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THE
BENGAL LAW REPORTS
OR
DECISIONS OF THE HIGH COURT AT FORT WILLIAM,
[CIVIL AND CRIMINAL]
IN ITS ORIGINAL AND APPELLATE JURISDICTIONS;
PRIVY COUNCIL DECISIONS ON INDIAN APPEALS;
PRIVY COUNCIL RULES AND ORDERS;
ORDERS AND RULES OF THE HIGH COURT;
REVENUE CIRCULAR ORDERS;
AND
ACTS OF THE SUPREME AND BENGAL COUNCILS.

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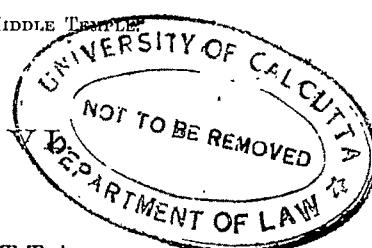
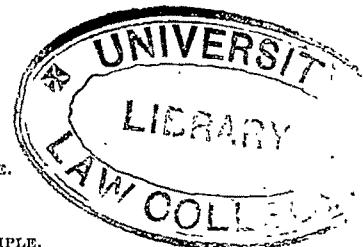
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JUDGES OF THE HIGH COURT.

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„ G. C. PAUL,

„ O. C. MOOKERJEE,

} *Puisne Judges.*

ADDENDA AND CORRIGENDA.

- Page 2, last line of marginal note, *for "Colector" read "Collector."*
,, 110, line 15, *for "merely" read "very."*
,, 121, „ 28, *for "proceedings quare impedit" read "proceedings in
quare impedit."*
,, 122, line 13, *for "female" read "feme."*
,, foot-note (2), *for "Vernan" read "Vernon."*
,, 185, foot-note, *for "2 B. L. R., P. C." read "2 L. R., P. C."*
,, 219, line 18, *for "found" read "formed."*
,, 283, line 2 of marginal note, *for "haing" read "having."*
,, 321, „ 1, *for "B" read "A."*
,, lines 13 and 16, *for "Ram Chandra" read "Ram Chand."*
,, 328, line 18, *for "now" read "here."*
,, 495, „ 17, *for "appellants" read "respondents."*
,, 556, „ 10, *for "must obtain a decree" read "must absolutely ob-
tain a decree."*
,, 562, insert heading "Appellate Civil" before case of Chandra Kumar
Banerjee *v.* Iswar Chandra Newgi.
,, 569, omit heading "Appellate Civil."
,, 592, foot-notes, *for "5, 6, 1, 7" read "1, 2, 3, 4."*
,, 623, insert heading "Original Civil" before case of Abhai Charan
Ghose *v.* Dasmani Dasi.
,, 643, line 3 from bottom, omit the words "of the Court."
,, 702, „ 11, *for "2nd November" read "25th November."*
,, 717, heading to case, *for "Act XXIII of 1861, s. 271," read "Act
XXIII of 1861, s. 27."*
,, 722, line 27, *for "the judgment of the Court was delivered by" read
"the following judgments were delivered."*
,, 733, line 3, *for "B" read "R. C."*
,, 738, foot-note (7), *for "Rad" read "Rud."*
,, 740, lines 1 and 2, *for "asked for an enquiry to be directed in respect
of the prior lien" read "asked that any enquiry which should be
directed should respect the prior lien."*

APPENDIX.

- Page 28, line 7 of marginal note, *for "B" read "A."*
,, 85, heading to case, *for "new point not taken in ground of as appeal" read "new point not taken in grounds of appeal."*
,, 99, heading of case, *for "Act VIII of 1659" read "Act VIII of
1859."*
,, 141, line 8, *for "Gifford" read "Giffard."*



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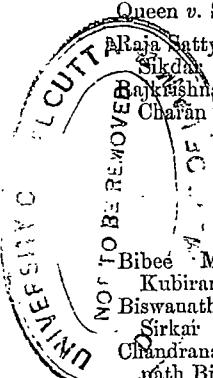
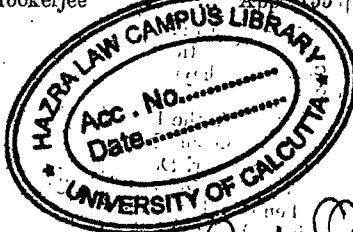


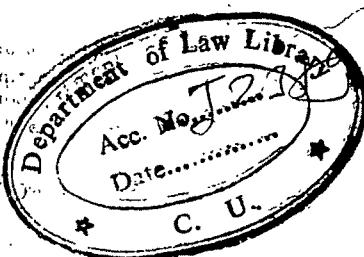
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ACT—1835—VIII— <i>Sale of Tenure for Arrears of Rent—Encumbrances.</i>] The plaintiff held certain lands in talook Q. under a howladari patta. Q. was sold for arrears of rent under Act VIII of 1835, and purchased by the defendant. After purchase, the defendant dispossessed the plaintiff from his lands, on the ground that he had purchased the talook free from all encumbrances created by the late defaulting talookdar. The plaintiff brought this suit to recover possession of his lands from the defendant. Held, that a purchaser of a tenure, under Act VIII of 1835, does not necessarily acquire it free from all encumbrances. Case remanded for trial of the genuineness of the plaintiff's patta.		
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GAJJO KOER v. SYAD AALAY AHMED App.	62
—1857—VI, s. 8— <i>Right of Way.</i>] When land is taken by the Government under Act VI of 1857, the land is absolutely vested in the Government under section 8, free from any right of way previously enjoyed by the public over such land.	
IN THE MATTER OF THE PETITION OF H. B. FENWICK. App.	47
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—, s. 15	320
<i>See DECLARATORY DECREE.</i>	
—, ss. 111, 119— <i>Non-appearance of Defendant—Ex parte Decision.</i>] A defendant filed a written statement in a suit, and when the case was called on for final disposal, an application was made by Counsel on his behalf for an adjournment, but the application was refused, and, no one appearing for him, the case was proceeded with, and a judgment was obtained by the plaintiff. The defendant afterwards applied for an order setting aside the judgment, on the ground that he was prevented from appearing when the suit was called on. <i>Held</i> , that the application was within section 119 of Act VIII of 1859, and the Court had no power in granting the order to impose terms as under section 111.	
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—, ss. 205, 243— <i>Attachment of Maintenance or "Babooana"—Execution of Decree by Attachment of Future Maintenance.</i>] Where a judgment-debtor was possessed of a decree entitling him to maintenance from a third party, <i>held</i> that his judgment-creditor could attach the amount before it accrued due, by prohibitory order forbidding such third party to pay the judgment-debtor, and directing him to pay to such person only as the Court might direct; or an arrangement might be made for the collection or administration, if necessary, of the amount of maintenance.	
MANISWAR DAS v. BABOO BIR PERTAB SAHU	646
—, s. 206	339
<i>See EXECUTION OF DECREE.</i>	
—, s. 209— <i>Execution—Cross-decree—Set-off.</i>] The purchaser of a decree sought to execute the decree, but was opposed by the judgment-debtor who sought to set-off two other decrees obtained by herself and her sisters, against the judgment-creditor. These decrees were obtained about the date of the	

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purchase, but it did not appear whether previously or subsequently.
Held, in neither case could they be the subject of set-off.

KASIMANISSA BIBI v. HILLS App. 125

ACT—1859—VIII, s. 216 App. 146
See EXECUTION.

—, ss. 229, 230.—*Title—Possession.*] A. and B. obtained a decree against their father, C., for possession of their share of ancestral property. In execution, they dispossessed D., who held under a mortgage from C. On an application under section 230, Act VIII of 1859, *held*, upon proof of such holding, the Court ought to have gone into the question of the validity of the mortgage against A. and B.

BABOO JADUNATH SING v. KALIPRASAD App. 55

—, s. 246 721, 727
See SUPERINTENDENCE BY HIGH COURT.

—, s. 272—*Improper Means*—24 & 25 Vict., c. 104, s. 15.] A. obtained a decree under section 23, Act XX of 1866, upon a registered bond, against B., one of the original obligors, and C., the representative of another obligor, who had died before the institution of the suit. A. sued out execution, and caused certain property of B. to be attached. D., a judgment-creditor of B., sued out execution of his decree, which was of a subsequent date to the decree of A., and caused the same property to be attached. Subsequently D. applied to the Moonsiff, under section 272, Act VIII of 1859, that he might be first paid from the proceeds of sale, as the decree of A. had been obtained by fraud and improper means. The Moonsiff held, as the decree was obtained upon a plaint whereupon was a stamp of one-fourth of the value it ought to bear, it was obtained by "improper means." On the application of A. to the High Court for an order that the order of the Moonsiff be set aside as passed without jurisdiction,—*Held*, that a mere error in the procedure did not come within the scope of the words "improper means" in section 272, Act VIII of 1859, and that there must be some misconduct of the decree-holder to invalidate his decree under that section.

BRAJA NATH SHAHA v. KANAYILAL SEN 174

—, s. 273 575
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—, s. 350 App. 12
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—, s. 17 App. 154
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ACT—1859—X, s. 17— <i>Suit for Enhancement of Rent—Onus Probandi.</i>] In a suit for enhancement of rent, on the ground that “the produce and productive powers of the land have increased otherwise than by the agency or at the expense of the ryot,” the <i>onus</i> is upon the plaintiff to prove the grounds upon which he seeks enhancement.	
In coming to a conclusion as to whether the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot, the average of four or five years ought to be taken; the increase of an exceptional year should not be the guide.	
RAJKRISHNA MOOKERJEE v. KALI CHARAN DOBAIN	App. 122
—, s. 20 ...	App. 119
<i>See INTEREST ON ARREANS OF RENT.</i>	
—, s. 23, cl. 7; ss. 34, 145, AND 160— <i>Suit—Complaint—Appeal.</i>] A complaint under section 145 of Act X of 1859 is not a suit, and does not fall within the description of the suits in which, under section 160, an appeal is given to the Zilla Judge.	
IN THE MATTER OF THE PETITION OF AMANATULLA ...	569
—, s. 24— <i>Assignee of Landlord—Gomasta.</i>] An assignee of a landlord can sue a gomasta, employed by the latter, for the recovery of moneys received by the gomasta in the course of his employment, under section 24 of Act X of 1859.	
LALMOHAN SING v. TRAILAKHANATH GHOSE	... App. 17
—, s. 42 ...	App. 84
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—, s. 77 ...	App. 106
<i>See RENT, BONA FIDE PAYMENT AND RECEIPT OF.</i>	
XI, s. 11— <i>Separate Account—Objection before Collector—Suit to set aside Collector's Order—Civil Court—Jurisdiction.</i>] The plaintiff and A. and B. were joint owners of an estate paying revenue to Government. The names of A. and B. were alone recorded in the rent-roll of the Collector. A. and B. alienated certain specific portions of the lands of the estate to their wives, and applied to the Collector, under section 11 of Act XI of 1859, to open a separate account for payment of the proportionate share of the revenue payable in respect of the lands so alienated. The plaintiff objected to such separation, on the ground that the lands had never been divided, but always held ijmal, and that A. and B. claimed a larger share than they owned; but his objection was rejected by the Collector, on the ground that he was not a recorded proprietor, and the application of A. and B. was granted. The plaintiff now sued in the Civil Court for a declaration of the extent of his share in the joint estate, and to have the order of the Collector set aside. <i>Held</i> , that the Civil Court had jurisdiction to entertain such a suit, and that it was not necessary to make the Collector a party.	
HARGOBIND DAS v. BARODA PRASAD DAS 614
XIV. <i>See LIMITATION.</i>	
—, s. 1, cl. 9 160, 292
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—, cl. 10 App. 40
<i>See PROMISSORY NOTE.</i>	
—, cl. 10, 16 668
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ACT—1859—XIV, s. 1, CLS. 13, 15; ss. 5, 10 <i>See MORTGAGE BY ONE OF A JOINT HINDU FAMILY.</i> 530
—, CLS. 13, 16 <i>See CAUSE OF ACTION.</i> 352
—, s. 4— <i>Acknowledgment—Limitation.</i>] An acknowledgment not coming directly from the debtor himself, but merely deduced as an inference from the tenor of a series of letters, is not a sufficient acknowledgment to satisfy section 4, Act XIV of 1859. To satisfy that section, there must be some principal writing of a particular date which can be relied on by itself, when properly construed, as constituting an acknowledgment of the debt. ROGERS v. MONTRIOU 550	
—, <i>Limitation—Acknowledgment.</i>] The defendant, who was the owner of a moiety of certain property (the plaintiff and another being owners of the other moiety), mortgaged his moiety to the plaintiff; the mortgage-deed, dated 11th June 1863, contained a covenant to pay off the principal and interest at the expiration of a year, and gave a power of sale in default of payment. The whole property, including the mortgaged portion, was conveyed to one J. D., on 27th November 1864, by a bill of sale executed by the three owners of the property. On the execution of the bill of sale, the sum of Rs. 16,250, the half of the purchase-money which belonged to the defendant, was handed over to the plaintiff in part payment of a sum of Rs. 19,555, which was therein recited as being then due on the mortgage. In a suit for the balance brought in November 1869, the defence was that it was barred by the Law of Limitation. Held, that the admission by the defendant contained in the bill of sale of November 1864 was a sufficient acknowledgment to take it out of the operation of Act XIV of 1859, section 4. MADHUSUDAN CHOWDHRY v. BRAJANATH CHANDRA 299	
—, s. 19. <i>See LIMITATION ACT, s. 19.</i>	
—, s. 20 <i>See EXECUTION.</i> App. 146
—1860—XXVII— <i>Recall of Certificate granted without Jurisdiction.</i> IN THE MATTER OF THE PETITION OF JAGESWAR DHAR	App. 128
—XLV. <i>See PENAL CODE, s. 304. See PENAL CODE, ss. 380, 447</i>	
— <i>See PENAL CODE, ss. 372, 373.</i> App. 34
—, ss. 148, 304 <i>See RIOTING.</i> App. 9
—, s. 425. <i>See PENAL CODE, s. 425.</i>	
—, s. 499. <i>See PENAL CODE, s. 499.</i>	
—1861—XXIII, s. 11 <i>See SUPERINTENDENCE BY HIGH COURT.</i> 721
—, s. 27 <i>See SUPERINTENDENCE BY HIGH COURT.</i> 717
— <i>Special Appeal—Decree for Land under a Compromise in a Suit cognizable by the Small Cause Court.]</i> In a suit for recovery of a sum of money below Rs. 500, the parties entered into a compromise, whereby the defendant made over a certain piece of land in lieu of the money claimed, and a	

