightened toleration, and I fail to see how it could be regarded as indicative of an inclination to commit a breach of the peace against the Hindu townsmen. The sounding of the *sankh* appears to have caused some annoyance to the other petitioner, Muhammad Nasir (brother of the first-named petitioner), and some other Muhammadans, who prevailed upon Abdul Kadir to dismiss the Pandit, who seems to have gone away in peace. All this happened as far back as August, and the recorded evidence fails to prove any such conduct on the part of either of the petitioners as would justify an apprehension that they would commit breach of the peace.

The case of the two petitioners is a good practical illustration of how the other persons implicated were dealt with in the joint inquiry. The Magistrate seems to have considered that the best way to secure the public peace was to accept the theory put forward by the police, that fifteen Hindus and fifteen Muhammadans should be bound over to keep the peace; and in holding the inquiry these thirty persons were, to use a quaint expression, "herded" together, as if what was evidence against one would be evidence against all. The Magistrate was no doubt acting in the interest of the public peace, but as Straight, J., so emphatically pointed out in *Queen-Empress v. Nathu* (3), no amount of laudable desire on the part of the Magistrate to prevent breach of the peace will justify him in

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dealing with human beings as if they possessed no individuality of their own, and might be dealt with, in proceedings of this nature, as if they were members of an indiscriminate crowd. In the present case no attempt appears to have been made, either in the [464] order made by the Magistrate under s. 112 of the Criminal Procedure Code or in taking the evidence, to discriminate between the cases of the various persons implicated by the information which the Magistrate had received; and whilst the evidence of the police speaks of these thirty persons together in one and the same breath, to the effect that "there is a great probability of breach of the peace occurring any day between the Hindus and the Muhammadans in Court," the defence of each one of the persons implicated is, "I have done nothing to deserve being bound over to keep the peace." It was essential, before any proceedings under s. 107 could succeed, for the prosecution to establish what each individual person implicated had done to furnish a basis for the apprehension that he would commit breach of the peace; but no such attempt appears to have been made in this case. The inquiry, indeed, seems to me to be open to almost every objection which Sraight, J., pointed out in the case to which I have just referred, and I cannot help thinking that the Magistrate was unaware of what had been laid down in that case.

Much argument was addressed to me by the learned Public Prosecutor on behalf of the Crown as to the nature and *quantum* of evidence required in such cases to justify the action of the Magistrate under Ch. VIII of the Criminal Procedure Code. I am willing to concede that the Magistrate may initiate proceedings under s. 107 of the Code, upon any such information as may satisfy him as to the likelihood of a breach of the peace being committed. I am also prepared to hold that, in holding the inquiry under s. 117, the nature or *quantum* of evidence need not be so conclusive as in trials for offences, but at the same time hold that in such inquiry the Magistrate should not proceed purely upon an apprehension of a breach of the peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated, which would lead to such a conclusion. What the nature of the facts should be is a question which, of course, depends upon the circumstances of each case, but I have no hesitation in thinking that, when the nature of the information requires it, overt acts must be proved before the Magistrate can make an order under s. 118 of the Code.

[465] This indeed is the general effect of many reported cases, of which *Queen v. Abdool Huq* (1), *Goshain Luchmun Pershad Pooree v. Pohoop Narain Pooree* (2), and *Raja Run Bahadoor Singh v. Ranees Tillessuree Koer* (3) are good illustrations. In the last of these cases, Phear, J., laid down the rule that it is only evidence of specific conduct on the part of the accused from which the reasonable and immediate inference is that they are likely to commit a breach of the peace, which will justify a Magistrate in taking action in such cases; and the case of *Kashi Chunder Doss* (4) is authority for the proposition that a person cannot be prevented by a Magistrate from exercising his rights simply upon the ground that another person is likely to commit breach of the peace.

The whole inquiry in this case seems to have been conducted irrespective of these principles of law which I have mentioned, and the result is that it is impossible for me to be satisfied from the evidence that the

(1) 20 W.R. Cr. 57.

(3) 22 W.R. Cr. 79.

(2) 24 W.R. Cr. 80.

(4) 10 B.L.R. 441 = 19 W.R. Cr. 47.

Magistrate was justified in making the order under s. 118 against any single person implicated by the information which he had received. If the circumstances of the case had indicated that a fresh inquiry should be held, I might, perhaps have directed accordingly. But it seems to me that the order of the Magistrate is based upon inadequate data in respect of all the persons, for the evidence upon the record fails to prove satisfactorily that any one of the persons implicated had given cause by any substantial act for thinking that he would commit a breach of the peace. And in considering this part of the case, it is by no means unimportant to observe that the circumstances which the Magistrate was considering were antecedent to the festival of the Ram Lila and the Muharram. The first is with the Hindus a time of rejoicing in memory of the tradition of a great conquest; the latter is with the Muhammadans a period of mourning in memory of what has been described in their literature as "the darkest day of the history of Islam," being the period when the massacre of Imam Husain and his followers took place upon the battle-field of the Kerbella. These two festivals, so opposite in traditional characteristics, were coincident during the last year, and it would be then, if at any time, that the ill-feeling between [466] the Hindus and the Muhammadans of the town would burst forth into a breach of the peace. But it is proved in this case, by the evidence of the police themselves, that, in the locality with which this case is concerned, the Hindus celebrated their Ram Lila and the Muhammadans their Muharram, and that no breach of the peace took place. But the evidence of the police adds, almost naturally, "it was with much difficulty that a breach of the peace was prevented." What the difficulty was, does not in the least degree appear from the evidence. And in the face of this great fact, which the Magistrate does not seem to have taken into account at all, I find it impossible to uphold the view of the Magistrate, that so late as the 4th of December, 1885, when he made the order now under revision, the state of feeling in the town was such as to create a reasonable apprehension of breach of the peace being committed by a dispute between the Hindus and the Muhammadans. And under this view, it seems to me that the action of the Magistrate was an unnecessary exercise of the discretionary power which the Code confers upon him in such matters.

I wish, however, to add that, even if upon the evidence taken in the inquiry, the Magistrate were justified in apprehending a breach of the peace, the order passed by him in this case was much too severe, and, to use the language of Straight, J., in the case of *Queen-Empress v. Nathu* (1) already referred to, it was a most excessive exercise of power to require all the parties to find security for one year. In the present case, the order being dated the 4th December, 1885, the greater portion of the period has already elapsed, and this reason alone would, to my mind, be sufficient to prevent my directing a fresh inquiry, even if the circumstances upon which the Magistrate acted in making the order were considered by me adequate to cause apprehensions of a breach of the peace.

For these reasons I set aside the Magistrate's order of the 4th December, 1885, and direct that the surety bonds and recognizances of such persons as have given security be discharged and cancelled, and that if any of the thirty persons mentioned in the order are in prison under s. 123 of the Criminal Procedure Code, such persons be immediately released.

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11 Ind. Jur.  
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7 A.W.N.,  
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[467] But I do not wish to conclude without saying that I have considered it my duty to deal with this case at such elaborate length, because I feel that the discretionary powers conferred by the law upon Magistrates, in the interests of preserving the public peace, must not be exercised without care and caution, and certainly never in derogation of the rights of liberty and security to which the people are entitled under the British rule.

*Application granted.*

9 A. 467 = 7 A.W.N. (1887) 118.

### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

NARAINI KUAR (*Defendant*) v. CHANDI DIN AND ANOTHER (*Plaintiffs*).<sup>\*</sup>  
[7th December, 1886.]

*Evidence—Statement by deceased person as to relationship—Act I of 1872 (Evidence Act), s. 32 (5)—Hindu Law—Mitakshara—Inheritance—Sister's son.*

S. 32 (5) of the Evidence Act (I of 1872) does not apply to statement made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents.

According to the Mitakshara, a sister's son, who is a *bandhu* and not a *sapinda* similar to a daughter's son, cannot inherit until the direct male line down to and including the last *samanodaca*, i.e., fourteen degrees of the direct male line, has been exhausted. *Koor Golab Singh v. Rao Kurun Singh* (1), *Bhyah Ram Singh v. Bhyah Ugur Singh* (2), and *Lakshmanammal v. Triuvengada Mudali* (3) referred to.

[R., 20 A. 191; 9 O.C. 239 (242); 19 M.L.T. 275 = 30 M.L.J. 514 = 3 L.W. 331 = 34 Ind. Cas. 294.]

THIS was a suit brought by Chandi Din, with Nawab Mashuk Mahal, to whom he had transferred his interest in a portion of the property in dispute, for possession, by right of inheritance, of the ancestral estate of his maternal uncle Chaudhri Naubat Ram. The defendant, Rani Naraini Kuar, was the widow of Raghunandan Prasad, who, she alleged, had been adopted by Chaudhri Naubat Ram, who had died without natural issue. After the death of Chaudhri Naubat Ram (who was a separated Hindu) in February, 1867, his widow, Rani Ganesh Kuar, entered into possession of his estate, and continued in possession until her death in August, 1878. After her death the defendant obtained mutation of names [468] in her favour as the widow of Raghunandan Prasad, and entered into possession.

The Court of first instance (District Judge of Bareilly) decreed the claim. The only issue to which it is necessary to refer was whether the plaintiff Chandi Din was or was not, according to the Hindu law, the nearest heir to the estate of Naubat Ram. This issue was remitted by the High Court under s. 566 of the Civil Procedure Code to the District Judge, who returned a finding to the effect that two persons, named Shib Lal and Bhairon Prasad, stood nearer than Chandi Din in point of

<sup>\*</sup> First Appeal No. 128 of 1881 from a decree of W. Young, Esq., District Judge of Bareilly, dated the 20th June, 1881.

(1) 10 B.L.R. 1.

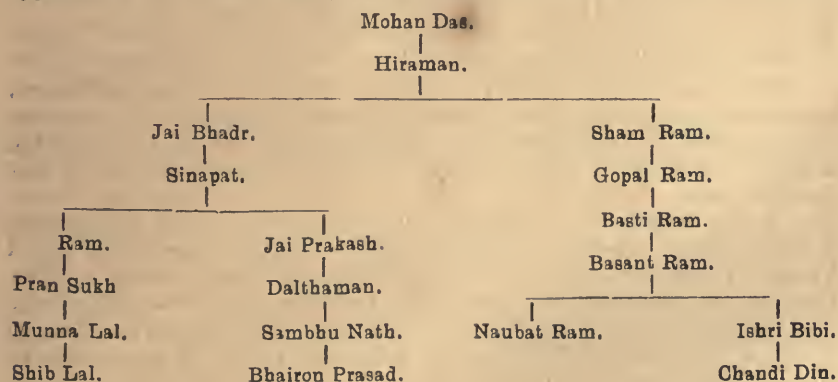
(2) 13 M.I.A. 373.

(3) 5 M. 241.

heirship to Naubat Ram. Objections were taken to this finding under s. 567 of the Civil Procedure Code, on behalf of the plaintiffs-respondents, and the appeal and the objections came on for hearing together. It was contended on behalf of the respondents that, upon the evidence and according to the rules of Hindu law, Chandi Din was proved to be the heir of Naubat Ram, that the alleged relationship of Shib Lal and Bhairon Prasad with Naubat Ram was not established, and that, even assuming it to be established, Chandi Din was the heir of Naubat Ram, and, as such, was entitled to possession of his ancestral estate on the death of Rani Ganesh Kuar.

On behalf of the respondents, certain documents were tendered in evidence, which were objected to by counsel for the appellant. One of these documents was a written statement of defence filed on behalf of Ganesh Kuar on the 5th January, 1875, in an action brought against her and Raghunandan Prasad by Bhairon Prasad and one Piare Lal in 1874. In that suit the plaintiffs prayed for a declaration of their right, as heirs of Naubat Ram, to succeed to his estate after Ganesh Kuar's death, alleging as their cause of action a statement made by Ganesh Kuar in a written defence in a previous suit brought against her by Chandi Din, to the effect that her husband Raghunandan had been adopted by Naubat Ram. In defence to the suit of Bhairon Prasad and Piare Lal, Ganesh Kuar replied, in her written statement, that the plaintiffs had no cause of action, and that Raghunandan Prasad had, in fact, been adopted by Naubat Ram. She added :—"The plaintiffs do not belong to the family of Chaudhri Naubat Ram, deceased. The pedigree produced by them is incorrect."

[469] In a condensed form, the pedigree alleged by the defendant-appellant in the present case, was as follows :—



The only points in the case to which reference is necessary for the purposes of this report are, first, the question whether Ganesh Kuar's written statement of defence in the suit of 1875 was relevant under s. 32, cl. (5) of the Evidence Act, as showing that Bhairon Prasad was not related to Naubat Ram; and secondly, the question whether, assuming the pedigree put forward by the appellant to be proved, the plaintiff Chandi Din, as the sister's son of Naubat Ram, would inherit in priority to Shib Lal or Bhairon Prasad.

Mr. C. H. Hill, Kunwas Shivanath Sinha, the Hon. Pandit Ajudhia Nath and Pandit Nand Lal, for the appellant.

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Mr. W. M. Colvin, Munshi *Hanuman Prasad*, Munshi *Kashi Prasad*, and Pandit *Sundar Lal*, for the respondents.

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### JUDGMENT.

EDGE, C.J., and STRAIGHT, J., upon the question whether Ganesh Kuar's written statement of the 5th January, 1875, was admissible in evidence, said:—The next document was the written statement of Rani Ganesh Kuar, filed in an action brought against her and Babu Raghubandan Prasad by Piare Lal and Bairon Prasad. This document was tendered in evidence with the object of showing that Rani Ganesh Kuar denied that Piare Lal and Bhairon Prasad were of the family of Chaudhri Naubat Ram. Pandit *Sundar Lal* contended that it was a statement within the meaning of sub-section 5 of s. 32 of the Indian Evidence Act of 1872, and, as such, was admissible. We rejected this state- [470] ment, being of opinion that sub-section 5 does not relate to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties.

[After referring to the evidence in detail, their Lordships came to the conclusion that the pedigree asserted by the appellant was proved. Their judgment continued thus:—]

As has been already mentioned, Pandit *Sundar Lal* and Munshi *Kashi Prasad* contended that, even assuming the appellant's family tree to be established, their client Chandi Din, as the sister's son of Chaudhri Naubat Ram, would inherit in priority to Shih Lal or Bhairon Prasad. They relied on *Umrid Bahadur v. Udoi Chand* (1), and the judgment of Mitter, J., in *Anrita Kumari Debi v. Lakhinarayan Chuckerbutty* (2). All that these authorities, as it appears to us, establish is that, according to the Mitakshara, which is the law prevailing in these Provinces as to inheritance amongst Hindus, a sister's son may be the heir of his mother's brother,—a proposition which appears at one time to have been doubted. They contended that although a sister's son was not a *gotraja sapinda* of his mother's brother, he was a *sapinda* similar to a daughter's son, and as a daughter's son would inherit in case there being no son, grandson, great-grandson, widow or daughter living of the last owner, so similarly a sister's son would inherit before the more remote relations of his uncle's family.

On the other side, Pandit *Ajudhia Nath* contended that the sister's son, who was a *bandhu*, could not, according to Mitakshara, take until the direct male line, down and including the last *samanodaca*, that is, fourteen degrees of the direct male line, had been exhausted. In support of his contention, he referred the Mitakshara, to Vijnanesvara, and to Mayne's *Hindu Law and Usage*, ss. 436 and 490. He also referred to *Kroer Golab Singh v. Rao Kurun Singh* (3), *Bhyah Ram Singh v. Bhyah Ugur Singh* (4), and to *Lakshmanammal v. Tiruvengada Mudali* (5). As Pandit *Sundar Lal* and Munshi *Kashi Prasad* failed to produce any authority showing that the view as to the rule of the Mitakshara, which has hitherto been accepted and is that contended for by Pandit *Ajudhia* [471] *Nath*, is not correct, we dismiss the contention with the observation that we see no ground for departing from the construction of the Mitakshara which has hitherto been accepted. We accordingly find that the respondents have failed to show that Chandi Din was the heir

(1) 6 C. 119.

(4) 13 M.L.A. 373.

(2) 2 B.L.R. (F.B.) 29.

(3) 10 B.L.R. 1.

(5) 5 M. 241.

of Chaudri Naubat Ram; and we find, in fact, that Chandi Din was not the heir of Chaudhri Naubat Ram, and consequently the respondents have failed to prove that they are entitled to maintain this action. Under these circumstances, it is not necessary for us to express any opinion on the various questions of limitation and estoppel which have been argued in this case. We decree the appeal with costs against the respondents and the estate of the deceased plaintiff Nawab Mashuk Mahal. The suit will stand dismissed.

*Appeal allowed.*

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### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

AGAR SINGH (*Defendant*) v. RAGHURAJ SINGH AND ANOTHER  
(*Plaintiffs*).<sup>\*</sup> [23rd February, 1887.]

*Pre-emption—Cancellation by vendor and vendee of actual price—Evidence—Market-value of property sold.*

In suits for pre-emption, where the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract price, and where it cannot ascertain the true price by reason either that the vendor and vendee refuse to disclose the same by their own evidence, or their evidence cannot be believed, the Court should ascertain, if possible, what was the market-price of the property in dispute at the time of the sale, and accept that market price as the probable price agreed upon between the parties. It is for the plaintiff either to show what was the actual contract price, or to give substantial evidence on which the Court cannot act, showing what was the market-value at the time of the sale.

[R., 6 O.C. 327 (330); 29 A. 618 = A.W.N. (1907) 202 = 4 A.L.J. 531; 14 Ind. Cas. 158 (159).]

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village. The facts of the case are stated in the judgment of Edge, C.J.

Lala Lalta Prasad, for the appellant.

Lala Juala Prasad, for the respondents.

### JUDGMENT.

EDGE, C.J.—This is an appeal in a pre-emption suit against the judgment of the Subordinate Judge of Gorakhpur, by which he decreed the plaintiff's claim, and found that Rs. 475 was the [472] price to be paid by the plaintiff-pre-emptor. The facts of the case are shortly these. The vendee, who is a stranger, alleged that the contract price was Rs. 775, and put in evidence the sale-deed. The plaintiff, on the other hand, alleged that the contract price was Rs. 75, and he gave evidence that a share in a neighbouring mahal had been sold for Rs. 75. The vendee and the vendor were not called to give evidence in support of the price alleged in the deed. The Subordinate Judge came to the conclusion that the price alleged in the sale-deed was not the true contract price, and he found, apparently

<sup>\*</sup>Second Appeal. No. 371 of 1886 from a decree of Maulvi Saah Ahmadullah, Subordinate Judge of Gorakhpur, dated the 5th May, 1885, confirming a decree of Maulvi Abdurrazzak, Munsif of Bansi, dated the 8th January, 1885.



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without any evidence, that Rs. 475 was the contract price or the market-value.

Under these circumstances we have to consider what should be done in this and in similar cases. It appears to me that in cases of this kind, when the Judge has come to the conclusion that the price alleged in the sale-deed is not the true contract price, and where he cannot ascertain what, in fact, was the contract price, he should ascertain, if possible, what was the market-price at the time of the sale, and for these reasons :—In the cases I am supposing, the vendor and the vendee either refuse to disclose by their own evidence what was the true price, or their evidence, with regard to the price, for some good reasons cannot be believed. In such cases it is frequently impossible for the plaintiff to give direct evidence as to what the true contract price was; because, in cases in which a fictitious price is inserted in the sale-deed, it is done with the intention of defeating the rights of the persons entitled to pre-emption, and the true contract price is concealed. It cannot be expected that in such cases the plaintiff would be able to give direct evidence of the actual contract price. It appears to me that in these cases the plaintiff should be prepared with the best evidence he can obtain as to what was the market-value of the share at the time of the sale. It would be doing no injustice to the vendor or the vendee, who refused to disclose what the true price was, or whose evidence for some good reason is not believed, to treat the market-value, which a prudent man would give for the share, as the price which was most probably agreed upon. In such cases the Judge should ascertain what was the market-value at the time of the sale, and accept that market price as the probable price agreed upon between the parties.

[473] In this particular case there was, as I have said, evidence on behalf of the plaintiff that Rs. 75 had been the price given for a share in an adjoining mahal. That evidence was not relied upon by the Subordinate Judge as correctly showing what was the market-value at the time of the sale. I think that this case had better go back to enable the Court below to hear further evidence, tendered by either party, as to what was the market-value of the share at the time of the sale. I do not propose that the Judge below should have to reconsider his finding that Rs. 775 was not the contract price, for that has already been decided; but I think it right that the parties should have an opportunity of putting forward some further evidence as to what the market-value was. We have allowed a remand in this particular case, but in future we ought to hesitate before sending a case of this kind back. It is a part of the plaintiff's case to show either what was the actual contract price or to give substantial evidence, on which the Judge can act, showing what was the market-value. It is necessarily a part of the plaintiff's case that the price should be fixed by the decree of the Judge. For unless the Judge is in a position to fix the price, it is obvious that the decree would be ineffective and a nullity. In future, in cases similar to the present, if the plaintiffs are not prepared to give substantial evidence, on which a Judge can act as to the market-value, those plaintiffs will deserve to have their cases dismissed. In the present case, however, an issue must be sent down to the Subordinate Judge to take further evidence as to the market-value of the share at the time of the sale. Ten days will be allowed for objections.

BRODHURST, J.—I concur in the order proposed by the learned Chief Justice (1). Issue remitted.

(1) See *Sheopargash Dube v. Dhanraj Dube*, 9 A. 225,

9 A. 475=7 A.W.N. (1887) 95.

[474] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*KADIR BAKHSH (Defendants) v. SALIG RAM (Plaintiff).  
[8th March, 1887.]1887  
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CIVIL.9 A. 474-  
7 A.W.N.  
(1887) 95.

*Mortgage—Hypothecation—Decree for enforcement of lien—Objection to attachment and sale raised by person not a party to decree—Release of property from attachment—Suit by decree-holder for declaration of right based on decree—Defence based on sale-deed found to be fraudulent—Plaintiff entitled to succeed on basis of his decree without further proof of title—Costs—Suit to recover costs incurred in former proceedings in Court having jurisdiction.*

An objection to the attachment and sale of a house which was advertized for sale in execution of a decree for enforcement of lien, was allowed, upon the ground that the objector had purchased the house from the mortgagor, and his purchase was not subject to the decree, to which he was not a party. The decree-holder then brought a suit against the objector, claiming a declaration of his right to recover the amount due under his decree by enforcement of lien against the house, and that the order releasing the property from attachment should be set aside, and also to recover the costs incurred by him in the execution-department on the defendant's objection. The Courts below, holding that the deed of sale set up by the defendant was fraudulent and collusive, decreed the claim.

*Held* that, although the defendant was not a party to the decree obtained against the mortgagor, yet, as the basis of his title to claim the property had been found to be a mere nullity, the plaintiff was entitled to succeed on the basis of the decree, which stood unimpeached, without being put to proof of the mortgage-deed as against the defendant.

*Held* also that inasmuch as where a Court, having jurisdiction, orders or refuses costs, a separate action for such costs cannot be brought, the plaintiff was not entitled to recover from the defendant the costs incurred by him in the execution department. *Mahram Das v. Ajudhia* (1) followed.

[R., U.B.R. (1897—1901), 426; 15 C.P.L.R. 129; U.B.R. (1904) 1st Qr., C.P.C., 263; U.B.R. (1905) 2nd. Qr., C.P.C. 263; 11 C.W.N. colxiii (N); A.W.N. (1908) 18=5 A.L.J. 140.]

THE plaintiff in this case held two deeds under which a house was hypothecated to his father, by the predecessors in title of two persons named Rafi-ud-din and Musammat Khatun Daulat. These deeds were dated respectively the 29th September, 1875, and the 22nd April, 1876. In 1881, the plaintiff brought a suit upon these deeds against the obligors, and obtained, on the 19th December, 1881, a decree for enforcement of the lien held by him upon the hypothecated house. Upon the house being advertized for sale in execution of the decree, an objection was raised by the defendant, Kadir Bakhsh, that, under a deed of sale dated the 9th December, 1877, and executed in his favour by Rafi-ud-din and Khatun Daulat, [475] he had purchased the house, and that his rights and interest therein could not be affected by the decree, to which he was not a party. This objection was allowed, and the house was released from attachment, by an order dated the 2nd August, 1884.

The plaintiff then brought the present suit in which he claimed "to recover a sum of Rs. 418, the judgment-debt under the decree dated the

\* Second Appeal, No. 693 of 1886 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 6th June, 1885, confirming a decree of Maulvi Ahmad Khan, Munsif of Moradabad, dated the 28th April, 1885.



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(1887) 95.

19th December, 1881, with future interest, by enforcement of hypothecation and sale of a house.....the hypothecated property, by declaring that the collusive sale-deed was ineffectual, by cancellation of the miscellaneous order dated the 2nd August, 1884, and by disallowing Rs. 9-2-0, being the costs of the objection."

The Court of first instance (Munsif of Amroha) found that the sale-deed set up by the defendant was fraudulent and collusive, and decreed the claim, with the exception of the item as to future interest upon the amount claimed under the decree of the 19th December, 1881. On appeal, the lower appellate Court upheld the Munsif's decree.

The defendant appealed to the High Court, principally upon the following grounds :—(i) "that the respondent cannot claim enforcement of lien against the appellant based upon his decree; it was for him to prove his mortgage against the appellant;" (ii) "that the decree for the costs incurred in the execution department, when the appellant's objection was allowed, is legally wrong."

Munshi *Hanuman Prasad*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

### JUDGMENT.

EDGE, C.J.—The plaintiff, who was the mortgagee of the house in question in this suit, brought an action against the mortgagors for recovery of a sum of money by enforcement of lien against the house, and obtained a decree, in execution of which that house was advertized for sale. The defendant, who claimed to have purchased the house from the same mortgagors raised an objection, and the result was that his objection was allowed, and the plaintiff was compelled to bring the present suit.

In this case it has been found by both the lower Courts that the alleged sale-deed of the defendant was fraudulent and collusive. The defendant contends that, notwithstanding this finding, he is [476] entitled to put the plaintiff to the proof of his title; or, in other words, that the plaintiff should have proved his mortgage-deed as against him. It is true that he was no party to the decree obtained against the mortgagor, but the basis of his title to claim the property has been found to be a mere nullity, and therefore the plaintiff is entitled to succeed on the basis of the decree, which stands unimpeached.

The plaintiff also claimed costs incurred by him in the execution department on the defendant's objection. These costs were decreed by the Court below. I have no hesitation in holding what my brother Mahmood has held in the case of *Mahram Das v. Ajudhia* (1), that where a Court has jurisdiction and orders or refuses costs, the parties cannot bring a separate action for such costs. The plaintiff is, therefore, not entitled to recover from the defendant the costs incurred by him in the execution department, and to this extent the defendant's appeal will be allowed, and the decree of the lower Court will be modified, the rest of the decree being confirmed. The appellant will bear all costs.

MAHMOOD, J.—I entirely agree.

*Appeal allowed in part.*

9 A. 476—7 A.W.N. (1887) 67.

## APPELLATE CIVIL.

*Before Mr. Justice Straight, and Mr. Justice Tyrrell.*

JANI BEGAM (Plaintiff) v. JAHANGIR KHAN (Defendant).\*

[12th March, 1887.]

Act IV of 1882 (Transfer of Property Act), s. 135—Transfer of a claim for a smaller value—Transferee not entitled to recover more than price paid for claim.

S. 135 (d) of the Transfer of Property Act (IV of 1882) means that if a creditor or party having an actionable claim against another, has put it into Court and has proceeded to proof of it to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, the mischief or danger of any trafficking or speculation in litigation disappears, and the defendant can suffer no prejudice by any arrangement between the plaintiff and a third person as to who is to enjoy the fruits of the decree, nor is there any probability that the process of the Court will be misused. On the other hand, if one who has an actionable claim against another chooses to sell it for less than its actual value, the person who buys embarks more or less in a speculation which can be defeated by payment to him of the price paid for it with interest and incidental expenses, [477] The debtor's right to discharge himself by such payment is not forfeited by his putting the assignee to proof of his case in Court, nor did the Legislature intend that the position of the assignee should be better after suit and decree than before. *Grish Chandra v. Kashisauri Debi* (1) dissented from *Chedambara Chetty v. Renga K. M. V. Puchayya Naicker* (2), and *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (3) referred to.

The assignee, under an instrument dated the 18th December, 1885, and in consideration of Rs. 5,000, of a share of Rs. 10,000 out of Rs. 20,000, claimed by his assignors as unpaid dower-debt, joined with the assignors in instituting a suit for recovery of the dower debt, on the 22nd December of the same year.

Held that the assignee's proceedings were of the nature contemplated by s. 135 of the Transfer of Property Act (IV of 1882), and that he was not entitled to a decree for anything in excess of Rs. 5,000, the price paid by him for the Rs. 10,000 share of the debt.

[*Diss.*, 18 C. 510; *F.*, 13 A. 102 (107); *Appr.*, 21 C. 569; *R.*, 13 M. 225; 5 C. P. L. R. 13; 19 B. 290; 21 B. 761; 20 A. 347; 3 O.C. 18 (20); *D.*, 16 A. 313]

THIS was a suit against one Jahangir Khan for recovery of Rs. 20,000 as part of the unpaid dower-debt of his wife Jafri Begam, who died on the 17th January, 1883. The suit was brought on the 22nd December, 1885, by Wilaiti Begam, the mother, and Shateh-ul-lah Khan, and Hafiz-ullah Khan, brothers of the deceased Jafri Begam, together with one Jani Begam, to whom, by a deed executed on the 18th December, 1885, they had assigned half their interests in the dower-debt for Rs. 5,000. The plaintiffs alleged that upon the marriage of Jafri Begam with the defendant her dower was fixed at Rs. 80,000; that the defendant had paid no part of this sum; that according to the Muhammadan law the amount of the debt was divisible into six *shams*, to three of which the defendant was entitled, and the other three were due to the plaintiffs Nos. 1, 2 and 3; and that they claimed Rs. 20,000 only, instead of Rs. 40,000, out of consideration for the inability of the defendant to meet

\* First Appeal No. 88 of 1886 from a decree of Maulvi Muhammad Quiyum Khan, Subordinate Judge of Bareilly, dated the 1st March, 1886.

(1) 13 C. 145.

(3) L.R. 2 App. Cas. 186=4 I.A. 23.

(2) 1 I.A. 241=13 B.L.R. 109.



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the larger demand. The defendant in reply to the suit, so far as concerned the plaintiffs Wilaiti Begam, Snafel-ul-lah Khan and Hafiz-ullah Khan, raised various pleas which are not material to the purposes of this report. In reply to the plaintiff Jani Begam, he pleaded that, under s. 135 of the Transfer of Property Act (IV of 1882), she was not competent to sue for anything in excess of the sum of Rs. 5,000, which was the price paid by her under the deed of the 18th December, 1885.

The Court of first instance (Subordinate Judge of Bareilly) found in favour of the plaintiffs upon all the points raised, except [478] that which related to the assignment in favour of the plaintiff Jani Begam. Upon this point the Court observed as follows:—"Under these circumstances, the purchaser, under the provisions of s. 135 of the Transfer of Property Act, cannot obtain a decree for anything in excess of Rs. 5,000. It has been admitted that the three plaintiffs are, out of six *sihams*, shareholders of one *siham* each, and each has sold half his share to Jani Begam for Rs. 5,000, after relinquishing half of his demand on account of the entire marriage-dower. The share of plaintiffs Nos. 1, 2, and 3 out of Rs. 80,000 is Rs. 40,000, and they have relinquished the claim for Rs. 20,000 and have claimed the remaining sum of Rs. 20,000, and out of Rs. 20,000, Jani Begam is, according to the contents of the sale-deed and the petition of plaint, a purchaser of Rs. 10,000 for Rs. 5,000; but she cannot, according to the provisions of s. 135, obtain a decree for anything in excess of Rs. 5,000. Therefore a decree should be made for Rs. 10,000 in favour of plaintiffs Nos. 1, 2 and 3, and for Rs. 5,000 in favour of Jani Begam, plaintiff No. 4. Ordered, that the claim for Rs. 15,000 be decreed, and the rest dismissed."

On appeal to the High Court from this decree by Jani Begam, it was contended on her behalf that, having regard to clause (d) of s. 135 of the Transfer of Property Act, and to the fact that the defendant had entirely failed to establish the defence set up by him, the Court of first instance was wrong in limiting the decree in her favour to the amount of the consideration for the sale of the 18th December, 1885.

Pandit Bishambhar Nath, for the appellant.

Baboo Jogindro Nath Chaudhri, for the respondent.

#### JUDGMENT.

STRAIGHT, J.—Musammat Jani Begam, the fourth plaintiff in the suit, is the only appellant before us as assignee for a consideration of Rs. 5,000 of a share of Rs. 10,000 out of Rs. 20,000 claimed by the other plaintiffs on account of the dower-debt alleged to be due from the defendant to Musammat Jafri Begam, deceased, the daughter of plaintiff No. 1, and sister of plaintiffs Nos. 2 and 3. It may be taken as established that by a sale-deed of the 18th December, 1885, the appellant, for a sum of Rs. 5,000 then paid, [479] purchased the rights of plaintiffs Nos. 1, 2 and 3, as heirs of Jafri Begam to recover Rs. 10,000 from the defendant. The present suit was instituted on the 22nd of December, 1885, and the single question with which we are concerned in appeal is whether the Court below was right in holding the appellant barred from recovering more than Rs. 5,000, the price paid by her for the Rs. 10,000 of the debt, by the provisions of s. 135 of the Transfer of Property Act, 1882. In support of the appeal that he was not, our attention has been called to *Grish Chandra v. Kashisauri Debi* (1), and no doubt that is an authority directly in point.





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## APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

BENI SHANKAR SHELHAT AND OTHERS (*Defendants*) v. MAHPAL  
BAHADUR SINGH (*Plaintiff*).\*. [16th March, 1887.]

*Pre-emption—Co-sharers—Recorded co sharers—Benami purchase of shares—Sale by co-sharer—Claim for pre-emption resisted by person alleging himself to be co-sharer by virtue of benami transaction—Equitable estoppel.*

A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption either under the Muhammadan Law or under the provisions of a *wajib ul arz*, so as to enable him upon the [481] strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder who had no notice direct or constructive of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character. *Ramcoomar Koondo v. Macqueen* (1) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

The Hon. T. Conlan, Munshi Sukh Ram, and Lala Juala Prasad, for the appellants.

Mr. C. H. Hill, and Munshi Hanuman Prasad, for the respondent.

## JUDGMENT.

STRAIGHT and TYRRELL, JJ.—The facts of this case can be stated without many words. The plaintiff is a recorded sharer in the villages Nagra, Deokali, Daekwari, Chachia, Pairahi, Parasrampur, Pal Chandbha, Gotha, Masaba, Ahirauli, Tilokha, Chainpur, and Karsand. Two other sharers in the same, namely, Babus Fakir Chand and Moti Lal, sold their interests therein on the 21st March, 1883, to the two answering defendants Bhawani Shacker Shelhat and Beni Shankar Shelhat. On the 1st May, 1883, the plaintiff, learning of the sale, preferred his claim of pre-emption. The defendants defended the action on the main and practically the single ground that they were co-sharers in the villages in question, and, as such, being in the same relation to the vendors as the plaintiff, were unassailable by way of pre-emption. It is true that other pleas were raised, but in fact the case was fought, and must be decided, on this issue only. It is admitted that the defendants have never been recorded shareholders in any part of the estate in question, but they contend that on various occasions they purchased shares in the *farzi* names of their gomastha Bisheshwar Tiwari and his brother Baldeo Tiwari. For example, they allege that on the 20th December, 1873, in execution of a decree obtained on the 29th March, 1866, by Bisheshwar Tiwari against Babus Ram Narain Singh and Jagdeo Bahadur Singh, they bought these judgment-debtors' shares in Chainpur, Pal Chandbha, and Karsand. Again, on the 20th February, 1882, they profess to have similarly acquired shares in Daekwari and Parasrampur, and on the same date, in Masaba and Pairahi. Likewise, on the 20th December, 1882, [482] they claim to have become sharers in Ujraon, Tilokha, Nagra, Deokali, and other villages, and lastly, they boldly state that when the present

\* First Appeal No 207 of 1885 from a decree of Pandit Kashi Narain, Subordinate Judge of Ghazipur, dated the 4th September, 1885.

(1) I.A. Sup. Vol. p. 40.

vendors, Fakir Chand and Moti Lal, in 1877, purchased the properties they are now transferring, they purchased them not for themselves only, but, to the extent of the two parts out of three, for the present vendees, the defendants and appellants before us. By virtue of all these transactions the defendants claim to be substantial co-sharers in all the villages in suit, no less than the plaintiff, although they have to admit that on every occasion their acquisitions were *benami*, under cover of the name of Bisheshar Tiwari, who, with his brother Baldeo, in all the proceedings, was the ostensible and only apparent creditor, suitor, decree-holder and vendee of the original share-holders Ram Narain Singh and Jagdeo Bahadur Singh. On these pleadings two issues arose—one of fact, whether Bisheshar Tiwari was the *farzi* purchaser, the real purchasers being the defendants-appellants; the other of law, whether in the event of its being found that the defendants were the real vendees on the various occasions above mentioned, they may not be equitably estopped from pleading these covert acquisitions in defeasance of the plaintiff's open and unquestionable rights and privileges as a duly recorded shareholder. The question of fact formed the subject of the seventh issue tried by the Subordinate Judge, who decided that Bisheshar Tiwari was not the *farzi* of the defendants-vendees in his acquisitions of the estate of Ram Narain Singh and Jagdeo Bahadur Singh, or in the agreement he made on the 13th August, 1874, with Fakir Chand and Moti Lal.

[Their Lordships proceeded to consider the correctness of this finding upon the evidence, and while not agreeing with the Court below that Bisheshar Tiwari had no business relations as *gomashta* or other servant with the defendants' firm, concurred in holding that he was not proved to have lent the defendants his name for *benami* purposes on the occasions and to the extent asserted. After dealing with matters of evidence upon this point, which are not material to the purposes of this report, the judgment continued as follows] :—

This finding would suffice to dispose of the defendants' case. But we may add that even if there had been better reason for [483] thinking that the purchases of the Tiwaris in 1873 and 1882 had been *benami* for the defendants, we should have hesitated very much in holding that such covert and undisclosed interests in an estate should be regarded as the co-sharership therein contemplated by the *wajib-ul-arz* provisions and the Muhammadan Law in respect to the right of pre-emption. Under the Revenue Act of 1873, a co-sharer to be qualified to assert pre-emption at a sale of an undivided estate in satisfaction of a claim for revenue must be "a recorded sharer." This is mentioned by way of analogy only; but it appears to us that it would be unjust from many points of view to allow an otherwise unquestionable right of pre-emption to be defeated by a stranger asserting that, by subterranean proceedings and carefully preserved *incognitos*, he had been in fact a sharer in the dark for a period long enough to baffle any action to get rid at law of his unauthorised acquisitions. The act of transfer, it is true, is that which furnishes the *bona fide* shareholder with the occasion to claim his pre-emptive right, but it is the disclosure of that transfer, whether by way of physical seizure or of registration of the instrument of sale, that is held to afford not only the *terminus a quo* but also the complete cause of action for the pre-emptor's suit. The principle of natural-equity laid down in *Ramcoomar Koondoo v. Macqueen* (1) is applicable to this case. It suited the defendants to

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conceal their alleged acquisitions of shares in the plaintiff's villages, which he might have hindered at the time if he could have known of them : and they cannot now be allowed upon these secret titles to defeat his right of pre-emption, which he asserted at once at their first appearance as purchasers in his villages in their true character. For it cannot be held that there is any sufficient evidence, or indeed even plausible grounds, for suggesting that the plaintiff had direct notice, or anything amounting to constructive notice of the *farzi* nature of Bisheshar's interference in the village management, collections, and affairs generally ; or that there were any circumstances connected with Bisheshar's *original* dealings with the Babus, or with his appearances against them in Courts, his purchases of their shares, the consequent mutations of names, or the *personnel* of his local agents and servants, to put him on inquiries that, duly prosecuted, should have [484] led him in Ghazipur to discover that Bisheshar and Baldeo were mere *ism-farzi* for the stranger-bankers at Benares, the Shelhatjis.

Some objections were filed on behalf of the respondent ; but his learned counsel declined to support them. We accordingly disallow the objections. And dismissing the appeal of the defendants, we direct that they pay all the costs of the appeal.

*Appeal dismissed.*

9 A. 484=7 A.W.N. (1887) 101.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

JOHARI MAL AND ANOTHER (*Judgment-debtors*) v. SANT LAL AND OTHERS (*Decree-holders*).<sup>\*</sup> [18th March, 1887.]

*Execution of decree—Decree for sale of hypothecated property and against judgment-debtor personally—Execution against judgment-debtor's person—Decree-holder entitled to proceed against property or person as he might think fit.*

Where a decree upon a hypothecation bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property, and where there is no question of fraud being perpetrated on the judgment-debtor, there is no principle of equity which prevents the decree-holder from enforcing his decree against the judgment-debtor's person or property, whichever he may think best. *Wali Muhammad v. Turab Ali* (1) explained.

[R., 10 A. 95 (37).]

In this case Sant Lal and others had obtained a decree upon a hypothecation bond against Johari Mal and Kalian Das. The decree allowed satisfaction of the debt from the hypothecated property and also from the judgment-debtors personally. In the execution department, the judgment debtors contended that the decree should be executed first against the hypothecated property, and if any balance remained due under the decree, then against their persons. The Court executing the decree, (Subordinate Judge of Aligarh) dismissed the objection raised by the judgment-debtors on this point, observing that the Court had only to

<sup>\*</sup> First Appeal No. 20 of 1887 from an order of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 6th November, 1886.

(1) 4 A. 497.

execute the decree as it stood, and the decree contained no condition to the effect that execution should first be enforced against the hypothecated property, but left it optional to the decree-holder whether it should be enforced against the property or against the persons of the judgment-debtors.

[485] The judgment-debtors appealed from this order to the High Court. It was contended on their behalf that, applying the principles of equity to the case, the Court should not have ordered execution of the decree against their persons until it had been found that the decree could not be wholly satisfied by sale of the hypothecated property. The case of *Wali Muhammad v. Turab Ali* (1) was referred to.

Munshi Kashi Prasad, for the appellants.

The respondents were not represented.

### JUDGMENT.

EDGE, C.J.—In this case the decree-holders obtained a decree against the hypothecated property and against the defendants personally. They applied for execution of the decree against the judgment debtors, and an order was made in accordance with the application. This order is now the subject of this appeal. It is contended that there is a principle of equity which applied. The alleged principle is that when a creditor has got a decree against the person of his debtor and against the debtor's property, he is bound to go against the property before seeking his remedy against the person. In support of this there is a case—*Wali Muhammad v. Turab Ali* (1), which has been cited. On looking at that case it is obvious that the learned Judges there were forced to exercise an equitable jurisdiction in order to prevent a fraud being perpetrated on the judgment-debtor. I am also told by my brother Mahmood, who was present in that case, that, to the best of his recollection, the construction I have put on that case is the right one. It is a pity that the facts are not fully reported, but it is reported fully enough to draw this conclusion. No such fraud arises here. The decree-holder was entitled to enforce his decree against the person or the property of the judgment-debtor, whichever he thought best.

This appeal is dismissed.

MAHMOOD, J.—I agree.

*Appeal dismissed.*

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9 A. 486=7 A.W.N. (1887) 133.

## [486] CIVIL REVISIONAL.

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SIONAL.*Before Sir John Edge, Kt, Chief Justice, and Mr. Justice Mahmood.*GOBIND PRASAD (*Plaintiff*) v. CHANDAR SEKHAR  
(*Defendant*).<sup>\*</sup> [22nd March, 1887.]

9 A. 486=

7 A.W.N.

(1887) 133.

*Joinder of parties—Plaintiffs—Partnership debt—Suit by sole surviving partner—Representatives of deceased partner not joined—Act IX of 1872 (Contract Act), s. 45—Civil Procedure Code, s. 26—Plaint not stating debt to be partnership debt or that plaintiff sues as surviving partner—Practice—High Court's powers of revision—Civil Procedure Code, s. 622.*

The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, and is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary.

The effect of s. 45 of the Contract Act (IX of 1872), is to extend the English law applicable to trading partnerships to all cases of partnership. There is nothing either in that section nor in s. 26 of the Civil Procedure Code, read with it, to show that the representatives of a deceased partner must be joined in an action for a partnership debt brought by the surviving partner though it may be that they might be joined in such an action.

A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover a partnership debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiffs.

*Held* that it was the Judge's duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain it on the merits, he had failed to exercise his jurisdiction, and had acted with material irregularity, within the meaning of s. 622 of the Civil Procedure Code. *Muhammad Suleman Khan v. Fatima* (1) and *Dhan Singh v. Basant Singh* (2) referred to.

*Held* also that in a such a suit, the plaintiff, if properly framed, ought to have alleged that the debt of which recovery was prayed was a partnership debt, that the deceased partner had died before the suit, and that the suit was brought by the plaintiff as surviving partner for his own benefit and that of the estate; but the suit should not be dismissed merely because the plaint did not contain these averments. *Jell v. Douglas* (3) referred to.

A suit should not be dismissed on merely technical grounds when the merits are proved, and no injustice by surprise or otherwise will be done.

[*Dis.*, 70 P.R. 1904; *F.*, 20 A. 365; 10 P.R. 1906; *App.*, 17 B. 6; *R.*, L.B.R. (1872-1892) 651; 14 A. 524=A.W.N. (1892) 104; 21 B. 412; *D.*, 18 C. 86; *R.*, 24 Ind. Cas. 268=7 Bur. L.T. 261; 8 L.B.R. 130.]

THIS was an application for revision, under s. 622 of the Civil Procedure Code, of a decree of the Court of Small Causes at Benares. The suit was for the balance of an account stated by the [487] defendant, who had purchased cloth from a shop in which the plaintiff Gobind Prasad and one Moti Chand, deceased, had been partners. The cloth was purchased by the defendant Chander Sekhar during the life-time of Moti Chand. The suit was instituted after Moti Chand's death by Gobind Prasad alone. The plaint contained no reference to the partnership, or to the interest of Moti Chand or his representatives in the debt recovery of

<sup>\*</sup> Application No. 23 of 1887, for the revision of an order of Babu Mritonjoy Mukerji, Judge of the Court of Small Causes at Benares, dated the 14th January, 1887.

(1) 9 A. 104.

(2) 8 A. 519.

(3) 4 B. and Ald. 374.

which was sought ; but claimed the amount in suit as due exclusively to the plaintiff.

The judgment of the Court of Small Causes was as follows :—" The plaintiff and Moti Chand (late) were partners of the shop from which the cloth was purchased. The former alone is not therefore competent to maintain the suit. Suit dismissed. I would allow no costs to the defendant, as he falsely stated that the debt was due to Moti Chand alone. The claim is dismissed without prejudice to the plaintiff's right to bring a proper suit by joining all the necessary parties."

The plaintiff applied for revision of the Small Cause Court's decree on the ground that, as sole surviving partner, he was competent to sue alone for the partnership debt due to himself and Moti Chand, and that in dismissing the suit without trial on the merits, the Court had failed to exercise a jurisdiction vested in it by law.

Munshi Kashi Prasad, for the appellant.

Mr. A. Strachey, for the respondent.

A preliminary objection was taken on behalf of the respondent that the application was not entertainable under the provisions of s. 622 of the Civil Procedure Code.

[MAHMOOD, J.—The Judge declined to entertain the suit on the merits. If he was wrong, he failed to exercise a jurisdiction vested in him by law. He refused to try the case.]

He did not decline jurisdiction : what he did was to dismiss the suit on the ground of variance between the contract alleged in the plaint, which was a debt due to the plaintiff alone, and that which (if any) had been made, which was a debt due to the plaintiff and Moti Chand's representatives jointly. If he was wrong, he made a mistake in law, but he did not refuse to exercise his jurisdiction. There is no such refusal where a Judge disposes of a suit or other matter brought before him, by a decree or order which may [488] be executed ; but only where he declines to dispose of it, as in *Badami Kuar v. Dinu Rai* (1), or *Huxley v. The West London Extension Railway Company* (2). The determination of a case upon a preliminary point, and without considering the merits, is not a refusal to try the case : trial does not necessarily involve consideration of the merits. It has been held that the erroneous dismissal of a suit as barred by limitation and without considering the merits, is not a refusal to exercise jurisdiction, but is merely an error in law (3). That is precisely analogous to this case. The trial of a suit usually requires an investigation of the merits by hearing evidence on both sides : this is the normal state of things. In other cases the trial requires evidence to be taken on one side only : as where at the close of the plaintiff's case it is held that there is nothing to go to the jury. Again, there are cases in which no evidence at all need be taken, but the suit is tried and decided upon the determination of a preliminary question of law. In each class of cases, error may be made : in the first, the verdict may be against the weight of evidence ; in the second, the plaintiff may have raised a presumption in his favour which required rebutting ; in the third, the preliminary point of law may have been wrongly decided against the plaintiff, and he should have been allowed to give evidence. But in each case jurisdiction is exercised and not declined, and the suit is tried and decided ; and in each case if error is made it is error in fact or law, and not refusal of jurisdiction.

(1) 8 A. 111.

(2) L.R. 17 Q.B.D. 373 = 55 L.J.N.S. 506.

(3) *Ali Mashar v. Sheo Bakhsu*, A.W.N. (1885) 32 per Oldfield and Mahmood, JJ.

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The objection was overruled.

## JUDGMENT.

EDGE, C.J.—This is an application to the Court to exercise its powers of revision under s. 622 of the Civil Procedure Code. It appears from the judgment of the Judge of the Small Cause Court of Benares that the plaintiff and one Moti Chand carried on the business of shonkeeners in co-partnership. Before the action Moti Chand died, and the plaintiff, without joining the representatives of Moti Chand, brought this action, in which he alleged that he had kept a shop, and that goods were sold to the defendant, and that the defendant had stated an account. The plaintiff sued for the balance, with interest. The Judge below dismissed the suit on the ground that the plaintiff, suing alone, could not [489] maintain the action. Mr. Strachey, for the defendant, contended that the plaintiff could not maintain this action unless he joined the representatives of Moti Chand as co-plaintiffs, or, in case of their objecting to be co-plaintiffs, then as co-defendants. He contended that where a debt is due to two or more persons jointly, all the persons jointly interested must be made parties to the action, either as plaintiffs or as defendants. In support of that contention he relied on the judgment of Lord Blackburn in *Kendall v. Hamilton* (1) and on Dicey *On the parties to an action*, pp. 11, 104, 105, 106, 148 150, 153, 154, 230, 231, 502, 503 and 506, and on the note to p. 227 of Bullen and Leake's *Precedents of Pleadings* (3rd ed.), *Jell v. Douglas* (2), Story's *Equity Pleadings*, 8th ed., ss 159 and 167, Story *On the Law of Contracts*, 5th ed., vol. 1. p. 44 and *Kundhiya Lal v. Chandar* (3). Basing his argument on the propositions of law enunciated in those authorities, he contended that under s. 45 of the Indian Contract Act, taken with s. 26 of the Code of Civil Procedure, a sole surviving partner could not sue alone for a debt due to the firm, and the rule of English law by which the right to maintain an action for a trading partnership debt survived to a surviving partner, did not apply. In support of that contention he referred to the following authorities, which I shall now consider. The case of *Kalidas Kevaldas v. Nathu Bhagvan* (4).

That was a case in which one of three sons sued alone for a debt which had become due to his father, himself, and his two brothers, as members of a joint Hindu family. That case does not, I think, support Mr. Strachey's contention. It is only an authority for saying that one of three partners cannot maintain an action for a partnership debt. The case of *Ramsebuk v. Ramlall Koondoo* (5) was a case in which one member of a joint Hindu family sued alone for a debt due to the family. The case of *Uma Sundari Dasi v. Ramji Halder* (6), only decided that in that particular case, which was an action for rent, all the co-sharers should join as plaintiffs, or, if they objected, then those objecting to join as plaintiffs should be made defendants. The judgment of Sir Charles Turner, in the case of *Patinharipri Krishnan v. Chekur Manakkal* (7), no doubt [490] decided that the practice in India was to make those persons defendants who ought to be plaintiffs, but objected to be such. The case of *Gopal Chunder Gooko v. Juggodumba Dossia* (8), only decides that one joint landlord cannot sue for rent unless he makes his co-landlord a plaintiff or a defendant. Mr. Strachey also relied on Domat's *Civil Law*, Part I,

(1) L. R. 4 App. Cas. at p. 543.

(3) 7 A. 313 (326 and 327).

(5) 6 C. 815.

(7) 4 M. 141.

(2) 4 B. and Ald. 374.

(4) 7 B. 217.

(6) 7 O. 242—9 C.L.R. 13.

(8) 10 W. R. 411.

Book III, Title iii, ss. 1 and 2, p. 712, and the note to s. 26 in O'Kinealy's Code of Civil Procedure, 2nd ed., which says that all persons that are interested in the case should be before the Court, either as plaintiffs or defendants. Mr. Strachey also contended that the present case was not within s. 622 of the Code of Civil Procedure.

Now, notwithstanding the very careful and able argument which has been addressed to us, I have come to the conclusion that s. 45 of the Contract Act, read with s. 26 of the Code of Civil Procedure, has not the effect which Mr. Strachey contends it has. The general rule of English law, which is to be found in William's *On Executors*, 8th ed., at p. 850, that, in trading partnerships, "although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his co-partner, who alone must enforce the right by action, and will be liable on recovery to account to the executors or administrators for the share of the deceased," is, I think, based on a principle of sound common sense. This rule of law is referred to by Lord Justice Mellish in *Mc Clean v. Kenard* (1). It is obvious to my mind that it would lead in many cases to difficulties and confusion in the getting in of the assets of a firm on the death of a partner, if it were held that a surviving partner could not sue for such assets unless he joined in the action the representatives of the deceased partner. It might be difficult, if not impossible, for the surviving partner to ascertain who was the legal representative of the deceased partner. The period of limitation for the bringing of the action might almost have run, and by the time the surviving partner had ascertained who the representatives were, the action might be barred by limitation. Again, if it were necessary to make the representative a party, the defendant, who might be clearly liable, would be entitled to defend the action, and [491] possibly successfully in that event, on the ground that the person that was added as representative was not the legal representative of the deceased partner. Now, as I have said, the principle of English law is based on common sense, and it is a rule which, in my opinion, we should apply here unless there is statutory provision or authority to prevent us.

What is the effect of s. 45 of the Contract Act? It appears to me that s. 45 extends the English law applicable to trading partnerships to all cases of partnership. There is nothing in s. 45 which says that the representatives of a deceased partner must be joined in an action for a partnership debt. It may be that the legal representatives of a deceased partner might under s. 45 be joined in a suit by the surviving partner for a debt due to the partnership, but I see nothing which prohibits the rule of English law in the case of trading partnerships being applied in India. It may be doubted whether those who framed that section had a case of this kind in view. The legal representative in this case would not be entitled necessarily to a moiety of the amount recovered in the action; his share of the amount recovered would depend on a settlement of accounts on the realization of the partnership assets, and it would, in my judgment, be highly inconvenient and possibly mischievous to allow him to interfere in the realization of the assets unless through the intervention of the Court, by the appointment of a receiver in cases in which such interference by the Court might be necessary.

Now s. 26 of the Code of Civil Procedure enables all persons to be joined as plaintiffs in whom the right to any relief claimed is alleged to

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(1) L. R. 9 Ch. App. at pp. 346, 347.



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exist. That section is similar to the rule to be found in the rules under the Judicature Act in England (1) and no doubt was introduced to prevent a miscarriage of justice from want of parties, and to enable persons who claimed somewhat different reliefs to be joined as plaintiffs in one action. But that section does not say that all persons who may be interested in the result of an action must necessarily be parties, nor does it say that an action by a surviving partner cannot be maintained unless the representatives of the deceased partner are made parties. For these reasons I am of opinion that the representatives of Moti Chand were not neces- [492] sary parties to the action, and that the plaintiff was entitled to require the Court to proceed and try the action on the merits.

In my opinion the Judge of the Small Cause Court failed to exercise his jurisdiction, and probably acted with material irregularity in dismissing this suit on the ground that the representatives of Moti Chand had not been made a party. S. 622 of the Code of Civil Procedure has been considered by a Full Bench of this Court in *Muhammad Suleman Khan v. Fatima* (2), and was also fully considered by my brother Mahmood in the case of *Dhan Singh v. Basant Singh* (3). I adhere to what I said in the Full Bench case, and approve of what was said by my brother Mahmood. This suit was one within the jurisdiction of the Small Cause Court Judge, and it was his duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain the suit on the merits he brought the case, in my judgment, within the scope of s. 622 of the Code of Civil Procedure.

There is only one other observation I have to make. If this was a partnership debt, which does not appear to have been proved, though it appears to have been assumed by the Judge, the plaint, if properly framed, ought, I think, to have alleged that fact, and that Moti Chand had died before the action, and that the action was brought by the plaintiff as surviving partner for his own benefit and the benefit of the estate. The case of *Jell v. Douglas* (4), cited by Mr. *Strachey*, shows, I think, that according to English procedure at that date in force, at any rate, the claim should have contained some averments. Although I say this, I would not dismiss the action merely because the claim did not contain those averments. In this case the plaintiff not only relied on proof of the original liability by showing a sale of the goods to the defendant, but he also relied upon an account stated with the defendant, and on part-payment of the amount of the original debt. It may be that the account was stated between the plaintiff and the defendant. In my opinion an action should not be dismissed on merely technical grounds when the merits are proved, and no injustice by surprise or otherwise will be done. In this case I think we ought to exercise the [493] power of revision conferred on us by s. 622 of the Code of Civil Procedure, and make an order allowing the application, and directing the Judge to enter the action on his list of pending cases, and dispose of it according to law. Costs to abide the result.

MAHMOOD, J.—I concur.

*Application granted.*

(1) Order XVI, Rule 1.  
(3) 8 A. 519.

(2) 9 A. 104.  
(4) 4 B. and Ald. 374.

9 A. 493—7 A.W.N. (1887) 116=11 Ind. Jur. 466.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

JAMNA AND OTHERS (*Plaintiffs*) v. NAIN SUKH AND OTHERS  
(*Defendants*).<sup>\*</sup> [26th March, 1887.]

*Hindu Law—Joint Hindu family—Mortgage by father—Suit to enforce the mortgage against sons' shares—Legal necessity—Burden of proof.*

As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest, should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family.

There is a distinction between such cases as this and cases in which a decree had been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father for an antecedent debt. Where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for.

In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiff as to the objects for which the bond was executed by the father.

*Held* that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity, or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family; and that, no evidence having been given, the suit must be dismissed.

[*Dis.*, 30 A. 156=A.W.N. (1908) 61=5 A.L.J. 175; N. F., 24 A. 459=A.W.N. (1902) 123; R., A.W.N. (1889) 142; 14 B. 320; 20 C. 328; 16 C.P.L.R. 169; 28 A. 508=3 A.L.J. 274=A.W.N. (1906) 117; 34 C. 735=11 C.W.N. 613=5 C.L.J. 569; 31 A. 176 (F.B.)=6 A.L.J. 263.]

THE facts of this case are stated in the judgment of Edge, C. J.

[494] The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

JUDGMENT.

EDGE, C.J.—In this case, the plaintiffs sued the sons upon an hypothecation bond which was given by their father. The family was a joint Hindu family. The plaintiffs gave no evidence as to the circumstances under which the bond was given or to show that any inquiry had been made by them. The defendants, on the other hand, have given no evidence as to the circumstances under which the bond was given. In both Courts, the Judges decreed the claim so far as the father's interest in the property was concerned, and dismissed the claim so far as the interests of the other parties (the defendants) were concerned. The single question

<sup>\*</sup> Second Appeal No. 738 of 1886, from a decree of Maulvi Saiyyid Muhammad, Subordinate Judge of Aligarh, dated the 30th March, 1886, confirming a decree of Babu Ganga Prasad, Munsif of Aligarh, dated the 30th September, 1885.

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1887 before us is as to upon whom the onus of proof lies. Pandit *Ajudhia Nath* and Mr. *Ram Prasad* have contended that the onus of proof was on the defendants, and that their clients, the plaintiffs, were entitled to succeed, unless it was shown that the bond was given for illegal or immoral purposes. In support of this contention, they cited the following cases:—*Narayana-charya v Narso Krishna* (1), *Luchmun Dass v. Giridhur Chowdhry* (2), *Gunga Prasad v. Ajudhia Pershad Singh* (3), *Girdharee Lall v. Kantoo Lall* (4), *Sita Ram v. Zalim Singh* (5), *Nanomi Babuasin v. Modun Mohun* (6), *Rampardip Rai v. Salig Rai* (7), *Ponnappa Pillai v. Pappu-vayyanganar* (8), *Gangulu v. Ancha Bapulu* (9), *Hanuman Singh v. Nanak Chand* (10). With regard to the cases cited, with the exception of two, to which I will refer, they do not appear to bear out the proposition contended for on behalf of the plaintiffs. They are cases in which a decree had been obtained against the father, and the property sold, or cases in which the sons had come into Court to ask for relief against the act of their father. These are cases that seem to me to afford no safe guide, because, where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask relief against a sale effected by his father for an antecedent debt, it would be for the son [495] to make out a case for the relief asked for. I approve of everything which was said by my brother Sraight in his judgment in *Hanuman Singh v. Nanak Chand* (10). As to the case of *Sita Ram v. Zalim* (5), it would appear, until examined, to be in point. The difficulty with regard to dealing with that case as an authority is that it was a first appeal to this Court, and it does not appear what the findings of fact of this Court in that case were. It is true that the findings of fact of the Judge of the Court below were referred to in the judgment of this Court. We must assume that this Court, as a Court of first appeal, found facts to which the proposition of law contained in the judgment at p. 234, was applicable. Then I come to the case of *Luchmun Dass v. Giridhur Chowdhry* (2). That is a most important case. It was on the authority of that case that the eminent Judge, Mr. Justice Mitters, decided as he did in the case of *Gunga Prasad v. Ajudhia Pershad Singh* (3). Now as to the case of *Luchmun Dass v. Giridhur Chowdhry* (2), it is difficult to ascertain what the facts were, or what was the precise form of litigation. This alone is certain, that there were certain questions which appear at p. 857 of the report, which were referred to a Full Bench. The answers to these questions are found at p. 863, and taking the first question and answer as an example and as those relied upon by Pandit *Ajudhia Nath* here, it is to be observed that the Judges, in giving their answer, have assumed a most important fact which is not suggested in the question. The same observation applies to others of the questions. They have assumed that the debt contracted by the father was an antecedent debt within the rulings of the Privy Council. It is unfortunate that the full facts of that case do not appear in the report. Now with regard to the case of *Gunga Prasad v. Ajudhia Prashad Singh* (3), the judgment of Mr. Justice Mitter and Mr. Justice Maclean is based upon the Full Bench decision in *Luchmun Dass v. Giridhur Chowdhry* (2),

(1) 1 B. 262.  
 (3) 8 C. 131.  
 (5) 8 A. 231.  
 (7) A.W.N. (1883) 107.  
 (9) 4 M. 73.

(2) 5 C. 855.  
 (4) 1 I.A. 321.  
 (6) 13 I.A. 1=13 C. 21.  
 (8) 4 M. 1; and see 9 M. 343.  
 (10) 6 A. 193.

above referred to. That fact, to my mind, naturally lessens the authority of that case, so far as it may apply to a case like the present. Now on the other side, Pandit *Sundar Lal* for the respondent relied on three cases. The first was a judgment of the Full Bench of the Calcutta Court delivered by Sir Barnes Peacock, [496] C.J.,—*Madhoo Dyal Singh v. Golbur Singh* (1) in which the Full Bench dealt with the onus of proof as to the application of the purchase-money. The son in that case contended that the money borrowed by the father was not for legal necessity. The Full Bench laid down a stronger rule of law than has since been acted upon. The case is, however, important as affording an indication on which side the onus of proof would lie in a case like this. The next case is *Bheknarain Singh v. Januk Singh* (2). In that case the Court, which was composed of Mr. Justice Jackson and Mr. Justice White, applied to a case similar to the present, the principle of law to be found in the judgment of Lord Justice Knight Bruce in the case of *Hunoomanpersaud v. Mussummat Baboo* (3). In my opinion the rule of law applied in the case of *Bheknarain Singh v. Januk Singh* (2) applies also in this case. I think the same rule of law may be deduced from the judgment of this Court in *Lal Singh v. Deonarain Singh* (4). It appears to me that the authorities cited by Pandit *Sundar Lal* govern this case. It is good sense and a general rule that a creditor endeavouring to enforce his claim under a bond given by a Hindu father against the estate of a Hindu family in respect of money lent or advanced to the father having only a limited interest should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable enquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family. He is the person who would know, or ought to have known, the circumstances under which he parted with his money on the security of the property of the Hindu family, and, in such a case as the present, it is only reasonable that the onus of proof should fall on him. Since no evidence on this point has been given, I am of opinion that the appeal should be dismissed with costs.

MAHMOOD, J.—I concur.

*Appeal dismissed.*

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(1) 9 W.R. 512.  
(3) 6 M.I.A. 598.

(2) 2 C. 498.  
(4) 8 A. 279.



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9 A. 497=7 A.W.N. (1887) 107.

## [497] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*THE DELHI AND LONDON BANK, LIMITED (*Plaintiff*) v. RAM NARAIN  
(*Defendant*).<sup>\*</sup> [1st April, 1887.]*Civil Procedure Code, ss. 492, 493—Temporary injunction restraining alienation of property in suit—Mortgage of such property not void—Act IX of 1872 (Contract Act), s. 23.*

The effect of a temporary injunction granted under s. 492 (b) of the Civil Procedure Code is not to make a subsequent mortgage of the property in question illegal and void, within the meaning of s. 23 of the Contract Act (IX of 1872). Such a penalty must not be read into s. 493, which provides otherwise for the breach of an injunction granted under s. 492.

[F., 25 A. 431=A.W.N. (1903) 93; Appr., 12 C.P.L.R. 109; R., L.B.R. (1893—1900) 414; A.W.N. (1900) 148.]

In a suit for a money claim brought by the respondent Ram Narain, against two persons named, respectively, Ram Sarup and Piare Lal, an injunction under s. 492 (b) of the Civil Procedure Code was, on the application of the plaintiff, granted by the Court in the following terms:—

"Whereas it has, in this suit, been proved to the satisfaction of the Court that, as regards the property mentioned below, there is an apprehension of your transferring it to some person, or of your causing damage to the disputed property by cutting down trees or pulling down buildings, you are hereby ordered to refrain from the act complained of, without fail."

The property referred to in this order consisted of two bungalows. The order was dated the 12th June, 1884, and a copy of it was served on both defendants on the 14th June.

On the 27th June, 1884, while the suit was still pending, the defendants executed a deed in which they hypothecated both bungalows to the Delhi and London Bank, Limited. In this deed, it was stated that the bungalows had "been attached, together with other property and villages, in suit No. 58 instituted in the Court of the Subordinate Judge of Bareilly by Pandit Ram Narain, plaintiff, against us, the declarants, for Rs. 3,721. But the whole of this property will be caused to be released and freed from attachment."

On the 7th August, 1884, Ram Narain obtained a money-decree against Ram Sarup and Piare Lal, and, on the 12th August, [498] attached the bungalows and caused them to be advertized for sale in execution of the decree.

On the 19th January, 1885, the Delhi and London Bank obtained a decree upon their deed of the 27th June, 1884, and on the 25th March, 1885, attached the same two bungalows in execution of their decree. On the 23rd and 24th July, the bungalows were sold by auction for Rs. 13,005.

An application was then made in the execution department by the Delhi and London Bank for payment of the whole amount of the sale proceeds. An objection was made by Ram Narain, on the ground that the hypothecation of the 27th June, 1884, in favour of the Bank was, by

\* First Appeal No. 72 of 1886 from a decree of Maulvi Muhammad Abdul Quiyum Khan, Subordinate Judge of Bareilly, dated the 23rd February, 1886.

reason of the injunction issued on the 12th June, 1884, invalid, and that consequently the Bank were not entitled to recover any part of the proceeds of the auction-sale. On the 13th November, 1885, the Court passed an order allowing the objection.

The Bank then brought the present suit against Ram Narain, praying for cancellation of the order of the 13th November, 1885, and for recovery of the whole amount of the proceeds of the auction-sale of the 23rd and 24th July, 1885.

The Court of first instance (Subordinate Judge of Bareilly) dismissed the claim, holding that the effect of the injunction was to make any transfer of the property to which it referred illegal and void, and that the plaintiff Bank had therefore derived no title to the property under their mortgage-deed and decree. The plaintiff Bank appealed to the High Court.

Mr. G. T. Spankie and Mr. W. M. Colvin, for the appellant.  
Babu Ratan Chand, for the respondent.

### JUDGMENT.

EDGE, C. J.—This was an action which the plaintiffs brought against the defendant to try the question as to who was entitled to the proceeds of an execution. It appears that Ram Sarup and Piare Lal, whom I shall call the debtors, owed money to the defendant. On the 7th June, 1884, the defendant brought his suit against the debtors to recover that money, and on the same day applied for an injunction against the debtors under s. 492 of the Code of Civil Procedure, clause (b). On the 12th June, 1884, the [499] Court granted the injunction, which is in the following words: "Whereas it has, in this suit, been proved to the satisfaction of this Court that as regards the property mentioned below there is an apprehension of your transferring it to some person or of your causing damage to the disputed property by cutting down trees or pulling down buildings, you are hereby ordered to refrain from the act complained of without fail." The property consisted of, amongst other things, two bungalows, the dealings with which are the subject-matter of this suit. On the 27th June, 1884, the debtors executed a mortgage of the same property to the plaintiffs for a debt due. On the 7th August, 1884, the defendant obtained a money-decree in his suit against the debtors. On the 19th January, 1885, the plaintiffs obtained a decree on their mortgage for enforcement of their lien by sale, and on the 25th March, 1885, attached the property in question. I should have said that on the 12th August, 1884, the defendant had attached the same property under his money-decree of the 7th August, 1884. The plaintiffs and defendant respectively claimed execution. The property was sold and realised, after the payment of expenses, the money in dispute. It is contended that the effect of s. 492 of the Code of Civil Procedure was in this case to take away from the debtors the power to transfer the title of the property to the plaintiffs, or, in fact, to any one. In other words, that the mortgage executed by the debtors on the 27th June, 1884, was void by reason of the injunction of the 12th June, 1884. For that proposition no authority is cited. It is contended that s. 23 of the Contract Act applies, on the ground that the object of the mortgage was of such a nature that, if permitted, it would defeat a provision of law, that is, the injunction. It appears to me that s. 23 of the Contract Act does not apply to this case. It might apply if there were any provision of the law by which a mortgage under these circumstances would be void or illegal, or if it were forbidden by law that a particular creditor

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should obtain security for his debt. It is said that one of the penalties which result from an infringement of an injunction granted under s. 492 of the Code of Civil Procedure, is that any dealing with the property, the subject of such an injunction, contrary to the terms of the injunction, is illegal and void. For this proposition no authority has been cited. What I do find [500] is, that s. 493 provides a penalty for the breach of an injunction granted under s. 492, and the penalty there provided is not the one contended for. I fail to see why we should read into the section words which are not found there, in order to provide another penalty. The omission of any such words in s. 492 or s. 493 is all the more marked when we turn to ss. 274 and 276 of the same Code. Those sections relate to attachment of property, and even in the case of attachment of property under s. 274, a subsequent private alienation of the property is not rendered void, even as against claims enforceable under the attachment, unless the attachment has been made by actual seizure or by written order duly intimated or made known. In conclusion, I can find neither in the Codes, case-law, nor text-books, any authority to support the contention of the defendant in this action. Under these circumstances the appeal must be allowed with costs, and the decree of the lower Court must be set aside; the relief prayed for in paras A, B, C, D, of the plaint must be decreed with costs here and below. Mr. Colvin, relying on the strength of his point, has not raised the question as to whether or not the injunction was legally made. We do not consider it necessary to enter into that question.

MAHMOOD, J.—I agree.

*Appeal allowed.*

9 A. 500=7 A.W.N. (1887) 109.

### APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

HULAS RAI AND ANOTHER (Plaintiffs) v. PIRTHI SINGH AND ANOTHER (Defendants).\* [7th April, 1887.]

*Mortgage—Decree for foreclosure—Order allowing mortgagor to deposit in Court amount due after date fixed—Ministerial act—Order not appealable—Civil Procedure Code, ss. 244, 588—Act IV of 1882 (Transfer of Property Act), s. 87.*

S. 244 of the Civil Procedure Code contemplates that there must be some question in controversy and conflict in execution which has been brought to a final determination and conclusion so as to be binding upon the parties to the proceedings, and which must relate in terms to the execution, discharge or satisfaction of the decree.

A judgment-debtor under a decree for foreclosure made an application to the Court two days after the expiry of the time prescribed by the decree for payment of the amount due thereunder, in which she alleged that, by reason of [301] the two previous days having been holidays, she had been unable to pay the money before, and asked to be allowed to deposit the same. Upon this application the Court passed the following order:—"Permission granted. Applicant may deposit the money." The money was deposited accordingly.

*Held* that the order was merely a ministerial act, and nothing more than a direction from the Judge to his subordinate official to receive the money, which, as it did not fall within either s. 244 or s. 583 of the Civil Procedure Code, was

\* First Appeal No. 28 of 1887 from an order of Maulvi Abdul Basit, Subordinate Judge of Mainpuri, dated the 25th January, 1887.

not appealable; and that the proper remedy of the decree-holder, assuming the deposit to have not been made in time, was to apply for an order absolute for foreclosure, which order would be subject to any steps the parties affected by it might take by way of appeal or otherwise.

[R., 14 A. 350 (354); 8 C.W.N. 257; 25 M. 244 (F.B.); 25 M. 300 (F.B.); D., 14 A. 520.]

THIS was a first appeal from an order of the Subordinate Judge of Mainpuri, dated the 25th January, 1887. The principal facts of the case are stated in the judgment of the Court. The appellants obtained against the respondents a decree for foreclosure of a mortgage executed by the latter in their favour; and, by an order of the High Court, dated the 11th January, 1887, an extension of time was granted to the respondents for payment of the amount due under the decree, up to the 23rd January, 1887. That day and the next were close holidays. On the 25th January, the following petition was filed in the Court of the Subordinate Judge, on behalf of the respondents:—

"The aforesaid defendants beg to state that in the case noted above, the 23rd January, 1887, was fixed, under the High Court's order, as the latest day for payment of the decretal money; that they had consequently procured money on that day, but the 23rd and 24th days of January, 1887, were holidays; and that they therefore pray that they may be allowed to deposit the decree-money, which they have brought with them, to-day, on the re-opening of the Court."

Upon this petition the Subordinate Judge passed the following order:—"Permission granted. Applicant may deposit the money." The amount tendered, viz., Rs. 7,096-5-7, was accordingly paid into Court.

The decree-holders appealed from the Subordinate Judge's order to the High Court, on the ground that the Court of first instance was not competent to accept payment of the mortgage money after the expiry of the prescribed period.

[502] Maulvi *Abdul Majid* and Munshi *Hanuman Prasad*, for the appellants.

Babu *Baroda Prasad Ghose*, for the respondents.

#### JUDGMENT.

STRAIGHT, J.—In this case the circumstances out of which this first appeal from order arises may be conveniently stated in order to make the view that I take of the preliminary objection which has been raised from the Bench itself intelligible. The appellants before us obtained a foreclosure decree in their favour on the 22nd March, 1866, which, it is conceded, was prepared in accordance with the terms of s. 86 of the Transfer of Property Act. By that decree it was provided, among other matters, that, in the event of the mortgage money not being paid on or before the 22nd September, 1886, the property would be foreclosed, with the necessary other alternative that, if it was paid on or before that date, the mortgagor would be entitled to the possession of the property. The matters that occurred subsequent to that decree are not very clear; but it would seem that the judgment-debtor, whose name was Lala Pirthi Singh, was insane or a lunatic, and an application was made on the 20th September, that is to say, two days before the period limited by the foreclosure decree had run out, by the wife of the judgment-debtor to the Court granting the decree, for an extension of time from the 22nd of September, the date upon which the foreclosure would otherwise ensue, and that the Subordinate Judge refused that application. From that refusal there was an appeal to this Court, which, on the 11th

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January, 1887, granted an extension of time to the 23rd January, 1887 (1) and for the purpose of dealing with this appeal, we must, in my opinion, regard the decree obtained by the appellants on the 22nd March as having had written into it the 23rd January, 1887, instead of the 22nd September, 1886. It is admitted that the 23rd January was a holiday when the Court which passed this order was closed, [503] and it is also admitted that the 24th January was also a holiday, and on the 25th January, 1887, the second respondent appeared in the Court of the Subordinate Judge and presented a petition, alleging that by reason of those two days having been holidays—one being the date for the deposit—she had not been able to pay in the money, and stating that the money having been brought along with her, she asked to be allowed to deposit that money. There was nothing, to my mind, in that petition which may be regarded as in the nature of a petition judicially filed *i. e.*, as a legal document filed in the course of a suit. It was an application to the Court that originally passed the decree, asking it to receive a certain sum of money, which the party wished to deposit. Upon the face of that petition an order was granted, which I take to be nothing more than a direction from the Subordinate Judge to his subordinate official to receive the money. Upon this order passed by the Subordinate Judge, it is now admitted, and is beyond all question, that the money was deposited in the Court of the Subordinate Judge.

These are the facts upon which the applicants have presented the appeal to this Court, and it is this order of the Subordinate Judge directing that the money might be deposited with the officer of the Court, which is sought to be made the subject of the appeal from order.

Now, objection was taken by my brother Mahmood and myself to there being any appeal from an order of this kind. It can only be, and could only be, appealable if it is an order of the class and description mentioned in s. 244 of the Civil Procedure Code, or an order of the kind mentioned in s. 588 of the Code. As to s. 588, it is obvious that this order is not within that section, as we do not find it there. As to its being within the purview of s. 244 of the Code, it seems to me that that section contemplates that there must be some question in controversy and conflict in execution which had been brought to a final determination and conclusion so as to be binding upon the parties to the proceedings, and which must relate in terms to the execution, discharge or satisfaction of the decree. In my opinion this sanction to the deposit of money was merely a ministerial act, and the fact that by operation [504] of law such deposit may result in certain consequences which will take legal shape in a judicial order of the Court, does not alter its character. That formal order will itself be subject to any steps which the parties affected by it may think proper to take by way of appeal or otherwise. If the deposit was made in time, the mortgagor is entitled to the benefits that are provided for him in s. 87 of the Transfer of Property Act; if it has not been

(1) The judgment of Edge, C.J., (in which Oldfield, J., concurred) was as follows:—"In this case, it is alleged on behalf of the appellant, and not denied on behalf of the respondent, that the principal debtor is insane. Under these circumstances, we think that the Judge below ought to have granted a reasonable extension of the time. It is said also that this is not a case in which there can be an appeal. It appears to us that it does come within the sub-section (c) of s. 244 of the Civil Procedure Code. It is a question "relating to the execution, discharge, or satisfaction of the decree." Under these circumstances we allow the appeal without costs, and make an order that the appellant shall have until the 23rd January, 1887, to make payment of the amount due under the decree."

made in time, the mortgagee, who is represented by the appellants here, is entitled to make the application provided for in sub-section 2 of s. 87 of the Transfer of Property Act, with the consequence that if he obtains an order as therein provided, on the passing of such order, the mortgage-debt will be discharged. And that is, in my opinion, a step which the mortgagees appellants must first take, before they have laid the foundation for coming into this Court to impeach the propriety of the action of the Subordinate Judge in allowing the deposit to be made. In short, it comes to this, that the order was purely a ministerial order not falling within the purview of s. 244 or s. 588 of the Civil Procedure Code, and, as such, cannot be made the subject-matter of appeal. Without, therefore, discussing or determining the other questions raised in the appeal, I am of opinion that as no appeal lay, we have no alternative but to dismiss it with costs.

MAHMOOD, J.—I am entirely of the same opinion, and only wish to add that the judgment of the learned Chief Justice and my brother Oldfield, in F. A. from Order No. 223 of 1886, disposed of on the 11th January, 1887 (1) does not, in my opinion, lay down any rule which is inconsistent with what my learned brother has said, and which I think is the point upon which our judgment should be based; namely, that no appeal lies from an order such as the order of the 25th January, 1887, from which this appeal has been preferred. I would, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

9 A. 505 = 7 A.W.N. (1887) 137.

### [505] APPELLATE CIVIL.

*Before Mr. Justice Straight, and Mr. Justice Tyrrell.*

THE RAJAH OF TOMKUHI (*Plaintiff*) v. BRAIDWOOD AND OTHERS  
(*Defendants*). \* [29th April, 1887.]

*Plaint—Signature—Verification—Allegation of fraud—Practice.*

Where a plaintiff contained numerous allegations of fraud some of which must have been true or false to the plaintiff's own knowledge, and was signed and verified on the plaintiff's behalf by his general attorney,—*held* that the defendants might reasonably require the plaintiff to subscribe and verify the plaintiff himself, and that he should so subscribe and verify.

THIS was an appeal from an order of the District Judge of Gorakhpur, returning a plaint for amendment. The plaintiff was the Rajah of Tomkuhi, and the first defendant, F. Braidwood, held a general power of attorney from him, for the management of his estate, dated the 6th January, 1832. The suit was for a declaration of the plaintiff's exclusive right to an indigo factory at Gaazia, in the Gorakhpur district and that a certain partnership agreement of the 13th August, 1833, a deed of sale dated the 12th October, 1834, and two leases dated the 19th July, 1833, might be declared void and cancelled. The material allegations of

\* First Appeal No. 4 of 1887 from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 18th December, 1886.

(1) 9 A. 502, note.

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1887 the plaintiff in regard to these documents were contained in the following paragraphs :—

APRIL 29. "5. That after obtaining the powers under the general power of attorney dated the 9th July, 1883, acting as such, the defendant No. 1, without the knowledge of the plaintiff, and without legal authority, gave on the 19th July, 1883, a lease of seven villages for a period of nine years, from 1291 to 1299 fasli, at an annual *jama* of Rs. 11,090-4, and another lease for sixteen years, from 1291 fasli to 1307 fasli on a *jama* of Rs. 16,671-8-3, to the defendants Nos. 2 and 3, without securing an enhanced rate as required by the rules of the estate, in bad faith and collusively with the defendants Nos. 2 and 3, within the terms of the lease granted by the plaintiff on the 26th May, 1882, and without recording any reason for renewing the lease.

"6. That, contrary to the powers entrusted to him by the power of attorney, in bad faith and with the object of injuring the plaintiff, the defendant No. 1 executed an agreement on the 13th August, 1883, to the effect that in the factory at Ghazia, the [506] defendant No. 2 held a four-annas share, the defendant No. 3 a four-annas share, the defendant No. 1 a three-annas share and the plaintiff a five-annas share, though the said factory was built by the plaintiff and was owned and possessed exclusively by him, and it is still so owned and possessed.

"7. That on returning from a pilgrimage, the plaintiff became apprised of the dishonesty of the defendant No. 1 to some extent, and he therefore recorded a proceeding on the 24th August, 1884, to the effect that without the permission of the Committee, the said defendant could not do any new act, such as purchase, &c., and the latter affixed his seal and signature on it.

"8. That in spite of the proceeding dated the 24th August, 1884, the defendant No. 1 dishonestly and in collusion with the defendants Nos. 2 and 3, on the 12th October, 1884, without the knowledge or permission of the plaintiff, obtained a sale-deed of an eight annas fictitious share of the defendants Nos. 2 and 3, in the Ghazia kothi, for Rs. 50,000, in favour of the plaintiff, making him liable to pay Rs. 15,740, the expenses of the Ghazia kothi, Rs. 3,526 due to Grayson and Co., and Rs. 830, the price of stamp, to the defendants, and agreed that the consideration should be paid out of the lease-money."

Other paragraphs of the plaintiff also imputed fraud and dishonesty to the defendants.

The plaintiff was thus signed and verified :—"Rajah Krishna Partab Bahadur Sahi, plaintiff : The contents of this petition are, to the best of my knowledge and belief, correct. (By the pen of Jagmohan Lal, general-attorney.)"

All the defendants filed petitions in the Court of the District Judge of Gorakhpur, in which they prayed that as the plaintiff contained numerous allegations of fraud on their part, it should not be admitted unless signed and verified by the plaintiff with his own hand. Upon these petitions the District Judge passed the following order, dated the 13th December, 1886 :—

"The objections taken by the defendants to the signing and verification of the plaintiff in this case are, in my opinion, sound. The [507] plaintiff contains numerous allegations of fraud, many of which must obviously be true or false within the knowledge of the plaintiff himself, and I hold therefore, following the Calcutta decisions in *Jardine Skinner &*

*Co. v. Moharanee Shurno Moyee* (1) and *Protap Chunder Banerjee v. Krishto Kishore Shaha* (2), that the plaintiff may reasonably be required to sign and verify in person. The signature and verification do, in my opinion, purport to be made by the plaintiff, but they are made in such a manner as to leave room for future contention, and the plaintiff being admittedly a literate person, there is no good reason why he should not sign and verify with his own hand.

"The verification is, moreover, defective, in that it is not made in the manner prescribed by s. 52 of the Civil Procedure Code. As pointed out in *the matter of Upendro Lall Ghose* (3) the party verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.

"I accordingly direct that the plaint be returned in order that it may be signed and verified by the plaintiff with his own hand, and I allow him till the 7th January next for that purpose. On the order of the Court being complied with, a further date will be fixed for the filing of written answers by the defendants and for the settlement of issues."

The plaintiff appealed from this order to the High Court. It was contended on his behalf that his general attorney was fully competent to sign and verify all plaints on his behalf, and that the precedents referred to by the District Judge were not applicable to the case.

Mr. J. E. Howard and Mr. G. E. A. Ross, for the appellant.

The Hon. T. Conlan, for the respondents.

### JUDGMENT.

STRAIGHT and TYRRELL, JJ.—We think that this appeal must be dismissed with costs. Upon reading the plaint and seeing the allegations that are contained in it in reference to all the three defendants in the suit, we do not think that there was anything unreasonable in their requiring the plaintiff to subscribe and verify [508] the plaint himself, and, this being so, in our opinion, it is right and proper that he should subscribe and verify. We refrain from making any further observations, feeling sure that this intimation from us will be acceded to at once and without delay by the plaintiff. Let the plaint be signed and verified by the plaintiff within fourteen days from the date of the receipt of this order of ours by the lower Court.

*Appeal dismissed.*

9 A. 508=7 A.W.N. (1887) 189.

### APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

PARMESHAR DAS AND OTHERS (*Defendants*) v. BELA AND ANOTHER (*Plaintiffs*).<sup>\*</sup> [15th March, 1887.]

Act XL of 1858 (*Bengal Minors Act*), s. 3—*Suit on behalf of minor—Permission to relative to sue, proof of—Civil Procedure Code*, ss. 440, 678.

In a suit conducted on behalf of a minor by a relative, the absence of the certificate of the guardianship required by s. 3 of the *Bengal Minors Act* (XL of

<sup>\*</sup> Second Appeal No. 345 of 1886 from a decree of R. G. Leeds, Esq., District Judge of Gorakhpur, dated the 28th November, 1885, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 11th June, 1885.

(1) 24 W.R. 215.

(2) 8 C. 895.

(3) 6 C. 675.



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1858), is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not in fact been given, the irregularity is covered by s. 578 of the Civil Procedure Code. *Bhiza Pershad Khan v. The Secretary of State for India in Council* (1) followed.

[R., 166 P.R. 1889; 67 P.R. 1897; 20 A. 370 (374).]

THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Mr. J. E. Howard, for the appellants.

Mr. W. S. Howell, for the respondents.

## JUDGMENT.

MAHMOOD, J.—This is a suit by one Ram Ghulam, under the guardianship of his mother Bela, for the recovery of possession of certain property, which admittedly belonged to one Indar Sen. Indar Sen is said to have died, by one party, in 1273 fasli, corresponding to 1866 of the Christian era, and it is found by the Court of first instance that he died in 1275 fasli, which would be about 1868 A. D. The plaintiff's suit was resisted by the defendants on the allegation that they were the real heirs of Indar Sen, but that the plaintiff was born of Bela, after the death of Indar Sen, by another husband; that the plaintiff therefore had no right of inheritance [509] in respect of the property of Indar Sen; that the defendants had been in adverse possession for more than twelve years, and therefore the suit was barred by limitation. The Court of first instance decreed the claim upon findings which are not necessary to be set down here.

Upon appeal, amongst many of the grounds urged by the defendants, one was that Musammat Bela, who called herself the next friend and guardian of Ram Ghulam, had not obtained the certificate of guardianship from the Civil Court, as is required by s. 3 of Act XL of 1858, and therefore she could not maintain the suit. The learned Judge of the lower appellate Court overruled this point. But in dealing with the merits of the case, he has written a few lines, which do not convey to my mind any information that he had present to his mind all the essential points of this case. It seems to me that it may be presumed that the learned Judge did not dispose of the case upon a preliminary point, and that he did make some sort of endeavour to deal with the case upon the merits. But the judgment recorded by him is very unsatisfactory, and it is not such as is required by s. 574 of the Civil Procedure Code. I have had doubts whether the judgment should not be set aside altogether, and the case remanded under s. 562, Civil Procedure Code, for proper decision according to law. But considering the exigencies of this particular case, I think it will be sufficient for the ends of justice to indicate what the issues were upon which the learned Judge ought to have concentrated his mind and arrived at a final decision. I say this, as I have often said it before, that it is the bounden duty of Judges in appeals from original decrees to indicate clearly the reasons of their conclusions, and properly weigh the evidence in the case. It is not our duty, sitting as a Court of second appeal, to weigh the evidence.

Before, however, indicating those issues, it is necessary to dispose of the question of law insisted upon by Mr. Howard, namely, whether the plaintiff was properly represented in this litigation by his mother, who

never obtained a certificate of guardianship. With regard to this, I am of opinion that the Full Bench ruling in the case of *Bhaba Pershad Khan v. The Secretary of State for India in Council* (1) decides the point. All that has been argued before [510] us was argued there, and it was held that the absence of a certificate of guardianship was not a fatal matter, and that the very fact of the Court allowing a suit to proceed must be taken to imply that the necessary permission was given. Moreover upon this point, I have very definite views of my own, and even if no such permission was given, the irregularity was such as was covered by s. 578 of the Code; that is to say, it did not affect the merits of the case or the jurisdiction of the Court. I therefore disallow this objection.

As to the other grounds of appeal, there are only these points, which form the main issues in the case:—When did Indar Sen die, and when was Ram Ghulam born? The learned Judge below must find on these and decide whether Ram Ghulam is the legitimate son of Indar Sen or not.

Then as to adverse possession, which has been made the subject of the fourth ground of appeal, I think, the plaintiff being a minor, no plea of that character can arise. But there are other circumstances which the learned Judge should bear in mind in deciding the case. Among them it is alleged by one side that upon the death of Indar Sen, the property was entered in the Government revenue records in the name of Musammat Bela and not in the name of Ram Ghulam, who, if the son of Indar Sen, would be the rightful heir. There are also other minor circumstances in the case to be borne in mind; for instance, the allegation that after the mutation of names had already been made, Musammat Bela had, by an application subsequently presented to the revenue authorities, asked for her name to be expunged, and the names of the defendants recorded, because she had contracted a second marriage. These are questions which bear upon the main issues. I would therefore remand the case under s. 566 for decision upon those points. On the return of the findings, ten days will be allowed for objections.

BRODHURST, J.—I concur in the remand order proposed by my learned colleague (2).

*Issues remitted.*

9 A. 511=7 A W.N. (1887) 145.

### [511] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

JASODA (*Objector*) v. MATHURA DAS AND OTHERS (*Auction-purchasers*).<sup>\*</sup> [23rd March, 1887.]

*Execution of decree—Civil Procedure Code, s. 311—Material irregularity in publishing or conducting sale—Substantial injury—Notification emitting to state place of sale—Sale held after date advertised—Civil Procedure Code, ss. 257, 290.*

Where a proclamation of sale of immoveable property in execution of a decree omitted to state the place of sale and where the sale took place on a date other than that notified in the proclamation, and before the expiration of the thirty

<sup>\*</sup> First Appeal No. 21 of 1887 from an order of Babu Ram Dhun Mukerji, Munsif of Gorakhpur dated the 13th November, 1886.

(1) 14 C. 159.

(2) See also *Janki v. Dharam Chand* (4 A. 177) *Contra*, see *Pirithi Singh v. Lobhan Singh* (4 A. 1).



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days required by s. 290 of the Civil Procedure Code,—held that the non-compliance with the provisions of ss. 287 and 290 of the Code was more than a mere irregularity, that it must have caused substantial injury, and that the order confirming that sale must be set aside. *Bakhshi Nand Kishore v. Malak Chand* (1) referred to.

*Per* MAHMOOD, J., *quære*, whether material irregularities such as the above were not in themselves sufficient, within the meaning of the first paragraph of s. 311 of the Code, to justify a Court in setting aside a sale, without inquiring whether such irregularities had resulted in substantial injury within the meaning of the second paragraph.

[N F. 14 M. 227; R., 10 A. 506; 11 A. 333; 12 A. 440 (443 and 459) and 12 A. 510 (518); 18 O. 422 (426); 21 A. 140.]

THE facts of this case are stated in the judgment of Edge, C.J.

*Lala Juala Prasad*, for the appellants.

*Munshi Sukh Ram*, *Pandit Sundar Lal*, and *Maulvi Mehdi Hasan*, for the respondents.

### JUDGMENTS.

EDGE, C.J.—This is an appeal from an order of the Munsif of Gorakhpur, confirming a sale of immoveable property. The notification of sale was put up in the Court-house on the 30th June, 1886. That notification did not state the place of sale; it stated that the sale would take place on the 27th July, but it took place on the 29th July, and before the expiration of the thirty days required by s. 290 of the Code of Civil Procedure. It is contended that no substantial damage resulted from these irregularities. I cannot believe that injury was not done by omitting from the notification the name of the place of sale and by holding the sale on a date subsequent to the date advertized. The non-compliance with the provisions of ss. 287 and 290 of the Code of Civil Procedure was more than an irregularity. I am of opinion that the Munsif ought not to have confirmed the sale. I am of opinion [512] that this appeal must be allowed and the order set aside. I thoroughly agree with the judgment reported in the case of *Bakhshi Nand Kishore v. Malak Chand* (1).

MAHMOOD, J.—I agree with the learned Chief Justice, but as I was a party to the judgment which has been referred to by him, I wish to add that this is not the first occasion upon which I have entertained serious doubts as to the question whether *material* irregularities, such as those found in this case, are not in themselves sufficient, within the meaning of the first paragraph of s. 311 of the Code of Civil Procedure, to justify a Court in setting aside a sale without inquiring whether such "*material* irregularity" had resulted in substantial injury within the meaning of the second paragraph of the section. I am inclined to hold that the presence of "*material*" before the word "*irregularity*" in the former paragraph of the section, and the absence of that word in the latter paragraph of the section, would so far sustain the view I have indicated, especially because the second paragraph of the section does not appear in the Code in the form of a proviso governing the earlier paragraph, but as a separate clause beginning with a disjunctive word. The rule of construction under such circumstances would render the two clauses independent of each other for the decision of the point now before us, and I think an argument might well be addressed in support of a contention that "*material* irregularity" is, *ipso facto*, fatal to a sale. I only wish to add on this point, with reference to the judgment of Mr. Justice Oldfield in the case above referred to, that I concurred without expressing any definite opinion

whether a sale that infringes the rule of thirty days provided by s. 290 would not in itself be a sale subject to such a *material* irregularity as the earlier part of s. 311 contemplated. I have considered it necessary to say this with reference to the argument insisted upon before us on behalf of the respondent. The question in this form does not really arise because, as the learned Chief Justice has said, it is impossible for us as a Court of first appeal, dealing with facts as well as law, to hold, as a question of fact, that a sale held under such conditions as the sale in this case, ever resulted otherwise than, in a substantial injury to the [513] judgment-debtor within the meaning of the last part of s. 311 of the Code of Civil Procedure. I concur with the learned Chief Justice.

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*Appeal allowed.*

9 A. 513 = 7 A.W.N. (1887) 146 = 12 Ind. Jur. 35.

### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

RAM PRASAD (*Plaintiff*) v. ABDUL KARIM (*Defendant*).\*

[28th March, 1887.]