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decree was passed accordingly. In execution of the decree, disputes arose between the parties. Upon special appeal by the judgment-debtor to the High Court,— <i>Held</i> that, under section 27, Act XXIII of 1861, no special appeal lay to the High Court.	
SRIMATI TALAN BIBI v. SRIMATI TENU BIBI ... App. 82	
ACT—1861—XXV. <i>See</i> CRIMINAL PROCEDURE CODE. <i>See</i> CRIMINAL PROCEDURE CODE, s. 273.	
—, CHAPTER XV 296 <i>See</i> POWER OF MAGISTRATE.	
—, XX, ORDER OF MAGISTRATE UNDER 643 <i>See</i> DECLARATORY DECREE.	
—, ss. 62, 404. <i>See</i> CRIMINAL PROCEDURE CODE, ss. 62, 404.	
—, s. 253 App. 78 <i>See</i> EVIDENCE.	
—, ss. 419, 434. App. 46 <i>See</i> PRIVATE PROSECUTOR.	
— AND ACT VIII of 1869, ss. 180, 244, 308 App. 6 <i>See</i> JURISDICTION OF MAGISTRATE.	
1862—VI (B. C.), s. 9— <i>Measurement of Land—Possession—Receipt of Rents.</i>] Where a person sues to have the assistance of the Collector to measure lands, of which he alleges himself to be the proprietor by purchase, he is not entitled to have such assistance if his title is disputed, and if he is found not to have been in possession, or in the receipt of rents from the date of his purchase.	
DURGA CHARAN MAZUMDAR v. MAHOMED ABBAS BHUYA ... 361	
—, ss. 9, 10, 11— <i>Act VIII of 1869 (B. C.), ss. 37, 38, 41—Standard Measurement Pole—Pergunna Pole—Measurement—Jurisdiction of Collector—Appeal.</i>] <i>Per</i> KEMP, PHEAB, MITTER, and HOBHOUSE, JJ.—When the right of a proprietor to make, under section 9, Act VI of 1862 (B. C.), a measurement of a tenure is disputed, solely on the ground that the pole with which the measurement is attempted to be made is not the standard pole of measurement of the pergunna, as provided in section 11, and the parties are at issue as to what is the length of the standard pole, the Collector has jurisdiction to enquire into and decide as to the true length of the standard pole.	
COUCH, C. J., and BAYLEY and JACKSON, JJ., <i>contra</i> .	
<i>Per</i> BAYLEY, KEMP, JACKSON, PHEAB, MITTER, and HOBHOUSE, JJ.—If the Collector has jurisdiction, his order is appealable.	
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—, ss. 16, 17 180 <i>See</i> SUPERINTENDENCE BY HIGH COURT.	
1864—VII (B. C.), s. 16 381 <i>See</i> SALT.	
—XVI, s. 16 App. 40 <i>See</i> PROMISSORY NOTE.	
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BUTTOKRISTO DOSS v. KHETTRA CHANDRA BHUTTACHAR-JEE	App. 69
—, s. 18, cl. 1, AND s. 50—Registration—Priority of Registered Document over Unregistered one.] A. entered into an agreement with B. to convey to him a certain portion of land for a consideration of Rs. 98, of which Rs. 60 had been paid as earnest-money. The agreement contained a proviso that, on A.'s refusal to convey the property within the time mentioned in the agreement, this document should operate as a conveyance, and A. should forfeit his claim to the balance of the consideration. Before the expiry of the time mentioned in the agreement, A. sold, by a registered deed, a portion of the property mentioned in the agreement. On suit by B. for possession of the property and for declaration that the agreement operated as a conveyance— <i>Held</i> , that under clause 1, section 18, and section 50 of Act XX of 1866, the subsequent registered conveyance had priority over the unregistered agreement.	
SHAMACHARAN NEOGI v. NABINCHANDRA DHOBA	App. 1
—, ss. 52, 53 See SMALL CAUSE COURTS, PRESIDENCY TOWNS.	177
—, s. 95 See JURISDICTION OF MAGISTRATE AND SESSIONS JUDGE.	692
—1867—XXVI—Act VIII of 1859, s. 350—Jurisdiction—Valuation of Suit.] Under Act XXVI of 1867, the decision of a Court of first instance, as to the valuation of the subject-matter of a suit, is final.	
ISHAN CHANDRA MOOKERJEE v. LOKENATH ROY	App. 12
—Valuation of Suit—Jurisdiction.] An Appellate Court has no power to set aside a decision arrived at by the Court of first instance as to the valuation of the property in suit.	
MAFIZUDDIN alias ASSHAD ALI CHOWDRY v. KARIMANISSA BIBI	App. 11
—1869—VIII. See CRIMINAL PROCEDURE CODE.	
—, s. 422—Appeal.] Upon an appeal from a sentence passed by a Magistrate, the Sessions Judge remanded the case for the purpose of additional evidence being taken by the lower Court. Such evidence having been taken by the Magistrate, the case was returned to the Appellate Court. The Sessions Judge then disposed of the case in the manner prescribed by section 419 of the Criminal Procedure Code. On an application by the prisoner	

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XXVII, s. 10, 294A— <i>Lottery Office.</i>] No charge for the offence (of keeping a lottery office) under section 10, Act XXVII of 1870, 294A., can be entertained without the authority of the local Government.	
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ARBITRATION, REFERENCE TO— <i>Agreement to withdraw Suit—Restoration to file of Court.</i>] A suit was, by order of Court, referred to three specified arbitrators, who were to make an award within six months, and, in case of difference of opinion, all matters in dispute were to be referred to the decision of an umpire. The arbitrators had only one meeting, at which an agreement was come to by the parties to settle all matters in dispute among themselves, and withdraw the matters from arbitration, which was accordingly done,	

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but nothing appeared to have been afterwards done. No award was made by the original arbitrators within six months from the reference. On application by the plaintiff to have the suit restored to the file of the Court,—	
<i>Held</i> , that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court.	
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BILLS OF EXCHANGE ACT (V OF 1866)— <i>Practice—Leave to Appear and Defend—Costs.</i>] The Court will give leave to a defendant to appear and defend in suits under Act V of 1866, where he shows a defence apparently real; but where there is a doubt as to the bona fides of the defence, payment of money into Court will be ordered, or security directed to be given.	

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The Court has, in giving leave to defend, a discretion to order security for costs, not only where it doubts the <i>bona fides</i> of the defence, but also if it considers the matter of defence raised is unnecessary, though allowable.	
If the plaintiff has not been heard at first against the defendant's application, the Court will always allow him to come in afterwards and show that the leave ought not to have been granted, or, if granted at all, on more stringent terms.	
VONLINTZGY v. NARAYAN SING ...	App. 64
BONA FIDE HOLDER FOR VALUE 581
<i>See TROVER.</i>	
— — — PAYMENT OF RENT. <i>See RENT</i> — — —	
— — — PROCEEDINGS App. 146
<i>See EXECUTION.</i>	
BOND-HOLDER. <i>See BOTTOMRY</i>	
BOTTOMRY BOND-HOLDER— <i>Sale of Ship—Master's Lien for Disbursements and Wages—Towage—Jurisdiction</i> —24 Vict., c. 10 (<i>The Admiralty Act, 1861</i>)—26 Vict., c. 24 (<i>The Vice-Admiralty Act, 1863</i> .) A ship was chartered for a voyage from Calcutta to Jeddah and back. While at Jeddah, the master found it necessary to borrow money for the wages of the crew and other purposes; and with the consent of the owner, tenders were invited by advertisement for a sum for which a bottomry-bond was to be given. Several tenders were made, and one by the charterer of the ship was accepted. A bottomry-bond was executed by the master, with the consent of the owner, in which was included the expense of certain repairs which had been found necessary at an intermediate port on the voyage from Calcutta, and for which the master made himself liable. By the bond the master bound himself, his heirs, executors and administrators for the payment of the sum named therein, and part of the consideration was expressed to be the payment of the debt which the master had incurred at the intermediate port. On arriving in the Hooghly, the ship was taken in charge by a pilot, under whose advice the master engaged a steamer to tow her to Calcutta. He was sued in Calcutta for the hire of the steamer, and had to pay the claim. When the ship arrived in Calcutta, the bond-holder obtained a decree on his bond, and had the ship arrested and sold; but on the application of the master, who had put in a claim for wages, the Court ordered that the proceeds should remain in Court, pending the consideration of the master's claim. In a suit by the master to recover the balance of wages due to him as master of the ship, and for the expense of the steamer which towed the ship up the river to Calcutta,—	
<i>Held</i> , the towage was a disbursement fairly made, and of which the bond-holder had the benefit; the master therefore had a lien on the ship for such disbursement.	
<i>Semble</i> .—The master also had a lien for wages down to the time when he was duly discharged, and not merely down to the time of the arrival in port and arrest of the ship.	
The master, however, having bound himself by the terms of the bond, was precluded thereby from setting up his lien against that of the bond-holder, to whom, on the face of the bond, he had constituted himself a debtor.	
24 Vict., c. 10 (<i>The Admiralty Act, 1861</i>), and 26 Vict., c. 24 (<i>The Vice-Admiralty Act, 1863</i>), extend to India. The High Court, as constituted by the Charter of 1862, had not, by virtue of the Admiralty Act, 1861, or otherwise, any jurisdiction over claims	

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for disbursements by the master. But, after the passing of the Charter of 1863, the Vice-Admiralty Act 1863 applied to the High Court, as being "a Vice-Admiralty Court established, after the passing of that Act, in a British possession." <i>Held</i> , therefore, that the High Court had jurisdiction, as a Vice-Admiralty Court, to entertain the claim of the master for wages and disbursements on account of the ship.	
IN THE MATTER OF THE SHIP PORTUGAL	323
BOUNDARIES, SPECIFICATION OF	356
<i>See KABULIAT.</i> ...	
BREACH OF COVENANT TO PUT LESSEE IN POSSESSION	App. 44
<i>See LESSOR AND LESSEE.</i> ...	
CATTLE	App. 3
<i>See PENAL CODE, s. 425.</i> ...	
CAUSE OF ACTION	154, 160, 292
<i>See DECLARATORY RELIEF. See LIMITATION.</i> ...	
<i>Jurisdiction—Letters Patent, s. 12—Action for Malicious Prosecution.]</i> Where the plaintiff, in an action for malicious prosecution, alleged that the defendant had instituted criminal proceedings against him before the Magistrate of Moorshedabad, causing a warrant to be issued by the Magistrate, and having him arrested under that warrant in Calcutta, <i>held</i> , the whole cause of action did not arise at Moorshedabad; that part of the cause of action arose in Calcutta, so as to entitle the plaintiff, with leave of the Court, to bring an action in the High Court.	
LUDDY v JOHNSON	141
<i>Limitation—Act XIV of 1859, s. 1, cl. 13 and 16—Suit for Turn of Worship of an Idol—Witnesses, Summoning of.]</i> The plaintiff sued the defendants for declaration of his right to a turn of worship of an idol for 7½ days in each month, alleging that the defendants, who were entitled to another turn, had in 1864 taken adverse possession of the idol and properties belonging to it, and had so deprived him (the plaintiff) of his turn of worship from that time.	
<i>Held</i> , that the cause of action did not recur as the turn of worship came round. Such suit falls within the operation of clause 16, section 1, Act XIV of 1859.	
GAUR MOHAN CHOWDHRY v. MADAN MOHAN CHOWDHRY ...	352
CERTIFICATE GRANTED WITHOUT JURISDICTION, RECALL OF	App. 128
<i>See ACT XXVII OF 1860.</i> ...	
CHARACTER, BAD, EVIDENCE OF	App. 108
<i>See EVIDENCE OF ACCOMPLICES.</i> ...	
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<i>See MOOKTEAR.</i> ...	
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<i>See POWER OF MAGISTRATE.</i> ...	
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CHUR—Island—*Reg. XI of 1825, s. 4, cl. 3—Act IX of 1847.]*
 When a chur or island is thrown up in a large navigable river, originally surrounded by deep, unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the criterion for deciding whether the Government has the right of disposing of that island, or whether the owner of the land to which it is most contiguous has that right, is to consider the state of circumstances at the time of the formation of the island,—that is, the time when it is thrown up, and not the state of things at any subsequent or fluctuating period, such as the subsequent silting up of the bed of the river between the island and the contiguous estate so as to form a fordable passage.

Act IX of 1847 does not alter the state of the law under Regulation XI of 1825, but merely lays down a procedure.

There is nothing in Act IX of 1847 to prevent the Government from taking possession of a chur, after it has silted up, if the chur be one that the Government would be entitled to under Regulation XI of 1825.

MUSSAMAT BUDRUNNissa CHOWDHREIN v. PROSUNNO KUMAR BOSE LAND <i>See ACCRETION.</i> 255 677
CIVIL COURT. <i>See JURISDICTION OF</i>	
See ACT XI OF 1859, s. 11. DAMAGES, SUIT FOR. COURT'S JURISDICTION <i>See DECLARATORY DECREE.</i> PROCEDURE CODE, s. 376 <i>See REVIEW.</i> SUIT <i>See JURISDICTION.</i> App. 99 643 126 243, 658
CLAIMS OF EUROPEAN ASSISTANTS <i>See INSOLVENT FIRM.</i>	
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COLLECTOR, JURISDICTION OF <i>See ACT VI OF 1862 (B. C.), ss. 9, 10, 11.</i>	
OBJECTION BEFORE <i>See ACT XI OF 1859, s. 11.</i>	
COLLECTOR'S ORDER, SUIT TO SET ASIDE <i>See ACT XI OF 1859, s. 11.</i>	
COMMISSION, EXECUTION OF <i>See MESNE PROFITS.</i>	
COMMittal ON CHARGE OF PERJURY <i>See POWER OF MAGISTRATE.</i>	
COMMUTATION OF SENTENCE <i>See PUNISHMENT, ENHANCEMENT OF.</i>	
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COMPROMISE—Declaratory Decree—Execution—Powers of a Court executing a Decree of another Court.] B. sued his brother C. for possession of certain lands. B. and C. came to an amicable settlement, one of the terms of which was that C., during his life, should retain possession of certain of the lands, and that, after his death, they should pass to B. A decree was given in accordance with the terms of the compromise. On C.'s death, his widow refused to put B. in possession of the lands. B. sought to obtain possession of the lands with mesne profits by executing the decree under the compromise against C.'s widow.	
<i>Held</i> , that he ought to proceed by regular suit.	
TARA MANI DASI v. RADHA JIBAN MUSTAFI	App. 142
—, DECREE FOR LAND UNDER	App. 82
<i>See Act XXIII of 1861, s. 27.</i>	
—, AND DECREE THEREON — Review of Judgments—Concurrent Judgments on Fact.] The manager of the Court of Wards effected a compromise with claimants on the estate ; a decree was passed on the basis of that compromise, but before the parties wished the decree to be made ; in the decree leave was reserved to apply for a review if the compromise was not sanctioned by the Commissioner, and was prejudicial to the parties. The compromise was sanctioned by the Commissioner, but afterwards the manager found that he had been deceived by his servants, and that the claim had been allowed erroneously. <i>Held</i> , that the Court having granted a review, and the claim being proved to be exaggerated, a decree was properly given for the true amount.	
Where both the lower Courts had agreed as to the facts, the Privy Council refused to examine the evidence, the controversy being merely as to the weight to be attributed to it.	
LALJI SAHU v. THE COLLECTOR OF TIRHOOT	648
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<i>See LIMITATION.</i>	
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<i>See FACTS DISPUTED.</i>	
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<i>See JURISDICTION.</i>	
—, OF HINDU WILL. <i>See HINDU WILL, —.</i>	
CONTRACT—Specific Performance—Unregistered Document.] The plaintiff contracted with the defendant for the purchase of a piece of land, and paid him part of the purchase-money, it being agreed that the balance should be paid after registration of the bill of sale.	

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The defendant kept the document with him, but failed to get it registered. In a suit by the plaintiff to enforce specific performance, *held*, the suit would lie.

TRIPURA SUNDARI v. RASIK CHANDRA KANUNGUI ...	App.	134
CONTRACT OF SERVICE, NOTICE OF	107
<i>See</i> MASTER AND SERVANT.		
— OR OBLIGATION	App. 40
<i>See</i> PROMISSORY NOTE.		
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<i>See</i> EVIDENCE.		
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CO-SHARER, RENT PAID TO, SEPARATELY	356
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(<i>VII</i> of 1870) Schedule I, cl. 11.]		
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(<i>VII</i> of 1870) Schedule II, cl. 1 (a).]		
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COVENANT TO PUT LESSEE IN POSSESSION, BREACH OF	App. 44
<i>See</i> LESSOR AND LESSEE.		

CRIMINAL COURTS, FUNCTIONS OF—*Jurisdiction of Assistant Magistrate—Penal Code, s. 169—Code of Criminal Procedure, s. 11, 169, 171, 422.*] When an Appellate Court directs further evidence to be taken by a Subordinate Court under section 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice, as described in section 169, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of section 171.

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The words "whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or officer," in section 11 of the Code of Criminal Procedure, are not an exhaustive enumeration of the functions of Criminal Courts ...	698
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<i>See Declaratory Decree.</i>	
, ss. 11, 169, 171, 422 ...	698
<i>See Criminal Courts, Functions of...</i>	
(Act XXV of 1861,) ss. 62 & 404— <i>Judicial Power of Magistrate—Obstruction, Annoyance, and Injury—Nuisance.</i>] An order of a Magistrate, under section 62, Criminal Procedure Code,—e. g., prohibiting one of two rival proprietors of two different hauts from holding his haut on certain days of the week in order to prevent obstruction, annoyance, and injury,—is not a judicial order; and is, therefore, not open to revision by the High Court under section 404, Criminal Procedure Code.	
<i>Per PHEAR, J. (dissenting)</i> —The power conferred by section 62, Criminal Procedure Code, is of a judicial character within the meaning of the word "judicial" in section 404; and an order of a Magistrate in exercise of that power, is in the nature of an injunction, and is, therefore, subject to revision by the High Court, under section 404, Criminal Procedure Code.	
THE QUEEN v. ABBAS ALI CHOWDHRY	74
(Act XXV of 1861 and Act VIII of 1869), ss. 68, 225, 404, 435— <i>Fresh Proceedings after Discharge.</i>] Where an accused person is discharged by a Deputy Magistrate under section 225 of the Code of Criminal Procedure, after a preliminary enquiry, the Magistrate of the district may proceed against him afresh under section 68 of the Criminal Procedure Code.	
<i>Per MARKBY, J.</i> —Section 435 (Act VIII of 1869) provides for the revision of proceedings which have already been commenced; section 68 (Act XXV of 1861) provides for the institution of proceedings <i>de novo</i> .	
IN THE MATTER OF THE PETITION OF RAMJAI MAZUMDAR, App. ...	67
, ss. 244 & 180 & 308 App. ...	6
<i>See Jurisdiction of Magistrate.</i>	
, s. 253 App. ...	78
<i>See Evidence.</i>	
(Act XXV of 1861), s. 273— <i>Jurisdiction—Grievous Hurt.</i>] A Magistrate has no power under section 273 of the Code of Criminal Procedure to refer a case of grievous hurt for trial to a Deputy Magistrate having only the power of a Subordinate Magistrate of the second class.	
GABIND CHANDRA BISWAS v. HEM CHANDRA BARDER App. ...	115
(Act XXV of 1861), s. 298— <i>Recognition to keep the Peace.</i>] A. was bound over to keep the peace for a year. Before the expiry of the period, he was involved in fresh disputes with other persons. The Deputy Magistrate, instead of referring the case to the Court of Session under sec-	

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tion 298 of the Code of Criminal Procedure, directed A. to enter into another recognizance for a further period of one year.

Held, the order was illegal.

THE QUEEN v. KALINATH BISWAS App. 116

CRIMINAL PROCEDURE CODE (*Act XXV of 1861*), s. 370—

Report of Chemical Examiner.]

THE QUEEN v. BISWAMBHAR DAS App. 122

—, ss. 419, 434 App. 46

See PRIVATE PROSECUTOR.

— TRESPASS App. 80
See PENAL CODE, ss. 380, 447.

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See ACT VIII OF 1859, s. 209.

— EXAMINATION App. 88
See EVIDENCE.

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— NOT AMOUNTING TO MURDER, App. 86
See PENAL CODE, s. 304.

CUSTODY OF CHILDREN 318

See SUIT BY WIFE FOR JUDICIAL SEPARATION.

CUSTOM 232

See JOINT ESTATE.

DAMAGE, SPECIAL App. 73
See OBSTRUCTION TO PUBLIC ROAD.

DAMAGES—*Remoteness.*] The plaintiffs chartered a ship of the defendant; and by the charter-party it was stipulated, that the said ship, being tight, staunch, and strong, should receive from the plaintiffs a full cargo of rice or grain; and being so loaded, should therewith proceed to St. Denis, the freight to be paid there on right delivery of cargo: the penalty for non-performance of the charter-party was to be the estimated amount of freight. The plaintiffs began to load on May 3rd, and continued doing so until June 10th, having then shipped very nearly the full cargo; they then stopped loading in consequence of a notice from the defendant that the ship was leaking; in consequence of the leakage, the cargo had to be shifted, and a portion of it, found to be damaged, had to be replaced after the leak was stopped. The charges of shifting the cargo and the cost of the cargo substituted were paid by the defendant. Considerable delay occurred in consequence of the leak, and the loading was not completed until the end of July. On May 28th, when the plaintiffs had loaded a portion of the cargo, and had obtained bills of lading, they drew a bill of exchange at 60 days for the value of the cargo covered by the bills of lading on their agent at St. Denis, which they sold to the Comptoir d'Escompte de Paris, hypothecating the cargo for the amount of their draft. Other similar drafts were subsequently drawn and sold. When the plaintiffs received notice of the leakage, they, in anticipation of the delay which would occur in consequence, arranged with the Comptoir d'Escompte that the bills should not be forwarded forthwith, but should be held by the Comptoir d'Escompte, and renewed by the plaintiffs on the completion of the loading, the plaintiffs paying interest on the bills in the meantime at 9 per cent. per annum. On renewing the bills, the plaintiffs, in consequence of the difference in the rate of exchange, were out of pocket 400 rupees. In an

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action against the owner for breach of the charter-party in not supplying a ship tight, staunch, and strong, as stipulated, the plaintiffs sought to recover, as damages arising out of such breach of the charter-party, the interest paid by them on the draft in pursuance of their arrangement with the Comptoir d'Escompte, the sum they had to pay on renewing the bills, a further sum for interest on bills they could not negotiate in consequence of not being able to obtain bills of lading from the defendant, and the value of the stamps on the bills which had been cancelled in pursuance of the plaintiffs' arrangement with the Comptoir d'Escompte. <i>Held</i> that such damages were too remote.	
ROBERT AND CHARRIOL v. ISAAC ...	App. 20
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—, SUIT FOR— <i>Jurisdiction—Civil Court—Act VIII of 1859, s. 1—Act XI of 1865, s. 6, cl. 3—Mofussil Small Cause Court.</i>] A suit will lie in the Civil Court to recover damages for abuse.	
KALI KUMAR MITTER v. RAMGATI BHATTACHARJEE	App. 99
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— OF TITLE, SUIT FOR. <i>See Title —.</i>	
DECLARATORY DECREE ...	App. 142
<i>See Compromise.</i>	
— <i>Act VIII of 1859, s. 15.</i>] On attachment of certain property in execution of a decree, A. preferred his claim under section 246, Act VIII of 1859, on the ground that he held a mortgage thereof from the judgment-debtor. Thereupon an order was passed for sale of the property subject to the mortgage. B. afterwards claimed the same property as his absolute estate, and his claim was allowed, and the property released	

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from attachment. A. was not a party to these proceedings. *Held*, that A. could maintain a suit against B. for a declaration of his title as mortgagee.

GABIND PRASAD TEWARI v. UDAI CHAND RANA 320

DECLARATORY DECREE.—*Order of the Magistrate under Chap. XX of Criminal Procedure Code (Act XXV of 1861)—Suit—Civil Court's Jurisdiction.]* The plaintiff built a bridge over a certain *hhal* (canal), which was removed by order of the Magistrate under Chapter XX of the Criminal Procedure Code; the defendant, it was alleged, set the Magistrate in motion. The plaintiff now sued the defendant for a declaration of his right to erect the bridge in question, and to have the order of the Magistrate set aside.

Held, that no such suit would lie.

The Judge in the Court below held that the suit would lie to try the plaintiff's right to erect a bridge over the *hhal*. *Held*, on appeal, the suit ought to have been dismissed.

MADHAB CHANDEA GUHO v. KAMALA KANT CHUCKERBUTTY ... 643

RELIEF—*New Point—Special Appeal—Act VIII of 1859, s. 374—Cause of Action.]* A suit was brought against the plaintiff by his tenants for an illegal distress in attaching crops raised by them on the land let to them by him. The present defendant, in the course of that suit, presented a petition to the Court, in which he stated that he was the owner of the land on which the crops attached had been raised. The plaintiff brought the present suit for a declaration of his title and confirmation of possession, alleging that the defendant's statement affected his (plaintiff's) title by throwing a cloud over it. On special appeal it was objected, for the first time, that the plaint disclosed no cause of action, and the objection was admitted and prevailed.

Per PAUL, J.—A suit merely in anticipation of a threatened ejection will not lie. There must be something in the case either in the nature of an invasion of some right, or in the shape of an impediment or obstacle in the way of full enjoyment of proprietary right, to found a claim to a declaratory relief; but a mere allegation, or a mere threat without action taken or founded upon it, will not be sufficient to entitle a party to a declaration of his title.

SHEIKH JAN ALI v. KHONKAR ABDUR KUHMA 154

DECREE. *See DECLARATORY —. See EXECUTION. See EXECUTION OF —. See PRACTICE IN EXECUTION BY HIGH COURT OF DECREE OF ANOTHER COURT. See SALE IN EXECUTION OF DECREE PASSED WITHOUT JURISDICTION.*

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DEPOSIT	160
<i>See LIMITATION.</i>					
<p>— OF TITLE-DEEDS—<i>Insolvent Act (11 & 12 Vict., c. 21), s. 24—Voluntary Assignment—Costs.</i>] The firm of C. N. and Co., Calcutta, had an account with a Bank, of which R. was the manager, under an arrangement that the Bank should discount bills accepted by C. N. and Co. to a certain amount, and that C. N. and Co. should keep in the Bank a certain fixed cash balance. In November, R., finding that the limit of the discount accommodation had been exceeded, and the cash account overdrawn, declined to discount any more bills unless security were given for the amount then due to the Bank. A., the only partner in the firm of C. N. and Co. then in Calcutta, verbally promised on 24th November to deposit with the Bank the title-deeds of the premises in which C. N. and Co. carried on their business; and in consideration of such promise, R. discounted further bills from 24th to 29th November. A. sent to R. a letter, on 25th November, as follows:—In pursuance of the conversation the writer had with you yesterday, we now deposit the title-deeds of landed house property as security against our discount account." The letter enclosed certain title-deeds, of which R. acknowledged the receipt. R. subsequently discovered they were not the title-deeds which A. had promised to deposit, and of this he gave A. a notice by letter on 28th November. C. N. and Co., on the 5th December 1870, suspended payment, and by the usual order their estate and effects vested in the Official Assignee, who thereupon, finding that the Bank claimed a lien on the deeds, brought a suit against the Bank for recovery of them. Held, that the deposit of the title-deeds was not void under section 24 of the Insolvent Act.</p>					
<p>Held, also, that the Bank was entitled to retain the deeds as security both for the balance of the discount account existing at the time of the promise to deposit, and also for the bills discounted between the 24th and 29th November.</p>					

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DISPUTES SETTLED BY FAMILY ARRANGEMENT— <i>Interpretation—Document.</i>] Where a dispute in a Hindu family as to legitimacy and the right to succession resulted in a family arrangement as to the mode in which the estate was to be held by the sons,—held, that such a document ought not to be construed narrowly by a strict interpretation of the literal meaning of the words, but that the object and general spirit are the best keys to the interpretation.	

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Where a family arrangement, if construed strictly, would have given a talook in the event of the death of a younger son to such of the lawful widows as should have male issue,— <i>held</i> that, as such a disposition would contravene the ordinary rules of devolution of Hindu property, and be contrary to the usages of Hindus, and as there was no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers was inadmissible.	
SRI GAJAPATHI RADHIKA PATTA MAHADEBI GURU v. SRI GAJAPATHI HARI KRISHNA DEBI GURU, AND SRI GAJAPATHI RADHIKA PATTA MAHADEBI GURU v. SRI GAJAPATHI HARI KRISHNA DEBI GURU	202
DISSOLUTION OF MARRIAGE, SUIT FOR—<i>Adultery and Desertion—Delay in bringing Suit—Permanent Alimony.</i>] A wife brought a suit for dissolution of marriage on the ground of her husband's adultery and desertion. The desertion took place twenty-four years before the suit was brought, and ever since the husband had made his wife an allowance. Latterly his circumstances had considerably improved. The Court gave a decree for dissolution, but in determining the suitable amount of permanent alimony, it took into consideration the circumstances of the husband at the time of the desertion, and refused to give the wife the full advantage of the present improved circumstances of the husband.	
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—, ADMISSIBILITY IN EVIDENCE OF UNREGISTERED	App. 69
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—. <i>Cross-Examination—Witness for Defence.</i>	
THE QUEEN v. ISHAN DUTT ...	App. 88
—. <i>Documents—Prisoner, Right of, on Trial.]</i> A prisoner applied for copies of certain documents filed in Court, for the purpose of his defence. Held, the Magistrate had erred in refusing his application. <i>Per Loch, J.—A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence. And it is for the officer trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by the prisoner are or are not admissible as evidence.</i>	
IN THE MATTER OF THE PETITION OF SHIB PRASAD PANDA, App.	59
—. <i>Judgment in former Suit admissible for Strangers.]</i> The judgment in a former suit against the same defendants in respect of the same subject-matter is admissible, though not conclusive evidence against the defendants in a subsequent suit brought against them by other parties.	
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—. <i>Records—Conviction quashed.]</i> The prisoners were convicted, under section 154 of the Indian Penal Code, upon evidence taken in another case to which the prisoners were not parties. The conviction was set aside.	
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—. <i>Summoning of Witnesses for the Defence—Criminal Procedure Code (Act XXV of 1861), s. 253.]</i> It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence.	
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EVIDENCE—Witnesses—Practice.] It is not right for the lower Court to select five out of twenty witnesses tendered for examination. It is the bounden duty of the Judge to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case, or otherwise to obstruct the ends of justice.	
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—Wrongful Admission of Evidence.] Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding.	
Disapproval was expressed by their Lordships of the reception by the lower Court of evidence which ought not to have been admitted.	
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—, ADMISSIBILITY OF—Record of Proceedings in Calcutta Small Cause Court.] The summons book of the Small Cause Court, Calcutta, is admissible in evidence, though not signed by the presiding Judge.	
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<i>See Act XX of 1866.</i>	
— AS TO ADOPTION—Direct Evidence as opposed to Suspicion.] The Sudder Ameen having held an adoption proved, the Principal Sudder Ameen, on appeal, reversed that decision on the facts. The case came before the High Court on special appeal, and the decision then given was appealed to England, and special leave was given by Her Majesty to appeal against the decision of the Principal Sudder Ameen. The decision of the High Court on the law was admitted to be good, but the Judicial Committee reversed the finding of the Principal Sudder Ameen on the facts.	
Deeds though unregistered (registration not being compulsory), when proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside on mere suspicion of perjury and forgery.	
KALI CHANDRA CHOWDHRY v. SHIBCHANDRA BHADURI ...	501
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—, HEARSAY, ADMITTED UNDER THE CIRCUMSTANCES—Lunacy—Act XXXV of 1858.] Where the High Court founded their judgment upon evidence which did not justify the conclusion, the Judicial Committee reviewed the whole evidence, in order to ascertain whether the decree could be supported.	
On an inquiry as to the fact of lunacy under Act XXXV of 1858, any finding as to the actual time when the lunacy began is beyond the jurisdiction of the judicial officer making the enquiry.	
Where the fact of lunacy was admitted, and the question was the date at which it commenced, the evidence of a planter in the neighbourhood as to common report for years in the village as to the lunacy having been admitted by the lower Court, the Judicial Committee refused to reject it.	
The rule as to admission of evidence laid down by Dr. Lushing-	

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ton in *Unide Rajaha Raje Bomparauze Bahadur v. Pemmasamy Venkataudry-Naidoo* followed.

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— OF ACCOMPLICES—*Judge's Summing-up—Evidence of Accused's Bad Character—Improper Admission of Evidence—Discharge of Prisoner on Appeal—Recording Depositions.]*

THE QUEEN v. MAHIMA CHANDRA DAS App. 108

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See EVIDENCE OF ACCOMPLICES.

— PREVIOUS CONVICTION—*Kaifut.]* A kaifut or report from the Record Office that A. had been convicted of a crime, is no evidence of a previous conviction.

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— 721, 727
See SUPERINTENDENCE BY HIGH COURT.

— *Act VIII of 1859, s. 216—Limitation—Act XIV of 1859, s. 20—Notice—Decree—Bonâ fide Proceedings.]* The service of a notice under section 216 of Act VIII of 1859, if made *bonâ fide* with a view to take further proceedings, is sufficient to keep a decree alive. The question in this case was whether service of a notice under section 216 of Act VIII of 1859 was a proceeding within the meaning of Act XIV of 1859, section 20.

MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR v. LAKHII BIBI App. 146

— *Sale—Decree-holder, Purchase by.]* The mere fact of the decree-holder having bid and purchased at the execution-sale, without having obtained the leave of the Court, does not, *ipso facto*, invalidate the sale.

IN THE MATTER OF VEERAPAH CHETTY App. 34

— OF COMMISSION App. 70
See MESNE PROFITS.

— DECREE 571, 646
See JOINT UNDIVIDED PROPERTY. See ACT VIII OF 1859, ss. 205, 243.

— *Instalment—Limitation.]* The decree provided that the amount should be paid in three instalments, and in default of payment of one instalment, the decree-holder was empowered to execute his decree for the whole amount. When the instalment for December 1865 fell due, the judgment-debtor paid a portion, and obtained an extension of time up to December 1866. On application on 21st September 1869 for execution of the decree for the instalments of 1866 and 1867,—held, that the instalment for 1866 was not barred by lapse of time.