*Pre-emption—Wajib-ul-ars—Custom—Muhammadian Law—Immediate and confirmatory demands—Practice—Remand.*

The *wajib-ul-ars* of a village gave a right of pre-emption *shufaa* "according to the usage of the country." In a suit for pre-emption there was no evidence to show what, in fact, was the usage prevailing in the district, in regard to pre-emption. There was no evidence that the plaintiff had satisfied the requirements of the Muhammadian Law as to immediate and confirmatory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time willing to pay the actual contract price.

Held that in the absence of evidence of any special custom different from or not co-extensive with the Muhammadian Law of pre-emption, the law must be applied to the case, and that, under the circumstances above stated, the suit failed and must be dismissed. *Fakir Rawol v. Sheikh Emambaksh* (1), *Chowdry Brij Lal v. Rajah Goor Sahai* (2), and *Jai Kuar v. Herra Lal* (3), referred to.

A case ought not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below and brought to the attention of the parties, and where they have failed at the trial to give any evidence upon it.

[F., 28 A. 60 = 2 A.L.J. 482 = A.W.N. (1905) 190; Expl., 12 A. 234 (271); R., 4 Bom. L.R. 811; D., 13 A. 373.]

THE facts of this case are stated in the judgment of Edge, C.J.

Mr. W. M. Colvin and Pandit Nand Lal, for the appellant.

The Hon. T. Conlan and Shah Asad Ali, for the respondent.

### JUDGMENTS.

EDGE, C. J.—In this action the plaintiff claimed a decree for pre-emption in respect of 5 biswas of land which had been sold by a co-sharer in the mauza to a stranger. The right of pre-emption was alleged to have

\* First Appeal No. 58 of 1886 from a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 23rd February, 1886.

(1) B.L.R. Sup. Vol. p. 35.

(2) N.-W.P. Full Bench Rulings, July-December, (1867) 128.

(3) N.-W.P.H.C.R. (1875) 1.



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arisen by reason of the *wajib-ul-arz*. The *wajib-ul-arz* in question contained the following paragraph:—"The custom of pre-emption prevails according to the usage of the country." That I understand to mean a declaration by the parties to that *wajib-ul-arz* that pre-emption, according to the usage of the country, should be the rule amongst them. The plaintiff in his [514] plaint alleged that the property in suit was in fact sold for Rs. 5,500; and that a fictitious price of Rs. 6,825 was mentioned in the sale-deed: that, as a matter of fact, a portion of that price had been returned. He also alleged that he had several times given notice to the defendant-vendee to the effect that he should take the actual price and convey the property to the plaintiff; but that the defendant had refused to sell on those terms.

Paragraph 3 of the written defence alleged that, after the purchase, the defendant had given information to the plaintiff, orally as well as by written notice, of the sale; that the plaintiff had not shown his readiness to pay the sale consideration, notwithstanding that he was aware of the actual price; and that the plaintiff did not even say in reply what price he wished to pay; and by reason of that his right was lost.

The third issue which was framed by the Subordinate Judge was as follows:—"Whether the plaintiff did not show his readiness on notice being given by the defendant; or whether the plaintiff sent several notices to the vendee, to the effect that he should take the proper value, but the vendee did not agree." The Court below found that the *wajib-ul-arz* was vague and meaningless; that the plaintiff had failed to prove that Rs. 6,825 was not the correct price; and that there was utter silence on the part of the plaintiff with regard to the notices sent by the defendant; and accordingly it dismissed the plaintiff's suit with costs.

From that decree this appeal is brought. It would be convenient to dispose of the case as regards the sale consideration first. I am satisfied that the plaintiff has failed to prove that Rs. 6,825 mentioned in the sale-deed was not the correct price. It was a case in which, in my judgment, it lay upon the plaintiff to make out that the price mentioned in the sale-deed was not the true price. There are no suspicious circumstances in the case pointing to the conclusion that the alleged price was not the true price. As a matter of fact, the plaintiff himself had purchased one biswa in this village for a sum of Rs. 1,300. Under these circumstances I hold that the price mentioned in the sale-deed was the true price.

The next point to consider is, whether the plaintiff is entitled to pre-emption or not. There is no evidence to show what, in fact, [515] the custom of the country was in that district with regard to pre-emption. The plaintiff's witnesses say that there had been sales, but the question of pre-emption had never arisen up to this time. Therefore, if there is, in fact, any special custom prevailing in that district, the Court is left without any information on that point. It is the duty of the plaintiff, who is alleging a custom as the basis of his right of pre-emption, to give evidence in proof of that custom. But he has done nothing of the kind. There being, therefore, no evidence that there was any peculiar custom in that particular district with regard to pre-emption, what is then the law to be applied to the case? This is a point which has been very frequently considered, and particularly in this Court, by my brother Mahmood. The first case to which I need refer is the Full Bench case of the Calcutta High Court, namely, *Fakir Rawot v. Sheikh Emambaksh* (1). In the

judgment of Sir Barnes Peacock, C.J., we find at page 47 the following :—" We therefore think the established law upon this subject is clear enough, that a right or custom of pre-emption is recognized as prevailing among Hindus in Behar and some other portions of Western India; that in districts where its existence has not been judicially noticed the custom will be matter to be proved; that such custom, when it exists, must be presumed to be founded on, and co-extensive with, the Muhammadan law upon that subject, unless the contrary be shown; that the Court may, between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan Law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

According to that judgment, if we are to follow it in this particular case, there being no evidence to show that the custom here amongst Hindus was not co-extensive with the rule of Muhammadan Law, we ought to dismiss this appeal; because the rule [516] of Muhammadan Law with regard to pre-emption has not been complied with by the plaintiff.

The next case is that of *Choudhry Brij Lal v. Rajah Goor Sahai* (1). That was a judgment of this Court, and, so far as I can see, the only point in which it diverges materially from the judgment of the Full Court of Calcutta is in the following, which we find on page 130 :—" It is conceivable that there may be districts in which the right of pre-emption obtains by general usage, unfettered by any, or accompanied by only some, of the restrictions of the Muhammadan Law. If the existence of such a custom so unfettered were proved, it would be the duty of the Court to give effect to it without adding to it incidents which are not proved to form part of the custom." My observation with regard to that is, that if we are to follow it, it leaves Mr. *Colvin* in the same difficulty in which he was in the former case. It would still lie upon the plaintiff to show that there was something in the custom which curtailed the requirements of Muhammadan Law, and admittedly there is no evidence to that effect.

There is also a case decided by this Court, *Jai Kuar v. Heera Lal* (2). That case goes no further than the ruling last referred to. The head-note says :—" Where the custom of pre-emption prevails among the Hindus, it does not necessarily follow that the person claiming pre-emption must fulfil all the conditions of the Muhammadan Law regarding pre-emption. It should be determined whether the custom is a custom under which it is incumbent upon him to fulfil those conditions." All that I can say about this is, that if a person comes into Court and relies upon a custom he must prove that custom, but if he cannot prove that custom, but relies upon a rule of law, he must take the rule of law as he finds it.

The next case is that of *Zamir Husain v. Daulat Ram* (3) in which the judgment of the Full Bench of Calcutta referred to above is very fully considered by my brother Mahmood. Looking into that judgment, I entirely agree with what fell from my brother Mahmood in that case.

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(1) N.-W.P. Full Bench Rulings, July-December, (1867) 128.

(2) N.-W. P. H. C. R. (1875) 1.

(3) 5 A. 110.



1887 [517] In the case of *Gobind Dayal v. Inayat-ullah* (1) my brother  
 MARCH 28. Mahmood very fully points out what the origin of this law is, that it is a  
 --- law which had its origin in the old Muhammadan Law, and was adminis-  
 APPEL- tered by the Muhammadan Judges. He also points out that though the  
 LATE law of pre-emption was originally Muhammadan, pure and simple, yet  
 CIVIL. subsequently it was adopted by the Hindus, and he points to a great  
 --- many cases relating to the subject of pre-emption.

9 A 513= The law with regard to pre-emption was again discussed by my  
 7 A.W.N. brother Mahmood and Duthoit, JJ., in their judgment in the case of *Ram*  
 (1887) 146= *Dial v. Budh Sen* (2).

12 Ind. Jur. The result is this, that if we are to follow the ruling of the Full  
 34. Bench of the Calcutta High Court, then all the requirements of the Muham-  
 madan Law must be strictly complied with to entitle a person to claim  
 pre-emption; for instance, he must make an immediate demand and a con-  
 firmatory demand as understood in the Muhammadan Law. On the other  
 hand, if we regard the Full Bench ruling of 1867 of this Court, it may be  
 that the plaintiff-pre-emptor might be entitled to show that a particular  
 custom prevailing in the District exempted him from performing all the  
 strict requirements of the Muhammadan rule. But on either view the  
 plaintiff fails in this case. There is no evidence here that the plaintiff  
 performed the strict requirements of the Muhammadan Law, nor has he  
 given any proof of the existence of a custom exempting him from such per-  
 formance. Mr. Colvin, on behalf of the plaintiff-appellant, has relied on  
 the notice of the 19th September, 1884, sent by the respondent to the  
 plaintiff; he has also relied upon the notice sent by the respondent on  
 the 22nd September, 1884; and he has asked us to infer from these notices  
 that there had been a demand made, and notice given that the prop-  
 erty would be taken at the contract price by right of pre-emption. Looking  
 at those notices, I infer, in the first instance, that, if there was any  
 demand made at all within a reasonable time, it was a demand that  
 the property should be handed over to the plaintiff on payment of the  
 price which he himself assessed, that is, Rs. 5,500, and not at the price  
 which really was the contract price. [518] But even of any demand, I  
 think these letters do not afford a sufficient proof. There is further no  
 evidence of any confirmatory demand. There is no evidence that the  
 plaintiff was willing to pay the actual contract price. What the actual price  
 was is one of the points which he has contested up to the present moment.

Under these circumstances, it appears to me that the plaintiff in this  
 case failed to show that there was, in fact, any custom which absolved  
 him from complying with those rules of the Muhammadan Law, and he  
 failed to prove that he did, in fact, comply with such rules. For these  
 reasons I am of opinion that this appeal must be dismissed with costs.

It is suggested that we should send down issues as to what the cus-  
 tom was, or whether there was any custom curtailing the general rule of  
 the Muhammadan Law, or whether any immediate demand or confirma-  
 tory demand was made. I, as a rule, object to send down cases of this  
 kind where the point has been framed as an issue by the Judge below and  
 brought to the attention of the parties, and they have failed at the trial  
 to give any evidence in support of or against it. It would only give  
 the parties a chance of procuring false and perjured evidence, and trying  
 their cases in two or three different ways. I therefore decline to accede  
 to that suggestion.

MAHMOOD, J.—I am entirely of the same opinion, but only wish to add, with reference to the language of the *wajib-ul-arz*, clause 14, that the word *shufaa* is used. The word *shufaa* is a technical Arabic legal expression, and, as such, I cannot read that clause of *wajib-ul-arz* as if no such word existed; and in interpreting that clause I would attach to the word *shufaa* such meaning and all those incidents which it possesses under the Muhammadan Law. There is no doubt in my mind that the parties to the *wajib-ul-arz* did use that expression in the sense it has under the Muhammadan Law. The plaintiff having declined to buy the property at the proper time, when it was offered to him, he has no right to come into Court now. I entirely agree with the learned Chief Justice that if we were to remand this case it would be giving the appellant a chance of producing evidence which he [519] could have produced at the proper time, but did not choose to produce. He might well have produced all the evidence which he now wishes to produce, when the case was being tried by the Court below. I therefore concur in dismissing the appeal with costs.

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*Appeal dismissed.*

9 A. 519=7 A.W.N. (1887) 135.

APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

BALWANT SINGH (*Defendant*) v. GOKARAN PRASAD (*Plaintiff*).\*  
[15th April, 1887.]

*Co-sharers—Rents collected by one co-sharer in respect of another's share—Intermeddler—Suit for recovery of rents—Intermeddler not liable for more than amount actually collected less collection expenses.*

The lessee of two-thirds of a five biswas zamindari share asserted and exercised a right of collecting rents in respect not only of the two-thirds but also of the remaining one-third. It appeared that he made these collections not as a matter of contract, but as an intermeddler, and in defiance of the wishes of the holder of the one-third share. Subsequently a suit was brought against him by a purchaser of the five biswas for recovery of rents so collected, the claim extending to rents which the defendant might have collected but neglected to collect, and which were consequently lost to the plaintiff.

*Held*, that the defendant, not having been under any obligation to collect the rents of the one-third share, could not be made liable for any of such rents which he had not actually collected, and that as the collection expenses had exceeded the amount collected, the suit must be dismissed.

THE facts of this case were as follows:—Three persons, Paras Ram, Lal Singh and Bhupat, each held one-third of a five biswas share in a village. The two former executed a joint lease of their shares in favour of one Hukm Singh, who died, his rights devolving upon his son, Balwant Singh. After this lease had been granted, the rights and interests of Paras Ram, Lal Singh and Bhupat were sold in execution of a decree obtained against them by one Gokaran Prasad. The decree-holder himself was the purchaser at the execution sale.

\* Second Appeal No. 1805 of 1885 from a decree of J. W. Muir, Esq., District Judge of Mainpuri, dated the 3rd September, 1885, confirming a decree of A. Shakespeare, Esq., Assistant Collector of Mainpuri, dated the 9th June, 1885.



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Prior to the execution of the lease, Paras Ram had, as lambardar of the five biswas, collected rents on behalf of his co-sharers and himself. After the lease, Hukm Singh and, after his death, Balwant Singh, asserted and exercised a right of collecting rents in [520] respect of Bhupat's share, as well as of the two-thirds of the five biswas of which they were lessees. The present suit was brought against Balwant Singh, in 1885, by Gokaran Prasad, for recovery of rents for the years 1289, 1290 and 1291 fasli, collected by the defendant in respect of the share formerly held by Bhupat. The claim was not confined to the rents actually collected by the defendant, but extended to those which he might have collected, but neglected to collect, and which were consequently lost to the plaintiff. The Court of first instance (Assistant Collector of Mainpuri) decreed the claim. The Court observed:—"I have no hesitation in saying that the ordinary rule must be carried out in this case, *viz.*, that as the knowledge can alone be with the defendant collecting, it is for him to prove clearly that such and such items are not possible of collection." In another part of its judgment, the Court observed:—"The defendant puts his collection at very much less than the *nikasi*. He has failed to show that any item is irrecoverable."

On appeal, the District Judge of Mainpuri affirmed the Assistant Collector's decree.

The defendant appealed to the High Court. It was contended on his behalf that the Courts below ought to have determined the amount of the actual and not of the possible collections, and that he could not properly be held liable for any rents which he had not actually collected.

The Hon. Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant. Pandit *Bishambar Nath*, for the respondent.

#### JUDGMENTS.

EDGE, C.J.—A difficulty has been caused in this case by the somewhat vague way in which the claim is preferred. It may be doubtful whether the plaintiff intended to imply that the defendant had collected the rents of the one-third share as a volunteer, or whether he had undertaken to collect them as a matter of contract.

If as a volunteer, he could not be made liable for any greater amount than he actually collected. As volunteer, there would have been no contract to collect. If, on the other hand, he undertook to collect as a matter of agreement based on consideration, it appears to me that he would be liable for the rents he actually [521] collected, subject to all just deductions, and also liable in damages for any rents he undertook to collect, and which by reason of his negligence were lost to the plaintiff at the commencement of the action, either by reason of their being barred by statute, or some other cause.

If the Court below finds he was merely a volunteer, it appears to me that the question of negligence cannot be inquired into, and the only account to be taken would be as to whether, after all just deductions, the defendant has actually accounted for the rents which he did, as a matter of fact, receive. If, on the other hand, the collections were based on contract, the lower Court should find whether he was guilty of negligence; and, if guilty of negligence, whether the plaintiff lost his right to recover at the date of the commencement of the action any and which of the rents by reason of such negligence. In the latter event, in the event of its being found that there were rents relating to the one-third, which the defendant had contracted to collect, and which had been lost to the plaintiff at the

date of the commencement of this action by reason of the negligence of the defendant, the defendant should be held liable for those rents, less such fair allowances as would have to be made if such rents had been collected; and also for the rents, if any, of the one-third which he has collected and not accounted for, less the amount of revenue, cess, &c., together with reasonable expenses, and a reasonable allowance for the trouble of collecting. Ten days will be allowed for any objections.

OLDFIELD, J.—I concur in the order of remand.

On the remand, the District Judge recorded findings in the following terms:—

"Neither the defendant Balwant Singh nor his father was appointed lambardar when the lease was given, but they continued to assert their rights to collect the rents of Bhupat's share as well as of the two-thirds of which they were lessees. It was not incumbent on the defendant to collect the rent of Bhupat's share: he might have refused to have anything to do with it, and if he had, he could not have been forced to collect. In this light, therefore, the defendant collected as a volunteer. If the defendant be looked on as a volunteer, and therefore liable only for the rents he [322] is shown to have realised, nothing is due to the plaintiff for the years in suit, for it appears from the evidence that in each of the years the actual collections fell short of the expenses. I do not think it can be contented that the defendant collected in pursuance of a contract or agreement, either express or implied. On the contrary, it appears from the documentary evidence that the plaintiff has all along, but in vain, endeavoured to assert his right to collect from Bhupat's one-third.....It should be mentioned that there is no actual division of the land or tenants into shares: the tenants are common to the *thoke*: joint collections are made and profits divided according to the shares, after deduction of expenses. I would submit that the defendant is not a mere volunteer, who undertook, owing to the plaintiff's apathy, to collect the rents of his shares as well as of his own. Nor did he collect in pursuance of a contract. He is more in the position of an intermeddler who collected in defiance of the plaintiff's wishes. If I am restricted to the alternative indicated in the judgment of the High Court, I find that the defendant collected as a volunteer, and that nothing is due from him to the plaintiff. But if I am not so restricted, I find that the defendant collected neither as a volunteer nor as a matter of agreement based on consideration, but as an intermeddler, and that he was rightly held liable by the Assistant Collector for profits calculated on the rent-roll, minus 10 per cent. allowed him for cost of collection."

Upon the return of these findings the case came before Edge, C.J., and Straight, J., for disposal.

The parties were represented as before.

EDGE, C.J.—We must take these findings as they are, that the collection expenses exceeded the amount collected. An intermeddler cannot be liable for the money he has not collected. He can only be liable for the money not collected if there was any duty cast upon him to collect that money. But here, from the very commencement of the suit, it appears that the defendant was not a lambardar, and cannot be made liable. The appeal is decreed with costs in accordance with the remand.

STRAIGHT, J.—The defendant in this suit stands in the position of an ordinary person who has received money for and on account [523] of another, and upon whom vests the obligation and duty to pay to such other the amount of money so received. Such person may acquit himself

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of it in one of two ways: either by paying the actual money received, or by paying an equivalent sum of money to such person. In the present case the findings are that no doubt the defendant collected and received profits on the plaintiff's behalf, but nevertheless that the expenses in regard to the collection of those profits were far in excess of the amount of profits so collected. Upon that finding I think the plaintiff's claim is sufficiently answered; and having regard to the rule of law laid down by the learned Chief Justice in the order of remand, we must accept the findings, and upon these findings the plaintiff's suit failed, and the appeal must succeed, and, the decision of the lower Court being reversed, the plaintiff's suit in regard to those profits will stand dismissed with costs in all the Courts.

*Appeal allowed.*

9 A. 523 = 7 A.W.N. (1887) 131.

### APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

QUEEN-EMPRESS v. KIRPAL SINGH AND OTHERS. [25th April, 1887.]

*Jurisdiction—Criminal Procedure Code, s. 180—Dacoity committed in British territory—Dishonest receipt of stolen property in foreign territory.*

Certain persons, who were not proved to be British subjects, were found in possession, in a native State, of property the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under s. 412 of the Penal Code.

*Held*, that no offence was proved to have been committed within the jurisdiction of a British Court.

[R., 126 P.L.R. 1902.]

In this case three persons, Kirpal Singh, Kehri Singh and Harbhan, were tried before the Commissioner of Jhansi upon charges under s. 396 of the Penal Code (dacoity with murder) and s. 412 dishonestly receiving property stolen in the commission of dacoity). A fourth person, Zahir Singh, was tried at the same time for abetment of the offence punishable under s. 396.

The dacoity in which the prisoners were alleged to have taken part was committed on the 16th April, 1887, at Maheshpura, a [524] village in the Jalaun district, on the border of the State of Gwalior. The house of Ramdin, a *bania* of that village, was broken into at night by a large band of robbers, who carried off property said to be worth Rs. 900, and who inflicted injuries upon a chowkidar named Bhagwan, injuries from which he soon afterwards died. It was proved that the robbers crossed the river which divided the British territory and the Gwalior State. The police were sent into the Gwalior State, and ultimately found there, concealed in different places, property which had evidently been stolen from the house of Ramdin during the dacoity. Part of this property was produced by the prisoner Kirpal Singh, and part was found, at his suggestion, at the houses of the prisoners Kehri Singh and Harbhan. The accused and the stolen property were left for a time in the custody of the Gwalior police, who subsequently sent them to the Jalaun district

for trial. It did not appear whether they were British subjects or subjects of the State of Gwalior.

The Commissioner of Jhansi was of opinion that the evidence adduced to prove that the accused, Kirpal Singh, Kehri Singh and Harbhan, took part in the dacoity was "absolutely worthless." He was also of opinion, however, that they were clearly guilty of dishonestly receiving property stolen in the commission of the dacoity. Upon the question of his jurisdiction to try them upon a charge of this offence, he observed:—"Under s. 180 of the Criminal Procedure Code, I hold that, having been made over to this Court for trial, they are as amenable to my jurisdiction upon the one charge as upon the other." He accordingly convicted them of the offence punishable by s. 412 of the Penal Code, and, "in view of the aggravated nature of the dacoity, the frequency with which this crime is committed on the border of the Jalaun district, and the strong presumption that the accused were concerned in the dacoity itself," sentenced them to transportation for life. He acquitted Zahir Singh upon the charge of abetment of the dacoity with murder.

The accused, Kirpal Singh, Kehri Singh and Harbhan, appealed to the High Court.

The two former were not represented by counsel or pleader.

Mr. *J. D. Gordon*, for the appellant Harbhan.

The *Public Prosecutor* (Mr. *C. H. Hill*), for the Crown.

#### JUDGMENT.

[525] EDGE, C.J.—In this case the three prisoners were arrested in the State of Gwalior on a charge of dacoity, and were transferred to these Provinces to be tried for an offence under s. 396 of the Indian Penal Code. At the trial they were acquitted of the offence under s. 396 of the Indian Penal Code, but were convicted on a charge under s. 412. There was no evidence that they had dishonestly or otherwise received or retained in British India any stolen property whatever. The evidence was that they were found in possession in Gwalior of property the subject of a dacoity in British India. There is no evidence that they were British subjects. Under these circumstances, Mr. *Gordon*, who appears for the appellant Harbhan, contends that no offence was proved to have been committed within the jurisdiction of the Court. In my judgment this contention is well founded, and, this being a question as to jurisdiction, I think we are bound to give the other appellants the benefit of the point raised for one of them. I am of opinion that these appeals should be allowed, the convictions quashed, and the prisoners discharged.

BRODHURST, J.—I concur.

*Convictions quashed.*

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9 A. 525 = 7 A.W.N. (1887) 155 = 12 Ind. Jur. 37.

EXTRAORDINARY ORIGINAL CRIMINAL.

*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. GORDON. [31st May, 1887.]

Charge—Addition of charge at trial—Altering charge—Criminal Procedure Code, s. 227.

Held that on a trial upon charges under ss. 467 and 471 of the Penal Code, the Court had power, under s. 227 of the Criminal Procedure Code, to add a charge under s. 193 of the Penal Code, upon which the prisoner had not been committed for trial. *Queen-Empress v. Appa Subhana Mendre* (1) dissented from.

[R., 10 C.P.L.R. 13 (14) ; 16 Cr. L.J. 573 = 9 S.L.R. 37 = 30 Ind. Cas. 125.]

THE prisoner in this case, who was a European British subject, was tried at the Criminal Sessions of the High Court before Straight, J., and a jury. He was committed for trial by the Assistant Commissioner of Jabalpur upon charges of offences punishable under ss. 467 and 471 of the Penal Code. It appeared that he had acted as the agent of his mother-in-law, Mrs. E. Watts, [526] who had taken out letters of administration, with the will annexed, to the estate of her deceased husband, E. R. Watts, who died in February, 1885, leaving property worth about Rs. 51,000. By his will the testator left his moveable property to his wife absolutely. With regard to the immoveable property, he directed that the rents should go to his wife for her life, and, after her death, should be equally divided between his daughter Mrs. A. C. Gordon (wife of the prisoner) and her minor children, with provisions as to survivorship which need not be stated, and a clause stipulating that his daughter's husband (the prisoner) should not be entitled to any portion of the estate. There was also a clause prohibiting the selling of any part of the immoveable property until all the testator's grandchildren should come of age.

At the end of a year from the grant of letters of administration, the prisoner, as representing the administratrix Mrs. Watts, filed an account of the estate in the Court of the Commissioner of Jabalpur, in accordance with the provisions of s. 277 of the Succession Act (X of 1865). Upon inspection of the accounts, it appeared that certain houses, which formed part of the estate, had been sold and mortgaged by the administratrix and by the prisoner as her agent, and that the proceeds of these transactions amounted to Rs. 10,000. To account for this sum, a document was filed with the accounts, which purported to be a promissory note for the same amount executed by the testator, shortly before his death, in favour of a Mrs. de Saran; and the expenditure side of the accounts contained entries which purported to show that the amount due under the promissory note had been repaid at various dates. The appearance of this note was so suspicious as to lead the commissioner to institute inquiries, the result of which showed that the testator had never borrowed any money from Mrs. de Saran, or executed any promissory note in her favour, and that the note filed with the accounts, as well as the entries above referred to, had been fabricated by the prisoner. This led to his commitment and trial as already stated.

In support of the charges under ss. 467 and 471 of the Penal Code, a number of witnesses were called. When the case for the prosecution had concluded, and the prisoner had made a statement, [527] Mr. W.S. Howell, on his behalf, submitted that there was no case to go to the jury upon either of the charges.

The *Public Prosecutor* (Mr. G.E.A. Ross) was heard in reply.

STRAIGHT, J., then directed the Clerk of the Crown to add a charge of fabricating false evidence under s. 193 of the Penal Code, with reference to the provisions of s. 227 of the Code of Criminal Procedure.

Mr. Howell, for the prisoner, objected that the Court had no power under s. 227 to add a fresh charge upon which the accused had not been committed for trial. All that the Court could do was to alter the existing charges: what it was proposed to do was not to "alter" the charges, but to leave them untouched, and to add another charge perfectly distinct from them. He cited *Queen-Empress v. Appa Subhanu Mendre* (1).

The *Public Prosecutor* (Mr. Ross), for the Crown, contended, in reply, that the practice of the Court had always been, when such a course was necessary, to alter or add to the charge in the manner proposed, and that such a procedure was covered by the terms of s. 227 of the Criminal Procedure Code.

STRAIGHT, J., overruled the objection. His Lordship was not bound by the decision of the Bombay High Court in the case referred to, and the Court in that case was not unanimous. He agreed with the dissentient judgment of Mr. Justice Scott, and considered that the course he proposed to take was within the meaning of the words "alter any charge" used in s. 227 of the Code.

The charge under s. 193 of the Penal Code was then added. The prisoner pleaded guilty to this charge. Upon the direction of the Court, the jury returned a verdict of not guilty upon the charges under ss. 467 and 471, and upon the charge under s. 193 convicted him on his plea of guilty. The Court sentenced him to ten months' rigorous imprisonment (2).

9 A. 528 = 7 A.W.N. (1887) 156.

### [528] APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Brodhurst.*

#### QUEEN-EMPRESS v. GOBARDHAN, [10th June, 1887.]

*Accomplice—Evidence—Corroboration—Act I of 1872 (Evidence Act), s. 133—Practice—Questions of fact to be determined on the merits and not on supposed analogy to previous cases—Appeal by Local Government from judgment of a quittal—Criminal Procedure Code, s. 427.*

*Per* EDGE, C.J. — Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may

(1) 8 B. 200.

(2) See *The Queen v. Waris Ali* [N.W.P.H.C.R., (1871), 337]. The Code of Criminal Procedure then in force was Act XXV of 1861, s. 244 of which (corresponding with s. 227 of the present Code) provided that "it shall be competent to any Court before which a trial is held, at any stage of the trial to amend or alter the charge."



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have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict. *Reg. v. Ramasami Padoyachi* (1), *Empress v. Hardeo Das* (2), and *Queen-Empress v. Ram Saran* (3) referred to. *Queen Empress v. Ram Saran* (3) explained and distinguished by STRAIGHT, J.

*Per* BRODHURST, J., *contra*—Observations as to the necessity of corroboration in material particulars, of the evidence of accomplice witnesses. *Queen-Empress v. Ram Saran* (3), *Queen v. Ramsadoy Chuckerbutty* (4), and *Reg. v. Budhu Nanku* (5), referred to.

*Per* EDGE, C.J., and STRAIGHT, J.—Every case as it arises must be decided on its own facts, and not on supposed analogies to other cases. *Queen-Empress v. Gayadin* (6) distinguished.

*Queen Empress v. Gayadin* (6) followed by BRODHURST, J., as to the principles applicable to the determination of appeals preferred by the Local Government from judgments of acquittal.

*Per* EDGE, C.J.—In capital cases, where the Local Government appeals, under s. 417 of the Criminal Procedure Code, from an order of acquittal, it is, generally speaking, undesirable that the prisoner's fate should be discussed while he remains at large; and the Government should, in such cases, apply for the arrest of the accused, under s. 427 of the Code.

[*Rel on.*, 21 M.L.J. 283 (299)=1 M.W.N. (1911), 327 (339)=9 Ind. Cas. 897; 9 M.L.T. 503=9 Ind. Cas. 978=12 Cr. L.J. 170; R., Rat. Uatoo. Cr. Cas. 750 (752); U.B. R. (1897–1901) 173 (174); 20 A. 459 (464)=A.W.N. (1898) 117; 97 P.L.R. 1904=7 P.R. 1904 (Cr.); 35 M. 247 (343)=(1912), M.W.N. 207=22 M.L.J. 490=11 M.L.T. (Sup.) 1=14 Ind. Cas. 849=13 Cr. L.J. 305; 35 M. 397 (511)=(1912), M.W.N. 549=12 M.L.T. 1=12 Cr. L.J. 352=14 Ind. Cas. 896; 11 P.W.R. 1915 (Cr.)=17 P.R. 1915 (Cr.)=16 Cr. L.J. 354=28 Ind. Cas. 738=246 P.L.R. 1915; 2 P.R. 1917 (Cr.)=18 Cr. L.J. 29=36 Ind. Cas. 961.]

THE facts of this case, which was an appeal by the Local Government under s. 417 of the Criminal Procedure Code from an order of acquittal on a charge of murder, are fully stated in the judgments of the Court.

[529] *The Public Prosecutor* (Mr. C. H. Hill), for the Crown.

Mr. W. M. Colvin and Mr. J. D. Gordon, for the prisoner.

On the opening of the case for the Crown, Edge, C.J., addressing the Public Prosecutor, said that in capital cases, in which Government was appealing under s. 417 of the Criminal Procedure Code, it was, speaking generally, and without laying down any inflexible rule, undesirable that the prisoner's fate should be discussed while he remained at large. In such cases, the Government should apply for the arrest of the accused, under s. 427 of the Code.

The Court, after taking additional evidence under s. 428, and hearing counsel, was divided in opinion, Edge, C.J., being of opinion that the appeal, should be allowed and the prisoner convicted of murder, and Brodhurst, J., that the judgment of acquittal should be affirmed. Their Lordships recorded the following opinions, under s. 429.

#### OPINIONS.

EDGE, C. J.—This is an appeal by the Local Government under s. 417 of the Code of Criminal Procedure, 1882, from an original order of acquittal passed by the Sessions Judge of Agra on the 23rd of October, 1886.

The respondent, Gobarthan, was tried for the murder of one Nihal Singh, under s. 302, Indian Penal Code, and was acquitted. The undisputed facts of the case are that from the 14th to the 19th of December,

(1) 1 M. 394.

(4) 20 W.R. Cr. 19.

(2) A.W.N. (1884), 286.

(5) 1 B. 475.

(3) 8 A. 306.

(6) 4 A. 148.

1885, Nihal Singh, with his wife and family, was staying with one of his elder brothers, Tej Ram, at Barai. At 7 o'clock on the morning of Saturday, the 19th December, 1885, Nihal Singh, accompanied by his family, left Tej Ram's house at Barai to proceed to Agra. His wife, mother, and son were in a *rath* driven by his servant Pokha Ram. Nihal was on horseback. After they had proceeded a short distance, Nihal Singh told his servant to go on with the *rath* to Tundla, and saying that he, Nihal Singh, would go to Tundla by way of Barai and Ratauli, rode off in the direction of Barai. Nihal Singh lived at Ratauli, where also lived his father-in-law's people. About noon of the 19th December, Nihal Singh arrived at the house of Abu Singh at Ratauli, and after eating some food and sending off some cooking utensils, left Ratauli about one o'clock in the afternoon, and proceeded in the [530] direction of Narki. The road from Ratauli to Tundla goes by Narki. Abu Singh was a connection by marriage of Nihal Singh. So far as appears by the evidence before us, this was the last time that Nihal Singh was seen alive by any of his relations. On the morning of the 20th December, Abu Singh found at his door the horse Nihal Singh had been riding on the previous day. The horse was then without any bridle, and the stirrups had disappeared. Between 9 and 10 o'clock in the forenoon of the 20th of December, Pokha Ram, Nihal Singh's servant, called at Abu Singh to make inquiries about Nihal Singh, who had not arrived at Tundla. On the afternoon of the 20th December, a man called Mahasukha called at the *thana* at Itmadpur, and at about 5 o'clock reported to Wali Husain, head constable, moharrir, to the effect that on the previous evening he, Mahasukha, having sold some eggs and fowls, was going from Tundla to his village Shibsingpura, and that on getting to a bridge on the Kotki road he found there Gobardhan, the present respondent, and another man whose name he did not know; that a mounted man whom he conjectured to be the Raja of Awa's karinda, and two other men, whose names he did not know, were coming along. That when the karinda got near the bridge Gobardhan shot the mounted man, who fell and expired; that the four men seized him, Mahasukha, took his basket and rope from him, threw the dead body into a well, and dragged him near to it, and threatened him, saying—"If you tell, you will be murdered;" and that with great difficulty and by making many entreaties he got the men to let him go. He also reported, on the night of the 20th of December, that Gobardhan had said he was going to Umrao Singh at Agra.

Wali Husain, three constables, and a chaukidar went with Mahasukha, and between 7 or 8 o'clock that night arrived at a well, which Mahasukha pointed out as the well in which the body was. Wali Husain and the constables remained at the well that night, and on the morning of the 21st December, Wali Husain went with Mahasukha to the bridge, where Mahasukha said the gun had been fired, and on arriving at the bridge Mahasukha pointed out blood which was laying in a hollow place ahead of the bridge in a northerly direction, and said,—“At this place the mounted man fell from his horse.” Mahasukha then took Wali Husain into an [531] *arhar* field in an easterly direction, and pointed out marks of dragging. Under a *babul* tree in the *arhar* field there were marks of blood, and at that place a leather purse and pencil-case were found. Mahasukha said,—“At this place the corpse was tied up.” After that, Wali Husain and Mahasukha returned to the well, and there, with the assistance of some divers who had by that time arrived, the body was got out of the well. When the body was taken out of the well it was found

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that a *dhoti* was tied on the neck and that the feet were tied up to the neck with a rope. Some rings and other articles were found on the body. There was a bullet wound in the forehead on the right side, and the back of the corpse had scratches on it which might have been produced by the body having been dragged along the ground. In the well was also found a pole, with which Mahasukha said the body had been carried to the well. Wali Husain showed the corpse to the people of the neighbouring villages, but no one recognized it. The well was about one mile from the bridge, and was on the way from the bridge to the Jamna.

Wali Husain, having handed over the corpse to Mahtab Khan, went in search of Gobardhan. Gobardhan lived at a village called Garhi Godhi, which is between  $2\frac{1}{2}$  and 3 *kos* from the bridge. About noon on the 21st December, Wali Husain arrived at Garhi Godhi and searched Gobardhan's house in the presence of Gobardhan's brother, Bhagwant, but failed to find Gobardhan or to obtain any information as to his whereabouts. The body found in the well was subsequently identified as that of Nihal Singh.

On the 22nd of December, Mahasukha handed over to Amir Khan, Sub-Inspector of Police, four beads which had belonged to Nihal Singh. On the 22nd and 23rd of December, Mahasukha made statements implicating Gobardhan, Koka Ram, Babuti, Hira, Harpal and Srikishan. Babuti, Harpal and Srikishan were practically taken into custody on the afternoon or evening of the 23rd of December. Gobardhan was arrested in Gwalior State some even months later. Hira and Koka Ram have not yet been found. Prior to the arrest of Gobardhan, Mahasukha, Babuti, Harpal and Srikishan were tried for the murder of Nihal Singh. Mahasukha was convicted and sentenced to transportation for life. Babuti [532] made no confession, but Harpal and Srikishan each made a confession. Babuti, Harpal and Srikishan were acquitted, apparently on the ground that Mahasukha's evidence as against them was not corroborated, although as to Harpal and Srikishan, Mr. Young, who tried them, was apparently satisfied that they had voluntarily made their confessions, and although those confessions afforded ample corroboration as against Harpal and Srikishan of Mahasukha's evidence.

So far as I have been able to ascertain from the evidence and from statements agreed to by the counsel engaged in the case, the distances between the different places referred to by the witnesses or by counsel are as follows:—Barai to Tundla 16 *kos*, Barai to Agra 24 *kos*, Ratauli to Tundla 8 to 9 *kos*, Ratauli to the bridge 7 *kos*, Garhi Godhi to the bridge  $2\frac{1}{2}$  to 3 *kos*, Itmadpur to Garhi Godhi 5 *kos*, Itmadpur to the well 2 *kos*, Itmadpur to Ratauli 9 *kos*. Persons going from Barai and Ratauli to Tundla would pass the bridge in question. The bridge is close to a place where two roads cross each other.

Mhasukha and Harpal lived at Shihsingpura; Koka Ram lived at Kotra; and Gobardhan, Babuti, Hira and Srikishan lived at Garhi Godhi. Srikishan was a servant in the employment of Bhagwant and Gobardhan. Koka Ram was the son-in-law of Bhagwant. Bhagwant, Gobardhan and Babuti are Brahmans; Mahasukha and Hira are of the sweeper caste; Harpal is an Ahir, and Srikishan is a Chamar.

At the sessions trial the case for the prosecution was shortly, and put in narrative form, as follows:—The title of Raja Baldeo Singh to the Awa estates was, at and prior to the time of the murder of Gobardhan, being disputed by the Rani Sakarwar, a widow of a previous Raja, and by Nihal Singh. Nihal Singh was not only claiming on his own account, but was also assisting Rani Sakarwar to establish her claim. Nihal

Singh's elder brothers, Zorawar Singh and Tej Ram, had compromised their claims. Umrao Singh had on one occasion threatened Nihal Singh saying, "Very well; I will settle with you," because Nihal Singh was raising a contention as to the Raj. Umrao Singh was a friend of Raja Baldeo Singh. Gobardhan, professing to act on [533] behalf of Raja Baldeo Singh and Umrao Singh, had employed Mahasukha, Hira, Harpal, Babuti, Koka Ram and Srikishan to assist him in murdering Nihal Singh when on his way to Tundla, and carrying the body to the Jamna. Gobardhan had stated to Mahasukha that "ten thousand rupees have been settled by me and Raja Baldeo and Umrao as the price of killing a man," and that a village would be given if the Rs. 10,000 were not. On the 18th of December, Gobardhan had said to Mahasukha:—"Two men came to me from Awa in the night; they have just gone away this morning. Those men said that Raja Baldeo had said the man would come to-morrow, and that if he escaped this time he could not be got hold of again. Will you come?" On the 18th of December, Gobardhan, Mahasukha and Koka Ram went to the bridge, and Hira went in search of the other men. Gobardhan shot Nihal Singh at the bridge, and Nihal Singh, after the horse had gone some ten paces in the direction of Eta, fell off. Gobardhan and Koka Ram dragged the dead body into an *arhar* field, and then Koka Ram and Mahasukha dragged it under a *babul* tree. The deceased man at the time of the murder was wearing a sword attached by a cross-belt, and had a bag with him. Just then the sound of feet was heard, and Gobardhan, Koka Ram and Mahasukha ran and sat down in the *arhar* field, when four men were seen coming from the direction of Narki. One of the four coughed, and Gobardhan asked:—"Who is it? Is it Hira?" And one of the four said:—"Yes;" and Gobardhan said "Come. It is some time since we killed the man. Why have you made this delay?" The seven men went to the corpse, and Gobardhan told Hira and Mahasukha to tie up the body so that blood should not drop on the road. They tied the hands and feet of the body with a *dhoti*. Gobardhan told him to turn up the coat and bind it with the thick cloth round the head so that blood should not fall. Hira and Mahasukha did this, and then Harpal brought a rope and vole, and Gobardhan told them to tie the hands and feet securely. "The *dhoti* may get rent, the Jamna is three *kos* off." Hira and Mahasukha tied the hands and feet with the rope, and the latter told Gobardhan that he felt something on the upper arm of the corpse. Gobardhan said—"It will be an armlet," and told Mahasukha to pull it off. Mahasukha was unable to pull it off, and then Gobardhan told him to cut it off [534] with the sword, which was done, and the *dholania* was then handed by Mahasukha to Gobardhan. The body was then carried some distance on the pole, when, the men objecting to carry it further, it was proposed to throw it into a well close by. That well being dry, Gobardhan directed them to carry it to another well, which was done: and then Koka Ram and Gobardhan pushed it with the pole into the well in which it was found. The men then returned to the place where the body had been tied up, where were a *razai*, a *safa* and a pair of boots, which Koka Ram tied up and put on his back, Gobardhan saying he would show them to Raja Baldeo and Umrao as evidence of the murder. Gobardhan gave the *dholania* to Mahasukha, saying "sell it, and you and Hira divide the proceeds, and I will go to Raja Baldeo Singh and get money and give some to everybody." Gobardhan gave Harpal three swords, two of which he had himself brought, the other being the deceased's, and the pistol, and told him to take them

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to Bhagwant. Gobardhan and Koka Ram then went off towards Tundla, and the other five men went to their homes. Mahasukha discovered the next morning that the *dholania* was of copper, or copper and silver; he then went to Gobardhan's house, arriving there between 10 and 11 o'clock. Finding Bhagwant there, he asked him where Gobardhan was, when Bhagwant reviled him, and said he did not know where Gobardhan was. At this Mahasukha got angry, uttered abuse, saying he had got nothing, and went to the *thana* at Itmadpur and made the report already referred to. Gobardhan absconded.

In support of that case, Tej Ram, Abu Singh and Koka Ram were called and spoke to the movements of Nihal Singh on the 19th December. Zorawar and Tej Ram spoke as to Nihal Singh having had a dispute as to the Awa estate, and Zorawar as to the threatening language alleged to have been used by Umrao Singh to Nihal Singh. Mahasukha spoke as to his having been brought by Hira to Gobardhan, and as to Gobardhan inducing him to join in the murder by representing that he had arranged with Umrao Singh and Raja Baldeo Singh that Rs. 10,000 or a village would be given for the committing of the murder. He also spoke as to the fact of Gobardhan shooting Nihal Singh at the bridge, and the subsequent disposal of the body. A man called Sarwar stated that on the evening of the murder he saw Gobardhan and two [535] other men at the bridge. Wali Husain spoke as to the statement made by Mahasukha on the evening of the 20th December at the *thana* at Itmadpur, of the marks at the bridge, in the *arhar* field, and under the *babul* tree, of the finding of the body and the marks on it, and of his searching for Gobardhan at his house on the 21st of December. Amir Khan proved that on the 16th of December, 1885, he had examined Gobardhan in Narki in reference to a burglary, when Gobardhan stated that he was in the service of Umrao Singh and that he was going with a letter to Awa from Umrao Singh to Raja Baldeo. The witness identified the counterfoil of his diary, dated the 16th December, 1885, which contained a copy of Gobardhan's statement on that occasion. The copy was in the handwriting of a constable who was then acting as a clerk, and was signed by the witness. This witness was not cross-examined at the sessions trial as to the entry in his diary or as to the fact of his having seen Gobardhan in Narki on the 16th December, 1885. This witness gave his evidence on the 13th October, 1886, and was subsequently, on the 19th of October, recalled, examined and cross-examined, but not as to what had taken place on the 16th December, 1885. Juala Prasad produced a statement made by Mahasukha before Mr. Redfern, then a Joint Magistrate, on the 24th of December, 1885. Wazir Ahmad, constable, stated that on the 16th of December, 1885, he brought Gobardhan from Garhi Godhi to Amir Khan at Narki, and that on that day he had seen Koka Ram, Gobardhan and some other men at a well at Garhi Godhi. This witness was cross-examined, apparently to see if he was near enough to Gobardhan, at the interview between Gobardhan and Amir Khan on the 16th December, to hear what passed, and to impugn the accuracy of the statement that he had in fact brought Gobardhan to Amir Khan on that day. Balwant, a constable, identified the body of Nihal Singh. Kanak was examined as to the taking of the dead body to Agra, and as to its having been carried by eight men (*kahars*).

Baldeo, chaukidar of Sarai Nurmahal, stated, *inter alia*, that a month or fifteen days before Nihal Singh was killed he had seen Gobardhan in Sarai Nurmahal and Garhi Godhi, and did not see him afterwards in the

village. Nawala, a sweeper, contradicted Mahasukha as to the number of days during which Mahasukha [536] had been living with him at Shib-singpura, and stated that at 10 o'clock on the night in question, Hira had called for Mahasukha and taken him away. The note of the Sessions Judge with regard to this witness is:—"A very stupid witness, as noted by the committing Magistrate.

Mr. Yeatman, District Superintendent of Police, spoke to a witness named Chidda having given him some letter, and to the fact that Zorawar Singh had brought Chidda to him about the 25th of August, 1886. The evidence of Chidda and Ram Lal went to connect Umrao Singh and Raja Baldeo Singh with the murder of Nihal Singh. Sugaria, a *dhobi*, spoke to having seen Mahasukha and two other men on the night in question. At the close of the case for the prosecution, Umrao Singh was called as a witness. The following, as appears from the record, then took place:—

"Umrao Singh.—Neither the letter No. 1 nor the envelope No. 1 produced are in my writing, nor is the letter No. 2 nor envelope No. 2 in my writing. The handwriting of the letter No. 2 is like my handwriting, that of the envelope No. 2 is not, nor are the signatures in my handwriting. (To Court, at instance of Government Vakil).—I sometimes write to Balwant and Baldeo. I know English. I sometimes sign with an English pen. I always sign as I have now signed. I never addressed Rao Balwant as he is addressed in the letter of the 13th December, and the letter dated 14th contains mention of matters not within my knowledge. I didn't hear of application therein mentioned.

"Chidda:—This is Umrao (Umrao last witness) whom I mentioned in my evidence.

"Umrao Singh to counsel for defence:—I never saw this man Chidda in my life.

"(Mr. Colvin was about to question the witness generally on the case and was ready to do so, but at the suggestion of the Court, Umrao having denied that he had ever seen Chidda, did not put any further question.)"

In passing I cannot refrain from saying that in my opinion the suggestion of the Sessions Judge was a most unwise one. There [537] was much other matter in the case upon which Umrao Singh should not only in his own interests, but in the interests of Justice, have been examined. That unwise suggestion practically relieved Mr. Colvin, as he contended before us, from the necessity of calling any witnesses, and consequently placed this Court in a most difficult position in dealing with the case, and obliged us to allow Mr. Colvin to call several witnesses, the examination of whom in this Court consumed much valuable time. That suggestion of the Sessions Judge also most probably deprived him of the opportunity of hearing the evidence for the defence and of seeing how far such evidence pointed to the guilt or innocence of Gobardhan. This opportunity has been afforded to us.

Mr. Colvin for Gobardhan contended before us that the witnesses Chidda and Ram Lal were false witnesses who had been put forward at a late stage of the case to connect Raja Baldeo Singh and Umrao Singh with the murder. With this contention we agreed, and we have discarded their evidence. He further contended that the evidence of Sarwan could not be relied upon, and that if his evidence was discarded the evidence of Mahasukha was uncorroborated, and being that of an accomplice we should not, under such circumstances, act upon it. He also contended that in certain details the evidence of Mahasukha was contradicted by Nawala and other witnesses; that Mahasukha had on different occasions

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1887 made different statements, and that his evidence was improbable, and that in the end of November, 1885, Gobardhan had left his village on a pilgrimage to Unkarji in the Gwalior State, and was absent on that pilgrimage until he was arrested at Unkarji on this charge in July, 1886. Mr. *Colvin* also contended that there was no evidence to connect Raja Baldeo Singh or Umrao Singh with the murder, and that as there was no such evidence, the alleged motive for the crime was not proved. He also argued that some enemies of Raja Baldeo Singh and Umrao Singh had, after the murder was committed, induced Mahasukha to falsely inculpate by his statements Gobardhan, Raja Baldeo Singh, and Umrao Singh. Mr. *Colvin* strenuously argued that the Sessions Judge having acquitted Gobardhan of the charge we should not reverse his finding. He also contended that after the expression of opinion of the Sessions Judge to which we have already referred, no inference adverse to his client should be drawn [538] from the fact that he had not called as witnesses for Gobardhan, any of the persons who were referred to by Mahasukha in his evidence, such as Bhagwant, Srikishan and others. As the case stood, I thought, and still think, that, at any rate before the Sessions Judge, Mr. *Colvin* exhibited sound judgment and wise discretion, and acted as an able counsel should in the interests of his client in availing himself of the opportunity of not running the risk of calling witnesses for the defence. We thought it right in the interests of justice that Mr. *Colvin* should before us have the opportunity, if he chose to avail himself of it, of calling such witnesses for Gobardhan as he might think it advisable to call. Mr. *Colvin* elected to call witnesses. We gave a similar opportunity to Mr. *Hill* for the Crown, but he elected to stand on the evidence for the Crown which was upon the record. We directed that Amir Khan, Sub-Inspector; Jai Narain, the clerk referred to in the evidence of Amir Khan; Wazir Ahmad, constable; Sarwan and Nand Kishore, and Jagat, zamindar, referred to in Sarwan's evidence, should attend to be examined before us, and that the police diaries, and particularly those relating to the 16th of December, 1885, should be forwarded to the Court for our inspection. For these purposes the hearing of the case, the arguments in which had already occupied us for four and a half days, was adjourned. The case was again proceeded with on the 2nd, 3rd, 4th, 5th, 6th, 7th, and 10th of last month, when Amir Khan, Jai Narain, Wazir Ahmad, Sarwan, Jagat and two men of the name of Nand Kishore were called at our suggestion and were examined, cross-examined and re-examined, most of them at considerable length. Mr. *Colvin* and Mr. *Gordon* for Gobardhan called Umrao Singh, Chidda Khan, a daffadar of the Central Jail at Agra; Harpal, Babuti, Srikishan, Bhagwant, and Mahi Lal. Gobardhan was also questioned by the Court. Mr. *Gordon* stated that he had two witnesses to prove an *alibi* for Gobardhan, and invited us to express our opinion as to whether he should call them. The only expression of opinion which we thought it our duty to give, we gave, by informing him that he must exercise his own discretion, and that it was not for us to advise him as to the course which he should adopt. The result was that these persons were not called. Umrao Singh denied all knowledge of the transaction, generally contradicted the evidence of Zorawar Singh, and more [539] particularly that part of it in which it was stated that he had threatened Nihal Singh. Umrao Singh stated that he first heard of Gobardhan on the 21st of December, 1885, when a policeman called at his house in Agra, in search of Gobardhan, in connection with this charge. Having

regard to part of Mr *Colvin's* argument, this statement of Umrao Singh is of importance as showing that on or before the 21st of December, Gobardhan's name and that of Umrao Singh were associated in the matter then under investigation, and that the introduction of Umrao Singh's name into the case was not an afterthought, unless it was the result of a conspiracy between the night of the 19th December and the time when the policeman was sent to Agra on the 21st. As a fact, Mahasukha had at 5 o'clock on the afternoon of the 20th of December mentioned the name of Gobardhan, and at 8 o'clock that night he also mentioned the name of Umrao Singh to the police. I have come to the conclusion that Mahasukha when he made his statement at the *thana* at Itmadpur on the 20th of December, did not in fact know who the murdered man was, or where he or his relations lived.

A careful examination of his statement and evidence, and the other evidence in this case, can, in my judgment, lead to no other conclusion. Having said this, I think it right to say at once that there is in my opinion, no evidence before us to show that either Raja Baldeo Singh or Umrao Singh were in any way connected with Gobardhan or the crime. Mahasukha's evidence as to Raja Baldeo Singh and Umrao Singh is solely based on the statements which he says were made to him or in his presence by Gobardhan. If Gobardhan made these statements as to Raja Baldeo Singh and Umrao Singh, as I believe he did, it does not follow that there was any foundation for them. They may or may not have been true. It is I think obvious that Gobardhan would have had a difficulty in securing the assistance of Mahasukha and the other men to commit the murder, unless he could persuade them that they would obtain some material advantage in money, protection or otherwise, from joining in the dangerous enterprise which he was going to undertake, and it is difficult to see what course he could have adopted more likely to attain that object than the introduction of the names of two men of position, such as Raja Baldeo Singh and Umrao Singh. The views of the Sessions Judge on this point lead me to infer that he had [510] in this, as on other points of the case, been carried away by the arguments of Mr. *Colvin*, and had not examined closely into the probabilities of the evidence or the motives which may probably have influenced the parties. The theory of the defence which was adopted by the Sessions Judge, that it is improbable that Gobardhan should have mentioned the names of Raja Baldeo Singh and Umrao Singh so freely as he appears by Mahasukha's evidence to have done, and that "the way in which they are mentioned in his story points to the inference that he has been got at by their enemies," is not, in my opinion, justified by an examination of the evidence which was before him.

The question on that point arises, by whom and when could Mahasukha have been got at? It has been suggested on behalf of Gobardhan the relations of Nihal Singh, or the Rani or Thakurain of Kotla, and Adil Singh, may have got at Mahasukha. There is no evidence to support this suggestion. So far as Nihal Singh's relations are concerned, three of them, Zorawar, Tej Ram and Abu Singh, were examined, and not one question pointing to such a suggestion was put to any of them. It was not even suggested by any question put to them that they or any of them or any of Nihal Singh's relations ever heard of Mahasukha until after he had, on the 20th of December, 1885, made the statements which inculpated Gobardhan and Umrao Singh. Now as to the Rani of Kotla and Adil Singh, there is no evidence that they or either of them ever knew anything

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of Mahasukha. There is a vague statement of Gobardhan that Adil Singh had at some previous time been tried and acquitted on a charge of murder, that Koka Ram had been in some way mixed up in that case, and that Gobardhan had employed a *mukhtar* on behalf of Koka Ram. Gobardhan in his statement before us at the end of the case and when asked why should Mahasukha have made a false charge against him, told this vague story, and said that since he was released he had heard that Mahasukha was in the service of Adil Singh. Further, what must this suggestion as to the Rani of Kotla and Adil Singh presuppose? It must presuppose either that the Rani of Kotla or Adil Singh knew beforehand that Nihal Singh would be murdered, and had prior to the murder laid their plans for connecting Gobardhan, Umrao Singh and Raja Baldeo Singh, or one of them, it does not [541] matter which, with the murder, or that between the time of the committing of murder, that is to say, between the evening of the 19th of December and 5 o'clock in the afternoon of the 20th of December, they or one of them had ascertained that a murder had been committed, and that the murdered man, whose corpse was still in the well and unidentified, was Nihal Singh. Further, during that time, they or one of them must have ascertained that Mahasukha was an eye-witness of the murder and of the disposal of the body, or they must during that time have ascertained the circumstances of the murder, and of the disposal of the body, and have found Mahasukha, and in either case have got him to make his statements of the 20th December. Any one who reads with care the statements and evidence of Mahasukha must be satisfied that he did not know on the 20th of December, 1885, who the murdered man was. On the 21st of December, Wali Husain showed the corpse to the people of the neighbouring villages, and no one recognised it. At 5 o'clock on the afternoon of the 20th, Mahasukha had introduced the name of Gobardhan, and at 8 o'clock that same night, the name of Umrao Singh, into the case. On the 21st, Gobardhan was sought for by the police at his own house at Garhi Godhi and at Umrao Singh's house at Agra. It is true that the constable who went to Umrao Singh at Agra did, according to Umrao Singh's evidence, tell him that Nihal Singh had been murdered. It is the fact that Abu Singh stated that the *thanadar* of Narki came to him with Pokha Ram on the morning of the 20th, and told him that Nihal Singh had been murdered. This statement must have been merely the result of an inference based on the facts that Nihal Singh had not arrived at Tundla on the previous evening, that his riderless horse was found outside Abu Singh's door on the morning of the 20th, and that Pokha Ram had noticed marks of blood at the bridge. It is obvious that nothing definite was known as to the fact of a murder having been committed until Mahasukha made his statement at the *thana* of Itmadpur, which appears to have been the first information which the police of the *thana*, which was nearest to the scene of the murder, had of the fact that any one had been murdered or was in fact missing.

Mahi Lal, one of the fresh witnesses called by Mr. Gordon, stated that he had been a *Karinda* of Rani Sakarwar, and had been [542] engaged in preparing her case, and had never known Nihal Singh in connection with her claim to the Awa estate; and that, so far as he knew, Nihal Singh had never visited the Rani between the time when she put forward her claim and Nihal Singh's death. He also stated that Nihal Singh was not in a position to assist the Rani with money.

Mr. Gordon tendered evidence to show that Nihal Singh could not have had any good claim in law to the Awa estate. Mr. Hill objected to this.

evidence, and we rejected it on the ground that there was no evidence before us from which we could infer that Nihal Singh had any legal claim to the estates, and that it was not necessary for Mr. *Gordon* to give evidence to prove a negative until the prosecution had given some evidence to prove an affirmative. The evidence tendered by Mr. *Gordon* and rejected by us did not touch or qualify the fact which was proved, namely, that Nihal Singh had put forward claims to the estate. There was the fact proved by the evidence that Nihal Singh had preferred claims to the estate, to the Collectors of Agra, Aligarh, Muttra, Etah and Mainpuri, and to the Commissioner of Agra and the Board and the Lieutenant-Governor. These claims, so far as we know, may have been unfounded, but there was the circumstantial evidence of Zorawar Singh given at the sessions trial on the 13th October, 1886. When Zorawar Singh was examined before the committing Magistrate, he gave a good deal of evidence on this point, and he stated, amongst other things, that before Raja Baldeo Singh was acknowledged as Raja, Nihal Singh had applied to the Collector of Muttra to have his name recorded as owner of the villages belonging to the estate in that district, and that a notification was issued from the Jalesar tahsil. He also stated in the course of that examination that Nihal Singh had presented a petition to the Board and to Government claiming the estate. Zorawar Singh, although he was cross-examined at the sessions trial as to whether there was any civil cause other than that of Rani Sakarwar's pending at the date of Nihal Singh's death relating to the Awa estate, was not cross-examined as to the allegation that Nihal Singh had preferred the claims to which he had referred. If Zorawar Singh's evidence on this point was false, it was capable of easy and certain refutation, and the way to [543] refute it was not by proving that those claims were unsubstantial and unfounded. These claims of Nihal Singh, we assume, were unfounded in law; but the fact remains that they had been made. Umrao Singh has come before us, and he has denied, upon his oath, that he was in any way concerned with Gobardhan or with the murder, and, so far as he is concerned, he should have the benefit of his having given his evidence, which appeared to me to be given in a manly and straightforward manner. Whether or not there was any foundation for the statements made by Gobardhan to Mahasukha, it is impossible for me to say. I can say no more than that Umrao Singh has, so far as he is concerned, denied on his oath in Court any complicity in the transaction, and that there is no evidence that the statements of Gobardhan as to Umrao Singh and Raj Baldeo Singh were true. I have dealt at some length with this part of the case, not only on account of the view expressed by the Sessions Judge, but also because we have been much pressed on the point by Mr. *Colvin* in his argument before us.

Harpal, Babuti and Srikishan have denied the story told by Mahasukha, and they have stated that the confessions of Harpal and Srikishan were extorted by the police, and principally by violence and torture ordered by Amir Khan. The fact that Harpal and Srikishan made statements at one time which, if believed, and if they had not been accomplices, would afford full corroboration of all that is material in Mahasukha's evidence, is proved. Those statements were put to them, and they admitted that they had made them, but they said that they had been threatened, tortured and tutored by the police.

Having examined carefully the statements of Harpal and Srikishan, their several retractions and their evidence, and that of Babuti given before us, I am satisfied that their evidence before us is false, and that their

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allegations as to the torturing and tutoring by the police are substantially unfounded. According to Harpal, Mahasukha early on the Sunday morning after the murder told him, a stranger, that he, Mahasukha, was trumping up a charge against Gobardhan for the slaughter of a man, and asked him to give evidence against Gobardhan, and this, if the evidence for [544] the defence is to be believed, some 20 or 25 days after Gobardhan had left for the Gwalior State on his alleged pilgrimage. In reply to us, Harpal said, according to my note of his evidence:—"I did not ask Mahasukha who had been killed. He did not tell me. I did not ask him where the man had been killed. He told me to say it was at the bridge. I did not then know which bridge. I asked him which bridge it was, and he said, 'You say it is the bridge. What have you to do with what bridge it was?' He did not tell me when the man had been killed. I did not ask him who the man was." When Harpal and Srikishan first retracted their confessions, no distinct allusion was made by them to Amir Khan, whilst in their evidence before us, as to the alleged torturing and tutoring by the police, Amir Khan was the principal offender. Babuti, Harpal, Srikishan and Bhagwant gave evidence to show that Gobardhan had left his village and the neighbourhood some 20 or 25 days before the murder of Nihal Singh, and had not returned. This evidence I do not believe. On the contrary, I am satisfied not only that Gobardhan was with Amir Khan at Narki on the 16th of December, but that it was his hand which fired the shot that killed Nihal Singh at the bridge on the 19th of December, 1885. Bhagwant, who was examined next after Srikishan, had had no opportunity of knowing what Srikishan had said in cross-examination, and contradicted Srikishan on several material points so far as the credibility of their evidence was concerned, as, for instance, on the question of the partition of the joint property. Srikishan professed to having been told by Gobardhan that he, Gobardhan, was going on a pilgrimage to Unkarji, and would not come back. Bhagwant, Gobardhan's brother, said that they cultivated jointly; that Gobardhan wanted a partition; on that a quarrel took place, and he, Gobardhan, went off, leaving his wife and child behind, and saying that Bhagwant might take the whole, and that he, Bhagwant, did not know or inquire where Gobardhan had gone, or whether he had gone on a pilgrimage or not. He admitted that he knew that the police were searching for Gobardhan on the Monday after the murder. Bhagwant's story, even if it had stood alone and uncontradicted, would have been most improbable.

I have come to the conclusion that no reliance can be placed upon the evidence of Sarwan. His evidence, if we could have [545] believed it, would have afforded a complete corroboration of Mahasukha's as to Gobardhan having been at the bridge on the evening of the 20th December. It is possible that Sarwan may have passed the bridge on that evening and seen Gobardhan there, but his evidence on other points relating to his credibility has been so fully contradicted by Amir Khan, the police diaries, Jagat and the Nand Kishores, that I consider it safer to discard it altogether.

In justice to the police, I should say that it appears to me that they were not responsible for the introduction into the case of the evidence of Sarwan or of that of Chidda or Ram Lal. Sarwan, on the important point as to when he first gave information to the police, was, at the sessions trial, and again before us, distinctly and in unequivocal terms contradicted by Amir Khan, Sub-Inspector of police. Chidda and Ram

Lal appeared to have been first introduced by Zorawar Singh, and not by the police.

Before proceeding to consider the evidence of Mahasukha, I may repeat that I am satisfied that Gobardhan did not leave his village on the alleged pilgrimage 20 or 25 days before the murder of Nihal Singh, and that the story as to his having done so is absolutely false. I am also satisfied that Gobardhan was in Garhi Godhi on the 16th of December, 1885, and that on that day he was taken by Wazir Ahmad, constable, to Amir Khan at Narki, and that Amir Khan's evidence as to what Gobardhan then said to him is true. I am also satisfied that on or before the morning of the 20th December, 1885, Gobardhan absconded, and that, although rewards were offered for his apprehension, he was not arrested until July, 1886, when he was found in the Gwalior State, far distant from his home, and that the explanations which he has given as to the cause of his long absence from his home are untrue. If my belief is well-founded, that the story of Gobardhan and the evidence of his witnesses as to his leaving his village are untrue, it follows that he left his village at a time and under circumstances other than those which his story and their evidence have disclosed, and that the true reason for his leaving his village and his long absence from his home and family has been carefully concealed by him, whilst he has attempted by false evidence to mislead us, not only as to his motive for absenting himself, but also as to the time when he disappeared from the village. His disappearance from [546] his village, otherwise unexplained, appears to me to afford corroborative evidence of Mahasukha's story so far as Gobardhan was concerned, and to be explainable, under the circumstances, only on the hypothesis that he was a party to the crime with which he is charged, and, fearing that by the evidence of some of his accomplices or otherwise he might be implicated in it, he absconded and intended to keep out of the reach of the law either permanently or until he might find it safe to return. The explanation of his disappearance which I have adopted is a natural one, and is consistent with the evidence of Mahasukha, Amir Khan, Wazir Ahmad and Jai Narain, and the evidence afforded by the entries in the police diaries as to what took place on the 16th of December, 1885. The explanation given by Gobardhan and his witnesses is, I believe, an untrue one, and is the only one offered by him or his witnesses. No other explanation has been suggested by Gobardhan, his witnesses or his counsel, and I must assume that Gobardhan and his counsel had no other explanation inconsistent with his guilt to put forward. Gobardhan was defended at the sessions trial and before us by a most able counsel, who did everything which it was possible for a counsel to do to secure a finding of acquittal, and who was fully alive to the hearing on the case of the disappearance of Gobardhan from his village, if that disappearance was not satisfactorily explained.

It is now necessary to consider the evidence of Mahasukha and the statements made by him at different times relative to the murder of Nihal Singh. In doing so, it must be kept in mind that Mahasukha had not been long in the neighbourhood, and was a comparative stranger, which may account for his not being able at an early stage of the inquiry to mention the names of all the six other men. According to Mahasukha's evidence, he had known Hira for four years, and Hira was the man who sought him out and brought him to Gobardhan. This would also account for the fact that Gobardhan had employed Mahasukha, who was a stranger to him. It must also be kept in mind that some of Mahasukha's statements were made after he himself was charged as a party to the murder.

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and when he would naturally be anxious to make it appear that he was not a party to the actual murder. These statements must be looked at carefully to [547] see if there is in any one of them anything inconsistent with the case for the Crown that Gobardhan is guilty of the offence with which he is charged. It would be rash to assume that an accomplice, because he tried, when charged with the offence of murder, to keep himself in the background, must necessarily be stating what was untrue as to the prisoner's share in the transaction. This evidence must be looked at in the light of common sense, and with the assistance of such knowledge as a Judge or jury may have of the motives which would ordinarily be likely to influence a person in his position.

The first statement which Mahasukha made, was made at the *thana* at Itmadpur, at 5 o'clock in the afternoon of Sunday, the 20th of December, 1885, that is, on the day after that on which Nihal Singh was, so far as we know, last seen alive by any of his relations. In that statement, as to which Wali Husain was examined at the sessions trial, Mahasukha professed to have seen the murder actually committed by Gobardhan. He accounted for his presence at the scene of the murder by saying that he was going from Tundla to his village after selling eggs. According to that statement he, Mahasukha was not a party to the murder, and was an unwilling witness to the disposal of the body. He said he conjectured that the murdered man was the karinda of the Raja of Awa (Raja Baldeo Singh). In that statement he did not mention any other names.

After making that statement, he took Wali Husain and other constables to the well in which the body of Nihal Singh was subsequently found. Later on the same day, and after Mahasukha and the constables arrived at the well, Mahasukha made a further statement that Gobardhan and another man said they would go to Umrao Singh at Agra. It is obvious that at this time Mahasukha wished it to be understood that he was in no way a criminal participator in what had taken place.

Mhasukha's next statement was made on the 24th of December, 1885, before Mr. Redfern. In that statement he told substantially the same story as he told before the Sessions Judge at the trial of Gobardhan. On that statement Mahasukha could have been convicted of murder. Of the seven men who, he alleged, took [548] part in the murder or the disposal of the body, he appears by that statement to have known, excluding himself, the names of Gobardhan, Hira, Harpal and Koka Ram. In that statement, although he said that Gobardhan had told him that "Umrao and Baldeo Singh had promised a village or Rs. 10,000 for the job," he does not expressly state that Gobardhan said he would go to Raja Baldeo Singh and get money. He did then state that "it was then that Gobardhan gave me the pieces of the armlet, bidding Hira and me divide, and as to the rest of the property he would settle in the morning. He said the armlet was of gold. Next morning early I went to Gobardhan's house to show him that the pieces were of copper or silver. I could not find him or Koka. His younger brother abused me, and Gobardhan was not there, so I went to the police."

In speaking of Gobardhan's younger brother, Mahasukha is obviously referring to the elder brother, Bhagwant, the only brother of Gobardhan we have heard of.

On the 4th of February, 1886, Mahasukha, who was then before Mr. Hamblin, charged with the murder, made another statement. That statement is as follows:—

Q.—"Do you wish to say anything?"

A.—“I have one thing to say in Court. If I make my statement, the Court will beat me. Shall I make the statement which the police told me to make? I now wish that my true statement be taken; and if so, I will make it.”

Q.—“Did the Court before which you made your previous statement beat you?”

A.—“No.”

Q.—“Why will the Court beat you now?”

A.—“I say this because if I do not state what the police told me to do, I shall be beaten; and if I do so, I shall be undone.”

Q.—“What is your true statement?”

A.—“My true statement is this. On Saturday Hira Bhangi awoke me at 10 P.M., and took me to a well near which there is a *nim* tree. I found Harpal, Gobardhan and Koka Ram present there. Two other persons were also present. I did not know the [549] names of those persons at that time, but I learnt afterwards that they were Babuti and Srikishan. Thus we were seven persons in all. Gobardhan took me away from the place by the road, and only said that he was taking me for service to Umrao Singh. He then took me to an *arhar* field, which was at a short distance from the road, and where there was a *babul* tree. I found a body tied there. When we arrived there, Gobardhan said to me that he and Koka Ram murdered the man. I said that we two persons would be unable to carry the body to the Jamna. Then Srikishan Chamar came near the body and wept. We all then said that we had been brought for service. He (*sic*) said that we should not have come if he had not deceived us. The body remained tied. There was a stick lying there. Gobardhan and Koka Ram gave the order for the body to be fastened to the stick and taken to the Jamna. I and Hira carried the body. When I and Hira arrived at a field, Gobardhan and Harpal carried it; and when these persons were tired Babuti and Srikishan carried, and put it near a disused well close by the road. We all then said that we would not be able to carry the body to the Jamna. Gobardhan said that the body should not be thrown into that well, while Koka Ram said that it should be thrown into that well. When we took the body at Gobardhan's order to another well at a *rabi* field, Gobardhan said that, there being water in the well, the body would not be discovered two or three days. After that Babuti was dismissed, but I and Srikishan remained there to carry the body. After the body had been thrown into the well, Gobardhan and Koka Ram said ‘wife's brothers’ (an abusive term), ‘do not communicate this to anybody. If you will do so, then know that the man had been caused to be murdered by Raja Baldeo Singh and Umrao Singh.’ Gobardhan took out of his pocket an armlet or *dholna*, and told me, Hira Singh and Harpal to divide it, and that it was of gold. Gobardhan had a pistol and a sword, and Koka Ram had a sword. They told me to take the pistol and the sword, and to make it over to their brother, Bhagwant. I refused. Thereupon Gobardhan said that they would take them themselves. Gobardhan told me to go home, adding that he was going to Umrao Singh, and enjoining me not to mention the fact. A *razai*, a pair of shoes, and a white *safa* (turban) were tied up in a bundle, and they took them away, saying that [550] they would show them to Umrao Singh. After this they, I and Harpal went home. The Inspector who met me on the spot, near Itmadpur, gave me sweetmeat to eat. He showed me two-anna pieces and four-anna pieces, and told me to state what he had tutored me. Amir Khan, Suh-Inspector, also said so. The two-anna

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pieces and four-anna pieces have been given to me by the Munshi who is with the Inspector. The Munshi and Sheikh Kallan gave me sweetmeat to eat. They gave me *chilam* and tobacco (produced) to smoke in the *hawalat*."

Q—"Is the statement you have now made in the presence of the Court true, or have you made it at the instigation of the police?"

A—"This statement is true. I went to the police and made the report. It was I who made over the armlet to the *darogah*. The armlet in Court is the same. Three beads are of copper and one is of silver. Gobardhan gave them to me as remuneration for throwing the body, and stated them to be made of gold."

Q—"Why do you make a mention of two-anna pieces, four-anna pieces, *chilam* and tobacco, if the statement you made before the Court is true?"

A—"I made a mention thereof because the Inspector told me to confess that I was an accomplice to the murder. He tells me to state what I stated before the police. The said two statements of mine are false, and what I have now stated before the Court is true. The said two statements were made at the instigation of the Inspector."

Q—"Have you got to say anything more?"

A—"The Inspector caused me to make a statement before the "Collector" (then he said) "before the Joint Magistrate. The Inspector" told me that as there was no witness to the murder, he would make me a witness and get me released. I agreed to state what he would tell me to state. He told me that I would get tobacco and *puri* daily. I eat *puris* and *gur* daily."

Q—"Was the body discovered on your report?"

A—"Yes; the body was discovered on my report."

Q—"Do you mean the same body about which evidence has been given in this Court?"

[551] A—"The same."

Q—"Is your name Maha Singh or Mahasukha?"

A—"My name is Mahasukha and not Maha Singh. I am called Mehrama."

There is nothing except Mahasukha's statement to show how he procured the anna pieces and the tobacco which he produced. It is possible that they may have been given to him by the police to induce him to stick to the statement which he had made on the 24th of December, 1885, before Mr. Redfern, when he probably did not see the full bearing of that statement against himself. The fact that he produced the anna pieces and the tobacco proved nothing beyond the fact that he had the anna pieces and the tobacco in his possession. To make the production of them corroborative of his statement that the police had given them to him, it should have been shown that he could not have procured them or had them in possession unless they had been given to him by the police. The production of the anna pieces and the tobacco by Mahasukha is a species of supposed corroborative evidence which is, in my experience, not unfrequently volunteered by witnesses anxious to give a realistic appearance to evidence given by them, and generally has the result of causing the statement to be discredited which the witness intended that it should support. It may be the fact that the police did give the anna pieces and the tobacco to Mahasukha. The production of them does not prove that they had done so. On the other hand, it may be the fact that Mahasukha seeing how fatal to his own case was his statement of the 24th of

December, was anxious to mislead Mr. Hamblin by the production of the anna pieces and tobacco, which, for all that appears except from his own statement, he may have had or procured otherwise than through the police.

On the 15th of February, 1886, Mahasukha was examined on the charge of murder by Mr Hamblin. The following were the questions put to him and his answers on that occasion :—

*Question by Court.*—"The charge under ss. 302 and 201, Indian Penal Code, is read out to you, and you are asked whether or not you have committed the said offence."

[552] *Answer.*—"I have heard the charge. I have not committed this offence."

*Q.*—"Did any one else hit (or kill) him in your presence?"

*A.*—"No."

*Q.*—"Did you throw the corpse of the deceased into the well?"

*A.*—"No."

*Q.*—"Did any one else throw down the corpse in your presence?"

*A.*—"Yes; other persons threw the corpse into the well in my presence."

*Q.*—"Have you any witness?"

*A.*—"There was one Newala, whose statement has been taken down."

*Question by Court.*—"The charge under s. 411 of the Indian Penal Code is read out to you, and you are asked whether or not you have committed the offence?"

*A.*—"I heard the charge. I have not committed even this offence."

When on his trial before Mr. Young, Mahasukha said that his statement made before Mr. Hamblin on the 4th of February, 1886, was correct. On the prosecution of Gobardhan, Mahasukha was examined before Mr. Harrison, the Magistrate, and at the sessions trial. On these two occasions he gave his evidence after he himself had been convicted and sentenced to transportation for life.

It is to be observed that Mahasukha from the first alleged that Gobardhan was connected with the murder, and on that point his statements and evidence never varied. On the 20th of December, he mentioned Umrao Singh's name. On the 24th of December, he also mentioned the name of Raja Baldeo Singh, and, according to his statement of that date, he, Mahasukha, was a party to the committing of the crime. When the case against him, Mahasukha, was being investigated before the Magistrate on the 4th and 15th of February, 1886, and again when he was on his trial, his story, he then being aware of the dangerous position in which he stood, was so framed as to exclude himself, if his story were believed, [553] from participation in the murder and from previous knowledge that a murder was about to be committed. This may also account for the evidence of his friend Newala, that he, Gobardhan, did not leave Newala's house until 10 o'clock on the night of the murder. If any one of Mahasukha's statements is to be believed, Gobardhan did, in fact, murder Nihal Singh. I cannot find in any one of those statements anything inconsistent with the guilt of Gobardhan. Where there is any essential discrepancy between Mahasukha's different statements, the discrepancy may be accounted for by his anxiety to show that he did not actually participate in the murder. His statements on this trial, and indeed as a whole, are minute and circumstantial, and lead me to the conclusion that he was an eye-witness of the murder and of the subsequent disposal of the body, and that the evidence which he gave at the sessions trial in this case, that Gobardhan actually committed the murder,

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is true. A careful examination of that evidence, tested by the examination of the statement made by him at the *thana* of Itmadpur on the 20th of December, and again tested by his statement of the 24th of December, 1885, have satisfied me that he saw the murder actually committed. His description of how the horse went on a few paces after the fatal shot was fired, and how Nihal Singh then fell to the ground, can hardly have been the result of imagination or of tutoring. There are many other points in Mahasukha's evidence, many of them small in themselves, which lead me without doubt to the conclusion that Gobardhan committed the crime of murder within the meaning of s. 302 of the Indian Penal Code, and that Mahasukha saw him commit it, as he says he did. That Mahasukha was an accomplice of Gobardhan in the commission of this great crime is evident from his own evidence.

That we could legally convict Gobardhan of the offence of murder on the uncorroborated testimony of his accomplice, Mahasukha, is apparent from reading s. 133 of the Indian Evidence Act, 1872. On this point I may refer to the case of *Reg v. Ramasami Padayachi* (1), *Empress v. Hardeo Das* (2), and *Queen-Empress v. Ram Saran* (3).

[554] In the case of *Reg v. Ramasami Padayachi* (1), Sir Walter Morgan, C.J., and Mr. Justice Kindersley refused to interfere with a finding of guilty, the only evidence in support of which was the uncorroborated evidence of an accomplice. Whether it would be prudent to convict Gobardhan on Mahasukha's evidence, if uncorroborated, is another matter. As a general rule, it would, I think, be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice. The evidence of an accomplice, whether it is corroborated or not, must, like the evidence of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, it is his duty to act upon the strength of his convictions. The oath of a juror in a criminal case in these Provinces is as follows:—"I shall well and truly try and true deliverance make between our Sovereign Lady the Queen-Empress and the prisoner at the bar, and give a true verdict according to the evidence. So help me God." The form of affirmation is to the same effect. If jurors believe the uncorroborated evidence of an accomplice, and that evidence, if believed, establishes the guilt of a prisoner, are they to violate their oaths, and, contrary to their oaths and the uncorroborated evidence of the accomplice which they believe, to return a verdict of acquittal? In such a case, is a Judge to direct the jury to violate their oaths? There can be no difference in this respect between the duty of a Judge acting as a jury and that of a juror. A Judge would advise a jury that it would be unsafe to act upon, in other words, to believe the uncorroborated evidence of an accomplice, as he would advise the jury not to act upon the evidence of any other witness whose evidence might, from any cause, be open to suspicion; but in either case, he would have to tell the jury that if they believed the evidence, they might legally convict the prisoner. Confusion on this question has sometimes arisen from overlooking the distinction between a caution to be given to a jury and a direction on law.

(1) 1 M. 394.

(2) A.W.N. (1884) 286.

(3) 8 A. 306.

The [555] questions of fact are for the jury to find on the evidence. On questions of law the jury must accept the direction of the Judge. Similarly, a Judge when trying a case without a jury must, as a juror, come to a finding on the facts, and, as a Judge, direct himself upon the law. I do not think that it has ever been suggested that the advice of a Judge to a jury not to act upon the uncorroborated evidence of an accomplice is a direction on law. It appears to me, speaking generally, that an accomplice who is being tried, or who is awaiting his trial, is more likely to tell a false story with the object of exculpating himself than is an accomplice who has already been tried and sentenced, and knows his fate. As to the general circumstances of the murder, there is ample corroboration of Mahasukha's evidence. As to the fact that Gobardhan was a party to that murder, the only corroboration of Mahasukha's evidence which I find, taking the view of the whole of the evidence, which I do, is afforded by Gobardhan himself. He absconded and remained away until he was arrested seven months after Nihal Singh's death. Gobardhan and his witnesses gave a false account as to the time when he left his village, and he has never given any other. This, I think, is some corroboration of Mahasukha's evidence that Gobardhan was a party to the murder, and his sufficient for us to act upon. In the course of the argument our attention was drawn to the decision of this Court in the case of *Queen-Empress v. Ram Saran* (1). In that case the Court decided on the facts before it. What those Judges would have done if they had the facts in this case before them, I have no means of knowing. In my judgment, every case as it arises must be decided on its own facts. If cases were to be decided as to the facts on their supposed analogy to others, the result might be that when there was a series of cases, each decided on its analogy to the previous case, the last case to be decided would have applied to it the same principle which had been applied in the first of the series, although as between them there might be no similarity in the facts. The fallacy and the danger of applying such a principle to the legal construction of documents was pointed out more forcibly than I can hope to do, by one of the most eminent and clear-headed Judges and lawyers who ever adorned the English Bench,—I refer to the late Master of the Rolls, Sir George Jessel,—in [556] one of his celebrated judgments. If such a principle be a fallacious and dangerous one to apply to the construction of documents, how much more fallacious and dangerous must such a principle be if applied to the determination of cases which depend on the consideration of oral evidence, and the value and weight to be attached to such evidence.

If Judges were to decide criminal or other cases, so far as questions of fact were concerned, on their supposed analogy to a previous case, the Judges would not be exercising their own independent judgment upon the facts before them in the particular case, but would be accepting and leaning on the findings of fact of other Judges in the previous case, and would be applying such findings to the particular case, on the speculative assumption that the other Judges would take the same view of the evidence in the particular case in hand which they had taken of the evidence in the previous case.

Mr. Colvin also pressed upon us the fact that Gobardhan has been already acquitted; and the decision in the case of *Empress v. Gayadin* (2).

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I have before now expressed my approval, if I may say so, of the principle enunciated in that case. I do not think that case applies to the present.

In this case, we have not been considering whether or not the case shall be sent down for a re-trial. We have re-tried the case on the evidence which was before the Court below, and on further evidence which has been brought before us; and I think it is my duty to act upon the belief, which from an examination of the evidence I entertain, that Gobardhan did, in fact, murder Nihal Singh. As I have said, I think the Sessions Judge committed a grave error of judgment in expressing, in a case like this, an opinion which relieved Mr. *Colvin* from the necessity of calling witnesses, thereby depriving himself of the opportunity of seeing how far Gobardhan could make out his *alibi*, and what light the evidence of his witnesses might throw upon the case. The inference which he appears to have drawn, that Mahasukha had been "got at" by the enemies of Rajah Baldeo Singh and Umrao Singh, is not supported by any evidence in the case, and cannot, I think, be [557] supported when the evidence and the probabilities of the case are carefully considered.

I do not agree with the view of the Sessions Judge that because Mahasukha asked for a promise before giving his evidence, it should be assumed that without such promise having been given, Mahasukha was unwilling to tell the truth.

The Sessions Judge appears to think that the reason given by Mahasukha for his having given information to the police on the 20th of December is improbable. I do not agree with him. Mahasukha is a common man, and he evidently thought that he had been done and left in the lurch by Gobardhan, and became angry and desirous of punishing Gobardhan. The manner in which his inquiries as to Gobardhan were received by Bhagwant was not likely to re-assure him. We asked Mr. *Colvin* what other motive could be suggested for Mahasukha making his statement to the police on 20th December, and he could not point to any other. The Sessions Judge says in his judgment:—"If his present story is true, Mahasukha ought to be able to account for everything Nihal Singh had about his person. He was taking his family to Agra, and must have had money about him. There is no mention of any money in Mahasukha's present story." Did the Sessions Judge omit to notice that Mahasukha, in his evidence at the sessions trial, as recorded by the Judge, had said—There was a sword on the corpse, hanging from a cross-belt, and a leather bag, and Gobardhan took them both, and there was a ring of gold on the right and of silver on the left hand; Koka Ram took them both. The sound of feet was heard, and Gobardhan said—"there are men coming; run." The three of us ran and sat down in an *arhar* field, two fields or two and a half away;" and then Hira and two other men came up. If the Judge is right in his surmise that Nihal Singh had money upon him, the money would probably have been in that bag. If it had been permissible to have asked Mahasukha as to what he thought was in the bag, the Judge, if he had looked at the previous statement of Mahasukha, would have had a question suggested to him, the answer to which would probably have relieved his mind upon this point. If by using the words "present story" in the passage from his judgment above quoted, the Judge meant [553] it to be inferred that Mahasukha's "present story" was at variance with a previous story of his, I should like to ask whether the Sessions Judge or any one else, before making such a comment on his evidence, had given Mahasukha an opportunity of explaining what may have been no variance at all. Again, the Sessions

Judge says :—" According to what Mahasukha now says, he gave his services after much expression of reluctance. How was it that he was taken to stand by and see the murder done, while the other 'sweeper, the more active Hira, was only employed in bringing men to help to carry away the body? Is it not more likely that Hira brought Mahasukha, as, according to Mahasukha's story, he brought Harpal, Babuti and Srikishan, after the murder had been committed? It cannot be said that if it was thought necessary for Hira to get three other men, a line can be drawn by saying it could not have been thought necessary for him to get as many as four. According to Mahasukha's story, the first idea was to carry the body to the Jamna, and the seven men, Gobardhan, Koka, Hira, Harpal, Srikishan, Babuti, and himself, proved unequal to the task." Reading this paragraph, one would be led almost to conclude that the Sessions Judge had not read the evidence which, in fact, he had himself recorded. Mahasukha's evidence on this point, as recorded by the Sessions Judge, was as follows :—"At midday Hira Bhangi came to me and said to me 'Come along, Gobardhan has sent for you. Why did not you come in the morning?' and Hira said to me 'I will get other men; you go to Garhi Godhi. I went to Garhi Godhi to Gobardhan, and Gobardhan and Kota and I sat and talked, and I said 'How can three men kill the man and throw him into the Jamna? Others must be got.' Gobardhan said 'Hira has gone for others.' I said 'He told me that, but I don't know when he will come.' He said 'As you were sent for, they were sent for. You don't know how important his business is.' I said 'I have come and they have not come.' Gobardhan said 'How long will you wait for them? There has been great delay, come along.'" The evidence of Mahasukha affords, to my mind, a most natural, most reasonable, and most direct answer to this comment of the Sessions Judge. I do not find it stated in the evidence that the seven men were unequal to the task of carrying the body to the Jamna. I do find it stated [559] in the evidence recorded by the Sessions Judge, that after the body had been carried a considerable distance and near to the well where it was found, some of the men said they were tired. If the Sessions Judge had looked into the previous statements which had been made, a question for Mahasukha would have been suggested to the Judge, namely, whether any of the men gave other reasons for objecting to go further. It must be remembered that it was still a long way to the Jamna, and, if the question had been put, it would have been found that from the *arhar* field where the body was tied up to the place where the objection to go further was made, the men had been carrying the body along a road where they might have been seen by any one passing by. There are several other comments which I could make on the conclusions and surmises of the Sessions Judge. I should not have made any if I did not wish to show the kind of surmises and deductions upon which most of his judgment is founded. The conclusion at which I have arrived is that this is not a judgment of acquittal which we, in the exercise of the duty imposed upon us, can allow to stand. In coming to this conclusion I have given full attention to the fact that Chidda and Ram Lal appeared to me, as they appeared to the Sessions Judge, to be false witnesses, and to the fact that Sarwan's evidence has been so shaken by his own contradictions and by the evidence of Amir Khan and others, that it is not safe to depend on any part of it. This affords no reason why I should not act upon the evidence in the case which I do believe. The question which I have to decide is whether, to the best of my judgment on the facts before

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me, Gobardhan is or is not guilty. I should not be doing my duty if, holding the opinion I do as to Gobardhan's guilt, I were to find him not guilty merely because I wished to mark my sense of the wickedness and impropriety of those who put forward false evidence for the prosecution, or even if I thought that the police had acted irregularly in the case. It would be a great misfortune to the administration and vindication of the law if a Judge were to allow such considerations to outweigh his conviction as to the guilt of a prisoner, and thereby permit a great crime, such as the present, to go unpunished. I find that Gobardhan did, in fact, on the 19th December, 1885, murder, within the meaning of s. 302 of the Indian Penal Code, Nihal Singh, [560] and for that offence Gobardhan should suffer the extreme penalty provided by the law. It was a cruel, wicked, and unprovoked murder. In my judgment the order of acquittal should be set aside, a finding of guilty of murder entered, and Gobardhan should be sentenced to be hanged by the neck until he is dead. As my brother Brodhurst and I differ in opinion, the case will be referred with our opinions to a third Judge.

BRODHURST, J.—On the morning of the 19th December, 1885, one Nihal Singh, who was a near relative of the Raja of Awa, left Barai, a village near to Awa, in the district of Etah, with the intention of riding to Tundla, and thence proceeding by train to Agra. He rode a pony, and he went *via* Ratauli, where his wife's family reside. He rode alone, having sent his wife and family direct to Tundla in a bullock carriage. Apparently he arrived at a bridge near Sukrari about two miles from Tundla, in the evening, and was there waylaid and murdered by being shot in the head with a bullet. The first information of the crime that was received by the police was from Mahasukha Bhangi, who, on the 20th December, at 5 P.M., reported at the police station of Itmadpur as follows:—

"Yesterday evening I was going from Tundla to my village, after having sold eggs and fowls. When I got to a bridge, on the Kot i road, I found there sitting on the bridge, Gobardhan, Brahman, resident of Garhi Godhi, and another man whose name I don't know. From that direction a mounted man, whom I conjecture to have been the Raja of Awa's *karinda*, and two other men behind him, whose names I don't know, were coming. When the *karinda* got near the bridge, Gobardhan shot him: he, being struck by the bullet, fell and died. *The four men* seized me, and taking my basket and rope from me, threw the dead body into a well, and dragged me near to it and said:—'If you tell you will be murdered.' With great difficulty, by making use of entreaties, I got them to let me go. The body is lying in the well."

On receiving this information, Wali Husain, Head-constable, *muharrir*, some constables and a *chaukidar*, accompanied Mahasukha to the well, which is on the boundary of Alawalpur, about one mile from the bridge and four miles from the police station. The party reached the well between 7 and 8 o'clock P.M., and remained [561] there that night. Next morning Mahasukha went with the head-constable to the bridge, pointed out the place on the bridge where he alleged the man was shot, also the place, about 20 feet from the bridge, where there was much blood, and where he said the deceased fell from his pony, also the place near a *babul* tree in an *arkar* field, about 200 paces from the bridge, to which he said the four men dragged the corpse. He showed the head-constable the marks of dragging, and under the *babul* tree were found some cardamoms and pieces of betel-nut, a leathern purse and pencil, and also some more blood, and Mahasukha stated that at that place the body had

been tied up, slung on to a pole, and thence carried to the well. The party then returned to the well, divers were sent into it, and they took out the body, which was subsequently identified as that of Nihal Singh. In the coat pocket, amongst other articles, were found some cardamoms and pieces of betel-nut. The head-constable searched for Gobardhan at his home in Garhi Godhi, a village distant about five or six miles from the bridge, but could not find him.

Mahasukha had at first stated that he was a resident of mauza Teo. On inquiry by the police in that village it was ascertained that he had lived in that village; that he was originally a *kumhar*, but had married a woman of the sweeper caste, and had thus become a *bhanghi*; that he had left the village four of five years ago, and had not since been to it. The police, having ascertained these particulars, questioned Mahasukha on the 22nd December, and he then admitted that he had been a *kumhar* and had become a *bhanghi*; that he had left the village of Teo some years ago, and had since then been wandering about; that he had put up at the house of Newala, *bhanghi*, in mauza Shibsingpura, near Garhi Godhi, 10 or 15 days previously; that five or six days before the murder, Hira, *bhanghi*, of Garhi Godhi, had taken him to Gobardhan, with whom he was previously acquainted; that Gobardhan and Koka Ram, who is the son-in-law of Bhagwat, Gobardhan's eldest brother, informed him that they were in the service of Thakur Umrao Singh, and that Umrao Singh offered a reward of Rs. 10 000 or a village for the murder of a certain person of Awa; that Gobardhan and Koka Ram asked him, Mahasukha, to accompany them; that he consented on the understanding that he should [562] receive a share of the money; that on Saturday, the 19th December, 1885, Hira came to him at noon, and told him to go to Gobardhan's house, whilst he, Hira, collected other persons; that he accordingly went and found Gobardhan at his home and Koka Ram with him; that Gobardhan said the man who was to be murdered was coming that day, and that three or four other men were being collected to assist in the murder; that they waited for them until about 4 o'clock P.M., and that Gobardhan then said that they must delay no longer, and that the other men would meet them at the Sukrari bridge; that Gobardhan was armed with a pistol, Koka Ram with a sword, and he, Mahasukha, with a *lathi*; that they went to the bridge and sat down on it; that at about one *ghari* after sunset, a man riding a mare and unaccompanied by any one else, approached from the direction of Awa; that Gobardhan told him, Mahasukha, that this was the man they were expecting; that Gobardhan and Koka Ram sat down on the bridge and told him to stand at a distance of 9 or 10 paces in front, and in case the bullet missed its mark to seize hold of the mare, in order that the other two might then despatch the rider with the sword; that he went forward as directed; that when the mounted man arrived at the bridge, Gobardhan fired at and wounded him; that the mare ran away; that when she had gone only 10 or 15 paces her rider fell to the ground; that he made some convulsive movements and died; that they all three then dragged him by the legs to the *babul* tree in the *arhar* field; that after a time they heard persons coming; that Gobardhan asked who they were; that Hira replied; and that he, Hira, Harpal, *ahir* of Shibsingpura, a *chamar* of Garhi Godhi, and a fourth man, both of whom he could recognise, but whose names he did not know, joined them; that he and Hira tied up the body; and that the seven men carried it, two at a time by turns, and threw it into the well where it was found.

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Mahasukha made a confession before Mr. Redfern, a Magistrate of the first class, on the 24th December, which was very much to the same effect as the statement he is alleged to have made before the police on the 22nd idem.

Mahasukha's statement was again recorded by Mr. Hamblin, the committing officer, on the 4th February, 1886. He then told a story different to either of those he had previously told, and which [563] is to the following effect, *viz.*, that at 10 o'clock P.M., on the Saturday, Hira, *bhangī*, awoke him and took him to a well where were Gobardhan, Koka Ram, Harpal and two other men whom he did not then know, but whose names he now understands to be Babuti and Srikishan; that Gobardhan, saying that he was taking him in the service of Umrao Singh, conducted him to an *arhar* field where, near a *babul* tree, they found a corpse tied up; that Gobardhan then said, "I and Koka Ram murdered this man, but we unaided cannot carry his body to the Jamna;" that Srikishan said they should none of them have come there had they not been deceived; that then, under orders of Gobardhan and Koka Ram, he Mahasukha, and Hira tied the body to a pole, and that they all, two and two in turn, carried it for some distance; that they declared that they could not carry it to the Jamna; that Gobardhan said, it should not be thrown into a well; that Koka Ram, however, was of a different opinion, and that Gobardhan eventually, ordered its being thrown into the well where it was found, but where he said, as there was water in it, it would not be discovered for two or four days; that Gobardhan and Koka Ram then told them that Baldeo Singh, Raja of Awa, and Umrao Singh had caused the murder; but that they were not to say anything on the subject to any one. Mahasukha went on to say:—"The Inspector I met near the scene of murder has told me to say this, and also the *darogha* now present, Amir Khan. I have received 2 anna pieces and 4 anna pieces from a Munshi who is with the Inspector. I have tobacco now and a *chilam*. The Munshi and Shaikh Kallan have given me sweets. This Munshi is now present in Fetehabad. The statement I have made to-day is a true one. I went to the police and made the report. I gave up these beads to the police. These are the beads which belonged to the armlet; Gobardhan gave them to me. The statements I made to the Inspector and the Court are false. The Inspector told me that if I changed my statement, I should be punished for perjury. I made the false statements before at the instigation of the Inspector. Before the former Court the Inspector caused my statement to be recorded. The Inspector said that I should be taken as a witness and released. I agreed to this, and he said I should have tobacco and *puris* every day. Owing to my report the body was found, about [564] which the evidence has been given in this Court." There is a note by the Magistrate that Mahasukha "showed money, tobacco and pipe." Harpal, *ahir*, and Srikishan, *chamar*, each made a confession before Mr. Redfern on the 28th December, and each retracted his confession before Mr. Hamblin, and stated the circumstances under which he alleged it had been made. Babuti all along denied that he had any knowledge of the crime. The four men, Mahasukha, *bhangī*, Srikishan, *chamar* Harpal, *ahir*, and Babuti, Brahman, were committed for trial on the 15th February, 1886. The remaining three accused, *viz.*, Gobardhan and Koka Ram, Brahmans, and Hira, *bhangī*, though repeatedly searched for, could not be found, and apparently they had absconded.

The prisoners were tried by the then Sessions Judge, Mr. Young, who, towards the end of his judgment of the 30th March, 1886, observed:—

—" I will here note that the assessors, two of whom are vakils, took great pains with the case and were of much assistance to me. Two of them would acquit Mahasukha of the charge under s. 302, but would convict him under ss. 302 109. And the third convicts him under s. 302, Indian Penal Code. All convict him under ss. 201-411, Indian Penal Code."

Mr. Young acquitted Srikishan, Harpal, and B. buti. As to Mahasukha, he recorded :—" The Court, concurring with the minority of the assessors as to s. 302, and with all the assessors as to ss. 201 411, finds that Mahasukha, *bhangī*, is guilty of the offence specified in the charge, namely, that he, on or about the 19th December, 1885, at a bridge in Sukrari, on the Awa-Tundla road, has committed the offence of murder by abetting the killing of Nihal Singh, being present at the said murder ; and secondly, at the same time and place, dishonestly received a stolen armlet, knowing it to be stolen ; thirdly, caused evidence of murder of Nihal Singh to disappear in order to screen the offender from legal punishment, and has thereby committed offences punishable under ss. 302, 411, and 201 of the Indian Penal Code, and the Court directs that the said Mahasukha, *bhangī*, suffer transportation for life."

One of the assessors, *viz.*, Jala, Pirbhu Dayal, wakil, in stating his opinion that Mahasukha, was guilty of abetment of murder as [565] well as the other two offences for which he was tried, remarked :—" I very much doubt that he was actually present at the commitment of the murder, but I think he took part in the conspiracy."

Gobardhan was arrested in Gwalior territory, apparently during the latter half of July, 1886. He was committed for trial on a charge of murder on the 26th August, and was tried by the then Sessions Judge, Mr. Macmillan, with the aid of two assessors, and, on the 23rd October, Mr. Macmillan, in concurrence with the opinions of both the assessors, found that the charge was not proved against Gobardhan, and acquitted him.

Against that acquittal the Government preferred this appeal on the 8th February, 1887.

Nihal Singh was killed by a gunshot wound in the head. He sustained no other injury. His body was not left on or near the spot, but was slung on a pole and carried from the *arhar* field into which it had been dragged, past two dry wells, to a well in which there was water, and which well is about a mile distant from the scene of the murder. From these facts alone I am satisfied that Nihal Singh was not killed by ordinary robbers, but was way-laid and intentionally murdered, but by whom the murder was instigated there is no proof, and I concur with the learned Chief Justice that Ram Lal and Chidda, who were at a late stage produced to give evidence on this point, are false witnesses.

The learned Chief Justice has stated the circumstances under which the evidence of certain witnesses for the prosecution and defence was recorded before us. I agree with him in discarding the evidence of Sarwan, a witness for the prosecution. This witness, who is at present undergoing a year's imprisonment for dishonestly receiving stolen property, deposed that he saw Gobardhan at the bridge on the evening on which the murder took place. He did not, however, give any information on the subject to the police until the expiration of twenty days, although he had abundant opportunity of doing so at the time the body was recovered from the well and on other subsequent dates. His statements are very conflicting, and they are, on one point, refuted by Nand Kishore, Jat, to whom Sarwan made allusion in his deposition. The whole of Sarwan's evidence is, in my

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opinion, utterly unreli- [566] able, and the production of such palpably false evidence is very damaging to the prosecution.

Amir Khan has, amongst other matters, deposed that he was Sub-Inspector at Itmadpur, in December, 1885; that he arrested Harpal, Srikishan and Babuti on the 25th December, 1885, and that their statements as to ill-treatment at the hands of the police, in his presence, are absolutely false. He admits, however, that these three persons were taken to his tent on the 23rd December, and were ordered to remain there. A procedure of a similar kind was declared by the Full Bench of this Court, in their judgment in the case of *Empress v. Madar* (1) to be "illegal," and "a gross and unwarrantable breach of the powers entrusted to police officers," and it was observed that a confession obtained under such circumstances "must be regarded with grave suspicion."

Harpai, Srikishan and Babuti were actually arrested on the 23rd December, and they were not produced before a Magistrate until the 28th idem, when each of the first two mentioned made a statement which amounts to a confession of having committed offences under ss. 109-302 and 201 of the Indian Penal Code. They, however, retracted these confessions before the committing officer, and alleged that they had been extracted from them owing to ill-treatment at the hands of the police. They have now been called for the defence, and they have deposed that, by threats and maltreatment, they were compelled to make false confessions, as taught them by the police. I have known several instances of a murderer having, immediately after killing his victim, gone with the lethal weapon in his hand and still wearing blood-stained clothes, to the nearest police station and given himself up, and made a voluntary confession of his guilt. Confessions made some days after arrest may also often be true, but such confessions will, I believe, in almost every instance, not have been made voluntarily, but have been extorted by maltreatment, or induced by promises of pardon on being made a witness for the Crown. Police officers do not thus detain accused persons without an improper motive, and confessions obtained under such circumstances may almost with certainty be held to have been obtained by false inducements, or by maltreatment of one kind or other.

[567] It is a significant fact that, in the same year, 1885, at the same police station of Itmadpur, two persons, *viz.*, Manphul and Mussammatt Chironji, were charged with the murder of a woman named Kishori.

Manphul was illegally detained by the police for thirty hours before he was taken into *lawful* arrest, and he was then sent to a Deputy Magistrate, who was encamped in the neighbourhood. Before that Magistrate he made a confession which, however, he entirely withdrew, in the Court of Session; declared that he knew nothing whatever of the corpse that had been found, nor of any murder, and that his former statements were extorted from him by ill-treatment at the hands of the police. The trial was most carefully conducted by Mr. Redfern, who was then Sessions Judge of Agra. He, concurring with the assessors, found both of the accused not guilty, and acquitted them. It is very fortunate that the Sessions Judge and the assessors disbelieved the entire mass of concocted evidence that was produced before them for the prosecution, for it appears that Mussammatt Kishori has since returned home, alive and well, and has given an explanation of her absence.

(1) A.W.N. (1885) 59.

The evidence of Gobardhan's witnesses, Bhagwant, Brahman, his brother, and Srikishan, *chamar*, his former servant, as to the time and circumstances when and under which he Gobardhan, left his home, is conflicting, and I concur with the learned Chief Justice in disbelieving it.

The evidence to prove the charge against Gobardhan consists merely in the statement of the accomplice Mahasukha, supported by the fact that Gobardhan disappeared from his home about the time that the murder was committed, and was arrested several months afterwards, under suspicious circumstances, in foreign territory. I believe, however, that, with the exception of the statement of the accomplice, there is no evidence that Gobardhan actually absconded after the murder was perpetrated. Admitting, for the sake of argument, that he did so, the fact would be relevant, but would not, I think, be sufficient corroboration of the evidence of an accomplice such as Mahasukha.

[568] As observed by MACPHERSON and GLOVER, JJ., in their judgment in *Queen v. Sorob Roy* (1)—“Under certain circumstances the case against an accused person is certainly strengthened by his running away, and it is to some extent in the present instance; but a man who runs away may be, and often is, innocent, and any presumption of guilt which may arise from such a course is usually but a very small item in the evidence on which a conviction is based.”

Mahasukha has now been transported, and we have not had the advantage that the Sessions Judge and assessors had of hearing him make his deposition.

The Sessions Judge, Mr. Macmillan, has observed:—“Mahasukha's evidence does not satisfy me that he saw Nihal Singh shot dead. I think it more probable that he did not, than that he did, see the fatal shot fired. If he did not see Nihal Singh shot dead, his evidence is false at its core.”

Not only did Mr. Macmillan and the assessors, who aided him in the trial, think that Mahasukha did not see the murder committed, but, as I have already mentioned, Lala Pirbhu Dayal, *vakil*, one of the assessors at the trial of Mahasukha, when expressing his opinion that Mahasukha was guilty of abetment of murder, also remarked:—“I very much doubt that he was present at the commitment of the murder, but I think he took part in the conspiracy.”

I think it highly probable that Mahasukha did, as he states, enter into a conspiracy to commit murder, and I am satisfied that he assisted in carrying Nihal Singh's body from the *arhar* field to the well.

The *arhar* field is close to the place where the murder was committed; and Mahasukha, even if not present at the murder, nevertheless saw the pool of blood on the road, showing where Nihal Singh fell from his pony, and he no doubt, when assisting to remove the corpse, would hear all particulars from the persons who were actually present at the time.

Mahasukha has, on different occasions, told three different stories: two of those stories are undoubtedly not true, and it is very [569] probable that the third and last story is also partly untrue. I am inclined to think that all of the principal offenders absconded, and I consider it scarcely probable that, if Mahasukha had actually abetted the murder at the spot, he alone would have remained and have given information of the murder to the police.

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From a police point of view, it was very desirable that Mahasukha should depose that he saw the murder committed, for otherwise there was no chance of securing the conviction of the actual murderer.

Mahasukha, after he was sent up by the police, was not on bail, but was in the lock-up; and the fact that he, under those circumstances, was able to produce before the committing Magistrate "money, tobacco and a pipe," shows that he was allowed unusual indulgences, and probably with the object of keeping him in good humour, and willing to adhere to the evidence that he had given before Mr. Redfern. The production by Mahasukha of the forbidden articles abovementioned tends also to support his allegation that he was induced by the Inspector to give evidence on the promise of his being pardoned and made a witness for the Crown. The evidence that Mahasukha has given in the present case undoubtedly differs greatly from each of two of his previous statements, and it certainly therefore should be corroborated in material particulars.

My brother Straight in *Queen-Empress v. Ram Saran* (1) observed:—"The law in this country, as expressed in ss. 133 and 114 of the Evidence Act, is in no respect different from the law of England. It simply reproduces a rule of practice which the English Courts have recognized time out of mind, and which, I may add, their tendency of late years has been to apply with great strictness. The rule is this: a conviction based on the uncorroborated testimony of an accomplice is not illegal, that is, it is not unlawful. But experience teaches that it is not safe to rely upon the evidence of an accomplice unless it is corroborated, and hence it is the practice of the Judges, both in England and in India, when sitting alone to guard their minds carefully against acting upon such evidence when uncorroborated, and when trying a case with a jury to warn the jury that such a course is unsafe. [570] Further, not only is it necessary that the evidence should be corroborated in material particulars, but the corroboration must extend to the identity of the accused person."

Numerous rulings on the subject by eminent Judges are quoted or referred to under the heading of "accomplice" in the valuable works of Taylor *On Evidence*; Russell *On Crimes and Misdemeanours*, Archbold's *Pleading and Evidence in Criminal Cases*, and Roscoe's *Criminal Evidence*.

In the case *Queen v. Ramsadoy Chuckerbutty* (2) Pontifex, J., observed:—"I think it would be unsafe to uphold this conviction. The only evidence against the prisoner is the woman, Romonee Shekranee, who is none the less an accomplice because she has already been convicted on her own confession. Under the circumstances, therefore, I do not think it would be right to convict on the uncorroborated evidence of such an accomplice. Accordingly I concur with Mr. Justice Mitter in setting aside the conviction and directing the discharge of the prisoner."

In the case of *Reg v. Budhu Nanku*, (3), Westropp, C.J., and Nanabhai Haridas, J., remarked:—"As regards the other appellants, the Court quashes the convictions and sentences on the ground that the approvers Shripatray and Rama are not corroborated as to the identity of these latter prisoners. The confessions of co-prisoners implicating them cannot, in our opinion, be accepted as evidence to corroborate the testimony of these approvers: see Russell *On Crimes*, 4th edition, by Greaves, pages 603, 604 and 605; *Reg v. Malapa* and *Reg v. Chatur*

(1) 8 A. 306.

(2) 20 W.R. Cr. 19.

(3) 1 B. 475.

*Purshotam*, decided on the 7th January, 1876, by West and Nanabhai Haridas, JJ."

The appeal in the case of *Queen-Empress v. Ram Saran* was disposed of by Straight and Tyrrell, JJ., whose judgment is reported in I. L. R. 8 All. 306.

The following portions of the head-note will sufficiently show the evidence that was adduced against the four prisoners, appellants, and that was held to be inadequate except in the case of one of the four prisoners who had confessed his guilt:—

[571] "The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder, though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.

"In the trial of *R. S.* and *M.* upon a charge of murder, the evidence for the prosecution consisted of—(1) the confession of *P.*, who was jointly tried with them for the same offence; (2) the evidence of an accomplice; (3) the evidence of witnesses who deposed to the discovery in *R.*'s house of property belonging to the deceased; and (4) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found. Held that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner *P.*"

*R. S.* and *M.* who had been convicted by the Sessions Judge, in concurrence with the unanimous opinion of the assessors, were accordingly acquitted.

For the purposes of this case, it is unnecessary for me to make any remark regarding all or any of these judgments beyond this, that they are rulings of Judges whose opinions are entitled to the highest respect, and that, as contended by the learned counsel for the prisoner-appellant before us, the evidence that can be considered against Gobardhan is apparently weaker than that was held to be insufficient for a conviction in the cases referred to.

The learned counsel for the appellant lastly argued that this was not a case for interference under s. 417 of the Criminal Procedure Code, and in support of his argument he referred us to a judgment of Straight and Tyrrell, JJ., under the corresponding section of Act X of 1872, in *Empress v. Gayadin* (1) the head-note of which is as follows:—

"It is not because a Judge or a Magistrate has taken a view of a case in which the Local Government does not coincide, and has acquitted accused persons, that an appeal by the Local Government must necessarily prevail, or that the High Court should be called upon [572] to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on it by s. 272 of the Criminal Procedure Code. The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public.

"Held, therefore, the Local Government having appealed from an original judgment of acquittal of a Sessions Judge, that as such judgment was an honest and not unreasonable one, of which the facts of the case were susceptible, such appeal should be dismissed."

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I do not think that it can, in this case, be possibly said that the Sessions Judge "has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public."

To adopt the language of my learned brothers, I may say that "he, the Sessions Judge, had the witnesses before him, and consequently the best opportunity of judging their truth; and he appears to have conducted the inquiry with care and patience, and to have weighed and considered the facts to the best of his ability."

I may go even further than this, and say that Mr. Macmillan has long and varied experience in these Provinces; that his judgment, as a whole, is able and well considered: and that, having regard to all the circumstances of the case, he has, in my opinion, properly acquitted the accused; and, moreover, that if he followed the judgment of a Bench of this Court to which he is subordinate—I refer to the judgment reported in I. L. R. 8 All. 306—he could not have come to any other conclusion.

For the reasons above mentioned, I would dismiss this appeal.

[In consequence of this difference of opinion, the case was, under s. 429 of the Criminal Procedure Code, laid before Straight, J., before whom it was re-argued.]

The *Offg. Public Prosecutor* (Mr. G. E. A. Ross), for the Crown.  
Mr. J. D. Gordon, for the prisoner.

#### JUDGMENT.

STRAIGHT, J.—This case has been referred to me in accordance with the provisions of s. 429 of the Criminal Procedure Code, in consequence of a difference of opinion between the learned Chief [573] Justice and my brother Brodhurst upon the hearing of an appeal by Government from an acquittal of the respondent by the Sessions Judge of Agra, upon the 23rd October, 1886. The respondent was charged in that trial with the murder, on the 19th December, 1885, of a man of the name of Nihal Singh; and after the examination of a large body of evidence, the learned Sessions Judge and the assessors were of opinion that the evidence of the principal witness in the case, one Mahasukha, an admitted accomplice in the transaction, was not to be relied upon; that it was not satisfactory or sufficiently corroborated; and that therefore no conviction could properly be passed upon such materials. The result was that the respondent Gobardhan, a Brahman by caste, was acquitted of the crime with which he was charged. The Government then were advised that this acquittal was an improper one, and in the result an appeal was preferred from that acquittal to this Court in the month of February last, and in due course was heard by the learned Chief Justice and my brother Brodhurst at very great length and under somewhat exceptional circumstances. By that I mean to say that a number of witnesses were either re-called or called for the first time, and the fullest materials were obtained for the purpose of enabling this Court to form its opinion upon the propriety or otherwise of the acquittal by the Sessions Judge.

I have now heard the case also, though not at such length, and have had an opportunity of very closely scrutinizing all the evidence and the records bearing upon it, and I need scarcely add that the consideration of it has cost me much serious and anxious thought. For it goes without saying that at any time a matter involving such grave questions as those that are concerned here must necessarily demand and receive the closest and most acute attention that a Judge can bestow.

But in the present instance the difficulties cannot but be enhanced by the fact that, apart from the interests of the public on the one hand and the accused on the other, the learned Chief Justice and my brother Brodhurst have, after prolonged and careful deliberation, come to different conclusions, which they have fully and exhaustively stated in the two elaborate judgments delivered by them. I need hardly add that I have perused and re-perused those judgments with the most minute attention, to thoroughly value and understand them.

[574] Before I proceed to discuss—and I shall not attempt to do so at any great length—the facts of this case, I feel it incumbent upon me, as more than once referred to by my brother Brodhurst in the course of his judgment, to make a few remarks in regard to two matters upon which he comments: first, as to the duty of this Court in dealing with appeals from judgments of acquittal; and next, as to the analogies to be drawn between the facts of the present case and the facts of another case decided by my brother Tyrrell and myself, which analogies my brother Brodhurst employs as the foundation of the view that, as it was considered unsafe in that case to convict an accused person, so it necessarily follows that an acquittal is the only proper result in the case now under consideration.

With regard to the first of these matters, which is concerned with my remarks in the case of *Queen-Empress v. Gayadin* (1) so frequently referred to, I can only say that when I made the observations I did on that occasion, I could not expect that they would be exhaustive of every possible condition or state of things that might arise, and I certainly had not present to my mind a case like that before me—in which, as I shall by and by have to point out, the Sessions Judge has overlooked the main and crucial circumstance which goes to corroborate the evidence of the accomplice, namely, the disappearance of Gobardhan from his village contemporaneously with the undoubted murder of Nihal Singh. Under such circumstances I confess I cannot feel that I am in any way departing from, or doing violence to, the principle laid down in *Queen-Empress v. Gayadin* (1), by entertaining this appeal and determining one way or other as to the guilt of the respondent.

In respect of the second matter, namely, the analogies on which my brother Brodhurst has relied, it seems to me—and I say this with the most profound respect for him and for anything which falls from him with his long experience in this Court and as Sessions Judge—that I doubt the safety and soundness of applying such a method to the determination of questions of fact: indeed, I would venture to go the length of saying it is misleading. It is next to impossible to find one case in which the facts are identical with [575] those of another, and this test by analogy can only be plausibly applied where they are precisely the same. In the case of *Queen-Empress v. Ram Saran* (2), I, imperfectly no doubt, endeavoured to point out, for my own guidance and that of the Subordinate Courts, what the rule of practice appeared to me to be in reference to the evidence of accomplices as embodied in the sections of the Evidence Act here, and illustrated by decisions of the English Judges; and the learned Chief Justice was right in the view he has formed as to what I intended to convey by that ruling. I could not for a moment pretend to lay down any hard-and-fast rule as to how questions of fact were to be determined. I do not think that a Judge or a jury, in trying a man upon one set of facts, can rightly or properly be

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influenced by the decision some other Judge or some other jury has arrived at upon facts some of which may be similar, but which cannot be identically the same. If it were necessary, for me to enter at large into the facts of the case of Ram Saran, it would not be difficult to point out many variations between the facts there and those here. Every case, as far as its decision is concerned upon the merits, must stand or fall on the particular facts proved; and it is obvious that while, in one instance, the intrinsic truth and probability of an accomplice's evidence would necessitate the looking for slight evidence of corroboration of the kind mentioned in *Queen-Empress v. Ram Saran* (1) in another its inherent improbability would cast upon the Court the obligation of requiring very full support from independent materials. Thus, in the present case, it is necessary, first of all, to look very closely into the statements of the accomplice Mahasukha, to see whether they are such as to commend themselves to the better judgment, and I do not think it would be of the slightest assistance to me in doing so to compare the evidence given by the accomplice in the case of Ram Saran, and then to draw the conclusion that because he was not believed, therefore Mahasukha is unworthy of belief. I cannot therefore adopt the test applied by my brother Brodburst, nor do I think he was in the least degree bound by the conclusion of facts at which my brother Tyrrell and myself arrived in Ram Saran's case. I concur with what the Chief Justice has said in his judgment on this point, and I feel my-[576]self in no way fettered by my own decision in another case upon a matter of fact arrived at on the facts of that case. This brings me to the facts of the case, and to the determination of the question which I have to decide, namely, aye or no, has the prosecution satisfactorily established that the respondent Gobardhan was the person who, upon Saturday night, the 12th December, 1885, shot Nihal Singh through the head and thereby committed the crime of murder?

Now, there are some matters in this case about which there can be in my opinion, no dispute, and they are these:—The deceased Nihal Singh was the brother of Zorawar and Tej Singh, both of whom have been examined as witnesses, and it appears that upon the 19th December, 1885, Nihal Singh had been paying a visit with his brother Tej Singh, for the purpose of assisting at the *gouna* of Zorawar Singh's daughter, his own niece. Nihal Singh was undoubtedly connected with the family of one Raja Baldeo Singh and his brother Balwant Singh, and subsequent to the death of the last Raja, he had, whether rightly or wrongly, preferred claims to the property of the Raj. At any rate I see no reason to doubt the truth of Zorawar Singh and Tej Singh on this point. A lady of the name of Rani Sakarwar had at the time Nihal Singh was murdered also brought a suit shortly before his, and that proceeding was pending at the time; and if Tej Singh is to be believed, when his brother left his house on the 19th December, he was bound for Agra "to assist Rani Sakarwar in the prosecution of her claim against Raja Baldeo Singh." Despite the evidence of Umrao Singh—and here I may remark Baldeo Singh has never attempted to give any evidence in the case—I cannot but feel a strong conviction that Nihal Singh was not a person who was likely to be regarded with favour by those connected at least with the management of the Raja's affairs. Whatever the precise nature of the deceased Nihal Singh's pretensions were, I believe what his brothers say, that he had been setting up some claim, and, moreover, had made himself busy in espousing the cause of Rani Sakarwar. Going on with the narrative, it appears that about 7 o'clock on the morning of 19th the December, Nihal Singh

left his brother's house with the avowed object of going, accompanied by his wife and family, to Tundla, there to take the train to Agra to support Rani Sakarwar. [577] He was riding a horse, was armed with a *talwar*, and his wife and family were in a *rath*, which was driven by a man of the name of Dungar, and accompanied by a servant named Pokha.

When Nihal Singh left his brother at Barai he was in good health, clothed in his ordinary costume, and having a sort of satchel with some papers in his possession. He does not, however, appear to have had any money about him beyond a few rupees for the purpose of paying the railway fare from Tundla to Agra. For some time after leaving Borai, he and his wife and children continued along the same road, but when they got to a turning which led to Ratauli, the village in which Nihal Singh ordinarily resided, he intimated that he was going to make a detour in that direction and would follow on after. They continued directly along that road to Tundla, and in the course of their journey they passed over the bridge to which by and by I shall have more particularly to refer.

Nihal Singh having turned aside and gone in the direction of Ratauli, arrived there somewhere about the middle of the day. He called on a person there of the name of Abu Singh, and put up with him for the short rest that he made there, his object in going apparently having been to get his cooking utensils from his house, and send them to Tundla for the purpose of taking them on with him to Agra. The circumstance is a trifling one in itself no doubt; but I gather from it that Nihal Singh was at that time contemplating somewhat of a stay at Agra, which would be consistent with the object for which Tej Singh says he was going there. Nihal Singh left Abu Singh's house about the middle of the day, riding his horse, and proceeded thence to the bridge on the road to Tundla which is some two miles out of Tundla; the distance is some 14 miles. So that in ordinary course, presuming that Nihal Singh left Ratauli at 1 or 2 o'clock, he would, by travelling along at the rate of some four miles an hour, arrive in the neighbourhood of the bridge between 5 and 6 o'clock in the evening. The last person, except those who were concerned in doing him to death, who saw Nihal Singh leave, was Abu Singh, and I think it is pretty clear that Nihal Singh was at that bridge somewhere about 6 o'clock in the evening, and that he was shot down by some person who knew of his coming by that road and was awaiting him. The next fact proved is, that at [578] 5 in the evening of Sunday, the 20th, the day following, one Mahasukha, a sweeper by caste, who was at the time a resident in the house of a man named Newala, in Shibsingpura, presented himself at the Itmadpur *thana*, and there to the officer in charge made a statement to the following effect:—[His Lordship read the statement, and continued]:—

I see no reason whatever for doubting that this is a perfectly truthful statement of the police officer as to what was told him by Mahasukha at 5 o'clock on Sunday evening, the 19th of December. So that within 24 hours of Nihal Singh's being killed at the bridge, information was given as to the mode in which he had been killed, which turned out afterwards to be perfectly correct; and most important of all, the name of Gobardhan, the respondent, was mentioned as that of the person who had shot Nihal Singh there. I can see no grounds whatever for suspecting that that statement has been concocted, or that the officer deposing to it has lent himself to a most wicked and diabolical conspiracy for the purpose of bringing to the gallows an innocent man. After he had made that statement the police went with Mahasukha to a place to which he led them.

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He first of all took them to a well, which they were unable at that time to search; but upon the following morning a diver went down and brought up the body of the deceased Nihal Singh, having upon it clothes as to which it is noticeable that his dark-coloured outside coat was pulled up and fastened over his head. He was found to have a bullet wound on his right jaw, and along with the body was found a big bamboo stick with which it was obvious that the body had been carried to the well and thrown in. Subsequent to his taking them to the well, Mahasukha pointed out a spot at the bridge where blood was found, and a place in an *arhar* field towards which the ground presented signs of a body having been dragged along, similar signs being also apparent upon the back of the clothes and body of the deceased man. There was, I say without hesitation, nothing in all the appearances of Nihal Singh's corpse, or of the things that were found upon it, to lead to the conclusion that that unfortunate man had been murdered for the purposes of ordinary robbery. Every indication, on the contrary, goes to satisfy me that from some motive of revenge or the like he was deliberately shot down upon that bridge by some one who had lain in wait for [579] him with the sole or main object of taking his life. Starting then with this hypothesis, which, in my opinion, is fully warranted by the facts, let me next consider in what way the case presents itself, first, as put forward for the prosecution, and next, how it is met by the defence. The suggestion for the prosecution is that, as asserted by Mahasukha, directly or indirectly, at the instance of persons who wished to get Nihal Singh out of the way, he was deliberately murdered by Gobardhan, the respondent, who was hired for the purpose. On the other hand, it is alleged by the defence that the police, as the instruments of some enemies of the Raja and Umrao Singh, tutored Mahasukha to tell the story that he did, introducing Gobardhan into the matter for the purpose of setting afloat a gross and wicked imputation upon those two persons.

Now, I think it will be convenient first for me to deal at once with this latter contention. I said so at the hearing of the case, and I say so now after having given it my most earnest and anxious consideration, that it appears to me an incredible idea, for it involves this, that Nihal Singh's own friends must have, before he was murdered, determined that he should be murdered, with the knowledge and sanction of the police so to speak, and that the police should have put Mahasukha up to charge a man with the crime who, if his story is true, they must have known to be absent from his village, and who would therefore be able with little difficulty to prove an *alibi*. The wanton wickedness of the one thing and excessive folly of the other render it impossible for me seriously to entertain any such theory. It is no part of my duty sitting here—and I am very thankful it is not—to determine whether, aye or no, the case for the prosecution, in so far as it seeks to implicate the Raja and Umrao Singh, has been made out. It is enough for me to repeat what I have already said, that there are materials upon this record that show that Nihal Singh was not a person towards whom those connected with the Raj would be animated by the friendliest feelings. While one would be slow to attribute to the Raja or Umrao Singh all that the evidence of Mahasukha suggests, it may well be that over-zealous and unscrupulous hangers-on may have instigated what they would have deprecated, and have used their names for the purpose of encouraging the commission of an act that would, as they thought, benefit the Raja's interests, and get rid of a

person, [580] who had already proved troublesome, and was likely to prove more so.

Much stress has been laid on the circumstances that Mahasukha has varied his statements in regard to this matter : more particularly in the statement that he made to Mr. Hamblin during the preliminary inquiry that took place with regard to the charge against himself. I have read all his statements through, and I entirely concur with the learned Chief Justice's criticism. I think that the learned Chief Justice's remark, that so long as he was in peril himself he undoubtedly did endeavour to make it appear that his part was a lesser one, is a perfectly well-founded observation. But when I come to his evidence given before the Magistrate and before the Sessions Judge, I do not hesitate to say—and I may claim a long experience in dealing with this class of evidence—that after reading it over and over again it leaves upon my mind an absolute conviction as to its truth. I do believe that with his own eyes he saw Gobardhan shoot Nihal Singh on the bridge in the way he describes, and, if there is corroboration, his evidence must undoubtedly be accepted.

There are things and incidents mentioned by him which, allowing for native ingenuity and police tuition, I do not believe it was ordinarily possible for the witness to fabricate or invent. Incidentally I refer to one of them which has struck me. I have remarked that the coat of Nihal Singh was found pulled over his head. When I turn to the evidence of Mahasukha, when he was examined in the Sessions Court, he says this about it:—"Gobardhan afterwards turned the coat from behind over the deceased's head....."

Now, I have already remarked that this was obviously not a murder for the purpose of robbery. For if the people who killed Nihal Singh had had booty for their object, in the first place, they would have robbed him, and in the next place, they would not have troubled themselves to remove his body, and would at most have thrown it by the road-side. But as a matter of fact, his body is found at a distance of one mile or more from the place where it was killed. Why I refer to that is because it seems to me in a striking way to corroborate the mode in which Mahasukha states it came about that he was introduced into the transaction. If mere [581] robbery had been contemplated, two or three men would have been sufficient, but if a deliberate murder was contemplated with the object of carrying off the body and concealing it so that discovery should be impossible, or at least be delayed, then a considerable number of men would be necessary. We must remember, too, that the accused man is a Brahman and that, ordinarily speaking, except under great emergency, he would have the strongest indisposition to touch or carry a corpse himself. Mahasukha states how he was first called by Hira, who took him to Gobardhan and then he goes on to describe how, after a good deal of conversation, he went back and was again sent for on Saturday to go alone with Gobardhan, the object being for the purpose, not of using the weapon with which the man was to be killed, but principally to assist in carrying the body after the murder to the Jamna, into which river it was intended to throw it.

Now, I do not think that I can do better than read through the deposition given by the man Mahasukha in the Court below. He says:—"Nihal Singh was killed in my presence. Q.—In what way was he killed? A.—If your honor will make a promise to me, I will tell the whole matter. Q.—What do you mean? What promise should be made to you? A.—If hitherto it has been the practice for informers to be hanged or transported for life, even so be my fate. I want this promise, either

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that my imprisonment may be shortened or that I may be released. (Mahasukha was told at this stage that the Court would not make any promise to him whatsoever.)

Mr. Gordon has contended that that was an indication that this witness was a false and dishonest person. To my mind it seems rather the other way; for when he found that he could get nothing from the Court, he proceeded to speak at full length and in detail. Then he goes on to say:—"Four or five days before this case occurred, Hira, bhangi, said to me:—'Will you take service?' I answered—'Yes.' It was then evening....."

That is the description given by Mahasukha of the circumstances under which he became a party to this enterprise. I do not hesitate to say that if anybody reads that story, it is almost impossible to conclude that he either fabricated it out of his own [582] head, or that the police were at the bottom of it. After all, it was no more than an elaboration of the information which, within 24 hours of the murder, he had volunteered at Itmadpur *thana*, giving the name of Gobardhan. Then he goes on to describe the way in which he got to the bridge, and what occurred there:—"Gobardhan said 'the man has not come,' and as he said this, we heard the sound of a man coming along on horseback ..... 'O, Thakur, it is dark, why are you going along alone?'"

Now it seems to me at once preposterous to suppose that these words were put into his mouth by the police. The whole thing seems highly natural, and the conversation is one which would be likely to take place when a man is travelling alone along an Indian road, in the dark of a December evening, under the circumstances described.

Then Mahasukha goes on to say:—"The mounted man had pulled up his horse when this talk was going on ..... When his horse had gone ten paces in the direction of Etah to where Koka was standing he fell"...

We know that the horse did go back. Then he goes on to say:—"When he fell on the ground, &c., I recognised two of them as Hira, bhangi, the man I mentioned before, and Harpal."

And then he goes on to describe how, in handling the body, he discovered an armlet, and with the assistance of the *talwar* he cut it off, and subsequently four pieces of it were given to him by Gobardhan, which probably appeared to be of some value, more or less. Then he goes on to say that "Gobardhan gave the order to take up the corpse, and I and Hira took it up." Then he goes on to describe in considerable detail how he stopped at various places and found that it was a laborious task, and subsequently Gobardhan, with his foot, pushed the body into the well with the pole." And then he says:—"Then the seven of us came on to the road." [His Lordship, after reading other portions of the evidence, continued]:—

I have given now his account of the mode in which he came to be engaged in this transaction and of the part he played. I need not read his deposition further. He explains how it was that he [583] went to the police *thana* and made the statement he made there. He says, on the morning of Sunday, Gobardhan having gone away, he went to the house of Gobardhan; that he could not find him there; that he made inquiry; that Gobardhan's brother Bhagwant repulsed him with abuse, and he therefore went off and lodged his information.

I confess I do not myself see anything very unnatural in his conduct; on the contrary, it was like that of an angry man, who, finding he had been deceived, sought to punish the person he believed had deceived him, by getting him into trouble. No doubt at the first he sought to convey to

the police the idea that he was a mere eye-witness, but he nevertheless denounced from the very first Gobardhan as the principal culprit.

I entirely concur with the learned Chief Justice that it is not within the bounds of credibility that he made that statement about Gobardhan with the connivance or conspiracy of the police. His statement to that effect and his evidence stands far above the ordinary evidence of an accomplice, and is fortified by his mention of the name of Umrao Singh on the night of the 20th of December, upon which fact the learned Chief Justice lays so much stress, and in my opinion rightly, for the reasons given by him. Moreover it is not out of place to note that, at the time he gave his evidence, he had been convicted of a share in the murder, and was a convict under sentence of life transportation.

Is he corroborated? I agree again with the learned Chief Justice that the absconding of Gobardhan from his village contemporaneously with the murder of Nihal Singh is a corroboration of a kind that, in a case like the present, may be acted upon. Mr. Gordon contended that it was open to question whether he did abscond. Upon looking into the evidence, I see no reason to doubt that Amir Khan saw him at Narki three days before the murder, namely, on the 16th, and that he saw him upon the evening of that day a second time; and he is corroborated by the constable who went to fetch Gobardhan from his house in the adjacent village. Therefore it is beyond doubt that on the 16th December he was not in his own village, with no grounds, apparent or disclosed, for leaving it. At 5 o'clock of the 20th December he is named as having taken [584] part in the murder, and when search is made for him at his brother's house, where he resided, not a trace of him is found, nor does he ever return there. The absconding and absence from home when sought for seems to me to corroborate the evidence given by the accomplice, namely, that when the gang parted on that Saturday night, Koka went off in the company of Gobardhan towards Tundla, and that they were then carrying with them the *razai* and the pair of boots to take to those who had employed them, for the purpose of satisfying them that the deed was done. I have thought over the matter long and anxiously, and cannot believe that this case is the outcome of police concoction. With every disposition to criticize in the most stringent manner the conduct of the police, I see no indication about the evidence, either of Mahasukha or the other witnesses for the prosecution, which lead me to suspect that there was any tampering with him or with them. Though I quite concur with the observations of my brother Brodhurst in regard to the impropriety of the action of the police with regard to the other persons who were tried with Mahasukha, they do not apply to him in so far as his implicating Gobardhan is concerned. The crucial fact remains that upon that Sunday night, not only did Mahasukha name Gobardhan, but he also made use of the name of Umrao Singh in connection with the charge.

I have said all that I think it necessary to say in dealing with this case, which has been so exhaustively discussed in the judgments of the learned Chief Justice and my brother Brodhurst. I have pointed out the intrinsic grounds upon which the evidence of Mahasukha seems to me entitled to credit, and I have shown that it is corroborated by the absconding of the accused—an absconding which he has only faintly attempted to account for, but has given no proof to explain. Does the story told by Mahasukha reasonably adapt itself to the conclusion I have arrived at, that Nihal Singh was murdered for revenge or some such motive and not robbery? I think it does. The whole story is consistent with that view,

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and the actual facts proved go to show that Nihal Singh was the victim of a deliberate murder, plotted and planned by persons who owed some grudge to him. I have only to add that the perusal of the evidence of the accomplice has driven me to the same conclusion as that arrived at by the learned Chief Justice, and I think the [585] corroboration he acts upon is sufficient to support the evidence of the accomplice.

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I confess I do not quite see why Sarwan has been discredited. It is true that he is a criminal person, and it is equally true that he had not made any statement to the police till the 8th of January; but he never changed his statements, although he was aware that the police contradicted him on some points, and although he knew that his evidence was opposed to the evidence of other witnesses about the colour of the coat worn by the deceased. He nevertheless stuck to his original statements; and I am disposed to think that Sarwan was speaking what he believed to be the truth, and that his evidence might be relied upon for the purpose of corroboration. But I do not think it is necessary to go into that matter, as without him there appears to me to be sufficient evidence.

That being so, I am of opinion that the appeal by Government ought to be allowed, and that Gobardhan, being convicted of the crime of murder, should suffer the punishment of being hanged by the neck until he be dead.

*Appeal allowed.*

9 A. 585 (F.B.)=7 A.W.N. (1887) 190.

#### FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

IN THE MATTER OF GAJRAJ SINGH.\* [25th March, 1887.]

*Act I of 1879 (Stamp Act), s. 3, sub-sections 4 (c) and 13, ss. 7, 26, sch. I, Nos. 13, 44—Bond—Mortgage.*

A grower of sugarcane executed a deed whereby he borrowed a sum of Rs. 25 as "earnest-money," and covenanted to deliver to the lender on a certain date 21 maunds of *rab* (unrefined sugar), upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows:—"If the supply of the *rab* be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rab* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits." As collateral security he hypothecated the produce of a field of sugar-cane, the value of which was not stated.

[586] *Held* by the Full Bench that the instrument was a "mortgage-deed" within the meaning of s. 3 (13) and No. 44 (b) of schedule I of the Stamp Act (I of 1879).

*Held* by STUART, C.J., STRAIGHT, J., and BRODHURST, J., that it was also a "bond" within the meaning of s. 3 (4) (c), and No. 13 of schedule I, and, with reference to the provisions of s. 7, was chargeable with stamp duty solely as a bond under No. 13, the contract being a single one.

*Held* by the Full Bench that the proper stamp duty payable on the instrument was four annas.

*Held* by STUART, C.J., and STRAIGHT, J., that in estimating the stamp-duty payable on the instrument, the amount stipulated to be paid by way of

\* Reference by the Board of Revenue under s. 46 of the Stamp Act (I of 1879).

penalty in case of breach of the covenant to deliver the *rab* must not be taken into account.

Reference by Board of Revenue, N.W.P. (1), doubted, and *Gisborne v. Subal Boweri* (2) referred to by STRAIGHT, J.

Per STUART, C.J., that, for the purpose of estimating the stamp duty, the amount secured by the instrument was Rs. 25, the amount borrowed, *plus* Rs. 11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, i.e., the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp-duty.

Per OLDFIELD, J., that the amount secured or limited to be ultimately recoverable under the instrument, was Rs. 25, the amount borrowed, *plus* Rs. 21, the sum recoverable at Re. 1 per maund, in the event of the borrower's non-delivery of the 21 maunds; and stamp-duty was payable on this amount.

THIS was a reference by the Board of Revenue, under s. 46 of the Indian Stamp Act (I of 1879). The reference was in the form of a letter from the Secretary of the Board to the Registrar, and the material portion of it was as follows:—

"The Board desire me to request that you will be so good as to lay the accompanying copy of an instrument impounded by the Collector of Shahjahanpur, together with a translation of the same, before the Hon'ble Court, and to obtain from the Court a ruling under s. 46 of Act I of 1879 as to its liability to stamp duty.

"The document relates to the supply of goods or merchandise. It provides for the payment of a sum of Rs. 25 as earnest-money to secure the supply of 21 maunds of *rab* (unrefined sugar), on which the grower is to receive as profit 9 annas per maund over the price fixed at the meeting of growers. As collateral security [587] for fulfilment of the contract, the grower hypothecates a field of sugar-cane, the value of which is not stated.

"The amount secured by the deed is therefore Rs. 25, earnest-money advanced, *plus* Rs. 11-3, amount of profit to be paid to the grower on the 21 maunds at 9 annas a maund, *plus* the payment of a sum which could not have been ascertained at the time of execution of the deed owing to the price not having then been fixed.

"Further, there is a mortgage, (without possession) securing the last mentioned sum, which could not be ascertained at the time of execution of the deed.

"The Board are of opinion that the document should be classed as a mortgage-deed without possession, and should be stamped accordingly for the amount secured. In the present case, as the amount secured could not be ascertained at the time of execution, the sum recoverable on the mortgage-deed would, under s. 26 of Act I of 1879, apparently depend on the value of the stamp used, provided it were not less than 2 annas, the minimum stamp for a mortgage-deed."

The instrument to which this reference related was dated the 28th December, 1878, and was in the following terms:—

"I, Gajraj Singh, son of Pahlwan Singh, caste Thakur, of mauza Baskhara Bozrag, parganna Pawayan, zila Shahjahanpur, borrowed Rs. 25 of Government coin, half of which is Rs. 12-8, as earnest-money, as per detail below, from Lala Shib Charan Lal, son of Jagannath, caste *Baqaludha*, resident of kasba Pawayan, on the following conditions:—That I will

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supply 21 maunds *pukhta* of *rab* of the first quality, the produce of sugar-cane of the year 1286 fasli, at the rate of 9 annas per maund profits over and above the Katauli prices, on Magh Badi *dooj*, 1286 fasli; that if the supply of the *rab* be less than the fixed quantity, and the money, still remains due, then the said money thus due, including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rab* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits, and, on my refusal to pay, the creditor shall have power to institute a suit and to recover the money on demand, and I shall have no defence. To secure payment of the said money, including the pro-[588]fits, I do hereby hypothecate in this document the produce of a field sown with sugar for the year 1286 fasli, measuring 6 *highas kham*, boundaries detailed below, situate in mauza Jiwan, pargana Pawayan, and possessed and cultivated by me, and agree that I will not transfer it in any other way until the payment of this money; and if I do transfer it, the transfer shall be held invalid. I have therefore executed this mortgage-deed that it may be useful in time of need."

The following opinions were delivered by the Full Bench :—

#### OPINIONS.

STUART, C.J.—The stamp duty chargeable on the instrument submitted to us in this reference is, in my opinion, four annas. The instrument itself, although really one and the same contract or agreement, is of a double character: it is a bond within the meaning of that word as given in s. 3, sub-section 4 (c), because it is an "instrument so attested whereby a person obliges himself to deliver grain or other agricultural produce to another," the consideration for which in the present case is that mentioned in the Board's letter, namely, Rs. 25, and the profits which the Board states to be Rs. 11-3. As to the sum which could not have been ascertained, that appears to fall within the provisions of s. 26 of the Stamp Act, and cannot therefore have the effect of adding to the stamp duty.

The instrument is also, in respect to the hypothecation it provides, a "mortgage-deed" within the meaning of Nos. 44 and 13 of schedule I of the Stamp Act, inasmuch as it is a mortgage-deed "when at the time of execution possession is not given or agreed to be given by the mortgagor."

And being of this double character, the instrument for the purpose of the stamp duty appears to me to fall within the principle recognized by s. 7 of the Stamp Act, whereby it is provided that an instrument of such a description "shall, when the duties chargeable thereunder are different, be chargeable only with the highest of such duties." Here the stamp duty in regard to both descriptions of the instrument is the same, but it is the highest that can be charged in either view of the instrument, the contract made by it being obviously one and the same.

The result is, that having regard to the provisions of the Stamp Act to which I have referred, namely, the definition of "bond" in [589] s. 3, sub-section 4 (c), Nos. 44 and 13 of schedule I, and ss. 7 and 26, the stamp duty chargeable on the instrument before us is the highest duty chargeable on a bond the amount or value of which exceeds Rs. 10, but does not exceed Rs. 50, as provided by No. 13 of schedule I.

I have only to add that the stipulation in the instrument in the event of the supply of *rab* being less than the fixed quantity, and the money still remaining due, with the condition that in such a contingency the money and the profits shall be paid at the rate of Re. 1 per maund, and also as to the *rab* not being supplied at all or sold at some other place—

are all provisions of an essentially penal character, and also merely contingent, as they may or may not come into operation and are therefore not to be taken into account in estimating the stamp duty. 1887  
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STRAIGHT, J.—Looking to the terms of the document to which this reference relates, and construing them in their ordinary legal sense, would appear to fall within two definitions. First, it is an agreement for the delivery of *rab* with a provision for damages in case of breach of the contract to deliver, and next it is an hypothecation bond of certain moveable property, to wit, the produce of a sugar-cane field, as security for the payment of any damages that might become recoverable by way of compensation for non-delivery. But cl. (c) of s. 3 of Act I of 1879, declares that "any instrument whereby a person obliges himself to deliver grain or other agricultural produce to another" is a bond, and if *rab* can properly be regarded as "agricultural produce," which I think it may, the instrument now before us exactly falls within the above definition, and should bear a stamp of the value of four annas. As regards the provision in it for a penalty, I have present to my mind the Full Bench ruling reported in I.L.R. 2 All. 654 in respect of which Garth, C.J., has made some remarks in *Gisborne v. Subal Bowri* (1), which I may note related to Act XVIII of 1869, where there was no provision such as that to be found in cl. (c) of the present law. Upon further consideration I am disposed to doubt the correctness of the ruling of this Court to which I was a party and to concur in the views expressed by Garth, C.J., upon the subject of a penalty clause. The sum named in a contract to be [590] paid in case of breach is not necessarily recoverable *in toto*. On the contrary, it only fixes the extreme amount beyond which compensation cannot be assessed. In the present case, upon failure to deliver the *rab*, the plaintiff was entitled under the contract to recover damages for such non-delivery; but it by no means followed as a matter of course that a Court would give him the full amount provided in the instrument. I do not think that it was ever intended to impose stamp duty upon an item of this fluctuating character. Under these circumstances it seems to me that the document should, in advertence to cl. (c) of s. 3 of the Stamp Act, and s. 7, be dealt with solely as a bond under art. 13 of the 1st schedule, and should be stamped with a stamp of four annas.

OLDFIELD, J.—The instrument to which this reference refers is in the following terms. (His Lordship read the instrument, and continued):—

The effect of this deed is that the obligor borrows Rs. 25 from the obligee, and covenants to deliver to him 21 maunds of *rab*, at a certain price on a certain date, and if delivery is not made in part or in whole, to pay to the obligee the sum borrowed, or as much of it as may be due, together with a sum of Re. 1 per maund on the 21 maunds which he covenants to deliver and fails to deliver; and property is mortgaged to secure the payment of the money advanced and to be paid on failure to deliver the *rab*.

This instrument is, in my opinion, a mortgage-deed, which, for the purposes of the Stamp Act, is defined to "include every instrument whereby, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, or the performance of an engagement, one person transfers or creates to or in favour of another a right over specified property."



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The duty therefore will be leviable under No. 44 of schedule I, that is, the same duty as a bond (No. 13) for the amount secured by the deed.

The amount secured, or, in other words, the amount limited to be ultimately recoverable under this deed, is, in my opinion, Rs. 25, the sum borrowed *plus* Rs. 21, which is the sum recoverable at Re. 1 per maund on the 21 maunds of *rah* the obligor engaged to deliver in the event of non-delivery.

[591] The sums taken together are the limit of what is ultimately recoverable or secured by the deed, and are ascertainable from the deed, and are sums on which duty is capable of being fixed, and the duty is payable on this amount, and is not affected by the question whether the obligor may or may not fulfil his engagement and thereby render void his obligation of payment, or whether the amount secured may or may not be ultimately recovered.

BRODHURST, J.—The document that is the subject of this reference is, I consider, a "bond" as defined in cl. (c), sub-section 4, s. 3 of Act I of 1879, and also a "mortgage deed" as defined in sub-section 13 of the same section. The stamp duty in either case is, with reference to arts. 13 and 144 of schedule I, respectively, four annas, and four annas only is, I think, the amount of stamp duty that is, with regard to the provisions of s. 7, chargeable on the instrument.

TYRRELL, J.—Without going into the question whether *rah* or saccharine liquor comes within the definition of "agricultural produce," it seems clear that this instrument is a mortgage, and therefore I concur in the answer recorded by the learned Chief Justice.

9 A. 591=7 A.W.N. (1887):121.

#### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.*

CHURAMAN (Plaintiff) v. BALLI (Defendant).<sup>\*</sup> [12th April, 1887.]

*Malikana—Heritable charge—Suit for arrears of malikana allowance, Small Cause Court suit—Act XI of 1865, s. 6—Bona fide transferee without notice—Act IV of 1882 (Transfer of Property Act), s. 3.*

S sold a share in immoveable property to M, by a registered deed of sale which contained the following provision:—The said vendee is at liberty either to retain possession himself or to sell it to some one else; and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he has agreed to pay." M mortgaged the property to B, who obtained possession; and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued M and B to recover arrears of *malikana*, the amount sued for being less than Rs. 500.

[592] Held, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mufassal Small Cause Courts Act (XI of 1865) was that suits directly and immediately involving questions of title to immoveable property should not be cognizable by the Small Cause Courts; that in the present suit such a question

<sup>\*</sup> Second Appeal, No. 614 of 1886 from a decree of W. Barry, Esq., District Judge of Banda, dated the 12th January, 1886, modifying a decree of Maulvi Muhammad Hafiz Rahim, Munsif of Hamirpur, dated the 28th April, 1885.

was directly involved; and that consequently s. 586 of the Code had no application, and a second appeal would lie. *Mohomed Kuramut-oollah v. Abdool Majeed* (1) and *Bhawan Singh v. Chaltar Kuar* (2), referred to. *Pestonji Bessonji v. Abdool Rahiman* (3), *Qutub Hussain v. Abul Husain* (4) and *Kadaresur Mookerjee v. Gooroo Churn Mookerjee* (5), distinguished.

Held that the words "as *malikana*" in the deed of sale could not be rejected as surplusage; that they showed an intention that the payment of the Rs. 25 should be an annual charge upon the property and the profits arising therefrom analogous to that of a *malikana* reserved on a settlement by a Government settlement officer for a zamindar; that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property; and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance. *Herranund Sheo v. Oseerum* (6), *Bhoalee Singh v. Nemoo Behoo* (7), *Hurmuzi Begum v. Hirday Narain* (8), *Mohomed Karamut-oollah v. Abdool Majeed* (1), *Koolaeep Narain Singh v. The Government* (9), *Tulshi Pershad Singh v. Ram Narain Singh* (10), *Gaya v. Ramjiwan Ram* (11), and *Gayan Singh v. Kooer Petum Singh* (12), referred to.

Held also, without expressing any opinion as to whether registration of the deed of sale operated as notice to all the world, or whether notice of the terms of the deed was necessary to bind B, and assuming B to have had no such notice in fact, that if he had searched the register he would have ascertained those terms, and if he did not search the register he must have wilfully abstained from so doing or was guilty of gross negligence in not so doing; that in either case he could not be treated as a *bona fide* mortgagee without notice; and that, being in receipt of the profits of the property, he was liable for the annual payment of the Rs. 25 from the date when he took possession as mortgagee. *Agra Bank v. Barry* (13) and *Pilcher v. Rawlins* (14), distinguished. *Abadi Begum v. Asa Ram* (15), referred to.

The definition of the word "notice" in s. 3 of the Transfer of Property Act (IV of 1882) correctly codifies the law as to notice which existed prior to the passing of the Act.

[Disappr., 7 C.W.N. 11; R. 134 P.L.R. (1904); 1 S.L.R. 104; 6 N.L.R. 117 (121)= 3 Ind. Cas. 276 (278); 12 A.L.J. 1032=26 Ind. Cas. 128.]

THIS was an appeal from an appellate decree of the District Judge of Banda, dated the 12th January, 1886, by which he dismissed the claim of the plaintiff Churaman as against the defendant [593] Balli. On the 20th December, 1867, Sheo Charan, Narain Sukh and Durga, who were possessed of certain lands, mortgaged 367 bighas  $18\frac{3}{4}$  biswas to one Adhar Singh, reserving 18 bighas as "*malikana*." On the 28th March, 1870, Adhar Singh mortgaged the 367 bighas  $18\frac{3}{4}$  biswas to Mahiput Singh. On the 30th March, 1873, Sheo Charan sold his interests in his one-third share in the lands to Mahipart Singh. The following is a translation of the deed of sale:—

"I, Sheo Charan, son of Nau Nidh, caste Thakur, pattidar of mauza Goedi, mahal Thao Ragnath, pargana Mahoba, in the district of Hamirpur, do declare that I, being in need of Rs. 49 of the Queen's coin, half of which is Rs. 24-8 of the said coin, to meet my private expenses and other emergencies, borrowed that sum from Mahipat Singh, son of Ajudbia Singh, Thakur of mauza Ardauli, pargana Bindki, in the district of Fatehpur; and in consideration of the said money, I have sold absolutely my share consisting of 122 bighas 13 biswas of land, assessed at Rs. 66-15-1, which is in my exclusive possession, together with ponds,

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(1) N.-W.P.H.C. R. (1869) 205.

(3) 5 B. 463.

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(11) 8 A. 569.

(13) L.R. 7 H.L. 135.

(15) 2 A. 162.

(2) A.W.N. (1882) 114.

(4) 4 A. 184.

(6) 9 W.R. 102.

(8) 5 C. 921.

(10) 12 C. 117.

(12) N.-W.P.H.C.R. (1869) 73.

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tanks, ravines, streams, *pakka* and *kacha* wells, stone-mills, fruit and timber trees, and all that appertains to zamindari rights. The said vendee is to remain in possession, to pay Government revenue, and to enjoy profits and bear losses. I and my heirs have no connection (with the property). The said vendee is at liberty either to retain possession himself or to sell it to some one else, and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he has agreed to pay. I have written these presents in the shape of a deed of absolute sale that it may be of use when needed."

This sale-deed was registered on the 30th March, 1870.

In 1873, Mahipat Singh mortgaged the property to the defendant Balli, who obtained and continued in possession.

From the 30th March, 1870, until the property was mortgaged to the defendant Balli, Mahipat Singh duly paid to Sheo Charan the annual payments of Rs. 25 provided for by the sale-deed. Since then no payments were made. Sheo Charan died on the 11th October, 1881. The plaintiffs in the presentsuit were the heirs and legal representatives of Sheo Charan, and they brought the suit on the 29th January, 1885, against Balli and Mahipat Singh in the Court [594] of the Munsif of Hamirpur, to recover eleven years' arrears of the Rs. 25 agreed, by the sale-deed of the 30th March, 1870, to be paid annually. The Munsif of Hamirpur decreed the claim of the plaintiff against both the defendants. The District Judge of Banda, on appeal dismissed the suit as against the defendant Balli, holding that he had become mortgagee without notice of the agreement to make the annual payment of Rs. 25; and that, under such circumstances, he was not liable. From this portion of the decree, the plaintiffs brought the present appeal to the High Court. The Judge modified the decree of the Munsif as against Mahipat Singh, holding that Mahipat Singh's liability to make the annual payments was determined by the death of Sheo Charan on the 11th October, 1881. From that portion of the decree which related to the liability of Mahipat Singh, no appeal was brought, and Mahipat Singh was not a party to the present appeal.

Babu *Sital Prasad Chatterji*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

On behalf of the respondent, a preliminary objection was taken by Pandit *Ajudhia Nath*, that the suit was a suit of the nature cognizable in a Court of Small Causes, and that as the amount sued for did not exceed Rs. 500, the second appeal would not lie. He referred to s. 6 of the Mufassal Small Cause Courts Act (IX of 1865), s. 586 of the Code of Civil Procedure, art. 132 of the second schedule of the Limitation Act, s. 100 of the Transfer of Property Act, 1882, *Pestonji Bezonji v. Abdool Rahiman* (1), *Qutub Husain v. Abdul Husain* (2), *Ali Mozhar v. Gopi Nath* (3), *Alagirisami Naicker v. Innasi Udayan* (4), and *Kadaressur Mookerjea v. Gooroo Churn Mookerjea* (5).

Babu *Sital Prasad Chatterji*, for the appellant, in reply referred to *Bhawan Singh v. Chattur Kuar* (6), *Mohomed Karamut-oollah v. Abdool Majeed* (7), *Gobind Chunder Roy Chowdry v. Ram Chunder Chowdry* (8).

The Court overruled the preliminary objection.

[595] Babu *Sital Prasad Chatterji*, for the appellant, contended that the Rs. 25 was annual payment charged on the land, for the payment of

(1) 5 B. 463.

(2) 4 A. 134.

(3) 4 A. 152.

(4) 3 M. 127.

(5) 2 C.L.R. 388.

(6) A.W.N. (1882) 114.

(7) N.-W.P.H.C.R. (1869) 205.

(8) 19 W.R. 94.

which the respondent was liable, that registration operated as notice to all the world, and that, in any event, whether the respondent had or had no notice of the contents of the sale-deed of the 30th March, 1870, was immaterial. In support of this contention, in addition to the cases cited by him on the preliminary objection, he relied *Herranund Sheo v. Ozeerun* (1), *Bhoalee Singh v. Neemoo Behoo* (2), *Hurmuzi Begam v. Hirday Narain* (3), *Abadi Begam v. Asa Ram* (4), *The Collector of Thanu v. Krishna Nath Govind* (5), *Gunga Deen v. Luchmun Pershad* (6), *Lakshmandas Sarup Chand v. Dasrat* (7), and *Vasudev Bhat v. Narayan Daji Damle* (8).

The Hon. Pandit *Ajudhia Nath*, for the respondent, contended in reply that no charge upon the land was created by the sale-deed of the 30th March, 1870; that there was nothing in the surrounding circumstances to show that it was the intention of the parties that any such charge should be created; that the agreement to pay the Rs. 25 annually amounted only to an agreement on the part of Mahipat Singh that he would make the annual payments to Sheo Charan during Sheo Charan's life, and was binding on Mahipat only, and in any event that the respondent, as a mortgagee without notice, could not be liable. In addition to the cases cited in support of his preliminary objection, he referred to *Kooldeep Narain Singh v. The Government*, (9), *Lewin On Trusts*, 6th, ed., p. 701, *Pilcher v. Rawlins* (10), and *Agra Bank v. Barry* (11).

Babu *Sital Prasad Chatterji*, in reply.

#### JUDGMENT.

EDGE, C. J. (after stating the facts as above, continued):—The first question which we have to consider is whether or not the words in the sale-deed "as *malikana*" should be treated as words of surplusage. If the intention of Sheo Charan and Mahipat Singh was that the Rs. 25 should only be payable by the latter to the former [396] during the life-time of the former, then it was unnecessary to insert the words "as *malikana*," as the clause in the sale-deed relating to the payment of the Rs. 25 annually would have expressed such intention, even if these words had not been inserted. If no meaning can be inferred from which the intention of the parties can be gathered from the use of the words "as *malikana*," they no doubt might be treated as words of surplusage. If, on the other hand, the intention of the parties can be inferred from the use of these words in the sale-deed, we consider that we should, in construing the sale-deed, give effect to them, if there is in the sale-deed, or the surrounding circumstances, nothing inconsistent with such inference.

The earliest definition of the word "*malikana*" of which we are aware is that given in the answer of Gholam Hosein Khan, Appendix No. 16 to Mr. Shore's Minute of 2nd April, 1788, when he said—"Malikana is the inalienable right of proprietorship, but *nanker* depends upon fidelity and attachment to the State and a due discharge of the public services." (See *Landholding and the Relation of Landlord and Tenant in various countries*, by C. D. Field, p. 738, Note 1). This definition probably would not now be considered as strictly correct or sufficiently wide. In Wilson's Glossary

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(1) 9 W.R. 102.

(3) 5 C. 921.

(5) 5 B. 322.

(7) 6 B. 168.

(9) 14 Moo. 247.

(11) L.R. 7 H.L. 135.

(2) 12 W.R. 498.

(4) 2 A. 162.

(6) N.-W.P.H.C.R. (1869) 147

(8) 7 B. 131.

(10) L. R. 7 Ch. App. 259.



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of Judicial and Revenue Terms and of useful words occurring in official documents relating to the administration of the Government of British India, 1885, *malikana* is described as "pertaining or relating to the *malik*, or proprietor, as his right or due; applied, especially in revenue language, to an allowance assigned to a zemindar, or to a proprietary cultivator, who from some cause, such as failure in paying his revenue, or declining to accede to the rate at which his lands are assessed, is set aside from the management of the estate and the collection and payment of the revenue to Government, which offices are either transferred to another person, or taken under the management of the Government Collector: in such case a sum not less than 5 per cent. and not exceeding 10 per cent. on the net amount realized by the Government, was finally assigned to the dispossessed landlord.—(Ben. Reg. i, viii, xliii, 1793; vii, 1882.) It was also applied formerly to an allowance made to the headman by the other villagers, or, when authorized to collect and pay the revenue of the village, by the State."

[597] In Fallon's new Hindustani-English Dictionary of 1879, we find the following:—

"*Malikana*, adj. Proprietary.

"*Malikana*, adv. In manner of an owner.

"*Malikana*, n. m. An allowance to zemindars ousted from their estates.

"*Malikan-i-khanji*, n. m., fees levied on cultivators by a land-holder for his house-hold expenses.

"*Malikana-rasum*. Proprietary dues."

In the case of *Herramund Sheo v. Ozeerun* (1), Phear, J., said; "It seems to me that the right to raise *malikana* is a distinct proprietary right and that it constitutes an interest in the land." In the case of *Bhoalee Singh v. Nemoo Behoo* (2), Sir Barnes Peacock, C.J., held that "*malikana* is not rent nor has it the elements of rent. It is a right to receive a portion of the profits of the estate for which the Government has made a settlement with another person, the real proprietor having neglected to come in and make a settlement." In the case of *Hurmuzi Begum v. Hirday Narain* (3), it was held that *malikana* was an annual recurring charge on immoveable property. In the case of *Mohomed Karamut-oolah v. Abdool Majeed* (4), Sir Walter Morgan, C.J., and Mr. Justice Ross, held that a *malikana* allowance is that which comes to the proprietor in respect of his ownership and as a mode of enjoying his ownership. To the same effect is the judgment in *Gobind Chunder Roy Chowdry v. Ram Chandra Chowdry* (5).

It is true that these last five cases related to *malikana* properly so called which had on a settlement been reserved by the Government settlement officer for the zamindar or proprietor, but still they show what *malikana* is or may be. It appears to us that the words "*as malikana*" were not inserted in the sale-deed without an object, and cannot be rejected as words of surplusage, and that they clearly indicate that the payment of Rs. 25 annually was intended by Sheo Charan and Mahipat Singh to be an annual charge upon the property and the profits arising from the property of a nature analogous to that of a *malikana* reserved on a settle-  
[598]ment by a Government settlement officer for a zamindar, and that it was intended by the use of those words to reserve or create a perpetual

(1) 9 W.R. 102.

(2) 12 W.R. 498,

(3) 8 C. 921.

(4) N.W.P.H.C.R. (1889) 205.

(5) 19 W.R. 94.

and heritable charge upon the property. The employment of the words "as *malikana*" appears to us to have had the same object as would have been obtained had words expressly declaring the payment to be perpetual or the right heritable been employed. We are not prevented from coming to this conclusion by the omission of specific words of inheritance. For this latter proposition the cases of *Kooldeep Narain Singh v. The Government* (1), *Tulshi Prasad Singh v. Ram Narain Singh* (2), and *Gaya v. Ramjiawan Ram* (3), are authorities. The case of *Gyan Singh v. Koore Peetum Singh* (4) apparently is an authority against the view which we take of the construction of the sale-deed. That case, so far as the construction of sale-deed is concerned, appears to be in point, and to support the contention of Pandit *Ajudhia Nath* on behalf of the respondent. The Judge who decided that case does not appear to have considered what was the intention of the parties in using the words "*malikana* payment" which appear in the judgment, and which we therefore presume were used in the document then under consideration. If the words "*malikana* payment" or "*malikana*" were not employed in the document in that case, that case is not in point. If those words were used in that document, the Judge in that case appears not to have considered their meaning or the object of their having been used, and we, sitting here as a Bench of three Judges, decline to follow that decision if it be in point. We may also say, if we are entitled to look at the earliest dealing with his property appearing on the record to assist us in ascertaining the intention which the parties had in using the words "as *malikana*" in the sale-deed, that we find there that Sheo Charan and the other two mortgagors when they mortgaged the property on the 20th December, 1867, reserved 18 bighas as *malikana*.

We are bound in this second appeal to accept the finding of the Judge of Banda that Balli took as mortgagee without notice, in fact, of the terms of the sale-deed, although we should most probably have been led to a different conclusion. Assuming that Balli had in fact no notice of the terms of the sale-deed, does that fact afford a defence to this claim? We are of opinion that it does not. If [899] Balli had searched the register he would have ascertained the terms of the sale-deed, in which case he would have had actual notice. Any prudent intending mortgagee who did not designedly abstain from inquiring for the purpose of avoiding notice, or who was not honestly, as far as he was concerned, misled by fraudulent statements of the mortgagor, would search the register to ascertain the title to the property and the charges, if any, upon it. It is not shown that Balli made any inquiry, or that any statements were made to him which would mislead him or put him off his guard, such as were made in the case of *Agra Bank v. Barry* (5). If Balli, in fact, did not search the register, he must wilfully have abstained from making the search, or he was guilty of gross negligence in not making it; and in either case he cannot be treated as a *bona fide* mortgagee without notice. In *Pilcher v. Rawlins* (6), the purchaser who got the legal estate had acted with *bona fides*, and the prior mortgage and the re-conveyance were concealed from him by the mortgagor, with the connivance of the trustee. Obviously that was a very different case to this. The definition of the word "notice" in s. 3 of the Transfer of Property Act,

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(1) 14 M.I.A. 247.

(3) 8 A. 569.

(5) L.R. 7 H.L. 135

(2) 12 O. 117.

(4) N.-W.P.H.C.R. (1869) 73.

(6) L.R. 7 Ch. App. 259.



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1882, in our opinion, correctly codifies the law as to notice which existed prior to the passing of that Act.

We do not consider it necessary to express any opinion as to whether or not the registration in India operated as notice to all the world, nor do we consider it necessary to decide whether or not notice was necessary in order to bind Balli. In the case of *Abadi Begum v. Asa Ram* (1), in which a husband had by a deed which was registered, covenanted with his wife, for himself, his heirs and successors, to pay her monthly Rs. 12 in lieu of dower out of the income of certain specified lands, and further covenanted not to alienate those lands without stipulating for the payment of the allowance, it was held that that covenant ran with the land and created a lien which, with or without notice, extended to all subsequent persons claiming to hold the lands to the extent of the amount of the profits set apart for the benefit of the wife, who was the plaintiff in that case, and was suing a sub-mortgagee of a mortgagee who had taken subsequently to the deed relied upon by the wife.

[600] For the reasons above stated we hold that the sale-deed of the 30th March, 1870, was intended to create a perpetual and heritable charge upon the land; that Balli, being in receipt of the profits of the lands, is liable for the annual payment of the Rs. 25 from the date when he took possession as mortgagee.

It now only remains to be considered whether this is a case in which a second appeal lies, and this depends upon the construction to be placed upon s. 6 of Act XI of 1865, the Mufassal Small Cause Courts Act of 1865. That section, so far as is material, is as follows:—"The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise; provided no action shall lie in any such Court...(4) for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims for such arrears." Looking at this section, the first thing which we notice is that, although the Small Cause Courts are given jurisdiction over claims within the specified amount on contract, claims for rent subject to the limitation contained in the 4th proviso, are also expressly brought within the jurisdiction of the Small Cause Courts. Claims for rent are claims which can only arise out of contract: and if it were intended by the Legislature that all claims or contracts other than those excluded by the proviso in the section, should be within the jurisdiction of the Small Cause Courts, it is difficult to see why claims for rent should have been specifically mentioned in the enabling portion of the section. Again, we notice that claims within the specified amount or value for personal property, are specifically brought within the section, whilst claims for immovable property are not referred to in the section. Again, the effect of the 4th proviso is to limit the jurisdiction as to suits for rent to suits in which the rents sued for accrue in respect of house property, and to arrears of rent in cases provided for. The inference which we draw from an examination of s. 6 is that it was the intention of the Legislature that suits

which directly involved questions of title to immoveable property should not be cognizable by the Small Cause Courts. We do not question the correctness of those decisions in which it has been held that in those cases in which the suit is otherwise within the jurisdiction of a Small Cause Court, that jurisdiction is not ousted because it may become necessary incidentally to decide a question of title. In this case it appears to us that the question of title to immoveable property was directly involved. The respondent's case was and is that he held the lands free of any charge. The appellant's case was and is that the respondent held the lands subject to the charge of Rs. 25 annual payment. We are aware that it has been decided that a suit to recover the principal money and interest secured by a hypothecation-bond on immoveable property can be maintained in a Small Cause Court. In such cases, unless otherwise provided by the hypothecation-bond, the mortgagee would be entitled to his personal remedy against his debtor for the debt, or on the debtor's promise to pay, of which the bond would probably be evidence. Here there is no purely personal contract on the part of Balli to make the annual payments: his liability arises out of the fact that he is the person who is in possession of the property charged with the payments. He cannot take the benefit to be derived from the profits of the land without taking up at the same time on himself the liability to make the payments charged on that land. In *Mohomed Karamut-oollah v. Abdool Majeed* (1), Sir Walter Morgan, C.J., and Mr. Justice Ross, held that a suit for *malikana* allowance concerned the proprietary right in land, and was not one for a Small Cause Court, although they said "it is true that the allowance is as to its amount fixed by contract, and that ordinarily a claim arising under a contract would be cognizable by a Small Cause Court."

In the case of *Bhawan Singh v. Chatter Kurr* (2), Mr. Justice Straight and Mr. Justice Brodhurst held that a suit for arrears of *malikana* affected the proprietary interest in immoveable property, and fell without the scope of the Small Cause Court. It appears to us that the same principle applies here. The view which we take is not at variance with any of the authorities cited [602] before us. In *Pestonji Bezonji v. Abdool Rahiman* (3) no question of title to immoveable property arose. There the mortgage contained a personal undertaking to repay, and the suit was for a money-decree only. In *Qutub Hasain v. Abdul Hasan* (4) the only question which could be called in any sense a question of title, was whether the defendant was the proprietor of the village in respect of which the plaintiff had been compelled to pay the Government revenue which he sought to recover in the suit. It does not even appear that the facts of such proprietorship was in issue. In *Kadaressur Mookerjea v. Gooroo Churn Mookerjea* (5) the sole question was, whether the plaintiff had purchased the properties for himself or *benami* for the defendants, and if as *benami* for the defendants, whether they were liable on the implied contract of indemnity.

In conclusion we hold that the respondent Balli is liable in this suit for the arrears of the annual payments of Rs. 25 claimed in the suit, and that the decree of the lower appellate Court, so far as Balli is concerned, must be accordingly reversed, and that this appeal must be allowed with costs.

BRODHURST, J., concurred.

MAHMOOD, J.—I concur.

*Appeal allowed.*

1) N.-W.P.H.O.R. (1889) 205, (2) A.W.N. (1882) 114, (3) 5 B. 463.  
(4) 4 A. 134.

(5) 2 C.L.R. 388.

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## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*BANDI BIBI (*Defendant*) v. KALKA (*Plaintiff*).\*  
[13th April, 1887.]*Execution of decree—Suit for confirmation of execution sale set aside by Collector—Jurisdiction of Civil Court—Civil Procedure Code, s. 312.*

A suit lies in a Civil Court for confirmation of a sale held in execution of a decree by the Collector under s. 320 of the Civil Procedure Code, and to set aside an order passed by the Collector cancelling the sale. *Madho-Prasad v. Hansa Kuar* (1), referred to. *Asim-ud-din v. Baldeo* (2), followed.

In such a suit, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting the sale.

[*Dis.*, 18 A. 437 (*Overruled* by 20 A. 379) ; R., 19 B. 216.]

IN this case the execution of a decree against the appellant, Musamat Bandi Bibi, was transferred to the Collector of Fateh-[603] pur, under s. 320 of the Civil Procedure Code, and the Notification of Government, North-Western Provinces, No. 671, dated the 30th August, 1880. In execution, by order of the Collector, the zamindari property of the judgment-debtor was sold by public auction, on the 21st July, 1884, and was purchased by the plaintiff-respondent, Kalka. On the 6th September, 1884, the Collector, upon an application by the judgment-debtor, passed an order setting aside the sale, the only ground being apparently that the price realized was inadequate. No irregularity of the kind referred to in s. 311 of the Code was mentioned in this order. The auction-purchaser made no appeal from the order, but on the 21st March, 1885, brought the present suit in the Court of the Munsif of Fatehpur, in which he prayed that the sale of the 21st July, 1884, might be confirmed and the order of the 6th September, 1884, cancelled.

The defendants (the decree-holders and the judgment-debtor) pleaded, with reference to the last paragraph of s. 312 of the Civil Procedure Code, that the suit would not lie, and also that the order of the 6th September, 1884, was regular and should be maintained.

The Courts below overruled the first plea, on the authority of *Asim-ud-din v. Baldeo* (2). With reference to the second, they observed that it was for the defendant to prove that the price realized by the sale of the 21st July, 1884, was inadequate, and that the inadequacy was the result of material irregularity in publishing or conducting the sale; but that no such proof had been given. They accordingly decreed the claim. The defendant judgment-debtor appealed to the High Court.

Munshi *Hanuman Prasad*, for the appellant.

Munshi *Nawal Bihari*, for the respondent.

## JUDGMENT.

EDGE, C.J.—In this case the plaintiff was an auction-purchaser at a sale under an execution, and brought this action to obtain confirmation of

\* Second Appeal No. 628 of 1886 from a decree of Munshi Rai Kalwant Prasad, Subordinate Judge of Cawnpore, dated the 23rd November, 1885, confirming a decree of Maulvi Ruballa, Munsif of Cawnpore, dated the 8th April, 1885.

(1) 5 A. 314.

(2) 3 A. 554.

this sale, the Collector having passed an order setting aside the sale. From that order no appeal was brought. The Courts below granted a decree in favour of the plaintiff. The defendant has appealed, and her points are: first, that the action [604] cannot be maintained in a civil Court; secondly, that the price realized was inadequate. In support of the first contention the appellant has relied upon the Full Bench judgment in the case of *Madho Prasad v. Hansa Kuar* (1), and a judgment in the case of *Jasoda v. Gulzari Lal* (2), and the case of *Dwarka Prasad v. Hinimat Rai* (2). The two latter cases were decided on the authority of the first. The first case only decided that an appeal from an order made by the Collector in execution of a decree did not lie to the civil Court. We have had the opportunity of consulting our brothers Straight and Tyrrell who were parties to the judgment in the Full Bench case. They confirm us in the view that it was not intended to be laid down there that an action like this would not lie. For my part I do not think that the Full Bench decided any such question. No such question was before the Full Bench for their consideration. Now the case of *Azim-ud-din v. Baldeo* (3) which came before the Full Bench of this Court, decided that such an action would lie in a case where execution had proceeded in the civil Court. Munshi *Hanuman Prasad*, on behalf of the appellant, has contended that the effect of the order of the Local Government of 12th November, 1883, rule 19, which provides, that "all orders under clause 13 passed by the Collector, shall be subject to appeal to the Commissioner of the Division, whose order shall be final," had the effect of taking away the right to maintain this action. Being of opinion that the cases cited by the Munshi do not apply, and being able to discover no difference in principle between this case and the case of *Azim-ud-din v. Baldeo* (3) to which I have referred, I am of opinion that the action does lie in the civil Court. As to the other point, whether the property was sold for an insufficient price, it lay on the defendant to show that there had been a material irregularity in publishing or conducting the sale. The findings of the Courts below are conclusive on that point. The appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing the appeal with costs.

*Appeal dismissed.*

9 A. 605—7 A.W.N. (1887) 132.

### [605] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

MULMANTRI AND ANOTHER (*Judgment-debtors*) v. ASHFAK AHMAD AND OTHERS (*Decree-holders*).<sup>\*</sup> [26th April, 1887.]

*Execution of decree—Decree passed against representative of debtor—Attachment of property as belonging to debtor—Objection to attachment by judgment-debtor setting up an independent title—Appeal from order disallowing objection—Civil Procedure Code, ss. 2, 244, 283.*

The decree-holders in execution of a simple money-decree passed against the legal representatives of their debtor, and which provided that it was to be enforced against the debtor's property, attached and sought to bring to sale a house

<sup>\*</sup> First Appeal No. 190 of 1886 from an order of Maulvi Abdul Qaiyum Khan, Subordinate Judge of Bareilly, dated the 15th February, 1886.

(1) 5 A. 314.

(2) Not reported.

(3) 3 A. 554.

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9 A. 605—  
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(1887) 132.

as coming within the scope of the decree. The judgment-debtors objected to the attachment and proposed sale, on the ground that the house was their own private property and not the property of the debtor within the meaning of the decree, having been validly transferred to them during the debtor's life-time. The objection was disallowed by the Court of first instance.

Held that s. 283 of the Civil Procedure Code had no application, that the case fell within s. 244, and that an appeal would lie from the first Court's order. *Ram Ghulam v. Hazaru Kuar* (1), and *Sita Ram v. Bhagwan Das* (2), followed. *Shankar Dial v. Amir Haidar* (3), *Abdul Rahman v. Muhammad Yar* (4), *Awadh Kuari v. Raktu Tiwari* (5), *Chowdhury Wahed Ali v. Musammat Jumaes* (6), *Ameeroon-nissa Khatoon v. Meer Mahomed* (7) and *Kuriyali v. Mayan* (8), referred to.

[R., 12 A. 312 (F.B.); 12 A. 73; 17 M. 399; D., 11 A. 74 = A.W.N. (1888) 275; 15 C. 437 (445).]

THE respondents in this case obtained a simple money-decree against the legal representatives of one Rai Chadammi Lal, deceased. The judgment-debtors were Musammat Mulmantri, the widow, and Rai Roshan Lal, the minor son of the deceased; the latter being under the guardianship of the former. In execution of this decree, the respondents attached and caused to be put up for sale a house with its appurtenances as the property of their debtor and subject to satisfaction of the decree. Thereupon the judgment-debtors filed objections to the attachment and proposed sale of the property in question, in the Court of the Subordinate Judge of Bareilly, in which the execution was proceeding. These objections contained the following statement:—"The decree-holder holds a decree against the property left by Rai Chadammi Lal, deceased. The attached property has been in the judgment-debtors' possession from during the life-time of the Rai Sahib, under a [606] *tamliknama*, dated the 23rd August, 1883. It cannot be attached and sold by auction. The decree-holder should bring to sale the property left by Rai Chadammi Lal. The property belonging to the claimants should not be sold." The objectors prayed the Court to release the property from attachment.

In reply, the decree-holders filed an answer which was to the effect that the *tamliknama* or deed of transfer of the 23rd August, 1883, was executed by Chadammi Lal for the purpose of defrauding his creditors, including themselves, that it represented a collusive and nominal transaction, and that the objectors were not transferees in good faith and for consideration, within the meaning of s. 53 of the Transfer of Property Act (IV of 1882).

The judgment of the Court of first instance was in the following terms:—"The *tamliknama* is subjected to the just debts decreed incurred in the life-time of Chadammi Lal and before the deed. The objection should therefore be disallowed with costs and interest."

The defendants appealed to the High Court.

Mr. A. H. S. Reid, for the appellants.

Maulvi *Abdul Majid* (with him Syed *Habibullah*, Munshi *Hanuman Prasad*, and Munshi *Madho Prasad*), for the respondents.

A preliminary objection to the hearing of the appeal was taken by Maulvi *Abdul Majid*, on the ground that the order of the Court of first instance must be considered as passed under s. 281 of the Civil Procedure Code, and that, under s. 283, the order was therefore final. The order

(1) 7 A. 547.  
(5) 6 A. 109.

(2) 7 A. 793.  
(6) 11 B.L.R. 149.

(3) 2 A. 752,  
(7) 20 W.R. 280.

(4) 4 A. 190.  
(8) 7 M. 255.

was not passed under s. 244, because the respondents, though parties to the suit in which the decree was passed, had not objected to the attachment and sale in that capacity, but in an independent capacity, setting up a title to the property distinct from that in which they were sued. Reference was made to *Shankar Dial v. Amir Haiddar* (1), *Abdul Rahman v. Mahammad Yar* (2), *Awadh Kuari v. Raktu Tiwari* (3), *Ram Ghulam v. Hazaru Kuar* (4), and *Sita Ram v. Bhogwan Das* (5).

[607] Mr. A. H. S. Reid, for the appellants, referred to *Chowdhry Wahan Ali v. Musammat Jumae* (6), *Ameer-oon-nissa Khatoon v. Meer Mahomed* (7), and *Kuriyali v. Mayan* (8).

Maulvi *Abdul Majid*, in reply.

### JUDGMENT.

EDGE, C.J.—There is a preliminary objection which we must dispose of. The plaintiffs obtained a money-decree against certain persons who were the representatives of the debtor, and by that decree it was provided that the decree was to be enforced against the property which had belonged to the debtor. In executing that decree, the plaintiffs proposed to sell the property which the defendant-appellants here alleged was their own private property and had not come to them from the debtor, and that it was not to the property which had been of the debtor within the meaning of the decree. The Court below decided against the defendants, and the appeal is brought here from that decision. It is contended here that this being an adjudication under s. 281 of the Civil Procedure Code, s. 283 applies, and there is no appeal. The preliminary objection is taken here by Mr. *Abdul Majid*. Three authorities have been cited by Mr. *Abdul Majid* in support of his contention, namely, *Shankar Dial v. Amir Haidar* (1), *Abdul Rahman v. Muhammad Yar* (2), and *Awadh Kuari v. Raktu Tiwari* (3).

As regards these authorities, I think I am right in saying as to the two first that there was, in the Act under which they were decided, no definition of the word "decree," such as we find in the present Code of Civil Procedure, Act XIV of 1882. Under the present Code of Civil Procedure, an order determining any question mentioned or referred to in s. 244, but not specified in s. 586, is a decree from which an appeal lies. If I am correct in saying that and I think I am, the two first authorities would be no authorities at all. As regards the third authority, *Awadh Kuari v. Raktu Tiwari* (3), it would appear that in Act X of 1877, as amended by Act XII of 1879, under which the above case was decided, there was a corresponding clause, which made certain orders in the execution department decrees, and therefore appealable. But [608] that definition does not appear to have been brought to the attention of the learned Judges who decided that case. As regards the other cases cited by Mr. *Abdul Majid*, i. e., that of *Ram Ghulam v. Hazaru Kuar* (4), and that of *Sita Ram v. Bhagwan Das* (5), I find that they are authorities which, to my mind, distinctly show that this was a matter which came within s. 244 of the Civil Procedure Code. The decision in that matter was a decree and appealable. I am bound to say that if there is a conflict of authorities on this matter, I prefer to follow the judgments in *Ram Ghulam v. Hazaru Kuar* (4), and *Sita Ram v. Bhagwan Das* (5). In addition to these cases,

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(1) 2 A. 752.  
(5) 7 A. 733.

(2) 4 A. 190.  
(6) 11 B.L.R. 149.

(3) 6 A. 109.  
(7) 20 W.R. 280.

(4) 7 A. 547.  
(8) 7 M. 355.



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I think some light is thrown on the subject by the cases cited by Mr. Reid, namely, *Chowdhry Wahed Ali v. Musammat Junae* (1), *Ameer-oon-nissa Khatoon v. Meer Mahomed* (2), *Kuiryal v. Muyan* (3).

It appears to me that this was a case under s. 244 of the Civil Procedure Code. The parties were clearly the same. But Mr. *Abdul Majid* argues that the parties are not the same because they are setting up a different title from that under which they were sued. But I think the only thing which the defendants have done is that they have alleged, rightly or wrongly, that the property is their own private property and not the property which came within the scope of the decree. Under these circumstances, I am of opinion, that the case falls within s. 244 of the Civil Procedure Code and that an appeal lies.

BRODHURST, J.—I concur with that view.

The appeal was then heard, and the following issues were remitted to the Court of first instance, under s. 566 of the Civil Procedure Code:—

"1. Was the deed spoken of as the *tamiliknama* executed for the purposes of defrauding creditors, or did it effect a *bona fide* transfer in favour of the appellants?

"2. Was the house under attachment held by the appellant Rai Roshan Lal in his own right under the deed, or did he inherit it from his father?

[609] "3. Did the deceased, Rai Chadammi Lal, retain, after the execution of the deed, any interest which could be attached in execution of a decree against him, or against his representatives after his death?"

Upon the return of the findings upon these issues, the appeal again came before Edge, C.J., and Brodhurst, J., and was dismissed with costs.

*Appeal dismissed.*

9 A. 609 = 7 A.W.N. (1887) 143.

CRIMINAL REVISIONAL.

*Before Mr. Justice Mahmood.*

QUEEN-EMPRESS v. NAND RAM AND OTHERS. [30th April, 1887.]

*Criminal proceedings—Irregularity—Evidence given at previous trial treated as examination-in-chief—Criminal Procedure Code, ss. 353, 537—Act I of 1872 (Evidence Act), ss. 138, 167.*

At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination-in-chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans who were opposed to the Hindus in the same riot. These copies were read out to the witnesses, who were then cross-examined by the prisoners, and no objection to this procedure was taken on the prisoners' behalf. The accused were convicted.

Held that although the procedure adopted by the Magistrate was irregular, the irregularity was cured by the provisions of s. 537 of the Criminal Procedure Code and of s. 167 of the Evidence Act (I of 1872) as it was not shown that there had been any failure of justice or that the accused had been substantially prejudiced and as the matters elicited in cross-examination were sufficient to sustain the conviction.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. O. Dillon, for the petitioner.

The Government Pleader (Munshi Ram Prasad), for the Crown.

JUDGMENT.

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MAHMOOD, J.—This is a case in which two parties, Hindus and Muhammadans, were accused of rioting and convicted under s. 147 of the Indian Penal Code. In the trial of the Muhammadan party a number of witnesses were produced and examined on behalf of the prosecution. In the trial of the Hindus, which was subsequently held, the Magistrate, instead of examining the witnesses, had the copies of the examination-in-chief of the witnesses [610] recorded in the former trial produced in the present trial with which I am concerned in the revision case now before me, and the petitioners, who were the accused, cross-examined the witnesses. I presume that the copies of the depositions were read out to the witnesses, because but for this no cross-examination could have taken place. Mr. Dillon on behalf of the petitioners concedes that the grounds mentioned in the application for revision cannot be sustained. But he argues that, because of the irregularity as to the examination of the witnesses, the trial is *ab initio* void, since there was no evidence by way of examination-in-chief in the presence of the accused in this trial, and therefore the conviction should be quashed. At the same time he argues that a new trial would not be to the interest of his clients, because the sentences passed on them expire on the 4th proximo.

What I have to consider is, whether this is a fit case for interference in revision. Mr. Dillon relies on s. 138 of the Evidence Act, that witnesses shall be first examined in chief and then cross-examined. He further refers to s. 353 of the Criminal Procedure Code, which lays down that the evidence shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader. His contention, as based on these sections, referred to above, is that there was no evidence taken in presence of the accused as far as the examination-in-chief is concerned, and that there having been no examination-in-chief, there could legally be no cross-examination. He refers to *Queen v. Bhola-nath Sen* (1) as also *Empress v. Zauwar Husain* (2), in support of his contention. On the other hand, the learned Government Pleader, though fully conceding that the procedure adopted by the Magistrate was irregular, contends that this is an irregularity which is covered by s. 537 of the Criminal Procedure Code, and it cannot therefore have the effect of vitiating the trial. He further, relies on *Purmessur Singh v. Soroop Audhikaree* (3) and argues further, that, if it be necessary to go into the merits, s. 167 of the Evidence Act would materially help him, inasmuch as the matter elicited in cross-examination is sufficient to sustain the conviction. I have, after due consideration, come to the conclusion [611] that the contention of the Government Pleader is adequate for declining to interfere in this case. When the witnesses were produced and their depositions in the former trial were read out and verified, no objection was taken to the procedure on behalf of the accused, but on the other hand, the witnesses were cross-examined on those depositions on behalf of the accused. The points which have thus been elicited in cross-examination are sufficient to sustain the conviction, and the irregularity is cured by the provisions of s. 537 of the Criminal Procedure Code.

(1) 2 C. 23.

(2) A.W.N. (1885) 28.

(3) 13 W.R. Cr. 40.



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Mr. Dillon has not shown that there has been any failure of justice in the case in consequence of the procedure adopted by the Magistrate, or that the accused have been substantially prejudiced thereby. I therefore refuse the application and direct that the record be returned.

*Application rejected.*

9 A. 609=  
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1887) 143.

9 A 611 (F.B.)=7 A. W. N. (1887) 143.

### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

### IN THE PETITION OF DWARKA PRASAD AND OTHERS. [11th May, 1887.]

*Pledership Examination—Board of Examiners raising standard of marks required for pass certificate without notice to candidates—Petition to High Court by unsuccessful candidates.*

The Board of Examiners having, without giving any notice to the candidates at the annual Examination for pleaderships of the Upper Subordinate Grade, raised the minimum number of marks qualifying for a pass certificate, some of the unsuccessful candidates petitioned the High Court that the result of the examination might be reconsidered and the former standard reverted to.

*Held* that the Court having delegated its powers in connection with the examination to the Board of Examiners, and the Board having exercised its powers legally, properly, and for the benefit of the public, there was no cause for interference.

THIS was a petition on behalf of certain persons who were unsuccessful candidates at the examination for pleaderships of the Upper Subordinate Grade which was held in January, 1887. The petition set forth that, out of 499 candidates, 44 only had been successful; that the percentage of successful candidates had fallen this year to 8·8 from 29 per cent. in 1883, 53 per cent. in 1884, 23 per cent. in 1885, and 28 per cent. in 1886; that the questions set this year were unusually difficult, and that the Board of Examiners had, [612] without giving any notice to the candidates, raised the minimum number of marks qualifying for a pass certificate (1). It was also pointed out that, in consequence of the new rules framed by the Board, and taking effect from 1888, requiring that the examinations are in future to be held in the English language (2), and that candidates, to be eligible, must have matriculated for the F. A. degree of any Indian University (3), the majority of the unsuccessful candidates of this year would be precluded from again competing, as they would next year be too old to be eligible as candidates for the F.A. Examination.

(1) By rule 37 of the High Court's Circular order, No 7 of 1882, it was provided that "no candidate will be passed as a Vakil or pleader unless he obtains at least thirty-three per cent. of the marks assigned by the Examination Board under rule 36 in the papers set in each of the Procedure Codes." Under Circular Order, No 5 of 1886 (by which the order of 1882 is superseded) no standard is prescribed, but the matter is left to the discretion of the Board.

(2) Circular Order, No. 5 of 1886, rule 35, modifying rule 36 of Circular Order, No. 7 of 1882.

(3) Circular Order, No. 5 of 1886, rule 30, clause (2). Other and alternative conditions of eligibility are specified in clauses (1), (3), and (4) of the same rule.

The prayer of the petitioners was "that the present year is the Jubilee year of Her Gracious Majesty's reign, and a year of rejoicing for all the subjects of the Queen-Empress; and although your humble petitioners do not venture to pray for any special leniency to individuals, they have strong hopes that the result of the last examination may be reconsidered, and the recognized old percentage for obtaining a pass certificate be reverted to."

The petition was, by order of the Chief Justice, laid before the Full Bench for disposal.

Mr. *M. Hameedullah*, for the petitioners.

[STRAIGHT, J.—What do you want us to do?]

To direct the revision of the list of successful candidates, and the admission of those who have qualified themselves for a pass certificate according to the old standard.

[MAHMOOD, J.—How can we do anything of the kind? As I understand, this Court has delegated many of its powers in reference to the admission and qualification of pleaders to the Board of Examiners. See s. 8 of the Letters Patent and ss. 6 and 7 of the Legal Practitioners Act (XVIII of 1879). (1)]

[613] [EDGE, C. J.—Do you contend that this Court could not delegate these powers to the Board of Examiners?]

No.

[EDGE, C. J.—Then do you say that the Board, in the exercise of the powers so delegated, has acted illegally?]

Not illegally, but irregularly and improperly, in raising the standard in the way that it did. It was unfair to raise the standard without giving notice. If such notice had been given, many of the candidates would not have incurred the expense and trouble of preparing themselves and competing. The case of *Sukhnandan Lal* (2) seems to imply that the Court has jurisdiction to interfere if it thinks proper.

[EDGE, C. J.—If the Board should act illegally, the Court might have power to interfere. But you admit that it has not so acted, and ask us to interfere with the legal exercise of its discretion.]

#### ORDER.

EDGE, C. J., BRODHURST, TYRRELL and MAHMOOD, JJ.—This is an application to the Judges of the High Court to interfere with the discretion which was exercised by the Examination Board in the late examination of the candidates of the Upper subordinate Grade. The High Court had delegated its power to the Board of Examiners, which the Court was authorized by law to do, and it appears to us that the Board has exercised its discretion properly, legally, and for the benefit of the public. In our opinion there is no cause for the Court to interfere in the matter.

STRAIGHT, J.—I prefer to express no opinion one way or the other, being the President of the Examination Board.

*Application rejected.*

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(1) See also Circular Order, No. 5 of 1886, rules 27—41 (inclusive), and in particular, rules 28, 29 34, 35, 36—40.

(2) 6 A. 169.



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MAY 21,

FULL  
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9 A. 613

(F.B.)=

7 A.W.N.

(1887) 152.

9 A. 613 (F.B.)=7 A.W.N. (1887) 152.

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*MATADIN AND OTHERS (*Defendants*) v. GANGA BAI (*Plaintiff*).<sup>\*</sup>  
[21st May, 1887.]*Practice—Pleader—Vakalatnama—Pleader handing over his brief to another—Civil Procedure Code, ss. 36, 37, 39, 635—Rule of Court of 22nd May, 1883.*

The Rule of Court dated the 22nd May, 1883, and authorising legal practitioners in certain cases to appoint other legal practitioners to hold their briefs and appear [614] in their place (1), was passed to facilitate the work of the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by s. 635 of the Civil Procedure Code.

[F., 9 A. 617 (622) ; R., 22 B. 654 (656) ; U B.R. 1902, 2nd Qr. (Power of attorney) (1) 9 O.C. 65 (68).]