KRISHNA CHANDRA SHAWA v. OMED ALI App. 31

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EXECUTION OF DECREE—<i>Instalment-bond—Cause of Action.</i>] In execution of a decree, seven out of nine judgment-debtors, with the consent of the decree-holder, filed an instalment-bond, agreeing to pay the amount of the decree with interest thereon in two instalments. The decree-holder neglected to take proceedings to keep alive the decree, and his application to execute the decree was disallowed. In a suit brought by the decree-holder against the persons who had executed the instalment-bond for the amount of principal and interest due thereon,—held, that the suit was maintainable.	
ASHIAHARI CHOWDHRY v. JAHGESWAR KUMAR ... App.	32
Interest on Costs—<i>Procedure.</i>] The Court in executing a decree has no power to allow interest on costs when not mentioned in the decree. The proper course for obtaining such interest is to apply to the Court which passed the decree to amend it.	
ULFUTUNNissa v. MOHAN LAL SUKAL App.	33
Release of Decree—<i>Consideration—Act VIII of 1859, s. 206.</i>] A. had obtained a decree against B., C., and D., in execution of which the Sheriff attached certain property belonging to B., C., and D., who were carrying on business in partnership. The property was sold, and the proceeds paid into Court; and by order of Court, A. received a sum in part satisfaction of his decree. Subsequently A., at the request of B., and without receiving any consideration, gave him a letter in Bengali, purporting to be a release to him of the remainder of his decree, but such adjustment was not made through the Court. A. afterwards applied for execution of his decree against B., C., and D., but his application was refused, the Court treating the letter as a release. A. appealed. Held, on appeal, that the letter was not a release: there was no consideration for it. The adjustment of the decree should have been made through the Court or certified to it in accordance with section 206, Act VIII of 1859.	
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, DISPUTED—<i>Concurrent Decisions of Courts below.</i>] Where the Court of Appeal in India concurs in the finding of the Court of first instance on a question of fact, the Privy Council will not disturb that finding, unless satisfied, beyond all reasonable question, that there was some miscarriage in respect of the principle on which the decision rested, of a presumption to which too much weight was given, or of something as to which the Judicial Committee could see there was a principle involved which ought to be set right for the guidance of the Court in other cases	
GABINDSUNDARI DEBI v. JAGADAMBA DEBI 168	
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FORFEITURE OF RECOGNIZANCE— <i>Recognizance to keep the Peace.</i>] On the application of A., a recognizance was taken from B. that he would keep the peace for six months under a penalty of 500 rupees. Before the expiry of the period, B. assaulted C. Held, that there was a forfeiture of the recognizance.	
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GHATWALI TENURES OF BEERBHOOM— <i>Right of creating Encumbrances.</i>] A ghatwal in the District of Beerbhoom is not competent to grant a lease of the whole or a portion of his ghatwali tenure in perpetuity. Ghatwali tenures in Beerbhoom are grants of land by the Government to individuals for the performance of certain police duties. These tenures are heritable, but the incomes arising from them cannot be charged or encumbered by the ghatwal in possession so as to bind his successor.	
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c. 142, s. 8—21 <i>George III</i> , c. 70—3 & 4 <i>Will. IV</i> , c. 85, s. 43.] A Mahomedan subject of the Crown was arrested in Calcutta, taken into the mofussil, and there detained in jail, under a warrant of the Governor-General in Council in the form prescribed by Regulation III of 1818. <i>Held</i> , that such arrest and detainer were not acts of State, but matters cognizable by a Municipal Court.	
On an application to the High Court to issue a writ of <i>habeas corpus</i> to the superintendent (a European British subject) of the jail, <i>held</i> , that the Supreme Court had power to issue writs of <i>habeas corpus</i> to persons in the mofussil, and that the same power is continued to the High Court. Regulation III of 1818 was applicable only to natives and those subject to the jurisdiction of the Provincial Courts. It was passed under 37 <i>George III</i> , c. 142, s. 8, not 13 <i>George III</i> , c. 63, s. 36. It was passed by a legislative authority having full power in that behalf. Considering the circumstances under which it was enacted, Act III of 1858, which extended the effect of that Regulation to Calcutta, was not <i>ultra vires</i> .	
As the person against whom the writ was applied for had acted under the written order of the Governor-General in Council, the Court would not direct the writ to issue.	
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HABEAS CORPUS AD SUBJICIENDUM— <i>Regulation III of 1818—Act XXXIV of 1850—Act III of 1858—3 & 4 Will. IV, c. 85, s. 43.—Allegiance—Prerogative—Appeal—Detention—Warrant—Arrest.</i>] Assuming the power of a Judge of the High Court to issue a writ of <i>habeas corpus</i> , and assuming the right of appeal against an order refusing such writ, <i>held</i> that, it appearing that the prisoner was in custody under a warrant in the form prescribed by Regulation III of 1818, the detention was legal. The detention to be legal need only be covered by an actually existing warrant of the Governor-General in Council in the form prescribed, without regard to the lawfulness of the arrest. The Regulation is not confined to prisoners of war or foreigners held in confinement for political reasons.	
The substance of Regulation III of 1818 was expressly re-enacted by Act XXXIV of 1850 and Act III of 1858, and therefore as the result of these later Acts alone the detention would be legal. These Acts are not contrary to the powers conferred on the Indian Legislature by 3 & 4 <i>Will. IV</i> , c. 85, s. 43.	
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<i>See PARTITION. See VARIANCE BETWEEN PLAINT AND EVIDENCE.</i>	
<i>Maintenance—New point not taken in Grounds of Appeal.] A Hindu kept a Mahomedan mistress, and by such conduct compelled his wife under her religious feeling to leave the house. She went and resided with her mother, and continued to live in chastity. Held, the husband was bound to give maintenance to his wife.</i>	
LALA GOBIND PRASAD v. DOULAT BIBI	App. 85
<i>Next Heir of a Hindu who has disappeared—Cause of Action—Declaration—Limitation.] A., a Hindu infant, disappeared and had not been since heard of. In a suit brought, within twelve years from the date of his disappearance, by the next heir, for a declaration of right, and alleging waste by those in possession, and an apprehension that, if the infant should not return within twelve years, he (the plaintiff) would be barred by the Law of Limitation, held, that there was no cause of action.</i>	
GURU DAS NAG v. MATILAL NAG	App. 16
<i>Purchase by a Widow for one of her own Relations—Benami—Practice—Issue.] A step-son made over property to his step-mother for her support. Out of the produce she bought properties for her nephew in the names of other parties. Held, under the circumstances, that the purchased property, on her death, went to the nephew, and not to the step-son as heir of her husband.</i>	
Although the defendant, by his written statement, denied the fact of the purchases being with the widow's money, and it was proved that they were made with her money, held that this did not remove from the plaintiff the burden of proving that the purchases were made <i>benami</i> for her.	
RAJA CHANDRANATH ROY v. RAMJAI MAZUMDAR	303
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WHO HAS DISAPPEARED, NEXT HEIR OF	App. 16
<i>See HINDU LAW.</i>	
WIDOW	App. 101
<i>See LIMITATION.</i>	
<i>Fraudulent Assignment—Right of Widow in Property of her Husband—Accumulations.] A Hindu, R. C., died possessed of considerable property, and leaving five sons. One of them died leaving a widow, B. She brought a suit to recover her husband's share in R. C.'s estate, together with the profits thereon. The suit was conducted by G. R. A large amount became due to him for costs. To secure this, B. executed a bond and warrant of attorney to confess judgment. The suit failed. In order to obtain the means of bringing another suit, B., by deed dated 4th April 1859, assigned her interest in the estate in the right of her husband, and all benefit to be derived from the suit to be instituted, to G.,—one half absolutely, the other in trust to retain thereout what he might advance to her for maintenance and for the costs of suit with interest at 12 per cent., and to pay her the residue. In November 1859, G. by deed sub-assigned to H. S., in consideration</i>	

that H. S. should undertake the maintenance of B. and the management of the suit, retaining only five-sixteenths out of the eight-sixteenths assigned to him (G.) absolutely. On 19th August 1861, B. obtained a decree in the Supreme Court declaring her entitled to the accumulations on her husband's one-fifth share in the estate of his father, R. C., and to all profits made on such accumulations since her husband's death. In September 1861, G. R. caused judgment to be entered on the bond and execution to be issued, and the Sheriff seized and was about to sell B.'s interest in the estate of her husband. Thereupon, B. being entirely without means, P. S., brother of H. S., paid off G. R., and in consideration thereof took an assignment by deed dated 18th December 1861, in the name of one I. S. from B., of five-eighths of the half-share reserved to her by the deed of 4th April 1859, but subject to the assignment by that deed to G. On 20th December 1869, Rs. 84,685 were paid into Court as B.'s husband's share of the accumulations on R. C.'s property at the date of his death, and Rs. 1,55,255 as the profits made thereon since her husband's death. P. S. now sued for a declaration that the deed of 18th December 1861 was binding upon B. and the reversionary heirs, and for an order that the precise amount due to him be ascertained and paid to him out of the moneys paid into Court. At the trial he abandoned his claim against the Rs. 84,685, on the ground that he could not prove legal necessity on the part of B. when she executed the assignment. *Held*, the deed could be supported only so far as it charged the profits made since R.C.'s death with the repayment of the Rs. 12,500 advanced with interest at 12 per cent. P. S. was entitled to have that amount paid out of the Rs. 1,55,255 in Court.

A Hindu widow is entitled absolutely to the accumulations of income from her husband's estate.

PANNALAL SEAL v. SRIMATI BAMESUNDARI DASI ... 732

HINDU WIDOW—Right of Widow in Property of her Husband—Allegations of Unchastity and Waste—Payment of Money out of Court.] A decree was made in favour of K., a Hindu widow, in a suit brought by her against B. C., which declared that she was entitled to one-fifth share of the accumulations of the estate of the father of her husband from his death to the death of her husband to be held by her as a Hindu widow, and to one-fifth of the subsequent accumulations absolutely. Execution of the decree was taken out, and the sum to which K. was declared entitled was paid into Court by B. C., in March 1869. Macpherson, J., in delivering judgment, expressed a doubt whether the suit was brought for the benefit of the plaintiff, and stated that he would consider any application to protect any right the reversionary heirs might have in the amount recovered by the plaintiff. No steps, however, were taken by B. C., by suit or otherwise, to protect the interests of the reversionary heirs in the sum paid into Court, but on K.'s applying, in March 1871, to have the money paid to her out of Court, B. C., on behalf of himself as reversionary heir, filed an affidavit in opposition to K.'s application, charging her on information and belief with leading an immoral life, and of having assigned half the amount in Court to H. S., and expressing his apprehension of waste, and that if the money were allowed to be taken out of Court, it would be lost to the reversioners. *Held*, that K. was entitled to have the money paid out of Court to her.

BISWANATH CHANDRA v. KHANTAMANI DASI ... 747

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HINDU WILL, CONSTRUCTION OF—*Power to adopt—Double Adoption—Decision of Appeal Bench how far binding.*] The decision of an Appeal Bench of the High Court upon a point of law, or the construction of a document in the case before them, is not necessarily binding on a single Judge of that Court, where the same question again arises in another suit before him.

A Hindu testator died leaving a widow, and leaving also a will which contained the following clause:—"My wife is supposed to be pregnant with child; if a daughter be born, she will in that case adopt the twain mentioned below (the plaintiff and one S. G.), and whatever property there shall exist, consisting of moveable and immoveable, my executors shall divide into three equal shares, and give the same to the daughter and adopted sons on their attaining the age of majority." S. G. died. No child was borne by the widow. The plaintiff, having attained his majority, brought a suit for declaration of his title, alleging that he had been duly adopted under the will; but that, whether he had been adopted or not, he was entitled under the will to a share in the moveable and immoveable property of the testator. No valid adoption took place.

Held that there was no gift by implication to the plaintiff. The testator only intended him and S. G. to take under the will in the event of their being adopted—*Prosonomoye Dossee v. Dossmoney Dossee* not followed.

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COURT— <i>Abatement of Suit—Representative.</i>] Proceedings in the Insolvent Court do not necessarily abate by the death of the party who institutes such proceedings. There is				

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nothing in the Indian Insolvent Act, or in the rules of the Court, which prevents the Commissioner from allowing the proceedings to be carried on by the representative of such deceased party, he being interested in them.	
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INSOLVENT COURT—Discharge—Dismissal of Petition—Jurisdiction.] When an insolvent has obtained his discharge, a Commissioner has no jurisdiction on the application of some of the creditors to make an order dismissing his petition, and ordering the estate and effects of the insolvent in the hands of the Official Assignee to be made over to certain persons, on behalf of the creditors. The petition being dismissed, the property re-vested in the insolvents.	
The Court which passed the order dismissing the petition, upon finding that such order had been obtained by fraud, has power to set aside the order.	
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POWER OF—Application to withdraw Petition.] The Insolvent Court has no power to allow an insolvent to withdraw his petition of insolvency, on the ground that he has made a compromise with his creditors. Where, however, the Court is satisfied that all parties concerned desire to take the matter out of the hands of the Court, it will dismiss the petition, even though there is no ground arising out of the facts of the case why the petition should be dismissed.	
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INSURANCE—Abandonment—Total Loss—Notice of Abandonment.] A cargo, consisting of railway sleepers, was insured by the plaintiffs in the ship <i>Heimdhaf</i> from Geography Bay to Calcutta, and expressed in the policy to be warranted from all risks, except total loss. In proceeding up the River Hooghly in charge of a pilot, on the 30th April, the vessel grounded on the Rungaula Sand, heeled over, and lay imbedded in the sand. Endeavours were made unsuccessfully to get her off. On May 5th, Lloyd's surveyor inspected the vessel, and reported that, considering her position, the state of the tide at that season, and the expence of getting her off, it was unadvisable to go to further expense in doing so; and that the cost of repairs would, in all probability, amount to much more than the value of the ship when repaired. Some of the sleepers had been then jettisoned, and the surveyor recommended that the vessel and cargo should be abandoned and sold by public auction to the highest bidder. Attempts were made, but unsuccessfully, to get some of the cargo off, and the sleepers were of such a quality that they would not float. The consignees, accordingly, caused the ship and cargo to be sold by public auction in Calcutta, on 12th May. No notice of abandonment was given.	

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The sleepers realized the sum of Rs. 450. The purchaser hired boats and began unloading the ship; he unloaded 78 sleepers in all. On 14th May, the ship floated off and came up the river, with the rest of the cargo in safety, proving not to be so much damaged as was supposed. <i>Held</i> , that there was not such a total loss of the cargo as entitled the plaintiffs to recover as for a total loss without giving notice of abandonment.	
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There was no sufficient proof of a family or local custom that the descent of the zemindari, the subject-matter of dispute, was regulated by the rule of primogeniture.	
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UNDIVIDED PROPERTY— <i>Execution of Decree—Interim Injunction—Partition.</i>] A. obtained a decree against B. and others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house, to the remaining moiety of which C. (a Hindu) alleged he was jointly entitled, and that he and his family were in possession. On A.'s proceeding to obtain execution of his decree, C. brought a suit, alleging that A. had obtained no title under his purchase, and praying for partition of the property. On application for an <i>interim injunction</i> to restrain A. from executing his decree pending the partition suit, the Court granted the application.	
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JUDGMENT-DEBTOR— <i>Act VIII of 1859, s. 273—Discharge—Stipend.</i>] A judgment-debtor, in receipt of a monthly stipend, is not entitled to obtain a discharge under section 273 of Act VIII of 1859, unless he submits to place that stipend at the disposal of the Court, that provision may be made for satisfaction of the debt.	
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Civil Suit— <i>Act VIII of 1859, s. 1—Hindu Marriage.</i>] A suit for a declaration that an alleged Hindu marriage is invalid, is a suit of a civil nature, and will lie in the ordinary Civil Courts.	
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JURISDICTION—Civil Suit—Act VIII of 1859, s. 1—Objection raised for the first time in Special Appeal—Batwara—Regulation XIX of 1814, s. 20.] Section 20, Regulation XIX of 1814, which says, “the determination of the Board of Revenue or Board of Commissioners on the paper of partition shall be final,” refers to those questions only which can be legally determined by the revenue authorities, and will not prevent a regular suit being instituted to establish a right and title to the land, which a party has lost by a batwara, notwithstanding that the plaintiff may have failed to make his objection before the Collector within fifteen days as required by clause 2, section 4, Regulation XIX of 1814. There is nothing in the batwara law or in any other Regulation to prevent the Civil Court from entertaining a suit for the declaration of the plaintiff's right to a larger share than that recorded in his name in the paper of partition.

An objection urged by the respondents for the first time in special appeal—that inasmuch as it was the plaintiff's own fault that he did not appear before the Collector and make his objection in time, his suit, which is one merely for declaration of title, and therefore is in the discretion vested in the Court by the 15th section of Act VIII of 1859, ought not to be entertained—was not allowed.

Where a batwara had been made, and the plaintiff had had a specific share allotted to him, but which share was less than his proper share in the estate, and the plaintiff brought his suit against the co-sharers generally, without specifying in whose share the quantity he had lost was included, *held*, the Court could, in such suit, declare the plaintiff's title to the same, treating him as a shareholder to that extent only in the patta in which it may have been included.

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—, RECALL OF CERTIFICATE GRANTED WITHOUT App. 128
See Act XXVII of 1860.

—, Recorder of Moulmein—Amherst.] Under Act XXI of 1863, the Recorder of Moulmein has no power to order execution to issue on a judgment of the late Court of the First Class Assistant Commissioner of the District of Amherst.

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—, Small Cause Court.] A suit, the object of which is not only the recovery of money due upon a bond, but also a declaration of the plaintiffs' lien on the property mortgaged by the bond, is not cognizable by the Small Cause Court.

RAM NARAYAN MOOKERJEE v. SRIMATI SARADA DEBI App. 39

—, Suit for Land—Letters Patent of High Court, cl. 12, Construction of.] Under clause 12 of the Letters Patent, the High Court has jurisdiction to entertain suits for land, whether the land is situated wholly or in part only within the local limits of its ordinary original jurisdiction, leave of the Court having been first obtained in the latter case.

S. M. JAGADAMBA DASI v. S. M. PADMAMANI DASI 686

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JURISDICTION OF CIVIL COURT— <i>Suit for Possession.</i>] A Civil Court alone has jurisdiction to try a suit which is brought to recover possession of land with mesne profits from one who is alleged to be in possession as a trespasser, notwithstanding the defence set up is that, in respect of part of the lands, the defendant has a permanent ryoti tenure.		
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<i>See ACT VI of 1862 (B. C.), ss. 9, 10, 11.</i>		
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<i>See HABEAS CORPUS AD SUBJICIENDUM.</i>		
MAGISTRATE— <i>Criminal Procedure Code (Acts XXV of 1861 and VIII of 1869), ss. 180, 244, 308.</i>] The accused was charged before a Deputy Magistrate with an offence under section 431, Penal Code. The Deputy Magistrate examined the complainant, took bail from the accused, but refused to examine the complainant's witnesses, although present, and delayed the investigation unnecessarily for a long time. The Magistrate of the district then called for the proceedings, and, having looked at them, considered that there was no case for the interference of the Criminal Courts, and discharged the prisoner, although he was present and under bail.		
<i>Held</i> , that the Magistrate was not only competent but bound to discharge the prisoner, if his conclusion that no offence was made out was correct.		
But <i>held</i> also, that the Magistrate's conclusion was wrong, and that the act complained of, if true, did amount to an offence under section 431 of the Penal Code; therefore the Magistrate's order was set aside, and further enquiry ordered.		
NIAMATULLA v. GOPAL SAHA. App.	6
AND SESSIONS JUDGE		
— <i>Registration Act (XX of 1866), s. 95.</i>] The Sessions Judge has jurisdiction to try a case of abetting false personation of a witness before a Registrar of Assurances, under section 95 of the Registration Act XX of 1866.		
The word "instituted" in that section should be construed to mean "commenced."		
THE QUEEN v. SHEOGOLAM DAS	692
KABULIAT— <i>Fractional Share of an Estate—Rent paid to Co-sharer separately—Specification of Boundaries in Kabuliat—Act X of 1859, s. 2—Patta—Tender of Patta.</i>] A proprietor of a fractional share of an undivided estate may sue to obtain a kabuliat from the ryot, without making his co-sharers parties, when there is no dispute as to his share, and when the tenant has paid him rent separately for his share.		
The want of specification of boundaries in a kabuliat is no ground for dismissing a suit for a kabuliat, when all the particulars of area are given as required by section 2 of Act X of 1859.		
The lower Appellate Court ought not to have entertained the objection of the defendant, that no patta had been tendered before the institution of the suit, as the objection had not been taken before the first Court. That issue was not essential to the right determination of the suit upon its merits.		
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— AND TENANT <i>See LIMITATION ACT, s. 1, cl. 12.</i>	App.	130
<i>Adverse Possession—Limitation—</i>				
<i>Onus Probandi.]</i> The plaintiff purchased a mauza from the proprietor in 1869, and now sued to obtain possession from the defendant, who was proved to have held under a ticca lease down to 1866, and who now claimed to hold under a mokurrari lease, which he said was granted by the former proprietor in 1869. The plaintiff failed to prove possession by his vendor within twelve years of suit brought, and therefore the Courts below dismissed his suit. On special appeal, it was held that the defendant, before succeeding on the question of limitation, ought to have shown that the plaintiff had notice of the mokurrari title set up. The case was sent back to the Court below to try the validity of that title.				
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LESSEE. <i>See LESSOR AND —.</i>				
LESSOR AND LESSEE—Lease— <i>Breach of Covenant to put Lessee in Possession—Measure of Damages.</i>] In a lease for a period of nine years, without payment of salami, entered into between A. and B., A. bound himself by the following covenant:—"In the "event of B. not being put in possession of the leased premises, "A. will have to make good anything in the shape of <i>hisara</i> or " <i>nuksan</i> (loss) to which B. may be put in consequence." On A. failing to put B. in possession of the premises mentioned in the lease, B. brought a suit against the party in possession, but failed to recover possession.				
In a suit by B. against A. for recovery of damages for breach of contract, measuring the amount of damages at the expenses he had to incur in the suit for possession, and also the whole of the profits which he expected to derive from the lease, <i>held</i> that the plaintiff was entitled to recover only nominal damages.				
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LIEN FOR DISBURSEMENTS AND WAGES <i>See BOTTOMRY BOND-HOLDER.</i> 323
 LIGHT AND AIR— <i>Prescription—Easement.</i>] In a suit for enforcing the removal of an obstruction to the alleged right of the plaintiffs to the light and air through certain windows in a room of a house contiguous to the house of the defendants, it was proved that the plaintiffs had purchased the premises in 1847, and that the building of the room, in which the windows in question were, had been subsequently commenced in 1849; and the Judge of the Court below found on the evidence that the room and windows had been completed, and in use for a period of twenty years prior to the date of suit, May 18th, 1870; that the plaintiffs had enjoyed the light and air through the windows for a period of twenty years without any interruption by the defendants; and, it being proved that the defendants had by building obstructed the light and air coming to the plaintiffs' windows, he granted an injunction, commanding the defendants to take down so much of the wall as rose to the height of more than five feet above the level of the plaintiffs' floor, and restraining them, the defendants, from continuing their building above the height of five feet.	
<i>Held</i> , on appeal, <i>per COUCH, C. J.</i> —By the English law before the Prescription Act (which is the law governing the case), the presumption of a grant, in the case of a claim to the access and use of light for a building, was a presumption of fact, the presumption being founded on the consent or acquiescence of the owner of the servient tenement. Acquiescence implies knowledge, and knowledge may be presumed where the owner is in possession. There must be knowledge for twenty years, at any rate; if the knowledge were for a lesser period, whether there was a grant would be a question of fact, and no presumption could arise. The question of whether or not there was knowledge is one preliminary to the consideration whether or not a grant is to be presumed.	
<i>Held</i> , on the evidence, that there had been no knowledge on the part of the defendants during the whole time, and therefore there had not been a twenty years' enjoyment of the light and air with their acquiescence.	
<i>Held, per MARKBY, J.</i> —The presumption of a lost grant is one of fact. An uninterrupted user for twenty years would be evidence from which, taken with other circumstances, it might be inferred that a grant had existed.	
No “ <i>patientia</i> ” or “ <i>submission</i> ” on the part of the defendants being shown so as to constitute an acknowledgment of the existence of the right of the plaintiffs to the light and air, the defendants were entitled to succeed.	
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— App. 16, 31, 146, 151	
<i>See HINDU LAW. See EXECUTION OF DECREE. See EXECUTION. See LANDLORD AND TENANT.</i>	
— <i>Act XIV of 1859, s. 1, cl. 9—Cause of Action—Mode of Computing Limitation—Holiday.]</i> The plaintiff sued on a promissory note payable on demand, dated November 14th, 1867. He filed his plaint on November 14th, 1870, that being the first day on which the Court was open after the Durga Puja holidays. The 13th November was Sunday. <i>Held</i> , the day on which the note	

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was made was to be excluded in computing the period of limitation, and that therefore the suit was not barred.	
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LIMITATION— <i>Act XIV of 1859, s. 1, cl. 9—Deposit—Cause of Action—Demand—Hatchitta.]</i> Where money has been deposited by A. at interest with B. repayable on demand, and interest is paid accordingly, the cause of action arises not on the date of the deposit, but on the date of demand.	
TARINI PRASAD GHOSE v. RAM KRISHNA BANERJEE...	... 160
— <i>Act XIV of 1859, s. 1, cls. 10, 16—Agreement in writing which could not be registered—Acknowledgment.]</i> On 9th April 1864, the defendant, L., an attorney, entered into an agreement with the plaintiff and one P. K. D., by which the plaintiff engaged to employ himself as cashier and accountant of L., and the plaintiff and P. K. D. engaged that they would, from time to time, on the requisition of L., advance money to him subject to the proviso that there should be at no one time a larger sum due by L., on account of such advances, than three-fourths of the value of all bills, stocks, and other property which L. would make over to the plaintiff and P. K. D.; provided also that the said advances should not exceed in total at any time Rs. 10,000. L. was to pay interest on such advances at 9 per cent., and the plaintiff and P. K. D. were to have a lien for such advances on all bills, stocks, and other property of L.'s which the plaintiff and P. K. D. should have in their custody as security for such advances. L. was to be at liberty to realize such bills and sell such stocks as he should deem necessary, provided that the money was to be paid to the plaintiff and P. K. D. in payment of such advances. Should there be any surplus money remaining after the settlement of the account, such money was to be credited to the account of L. The agreement was made before the Registration Act of 1864 came into force, and it was admitted that it could not have been registered. In a suit against L. to recover money advanced by the plaintiff and P. K. D., held that there was such an agreement by L. to repay the advances as to constitute a contract in writing signed by the party to be bound within the terms of clause 10, section 1 of Act XIV of 1859, and therefore the period of limitation was six years as provided by clause 16, section 1 of that Act.	
S. J. LESLIE v. PANCHANAN MITTER	... 668
— <i>Act XIV of 1859, s. 1, cl. 12—Landlord and Tenant—Mokurrari.]</i> Where a landlord sued, after the lapse of more than twelve years from the date of his knowledge that a tenant was setting up a mokurrari title, for a declaration that the alleged mokurrari title was invalid, held that the suit was barred by lapse of time.	
SHEIKH NAZIMUDIN HOSSEIN v. LLOYD	... App. 130
— <i>Act XIV of 1859, s. 19—Execution of Decree of High Court—Jurisdiction—New Grounds on Appeal.]</i> Where a decree of the lower Court is materially altered on appeal by the High Court,—e. g., where the amount of mesne profits allowed by the lower Court is cut down by the High Court,—the decree becomes a decree of the High Court, and the period within which a proceeding must have been taken to enforce the same, so that it may not be barred by the Law of Limitation, is twelve years under section 19 of Act XIV of 1859.	
The Court will take notice of a question affecting its jurisdiction, even when urged for the first time on appeal after remand.	
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LIMITATION— <i>Cause of Action—Contribution—Joint Debts—Hindu Widow.</i>] N., G., and H. were three brothers living together as a joint Hindu family. After the death of N. and G., decrees were obtained against N.'s widow, and satisfied by her, in respect of money borrowed by N. and H. as the managing members of the family, and spent on family purposes while G.'s widow was living in the family. In a suit by N.'s widow for contribution against G.'s widow,—held that, although no legal necessity had been shown for borrowing, the defendant was bound to pay her share under the circumstances of the case, as the money had been spent for family purposes while she was living in the family. The cause of action arose, not on the date of the decrees against the plaintiff, but at the time when she had to pay over their amount.	
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<i>See MOOKTEAR.</i>	
MAHOMEDAN LAW— <i>Dower—Lien—Mortgage—Hypothecation.</i>] The widow's claim for dower under the Mahomedan law is only a debt against the husband's estate. It may be recovered from the heirs to the extent of assets come to their hands. It does not give the widow a lien on any specific property of the deceased husband, so as to enable her to follow that property, as in the case of a mortgage, into the hands of a <i>bond fide</i> purchaser for value.	
<i>Semble.</i> —Under the Mahomedan law, there is not hypothecation without seizure, but a creditor, whether widow or any other creditor, if in possession of the husband's property with the consent of the debtor or his heirs, might hold over until the debt is paid; and the cases cited to show that the widow had a right to hold until her dower was paid off, proceeded on this principle.	
<i>Per Hobhouse, J.</i> —It is very questionable whether the Court is bound to apply the Mahomedan law to this case under the provisions of Regulation VII of 1832, the case not being one of succession, inheritance, marriage, caste, or religious usage; but simply one of contract.	
<i>Mussamat Wahibunissa v. Mussamat Shubrattun</i> ...	54
<i>Pre-emption—Partner, Right of, to Pre-emption on Sale of Villages or large Estates—Vicinage, Right of</i>	

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<i>Pre-emption on the ground of.]</i> According to the Mahomedan law, a partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such right on the ground of vicinage.	
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MAHOMEDAN LAW— <i>Pre-emption—Suit to enforce Pre-emption to a Portion of the Property sold.</i>] Under a deed of sale the vendor conveyed to the purchaser five plots of land. In a suit by a third party to enforce a right of pre-emption in respect of one out of the five plots,—held that he could not divide the bargain and sue on the ground of pre-emption for a portion only of the property covered by the deed of sale.	
SHEIKH IZZATULLA v. SHEIKH BHIKARI MOLLA ...	386
— <i>Pre-emption—Suit for Pre-emption.]</i> On the foreclosure of a mortgage, after the expiry of the year of grace, but before a decree for possession has been obtained by the mortgagor, a suit to enforce the right of pre-emption, in respect of the property mortgaged, is maintainable.	
MUSSAMUT TARA KUNWAR v. MANGRI MEEA ... App.	114
— <i>Pre-emption—Tulub-ishhad—Invocation of Witnesses to the Pre-emptor's Demand.]</i> According to the Mahomedan law, it is essential to the performance of the <i>Tulub-ishhad</i> that third persons should be formally called upon, either in the presence of the purchaser or on the land, or if the vendor is in possession, in the presence of the vendor, to bear witness to the demand.	
GOLAKRAM DEB v. BRINDABAN DEB	165
MAINPRIZE, WRIT OF— <i>Power of High Court to issue it.]</i> A writ of <i>mainprize</i> could only be issued where the party applying for it was bailable, and had offered securities, but bail had been refused; it could not be issued to a prisoner confined under Regulation III of 1818, which authorizes his detention absolutely and unconditionally, and gives him no right to demand to be released on bail.	
The writ is one which could be issued only on the Common Law Side of the Court of Chancery in England. The power of the Common Law Side of the Court of Chancery to issue such writ was not conferred on the Supreme Court; nor is there anything in the Charter of the High Court to give that Court power to issue it.	
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<i>See CAUSE OF ACTION.</i>	
— <i>Onus Probandi.]</i> In an action for malicious prosecution, it is for the plaintiff to prove the existence of malice and want of reasonable or probable cause, before the defendant can be called upon to show that he acted <i>bona fide</i> , and upon reasonable grounds, believing that the charge which he instituted was a valid one.	
MOHANTY GAUR HARIDAS ADHIKARI v. HAYAGRIB DAS MOHANT 371	
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— AND SERVANT— <i>Action for harbouring or sheltering the Servant of another—Notice of Contract of Service.]</i> An action will not lie for the mere harbouring or sheltering a person who is under a contract of service to another, even with notice of such contract of service.	
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OF LAND 361 <i>See Act VI of 1862 (B. C.) s. 9.</i>	
POLE 1 <i>See Act VI of 1862 (B. C.) ss. 9, 10, 11.</i>	
MESNE PROFITS— <i>Co-sharers—Local Investigation—Depositions—Ameen's Report—Execution of Commission—Act VIII of 1859, s. 180.]</i> Plaintiff and defendant and certain others were co-sharers of an abad. Each agreed to cultivate certain portions, and afterwards to give up any excess land cultivated by him. Defendant cultivated 399 bigas in excess of his share. Plaintiff sued him and got possession of the excess land on payment to the defendant of a compensation for the expense of cultivation, and then brought his suit for mesne profits. <i>Held</i> that he was not, under the circumstances, entitled to mesne profits.	
An Ameen had been deputed to make a local investigation, and had examined certain witnesses, but could not examine the rest, or complete his investigation and draw up his report owing to the plaintiff not paying the necessary expenses. <i>Held</i> , that the depositions of the witnesses without the Ameen's report were not admissible in evidence.	
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<i>See MAHOMEDAN LAW.</i>	

—The following terms in a deed—"that, for the security of the payment of this debt, the lands mentioned in this deed are pledged by me; and that until the principal money and the interest recited in this deed are paid off, I would not on any account transfer the property pledged to anybody by sale or *hibabilawaz*, or gift or mortgage in any other way"—were held to amount to a mortgage.

LALA RAMDHARI LAL v. JANESSAR DAS App.

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Usufructuary Mortgage—Redemption, Period of.]

A. executed an ikrar by way of mortgage, whereby it was stipulated that B., the mortgagee, was to remain in possession of the mortgaged premises for a period of eight years; that the amount due was to be paid off from the usufruct; and that if, at the expiry of that period, any sum should remain due under the ikrar, A. was to pay the same.

In a suit for redemption brought before the expiry of the period mentioned in the ikrar on deposit of the amount due thereunder,—held that the suit would not lie.

CHANDRA KUMAR BANERJEE v. ISWAR CHANDRA NEWGI ... 562

—BY ONE OF A JOINT HINDU FAMILY—*Surrender of Equity of Redemption—Act XIV of 1859, s. 1, cl. 13, 15; ss. 5, 10—Purchaser for Valuable Consideration—Pleading.]* A member of a joint Hindu family granted a usufructuary mortgage: he subsequently, without the knowledge of the co-partners, released the equity of redemption: on hearing of this, the co-partners contested the validity of the release. Held that the parties claiming from the person to whom the release was made, took, so far as the co-partners were concerned, a title only as mortgagees.

Act XIV of 1859, section 1, clause 13, is intended to apply to suits between members of a joint family, not to a case where a mortgage having been made by one member on behalf of all to a stranger, that member afterwards, against the will of his co-partners, releases the equity of redemption.