THIS was a reference to the Full Bench of a preliminary objection which was raised on behalf of the respondent in a second appeal which was heard by Straight and Mahmood, JJ. The order of reference, in which the objection was stated, was as follows:—

STRAIGHT, J.—This appeal, No. 732, had been called on for hearing, Mr. Hill and Mr. Baroda Prasad being instructed on behalf of the appellants. Mr. Hill is engaged in the other Court, and Mr. Baroda Prasad does not appear himself. But Mr. Sris Chandra states that he has been requested by Mr. Baroda Prasad to hold his brief and argue the case on the part of the appellants. Pandit Ajudhia Nath, for the respondent, objects to Mr. Sris Chandra being heard. Mr. Sris Chandra relies for his authority to be heard upon the rule to be found at page 5 of the supplement to the Rules of this Court, and dated the 22nd May, 1883 (1). Mr. Ajudhia Nath objects that this rule was *ultra vires* of this Court to make, and he bases his argument mainly upon the contention that Mr. Baroda Prasad, under the provisions of the Civil Procedure Code, being required by law to have a *vakalatnama* to act on behalf of his client, and having been so constituted the agent of his client, cannot delegate his authority to any other person; that the rule of this Court to which I have referred infringes the requirements of the law as laid down in the Civil Procedure Code, and, as such, should not have been made. I the determination of this question to the Full Bench.

MAHMOOD, J.—I agree.

The Hon. Pandit Ajudhia Nath, for the respondent, in support of the objection.—The question depends upon the construction to be placed on s. 39 of the Civil Procedure Code. The Rule of 22nd May, 1883, is inconsistent with this section, because it [615] authorizes the appointment of one pleader by another without any *vakalatnama* or appointment by the

<sup>\*</sup> Second Appeal, No. 732 of 1886, from a decree of G.E. Ward, Esq., Commissioner of Jhansi, dated the 27th January, 1886.

(1) "When a legal practitioner, retained to appear and plead for any party to an appeal or other case in the High Court, is prevented by sickness or engagement in another Court from appearing and conducting the case of his client, he may appoint another legal practitioner to appear in his place, so that his client may not be unrepresented at the hearing; and the Court, if it see no reason to the contrary, may allow the hearing to proceed in the absence of the legal practitioner originally engaged."

client being written and filed in Court. Further, a vakil is merely the agent of his client, and consequently he cannot delegate his functions to another. The appointment of a pleader, like that of any other agent, is the outcome of personal confidence, which the client cannot be presumed to extent to any person whom the pleader may appoint as his substitute.

[EDGE, C.J.—Does your argument apply to counsel as well as pleaders?]

Not to the same extent. Pleadors in this country stand in the same kind of relation to their clients as solicitors in England.

[EDGE, C.J.—That is an unfortunate illustration. It has never been suggested that a country solicitor who sends his papers to a solicitor in London exceeds his powers, though he acts without any express authority given by the client. Again, it often happens that one solicitor employs another to appear and argue in his place in the county Court. No authority for such a course is ever obtained from the client.]

The analogy is not complete. A solicitor is not required to file a written authority empowering him to act.

[EDGE, C.J.—No, but he is an agent, and is liable to his principal for negligence.

STRAIGHT, J.—How is the provision of s. 39 as to *vakalatnamas* inconsistent with the pleader's right to transfer his brief?]

The substituted pleader must appear on behalf of either the original pleader or the client. In the former case he has no *locus standi*: in the latter, his appointment must, under s. 39, be in writing filed in Court. If it is not, he is not "duly appointed to act" on the client's behalf; nor is he a "recognized agent" of the client within the meaning of ss. 36 and 37: under the former section, therefore, he is not competent to appear or act.

[STRAIGHT, J.—You would argue that inasmuch as a pleader may bind his client by admissions as to matters of fact, considerable hardship might result if an incompetent or inexperienced substitute were appointed without the client's consent or knowledge. [616] Could not the client repudiate such admissions as made by a person not appointed by him, and therefore not authorized to make admissions on his behalf?]

Unquestionably he might do so.

[EDGE, C. J.—The rule involves no hardship to the client, so far as I can see. If he complained, the answer would be that if no substitute had been appointed, he would have been unrepresented: if he were appealing, the appeal would have been dismissed for default, and if he were respondent, his chance of sustaining the decree would have been smaller. Then again, if you admit any analogy between Indian and English practitioners, you must meet this difficulty. Suppose that in the Court below your client has filed a forged receipt upon which his whole case depends, and has called witnesses to support it. In this Court, on appeal, you are obliged to admit the forgery and to throw your client over. You say that your client has committed forgery and his witnesses perjury, but your *vakalat-nama* is hardly what authorizes you to do that. Then under what authority can you do it?]

Babu Baroda Prasad Ghose, for the appellant.—The rule to which objection has been made is warranted by s. 635 of the Civil Procedure Code. See s. 7 of the Letters Patent. The Calcutta High Court has made a similar rule; that was framed under Act VIII of 1859, but the

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provisions of that Act as to *vakalatnamas* were the same as those of the present Code. The validity of the rule has never before been questioned.

The Hon. Pandit *Ajudhia Nath*, in reply.

The following judgment was delivered by the Full Bench :—

#### JUDGMENT.

EDGE, C.J., and STRAIGHT, BRODHURST, TYRRELL, and MAHMOOD, JJ.—The simple question to be determined is whether the rule mentioned in the referring order was beyond the power of this Court to make. In our opinion it was not, and we do not think that the argument urged against its validity, based upon the provisions of ss. 36, 37, and 39 of the Civil Procedure Code, has any force. By s. 635 of the Code it is distinctly provided that "nothing in this Code shall be deemed.....to interfere with the power of the High Court to make rules concerning advocates, vakils, and attorneys." The rule now impeached was passed to facilitate the work [617] of the Court and for the convenience of the pleaders practising before it, and was, in our opinion, fully within the powers conferred by s. 635. We think, therefore, that Mr. *Sris Chandra* was entitled to be heard on behalf of Mr. *Baroda Prasad*.

9 A. 617 (F.B.) = 7 A.W.N. (1887) 153.

#### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

BAKHTAWAR SINGH (*Judgment-debtor*) v. SANT LAL AND ANOTHER (*Decree-holders*).<sup>\*</sup> [21st May, 1887.]

*Practice—Barrister—Advocate of the High Court—Right to take instructions directly from client—Right to "act" for client—Letters Patent, N.W.P., ss. 7, 8—Civil Procedure Code, ss. 2, 36, 39, 635.*

Reading together ss. 7 and 8 of the Letters Patent for the High Court, and ss. 2, 36, 39, and 635 of the Civil Procedure Code, an advocate on the roll of the Court can, for the purposes of the Code, perform on behalf of a suitor all the duties that may be performed by a pleader, subject to his exemption in the matter of a *vakalatnama* and to any rules which the High Court may make regarding him. No such rule having been made to the contrary, such an advocate may take instructions directly from a suitor, and may "act" for the purposes of the Code on behalf of his clients.

[R, 8 C.P.L.R. 13 (18).]

THIS was a reference to the Full Bench by Straight and Mahmood, JJ., of two preliminary objections raised on behalf of the respondents to the hearing of a first appeal from an order. The reference was in the following terms :—

STRAIGHT, J.—In reference to this first appeal from Order No. 35 of 1887, Pandit *Ajudhia Nath*, on behalf of the respondents, objects to Mr. *Amir-ud-din*, who appears to support the appeal on behalf of Mr. *Reid*, who handed over his brief to him, on two grounds : first, that Mr. *Reid*, as an English barrister, had no power to take direct instructions from the

<sup>\*</sup> First Appeal, No. 35 of 1887, from an order of Babu Abinash Chandar Banerji, Subordinate Judge, of Aligarh, dated the 22nd February, 1887.

appellant and file the appeal; and, secondly, that if he had such power, he had no power to hand over his brief to Mr. *Amir-ud-din*, and therefore the appeal ought to be dismissed in default of any person competent to act or to appear on behalf of the appellant having acted or appeared on his behalf. I refer these two points to the Court at large for determination.

MAHMOOD, J.—I agree.

The Hon. Pandit *Ajudhia Nath*, for the respondents, in support of the objections.—I contend that an English barrister is not [618] entitled to file an appeal, or to "act" for his client in other similar ways. He is not entitled to do so by reason of a positive disability attaching to his status as counsel. The disability is created by the custom of the English Bar.

EDGE, C.J.—Do you insist on the first point mentioned in the order of reference—that Mr. *Reid* was not entitled to take instructions direct from his client? Up to the end of the last century, counsel often dealt directly with their clients, without any solicitor or attorney at all.

Strictly speaking, and as a matter of law, he was entitled to do so: *Deo d Bennett v. Hale* (1). But according to the practice of his profession, which, in England, is now universal, he ought not to do so. That practice the Court should enforce.

[STRAIGHT, J.—In England it is merely a rule of professional etiquette made by the Bar itself. In India, circumstances being different, no such rule has been made by the Bar, and there is no such rule to enforce.]

The English Bar is one body, which has its own practice and etiquette. This practice is whatever the body as a whole has in course of time established, and it ought not to be set aside or disregarded by a minority, wherever they may happen to be practising. S. 2 of 6 and 7 Vic., c. 73 (An Act for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales) (2), shows that in England the power of acting [619] for the client belongs exclusively to the solicitor, and counsel are as much excluded from the exercise of such power as any other class of persons.

[EDGE, C.J.—That statute does not help you. Its only object was to prevent any one from practising as a solicitor without a certificate.]

In Stephen's Commentaries, vol. iii, p. 278 (8th ed.), it is said that "no man can conduct the practical proceedings in a cause to which he

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(1) 15 Q.B. 171 = 18 L.J. Q.B. 353.

(2) "And be it enacted that from and after the passing of this Act no person shall act as an attorney or solicitor or as such attorney or solicitor sue out any writ or process or commence, carry on, solicit or defend any action, suit, or other proceeding in the name of any other person or in his own name in Her Majesty's High Court of Chancery or Courts of the Queen's Bench, Common Pleas or Exchequer, Court of the Duchy of Lancaster, or Court of the Duchy Chamber of Lancaster at Westminster, or in any of the Courts of the counties palatine of Lancaster and Durham, or in the Court of Bankruptcy ..... or in any county Court or any Court of civil or criminal jurisdiction or in any other Court of law or equity in that part of the United Kingdom of Great Britain and Ireland called England and Wales, or act as an attorney or solicitor in any cause, matter, or suit, civil or criminal, to be heard or determined before any justice of assize or eyer and terminer of gaol delivery, or at any general or quarter sessions of the peace county, Riding, division, liberty city, borough or place, or before any justice or justices or before any commissioners of Her Majesty's revenue, unless such person shall have been previously to the passing of this Act admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this Act be admitted and enrolled and otherwise duly qualify to act as an attorney or solicitor pursuant to the directions and regulations of this Act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid."



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is not himself a party, unless he be a solicitor." In the Calcutta and Bombay High Courts, advocates are not allowed to act (1). See also *Ram Taruck Burick v. Sidessoree Dosee* (2).

[TYRRELL, J.—How can you possibly apply the English practice in a place where there are no solicitors?]

It is because the rule has been ignored that solicitors have ceased to practise here. Formerly solicitors were enrolled by this Court, but their privileges were disregarded, and they could not maintain their position.

[STRAIGHT, J.—In the absence of express rules to the contrary, such as those made by the Calcutta High Court, the last paragraph of s. 39 of the Civil Procedure Code clearly shows that an advocate may act, and that in doing so he is not subject to the same restrictions as a pleader. Under s. 635 we, like the Calcutta Court, might make rules forbidding advocates to act, but we have not made them.

TYRRELL, J.—Reading s. 36 with the last paragraph of s. 39, it appears to me that an advocate may do for his client all that a pleader might do, and without being obliged to produce his authority.]

[620] S. 39 only means that inasmuch as in England and elsewhere no *vakalatnama* need be filed by counsel, so it need not be in India. For the practice of the county Courts in England, see 15 and 16 Vic., c. 54, s. 10, which has an indirect bearing on the question. *The Queen v. Doutre* (3), implies that a member of the English Bar, wherever he may practise, cannot divest himself of the disabilities imposed on him by the general usage of his profession. See also *Neate v. Denman* (4).

[EDGE, C.J.—So far as the question you raise is one of discipline, if you consider that the practice adopted here by any counsel is unprofessional, you should petition the Benchers of his Inn. If there was a well-established body of solicitors practising here, the case might be different, but practically there are no solicitors. Then, so far as the question is one of law, it depends on the provisions of the Civil Procedure Code and the Letters Patent.]

The point as to Mr. Reid's power to hand over his brief was not pressed, being settled by *Matadin v. Ganga Bai* (5).

Mr. Amir-ud-din, for the appellant, was not called upon to reply.

The following judgment was delivered by the Full Bench:—

### JUDGMENT.

EDGE, C. J., and STRAIGHT, BRODHURST, TYRRELL, and MAHMOOD, JJ.—The only question that has been argued on this reference is as to the power of members of the Bar admitted to the roll of advocates of this Court to take instructions directly from the parties to appeals, and to "act" for the purposes of the Civil Procedure Code on behalf of their

(1) See Belchambers' Rules and Orders of the High Court of Judicature at Fort William in Bengal, General Rules, Original Side. Rule 70.—"Advocates of this Court may appear and plead for suitors in any branch of the Court, civil or criminal.

"71. Vakils may appear, plead and act for suitors in this Court, provided that they shall not appear, plead, and act for any suitor in any matter of ordinary original jurisdiction, civil or criminal, or in any matter of appeal from any case of ordinary original civil jurisdiction, unless, upon appeal from a judgment in a case of such original civil jurisdiction, a question of Hindu or Muhammadan law or usage shall arise, and unless the Court or a Judge thereof shall think fit to admit a vakil or vakils to plead for any suitor or suitors in that case. In such case, the vakil or vakils so admitted may plead accordingly."

(2) 13 Suth. C.R. 60.

(4) L.R. 18 Eq. 127.

(3) L.R. 9 App. Cas. 745, 752.

(5) 9 A. 613.

clients. It does not appear to us necessary to enter upon a discussion of the practice that prevails and regulates the professional status and proceedings of counsel in England, as it seems to us to be altogether beside the question we have to determine, namely, whether enrolled advocates of this Court are, as such, prohibited from doing all such acts as admittedly may be done by the vakils. By s. 7 of the Letters Patent, powers are conferred upon this Court "to approve, admit, and enrol such and so many advocates, vakils, and attorneys as to the said Court shall [621] seem meet; and such advocates, vakils, and attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act or to plead *and* act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions." This in plain terms empowers advocates of the High Court to "act." By s. 8 it is further declared that this Court shall have the power to make rules for the qualification and admission of its advocates, vakils, and attorneys, and to remove or suspend them, and it directs that no person whatever other than such advocates, vakils or attorneys "shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor." By s. 635 of the Civil Procedure Code it is in specific terms enacted that "nothing in this Code shall be deemed to interfere with the powers of the High Court to make rules concerning advocates, vakils, and attorneys." And in s. 39 of the same Act it is declared in terms that "no advocate of any High Court established by Royal Charter shall be required to present any document empowering him to act"—an exemption that does not apply to pleaders. But more than this, s. 2 of the Code defines the term "pleader" as used in the Act "to include an advocate, a vakil, and an attorney of a High Court." Reading ss. 36 and 39 in conjunction with the interpretation clause and s. 635, therefore, it comes to this, that for the purposes of the Civil Procedure Code an advocate can perform all the duties for a suitor that a pleader may perform, subject to his exemption in the matter of a *vakalatnama*, and subject, further, to any rules this Court may make regarding him. Not only by the Letters Patent, therefore, but by the Civil Procedure Code, an advocate may "act" for his client in this Court in the manner in that statute set forth, and do all things, that a pleader, *i.e.*, a vakil, may do, provided always that he be upon the roll of the Court's advocates. Referring to the matter more particularly mentioned in the order of reference, we have to concern ourselves with the action of the gentieman whose name is therein mentioned only as an advocate upon our roll, and not as an English barrister. As we have made no rule prohibiting an advocate from taking instructions directly from a suitor, and as [622] his doing so is in conformity with the provisions of the Civil Procedure Code, we think the first objection mentioned in the order of reference had no force and should be disallowed. As to the second, that has been disposed of in another case (1).

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(1) *Matadin v. Ganga Bai*, 9 A. 613.



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MAY 5.

APPEL-  
LATE  
CIVIL.

9 A. 622=

7 A.W.N.

(1887) 226.

9 A. 622=7 A.W.N. (1887) 226.

## APPELLATE CIVIL.

*Before Mr. Justice Brodhurst, and Mr. Justice Mahmood.*MUHAMMAD MASHUK ALI KHAN AND OTHERS (*Plaintiffs*) v. KHUDA BAKHSH (*Defendant*).<sup>\*</sup> [5th May, 1887.]Declaratory decree—Act I of 1877 (*Specific Relief Act*), s. 42, *Civil Procedure Code*, s. 578.

An improper or irregular exercise of the discretionary power conferred by s. 42 of the *Specific Relief Act* (I of 1877) does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection on the ground of jurisdiction or of the merits of the case, being covered by s. 578 of the *Civil Procedure Code*. *Sant Kumar v. Deo Saran* (1) referred to.

[R., 6 O.C. 324 (326).]

THE plaintiffs in this case sued Khuda Bakhsh and others, co-sharers and the lambardar in a village Landhaur, for a declaration of their right to have the profits of the village divided on the principle that there were three *thokes*, one of  $\frac{1}{3}$ rd and two of  $\frac{1}{4}$ th each, and not three equal *thokes*. It appeared that a suit had previously been brought by Khuda Bakhsh against the lambardar for a share of certain trees, and that the Munsif had decided in decreeing that suit that the three *thokes* were equal.

This decision was alleged to be the cause of action for the present suit. The defendant pleaded, *inter alia*, that the plaintiffs had no cause of action. The Court of first instance (Subordinate Judge of Saharanpur) decreed the claim after taking evidence and investigating the case on the merits. On appeal the District Judge of Saharanpur reversed the Subordinate Judge's decree on grounds which he stated as follows:—

"It is clear that no cause of action accrued to the plaintiffs against Khuda Bakhsh or any one by the Munsif's decree in his [623] favour. That decree could only bind him and the lambardar he impleaded, and could not be set up by the latter as a defence to any suit brought by the co-sharers. The respondent's vakil admits almost that all they want is a declaration that the decree is not binding on them. S. 42 of the *Specific Relief Act* does not apply. The lambardar impleaded in the former suit did not deny the plaintiff's title but affirmed it, though unsuccessfully; and it is not Khuda Bakhsh's mere denial of this title, but the decree in his favour which they really seek to declare null and void. The merits of the case, then, need not have been discussed by the lower Court, and I need not discuss them here. The appeal is decreed, and the appellants will get their costs both here and in the lower Court."

From this decree the plaintiffs appealed to the High Court.

SHAH Asad Ali, for the appellants.

The Hon. T. Conlan and Munshi Kashi Prasad, for the respondent.

## JUDGMENT.

BRODHURST, MAHOOD, JJ.—In our opinion this case cannot be finally disposed of here, because the learned Judge of the lower appellate

<sup>\*</sup> Second Appeal, No. 856 of 1886, from a decree of J.W. Muir, Esq., District Judge of Saharanpur, dated the 22nd January, 1886, reversing a decree of Maulvi Maqsdud Ali Khan, Subordinate Judge of Saharanpur, dated the 28th June, 1883.

Court has not disposed of it upon the merits. The original suit was of a declaratory character, falling under the purview of s. 42 of the Specific Relief Act (I of 1877), and the Court of first instance, having admitted the suit and heard the pleadings of the parties upon the merits of the issues raised in the cause, decreed the claim, holding that the plaintiffs were entitled to the relief for which they prayed. The case then came up in first appeal to this Court upon a question of jurisdiction, and this Court, by its order of the 11th May, 1885, directed the learned Judge of the lower appellate Court to restore the appeal to his file and to dispose of it. In dealing with the case the learned Judge has simply held that the suit in its declaratory form was not maintainable under s. 42 of the Specific Relief Act, and upon that ground alone has decreed the appeal before him and dismissed the suit.

From that decree this second appeal has been preferred, and we are of opinion that the view adopted by the learned Judge in this case was erroneous, and that the litigation should have been tried upon [624] the merits. In the case of *Sant Kumar v. Deo Saran* (1) it was held by one of us in a judgment which referred to older cases that an improper exercise of the discretionary power conferred by s. 42 of the Specific Relief Act by a Court of first instance does not in itself constitute a sufficient ground for the reversal of a decree which is not open to any objection upon the ground of jurisdiction or of the merits of the rights of the parties. In that ruling no rule was laid down as to cases which might fall under the proviso of s. 42 of Act I of 1877. This is not one of those cases which fall under the proviso to that section, and, indeed, Mr. *Kashi Prasad*, in arguing the case on behalf of the respondent, has conceded that the case is not governed by that proviso, no further relief being capable of being claimed by the plaintiffs within the meaning of that proviso. The ruling, therefore, fully applies to this case; and even if the Court of first instance exercised its discretion irregularly in entertaining the suit and trying it upon the merits, we think that it was the duty of the lower appellate Court not to have set aside the decree upon that ground alone, but to have decided it upon the merits, there being no question as to the want of jurisdiction: the error of the first Court, if indeed there was any error, being covered by s. 578 of the Civil Procedure Code, as stated in the ruling to which we have referred.

We, therefore, decree the appeal and set aside the decree of the lower appellate Court, and remand the case to that Court for disposal upon the merits, with reference to the observations we have made. The costs to abide the result,

*Cause remanded.*

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9 A. 622—  
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9 A. 625 (F.B.) = 7 A.W.N. (1887) 154 and 7 A.W.N. (1887) 179 = 12 Ind. Jur. 70.

MAY 11.

## [625] FULL BENCH.

FULL  
BENCH.*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

9 A. 625 =

(F.B.) =

7 A.W.N.

(1887) 154

and

7 A.W.N.

(1887) 179 =

12 Ind. Jur.

70.

LAL SINGH AND OTHERS (Plaintiffs) v. GHANSHAM SINGH  
(Defendant).\* [11th May, 1887.]*High Court, N.W.P., constitution of—Stat. 24 and 25 Vic., c. 104, ss. 7, 16, 17—Letters Patent, N.W.P., s. 2—Omission to fill up vacant appointment—Court consisting of Chief Justice and four Judges only—Court not illegally constituted—Civil Procedure Code, s. 575—Difference of opinion between Judges hearing appeal—"Judgment" Reference to Full Bench after delivery of dissentient judgments on the appeal—Reference ultra vires.*

By s. 2 of the Letters Patent for the High Court it was not intended that if the Crown or the Government should omit to fill up a vacancy among the Judges under the powers conferred by s. 7 of the High Courts Act (24 and 25 Vic., c. 104), so that the Court should then consist of a Chief Justice and four Judges only, the constitution of the Court should thereby be rendered illegal, and the existing Judges incompetent to exercise the functions assigned to the High Court.

Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments on the appeal as judgments of the Court without any reservation, they are not competent to refer the appeal to other Judges of the Court under s. 575 of the Civil Procedure Code.

*Rohilkhand and Kumaun Bank, Limited v. Row* (1) referred to by MAHMOOD, J.

[R., 16 A. 136 (150) ; D., 6 Bom. L.R. 131 (206).]

THIS was a second appeal, which was originally heard by Petheram, C.J., and Brodhurst, J. The learned Judges differed in opinion, Petheram, C.J., holding that the appeal should be allowed, and Brodhurst, J., that it should be dismissed. The judgment of the Chief Justice ended thus :—"For these reasons I think that the judgment of the lower Court is wrong, and that the appeal should be allowed with costs." Brodhurst, J.'s judgment ended thus :—"I see no reason to think that the case has been wrongly decided by the lower Courts, and undoubtedly there is not, in my opinion, any ground for interference in second appeal, and I would dismiss the appeal with costs." The judgment of Brodhurst, J., was signed, and bore date the 12th November, 1885 ; that of the Chief Justice bore neither signature nor date, nor the stamp of the judgment-writer. Immediately following the judgment of Brod-[626]hurst, J., an order was recorded in the following terms :—"As the conclusions we have each arrived at in this case are not in unison, we refer the case for disposal to the Full Bench." This order was signed by both the learned Judges, and dated the 12th November, 1885.

The case was accordingly argued before the Full Bench, which gave judgment on the 21st January, 1886, in the absence of the respondent and his counsel, decreeing the appeal with costs. On the 29th March, 1886, an application was made on behalf of the respondent for review of the judgment of the Full Bench ; and on the 15th November of the same year,

\* Second Appeal, No. 1468 of 1884, from a decree of R. S. Aikman, Esq., District Judge of Aligarh, dated the 14th May, 1884, confirming a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 31st January, 1882.

the Full Bench, for reasons which will be found stated in the report of *Ghansham Singh v. Lal Singh* (1), granted the application, and directed that the reference should be restored to the list and laid before the Full Bench for disposal. The case came on for hearing on the 11th May, 1887.

The Hon. Pandit *Ajudhia Nath*, for the appellants.

Mr. *G. E. A. Ross* and the Hon. *T. Conlan*, for the respondent.

The Hon. Pandit *Ajudhia Nath*, for the appellants.—I take a preliminary objection that this Court is not legally constituted in accordance with the provisions of the Letters Patent, and is therefore not competent to dispose of the appeal. The power of the Crown to establish a High Court in these Provinces by Letters Patent was created by s. 16 of the High Courts Act (24 and 25 Vic., c. 104). By this section the Crown was specifically empowered to determine the number of Judges composing the Court. By s. 2 of the Letters Patent it was provided that the Court should, until further or other provision should be made in accordance with the Act, consist of a Chief Justice and five Judges, and the first holders of these offices were then named. Now, the Court so established does not exist: there is at this moment only a Chief Justice and four Judges. But the Crown has not, under s. 2, diminished the number of Judges constituting the Court in accordance with the powers conferred on it by the Act. The provisions of the section could only be altered by the issue of other Letters Patent giving effect to the alterations: s. 17 of the Act. There is no provision authorizing less than the full number of Judges to [627] exercise the powers of "the Court" defined in s. 2. The jurisdiction conferred by the Act and the Letters Patent could no more be understood as vested in such Judges than five only out of six arbitrators could (without express authority) legally determine a matter referred to the whole six. If the six Judges existed, they might perhaps authorize some of their number to act, in certain cases, for the whole body; but some cannot act for the whole body without assignable legal authority. Ss. 4, 9 and 10 of the Letters Patent, referring to "the said High Court" and conferring upon it various powers, mean the High Court constituted in accordance with s. 2.

The constitution and jurisdiction of the Court thus established could only be legally altered in certain definite ways. Thus s. 7 of the Act prescribes the method of filling up vacancies; and s. 17 the method of revoking the Letters Patent or any portions of them, and granting supplementary charters. This virtually enacts that alterations of the charter can be made only by similar charters similarly granted; and, moreover, fixes a limitation of three years, after which the power of revocation or amendment is not to be exercised, except by the Legislature. The limitation was probably fixed in this way so as to confine the Crown's power of altering the Court's constitution to a period during which the Court might reasonably be regarded as an experiment. If, then, the Crown's power in this respect has now determined, *a fortiori* the Governor-General in Council has no such power. The result is that the Court whose jurisdiction was created and defined by the Letters Patent no longer exists; that the omission of Government to maintain that Court by filling up its vacancies was contrary to law; and that nothing has been done which could legally have the effect of conferring the jurisdiction of that Court upon a Chief Justice and four Judges.

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MAY 11.

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BENCH.

9 A. 625 =  
(F.B.) =  
7 A.W.N.  
(1887) 184  
and  
7 A.W.N.  
(1887) 179 =  
12 Ind. Jur.  
70.



1887  
MAY 11.

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FULL  
BENCH.

9 A. 628 =  
(F.B.) =  
7 A.W.N.  
(1887) 154  
and  
7 A.W.N.  
(1887) 179 =  
12 Ind. Jur.  
70.

[MAHMOOD, J.—The fact that Her Majesty has omitted for several years to fill up a vacancy does not alter the constitution of the Court or make it illegal; nor does it amount to altering s. 2 of the Letters Patent. If your argument is correct, supposing a Judge were to die, the whole working of the Court would be brought to a standstill until his successor could be appointed.]

[628] To comply with the provisions of s. 2, the vacancy must be filled up within a reasonable time. Otherwise the executive could at pleasure alter the constitution of the Court and even reduce the Court to a single Judge. This cannot have been intended. S. 7 of the Act prescribes the procedure to be followed when a vacancy occurs, but the powers given by the section have not been exercised. The vacancy now in question occurred in 1873.

[TYRRELL, J.—Probably it was in consequence of the transfer of jurisdiction in rent cases to the Board of Revenue. It was thought that this would greatly reduce the work of this Court; but that work has, from other causes, been much increased.]

My argument does not involve the result that a Judge by taking leave alters the constitution of the Court. He is still a member of the Court, and there is no vacancy. Again, I do not dispute that the Court as a body may direct that any of their number may constitute a Full Bench or dispose of any particular class of cases.

[TYRRELL, J.—S. 2 of the Letters Patent merely fixes the maximum number of the Judges.

EDGE, C. J.—S. 7 of the Act certainly contemplates the possibility of the Court consisting of a Chief Justice and four Judges, where the Chief Justice dies and a puisne Judge is appointed to officiate as Chief Justice. In such a case the Act does not say that the puisne Judge's place is to be filled up, but only that "it shall be lawful" for the Governor-General in Council to fill it up.

STRAIGHT, J.—I think that the word "shall" in s. 2 of the Letters Patent is permissive, not imperative. It leaves a discretion to the Crown.]

"Shall" ought to be construed as imperative, unless there is something in the context to make it merely permissive. If a statute said that a jury "shall" consist of nine persons, a case could not be tried by six. If the Crown, by leaving the vacancy unfilled, diminishes the Court as constituted by the Letters Patent, it evades the limitation of s. 17 of the Act as to revoking the Letters Patent within three years. This period having elapsed without such revocation, the crown is bound by law to fill up the vacancy.

[EDGE, C.J.—The words in s. 2 of the Letters Patent "until further or other provision shall be made by us or our heirs and successors in that behalf" keep alive the powers of the Crown in respect of the constitution of the Court. The exercise of the Crown's power under that section does not appear to me to be effected by s. 17 of the Act. Such an exercise is not "revoking" the provisions of the Letters Patent within the meaning of s. 17. "Revoking" means revoking the authority given by the Letters Patent.]

The words "further or other provision" are qualified by the words "in accordance with the said recited Act." S. 17 of the Act prescribes the only mode in which the powers conferred by s. 2 of the Letters Patent can be exercised. There is no other provision prescribing any other mode.

[EDGE, C. J.—How do you read the words in s. 16 of the Act, "such number of Judges.....as Her Majesty from time to time may think fit to appoint?"

That also must be read subject to s. 17. "Appoint" does not mean "nominate," but "declare"—see Letters Patent, s. 2 ("appoint and ordain") and s. 4 ("grant, ordain, and appoint"). If the exercise of this power involves alteration of any provision of the Letters Patent, the Crown can only issue new Letters Patent for the purpose, and can only do so within three years after the establishment of the Court. Of course, the same result might be attained by legislation either in England or by the Governor-General in Council: Letters Patent, s. 35. *Damodar Gordhan v. Deoram Kamji* (1) shows that where Parliament has prescribed a particular mode of exercising a particular power, all other modes are impliedly forbidden.

[BRODHURST, J.—In s. 2 of the Letters Patent granted to the Calcutta High Court in 1862 and revoked in 1865, it is said that the Court shall consist of a Chief Justice and thirteen Judges. The section then goes on to appoint a Chief Justice and *twelve* Judges only. So that the Letters Patent themselves fix the number of Judges, but abstain from making a complete appointment. According to your argument, those actually appointed could not sit or do the work of the Court.

MAHMOOD, J.—The weak part of your argument as regards s. 2 of the Letters Patent appears to me to be, first, that I think [630] the Crown is not bound to fill up a vacancy within any specified time; and secondly, that even if it is so bound and acts illegally in not filling up the vacancy, it does not follow that the constitution of the Court is vitiated, so as to deprive the remaining Judges of all jurisdiction. That must depend upon the construction of the Act and Letters Patent, and there is nothing in either one or the other to suggest any such intention.]

If so, the executive might legally reduce the Court to a single Judge. I submit that vacancies must be filled up, and though no limit of time is expressly provided, a reasonable time must be understood.

[TYRRELL, J.—Your argument involves the consequence that the appeal was admitted by a Judge who was incompetent to admit it.

EDGE, C. J.—And that we are incompetent to give you a decree.]

Yes, but the appeal was at all events properly presented. I have a right to object to its being heard except by the Court constituted under the High Courts Act and Letters Patent.

Mr. G. E. A. Ross, for the respondent.—The effect of the argument for the appellants is, that the appeal cannot be disposed of and the lower Court's decree must stand. I am not concerned to dispute this.

EDGE, C. J.—A preliminary objection was raised to the hearing of this appeal by the learned Pandit. It was that this Court, such as it is, was not competent to transact the business of a High Court of Judicature for the North-Western Provinces, and that, in fact, it was not legally constituted. In support of that contention, he relied upon s. 2 of the Letters Patent creating this Court. That section is as follows:—

"And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces, shall, until further or other provision shall be made by Us, or Our heirs and successors in that behalf, in accordance with the said recited Act, consist of a Chief Justice and five Judges, the first Chief Justice [631] being Walter Morgan, Esquire, and

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FULL  
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9 A. 625=

(F.B.)=

7 A.W.N.

(1887) 154

and

7 A.W.N.

(1887) 179=

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70,



1887 the five Judges being Alexander Ross, Esquire; William Edwards, Esquire;  
MAY 11. William Roberts, Esquire; Francis Boyle Pearson, Esquire, and Charles  
— Arthur Turner, Esquire, being respectively qualified as in the said Act  
FULL declared."  
BENCH. His contention on that section was that as long as the Court did not  
— consist of a Chief Justice and five puisne Judges, the Court did not in fact  
9 A. 625= exist, and consequently the Judges who had been appointed were not  
(F.B.)= competent to exercise any of the functions assigned to the High Court of  
7 A.W.N. Judicature of these Provinces.  
(1887) 154 It appears that from 1866 until 1868, the High Court was in fact  
and constituted of a Chief Justice and five puisne Judges. From 1868, I think,  
7 A.W.N. down to the present time, there have never been actually five Judges, in  
(1887) 179= addition to the Chief Justice, as the working strength of the Court.  
12 Ind. Jur. What I mean is this, that leaving out of question the Judges who may  
70. have been on furlough or leave, and counting the Judges who may have  
been officiating, there never have been actually five Judges in addition to  
a Chief Justice. The result, therefore, of that contention of the learned  
Pandit, would be that all the decisions of this Court since 1868, which  
have been passed, both in civil and criminal cases, have been extra-judicial  
and inoperative. Another result of that contention would be this, that  
even if this Court consisted of a Chief Justice and five puisne Judges, on  
the death of one of those five Judges, or if one of them was on leave, there  
being no officiating Judge, the jurisdiction of this Court would cease, and  
be absolutely determined, until another Judge was appointed, whether  
permanently or officiating. This is the result to which the argument of  
the learned Pandit reduces itself.

We may take an example: Suppose a Judge proceeds on his furlough,  
there being no officiating Judge appointed in his place; there is nothing to  
compel the Sovereign to appoint an officiating Judge in the place of a  
puisne Judge being absent from the duties of the Court. And as an  
extreme example, suppose that he is going to England round the Cape of  
Good Hope or by way of America, the ship by which he sailed is never  
heard of; and the necessary presumption would be that the Judge had  
died. If the [632] arguments of the learned Pandit are correct, the  
result is this:—The proceedings of this Court would be lawful up to the  
death of that Judge, because, though on leave, he would still be a Judge  
of the High Court. But it also will result from his arguments that, on  
the death of that Judge, this Court would cease to have jurisdiction to  
proceed with the judicial business of these Provinces. I should like to  
see how that difficulty could be met. There might be no possible means  
of knowing when the Judge actually died, and what was the date when  
this Court ceased to have jurisdiction to exercise its judicial functions.  
The result would be that for months the decisions of this Court might be  
passed not by a lawfully constituted Court, but by a body of gentlemen  
sitting here extra-judicially. It is quite clear that under s. 7 of 24 and  
25 Vic., c. 104, this Court can never be left without either an actual or  
an officiating Chief Justice, and it is also clear from the wording of that  
section that it would not be compulsory to appoint a puisne Judge in the  
place of a puisne Judge who either might be on furlough, or absent, or  
dead, or might have resigned. The words used are:—"It shall be lawful  
for the Governor-General in Council or Governor in Council, as the case  
may be, to appoint a person .....to act as a Judge of the said High Court."  
These words "*shall be lawful*" do not indicate that it was intended that  
it was compulsory to fill up the post of a puisne Judge.

Under these circumstances, am I to infer that it was intended that by s. 2 of the Letters Patent, if the Crown did not fill up the vacancy created by the death, retirement, or otherwise of a puisne Judge, the whole judicial powers vested in us should cease to exist? I cannot come to such a conclusion as that.

In conclusion, I can only say that, whatever may be the true interpretation of s. 7 of the Charter Act with reference to the duty of the Crown to make provision for a vacancy in the office of a Judge, it seems to me, while, by s. 2 of the Letters Patent, our Court is constituted to be a Court of six Judges, no omission on the part of the Crown to fill up a vacancy under s. 7 of the Act amongst the puisne Judges can operate to discharge or to suspend the jurisdiction and functions of the Chief Justice and subsisting Judges of the Court. I may also add that it is not for me to pass [633] any judgment on the acts of the Crown, but it appears to me that the work of this Court would be more advantageously carried on with the full number of Judges contemplated by the Charter. I am consequently of opinion that the objection raised by the learned Pandit must be overruled, and I hold that this Court has jurisdiction to hear this appeal.

STRAIGHT, J.—I am of the same opinion.

BRODHURST, J.—In this case Mr. *Ajudhia Nath*, the learned pleader for the plaintiffs-appellants, has taken a preliminary objection which is to the following effect, namely:—That Her Majesty by Letters Patent, dated the 17th March, 1866, under the Great Seal of the United Kingdom, erected and established a High Court of Judicature for the North-Western Provinces of the Bengal Presidency; that, under s. 2 of the Letters Patent, Her Majesty appointed and ordained that the said High Court "shall, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the said recited Act" (an Act for establishing High Courts of Judicature in India), "consist of a Chief Justice and five Judges; " that a Chief Justice and five Judges named in the same section were appointed and sat for some time; that at other times since 1866 the Court has consisted sometimes of a Chief Justice and three Judges, and that it now consists of a Chief Justice and four Judges; that whenever the Court has, owing to the promotion, retirement, or death of any Chief Justice or Judge, or from any other cause, consisted of less than a Chief Justice and five Judges, its constitution has been illegal, and that every judgment and order passed by it under such circumstances has necessarily been also illegal.

The High Court of these Provinces was established twenty-one years ago. The Court has not consisted of a Chief Justice and five Judges since October, 1868, so that, if Mr. *Ajudhia Nath's* contention is correct, only a very small proportion of the business of the Court, since its first establishment, has been legally disposed of.

The whole of s. 2 of the Letters Patent for the North-Western Provinces, excluding, of course, the description of the Court and the names of the Chief Justice and Judges, is contained word for word [634] in s. 2 of the Letters Patent constituting a High Court of Judicature for the Bengal Division of the Presidency of Fort William. Under s. 2 of the Letters Patent of 1862, Her Majesty appointed and ordained that the said High Court "shall, until further or other provision shall be made by Us or Our heirs and successors in that behalf, in accordance with the recited Act, consist of a Chief Justice and thirteen Judges." But immediately afterwards, in the same section, the names of only a Chief

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(F.B.) =

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Justice and twelve Judges are mentioned. The Letters Patent of the 14th May, 1862, apparently were not revoked until the 28th December, 1865. If Mr. *Ajudhia Nath's* argument is correct, the High Court at Calcutta was, as I pointed out at the hearing of the case, not properly constituted until a thirteenth puisne Judge was appointed to it, and it follows that the legal advisers of Her Majesty and the eminent Chief Justice and the twelve learned Judges who took their seats in the Calcutta Court in 1862 were apparently unable to detect the gross blunder made in s. 2 of their Letters Patent.

If the learned pleader's argument is sound, the illegal judgments and orders passed by the different High Courts in India during the twenty-five years must amount to tens of thousands.

This fact alone should be sufficient to cause us to hesitate in deciding that we ourselves, our predecessors, and the learned Chief Justices and Judges of the other High Courts in India have, during many past years, been deciding all cases, of every description, in an illegal manner; that we are not a properly constituted Court, and that we must now forbear from disposing of any kind of business until a fifth puisne Judge has been duly appointed to the Court.

With regard to the legal aspect of the case, I think that a reference merely to s. 7 of the Royal Charter Act, or the Act of Parliament for establishing High Courts of Judicature in India, will show the unsoundness of the learned pleader's arguments. S. 7 is as follows:—

"Upon the happening of a vacancy in the office of Chief Justice, and during any absence of a Chief Justice, the Governor-General in Council, or Governor in Council, as the case may be, shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has [635] been appointed by Her Majesty to the office of Chief Justice of the same Court, and has entered on the discharge of the duties of such office, or until the Chief Justice has returned from such absence; and upon the happening of a vacancy in the office of any other Judge of any such High Court, and during any absence of any such Judge, or on the appointment of any such Judge to act as Chief Justice, it shall be lawful for the Governor-General in Council, or Governor in Council, as the case may be, to appoint a person with such qualifications as are required in persons to be appointed to the High Court to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council as aforesaid shall see cause to cancel the appointment of such acting Judge."

From this it is evident that when the office of Chief Justice becomes vacant on a Chief Justice leaving his Court on promotion or otherwise, a Judge of the same Court must be appointed by the Governor-General in Council or other properly constituted authority to act in the office of Chief Justice until some person has been appointed by Her Majesty to the office of Chief Justice and has entered on the discharge of the duties of such office, and that a successor to the Judge who has been appointed to officiate as Chief Justice or to any other Judge who may have left the Court on promotion or from other cause, may be temporarily appointed, but need not necessarily be so, and that, even if appointed, the appointment

of such acting Judge may be cancelled if the Governor-General in Council or other constituted authority sees cause to do so.

For the reasons above stated, I am of opinion that the learned pleader's preliminary plea is not valid, and I concur in overruling it.

TYRRELL, J.—I entirely agree with the opinions expressed by the learned Chief Justice and my learned brother Brodhurst.

MAHMOOD, J.—I have arrived at the same conclusion, and it would scarcely be necessary for me to deliver a separate judgment, [636] but for the fact that I happen to be the only member of this Bench who does not hold a patent from the Crown (1), and I look upon it as my duty to recognise this circumstance as requiring me to justify the constitution of this Court and my position therein with reference to the action of the Local Government in appointing me, His Honour the Lieutenant-Governor being the authority contemplated by s. 7 of 24 and 25 vic., c. 104, read with s. 19 of the same enactment.

It seems to me perfectly clear that if the argument of the learned Pandit is sound, my appointment is invalid, and I must be regarded as a private individual without any authority to exercise any judicial functions in connection with the lives, liberties, and property of my fellow-beings as a Judge of this Court. The authority under which I sit here is the order of His Honour the Lieutenant-Governor, which I hold in my hand, and which runs as follows:—"No. <sup>803</sup> of 1887. Notification, Appoint-

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ment Department, N. W. P. and Oudh. Dated the 24th February, 1887, Appointment. In exercise of the powers conferred upon him by the Act of Parliament, 24 and 25 Vic., c. 104, the Hon'ble the Lieutenant-Governor and Chief Commissioner has been pleased to appoint Mr. Saiyid Mahmood, Barrister-at-Law, District Judge of Rae Bareilly to act as Puisne Judge of the High Court of Judicature for the N. W. Provinces, on the retirement of the Hon'ble B. C. Oldfield, until further orders. By order, etc. (Sd.) J. Woodburn, Chief Secretary to Government, N. W. Provinces and Oudh."

This notification was published in the official Gazette of the Local Government dated the 26th February, 1887, and we can take judicial notice of it under cl. (7) of s. 57 of the Evidence Act (I of 1872). Moreover, the notification was sent to me personally under the signature of the Chief Secretary to the Local Government; and the argument of the learned Pandit involves the full length of the contention that, because the constitution of the Court is illegal, therefore no power was vested in the Local Government to appoint me to act as a Judge of this Court. In order to dispose of this contention, it is necessary to consider the legal authority under which this Court was originally established, the constitution provided therefor, and the power created by the law in connection with the filling up of vacancies among the Judges.

[637] I may take it as a well-established proposition of law that under the British constitution, an Act of Parliament was necessary to empower Her Majesty to establish a High Court such as this. Such power was conferred by what has been called the Charter Act, the statute 24 and 25 Vic., c. 104. The enactment was primarily intended to apply only to

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(1) Since the above judgment was delivered, Mahmood, J., has received a patent.



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the Presidency High Courts, but s. 16 of the statute gave special power to Her Majesty in the following terms :—

"It shall be lawful to Her Majesty, if at any time hereafter Her Majesty see fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges, with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty may from time to time think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will be vested in the High Court to be established in any Presidency hereinbefore mentioned, and subject to the directions of such Letters Patent. All the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other Judges of such Court, and to the Governor-General or Governor of the Presidency in which a High Court is established, shall, as far as circumstances may permit, be applicable to High Court established in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories."

In the exercise of the power conferred by this section Her Majesty, by Her Royal Letters Patent dated the 17th of March, 1866, established this High Court, and by s. 2 of the said Letters Patent Her Majesty ordained that the constitution of the Court shall consist of a Chief Justice and five Judges. The first Chief Justice and Judges appointed are named in the section, and we are [638] all naturally familiar with their names, and their judgments have always been held to be authoritative and valid. The first appointment of the Judges of this Court being fully in conformity with s. 2 of the Letters Patent as to the constitution of the Court, the question does not arise whether or not the Court was originally properly constituted. Indeed, the learned Pandit's argument does not necessitate our considering the hypothetical question whether this Court would have been properly constituted if the original appointments of Judges were less than the number mentioned in s. 2 of the Letters Patent.

But the question that does arise is whether in case of death, resignation, removal, &c, which, by causing a vacancy, would reduce the number of Judges, there is any authority to maintain that either the Crown or the Government is bound to fill up the vacancy within any definite period. The learned Pandit fully realised the importance of this question, and the argument which he addressed to us amounts to a contention that because by s. 17 of 24 and 25 Vic., c. 104, Her Majesty's power to alter the constitution of the High Courts is limited to a specific period of three years (which was extended to the 1st January, 1866, by s. 1 of 28 Vic., c. 15), therefore Her Majesty as well as the Government, in omitting to appoint a sixth Judge to this Court, has committed a fraud upon the statute.

Now, in the first place, as to s. 17 of the statute, I am not prepared to hold that these provisions are in any manner applicable to the points now before us ; because Her Majesty has not altered the constitution of this Court nor has she exceeded the limitation mentioned in that section modified as it has been by s. 1 of 28 Vic., c. 15. The section is not, therefore, applicable to omissions to fill up vacancies caused by accidents such as

those to which I have referred. But even if it were so, from such knowledge of the English constitutional law as I may claim, I am not aware of any such plea being raised as asking Her Majesty's Judges to hold that Her Majesty, under whose especial delegation we are exercising judicial functions, has committed a fraud upon the statute. Nor am I aware of any case in which a writ of mandamus has been issued against the Sovereign in connection with the exercise of the Royal prerogative.

[639] The real question, then, resolves itself into this : a vacancy having occurred in the Court reducing the number of Judges originally appointed under s. 2 of the Letters Patent, whether the omission by Her Majesty and the Local Government to fill up the vacancy has vitiated the constitution of this Court, so as to deprive it of its authority as the highest Court of Justice of these Provinces. I have already said that the action of the Crown in omitting to fill up any vacancy, being a matter relating to the exercise of the Royal prerogative, cannot form the subject of adjudication by us ; but so far as the Government is concerned, the terms of s. 7 of the statute 24 and 25 Vic., c. 104, require consideration, and I am all the more anxious to interpret that section, because it is by virtue of that provision that I am at present acting as a Judge of this Court, a vacancy having occurred in consequence of the retirement of Mr. Justice Oldfield, and Government having filled up that vacancy by appointing me under the power conferred upon it by that section.

Now, in the first place, there is not in that section, nor, indeed, anywhere else in the statute, any legislative provision requiring Her Majesty to fill up a vacancy among the Judges within any specified period. What the section says is that "upon the happening of a vacancy in the office of Chief Justice," the Government "shall appoint one of the Judges of the same High Court to perform the duties of Chief Justice of the said Court until some person has been appointed by Her Majesty to the office of Chief Justice." Then the section goes on to say that "upon the happening of a vacancy in the office of any other Judge of any such High Court.....it shall be lawful" for the Government "to appoint a person, with such qualifications as are required in persons to be appointed to the High Court, to act as a Judge of the said High Court, and the person so appointed shall be authorized to sit and to perform the duties of a Judge of the said Court until some person has been appointed by Her Majesty to the office of Judge of the same Court, and has entered on the discharge of the duties of such office, or until the absent Judge has returned from such absence, or until the Governor-General in Council, or Governor in Council, as aforesaid, shall see cause to cancel the appointment of such acting Judge."

[640] Now it is very important to note that whilst in connection with the appointment of Chief Justices the statute employs the expression "*shall appoint*," the same section, in connection with the appointment of puisne Judges, uses the phrase "*it shall be lawful*" for the Government to fill up the vacancy. The change in the language is remarkable, and I understand it to be a well-known rule of construing statutes that when in one and the same section which relates to any special purpose two expressions of such different meanings are employed, the Legislature must be taken to have intended a distinction. This being so, the phrase "*it shall be lawful*" cannot be held to mean that it was imperative upon the Government to fill up any vacancy in the office of a puisne Judge of this High Court. Nor is there any limitation of time within which the Government

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is required to fill up a vacancy, if it chooses to exercise the power conferred upon it by s. 7 of the statute. It seems to me therefore, clear that neither the Crown nor the Government is bound to fill up a vacancy in the office of a puisne Judge within any specified period, and, so far as the statute is concerned, the Government may leave any number of vacancies in the office of a puisne Judge unfilled for any period, be it a day, a week, a month, a year or more. My interpretation of the section therefore goes the full length of holding that even if the Crown and the Government in the exercise of their statutory powers omitted to fill up vacancies in this Court and left the Court with a Chief Justice and only one puisne Judge, the Court would still continue to possess the judicial authority which it now possesses in connection with the lives, liberties and property of Her Majesty's subjects within the jurisdiction of this Court. On the other hand, if the Government does, as a matter of fact, exercise the power under s. 7 of the statute, as it has done in my case, my appointment is legally valid, and I can exercise all the powers and perform all the duties of a Judge of this Court "until some person has been appointed by Her Majesty to the office of Judge of the same Court," or the Government "shall see cause to cancel the appointment." Further, the word "until" does not, as used in the section, convey to my mind any definite period of limitation, nor is there any other limitation imposed upon the exercise of the power, beyond the restriction that the person appointed should possess such [641] qualifications as are prescribed in s. 2 of the statute, of which the first clause lays down that "Barristers of not less than five years' standing" are eligible for such appointments, and, so far as I am concerned, I fall under that category, because s. 19 of the statute expressly provides that members of the English Bar are included within the term "*Barrister*" as is used in the statute. My appointment by His Honour the Lieutenant-Governor was therefore not illegal, and so long as Her Majesty does not appoint a person to take my place on the Bench, and so long as the Government does not see cause to cancel my appointment, I hold that I am authorized by the law to exercise the functions of a puisne Judge of this Court, and my presence on the Bench of this Court cannot therefore operate to vitiate its constitutional power as the highest judicial tribunal in these Provinces.

That any such contingency should have occurred as renders it necessary for us to consider the subtle argument addressed to us by the learned Pandit, and whether such a state of things is desirable with reference to the public feeling as to the validity of the constitutional authority of this Court, are matters which do not lie within my province as a Judge of this Court to consider, and I therefore decline to express any opinion thereon.

I concur with the learned Chief Justice in overruling the preliminary objection raised by the learned Pandit.

Mr. *G. E. A. Ross*, for the respondent.—I also have a preliminary objection. This purports to be a reference under s. 575 of the Civil Procedure Code. No legal reference, however, was or could have been made, Petheram, C. J., and Brodhurst, J., having, on the 12th November, 1885, actually delivered their judgments on the appeal. Under the second paragraph of s. 575, there being no majority concurring in a reversal of the first Court's decree, that decree necessarily stood affirmed. The appellant's only remedy was to appeal under s. 10 of the Letters Patent: this, however, he has not done.

[BRODHURST, J.—I think the reference was made under a misapprehension. As far as I recollect, the opinions of Petheram, C. J., and

myself were delivered in open Court, and were at that time intended to have effect as judgments disposing of the appeal. [642] The decretal orders at the end of each judgment are such as are never inserted in references under s. 575.]

The Hon. Pandit *Ajudhia Nath*, for the appellants, in reply.—The objection is too late: it should have been raised on the application of the respondent for review of judgment (1). In the next place, I submit that this reference was not made under s. 575 of the Civil Procedure Code. That section is not mentioned in the referring order. The words are, "We refer the case to the Full Bench for disposal." Even if the reference was under s. 575, the delivery of judgments on the appeal is not inconsistent with that section: Rule II of Order of Court dated 30th March, 1878, at p. 74 of Mr. Harvey James's collection (2).

[MAHMOOD, J., referred to *Rohilkhand and Kuman Bank, Limited v. Row* (3).]

In that case the order of reference was in precisely the same form as here. Each opinion or judgment ended with a proposed decretal order; the reference was then made under s. 575, and its validity was never questioned on this ground.

In the next place, I submit that Petheram, C.J.'s written opinion was not a judgment disposing of the appeal. It was not signed or dated, which would have been necessary under s. 574.

[MAHMOOD, J.—That section would not apply to a judgment of the High Court: s. 633 and *Sundar Bibi v. Bisheshar Nath* (4).]

That case only relates to the question how far the High Court Judges are bound to set forth the points at issue and their reasons for the decision: it does not touch the application of the last paragraph of s. 574 to the judgments of the High Court. Again, in the present case, notice was not issued to the parties under s. 571, which would have been necessary if judgment in the usual sense was to be delivered.

Mr. *G. E. A. Ross*, for the respondent, was not called upon to reply.

#### JUDGMENT.

EDGE, C.J.—In this case a preliminary point is raised, that the order of reference is *ultra vires*. Our brother Brodhurst [643] informs us that the judgments of Sir Comer Petheram and himself were delivered, and that the order of reference was drawn up after the judgments had been delivered. Sir Comer Petheram and my brother Brodhurst, having delivered their judgments as judgments and without any reservation, could not make an order under s. 575 of the Code of Civil Procedure. Under these circumstances the order was *ultra vires*, and we cannot entertain this reference. That order being *ultra vires* it must be set aside, and the judgment will be drawn up as if no such order had been made. There will be no order made as to costs.

STRAIGHT, J.—I concur.

BRODHURST, J.—The judgments of Sir Comer Petheram and myself in Second Appeal No. 1468 of 1884 were written to have effect as judgments, and a fair copy of each of them was made in the office. My judgment thus copied out was signed and dated by myself on the 12th

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(1) 9 A. 61.

(2) "The Judges so differing shall each record his judgment on the appeal, and the Judge or Judges desiring that the appeal be referred shall record an opinion to that effect."

(3) 6 A. 468.

(4) 9 A. 93.



1887 November, 1885, and, to the best of my recollection and belief, the judgments were pronounced in open Court.  
 MAY 11. As I concurred in the judgment of the lower appellate Court, my judgment would prevail; and it is obvious that the reference to the Full Bench that was made on the 12th November, 1885, though with my concurrence, was not at my suggestion.  
 FULL BENCH.  
 9 A. 625 The judgments were not withdrawn from the record, but remained (F.B.)= with it; and when the case came before the Full Bench, they were 7 A.W.N. referred to and were treated as judgments. There was no difference (1887) 154 between Sir Comer Petheram and myself on a point of law, and the and reference to the Full Bench does not purport to have been made under 7 A.W.N. s. 575 of the Civil Procedure Code.  
 (1887) 179= After the application for review of the Full Bench judgment had been 12 Ind. Jur. granted, it occurred to me that the reference to the Full Bench that was 70. made on the 12th November, 1885, was not in accordance with any provision of the law, and I communicated that opinion to my learned colleagues before the preliminary objection was taken.

As I now consider that the reference to the Full Bench was, under the circumstances above-mentioned, illegal, I concur with the learned Chief Justice that the order must be reversed.

[644] TYRELL, J.—I concur with the learned Chief Justice.

MAHMOOD, J.—I concur with the learned Chief Justice, and if the objection were a mere matter of formality, I should have regarded it as unimportant, and would have added nothing to what has fallen from the learned Chief Justice. But the objection raised by Mr. Ross is not a pure matter of technical formality, because the procedure followed under the rules of this Court in appeals under s. 10 of the Letters Patent is essentially different from the rules applicable to references under s. 575 of the Civil Procedure Code. The rules regulating the disposal of appeals under s. 10 of the Letters Patent are contained in page 72 of the printed volume of the rules of this Court, and the question as to their validity has been decided in the affirmative by the majority of a Bench of three Judges in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1), whilst the rules governing references under s. 575 of the Civil Procedure Code appear at page 74 of the printed volume of rules, and are materially different from the rules relating to appeals under s. 10 of the Letter Patent. Pandit *Ajudhia Nath* has argued that the present case must be regarded as a valid reference, under s. 575 of the Civil Procedure Code, because Petheram, C.J., and my brother Brodhurst, in recording their judgments, the one decreeing the appeal and the other dismissing it, only acted in conformity with Rule II of the rules regulating references under s. 575 of the Civil Procedure Code, and that the present case, therefore, is only the subject of a reference under that section. The effect of the rule was considered by a Bench of three judges in *Rohilkhand and Kumarr Bank, Limited v. Row* (2), where, with the concurrence of Straight and Duthoit, J.J., I said :—"It seems to us that the word *judgment* as used in that rule must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment. For if we are to regard the opinions recorded by the referring Judges as judgments in the strict sense of the term, it may often be that the appeal heard by them would be disposed of *ipso facto*, by reason of those judgments under the penultimate paragraph of s. 575 itself. And

in such cases, no appeal being pending, it could not be referred to other Judges under s. 575, for that section [646] clearly contemplates *pending* appeals, and not appeals already determined and disposed of."

In the present case we have been assured by my brother Brodhurst that the judgments which he and Petheram, C.J., recorded were delivered from the Bench as judgments of the Court, and this being so, consistently with the views which I expressed in the case already cited, those learned Judges ceased to be possessed of the case, and could, therefore, make no reference under s. 575 of the Civil Procedure Code. Indeed, under the provisions of that section, the decree made by my brother Brodhurst prevailed, and the order which referred the case to us was, therefore, *ultra vires*, and the proper remedy open to the appellant was to have preferred an appeal under s. 10 of the Letters Patent. The remedy may still be open to him, but I express no opinion as to how far such a remedy will be affected by the question of limitation.

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(F.B.) =  
7 A.W.N.  
(1887) 154  
and  
7 A.W.N.  
(1887) 179 =  
12 Ind. Jur.  
70.

9 A. 646 = 7 A.W.N. (1887) 149 = 12 Ind. Jur. 112.

### APPELLATE CRIMINAL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

#### QUEEN-EMPRESS v. BISHESHAR AND OTHERS. [16th May, 1887.]

*Rioting—Grievous hurt committed in the course of riot and in prosecution of the common object—Distinct offences—Separate sentences—Act XLV of 1860 (Penal Code), ss. 71, 147, 149 and 325—Act VIII of 1882, s. 4—Criminal Procedure Code, s. 235.*

S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. In prosecution of the common object of an unlawful assembly, *M*, with his own hand, caused grievous hurt. *M* and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 147 and grievous hurt under s. 325 of the Penal Code, and were each sentenced to separate terms of imprisonment for each offence. The highest aggregate punishment, which was *M*'s was six years' rigorous imprisonment, being one year for rioting and five years for causing grievous hurt.

*Held* that, assuming s. 71 of the Penal Code to be applicable, the sentences were not illegal, as the combined periods of imprisonment did not, in the case of any prisoner, exceed the maximum punishment of seven years' rigorous imprisonment which could have been awarded for the offence punishable under s. 325.

[646] *Held* also that the riot could not, in any of the cases, be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal.

*Queen Empress v. Ram Partab* (1), dissented from. *Queen Empress v. Dunga Singh* (2), *Queen Empress v. Ram Sarup* (3). *Queen v. Ru bee—Oollah* (4) *Loke Nath Sarkar v. Queen Empress* (5), *Queen Empress v. Pershad* (6), *Chandra Kant Bhattacharjee v. Queen Empress* (7), and *Reg. v. Tukaya bin Tamana* (8), referred to.

[F., 33 A. 48 (51) = 7 A.L.J. 910 = 7 Ind. Cas. 412; R., U.B.R. (1892—1896) 241; 10 A. 58 (67); 17 B. 260 (270); 14 A.L.J. 738 = 35 Ind. Cas. 978.]

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|----------------|---------------|----------------|--------------------|
| (1) 6 A. 121.  | (2) 7 A. 29.  | (3) 7 A. 767.  | (4) 7 W.R. Cr. 13. |
| (5) 11 C. 349. | (6) 7 A. 414. | (7) 12 C. 498. | (8) 1 B. 214.      |



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MAY 16,

C.J.

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LATE

CRIMINAL.

9 A. 645 =

7 A.W.N.

(1887) 149 =

12 Ind. Jur.

112.

The facts of this case are sufficiently stated in the judgment of Edge,

Mr. C. Ross Alston, for the appellants.

The Government Pleader (Munshi Ram Prasad), for the Crown.

## JUDGMENT.

EDGE, C. J.—The appellants in this case were, on the 22nd January last, convicted by the Sessions Judge of Gorakhpur, under s. 147 of the Indian Penal Code, of a riot, and, under s. 325 of the same Code, of voluntarily causing grievous hurt to Mr. Turner.

Harnath Pande was sentenced to two years imprisonment for the riot and to three years for causing grievous hurt. Mangan was sentenced to one year's imprisonment for the riot and to five years for causing grievous hurt. The Judge directed that in each case the sentence for causing grievous hurt should commence on the expiration of the sentence for the riot.

It was not contended by Mr. Alston, who appeared for the appellants, that a riot had not in fact taken place. But it was contended by him as to Dubri, Bisheshar, Lalsa, Sarju, Amir Khan, and Mathura, that they were not present, and were not parties to the riot or to the inflicting of the grievous hurt upon Mr. Turner. It was contended by Mr. Alston, as to all the appellants, that by reason of s. 71 of the Indian Penal Code, as amended by s. 4 of Act VIII of 1882, the sentences were in each case illegal. In support of this contention Mr. Alston relied upon the judgment of Mr. Justice Straight in the case of *Queen-Empress v. Ram Partab* (1). Mr. Alston also contended that in any event the sentences in each case were too severe. Owing to the respect we entertain for the opinion of Mr. Justice Straight, we took time to consider our judgment. The riot, in the course of which Mr. Turner was seriously injured [647] took place on the 26th of October, 1886. It appears that Mr. Turner had previously been in the employment of Sant Bakhsh Singh, and had, in the course of his employment, collected rents for him. Prior to the 26th of October, 1886, Mr. Turner had transferred his services to Nath Bakhsh Singh, a brother of Sant Bakhsh Singh, and on the occasion in question had gone to Chota Bishenpura, as the agent of Nath Bakhsh Singh, to collect rents from the villagers, who appear to have been the tenants of Sant Bakhsh Singh and Nath Bakhsh Singh. Whilst Mr. Turner was endeavouring to collect the rents for his employer, Nath Bakhsh Singh, a large body of men armed with *lathis*, at whose head was the appellant Harnath Pande on horseback, came to the village. Harnath Pande was the *karinda* of Sant Bakhsh Singh. Harnath Pande ordered Nath Bakhsh Singh to move away, saying, "Sant Bakhsh Singh's orders are to beat the Sahib, not you or your men." Harnath Pande's party surrounded Mr. Turner, and the appellant Mangan and others struck Mr. Turner with their *lathis* on the head and body and thereby caused him grievous hurt. Mr. Turner ultimately succeeded in escaping with his life. It does not appear whether or not any of the other appellants actually struck Mr. Turner. I have no doubt that each of the appellants was a party to, and participated in, the riot. Each of them is, in my judgment, fully identified, and as to the *alibis* which were called for Dubri, Bisheshar, Lalsa, Sarju, Amir Khan and Mathura, I consider them to have been worthless. In my opinion it was also clearly established that Mangan

committed an offence under s. 325 of the Indian Penal Code by voluntarily causing grievous hurt to Mr. Turner, and that each of the other appellants is as responsible for the committing of that offence as if it had been committed by his own hand. The common objects of that unlawful assembly were, in my opinion, to compel Mr. Turner to refrain from collecting the rents for his employer, and to use violence to him. These objects were effected. That the appellants could legally be tried for and convicted of the offences under ss. 147 and 325 is not questioned, nor can there be any doubt on the point. That the appellants were properly convicted, and that the sentences passed in each case were not too severe, I have equally no doubt. My only doubt on this point of the amount of the sentences is whether Harnath Pande ought not [643] to have received a more severe sentence than that passed upon him.

The question then remains, whether or not the sentences were legal. This depends on the true construction of s. 71 of the Indian Penal Code as amended by s. 4 of Act VIII of 1882, and upon the construction of ss. 149 and 325 of the same Code.

A person convicted under s. 325 of voluntarily causing grievous hurt may be punished with imprisonment of either description for a term which may extend to seven years. In none of the cases before us did the combined sentences exceed the term of imprisonment which the Judge might have awarded in each case for the offence under s. 325.

S. 71 as amended is as follows:—"When anything which is an offence, is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences unless it be so expressly provided.

"When anything is an offence falling within two or more definitions of any law in force for the time being by which offences are defined or punished, or when several acts, of which one or more would by itself or themselves constitute an offence, constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

If the second and third paragraphs of s. 71 as amended are the only portions of the section which apply in this case, it is clear that none of the appellants has been punished "with a more severe punishment" than the Court which tried him could have awarded for the offence under s. 325. Mangan's punishment was six years' imprisonment, made up of two sentences of five years and one year. The Judge could have awarded him seven years for the offence under s. 325.

Throughout s. 71 the word "punishment" and not the word "sentence" is used and, I assume, with an object. If the earlier part of s. 71, that is, the section as it stood before it was amended, applies to this case, the answer is that none of the appellants has been punished with the punishment of more than one of his offences [649]ces; that is to say, the combined periods of imprisonment do not in any of the cases exceed the maximum punishment which could have been awarded for the offence under s. 325. If it were intended by the Legislature that in cases coming within s. 71 as amended, a prisoner should be sentenced to punishment for one offence only, it would have been easy for the Legislature to have said so, and the section would then have not only the effect which I think it has, but also the effect which it was contended by Mr. Alston that it has.

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If Mr. *Alston's* contention be well founded, I confess I do not see any adequate reason for the insertion of s. 235 in the Code of Criminal Procedure, 1882, nor of the illustrations to that section. There would be little use in inquiring into and convicting an accused person of two offences if he could be legally sentenced for one only. In my opinion, which I express with diffidence, knowing that it is opposed to that of one of the most accomplished criminal lawyers on the Indian Bench—I refer to Mr. Justice Straight—s. 71 as amended does not apply to a case of this kind at all. Whether or not s. 71 as amended applies to this case, must depend upon the construction of s. 149 of the Indian Penal Code. Unless s. 149 creates an offence, it is obvious that s. 71 does not apply.

S. 149 appears to me to create no offence, but to be, like s. 34 of the same Code, merely declaratory of a principle of the common law, which at any rate in England has prevailed. In the present case no doubt, in order to convict the appellants, other than Mangan, of the offence under s. 325, it was necessary for the prosecution to give such evidence as entitled the Judge to find that there was an unlawful assembly; that some member of that unlawful assembly had voluntarily inflicted grievous hurt, within the meaning of s. 325, upon Mr. Turner, and that the offence was committed by such member of the unlawful assembly in prosecution of the common object of that assembly, or was such as the members of that assembly knew to be likely to be committed in prosecution of that object, and that the accused were, at the time of the committing of that offence, members of the same assembly. When such facts were established, the commission of an offence under s. 325 was proved against the accused. It is true that one step in the proof was [650] the evidence that the accused, at the time of the committing of the offence under s. 325, were members of an unlawful assembly. The offence under s. 325 is one, except as therein provided, of voluntarily causing grievous hurt, and not of voluntarily causing grievous hurt whilst the accused is a member of an unlawful assembly. The object of s. 149, as I think, in such a case as the present is to make it clear that an accused who comes within that section, cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. Take the case of Mangan, whose hand did, in fact, inflict grievous hurt upon Mr. Turner. In his case he was a member of the same unlawful assembly, and the offence committed by him was committed in the prosecution of the common object of that assembly, and was such as he and the other appellants knew to be likely to be committed in prosecution of that object. According to the judgment of the majority of this Court in the case of the *Queen-Empress v. Ram Sarup* (1) if their judgment applies at all, Mangan could be legally sentenced to imprisonment for the riot and to imprisonment for inflicting grievous hurt on Mr. Turner. My reason for raising a doubt as to whether the judgment of the majority of the Court in that case applies is, that it does not clearly appear from the referring order, or from the judgment of the majority of the Court, that the case had to be regarded by the Court, or was in fact regarded by the majority as one in which it was proved that the grievous hurt had been caused in the prosecution of the common object of the unlawful assembly, or that the offence of causing grievous hurt was known by the members of that assembly to be likely to be committed in the prosecution of the common object. Nevertheless, if that case was not referred on the basis that the Court should assume

(1) 7 A. 757.

that the grievous hurt was caused in the prosecution of the common object of an unlawful assembly, it is difficult to see why the case was referred at all; and certainly my brother Brodhurst in his judgment in that case appears to have dealt with the reference on that basis.

If five people, *A, B, C, D* and *E*, go out with the common object and intention of doing that which would constitute a riot, and of causing in the course of the riot grievous hurt to a particular person, and carry this intention into effect, but by chance [651] the grievous hurt is inflicted upon the particular person by the hands of one only of the five rioters—let me say by the hands of *A*—I fail to see upon what principle of law or common sense *A* should be liable to be sentenced for the riot, and also for causing the grievous hurt, whilst his equally guilty companions should be liable to be sentenced for one only of those offences. It may be said on the authority of the decision in the case of *Queen v. Rubbee-Oilak* (1) that, in the case I have just put, *A* could not have been punished for the riot and also for causing grievous hurt. A passage in the judgment of Tottenham and Ghose, JJ., in the case of *Loke Nath Sarkar v. Queen-Empress* (2), would appear also to be an authority for that contention. The passage to which I refer is as follows:—"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoner could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted." If this be a correct view of the law, *A*, whose act of causing grievous hurt constituted in that event the offence of rioting, could not be punished for the riot and for the grievous hurt, but his companions *B, C, D*, and *E*, who subsequently in the course of the riot and in the prosecution of the common object of the same unlawful assembly, by their own hands, voluntarily caused grievous hurt to another person, might be punished for the same riot and for the grievous hurt caused by them. In other words, the person whose act converted what was an offence under s. 143 into the offence of rioting under s. 146, and whose hand it was that inflicted the first blow, would be liable to be sentenced for one offence only, whilst his not more guilty companions would be liable to be punished for two offences, although all of the offences were committed in prosecution of the common object of the unlawful assembly, and were such as the members of that assembly knew to be likely to be committed in prosecution of that object. If it be said that in such a case *A* might be sentenced for the riot, and also for the grievous hurt caused by *B, C, D*, and *E*, the answer is that that is to suppose that the latter offence was not a component part of the offence [652] of the rioting, and that nothing but the first act of force or violence, *plus* the unlawful assembly, constituted the riot. In that event I should like to ask how long the riot continued, and whether each subsequent act of force or violence constituted a fresh offence of rioting, and if it did, whether *A, B, C, D*, and *E* could, under such circumstances, be punished for more than one offence of rioting, or for the riot completed by the grievous hurt caused by *A*, and for the offence under s. 325 committed by *B, C, D*, and *E*, in prosecution of the common object of the same unlawful assembly, which by itself, *plus* the unlawful assembly, would have been sufficient to constitute a riot. In my humble opinion, the violence of *A* and that of *B, C, D*, and *E*

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(1) 7 W.R. Cr. 13.

(2) 11 C. 349.



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were component parts of one and the same riot. It might be contended that, although *A, B, C, D* and *E* could not in a case like the present be sentenced for rioting and also for causing grievous hurt, they might each, or any of them, be sentenced for having been members of an unlawful assembly and also for the causing of the grievous hurt. Such sentences would, in the present case, be based upon findings inconsistent with each other and with the facts, and inconsistent also, as I think, with the law, unless the Judge were entitled to split up the transaction and find the appellants guilty of the offence of having been members of an unlawful assembly up to 9 o'clock in the morning, when the offence of unlawful assembly merged by the violence into that of riot. In such a case, would it have been competent for the Judge to have sentenced the appellants for having been members of an unlawful assembly and also for the riot? A component part of the riot was the same unlawful assembly and if s. 149 does create an offence, the same unlawful assembly was a component part of the offence of grievous hurt, so far as *B, C, D* and *E* are concerned, and in the case of *A*,—Mangan—the evidence showed that he had caused the grievous hurt whilst he was a member of the unlawful assembly, and in the prosecution of the common object of that assembly. As I have said, s. 149 does not, in my opinion, create an offence: it is merely declaratory of the law, and I should think the Courts in India would so have interpreted the law, even if s. 149 had not been in the Code. The section which relates to dacoity with murder—s. 396 of the Indian Penal Code—is, I think, an example of a section [653] which does create a substantive and distinct offence. The difference in principle between s. 149 and s. 396 is apparent. Under s. 396 all persons who are conjointly committing dacoity are equally responsible, whether the murder was or was not committed in the prosecution of the common object, and even if they did not, in fact, know that it was likely that murder would be committed in the committing of the dacoity.

It appears to me that in the case of the other appellants the riot was no more part of the offence under s. 325 than it was in the case of Mangan. To take an illustration from the law in England, if these appellants had been convicted in England of, and sentenced for, the offence of unlawful wounding under circumstances similar to those in the present case, and were subsequently indicted for the riot, no one would, I think, suggest that they could plead the previous conviction as a bar, and for the reason that the offences were not the same, and they could not have been convicted of the riot on the indictment which charged them with the unlawful wounding. If they could not plead the previous conviction as a bar, they would be liable to be convicted and sentenced for the riot, although they had been previously convicted and sentenced for the unlawful wounding. But no doubt the previous sentence would be taken into account.

To constitute a riot according to the law in England, there must be an assembly together of three or more persons, and their assembling must be accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are calculated to inspire people with terror. It is sufficient if any one of the Queen's subjects be in fact terrified. (Archbold's *Pleading and Evidence in Criminal Cases*, 20th ed., page 956.) As illustrating the Law of England on this point, I may quote the following passage from Archbold's *Pleading and Evidence in Criminal Cases*, 20th ed., page 148:—

"An acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for larceny of the same goods, because upon

the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary with intent to commit a larceny, and did not charge an [654] actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny—2 Hale 245, *R. v. Vandercomb* (1), because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter—Fost. 392; 2 Hale 246—because the defendant might be convicted of manslaughter upon the first indictment. So an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder—Fost. 229; 3 Co. 466; *Holcroft's case* (2); 1 Stark. 305; *R. v. Tincock* (3). So now also a person cannot, after being acquitted on an indictment for felony, be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony—14 and 15 Vic., c. 100, s. 9. So also a person indicted and acquitted on an indictment for robbery cannot afterwards be indicted for an assault with intent to commit it—ss. 24 and 25 Vic., c. 96, s. 41; a person indicted and acquitted for a misdemeanour, which upon the trial appears to be a felony, cannot afterwards be indicted for the felony—14 and 15 Vic., c. 100, s. 12; a person indicted and acquitted for embezzlement, cannot afterwards be indicted as for a larceny, or, if tried and acquitted for a larceny, cannot afterwards be indicted as for embezzlement upon evidence of the same facts—24 and 25 Vic., c. 96, s. 72; *R. v. Gorbutt* (4).

S. 71 would, in my opinion, apply, for instance, to a case in which a man in committing a theft voluntarily caused hurt to any person. In that case one component part of the offence of the robbery would be the offence of the theft.

The judgment of my brother Brodhurst in the case of *Queen-Empress v. Dugar Singh* (5), the judgment in the case of *Queen-Empress v. Ram Sarup* (6), the judgments of Oldfield, Brodhurst, Duthoit and Mahmood, JJ., in the case of *Queen-Empress v. Pershad* (7), and the judgment of Mitter and Beverley, JJ., in *Chandra Kant Battacharjee v. Queen-Empress* (8), support the view that in such a case as this a sentence for riot and a sentence for voluntarily causing grievous hurt can be legally [655] passed. The judgment in the case of *Reg. v. Tukaya bin Tamana* (9) has a bearing on this point.

I am of opinion that the sentences in this case were legal, and that these appeals should be dismissed.

BRODHURST, J.—The facts and the law applicable to the case have been fully stated by the learned Chief Justice, and I have, on previous occasions, expressed my own views on the legal points that have again arisen. Under these circumstances, it is, I think, sufficient for me to observe that the convictions are supported by the evidence for the prosecution; that the sentences that have been passed are, in my opinion, undoubtedly legal; that I see no sufficient reason for interference either with the convictions or the sentences, and that I therefore concur in dismissing the appeals.

*Appeals dismissed.*

(1) 2 Leach 716.

(2) 2 Hale 246.

(3) 13 Cox 217.

(4) Dears and B. 166 = 26 L.J.M. C. 47.

(5) 7 A. 29

(6) 7 A. 757.

(7) 7 A. 414.

(8) 12 C. 498.

(9) 1 B. 214.



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APPELLATE  
CIVIL.

9 A. 655—7 A.W.N. (1887) 185.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and  
Mr. Justice Brodhurst.*9 A. 655—  
7 A.W.N.HUSAINI BEGAM (Plaintiff) v. THE COLLECTOR OF MUZAFFARNAGAR  
AND OTHERS (Defendants).<sup>\*</sup> [20th May, 1887.]

(1887: 185.

*Limitation—Appeal—Admission after time—Act XV of 1877 (Limitation Act), s. 5—  
“Sufficient cause”—Poverty—Pardah-nashin—Letters Patent, N.W.P., s. 10—  
“Judgment.”*

On the 14th February, 1884, the High Court dismissed an application of the 22nd March, 1883, by a *pardah-nashin* lady, for leave to appeal *in forma pauperis* from a decree dated the 16th September, 1882, the application, after giving credit for 86 days spent in obtaining the necessary papers, being out of time by 73 days. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the previous order to stand over, pending the decision of a connected case. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. Nothing more was done by the appellant until the 18th June, 1885, when, on her application, an order was passed by a single Judge allowing her, under s. 5 of the Limitation Act (XV of 1877) to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal, which was admitted provisionally by a single Judge.

[656] *Held*, affirming the judgment of MAHMOOD, J.—(1) that the poverty of the appellant, and the fact that she was a *pardah-nashin* lady, did not constitute “sufficient cause” for an extension of the limitation period within the meaning of s. 5 of the Limitation Act, and that such extension ought not to be granted. *Moshaullah v. Ahmedullah* (2) and *Collins v. The Vestry of Paddington* (3) referred to.

Where the Judges of a Division Bench hearing an appeal differed in opinion, one of them holding that the appeal should be dismissed as barred by limitation, and the other that sufficient cause for an extension of time had been shown, and that the appeal should be determined on the merits,—*held*, that the “judgment” of the latter Judge came within the meaning of that term as used in s. 10 of the Letters Patent, and that, as the result of the difference of opinion was that the appeal to the Division Bench stood dismissed, an appeal under s. 10 was not premature.

[F., 10 A. 524 (530); R., U.B.R. Civil (1892—1896) 452.]

THIS was an appeal under s. 10 of the Letters Patent from a judgment of Mahmood, J., in which his Lordship differed in opinion from Tyrrell, J., Mahmood, J., holding that the appeal before the Division Bench should be dismissed as barred by limitation, and Tyrrell, J., that “sufficient cause” for an extension of time had been shown by the appellant within the meaning of s. 5 of the Limitation Act (XV of 1877), and that the appeal should be heard and determined on the merits. The judgments of Tyrrell and Mahmood, JJ., in which the facts of the case were stated, will be found reported at p. 11, *ante*.

Mr. G. E. A. Ross, for the respondent (the Collector of Muzaffarnagar, representing the Court of Wards), took a preliminary objection to the hearing of the appeal, to the effect that the appeal was premature. The only question before the Division Bench was, whether the appeal to that Bench being admittedly out of time, an extension of time should be allowed.

<sup>\*</sup> Appeal No. 3 of 1886 under s. 10 of the Letters Patent.

(1) 9 A. 11. (2) 13 C. 78. (3) L.R. 5 Q.B.D. 368=49 L.J.N.S. (C.L.) 612.

Tyrrell, J., had given no "judgment" on the appeal within the meaning of s. 10 of the Letters Patent, but merely a kind of interlocutory order, to the effect that sufficient cause had been shown for the hearing of the appeal. If the Division Bench had proceeded to deal with the appeal, *non constat* but that Tyrrell, J., might have concurred with Mahmood, J., in dismissing it, and in such a case no further appeal would have been possible. If the Judges of the Division Bench had chosen to do so, they might have referred the case to the rest of the Court under s. 575 of the Civil Procedure Code, and no objection could [657] then have been raised. But under the circumstances the case should go back to the Division Bench, and if, after a hearing on the merits, the learned Judges should record dissentient judgments, an appeal under the provisions of the Letters Patent would then lie.

The Court overruled the preliminary objection, holding that the "judgment" of Tyrrell, J., came within the meaning of that term as used in s. 10 of the Letters Patent. The result of the difference of opinion in the Division Bench was that the appeal to that Bench stood dismissed, and consequently the present appeal was not premature, and must be heard.

Pandit *Sundar Lal*, for the appellant.—Tyrrell, J., was right in applying s. 5 of the Limitation Act to this case. That section was enacted to enable the Court to do justice; and the expression "sufficient cause for not presenting the appeal" should be held to include any cause, beyond the appellant's control, which has prevented the appeal from being presented. Extreme poverty, like extreme illness, is such a cause.

[EDGE, C. J.—Such a construction would enable the period of limitation to be extended for fifty years, if the appellant's poverty lasted the whole of that time. Why should the successful litigant be kept indefinitely in a state of uncertainty, and prevented from dealing freely with the subject-matter to which the first Court has declared him entitled?

STRAIGHT, J., referred to *Collins v. The Vestry of Paddington* (1)].

It is not contended that the plea of poverty should in all cases be a sufficient reason for extending the time indefinitely. The plea must be examined with reference to the particular circumstances of each case. It is only thus that it can be determined whether any, and if so what, extension should be granted. Here there are special circumstances: the appellant was unable to furnish the necessary court-fees, and she is a *pardah-nashin* lady.

[EDGE, C. J.—The law provides a special procedure for the relief of pauper appellants. Art. 169 of the second schedule of the Limitation Act fixes thirty days as the period within which leave [658] to appeal as a pauper may be applied for. The view you contend for would make that provision useless.]

In *Fatima Begam v. Hansi* (2), it was held that an order admitting an appeal under s. 5 of the Limitation Act ought not to be set aside, unless the Judge had clearly acted on insufficient grounds or improperly exercised his discretion.

[EDGE, C. J.—In that case the cause of the delay was that the appellant was *bona fide* pursuing a wrong remedy. Here you were pursuing a remedy which was barred by time.]

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Mr. G. E. A. Ross, for the respondent, was not called upon to reply.

### JUDGMENT.

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7 A.W.N.  
(1887) 185.

EDGE, C.J. (STRAIGHT and BRODHURST, JJ., concurring).—This is an appeal under s. 10 of the Letters Patent. On the 16th September, 1882, the plaintiff's suit was dismissed by the Subordinate Judge of Saharanpur. It appears that for eighty six days the plaintiff was unable to obtain the papers necessary for filing her appeal. However, having obtained the papers, she, on the 22nd March, 1883, filed a memorandum of appeal with a prayer to allow her to proceed *in forma pauperis*. The time limited, giving credit for the eighty-six days spent in obtaining the necessary papers for proceeding *in forma pauperis*, had expired seventy-three days before the 22nd March, 1883. The result of the appeal *in forma pauperis* was that, on the 14th February, 1884, her application was rejected, the Court deciding that it was barred by limitation. On the 10th May, 1884, the appellant filed an application for review. That application was rejected on the 24th April, 1885. Nothing was done by the appellant until the 18th June of the same year, when, on her application, the late Chief Justice gave her leave to file an appeal on full stamped paper and extended the time for filing it. That is a form of order which, when made by a Judge of this Court, has never been treated as precluding the Bench before whom the matter may come from considering the propriety of the order so far as the question of limitation may be concerned. I say this from my short experience, and with the concurrence of my brothers Straight and Brodhurst, who have had long experience in this Court. On the 17th July, 1885, the appeal was filed; the case came on to be [659] heard before Tyrrell and Mahmood, JJ., when the point was raised as to the appeal being time-barred. Tyrrell, J., considered that the appellant should be allowed to proceed with her appeal, thinking that the case was one of some hardship on account of the poverty of the appellant and the fact of her being a *pardah-nashin* lady. Mahmood, J., on the other hand, considered that no case was made out for extending the time under s. 5 of the Limitation Act, and the Judges having thus differed in their judgments, the appeal stood dismissed. I have already said that the appeal *in forma pauperis*, after making allowance for 86 days, was 73 days out of time. Making the same allowance of 86 days, the appeal on a full stamped paper, if it had been filed on the 22nd March, 1883, would have been 13 days out of time. The appellant for 55 days, between the 24th April, 1885, and the 18th June, 1885, did nothing; that is a period we cannot overlook. It is contended by Pandit Sundar Lal, that the fact that the appellant had not the means to appeal on full stamped paper brings the case within s. 5 of the Limitation Act. We have asked him, if that be so, what period of limitation a Court in its discretion should apply to the case of a would-be appellant who was a pauper. We have received no satisfactory suggestion from him. The framers of the Limitation Act have not overlooked the fact that a would-be appellant may be a pauper. It is enacted that an appeal *in forma pauperis* must be brought within 30 days. If we were to listen to this contention of the learned Pandit, we would be holding that the Limitation Act did not apply to cases of would-be appellant paupers. We agree with the judgment of Mahmood, J., in which he refers to *Moshaullah v. Ahmedulla* (1). The principle upon which Courts

should grant indulgence, at any rate as far as England is concerned, in cases which have not been brought in time, is discussed in the judgements of the majority of the Court of appeal in *Collins v. The vestry of Paddington* (1). This appeal is dismissed. Separate sets of costs are allowed to the respondents, who are separately represented here, in proportion to their interests in the subject-matter of this suit.

*Appeal dismissed.*

9 A. 660—7 A. W. N. (1887) 226.

[660] APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

SABIR ALI AND OTHERS (*Plaintiffs*) v. YAD RAM AND OTHERS (*Defendants*).<sup>\*</sup> [20th May, 1887.]

*Pre-emption—Wajib-ul-arz—Co-sharers—“Ek jaddi.”*

The *wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale, to “brothers,” and provided that, on refusal by a “brother,” there should be a right of pre-emption in favour of co-sharers in the *thoke* who were related to the vendor by descent from a common ancestor (“*his sadaran ek jaddi thoke*”). It was also provided that, in the event of any dispute arising as to price, it should be settled by arbitration, and that “if the co-sharers do not take in at the amount fixed by the arbitrators,” the co-sharer desiring to sell might make the transfer to a stranger.

Held, that co-sharers who were not of common descent from the vendor were entitled to pre-emption after own brothers and co-sharers *ek jaddi*, and to have preference over strangers. *Guneshee Lal v. Zaraut Ali* (2) followed.

This was a suit for pre-emption based upon the *wajib ul arz* of a village. The provisions of that instrument relating to pre-emption were that in cases of sale a “brother” should have the option of buying, and that, on refusal by a “brother,” there should be a right of pre-emption in favour of co-sharers in the *thoke* who were related to the vendor by descent from a common ancestor (“*hissadaran ek jaddi thoke*”). It was also provided that “in case of dispute as to price, it will be settled by appointment of arbitrators before the *hakim*, and that if the co-sharers do not take at the amount fixed by the arbitrators, then he may transfer it to a stranger.” The vendee in this case was a stranger.

The defendants pleaded that, under the provisions of the *wajib-ul-arz*, the plaintiffs who, though co-sharers, were not of common descent with the vendor, were not entitled to pre-emption. The Courts below (Subordinate Judge and District Judge of Saharanpur) accepted this view and dismissed the suit. The plaintiffs appealed to the High Court.

Mr. C. Dillon, Mr. C. Ross Alston, and Maulvi Abdul Majid, for the appellants.

Munshi Hanuman Prasad and Munshi Madho Prasad, for the respondents.

#### JUDGMENTS.

[661] EDGE, C.J.—I think this case is governed by *Guneshee Lal v. Zaraut Ali*. This case will have to be remanded under s. 562. The appeal is allowed.

<sup>\*</sup> Second Appeal, No. 841 of 1886, from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 29th February, 1886, confirming a decree of Maulvi Maqsood Ali Khan, Subordinate Judge of Saharanpur, dated the 28th September, 1885.

(1) 5 Q. B. D. 368—49 L. J. N. S. (C. L.) 612.

(2) N.-W.P.H.C.R. (1870) 343.

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STRAIGHT, J.—I agree with the learned Chief Justice that the Judge and the Subordinate Judge were in error in dismissing the plaintiff's claim preferred on the basis of the right of pre-emption, on the ground that, under the terms of the *wajib-ul-arz*, they had no such right. Looking to the language of that document, and more particularly to the clause that "in case of dispute as to price, it will be settled by appointment of arbitrators before the *hakim*, and that if the co-sharers do not take at the amount fixed by the arbitrators, then he may transfer it to a stranger." I agree with the learned Chief Justice that the case of *Guneshee Lal v. Zaraut Ali* is directly applicable, and from the language of the *wajib-ul-arz* before us, it is reasonable to infer that a mere co-sharer is entitled to the refusal after own brothers and co-sharers *ek jaddi*, and to have the preference over strangers. As we are informed that all the necessary evidence is on the record, the proper course, therefore, is to reverse the Judge's decree, he having disposed of the case on a preliminary point, and to direct him to restore the appeal to his file of pending appeals and determine the questions of fact between the parties. Costs to abide the event.

*Cause remanded.*

9 A. 661=7 A.W.N. (1887) 253.

#### APPELLATE CIVIL.

*Before Mr. Justice Mahmood.*

#### PARAS RAM AND OTHERS (*Defendants*) v. SHERJIT AND OTHERS (*Plaintiffs*).\* [16th April, 1887.]

*Co-sharers—Right to deal with joint property—Building by one co-sharer against the wish of others—Suit for demolition of building—Discretion of Court.*

The mere fact of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. *Lala Biswambhar Lal v. Raja Ram* (1), *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty* (2), [662] *Girdhari Lal v. Vilayat Ali* (3), *Wahid Ali Khan v. Ghansham Narain* (4), and *Joy Chander Rukhit v. Bippro Churn Rukhit* (5), referred to.

[F., 4 C.L.J. 198 (206); Appr., 12 A. 436 (437); R., 14 C.P.L.R. 76 (78); 33 P.R. 1901=71 P.L.R. 1901; 7 O.C. 336 (337); 2 A.L.J. 455 (456); 11 C.L.J. 189 (193)=5 Ind. Cas. 171 (173); D., 18 A. 361 (363).]

THE plaintiffs and the defendants in this case were joint owners of a courtyard between their two houses. In this courtyard the defendants commenced the building of a *kotla* or hall, without obtaining the consent of the plaintiffs; and the object of the present suit was to have this building demolished on the ground that the defendants had no right to erect it against the wishes of the plaintiffs, and that it caused inconvenience by shutting out light and air, and otherwise. The defendants pleaded, among other things, that the building had existed for a long time without

\* Second Appeal, No. 1349 of 1886, from a decree of Maulvi Syed Faridud-din Ahmad, Subordinate Judge of Agra, dated the 26th April, 1886, confirming a decree of Maulvi Nazar Ali, Munsif of Mahaban, dated the 27th November, 1885.

(1) A.W.N. (1885) 277. (2) A.W.N. (1887) 116. (3) 3 B.L.R. App. 67.  
(4) 8 C. 708. (5) 14 C. 236.

any objection being made, and that no inconvenience was in fact caused by it.

The Court of first instance (Munsif of Mahaban) decreed the suit. In the course of its judgment, it said:—"Seeing that the court-yard belongs to the plaintiffs and defendants jointly, there is no reason why it should remain in the defendants' exclusive use. The plaintiffs' witnesses fully prove that the two parties have equally been in possession of the court-yard, and that the defendants have unjustly built the *kotha* wall, and in spite of the issue of an injunction the defendants have completed the *kotha* with a roof.....The house has been newly built, and the plaintiffs' passage way has also been narrowed, so that the plaintiffs have cut off a portion of their platform and added it to the way, which has thus been widened. The defendants, who own a moiety, have taken a much greater portion of the courtyard than a moiety. The plaintiffs' passage way at this time, after the cutting of their platform, is six feet to the south and eight feet to the north. Four feet of the plaintiffs' platform to the south and six feet to the north have been annexed to the way. Had the part of the plaintiffs' platform not been added to the way, the way would have remained two feet wide to the south and two feet to the north. This way is certainly not sufficient for cattle to pass. The defendants had no right to build on a land which was jointly possessed."

On appeal by the defendants, the Subordinate Judge of Agra affirmed the Munsif's decree. He recorded no finding as to whether the building had caused material injury to the plaintiffs, or [663] whether it had been built in spite of any protest from them or any attempt on their part to prevent its erection.

The defendants appealed to the High Court.

Babu Baroda Prasad Ghose, for the appellants.

Pandit Moti Lal Nehru, for the respondents.

#### JUDGMENT.

MAHMOOD, J.—The parties to this litigation have been found to be joint owners of the land in suit, upon which the defendants erected certain buildings the demolition of which is the main object of the suit. It has also been found that the said buildings have been recently constructed, and upon these findings the lower Courts have concurred in decreeing the claim and ordering demolition of the buildings.

The principal contention urged before me in second appeal on behalf of the defendants is whether, upon the facts found, such a suit was rightly decreed, and with due regard to the rules of equity which apply to suits of this kind between joint proprietors of land. Mr. *Moti Lal*, whilst conceding on behalf of the plaintiffs-respondents that the land built upon is the joint property of the parties, contends that the building was constructed in spite of the objections of the plaintiffs-respondents to such building going on, and that they were therefore entitled to a decree for demolition of the building in order to have the land restored to its original condition.

As a pure question of law as distinguished from the rules of equity this contention may have considerable force, but Courts in India exercise the combined jurisdiction of law and equity, and cannot disregard equitable doctrines in enforcing remedies. The present case is not one in which a stranger has, with knowledge of the plaintiffs' exclusive title, trespassed upon land by building thereon, nor is it a case to which the equitable

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doctrine of estoppel by acquiescence referred to in *Uda Begam v. Imamuddin* (1) would be applicable. This is a case in which one joint owner of land commenced building thereon without the permission of his co-owners, the plaintiffs-respondents; and it has not been found by the lower appellate Court whether the building was commenced in spite of the protest of the plaintiffs-respondents, or that the latter took reasonable steps in time to prevent the erection of the building.

[664] I have already said enough to indicate that a distinction must be drawn between cases in which the building has been erected by a pure trespasser upon the land of another, and cases in which the building has been erected by a joint proprietor on joint land without the permission of his joint co-owners or in spite of their protest. The rules of equity applicable to the former class of cases have been set forth by Turner, Offg. C.J., in the case of *Uda Begam* (1) to which I have already referred, and in the rule therein laid down, I concur. But to the latter class of cases somewhat different doctrines of equity are applicable, and they have been the subject of consideration in many of the reported cases, to some of which I wish to refer here.

The most important case, so far as India is concerned, is *Lala Bishwambhar Lal v. Raja Ram* (2), where, the parties being joint owners of land, one of them erected a wall upon the land, without obtaining the consent of his co-owner, and it was held by Peacock, C.J., that the Court would not interfere to order the demolition of the wall, when there was no evidence to show that injury had been done to the co-tenant of the builder by its erection, and in the course of his judgment that eminent Chief Justice, said:—"It appears to me that even if the defendant had not a strict legal right to build the wall upon the joint land, this is not a case in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights." This ruling was followed in *Mussim Moollah v. Panjoo Ghoramee* (3), and in the other cases to which I need not refer, because the effect of the rulings of the Calcutta High Court has been well summarised in *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty* (4), where Field, J., in delivering the judgment of the Court, said: "There is no considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek by an injunction to prevent the erection of a permanent building, and a case in which, after a permanent building has been erected at considerable expense, he seeks to have that building removed. In a case such as that last [665] mentioned, the principle which seems to have been settled by the decisions of this Court is this, that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and, as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further, that he took reasonable steps in time to prevent the erection." This view was followed by my brother Brodhurst, with the concurrence of my brother Tyrrell, in *Girdhari Lal v. Vilvyat Ali* (5), and I remember that on more than one occasion I have given expression to the same view,

(1) 1 A. 82.