To entitle a purchaser to claim the benefit of Act XIV of 1859, section 5, he must prove,—1st, that he is a purchaser of what is represented to him, and what he fully believes to be not a mortgage but an absolute title; 2nd, that he purchased *bonâ fide*,—that is to say, without a knowledge of the title having been originally a mortgage, and of a doubt existing as to the mortgage having ceased; and 3rd, that he is a purchaser for valuable consideration.

A pleading setting up as a defence a purchase for valuable consideration should aver the seisin of the vendor, and the sale of his absolute title for good consideration.

Where an estate having been originally mortgaged by K., a member of a joint Hindu family, he subsequently, without the knowledge of the other members, released the equity of redemption to R., who afterwards sold to II., the owner of a factory, who

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afterwards sold to G. and Co. the factory with the lands appertaining thereto, amongst which was the property so released, and proceedings had for many years been taken by the other members to assert their rights,— <i>held</i> , reversing the decision of the High Court, that G. and Co. were not purchasers entitled to the protection of Act XIV of 1859, section 5. <i>Held</i> , also, that section 10 does not apply in such a case, although K. acted fraudulently.	530
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. <i>Co-heiresses—Hindu Law—Jurisdiction.] Two co-heiresses, in joint possession of property by Hindu law, are in the nature of co-parceners, and one of them can enforce partition against the other, notwithstanding the limited character of their tenure, and although such partition might not be binding on the reversoners.</i> A person suing for partition is not obliged to include in his suit the whole of the property, but may confine his suit to the portion of the property which he is desirous of having partitioned; therefore where, in a suit for partition, it was shown that some portion of the property was out of the jurisdiction of the Court, objections that fresh parties would be necessary if the mofussil property were included, and that therefore the suit had not been properly brought, and that the leave of the Court had not been obtained previous to bringing the suit, were overruled.	
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— (<i>Act XLV of 1860</i>), s. 304— <i>Culpable Homicide not amounting to Murder—Mitigation of Sentence.</i>] In his charge to the Jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in section 304 of the Penal Code, and direct them to find specially under which, if either, the prisoner was guilty.	
<i>THE QUEEN v. KALI CHARAN DAS</i>	App. 86
— (<i>Act XLV of 1860</i>), ss. 372, 373— <i>Disposing of Minor for Prostitution—Obtaining Possession of Minor for Pro- stitution.</i>] S., a married Mahomedan girl under 16, while living with N., her grandmother, and in the absence of her husband, formed an adulterous intrigue with two Hindus, with the knowledge of N.; S. and N. were then induced by the Hindus to remove to another village, that S. might take up the trade of a prostitute; they there met J., a public woman, with whom they went to reside, and who introduced visitors to S., and received the money paid by them, in exchange for the board and food supplied to S. and N. N. was convicted, under section 372, Indian Penal Code, of disposing of a minor for the purpose of prostitution, and J. was convicted under section 373, Indian Penal Code, of obtaining possession of a minor for the purpose of prostitution. <i>Held per JACKSON, J.</i> —That on the facts proved, no offence was committed under the Penal Code.	
<i>Per GLOVER, J.</i> —N. and J. were both guilty under sections 372 and 373, respectively, and their appeals should be dismissed.	
<i>QUEEN v. NOURJAN</i>	App. 34
—, s. 378	App. 133
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— (<i>Act XLV of 1860</i>), ss. 380, 447— <i>Criminal Tres- pass.</i>] Entrance of a member of a Hindu joint family into the family-dwelling-house is not criminal trespass. The entry of a stranger into a family dwelling-house, with the permission and license of one of the members, is not criminal trespass.	
<i>IN THE MATTER OF THE PETITION OF PRANKRISHNA CHANDRA</i>	App. 80
— (<i>Act XLV of 1860</i>), s. 425— <i>Cattle—Trespass.</i>] Mere neglect on the part of an owner of cattle to keep them from straying into fields, is not causing cattle to enter a compound within the meaning of section 425 of the Penal Code. The section	

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requires that, before the owner is convicted of the offence, it must be proved that he actually caused the cattle to enter, knowing that by so doing he was likely to cause damage.

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PENAL CODE (*Act XLV of 1860*), s. 499—*Defamation.*] The accused, an inspector of police, was sent to enquire if it was true that one Brojonath was a leader of dacoits. He reported that it was false, and that the banias of the village were trying to get him punished from an ill feeling. He added:—"I learnt from private enquiries that there is scarcely a woman in the houses of the banias who has not passed a night or two with the defendant Brojonath." Commitment of the accused for trial for defamation under section 499 of the Penal Code, supported under the circumstances of the case.

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See BENGALI MORTGAGE.

—, See VARIANCE BETWEEN PLAINT AND EVIDENCE.

—, Issues—Amendment—*Variance between Case in Plaintiff and Evidence—Act VIII of 1859, s. 141.*] The plaintiffs sued the defendants for damages for breach of contract, alleging in their plaint that they had agreed to sell, and the defendants to purchase, certain indigo seed, but that the defendants had refused to take delivery, although the plaintiffs were ready and willing to deliver the same.

Upon the evidence of the plaintiffs, it appeared that there was no contract as alleged in the plaint, but the contract, as stated by them, was that they (the plaintiffs) were to purchase seed as agents for the defendants.

The Judge dismissed the suit, on the ground that the plaintiffs were bound to prove their case as stated in the plaint.

Held that the suit ought not to have been dismissed on that ground. The issues raised admitted of the true question being tried,—viz., whether, under the circumstances, the defendants were liable to pay the price of the seed; and, if they did not, the Court ought to have amended the issues, or framed additional ones. The object of the plaint is merely to bring the matter in dispute before the Court, but it is for the Court, upon the statements before it, to determine the real issue between the parties.

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—, RETURN OF— <i>Act X of 1859, s. 42—Mistake in the Plaintiff—Amendment of Plaintiff.</i>] A suit cannot be dismissed merely on the grounds that the plaint did not contain a specification of the land in the defendant's possession, and that there was an error in the plaint in the description of the defendant's residence.	
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—, <i>Criminal Procedure Code (Act XXV of 1861), c. XV—Compensation to an Accused—False Evidence—Comittal on a Charge of Perjury.</i>] When a prosecutor fails to substantiate his charge by making contradictory statements, the Magistrate who tries the case under Chapter XV of the Criminal Procedure Code, can award compensation to the accused, although he commits the prosecutor to take his trial on a charge of giving false evidence.	
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— <i>Infant Appellant coming of Age—Withdrawal from Appeal.] An infant appellant, in an appeal pending in the Privy Council, having come of age, and having petitioned the High Court in India to be allowed to withdraw from the suit,—held that it was competent to the respondent in England to have the appeal dismissed for want of prosecution, although the guardian had given security for the costs and paid the expenses of the appeal, and although the (former) infant was not served with notice of the motion, the Council being satisfied that he had in the High Court petitioned for leave to withdraw.</i>	
RANI BISTUPREYA PATMADY v. BASUDEB DHALL (or NAND DHALL) BEWARTI PATNAIK ...	190
— <i>Reference to a Judge of another Sudder Court—Relin- quishment of a Mother's Interest in favor of a Daughter-in-law and Son—Effect of Son's subsequent Death.] The Sudder Court, being equally divided, referred a case for the opinion of the High Court of Calcutta. The High Court at Agra, having been established in the meanwhile,—held that the Chief Justice of that Court had power to hear and determine the case.</i>	
A widow, being old, presented a petition in a suit by her daughter-in-law, a guardian of the former's infant son, relinquishing all her rights in the property to the daughter-in-law herself, and as guardian of the infant. The son died, and the mother now sued her daughter-in-law for possession as heiress of her son. Held that, by the petition, the mother had transferred no rights to the daughter-in-law as proprietor, but that the mother, as heiress of her son, was entitled to the estate.	
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— <i>Settlement of Issues—Remand.] Where, on an appeal, the Counsel for the appellant admitted he could not succeed on the merits, as the evidence stood on the record, and their Lordships were of opinion that substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of Appeal, but was noticed and commented on by that Court, was held not to constitute a fatal mistrial of the cause so as to render a new trial necessary.</i>	
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<i>See DIRECTOR OF PUBLIC COMPANY.</i>		
PROMISSORY NOTE— <i>Contract or Obligation—Registration Act (XVI of 1864), s. 16—Act XIV of 1859, s. 1, cl. 10.]</i> A promis- sory note is a “contract or obligation,” under section 16, Act XVI of 1864, and as such might have been registered under that Act; consequently the period of limitation prescribed by section 1, clause 10 of Act XIV of 1859,—viz., three years,—applies to it.		
PYARI CHAND MITTER v. FRAZER	App.	40
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PUNISHMENT, ENHANCEMENT OF— <i>Commutation of Sentence— Whipping—Rigorous Imprisonment.]</i> Upon conviction of the offence of house-breaking, the accused was sentenced by the De- puty Magistrate to six months' rigorous imprisonment, and to be whipped. On appeal, the Judge found that, as this was the first offence, the additional punishment of whipping was illegal, and, setting aside so much of the sentence, passed a sentence of three months' rigorous imprisonment, in addition to the six months' rigor- ous imprisonment passed by the Deputy Magistrate.		
<i>Held that the commutation of the punishment was illegal.</i>		
THE QUEEN v. BANDA ALI	App.	95
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RECEIVER, POSITION AND FUNCTIONS OF.— <i>Suit for Speci- fic Performance.]</i> The receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the		

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grasp of the Court, in order to preserve the subject-matter of the suit <i>pendente lite</i> ; and the possession of the receiver is simply the possession of the Court. He has no personal rights in the property, nor can he take any steps with regard to it without the sanction of the Court. If it is necessary for him to take action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as the agent of the owners of the property.	
Where the receiver in a suit had, by order of Court, sold certain property in the suit, and had executed the contract of sale in his own name, a plaint praying for specific performance against the purchaser for refusing to complete the contract, was admitted with the receiver as co-plaintiff, he having obtained leave to sue.	
WILKINSON v. GANGADHAR SIKKAR	486
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<i>See</i> CRIMINAL PROCEDURE CODE.	
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<i>See</i> FORFEITURE OF —.	
<i>Judicial Enquiry—Evidence—Report of Police Officer.]</i> The existence of a dispute likely to cause a breach of the peace must be first proved by legal evidence before the Magistrate can proceed to call upon the parties to enter into recognizances to keep the peace.	
• The report made by a Police Officer that there is a likelihood of there being a breach of the peace is not legal evidence to prove the existence of any dispute likely to cause a breach of the peace.	
ABHAYA CHOWDHRY v. T. BRAE	App. 148
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ACT, s. 16 <i>App.</i>	40
<i>See Promissory Note.</i>	
(XX of 1866) ss. 31, 82, 84— <i>Refusal to Register.</i>] Although the Registrar-General may have a discretion to refuse to register without endorsing his refusal on the document, yet in cases where he does so endorse his refusal, the last clause of section 82 is applicable, and the case falls within the provisions of section 84; the party aggrieved has a right of petition to the District Court. Where the property, the subject of a deed presented for registration, was without the jurisdiction of the High Court, but the order of refusal was made by the Registrar-General, who was within such jurisdiction,— <i>held</i> , the High Court was the District Court under section 84 to which the petition should be made.	
IN THE MATTER OF THE INDIAN REGISTRATION ACT (XX OF 1866) AND IN THE MATTER OF PERCY WYNDHAM <i>App.</i>	576
, ss. 52, 53 <i>App.</i>	177
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—1798—I, s. 2— <i>Reg. XVII of 1806—Mortgage—Liability of Mortgagor in Possession.</i>] On a question of the right of a mortgagor to redeem by deposit of the principal sum due only, the length of possession by the mortgagee is immaterial.	
ABDULLA KHAN v. UPENDRA CHANDRA <i>App.</i>	53
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<i>See Jurisdiction.</i>	
1818—III <i>App.</i>	392, 459
<i>See Habeas Corpus ad Subjiciendum.</i>	
—1819—VIII— <i>Purchaser, Right of, in Patni Talook sold for Arrears.</i>] The purchaser of a patni talook, under Regulation VIII of 1819, sued for a kabuliatal at an enhanced rent. The former patnidar had brought a similar suit, and the Court had declared that the rent was not liable to enhancement. <i>Held</i> that the purchaser was bound by that decree.	
TAEPASAD MITTRA v. RAM NRISING MITTRA <i>App.</i>	5
1825—XI, s. 4, cl. 3 <i>App.</i>	255
<i>See Chur.</i>	
<i>Island—Re-formation on Site of old Land—Right of Government.</i>] Under clause 3, section 4, Regulation XI of 1825, Government has no right to land thrown up as an island in the bed of a navigable river, when such island is formed on the site of land which had been washed away.	
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REGULATION—1825—XI, s. 4, cl. 3— <i>Right of Property of a Riparian Proprietor to an Island in a Navigable River—“Fordable,” Meaning of.]</i> Under clause 3, section 4, Regulation XI of 1825, a riparian proprietor has no right to an island thrown up in a large navigable river, when the channel which intervenes between his land and the island is, under ordinary circumstances, and at the most favorable season, unfordable for 16 out of 24 hours.	
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<i>See DAMAGES.</i>	
RENT. <i>See INTEREST ON ARREARS OF RENT.</i>	
— <i>Apportionment of Rent—Joiner of Parties.]</i> Where a tenant held lands in six villages under a patnidar at an admitted rent, and the patnidar subsequently granted dar-patnis to two different parties of two and four of the said villages respectively, the tenant having admitted a certain sum to be the rent payable in respect of the lands situated in the two villages,— <i>held</i> , the dar-patnidar of the other four villages could sue the tenant for the rent payable in respect of the lands situated in four villages comprised in his dar-patni, without joining as co-plaintiff in the action the dar-patnidar of the two villages, and the rent payable to the dar-patnidar of the four villages was properly estimated as the difference between the admitted rent of the land in all six villages, and the admitted rent of the land situated in the two villages.	
BRAJA LAL ROY v. SAYAMA CHARAN BHUTT	523
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— <i>BONA FIDE PAYMENT AND RECEIPT OF—Act X of 1859, s. 77.</i>	
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— <i>LAW—Right of Occupancy—Sale of Tenure—Zemindar's Consent to Sale of Tenure.]</i> A Zemindar does not, by the mere receipt of rent from a purchaser from the tenant having a right of occupancy, sanction the sale to the purchaser, so as to give him a right of occupancy.	
GAUR LAL SIRKAR v. RAMESWAR BHUMIK ... App. 92	
— <i>PAID TO CO-SHARER SEPARATELY</i> <i>See KABULIAT.</i>	356
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— — — <i>Admission of Special Appeal, Meaning of—Power of Lower Appellate Court—Act VIII of 1859, s. 370.]</i> Upon the dismissal of a special appeal by the High Court, the appellant in special appeal applied to the High Court for a review of judgment upon the ground of discovery of fresh evidence. This application was rejected, on the ground that the Court could not take cognizance of the merits of a case in special appeal, and, therefore, could not admit a review upon fresh evidence. The special appellant then applied to the lower Appellate Court for a review of its judgment, on the ground of discovery of fresh evidence. This application was admitted, and a review of the judgment was allowed.	...
On application to the High Court, under section 15 of the Charter Act, <i>held</i> , the lower Appellate Court had no jurisdiction to admit the application for review.	...
IN THE MATTER OF THE PETITION OF JADUNATH MOOKERJEE ...	333
— — — <i>Civil Procedure Code (Act VIII of 1859), s. 376.]</i> It cannot be treated as a universal rule that no point can be raised on an application for a review which has been already discussed and decided on the original hearing of the appeal; or that no new point, which has not been raised on the hearing of the appeal, can be argued on the application for a review. In each case, the Court, to which the application is made, must consider and decide whether a review is necessary to correct any evident error or omission, or is otherwise requisite for the ends of justice.	...
IN THE MATTER OF THE PETITION OF CHINTAMANI PAL v. PYARE MOHAN MOOKERJEE, AND IN THE MATTER OF THE PETITION OF SALEH SHABI SABI-UD-DIN ABU SALEH. SALEH SHABI SABI-UD-DIN ABU SALEH v. ASADUNISSA BIBI ...	126
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RIGOROUS IMPRISONMENT ... <i>See PUNISHMENT, ENHANCEMENT OF.</i>	App. 95
RIOTING— <i>Culpable Homicide—Penal Code (Act XLV of 1860), ss. 148, 304.]</i> The prisoners, who, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crop, and when they had no time to complain to the Police, inflicted a wound on one of them with a bamboo, from the effects of which the man died, were convicted by the Sessions Judge, under sections 148 and 304 of the Indian Penal Code. The High Court acquitted the prisoners, holding that the force used, or the injuries inflicted, were not such as to exceed their right of private defence of property. <i>QUEEN v. GURU CHARAN CHAND...</i> ... App. 9	
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IN EXECUTION OF A DECREE PASSED WITHOUT JURISDICTION.] Under a decree passed by a Court, which had no jurisdiction to try the suit, the right, title, and interest of the judgment-debtor, A., in a certain property, was sold and purchased by B. The decree was, after the sale, set aside as having been passed without jurisdiction. In a suit by A. against B. for confirmation of possession, on the ground that B. was about to take possession of the property under the purchase,—held, that the sale in execution was a nullity, as the decree had been passed without jurisdiction. <i>JADU NATH KUNDU CHOWDHRY v. BRAJA NATH KUNDU, App.</i> 90	

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SALT— <i>Confiscation—Rowana—Pass—Act VII of 1864, s. 16 (B.C.).</i>]				
If salt exceeding five seers is found within the limits prescribed by section 12 of Act VII of 1864 (B.C.), unprotected by a rowana or pass, the salt is contraband, and liable to seizure, and the parties transporting it are punishable under section 16. It matters not whether any attempt or intention to sell is proved or not.				
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SLAUGHTER-HOUSE LICENSE— <i>Act VII of 1865 (B.C.), s. 7.</i>]				
R. was fined by the Deputy Magistrate for using an unlicensed slaughter-house. He subsequently gave an ijara or lease to A. to carry on the business. R. was prosecuted again for evading the law by "slaughtering cattle or allowing cattle to be slaughtered" without				

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a license. He was fined Rs. 200 by the Deputy Magistrate. On appeal to the Sessions Judge, he was acquitted. On the motion of the Municipal Commissioners for a rule to set aside the order of the Sessions Judge, it was held,—	
<i>Per JACKSON, J.</i> —That R., by giving a lease to A., had parted with his interest, and had ceased to have any power to allow or disallow the slaughtering of cattle. That section 7 provides penalties only, and does not describe an offence or relate to a conviction. It is quite another question whether the act itself is an offence irrespective of section 7, and whether R. could be dealt with as an abettor.	
<i>Per MITTER, J. (dissenting.)</i> —The Judge has found that the lease was given by R., with the avowed object of continuing the slaughter-house, and admittedly for the express purpose of evading the law; the case therefore falls within the express words of the section, “or allows cattle to be slaughtered.”	
IN THE MATTER OF THE PETITION OF THE MUNICIPAL COMMISSIONERS FOR THE SUBURBS OF CALCUTTA ... App. 28	
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... , MOFUSSIL App. 99	
<i>See DAMAGES, SUIT FOR.</i>	
Review— <i>Act XI of 1865, s. 21—Procedure.</i>] The Judge of a Small Cause Court in the mofussil cannot review his judgment, except as provided by section 21 of Act XI of 1865.	
IN THE MATTER OF THE PETITION OF TADIR HOSSEIN KHONDKAR 388	
Wages under Rs. 50— <i>Act XI of 1865, s. 12.</i>] Suits for wages under Rs. 50 alleged to be due from a European British subject to a native can be tried in a Small Cause Court in the mofussil.	
MIRZA RAMJAN BEG v. J. COOK App. 91	
... , RANGOON, ESTABLISHMENT OF— <i>Recorder's Court—Act XXI of 1863, s. 10—Act XI of 1865.</i>] Act XXI of 1863, after establishing Recorders' Courts in British Burmah, and fixing the limits of their jurisdiction, enacts by section 10 that, “save as in this Act provided, no Court other than the Recorders' Court shall have or exercise any civil jurisdiction whatever within the limits for the time being fixed as aforesaid.”	
Act XI of 1865, after declaring that the words “Local Government” should denote “the person authorized to administer the Executive Government in such part,” enacts by section 3 that the Local Government might, with the previous sanction of the Governor-General in Council, constitute Courts of Small Causes under that Act at any places within the territories under such Government. By section 3 the Judge of such Small Cause Court was to be appointed by the Local Government. Act XI of 1865 does not repeal section 10 of Act XXI of 1863.	
By notifications dated 1st September 1869, the Governor-General appointed a Judge of the Small Cause Court at Rangoon,	

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extended the provisions of Act III of 1864 to British Burmah, and invested the Chief Commissioner of British Burmah with the powers conferred on a Local Government by that Act.

By notification of 2nd October 1869, the Governor-General in Council sanctioned the establishment of a Court of Small Causes in Rangoon, under section 3, Act XI of 1865, extended the jurisdiction of the said Court to an amount not exceeding 1,000 rupees, and notified that the territorial jurisdiction would be co-extensive with that of the existing Small Cause Court jurisdiction of the Recorder's Court at Rangoon.

Held, that the Small Cause Court at Rangoon so established was properly constituted. There is nothing to show that the words "Local Government," as used in Act XI of 1865, were intended to include a Chief Commissioner.

KO SHAOY DOON v. SHAOY GAN 196

SMALL CAUSE COURT, SUIT COGNIZABLE BY ... App. 82
See ACT XXIII OF 1861, s. 27.

COURTS, PRESIDENCY TOWNS—*Jurisdiction*—

Registration Act (XX of 1866), ss. 52, 53.] Small Cause Courts in the Presidency Towns have no jurisdiction to entertain petitions and make decrees under the provisions of sections 52 and 53, Act XX of 1866.

IN THE MATTER OF ACT XX OF 1866, AND IN THE MATTER OF NILKAMAL BANERJEE v. MADHUSUDAN CHOWDHRY ... 177

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Grounds.] The grounds of special appeal must not be vague and indistinct, conveying no information to the respondent what the point of law is that he has to meet.

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— 37 GEO. III, c. 142, s. 8	392
<i>See HABEAS CORPUS AD SUBJICIENDUM.</i>	
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<i>See ACT X OF 1859, s. 23, cl. 7, ss. 34, 145, & 160. See DECLARATORY DECREE.</i>	
— ABATEMENT OF	119
<i>See INSOLVENT COURT.</i>	
— AGAINST REPRESENTATIVE OF A DECEASED PERSON — <i>Act VIII of 1859, s. 203.]</i> The plaintiff sued the defendants on the ground that they were in possession of his deceased debtor's property. It being found that the defendants received no assets from the deceased, <i>held</i> , the suit was rightly dismissed.	
If the suit had simply been against the defendants as heirs or personal representatives of the deceased, and if they had alleged that no assets had come to their hands, the plaintiff would have been entitled to a decree against them as representatives of the deceased: if he had prayed for such a decree, without going to trial on the question whether or not the defendants had assets; and in that case he might have proceeded, in enforcement of his decree, under the provisions of section 203 of Act VIII of 1859.	
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— FOR CONTRIBUTION.] A. and B. jointly executed a bond in favor of C. When the bond fell due, A. alone executed a second bond for a larger amount in favor of C., covering the	

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amount of the debt under the former bond together with a further advance to him (A.). At the same time C. cancelled the former bond. <i>Held</i> , that thereupon A. could maintain his suit against B. for contribution.	
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— JUDICIAL SEPARATION BY WIFE— <i>Custody of Children.</i>] When a wife obtains a decree for judicial separation, on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children.	
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— TO CLOSE WINDOWS— <i>Right of Property—Zenana.</i>] A suit to close doors recently opened in the house of a neighbour, on the ground that such doors overlook the zenana, or female apartments, of the plaintiff, does not lie.	
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cution—24 & 25 Vict., c. 104, s. 15— <i>Jurisdiction.</i>] A. obtained a decree against B. in her representative character for a debt contracted by her mother. The decree declared that execution should be taken out against the property of the mother, and not against any part of her (the mother's) deceased husband's estate. In execution, A. attached and put up to sale certain property as belonging to the mother. B. objected to the sale, alleging that the property was not her mother's, but was inherited by her from her father. The Moonsiff disallowed her objection on the ground that only the right, title, and interest of the defendant's mother was put up for sale. On appeal, the Judge set aside the Moonsiff's order. <i>Held</i> , that for the purposes of her objection, B. was a third party unconnected with the decree, and that her objection should have been disposed of under section 246 of Act VIII of 1859. Section 11 of Act XXIII of 1861 did not apply. There being therefore no appeal, the Zilla Judge's order was set aside as passed without jurisdiction, and the Moonsiff's order was also set aside as not having been passed under section 246, Act VIII of 1859, under which section the objection had been preferred.	721
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SUPERINTENDENCE BY HIGH COURT—Execution— <i>Debsheba—Shebait—Palas, Sale of—Act VIII of 1859, s. 246—24 & 25 Vict., c. 104, s. 15.</i>] Rights of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of a shebait. Where an order was made by a Moonsiff under section 246 of Act VIII of 1859, and a regular appeal was preferred, and then a special appeal to the High Court, the Court, while refusing to entertain the appeal on the ground that the Moonsiff's order was final, or to set aside the order under section 15 of 24 & 25 Vict., c. 104, expressed an opinion that the order was contrary to law, and left it to the Moonsiff to act upon such opinion.	727
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—, SUIT FOR DECLARATION OF— <i>Raising Issues during the hearing.</i>] The plaintiff sued for declaration of her title to property, of which the defendant was in possession, but of which she produced the title-deeds in favor of herself. Held, the onus was on the defendant to disprove the plaintiff's title. On the evidence, the defendant wished to raise issues as to the unchastity and inability of the plaintiff to succeed, and as to her suing on behalf of another person, not having alleged that she was doing so, neither of which matters were referred to in his written statement; but leave to raise them was refused, and the Court held that the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title-deeds in her favor. SWARNAMAYI RAUR v. SRINIBASH KOYAL ...	144
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Per PAUL, J., in the Court below, and per Norman, J., on appeal.—The notes were specially entrusted to D. for the purchase of the Company's paper.	
Per PHEAR, J.—Upon the case put forward by the plaintiff, the transaction was a short loan, and not a bailment, and did not bear the character of a trust. But, upon the evidence, the notes were the property of the bank, and remained so in D.'s hands, and therefore the plaintiff was entitled to recover on behalf of the bank.	
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<i>Held</i> , that such variance could not be allowed, and that the plaintiff must prove his case as laid in the plaint.	
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BENGAL LAW REPORTS.

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Phear, Mr. Justice Mitter, and Justice Sir C. P. Hobhouse, Bart.

SRIMATI MANMOHINI CHOWDHRAIN (PLAINTIFF) v. PREMCHAND ROY (DEFENDANT.)*

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July 13.

Act VI of 1862 (B. C.), ss. 9, 10, 11—Act VIII of 1869 (B. C.), ss. 37, 38, 41 (1) — Standard Measurement Pole — Pergunna Pole — Measurement — Jurisdiction of Collector — Appeal.

Per KEMP, PHEAR, MITTER, and HOBHOUSE, JJ.—When the right of a proprietor to make, under section 9, Act VI of 1862 (B. C.), a measurement of a

* Special Appeals, Nos. 2299, 2300, and 2306 of 1869, from the decrees passed by the Officiating Judge of the 24-Pergunnas, dated the 30th June 1869, affirming the decrees of the Deputy Collector of that district, dated the 8th March 1869.

(1) *Act VIII of 1869 (B. C.), Section 37.*—“If any person intending to measure any land, which he has a right to measure, is opposed in making such measurement by the occupant of the land ; or if any under-tenant or ryot, having received notice of the intended measurement of land held or cultivated by him, which is liable to such measurement, refuses to attend and point out such land, the person claiming the right to measure such land may apply to establish his right to measure such land in the Court which would have jurisdiction in case such suit had been brought for the recovery of such land, and such Court shall hear and determine the right to make such measurement, and, if the case shall so require, shall make an order enjoining or excusing the attendance of any such under-tenant or ryot. If any under-tenant or ryot, after the issue of an order enjoining his attendance, neg-

lects to attend and to point out the land, it shall not be competent to him to contest the correctness of the measurement made, or any of the proceedings held, in his absence.”

Section 38.—“If the proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure, or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands, or any part of the lands comprised therein, such proprietor or other person may apply to the Court which would have had jurisdiction in case a suit had been brought for the recovery of such lands, and such Court thereupon, and on the necessary costs being deposited therein by the applicant, shall order such lands to be measured, and shall cause a copy of such order to

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tenure is disputed, solely on the ground that the pole with which the measurement is attempted to be made is not the standard pole of measurement of the pergunna, as provided in section 11, and the parties are at issue as to what is the length of the standard pole, the Collector has jurisdiction to enquire into and decide as to the true length of the standard pole.

COURT, C. J., and BAYLEY and JACKSON, JJ., *contra*.

Per BAYLEY, KEMP, JACKSON, PHEAR, MITTER, and HOBHOUSE, JJ.—If the Collector has jurisdiction, his order is appealable.

THE following questions were referred by MACPHERSON and MITTER, JJ., to a Full Bench, *viz.* : “When the right of a proprietor to make, under section 9, Act VI of 1862 (B. C.), a measurement of a tenure is disputed, solely on the ground that the rod with which the measurement is intended or attempted to be made is not the standard pole of measurement of the pergunna (as provided in section 11), and the parties are at issue as to what is the length of the standard pole, has the Collector jurisdiction to enquire into and decide the question as to what is the true length of the standard pole? And if the Collector does decide the question, is there any appeal from his decision?”

The questions turned upon the construction of the following sections of Act VI of 1862 (B. C.):

Section 9.—“Every proprietor of an estate or tenure, or other person in the receipt of the rents of an estate or tenure, has a right of making a general

be transmitted to the Collector in whose jurisdiction the lands are situate, together with the sum so deposited for costs; and the Collector shall thereupon proceed to measure such lands, and shall ascertain and record the names of the persons in occupation of the same; or on the special application of the proprietor or other person aforesaid, but not otherwise, shall proceed to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable. If after due enquiry the Collector shall be unable to cause such lands to be measured, or to ascertain or record the names of the persons in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures

in such lands, or any part thereof, then, and in any such case, such Collector may declare the same to have lapsed to the party on whose application such enquiry may have been made. If any person within fifteen days after such Collector shall have recorded the name of such person as being in occupation of such land or any part thereof, or shall have declared a tenure to have lapsed, shall appear and show good and sufficient cause for his previous non-appearance, and satisfy such Collector that there has been a failure of justice, such Collector may, upon such terms or conditions as may seem fit, alter or rescind such order according to the justice of the case.”

Section 41.—“All measurements made under this Act shall be made according to the standard pole of measurement of the pergunna in which the land is situated.”

survey of the lands comprised in such estate or tenure, or any part thereof, unless restrained from doing so by express engagements with the occupants of the lands. If any person intending to measure any lands, which he has a right to measure, is opposed in making such measurement by the occupant of the land; or if any under-tenant or ryot, having received notice of the intended measurement of land held or cultivated by him, which is liable to such measurement, refuses to attend or point out such land, such person may make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under Act X of 1859, and shall pass a decision either allowing or disallowing the measurement, and, if the case so require, enjoining or excusing the attendance of any such under-tenant or ryot. If any under-tenant or ryot, after the issue of an order enjoining his attendance, neglects to attend and to point out the land, it shall not be competent to him to contest the correctness of the measurement made, or any of the proceedings held, in his absence."

Section 10.—"If the proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure, or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rents in respect of the lands, or any part of the lands comprised therein, such proprietor or other person may petition the Collector in respect of the lands which he cannot measure as aforesaid, and the Collector shall thereupon, and on the necessary costs being deposited with him by the applicant, proceed to measure the lands and to ascertain and record the names of the persons in occupation of the same; or, on the special application of the proprietor or other person aforesaid, but not otherwise, shall proceed to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable. The provisions of section 67 of Act X of 1859 shall apply to any proceeding of the Collector instituted under this section. If after due enquiry the Collector shall be unable to measure the land or to ascertain or record the name of the person in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands, or any part thereof, then, and in any such case, he may declare the same to have lapsed to the party on whose petition he has made the enquiry. If any person, within fifteen days after the Collector shall have recorded the name of such person as being in occupation of such lands, or any part thereof, or shall have declared a tenure to have lapsed, shall appear and show good and sufficient cause for his previous non-appearance, and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms or conditions as he may think proper, alter or rescind his declaration according to the justice of the case. Save as aforesaid, the decision of the Collector on all matters enquired into and determined by him under this or the last preceding section shall be final, unless the same shall be

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1870 reversed on appeal therefrom to the Civil Court. Such appeals shall lie to the Zilla Judge or to the Sudder Court, subject to the provisions and conditions contained in sections 160 and 161 of Act X of 1859."

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Section 11.—"All measurements made under this Act shall be made by the standard pole of measurement of the pergunna in which the land is situated."

The questions were referred with the following remarks by
 MACPHERSON, J.—In the present suit, the defendant did not dispute the plaintiff's right to measure, but opposed him in making the measurements, because the rod with which he intended to measure was not (the defendant alleged) the standard pole of measurement of the pergunna.

The Deputy Collector went into the question as to what was the true length of the standard pole of the pergunna, and decided that question.

Against this decision the plaintiff appealed to the Judge, who held that no appeal would lie, as the Deputy Collector's decision was final, as ruled by a Division Bench of this Court in *Tarucknath Mookerjee v. Meydee Biswas* (1).