(3) 21 W.R. 373.

(4) 8 C. 708.

(2) 3 B.L.R. App. 67.

(5) A.W.N. (1885) 277.

the last being the case of *Wahid Ali Khan v. Ghansham Narain* (1) in which I concurred with the learned Chief Justice of this Court in adopting the principle of rule laid down by Sir Barnes Peacock in the case to which I have already referred.

These cases have the effect of laying down the rule that when a joint owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners, unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. But those cases leave the question open whether when a joint owner of land builds thereon in spite of his co-owners' protest, such co-owners can obtain demolition of the building without showing that such building has caused material and substantial injury to them such as I have already mentioned. This question was, however, recently considered by a Division Bench of the Calcutta High Court in *Joy Chunder Rukhit v. Bippro Churn Rukhit* (2), where the learned Judges, after considering the earlier rulings of their Court, held that even in cases where joint land has been dealt with in an exclusive manner by one joint owner in spite of the protest of his co-owners before a Court will make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the others should be restored to its former condition (as, for instance, where a tank has been excavated), a plain-[666]tiff must show that he has substantiated by the act he complains of some injury which materially affects his position.

I agree in the rule laid down in this last case, and I hold that the mere circumstance of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient, *in itself*, to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as a Court of Equity could not remedy in a suit for partition of the joint land.

Holding these views I do not think I can dispose of this case finally, without distinct findings on the following points:—

1. Has the building sought to be demolished in this suit caused such material and substantial injury to the plaintiffs-respondents as cannot be remedied by partition of the joint land, and, if so, to what extent of the area covered by the building?

2. Did the plaintiffs-respondents object to the building at the time when it was commenced, and did they take due steps in time to prevent the continuance of such building?

I remand the case under s. 566 of the Code of Civil Procedure for clear findings upon these points, and upon receipt of the findings ten days will be allowed to the parties for objections under s. 567 of the Code.

*Issues remitted.*

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*Before Mr. Justice Mahmood.*

QUEEN-EMPRESS v. MURPHY. [18th April, 1887.]

9 A. 666=  
7 A.W.N.  
(1887) 141.*Criminal Procedure Code, s. 203—"Examining"—Written complaint' attested by complainant on oath—Irregularity—Criminal Procedure Code, s. 537—Act XLV of 1860 (Penal Code), s. 405.*

Where a deposition in the shape of a complaint is made orally or in writing and is sworn to, the requirements of s. 203 of the Criminal Procedure Code in regard to the examination of the complainant, are sufficiently satisfied.

*Held* therefore, where a Magistrate dismissed a complaint of criminal breach of trust without examining the complainant on oath, but after the complainant had sworn to the truth of the matters alleged in the complaint, that the provisions [667] of s. 203 had been sufficiently complied with, and, if not, that the irregularity was covered by the terms of s. 537.

*Held* also that inasmuch as the complaint only amounted to a statement that the accused had, in consequence of certain arrangements made with the complainant's father, received certain moneys and had refused to render accounts, but contained no allegation that he had in fact realized and dishonestly misappropriated any particular sum, and obviously was made for the purpose of forcing him to render accounts, the Magistrate was right in dismissing it, since the facts alleged did not constitute criminal breach of trust,

[F. 4 Bom. L.R. 609 (611); 11 P. R. 1911; Cr.=146 P.L.R. 1911=32 P.W.R. 1911=10 Ind. Cas. 156=12 Cr. L.J. 217; Diss., 18 A. 221=A.W.N. (1896) 35; R. U.B.R. (1905) 1st Qr., Penal Code, p. 19. Doubtful., 11 Cr. L. J. 44=4 Ind. Cas. 762, U.B.R. (1909) I.P.C. p. 21.]

THIS was an application by the complainant, J. W. Jervis, for revision of an order of the District Magistrate of Dehra Dun, dated the 7th September, 1886, dismissing his complaint against the defendant, G. Murphy, of the offence of criminal breach of trust. In August, 1886, upon some date which does not appear, the complainant filed the following written petition in the Court of the District Magistrate:—

"1. That the petitioner's late father, Captain Jervis, employed Mr. G. Murphy, pleader of Meerut, to recover moneys due to him from Mrs. Julian McCutchan, deceased.

"2. That the petitioner cannot without the assistance of the Court ascertain the exact amount received by Mr. Murphy. In his letter of the 16th August, 1883, he says that he had recovered Rs. 1,000. In his letter of 28th November, 1883, he says that he had invested Rs. 600 of that money at 12 per cent. On the 26th April, 1884, he sent Captain Jervis Rs. 500, and says in his letter of that date:—'The amount now due to you is Rs. 350 *plus* interest at 12 per cent. on the Rs. 600.' At first sight this Rs. 500 would appear to be half of the Rs. 1,000 and to include a portion of the Rs. 600, but, on consideration, it appears doubtful for the following reasons:—Mr. Murphy's fee could have been at the most Rs. 100 only (10 per cent. on Rs. 1,000), and therefore the balance would have been Rs. 400, not Rs. 350; he must have recovered Rs. 1,500 to have charged a fee of Rs. 150. Again, in his letter of the 3rd December (1884 apparently) he says:—'I am glad my having put out some of the money at interest, has your approval;' implying that it was still out at interest.

"3. That whatever the amount may be that Mr. Murphy recovered, he at least admits on the 26th April, 1884, a balance in [668] hand of

Rs. 350 *plus* interest at 12 per cent. on Rs. 600, and for the purpose of this prosecution it is immaterial whether he held any additional amount.

"4. That Mr. Murphy has never accounted for the above sum, and though written to on the subject has sent no reply.

"5. That petitioner charges Mr. Murphy with having dishonestly misappropriated the said money and committed criminal breach of trust in respect thereof, and prays that he may be punished according to law."

The Magistrate, upon receiving this petition, did not examine the complainant on oath under s. 200 of the Criminal Procedure Code; but the complainant was sworn, and attested the petition in the following terms:—"The contents of my petition given in to-day are correct and true." This attestation was headed by the words, "J.W. Jarvis sworn" in the hand-writing of the Magistrate, and was followed by the complainant's and the Magistrate's signatures. The Magistrate thereupon passed the following order:—"Send copy of this petition to Mr. Murphy and ask him for an explanation. The Sheristadar to put up in presence of Mr. Melvill."

On the 7th September, 1886, the accused Murphy submitted an explanation in the form of a letter addressed to the Magistrate, and upon this the following order was passed:—"On reading Mr. Murphy's explanation and the second petition of Mr. Jarvis, I have no hesitation in saying that this is no case for a Criminal Court. Mr. Jarvis has the Civil Courts to go to if he is so disposed. The petition is dismissed." The second petition here referred to was a petition filed by the complainant, Mr. Jarvis, apparently in reply to the defendant's explanation. Among the papers received by the Magistrate before passing his order, and placed by him on the record, were certain "opinions" which had apparently been obtained by the defendant from various legal practitioners and forwarded by him to the Magistrate for the purpose of showing that the facts alleged by the complainant did not in law amount to the offence of criminal breach of trust as defined in s. 405 of the Penal Code.

[669] The effect of the Magistrate's order was to dismiss the complaint. The complainant Jarvis then presented an application to the High Court, imugning the validity of the Magistrate's order of the 7th September, 1886, for reasons stated in his petition of the 15th February, 1887. Upon that petition for revision the following order was passed on the 25th March, 1887, by Brodhurst, J.:—"The Magistrate was not required to send a copy of the complainant's petition to Mr. Murphy for an explanation, but he was, I think, bound to examine the complainant before dismissing his complaint under s. 203 of the Criminal Procedure Code. I therefore direct that notice issue to Mr. Murphy to show cause why the Magistrate's order of the 7th September, 1886, should not be set aside, and why the Magistrate should not be directed to examine the complainant and then pass whatever order he may consider requisite."

On the 18th April, 1887, the rule came on for hearing before Mahmood, J.

Mr. A. Strachey, for the defendant, Murphy, showed cause.

Mr. J.D. Gordon, for the petitioner, supported the rule.

#### JUDGMENT.

MAHMOOD, J. (after stating the facts of the case continued):—Amongst the reasons given for this rule, my learned brother Brodhurst stated that the provisions of s. 203 of the Criminal Procedure Code were imperative in respect of the examination of the complainant before the dismissal

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of any such complaint. That section runs as follows:—"The Magistrate before whom a complaint is made or to whom it is transferred may dismiss the complaint if, after examining the complainant and considering the result of the investigation (if any) made under s. 202, there is in his judgment no sufficient ground for proceeding."

The general effect of the order of my brother Brodburst was to call upon the accused to show cause why the infringement of the provisions of this section should not result in the exercise of this Court's revisional powers, directing the Magistrate to examine the complainant and to proceed according to law.

Mr. *Strachey* appeared on behalf of the accused, and I think the argument which he addressed to me upon the subject is sufficient [670] to enable me to discharge the rule. Mr. *Strachey* argued that the original petition which initiated the prosecution was sworn to by the complainant himself as I have already stated, and the learned counsel argued that the words I have quoted are in substance sufficient to satisfy the requirements of s. 203, and that even if swearing to the contents of the petition is not covered by and included within the meaning of the word "examine" as used in s. 203, the omission to examine could amount only to an irregularity of such a character as would be covered by the somewhat extensive provisions of s. 537.

I accept the contention because it appears to me that in using the word "examine" in s. 203, the Legislature could only have intended (putting the highest interpretation on the word) to provide that such examination should be made under the sanction of an oath or solemn affirmation, with such checks upon untruthful statements as the law provides as penalties for perjury. Where a deposition in the shape of a complaint is made orally or in writing, and when it is sworn to, I hold that the provisions of s. 203 are sufficiently satisfied. I have no doubt on the subject, and if there is any reason to doubt this proposition, s. 537 fully covers any such irregularity in this particular case. The main reasons therefore, why the rule was issued on the 25th March, are shown by Mr. *Strachey* to be such as disable me from making the rule absolute.

But the rule went further, because it generally makes it necessary for me to consider whether or not the case is one in which, irrespective of the provisions of s. 203, I should not direct the prosecution to be taken up again with such results as may follow. For this purpose I have carefully read the original complaint of Jervis on which the Magistrate passed his order of the 7th September last and I am satisfied that the allegations contained in that petition, even if held to be perfectly true, are not sufficient in law to furnish grounds for a charge of an offence such as that contemplated by s. 405 of the Indian Penal Code. The complaint amounts only to saying that because as between the father of the complainant and the accused Murphy certain arrangements were made, in consequence of which certain moneys were received by the accused, [671] and inasmuch as the accused declined to render accounts, therefore the accused has been guilty of the offence of criminal breach of trust. There is no allegation in the complaint that the money had, as a matter of fact, been realised by the accused Murphy; no allegation that the money so realised was wrongfully appropriated to his own use, and obviously the object of the complaint was simply to force Murphy to render account. The object in fact was to obtain a remedy which a Civil Court can alone properly award, in a suit which is known here as a suit for rendition of accounts, or in other words, a suit for accounts. The relations

between the complainant and the accused were not of a direct character, because the moneys alleged to have been realised by Mr. Murphy, or the transactions to which prosecution relates, were transactions between the father of the complainant and the accused.

Upon these grounds I hold that the Magistrate was right in declining to proceed further, that he did substantially comply with the provisions of s. 203, and that upon the facts stated in the petition of Jervis, no such case is disclosed as would constitute the *corpus delicti* of the offence defined in s. 405 of the Indian Penal Code, and that the Magistrate acted rightly in dismissing the complaint.

I, however, wish to add that in dealing with this case the Magistrate in calling upon the accused to furnish an explanation, in entering into a correspondence with the accused, and in placing upon the record correspondence and opinions of professional men and lawyers and making them part of the record, has acted in a very irregular manner. It is not necessary for the purposes of this judgment for me to say more. But I may say that my judgment is limited to the documents which are strictly parts of this record, and irrespective of other papers which have been sent up here as if they were legal evidence to enable this Court to determine the question. I reject the application.

*Rule discharged, and application rejected.*

9 A. 672=7 A.W.N. (1887) 221=12 Ind. Jur. 154.

### [672] APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

RAM SAHAI AND ANOTHER (*Defendants*) v. KEWAL SINGH  
AND OTHERS (*Plaintiffs*).<sup>\*</sup> [6th May, 1887.]

*Hindu Law—Joint Hindu family—Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money-decree, sale in execution of—Sale certificate referring to rights and interests of father only in joint family property—Suit by sons for declaration of rights to their shares—Form of decree.*

If a person in possession of property which originally belonged to the members of a joint Hindu family, of whom the father was one, can produce as his document of title only a sale-certificate showing him to have bought in execution of a money-decree against the father only, the right, title and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale.

The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zamindari property, covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation and obtained a money-decree, in execution whereof the right, title and interest of the judgment debtor in certain joint family property was notified for sale, and a sale took place at which, upon the face of the sale-certificate, only that right, title and interest was sold. The auction-purchasers having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as *Karta*, and

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<sup>\*</sup> Second Appeal No. 743 of 1886, from a decree of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 9th March, 1886, confirming a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 10th June, 1885.



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that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares.

*Held*, that inasmuch as, upon the terms of the sale-certificate, nothing more passed to the defendants at the sale than the right, title and interest of the father, the plaintiffs were entitled to maintain the suit, and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share, might come in and claim a partition of that share out of the joint estate.

*Per* MAHMOOD, J., that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law.

[673] *Simbhunath Panday v. Golab Singh* (1), *Deendyal Lal v. Jugdeep Narain Singh* (2), and *Hurday Narain Sahu v. Ruder Perakash Misser* (3), referred to.

[R., 12 A. 99 (101).]

THE plaintiffs in this suit, the sons and grandsons of one Akbar Singh, who, with him, formed a joint Hindu family, sought to have it declared that their shares in the ancestral family property had not passed at a sale in execution of a decree against Akbar Singh, and to recover possession of the property, with mesne profits, from the auction-purchasers.

It appeared that, on the 27th December, 1863, Akbar Singh executed a deed of mortgage in favour of Param Sukh and Ram Sahai, whereby he borrowed a sum of Rs. 99, hypothecating, as security, a four annas zamindari share in mauza Bhojpur. The following is a translation of the deed :—

"I, Akbar Singh, caste Gaur, son of Man Singh, resident of Ririya, pargana Derapur, do hereby declare that I, having borrowed the sum of Rs. 99 (cash) from Param Sukh and Ram Sahai Chaube, with interest at Rs. 2 per cent. per mensem, hypothecate my four annas share in a village called Bhojpur, pargana Akbarpur Shahpur. Further, I promise to pay the said sum in the month of Aghan Badi 2, Sambat 1921, without any excuse; if the money be not paid on that date, the mortgagee will be placed in proprietary possession of the mortgaged property. I have executed this bond in the presence of the witnesses named in the margin. Dated Pus Badi 3, Sambat 1920."

It subsequently appeared that this hypothecation was a fraudulent act on the mortgagor's part, as he had no interest in the hypothecated property. The mortgagees accordingly brought a suit against Akbar Singh to recover the debt upon the personal obligation, and on the 7th December, 1868, they obtained a money-decree, in execution of which they caused to be attached the zamindari interests of Akbar Singh in mauza Ririya, which formed the joint ancestral estate of the judgment-debtor and his family. The notification of sale in execution of the decree referred only to the right, title and interest of the judgment-debtor. The sale took place on the 20th March, 1873, and the decree-holders, in the name of Ram Sahai, [674] were the purchasers. The certificate of sale granted under s. 259 of the Civil Procedure Code (Act VIII of 1859) was as follows :—  
"Whereas for the enforcement of the decision passed by the Civil Court of Cawnpore on the 7th December, 1868, against the debtor, and for putting up to auction-sale the property of the said person, the plaintiffs, decree-holders, presented an application, and on the said application the sale notifications were issued by the Munsif's Court of Akbarpur, and the property of the defendant was sold on the 20th March, 1873, by the Deputy

(1) 14 I.A. 77=14 C. 572,

(2) 4 I.A. 247=3 C. 198.

(3) 11 I.A. 26=10 C. 626.

Collector of Cawnpore, who conducted the sale; and as it was proclaimed that the rights and interests of the judgment-debtor in the property detailed below were purchased by Ram Sahai, son of Moti Ram, caste Brahman, Chaube, resident of Baghpur, pargana Sheorajpur, for Rs. 300, who deposited the whole amount of the sale consideration in Court within the fixed time; this sale-certificate is granted to Ram Sahai, plaintiff and decree-holder, the auction purchaser, and it is notified that the rights and interests of the judgment-debtor in this property ceased from the date of sale and passed to the auction-purchaser. The sale-certificate regarding the rights and transfer of the property of the defendant, shall be considered a valid document.

"List of property sold at auction belonging to Akbar Singh, judgment-debtor:—Rights and interests of the debtor out of 1 anna 7 pies, out of  $1\frac{1}{2}$  anna out of 3 annas  $2\frac{3}{4}$  pies zamindari share in mauza Ririya, pargana Derapur, for Rs. 300, dated 22nd April, 1873."

The purchasers subsequently obtained and asserted exclusive possession of 3 annas 8 pies 7 krants and  $1\frac{3}{4}$  jans share; and the present suit was brought in February, 1885, by Kewal Singh, and Radhe Singh, sons, and Pohlad Singh and Girdhar Singh, grandsons of Akbar Singh, against Ram Sahai and Behari Lal the representative of Param Sukh.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the claim to the extent of awarding possession of half the property, holding that to be the amount of the plaintiffs' shares, and dismissed the claim as to the other half, with the following observations:—

"It should now be considered whether I should absolutely set aside the sale of the property in suit and give it in its entirety to [675] the plaintiffs, and confer on the auction-purchasers the right of claiming as purchasers of the rights of the plaintiffs' father, possession and partition of the rights of Akbar Singh, after returning the property in suit to the plaintiffs, or make the plaintiffs successful by conferring on them their rights only. Considering that the sale took place on the 20th March, 1873, and this suit has been instituted on the 17th February, 1885, just before the expiry of twelve years, and about eleven years after the death of Akbar Singh, justice requires that I should let the auction-purchasers remain in possession of the sold property, and assist the plaintiffs by making them successful in respect of their rights only. A great difference which exists between the well-known case of *Deendyal Lal v. Jugdeep Narain Singh* (1) and the present case is that, in the former, the suit was instituted by the sons immediately after the sale had taken place, whereas in the present case there are circumstances which, having regard to justice, do not permit that, after a lapse of twelve years, the auction-purchasers should be dispossessed and directed to bring a regular suit."

Both parties appealed from the Subordinate Judge's decree to the District Judge of Cawnpore. The District Judge dismissed the defendants' appeal. Upon the appeal of the plaintiffs, the principal part of his judgment was as follows:—

"The authorities concerned are collated and the resulting propositions are stated in *Ramphul Singh v. Degnarain Singh* (2). The present case comes under the eighth of these propositions. There was no alienation or mortgage of this property by Akbar Singh, and he alone was sued, and his right, title and interest alone passed to the purchasers. The ruling in *Ram Narain Lal v. Bhawani Prasad* (3) in no way conflicts with this

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view: *vide* the grounds set out at p. 454 of the report. The plaintiffs-appellants' case is fully established, and it is proved that the defendants, under colour of acquiring the rights and interests of Akbar Singh, have possessed themselves of property to which they have no right or title. The latest decision of the Privy Council appears to me to support the case of *Ramphul Singh v. Degnarain Singh* (1) and to be opposed to that of *Umbica Prosad Tewary v. Ram Sahay Lall* (2), both of which authorities were quoted in argument. The decree of the lower Court is modified, and the claim is decreed."

The defendants appealed to the High Court.

The Hon. *T. Conlan* and Munshi *Hanuman Prasad*, for the appellants.

The Hon. Pandit *Ajudhia Nath* (with him Mr. *W. S. Howell*), for the respondents.

The following authorities were cited, in addition to those referred to in the judgments of the Court:—*Ram Narain Lal v. Bhawani Prasad* (3), *Basa Mal v. Maharaj Singh* (4), *Balbhadar v. Bisheshar* (5), *Balbir Singh v. Ajudhia Prasad* (6), *Nanomi Babuasin v. Modun Mohun* (7), *Narasanna v. Gurappa* (8), *Jagabai Lalubhai v. Bhukandas Jagivandas* (9), and *Sakharamshet v. Sitaramshet* (10), (11).

#### JUDGMENTS.

STRAIGHT, J.—The suit to which this appeal relates belongs to a class of cases that has frequently occupied the attention of this Court upon former occasions in a somewhat different shape, and has been the subject of numerous decisions at the hands of their Lordships of the Privy Council. The plaintiffs-respondents, who are the sons and grandsons of one Akbar Singh, sue to recover from the defendants 3 annas 8 pies 7 krants and 1½ jans of the zamindari share of mauza Ririya, by a declaration that the property is the joint property of the plaintiffs and Akbar Singh, and that the defendants had obtained the share of Akbar Singh as auction-purchasers, and are entitled to the possession of his share after determination of its extent by a suit for partition. They also prayed for a decree for mesne profits to the extent of the shares sued for from rabi 1879 to kharif 1885, and they also prayed for provision to be made for future mesne profits. The circumstances out of which this suit has been brought are these:—On the 27th December, 1863, Akbar Singh, the ancestor of the plaintiffs, borrowed a sum of Rs. 99 from the defendants, and as security for that loan he hypothecated a four annas zamindari share of mauza Bhojpur. It subsequently appeared that he had no interest in, or authority to hypothecate this particular mauza or the share in it, and in consequence the defendants were constrained to bring a suit against him to recover back from him the money which, in point of fact, by fraud he had obtained a loan of from them, and on the 7th December, 1868, they obtained a decree against Akbar Singh for that amount. Apparently that decree was not perfected, so far as execution was concerned, until the 20th March, 1873, when the right, title and interest of Akbar Singh in certain properties were put up to sale, were sold, and were bought by the present defendants, the then decree-holders. There can be no question, from the terms of the decree of the 7th December,

(1) 8 O. 517.

(2) 8 O. 898.

(3) 3 A. 443.

(4) 8 A. 205.

(5) 8 A. 495.

(6) 9 A. 142.

(7) 13 I.A. 7 = 13 O. 21.

(8) 9 M. 424.

(9) 11 B. 37.

(10) 11 B. 42.

(11) See also *Pettachi Chettiar v. Sangili Veera Pandea Chinnathambiar*, 14 I.A. 84 = 10 M. 241.—REP.

1868, that it was a simple money-decree, and in clear and specific terms affecting only the judgment-debtor in the suit that had then been tried. But it is equally plain that all that was notified for sale was the right, title and interest of the judgment-debtor, and from the terms of the sale-certificate, which is the defendant's document of title, and upon which they claim the right to hold possession of the whole of the property, that is to say, including not only the share of Akbar Singh, but the interest of the plaintiff's, all that the defendants bought at the auction-sale was the right, title and interest of Akbar Singh. So that this case is distinguishable from the vast majority of cases to which I have already referred, which have been decided by this Court and by their Lordships of the Privy Council, because here there was a mortgage which turned out to be a fraudulent act of Akbar Singh, and a simple contract-debt, and simple money-decree, and a sale in specific terms of the right, title and interest of the judgment-debtor. Therefore the considerations that would arise in regard to the position and rights of an auction-purchaser at sale in execution of a decree obtained by a creditor against the father upon a mortgage made by him did not arise. And it seems to me that in this case, which relates, as I have said before, to a sale which took place in execution of a simple money-decree and to a contract made between the father and defendants out of which a loan was made to him, if the defendants in the suit that they brought to recover money from the father [678] sought to make the plaintiffs liable along with him for the amount, they should have included them in that suit as parties, and obtained a decree against them, and executed it against them. They did not do anything of the kind, and the fact remains that the decree was a simple money-decree, and what was sold, namely, the interest of Akbar Singh, was all that they are entitled to claim.

The contention for the defendants is that though that was a simple money-decree, and that though in terms nothing but the interest of the father was sold, nevertheless from the mere circumstance that he was the father, it must be assumed that the decree was made against him in his capacity of *karta*, and as such the plaintiffs are bound by that decree and the sale that took place under it.

I dissent wholly from that view, and I have, in support of the opinion I have formed, the ruling of their Lordships of the Privy Council in which judgment was delivered upon the 26th February last—*Simbhu-nath Panday v. Golab Singh* (1). As I understand it, the position in which the law now stands is this, that if a party who is in possession of property which originally belonged to the members of a joint family, of whom the father was one, can only produce as his document of title a sale-certificate showing that he bought, in the execution of a money-decree against the father only, the right, title and interest of the father, then he has bought no more than that interest, and he is liable to be compelled to restore to the other joint members of the family their interest which had not, upon the face of the sale-certificate, passed by the sale. On this their Lordships observe :—" It appears to their Lordships that in all the cases—at least the recent cases—the inquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance, but only a sale in execution of a money-decree.

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"Their Lordships are sorry that they cannot follow the learned Judges of the High Court into their examination of the vernacular petition. But they find quite enough ground in the decree to express a clear agreement with them. They conceive that when a man conveys his right and interest and nothing more, he does not, [679] *prima facie*, intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate, would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is influenced by that of the Procedure Code; but it is the instrument which confers title on the purchaser. Its language, like that of the certificate in *Hurdey Narain's* case, is calculated to express only the personal interest of Lachman. It exactly accords with the expressions used in the decree of August, 1869, founded on Lachman's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *prima facie* conclusion instead of counteracting it. For the creditor took no steps to bind the other members of the family, and the Rs. 625, which he got for his purchase appears to be nearer the value of one-sixth than of the entirety."

These observations are very explicit, and indeed only state what, as far as I am aware, has always been understood to be the legal rule of interpretation both as to sale-certificates and other documents which profess to pass particular interests. There is no specific value to be attached to the language of a sale-certificate in preference to the meaning to be attached to any other document which conveys property to the purchasers. Indeed, the facts of this case are applicable to that before us; and, taking that case and applying it, I can come to no other conclusion by the reasoning their Lordships adopted in reference to those facts, than that upon the terms of the sale-certificate, which was given as the document of title, nothing more passed to the defendants than the right, title and interest of the father. That being so, the plaintiffs were undoubtedly entitled, if they were not barred by limitation, which is not suggested, to maintain the present suit; and though they have delayed about coming into Court, it may have been that this was for want of funds, or because, as they thought, there were conflicting decisions on the point.

The only remaining question to be determined is whether the form of the decree is open to objection. It does not appear to me [680] that it is; both according to the ruling in *Deendyal v. Jugdeep Narain Singh* (1) and of *Hurdey Narain Sahu v. Ruder Perakash Misser* (2) the terms in which the decree has been prepared are strictly accurate. The plaintiffs have been declared entitled to the possession of the whole share, subject to a declaration that the defendants as the auction-purchasers of the right, title and interest of Akbar Singh, may come in and claim a partition of that share out of the joint property. That being so, this appeal fails, and is dismissed with costs.

MAHMOOD, J.—I am of the same opinion, but wish to add, as my reasons for concurring in the conclusion at which my brother Straight has arrived, that the decree of the 24th December, 1868, which resulted in the auction-sale of 1873, was a simple money-decree passed only against the father of the present plaintiffs for a liability which, from the proceedings before us, appears to have been an immoral one, because it was in

(1) 4 I. A. 247 = 3 C. 198.

(2) 11 I. A. 26 = 10 C. 626.

consequence of a breach of warranty in a mortgage-deed of 1863 that the decree was passed. To the decree itself the present plaintiffs were no parties, because they were not impleaded in the suit which resulted in that decree. But irrespective of this, the debt for which the decree was passed cannot be taken to be a debt borrowed for the purposes of the joint family, because it arose out of an action for damages in consequence of an infringement of a covenant in the mortgage-deed of 1863. To such a debt no Hindu son is liable, because such a debt is immoral, within the meaning of Hindu law.

The next question is, what did the present defendants, as a matter of fact, purchase in the execution sale of 1873? My learned brother has referred to the rule of Hindu law which is enunciated by their Lordships of the Privy Council, and which governs such cases. But in addition to what he has mentioned, I may observe that, from the admitted facts of this case, there can be no doubt that the present defendants purchased the property knowing full well that they were purchasing nothing more than the share of Akbar Singh. It is found and admitted that the annual revenue payable by this property closely approximates to Rs. 400 per annum, and taking the profits as equal to the Govern-ment Revenue, the market-value of the property would be about Rs. 6,000; calculating it at fifteen years' purchase, while the price paid by the defendants was very much less.

From these facts I deduce these conclusions:—First, that the decree of the 24th December, 1868, was a personal decree, passed against the father of the present plaintiffs, for a liability which was immoral; secondly, that the decree was never intended to render the sons liable thereto; thirdly, that the sale, which took place in consequence of that decree in 1873, was a sale professing to convey neither more nor less than the right, title and interest of the judgment-debtor, the father; fourthly, that the present defendants-appellants purchased the property at that sale, knowing full well that they were purchasing the right, title and interest of the father, and no more.

As to the other point, whether the form of the decree was right in decreeing possession of the whole, I need only read out the following from the judgment of their Lordships of the Privy Council:—"According to the judgment of their Lordships in *Deendyal's* case, the decree which ought properly to have been made, would have been that the plaintiff, the first respondent, should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perakash Misser, and was entitled to take proceedings to have it ascertained by partition."—*Hurdey Narain Sahu v. Ruder Perakash Misser* (1). I concur in dismissing the appeal with costs.

*Appeal dismissed.*

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9 A. 681=7 A.W.N. (1887) 229.

APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

BIR BHADDAR SEWAK PANDE (*Defendant*) v. SARJU PRASAD  
(*Plaintiff*).<sup>\*</sup> [3rd June, 1887.]

9 A. 681= *Principal and agent—Right of person dealing with agent personally liable—Suit and judgment recovered against agent—Subsequent suit against principal barred—Act XI of 1872 (Contract Act), s. 233.*  
7 A.W.N. (1887) 229.

The obligee under a hypothecation bond brought a suit thereon against one who upon the face of the instrument, contracted as obligor, but whom, when the [682] suit was instituted, the plaintiff knew to have acted as agent in the transaction for a third person. Having obtained a decree, he satisfied it in part by attachment of a sum of money, and next caused the hypothecated property to be sold, and purchased it himself. Upon attempting to obtain possession he was successfully resisted by the principal debtor under the hypothecation bond, on the ground that the latter was the real owner of the property, and that the decree holder had derived no title thereto from his judgment-debtor. He then sued the principal debtor to recover the balance remaining due upon the bond, after giving credit for the amount recovered by attachment in the suit against the agent.

*Held* that the plaintiff having elected to hold the agent responsible upon the contract, and having obtained judgment and decree against him and written up full satisfaction of the decree, could not afterwards maintain a suit against the principal in respect of the same subject-matter. *Priestly v. Ferris* (1) referred to.

[R., 22 A. 307 (317)]

THE facts of this case are for the most part stated in the judgments of the Court. They may be shortly summarised as follows. The plaintiff, Sarju Prasad, on the 3rd December, 1871, advanced to one Nandan Tiwari, whom he knew to be acting as agent for Bir Bhaddar Sewak Pande, a sum of Rs. 9,000 secured by hypothecation of five villages which Nandan Tiwari had purchased for his principal in execution of a decree obtained against the latter by Mewa Lal. Subsequently the plaintiff sued Nandan Tiwari to enforce hypothecation, and, Nandan Tiwari having confessed judgment, obtained a decree, in execution whereof the five villages were sold, and were purchased by the plaintiff, decree-holder, himself. Upon attempting to take possession of the villages, he was resisted by Bir Bhaddar Sewak Pande, who claimed to be the real purchaser at the sale in execution of Mewa Lal's decree; and he then brought a suit to recover possession upon the basis of the title which he had derived from Nandan Tiwari, and upon the allegation that Nandan Tiwari, and not Bir Bhaddar, was the real purchaser. That suit was dismissed by the High Court on appeal; and the plaintiff then instituted the present suit against Bir Bahaddar to recover the balance due upon the hypothecation-bond, giving credit for a sum which had been realized in execution of his decree against Nandan Tiwari, apart from the sale of the five villages.

The hypothecation-bond of the 3rd December, 1871, was in the following terms:—

"I Nandan Tiwari, son of Mehgi Tiwari, resident of mauza Basuli, tappa Kuswansi, pargana Bhuapara, zilla Gorakhpur, do hereby declare, as I, the ex-[683] outant, have purchased at auction, on the 20th November, 1871, the share of Bir Bhaddar Sewak Pande, Musammat Jacki Pandain, Satnarain Sewak Pande, judgment-debtors, situate in mauza Dhara Buzurg and Milayan Khurd and Buzurg, tappa

<sup>\*</sup> First Appeal No. 213 of 1885 from a decree of Maulvi Shah Ahmad-ulla, Subordinate Judge of Gorakhpur, dated the 9th September, 1885.

(1) 3 H. & C. 977=34 L. J. Exch. 172.

Kuswansi, pargana Bhuapara, and mauza Kewalchuck, tappa Rajdhani, pargana Haveli Gorakhpur, and mauzas Karunpur and Mundera, tappa Nagwan Bangur, pargana Silhat, which were sold in the execution of the decree of Mewa Lal Pathak and others, decree-holders, for Rs. 12,325, and have paid Rs. 3,081-4-0 as earnest money on the day of sale. Now we have borrowed Rs. 9,000 of the Company's coin, half of which is Rs. 4,500, from Babu Sarju Prasad, banker, son of Babu Rupchand, banker, resident and zamindar of mohulla Alinagar, in the city of Gorakhpur, for the payment of the balance of the sale consideration, and in lieu of it have mortgaged and hypothecated the said purchased share of the villages, i.e., 4 as. and 1 pie share of mauza Dhara Buzurg; a 5 annas share of mauza Malalun Khard and Buzurg, tappa Kuswansi, pargana Bhuapara, a 6 annas share of mauza Kewalchuck tappa Rajdhani, pargana Haveli Gorakhpur, and a 4 annas share in each of the mauzas Karunpur and Mundera, tappa Nagwan Tikar, pargana Silhat, together with all the rights appertaining thereto. I do hereby promise and give in writing, that I shall pay the said principal money with interest thereon at the rate of Rs. 1-7-0 per cent. per mensem within six months. Whatever amount on account of interest shall become due up to the date of payment of any amount shall be paid first, and the surplus will go towards the principal, and all payments shall be endorsed on this bond. If I should produce a separate receipt or allege payment on any other ground than the entry of payment endorsed on this bond, then they shall be void; should I fail to pay the whole amount or any portion of it within the fixed period the said creditor shall be competent to realize the amount due to him from the mortgaged shares of the villages, and other moveable and immovable properties as well as from the person of me, the mortgagor, and I shall make no objection in respect of it. As long as I shall not pay the whole amount of principal and interest and take back this bond, I shall not transfer the mortgaged and hypothecated shares of the villages in any way, by way of sale, mortgage or gift, &c., if I do so, the transfer shall be null and void. I also covenant that even if a suit is instituted in Court by the mortgagee, I shall continue to pay the interest at the rate of Rs. 1-7-0 promised by me up to the date of payment, without any objection. The Court of justice shall be competent to award the same against me. If any danger shall appear to the said shares of the mortgaged villages purchased by me at auction, the mortgagee shall be competent to realize the principal and interest from me the executant, and from my property, by means of legal proceedings without waiting for the expiry of the stipulated period, and I, the mortgagor, shall make no objection. I have, therefore, duly executed this mortgage deed, that it may be of use in time of need. Dated the 3rd December, 1871, corresponding with Agha Badi 6th, 1279 fasli, mohalla Alinagar, at the shop of the creditor."

The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim. The defendant appealed to the High Court.

Mr. G. T. Spankie (with him Munshi Sukh Ram, Munshi Ram Prasad, and Maulvi Medhi Hasan), for the appellant.—This [684] case is governed by s. 233 of the Contract Act. Nandan Tiwari could not deny his liability under the hypothecation bond of the 3rd December, 1871, because by the terms of that bond he made himself a party to the contract, and he could not give oral evidence to vary the effect of the written agreement by showing that he was not liable: Evidence Act, s. 92, *Higgins v. Senior* (1) *Soopromonian Setty v. Heilgers* (2). The plaintiff was therefore competent in the first instance to hold either Nandan Tiwari or the appellant or both together liable; but having made his election to sue Nandan Tiwari alone, and having pursued that suit to judgment, he cannot now proceed against the appellant, even though the judgment is not satisfied: *Priestly v. Fernie* (3), *Kendall v. Hamilton*, per Cairns, L.C. (4), and the notes to *Thompson v. Davenport* (5) in Smith's Leading Cases.

The Hon. T. Conlan and Munshi Hanuman Prasad, for the respondent.

#### JUDGMENT.

STRAIGHT, J.—In order to render intelligible the conclusions at which I have arrived with regard to this appeal, it is of importance very narrowly

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(1) 8 M. & W. 834.  
(4) 4 App. Cas. 514.

(2) 5 C. 71.

(3) 3 H. & C. 977 = 34 L.J. Exch. 172.  
(5) 9 B. & C. 78.



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to scan the terms of the plaint, and by the light of the previous litigation between the parties and the facts therein stated, to see what precisely is the form of the suit brought by the plaintiff-respondent to which this appeal relates. The facts, as set out in the plaint, are as follows :—

One Mewa Lal held a decree of the 7th December, 1864, against three persons, *viz.*, Bir Bhaddar Sewak Pande, Musammat Janki Pandain, and Sat Narain Sewak Pande, and in execution of that decree the zamindari properties of the judgment-debtors were advertized for sale to be held on the 20th November, 1871. Two days before the advertized date Bir Bhaddar Sewak Pande, the first of the above-mentioned judgment-debtors, came to the plaintiff in the present suit, and borrowed from him a sum of Rs. 5,000, for the purpose, as he said, of discharging the decree of Mewa Lal, and as security for that advance, he made a hypothecation bond in favour of the plaintiff, charging his zamindari interest in six villages, promising to pay the amount in six months, and undertaking to pay [685] interest at Re. 1-7 per cent. per mensem, or Rs. 15 per cent. per annum. On the 20th November, 1871, the sale advertized in execution of the decree of Mewa Lal took place, and the six villages, his interest in which Bir Bhaddar had already mortgaged, were sold as the property of all the judgment-debtors. One of the villages was purchased by Mewa Lal for Rs. 8,500, and the other five villages, with which we are alone concerned in the present case, were purchased by Nandan Tiwari for Rs. 12,325. How Nandan Tiwari obtained the money was this. He had apparently got sufficient to pay the earnest-money required by law to be paid in the Court at the time of sale probably out of the Rs. 5,000 lent to Bir Bhaddar, but there remained a sum of Rs. 9,000, the balance which had to be paid into Court to satisfy the amount in full at which the villages had been brought. According to the statement of the plaintiff as now made in his plaint, "Nandan Tiwari was an agent, mukhtar, friend or well-wisher of Bir Bhaddar Sewak Pande and after the aforesaid sale, at the request and desire of Bir Bhaddar Sewak Pande aforesaid, the plaintiff lent a further sum of Rs. 9,000 for the payment of the purchase-money, obtaining a hypothecation bond from Nandan Tiwari aforesaid, in whose name the property had been purchased at auction. The rate of interest agreed upon was Re. 1-7 per cent., and the money was to be repaid within six months as shown by the registered bond, dated 3rd December, 1871, which is forthcoming. The plaintiff was assured that the money borrowed was taken on security of the property, and that the execution of the bond in the name of Nandan Tiwari was necessary as a matter of form."

With regard to this paragraph in the plaint it is clear that Nandan Tiwari was, upon the face of the proceedings, the purchaser; and it is further to be taken, because the document speaks for itself, *viz.*, the document of the 3rd December, 1871, that he was the obligor upon the face of that instrument in favour of the plaintiff, and that he was, as a purchaser of the five villages, hypothecating them to the plaintiff for the amount of the advance made to him. It must be further taken as a fact in the cause, because it is indisputable that the fact is so, that the plaintiff was well aware that though upon the face of it Nandan Tiwari was the agent for Bir Bhaddar in the transaction, Bir Bhaddar was the principal [686] borrower, and that the transaction was conducted by Nandan Tiwari for and on his behalf as his agent. It appears that after the purchase by Nandan Tiwari, under the circumstances I have stated, one or two suits were brought by members of the family of Bir Bhaddar, who had not been parties to the decree of Mewa Lal, and they recovered from

Nandan, the auction-purchaser of the five villages sold, to the extent of their share or shares therein, with the result that the sum of Rs. 6,136-8-0 had to be refunded to Nandan, and was held by the Court to his credit in respect of the execution sale at which he had purchased. Babu Sarju Prasad, the present plaintiff, on the 12th February, 1874, brought a suit against Nandan Tiwari on the bond of the 3rd December, 1871, and he claimed under that, for principal and interest due, a sum of Rs. 12,514, and he obtained a decree against Nandan for that amount, by enforcement of the hypothecation of the five villages contained in the bond, on 28th March, 1874. Almost immediately after he had obtained that decree, he made an application for the attachment of the Rs. 6,136-8-0 which had been refunded to Nandan, and on the 3rd May, 1874, he took that particular sum of money out of Court, so that his decree upon the bond of the 3rd December, 1871, was *pro tanto* satisfied, and satisfaction to that extent was entered up. Having so far satisfied his decree, which left a balance of some Rs. 6,000 and odd, he proceeded to enforce it by sale of the hypothecated villages, and on the 20th August, 1874, he purchased those villages for the sum of Rs. 8,320; that is to say, he paid something in excess of the balance of the judgment-debt due, with the consequence that such excess went into the pocket of Nandan Tiwari, the judgment-debtor.

Then came the difficulties of the plaintiff. He applied for mutation of names, and he sought to obtain actual possession of the properties that he had purchased. He was then resisted by Bir Bhaddar and Sat Narain upon the ground that Bir Bhaddar was the real purchaser of the five villages at the execution sale of the 20th November, 1871, and that Nandan Tiwari was a mere *ismfarzi*. The opposition on the part of Bir Bhaddar was successful, and we may take it that the plaintiff has never obtained possession of the villages which he bought on the 20th August, 1874. In consequence of the opposition that had been thrown in his way by Bir [687] Bhaddar, the plaintiff, upon the 28th May, 1880, brought a suit against Bir Bhaddar and Sat Narain for possession of the villages he had bought for Rs. 8,320, and of course the title upon that occasion he was constrained to rely upon, was the title which he had acquired through Nandan Tiwari, and it was obviously necessary, for the purposes of that suit as brought, for him to establish that Nandan was in fact the real purchaser of the property, and that by reason of that circumstance he had acquired a proprietary title thereto. That suit ultimately ended in an appeal in this Court, and this Court held that, upon the evidence of the plaintiff himself given in that case, it was obvious that he knew perfectly well that Nandan was a mere agent in the transaction, that he was not the real purchaser at all, but that Bir Bhaddar was the real purchaser; and accordingly this Court held that the plaintiff's suit failed, and accordingly dismissed it.

Now the plaintiff comes into Court, and it is not very easy to understand what is the precise nature of the suit that he brings. Perhaps the most convenient way of presenting it is to read the relief sought. The 11th paragraph of the plaint recites:—"That under the bond, dated 3rd December, 1871, after deducting the sums realized, Rs. 7,518-3-0 principal and Rs. 4,818-0-6 interest, total Rs. 12,336-3-6, are due to the plaintiff as detailed at foot. As Bir Bhaddar Sewak Pande himself borrowed the money, though the second bond was taken at this desire and request in the name of Nandan Tiwari, and as the amount of both the bonds was advanced on the security of the property, which eventually, by a decree of the Court, has, by admitting the objection of Bir Bhaddar Sewak

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Pande, been declared to be Bir Bhaddar's property, he (Bir Bhaddar) cannot escape the liability to pay the debt. The property which he has acquired is chargeable with the debt due to the plaintiff by reason of its hypothecation in the two bonds and the conduct of the said defendant, and also because he (Bir Bhaddar Sewak Pande), defendant, has obtained it with the help of the money advanced by the plaintiff. Bir Bhaddar Sewak Pande failed to pay the money notwithstanding repeated oral demands and the notice given by means of a registered letter, dated 24th December, 1883, in which he was asked to pay the money. The cause of action as against Bir Bhaddar Sewak Pande arose on [688] the date of the decision of the High Court. The plaintiff therefore asks for the following reliefs:—1. That Rs. 7,518-3-0 principal and Rs. 4,818-0-6 interest, total Rs. 12,336-3-6, be awarded to the plaintiff from Bir Bhaddar Sewak Pande, defendant, with future interest to the date of payment. 2. That the sums mentioned above may be decreed against Bir Bhaddar Sewak Pande aforesaid personally, and also against the property hypothecated in the bond." And then it goes on to set out what the amount is, and the interest is calculated, at the rate of 8 annas per cent. from the 29th March to the 3rd May, 1874, and then Rs. 6,136-8-0, which was realized on the 3rd May, 1874, is deducted, leaving a balance of Rs. 7,518-3-0, and then interest is calculated on it from the 4th May, 1874, to the 9th January, 1885, at 8 annas per cent: total Rs. 12,336-3-6.

Now, it is obvious from what I have said that the only security which the plaintiff had for the advance made by him for the purpose of the purchase of the 20th November, 1871, was the bond executed in his favour by Nandan Tiwari upon the 3rd December, 1871. It was only under that instrument that any hypothecation was made or subsisted. I have said that Nandan Tiwari was treated as an agent, in the transaction, for and on behalf of Bir Bhaddar Sewak Pande, and I have also said that the plaintiff was well aware that he was not the principal in the transaction, but that the principal was Bir Bhaddar. That being so, what was the course he ought to have adopted, and what is the course in law he should have adopted in order properly to protect himself? I believe this to be a sound principle of law, that if a person enters into a contract with another, believing him to be the principal in the transaction, though in fact that other is acting as an agent, but subsequently discovers who the real principal is, even though he may first have given credit to the party who subsequently turns out to be an agent, he may nevertheless, upon discovering who the principal is, substitute him as his debtor. I believe it also to be the rule of law that in a case like the present, where the agent and the principal were perfectly well known to the plaintiff, he might have made one or the other or both of them responsible. But I understand it to be equally clear that when once the creditor has elected as the plaintiff did elect in the [689] present case, to hold the agent as responsible upon the contract, to take him into Court, and having obtained judgment and decree against him, to execute such decree and write up satisfaction thereof, it is not competent afterwards for him to maintain a suit against the principal in respect of the same subject-matter. My authority for this proposition is to be found in the case of *Priesly v. Fernie* (1), and it is based upon the principle which is discussed at large in the notes to *Thompson v. Davenport* (2).

(1) 3 H. & C. 977=34 L. J. Exch. 172.

(2) 9 B. & C. 78=Smith's L. C., Vol. II, 390.

In the present case it is to be noted that the plaintiff gives as his cause of action the decision of this court in the suit which he brought against Bir Bhaddar and Sat Narain for possession under the title which he asserted he had acquired by his purchase at the sale in execution of the decree against Nandan Tiwari. But as I have said before, the only document of title with which he had to bring the property to sale was the bond executed by Nandan Tiwari. If he had chosen when he put that instrument in suit in the first instance, to include Bir Bhaddar as a defendant, I think it would have been perfectly competent for him to show that Bir Bhaddar was the real principal in the transaction, and that Nandan Tiwari was merely an agent. But he did not do that; he chose to confine his proceedings solely and entirely to Nandan Tiwari, and to treat Nandan Tiwari as the party who was responsible to him upon that document. Having done that, and having not only obtained a decree, but having written up full satisfaction of that decree, it seems to me that that bond of Nandan Tiwari, which was the sole document entitling him to enforce hypothecation, has been merged in that decree, and as that decree was a decree against Nandan Tiwari alone, he can, out of that decree and out of that hypothecation which was merged in that decree, have no right whatever to come into Court and ask the relief which he does in the present case.

Indeed it is to be observed that the plaintiff in the plaint, treating the bond as partly satisfied in execution of the decree of Nandan Tiwari, namely, to the extent of Rs. 6,136-8-0, and giving credit for that amount obtained from Nandan Tiwari, comes in now and asks for the balance, with the interest calculated at a totally [690] distinct and different rate from that mentioned in the bond, and asks to bring the property to sale for such balance and altered interest. But I am unaware of any legal ground upon which, under the circumstances, such a claim can be sustained. No doubt, at first sight, it did strike one as somewhat inequitable that Bir Bhaddar should hold the property which he had purchased with the plaintiff's money, but the plaintiff has no one but himself to blame for having elected to bring his suit against Nandan Tiwari and to treat him as his debtor.

For the reasons stated I am of opinion that the suit was unmaintainable, and the Subordinate Judge's decision being reversed, the appeal is decreed with costs, and the suit of the plaintiff will stand dismissed with costs.

TYRRELL, J.—I concur.

*Appeal allowed.*

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## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*BANWARI DAS (Plaintiff) v. MUHAMMAD MASHIAT AND OTHERS  
(Defendants).\* [10th June, 1887.]

9 A. 690= Practice—Suit on mortgage by mortgagee purchasing part of the property ismfarzi—  
 7 A.W.N. Suit dismissed as brought with liberty to bring fresh suit—Non-suit—Civil Procedure  
 (1887) 254= Code, s. 373—Bond—Breach—Interest—Penalty—Act IX of 1872 (Contract  
 12 Ind. Jur. Act), s. 74.—Estoppel—Mortgage—Prior incumbrancer bidding at auction-sale in  
 192. execution of decree and not announcing his incumbrance—Sale by first mortgagee  
 in execution of decree upon second mortgage held by him—Interest acquired by  
 purchaser at such sale—Sale of portions of mortgaged property—Mortgagee not  
 compelled to proceed first against unsold portions—Enforcement of mortgage against  
 purchaser not having obtained possession.

Where a suit for enforcement of hypothecation against immoveable property was dismissed "in the form in which it was brought," and "with permission to bring a fresh suit," on the ground that the plaintiff, by purchasing a part, had put it out of his power to sue for relief against the whole, of the hypothecated property,—*held*, that the decree being in effect one of non-suit, which no Court in India had power to make, and not being made under s. 373 of the Civil Procedure Code, and the plaint not having been returned or rejected under Chapter V of the Code, the decision must be set aside. *Watson v. The Collector of Rajshahye* (1) and *Kudrat v. Dinu* (2) referred to.

A bond by which immoveable property was hypothecated provided for interest at 13½ per cent. and contained a condition that if the principal with interest [691] were not paid within one year, 27 per cent. should be paid as interest as from the date of the bond.

*Held*, that the question to be determined with reference to this condition was whether the parties intended to contract that, on failure by the mortgagor to pay within the stipulated time, 27 per cent. should be payable *qua* interest from the date of the bond, or whether they intended that the condition should be regarded merely as providing for a penalty, leaving the amount of compensation for non-payment at the stipulated time to be determined, in case of dispute, by the Court.

*Held*, that the condition would not in itself be an unreasonable one under the circumstances, that the parties contracted that the 27 per cent. should be payable *qua* interest, and that interest at that rate must therefore be allowed. *Wallis v. Smith* (3) referred to.

At a sale in execution of a decree for enforcement of a hypothecation-bond the decree-holder, by permission of the executing Court, made *bids*, but the property was purchased by another. At that time the decree-holder held a prior registered encumbrance, which he did not personally announce. In a suit brought by him subsequently to enforce this encumbrance, it was contended on behalf of the auction-purchaser that he was estopped by his conduct from setting it up as against her.

*Held*, that there was no estoppel; that under s. 114 of the Evidence Act the Court was entitled to presume that the provisions of s. 287 (c) of the Civil Procedure Code had been complied with, and that consequently the notification of sale disclosed the existence of the encumbrance now sued upon; that the plaintiff was entitled to assume that intending purchasers would read the notification or search the register for the purpose of ascertaining what was the property being sold; and that his rights were not affected by his not having personally announced his encumbrance, nor could it be said that solely by bidding at the sale he had encouraged the purchaser to buy. *Mackenzie v. British Linen Co.* (4) and *Gheran v. Kunj Behari* (5) referred to.

\* First Appeal No. 101 of 1886 from a decree of Maulvi Zain-ul-abdin, Sub ordinate Judge of Moradabad, dated the 9th March, 1886.

(1) 13 M.I.A. 160.

(2) 9 A. 155.

(3) 21 Ch. D. 242.

(4) 6 Ap. Cas. 82.

(5) 9 A. 413.

*Held*, also that it could not be said that under the circumstances the plaintiff must be taken to have sold, in execution of his decree, the interest which he held under the bond now in suit; that he could not be compelled to proceed first against those portions of the mortgaged property which had not been sold; and that the bond was enforceable against a purchaser of part of the mortgaged property who had never obtained possession.

[F., 17 A. 434 (435); Rel. on, 17 Ind. Cas. 936 (938); 16 C.L.J. 404; Ap., 15 A. 232 (242); R., 11 A. 187 (189); 10 C. 97 (99); 11 A. 57 (66); 25 M. 343 (346)=11 M.L.J. 421 (422); 13 M.L.T. 20 (44)=24 M.L.T. 135; 18 Ind. Cas. 417=36 M. 229; Expl., 15 M. 412 (413).]

THE plaintiff in this case, Banwari Das, sued to enforce the lien created in his favour by the following bond, which was executed on the 15th and registered on the 19th September, 1874:—

"We, Muhammad Mashiāt Ali and Muhammad Yahiya, sons of Sheikh Najaf Ali, deceased, and residents of kasba Nagina, Zila [692] Bijnour, do hereby declare that we have borrowed Rs. 3,000 of the Queen's coin, half of which is Rs. 1,500, as per following detail:—Rs. 2,413-7 were due from us on account of the principal and interest of four former bonds—(1) dated the 29th July, 1870, (2) dated 2nd August, 1871, (3) dated 22nd August, 1873, and (4) dated 13th March, 1874, besides the former notes of hand, and Rs. 586-9 received in cash at present. The said entire sum of Rs. 3,000 is due from us, the executants of this bond, to Lala Banwari Das, son of Munsekh Rai, deceased, caste Mahajan Agarwala, and resident of the said kasba Nagina. Therefore we do hereby promise that we shall pay the said sum with interest thereon at the rate of Re. 1-2 per cent. per mensem to the said Lala Sahib within one year, and shall make no objection. If, according to the condition agreed upon between the parties, we fail to pay the said money within one year from its expiry to the said Lala, we shall hypothecate any of our zamindari and malguzari property to the said Lala Banwari Das, creditor, and cause mutation of names to be effected in respect of it. If we fail even to mortgage the property, we shall pay at the end of Jaith of the year whatever amount shall be found due, with interest at the rate of Re. 1-2 per cent. per mensem at the end of the year, and if we fail even to pay the interest which falls due at the end of the Jaith of a year, we shall pay to the said Lala Sahib interest on the whole amount aforesaid at the rate of Rs. 2-4 per cent. per mensem from the date of the execution of this bond up to the date of realization, without any objection or dispute. For the satisfaction of the said Lala Sahib we do hereby mortgage and hypothecate in this bond, according to the detail given below, the entire 20 biswas of Abdullabad, pargana Badhpura, and of mauza Malackpur, pargana Nagina, zila Bijnour, the property of me, Muhammad Mashiāt Ali, the executant of this bond, and 5 biswas of mauza Takmapur Harbans, 10 biswas of Husainalipur Mathra, the rights and interests in 10 biswas of mauza Bibaripur, pargana Nagina, zila Bijnour, and 2½ biswas of mauza Barkatia, pargana Badhpura, tahsil Nagina, the property of me, Muhammad Yahiya, the other executant of this bond, with the covenant that as long as the said money shall not have been paid in full to the said Banwari Das, we shall not in any way transfer the property to any one else by way of sale, mortgage or gift, and that, if we do so, it shall be [693] considered void. If by some unforeseen circumstances the property mortgaged and hypothecated in this bond meet with any calamity, the said Lala will be competent to realize his money from our other moveable and immoveable properties, and we shall make no objection. If we plead payment orally, or by means of Hindi or Persian notes of hand or under

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account books, without having it endorsed on the bond, or if we claim reduction in the amount of interest, or make an application for instalments, &c., in a competent Court, they shall not be deemed to be capable of being entertained by the Court."

On the 18th September, 1874, the same mortgagors executed in favour of the plaintiff a second bond, by which they hypothecated (with other property) the same 5 biswas share in mauza Takhmapur which was included in the previous bond. Subsequently the plaintiff having obtained a decree upon this second bond, the property hypothecated therein was attached and sold in execution, the purchaser being one Abid Ali, as agent for Musammat Miriam-un-nissa, for Rs. 1,300. The plaintiff by permission of the Court executing the decree made bids through his son Naubat Rai; and it did not appear whether or not he personally made any statement regarding the mortgage created in his favour by the deed of the 15th September, 1874. On the 15th December, 1881, the property was conveyed by Muhammad Yahiya, acting as the agent of Miriam-un-nissa, to one Musammat Begami, under a registered deed of sale.

On the 17th March, 1883, two sale-deeds were executed by the mortgagor, Muhammad Yahiya, the first in favour of one Muhammad Fazl Ilahi, for Rs. 1,000, in respect of the ten biswas share in Biharipur, and the second in favour of Naubat Rai, son of the plaintiff, for Rs. 2,400, in respect of the ten biswas share in Husainalipur Mathra. Both deeds were duly registered. The former of them purported to be signed by the plaintiff as one of the witnesses. Of the remainder of the property included in the bond of the 15th September, 1874, the 20 biswas of Abdullabad was purchased by one Bihari Lal (who, however, did not obtain possession), the 2½ biswas in Barkatia by Parshadi Lal, and 3 out of the 20 biswas of Malakpur by Shafkat Ali.

The present suit was instituted on the 25th April, 1885, in the Court of the Subordinate Judge of Moradabad; and both the [694] mortgagors under the deed of the 15th September, 1874, and all the transferees above mentioned were impleaded as defendants. The plaint, after reciting the terms of the covenant that, in the event of failure to pay the principal money within one year, the mortgagors should pay interest at Rs. 2·4 per cent. per mensem, alleged that payment of the principal had not been made as agreed, and claimed interest accordingly at twenty-seven per cent. per annum as from the date of the bond. It further gave credit for a sum of Rs. 1,126 which had remained in the plaintiff's hands on account of interest.

The defendants raised a variety of pleas, such as payment and others which need not here be referred to more particularly, and the principal of which are stated and discussed in the judgment of the High Court. One of them was that the plaintiff himself was the real purchaser (*ismfarzi*) under the deed of sale executed on the 17th March, 1883, by Muhammad Yahiya, ostensibly in favour of Naubat Rai, in respect of the 10 biswas share in Husainalipur Mathra. In regard to Fazl Ilahi's purchase under the sale-deed of the same date of the 10 biswas in Biharipur, it was contended that the plaintiff, by the attestation of that deed, and by omission to announce at that time the incumbrance held by him, was estopped from enforcing the present claim against the interest which Fazl Ilahi then acquired. Upon this point, the plaintiff in cross-examination specifically denied that the signature upon the deed of sale which purported to be his had in fact been affixed by him.

The Subordinate Judge fixed issues, heard evidence on both sides, and, after discussing the evidence, dismissed the claim "as brought," upon grounds which he stated as follows:—

"The plaintiff has impleaded his son Naubat Rai in this case, and notwithstanding that he has obtained an *ismfarzi* sale-deed, dated the 17th March, 1883, in respect of 10 biswas of Husainalipur from Muhammad Yabiya, one of the executants of the bond, in favour of his son, Naubat Rai, he has prayed in his plaint for enforcement of hypothecation against this 10 biswas of Husainalipur Mathra (hypothecated). He has, however, said clearly in his deposition of the 24th February, 1886, that he would not realize any part of the amount claimed in this suit from the hypothecated 10 [695] biswas sold to his son, Naubat Rai, or from Naubat Rai himself; and that on the contrary, he would realize it from other property of Muhammad Yabiya. This sworn statement of the plaintiff, as well as his entire deposition and the evidence on the record, show that 10 biswas of Husainalipur Mathra, out of the property hypothecated in the bond, has been purchased by himself in the name of his son, Naubat Rai, and that he wishes to exempt it from all liability. He should therefore, after making deduction of so much of the lien as would be proportionately chargeable in the 10 biswas share of Husainalipur, and which he does not wish to realize from the said property, claim the enforcement of the remaining lien against the remaining hypothecated property. The claim, as brought by him, cannot be entertained and adjudicated upon. This Court is of opinion that it is proved beyond any doubt from the entire evidence on the record that on the 17th March, 1883, the plaintiff obtained the sale-deed in respect of the 10 biswas of the village Husainalipur Mathra in favour of his son, and that on the same date the sale-deed of the 10 biswas of Biharipur was executed in the name of Fazl Ilahi, defendant, with the knowledge and consent of the plaintiff, and without a declaration of the hypothecation in the bond sued on.....The signature of the plaintiff written in the margin of the sale-deed executed in favour of Fazl Ilahi does not appear to be forged. Thus both these properties (one having been purchased by the plaintiff fictitiously in the name of his son, and the other caused by him to be purchased by Fazl Ilahi in ignorance of his lien under the bond, under a sale-deed witnessed by the plaintiff himself) have been exempted from liability by the plaintiff's own act, and the plaintiff's lien under the bond sued on, so far as it was chargeable on these two properties previous to their transfer, has been destroyed, and therefore the plaintiff's claim as against the 10 biswas of Husainalipur and the 10 biswas of Biharipur, and against Fazl Ilahi, one of the contending defendants, and Naubat Rai, defendant, the plaintiff's son, who, in collusion with him, has kept quiet, must totally fail. As against the other property and the other defendants, the plaintiff's claim as brought must be dismissed."

The Court was of opinion that all the defendants, except Fazul Ilahi ("against whom the plaintiff's claim has been totally dis-[696]missed") should bear their own costs, as, against them, "the plaintiff's claim as brought is dismissed without a finding on the other objections set up by them, with permission to bring a fresh suit in the absence of a legal bar." In the decree it was ordered (after dismissing the plaintiff's claim "as brought, without an adjudication on the other points") "that the plaintiff shall have a right, in the absence of any legal bar, to bring a fresh suit, after deducting the lien proportionately chargeable on the 10

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- 1887 biswas of Husainalipur Mathra and the 10 biswas of Biharipur which  
 JUNE 10. have been hypothecated.”
- The plaintiff appealed to the High Court on the following grounds :—
- APPEL- “1. Because there is no bar to the entertainment of the suit in the  
 LATE present form.
- CIVIL. “2. Because the lower Court has erred in ruling that the plaintiff is  
 --- the purchaser of the 10 biswas of Husainalipur which have been conveyed  
 9 A. 690= to the plaintiff's son under the deed dated the 17th March, 1833.
- 7 A.W.N. “3. Because the lower Court has erred in exempting the 10 biswas of  
 (1887) 254= Biharipur purchased by Fazl Ilahi, defendant, from the plaintiff's claim.”
- 12 Ind. Jur. The defendants (other than Fazl Ilahi) filed objections under s. 561  
 192. of the Civil Procedure Code to that part of the Subordinate Judge's decree  
 which ordered that they should bear their own costs.

During the hearing of the appeal Kunwar *Shivanath Sinha* having informed the Court that the respondent Bihari Lal had died on the 11th August, 1886, after the filing of the appeal, the Court, under s. 368 of the Civil Procedure Code, and on the application of the Hon. Pandit *Ajudhia Nath* for the appellant, passed an order substituting the legal representatives of the deceased as respondents.

The Hon. *T. Conlan* and the Hon. Pandit *Ajudhia Nath*, for the appellant.

Mr. *Amir-ud-din*, for the respondents *Mashiat Ali* and *Begami*.

Kunwar *Shivanath Sinha*, for the representatives of the respondent *Bihari Lal*.

[697] Pandit *Sundar Lal*, for the respondents *Fazl Ilahi* and *Shafkat Ali*.

*Babu Jogindro Nath Chaudhri*, for the respondent *Parshadi*. The respondents *Muhammad Yahiya* and *Naubat Rai* did not appear either personally or by counsel or pleader.

#### JUDGMENT.

EDGE, C.J. (TYRRELL, J., concurring)—The appellant's suit was dismissed by the Court below on the preliminary ground that it must fail in the form in which it was brought, the Judge holding that the plaintiff by buying part of the property mortgaged to him had put it out of his power to sue for relief against the whole property mortgaged. Ordinarily we should have remanded the case under s. 562 of the Code of Civil Procedure for trial on the merits according to law. But we are precluded from this course because we find that the parties were not by the action of the Judge precluded from giving such evidence as they considered necessary, but on the contrary elected to stand on the evidence which had been recorded and to give no further evidence. The decision arrived at by the Subordinate Judge has not excluded evidence in the sense of that section.

That decision is clearly unsustainable. No Court in India has the power to make such a decree as the one before us, which is in effect a decree of non-suit. It was not made under s. 373 of the Code of Civil Procedure, nor was the plaint returned or rejected under Chapter V of the Code. These are the only provisions which justify a procedure analogous to a decree of non-suit. The decision of the Judicial Committee of the Privy Council in *Watson v. The Collector of Rajshahye* (1) and our ruling in *Kudrat v. Dinu* (2), are authorities in point. That decree must be set

(1) 13 M.I.A. 160.

(2) 9 A. 155.

aside, and we must proceed to try this appeal and the issues on the materials before us.

The bond on which the plaintiff sued was dated the 15th September, 1874. Subsequently to the making of that bond the mortgagors assigned a portion of the property, and other portions of property were sold in execution of a decree obtained by the plaintiff on a hypothecation bond, dated the 18th September, 1874. On the hearing of the appeal Pandit *Ajudhia Nath* consented on behalf of [698] the appellant that in the event of the appeal being allowed, the property in Husainalipur Mathra should have allocated to it a proportionate share of the debt and interest claimed, and that the burden to be thrown on the other property in suit should, to that extent, be diminished. He also consented, not as a matter of right but of grace and to save argument, that the Court should apportion the remainder of the amount to be decreed amongst the other properties in suit. This consent has considerably cleared the ground. The first defence raised by the respondents depended on an allegation of payment. It is admitted that there is no evidence to prove that allegation, and as that was a defence which it was for the defendants to make out, we may say no more than that there is no evidence in support of it. Another point was raised and contended for on behalf of all the respondents who were represented before us, namely, that the provision in the bond to the effect that if the principal debt was not paid within one year 27 per cent. should be paid as interest as from the date of the bond, was a provision to be regarded as providing for a penalty, and consequently that the plaintiff was not entitled to interest but only to compensation to be settled by the Court for the non-payment of the principal within the stipulated time. In support of the contention that we should regard the provision as to the 27 per cent. interest as a provision for a penalty, the following authorities were cited by Pandit *Sundar Lal*:—*Kharaj Singh v. Bholo Nath* (1), *Muthura Persad Singh v. Luggun Koor* (2), *Mackintosh v. Crow* (3) *Kunj Behari Lal v. Gulab Singh* (4), *Ram Lal v. Sada Sukh* (5), and *Shirekulu Timapa Hegda v. Mahabhya* (6). On this point Anson on Contracts (2nd ed.), p. 252, was also referred to. Pandit *Sundar Lal*'s arguments on this point were adopted by those who represented the other respondents who appeared. In support of the contrary contention of the appellant, that we should infer that the parties intended to contract that the 27 per cent. should be regarded and paid as interest and should not be considered as a penalty, the following authorities were cited before or were referred to by us: *Sham Lal v. Banni Begam* (7), *Chhab Nath v. Kamta Prasad* (8), [699] *Maya Ram v. Naubat* (9), *Darjan Singh v. Muhammad Abdul Ali Khan* (10), *Rai Balkishen Das v. Raja Run Bahadur Singh* (11), *Wallis v. Smith* (12), and *Herbert v. Salisbury and Yeovil Railway Company* (13).

We are of opinion that the cases relied upon on behalf of the appellant establish the principle that what we have to consider is whether the parties to the bond of the 15th September, 1874, intended to contract and contracted that on failure of the mortgagors to pay within the stipulated time, 27 per cent. should be payable *qua* interest from the date of the

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(3) 9 C. 689.

(5) A. W. N. (1884) 280.

(7) A. W. N. (1882) 95.

(9) A. W. N. (1885) 62.

(11) 10 J. A. 162=10 C. 305.

(13) L.R. 2 Eq. 212.

(2) 9 C. 615.

(4) A. W. N. (1884) 105.

(6) 10 B. 435.

(8) 7 A. 333.

(10) A. W. N. (1886) 31.

(12) L.R. 21 Ch. D. 243.



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bond, or intended that the provision as to the 27 per cent. should be regarded merely as providing for a penalty, leaving the amount of compensation or damages for the non-payment of the principal at the stipulated time to be ascertained and decided in case of dispute by a Judge or a jury. We may say that it appears to us that the stipulation as to the payment of the 27 per cent. interest would not in itself be an unreasonable one under the circumstances. In our opinion the case of *Rai Balkishen Das v. Raja Run Bahadoor Singh* (1), referred to above is a direct authority to show that there is no such rule of law as that which was enunciated in the passage from the judgment in *Muthura Persad Singh v. Luggun Koor* (2), which has been relied upon on behalf of the respondent. That passage is as follows: "But where, as here, an increased rate of interest from the date of the bond is made payable on default, we cannot regard it in any other light than as a sum named in the contract to be paid in case of breach, within the meaning of s. 74 of the Contract Act."

We thoroughly agree with the opinion expressed by the late Master of the Rolls, Sir George Jessel "in his judgment in *Wallis v. Smith*, where he said:—"I have always thought and still think, that it is of the utmost importance as regards contracts between adults, persons not under disability and at arms length, that the Courts of law should maintain performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges [700] know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character."

Most of the English authorities on the question as to when stipulations may be treated as stipulations for penalties were considered by Sir George Jessel in his judgment in that case. We are of opinion that the parties to the bond in questions did intend to contract and did by the bond contract that the 27 per cent. should be payable and paid *qua* interest.

Consequently we hold that the plaintiff's claim for interest at the rate of Rs. 27 per centum per annum must be allowed.

We can see nothing unreasonable in a man who is asked to lend his money on the security of landed property saying to the would-be borrower, "You can have the loan on the terms that if you repay it within one year you shall pay interests at the rate of 13½ per centum per annum, but if you do not repay the principal with interest within the year you shall pay interest as from the date of the bond at the rate of 27 per cent. per annum."; nor do we see anything unreasonable in the borrower agreeing to accept the loan on those terms. The borrower is under no compulsion to borrow the money from the particular lender, but if he does agree to accept it on the terms stipulated for by the lender, he and his assigns must, if there is no fraud and nothing illegal or obviously unconscionable in the transaction, abide by the contract. Equity does not relieve a borrower from the performance of his contract on the mere ground that his contract was a foolish one or on the ground that he might have made a contract more advantageous to himself by applying elsewhere.

Mr. *Sundar Lal* on behalf of *Fazl Ilahi* contended, in addition to the other points raised by him, that the plaintiff was estopped, so far as *Fazl Ilahi* was concerned, because he had witnessed the execution of the sale-deed dated the 17th March, 1883. The plaintiff denies that he witnessed that sale-deed. That the sale-deed was witnessed in the ordinary way

was not attempted to be proved. The evidence shows not that the alleged witnesses were present at the execution of the deed, but that at some subsequent date they, on the representation that Muhammad Yahiya, one of the mort-[701]gagors, had executed the deed, affixed their signatures as witnesses to the execution of the deed.

This point of Mr. *Sundar Lal* raised questions of law and issues of fact. We have very great doubt that Banwari Das, the plaintiff, ever put his signature to that deed. We are not satisfied that he did so. It is not proved or contended that if he did put his signature to that deed, he was present at the execution of that deed, and even if he had witnessed the execution of the deed there is not a tittle of evidence to show that the plaintiff represented before the contract of sale was completed that the property was not incumbered, nor is there any evidence to show that Fazl Ilahi believed or acted on any such alleged representation. For these reasons we think that that point of Mr. *Sundar Lal* fails.

Mr. *Amir-ud-din*, on behalf of Musammat Begami, further contended that the plaintiff could not have recourse to the property which she had purchased. The facts upon which that contention was based are as follows: The plaintiff had obtained a decree upon a bond dated the 18th September, 1874, and under that decree he caused the property which was subsequently purchased by Musammat Begami to be put up for sale. The plaintiff obtained permission to bid at the sale, and was in fact a bidder through his son, Naubat Rai. At the sale, the property was purchased by Abid Ali, apparently for Fazl Ilahi and Musammat Imam-un-nissa.

The plaintiff did not, as far as we know, personally announce that the property was subject to a prior incumbrance.

In the order sanctioning that sale, it was stated that Abid Ali had purchased the properties in question for Fazl Ilahi and one Musammat Imam-un-nissa. On the statement of Fazl Ilahi and Musammat Imam-un-nissa that Musammat Miriam-un-nissa, was the real purchaser, her name was entered on the register. Musammat Begami purchased subsequently from Musammat Miriam-un-nissa. Muhammad Yahiya, the mortgagor, acted in that sale as the agent of Musammat Miriam-un-nissa. On these facts Mr. *Amir-ud-din's* argument on this point was based, and in support of that argument he cited *Mackenzie v. British Linen Co.* (1), and the notes to *Le Neve v. Le Neve* in White and Tudor's Leading [702] Cases in Equity, 1872, at page 49. His client's case was that the plaintiff was estopped from setting up his mortgage as against Musammat Begami. It was not attempted to be shown that the provisions of s. 287 of the Code of Civil Procedure had not been complied with. We assume that the provisions of that section had in fact been complied with. Under s. 114 of the Indian Evidence Act we are entitled to make this assumption. If we are correct in making this assumption, the fact of the existence of the prior mortgage of the 15th September, 1874, now sued on, was disclosed by the notification of sale, and must have been known to any one who cared to enquire. The price at which the property was sold indicates that the bidders at the sale were aware that it was encumbered, and that what was being sold was in fact the equity of redemption. We consider that the plaintiff's rights were not affected by his not having personally given notice at the sale of his prior incumbrance, if in fact he gave no such notice. He was, we think, entitled to assume that the

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intending purchasers would take the ordinary precaution, by reading the notification of sale or searching the register, of ascertaining what was the property being sold. As was pointed out in the judgment in *Gheran v. Kunj Behari* (1) it cannot be said that one person solely by bidding at an auction-sale encouraged another person to buy. There is no proof here that Musammat Miriam-un-nissa or Musammat Begami believed or acted upon any representation of the plaintiff. In fact there is no proof that the plaintiff made any representation whatever. If Musammat Begami intended to rely upon facts which would have constituted an estoppel, it was for her to prove those facts. She has not done so, nor has she attempted to do so. The cases cited by Mr. *Amir-ud-din* on this point have no bearing on the facts before us.

Mr. *Amir-ud-din* also contended that the plaintiff by causing the auction-sale to be carried out under the decree, sold not only the judgment-debtor's interest, but also all the interest which he, the plaintiff, had in the property. This may no doubt be true so far as the plaintiff's interest under the mortgage-bond of the 18th September, 1874, was concerned, as it was in execution of the decree obtained on that bond that the plaintiff brought the judg-[703]ment-debtor's interest to sale. It is not necessary to consider that point. We know of no authority to show that under the circumstances in this case the plaintiff must be taken to have sold the interest which he had under the prior bond of the 15th September, 1874, and we are of opinion that Mr. *Amir-ud-din's* contention on this point cannot be supported. Musammat Begami purchased only the interest which Musammat Miriam-un-nissa had bought. She could by examining the register have ascertained what the title was. Mr. *Amir-ud-din* also contended that the plaintiff could not maintain this action, on the ground that there was still a sum of Rs. 1,125 portion of the mortgage-consideration unpaid to the mortgagors. On investigation, it appears that this sum of Rs. 1,125 is a portion of the sum of Rs. 1,126 for which the plaintiff has given credit in account at the end of his claim, and that it remained in his hands on account of interest.

In any event, Muhammad Mashiat Ali, one of the mortgagors, for whom and Musammat Begami Mr. *Amir-ud-din* appears, made no point as to this sum of Rs. 1,125 beyond alleging that it was held by the plaintiff on deposit and claiming that credit should be given for it, which has been done by the plaintiff. As a matter of fact, instead of Mr. *Amir-ud-din's* clients having been damaged by the Rs. 1,125 not having been actually paid over but only credit having been given for it, Mr. *Amir-ud-din's* clients will be benefited by their properties having to contribute a smaller sum than would otherwise have to be provided for. Mr. *Chaudhri* on behalf of Parshadi Lal contended that the plaintiff should first of all have recourse to the property known as Husainapur Mathra. The effect of that contention would be, if well founded, that the plaintiff would lose the purchase-money given by him for that property, if in fact he purchased that property, unless he was entitled to claim contribution from the other properties in the suit. All Mr. *Chaudhri's* client could be entitled to, he has obtained by the concession made on behalf of the plaintiff by which the property in Husainapur Mathra, purchased in the name of Naubat Rai, is to have allocated to it its proportion of the total amount claimed. The plea of Parshadi Lal that his 2½ biswas in mauza Barkatia had been purchased under a lien prior to that which the plaintiff

is seeking to enforce in this action is admitted here to have no [704] evidence in its support. Mr. *Sinha*, who appeared for Bihari Lal, one of the defendants, informed us on the last day of the hearing that his client had died on the 11th August, 1886, and he produced an affidavit to that effect sworn as far back as February last. Pandit *Ajudhia Nath* applied to us to add as respondents the persons who appeared by that affidavit to be the representatives of Bihari Lal. Mr. *Sinha* opposed that application on the ground that the application was not made within time. We granted the application under the powers given to us under the last clause of s. 368 of the Code of Civil Procedure, being of opinion that sufficient cause had been shown. As to the appellant not making this application within time we may mention that even in this year documents were printed apparently on behalf of Bihari Lal as if he was alive, from which it would appear that the appellant may have *bona fide* believed up to this day that Bihari Lal was alive. On behalf of the representatives of Bihari Lal Mr. *Sinha* also contended that the plaintiff should first have had recourse to the property of Husainalipur Mathra. That contention was the same as that of Mr. *Chaudhri*.

Mr. *Sinha* also contended as Pandit *Sundar Lal* had done that the plaintiff should first have had recourse to those portions of the mortgaged property which had not been sold. We see no reason in this case for limiting in that way the rights which the plaintiff obtained under the bond of the 15th September, 1874. The purchasers, whether by private contract or by auction-sale could, if they had adopted the ordinary precaution of examining the register, have ascertained the existence of the incumbrance created by the bond upon which this suit has been brought. It is most probable that they were aware of the circumstance in question.

It was also contended that the plaintiff's claim ought to be dismissed as against Behari Lal and his representatives on the alleged ground that, although Behari Lal had purchased property in the village in respect of which he was made a defendant, he had never obtained possession. It is admitted by Mr. *Sinha* that Behari Lal made the purchase. Under these circumstances we consider he was properly brought on the record, and the property he bought must bear its portion of the burden. In the result we allow this [705] appeal subject to the due proportion of the money claimed being allocated to the 10 biswas in Husainalipur Mathra. This brings us to the question of apportionment. We have no materials on the record by which we can now make an apportionment.

We refer this question under s. 566 of the Code of Civil Procedure to the Subordinate Judge, who will ascertain and determine what the value of each of the properties was at the date of the suit.

On the materials so supplied we will give a final decree in this case. The question of costs will be dealt with when we are dealing with the final decree.

*Issue remitted.*

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## PRIVY COUNCIL.

PRESENT :

*Lord Hobhouse, Sir B. Peacock, Sir R. Baggallay, and Sir R. Couch.*  
[On appeal from the High Court of the North-Western Provinces.]

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(P.C.) =

14 I.A. 173 =

5 Sar. P.C.J.

61 =

11 Ind. Jur. *Specific performance of contract—Act I of 1887 (Specific Relief Act).*

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BINDESHRI PRASAD (*Plaintiff*) v. MAHANT JAIRAM GIR (*Defendant*).  
[16th and 17th June, 1887.]

Upon a contract for the sale of the proprietary right in land, the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase-money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the appellate Court was about to be given against him on the ground that he was not entitled to what he claimed.

*Held* that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account.

APPEAL from a decree (23rd June, 1884) of the High Court (1) affirming a decree (9th June, 1883) of the Subordinate Judge of Allahabad.

The suit out of which this appeal arose was brought by the present appellant to obtain a decree for specific performance of a contract for the sale of the proprietary right in twenty-five mauzas forming taluka Dhobha, pargana Kiwai, in the Allahabad district. The plaint set forth that on the 3rd October, 1882, the defendant contracted with the plaintiff, at Mirzapur, to sell to the plaintiff for Rs. 10,075, his whole zamindari right in the above, the plaintiff paying Rs. 200 earnest-money, and Rs. 105 for the stamp; promising also to pay the remainder of the purchase-money within fifteen days, at the time of the execution and registration of the sale-deed. Refusal to complete on the tender of a sale-deed for execution on the 18th October was alleged, and the relief sought was a decree for specific performance by execution and registration of a sale-deed with terms involving a warranty of title.

The *satta*, or agreement, dated 3rd October, appears at the commencement of their Lordships' judgment. Its factum was not disputed; but the defence was that the plaintiff had not paid the purchase-money within the stipulated time, and this notwithstanding that he had been informed when the *satta* was signed that the risk of claims on the property that possibly might be brought forward by persons claiming through the former owners, must be taken by him as purchaser; and that no warranty could be given. He had, however, afterwards insisted upon one.

The issues recorded by the Subordinate Judge raised questions whether the fact that the plaintiff did not pay the purchase-money to the defendant within the stipulated time, affected his right to sue, whether, at the time of the agreement, it was stated that the defendant was not to be answerable for disputes as to the title to the property raised by other

parties, and whether if the plaintiff should be found entitled to have the sale-deed executed, he would be entitled to have it executed with the warranty of title claimed by the plaintiff.

It appeared that the material facts about taluka Dhobha were that, prior to December, 1873, it belonged to Chedi Lal and other members of his family. Chedi Lal had three brothers Madho, Sheo and Sadho. Of these Madho, about 1869, separated in estate from Chedi Lal, and died some three years after, leaving a widow Ramdai. Sheo died in 1861, leaving a widow Lachmania. Sadho, and, after his death, his son Kalka Prashad, continued joint with Chedi Lal; and against them in 1872 the respondent obtained a decree, in satisfaction whereof he caused to be sold in execution and purchased their right, title and interest in taluka [707] Dhobha, of which he obtained possession. In November, 1881, the appellant, through Chedi Lal, who acted for him, commenced the arrangements, with a view to purchasing the property, which ended in the execution of the *satta* of 3rd October, 1882. A dispute then arose as to an absolute warranty of title, which the appellant required, and after the interchange of proposed clauses in the sale-deed, this suit was brought.

Both the Courts below held that the plaintiff was not entitled to a decree for specific performance. The Court of first instance held: first, that the admitted fact of non-payment of the purchase-money within fifteen days was a sufficient defence to the suit, the willingness of the defendant to have executed a sale-deed, without the guarantee of title insisted on by the plaintiff, after the expiration of the fifteen days, not barring him in this suit from relying upon the condition as to payment within that time; secondly, that the defendant was not under the contract between the parties bound to guarantee the title.

The High Court, (Straight and Oldfield, JJ.) without expressing an opinion as to the correctness of the first ground relied on by the lower Court, concurred with that Court in substance as to the second. The material part of their judgment was as follows:—

"What we read the plaint to mean, and what we believe the plaintiff intended it to mean, was that the defendant should be compelled to execute a contract of sale, with a covenant therein guaranteeing an absolute and valid proprietary title to the whole of the villages in taluka Dhobha, and indemnifying the plaintiff against loss or damage in the event of his being hereafter ousted from the whole or any part thereof, by the subsequent assertion, on the part of any other person, of a title paramount to the vendor, whose position, it must not be forgotten, is that of an auction-purchaser and mortgagee. No doubt, under ordinary circumstances, it is an accepted principle of law, that "in every contract for the sale of land a condition is implied for a good title;" and the failure to mention it does not necessarily render such contract incomplete. And it is laid down "that the Court will carry into effect a contract framed in general terms, where the law will supply the [708] details." (Fry, para. 349, p. 156.) But, in the present case, it is patent, from the evidence of Chedi Lal, that the plaintiff was fully alive to, and well aware of, the precise character of the rights possessed by the defendant in the taluka of Dhobha; and we can only interpret the *satta* of the 3rd of October, 1882, as evidencing the preliminaries of a sale by which all that the defendant undertook to sell, and all that the plaintiff contracted to buy, was the rights and interests of the defendant, whatever they might be. The statements of Chedi Lal make it perfectly clear that the plaintiff knew of the existence of the two widows of Madho Prasad and Sheo

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Prasad, the deceased brothers of Chedi Lal, and that they had actual or apparent claims against the property proposed to be sold; indeed, it would seem that he at one time contemplated purchasing their interests, with a view to asserting them by litigation. Under such circumstances, while, on the one hand, it cannot be said that the plaintiff was in any way misled, on the other, the conclusion is irresistible that the defendant at no time either contemplated giving or agreeing to give such a guarantee of title as the plaintiff now seeks to put upon him. There is not a word in the *satta* from which we should be justified in drawing the inference that the defendant ever undertook to do more than to convey such rights and interests as he possessed to the plaintiff; and it seems to us that to accede to the prayer of the plaintiff's plaint would be to compel the defendant, by the coercive powers of a Court of law, to do something he had never agreed to do, and which could not legally be expected from him, having regard to the nature of the interest he was to be at the same time required to convey. In other words, upon the facts disclosed, the plaintiff virtually invites us to compel the defendant to vouch a title which, to his own knowledge, is, to say the least of it, doubtful, and to force him to sell to the plaintiff a higher estate than he ever undertook to transfer. The case does not appear to us one in which the discretion of this or any Court to enforce specific performance, under Act I of 1877, can properly be exercised; and for these reasons we hold that the decision of the Court below, dismissing the suit, should be maintained. The appeal is dismissed with costs."

On this appeal,

[709] Mr. T. H. Cowie, Q. C., and Mr. C. D. Arathoon, appeared for the appellant.

Mr. R. V. Doyne, for the respondent.

For the appellant it was contended that as the difference between the parties had not been cleared up when the litigation between them ensued, resulting in the Courts' finding what the contract, in fact, had been, there was no reason why a decree for the performance of the contract as found to have been actually entered into, should not be made. That the plaintiff had at one time insisted upon more than he was entitled to was no obstacle to this, nor did the lapse of the fourteen days, the position of the parties not having been altered by the delay, alter the case. Reference was made to *Joynes v. Statham* (1), *Lindsay v. Lynch* (2), *Ramsbottom v. Gosden* (3) and *Dort's Vendors and Purchasers*, ed. 1876, p. 1037.

Counsel for the respondent was not called upon. SIR R. COUCH delivered their Lordships' judgment.

### JUDGMENT.

SIR R. COUCH:—The appellant in the case, and the respondent, on the 3rd of October, 1882, entered into an agreement for the sale of an estate which is described in the agreement as taluka Dhobha. The agreement is very short, and is in these words:—"Out of Rs. 10,075 (ten thousand and seventy-five) at which it has been settled by Mahant Jairam Gir to convey taluka Dhobha to Babu Bindeshri Prasad, Rs. 200 (two hundred) have been received as earnest money through Lala Chedi Lal and Mata Prasad Malwai. The balance, viz., Rs. 9,875 (nine thousand eight hundred and seventy-five), exclusive of costs, will be

(1) 3 Atkyns 388.

(2) 2 Sch. & L. 9.

(3) 1 V. & B. 168.

received in cash within 15 days, and then I will execute the sale-deed and get it registered. The purchaser will bear the costs on account of the stamp paper and the registration and mutation fees. I will have nothing to do with them. I will take the entire amount in cash. If the balance is not paid within fifteen days, the earnest-money will be forfeited and the vendor will be at liberty to sell the ilaka or not."

On the 16th October, the following letter was written to the appellant: "My dear Mahant Jairam Gir,"—After compliments—[710] "I beg to say that you contracted with me to sell the zamindari of taluka Dhobha, pargana Kiwai, zilla Allahabad, for Rs. 10,075, and accepted Rs. 200 as earnest-money. The draft of the sale-deed is also ready. However, you make excuses in executing the sale-deed. It is 13 days since you were paid the earnest-money. You have also sent to me the stamp, but nobody appears on your behalf to write and complete the sale-deed. I have over and over again sent my man to you, but you have put the matter off from day to day. As I have some misgivings in the matter, and I am ready to pay the money and have the sale-deed executed by this writing, I request you to duly execute the said sale-deed in accordance with the corrected draft, and accept the money from me as soon after the receipt of this as possible." It is stated in the statement of the pleader who was examined by the Subordinate Judge before the settlement of the issues, that this notice was served on the 18th October, "and about three or four days after this, the aforesaid draft of the sale-deed was sent to Madho Chaubay, defendant's gomastha, at Mirazpur. The draft was not sent to the defendant's gomastha within the term of 15 days." It is stated afterwards that there was some mistake as to that date, and it would seem that the draft of the sale deed was sent three or four days before the 18th, probably on the 14th October. As sent to the defendant, it contained this clause:—"Should a stranger now or hereafter acquire any other title in the property sold, or any kind of flaw arise, I, the vendor, my heirs and assigns, shall in every way be responsible therefor. The vendee shall, at all events, be at liberty, if any such contingencies arise, to seek his relief in the Civil Court and realize his losses and damages from me, the vendor, from my person and property, and that of my heirs and assigns, together with interest and costs incurred in the Court; and to this I will have no objection whatever," thus requiring the defendant to give an absolute warranty of title to the property which was sold. The defendant objected to this, and struck out this clause, and it would seem that he substituted for it a clause to the following effect:—"Should any kind of dispute arise, whether now or hereafter on my part, or that of my heirs or assigns, in the property sold, I, the vendor, and my heirs will be responsible therefor," and the draft thus altered was returned to the plaintiff. The defendant appears [711] to have thought that the plaintiff was entitled to this, but their Lordships are not prepared to hold that such a contract of sale as this gave the purchaser a right to insist on any formal covenants such as the practice of English lawyers has attached to an English contract of sale, if that is what was in the minds of the parties.

The plaintiff, the purchaser, was not satisfied with this. After the 18th October, there appears to have been some correspondence or negotiation between the parties with respect to the receipt of some outstanding rents, and it is said that a letter was written on the 30th October, but that letter does not appear in the proceedings. The plaintiff insisted upon having in the sale-deed the agreement or covenant which had been inserted being an absolute warranty of title; and on the 4th December he brought

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his suit in the Court of the Subordinate Judge of Allahabad, in which, after stating the contract and the payment of the earnest-money, he alleged that "the defendant did not perform the aforesaid contract, and when the plaintiff saw that the defendant delayed in the complete execution of the deed in question, he requested the defendant to have the deed completely executed and registered by means of a written and registered notice on the 16th October, 1882," and that he sent the draft on the 18th October, 1882, which, as has been stated, was admitted to be a mistake. Then he said; "the plaintiff has all along showed readiness to have the contract completely performed as far as he himself was concerned;" and prayed that a judgment might be passed ordering the defendant to execute and get registered a sale-deed in favour of the plaintiff in respect of the property claimed, by entering a guarantee of good valid title.

Now, there he distinctly claimed to have the contract performed by having this warranty of title; and when he says that he was ready to have the contract completely performed, as far as he himself was concerned, it must be taken that he was ready to have it performed in that way.

The case went for trial before the Subordinate Judge of Allahabad, and he, in his judgment, came to the conclusion that the time fixed for the payment of the balance of the purchase-money was material, and that the plaintiff had not paid the purchase-money [712] at the time fixed, and no valid excuse had been shown for his not doing so, and consequently, he was not entitled to have a decree, and he dismissed the suit. It then went by way of appeal to the High Court, and it is important to see what the plaintiff insisted upon when he made his appeal to the High Court. In his memorandum of appeal, he said that he appealed because the appellant had done "all that lay in his power within the stipulated period to secure the due execution and completion of the sale-contract which had been previously accepted in unqualified terms by the defendant, the respondent; because there is ample evidence to prove that the appellant could not deposit with the respondent the balance of the consideration money in consequence of the refusal of the latter to execute a proper conveyance with a warranty of good title," distinctly insisting then on his right to have a warranty of good title; and "because upon the facts admitted by the respondent himself, the plaintiff-appellant is entitled to an equitable decree for his claim," namely, the claim for a deed with a warranty of good title. It has been suggested that the plaintiff was willing to take a decree upon the terms which it was said the defendant admitted he was liable to perform, namely, to have a sale-deed with a qualified covenant; but there is no evidence that at any time before this stage of the case, the plaintiff had in any way submitted or shown his willingness to take any other sale-deed than one with a warranty of title. The pleader was examined, and there is no trace of any willingness to do this.

When the case came before the High Court, it went to a consideration of some evidence, which, in its opinion, showed that the agreement between the parties was different from that which was stated in the writing; that all that the defendant undertook to sell, and the plaintiff contracted to buy, were the rights and interests of the defendant whatever they might be; that it was known to them that the subject-matter of the agreement was the right and interest of certain persons, and that the vendor could not be expected to give any absolute warranty of title. Their Lordships have not gone into this evidence, and therefore express no opinion as to

the ground upon which the High Court rested their judgment. They came to the conclusion, upon the oral evidence, that it was not a proper case for a decree for specific performance.

[713] The question which has now to be considered is whether the decree of the Subordinate Judge dismissing the suit ought to stand, and the position of the parties appears to be this: that the plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale-deed with the warranty of title; and it is admitted by his learned counsel at the bar, that he had no right to any such covenant. It has not been attempted to be shown that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase-money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

The cases to which their Lordships have been referred are very different from this. They are cases where apparently the plaintiff has been willing to submit to have the agreement which was actually proved performed. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the decree of the High Court affirmed, and the appellant will pay the costs of this appeal.

*Appeal dismissed.*

Solicitors for the appellant.—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent.—Messrs. *Pyke and Parrot.*

9 A. 713 (P.C.) = 14 I.A. 142 = 5 Sar. P.C.J. 80 = 11 Ind. Jur. 478.

### PRIVY COUNCIL.

#### PRESENT :

*Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, and Sir R. Couch.*

*[On appeal from the High Court for the North-Western Provinces.]*

RAJESWARI KUAR AND ANOTHER (*Defendants*) v. RAI BAL KRISHAN (*Plaintiff*). [15th July, 1887.]

#### *Evidence—Burden of proof.*

In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on the ground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items.

The Judicial Committee concurred with the High Court, which had reversed so much of the decree of the Court of first instance as disallowed these items; the latter Court not having correctly adjusted the burden of proof, and having [714] acted as if the plaintiff had relied on his own books to prove the debt; besides having erred in weighing the evidence.

[R., 28 B. 294 (296); 16 C.L.J. 328 (332) = 17 Ind. Cas. 266.]

APPEAL from a decree (21st March, 1884) of the High Court modifying a decree (19th March, 1883) of the Subordinate Judge of Benares.

The suit was brought by the plaintiff on the 3rd February, 1882, to recover Rs. 16,144-15 principal, and Rs. 7,733-2 interest, due on a bond

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mortgaging a taluka called Uchagaon Karotha, which was executed by the defendant's deceased husband, Raghubans Sahai, to the plaintiff's deceased father, Rai Narain Das, on the 9th of July, 1869, to secure payment of Rs. 20,000. on the 9th of July, 1874, with interest at 6 per cent. per annum.

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The execution of the bond was not disputed, nor the liability of the obligor to pay Rs. 13,000 out of the total amount of Rs. 20,000, admitted in the bond to have been previously due with interest thereon, but the defendant's contention was that the remaining sum of Rs. 7,000, which is stated in the mortgage-bond to have been borrowed from Rai Narain Das for the settlement and disposal of the claim for monthly allowance of one Vilayati Begam, not having been applied to that purpose, the plaintiff was bound to prove that it had been paid to, or expended for other purposes of, Raghubans Sahai, and that he had not so done.

The Subordinate Judge threw the burden on the plaintiff of proving that the amount in question of Rs. 7,000, which appeared by his books of account produced in Court not to have been paid over to Raghubans at the time of the execution of the bond, had been in fact subsequently paid, and by his judgment disallowed out of that amount as insufficiently proved, one item of Rs. 1,000 entered in the plaintiff's books as paid for Government revenue of the mortgaged estate on the 6th July, 1869, (i.e., three days before the date of the bond), a second item of Rs. 826-5-6, shown by the plaintiff's books to have been transferred on the date of the execution of the bond to the plaintiff's account in satisfaction of the interest due up to that date upon the previous debt, and various other items, aggregating Rs. 1,673-10-2, together with interest on those amounts, and gave plaintiff a decree for the rest of his claim.

[715] The ground on which the Subordinate Judge rejected the proof of the two first of those items was that, having regard to the date of the bond, it seemed highly improbable to him that those items, of which that for Rs. 1,000 appeared by the plaintiff's accounts to have been paid to Raghubans three days before the date borne by the bond, and the second, that for Rs. 826-5-6, to have been debited to him on that date, should have formed part of the Rs. 7,000, which the bond stated was to be applied to buying up Vilayati Begam's claim.

On appeal, the High Court (Oldfield and Tyrrell, JJ.) gave judgment as follows:—

"The plaintiff brings this suit to recover money due under a bond, dated 9th July, 1869, executed by the husband of the defendant, Rai Raghubans Sahai, in favour of the father of plaintiff, Rai Narain Das. There is no dispute as to the execution of the bond, which is for a sum of Rs. 20,000, of which Rs. 13,000 are on an old book debt, and Rs. 7,000 is stated to be borrowed for the settlement and disposal of the claim for monthly allowance of one Vilayati Begam.

"It is admitted by plaintiff that this sum was not expended in the way stated, nor paid to Rai Raghubans Sahai in one sum; but it is alleged that it was placed to his credit and drawn by him at various times for various purposes.

"The defendant does not distinctly deny that Rai Raghubans Sahai received it, but rather suggests that it could not have been received, as it was not required for the purpose named, and in fact puts plaintiff to the proof that the sum was paid.

" The only items of this sum which the Subordinate Judge disallows are items aggregating Rs. 3,499-15-8 and the interest claimed on them, and the plaintiff has appealed in regard to them. 1887 JULY 15.

" The items are Rs. 1,000, alleged to have been paid to Rai Raghubans Sahai on 6th July, 1869, for payment of Government revenue, Rs. 826 paid on 9th July, 1869, as interest to date of bond due on the old book debt of Rs. 13,000, and the above sum of Rs. 1,000 and items aggregating Rs. 1,673-10-2, paid to Rai Raghubans Sahai on various dates. PRIVY COUNCIL. 9 A. 713 (P.C.)= 14 I.A. 142= 5 Sar. P.C.J. 80=

[716] " The reasons of the Subordinate Judge for disallowing the items appear to us quite insufficient, and we have no doubt whatever that Rai Raghubans Sahai received the full sum of Rs. 7,000, of which the above items form portions. The Subordinate Judge dwells chiefly on the admitted fact that the recitals in the bond as to the manner in which the sum of Rs. 7,000 was drawn are opposed to the real facts as alleged by plaintiff, and to there being no evidence apart from the account books. But in the first place, there is the bond for the amount, both Rai Raghubans Sahai and Rai Narain Das are admitted to have been shrewd men of business, and it is most unlikely that Rai Raghubans Sahai would have for many years allowed the sum for which he had given a bond to remain undrawn. Next, there is the evidence of the plaintiff's account books. They are the properly kept books of a firm of character and respectability, and have been proved by the gomashtha of the firm, and contain particulars of all the items. The circumstance that items in these accounts may not be supported by vouchers in the handwriting of Rai Raghubans Sahai is accounted for by the admission that he and Rai Narain Das were very great friends, and the former was not in the habit of requiring from the latter vouchers for every sum he might draw from him, and the Subordinate Judge's objection in respect of the item of Rs. 1,000, that if it had been paid, plaintiff could produce the receipt, has little force, as it would have been with Rai Raghubans Sahai and not plaintiff. Moreover, the admitted friendly terms on which Rai Narain Das and Rai Raghubans Sahai lived, does not allow us to suppose that the former would cheat him by making false entries in his books, and we cannot hold that the claim as to these items fails without at the same time holding that the entries of the items are forged. But this supposition is preposterous, and, indeed, is not suggested by the Subordinate Judge, who, on the contrary, accepted the general correctness of the account-books by decreeing the larger portion of the claim in accordance with them. 11 Ind. Jur. 478.

" It is also noteworthy that the defendant does not distinctly deny that Rai Raghubans Sahai received the sum, but rather pleads ignorance, and has not attempted, by the production of his books of account (and it is impossible to believe that he left no memoranda of accounts), to disprove the claim. We therefore consider [717] that the payment of the entire sum in the bond has been established.

" There is another item disallowed about which the appellant also appeals.

" It is admitted that plaintiff's father received from the defendant's husband at various times a sum of Rs. 10,000; but plaintiff alleges that Rs. 1,000 of this was credited not in satisfaction of the bond in suit, but of another loan.



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"We consider that he has established this fact by the evidence of the accounts and of the gomashtha, whose statement there seems no reason whatever to disbelieve.

"We decree the appeal, and modifying the decree of the Subordinate Judge, we decree the claim in full with all costs and interest at 6 per cent. from date of institution of the suit to realization."

On this appeal,

Mr. *W. A. Raikes* and Mr. *Dunlop Hill*, appeared for the appellant.

Their contention mainly was that the entries in the books did not support the claim on the bond. The objection also was taken that the payments made had not been credited on their correct dates, whereby the interest account had been incorrectly made up.

Mr. *R. V. Doyne*, for the respondent, was heard on this last point only.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

### JUDGMENT.

LORD HOBHOUSE.—In this case, the appellant and respondent are the representatives of the original parties to the transaction, but no change of interest or any legal question is raised by their succession to their predecessors, and the case is exactly the same as if the present plaintiff and defendant were the original parties themselves.

The plaintiff sued on a bond for a debt of Rs. 20,000, and the nature of that debt is stated on the face of the bond. Rs. 13,000 was an old debt, and Rs. 7,000 was stated to be a new debt contracted at the time of the bond, and the bond stated also what the object of the contract for the new debt was. The defendant alleges [718] that those recitals are false. In effect he alleges that the bond must be taken as of no value, and that the account between the parties must be taken as between an ordinary debtor and creditor. In the first place, it is alleged that the object for which the Rs. 7,000 is said to be borrowed was not the object, and that the money was not applied to that object. Their Lordships think that is a matter of no importance whatever. It may be that the object stated was not the object. It may be that a week afterwards the recipient of Rs. 7,000 changed his mind and did not apply the money to that object. It does not signify what the object was. To prove that Rs. 7,000 was not actually advanced, the defendant called for the plaintiff's books of account. Those books of account were produced, and they showed apparently the whole transaction between the parties, and the impugned recital was substantially correct. About the old debt for Rs. 13,000 there was no question, and the Rs. 7,000, the new advance, was made out in this way: Rs. 1,000 was paid for revenue some two or three days before the date assigned to the bond; a sum of Rs. 800 odd due for interest was allowed on account and taken as capital; and the remainder, Rs. 5,000 odd was credited to the defendant in the books of the plaintiff to be drawn as occasion required. Then the books of the plaintiff showed that the money was drawn out, and if they are to be taken as evidence in favour of the plaintiff, there is a complete answer to the charge of incorrectness made by the defendant.

Now what the Subordinate Judge did, was to look whether the items of discharge in the plaintiff's books were corroborated or not. Where they were corroborated he allowed the discharge, and where they were not corroborated he disallowed them. In doing that their Lordships think that the Subordinate Judge acted on an entirely wrong principle. He acted on a principle which would have been correct if the plaintiff had

relied on his own books as proving his debt; but that was not the case. The plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action. It is the defendant who seeks her defence in the books of the plaintiff. She calls for the books and extracts her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such items as proved matters [719] of defence on her part, and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think the High Court were entirely right, and that the decree cannot be complained of on that ground.

Then a much smaller matter was put forward, just at the end of Mr. *Raikes*' argument on behalf of the appellant. It appears from the plaintiff's books that a number of sums were received from time to time by him on behalf of the defendant. The dates of those receipts are given, and it is alleged that they were not carried into account on those dates as against the principal or the current interest, as it may be, of the bond, so as to discharge the defendant from interest *pro tanto* from those dates. The principle that they should be so carried into account is a sound one, but their Lordships are exceedingly doubtful whether that principle has been violated, and it certainly is the duty of the appellant who asks them to modify a decree of the High Court on this point to show them clearly that it has been violated. Their Lordships find that the plaintiff's gomashtha, who is the battle-horse of the defendant on this matter, was not asked a question on the subject, and it may have been that if he had been asked questions he might have shown that in taking the interest account the receipts were credited on the right dates; or he may have given some other explanation of the mode in which the account was made out. That the parties were in habits of very great intimacy is shown by the gomashtha, and it is also shown that the defendant's predecessor was a shrewd careful man of business and it is unlikely that he should not have known how his own account was standing with the plaintiff. His own books are not produced, so that their Lordships do not know whether he himself would have given any different account of the transactions. Moreover it does not appear that this point was raised before the High Court, and even if it were raised as late as the appeal to Her Majesty, it is raised in so obscure a way that it requires Mr. *Raikes*' explanation to understand how it was raised at all.

Under these circumstances, their Lordships must say that although the principle contended for by Mr. *Raikes* is a sound one, they have no evidence before them that the decree contains any [720] violation of it. They therefore think that the decree appealed from should be affirmed and the appeal dismissed with costs, and they will humbly advise Her Majesty to that effect.

*Appeal dismissed.*

Solicitors for the appellant—Messrs. *Oehme and Summerhays*.

Solicitors for the respondent—Messrs. *T. L. Wilson and Co.*

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9 A. 720=7 A.W.N. (1887) 228.

## EXTRAORDINARY ORIGINAL CRIMINAL.

EXTRA-  
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CRIMINAL.*Before Sir John Edge, Kt., Chief Justice.*

QUEEN-EMPRESS v. RIDING AND OTHERS. [5th August, 1887.]

9 A. 720= Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Deposition not admissible in evidence—Act I of 1872 (Evidence Act), s. 114, illustration (c).

7 A.W.N. (1887) 228.

Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Criminal Procedure Code, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (c) of the Evidence Act (I of 1872) to have been so taken and attested.

[F., 18 A. 129 (131) ; R., 10 A. 174=A W.N. (1888) 11.]

THIS was a trial at the Criminal Sessions of the High Court before Edge, C. J., and a jury, of three soldiers named Riding, Adair and Linehan, upon charges of robbery, under s. 395 of the Penal Code. In the course of the case for the prosecution, it appeared that through some oversight the Assistant Surgeon, who had examined the complainant, and who had given evidence before the committing Magistrate as to the injuries said to have been inflicted by the prisoners, had not been served with a summons, and was therefore not presented for the purpose of giving evidence.

The *Public Prosecutor* (Mr. G. E. A. Ross), for the Crown, accordingly tendered in evidence, under s. 509 of the Criminal Procedure Code, the deposition of the Assistant Surgeon which had been taken by the Magistrate.

This deposition was signed by the Assistant Surgeon and by the committing Magistrate. The record contained no statement as to whether or not the deposition had been taken and attested in the [721] presence of the prisoners. No evidence was forthcoming as to whether it had been so taken and attested or not.

Mr. C. Ross Alston, for the prisoners, objected to the deposition being received in evidence.

## OPINION.

EDGE, C.J., said that he was of opinion that the deposition was inadmissible in evidence. Under s. 509 of the Criminal Procedure Code, it was essential that the deposition should have been taken and attested by a Magistrate in the presence of the accused." Since the prosecution was bound to prove every step of the case against the prisoners, before such a deposition could be admitted it must either appear on the Magistrate's record, or must be proved, by the evidence of witnesses, to have been taken and attested in the prisoners' presence. His Lordship had been referred to s. 114, illustration (c) of the Evidence Act; but that section did not direct the Court to presume the existence of facts likely to have happened, such as the regular performance of judicial acts, but left

the Court free to make the presumption or not according to its discretion. This being a criminal case in which, as he had said, the prosecution must prove every step of its case, he did not think it proper or expedient to act on a presumption that the requirements of s. 509 had been complied with, and he therefore ruled that the deposition should not be admitted (1).

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(1) S. 80 of the Evidence Act under which the Court is bound, subject to certain conditions, to presume the evidence recorded by a Judge or Magistrate was "duly taken" was not referred to in either the argument or the judgment in this case; but it would doubtless have been held inapplicable. Though, as a general rule, all evidence must be taken in the presence of the accused, there is nothing in Chapter XXV of the Criminal Procedure Code ("of the mode of taking and recording evidence in inquiries or trials") or elsewhere which expressly requires a Magistrate to *attest* depositions in the accused's presence. Such attestation therefore does not fall within the scope of the presumption provided for by s. 80, and if required for any special purpose, such as that of s. 509 of the Criminal Procedure Code, must be established *aliunde*. Assuming the deposition to have been duly taken, so as to be good evidence *quoad* the proceedings before the Magistrate, it could not be given in evidence at a future inquiry without satisfying the further condition of attestation in the presence of the accused; and there is no provision in the Evidence Act (apart from s. 114) under which the fulfilment of this condition could be presumed.



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*Held*, with reference to *A, B* and *M*, that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the crime as entitled the Court to act upon his story in regard to those particular persons.

*Held* that, inasmuch as there was no sufficient material to warrant the inference of guilty knowledge on *R*'s part, and, with regard to *N*, no property was found with him or produced through his instrumentality, both *R* and *N* ought to have been acquitted. *QUEEN-EMPRESS v. BALDEO*, 8 A. 509=6 A.W.N. (1886) 176 ...

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behalf of a minor by a relative, the absence of the certificate of the guardianship required by s. 3 of the Bengal Minors Act (XL of 1858), is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not in fact been given, the irregularity is covered by s. 578 of the Civil Procedure Code. <i>PARMESHAH DAS v. BELA</i> , 9 A. 508=7 A.W.N. (1887) 189 ...	819
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*Waiver—Company—Winding up—Contributories—Shareholders—Notice of allotment—Secondary evidence of notice—Press copy letter—Evidence of original letter having been properly addressed and posted—Act I of 1872 (Evidence Act), ss. 16, 114—Act IX of 1872 (Contract Act), ss. 3, 4—Register of members—Presumption of membership—Act VI of 1882 (Indian Companies Act), ss. 45, 47, 60, 61, sch. 1, Table A (97)—Appeal—Fresh evidence—Civil Procedure Code, s. 568.—S. 17 of the Bengal Civil Courts Act (VI of 1871) was framed in the interests of the Judges and officials of the Courts, and probably also in the interests of the pleaders, suitors and witnesses, whose religious observances might interfere with their attendance in Court on particular days. On a close holiday, a Judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his Court; and any party to any judicial proceeding could successfully object to any such inquiry being proceeded with, and, in the event of any such inquiry having been proceeded with in his absence and without his consent, would be entitled to have the proceeding set aside as irregular, probably in any event, and certainly if his interests had been prejudiced by such irregularity. But, at the furthest, the entertaining and deciding upon a matter within the ordinary jurisdiction of the Court on a close holiday, is an irregularity the right to object to which can be waived by the conduct of the parties; and a party who, on a close holiday, does attend, and without protest takes part in a judicial proceeding, cannot afterwards successfully dispute the jurisdiction of the Judge to hear and determine such matter.*

An appellant who had ample opportunity of giving evidence in the Court below, and elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed at the stage of appeal to give evidence which he could have given below.

A letter of acceptance to a proposer, not correctly addressed, could not, although posted, be said to have been "put in a course of transmission" to him, within the meaning of s. 4 of the Contract Act (IX of 1872).

Upon the settlement of the list of contributories to the assets of a Company in the course of liquidation under the Indian Companies Act, one of the persons named in the list denied that he had agreed to become a member of the Company, or was liable as a contributory. The District Court admitted as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector, for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record; but at the hearing of the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had been in fact given. There was no evidence as to the posting of the original letter, or of the address which it bore; but the press-copy was contained in the press-copy letter-book of the Company, and was proved to be in the handwriting of a deceased secretary of the Company, whose duty it was to despatch letters, after they had been copied in the letter-book. The objector denied having received the letter or any notice of allotment.

*Held* that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter was inadmissible in evidence; and that there was no proof of the communication of any notice of allotment.

The evidence adduced by the official liquidator to show that the defendant was a member of the Company and so liable as a contributory consisted of the register of members, a letter written by the objector, a reply thereto written by a managing director of the Company, and the oral testimony of the director himself. The objector adduced no evidence at all.



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*Held* that the official liquidator might, if he had chosen to do so, have put the register in evidence, and waited, before giving any further evidence, until the objector had given some to displace the *prima facie* evidence afforded by the register, or to impugn the character of the register; but his case must be looked at as a whole, and having taken the line which he did, he must take the consequences of his other evidence contradicting or impugning the *prima facie* evidence of the register, and, notwithstanding that the objector gave no evidence, the register was not conclusive. *RAM DAS CHAKRABATI v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY, LIMITED, CAWNPORE*, 9 A. 366=7 A.W.N. (1887) 34 ...

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Act XXIII of 1871 (Pensions).

S. 7—*Pension—Pension for land held under grants in perpetuity—Assignment—Suit against drawer of pension to establish right to share—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 127, 131—Muhammadan law—Gift—"Musha"—Undivided part—Ascertained share—Transfer of possession—Mutation of names—Delivery of title-deeds—Act VI of 1871 (Bengal Civil Courts Act), s. 24.—A pension of the nature described in Act XXIII of 1871 (Pensions Act), s. 7, clause (2), was drawn by a Muhammadan, in whose name alone it was recorded in the Government registers, for himself and the other members of his family who, up to the time of his death, received their shares from him. Shortly before he died, he executed a deed of gift in favour of his wife, which purported to assign to her the whole pension. No mutation of names was effected in the Government registers, but the deed of gift and the *sanads* in respect of which the pension had originally been granted were handed over to the donee. After the death of the donor, one of his sisters brought a suit against his widow to establish her right (i) to receive the share in the pension which she had inherited from her father and received up to her brother's death, and (ii) as heir to her brother himself, to the share which he had inherited. It was contended on her behalf that the deed of gift was in a case ineffectual as an assignment of more than the donor's own interest, and further that it was invalid even as an assignment of his own share, inasmuch as under the Pensions Act the pension could not be made the subject of gift, and under the Muhammadan law it was "*musha*" and not transferable, and actual delivery or transfer of possession was, under the same law, essential to the completion of the gift, but no such delivery or transfer had been effected. In defence it was pleaded (*inter alia*) that the suit was barred by limitation.*

*Held* that it was doubtful whether in such a case and as between such parties the Limitation Act would be applicable at all; but that, assuming it to be so, either art. 127 or art. 13, of the 2nd schedule should be applied, and, the plaintiff having received her share within twelve years, the suit was brought in time.

*Held* that the deed of gift was not a good assignment in law of the interest of the plaintiff, who was not a party thereto, and the defendant could take nothing more than the donor's own interest.

*Held* that, whatever might be the Muhammadan law apart from the Pensions Act, under s. 7 of the Act the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid.

*Held* that there was no force in the contention that the gift became void because the right was not divided, inasmuch as in the case of a right to receive a pension the rights of the individuals who are the heirs become at once divided and separate at the death of the sole

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owner; and in this case the share were definite and ascertained and required no further separation than was already effected upon the sole owner's death.

*Held* that the rule of the Muhammadan law as to the invalidity of gifts purporting to pass more than the donor was entitled to, was based upon the principle of *musha* or undivided part, and had no application to cases where the donor's interest itself was separate; and that even if it were, the strict Muhammadan law that where a man having a definite ascertained interest in a pension, and intending at any rate to pass his interest to his wife purported to give her more than he was entitled to, be failed to give her any interest at all, s. 24 of the Bengal Civil Courts Act (VI of 1871) did not make it obligatory to apply the strict Muhammadan law as to gifts in transactions of modern times.

*Held* that although, according to the Muhammadan law, possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, possession of a right to receive pension could only be given by handing over the documents of title connected with the pension, or assigning the right to receive the pension; that the gift in this case was perfect as soon as the deed was executed and handed over with the other papers to the donee; and that the mutation of names was merely a thing which would follow on the perfection of the title, and did not in itself go to make or form part of the title. SAHIB-UN-NISSA BIBI v. HAFIZA BIBI; HAFIZA BIBI v. SAHIB-UN-NISSA BIBI, 9 A. 213 = 7 A.W.N. (1887) 22 = 11 Ind. Jur. 192 ...

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Act XIX of 1873 (N.W.P. Land Revenue).

- (1) Ss. 3 (4), 79—89, 241 (*h*)—See ACT XII OF 1881 (N.W.P. RENT), 8 A. 552.
- (2) Ss. 72, 77—See ACT XII OF 1881 (N.W.P. RENT), 9 A. 185.
- (3) S. 91—See PRE-EMPTION, 8 A. 434.
- (4) Ss. 111, 112, 113, 131, 132, 241 (*f*)—See PARTITION OF MAHAL, 9 A. 429.
- (5) S. 113—See JURISDICTION (CIVIL AND REVENUE COURTS), 9 A. 445.
- (6) Ss. 113 114—See PARTITION, 9 A. 388.

Act XII of 1881 (N. W. P. Rent).

- (1) S. 7—*Sir-land—Ex-proprietary tenancy.*—The words "held by him as *sir*" in s. 7 of Act XII of 1881 (N.W.P. Rent Act) must be construed to mean land belonging to him, or to which he was entitled, as *sir*; and as literal an interpretation should be placed upon these words as is consistent with the canons of construction.

In 1879, one of the defendants sold a one-third share of certain *sir-land* in a village to the plaintiff, who, at the time, was in cultivatory possession thereof under a deed of mortgage executed in his favour by the same defendant in 1877. The plaintiff alleged that after the sale, he continued in possession of the *sir-land* till 1884, when he was dispossessed thereof by the defendants. He sued for recovery of possession of the land.

*Held* that the defendants, being *ex-proprietary* tenants of the land in dispute, were entitled to hold possession thereof, by operation of law, with reference to the terms of s. 7 of the N. W. P. Rent Act; and the plaintiff's contention that because for four or five years the defendants failed to assert their *ex-proprietary* tenant rights, they



were debarred from doing so, could only be well founded if there had been any provision either in the Limitation Act or the Rent Act creating such a disability.

*Held* also that, notwithstanding the fact that the plaintiff was in possession of the land in dispute as mortgagee at the time of the sale, and continued in possession afterwards, his vendor must be taken to have "held" the land as his *sir* at the time of the sale of his proprietary interest, within the meaning of s. 7 of the Rent Act. *HARJAS v. RADHA KISHAN*, 8 A. 256=6 A.W.N. (1886) 74

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(2) S. 7—See *SIR-LAND*, 8. A. 467.

(3) S. 7—See *TRANSFER OF PROPERTY ACT*, 8 A. 409.

(4) Ss. 7, 9—See *EX-PROPRIETARY TENANT* 9 A. 88.

(5) Ss. 7, 95 (l)—*Ex-proprietary tenant—Determination of rent by Revenue Court—Suit for arrears of rent as so determined for period prior to such determination.*—An application was made in the Revenue Court under s. 95 (l) of the N.W.P. Rent Act (XII of 1881), by the purchaser of proprietary rights in a mahal for determination of the rent payable by his vendors, who had become, under s. 7, his ex-proprietary tenants in respect of the land they had previously held as *sir*. The Revenue Court, by an order dated the 18th February, 1884, fixed the rent at a particular sum, payable annually, after making the deduction of four annas in the rupee required by s. 7 of the Rent Act. In May, 1884, the purchaser sued the ex-proprietary tenants to recover from them arrears of rent at the sum so fixed, for a period of three years prior to the Revenue Court's order.

*Held* by the Full Bench that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February, 1884, subject to any question of limitation that might arise. *MAHADEO PRASAD v. MATHURA*, 8 A. 189 (F.B.)=6 A.W.N. (1886) 52

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(6) Ss. 9, 56, 93 (b)—See *LIMITATION ACT*, 9 A. 244.

(7) Ss. 30, 3 (2), 95 (c) "*Rent free grant*"—"Rent"—*Services—Jurisdiction—Civil and Revenue Courts—Act XII of 1881 (N. W. P. Rent Act) ss. 3 (2), 30, 95 (c)—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 3 (4), 79-89, 241 (h).*—A suit was brought for the ejectment of the defendant from certain land, on the allegations that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent-free grant under s. 30 of the N. W. P. Rent Act (XII of 1881), but the application was rejected. In answer to the suit, the defendant pleaded that it was not cognizable by the Civil Court.

*Held* by *OLDFIELD, J.*, (*MAHMOOD, J.*, dissenting) that the suit could not be held to be one to resume a rent-free grant, inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit.

*Held* by *MAHMOOD, J.*, that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that under these circumstances the suit was not cognizable by the Civil Court.

*Per OLDFIELD, J.*—The definition of the term "rent" in s. 3 of the Rent Act was intended to include services or labour rendered for the use of land, and the grantee in the present case was a tenant who rendered rent in this sense on account of the use of the land. Further, there was no such grant as is contemplated by s. 30 of the

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Rent Act, inasmuch as that section refers to grants for holding land exempt from the payment of rent alluded to in s. 10 of Regulation XIX of 1793, and that Regulation, assuming it to refer to grants free from payment of rent as well as of revenue, contemplated grants not only free from payment of rent in cash or kind, but free from payment of anything in lieu thereof. A tenure such as in the present case, where the land was land originally paying rent in cash, and where the cash rent was exchanged for rendition of services, is not a rent-free grant within the meaning of the Regulation, nor consequently of s. 30 of the Rent Act.

*Per* MAHMOOD, J.—The services connected with the grant in this case did not constitute "rent" within the meaning either of the N.W. P. Rent Act, or of the N. W. P. Land Revenue Act (XIX of 1873), and the word "render" in s. 3 of the former Act does not include or imply the rendering of services or labour. The word "rent" is probably used as the equivalent of the Hindustani words *lagan* or *poth* representing the compensation receivable by the landlord for letting the land to a cultivator, and s. 3 of the Rent Act, where it uses the expressions "paid, delivered or rendered," must be taken to refer respectively to rent paid in cash, to rent delivered in kind, and to rent rendered by appraisement or valuation of the produce. The grant in the present case was a rent-fee grant of the nature of *chakran* or *chakri*, i.e., service-tenure to which s. 41 of Regulation VIII of 1793 related. The incidents of the tenure would be governed by s. 30 of the Rent Act and ss. 79-84 of the Land Revenue Act, being matters outside the jurisdiction of the Civil Court. The scope of s. 10 of Regulation XIX of 1793 is not limited to permanent rent-free grants, and the present suit was in respect of a matter falling within s. 95 (c) of the Rent Act, and "provided for in ss. 79 to 89, both inclusive," of the Land Revenue Act, within the meaning of s. 241, (h) of the latter Act. *WARIS ALI v. MUHAMMAD ISMAIL*, 8 A. 552=6 A.W.N. (1886) 221

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(8) S. 93 (b)—See LANDLORD AND TENANT, 8 A. 446.

(9) S. 93 (b), (c), (cc)—*Landholder and tenant—Suit by landholder for removal of trees planted by tenant—Jurisdiction—Civil and Revenue Courts.*—Held that a suit by a landholder against his tenant for the removal of certain trees planted by the latter on land let to him for cultivating purposes by the former did not fall within s. 93 of the N.W.P. Rent Act (XII of 1881), and was cognizable by the Civil Courts. *PROSONNA MAI DEBI v. MANSA*, 9 A. 35=6 A.W.N. (1886) 248

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(10) S. 93 (g)—See LAMBARDAR AND CO-SHARER, 8 A. 384.

(11) S. 95 (l)—*Land-holder and tenant—Determination of rent by Settlement Officer—Suit for arrears of rent for period prior to order—Jurisdiction in such suit to determine rent for such period—Civil and Revenue Courts—Act XIX of 1873 (N.W.P. Land Revenue Act)*, ss. 72, 77.—The jurisdiction to determine or fix rent payable by a tenant is given exclusively to the Revenue Court, either by order of the Settlement Officer or by application under s. 95 (1) of the N.W. P. Rent Act (XII of 1881), and such rent cannot be determined in a suit by a land-holder for arrears of rent in the Revenue Court, in which the appeal lies to the District Judge or High Court.

In March, 1884, the rent payable by an occupancy tenant was fixed by the Settlement Officer under s. 72 of Act XIX of 1873 (N.W.P. Land Revenue Act). In 1880, the land-holder brought a suit to recover from the tenant arrears of rent at the rate so fixed for a period antecedent to the Settlement Officer's order, as well as for the period subsequent thereto. The lower appellate Court dismissed the claim for rent prior to the 1st July, 1884, and decreed such as was due subsequently to that date, but without interest.



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*Held* that the Court could not decree any amount as arrears due until the rent payable had been fixed by private contract or by a competent Court; that under s. 77 of the N.W.P. Land Revenue Act, the rent fixed by the Settlement Officer was payable from the 1st July following the date of his order, but not before; that for the period prior to the 1st July, 1884, no rent had been fixed; that it could not be fixed in the present suit, neither the Court of first instance nor the High Court having jurisdiction to fix it; and that the claim for rent for the period in question must therefore be dismissed.

*Held* also that the plaintiff was entitled to interest at one per cent. on the sum decreed from the date of the institution of the suit. RADHA PRASAD SINGH v. JUGAL DAS, 9 A. 185=7 A.W.N. (1887) 12

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(12) S. 148—See LANDLORD AND TENANT, 9 A. 394.

(13) S. 209—Lambardar and co-sharer—Suit by co-sharer for profits—Burden of proof—See LAMBARDAR AND CO-SHARER, 8 A. 61.

**Act XV of 1883 (N.W.P. and Oudh Municipalities.)**

Ss. 69, 71—*Municipal Rules—Infringement of rules—Prosecutions—N.W.P. Government Notification, No. 865, dated, the 3rd November, 1869, Rule VI, legality of.*—Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal Rules, care is taken that the requirement of s. 69 of Act XV of 1883 (N. W. P. and Oudh Municipalities Act) are satisfied.

A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal Rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his motion and authority. The accused was tried and convicted under Rule 6, Government N.W.P. Notification No. 865, dated the 3rd November, 1869, read with s. 43 of Act XV of 1873 (N.W.P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868 (Municipal Improvements Act, N. W. P.), which authorized the making of "rules as to the persons by whom, and the manner in which any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes."

*Held* that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883 (N.W.P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf.

*Held* that the position of the Magistrate of the District in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorised by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside. QUEEN-EMPRESS v. YUSUF KHAN, 8 A. 677=6 A. W. N. (1886) 267

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—1.—General.	
(1) <i>Abatement of suit—Suit to recover share of joint family property sold in execution of decree—Death of plaintiff-respondent—Survival of right to sue.</i> —In a suit for the recovery of a share-ancestral of family property which had been sold in execution of a money, decree for a debt contracted by the plaintiff's grandfather, the plaintiff obtained a decree in the lower appellate Court, from which the defendant appealed to the High Court. While the appeal was pending the plaintiff died, and, on her application, his widow was made respondent in his place. At the hearing of the appeal the appellant contended that, upon the plaintiff's death, the right sue did not survive, and the appeal should therefore be decreed by the suit being dismissed.	
<i>Held</i> by the Full Bench that, judgment having been obtained before the plaintiff's death, the benefit of the judgment, or the right to sue, would survive to his legal representative, though whether the deceased plaintiff's representative could enforce the whole of the judgment in this case was a different matter.	
When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added. MUHAMMAD HUSAIN v. KHUSHALO, 9 A. 131 (F.B.) = 6 A.W.N. (1886) 322	559
(2) <i>Admission after time—Act XV of 1877 (Limitation Act), s. 5—“ Sufficient cause ”—Poverty—Purdha-nashin—Civil Procedure Code, s. 220—Costs.</i> —In February, 1884, the High Court dismissed an application by a Muhammadan <i>pardha-nashin</i> lady, under s. 592 of the Civil Procedure Code, for leave to appeal as a pauper from a decree passed in September, 1882, on the ground that it was barred by limitation. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the said order to stand over pending the decision of a connected case which had been remanded for re-trial under s. 562 of the Code. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. On the 18th June, 1885, an order was passed <i>ex parte</i> by PETHERAM, C. J., allowing the applicant, under s. 5 of the Limitation Act (XV of 1877), to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal, which was admitted provisionally by a single Judge,	
<i>Held</i> by TYRRELL, J., (MAHMOOD, J., dissenting) that the appellant had made out a sufficient case for the exercise of the Court's	



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discretion under s. 5 of the Limitation Act, and that the Court should proceed to the trial of her appeal.

*Held* by MAHMOOD, J., that the *ex parte* order of the 18th June, 1885, was one which the Civil Procedure Code nowhere allowed and was *ultra vires*, and that the Bench before which the appeal came for hearing was competent to determine whether the order admitting the appeal should stand or be set aside.

*Held*, also by MAHMOOD, J., (TYRRELL, dissenting) that the circumstances were such as to require the Court to set aside the order admitting the appeal and to dismiss the appeal as barred by limitation, inasmuch as it was presented more than two years beyond time, and neither the facts that the main reason why it was presented so late was that the appellant was awaiting the result of the connected case, and that the appellant was a pauper and a *pardha-nashin* lady, nor the orders of the 16th August, 1884 and the 18th June, 1885, constituted "sufficient cause" for an extension of the limitation period, within the meaning of s. 5 of the Limitation Act.

*Held* further by MAHMOOD, J., that although, but for the erroneous order of the 18th June, 1885, the appellant would neither have borrowed the money required to defray the institution-fees nor preferred the appeal, and this was a circumstance to be considered in the exercise of the discretionary power conferred by s. 220 of the Code, it could not be said that the error of a Court of Justice which leads a party to initiate proceedings against another is sufficient to exonerate the losing party from paying the costs incurred by the opposite party, and that the appeal should therefore be dismissed with costs. *HUSAINI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR*, 9 A. 11=6 A.W.N. (1886) 245 ...

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- (3) *Appeal from appellate decree—Applicability of provisions as to first appeals—Remand—Judgment of first appellate Court—Civil Procedure Code*, ss. 564, 565, 574, 578, 584, 587.—The judgment of a lower appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal; concluded, with general observations, as follows:—  
"The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. This Court, having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court ..... The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration.

*Held* that this was in law no judgment at all, inasmuch as it did not satisfy the requirements of s. 574 of the Civil Procedure Code, and that the decree of the lower appellate Court must therefore be set aside, and the record returned to that Court for a proper adjudication, in accordance with the provisions of that section.

Observations by Mahmood, J., upon the distinction between the duties of the Courts, of first appeal and those of the Courts of second appeal in connection with the provisions of ss. 574 and 578 of the Civil Procedure Code, and with the remand of cases for trial *de novo*. *SOHAWAN v. BABU NAND*, 9 A. 26=6 A.W.N. (1886) 284 ...

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- (4) *Death of plaintiff-respondent during pendency of appeal—Application by defendant-appellant for substitution of deceased's legal representative—Application by third person claiming to be such representative and to be substituted as respondent—Civil Procedure Code*, s. 32—"Questions involved in the suit"—*Civil Procedure Code*, ss. 365, 367, 268, 582—*Unappealed miscellaneous order set aside on appeal from decree—Civil Procedure Code*, s. 591.—The "questions involved in the suit" referred to in the second paragraph of s. 32 of the

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Civil Procedure Code, are questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or co-plaintiffs *inter se*. The section does not apply to questions which are not involved in the suit but drop up incidentally during the pendency of an appeal, such as the question whether one person or another is the legal representative of a deceased plaintiff-respondent.

- S. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred.

During the pendency of an appeal, the Plaintiff-respondent died, and, on the application of the appellant, the name of *H* was entered on the record as respondent in the place of the deceased. Subsequently *K* applied to be substituted as respondent, alleging that he and not *H* was the legal representative of the plaintiff. The Court passed an order making *K* a joint respondent with *H*. To this *H* objected, but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents.

Held that s. 32 of the Civil Procedure Code did not apply to the case so as to authorize the Court below to add *K* as a respondent; that the only other section under which he might possibly have been brought was s. 365; that even assuming s. 365 to apply to such a case, the Court had no power to make *K* a respondent jointly with *H*, but should have taken one or the other of the courses specified in s. 367, so as to determine who was the legal representative of the deceased plaintiff; and that the course adopted by the Court was an exceedingly inconvenient one which ought not to have been taken even if the Court had power under the Code to take it.

Held also that, on appeal from the decree of the Court below, *H* was entitled to object to the order adding *K* as a respondent, though he had not appealed from the order itself. *HAR NARIAN SINGH v. KHARAG SINGH*, 9 A. 447=7 A.W.N. (1887) 89 ...

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- (5) *Death of defendant-respondent—Civil Procedure Code*, ss. 368, 582—*Act XV of 1877 (Limitation)*, sch. ii, No. 171-B.—Art. 171-B, sch. ii of the Limitation Act (XV of 1877), applies to applications to have the representative of a deceased defendant-respondent made a respondent. *BALDEO v. BISMILLAH BEGAM*, 9 A. 118=6 A.W.N. (1886) 305 ...

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- (6) *Dismissal of suit for non-appearance of plaintiff—Civil Procedure Code*, ss. 102, 103.—S. 103 of the Civil Procedure Code, does not take away the remedy of appeal from a decree dismissing a suit under s. 102. *ABLAKH v. BHAGIRATHI*, 9 A. 427=7 A.W.N. (1887) 66 ...

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- (7) *Appeal under s. 10, Letters Patent—Limitation—Rules of practice of High Court.*—It must be assumed that Rule I of the "Rules of Practice adopted by the High Court for the North-Western Provinces on the 21st May, 1873, regarding the admission of appeals under s. 10 of the Letters Patent," which provides that such appeals must be presented to the Assistant Registrar within ninety days of the judgment appealed from, had a legal origin, and was not *ultra vires* of the Court. *NAUBAT RAM v. HARNAM DAS*, 9 A. 115 (F.B.)=6 A.W.N. (1886) 306 ...

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- (8) *Application to set aside award—See ARBITRATION*, 8 A. 64.

- (9) *Dismissal of suit for non-appearance of plaintiff ordered to appear under s. 66, Civil Procedure Code—Rejection of application to set aside dismissal—See CIVIL PROCEDURE CODE*, 8 A. 20.



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- (10) Decree in accordance with award—Objection to validity of award taken for the first time in appeal—See CIVIL PROCEDURE CODE, 8 A. 548.
- (11) Rejection of application for permission to sue as a pauper on the ground that it had been withdrawn—See CIVIL PROCEDURE CODE, 9 A. 129.
- (12) Dismissal of—Security for costs—Amount of security not fixed—Practice—See CIVIL PROCEDURE CODE, 8 A. 164.
- (13) Summary rejection of—See CRIMINAL PROCEDURE CODE, 8 A. 514.
- (14) See EXECUTION OF DECREE, 9 A. 46.
- (15) Execution of decree—Objection to sale—Order confirming sale before time for filing objection has expired—See EXECUTION OF DECREE, 9 A. 411.
- (16) Admission after time—See LIMITATION ACT (XV OF 1877), 9 A. 655.

### —2.—Second Appeal.

- (1) *Ex-parte decree—Civil Procedure Code, ss. 103, 108, 540, 560, 584—Construction of statute—General words.*—Held by the Full Bench (STRAIGHT, Offg. C. J., and TYRELL, J., expressing no opinion), that a respondent in whose absence the appeal has been heard *ex-parte*, and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s. 560 to the Court which passed the decree to re-hear the appeal.

*Per* OLDFIELD, J.—There is a distinction between the case of a defendant in a Court of first instance and that of a respondent in an appellate Court not appearing, with reference to ss. 103 and 560 of the Code.

*Per* MAHMOOD, J.—The distinction is one of detail merely and not of principle.

Also *per* MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other. AJUDHIA PRASAD v. BALMUKAND, 8 A. 354 (F.B.)=6 A. W. N. (1886) 110 ...

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- (2) *Husband and wife—Agency—Authority of wife to pledge husband's credit—Civil Procedure Code, ss. 565, 566, 587—Second appeal—Determination of issues of fact by High Court.*—Held by the Full Bench that s. 587 of the Civil Procedure Code, does not make ss. 565 and 566 applicable to second appeals, so as to enable the High Court in cases where the lower appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record; but the High Court in such cases must remit issues for trial to the lower appellate Court.

*Held* by the Division Bench that the liability of a husband for his wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done.

In a suit by a creditor to recover from his debtor and her husband the amount of money lent by the plaintiff to the former on her notes of hand, it appeared that the defendants had always lived together, that the wife had an allowance wherewith to meet the household expenditure and all her personal expenses, and that the money had been borrowed without the husband's knowledge and not to meet any emergent need, but to pay off previous debts, and had been raised by successive borrowings over a considerable period the debt having increased by high rates of interest. It was also found that

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it had not been shown that the plaintiff looked to the husband's credit, or that the husband had ever previously paid his wife's debts for her.

*Held* that under these circumstances no agency on the wife's part for her husband had been established, and that the husband was therefore not liable to the claim. *GIRDHARI LAL v. W. CRAWFORD*, 9 A. 147 (F.B.)=6 A.W.N. (1886) 325=11 Ind. Jur. 154 ...

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(3) See RES JUDICATA, 8 A. 172.

### —3.—To Privy Council.

*Appeal to Her Majesty in Council—Civil Procedure Code*, ss. 574, 596, 632, 633—"Substantial question of law"—*Judgment of High Court—Contents of judgment—Rules made by High Court under s. 633 for recording judgments.*—The intention of the Legislature as expressed in s. 633 of the Civil Procedure Code was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing, or according to any mode which might appear to it best in the interests of justice. The section does not merely give the High Court power to direct that judgments shall be recorded in a particular book, or with a particular seal.

Rule 9 of the rules made under s. 633, in March, 1885, is therefore not *ultra vires* of the Court, and it modifies the provisions of s. 574 in their application to judgments of the High Court.

With reference to the terms of Rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgment of the Court below, to go through the formality of re-stating the points at issue, the decision upon each point, and the reason for the decision.

*Per* EDGE, O.J.—Apart from Rule 9, it never was intended that s. 574 of the Code should apply to cases where the High Court, having heard the judgment of the Court below and arguments thereon, comes to the conclusion that both the judgment and the reasons which it gives are completely satisfactory, and such as the High Court itself would have given.

Assuming the provisions of s. 574 to be applicable, a judgment of the High Court stating merely that the appeal must be dismissed with costs and the judgment of the first Court affirmed, and that it was unnecessary to say more than that the Court agreed with the Judge's reasons, is a substantial compliance with those provisions.

The judgment of the High Court in a first appeal was as follows:—

"This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judge's reasons." The appellant applied for leave to appeal to Her Majesty in Council on the ground that the requirements of s. 574 of the Civil Procedure Code had not been complied with.

*Held* by the Full Bench that the objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected. *SUNDAR BIBI v. BISHESHAR NATH*, 9 A. 93 (F.B.)=6 A.W.N. (1886) 302 ...

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### Appellate Court, Powers of.

- (1) *Withdrawal of suit*—"Decree"—*Appeal—Civil Procedure Code*, ss. 373, 582.—Where, on appeal from a decree dismissing a suit, the appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under s. 373 of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh one—*held* that the order of the appellate Court



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was a "decree" within the meaning of the Civil Procedure Code, and afforded a proper ground of second appeal to the High Court.

*Per* STRAIGHT, J., that, with reference to the terms of s. 582 of the Civil Procedure Code, the appellate Court had power to avail itself of the provisions of s. 373 and therefore had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one.

Also *per* STRAIGHT, J., that it could not be said that the appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal.

*Per* TYRRELL, J., that it might be taken that the appellate Court, though not so stating in express terms, meant to set aside, and did set aside, the decree of the Court of first instance, regarding it as a decree which could not have been rightly made and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that, in this view, there was no legal objection to the exercise by the appellate Court of the discretionary power of Chapter XXII of the Code. *GANGA RAM v. DATA RAM*, 8 A. 82=6 A.W.N. (1886) 6 ...

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(2) Commitment—See CRIMINAL PROCEDURE CODE, 8 A. 14.

Arbitration.

(1) *Agreement to refer not providing for disagreement of arbitrators—Appointment of umpire by Court—Award by umpire and one arbitrator—Decree in accordance with award—Appeal—Civil Procedure Code*, ss. 508, 509, 511, 523—*Application to set aside award—Act XV of 1877 (Limitation Act)*, sch. ii, No. 158.—In an agreement to refer certain matters to arbitration, which was filed in Court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree.

*Held* that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award, such as the law contemplated.

*Held* that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties.

*Held* that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section.

*Held*, also, that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure Code, i.e., applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds. *MUHAMMAD ABID v. MUHAMMAD ASGHAR*, 8 A. 64=6 A.W.N. (1886) 2 ...

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- (2) *Agreement to refer—Order under s. 506 of the Civil Procedure Code to refer matters in dispute in action then pending—Order under s. 373 pending the reference, granting plaintiff permission to withdraw with liberty to bring fresh suit—Act I of 1877 (Specific Relief Act), s. 21.*—The wording of s. 21 of the Specific Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court.

The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under s. 506 of Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired and before any award had been made, one of the parties made an *ex parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877).

*Held*, that the Court in the former proceedings had no power to revoke the order of references prior to award except as provided by s. 510 of the Code; that consequently the Court's order under s. 373 was *ultra vires* in involving such revocation, or if not involving it, left order of reference still in force; that in their alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action.

*Per* TYRRELL, J.—That the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision. *SHEOAMBAR V. DEODAT*, 9 A. 168=7 A.W.N. (1887) 13 ...

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- (3) *Powers of arbitrators—Payment by instalments—Appeal—Civil Procedure Code, ss. 518, 522.*—The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed.

*Held* that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to s. 522 of the Code.

*Held* also that as it was clear that the reference to arbitration gave the arbitrators full powers not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed.

*Per* MAHMOOD, J.—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award," used in s. 522 were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518. *JAWAHAR SINGH V. MUL RAJ*, 8 A. 449=6 A.W.N. (1886) 210 ...

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- (4) Partnership—Agreement to refer disputes to arbitration—Filing award in Court—See CIVIL PROCEDURE CODE, 8 A. 340.
- (5) Making award after the time allowed by Court—See CIVIL PROCEDURE CODE, 8 A. 543.
- (6) Making award after the period allowed by Court—See CIVIL PROCEDURE CODE, 8 A. 548.
- (7) See HINDU LAW (ADOPTION), 9 A. 253.
- (8) Agreement to refer to—Refusal to refer—Suit in respect of matter agreed to be referred—See SPECIFIC RELIEF ACT (I OF 1877), 8 A. 37.

**Bailment.**

Hiring—Accident—Negligence—See EVIDENCE ACT (I OF 1872), 9 A. 398.

**Barrister.**

Right to take instructions directly from client—Right to act for client—See PRACTICE, 9 A. 617.

**Bond.**

- (1) *Interest—Penalty.*—The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due both compound interest and an increased rate shall be payable amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender.

In a bond dated in February, 1877, for a sum of money payable in June, 1882, it was provided that interest should be paid at the rate of Rs. 9 per cent. per annum on the Puranmashi of every Jaith, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the suit at Rs. 15 per annum, and compound interest for the same period at the same rate.

*Held* that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date.

*Held* that, for this purpose, the proper course was to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 per cent. from the due date of payment, upon the entire sum which was due when the bond became due, i.e., the principal added to the compound interest calculated at Rs. 9 per cent.

The same obligee held another bond executed by the same obligors in June, 1879, for a sum of money payable in June, 1882, with interest at Rs. 9 per cent. per annum. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of

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the bond. In December, 1881, the obligee brought a suit on the bond against the obligor, claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 per cent, per annum.

*Held* that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs. 9 per cent, per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond. *DIPNARAIN RAI v. DIPAN RAI*, 8 A. 185=6 A.W.N. (1886) 48 ...

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- (2) *Verbal assignment of rent of land in satisfaction of interest—"Jamog"—Mutation of names in favour of assignee not effected—Suit on bond—Claim for interest notwithstanding assignment—Act IV of 1882 (Transfer of Property Act), s. 131—Evidence—Subsequent oral agreement rescinding or modifying contract registered according to law—Act I of 1872 (Evidence Act), s. 92, proviso (4).—Subsequent to the execution and registration of a bond, jamog was made orally between the creditor and the debtor by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the jamog.*

*Held* that whether or not the plaintiff could maintain a suit on the jamog against the tenants for the rent assigned to him in the Revenue Court, he could do so in Civil Court, and the fact that the jamog was not in writing did not affect the question.

*Held* also that the jamog was not subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force within s. 92, proviso (4), of Act I of 1872 (Evidence Act).

*Held* that the effect of the jamog or novation was that the plaintiff's right to recover interest from the defendant was gone, and that the plaintiff was therefore not entitled to maintain his suit against the defendant in respect of the interest which was payable under the bond. *AUTU SINGH v. AJUDHIA SAHU*, 9 A. 249=7 A.W.N. (1887) 27 ...

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- (3) Contemporaneous oral agreement providing for mode of re-payment—See EVIDENCE ACT (I OF 1872), 9 A. 392.
- (4) Interest after due date—Measure of damages—See MORTGAGE (SIMPLE), 8 A. 486.
- (5) Breach—Interest—Penalty—See PRACTICE, 9 A. 690.

### Breach of Trust.

*Master and servant—Servant entrusted with moneys for payment to tradesman of account settled by master for a specific sum—Gratuity by tradesman to servant—Right of master to benefit of gratuity—Act XLV of 1860 (Penal Code), ss. 405, 409—Powers of appellate Court to alter finding of Court of first instance—Criminal Procedure Code, s. 423—Accomplice—Evidence—Corroboration.—Where a master entrusts his servant with money for the payment of an open account, i.e., an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bill and a reduction of the price by the servant, the latter obtains the reduction for his master's benefit, the money in his hands always remains*



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the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has *settled* the account with the tradesman for a specific sum, and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master for the money.

Where the Court of Session had tried, convicted, and sentenced an accused person under s. 409 of the Penal Code, and the High Court was of opinion that the conviction was not sustainable under that section, the Court refused to alter the finding, under s. 423 of the Criminal Procedure Code, to a conviction for some other offence for which the accused had not been charged or tried.

Observations on the necessity of requiring corroboration, in material particulars, of the evidence of an accomplice. *QUEEN-EMPRESS v. IMDAD KHAN*, 8 A. 120=6 A.W.N. (1886) 7 ...

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### Burden of Proof.

- (1) See *EVIDENCE ACT* (I OF 1872), 9 A. 398.
- (2) See *FRAUDULENT TRANSFER*, 8 A. 178.
- (3) See *HINDU LAW (JOINT FAMILY)*, 8 A. 279.
- (4) Suit by lambardar for profits—See *LAMBARDAR AND CO-SHARER*, 8 A. 61.
- (5) See *MORTGAGE (REDEMPTION)*, 8 A. 295.
- (6) See *PRE-EMPTION*, 9 A. 225.
- (7) See *VENDOR AND PURCHASER*, 8 A. 641.

### Cause of Action.

Suit for malicious prosecution—Application for sanction to prosecute—See *MALICIOUS PROSECUTION*, 9 A. 59.

### Charge.

- (1) *Suit for money charged upon immoveable property—Instrument purporting in general terms to charge all the property of obligor—Maxim "certum est quod certum reddi potest"—Act IV of 1882 (Transfer of Property Act), ss. 98, 100—Act XV of 1877 (Limitation Act), Sch. II, No. 132.*—The obligor of a bond acknowledged therein that he had borrowed Rs. 153 from the obligee at the rate of Re. 1-8 per cent. per mensem, and promised to pay the principal with interest at the agreed rate upon a date named. The bond continued thus:—"To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason, I have of my free will and consent executed this hypothecation bond that it may be of use when needed." The amount secured by the bond became due on the 6th May, 1879. The bond was registered under the Registration Act as a document affecting immoveable property, and the obligor was a party to such registration. On the 9th May, 1885, the obligee sued the heir of the obligor to recover the principal and interest due upon the bond by enforcement of lien against and sale of immoveable property belonging to the defendant.

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*Held*, that the bond showed that the intention of the parties was to create by it charge upon all the property of the obligor for the payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate.

*Held*, also, that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and certain to include, and were intended to include all the property of the obligor; that this being so, the maxim, "*certum est quod certum reddi potest*" applied; that, the bond created a charge upon the immoveable property of the obligor in respect of the principal and interest in question; that such principal and interest where monies charged upon immoveable property within the meaning of sch. ii, No. 132 of the Limitation Act XV of 1877; and that, so far as the claim was to enforce payment of such principal and interest by recourse to the immoveable property of the obligor, the suit was brought within time. RAMSIDDH PANDE v. BALGOBIND, 9 A. 158=7 A.W.N. (1887) 15.

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- (2) *Addition of charge at trial*—*Altering charge*—*Criminal Procedure Code*, s. 227.—*Held* that on a trial upon charges under ss 467 and 471 of the Penal Code, the Court had power, under s. 227 of the Criminal Procedure Code, to add a charge under s. 193 of the Penal Code, upon which the prisoner had not been committed for trial. QUEEN EMPRESS v. GORDON, 9 A. 525=7 A.W.N. (1887) 155=12 Ind. Jur. 37

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### Cheating.

Attempt to cheat—See PENAL CODE, 8 A. 304.

### Civil Procedure Code (Act XIV of 1882).

- (1) S. 2—*Suit in forma pauperis*—*Application for permission to sue as a pauper*—*Rejection of application on the ground that it had been withdrawn*—"Decree"—*Appeal*.—*Held* that an order rejecting an application for permission to sue as a pauper, and striking the case of the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, was a "decree" within the meaning of s. 2 of the Civil Procedure Code, and appealable as such. BALDEO v. GULA KUAR, 9 A. 129=6 A.W.N. (1886) 321

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- (2) Ss. 2, 36, 39, 635—See PRACTICE, 9 A. 617.

- (3) Ss. 2, 44—See DECREE, 8 A. 191.

- (4) Ss. 2, 214, 238—See EXECUTION OF DECREE, 9 A. 605.

- (5) Ss. 2, 251—See PENAL CODE, 8 A. 293.

- (6) S. 11—See PARTITION OF MAHAL, 9 A. 429.

- (7) S. 13—*Res judicata*.—Two-thirds of a village were sold by T, P and B. B was the widow of S, her name being recorded in respect of the property formerly recorded in his name, and what she sold was his one-third share in the village, the other one-third being sold by T and P. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit C, D, and M, to whom belonged the remaining one-third share in the village. These latter persons contended *inter alia*, that the family was a joint one, and that B was not competent to alienate her deceased husband's share in the village. The Court decided that the family was joint. After B's death, her daughter K, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share. A suit was brought by certain persons who had purchased the right in the same village of



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the representatives in interest of *C, D* and *M*, against *K*, her mortgagee, and their vendors, to set aside the mortgagee and recover the interests which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res judicata* by reason of the decision in the former litigation.

*Held* that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants *inter se*, but simply as against the plaintiff, and could only be *res judicata* against him or parties claiming under the same title; and the decree in that suit was therefore not binding against *K* in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with *B*, *K*'s mother, and on the same side. BHAGWANT SINGH v. TEJ KUAR, S A. 91=6 A W.N. (1886) 12.

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- (8) S. 13—*Res judicata*—Dismissal of suit under s. 10, cl. ii, Act VII of 1870 (Court Fees Act)—Dismissal of suit for misjoinder—Dismissal of suit "in its present form."—The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form" (*ba haisiyat maujudat*), upon two grounds: first with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was undervalued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit.

*Held* that the dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*.

*Per* MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose pecuniary burdens or encroach upon, or qualify the rights of, the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. S. 10 is simply a penal clause to enforce the collection of the court-fees, and dismissal of a suit under its provisions cannot operate as *res judicata*.

Also *per* MAHMOOD, J.—The condition in s. 13 of the Civil Procedure Code that the former suit must have been "heard and finally decided," means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought.

Also *per* MAHMOOD, J.—The words *ba haisiyat maujudat* must be taken as amounting to a permission to the plaintiff to bring a fresh suit, within the meaning of s. 373 of the Civil Procedure Code, and could only mean that the Judge using them in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by chapter XXII of the Code is not the only manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. MUHAMMAD SALIM v. NABIAN EIBI, 8 A. 282=6 A.W.N. (1886) 119

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- (9) S. 13—Suit dismissed "as brought"—*Res judicata*.—In a suit in which the plaintiffs claimed exclusive possession, and, in the

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alternative, joint possession of certain land, evidence was taken upon the issues raised; but the Court, without discussing the evidence, held that the alternative claims were "contradictory," and the plaintiff's claim, therefore, "uncertain," and accordingly ordered "that the plaintiff's claim as brought, be dismissed with costs." The plaintiffs did not appeal from this decision, but subsequently brought a suit against the same defendants, claiming joint possession of the same property.

*Held* that the suit was barred by s. 13 of the Civil Procedure Code, the Court in the former suit not having reserved to the plaintiffs the right to bring a fresh action. KUDRAT v. DINU, 9 A. 155= 7 A. W. N. (1887) 5 ...

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(10) S. 13—See MAHOMEDAN LAW (ALIENATION), 8 A. 324.

(11) S. 13—See PARTITION, 9 A. 388.

(12) Ss. 13, 111—See SET-OFF, 8 A. 396.

(13) Ss. 16, 20—See JURISDICTION, 8 A. 117.

(14) Ss. 25, 647—See COMPANY, 9 A. 180.

(15) Ss. 26, 612—See PARTNERSHIP, 9 A. 486.

(16) S. 32—See APPEAL, 9 A. 447.

(17) Ss. 36, 37, 39, 635—See PRACTICE, 9 A. 613.

(18) S. 43—See LEASE, 9 A. 23.

(19) S. 44—See CONTRIBUTION, 9 A. 221.

(20) S. 53—*Suit by Bank for money against executrix—Plaint—Description of parties—Order returning a plaint for amendment—Form of suit.*—A suit was brought by the manager of the M Bank against the executrix of B to recover a sum of money as due upon a bond executed by B in favour of the Bank. The plaint described the defendant as "Mrs. Sarah G. Barlow of Mussorie," and stated that she was executrix of the deceased B. It began thus:—"George Henry Webb, manager of the above named plaintiff's business, states as follows," and proceeded to state that the deceased was, at the time of his death, "indebted to the plaintiff," and to set forth the cause of action in detail. It was signed and verified thus—"For the M Bank, Limited, G. H. Webb, Manager." The Court of first instance returned the plaint for amendment under s. 53 of Civil Procedure Code (i) because the defendant was not properly described, (ii) because the plaint was set out as made by George Henry Webb, as manager, and not as on the part of the Bank, and (iii) because the suit should not have been brought in the form in which it was brought, but in the form referred to in s. 213 and No. 105 of Sch. IV of the Code.

*Held*, that the first of these grounds failed because it was clear that the defendant was stated to be the executrix of the deceased, and the suit was brought against her in that capacity.

*Held* that the second ground did not come within s. 53 of the Code, as it was clear that the circumstances set out in the plaint applied to the case of the plaintiff Bank, and the plaint sufficiently fulfilled the requirements of the Code that the facts which the plaintiff considers essential should be concisely and clearly set out and that the verification should be made by some one acquainted with these facts.

*Held*, with reference to the third ground, that the plaintiff was at liberty to bring a suit for money against any person administering to or representing an estate; and if such suit should be found with reference to the facts in evidence not maintainable, it should be dismissed; but there was no authority for returning a plaint for amendment when it was found that the suit was not maintainable in the form in which it was brought, in order to amend it so as to



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- convert the suit into one of a different character. *THE MUSSOORIE BANK, LIMITED v. BARLOW*, 9 A. 188=7 A.W.N. (1887) 17 ... 600
- (21) Ss. 66, 103, 107, 540, 588 (8)—*Dismissal of suit for non-appearance of plaintiff ordered to appear under s. 66, Civil Procedure Code—Rejection of application to set aside dismissal—Appeal*—A plaintiff who had been ordered, under s. 66 of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear and under s. 107, read with s. 102, his suit was dismissed. He then applied to the Court, under s. 103 for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit, under the provisions of s. 540.
- Held* that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *KRISHNA RAM v. GOBIND PRASAD*, 8 A. 20=5 A.W.N. (1885) 321 ... 14
- (22) Ss. 102, 103—See *APPEAL (GENERAL)*, 9 A. 427.
- (23) Ss. 103, 108, 540, 560, 584—See *APPEAL (SECOND APPEAL)*, 8 A. 354.
- (24) Ss. 103, 157—*Suit adjournment of hearing of—Ex-parte decree—“Appearance” of defendant.*—A Munsif, before whom a suit was pending, fixed, by way of adjournment, a particular date for its disposal. Upon the date so fixed, it was necessary to take evidence upon issues of fact which had previously been settled. The plaintiffs appeared on that day. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the outset and who had filed his *vakalat-nama*. There was nothing to show that he had ever received any other instructions whatever, either as to the facts of the case or the conduct of the defendants, or that the defendants had done anything beyond giving the pleader the instructions above referred to. Under these circumstances the plaintiffs gave their evidence and the Munsif decreed the claim.
- Held* that, under the circumstances stated, the defendants' pleader must be taken not to have been in Court on the date fixed, for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed; that it was therefore a fair inference that the defendants did not appear and the case was disposed of under s. 157 of the Civil Procedure Code; and that, under these circumstances, the provisions of s. 108 were applicable, and the decree was an *ex parte* decision, which it was open to the Munsif to reconsider. *RAMTAHAL RAM v. RAMESHAR RAM*, 8 A. 140=6 A.W.N. (1886) 42 ... 99
- (25) Ss. 129, 136—See *PARDAH-NASHIN WOMAN*, 8 A. 265.
- (26) S. 191—*Hearing of suit—Trial—Death or removal of Judge during suit—Procedure to be followed by new Judge—Power of new Judge to deal with evidence taken by his predecessor.*—The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument. At this point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor. The District Judge having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before

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him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below.

*Held* by the Full Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of first instance had jurisdiction to deal with and determine the suit in the mode in which he did.

*Per* STRAIGHT, Offg. C. J., that as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticised on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain.

*Per* OLDFIELD, J., that where a Judge takes up a trial begun by another, although the law permits him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself; and in every case it has to be seen whether, as a matter of fact, there has been a real trial and hearing of the entire case by the Judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it, and the entire case fully heard and tried, there has been no trial in the legal sense of the words, and the proceedings must be set aside.

*Per* MAHMOOD, J., that although it is true that "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a trial heard on the original date; that the Civil Procedure Code does authorise a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes a nullity; that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself; that the Code does not recognise such procedure as amounting to separate trials; that the Judge who succeeds another after a trial which has partly proceeded before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is *ipso facto*, evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;" that when the case comes on for hearing before the new Judge, there is no necessity for putting in the deposition of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge, that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited, by s. 564 of the Code, to order a trial *de novo*, but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record; that, where further issues are directed to be tried, or additional evidence is to be taken, the Court of Appeal is bound to act according to the provisions of ss. 566, 568 and 569 of the Code, but cannot order a new trial; that, even when there has been an



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- irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court.
- Per* TYRRELL, J., that in reference to the Full Bench the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *JADU RAI v. KANIZAK HUSAIN*, 8 A. 576=6 A.W.N (1886) 195 .. 399
- (27) S. 191—*Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.*—A Subordinate Judge having taken all the evidence in a suit before him adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed.
- Held*, that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial, became a nullity.
- Held* also that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code to prove their allegations in a different manner, *AFZAL-UN-NISSA BEGAM v. ALI ALI*, 8 A. 35=5 A.W.N. (1885) 322 ... 25
- (28) S. 206—See EXECUTION OF DECREE, 8 A. 377.
- (29) S. 206—See EXECUTION OF DECREE, 8 A. 492.
- (30) S. 206—See LIMITATION ACT, 9 A. 364.
- (31) S. 220—See APPEAL (GENERAL), 9 A. 11.
- (32) S. 230—*Twelve years' old decrees—Execution of decree—Meaning of "granted."*—A decree passed in April, 1872, was kept alive by various applications for execution up to 1882. In February and December of that year, two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November, 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Civil Procedure Code, 1882.
- Held* that the application must be entertained in accordance with the ruling of the Full Bench in 6 A. 189.
- Per* MAHMOOD, J., that the previous execution proceedings initiated by the applications of February and December, 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s. 230 of the Civil Procedure Code. *RAMADHAR v. RAM DAYAL*, 8 A. 526=6 A.W.N. (1886) 168. ... 371
- (33) S. 230—See EXECUTION OF DECREE, 8 A. 301.
- (34) S. 230—See EXECUTION OF DECREE, 8 A. 419.
- (35) Ss. 232, 244—See EXECUTION OF DECREE, 9 A. 46.
- (36) S. 244—*Question for Court executing decree—Separate suit—Civil Procedure Code*, ss. 266, 316.—The provisions of s. 244 (c) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the

decree, the object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

A judgment-debtor whose occupancy-tenure had been sold in execution of a decree for money, sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of s. 9 of Act XII of 1881 (N.-W.P. Rent Act).

*Held* by the Full Bench that the question involved in the suit was one of the nature referred to in s. 244 (c) of the Civil Procedure Code as determinable only by order of the Court executing the decree, and that the suit was therefore not maintainable. *BASTI RAM v. FATTU*, 8 A. 146 (F.B.)=6 A.W.N. (1886) 37 ...

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(37) S. 244—See EXECUTION OF DECREE, 9 A. 229.

(39) Ss. 244 (c), 278, 293—*Question for Court executing decree—Separate suit — "Representative" of judgment-debtor.*—The decree-holder under a decree for enforcement of lien against the zamindari rights and interests of *K*, applied for execution by attachment and sale of certain shares, one of which was recorded in the *khewat* in the name of *K*, and two others in the name of *B*, his brother's widow. The shares having been attached, the judgment-debtor died, and *J*, his brother, and *L*, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of *J* and *L*, as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this *B* objected under s. 281 of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objections she died, and *L* applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by *B*, *L* appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to *L*'s claim, as the heir of *B*, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to *L*'s bringing a suit to establish his right. On the other side, it was contended that, *L* being the representative of the deceased judgment-debtor *K*, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie.

*Held* that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as *L*'s claim which was rejected by it was nothing more than to come in as *B*'s representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filled as the legal representative of his deceased father. Because *L* happened, for the purpose of the execution proceedings, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution proceedings. *BAHORI LAL v. GAURI SAHAI*, 8 A. 626=6 A.W.N. (1886) 228 ...

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(39) Ss. 233, 545, 546—See EXECUTION OF DECREE, 8 A. 639.

(40) Ss. 257, 258—See EXECUTION OF DECREE, 9 A. 9.

(41) Ss. 297, 290—See EXECUTION OF DECREE, 9 A. 511.



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- (42) S. 295—See EXECUTION OF DECREE, 8 A. 67.
- (43) S. 311—See EXECUTION OF DECREE, 9 A. 511.
- (44) Ss. 311, 312—See EXECUTION OF DECREE, 8 A. 116.
- (45) Ss. 311, 312—See EXECUTION OF DECREE, 9 A. 411.
- (46) S. 312—See EXECUTION OF DECREE, 9 A. 602.
- (47) S. 313—*Sale in execution of decree—Setting aside sale—Incumbrance—“Saleable interest.”*—The fact that property sold in execution of a decree is incumbered, even when the incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold had no saleable interest therein. S. 313 of the Civil Procedure Code contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell; and the fact that the property may fetch little or nothing if sold does not affect the question. *SANT LAL v. RAMJI DAS*, 9 A. 167=7 A.W.N. (1887) 6 ... 585
- (48) Ss. 313, 320—*Transfer of Execution of decree to Collector—Jurisdiction of Civil Courts to entertain application under s. 313—Rules prescribed by Local Government under s. 320—Notification No. 671 of 1880, dated the 30th August.*—Held that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree which had been transferred for execution to the Collector in accordance with the rules prescribed by the local Government was entertainable by the Civil Courts, and the Collector had no jurisdiction under the Code or under Notification No. 671 of 1880 to entertain it. *NATHU MAL v. LACHMI NARAIN*, 9 A. 43=6 A.W.N. (1886) 269 ... 498
- (49) Ss. 344 (c), 246, 247, 411—See PAUPER SUIT, 9 A. 64.
- (50) Ss. 365, 367, 368, 592—See APPEAL (GENERAL), 9 A. 447.
- (51) Ss. 368, 582—See APPEAL (GENERAL), 9 A. 118.
- (52) Ss. 373—See PRACTICE, 9 A. 690.
- (53) Ss. 440, 578—See ACT XL OF 1858 (BENGAL MINORS), 9 A. 508.
- (54) Ss. 492, 493—*Temporary injunction restraining alienation of property in suit—Mortgage of such property not void—Act IX of 1872 (Contract Act), s. 23.*—The effect of a temporary injunction granted under s. 492 (b) of the Civil Procedure Code is not to make a subsequent mortgage of the property in question illegal and void, within the meaning of s. 23 of the Contract Act (IX of 1872). Such a penalty must not be read into s. 493, which provides otherwise for the breach of an injunction granted under s. 492. *THE DELHI AND LONDON BANK, LIMITED v. RAM NARAIN*, 9 A. 497=7 A.W.N. (1887) 107 ... 812
- (55) Ss. 508, 509, 511, 523—See ARBITRATION, 8 A. 64.
- (56) Ss. 508, 514, 521, 522—*Arbitration—Making award after the period allowed by Court—Order fixing time, or enlarging time fixed, for the delivery of award requisite—Decree in accordance with award—Appeal—Objection to validity of award taken for the first time in appeal.*—The law contained in ss. 508 and 514 of the Civil Procedure Code requires that there shall be an express order of the Court fixing the time for delivery of the award or for extending or enlarging such time and the mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given.  
An award which is invalid under s. 521 of the Civil Procedure Code because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree

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passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies, with reference to the ruling of the Full Bench in 6 A. 174.

Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court, *held*, that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.  
CHUHA MAL v. HARI RAM, 8 A. 548=6 A.W.N. (1886) 179 ...

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(57) Ss. 510, 522—See ARBITRATION, 8 A. 449.

(58) S. 521—*Arbitration—Making award after the time allowed by Court.*—Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless “made” within the period fixed by the Court, is equivalent to a rule that the award must be “delivered” within that period.

Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September on which day it was filed. It had been agreed that the opinion of the majority should carry the decision.

*Held* that the award was not “made within the period fixed by the Court” within the meaning of s. 521 of the Civil Procedure Code.  
BEHARI DAS v. KALIAN DAS, 8 A. 543=6 A.W.N. (1886) 179 ...

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(59) S. 521 cl. (a)—See HINDU LAW (ADOPTION), 9 A. 253.

(60) Ss. 525, 526—*Arbitration—Filing award in Court—Partnership—Agreement to refer disputes to arbitration.*—The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire. Certain differences having arisen among the three partners two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed but they refused to do so. The first mentioned partners then nominated an arbitrator, who in his turn nominated another, and these having appointed an umpire, made an award. One of the partners at whose instance the matter in dispute had been referred to arbitration presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objection within the meaning of s. 520 or s. 521 of the Code.

*Held* that the word “parties” as used in s. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of s. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *prima facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed.

*Held* also that ss. 525 and 526 of the Code, read together, mean that the party coming forward to oppose the filing of the award must show cause, that is, must establish by argument, or proof, or both,



reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in s. 520 or s. 521, and it is not sufficient, when it is sought to make the award a rule of Court, for the defeated party to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. *G. S. JONES v. H. LEDGARD*, 8 A. 340=6 A W.N. (1886) 107 ...

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- (61) S. 539—Suit for declaration that property is waqf—See *MAHOMEDAN LAW* (Waqf), 8 A. 31.

- (62) Ss. 545, 546, 647—*Execution of decree—Review of judgment—Stay of execution pending application for review—Jurisdiction—Civil Procedure Code, s. 623—“Any other sufficient reason.”*—S. 647 of the Civil Procedure Code provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with ss. 545 and 546, give no power to the Court or a Judge, after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree. No such power exists under the Code.

S. 623 gives a more extensive right of review than existed in England, where a review could only be obtained by showing that there was apparent on the record error in law, or that new and relevant matter had been discovered after the judgment which could not possibly have been used when the judgment was given, or that judgment was obtained by fraud. The words “or for any other sufficient reason” mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases “any other sufficient reason” may depend on a question of law, or a question of fact, or a mixed question of law and fact.

In case where a stay of execution or an injunction is granted on an *ex parte* application, liberty to apply to the Judge to vary or set aside his order must be implied, if not expressed.

On the 29th July, 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree dated the 18th March, 1886, for review of judgment. On the 28th August, the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex parte* granting this application. Subsequently, the opposite party applied under s. 623 of the Civil Procedure Code for a review of the *ex parte* order on the grounds (i) that the Court had no jurisdiction to make it, and (ii) that the application of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review.

*Held* that the Court had power, under s. 623 of the Code, to review the *ex parte* order of the 28th August, and that such order had been made without jurisdiction, and ought to be reviewed.

*Held* that the decree of the 18th March being final and unappealable, and no application for review of judgment having been granted within the meaning of s. 630 of the Code, the application for stay of execution did not fall within s. 545 or s. 546 nor did s. 647 apply to it, nor any other provision of the Code.

*Held* that, having regard to the circumstances that the order of the 28th August was made without jurisdiction, and upon an *ex parte* application of which the opposite party had no notice, and interfered perhaps indefinitely with his right to obtain the money in Court under the final and unappealable decree in his favour, as to which no application for review had been granted, and that the

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- application for review of judgment was made after the statutory period of ninety days had expired and contained no explanation of the delay, sufficient reason for reviewing the order of the 28th August had been shown. *AMIR HASAN v. AHMAD ALI*, 9 A. 36=6 A.W.N. (1886) 293 ... 494
- (63) S. 549—*Practice—Appeal—Security for costs—Poverty of appellant—Held* by the Full Bench (TYRRELL, J., *dubitante*), without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself, and without reference to any general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs. *JIWAN ALI BEG v. BASA MAL*, 8 A. 203 (F.B.)=6 A.W.N. (1886) 58 ... 143
- (64) S. 549—*Appeal may be restored on sufficient grounds, at the Court's discretion.*—An appeal, although it may have been rejected by the appellate Court, under s. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion.
- The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, held by the Judicial Committee that restoration was within the Court's discretion and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix. *BALWANT SINGH, v. DAULAT SINGH*, 8 A. 315=13 I.A. 57=4 Sar. P.C.J. 707 ... 220
- (65) S. 549—*Security for costs—Amount of security not fixed—Dismissal of appeal—Practice.*—Section 549 of the Civil Procedure Code contemplates an order by which some ascertained amount of security is required.
- The last paragraph of the section seems to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security.
- Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge such security at any time before the hearing. This order purported to be made under s. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing of the appeal, no security having been lodged, the respondent objected that, with reference to the terms of s. 549, the Court had no option but to dismiss the appeal.
- Held* that the objection had no force, no such order as was contemplated by s. 549 having been made.
- Held* also that the proper course was to have applied to the Judge who passed the order of security, at any time before the case came on for hearing, for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal. *THAKUR DAS v. KISHORI LAL*, 9 A. 164=7 A.W.N. (1887) 7 ... 589
- (66) Ss. 556, 558—*Non attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.* In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her



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absence when the appeal was called on for hearing. The Court rejected the application, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

*Held* that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal. *ZAINAB BEGAM v. MANAWAR HUSAIN KHAN*, 8 A. 277=6 A.W.N. (1886) 95 ... 194

- (67) *S. 561—Objections by respondent—Withdrawal of appeal.*—Where an appeal was dismissed upon the application of the appellant himself made before the hearing,—*held* that the respondents, who had filed objections to the decree of the Court of first instance under s. 561 of the Civil Procedure Code, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *MAKTAB BEG v. HASAN ALI*, 8 A. 551=6 A.W.N. (1886) 220 ... 382

(68) *Ss. 564, 565, 574, 578, 584, 587*—See *APPEAL (GENERAL)*, 9 A. 26.

(69) *Ss. 565, 566, 587*—See *APPEAL (SECOND APPEAL)*, 9 A. 147.

(70) *S. 568*—See *ACT VI OF 1871 (BENGAL CIVIL COURTS)*, 9 A. 366.

(71) *Ss. 574, 596, 632, 633*—See *APPEAL (TO PRIVY COUNCIL)*, 9 A. 93.

(72) *S. 575*—See *HIGH COURT, N.W.P.*, 9 A. 625.

(73) *S. 578*—See *DECLARATORY DECREE*, 9 A. 624.

(74) *S. 578*—See *HINDU LAW (REVERSIONER)*, 8 A. 365.

(75) *S. 591*—See *APPEAL (GENERAL)*, 9 A. 447.

(76) *S. 593*—See *EXECUTION OF DECREE*, 8 A. 545.

- (77) *S. 610—Privy Council decree—Execution for costs—Rate of exchange—Meaning of "for the time being."*—Under the last paragraph of s. 610 of the Civil Procedure Code, the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council," and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed.

The decree-holders under a decree passed by Her Majesty in Council having taken out execution for a sum of £119-11, under s. 610 of the Civil Procedure Code,—*held* that, the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to. *PARAM SUKH v. RAM DAYAL*, 8 A. 650=6 A.W.N. (1886) 249 ... 448

- (78) *S. 622—High Court's powers of revision—"Jurisdiction"—"Illegality"—"Material irregularity."*—A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, *held* that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code.

*Held*, by the Full Bench, that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs. 49;

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that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code.

The result of 11 C. 6 and 7 A. 336 is, that the questions to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided its decision on questions of both kinds is final.

*Per* STRAIGHT and TYRRELL, JJ.—Clauses (a) and (b) of s. 584, specifying grounds on which a second appeal lies to the High Court, embody what s. 622 refers to in the word "illegally;" that is to say to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (c) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, i.e., some "material irregularity" in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits." *BADAMI KUAR v. DINU RAI*, 8 A. 111 (F.B.) = 6 A.W.N. (1886) 28 ...

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- (79) Ss. 622, 906—*High Court's powers of revision—Meaning of "Jurisdiction"*—*Amenment of decree—Act XV of 1877 (Limitation Act, s. 4, No. 178.*—In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May, 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond the jurisdiction in amending it.

*Held* that the application for revision must be rejected.

*Per* OLDFIELD, J., that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in 11 C. 6 and of the Full Bench in 8 A. 111 and further that, upon the facts stated, the Court ought not to interfere.

*Per* MAHMOOD, J., that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code.

The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or under the pretence of exercising such authority, power and jurisdiction have acted against a positive prohibition of the law.



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*Held also Per MAHMOOD, J*, that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendments its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity," within the meaning of s. 622.

Under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or had to perform *suo motu*. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power will not render the action of the Court subject to the rule of limitation. *DHAN SINGH v. BASANT SINGH*, S. A. 519=6 A. W. N. (1886) 182 ...

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(80) S. 622—See EVIDENCE ACT, 9 A. 398.

(81) S. 622—HIGH COURTS' ACT, 9 A. 104.

(82) S. 623—*Review of judgment—Omission to serve notice of hearing of appeal upon applicant—"Any other sufficient reason"—Practice—Notice to show cause—Right to begin*—An appeal which was referred to the Full Bench for disposal was heard and determined by the Full Bench and judgment given in favour of the appellant in the absence of the respondent. Subsequently the respondent applied for a review of judgment and proved that his absence at the hearing before the Full Bench was due to a mistake which had been made in not serving him with notice of the reference.

*Held* by the Full Bench that, under the circumstances, the applicant's absence at the hearing came within the words "any other sufficient reason" in s. 623 of the Civil Procedure Code, and the review should be granted and the appeal re-heard.

Upon the hearing of an application for review of judgment upon which an order has been passed directing the opposite party to show cause why the application should not be granted, counsel for the opposite party should begin. *GHANSHAM SINGH v. LAL SINGH*, 9 A. 61 (F B) = 6 A. W. N. (1886) 296 ...

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(83) S. 623—See CIVIL PROCEDURE CODE, 9 A. 36.

### Companies Act (VI of 1882).

Ss. 45, 47, 60, 61, sch. I—See ACT VI OF 1871 (BENGAL CIVIL COURTS), 9 A. 366.

#### Company.

(1)—*Winding up—Transfer of winding up from District Court to High Court—Act VI of 1882 (Indian Companies Act), s. 219—Civil Procedure Code, ss. 25, 647—Stat 24 and 25 Vic. (High Courts Act), c. 104, s. 15—Letters Patent, s. 9—Creditor's vol. acting as liquidator—Practice—Barrister or Pleader appearing as litigant in person*—There is nothing in the Indian Companies Act (VI of 1882) or the High Courts Act (24 and 25 Vic., c. 104) or the Letters Patent, which prevents the High Court from calling for the record of the proceedings in the winding up of a company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25 of the Civil Procedure Code.

Where, in the proceedings in the winding up of a company under Act VI of 1882, an order was passed admitting the proof of a particular creditor of the company before any liquidator had been appointed, —*held*, that this was an irregularity which by itself would justify the High Court in sending for the record.

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Where the District Judge conducting the proceedings in the winding up of a company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to re-consider if the matter again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the District Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with windings up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other,—*held* that, under these circumstances, the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding up proceedings to its own file.

A person who has been appointed liquidator of a company, ought not, after such appointment, to continue to act as vakil of a creditor whose right to prove against the company is in dispute in the liquidation.

In cases where a Barrister or Pleader appears before the Court as a litigant in person, he must not address the Court from the advocates' table or in robes, but from the same place and in the same way as any ordinary member of the public. **IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED**, 9 A. 180=7 A. W. N. (1887) 7=11 Ind. Jur. 270 ...

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- (2) Winding up—Contributories—Shareholders—Notice of allotment—Secondary evidence of notice—See ACT VI OF 1871 (BENGAL CIVIL COURTS), 9 A. 366.

**Complaint.**

Dismissal of—Revival of proceedings—See CRIMINAL PROCEDURE CODE, 9 A. 85.

**Construction of Statute.**

- (1) See APPEAL (SECOND APPEAL), 8 A. 354.  
(2) See MORTGAGE (REDEMPTION), 8 A. 438.

**Contract Act (IX of 1872).**

- (1) Ss. 3, 4—See ACT VI OF 1871 (BENGAL CIVIL COURTS), 9 A. 366.  
(2) S. 23—See CIVIL PROCEDURE CODE, 9 A. 497.  
(3) S. 45—See PARTNERSHIP, 9 A. 486.  
(4) S. 65—See GUARDIAN AND MINOR, 9 A. 340.  
(5) S. 74—See PRACTICE, 9 A. 690.  
(6) Ss. 134, 137, 139, and 141.—*Surety*.—A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors, in annual instalments. He also accepted from certain other persons a surety-bond in the following terms :—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

*Held*, that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much



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more than the usual agreement under such circumstances, that the decree holder might execute his decree, if he pleased, on a default; that the legal consequences of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that this action was much more serious than "mere forbearance" in favour of this debtors, the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141), and that the suit must consequently be dismissed. *HAZARI v. CHUNNI LAL*, S. A. 259=6 A.W.N. (1886) 75 ...

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(7) Ss. 150, 151, 152—See EVIDENCE ACT (I OF 1872), 9 A. 393.

(8) S. 232—See PRINCIPAL AND AGENT, 9 A. 681.

**Contribution.**

*Joint liability—Joint tort-feasors—Misjoinder—Civil Procedure Code, S. 44, r. b.*—An objection to the attachment and sale of certain immoveable property, raised by one who claimed to have purchased the same at a sale in execution of a prior decree, was disallowed on the ground that, under the prior decree, the rights of one only of the present judgment-debtors had been sold and purchased by the objector. In accordance with this order, two-thirds of the property under attachment were sold; and the objector thereupon brought a regular suit for a declaration of his right as a purchaser of the whole property in execution of the prior decree. To this suit he impleaded as defendants the decree-holder and the judgment-debtors. The suit was decreed, and in the result the decree-holder alone was compelled to pay the whole of the costs. Subsequently he brought a suit for contribution in respect of these costs, making defendants to the suit (i) R, one of his co-defendants in the previous suit, personally and as heir of A, who was another of those co-defendants (ii), N, and (iii) S, these two being sued in the character of heirs of A.

*Held* that inasmuch as the rule preventing one wrong-doer from claiming contribution against another was confined to cases where the person seeking relief must be presumed to have known that he was acting illegally, and in this case there was no evidence to show that the plaintiff in attaching and advertising the property for sale in execution of his decree knew he was doing an illegal act, but the inferences were all the other way, he was fully entitled in law to maintain the suit, and to recover from the defendants the proportionate amount of the costs which he had to pay for them.

*Held*, with reference to a plea of misjoinder within the terms of rule (b) of s. 44 of the Civil Procedure Code, that even if there were misjoinder of parties, the first Court, having proceeded to trial of the suit, and not having rejected the plaint or returned it for amendment, or amended it, should have disposed of it upon the merits, and found what A's share in the amount paid by the plaintiff was, and whether assets to that amount had come to the hands of the defendants as her heirs. *KISHNA RAM v. RAKMINI SEWAK SINGH*, 9 A. 221=7 A.W.N. (1887) 31 ...

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**Co-sharers.**

(1) *Rents collected by one co-sharer in respect of another's share—Inter-meddler—Suit for recovery of rents—Intermeddler not liable for more than amount actually collected less collection expenses.*—The lessee of two-thirds of a five biswas zamindari share asserted and exercised a right of collecting rents in respect not only of the two-thirds but also of the remaining one-third. It appeared that he

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made these collections not as a matter of contract, but as an inter-meddlor, and in defiance of the wishes of the holder of the one-third share. Subsequently a suit was brought against him by a purchaser of the five biswas for recovery of rents so collected, the claim extending to rents which the defendant might have collected, but neglected to collect, and which were consequently lost to the plaintiff.

*Held*, that the defendant, not having been under any obligation to collect the rents of the one-third share, could not be made liable for any of such rents which he had not actually collected, and that as the collection expenses had exceeded the amount collected, the suit must be dismissed. *BALWANT SINGH v. GOKARAN PRASAD*, 9 A. 519=7 A.W.N. (1887) 135 ...

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(2) *Right to deal with joint property—Building by one co-sharer against the wish of others—Suit for demolition of building—Discretion of Court.*—The mere fact of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. *PARAS RAM v. SHERJIT*, 9 A. 661=7 A.W.N. (1887) 253 ...

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(3) *Recorded co-sharers—Benami purchases of shares—Sale by co-sharer—Claim for pre-emption resisted by person alleging himself to be co-sharer by virtue of benami transaction—Equitable estoppel—See PRE-EMPTION*, 9 A. 460.

(4) *Pre-emption—Wajib-ul-arz—"Ek jaddi"—See PRE-EMPTION*, 9 A. 660.

(5) *Effect of perfect partition—See PRE-EMPTION*, 9 A. 234.

### Costs.

(1) *See APPEAL (GENERAL)*, 9 A. 11.

(2) *Security for costs—Poverty of appellant—See CIVIL PROCEDURE CODE*, 8 A. 203.

(3) *Security for—Amount of security not fixed—Dismissal of appeal—Practice—See CIVIL PROCEDURE CODE*, 9 A. 164.

(4) *Reversal of decree—Refund of costs recovered by execution—Interest—See EXECUTION OF DECREE*, 8 A. 262.

(5) *See MORTGAGE*, 9 A. 205.

(6) *Suit to recover, by way of damages—See TRANSFER OF PROPERTY ACT*, 8 A. 452.

### Court-fees.

(1) *Recovery of, by Government—See FAUPER SUIT*, 9 A. 64.

(2) *Set-off—See SET-OFF*, 8 A. 396.

### Court Fees Act (VII of 1870)

(1) *S. 7 (ix)—See MORTGAGE (REDEMPTION)*, 8 A. 438.

(2) *S. 10 (2)—See CIVIL PROCEDURE CODE*, 8 A. 282.

(3) *S. 17—Court fees—Suit on hundis—Distinct causes of action—Distinct subjects.*—In a suit upon three different hundis executed on the same date by one of the defendants in favour of the other three defendants and by them assigned to the plaintiff, and not paid on maturity—*held* that each *hundi* afforded a separate cause of action, that the suit embraced three separate and distinct subjects, and that the memorandum of appeal by the first defendant was chargeable with the aggregate amount of the Court-fees to which the memoranda of appeal in suits embracing separately each of such



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subjects would be liable under the Court Fees Act. <b>PARSHOTAM LAL v. LACHMAN DAS</b> , 9 A. 252—7 A.W.N. (1887) 42 ...	644

### Creditors.

Arrangement between firm and—Giving time—Mortgage security—See **MORTGAGE (GENERAL)**, 9 A. 330.

### Criminal Procedure Code, 1882.

- (1) Ss. 78, 226, 236, 237, 537—See **SESSIONS COURT**, 8 A. 665.
- (2) Ss. 107, 112, 117, 118, 239—*Security for keeping the peace*—"Show cause"—*Burden of proof*—*Joint inquiry*—*Opposing factions dealt with in one proceeding*—*Nature and quantum of evidence necessary before passing order for security*.—Upon general principles, every person is entitled, in the absence of exceptional authority conferred by the law to the contrary effect, when required by the judiciary either to forfeit his liberty or to have his liberty qualified, to insist that his case shall be tried separately from the cases of other persons similarly circumstanced.

Where an order has been passed under s. 107 of the Criminal Procedure Code requiring more persons than one to show cause why they should not severally furnish security for keeping the peace, the provisions of s. 239 read with s. 117 are applicable, subject to such modifications as the latter section indicates, and to such procedure as the exigencies of each individual case may render advisable in the interest of justice. A joint inquiry in the case of such persons is therefore not *ipso facto* illegal; and even in cases where one and the same proceeding taken by the Magistrate under ss. 107, 112, 117 and 118 improperly deals with more persons than one, the matter must be considered upon the individual merits of the particular case, and would at most amount to an irregularity which, according to the particular circumstances, might or might not be covered by the provisions of s. 537.

An order passed by a Magistrate under ss. 107 and 112 of the Criminal Procedure Code, requiring any person to "show cause" why he should not be ordered to furnish security for keeping the peace, is not in the nature of a rule *nisi* implying that the burden of proving innocence is upon such person. The onus of proof lies upon the prosecution to establish circumstances justifying the action of the Magistrate in calling upon persons to furnish security.

Where, according to the information received by the Magistrate, there were two opposing parties inclined to commit a breach of the peace,—*held*, applying by analogy the principles relating to the trial of members of opposing factions engaged in a riot, that the Magistrate acted irregularly in taking steps against both parties jointly, and in holding the inquiry in a single proceeding. Such a procedure is not *ipso facto* null and void, but only where the accused have been prejudiced by it.

In proceedings instituted under s. 107 of the Criminal Procedure Code against more persons than one, it is essential for the prosecution to establish what each individual implicated has done to furnish a basis for the apprehension that he will commit a breach of the peace. In holding such an inquiry it is improper to treat what is evidence against one of such persons as evidence against all, without discriminating between the cases of the various persons implicated.

Although in an inquiry under s. 117, the nature or *quantum* of evidence need not be so conclusive as is necessary in trials for offences, the Magistrate should not proceed purely upon an apprehension of a breach of the peace, but is bound to see that substantial grounds for such an apprehension are established by proof of facts against each person implicated which would lead to the conclusion that an

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order for furnishing security is necessary. What the nature of the fact should be defence upon the circumstances of each case, but where the nature of the Magistrate's information requires it, overt acts must be proved before an order under s. 113 can be made, and such an order cannot be passed against any person simply on the ground that another is likely to commit a breach of the peace. *QUEEN-EMPRESS v. ABDUL KADIR*, 9 A. 452=7 A.W.N. (1887) 111=11 Ind. Jur. 467 ...

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(3) Ss. 134, 143, 144—See PENAL CODE, 8 A. 99.

(4) S. 180—Dacoity committed in British territory—Dishonest receipt of stolen property in foreign territory—See JURISDICTION, 9 A. 523.

(5) S. 195—See PENAL CODE, 8 A. 382.

(6) S. 203—"Examining"—Written complaint attested by complainant on oath—Irregularity—Criminal Procedure Code, s. 537—Act XLV of 1860 (Penal Code) s. 405.—Where a deposition in the shape of a complaint is made orally or in writing and is sworn to, the requirements of s. 203 of the Criminal Procedure Code in regard to the examination of the complainant, are sufficiently satisfied.

*Held* therefore, where a Magistrate dismissed a complaint of criminal breach of trust without examining the complainant on oath, but after the complainant had sworn to the truth of the matters alleged in the complaint, that the provisions of s. 203 had been sufficiently complied with, and, if not, that the irregularity was covered by the terms of s. 537.

*Held* also that inasmuch as the complaint only amounted to a statement that the accused had, in consequence of certain arrangements made with the complainant's father, received certain moneys and had refused to render accounts, but contained no allegation that he had in fact realized and dishonestly misappropriated any particular sum, and obviously was made for the purpose of forcing him to render accounts, the Magistrate was right in dismissing it, since the facts alleged did not constitute criminal breach of trust. *QUEEN-EMPRESS v. MURPHY*, 9 A. 666=7 A.W.N. (1887) 141 ...

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(7) Ss. 203, 437—Complaint, dismissal of—Revival of proceedings.—A complaint was made, before a Magistrate of the first class, of an offence punishable under s. 323 of the Penal Code. The Magistrate recorded a brief statement by the complainant, but did not ask him if he had any witnesses to call. An order was passed directing that "a copy of the petition of complaint should be sent to the Police-station, calling for a report on the matter," and on receipt of the report the Magistrate dismissed the complaint under s. 203 of the Criminal Procedure Code. There was nothing in the Magistrate's original order to show that he saw reason to distrust the truth of the complaint, nor did he direct any local investigation to be made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint. Subsequently to the dismissal of the complaint, the same complainant brought a fresh charge upon the same facts against the same persons in the same Court, and upon this charge the accused were tried, convicted, and sentenced.

*Held* that the Magistrate had not complied with the provisions of s. 203 of the Criminal Procedure Code, and ought not, merely on the reports he had received, to have dismissed the first complaint under s. 203.

*Held*, also that the Magistrate in ordering a further inquiry, on receiving the complainant's second petition, did not act contrary to any provision of the law, and that, considering the circumstances under which first complaint had been dismissed, a further inquiry was necessary. *QUEEN-EMPRESS v. PURAN*, 9 A. 85=6 A.W.N. (1886) 307 ...

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- (8) S. 227—See CHARGE, 9 A. 525.
- (9) S. 235—See RIOTING, 9 A. 645.
- (10) Ss. 291, 540, 216—*Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness.*—Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists, the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purpose only, and that there were no reasonable grounds for believing any evidence that he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it.  
*Held* that when a Magistrate refused, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, viz., that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.  
*Per* STRAIGHT, J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291 though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the Committing Magistrate. **IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT**, 8 A. 668=6 A.W.N. (1886) 260 ...
- (11) Ss. 307, 418, 423 (b)—See CRIMINAL PROCEDURE, AMENDMENT ACT (III OF 1884), 9 A. 420.
- (12) Ss. 353, 537—See CRIMINAL PROCEEDINGS, 9 A. 609.
- (13) Ss. 421, 367, 424, 439—*Appeal, summary rejection of—Judgment of criminal appellate Court—High Court's powers of revision—Delay in applying for exercise.*—The powers conferred by s. 421 of the Criminal Procedure Code should be exercised sparingly and with great caution and reasons, however concise, should be given for rejecting an appeal under that section.

Where a Sessions Judge rejected an appeal summarily under s. 421 of the Code, by an order consisting merely of the words "appeal rejected," and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that

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the Judge was wrong in rejecting the appeal without assigning his reasons for so doing,—*held* that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere. *QUEEN-EMPRESS v. RAM NARAIN*, 8 A. 514=6 A.W.N. (1886) 177 ...

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- (14) S. 423—See BREACH OF TRUST, 8 A. 120,

- (15) Ss. 423 (a), 439—*Order of acquittal—High Court's powers of revision—Order by High Court for re-trial after acquittal on appeal.*—The High Court has power under s. 439 of the Criminal Procedure Code to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction.

In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under s. 439, reverse such order and direct re-trial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal, or such other Court of equal jurisdiction as the High Court may entrust, under s. 526 of the Code, with the trial of the appeal. *QUEEN-EMPRESS v. BALWANT*, 9 A. 134 (F.B.)=6 A.W.N. (1886) 322 ...

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- (16) Ss. 423, 436, 439—*Appellate Court, powers of—Commitment.*—The appellate Court referred to in s. 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session.

The meaning of the words in s. 423 (b) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial," is as follows:—If in an appeal from a conviction, the appellate Court finds that the accused person, who was triable only by a Magistrate of the first class, or by a Court of Session, has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be retried by a Magistrate of the first class or by the Court of Session; and, in like manner, when the appellant, who was triable solely by the Court of Session, has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial. *QUEEN-EMPRESS v. SUKHA*, 8 A. 14=5 A.W.N. (1885) 298 ...

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- (17) S. 427—See EVIDENCE ACT, 9 A. 528.

- (18) S. 437—"*Further inquiry*"—*Practice—Notice to show cause.*—*Held* by the Full Bench that when a Magistrate has discharged an accused person under s. 253 of the Criminal Procedure Code, the High Court or Court of Session, under s. 437, has jurisdiction to direct further inquiry on the same materials, and a District Magistrate may, under like circumstances, himself hold further inquiry or direct further inquiry by a Subordinate Magistrate.

In exercising the powers conferred by s. 437, Sessions Judges and Magistrates should, in the first place, always allow the person who has been discharged an opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and, next, they should use them sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact.

As to the mode in which their discretion should be regulated under such circumstances, the remarks of STRAIGHT and TYRRELL, JJ., in 4 A. 148 in reference to appeals from acquittals, are applicable. *QUEEN-EMPRESS v. CHOTU*, 9 A. 52 (F.B.)=6 A.W.N. (1816) 281 ...

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(19) Ss. 438, 439—See PRACTICE, 9 A. 362.

(20) S. 488—*Maintenance—Wife—Breach of order for monthly allowance—Warrant for levying arrears for several months—Imprisonment for allowance remaining unpaid after execution of warrants—Act I of 1868 (General Clauses Act), s. 2 (18)—“Imprisonment.”*—Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate, acting under s. 488 of the Criminal Procedure Code, has no power to pass a heavier sentence in default than one month's imprisonment as if the warrant only related to a single breach of the order.

*Per* EDGE, O.J.—S. 488 contemplates that a separate warrant should issue for each separate monthly breach of the order.

*Per* STRAIGHT, J.—The third paragraph of s. 488 ought to be strictly construed and, as far as possible, construed in favour of the subject. Under the section, a condition precedent to the infliction of a term of imprisonment is the issue of a warrant in respect of each breach of the order directing maintenance, and where, after distress has been issued, *nulla bona* is the return. The section contemplates one warrant, one punishment, and not a cumulative warrant and cumulative punishment.

Also *per* STRAIGHT, J.—With reference to s. 2, cl. (16), of the General Clauses Act (I of 1868), “imprisonment” in s. 488 of the Criminal Procedure Code may be either simple or rigorous.

*Per* OLDFIELD, J.—A claim for accumulated arrears of maintenance arising under several breaches of order may be dealt with in one proceeding and arrears levied under a single warrant. *QUEEN-EMPRESS v. NARAIN*, 9 A. 240=7 A.W.N. (1887) 51=11 Ind. Jur. 280

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(21) S. 494—See PUBLIC PROSECUTOR, 8 A. 291.

(22) S. 509—*Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Deposition not admissible in evidence Act I of 1872 (Evidence Act), s. 114, illustration (c).*—Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Criminal Procedure Code, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrates's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (c) of the Evidence Act (I of 1872) to have been so taken and attested. *QUEEN-EMPRESS v. RIDING*, 9 A. 740=7 A.W.N. (1887) 228 ...

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(23) S. 512—*Act I of 1872 (Evidence Act), ss. 33, 157—Witness, threatening—Duty of Magistrate.*—In 1874, five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead and the Sessions Judge referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the

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depositions given in 1874 before the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner.

*Held*, that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a part to the former proceedings and not having then had an opportunity of cross-examining the witnesses.

*Held*, however, that, under the circumstances, the depositions given in 1874 before the committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code.

*Per* STRAIGHT, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner.

In cross-examination before the Court of Session, a witness stated, that, when she was before the committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody."

*Held* that if the Magistrate did so address the witness, he exceeded his duty. *QUEEN-EMPRESS v. ISHRI SINGH*, 8 A. 672=6 A.W.N. (1886) 257

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### Criminal Procedure Code Amendment Act (III of 1884).

S. 8 (6)—*European British subject—Trial by District Magistrate with a jury—Procedure "in a trial by jury"—Criminal Procedure Code, s. 307—Power of District Magistrate dissenting from verdict to submit the case to High Court—Powers of High Court under s. 307—Criminal Procedure Code, ss. 418, 423 (b)—Defamation—Act XLV of 1860—Penal Code, s. 499, Explanation 4—Words per se defamatory.*—The effect of cl. 6 of s. 8 of Act III of 1884 (Criminal Procedure Code Amendment Act), is to confer upon the District Magistrate precisely the same authority as the Sessions Judge has, under s. 307 of the Criminal Procedure Code, to submit to the High Court a case in which he disagrees with the verdict of a jury so completely that he considers a reference necessary. The expression "trial by jury" as used in cl. 6 of s. 8 does not only refer to proceedings up to the time when the jury pronounce their verdict, but refers generally to cases triable with a jury as contra distinguished from cases tried with the help of assessors or in any other manner mentioned in the Criminal Procedure Code.

No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal, and causing conviction and sentence to be entered against the accused.

The provisions of s. 307 of the Criminal Procedure Code are not in any way cut down by ss. 418 and 423; and the High Court has power, under s. 307, to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, i.e., misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law.

Explanation 4 of s. 499 of the Penal Code does not apply where the words used and forming the basis of a charge are *per se* defamatory; though when the meaning of words spoken or written is doubtful,



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and evidence is necessary to determine the effect of such words and whether they are calculated to harm a particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied, *QUEEN-EMPRESS v. MCOARTHY*, 9 A. 420=7 A.W.N. (1887) 39 ...

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**Criminal Proceedings.**

*Irregularity—Evidence given at previous trial treated as examination-in-chief—Criminal Procedure Code, ss. 353, 537—Act I of 1872 (Evidence Act), ss. 138, 167.*—At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination-in-chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans who were opposed to the Hindus in the same riot. These copies were read out to the witnesses, who were then cross examined by the prisoners, and no objection to this procedure was taken on the prisoners' behalf. The accused were convicted.

*Held* that although the procedure adopted by the Magistrate was irregular, the irregularity was cured by the provisions of s. 537 of the Criminal Procedure Code and of s. 167 of the Evidence Act (I of 1872) as it was not shown that there had been any failure of justice or that the accused had been substantially prejudiced and as the matters elicited in cross examination were sufficient to sustain the conviction. *QUEEN-EMPRESS v. NAND RAM*, 9 A. 609=7 A.W.N. (1887) 143 ...

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**Custom.**

*Succession to the office and property of a deceased Mahant—Custom of the math or institution.*—In determining the right of succession to the property left by the deceased head of a religious institution, the only law to be observed is to be found in custom and practice, which must be proved by evidence.

On the death of a *Mahant* the right to succeed to his land and other property was contested between two *goshains*; *Held* that the claimant, in order to succeed, must prove the custom of the *math* entitling him to recover the office and the property appertaining to it. The evidence showed the custom to be that the title to succeed to the office and property was dependent on the successor's having been the *chela* approved, and nominated, as such, by the late *Mahant*; and also, after the death of the latter, installed or confirmed as *Mahant* by the other *goshains* of the sect: *Held*, that a claimant who failed to prove his installation or confirmation was not entitled to a decree for the office and property against a person alleging himself to have been a *chela*, who, whether with or without title, was in possession. *GENDA PURI v. CHATAR PURI*, 9 A. 1 (P.C.)=13 I.A. 100=4 Sar. P.C.J. 726 ...

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**Decree.**

- (1) *Order rejecting application under Civil Procedure Code, s. 44, Rule (a) and returning plaint—Appeal—Civil Procedure Code, ss. 2, 44.*—No appeal lies under any of the provisions of s. 588 of the Civil Procedure Code from an order under s. 44, rule (a) rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property.

In a plaint filed in the Court of a Subordinate Judge, the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave, under s. 44, Rule (a) of the Civil Procedure Code, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint, with directions that the plaintiff should institute two suits for recovery of the house and the grain, respectively in the Court of the Munsif.

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*Held* that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of s. 44, Rule (a) of the Code, its effect was to reject the plaint; that such an order was a decree, with reference to the definition in s. 2, and was appealable as such to the District Judge; and that therefore a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under s. 622. **BANDHAN SINGH v. SOLHU**, 8 A. 191=6 A.W.N. (1886) 46 ...

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- (2) *Order dismissing a suit under Civil Procedure Code*, s. 381—*Civil Procedure Code*, s. 2—*Appeal*.—The definition of "decree" in s. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree."

*Held* by the Full Bench that an order passed under s. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court under s. 622 of the Code. **J. R. WILLIAMS v. T. A. BROWN**, 8 A. 108 (F.B.)=6 A.W.N. (1886) 30 ...

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- (3) Priority of—See **EVIDENCE ACT (I OF 1872)**, 9 A. 413.

### Declaratory Decree.

- (1) *Act I of 1877 (Specific Relief Act)*, s. 42—*Civil Procedure Code*, s. 578.—An improper or irregular exercise of the discretionary power conferred by s. 42 of the Specific Relief Act (I of 1877) does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection on the ground of jurisdiction or of the merits of the case, being covered by s. 578 of the Civil Procedure Code. **MUHAMMAD MUSHUK ALI KHAN v. KHUDA BAKSHI**, 9 A. 622=7 A.W.N. (1887) 226 ...

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- (2) Decree for maintenance—Decree directing payment of a certain sum every month for life—See **EXECUTION OF DECREE** 9 A. 33.

- (3) See **HINDU LAW (REVERSIONER)**, 8 A. 365.

- (4) See **HINDU LAW (WIDOW)**, 8 A. 70.

### Defamation.

See **CRIMINAL PROCEDURE AMENDMENT ACT (III OF 1884)**, 9 A. 420.

### Easement.

*Private right of way—Obstruction—Acquiescence—Suit for removal of obstruction—Decree for plaintiff qualified by declaring that parties retain rights exercised prior to obstruction*.—In a suit for the removal of a building which the defendants had erected and which was an obstruction to the plaintiff's right to use a Court yard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the *mohulla* had from time immemorial exercised a right of way over it to and from their houses. It also appeared that on a part of the same land, there had formerly stood a thatched building used as a "sitting place" by the residents of the *mohulla*. The lower appellate Court, while decreeing the claim, observed that the defendants, if they liked, could construct and use a shed "according to the old state of things," and "without offering obstruction to" the right of the plaintiffs to "use it as a sitting-place when necessary."

*Held* that this was not a declaration of a right in the defendants to build, but merely a statement that the decree would not operate as an interference with the rights of the parties to have similar thatched building set up as had existed in former time.



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*Held* also that the right which was alleged to have been obstructed was not a public right of way, but a right which was confined to the people dwelling in the *mohulla* and going to and from the houses in that *mohulla*; and that the suit, being brought in respect of an interference with a private easement, was maintainable without proof of special damage.

*Held* also that there was no principle of acquiescence involved in the case, inasmuch as there was no evidence that the plaintiffs had given their actual consent to the building, and the only evidence of their acquiescence could be that they did not immediately protest, and the defendants must have known that they were building upon a courtyard which their neighbours had a right to use. *FATEHYAB KHAN v. MUHAMMAD YUSUF*; *MUHAMMAD YUSUF v. FATEHYAB KHAN*, 9 A. 434=7 A.W.N. (1887) 82=11 Ind. Jur. 428 ...

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### Easement Act (V of 1882).

*Ss. 60, 61—License, revocation of—Works of permanent character executed by licensees.*—In a suit by a *zamindar* to have his right declared to build a house on some waste land in the *mauza*, the defendants, who were tenants in the *mauza*, resisted the claim on the ground that they had built wells and water courses on the land, and had a right also to use it as a threshing floor and for stacking cow dung.

*Held* that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed. *THE LAND MORTGAGE BANK OF INDIA v. MOTI*, 8 A. 69=6 A.W.N. (1886) 3 ...

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### Estoppel.

- (1) *Equitable*—See EVIDENCE ACT (I OF 1872), 9 A. 413.
- (2) See PRACTICE, 9 A. 690.
- (3) *Physical possession*—Purchase of equity of redemption by mortgagee in possession—Acquiescence—Equitable estoppel—See PRE-EMPTION, 9 A. 234.

### European British Subject.

Trial by District Magistrate with a jury—Procedure in a trial by jury—See CRIMINAL PROCEDURE AMENDMENT ACT (III of 1884), 9 A. 420.

### Evidence.

- (1) *Burden of proof.*—In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on the ground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items.

The Judicial Committee concurred with the High Court, which had reversed so much of the decree of the Court of first instance as disallowed these items; the latter Court not having correctly adjusted the burden of proof, and having acted as if the plaintiff had relied on his own books to prove the debt; besides having erred in weighing the evidence. *RAJESWARI KUAR v. RAI BAL KRISHAN*, 9 A. 713 (P.C.)=14 I.A. 142=5 Sar. P.C.J. 80=11 Ind. Jur. 478

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- (2) See BREACH OF TRUST, 8 A. 120.

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- (3) Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor—See CIVIL PROCEDURE CODE, 8 A. 35.
- (4) Accomplice—Corroboration—See EVIDENCE ACT, 8 A. 306.

## Evidence Act (I of 1872).

- (1) Ss. 16, 114—Press-copy of letter—Evidence of original letter having been properly addressed and posted—See ACT VI OF 1871 (BENGAL CIVIL COURTS), 9 A. 366.
- (2) S. 32 (5)—See HINDU LAW (INHERITANCE), 9 A. 467.
- (3) Ss. 33, 157—See CRIMINAL PROCEDURE CODE, 8 A. 672.
- (4) S. 91—Evidence—Contract—Promissory note executed by way of collateral security—Unstamped document—Admissibility of evidence of consideration aliunde—Suit for money lent.—A decree-holder agreed with the employer of his judgment-debtor who had been arrested in execution of the decree, to discharge the latter from arrest upon the condition that his master would pay the amount of the debt. Accordingly, the master executed a document, the material portion of which was as follows:—“Be it known that I have borrowed Rs. 986.15 from you in order to pay a decree which was due to you by D. P., so I write this in your favour to say that I will pay the said amount to you in six months with interest at 12 annas on every hundred rupees every month, and then take back this *parwana* from you.” This was written upon plain unstamped paper. Subsequently, the amount due not having been paid, the decree-holder sued the executant of the document for its recovery. It was objected that the suit was not maintainable without the document being put in evidence, but that, being a promissory note and not stamped as required by art. 11 of sch. I of the General Stamp Act (I of 1879), it was inadmissible in evidence, with reference to s. 34.

*Held* that the document, though it was a promissory note, was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendant's fulfilment of its promise to pay the debt, and that under the circumstances the plaintiff was entitled to give evidence of the consideration, and to maintain the suit as for money lent, apart from the note altogether. **BALBHADAR PRASAD v. THE MAHARAJA OF BETIA**, 9 A. 351=7 A.W.N. (1887) 49 ...

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- (5) S. 92—Evidence—Bond—Contemporaneous oral agreement providing for mode of repayment.—In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of execution of the bond, it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents; that, in accordance with this agreement, the plaintiff obtained possession of the land; and that he had thus realized the whole of the amount due.

*Held* that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence. **RAM BAHKSH v. DURJAN**, 9 A. 392=7 A. W.N. (1887) 65 ...

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- (6) S. 92—Proviso (4)—See BOND, 9 A. 249.
- (7) S. 106—Bailment—Hiring—Accident—Negligence—Evidence—Burden of proof—Act IX of 1872 (Contract Act), Ss. 150, 151, 152—High Court's power of revision—Civil Procedure Code, s. 622.—A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree,



it is liable to be set aside in revision under s. 622 of the Civil Procedure Code.

The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence.

*S* hired a horse from *W*, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over exertion on a full stomach. In a suit by *W* against *S* to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that, for some time previously, it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property; that he must have used his whip freely, or done something else which caused the horse to bolt; and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim.

*Held* by EDGE, C.J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under s. 622 of the Civil Procedure Code.

*Per* BRODHURST, J., that as the decree was not only unsupported by proof but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of s. 622. *SHIELDS v. WILKINSON*, 9 A. 398 = 7 A.W.N. (1887) 44 ...

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(8) *Ss.* 107 108—See *HINDU LAW (INHERITANCE)*, § A. 614.

(9) *Ss.* 114 (b), 133—*Accomplice—Evidence—Corroboration*.—The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice, is not illegal, that is, is not *unlawful*, but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it

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is necessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration.

The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property.

In the trial of *R.S. and M.*, upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of *P.*, who was jointly tried with them for the same offence, (ii) the evidence of an accomplice, (iii) the evidence of witnesses who deposed to the discovery in *R.*'s house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found.

Held that there was no sufficient corroboration of the statements of the the accomplice or of the co-confessing prisoner *P.* *QUEEN-EMPRESS v. RAM SARAN*, 8 A. 306=5 A.W.N. (1885) 311 ...

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(10) S. 114, illustration (c)—See CRIMINAL PROCEDURE CODE, 9 A. 720.

(11) S. 115—*Equitable estoppel—Decrees, priority of.*—A decree-holder at a sale in execution of his decree purchased a zamindari share belonging to his judgment-debtors. Afterwards, in execution of a subsequent decree held by another person, the same with other property was again put up for sale. Prior to the sale, the subsequent decree-holder applied to the officer conducting it stating the fact of the sale and purchased under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtor's interest which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decree-holder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn, and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decree-holder did not bid again. Afterwards, the prior decree-holder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction-sale in execution of the subsequent decree.

Held that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale.

A decree takes priority over other decrees in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces. *GHARAN v. KUNJI BEHARI*, 9 A. 413=7 A.W.N. (1897) 48 ...

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(12) S. 133—*Accomplice—Evidence—Corroboration—Practice—Questions of fact to be determined on the merits and not on supposed analogy to previous cases—Appeal by Local Government from judgment of acquittal—Criminal Procedure Code, s. 427.—Per EDGE, C.J.*—Although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his



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evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, is believed, establishes the guilt of the prisoner, it is his duty to convict.

*Per* BRODHURST, J., *contra*.—Observations as to the necessity of corroboration in material particulars, of the evidence of accomplice witnesses.

*Per* EDGE, C.J., and STRAIGHT, J.—Every case as it arises must be decided on its own facts, and not on supposed analogies to other cases.

4 A. 148 followed by BRODHURST, J., as to the principles applicable to the determination of appeals preferred by the Local Government from judgments of acquittal.

*Per* EDGE, C.J.—In capital cases, where the Local Government appeals, under s. 417 of the Criminal Procedure Code, from an order of acquittal, it is, generally speaking, undesirable that the prisoner's fate should be discussed while he remains at large; and the Government should, in such cases, apply for the arrest of the accused, under s. 427 of the Code. *QUEEN-EMPRESS v. GOBAR-DHAN*, 9 A. 528=7 A.W.N. (1887) 156 ...

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(13) Ss. 138, 167—See CRIMINAL PROCEEDINGS, 9 A. 609.

**Execution of Decree.**

- (1) *Amendment of decree—Objection to validity of amendment—Civil Procedure Code*, s. 206.—The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree, purporting to act under s. 206 of the Civil Procedure Code, altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the decree disallowed the objection, on the ground that it was not such as could be entertained in the execution department.

*Held* that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party, as required by s. 206 of the Code.

*Held* also that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed. *ABDUL HAYAT KHAN v. CHUNIA KUAR*, 8 A. 377=6 A.W.N. (1886) 127 ...

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- (2) *Attachment of property—Payment into Court of money due under decree—Civil Procedure Code*, s. 295—*Assets realized by sale or otherwise*.—*G* and *C* held decrees against *B* and took out execution of them, and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of *G*'s decree.

*Held* that *G* was entitled to the sum of Rs. 1,200 paid into Court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under s. 295 of the Civil

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Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor. *GOPAL DAI v. CHUNNI LAL*, 8 A. 67=6 A.W.N. (1886) 1 ...

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- (3) *Order of attachment—Judgment-debtor declared insolvent—Appointment of receiver—Vesting of insolvent's property in receiver—Objection to attachment—Jurisdiction to entertain objection—Civil Procedure Code*, ss. 278, 351, 354.—Where property has been made the subject of attachment under Chapter XIX of the Civil Procedure Code, the right of an objector to assert his claim to be the true owner of the property under s. 278, and the jurisdiction of the Court to entertain the objection, are not ousted by the mere circumstance that the judgment-debtor has been declared an insolvent, and his property vested in a receiver under Chapter XX. It is the judgment-debtor's property only, not that of the objector, that is thus vested. *PARAS RAM v. KARAM SINGH*, 9 A. 232=7 A.W.N. (1887) 20 ...

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- (4) *Adjudication that execution is barred by limitation—Finality of order—Civil Procedure Code*, s. 206—*Amendment of decree—Act XV of 1877 (Limitation Act)*, sch. ii, Nos. 178, 179.—An application to execute a decree passed in April, 1880, was made on the 19th February, 1884, and rejected on the 26th March, 1884, as being beyond time. This order was upheld on appeal in March, 1885. While the appeal was pending, the decree-holder in May, 1884, applied to the Court of first instance to amend the decree under s. 206 of the Civil Procedure Code, and in December, 1884, the application was granted. In April, 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 of the Limitation Act (XV of 1877) applied to the case.

*Held*, that No. 179 and not 178 was applicable, that the order rejecting the application of the 19th February, 1884, became final on being upheld on appeal, that the amendment could not revive the decree or furnish a fresh starting point of limitation, and that the application was therefore time-barred.

Observations by MAHMOOD, J., on the amendment of decrees and s. 206 of the Civil Procedure Code. *TARSI RAM v. MAN SINGH*, 8 A. 492=6 A.W.N. (1886) 156 ...

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- (5) *Civil Procedure Code*, s. 230—*Meaning of "granted"*.—Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, *i. e.*, an application for execution should not be granted if a previous application has been allowed under the provisions of that section.

The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not "granting" an application within the meaning of s. 230 of the Code, and ss. 245, 248 and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249.

In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March, 1877, various amount were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March, 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in



satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March, 1883, another application for execution was made, notice to appear was issued, and after this notice, petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March, 1884, the decree-holder applied once more for execution of the decree.

*Held*, that neither the previous application of the 9th March, 1881, nor that of the 5th March, 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Civil Procedure Code, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed. *PARAGA KUAR v. BHAGWAN DIN*, 8 A. 301=6 A.W.N. (1886) 97 ...

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- (6) *Civil Procedure Code*, s. 230—*Twelve years' old decree—Statute, construction of—General words—Retrospective effect.*—The holder of a decree bearing date on the 15th June, 1872, applied for execution thereof on the 9th February, 1885, the previous application being dated the 27th November, 1883.

*Held* that the application for execution was not barred by s. 230 of the Civil Procedure Code.

*Per MAHMOOD, J.*—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to s. 230 of the Civil Procedure Code must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy it to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation, and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect. *JOKHU RAM v. RAM DIN*, 8 A. 419=6 A.W.N. (1886) 162 ...

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- (7) *Certificate by decree-holder of payment out of Court—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4)—"Step-in-aid of execution"—Civil Procedure Code*, ss. 257, 258.—*Held*, following 12 C. 608 (*TYRRELL, J.*, doubting), that an application made by a decree-holder, the object of which is that the receipt of certain sums of money paid out of Court may be certified, is a "step-in-aid of execution," such as will keep the decree alive, within the meaning of the Limitation Act (XV of 1877), sch. ii, No. 179 (4). *MUHAMMAD HUSAIN KHAN v. RAM SARUP*, 9 A. 9=6 A.W.N. (1886) 292 ...

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- (8) *Compromise of suit awarding the plaintiff more than amount claimed—Consent of parties—Execution of decree limited to amount claimed—Suit for larger amount awarded in compromise—Question for Court executing decree—Civil Procedure Code*, s. 244.—By consent of the parties and the leave of the Court a suit may be amended to cover an increased claim, and there is nothing in the law which prevents the parties to a suit enlarging by consent or compromise the original claim, and getting or allowing a decree for a greater amount of money or land than that originally asked for.

The parties to a suit agreed upon a compromise the result of which was that the plaintiff obtained by the decree a greater quantity of land than he had originally claimed, and a decree was drawn up in accordance with the compromise. In the execution proceedings the defendant raised an objection that the plaintiff could not have

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execution for a greater quantity of land than he had claimed originally, and the Court executing the decree allowed the objection. No appeal from the Court's order was made, but the plaintiff brought a suit to recover possession of the larger amount of land mentioned in the compromise.

*Held* that the order of the Court executing the decree was erroneous in law and might properly be reconsidered upon an application for review; but that the present suit came within s. 244 of the Civil Procedure Code, and therefore could not be maintained. *MOHIBUL-LAH v. IMAMI*, 9 A. 229=7 A.W.N. (1987) 19 ...

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- (9) *Costs—Reversal of decree—Refund of costs recovered by execution.—Interest.*—A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

*Held*, that the appellant was entitled to the interest claimed on the refund of costs. *RAM SAHAI v. THE BANK OF BENGAL*, 8 A. 262=6 A.W.N. (1986) 87 ...

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- (10) *Decree for maintenance—Decree directing payment of a certain sum every month for life—Execution of decree—Declaratory decrees.*—Where a decree ordered the defendants to pay to the plaintiff the sum of Rs. 15 per mensem by way of maintenance during her lifetime, and directed that such maintenance should be charged on certain zemindari property—*held* that the decree-holder could obtain the amount ordered in execution of the decree, which was more than a mere declaration of right, and which, by allowance of a fixed rate per mensem, stood exactly on the footing of a decree ordering payment by instalments. *MANSA DEBI v. JIWAN LAL*, 9 A. 33=6 A.W.N. (1986) 248 ...

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- (11) *Decree passed against representative of debtor—Attachment of property as belonging to debtor—Objection to attachment by judgment-debtor setting up an independent title—Appeal from order disallowing objection—Civil Procedure Code, §§s. 2, 244, 293.*—The decree-holders in execution of a simple money-decree passed against the legal representatives of their debtor, and which provided that it was to be enforced against the debtor's property, attached and sought to bring to sale a house as coming within the scope of the decree. The judgment-debtors objected to the attachment and proposed sale, on the ground that the house was their own private property and not the property of the debtor within the meaning of the decree, having been validly transferred to them during the debtor's life-time. The objection was disallowed by the Court of first instance.

*Held* that s. 293 of the Civil Procedure Code had no application, that the case fell within s. 244, and that an appeal would lie from the first Court's order. *MULMANTRI v. ASHFAK AHMAD*, 9 A. 605=7 A.W.N. (1987) 132 ...

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- (12) *Decree for sale of hypothecated property and against judgment-debtor personally—Execution against judgment-debtor's person—Decree-holder entitled to proceed against property or person as he might think fit.*—Where a decree upon a hypothecation bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property, and where there is no question of fraud being perpetrated on the judgment-debtor, there is no principle of equity which prevents the decree-holder from enforcing his decree against the judgment-debtor's person or property, whichever he may think best. *JOHARI MAL v. SANT LAL*, 9 A. 484=7 A.W.N. (1987) 101 ...

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- (13) *Decree prohibiting execution till the expiration of a certain period—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 178, 179.*—A decree, which was passed on the 8th December 1881, in a suit on a simple mortgage-bond, contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property." On the 17th February, 1885, the decree-holder applied for execution of the decree.

*Held* that, inasmuch as the decree provided expressly that the decree-holders might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch. ii of the Limitation Act, and not of art. 179 should be applied to the case, and the application for execution having been made within three years from the 8th April, 1882, when the right to ask for execution accrued, was not barred by limitation. *THAKUR DAS v. SHADI LAL*, 8 A. 56=5 A.W.N. (1885) 327 ...

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- (14) *Civil Procedure Code, s. 311—Material irregularity in publishing or conducting sale—Substantial injury—Notification omitting to state place of sale—Sale held after date advertised—Civil Procedure Code, ss. 287, 290.*—Where a proclamation of sale of immoveable property in execution of a decree omitted to state the place of sale and where the sale took place on a date other than that notified in the proclamation, and before the expiration of the thirty days required by s. 290 of the Civil Procedure Code,—*held* that the non-compliance with the provisions of ss. 287 and 290 of the Code was more than a mere irregularity, that it must have caused substantial injury, and that the order confirming that sale must be set aside.

*Per MAHMOOD, J., quære*, whether material irregularities such as the above were not in themselves, sufficient, within the meaning of the first paragraph of s. 311 of the Code, to justify a Court in setting aside a sale, without inquiring whether such irregularities had resulted in substantial injury within the meaning of the second paragraph. *JASODA v. MATHURA DAS*, 9 A. 511=7 A.W.N. (1897) 145.

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- (15) *Civil Procedure Code, ss. 311, 312—Objection to sale—Limitation—Legal disability—Act XV of 1887 (Limitation Act), s. 7—Order confirming sale before time for filing objections has expired—Appeal from order.*—Although s. 312 of the Civil Procedure Code contemplates that objections to a sale under s. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute.

An application under s. 311 of the Civil Procedure Code, on behalf of a judgment-debtor who was a minor was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which no proper application of objection had been filed. From this order the judgment-debtor appealed.

*Held* that the appeal must be considered to be one from an order under the first paragraph of s. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would therefore lie.

*Held* that, assuming the first application on the minor's behalf to have been rightly rejected, the second was made by a duly authorized

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guardian, and, with regard to s. 7 of the Limitation Act (XV of 1877), was not barred by limitation ; and the judgment-debtor had therefore a right to make it, and the Court should have entertained and dealt with it before proceeding to confirm the sale or grant a sale-certificate.

The order disallowing the application and the order confirming the sale were set aside, and the case remanded for disposal of the appellant's objections. *BALDEO SINGH v. KISHAN LAL*, 9 A. 411 = 7 A.W.N. (1887) 58 ...

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- (16) *Sale of immoveable property—Error in proclamation of sale as to incumbrance to which property was liable—Civil Procedure Code, ss. 311, 312.*—In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was in fact one charge only, amounting to about Rs. 800.

*Held* that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it. *KANJIMAL v. BIBI SAILO*, 8 A. 116 = 6 A.W.N. (1886) 33 ...

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- (17) *Sale in execution of decree—Sale of rights and interests in mauza consisting of two mahals—Submersion of mahal at time of sale—Sale certificate not specifically mentioning submerged mahal—Passing of rights in submerged mahal to purchaser.*—The rights and interests of certain judgment-debtor in a mauza consisting of two separate mahals, respectively known as the *Uparwar Mahal* and the *Kachar Mahal* were brought to sale in execution of the decree. At the time of the sale, the *Kachar Mahal* was submerged by the river Ganges, and in the sale notification the revenue assessed upon the *Uparwar Mahal* only was mentioned, and there was no specific attachment of the *Kachar* or submerged land but the property was sold as that of the judgment-debtors in the mauza. Subsequently, the river having receded, the auction-purchaser attempted to obtain possession of the *Kachar* land but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale but only their rights and interests in the *Uparwar Mahal*.

*Held* that either the whole rights of the judgment-debtors in both mahals were sold, or, if not, their rights in the *Uparwar Mahal*, with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such mahal ; and the mere fact of the mention in the sale notification of the revenue of the *Uparwar Mahal* did not affect what passed by the sale.

*Held*, also that the attachment of the judgment-debtors' entire proprietary rights in the mauza included their interests in both mahals, and the sale certificates clearly showed that all their rights in the village were passed to the purchaser. *MUHAMMAD ABDUL KADIR v. KUTUB HUSAIN*; *KAMAL-UD-DIN AHMAD v. KUTUB HUSSAIN*, 9 A. 136 = 6 A.W.N. (1886) 327 ...

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- (18) *Security for restitution of property taken in execution—Reversal of decree—Execution against surety—Civil Procedure Code, ss. 253, 545, 546.*—S. 253 of the Civil Procedure Code contemplates a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given.

The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded, costs were deposited by the



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judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety.

*Held* that the Court executing the High Court's decree had no jurisdiction to execute it against the surety. HARDEO DAS v. ZAMAN KHAN, 8 A. 689=6 A.W.N. (1886) 238 ...

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- (19) *Transfer of decree—Civil Procedure Code, ss. 232, 244—Appeal—Act III of 1877 (Registration Act), s. 28.*—The words of s. 28 of the Registration Act (III of 1877), "some portion of the property" should not be read as meaning some substantial portion.

The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently *M* transferred the decree to other persons, and the co-transferees applied under s. 232 of the Civil Procedure Code to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the grounds that *M*'s name had not been substituted for the names of the original decree-holders who had transferred to him, and that the transfers to *M* were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate, in accordance with s. 28 of the Registration Act (III of 1877). It appeared that no notice had been issued to *M*, under s. 232 of the Civil Procedure Code, that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below.

*Held* that the matter involved question arising between the parties to the decree or their representatives within the meaning of s. 244 (c) of the Code, and that the order allowing the application was therefore a decree within the definition of s. 2, and was appealable as such.

*Held* that, even assuming that the judgment-debtor had a *locus standi* to raise the objection that notice had not been issued to the applicant's transferor, he had no possible interest in the question, and could not be prejudiced by the passing of the order; that it was not necessary to cite the representatives of the transferor; and that the order not being one upon which execution of the decree could issue, but merely for transfer of names, the objection that the transferor had not been cited under s. 232 was not a substantial one.

*Held* that the objection in reference to s. 28 of the Registration Act could only properly be raised between the transferor and the transferee, and not by the judgment-debtor, and moreover had no force.

*Held*, that it could not be said that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder was a condition precedent to the assignors passing title under the assignment. GULZARI LAL v. DAYA RAM, 9 A. 46=6 A.W.N. (1886) 287 ...

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- (20) *Suit for confirmation of execution sale set aside by Collector—Jurisdiction of Civil Court—Civil Procedure Code, s. 312.*—A suit lies in a Civil Court for confirmation of a sale held in execution of a decree by the Collector under s. 320 of the Civil Procedure Code, and to set aside an order passed by the Collector cancelling the sale.

In such a suit, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting

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- the sale. *BANDI BIBI v. KALKA*, 9 A. 602=7 A. W. N. (1887) 110 ... 882
- (21) *Decree enforcing the right of pre-emption—Non-payment of purchase money decreed by appellate Court—Restitution of purchase money paid under lower Court's decree—Civil Procedure Code, s. 583—Application for restitution—Revival of application—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4).*—A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139 and in July, 1880, the plaintiff paid the amount into Court, and it was drawn out by the defendant in August, 1881. Meanwhile, in July, 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May, 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted and the defendant ordered to refund, and this order was confirmed on appeal in January, 1885, and by the High Court in second appeal in May, 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December, 1884, removed the application temporarily from the "pending" list. In February, 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation.
- Held* that this application was only a revival of the application of May, 1883, which was within time.
- Held* also that the plaintiff was, in the sense of s. 583 of the Civil Procedure Code, "a party entitled to a benefit by way of restitution under the decree" of the High Court of July, 1881; that it was a necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the lower appellate Court; that he was competent under s. 583 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits;" that he did this in May, 1883, by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act; and that his present application to the same effect being within three years from that application was within time. *NAND RAM v. SITA RAM*, 8 A. 545=6 A.W.N. (1886) 178. ... 377
- (22) Sale in—Setting aside sale—Inoumbrance—Saleable interest—See CIVIL PROCEDURE CODE, 9 A. 167.
- (23) See LIMITATION ACT (XV OF 1877), 8 A. 573.
- (24) Cross decrees—Cross claims under same decree—See PAUPER SUIT, 9 A. 64.

### Ex-proprietary Tenant.

*Trees—Sale in execution of decree—Act XII of 1881 (N.-W.P. Rent Act), ss. 7, 9.—Held* by the Full Bench that an ex-proprietor, who under s. 7 of Act XII of 1881 (N.-W.P., Rent Act), gets occupancy-rights in his sir-land, obtains analogous rights in the trees upon such sir-land.

A purchaser of proprietary rights in zamindari property at a sale in execution of a decree for money held by himself applied in execution of the decree for the attachment and sale of certain trees growing on the judgment-debtor's ex-proprietary holding.

*Held* by the Full Bench, with reference to the provisions of ss. 7 and 9 of Act XII of 1881 (N.-W.P. Rent Act), that the trees were not liable to attachment and sale in execution of the decree.



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*Per* STRAIGHT, J.—When a proprietor sells his rights and becomes entitled, under s. 7 of the Rent Act, to the rights of an ex-proprietary tenant, he holds all rights in the land, *qua* such tenant, which he formerly held in his character as proprietor, and paying rent in his capacity as tenant. Where there are trees upon the sir-land held by him at the time when he lost his proprietary rights, neither the purchaser of those rights nor he himself can cut down or sell them *in invitam* to each other. Short of cutting the trees down, he has the same right to enjoy the trees as he originally had. *JUGAL v. DEOKI NANDAN*, 9 A. 88 (F.B.)=6 A.W.N. (1886) 320. ...

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**False Charge.**

Prosecution for making a—Opportunity to accused to prove the truth of charge.—See PENAL CODE, 8 A. 38.

**Family Custom.**

*Wajib-ul-arz—Muhammadian Law—Appeal to Her Majesty in Council—*

*Question of fact.*—It having been alleged that an estate, by custom, descended to a single heir in the male line, the High Court, concurring with the Court of first instance, found that this custom had not been proved to prevail in the family.

On an appeal contesting this finding, it was argued, among other objections, that the High Court had not given sufficient effect to an entry in the *wajib-ul-arz* of a zamindari village, the principal one comprised in the family estate now in dispute; the last owner of that estate who held all the shares in the village having caused an enquiry to be made to the effect that his eldest son should be his sole heir, the others of the family being maintained.

*Held* that, though termed an entry in a *wajib-ul-arz*, the document was not entitled to the name, but was rather in the nature of a testamentary attempt to make a disposition contrary to the Muhammadian Law of descent.

The appeal was not taken out of the rule as to the concurred findings of two Courts, primary and appellant, on a question of fact. *MUHAMMAD ISMAIL KHAN v. FIDAYAT-UN-NISSA*, 8 A. 516 (P.C.).

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**Forgery.**

See PENAL CODE, 8 A. 653.

**Forma Pauperis.**

Suit in—Rejection of application for permission to issue as a pauper on the ground that it had been withdrawn—Appeal—See CIVIL PROCEDURE CODE, 9 A. 129.

**Fraudulent Transfer.**

(1) *Burden of proof—Muhammadian Law—Sale of immoveable property by Muhammadian in satisfaction of wife's dower—Consideration—Deferred debt.*—A genuine sale made for good and valid consideration to one creditor, even if effected delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference.

Pending a suit for recovery of a debt, the defendant, who was a Muhammadian, executed a deed of sale dated in June, 1892, of a four annas zamindari share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower-debt. Subsequently the creditor obtained a simple money-decree against

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the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right, and to set aside the attachment order.

*Held*, that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have operation or effect, either as a transfer of the property or an extinguishment of the dower-debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four annas still remaining the property of the vendor, and as such liable to the attachment.

*Held*, applying the general principles of the Muhammadan law as to deferred debts, that there was good consideration for the sale of June, 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit. *SUBA BIBI v. BALGOBIND DAS*, 8 A. 178=6 A.W.N. (1886) 51 ...

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(2) See MORTGAGE (GENERAL), 8 A. 540.

### High Court.

Powers of revision of—See CRIMINAL PROCEDURE CODE, 8 A. 514.

### High Court (N.-W. P.)

*Constitution of*—Stat. 24 and 25 Vic., c. 104, ss. 7, 16, 17—*Letters Patent*, N.-W.P., s. 2—*Omission to fill up vacant appointment*—Court consisting of Chief Justice and four Judges only—Court not illegally constituted—Civil Procedure Code, s. 575—*Difference of opinion between Judges hearing appeal*—"Judgment"—Reference to Full Bench after delivery of dissident judgment on the appeal—Reference ultra vires.—By s. 2 of the Letters Patent for the High Court it was not intended that if the Crown or the Government should omit to fill up a vacancy among the Judges under the powers conferred by s. 7 of the High Courts Act (24 and 25 Vic., c. 104), so that the Court should then consist of a Chief Justice and four Judges only, the constitution of the Court should thereby be rendered illegal, and the existing Judges incompetent to exercise the functions assigned to the High Court.

Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments on the appeal as judgments of the Court without any reservation, they are not competent to refer the appeal to other Judges of the Court under s. 575 of the Civil Procedure Code. *LAL SINGH v. GHANSHAM SINGH*, 9 A. 625 (F.B.)=7 A.W.N. (1887) 154 and 7 A.W.N. (1887) 179=12 Ind. Jur. 70 ...

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### High Courts Act (Stat. 24 and 25 Vic., c. 104).

(1) Ss. 7, 16, 17—See HIGH COURT (N.-W.P.), 9 A. 625.

(2) S. 15—*Revision of judicial proceedings*—*Jurisdiction of High Court*—Civil Procedure Code, s. 622.—*Held* by EDGE, C.J., and OLDFIELD and BRODHURST, JJ., that under s. 15 of 24 and 25 Vic., c. 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a Subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority



to interfere with and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction.

Held by STRAIGHT and TYRRELL, JJ., that the word "Superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or quasi-judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. MUHAMMAD SULEMAN KHAN v. FATIMA, 9 A. 104 (F.B.)=6 A. W. N. (1886) 309 ...

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(3) S. 15—See COMPANY, 9 A. 180.

## Hindu Law.

- 1.—ADOPTION.
- 2.—ALIENATION.
- 3.—INHERITANCE.
- 4.—JOINT FAMILY.
- 5.—MARRIAGE.
- 6.—REVERSIONER.
- 7.—STRIDHAN.
- 8.—WIDOW.

### 1.—Adoption.

- (1) *Dattaka form*—*Gotraja relationship*—*Maxim*, quod fieri non debuit factum valet—*Limit of age within which person may be adopted*—*Ceremony of upanayana*—*Suit for declaration that alleged adoption is invalid*—*Limitation*—*Act XV of 1877 (Limitation Act), sch. ii, No. 118*—*Arbitration*—*Civil Procedure Code, s. 521, cl. (a)*—*"Misconduct" of arbitrator*.—The sources of Hindu law described and their comparative authority discussed. The various schools of Hindu law, and their divisions, and sub-divisions, enumerated and classified.

The ruling of the Privy Council in 7 I.A. 250 has no application to a case in which there is ample evidence, both oral and documentary, to prove the *factum* of adoption.

In a suit to obtain a declaration that an alleged adoption was null and void, the plaintiff based his own title upon an alleged adoption of himself. He was related to his alleged adoptive father as father's father's brother's son's son's son's son. It was contended on behalf of the defendants, who was related to the plaintiff's adoptive father as brother's son's son, that the plaintiff's relationship was too remote to admit of his being validly adopted in preference to the defendant and other near relatives.

Held that the plaintiff, by reason of his natural relationship towards his adoptive father, belonged to the same *gotra* as the latter, and although such relationship, compared with that of the defendant, was remote, that circumstance could not *ipso facto* vitiate his adoption.

The maxim *quod fieri non debuit factum valet* is applicable not only in the Dayabhaga school of Hindu law which prevails in Lower Bengal, but also in the various sub-divisions of the Mitakshara school. Its authority does not depend upon any rule of Hindu law

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### Hindu Law—1.—Adoption—(Continued).

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alone, but upon the principles of justice, equity and good conscience. There is no authority to show that it is to be applied to cases governed by the Hindu law in a manner exceeding the limits recognized by the Roman civil law in which it originated. Its application in cases of adoption should be confined to questions of formalities, ceremonies, preference in the matter of selection, and similar points of moral or religious significance, and which relate to what may be termed the *modus operandi* of adoption, but do not affect its essence. There may be cases where matters which in other systems would be regarded as merely formal are, by the express letter of the texts made matters affecting the essence of the transaction, and such texts may be sufficiently imperative to vitiate an adoption in which they have been disregarded; but, unless their meaning is undoubted, the doctrine of *factum valet* should be restricted to adoptions which, having been made in substantial conformity to the law, have infringed minor points of form or selection. Adoption under the Hindu law being in the nature of a gift, it contains three elements—capacity to give, capacity to take and capacity to be the subject of adoption—which are essential to the validity of the transaction, and, as such are beyond the scope of the doctrine of *factum valet*.

In dealing with questions of the Hindu law of adoption, it is unsafe to resort to analogical arguments derived from the *arrogatio* or the *adoptio* of the Roman civil law, and where it is necessary to recur to first principles, they should be sought for in the approved authorities of the Hindu law itself, and not in foreign systems of law.

According to Manu, in the case of the three "twice-born" classes, the turning point of the "second birth," which means purification from the sin inherent in human nature, is represented by the ceremony of *upanayana* or investiture of the sacred thread hallowed by the *goyatri*; and until the performance of this ceremony, the person concerned, though born of twice-born parents, remains on the same level as a Sudra. The ceremony is, moreover, the beginning of his education in the duties of his tribe, as prescribed by Manu."

As understood in the Hindu law, adoption is itself a "second birth," proceeding upon the fiction of law, that the adoptee is "born again, into the adoptive family. The existence of male issue being favoured mainly for the sake of the parent's beatitude in the future life, adoption is a sacrament justified under certain conditions when the natural male offspring is wanting. It is effected by a substantial adherence to ceremonies, but principally by the acts of giving and taking. Having taken place, its effect is the affiliation of the adoptee as if he had been begotten by his adoptive father, thus removing him from his natural into his adoptive family. In this manner, he is "born again" into the adoptive family by the rites of initiation.

According to the Hindu law as observed by the Benares school, the ceremony of *upanayana*, representing as it does the second birth of a boy and the beginning of his education in the duties of his tribe, is also the ultimate limit of time when a valid adoption in the *Dattaka* form can take place. Adoption in that form implies that the second birth has taken place in the adoptive family; and it cannot be effected after the boy's place in his natural family has become irrevocably fixed by the *upanayana* representing his second birth therein. The age of the boy is material only as determining the term at which the *upanayana* may be performed.

According to the Kalika-purana as interpreted by the Dattaka Mimamsa of Nanda Pandita, an adoption in the *Dattaka* form is wholly null and void if made after the adoptee has completed the fifth year of his age. It is a mistake to hold that according to the Dattaka Mimamsa, so long as an adoption takes place while the adoptee is under six years of age, it is valid. The mistake arises



from supposing that the word "*panchwarshiza*" used in paragraphs 48 and 53 of the *Dattaka Mimamsa* necessarily indicates that the person referred to has passed the fifth anniversary of his birth. It indicates, on the contrary, that he is in his fifth year.

The *dictum* of the Lords of the Privy Council in 12 M.I.A. 397 that the duty of European Judges administering the Hindu law, is not so much to inquire whether a disputed doctrine is deducible from the earliest authorities as to ascertain whether it has been received by the particular school governing the district concerned, and has there been sanctioned by usage, does not prohibit the Court from considering the question of fact whether a particular passage of the *Kalika-purana* upon which an argument in the *Dattaka Mimamsa* is based is authentic, by reference to other authoritative works of Hindu law. In that case no inflexible rule was laid down assigning supreme and infallible authority to the *Dattaka Mimamsa* in questions connected with the law of adoption as followed by the Benares school of Hindu law.

The authenticity of the text of the *Kalika-purana*, which lays down that a child must not be adopted whose age exceeds five years is extremely doubtful. The interpretation given to that text in the *Dattaka Mimamsa* was not necessarily intended to be universally applicable, and admits of a construction which would confine the application of the text to Brahmins intended for the priesthood; and various other equally plausible interpretations have been adopted by other authorities. This being so, it would be unsafe to act upon the text in question and upon the interpretation placed upon it in the *Dattaka Mimamsa*, so as to set aside an adoption which took place many years ago, which had ever since been recognized as valid, and under which the adoptee had ever since been in possession of his adoptive father's estate, upon the single ground that at the time of the adoption, the adopted son was more than five years of age. In such a case, the onus of proof is upon the person who alleges the adoption to be invalid.

In a case where the validity of an adoption was in dispute, and the parties to the suit were *Ushatriyas*,—*held* that even if it had been established that five years was the rigid and inflexible limit of age for the validity of all adoptions among the "twice born" classes, so as to be applicable even to *Ushatriyas*, in the circumstances of the case it would be necessary to have a full investigation of the question whether, among the clan of the *Ushatriyas* to which the parties belonged, any such rigid rule prevailed.

Where, in a suit brought in 1885, for a declaration that an adoption alleged to have taken place in 1871, was null and void, the *factum* of adoption was disputed and it was not shown that the alleged adoption became known to the plaintiff before 1881,—*held*, with reference to art. 118 of sch. II of the Limitation Act (XV of 1877), that the suit was within time.

The word "misconduct" as used in s. 521, cl. (a) of the Civil Procedure Code should be interpreted in the sense in which it is used in English law with reference to arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of justice expect from them before allowing finality to their awards.

An arbitrator to whom the matters in difference in a suit were referred under s. 508 of the Civil Procedure Code, and who was directed by the order of reference to deliver his award by the 22nd September, applied on the 17th September for an extension of time, on the ground that a very full investigation was necessary, which it was not possible to make within the prescribed period. On the 20th September, without waiting for the order of the Court, he notified

the parties that he proposed to hold an inquiry in the case on the 24th, and it appeared that he did not expect this intimation to reach them before the 21st or 22nd. On the 23rd, he informed the plaintiff's pleader that a new date would be fixed for the inquiry, of which notice would be given to the parties. Notwithstanding this, on the 23rd, the arbitrator took evidence for the defendant in the absence of the plaintiff and his pleader. All these proceedings were held before the arbitrator received an order of the Court extending the time for delivery of the award up to the 26th October. On the 27th September he directed the parties to be informed that the investigation would be held on the 5th October. On the 4th October the plaintiff presented a petition praying the arbitrator to summon witnesses and to take documentary evidence, and upon this nothing definite was settled at the time; but, after the pleaders had left, the arbitrator passed an order rejecting the petition, on the ground that the evidence sought to be produced was unnecessary. On the same date, and on the 5th and 6th October, he took evidence for the defence in the absence of the plaintiff and his pleader. On the 10th he rejected a petition by the plaintiff praying for further time to produce evidence, and complaining of his having taken evidence in the plaintiff's absence and having received in evidence a fabricated document. On the 25th October, the arbitrator delivered his award in favour of the defendant. Subsequently, upon objections made by the plaintiff, the Court set aside the award, and directed that the trial of the suit should proceed.

*Held*, that although no case of "corruption" within the meaning of s. 521, cl. (a) of the Civil Procedure Code had been made out against the arbitrator, the circumstances above stated amounted to, misconduct" and the award was therefore bad in law, and had rightly been set aside. *GANGA SAHAI v. LEKHRAJ SINGH*, 9 A. 253 ...

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- (2) *Brahmans — Adoption of sister's son — Suit for partition of property by person in possession making a false claim thereto.*—According to the Hindu Law a Brahman cannot validly adopt his sister's son. *B*, a childless Hindu and a Brahman, adopted *X*, his sister's son, and subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to *X*. After *B*'s death, *X* obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After this, joint possession of the estate was obtained by *P* and *S*, two widows of *B*, who set up a right of inheritance from *X*, as being in the position of mothers to him, in consequence of his adoption by their deceased husband. A suit was brought by *S* against *P* for partition of the estate.

*Held* that the adoption of *X* by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed him as his heirs.

*Held* also that, inasmuch as the parties had set up a false claim to the estate, and had no estate in law which they could divide, the suit for partition was not maintainable merely by reason of the fact that they were in possession. *PARBATI v. SUNDAR*, 8 A. 1=5 A. W. N. (1885) 315=10 Ind. Jur. 189 ...

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- (3) *Jains — Second adoption by widow.*—In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent to the husband's death, the defendant had adopted another person; who had died prior to the adoption of the plaintiff, and without leaving widow or child.

*Held* that the powers of a Jain widow, except that she can make an adoption without the permission of her husband or the consent of his heirs, and may adopt a daughter's son, and that no ceremonies



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are necessary, are controlled by the Hindu Law of adoption, and the *Kritima* form of adoption not being recognised by the Jain community, or among the Hindus of the North-Western Provinces, it must be assumed that the widow had power to make a second adoption, and that such adoption was to her husband.

*Held* therefore that, the adoption of the plaintiff was valid and effective.

*Held* that the effect of the second adoption being to make the second adopted son the son of the deceased husband, he must be treated as if he had been born, or at all events conceived, in the husband's lifetime, and his title related back to the death of the elder brother, the first adopted son, so that if the elder brother left no widow or child who would succeed him to the exclusion of his younger brother, the second adopted son would succeed as heir to the father. *LAKHMI CHAND v. GATTO BAI*, 8 A. 319=6 A.W.N. (1886) 118 ...

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### —2.—Alienation.

Power of the father to alienate ancestral property for pious purposes. See *HINDU LAW (JOINT FAMILY)*, 8 A. 76.

### —3.—Inheritance.

- (1) *Daughter's son—Missing person—Act I of 1872 (Evidence Act)*, ss. 107, 108.—Ss. 107 and 108 of the Evidence Act, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.

In the case of a sonless Hindu, his separate estate devolves, in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters, and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates; and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son.

Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1834, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it.

*Held*, that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 103 of the Evidence Act; that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed. *DHARUP NATH v. GOBIND SARAN*; *GOBIND SARAN v. DHARUP NATH*, 8 A. 614=6 A.W.N. (1886) 239 ...

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- (2) *Evidence—Statement by deceased person as to relationship—Act I of 1872 (Evidence Act)*, s. 32 (5)—*Hindu Law—Mitakshara—Inheritance—Sister's son*.—S. 32 (5) of the Evidence Act (I of 1872) does

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not apply to statement made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents.

According to the Mitakshara, a sister's son, who is a *bandhu* and not a *spinda* similar to a daughter's son, cannot inherit until the direct male line down to and including the last *samanodaca*, i.e., fourteen degrees of the direct male line, has been exhausted. *NARAINI KUAR v. GHANDI DIN*, 9 A. 467=7 A.W.N. (1887) 118 ...

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- (3) *Sudras—Illegitimate son.—Held* that an *Ahir* who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a *Sudra*. *DALIP v. GANPAT*, 8 A. 357=6 A.W.N. (1886) 136=10 Ind. Jur. 466 ...

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### — 4.—Joint Family.

- (1) *Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.—*The rule enunciated by the Privy Council in 14 B.L.R. 187=1 I. A. 321 and 5 C. 148 "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee." is limited to antecedent debts, i.e., to debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate. *LAL SINGH v. DEO NARAIN SINGH*, 8 A. 279=6 A.W.N. (1886) 96 ...

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- (2) *Power of the father to alienate ancestral property for pious purposes.—* According to the Hindu Law, the power of a father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose above mentioned, the son having contended the real motive for the gift was not piety to the gods, but malice against him, the Court remitted an issue to the lower appellate Court for the purpose of ascertaining whether the endowment had been made *bona fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff. *RAGHUNATH PRASAD v. GOBIND PRASAD*, 8 A. 76=6 A.W.N. (1886) 19=10 Ind. Jur. 269 ...

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- (3) *Fraudulent hypothecation by father—Suit upon the personal obligation against the father only—Money decree, sale in execution of—Sale-certificate referring to rights and interests of father only in joint family property—Suit by sons for declaration of rights to their shares—Form of decree.—*If a person in possession of property which originally belonged to the members of a joint Hindu family, of whom the father was one, can produce as his document of title only a sale-certificate showing him to have bought in execution of a



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money-decree against the father only, the right, title and interest of the father, then he has bought nothing more than such interest, and he is liable to be compelled to restore to the other members of the joint family their interests, which had not, upon the face of the sale-certificate, passed by the sale.

The father and manager of a joint Hindu family executed a deed whereby he hypothecated certain zamindari property, covenanting to put the mortgagee in proprietary possession thereof if the debt should not be paid on a certain date. This transaction afterwards turned out to be fraudulent on his part, as he had no interest in this property, and the obligors then sued him to recover the debt upon the personal obligation and obtained a money-decree, in execution whereof the right, title and interest of the judgment-debtor in certain joint family property was notified for sale, and a sale took place at which, upon the fact of the sale-certificate, only that right, title and interest was sold. The auction-purchasers having obtained possession, asserted a right to the whole of the joint family estate, upon the ground that, as the judgment-debtor was father of the family, the decree must be assumed to have been passed against him in his capacity as *karta*, and that the other members of the family were therefore bound by the decree and sale. The other members brought a suit to recover possession of their shares.

*Held*, that inasmuch as, upon the terms of the sale-certificate, nothing more passed to the defendants at the sale than the right, title and interest of the father, the plaintiffs were entitled to maintain the suit, and to have a decree declaring them entitled to the whole property, subject to a declaration that the defendants, as auction-purchasers of the father's share, might come in and claim a partition of that share out of the joint estate.

*Per* MAHMOOD, J., that the plaintiffs were entitled to succeed on the further ground that the debt for which the decree against the father was passed was immoral within the meaning of Hindu law. *RAM SAHAI v. KEWAL SINGH*, 9 A. 672=7 A.W.N. (1887) 221=12 Ind. Jur. 154 ...

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- (4) *Joint and undivided property—Debts of deceased member—Liability of his interest.*—*J*, a member of a joint Hindu family, left two sons, *R* and *S*. *S* borrowed money upon a simple bond, and after his death, the obligee sued his widow and daughter-in-law upon the bond, obtained a decree against them, and, in execution thereof, brought to sale *S*'s interest in the property. *B*, the grandson of *R*, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of *S* and himself, and could not be attached and sold in satisfaction of *S*'s debt.

*Held* that on the death of *S*, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of *S* when he had not obtained judgment against *S*, and taken out execution by attachment against him. *BALBHADAR v. BISHESHAR*, 8 A. 495=6 A.W.N. (1886) 154=11 Ind. Jur. 31 ...

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- (5) *Liability of ancestral estate for satisfaction of father's debt, when not incurred for immoral purposes.*—A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten biswas of ancestral estate as security for a loan, to recover the amount of the loan by enforcement of the mortgage against the entire ten biswas. During the pendency of the suit *G* died, and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten biswas and not merely against the share therein which *G* during his lifetime might have got separated, the

plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu Law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that, although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in *G*'s personal expenses.

*Held*, that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten biswas mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *SITA RAM v. ZALIM SINGH*, 8 A. 231=6 A.W.N. (1886) 62 ...

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- (6) *Mortgage by father—Suit to enforce the mortgage against sons' shares—Legal necessity—Burden of proof.*—As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest, should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family.

There is a distinction between such cases as this and cases in which a decree had been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father, for an antecedent debt. Where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for.

In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiffs as to the objects for which the bond was executed by the father.

*Held* that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity, or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family; and that, no evidence having been given, the suit must be dismissed. *JAMNA v. NAIN SUKH*, 9 A. 493=7 A.W.N. (1887) 116=11 Ind. Jur. 466 ...

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- (7) *Mortgage of family property by father—Decree against father enforcing mortgage—Decree for money against father—Sale in execution of decrees—Rights of sons.*—The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from such sale. One of these decrees was for enforcement of a hypothecation by the plaintiff's father of the property in suit. It was admitted on behalf of the plaintiffs, in connection with this decree, that, although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest.



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*Held* that the plaintiffs were not entitled to any declaration in respect of the execution proceedings under the decree for enforcement of hypothecation.

The second of the decrees above referred to was a simple money decree for the principal and interest due upon a *hundi* executed by the father in favour of the decree-holder. The suit terminating in that decree was brought against the father alone, and the debt was treated as his separate debt.

*Held* that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which he could execute against the family property, and not against the father's interest only, and if he could maintain such suit, either against those members of the family against whom he desired to execute his decree, or against the father as head of the family, expressly or impliedly suing him in that capacity; but that, not having taken this course, his decree was not enforceable against the plaintiffs' rights and interests in the attached property. **BALBIR SINGH v. AJUDHIA PRASAD; JAGRAJ SINGH v. AJUDHIA PRASAD**, 9 A. 142=6 A.W.N. (1886) 323=11 Ind. Jur. 267 ...

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- (8) *Sale of ancestral estate in execution of decree against father—Effect of sale on son's rights and interests.*—When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge.

If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest, in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, i.e., the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder. **BASA MAL v. MAHARAJ SINGH, MINOR, BY HIS NEXT FRIEND, SARUP KUAR**, 8 A. 205=6 A.W.N. (1886) 58 ...

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—5.—Marriage.

- (1) *Husband and wife—Hindu Law—Restitution of conjugal rights—Suit by Hindu husband out of caste at time of suit—Decree for restitution conditional on plaintiff's obtaining restoration to caste.*—In a suit by a Hindu, a sunar by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Muhammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to render him liable to perpetual excommunication, and, upon making certain amends, he could obtain restoration to his caste.

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*Held* that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste.

*Held*, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste.

*Held* also that, under the Hindu law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights. *PAIGI v. SHEONARAIN*, 8 A. 78=6 A.W.N. (1886) 5 ...

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- (2) *Hindu widow—Re-marriage—Presumption of legality of marriage—Act XV of 1856.*—*L* sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the Mitakshara, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower appellate Court on the grounds that the plaintiff at the time when her connection with the deceased began was the widow of one of his cousins; that, according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate.

*Held* that, the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and looking to the provisions of Act XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown, *i.e.*, until the defendants had established that, according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited. *LACHMAN KUAR v. MARDAN SINGH*, 8 A. 143=6 A.W.N. (1886) 43 ...

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## 6.—Reversioner.

- (1) *Daughter's son—Hindu widow—Decree against widow—Reversioner—Res judicata—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 42—Civil Procedure Code, s. 578.*—A suit brought against *K*, the widow of *R*, a Hindu, by the representatives of *R*'s brothers *H* and *P*, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiffs' rights, and conceded that the family was joint. After *K*'s death, *M*, a daughter of *R*, brought a suit on her own behalf against the above-mentioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, *S*, *M*'s son, who had been born after *K*'s compromise, brought a suit against *M* and the representatives of *H* and *P* to recover possession of the estate, on the allegation that, the family being a divided one, he was entitled, under the Hindu Law, to succeed to such estate, and that both the compromise entered into by *K* and the withdrawal of the



former suit by *M* were in fraud of his succession, and did not affect his rights. The Court of first instance found that the plaintiff was entitled to succeed to the estate, but that, his mother being still alive, he was entitled to possession after her death only, and, upon these findings, gave him a decree declaring his right to possession on *M*'s death. The lower appellate Court reversed the decree, holding that the compromise entered into by *K* was conclusive against the plaintiff's claim, and also that, during his mother's lifetime, he had no *locus standi* to maintain the suit.

*Per* MAHMOOD, J., that the plaintiff's rights as a daughter's son (which were not affected by his birth having taken place after his maternal grand-father's death) did not entitle him, under ordinary circumstances, to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed.

Also that the prayer in the plaint was wide enough to include a prayer for declaratory relief such as the first Court had given.

Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representatives, was limited to decrees fairly obtained against the widow in a contested and *bona fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made, and which the plaintiff distinctly alleged had not been fairly obtained.

Also that *M*'s withdrawal of her suit was not a bar to the suit of the plaintiff.

Also that it could not be said that a daughter's son, was not, under any condition, competent to maintain a declaratory suit of this nature during the life-time of his mother or maternal aunt, in respect of his maternal grandfather's property, to the full ownership of which he had a reversionary right.

Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first instance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree cannot be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code.

This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. *SANT KUMAR, MINOR. BY HIS GUARDIAN, SUKH NIDHAN v. DEO SARAN*, 8 A. 365=6 A.W.N. (1886) 129 ...

- (2) *Sadhs—Partition between widow and mother, both claiming life interest—Alienation by mother—Reversioner—Declaratory decrees.*—Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration and an award was made dividing the property between the disputants. It did not appear that either of them claimed the

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property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased, as reversioners, sued the donees to set aside the gift asserting that the donor had no power to make it, having under the Hindu law a life-interest only in the property. The parties were Sadhs.

*Held* that the Hindu law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the Sadhs, having the force of law, prevailed opposed to the Hindu law.

*Held* that inasmuch as the donor was in any circumstances entitled to maintenance, and the decision came to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners.

*Held* also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death. *GOPI CHAND v. SUJAN KUAR*, 8 A. 646=6 A.W.N. (1886) 243 ...

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**— 7.—Stridhan.**

*Stridhan—Succession.*—Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, *S*, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against *S* and his son by *C*, on the allegation that he and *J*, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up.

*Held* that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *CHAMPAT v. SHIBA*, 8 A. 393=6 A.W.N. (1886) 142=10 Ind. Jur. 467 ...

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**— 8.—Widow.**

- (1) *Alienation—Suit by reversioner to set aside alienation—Nearest reversioner—Collusion.*—The only person who can maintain a suit to have an alienation by the widow of a childless Hindu declared inoperative beyond the widow's own life-interest is the nearest reversioner who, if he survived the widow, would inherit; unless it is shown or found that he refused without sufficient cause to sue, or precluded himself by his own act from suing, or colluded with the widow, in which case only can the more remote reversioners maintain such a suit. *JHULA v. KANTA PRASAD*, 9 A. 441=7 A.W.N. (1887) 91=11 Ind. Jur. 431 ...

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- (2) *Decree against widow—Fraud—Reversioner.*—Upon the death of *R*, a Hindu, who was separate from his brother *S*, his widow *G* became life-tenant of his estate, and his daughter *B* became entitled to succeed after *G*'s death. In 1882, a suit was brought by *S* and *G*



against V, to recover the value of a branch of a mango tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that R was not the owner of the grove, nor was G the owner. In 1885 B brought a suit against G, S, V and A, to whom V had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in collusion between S and G on the one hand and V on the other, for the purpose of improperly preventing her from asserting her rights.

*Held* that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though S might have been improperly joined as plaintiff, any decision then passed against G would be binding upon the present plaintiff, and estop her again litigating questions which were then decided.

*Held* also that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the plaintiff under the circumstances.

*Held* also that if it should turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant; and that such relief could be given upon this form of plaint. *SACHIT v. BUDHUA KUAR*, 8 A. 429 = 6 A.W.N. (1886) 153 ...

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- (3) *Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 42.*—The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property, during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond.

*Held* that if the widow's possession were only a possession by the plaintiff's consent entitling her merely to receive the profits for her maintenance, the plaintiffs might eject her from the property, and that before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate.

*Held* also, that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate. *BHOLAI v. KALI*, 8 A. 70 = 5 A.W.N. (1885) 324 = 10 Ind. Jur. 305 ...

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### Hindis.

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### Husband and Wife.

- (1) Agency—Authority of wife to pledge husband's credit—See APPEAL (SECOND APPEAL), 9 A. 147.
- (2) Suit by Hindu husband out of caste at time of suit—Decree for restitution of conjugal rights conditional on plaintiff's obtaining restoration to caste—See HINDU LAW (MARRIAGE), 8 A. 78.

### Interest.

- (1) Bond—Compound interest—See UNCONSCIONABLE BARGAIN, 9 A. 228.
- (2) "Dharta"—Illiterate agriculturist—See UNCONSCIONABLE BARGAIN, 9 A. 74.

### Jamog.

Verbal assignment of rent of land in satisfaction of interest—Mutation of names in favour of assignee not effected—Suit on bond—Claim for interest notwithstanding assignment—See BOND, 9 A. 249.

### Joinder of Parties.

See PARTNERSHIP, 9 A. 486.

### Jurisdiction.

- 1.—GENERAL.
- 2.—CIVIL AND REVENUE COURTS.

#### 1.—General.

- (1) *Criminal Procedure Code*, s. 180—*Dacoity committed in British territory—Dishonest receipt of stolen property in foreign territory.*—Certain persons, who were not proved to be British subjects, were found in possession, in a native State, of property the subject of a dacoity committed in British India. They were not proved to have taken part in the dacoity, and there was no evidence that they had received or retained any stolen property in British India. They were convicted of offences punishable under s. 412 of the Penal Code. *Held*, that no offence was proved to have been committed within the jurisdiction of a British Court. *QUEEN-EMPRESS v. KIRPAL SINGH*, 9 A. 523=7 A.W.N. (1887) 131 ...

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- (2) *Place of suing—Suit for sale of mortgaged property—Civil Procedure Code*, ss. 16, 20.—In 1879 *R* gave *J* a bond containing a simple mortgage of immoveable property. Subsequently *R* and *P* jointly gave *D* a bond containing a simple mortgage of the same property. In 1881 *D* obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 *J* obtained a decree in the Court of the Munsif of *G* (within the local limits of whose jurisdiction the property was not situated) for enforcement of his mortgage-bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of *J*'s decree so far as it ordered the sale.

*Held*, that *J*'s decree could only be regarded as a simple money-decree, because, as shown by s. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction; and neither the proviso to s. 16 nor s. 20 of the Code met the circumstances.

*Held* therefore that the plaintiffs were entitled in this suit to have it declared that *J*'s decree was a simple money-decree only, on the



basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiffs' possession from any part of it. *GUDRI LAL v. JAGANNATH RAM*, 8 A. 117=6 A.W.N. (1886) 32 ...

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- (3) *Suit for declaration that property is liable to sale in execution of decree—Valuation of suit—Jurisdiction.*—In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution of the plaintiff's decree for Rs. 1,500—*held* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *DURGA PRASAD v. RACHLA KUAR*, 9 A. 140=6 A.W.N. (1886) 328 ...

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- (4) *Jurisdiction under Act XV of 1859, s. 22—Objection to suit not competently brought—Civil Procedure Code, ss. 25, 562, 564—Withdrawal, transfer, and remand of suits—Effect of consent of parties as regards jurisdiction—Particulars of infringement required by Act XV of 1859, s. 34—Sufficiency of statement to satisfy that requirement.*—An order for the transfer of a suit from one Court to another, under s. 25 of the Code of Civil Procedure, cannot be made unless the suit has been brought in a Court having jurisdiction.

When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process; although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision.

On the other hand, in a suit tried by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.

A suit, having been instituted in a Court not of competent jurisdiction, was transferred, with the consent of parties, to a Court which was competent; but the defence of jurisdiction was set up before the issues were fixed, and was afterwards insisted on throughout.

*Held*, that in the single fact that the defendant had personally concurred in the transfer, there had been no waiver of the right to maintain this defence, and that the suit must be dismissed on the ground that it was not competently brought.

A Court of appeal, having set aside the whole of the proceedings, including the plaint, directed that a new plaint be presented in the proper Court.

*Held*, that this order, equivalent to directing the plaintiff to institute a new suit, was wrong; and that, with only the alternative of having leave to withdraw the suit and bring a new one, his suit should have been dismissed.

The sole object of s. 34 of Act XV of 1859, "An Act for granting exclusive privileges to inventors," (substantially the same as s. 41 of the English Act of 1852, 15 and 16 Vic., c. 82) is to compel the plaintiff to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information is given in the plaint itself or in a separate paper.

Particulars of breaches, upon an alleged infringement, are distinguished from particulars of objection for want of novelty in this, that, in the latter case, instances of use may not be within the knowledge of the patentee, and therefore must be specified, while, in the former, the defendant must himself know whether, and in what respects, he has infringed the patent.

The plaintiff had three patents relating to one article, a brick-kiln; the second and third being for improvements upon the invention

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### Jurisdiction—1.—General—(Concluded).

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- specified in the first. The plaintiff indicated a kiln, constructed and used by the defendant, showing as to each of his patents, the distinctive features of invention alleged to have been appropriated. *Held*, a sufficient compliance with s. 34. *LEDGARD v. BULL*, 9 A. 191 (P.C.) = 13 I.A. 134 = 4 Sar. P.C.J. 741 = 10 Ind. Jur. 471. 602
- (5) Close holiday proceeding on civil side of District Court during vacation—Irregularity—Consent of parties—See ACT VI OF 1871 (BENGAL CIVIL COURTS), 9 A. 366.
- (6) See CIVIL PROCEDURE CODE, 9 A. 36.
- (7) Execution of decree—Order of attachment—Judgment-debtor declared insolvent—Appointment of a receiver—Vesting of insolvent's property in Receiver—Objection to attachment—See EXECUTION OF DECREE, 9 A. 232.
- (8) Of Rent Court to pass decree for rent against such person who received rent but whose right is disputed—See LANDLORD AND TENANT, 9 A. 394.

### —2.—Civil and Revenue Courts.

- (1) *Partition of mahal—Order for partition by Assistant Collector confirmed by Collector—Objection subsequently made to mode of partition—Question of title—Act XIX of 1873 (N.-W.P. Land Revenue Act), s. 113.*—Upon an application made under s. 108 of the N.-W.P. Land Revenue Act (XIX of 1873), for partition of a share in a mahal, no question of title or proprietary right of the nature contemplated by s. 113 was raised, nor any serious objection made by any of the co-sharers, and the Assistant Collector recorded a proceeding setting forth the rules which were to govern the partition, and this proceeding was confirmed by the Collector under s. 131. An Amin was ordered to carry out the partition, and, in taking steps to do so, stated the principle upon which he proposed to distribute the common land. An objection was then for the first time raised by two of the co-sharers in the Court of the Assistant Collector to the inclusion of a particular piece of land in the partition, on the ground that it appertained exclusively to their share. This objection was disallowed by the Assistant Collector, and on appeal, by the District Judge.

*Held* that, at the stage of the proceedings when objections were taken, it was too late to determine questions of title under s. 113 of the Act; that accordingly the Assistant Collector could not be said to have done so; that the objections could therefore only be regarded in the light of objections to the mode in which it was proposed to make the partition; and that consequently there was no appeal from the order of the Assistant Collector to the District Judge, or from the District Judge to the High Court. *TOTA RAM v. ISHUR DAS*, 9 A. 445 = 7 A.W.N. (1887) 76. ...

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- (2) *Suit by lessee of occupancy-tenant for recovery of possession—Act XII of 1881 (N.-W.P. Rent Act), s. 95 (n).*—S. 95 (n) of the N.-W.P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy-tenant to recover possession of the land under the lease, from which the lessor has ejected him; and such a suit is exclusively cognizable by the Revenue Courts. *CHIDDU v. NARPETH*, 8 A. 62 = 5 A.W.N. (1885) 332. ...
- (3) See ACT XII OF 1881 (N.-W.P. RENT), 8 A. 552; 9 A. 35.
- (4) To entertain application under s. 313, Civil Procedure Code—See CIVIL PROCEDURE CODE, 9 A. 43.
- (5) See EXECUTION OF DECREE, 9 A. 602.
- (6) See LANDLORD AND TENANT, 8 A. 446.
- (7) See PARTITION OF MAHAL, 9 A. 429.

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- (1) *Suit by co-sharer for profits—Burden of proof—Act XII of 1881 (N. W. P. Rent Act), s. 209.*—When a co-sharer claims a dividend on the full rental of the mahal, and the lambardar pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardar, in the sense of s. 209 of the N. W. P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections. *DHANAK SINGH v. CHAIN SUKH*, 8 A. 51=6 A.W.N. (1886) 1 ...

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- (2) *Government revenue—Payment by lambardar of arrears of revenue due by co-sharer—Charge—Act XII of 1881 (N. W. P. Rent Act), s. 93 (g).*—In execution of a decree obtained by a lambardar under s. 93 (g) of the N. W. P. Rent Act, the decree-holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that, by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had obtained a charge on it, and could bring it to sale to satisfy the decree.

*Held*, that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to a realization from personal and immoveable property of the judgment-debtors. *LACHMAN SINGH v. SALIG RAM*, 8 A. 384=6 A.W.N. (1886) 134 ...

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- (3) *Collection of rents by co-sharer—Suit by Lambardar for money had and received—See TRANSFER OF PROPERTY ACT, 8 A. 452.*

### Landlord and Tenant.

- (1) *Suit for rent where the right to receive it is disputed—Third person who has received rent made party—Jurisdiction of Rent Court to pass decree for rent against such party—Question of title—Act XII of 1881 (N. W. P. Rent Act), s. 148.*—In a suit by a landholder for recovery of rent in which a third person alleged to have received such rent is made a party under s. 148 of the N. W. P. Rent Act (XII of 1881), the question of title to receive the rent cannot be determined between the plaintiff and such person, but can only be litigated and determined in a subsequent suit in the Civil Court. The only question between the plaintiff and the person so made a party, which can be determined in the Rent Court under s. 148 is the actual receipt and enjoyment of the rent.

A party who is brought in under s. 148 of the Rent Act cannot be made subject to the decree for rent so as to allow execution to be taken out against him, whether his *bona fide* receipt and enjoyment of the rent is proved or not. The only person against whom such a decree can be passed is the tenant.

*Per* EDGE, C.J., *semble*, that the intention of the Legislature in allowing a third person who claims under s. 148 of the Rent Act to be made a party to the suit may possibly have been that by bringing him in, he may be bound by a declaration in the suit that he had in fact received the rent, so as to prevent him in the civil suit from denying the fact that he had received it.

In a suit by a landholder for recovery of rent, the defendants pleaded that they had paid the rent to a co-sharer of the plaintiff. The co-sharer made a deposition in which he alleged that he was entitled to the rent, not only as a co-sharer, but also as the appointed agent of the plaintiff. The Court thereupon made him a party to the

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suit under s. 148 of the Rent Act, and passed a joint decree against him and the tenant for rent.

*Held* that the Court was justified in making him a party under s. 148 of the Rent Act, but was not competent to pass a decree for rent against him. *GOBIND RAM v. NARAIN DAS*, 9 A. 394=7 A.W.N. (1887) 79 ...

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- (2) *Suit for the removal of trees—Act XV of 1877 (Limitation Act), sch. ii, No. 32—Jurisdiction—Civil and Revenue Courts—Act XII of 1881 (N.-W.P. Rent Act), s. 93 (b).*—*Held*, that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court.

*Held* also that No. 32, sch. ii of the Limitation Act (XV of 1877), applied to the suit. *GANGADHAR v. ZAHURRIYA*, 8 A. 446=6 A.W.N. (1886) 210 ...

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- (3) Mortgage by ex-proprietary tenant—Act XII of 1881 (N.-W.P. Rent), ss. 9, 56, 93 (b)—Act "inconsistent with the purpose for which land was let"—See LIMITATION ACT, 9 A. 244.

### Lease.

- (1) *Lease for one year—Lease exceeding one year—Act III of 1877 (Registration Act), ss. 17 (d), 18 (c).*—A *kabuliyat* dated the 6th May, 1880, and executed by the lessee of a house in favour of the lessors set forth that the house was let to the former at an annual rent of Rs. 3, for a term of one year. It also contained this stipulation:—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs. 7-8 arrears of rent, the defendant pleaded that, according to the right construction of the lease, he was entitled to occupy the house, and the lessors were not entitled to eject him therefrom, so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May, 1884; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed.

*Held*, that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration; that the defendant had been a mere tenant-at-will since the expiry of the year 1880-81; and that the plaintiffs were therefore entitled to possession of the house. *KHAYALI v. HUSAIN BAKHSH*, 8 A. 198=6 A.W.N. (1886) 56 ...

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- (2) *Lease from year to year—Act VIII of 1871 (Registration Act), s. 17 (4)—Act III of 1877 (Registration Act), s. 49*—In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be executed in his favour by the defendants, and dated respectively in January, 1875, and June, 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—"If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 per annum." The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus:—"And if the said Shaikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without



objection." The lower Courts held that the *sarakhsats* were not admissible in evidence, as they required registration under s. 17 (4) of the Registration Act, VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent.

*Held* that the two *sarkhsats* created no rights except those of tenants-at-will, inasmuch as the clause common to both, to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice.

*Held* therefore that the leases did not fall under s. 17 (4) of Act VIII of 1871; that their registration was not compulsory; and that they could not be excluded from evidence under s. 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory. *KHUDA BAKHSI v. SHEO DIN*, 8 A. 405 = 6 A.W.N. (1886) 170 ...

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- (3) *Istimrari patta*—*Hereditary title*—*Construction of patta*.—In an instrument described as a perpetual lease (*patta istimrari*) the lessor covenanted as follows:—"So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 36 of the N.-W.P. Rent Act (XII of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

*Held* that the mere use of the word *istimrari* in the instrument did not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *GAYA v. RAMJIWAN RAM*, 8 A. 569 = 6 A.W.N. (1886) 227 ...

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- (4) *Mortgage for securing payment of rent*—*Decree by Revenue Court for arrears of rent*—*Decree time-barred*—*Effect of decree on mortgage*—*Suit for sale of mortgaged property*—*Civil Procedure Code*, s. 43.—In 1874, the plaintiff leased certain immoveable property to the defendant, and the latter executed a deed by which he covenanted to pay the annual rent and fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. In 1874, the plaintiff obtained decrees in the Revenue Court for arrears of rent, and the decrees were partially satisfied, and then became barred by limitation. In 1884, the plaintiff brought a suit to recover the balance due by enforcement of the mortgage-security against the purchasers of the mortgaged property.

*Held* that the plaintiff had two separate rights of action, one on the contract to pay rent, and the other on the mortgage-security; that he could only enforce the first by a suit in the Revenue Court for arrears of rent, and the second by suit in the Civil Court; and consequently there could be no bar to the latter suit by reason of the suit instituted in the Revenue Court, with reference to s. 43 of the Civil Procedure Code.

*Held* also that when the plaintiff obtained his decree for rent, the mortgage-security did not merge in the judgment-debts, nor did he lose his remedy on it; that the two rights were distinct, and the

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right of action on the mortgage-security was not lost because the execution of the decrees for rent was time-barred, the only effect of which was that the debt was not recoverable in execution, but the debt existed nevertheless so far as to enable the amount secured by mortgage to be recovered by suit in the Civil Court, so long as such suit were not barred by limitation.

Held also that the amount which the plaintiff could recover by enforcement of the mortgage-security was limited to Rs. 3,000. CHUNNI LAL v. BANASPAT SINGH, 9 A. 23=6 A.W.N. (1886) 279.

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- (1) Ss. 7, 8—See PRACTICE, 9 A. 617.
- (2) S. 9—See COMPANY, 9 A. 180.
- (3) S. 10—Appeal under—Limitation—Rule of practice of High Court—See APPEAL (GENERAL), 9 A. 115.
- (4) S. 10—See LIMITATION ACT (XV OF 1877), 9 A. 655.

Limitation.

Vendor and purchaser—Failure of consideration—Suit for money had and received for plaintiff's use—Debt—See VENDOR AND PURCHASER, 8 A. 214.

Limitation Act (XV of 1877).

- (1) S. 5.—“*Sufficient cause*” for not presenting appeal within time—Admission of appeal—Discretion of Court—Landholder and tenant—Mortgage by ex-proprietary tenant—Act XII of 1881 (N.W.P. Rent Act), ss. 9, 56, 93 (b)—Act “*inconsistent with the purpose for which land was let.*”—The policy of the framers of the N.W.P. Rent Act (XII of 1881) was not to protect the interest of the purchaser of the proprietary rights, but that of the person whose proprietary rights have been sold, and who has become an ex-proprietary tenant.

It would be straining the law as laid down in s. 93 (b) of the Act to hold that a mortgage of his holding granted by an ex-proprietary tenant was an act “*inconsistent with the purpose for which the land was let*” within the meaning of that provision. The word quoted have reference to something which may alter the character of the land, or cause injury to the land, and thus to the landholder. In the case of a mortgage by an ex-proprietary tenant, the landholder would not be damaged by being unable, in the event of his rent being in arrear, to distrain the crops grown upon the land by the so-called mortgagee, s. 56 of the Rent Act giving the landholder a right to distrain any crops growing upon the land, by whomsoever grown, in respect of which the arrear arises.

In a suit for ejectment instituted in the Revenue Court under s. 93 (b) of the N.W.P. Rent Act (XII of 1881), the Court gave judgment decreeing the claim on the 15th September, 1884. The value of the subject-matter exceeded Rs. 100, and an appeal consequently lay to the District Judge; but there was nothing upon the face of the record to show that the value exceeded Rs. 100 and that the decree was appealable. The period of limitation for the appeal expired on the 15th October, and the defendant, being under the impression that the decree was not appealable, applied to the Board of Revenue on the 8th January, 1885, for revision of the first Court's decree. The proceedings before the Board lasted until the 24th April, when the defendant for the first time was informed that the value of the subject-matter being over Rs. 100, the decree was appealable, and that the application for revision had therefore been rejected. On the 23rd May, the defendant filed an appeal to the District Judge,



who, under s. 5 of the Limitation Act, admitted the appeal and reversing the first Court's decision, dismissed the claim.

*Held*, on appeal by the plaintiff, that, under the circumstances, the High Court ought not to interfere with the discretion exercised by the District Judge in admitting the appeal under s. 5 of the Limitation Act after the period of limitation prescribed therefor.

*Per* EDGE, C.J., that, under the circumstances above stated, he would not himself have held that the defendant had shown "sufficient cause" within the meaning of s. 5. for the admission of the appeal; but that the Court ought not to interfere with the discretion of the Judge when he had applied his mind to the subject-matter before him, unless he had clearly acted on insufficient grounds or improperly exercised his discretion. *FATIMA BEGAM v. HANSI*, 9 A. 244=7 A.W.N. (1887) 29 ...

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- (2) S. 5—*Limitation—Appeal—Admission after time—“Sufficient cause,”—Poverty—Pardah-nashin—Letters Patent, N. W. P., s. 10—“Judgment.”*—On the 14th February, 1884, the High Court dismissed an application of the 22nd March, 1883, by a *pardah-nashin* lady, for leave to appeal *in forma pauperis* from a decree dated the 16th September, 1882, the application, after giving credit for 86 days spent in obtaining the necessary papers, being out of time by 73 days. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the previous order to stand over, pending the decision of a connected case. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. Nothing more was done by the appellant until the 18th June, 1885, when, on her application, an order was passed by a single Judge allowing her, under s. 5 of the Limitation Act (XV of 1877), to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal, which was admitted provisionally by a single Judge.

*Held*, affirming the judgment of MAHMOOD, J.—(1) that the poverty of the appellant, and the fact that she was a *pardah-nashin* lady, did not constitute "sufficient cause" for an extension of the limitation period within the meaning of s. 5 of the Limitation Act, and that such extension ought not to be granted.

Where the Judges of a Division Bench hearing an appeal differed in opinion, one of them holding that the appeal should be dismissed as barred by limitation, and the other that sufficient cause for an extension of time had been shown, and that the appeal should be determined on the merits,—*held*, that the "judgment" of the latter Judge came within the meaning of that term as used in s. 10 of the Letters Patent, and that, as the result of the difference of opinion was that the appeal to the Division Bench stood dismissed, an appeal under s. 10 was not premature. *HUSAINI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR*, 9 A. 655=7 A.W.N. (1887) 185.

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- (3) S. 5—See APPEAL, 9 A. 11.  
 (4) S. 7—See EXECUTION OF DECREE, 9 A. 411.  
 (5) S. 14—"Prosecuting"—"Good faith"—"Other cause of a like nature"—*Limitation Act. Construction of.*—In October, 1881, an account was struck between K and M, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs. 885 was paid. In March, 1885, K sued M for the balance of Rs. 600 then due on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain

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zamindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881.

*Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction, or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation.

*Per* STRAIGHT, Offg. C.J.—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

*Per* MAHMOOD, J.—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts where their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as “statutes of repose” and not as of a penal character or as imposing burdens. *MANGU LAL v. KANDHAI LAL*, 8 A. 475=6 A.W.N. (1886) 233 ...

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(6) Art. 10—See PRE-EMPTION, 9 A. 234.

(7) Art. 32—See LANDLORD AND TENANT, 8 A. 446.

(8) *Arts. 62, 97, 120—Suit for money paid by a pre-emptor under a decree for pre-emption which has become void—Suit for money had and received for plaintiff's use—Suit for money paid upon an existing consideration which afterwards fails.*—Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs. 1,595, the pre-emptor decree-holder, in August, 1880, applied for possession of the property in execution of the decree, alleging payment of the Rs. 1,595 to the judgment-debtors out of Court, and filing a receipt given by them for the money. This application was ultimately struck off. In April, 1881, judgment was given in the appeal, increasing the amount to be paid by the decree-holder to Rs. 1,994, which was to be deposited in Court within a certain time. The decree-holder did not deposit the balance thus directed to be paid, and the decree for possession of the property accordingly became void. In 1882, the decree holder assigned to K his right to recover from the judgment-debtors the sum of Rs. 1,595 which he had paid to them in August, 1880. In December, 1883, K sued the judgment-debtors for recovery of the Rs. 1,595 with interest.

*Held*, that No. 62 of the Limitation Act did not govern the suit, but that No. 97, and, if not, No. 120, would apply, and the suit was therefore not barred by limitation. *KOJI RAM v. ISHAR DAS*, 8 A. 273=6 A.W.N. (1886) 95 ...

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(9) Art. 118—See HINDU LAW (ADOPTION), 9 A. 253.

(10) *Arts. 118, 141—Limitation—Suit to obtain a declaration that an alleged adoption is invalid or never took place—Suit for possession of immoveable property.*—Art. 118 of the Limitation Act applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should



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not be a bar to a suit for possession of property on any ground of limitation prescribed for the former.

In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance.

*Held*, that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property, for which there was a special limitation. *BASDEO v. GOPAL*, 8 A. 644=6 A.W.N. (1936) 292 ...

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(11) Art. 120—Pre-emption—Mortgage by conditional sale—Time from which period of limitation begins to run—See PRE-EMPTION, 8 A. 54.

(12) Arts. 127, 13—See ACT XXIII OF 1877 (PENSION), 9 A. 213.

(13) Art. 132—See CHARGE, 9 A. 158.

(14) Art. 134—See MORTGAGE (SALE), 9 A. 95.

(15) Arts. 134, 138—See MORTGAGE (REDEMPTION), 8 A. 295.

(16) Art. 144—See MORTGAGE (PRE-EMPTION), 8 A. 86.

(17) Art. 158—See ARBITRATION, 8 A. 64.

(18) Art. 171 (B)—See APPEAL (GENERAL), 9 A. 118.

(19) Art. 178 — *Amendment of decree—Limitation — Civil Procedure Code*, s. 206 — Art. 178 of schedule ii of the Limitation Act (XV of 1877) applies only to applications made to a Court to exercise powers which, without being moved by such application, it is not bound to exercise, and not to applications to a Court to do acts which it has no discretion to refuse to do. It does not govern an application under s. 206 of the Civil Procedure Code, for amendment of a decree so as to bring it into conformity with the judgment, it being the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments and to correct them if necessary. *DARBO v. KESHO RAI*, 9 A. 364=7 A. W.N. (1887) 79 ...

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(20) Art. 178—See CIVILPROCEDURE CODE, 8 A. 519.

(21) Arts. 178, 179—Execution of decree—Decree prohibiting execution till the expiration of a certain period—Limitation—See EXECUTION OF DECREE, 8 A. 55.

(22) Arts. 178, 179—See EXECUTION OF DECREE, 8 A. 492.

(23) Art. 179 (2)—*Execution of decree—Limitation.*—Art. 179, cl. (2) of the Limitation Act (XV of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.

A suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors, in March, 1882. The last mentioned defendants alone appealed, and their appeal was dismissed in May, 1882. In May, 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree, and it was contended

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that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree.

*Held* that art. 179, cl. (2), of the Limitation Act was applicable, and that the application, being made within three years from the date of the appellate Court's decree, was not barred by Limitation. *NUR-UL-HASAN v. MUHAMMAD HASAN*, 8 A. 573=6 A.W.N. (1886) 237 ... 396

(24) Art. 179 (4)—See EXECUTION OF DECREE, 8 A. 545.

(25) Art. 179 (4)—See EXECUTION OF DECREE, 9 A. 9.

### Mahant.

Succession to the office and property of a deceased—See CUSTOM, 9 A. 1.

### Mahomedan Law.

- 1.—CUSTODY OF CHILDREN.
- 2.—DOWER.
- 3.—GIFT.
- 4.—GUARDIAN AND MINOR.
- 5.—LEGITIMACY.
- 6.—PRE-EMPTION.
- 7.—RESTITUTION OF CONJUGAL RIGHTS.
- 8.—WAQF.
- 9.—WILL.

#### ———1.—Custody of Children.

*Act IX of 1861, s. 5—Appeal.*—The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

*Held* that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

*Held* also that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application. *IDU v. AMIRAN*, 8 A. 322=6 A.W.N. (1886) 122 ... 225

#### ———2.—Dower.

(1) See FRAUDULENT TRANSFER, 8 A. 178.

(2) See MAHOMEDAN LAW (RESTITUTION OF CONJUGAL RIGHTS), 8 A. 149.



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- (1) *Gift in contemplation of death—Will—Disposition in favour of heir—Consent of other heirs.*—A Muhammadan executed in favour of his wife an instrument which purported to be a deed of gift of all his property. At the time when he executed this instrument he was suffering from an illness likely to have caused him to apprehend an early death, and he did, in fact, die of such illness upon the same day. There was no evidence that any of his heirs had consented to the execution of the deed. After his death, his brother sued the widow to set aside the deed as invalid.

*Held* that the instrument, though purporting to be a deed of gift, constituted, by reason of the time and other circumstances in which it was made, a death-bed gift or will, subject to the conditions prescribed by the Muhammadan law as to the consent of the other heirs, and, those conditions not having been satisfied, it not only fell to the ground, but the parties stood in the same position as if the document had never existed at all. *WAZIR JAN v. SAIYYID ALTAF ALI*, 9 A. 357=7 A.W.N. (1887) 32 ...

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- (2) "Musha"—Undivided part—Ascertained share—Transfer of possession—Mutation of names—Delivery of title-deeds—See ACT XXIII OF 1871 (PENSION), 9 A. 213.

**—4.—Guardian and Minor.**

- (1) *Muhammadan mother—Act XL of 1858 (Bengal Minors Act), s. 18—Mortgage by certificated guardian without sanction of District Court—Mortgage-money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Act IX of 1872 (Contract Act), s. 65—Obligation of person receiving advantage under void agreement—Restitution.*—S. 18 of the Bengal Minors Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian without the sanction of the Civil Court, is illegal and void *ab initio*; but the proviso means that in the absence of such sanction the certificated guardian, who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. If any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction is on the basis of no certificate having been granted.

S. 65 of the Contract Act (IX of 1872) should not be read as if the person making restitution must actually have been a party to the contract, but as including any person whatever who has obtained any advantage under a void agreement.

In a suit brought by the guardian of a Muhammadan minor for a declaration that a mortgage-deed executed by the minor's mother was null and void to the extent of the minor's share and for partition and possession of such share, it was found that a considerable proportion of the monies received by the mortgagor had been applied for the benefit of the minor's estate by discharging incumbrances imposed on it by his deceased father. It appeared that, at the time of the mortgage, the mother held a certificate of guardianship under the Bengal Minors Act, and that she had not obtained from the Civil Court any order sanctioning the mortgage, under s. 18 of that Act.

*Held* that the omission to obtain such sanction did not make the mortgage illegal or void *ab initio*, but relegated the parties to the position in which they would have been if no certificate had been granted, i.e., that of a transaction by a Muhammadan mother affecting to mortgage the property of her minor son, with whose estate she had no power to interfere.

*Held* that this fell within the class of cases in which it has been decided that if a person sells or mortgages another's property,

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having no legal or equitable right do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate.

*Held* that even if mortgages executed by a certificated guardian without the sanction required by s. 18 of the Bengal Minors Act were void, the section did not make them illegal; and with reference to s. 65 of the Contract Act, the plaintiff could not obtain a decree for a declaration that the mortgage was inoperative as against his share, except on condition of his making restitution to the extent of any monies advanced by the defendant under the mortgage-deed which had gone to the benefit of the plaintiff's estate, or had been expended on the maintenance, education, or marriage. GIRRAJ BAKSH V. KAZI HAMID ALI, 9 A. 340 = 7 A. W.N. (1887) 62

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- (2) *Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgages—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882 (Transfer of Property Act), ss. 78, 85—Resjudicata—Civil Procedure Code, s. 13—Meaning of "between parties under whom they or any of them claim."*—Upon the death of G, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son A, one upon each of his five daughters, and one upon his widow B. The name of B only was recorded in the revenue registers in respect of the zamindari property left by G. In 1876, A and B gave to X a deed of simple mortgage of 2½ biswas out of 5 biswas share of a village included in the said property. In 1878, A and B gave to S a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's "own" property. In 1882, X obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by X himself in January, 1884. In February and November, 1884, the daughters of G, obtained *ex parte* decrees against A and B in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885, S brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants A and B, G's daughters, and X, alleging that the decrees of February and November, 1884, were fraudulently and collusively obtained, and as to the auction-sale of January, 1884, that the 2½ biswas were sold subject to his mortgage, he not having been made a party to the suit brought by X upon the deed of 1876, and therefore not being bound by any of the proceedings taken therein or consequent thereto. It was contended that B's position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of 1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against A and B in February, 1884, were conclusive, by way of *res judicata*, against the plaintiff, who, as mortgagee from A and B, claimed under a title derived from them.

*Held* that there being no evidence to show that the decrees of February and November, 1884, were fraudulently and collusively obtained, the Court of first instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff; and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter.

*Per* MAHMOOD, J.—According to the Muhammadan Law, the surviving widow, though held in respect by the members of the



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family, would not be entitled to deal with the property so as to bind them, and the entry of her name in the revenue registers in the place of her deceased husband would probably be a mere mark of respect and sympathy. Her position in respect of her husband's estate is ordinarily nothing more or less than that of any other heir, and even where her children are minors, she cannot exercise any power of disposition with reference to their property, because although she may, under certain limitations, act as guardian of their persons till they reach the age of discretion, she cannot exercise control or act as their guardian in respect of their property without special appointment by the ruling authority, in default of other relations who are entitled to such guardianship. Even therefore if some of the daughters in the present case were minors at the time of the plaintiff's mortgage, their shares could not be affected thereby. They could only be so affected if circumstances existed which would furnish grounds for applying against them the rule of estoppel contained in s. 115 of the Evidence Act, or the doctrine of equity formulated in s. 41 of the Transfer of Property Act, but here no such circumstances existed.

*Also per* MAHMOOD, J. :—The decrees of February and November, 1884, did not operate as *res judicata* against the plaintiff, inasmuch as a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon and conclusive against such mortgagee. The plaintiff in the present suit could not be treated as a party *claiming under* his mortgagors, within the meaning of s. 13 of the Civil Procedure Code, and that section must be interpreted as it, after the words "under whom they or any of them claim," the words "by a title arising subsequently to the commencement of the former suit" had been inserted.

The principles of the rule of *res judicata*, as part of the law of civil procedure properly so called, and those of the rule of estoppel, as part of the law of evidence, explained and distinguished. *SITA RAM v. AMIR BEGAM*, 8 A. 324=6 A.W.N. (1886) 101 ...

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**—5.—Legitimacy.**

*Effect of acknowledgment of sonship.*—*Held* by PETHERAM, C.J., that, according to the Muhammadan law, the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the *status* of legitimacy, is to confer upon such person the *status* of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact.

In a suit for possession, by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased, the defendants pleaded that the plaintiff was not a son, but a step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son.

*Held* by PETHERAM, C.J. (BRODHURST, J., dissenting) that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the *status* of a legitimate son capable of

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inheriting the deceased's estate, although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the *status* of legitimacy.

*Held* by BRODHURST, J., *contra*, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff, and give him the *status* of a son, capable of inheriting. MUHAMMAD ALLAH DAD KHAN v. MUHAMMAD ISMAIL KHAN, 8 A. 231=6 A.W.N. (1886) 78=10 Ind. Jur. 343.

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### — 6.—Pre-emption

*Acquiescence in sale—Relinquishment of right.*—According to the Muhammadan Law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right.

In a suit to enforce the right of pre-emption founded on the Muhammadan Law it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiff's any time within a year, and if the latter paid the price and purchased the property for themselves.

*Held* that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it. HABIB UN-NISSA v. BARKAT ALI, 8 A. 275=6 A.W.N. (1896) 119=10 Ind. Jur. 424

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### — 7.—Restitution of Conjugal Rights.

*Suit for restitution of conjugal rights—Muhammadan Law—Dower—*

*Plea of non-payment—Form of decree.*—According to the Muhammadan Law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and has a defence to a claim for cohabitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid, is analogous to the lien of a vendor upon the sold goods while they remain in his possession, and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat



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altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principles recognized by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim.

It is a general rule of interpretation of the Muhammadan Law that, in cases of difference of opinion among the juriconsults Imam Abu Hanifa and his two disciples Quazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and, in the application of legal principles to temporal matters, the opinion of Quazi Abu Yusuf is entitled to the greatest weight.

In a suit brought by a husband for restitution of conjugal rights, the parties being Sunni Muhammadans governed by the Hanafi Law, the defendant pleaded that the suit was not maintainable, as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage, and that she had cohabited with the plaintiff for three months after marriage, and there was no evidence that she had ever demanded payment of her dower before the suit was filed, or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan Law.

*Held* by the Full Bench that the lower appellate Court's view of the Muhammadan Law relating to conjugal rights and the husband's obligation to pay dower, was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit. **ABDUL KADIR v. SALIMA**, 8 A. 149 (F.B.)=6 A.W.N. (1886) 53 ...

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———8.—**Wakf.**

*Suit for declaration that property is wakf*—Act XX of 1863, ss. 14, 15, 18—*Civil Procedure Code*, s. 539—Act I of 1877 (*Specific Relief Act*), s. 42.—A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was wakf. He did not allege himself to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement in which he denied that the property now in question was wakf.

*Held* that, unless it could be shown that the suit was maintainable under some statutory provision, it could not be maintained.

*Held* that, inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863, or under s. 539 of the Civil Procedure Code.

*Held* that the suit was not maintainable under the provisions of s. 42 of Act I of 1877 (*Specific Relief Act*).

*Held*, therefore, that the suit was not maintainable.

*Held*, further, that the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes,

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it would not be proper to make the declaration prayed for by the plaintiff, even if the suit were maintainable. *WAJID ALI SHAH v. DIANAT-UL-LAH BEG*, 8 A. 31=5 A.W.N. (1885) 318 ...

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### —9.—Will.

*Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation.*—Words such as "always" and "for ever" used in an instrument disposing of property, do not in themselves denote an extension of interest beyond the life of the person named as taking, their meaning being satisfied by the interest being for life.

An instrument in the nature of a will made by a Muhammadan, gave shares in his property to his surviving widow, son, and grandchildren, and devoted a share to charitable purposes. It directed that his son "should continue in possession and occupancy of the full sixteen annas of all the estates.....All the matters of management in connection with his estate should necessarily and obligatorily rest 'always' and 'for ever,' in his hand." It also, with the express object of keeping the property in the family, attempted to restrict alienation by the sharers. There were other provisions to the same effect, in regard to the management by his son, who retained it till his death. The defendant, who was a son of that son, having claimed to retain possession of the property, in order to carry out the provisions of the will; *held* that, on its true construction, the plaintiff, a sharer under it, was entitled to the full proprietary right in, and to the possession of her share, notwithstanding the above expressions in the will, and the attempt to control alienation by the sharers. *MUHAMMAD ABDUL MAJID v. FATIMA BIBI*, 8 A. 39 (P.C.)=12 L.A. 159=4 Sar. P.C.J. 670=9 Ind. Jur. 482 ...

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### Maintenance.

Decree for—Decree directing payment of a certain sum every month for life—See *EXECUTION OF DECREE*, 9 A. 33.

### Malicious Prosecution.

*Suit for—Application for sanction to prosecute—Cause of action.—Held*, that an unsuccessful application under s. 195 of the Criminal Procedure Code for sanction to prosecute for offences under the Penal Code, in which the only loss or injury entailed on the party against whom such application was directed, was the expense he incurred in employing counsel to appear in answer to such application, such appearance being due to the fact not that he had been summoned, but that he had applied through counsel for notice of the application, anticipating that it would be made, afforded no cause of action in a suit for recovery of damages on account of malicious prosecution. *EZID BAKSH v. HARSUKH RAI*, 9 A. 59=6 A.W.N. (1886) 297 ...

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### Malikana.

*Heritable charge—Suit for arrears of malikana allowance, Small Cause Court suit—Act XI of 1865, s. 6. Bona fide transferee without notice—Act IV of 1882 (Transfer of Property Act) s. 3.*—S sold a share in immoveable property to M, by a registered deed of sale which contained the following provision :—"The said vendee is at liberty either to retain possession himself or to sell it to some one else ; and he is to pay Rs. 25 of the queen's coin to me annually (as *Malikana*.) which he has agreed to pay." M mortgaged the property to B, who obtained possession ; and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the



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vendor sued *M* and *B* to recover arrears of *malikana*, the amount sued for being less than Rs. 500.

*Held*, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mufussal Small Cause Courts Act (XI of 1865) was that suits directly and immediately involving questions of title to immoveable property, should not be cognizable by the Small Cause Courts; that in the present suit such a question was directly involved; and that consequently s. 586 of the Code had no application and a second appeal would lie.

*Held* that the words "as *malikana*" in the deed of sale could not be rejected as surplusage; that they showed an intention that the payment of the Rs. 25 should be an annual charge upon the property and the profits arising therefrom analogous to that of a *malikana* reserved on a settlement by a Government settlement officer for a zamindar; that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property; and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance.

*Held* also, without expressing any opinion as to whether registration of the deed of sale operated as notice to all the world, or whether notice of the terms of the deed was necessary to bind *B*, and assuming *B* to have had no such notice in fact, that if he had searched the register he would have ascertained those terms, and if he did not search the register he must have wilfully abstained from so doing or was guilty of gross negligence in not so doing; that in either case he could not be treated as a *bona fide* mortgagee without notice; and that, being in receipt of the profits of the property, he was liable for the annual payment of the Rs. 25 from the date when he took possession as mortgagee.

The definition of the word "notice" in s. 3 of the Transfer of Property Act (IV of 1882) correctly codifies the law as to notice which existed prior to the passing of the Act. *CHURA MAN v. BALLI*, 9 A. 591—7 A.W.N. (1887) 121 ...

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**Master and Servant.**

See BREACH OF TRUST, 8 A. 120.

**Misjoinder.**

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**Mortgage.**

- 1.—GENERAL.
- 2.—FORECLOSURE.
- 3.—PRE-EMPTION.
- 4.—REDEMPTION.
- 5.—SALE.
- 6.—SIMPLE.
- 7.—USUFRUCTUARY.

—1.—General.

- (1) *First and second mortgages—Payment by purchaser of mortgaged property of first mortgage—Right of second mortgagee to bring to sale mortgaged property subject to the first mortgage.*—In 1874 a plot of land No. 111, which, in 1866, had been mortgaged to *L*, was with other property mortgaged to *R*. In 1878, the equity of redemption in plot No. 111 was purchased by *J*, who paid off the mortgage of 1866, *R* brought a suit against *J*, to bring to sale the whole of the property included in the mortgage of 1874. The Court of first instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off

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the mortgage of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874.

The Full Bench modified the decree of the Court of first instance by inserting after the words "land No. 111 to be exempted from the hypothecation lien" the words in "that property the interest of the plaintiff as second mortgagee only to be sold."

*Per* OLDFIELD, J., that the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage, without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee.

*Per* STRAIGHT, J., that the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the mortgagee of 1866: in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it endured. *RAGHUNATH PRASAD v. JURAWAN RAI*, 8 A. 105 (F.B.) = 6 A.W.N. (1886) 25 ...

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- (2) *First and second mortgages—Second mortgagee not made party to suit by first mortgage for sale of mortgaged property—Effect of decree—Act IV of 1882 (Transfer of Property Act,) s. 85—Notice.*—Certain immovable property was mortgaged in 1865 to *H*, in 1871 to *G*, and in 1873 again to *H*. In 1883 the property was purchased by *M*, the representative of *G*, in execution of a decree obtained in 1877 by *G* in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885, *M* sued the representatives of *H* for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court.

*Held*, with reference to the terms of s. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party; and that, under the circumstances, he should be placed in the same position as he would have held if the decree of 1877 had never been passed.

*Held* also that, although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet, the defendant having pleaded that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such a matter, where the defendant had the undoubted right now asserted by him, and where the result of not recognizing such right would be to extinguish his security.

The Court therefore passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree for redemption on



payment of the amount due on the mortgage of 1865 would stand.  
 MUHAMMAD SAMI-UD-DIN v. MAN SINGH, 9 A. 125=6 A.W.N.  
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- (3) *First and second mortgages—Registered and unregistered documents—Act III of 1877 (Registration Act), s. 50—Fraudulent transfer—Act IV of 1892 (Transfer of Property Act), s. 53.*—Apart from any question of equitable estoppel, such as described by Lord Cairns in the L.R., 7 H.L. 135 where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV of 1892) is applicable to such a transaction. In such a condition of circumstances *quoad* the prior title, though created by an unregistered instrument, the status of the second mortgages under his registered document is affected by his own *mala fides*; and as, on the one hand, the first mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a transaction that, in its inception, being fraudulent, was a *nudum pactum*. Such document would not be a "document" in the sense of s. 50 of the Registration Act, which term as therein used means a document legally enforceable.

In a suit for possession of immoveable property by virtue of a registered instrument of mortgage executed in 1883, against a defendant in possession of the same property under an unregistered mortgage-deed of 1881 (both deeds being instruments the registration of which was not compulsory), it was found as a fact that at the time of the execution and registration of his mortgage-deed the plaintiff was aware that the defendant was in possession under his mortgage.

*Held* that, under these circumstances, the fact that the plaintiff's deed was registered did not entitle him to dispossess the defendant by virtue of the provisions of s. 50 of the Registration Act (III of 1877). RAM AUTAR DHANAURI, 8 A, 540=6 A.W.N. (1886) 174.

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- (4) *First and second mortgages—Sale of mortgaged property in execution of money-decree obtained by first mortgagee—Effect on second mortgagee's rights—Purchase by one of several joint mortgagees of mortgaged property—Extinguishment of mortgage-debt—Principal and surety—Liability of surety—Limitation—Costs—Suit for sale of mortgaged property.*—In January, 1866, B obtained a simple money-decree only in a suit for enforcement of lien created by a bond executed by the wife of Z, and, at a sale in execution of such decree, a 10 biswas share hypothecated in the bond was sold and purchased by Z, in November 1872. On the 3rd May, 1872, two bonds were executed in favour of B and H jointly, the first by Z, and I jointly, hypothecating  $6\frac{1}{2}$  out of the above-mentioned 10 biswas, and the second by S, in which the obligor promised to pay the obligees the amount of the bond given by Z and I in the event of such amount not being paid by them, and mortgaged certain property as security for such payment by him. In December, 1872, Z, gave another bond to B, hypothecating the same 10 biswas, and in execution of a decree obtained by B upon this bond, the 10 biswas were sold and purchased B himself in 1877, and in 1883 were sold by him to D. Subsequently, B and H brought a suit against Z and, I, the joint obligors under the bond of the 3rd May, 1872, the heirs of their surety S, a purchaser from those heirs of the property mortgaged in the security-bond, and D, in which they claimed to recover the money due on the bond by sale of the property mortgaged therein and also by the sale of the property mortgaged in S's security-bond.

*Held*, that inasmuch as B's decree of January, 1866, was a simple money-decree only, Z's purchase thereunder in November, 1872,

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could not be regarded as operating in defeasance of the Joint bond of the 3rd May, 1872, executed by Z and I, and that the sale of November, 1872, therefore, left the rights of the parties wholly unaffected *quoad* that instrument.

*Held* also, that the effect of B's purchase of the 10 biswas in 1877 upon the joint bond of the 3rd May, 1872, was as effectually to extinguish the joint incumbrance thereon as if H had been associated with him in buying it; that consequently when B sold the 10 biswas to D in 1883, they were free of all incumbrance under the joint bond; and that he passed to her a 'clean title which she could assert as a complete answer to the present suit in regard to the 6½ biswas.

*Held* further, that inasmuch as the bond executed by S was only a guarantee for the personal obligation created by the joint bond of Z and I, and a cause of action could only accrue as against him in respect of the personal default of the joint obligors to pay the bond-money, and such default occurred beyond the period of limitation within which a suit to enforce the personal obligation to pay the money could have been maintained, it followed that, had there been a claim in the plaint to obtain a decree personally against the joint obligors, the plea of limitation by which such a claim could have been defeated would have been equally efficacious as regards the heirs of S; but no such claim had been made, and the obligation of the surety under his bond of the 3rd May, 1872, being confined to the personal default of S, his heirs had been wrongly imported into the present litigation, which alone sought to enforce the hypothecation of the joint bond against the hypothecated property.

*Held* also, that one set of costs was enough for the heirs of S and the purchaser from them of the property mortgaged in the security-bond, as their defences were identical, and that D's costs should be calculated on the value of the 6½ biswas, the decree of the Court of first instance being modified to this extent. BHUP SINGH v. ZAIN-UL-ABDIN, 9 A. 205=6 A.W.N. (1886) 279 ...

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- (5) *Arrangement between firm and its creditors—Giving time—Mortgage security.*—A firm, in difficulties, executed a mortgage, securing debts due to creditors named in the deed, it being understood that all the creditors should refrain from suing the firm until the expiration of a certain period.

Notwithstanding this, two creditors, named in the deed, immediately sued for their debts, and obtained decrees.

Other creditors, named in the deed, afterwards bringing the present suit to enforce their rights under the mortgage, it appeared that the intention and agreement was that the deed should not take effect, unless all the creditors came in and were bound by it.

*Held* that the suits above-mentioned having been brought before the expiration of the period agreed upon, the consideration for the mortgage had failed, and the creditors could not sue the firm on the mortgage-deed. AJUDHIA PRASAD v. SIDH GOPAL, 9 A. 330 (P.C.)=14 I.A. 21=4 Sar. P.C.J. 769 ...

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- (6) *Hypothecation—Decree for enforcement of lien—Objection to attachment and sale raised by person not a party to decree—Release of property from attachment—Suit by decree-holder for declaration of right based on decree—Defence based on sale-deed found to be fraudulent—Plaintiff entitled to succeed on basis of his decree without further proof of title—Costs—Suit to recover costs incurred in former proceedings in Court having jurisdiction.*—An objection to the attachment and sale of a house which was advertized for sale in execution of a decree for enforcement of lien, was allowed, upon the ground that the objector had purchased the house from the mortgagor, and his purchase was not subject to the decree, to which he was not a party. The decree-holder then brought a suit against the objector, claiming a declaration of his right to recover the



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amount due under his decree by enforcement of lien against the house, and that the order releasing the property from attachment should be set aside, and also to recover the costs incurred by him in the execution department on the defendant's objection. The Courts below, holding that the deed of sale set up by the defendant was fraudulent and collusive, decreed the claim.

*Held* that, although the defendant was not a party to the decree obtained against the mortgagor, yet, as the basis of his title to claim the property had been found to be a mere nullity, the plaintiff was entitled to succeed on the basis of the decree, which stood unimpeached, without being put to proof of the mortgage-deed as against the defendant.

*Held* also that inasmuch as where a Court, having jurisdiction, orders or refuses costs, a separate action for such costs cannot be brought, the plaintiff was not entitled to recover from the defendant the costs incurred by him in the execution department. *KADIR BAKSH V. SALIG RAM*, 9 A. 474=7 A.W.N. (1887) 95

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(7) Incumbrance—See PRACTICE, 9 A. 690.

(8) Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage-deed. See REGISTRATION ACT (III OF 1877) 8 A. 23.

### ———2.—Foreclosure.

(1) *Decree for foreclosure—Order allowing mortgagor to deposit in Court amount due after date fixed—Ministerial act—Order not appealable—Civil Procedure Code, ss. 244, 588—Act IV of 1882 (Transfer of Property Act), s. 87.—S. 244 of the Civil Procedure Code contemplates that there must be some question in controversy and conflict in execution which has been brought to a final determination and conclusion so as to be binding upon the parties to the proceedings, and which must relate in terms to the execution, discharge or satisfaction of the decree.*

A judgment-debtor under a decree for foreclosure made an application to the Court two days after the expiry of the time prescribed by the decree for payment of the amount due thereunder, in which she alleged that, by reason of the two previous days having been holidays, she had been unable to pay the money before, and asked to be allowed to deposit the same. Upon this application the Court passed the following order:—"Permission granted. Applicant may deposit the money." The money was deposited accordingly.

*Held* that the order was merely a ministerial act, and nothing more than a direction from the Judge to his subordinate official to receive the money, which, as it did not fall within either s. 244 or s. 588 of the Civil Procedure Code, was not appealable; and that the proper remedy of the decree-holder, assuming the deposit to have not been made in time, was to apply for an order absolute for foreclosure, which order would be subject to any steps the parties affected by it might take by way of appeal otherwise. *HULAS RAI V. PIRTHEY SINGH*, 9 A. 500=7 A.W.N. (1887) 109

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(2) *Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of 1806, s. 8—Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice—Act IV of 1882 (Transfer of Property Act).—The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but in strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed*

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in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor.

In a suit for possession of immoveable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge.

*Held*, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed.

*Held* also that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law. *SITLA BAKSHI, MINOR BY HIS GUARDIAN PUNNO KUAR v. LALTA PRASAD*, 8 A. 388=6 A.W.N. (1886) 140 ...

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- (3) *Mortgage by conditional sale—Interest—Foreclosure.*—A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession, contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decrees. In 1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest.

*Held* that whatever claim the mortgagee might have against his mortgagors for compensation or damages by way of interest in consequence of the failure to get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. *ALLAH BAKSHI v. SADA SUKH*, 8 A. 182=6 A.W.N. (1886) 47 ...

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### —3.—Pre-emption.

*Suit by mortgagee for possession of the mortgaged property—Sale of mortgaged property by mortgagor—Pre-emption—Purchaser for value without notice—Adverse possession—Act XV of 1877 (Limitation Act), sch. ii, No. 144.*—Under a registered deed of mortgage dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October, 1869, the mortgagors sold the property, and thereupon one *R* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree and got the property and sold it in 1871 to *D*. In 1883 the mortgagee brought a suit against *D* to obtain possession under his mortgage.



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*Held*, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the possession of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor.

*Held* also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bona fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India.

*Held*, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase. *DURGA PRASAD v. SHAMBHU NATH*, 8 A. 86 = 6 A.W.N. (1886) 11 ...

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—4.—Redemption.

- (1) *Suit to redeem brought before expiration of term of mortgage.*—A mortgage-deed, dated the 15th March, 1883, stipulated that the mortgagor would "pay the interest every year and the principal in ten years," that "the principal shall be paid at the promised time, and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period," the mortgagee should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 16th July, 1884.

*Held*, upon a construction of the mortgage-deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *RAGHUBAR DAYAL v. BUDHU LAL*, 8 A. 95 = 6 A.W.N. (1886) 13 ...

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- (2) *Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of 1882 (Transfer of Property Act), ss. 95, 100—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 134, 148—Burden of proof.*—*K* and *J* jointly mortgaged 36 saahms or shares of an estate to *C*, giving him possession. *C* transferred his rights as mortgagee to *T* and *M*. In execution of a decree for money against *K* held by *M*, *K*'s rights and interests in the mortgaged property were sold, and were purchased by *P*, whose heirs paid the entire mortgage-debt. *R*, an heir of *J*, sued the heirs of *P*, to recover from them possession of *J*'s saahms in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by *P*. The plaintiff alleged that the mortgage to *C* had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since *C* transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in

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proprietary and adverse possession of the sahams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point.

*Held*, applying the equitable principle adopted in ss. 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. ii of the Limitation Act (XV of 1877), and it was not possible for one of the two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other, to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

*Held*, therefore, that No. 148 and not No. 134 of sch. ii of the Limitation Act was applicable to the suit.

*Held* also that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *NURA BIBI v. JAGAT NARAIN*, 8 A. 295 = 6 A.W.N. (1886) 98 ...

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- (3) *Joint mortgage—Suit for redemption—Jurisdiction—Court-fee—Valuation of suit—“Subject-matter in dispute”*—Act VII of 1870 (Court Fees Act), s. 7, art. ix—Act VI of 1871 (Bengal Civil Courts Act), s. 20—*Statute, construction of.*—A deed of mortgage was executed by P, T and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of P and T the other mortgagors.

*Held* by the Full Bench with reference to s. 7, art. ix of the Court Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage-amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject.

*Held* also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the “subject-matter in dispute,” in suits of this kind was the amount of the mortgage-debt and the mortgagee’s rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif’s pecuniary jurisdiction.

*Per MAHMOOD, J.*—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction. *AMANAT BEGAM v. BHAJAN LAL*, 8 A. 438 (F.B.) = 6 A.W. N. (1886) 146 ...

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- (4) See REGULATION XVII OF 1806, 9 A. 20.



## Mortgage—5.—Sale—(Continued).

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- (1) *Right to sale—Death of sole mortgagee leaving several heirs—Sale of mortgagee's rights by one of such heirs—Suit by purchaser for sale of mortgaged property—Act IV of 1822 (Transfer of Property Acts), s. 67.*—Upon the death of a sale-mortgagee of zamindari property, his estate was divided among his heirs, one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgaged, though the deed purported to be an assignment of the whole mortgage.

*Held* by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against whole property, the other parties interested not having been joined; that moreover he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. *PARSOTAM SARAN BY HIS GUARDIAN CHIRANJI v. MULU, 9 A. 68 (F.B.)=6 A.W.N. (1886) 298* ...

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- (2) *Sale of mortgagee's rights and interest for the recovery of arrears of revenue—Suit for redemption—Act XV of 1877 (Limitation Act), sch. ii, No. 134—Regulation XI of 1822, s. 29—Regulation XVII of 1806.*—It was not intended that property which would pass on the sale by a mortgagee of his interest should come within the scope of art. 134, schedule II of the Limitation Act (XV of 1877). That article was intended to protect, after the expiration of twelve years from the date of a purchase, a person, who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor had the power to convey and was conveying to him an absolute interest, and not merely the interest of a mortgagee.

Contemporaneously with the execution of a registered deed of sale of zamindari property in 1835 for Rs. 4,000 the vendee executed a deed in favour of the vendors, which also was registered, and by which he agreed that if within ten years the vendors should pay Rs. 4,000 in a lump sum without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. This transaction admittedly amounted to a mortgage by conditional sale. The mortgagee remained in possession, and his name was entered as that of proprietor in the Collector's register, in which no allusion was made to a mortgage. In 1840 his rights in this property were sold by auction for arrears of Government revenue due by him on account of other land, and apparently no notice was given by any one at or prior to the sale that it was the mortgagee's interest only which was about to be or was being sold. The property was purchased for Rs. 3,000 by S, who took possession, and in 1845 sold it for Rs. 3,000 to T, who took possession and in 1847 sold it for the same sum to C. On the occasion of each transfer, the name of the transferee was entered in the Collector's register as that of proprietor. No application for foreclosure was made at any time. In 1865, the representatives of the mortgagors brought a suit against the representative of C or redemption of the mortgage, and for mesne profits. The defendant pleaded (i) that the suit was barred by limitation under art. 134, sch. ii, of Act XV of 1877, (ii) that the several transferees were innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was, with the consent, express or implied, of the persons for the time being interested, the ostensible owner, and had in each case, prior to the purchase, taken reasonable care to ascertain that the transferor had power to make the transfer, and had acted in good faith.

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### Mortgage—5.—Sale—(Concluded).

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*Held* that art. 134 of the Limitation Act did not apply to the case, inasmuch as that article referred only to persons purchasing what was *de facto* a mortgage, having reasonable grounds for the belief, and believing that it was an absolute title; and that, having regard to s. 29 of Regulation XI of 1822, to the presumption that the several transferees knew the law and made inquiries as to the interest they were purchasing, and examined the register in which the deed constituting the transaction of 1835 a mortgage was registered, and also having regard to the fact that Rs. 3,000 only were paid as purchase-money in each case, and to the circumstance that it was doubtful whether a purchaser at a formal auction sale such as that in question could be said to have purchased without notice an absolute interest from the mortgagee, it must be inferred that the transferees knew, or might, or ought to have known, unless they wilfully abstained from inquiry, that the interest which they respectively were purchasing was merely that of a mortgagee.

*Held* that as by Regulation XVII of 1806 mortgagors in such a case as the present were entitled to redeem within sixty years, the plaintiffs were entitled to a decree for redemption. BHAGWAN SAHAI v. BHAGWAN DIN, 9 A. 97=6 A.W.N. (1886) 303 ...

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### —6.—Simple.

*Words creating simple mortgage—Bond—Interest after due date—Measure of damages.*—A suit was brought in 1884 upon a hypothecation-bond executed in April, 1875, in which the obligors agreed to repay the amount borrowed with interest at Re. 1-8 per cent. per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provisions:—"Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period after as for the period before the due date of the bond.

*Held* that the terms of the bond by which the property was hypothecated were sufficiently clear and explicit to constitute a legal hypothecation of the shares and interests of which it recited at the opening that the obligors were owners.

*Held* that although cases might arise in which a jury or a judge might refuse to give a plaintiff any interest, *i. e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as for example, where the interest contracted to be paid before due date was exorbitant and extortionate.

*Held* that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages.

The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances. BISHEN DAYAL v. UDDIT NARAIN, 8 A. 486=6 A. W. N. (1886) 216 ...

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### —7.—Usufructuary.

(1) *Usufructuary mortgage—Interest—Waiver.*—By a deed of usufructuary mortgage dated in 1875 a sum of Rs. 30,000 with interest at Re. 1



per cent. per mensem, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and, among these, a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November, 1884, the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6 per cent. per mensem.

*Held*, that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, i.e., Re. 1 per cent. per mensem. *GANGA SAHAI v. LACHMAN SINGH*, 8 A. 124=6 A.W.N. (1886) 50 ...

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- (2) *Usufructuary mortgage — Pre-emption — Redemption—Interest—Act IV of 1882 (Transfer of Property Act)*, ss. 51, 83, 84.—Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as trespasser, who would have no right to enjoy the usufruct of the property which he has purchased.

In February, 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August, 1883, the decree holder executed his decree by depositing the principal amount of the mortgage-money, and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884.

*Held*, that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August, 1882 he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883.

*Semble* that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money.

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### Mortgage—7.—Usufructuary—(Concluded)..

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*Held* with reference to s. 84 of the Transfer of Property Act (IV of 1882) that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff to his knowledge deposited the whole money due on the mortgage.

*Held*, with reference to the last paragraph of s. 51 of the same Act that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had shown were out. *DEO DAT v. RAM AUTAR*, 8 A. 502=6 A.W.N. (1886) 149 ...

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- (3) *Usufructuary Mortgage—Redemption—Regulation XXXIV of 1803, ss. 9, 10—Act XXVIII of 1855—Act XIV of 1870—Act IV of 1882 (Transfer of Property Act). s. 2.*—A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions:—"Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money, neither they nor their heirs, shall have any right in the property." In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s. 62 (b) of the Transfer of Property Act (IV of 1882), and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage-money.

*Held* that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest.

*Held* that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with 12 per cent. interest had been realized by the mortgagee from the profits of the property. *SAMAR ALI v. KARIM-UL LAH*, 8 A. 402=6. A.W.N. (1886) 139 ...

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### Parda nashin Woman.

*Execution of deeds.*—A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *pardah-nashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registerable, and it was presented for registration by a person who professed to be authorized by a power-of-attorney in that behalf. The only proof given by the plaintiff that this power-of-attorney was executed by the ladies, or with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them, nor did he know their voices, that he went to their residence, that there were two women behind a *pardah* whom the executants of the bond



**Parda-nashin Woman—(Concluded).**

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said were their respective wives, and that these women acknowledged they had made the power-of-attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond.

*Held* that, even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it. *BEHARI LAL v. HABIBA BIBI*, 8 A. 267=6 A.W.N. (1886) 91 ...

- (2) *Civil Procedure Code*, ss. 129, 136—*Discovery of documents*.—In a suit brought by two Muhammadan *pardah-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under s. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtar, with a list of their documentary evidence, but the affidavit and list was considered defective upon several grounds, one of which was that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them personally, praying that the Court would have it verified in any manner thought proper, provided that their *pardah-nashini* were not interfered with. The Court, under s. 136 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under s. 129 not having been complied with, though ample opportunity had been given to the plaintiff, and no sufficient ground for non-compliance had been shown.

*Held*, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs, with regard to the orders made under s. 129 of the Code, that looking at the disabilities of the plaintiffs, and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of s. 136. *KALIAN BIBI v. SAFDAR HUSAIN KHAN*, 8 A. 265=6 A.W.N. (1886) 89 ...

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**Partition.**

- (1) *Question of title—Act XIX of 1873 (N.W.P. Land Revenue Act)* ss. 113, 114—*Irregular procedure—Civil Procedure Code*, s. 13—*Res judicata*.—Upon an application made under Chapter IV of the N.W.P. Land Revenue Act (XIX of 1873) for partition of common land in which the owners of six *pattis* were interested, into six equal parts, an objection was raised that the land should be divided into parts proportionate to the size of the different *pattis*. The Assistant Collector, before whom the objection was made, disallowed it with reference to the provisions of the *wajib-ul arz* in which the custom of the village was recorded, and made the partition in the manner prayed. No appeal was preferred by the objectors to the District Judge. The Collector confirmed the partition, and after an appeal to the Commissioner, the Assistant Collector's decision was upheld. The objectors then brought a suit in the Civil Court for a declaration that the defendants were only entitled to a share of the common land proportionate to the area of their *pattis*.

*Held* that the objection which was raised in the Revenue Court was one which raised a question of title or of proprietary right in respect of the common land within the meaning of s. 113 of the N.W.P. Land Revenue Act; that the decision of the Assistant

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### Partition—(Concluded).

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Collector was a decision within the meaning of s. 114 of the Act ; and that consequently the suit was barred by s. 13 of the Civil Procedure Code.

*Held* also that the question was not affected by any mistake in procedure that had been made in the Revenue Courts. **AMIR SINGH v. NAIMATI PRASAD**, 9 A. 388=7 A.W.N. (1887) 53 ...

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- (2) Suit for, of property by person in possession making a false claim thereto—See **HINDU LAW (ADOPTION)**, 8 A. 1.

### Partition of Mahal.

- (1) *Application by co-sharer for partition—Notice by Collector to other co-sharers to state objections upon a specified day—Objection raised after day specified by original applicant—Question of title—Distribution of land—Jurisdiction—Civil and Revenue Courts—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 111, 112, 113, 131, 132, 241 (f)—Civil Procedure Code, s. 11.—Reading together ss. 111, 112, and 113 of the N.W.P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by s. 111 is to be served, i.e., a person who is a co-sharer in possession, and who has not joined in the application for partition.*

So far as ss. 111, 112, 113, 114 and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under s. 113, or an appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under s. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings or on the partition after the time specified in the notice published under s. 111. S. 132 is not to be read as making the Commissioner the Court of appeal from the Assistant Collector or the Collector upon such questions, nor does s. 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them.

Where, therefore, after the day specified in the notice published by the Assistant Collector under s. 111, and after an Amin had made an apportionment of lands among the co-sharers of the mahal, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under s. 131—*held* that the objection was not one within the meaning of s. 113, that the remedy of the objectors was not an appeal from the Collector's decision under s. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not barred by s. 241 (f), and, with reference to s. 11 of the Civil Procedure Code, was maintainable. **MUHAMMAD ABDUL KARIM v. MUHAMMAD SHADI KHAN**, 9 A. 429=7 A.W.N. (1887) 81 ...

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- (2) Order for partition by Assistant Collector confirmed by Collector—Objection subsequently made to mode of partition—Question of title—See **JURISDICTION (CIVIL AND REVENUE COURTS)**, 9 A. 445.

### Partnership.

- (1) *Partners—Accounting—Suit by partner to recover from co partner share of losses and advances.—It is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution.*



Partnership—(Concluded).

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A suit was brought by the widow of a partner in an indigo concern against her deceased husband's co-partner in respect of certain alleged losses of the concern, and to recover a moiety of moneys expended by her husband in advances made to indigo cultivators on behalf of the partnership. At the time when the suit was brought, the partnership had not been dissolved.

*Held* that, the partnership not having been dissolved, the plaintiff was not entitled to an account, and the suit must therefore fail.  
KASSA MAL v. GOPI, 9 A. 120=6 A.W.N. (1886) 316 ...

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- (2) *Joinder of parties—Plaintiffs—Partnership debt—Suit by sole surviving partner—Representatives of deceased partner not joined—Act IX of 1872 (Contract Act), s. 45—Civil Procedure Code, s. 26—Plaint not stating debt to be partnership-debt or that plaintiff sues as surviving partner—Practice—High Court's powers of revision—Civil Procedure Code, s. 622.*—The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, and is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary.

The effect of s. 45 of the Contract Act (IX of 1872), is to extend the English law applicable to trading partnerships to all cases of partnership. There is nothing either in that section nor in s. 26 of the Civil Procedure Code, read with it, to show that the representatives of a deceased partner must be joined in an action for a partnership-debt brought by the surviving partner though it may be that they might be joined in such an action.

A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover a partnership-debt, on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiffs.

*Held* that it was the Judge's duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain it on the merits, he had failed to exercise his jurisdiction, and had acted with material irregularity, within the meaning of s. 622 of the Civil Procedure Code.

*Held* also that in a such a suit, the plaintiff, if properly framed, ought to have alleged that the debt of which recovery was prayed was a partnership-debt, that the deceased partner had died before the suit, and that the suit was brought by the plaintiff as surviving partner for his own benefit and that of the estate; but the suit should not be dismissed merely because the plaintiff did not contain these averments.

A suit should not be dismissed on merely technical grounds when the merits are proved, and no injustice by surprise or otherwise will be done. GOBIND PRASAD v. CHANDAR SEKHAR, 9 A. 486=7 A.W.N. (1887) 133 ...

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- (3) *Joint Hindu family—Suit by one member for debt due to family firm.*—In a suit for money lent, brought by the father of a joint Hindu family, who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks."

*Held* that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business, and he not being the managing member or proprietor. JUGAL KISHORE v. HULASI RAM, 8 A. 264=6 A.W.N. (1886) 89.

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**Partnership debt.**

See PARTNERSHIP, 9 A. 486.

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**Pauper Suit.**

*Court-fees, recovery of, by Government—Execution of decrees—Cross-decrees—Cross-claims under same decree—Civil Procedure Code, ss. 244, (c) 246, 247, 411.—Held* that a Collector applying on behalf of Government under s. 411 of the Civil Procedure Code, for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in forma pauperis*, might be deemed to have been a party to the suit in which the decree was passed, within the meaning of s. 244 (c) of the Code, and that an appeal would, therefore, lie from an order granting such application.

A plaintiff suing *in forma pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1,439. The Court, with reference to the provisions of s. 411 of the Civil Procedure Code, directed that the plaintiff should pay Rs. 1,196 as the amount of Court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross-suit in the same Court, should be set-off against the Rs. 1,439 payable by her to him, with reference to ss. 246 and 249 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his Rs. 1,439, or by the defendant for her costs. In appeal from an order allowing the Collector's application, it was contended that the "subject-matter of the suit" in s. 411 of the Code meant the sum which the successful pauper plaintiff is entitled to get as a result of his success in the suit; but that in the suit and the cross-suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether.

*Held* that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree, or was a representative of the plaintiff as holder of the decretal order in his favour for Rs. 1,439, so as to bring into operation the special rules of ss. 246 and 247 of the code between him and the defendant.

*Held* also that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject-matter" of his suit, and on that part therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant, who was ordered by the decree to pay it, in the same way as costs are ordinarily recoverable under the Code.

*Held* that the decrees in the suit and the cross suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play, no questions of set-off and consequent reduction or other modification of the "subject-matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained. *JANKI v. THE COLLECTOR OF ALLAHABAD*, 9 A. 64 = 6 A.W.N. (1886) 300 ...

**Penal Code (Act XLV of 1860).**

(1) S. 21—*Public servant.*—Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and it does not lie in



his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant," within the definition contained in s. 21 of the Penal Code. *QUEEN-EMPRESS v. PARMESHAH DAT*, 8 A. 201=6 A.W.N. (1886) 63

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- (2) Ss. 24, 25, 218, 464, clause 3—*Forgery*—"Dishonestly"—"Fraudulently"—*Public servant framing incorrect record*.—A treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs. 500 which was in the Treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that Rs. 500 in question then stood at the payee's credit as a revenue deposit, and that it was to be transferred to the Civil Court. Upon the first of these reports, an order was signed by the Treasury Officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-muharrir, which, as originally drawn up, related to the sum of Rs. 500, already mentioned. The signature of the cheque by the Treasury Officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court, as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to.

*Held*, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of Rs. 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's Rs. 500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside.

*Held* also that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which knew to be incorrect, he was rightly convicted under s. 218 of the Penal Code.

*Held* further that as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer, and as no question was put in the examination of the witnesses from the office, which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so, and as a public servant within the meaning of s. 218 of the Penal Code. *QUEEN-EMPRESS v. GIRDHARI LAL*, 8 A. 653=6 A.W.N. (1886) 264

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- (3) Ss. 71, 147, 149, 325—See *RIOTING*, 9.A. 645.

- (4) Ss. 99, 353—*Warrant of arrest in execution of a decree only initialled by proper officer—Civil Procedure Code*, ss. 2, 251—"Signed"—*Right of private defence*.—A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was

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initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted under s. 353 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad and the officer could not legally execute it, and consequently no offence under s. 353 of the Penal Code had been committed.

*Held* that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant.

*Held* also, with reference to s. 99 of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence. *QUEEN-EMPRESS v. JANKI PRASAD*, S A. 293=6 A.W.N. (1886) 106. ...

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- (5) S. 107—Abetment of making an unstamped receipt.—See *STAMP ACT (I OF 1879)* 8 A. 18.

- (6) S. 192—*Prosecution under s. 182—Criminal Procedure Code*, s. 195.—A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior.

Where a specific false charge is made, the proper section for proceedings to be adopted is under s. 211 of the Penal Code. *QUEEN-EMPRESS v. JUGAL KISHORE*, S A. 382=6 A.W.N. (1886) 193

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- (7) S. 189—*Threat of injury to public servant—Necessity for proving actual words used*.—In a prosecution for an offence under s. 189 of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner. The Sessions Judge, on appeal, affirmed the conviction, observing that it was immaterial what the words used were, and that the intention and effect of the words were plain.

*Held* that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether in fact a threat of injury to the public servant was really made by the accused. *QUEEN EMPRESS v. MAHESHWRI BAKSH SINGH*, S A. 380=6 A.W.N. (1886) 128 ...

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- (8) S. 201—S. 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crime, but only to the case of a person who screens the principal or actual offender. *QUEEN-EMPRESS v. DUNGAR*, S A. 252=6 A.W.N. (1886) 71 ...

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- (9) S. 211—*Prosecution for making a false charge—Opportunity to accused to prove the truth of charge*.—A complaint of offences under ss. 323 and 379 of the Penal Code was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code.

*Held* that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *QUEEN-EMPRESS v. GANGA RAM*, S A. 38=5 A.W.N. (1885) 223 ...

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- (10) S. 291—*Public nuisance, repeating or continuing—Injunction by public servant not to repeat or continue nuisance—Criminal Procedure Code*, ss. 134, 143, 144, *sch. v, Form 20*.—To support a conviction under s. 291 of the Penal Code, there must be proof of an injunction to the accused individually against repeating or continuing the same particular public nuisance. It must be shown that the person convicted had on some previous occasion committed the particular nuisance, had been enjoined not to repeat or continue it, and had repeated or continued it.

The authority under which a Magistrate can order or enjoin a person against repeating or continuing a public nuisance is s. 143 of the Criminal Procedure Code. It is the infringement of this order that is punishable under s. 291 of the Penal Code. What is contemplated is an order addressed to a particular person.

A Magistrate's powers to deal with public nuisances are contained in Chapters X and XI of the Criminal Procedure Code. Chapter XI is only properly applicable to temporary orders in urgent cases. It is only in such cases that an order may be made *ex parte*, and any exception is allowed to the general rule that it shall be directed to a particular individual. In such emergent cases an order may, under s. 144 of the Code, be directed to the public generally when frequenting or visiting a particular place, to abstain from a certain act; but this provision does not apply to a proclamation directed not to the public generally frequenting or visiting a particular place, but to a portion of the community. *QUEEN-EMPRESS v. JOKHU*, 8 A. 99=6 A.W.N. (1886) 27 ...

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- (11) Ss. 300, *Excp. 1*, 302, 304—*Murder—Culpable homicide not amounting to murder—Grave and sudden provocation*.—Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person, that one night the deceased, thinking that her husband was asleep, stealthily left his side, that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her.

*Held* that the act of the accused constituted the crime of murder, the facts not showing "grave and sudden provocation," within the meaning of s. 300, *Exception 1* of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder. *QUEEN-EMPRESS v. MOHAN*, 8 A. 622=6 A.W.N. (1886) 250 ...

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- (12) *Excp. 1*, 302, 304—*Murder—Culpable homicide not amounting to murder—Grave and sudden provocation*.—An accused person was convicted of culpable homicide not amounting to murder in respect of the widow of his cousin, who lived with him. The evidence showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour, and killed her with the chopper.

*Held* that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed, it could not be said that he was deprived of self-control by grave and sudden provocation. *QUEEN-EMPRESS v. LOCHAN*, 8 A. 635=6 A.W.N. (1886) 252 ...

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- (13) Ss. 403, 410, 411—*Animal "nullius inquit"*—*Bull set at large in accordance with Hindu religious usage—Appropriation of bull*.—A person was convicted and sentenced under s. 411 of the Indian Penal Code for dishonestly receiving a bull, knowing the same to have been criminally misappropriated. It was found that, at the

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- time of the alleged misappropriation, the bull had been set at large by some Hindu, in accordance with Hindu religious usage, at the time of performing funeral ceremonies.
- Held* that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor; that it was therefore *Nullius proprietas*, and incapable of larceny being committed in respect of it; and that the conviction must be set aside. *QUEEN-EMPRESS v. BANDHU*, 8 A. 51=5 A.W.N. (1885) 326 ... 36
- (14) S. 405—See CRIMINAL PROCEDURE CODE, 9 A. 666.
- (15) Ss. 405, 409—See BREACH OF TRUST, 8 A. 120.
- (16) Ss. 410, 411—*Res nullius*—*Bull set at large in accordance with Hindu religious usage*—"Stolen property"—A Hindu who, upon the death of a relative, dedicates or lets loose a bull, in accordance with Hindu religious usage, as a pious act for the benefit of the soul of the deceased, thereby surrenders and abandons all proprietary rights in the animal, which thereafter is not "property" which is capable of being made the subject of dishonest receipt or possession within the meaning of ss. 410 and 411 of the Penal Code. *QUEEN-EMPRESS v. NIHAL*, 9 A. 348=7 A.W.N. (1887) 73 ... 708
- (17) Ss. 417, 511—*Attempt to cheat*.—In a prosecution for an attempt to cheat, under ss. 417-511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas* and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be indorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so indorsed to the central office and present it to be cashed.
- Held* that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside. *QUEEN EMPRESS v. DHUNDI*, 8 A. 304=6 A. W. N. (1886) 125 ... 213
- (18) Ss. 459, 460.—Ss. 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a "lurking house-trespass" or "house-breaking" must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking. *QUEEN-EMPRESS v. ISMAIL KHAN*, 8 A. 649=6 A.W.N. (1886) 253 ... 446
- (19) S. 499, Expl. 4—See ACT III OF 1884, 9 A. 420.

## Plaint.

*Signature—Verification—Allegation of fraud—Practice*.—Where a plaint contained numerous allegations of fraud, some of which must have been true or false to the plaintiff's own knowledge, and was signed



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and verified on the plaintiff's behalf by his general attorney,—*held* that the defendants might reasonably require the plaintiff to subscribe and verify the plaint himself, and that he should so subscribe and verify. *THE RAJAH OF TOMKUIH v. BRAIDWOOD*, 9 A. 505=7 A.W.N. (1887) 137 ...

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### Pleader.

*Vakalatnama*—Pleader handing over his brief to another—See PRACTICE, 9 A. 613.

### Pledership Examination.

*Board of Examiners raising standard of marks required for pass-certificate without notice to candidates*—*Petition to High Court by unsuccessful candidates*.—The Board of Examiners having, without giving any notice to the candidates at the annual Examination for pleaderships of the Upper Subordinate Grade, raised the minimum number of marks qualifying for a pass-certificate, some of the unsuccessful candidates petitioned the High Court that the result of the examination might be re-considered and the former standard reverted to.

*Held* that the Court having delegated its powers in connection with the examination to the Board of Examiners, and the Board having exercised its powers legally, properly, and for the benefit of the public, there was no cause for interference. *In the Petition of DWARKA PRASAD*, 9 A. 611 (F.B.)=7 A.W.N. (1887) 148 ...

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### Pleadings.

Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Specific Relief Act (I of 1877), s. 21—See SPECIFIC RELIEF ACT, 9 A. 57.

### Practice.

(1) *Barrister—Advocate of the High Court—Right to take instructions directly from client—Right to "act" for client—Letters Patent*, N. W. P., ss. 7, 8—*Civil Procedure Code*, ss. 2, 36, 39, 635.—Reading together ss. 7 and 8 of the Letters Patent for the High Court, and ss. 2, 36, 34, and 635 of the Civil Procedure Code, an advocate on the roll of the Court can, for the purposes of the Code, perform, on behalf of a suitor, all the duties that may be performed by a pleader, subject to his exemption in the matter of a *vakalatnama* and to any rules which the High Court may make regarding him. No such rule having been made to the contrary, such an advocate may take instructions directly from a suitor, and may "act" for the purposes of the Code, on behalf of his clients. *BAKHTAWAR SINGH v. SANT LAL*, 9 A. 617 (F.B.)=7 A. W. N. (1887) 153 ...

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*Dismissal of suit by first Court without examining defendants' witnesses—Reversal of decree on appeal—Duty of appellate Court to direct examination of witnesses before reversing decree*.—Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal,—*held* that before doing so, the lower appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court, by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants.

The Court directed the first Court to examine the defendant's witnesses, and, having done so, to return their depositions to the lower appellate Court, which was to re-place the appeal upon its file and dispose of it. *KHUDA BAKSH v. IMAM ALI SHAH*, 9 A. 339=7 A.W.N. (1887) 61 ...

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- (3) *Pleader—Vakalatnama—Pleader handing over his brief to another—Civil Procedure Code*, ss. 36, 37, 39, 635—*Rule of Court of 22nd May, 1883*.—The Rule of Court, dated the 22nd May, 1883, and authorising legal practitioners in certain cases to appoint other legal practitioners to hold their briefs and appear in their place, was passed to facilitate the work of the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by s. 635 of the Civil Procedure Code. *MATADIN v. GANGA BAI*, 9 A. 613 (F.B.)=7 A.W.N. (1887) 152 ...

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- (4) *Revision—Criminal Procedure Code*, ss. 438, 439—*Reference by District Magistrate of proceedings of Sessions Judge*.—A District Magistrate who considers that there has been a miscarriage of justice in the Court of Session, should not report the case to the High Court for orders under s. 438 of the Criminal Procedure Code, but should communicate with the Public Prosecutor as to the case in which he thinks such miscarriage has occurred, and invite his assistance to move the Court with regard to it. *QUEEN-EMPRESS v. SHERE SINGH*, 9 A. 362=7 A.W.N. (1887) 64 ...

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- (5) *Suit on mortgage by mortgagee purchasing part of the property ism-farsi—Suit dismissed as brought with liberty to bring fresh suit—Non-suit—Civil Procedure Code*, s. 373—*Bond—Breach—Interest—Penalty—Act IX of 1872 (Contract Act)*, s. 74—*Estoppel—Mortgage—Prior incumbrancer bidding at auction-sale in execution of decree and not announcing his incumbrance—Sale by first mortgagee in execution of decree upon second mortgagee held by him—Interest acquired by purchaser at such sale—Sale of portions of mortgaged property—Mortgagee not compelled to proceed first against unsold portions—Enforcement of mortgage against purchaser not having obtained possession*.—Where a suit for enforcement of hypothecation against immoveable property was dismissed "in the form in which it was brought," and "with permission to bring a fresh suit," on the ground that the plaintiff, by purchasing a part, had put it out of his power to sue for relief against the whole of the hypothecated property,—*held*, that the decree being in effect one of non-suit, which no Court in India had power to make, and not being made under s. 373 of the Civil Procedure Code, and the plaint not having been returned or rejected under Chapter V of the Code, the decision must be set aside.

A bond by which immoveable property was hypothecated provided for interest at 13½ per cent. and contained a condition that if the principal with interest were not paid within one year, 27 per cent. should be paid as interest as from the date of the bond.

*Held*, that the question to be determined with reference to this condition was whether the parties intended to contract that, on failure by the mortgagor to pay within the stipulated time, 27 per cent. should be payable *qua* interest from the date of the bond, or whether they intended that the condition should be regarded merely as providing for a penalty, leaving the amount of compensation for non-payment at the stipulated time to be determined, in case of dispute, by the Court.

*Held*, that the condition would not in itself be an unreasonable one under the circumstances, that the parties contracted that the 27 per cent. should be payable *qua* interest, and that interest at that rate must therefore be allowed.

At a sale in execution of a decree for enforcement of a hypothecation-bond the decree-holder, by permission of the executing Court, made *bids*, but the property was purchased by another. At that time the decree-holder held a prior registered incumbrance, which he did not personally announce. In a suit brought by him subsequently to enforce this incumbrance, it was contended on behalf



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of the auction-purchaser that he was estopped by his conduct from setting it up as against her.

*Held*, that there was no estoppel; that under s. 114 of the Evidence Act, the Court was entitled to presume that the provisions of s. 287 (c) of the Civil Procedure Code had been complied with, and that consequently the notification of sale disclosed the existence of the incumbrance now sued upon; that the plaintiff was entitled to assume that intending purchasers would read the notification or search the register for the purpose of ascertaining what was the property being sold; and that his rights were not affected by his not having personally announced his incumbrance, nor could it be said that solely by bidding at the sale he had encouraged the purchaser to buy.

*Held*, also that it could not be said that under the circumstances the plaintiff must be taken to have sold, in execution of his decree, the interest which he held under the bond now in suit; that he could not be compelled to proceed first against those portions of the mortgaged property which had not been sold; and that the bond was enforceable against a purchaser of part of the mortgaged property, who had never obtained possession. *BANWARI DAS v. MUHAMMAD MASHIAT*, 9 A. 690=7 A.W.N. (1887) 254=12 Ind. Jur. 192 ...

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- (6) Appeal—Security for costs—Poverty of appellant—See CIVIL PROCEDURE CODE, 8 A. 203.
- (7) Security for costs—Amount of security not fixed—Dismissal of appeal—See CIVIL PROCEDURE CODE, 9 A. 164.
- (8) See CIVIL PROCEDURE CODE, 9 A. 61.
- (9) Criminal Procedure Code, s. 437—Further enquiry—Notice to show cause—See CRIMINAL PROCEDURE CODE, 9 A. 52.
- (10) Accomplice—Evidence—Corroboration—Questions of fact to be determined on the merits and not on supposed analogy of previous cases—See EVIDENCE ACT, 9 A. 528.
- (11) Partnership debt—Plaint not stating debt to be partnership or that plaintiff sues as surviving partner—See PARTNERSHIP, 9 A. 486.
- (12) Plaint—Signature—Verification—Allegation of fraud—See PLAINT, 9 A. 505.

## Pre-emption.

- (1) *Concealment by vendor and vendee of actual price—Evidence—Market-value of property sold.*—In suits for pre-emption, where the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract-price, and where it cannot ascertain the true price by reason either that the vendor and vendee refuse to disclose the same by their own evidence, or their evidence cannot be believed, the Court should ascertain, if possible, what was the market-price of the property in dispute at the time of the sale, and accept that market-price as the probable price agreed upon between the parties. It is for the plaintiff either to show what was the actual contract-price, or to give substantial evidence on which the Court cannot act, showing what was the market-value at the time of the sale. *AGAR SINGH v. RAGHURAJ SINGH*, 9 A. 471=7 A.W.N. (1887) 99
- (2) *Co-sharers—Recorded co-sharers—Benami purchases of shares—Sale by co-sharer—Claim for pre-emption resisted by person alleging himself to be co-sharer by virtue of benami transaction—Equitable estoppel.*—A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption either under the Muhammadan Law or under the provisions of a *wajib-ul-arz*, so as to enable him upon the strength of the interest

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so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder who had no notice direct or constructive of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character. BENI SHANKAR SHELHAT v. MAHPAL BAHADUR SINGH, 9 A. 490=7 A.W.N. (1887) 71 ...

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- (3) *Mortgage by conditional sale—Act XV of 1877 (Limitation Act), sch. ii, No. 120—Time from which period of limitation begins to run.*—A mortgagee under a deed of mortgage by conditional sale obtained a final order for foreclosure under Regulation XVII of 1806 in December, 1875. He then sued to have the conditional sale declared absolute and for possession of the mortgaged property, obtaining a decree for the relief sought in April, 1881.

In a suit for pre-emption in respect of the mortgage,—*held*, with reference to art. 120, sch. ii of the Limitation Act, which was applicable to the case, that the pre-emptor's full right to impeach the sale had not accrued until the mortgagee had obtained the decree of April, 1881, declaring the conditional sale absolute and giving him possession. UDIT SINGH v. PADARATH SINGH, 8 A. 54=5 A.W.N. (1885) 330 ...

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- (4) *Purchase-money—Evidence—Burden of proof.*—In suits for pre-emption, where the amount of the consideration for the sale is in dispute, the rule as to the burden of proof is that, in the first instance, the plaintiff who alleges the price stated in the deed of sale to be fictitious must give some *prima facie* evidence leading to the presumption that the price so stated was not the true price. Having done that, it then lies upon the vendor and vendee to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. In the majority of cases the only *prima facie* evidence which the plaintiff pre-emptor could produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious, or else evidence showing that the market-value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged price was not the real price.

Where the price stated in the deed of sale was nearly five times the market-value of the property sold, and the purchaser gave no explanation showing why he was willing to buy the property at a price apparently so extravagant,—*held* that there was sufficient evidence upon which to find that the price alleged in the contract was fictitious. SHEOPARGASH DUBE v. DHANRAJ DUBE, 9 A. 225=7 A.W.N. (1887) 39 ...

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- (5) *Wajib-ul-arz—Co-sharers—Effect of perfect partition—Act XIX of 1873 (N.W.P. Land Revenue Act), s. 191—Limitation—Act XV of 1877 (Limitation Act) sch. II, No. 10—"Physical possession"—Purchase of equity of redemption mortgagee in possession—Acquiescence—Equitable estoppel.*—The *wajib-ul arz* of three villages which originally formed a single mahal, gave a right of pre-emption to co-sharers in case of transfers of shares to strangers. Afterwards, the shares in these villages were made the subject of a perfect partition, and divided into separate mahals. Subsequently, by two deeds of sale executed on the 13th January, 1884, and registered on the 17th January, 1884, some of the original co-sharers sold to strangers their shares in all three villages. At the time of the sale, the shares in two of the villages were in possession of the vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in the third village was, at the time of the sale, in possession of another of the original co-sharers under a possessory mortgage. On the 17th January, 1885, this last mentioned co-sharer brought a suit against the vendors and the vendees to enforce his right of pre-emption under the *wajib-ul-arz* in respect of the shares sold in the three villages.



*Held* that, notwithstanding the partition of the village into separate mahals, the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and govern the separate mahals, until it was shown that a new one had been made.

*Held* that in the case of the sale of an equity of redemption by the mortgagor to the mortgagee in possession, which has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagee, it cannot properly be said that any property is sold which is capable of "physical possession" within the meaning of art. 10, sch. ii, of the Limitation Act. In a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be effected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word "physical" implies some corporeal or perceptible act done which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. An equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and a pre-emptor impeaching such a sale has one year from the date of registration of the instrument of sale within which to bring his suit.

*Held* therefore, that the period of limitation began to run from the date of the registration of the deed of sale, and that the suit was within time.

*Held* also that the Court below was wrong in holding that the plaintiff, by reason of his having omitted, in a suit previously brought against him for redemption of his mortgage and dismissed for want of jurisdiction, to set up in defence any right of pre-emption or to express any desire to purchase, was equitably estopped by acquiescence in the sale from asserting his pre-emptive right. *SHIAM SUNDAR v. AMANANT BEGAM*, 9 A. 234=7 A.W.N. (1887) 124 ...

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- (6) *Wajib-ul-arz—Co-sharers—“Ek jaddi.”*—The *Wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale, to "brothers" and provided that, on refusal by a "brother," there should be a right of pre-emption in favour of co-sharers in the *thoke* who were related to the vendor by descent from a common ancestor ("his *sadaran ek jaddi thoke*"). It was also provided that, in the event of any dispute arising as to price, it should be settled by arbitration, and that "if the co-sharers do not take at the amount fixed by the arbitrators," the co-sharer desiring to sell might make the transfer to a stranger.

*Held*, that co-sharers who were not of common descent from the vendor were entitled for pre-emption after own brothers and co-sharers *ek jodai*, and to have preference over strangers. *SABIR ALI v. YAD RAM*, 9 A. 660=7 A.W.N. (1887) 226 ...

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- (7) *Wajib-ul-arz—Custom—Muhammadan Law—Immediate and conformatory demands—Practice—Remand.*—The *wajib-ul-arz* of a village gave a right of pre-emption *shufaa* "according to the usage of the country." In a suit for pre-emption there was no evidence to show what, in fact, was the usage prevailing in the district, in regard to pre-emption. There was no evidence that the plaintiff had satisfied the requirements of the Muhammadan Law as to immediate and conformatory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time willing to pay the actual contract price.

*Held* that in the absence of evidence of any special custom different from or not co-extensive with the Muhammadan Law of pre-emption, that law must be applied to the case, and that, under the circumstances above stated, the suit failed and must be dismissed.

A case ought not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below and brought to the

attention of the parties, and where they have failed at the trial to give any evidence upon it. *RAM PRASAD v. ABDUL KARIM*, 9 A. 513=7 A.W.N. (1887) 146=12 Ind. Jur. 34 ...

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- (8) *Wajib-ul-arz*—Evidence of contract and custom—Act XIX of 1873 (N.W.P. Land Revenue Act), s. 91—Regulation VII of 1822, s. 9, cl. (i).—The *wajib-ul-arz* of a village is a document of a public character, prepared with all publicity, and must be considered as *prima facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence to cast on those denying the custom, the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the shareholders. Looking to the public character of the document, and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character.

A suit to enforce the right of pre-emption, which was based on contract and custom as evidenced by the *wajib-ul-arz* of a village, was dismissed by the lower Courts on the ground that any contract which might be founded on the *wajib-ul-arz* was not binding on the vendor-defendant as that document did not bear his signature, and the lower appellate Court attached no weight to the *wajib-ul-arz* as proof of the custom of pre-emption, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. The claim was dismissed on the ground that the plaintiff's evidence did not prove the existence of a custom of pre-emption in the village.

Held that the lower appellate Court had erred in dealing with the evidence, and that although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to its entries, both as proof of the contract as well as custom was very strong. *MUHAMMAD HASAN v. MUNNA LAL*, 8 A. 434=6 A.W.N. (1886) 166 ...

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- (9) *Wajib-ul-arz*—Right of pre-emptor to stand in the position of the purchaser.—A co-sharer of village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase-money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

Held that it could not be said that the partners of the vendor had not only the right of pre-emption, but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and the purchaser. *NIHAL SINGH v. KOKALE SINGH*, 8 A. 29=5 A.W.N. (1885) 314=10 Ind. Jur. 192 ...

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- (10) *Wajib-ul-arz*—Vendor and purchaser—Clause fixing price in case of sale to a co-sharer—Sale to a stranger for higher price—Agreement running with land—Pre-emptor entitled to take property on payment of price fixed in *wajib-ul-arz*—Purchaser entitled to recover purchase-money.—The *wajib-ul-arz* of a village contained a provision that any co-sharer desiring to sell his share should offer it to the other co-sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to other co-sharers, sold it to a stranger, for a price higher than that which would be payable according to the above-mentioned



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provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser, and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers.

*Held* by the Full Bench that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to any one else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price; and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor. *KARIM BAKHSH KHAN v. PHULA BIBI*, 8 A. 102 (F.B.) = 6 A.W.N. (1886) 24 = 10 Ind. Jur. 303 ...

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- (11) *Sale to a co-sharer and stranger—Specification of interest sold to stranger and of price—Right of pre-emption of vendee co-sharer.*—The principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of this does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers.

A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the lower appellate Court held that although the co-sharers-vendees had a pre-emptive right of the same decree as the plaintiff, nevertheless they, having joined a stranger with them in purchasing the property had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale-deed.

*Held* that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers-vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers. *SHEOBHAROS RAI v. JIACH RAI*, 8 A. 462 = 6 A. W. N. (1886) 214 = 11 Ind. Jur. 28 ...

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**Principal and Agent.**

*Right of person dealing with agent personally liable—Suit and judgment recovered against agent—Subsequent suit against principal barred—Act IX of 1872 (Contract Act), s. 233.*—The obligee under a hypothecation bond brought a suit thereon against one who upon face of the instrument, contracted as obligor, but whom, when the suit was instituted, the plaintiff knew to have acted as agent in the transaction for a third person. Having obtained a decree, he satisfied it in part by attachment of a sum of money, and next caused the hypothecated property to be sold, and purchased it himself. Upon attempting to obtain possession, he was successfully resisted by the principal debtor under the hypothecation-bond, on the ground that the latter was the real owner of the property, and that the decree-holder had derived no title thereto.

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### Principal and Agent—(Concluded).

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from his judgment-debtor. He then sued the principal debtor to recover the balance remaining due upon the bond, after giving credit for the amount recovered by attachment in the suit against the agent.

*Held* that the plaintiff having elected to hold the agent responsible upon the contract, and having obtained judgment and decree against him and written up full satisfaction of the decree, could not afterwards maintain a suit against the principal in respect of the same subject-matter. *BIR BHADDAR SEWAK PANDE v. SARJU PRASAD*, 9 A. 681=7 A.W.N. (1897) 229 ...

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### Public Prosecutor.

*Prosecution, withdrawal from—Government Pleader—Public Prosecutor—Criminal Procedure Code*, s. 494.—*Held* by the Full Bench that a person appointed by the Magistrate of the District, under s. 492 of the Criminal Procedure Code, to be Public Prosecutor for the purpose of a particular case tried in the Court of Session, has not the power of a Public Prosecutor with regard to withdrawal from prosecution under s. 494. *QUEEN-EMPRESS v. MADHO*, 8 A. 291 (F.B.)=6 A.W.N. (1886) 94 ...

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### Public Servant.

See PENAL CODE, 8 A. 201.

### Registration Act (VIII of 1871)

S. 17 (4)—See LEASE, 8 A. 405.

### Registration Act (III of 1877).

- (1) Ss. 17, 49—*Effect of a registered instrument confirming a prior one of the same purport not registered.*—An instrument purporting to assign a right in immoveables of more than the value of Rs. 100 (s. 17, sub-section (b) of Act III of 1877) being unregistered, was ineffectual to affect the title of the purchaser.

Some years after, the parties executed a deed of conveyance, making the same assignment, confirming the former instrument, and setting it forth in a schedule. The latter instrument was registered.

In a suit in which the ownership of the property was contested—*held* that the fact of the prior deed not having affected the property being unregistered, was no reason why the deed afterwards registered should not be admitted as evidence of title. In this there had been nothing contravening the objects of the Registration Act. *ALEXANDER MITCHELL v. MATHURA DAS*, 8 A. 6 (P.C.)=12 I.A. 150=4 Sar. P. C. J. 663=9 Ind. Jur. 442 ...

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- (2) S. 17 (b) and (c)—*Mortgage-bond—Indorsements of part-payment—Receipt—Registration.*—The strictest construction should be placed on the prohibitory and the penal sections of the Registration Act, which impose serious disqualification for non-observance of registration.

An instrument to come within s. 17 (b) of the Registration Act (III of 1877) must in itself purport or operate to create, declare, assign, limits, or extinguish some right, title, or interest of the value of Rs. 100 or upwards in immoveable property. To come within s. 17 (c), it must be, on the face of it, an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation, or extinguishment of such a right, title, or interest.

In a suit by a mortgagee for the sale of immoveable property mortgaged in certain simple mortgage bonds for amounts severally exceeding Rs. 100, the defendant pleaded that he had made certain payments in respect of the bonds, and in support of his plea relied



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on indorsements of payment upon them, one of which was as follows:—"Paid on the 21st December, Rs. 3,000." The other indorsements were in similar terms.

*Held*, by the Full Bench (STRAIGHT, J. doubting) that the indorsements, even if assumed to be receipts, did not fall within s. 17 (b) of the Registration Act, inasmuch as a receipt, unless so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property (which the indorsements did not), could not come within the section, and what ordinarily operated to limit or extinguish a mortgagee's interest in the mortgaged property was not the paper-receipt, but the actual part-payment of the mortgage-debt.

*Held*, also that the indorsements did not fall within s. 17 (c) of the Act, inasmuch as taken by themselves they were merely memoranda made by the mortgagee, and could not be treated as acknowledgments, nor, even if assumed to be such, did they show, upon their face, that they were acknowledgments of the receipt or payment of any consideration for the limitation or extinguishment of any interest of the mortgagee in the mortgaged property.

*Held*, therefore that the indorsements did not require to be registered in order to make them admissible in evidence of the payments to which they related. *JIWAN ALI BEG v. BASA MAL*, 9 A. 108 (F.B.)=6 A.W.N. (1886) 310 ..

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(3) Ss. 17 (d), 18 (c)—See LEASE, 8 A. 198.

(4) S. 28—See EXECUTION OF DECREE, 9 A. 46.

(5) S. 49—See LEASE, 8 A. 405.

(6) S. 50—*Registered and unregistered documents—Mortgagee under registered deed competing with holder of decree on prior unregistered mortgage deed.*—The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation-bond, or under a money-bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree effect a transfer of more than the interest which the judgment-debtor possessed.

*Held* that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *THE HIMALAYA BANK, LIMITED v. THE SIMLA BANK, LIMITED*, 8 A. 23=5 A.W.N. (1885) 310 ...

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(7) S. 50—See MORTGAGE (GENERAL), 8 A. 540.

**Regulation XXXIV of 1803.**

Ss. 9, 10—See MORTGAGE (USUFRUCTUARY), 8 A. 402.

**Regulation XVII of 1806.**

(1) See MORTGAGE (SALE), 9 A. 97.

(2) Ss. 7, 8—*Mortgage by conditional sale—Redemption.*—In the part of India where Bengal Regulation XVII of 1806 is in force, the right to redeem a mortgage by conditional sale depends entirely upon it, whatever may be the true construction of the terms of the condition in regard to payment of interest.

Within a year after notification of a petition for foreclosure a mortgagor deposited the principal debt and interest for the last year of the mortgage term, which had expired. Interest for prior years of the term had not been paid; but this, according to the mortgagor's contention, was, by the terms of the condition, treated as a separate debt.

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### Regulation XVII of 1806—(Concluded).

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*Held*, that, as the mortgagor had not deposited the interest due on the sum lent required, according to s. 7 of the Regulation, where, as here, the mortgagee had not obtained possession, and as the year of grace had expired, the conditional sale had become conclusive under s. 8, involving the dismissal of the mortgagor's suit for redemption. *MANSUR ALI KHAN v. SARJU PRASAD*, 9 A. 20=13 I. A. 13=4 Sar. P.O.J. 749 ...

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(3) S. 8—See MORTGAGE (FORECLOSURE), 8 A. 388.

### Regulation VII of 1822.

S. 9, cl. (i)—See PRE-EMPTION, 8 A. 434.

### Regulation II of 1832.

S. 29—See MORTGAGE (SALE), 9 A. 97.

### Religious usage.

Bull set at large in accordance with Hindu religious usage—Stolen property—See PENAL CODE, 8 A. 51, 9 A. 348.

### Remand.

Appeal from appellate decree—Applicability of provisions as to first appeals—See APPEAL (GENERAL), 9 A. 26.

### Rent.

- (1) "Rent-free grant"—See ACT XII OF 1881 (N.W.P. Rent), 8 A. 552.
- (2) Payment of—Mortgage for security—Decree by Revenue Court for arrears of rent—Decree time-barred—Effect of decree on mortgage—See LEASE, 9 A. 23.

### Representative.

Of judgment-debtor—See CIVIL PROCEDURE CODE, 8 A. 626.

### Res Judicata.

- (1) *Civil Procedure Code*, ss. 562, 568 (28)—*Second appeal—Civil Procedure Code*, ss. 565, 566—*Determination of case by High Court*.—In a suit for pre-emption in respect of a share of a village, the Court of first instance dismissed the claim on the ground that no right of pre-emption had been proved to exist in the village. The lower appellate Court, dissenting from this opinion, reversed the first Court's decree, and remanded the case under s. 562 of the Civil Procedure Code for a decision on the remaining question of fact, viz., the amount of the consideration for the sale. In appeal from the order of remand, the High Court, on the 3rd January, 1884, observed that it was not disposed to interfere with the finding of fact that the plaintiffs had a right of pre-emption, and accordingly dismissed the appeal, but added that the Judge was in error in remanding the case under s. 562 of the Code; that his order must so far be set aside; and that he should proceed under s. 565 or s. 566, as might be applicable. The Judge, on receipt of this order, replaced the case on his file, remitted an issue to the Court of first instance, under s. 566, as to the amount of consideration, and accepting the first Court's finding upon that issue, decreed the plaintiffs' claim. In second appeal by the defendants the High Court was of opinion that the Judge had disposed of the case upon a condition of things which the plaintiffs had never asserted, inasmuch as he had treated the right of pre-emption which was in issue as one arising from custom, and not, as alleged by the plaintiffs, as arising from a contract between the ancestors of the parties. All the evidence necessary to the determination of the case was on the record.



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### Res Judicata—(Continued).

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*Held* by the Full Bench that the defendants were not prevented by the operation of the High Court's order of the 3rd January, 1884, from disputing the right of pre-emption, inasmuch as that order was a decision of a merely interlocutory character passed in the same suit, and the questions of fact involved therein were decided only so far as was necessary for the purpose of passing the order, and it could not be regarded as determining the main question in the suit, which was still open, and must be decided in the final decree in the suit.

*Per* STRAIGHT, J., that the jurisdiction of the High Court in appeal under s. 588 of the Code from the Judge's order of remand was, like the jurisdiction of the Judge in passing the order, limited by the terms of s. 562; and hence the remark made in the High Court's order, dealing with the plaintiff's right of pre-emption, could only be regarded as an *obiter dictum*, and not as determining any question as to the pre-emptive right.

*Held* by PETHERAM, C. J., and OLDFIELD and TYRRELL, JJ., that the High Court was competent, in second appeal from the Judge's decree, to look into the evidence already on the record for the purpose of finding whether a right of pre-emption existed, in fact, in the village, if the evidence for answering this question was already on the record, and that in such a case, the question need not be referred to the Court of first appeal. *DEO KISHEN v. BANSI*, 8 A. 172 (F.B.)=A. W. N. (1886) 35=10 Ind. Jur. 340 ...

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(2) See CIVIL PROCEDURE CODE, 8 A. 282.

(3) See HINDU LAW (REVERSIONER), 8 A. 365.

### Restitution of Conjugal Rights.

See HINDU LAW, (RESTITUTION OF CONJUGAL RIGHTS).

See MAHOMEDAN LAW (RESTITUTION OF CONJUGAL RIGHTS).

### Review.

Of judgment—See CIVIL PROCEDURE CODE, 9 A. 36.

### Right of way.

Private—Easement—Obstruction—Acquiescence—Suit for removal of obstruction—See EASEMENT, 9 A. 434.

### Rioting.

*Grievous hurt committed in the course of riot and in prosecution of the common object—Distinct offences—Separate sentences—Act XLV of 1860 (Penal Code), ss. 71, 147, 149, 325—Act VIII of 1882, s. 4—Criminal Procedure Code, s. 235.*—S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. In prosecution of the common object of an unlawful assembly, *M*, with his own hand, caused grievous hurt. *M* and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 147 and grievous hurt under s. 325 of the Penal Code, and were each sentenced to separate terms of imprisonment for each offence. The highest aggregate punishment, which was *M*'s was six years' rigorous imprisonment, being one year for rioting and five years for causing grievous hurt.

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### Rioting—(Concluded).

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*Held* that, assuming s. 71 of the Penal Code to be applicable, the sentences were not illegal, as the combined periods of imprisonment did not in the case of any prisoner, exceed the maximum punishment of seven years' rigorous imprisonment which could have been awarded for the offence punishable under s. 325.

*Held* also that the riot could not, in any of the cases, be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal. *QUEEN-EMPRESS v. BISHESHAR*, 9 A. 645=7 A.W.N. (1887) 149=12 Ind. Jur. 11 ...

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### Security for keeping the Peace.

See CRIMINAL PROCEDURE CODE, 9 A. 452.

### Sessions Court.

- (1) *Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it—Criminal Procedure Code*, ss. 28, 226, 236, 237, 537.—Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session.

Three persons were jointly committed for trial before the Court of Session, two of them being charged with culpable homicide not amounting to murder of *J*, and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to *C* and convicted them upon both the original charges and the added charge. The assault upon *C* took place either at the same time as or immediately after the attack which resulted in the death of *J*.

*Held* that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things; but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case.

*Held* also that the Sessions Judge had power under, s. 28 of the Code, to try the charge assuming that he had power to add to it. *QUEEN-EMPRESS v. KHARGA*, 8 A. 665=6 A.W.N. (1886) 254 ...

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- (2) *Power of Sessions Judge to summon witness—See CRIMINAL PROCEDURE CODE*, 8 A. 668.

### Set-off.

*Res judicata—Civil Procedure Code*, ss. 13, 111—*Court-fee on set-off*.

—In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

*Held* that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on



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### Set-off—(Concluded).

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commission against the plaintiff's demand ; and that the claims for such set-off was not barred under the provisions of s. 13.

*Held* also that the Court-fee payable on the claim for set-off was the same as for a plaint in a suit. **AMIR ZAMA v. NATHU MAL**, 8 A. 396=6 A.W.N. (1886) 159. ...

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### Sir-Land.

- (1) *Ex-proprietary-tenant—Nature of the right of occupancy—Act XII of 1881 (N.W.P. Rent Act), s. 7—Trees.*—In a suit for recovery of possession of zamindari property conveyed by a sale-deed, including certain plots of land which were the defendant-vendor's sir, the lower Courts held, with reference to s. 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

*Held* that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed.

*Per* MAHMOOD, J., that the principle of the maxim *cujus est solum ejus est usque ad calum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed.

Also *per* MAHMOOD, J., that it would be impossible to give effect to the lower Courts' decrees without disturbing the ex-proprietary tenant's rights, for if the plaintiff were entitled to possession of the trees, he would be entitled to enter upon the land to get at the trees, because when the law gives a right, it must be understood to allow everything necessary to give that right effect. **DEOKI NANDAN v. DHIAN SINGH**, 8 A. 467=6 A.W.N. (1886) 192 ...

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- (2) See ACT XII OF 1881, 8 A. 256.

### Specific Performance.

*Of contract—Act I of 1877 (Specific Relief Act).*—Upon a contract for the sale of the proprietary right in land, the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase-money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the appellate Court was about to be given against him on the ground that he was not entitled to what he claimed.

*Held* that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this ; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account. **BINDESHRI PRASAD v. MAHANT JAIRAM GIR**, 9 A. 705 (P. C.)=14 I.A. 173=5 Sar. P.C.J. 61=11 Ind. Jur. 433 ...

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### Specific Relief Act (I of 1877).

- (1) S. 21—*Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings.*—One of the parties to a contract to refer a controversy to arbitration brought

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a suit for part of the subject matter deferred. The defendants pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract.

*Held* that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act.

The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it. *TAHAL v. BISHESHAR*, 8 A. 57 = 5 A.W.N. (1885) 331 = 10 Ind. Jur. 232 ...

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- (2) S. 21—See *ARBITRATION*, 9 A. 168.
- (3) S. 39—See *VENDOR and PURCHASER*, 9 A. 439.
- (4) S. 42—See *DECLARATORY DECREE*, 9 A. 622.
- (5) S. 42—See *HINDU LAW (REVERSIONER)*, 8 A. 365.
- (6) S. 42—See *HINDU LAW (WIDOW)*, 8 A. 70.
- (7) S. 42—Suit for declaration that property is waqf—See *MAHOMEDAN LAW (WAKF)*, 8 A. 31.

### Stamp Act (I of 1879).

- (1) S. 3, *sub sections 4 (c) and 13*, ss. 7, 26, *sch. I—Nos. 13, 44 Bond—Mortgage*.—A grower of sugarcane executed a deed whereby he borrowed a sum of Rs. 25 as "earnest-money," and covenanted to deliver to the lender on a certain date 21 maunds of *rab* (unrefined sugar), upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows:—"If the supply of the *rab* be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rab* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits." As collateral security he hypothecated the produce of a field of sugarcane, the value of which was not stated.

*Held* by the Full Bench that the instrument was a "mortgage-deed" within the meaning of s. 3 (13) and No. 44 (b) of schedule I of the Stamp Act (I of 1879).

*Held* by STUART, C. J., STRAIGHT, J., and BRODHURST, J., that it was also a "bond" within the meaning of s. 3 (4) (c), and No. 13 of schedule I, and, with reference to the provisions of s. 7, was chargeable with stamp duty solely as a bond under No. 13, the contract being a single one.

*Held* by the Full Bench that the proper stamp duty payable on the instrument was four annas.

*Held* by STUART, C. J., and STRAIGHT, J., that in estimating the stamp duty payable on the instrument, the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the *rab* must not be taken into account.

*Per* STUART, C. J., that, for the purpose of estimating the stamp duty, the amount secured by the instrument was Rs. 25, the amount borrowed, *plus* Rs. 11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, *i.e.*, the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp-duty.

*Per* OLDFIELD, J., that the amount secured or limited to be ultimately recoverable under the instrument, was Rs. 25, the amount borrowed.



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plus Rs. 21, the sum recoverable at Re. 1 per maund, in the event of the borrower's non-delivery of the 21 maunds; and stamp-duty was payable on this amount. *In the matter of GAJRAJ SINGH*, 9 A. 585=7 A.W.N. (1887) 190 ...

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- (2) Ss. 11, 16, 17, 18, 62, 69—*Instrument requiring to be stamped before or at time of execution—Non-cancellation of adhesive stamp—Sanction to prosecution.*—The first paragraph of s. 11 of the General Stamp Act (I of 1879) applies to cases in which the instrument chargeable with duty may be stamped after execution.

A bill for the monthly salary of a Government Official was sent to the Treasury for payment, when it was discovered that the one-anna receipt stamp affixed thereto was not cancelled, and a prosecution was thereupon instituted by the Collector against the official in question, who had executed the instrument, under s. 62 of the General Stamp Act. The accused was convicted under that section by the Deputy Magistrate, and the District Magistrate on appeal, holding that, upon the evidence, the conviction should have been for abetment and not for the principal offence, altered the finding accordingly to a conviction under s. 109 of the Penal Code, read with ss. 11 and 62 of the General Stamp Act.

*Held*, that the receipt to the salary bill in question was an instrument which was required to be stamped before or at the time of execution, and was not of the kind contemplated by the first paragraph of s. 11 of the General Stamp Act; that consequently there was no abatement of any offence under ss. 11 and 62 of the Act; that the offence which appeared to have been committed was one under the 2nd paragraph of s. 61; but that, no sanction having been given by the Collector under s. 69 for a prosecution under s. 61 it was not advisable to interfere further than by setting aside the conviction and sentence. *QUEEN-EMPRESS v. RAHATALI KHAN*, 9 A. 210=7 A. W. N. (1887) 5 ...

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- (3) S. 61—*Abetment of making an unstamped receipt—Act XLV of 1860 (Penal Code), s. 107.*—A debtor, having paid a sum of money to his creditor, accepted from the latter an unstamped receipt, promising to affix a stamp thereto.

*Held*, that this did not constitute abetment, within the meaning of s. 107 of the Penal Code, of the offence of making an unstamped receipt. *QUEEN-EMPRESS v. MITHU LAL*, 8 A. 18=5 A.W.N. (1885) 317 ...

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## Surety.

See CONTRACT ACT, 8 A. 259.

## Transfer of Property Act (IV of 1882).

- (1) S. 2—See MORTGAGE (FORECLOSURE), 8 A. 402.

- (2) S. 3—See MALIKANA, 9 A. 591.

- (3) Ss. 10, 11—*Vendor and purchaser—Contemporaneous "ikrarnamah"—Condition restraining alienation—Restriction repugnant to interest created—Lambardar and co-sharer—Collection of rents by co-sharer—Suit by lambardar for money had and received—Costs—Suit to recover costs by way of damages.*—*M*, a co-sharer in a village, transferred to *A*, another co-sharer, a two annas share, by deed of sale. Upon the same date, *A* executed an *ikrarnamah* in which he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in *M*. *A* suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrarnamah*, *A*, had collected

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the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipt given by A, on the basis of which the suits were dismissed; and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages from A, the amount of these costs and expenses, and also to recover certain sums of money realized by A as rent from the tenants, and further, by reason of the *ikrarnamah*, to avoid the sale-deed which preceded it.

*Held*, that the deed of sale and the *ikrarnamah* must be regarded as recording one single transaction, i.e., they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the other by the former; and that, in this view; it was clear from the *ikrarnamah* that the proprietary title created by the sale-deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right.

*Held* that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed, the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of ss. 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail.

*Held* by MAHMOOD, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place.

*Held* by MAHMOOD, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal with the question of costs, and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. MAHRAM DAS v. AJUDHIA, 8 A. 452=6 A.W.N. (1886) 189 ...

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- (4) Ss. 41, 48—Transfer by ostensible owner—Sir-land—Act XII of 1881 (N.W.P. Rent Act), s. 7—Meaning of "held"—Statute, construction of—Retrospective effect—Mortgage of sir-land before passing of Act XVIII of 1873 (N.W.P. Rent Act)—Sale of mortgagor's proprietary rights while that Act was in force—Right of mortgagee.—In 1869, A and J. two co-sharers of a moiety of a ten biswas share in a village (F and W being also co-sharers in the same moiety), joined with H, the holder of the other moiety, in giving to K a usufructuary mortgage of 87 bighas of land, being the whole of the sir-land appertaining to the ten biswas share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, F, W and A gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of sir-land; and it was stated in the deed that half the mortgage-money due to



*K* on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In November, 1876, *H*'s five biswas share, together with its *sir*-land, was sold in execution of a decree. Subsequently, *K*, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir*-land, by virtue of his mortgage-deed of 1869. The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F*'s and *W*'s share in the 87 bighas, because they were not parties to the deed of 1869. The lower appellate Court further held that from the date of the execution-sale of November, 1876, *H* became an ex-proprietary tenant of his *sir*-land, and that to give the plaintiff possession thereof, would be contrary to the provisions of s. 7 of Act XVIII of 1873 (N. W. P. Rent Act.)

*Held* that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, *F*, and *W* were aware of the transaction which made *K* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A*, *J*, and *H* to appear as if covering the entire zamindari rights in the ten biswas share of the *sir*-land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of *F* and *W* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of the Transfer of Property Act applied to the case, and *F* and *W* had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869.

*Per* MAHOMED, J., with reference to the effect of the execution-sale of November, 1876, in regard to the provisions of s. 7 of Act XVIII of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, *H* who had proprietary rights in the mahal, and held the five biswas share of the *sir* as such (the word "*held*" as used in s. 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as *H* had at the time of the mortgage subject only to *H*'s rights as ex-proprietary tenant; that the rights of the purchaser of *H*'s share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in s. 48 of the Transfer of Property Act, the rights of the mortgagee under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary.

*Per* TYRRELL, J., that in 1876, by reason of the execution-sale, the *sir*-rights and interests of *H*, mortgaged by him in 1869, as such went out of existence, and assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage-charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H*, the plaintiff retained his mortgage-charge of 1869 over the zamindari interests in the portion of the

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- land acquired by H's vendees. KARAMAT KHAN v. SAMI UDDIN,  
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- (5) Ss. 51, 83, 84—See MORTGAGE (USUFRUCTUARY), 8 A. 501.
- (6) S. 53—See MORTGAGE (GENERAL), 8 A. 540.
- (7) S. 67—See MORTGAGE (SALE), 9 A. 68.
- (8) Ss. 78, 85—See MAHOMEDAN LAW (ALIENATION), 8 A. 324.
- (9) S. 85—See MORTGAGE (GENERAL), 9 A. 125.
- (10) S. 87—See MORTGAGE (FORECLOSURE), 9 A. 500.
- (11) Ss. 95, 100—See MORTGAGE (REDEMPTION), 8 A. 295.
- (12) Ss. 98, 100—See CHARGE, 9 A. 158.
- (13) S. 131—See BOND, 9 A. 249.
- (14) S. 135—*Transfer of a claim for a smaller value—Transferee not entitled to recover more than price paid for claim.*—S. 135 (d) of the Transfer of Property Act (IV of 1882) means that if a creditor or party having an actionable claim against another, has put it into Court and has proceeded to proof of it to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, the mischief or danger of any trafficking or speculation in litigation disappears, and the defendant can suffer no prejudice by any arrangement between the plaintiff and a third person as to who is to enjoy the fruits of the decree, nor is there any probability that the process of the Court will be misused. On the other hand, if one who has an actionable claim against another chooses to sell it for less than its actual value, the person who buys embarks more or less in a speculation which can be defeated by payment to him of the price paid for it with interest and incidental expenses. The debtor's right to discharge himself by such payment is not forfeited by his putting the assignee to proof of his case in Court, nor did the Legislature intend that the position of the assignee should be better after suit and decree than before.
- The assignee, under an instrument dated the 18th December, 1885, and in consideration of Rs. 5,000, of a share of Rs. 10,000 out of Rs. 20,000, claimed by his assignors as unpaid dower-debt, joined with the assignors in instituting a suit for recovery of the dower-debt, on the 22nd December of the same year.
- Held that the assignee's proceedings were of the nature contemplated by s. 135 of the Transfer of Property Act (IV of 1882), and that he was not entitled to a decree for anything in excess of Rs. 5,000, the price paid by him for the Rs. 10,000 share of the debt. JANI BEGAM v. JAHANGIR KHAN, 9 A. 476=7 A.W.N. (1887) 67 ... 797

## Unconscionable Bargain.

- (1) *Bond—Interest—"Dharta"—Illiterate agriculturist.*—The High Court as a Court of Equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary prudence would enter into, and which, from their nature and the relative positions of the parties, raise a presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws.
- An illiterate Kurmi in the position of a peasant proprietor executed a mortgage-deed in favour of a professional money lender to whom he owed Rs. 97, by which he agreed to pay interest on that sum at



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the rate of 24 per cent. per annum at compound interest. He further agreed that "*dharta*," or a yearly fine, at the rate of one anna per rupee, should be allowed to the mortgagee, to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, a six pies *zāmindari* share was mortgaged for a term of eleven years. The effect of the stipulation as to "*dharta*" was that one anna per rupee would be added at the end of every year, not only to the principal mortgage-money but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of mortgage, the mortgagor brought a suit for redemption on payment of only Rs. 97, or such sum as the Court might determine as due to the mortgagee. At that time the accounts made up by the mortgagee showed that the debt of Rs. 97, with compound interest, had swollen to Rs. 878, of which the "*dharta*" alone amounted to Rs. 211.

Held that the stipulation in the deed as to "*dharta*" was not of the kind referred to in s. 74 of the Contract Act (IX of 1872), and that there was no question of penalty, but that, looking to the relative positions of the parties, and the unconscionable and oppressive nature of the stipulation, the benefit thereof should be disallowed to the mortgagee, and the mortgagor permitted to redeem on payment of the mortgage-money and interest, no appeal having been preferred by him from the decree of the first Court making redemption subject to the payment of interest. *LALLI v. RAM PRASAD*, 9 A. 74=6 A.W.N. (1886) 313 ...

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- (2) *Bond—Compound interest.*—In a suit for the recovery of a principal sum of Rs. 99 due upon a bond, with compound interest at 2 percent. per mensem, it was found that advantage was taken by the plaintiff of the fact that the defendant was being pressed in the *tahsili* for immediate payment of revenue due, to induce him to execute the bond, charging compound interest at the above-mentioned rate, notwithstanding that ample security was given by mortgage of landed property. It was also found that although, under the terms of the bond, the plaintiff had power to enforce the same at any time by bringing to sale the mortgaged property, he had wilfully allowed the debt to remain unsatisfied, in order that compound interest at a high rate might accumulate.

Held that the bargain was a hard and unconscionable one, which the Court had undoubted power to refuse to enforce, and which, under all the circumstances, it would be unreasonable and inequitable for a Court of justice to give full effect to; and that, under the circumstances, compound interest should not be allowed.

The Court decreed the principal sum of Rs. 99, with simple interest at 24 per. cent. per annum up to the date of institution of the suit. *MADHO SINGH v. KASHI RAM*, 9 A. 228=7 A.W.N. (1887) 19 ...

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Valuation of Suit.

Suit for declaration that property is liable to sale in execution of decree—See JURISDICTION (GENERAL), 9 A. 140.

Vendor and Purchaser.

- (1) *Failure of consideration—Suit for money had and received for plaintiff's use—Debt—Limitation.*—Prior to September, 1879, pecuniary dealings took place between *D* and *B*, resulting in a debt due by the former to the latter of Rs. 33,000 for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and, on the 1st September, 1879, it was arranged that *D* should execute a sale-deed conveying to *B* certain

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immoveable property for Rs. 55,000, and that *B* should pay this amount by giving *D* credit to the extent of the debt and paying the balance in cash. In August, 1880, *D* sued *B* for specific performance of the contract, which, he alleged, had been settled and executed, for the sale of the property. *B* in defence alleged that although certain terms and conditions as to the sale had been definitely settled for embodiment in a formal sale deed, it was only subject to these terms and conditions that he had been prepared to complete the transaction, and that, as they had been omitted from the document executed by *D* on the 1st September, 1879, he had never accepted that document. In March, 1884, the High Court, on appeal, dismissed the suit, holding that the parties had never been *ad idem* with reference to the contract alleged by *D*, and that the document of the 1st September, 1879, had never been finally accepted so as to be binding and enforceable by law. In September, 1884, *B* sued *D* for recovery of the sum of Rs. 33,000 with interest. He contended that, under the terms of the arrangement made on the 1st September, 1879, the debt of Rs. 33,000 then owing to him changed its character; that it was no longer merely the old balance due by the defendant, but having been credited in the latter's books, should be treated as a payment by him (the plaintiff) as a deposit on account of the sale; that the suit was therefore one for money had and received by the defendant to the use of the plaintiff; and that the cause of action did not arise until the contract failed, by reason of the decree of the High Court on 14th March, 1884, dismissing the suit for specific performance.

*Held* that this contention must fail, and the debt must be treated as the old balance due by the defendant to the plaintiff, inasmuch as by terms of the agreement itself which the plaintiff set up, no deposit was payable, and the price was not to be paid till the completion of the contract, and inasmuch as the plaintiff, in demanding payment, after the negotiations had failed, demanded simply as for the balance of the old debt, and not as for the return of the deposit.

*Held*, further, that the 1st September, 1879, upon which the contract set up by the plaintiff was alleged to have been completed, was the latest possible date upon which the debt could be said to have become due, and that, inasmuch as the present suit was not brought until the 18th September, 1884, it was barred by limitation. *DHUM SINGH v. GANGA RAM*, 8 A. 214=10 Ind. Jur. 394...

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- (2) *Non-payment of consideration money—Burden of proof.*--In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration.

*Held* that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed.

*Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed. *ACHOBANDIL KUARI v. MAHABIR PRASAD*, 8 A. 641=6 A.W.N. (1886) 242

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- (3) *Sale of immoveable property—Covenant by vendor of good title—Suit and decree on a previous mortgage against purchaser—Suit by vendor to set aside mortgage and decree as fraudulent—Vendor not competent to maintain the suit—Act I of 1877 (Specific Relief Act), s. 39.*—A vendor of land who had covenanted with his vendees that he had a good title, and who, after the sale, had no interest remaining in the property, brought a suit in which he claimed to set aside as fraudulent a mortgage on which the defendant had obtained a decree against the vendees, and the decree itself. He based his right to maintain the suit upon his liability under his covenant. The vendees were not parties to the suit.

*Held that, as the defendant's mortgage had merged in his decree, the suit could only be maintained if the plaintiff could show himself entitled to have the defendant's decree set aside, and that he had shown no interest which would entitle him to maintain a suit for such a purpose.* JHUNA v. BENI RAM, 9 A 439=7 A.W.N. (1887) 75

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- (4) See PRE-EMPTION, 8 A. 102.

### Waiver.

- (1) See ACT VI OF 1871 (BENGAL CIVIL COURTS), 9 A. 366.  
 (2) See MORTGAGE (USUFRUCTUARY), 8 A. 194.

### Will.

Disposition of estate among sharers—Words of duration of estate not denoting more than interest for life—Construction—Restriction upon alienation—See MAHOMEDAN LAW (WILL), 8 A. 39.

*Ans*