In special appeal it is contended, *firstly*, that the decision referred to is wrong, and that an appeal did lie to the Judge; and, *secondly*, that if there was no appeal to the Judge, the Deputy Collector acted without jurisdiction in deciding the question as to the length of the measurement rod.

In two cases—*Ramanath Rakhit v. Muchiram Paramanick* (2) and *Brajuhisor Sen v. Kasim Ali* (3)—it has been held that no appeal lies to the Judge, and that the Collector has no jurisdiction to decide what is the standard pole.

In two earlier cases—*Tarucknath Mookerjee v. Meydee Biswas* (1) and *Rakhal Doss Mookerjee v. Tunoo Paramanick* (4)—it has been held that the Collector has jurisdiction to decide what is the length of the standard pole, but there is no appeal from his decision.

For myself I incline to the opinion that, according to the true construction of sections 9, 10, and 11 of Act VI of 1862, B. C., the Collector ought to decide what is the standard pole, and that there is an appeal from his decision. It

(1) 5 W. R., Act X Rul., 17.

(2) 3 B. L. R., App., 63.

(3) 3 B. L. R., App., 78.

(4) 7 W. R., 239.

seems to me that, inasmuch as section 11 expressly directs that all measurement shall be made by the standard pole of measurement of the pergunna in which the land is situated, the fact that it is intended or attempted to measure with a pole other than that which is the standard of the pergunna, is a very good reason for "disallowing the measurement" within the meaning of section 9.

I would refer the case for the decision of a Full Bench.

Baboo *Kalimohan Das* for the appellant.

Baboos *Upendra Chandra Bose* and *Mahendra Lall Seal* for the respondents.

The following were the opinions of the learned Judges of the Full Bench :—

HOBHOUSE, J.—The plaintiff, in this instance, sought to measure, as zemindar, certain lands held by the defendant, proposing to use in that measurement a rod of 80 cubits in length. The defendant, the ryot, opposed the measurement on the ground that the rod with which the plaintiff was entitled to measure was a rod not of 80 cubits but of 90 cubits in length.

The zemindar, meeting with opposition to his intended measurement, applied to the Collector, basing his application upon the provisions of section 9, Act VI of 1862 (B. C.), and prayed the Collector to permit him to measure the defendant's land with a rod of 80 cubits, averring that that was the *Procholit* (প্ৰচলিত), or prevalent rod of the pergunna. The defendant opposed the plaintiff's application, on the ground that the *Procholit* (প্ৰচলিত), or prevalent rod of the pergunna was not a rod of 80 cubits, but was a rod of 90 cubits.

The Collector tried the case between the parties, after evidence had been adduced on either side, and passed a decree directing that the measurement might proceed, the plaintiff (the zemindar) being directed to use a rod of 90 cubits in making such measurement.

The plaintiff appealed to the Judge against this decision, and

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the Judge dismissed the appeal, on the ground that, under the rulings of this Court, no appeal lay to him from the decision of a Collector in so far as that decision declared what was the standard pergunna rod with which a measurement was to be made.

A special appeal was preferred to this Court, and the Judges of the Division Bench of this Court before whom the appeal was preferred, referred this and the other special appeals before them to a Full Bench of this Court.

The material parts of the sections of Act VI of 1862, B. C., with which we have to do in these appeals, are, I think, the first part and the general tenor of section 9 of the Act, that part of section 10 which refers to the appellate jurisdiction of the Courts, and the provisions of section 11.

The first part of section 9 is declaratory, and it lays down that "every proprietor of an estate or tenure, or other person in receipt of the rents of an estate or tenure, has a right of making a general survey and measurement of the lands comprised in such estate or tenure, or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands." Then the section goes on to say: "if any person intending to measure any land which he has a right to measure is opposed in making such measurement by the occupant of the land, such person may make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under Act X of 1859, and shall pass a decision either allowing or disallowing the measurement."

Then by the last clause of section 10 it is provided that "save as aforesaid" *i. e.*, saving certain matters with which we have nothing to do in this case, "the decision of the Collector on all matters enquired into and determined by him under this and the last preceding section" (*i. e.*, section 9) "shall be final, unless the same shall be reversed on appeal therefrom to the Civil Court. Such appeals shall lie to the Zilla Judge or to the Sudder Court" subject to certain provisions.

Then section 11 declares generally that "all measurements made under this Act shall be made by the standard pole of measurement of the pergunna in which the land is situated."

The pleader on the part of the special appellant and the pleader on the part of the special respondent both contend that the Collector has jurisdiction to enquire and to determine, for the purpose of the measurement prescribed by section 9, what is the standard pole of measurement of the pergunna; and the only point on which these pleaders differ is the second point submitted for our decision, namely, the point as to whether, when the Deputy Collector has decided this question, there is any appeal from his decision. I really therefore do not know upon what the contention is based when it is said that the Collector has no jurisdiction to determine in such a case as this, as to what is or what is not the standard pole of measurement of the pergunna. I can only gather the objections from certain recorded opinions of Division Benches of this Court, to which I shall now *seriutim* refer.

The first is a case of *Taruchnath Mookerjee v. Meydee Biswas* (1). In that case it was held that the order of the Collector under section 11, Act VI of 1862 (B. C.), was not appealable; and it further seems to have been held that so much of the decision of the Collector, in a case like the one we have before us, as declared what the standard pole of measurement was, was in the nature of an order and not of a decision, the Collector being, it was said, the depositary of the standard pole of the pergunna, and it being therefore exclusively within his province to declare what that standard pole was.

This decision is followed up by the same Judges in another case of *Hakhal Doss Mookerjee v. Tunoo Paramanick* (2). In this case it was said that the Collector had come to a judicial decision upon an issue properly raised as to what was the standard pole of measurement. The zemindar had appealed to the Judge upon this question of the standard pole, and the Judge had given a judgment upon the question. This Court held that the Judge had no jurisdiction to give any such judgment, and the learned Judges seem to have held that this was so, because, in the first instance, there was no provision in section 11 giving an appeal to the Judge upon the question of the standard pole of measure-

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ment of the pergunna, and because that question would seem to be one of which the judicial determination would more properly arise at the time of executing the award of the Collector, and therefore the Judges thought that the decision of the Deputy Collector as to the standard pole of measurement was not a matter open to appeal, and they dismissed the special appeal before them.

Then in a decision of *Ramanath Rakhit v. Muchiram Paramich* (1), a Division Bench of this Court, in which one of the Judges who had been a Judge in the Division Benches in the cases above mentioned, took a somewhat different view of the law, and came to a determination that neither the Collector nor the Judge, on appeal from the decision of the Collector, had any jurisdiction to determine what was the standard pole of measurement of the pergunna. The Judges were of opinion that "the functions of the Collector, as well as the provisions for appeal, were strictly defined in the 9th and 10th sections of the Act, and that the direction contained in section 11 was one obligatory on the zemindars or persons making the measurement; but that it was not for the Collector to lay down *a priori* in orders made under section 9 with what pole the measurement was to be made, but that all questions arising out of the pole with which the zemindar might measure must be reserved for after proceedings when any action was taken upon the result of the measurement obtained." And the Judges were of opinion "that the order of the Collector ought to be cut down to an order allowing the zemindar to measure, and that the responsibility of measuring with the proper standard must be left entirely to the zemindar." "The authority," the Judges remark, "given to the Collector in this matter, vexatious as is the nature of the proceedings, seems to be strictly limited to enabling the zemindar to carry out the power, which is supposed by law to reside in all proprietors, of measuring the lands within his estate. It can matter very little to the ryot by what standard his lands may be measured, because the mere measurement does not conclude either him or the landlord as to any further question."

The decision was followed in *Brajakisor Sen v. Kasim Ali* (1) in which I was one of the Judges. Mr. Justice Bayley concurred in the judgment which I delivered on that occasion ; but the reasons for it were given by myself, and I cannot, therefore, of course say to what extent those reasons were concurred in by my learned colleague. I was then of opinion that, had the case before us "been a case of application for measurement under section 10 of the Act, the Collector might have had jurisdiction to declare the length of the standard rod, and the Judge might have had jurisdiction to entertain and determine an appeal from the Collector's decision on this point. But the application here was an application under the provisions of section 9, and in the words of the law the Collector was bound to proceed to enquire into such application and pass a decision either allowing or disallowing the measurement. The point, therefore,—and the sole point—before the Collector under the provisions of section 9, was whether the measurement should be allowed or not, and there was not and could not be before the Collector the point as to the length of the measurement rod, because, until the zemindar had been permitted to measure, and had proceeded to measure, there could be no issue as to the measurement rod that he was to be permitted to use."

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These are the decisions in favor of the contention that the Deputy Collector has no jurisdiction to enquire into the question of the standard pole of measurement. But, on the other hand, there is a case of *Mackintosh v. Koylas Chunder Chatterjee* (2) which held a contrary doctrine. This goes to the full extent of declaring as well that the Collector has jurisdiction to enquire into such a question, as that an appeal will lie to the Judge on such a question against the decision of the Collector.

On re-considering the whole question, I have come to the conclusion that the answer to the questions before us should, in both cases, be made in the affirmative. I think that this decision must be given not from any consideration outside the law, such as it seems to me were many of those which influenced the Judges in the cases I have quoted, but I think that, within the

(1) 3 B. L. R., App., 78.

(2) W. R., 1864, Act X Rul., 59.

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exact terms of the law the jurisdiction lies with the Collector, and the appeal lies to the Judge. I observe that every zemindar may measure unless he is restricted by express engagement from measuring; then the law seems to me to say, that if the zemindar goes to that which, in the first part of the law, he has been declared entitled to do, namely, goes to exercise his rights to measure, and if he is opposed in making such measurement by the occupant of the land, then he may make an application to the Collector, and the Collector shall enquire into and determine the case. It is the opposition then of the tenant to the measurement which gives the zemindar his cause of action, and it would seem to follow that it would be the subject-matter of the opposition which would form the case between the parties on which the Collector was to determine whether there should be measurement or no measurement.

Then this opposition on the part of the tenant is not declared to be opposition on any one or more particular grounds, such as that the zemindar was restrained by express engagement with the occupant from the measurement, or that generally the zemindar had no right to measure and so forth; but it is declared to be opposition generally and without specification of grounds, so that it is hard to see why, if the Collector has jurisdiction to determine for measurement or the contrary, when the opposition of the tenant is based upon one ground, the Collector should not equally have such jurisdiction when the opposition is based upon another ground. It is, I would repeat, the opposition generally, and on whatever ground it may be based, which gives the cause of action, and that opposition once made, the Collector, it seems to me, is bound to determine whether that opposition is justified or not, on whatever ground he may find it to be based, so that he may eventually determine whether the measurement may proceed or not.

It has been suggested to me that the opposition to which the law has reference must be to give the Collector jurisdiction on opposition in the shape of a denial of the zemindar's right to measure, but as I read the law there is no such restriction in it.

The law simply says that "if the zemindar is opposed," not on this ground or on that ground, but "is opposed" generally, then

he, in making the measurement, may apply to the Collector, and the Collector shall enquire into and pass a decision allowing or disallowing the measurement, so that it seems to me, that if the zemindar is opposed on any ground by the occupant in making the measurement, whether it be on ground such as I have above referred to, or the ground in the matter before us, namely, the ground that the zemindar desires to use that as the standard pole of measurement which is not the standard pole of measurement, then I think that the law distinctly declares that the zemindar is at liberty to make application to the Collector, and the Collector must proceed to enquire into the case and to pass a decision either allowing or disallowing the measurement. And so in this case, as Mr. Justice Macpherson has suggested in his order of reference, I think that when the Deputy Collector had determined that the zemindar had applied to measure with a pole which was not the standard pole of measurement of the pergunna, then the Collector should, perhaps, more properly have given a decision disallowing the measurement. At the same time, I am not prepared, and it is not necessary, that I should say that the Collector might not give the decision that he has given in this case, namely, allowing the measurement but only allowing it on terms. If the Collector had jurisdiction, as I think he had, either to allow or to disallow the measurement in this case, then also I think that the words in the latter part of section 10 are conclusive on the point, that an appeal in such a matter will lie to the Judge, because the words of the law are, that "the decision of the Collector on all matters enquired into and determined by him under this or the last preceding section (*i. e.*, section 9), shall be final, unless the same shall be reversed on appeal therefrom to the Civil Court."

It is said, however, that there is no appeal, because the Collector is the depositary of the standard pole of measurement, and it is therefore exclusively within his province to declare what the standard pole is.

This argument, however, is I think based on an assumption that that is the fact which is not always the fact, and I will venture further to say, that it is a begging of the whole question. It is possible, and in fact it seems to be generally the case, and

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my own observation and experience is that it is the case, that the Collector is in one sense the depositary of a pole of measurement of the pergunna, but it does not at all follow that because he is sometimes, and under certain circumstances, the depositary of such a pole, that it is therefore the standard pole, or that he should always be the depositary, nor that, if he be always the depositary, he must also be exclusively the judge to declare what the standard pole is.

The same experience which has taught me that the Collector is generally the depositary of a pergunna pole of measurement has also taught me that this pole has emanated, in most instances, from the zemindar, and has been filed for record in the Collectorate behind the ryot's back, and without his knowledge and consent; that such pole is not filed for record in the case of every pergunna, and that even when it has been so filed it has often been tampered with.

But even if the Collector were invariably, or whenever he may be, the depositary of a standard pole of measurement, that pole might, and perhaps in every case ought, on production of the record of it, to be at once held to be the pole by which only a measurement should be effected, but that, it seems to me, would follow not because the Collector is the judge of the standard pole *qua* Collector, but because his record when produced is (if it is) conclusive evidence of what the standard pole is. And, indeed, I find nothing in the law declaring the Collector to be "exclusively the judge" of the standard pole.

I remember well a suit in which, on the evidence, the standard pergunna pole was part of a certain door-post in the house of a certain zemindar, and I imagine that, in all cases, the question of what is the standard pole must be a question of evidence.

It is however again said that the Collector has no jurisdiction to determine this point, because none is given by the provisions of section 11 of the Act. Those provisions, however, in my judgment, are simply declaratory. They simply declare what shall be the rod by which the measurement under the Act shall be made; and although those provisions do not declare who is the person to determine what the standard pole of measurement is, neither on the other hand do they forbid the Collector to be

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provisions of section 11, which peremptorily lays down that " all measurements made under this Act shall be made by the standard pole of the pergunna in which the lands are situated." When a particular right is created or declared by a particular law, every act done in the exercise of that right must be necessarily considered as an act done under that law, and it must, therefore, be done in the mode which that law prescribes. In the present case we find that the landlord is authorized to measure his lands by one part of Act VI of 1862 ; but by another part of that very Act it is peremptorily laid down that all measurements made under it must be made in a particular manner. How then can it be said that the measurement made in the exercise of such a right is not a measurement made under Act VI of 1862, or that such a measurement can be made in a manner different from that which that Act requires? Such a construction would, in my opinion, completely nullify the provisions of section 11 ; for, if the landlord is entitled to measure his lands with any arbitrary rod of his own selection, where was the necessity for making a provision to the effect that all measurements made under the Act, which gives him that right must be made by a fixed pole, namely, the standard pole of the pergunna ? The right to do an act is, in my opinion, inseparably from the mode in which that act is required to be done ; and if this is once conceded, it would follow, as a matter of course, that every measurement made by a landlord, under the power vested in him by the first part of section 9, must be considered as a measurement made under the Act of which that section is a part, and it must, therefore, be made by the standard pole of the pergunna, and by the standard pole of the pergunna only. In the next place, the Collector is required by the second part of section 9 to enquire into the case in the manner provided for suits under Act X of 1859, " and then to pass a decision allowing or disallowing the measurement," and it is further declared by the last portion of section 10 that " the decision of the Collector on all matters enquired into and determined by him" under section 9 " shall be final unless reversed on appeal therefrom to the Civil Court." It is clear from these provisions that the decision of the Collector under section 9 has the full force of a judicial decree between the parties, and

every measurement made by the landlord on the strength of such a decree must be considered in the same light as if it were made in execution thereof. Whether this measurement is made with or without any further assistance from the Collector does not seem to me to be very material; for the Collector would be bound to give such further assistance if the landlord is still opposed by the tenant in making such measurement. If then we are to consider that this measurement is a measurement made in execution of a decree passed under section 9, can it be possibly contended that it is not a measurement made under Act VI of 1862, when it is perfectly clear that the said section is nothing but a part of that Act? And if this proposition is once admitted, does it not necessarily follow that the landlord is bound to make the measurement according to the provisions of section 11, which says that "all measurements made under Act VI of 1862 must be made by the standard pole of the pergunna?" If the measurement made under the provisions of section 9 is not a measurement under Act VI of 1862, I am aware of no other law under which such measurement could be made so long as that Act was in force.

The preceding observations are, I believe, sufficient to show that every measurement is made under Act VI of 1862, and that the landlord is therefore bound to make that measurement by the standard pole of the pergunna under the provisions of section 11 of that Act. Let us apply this conclusion to the determination of the particular question under our consideration. The landlord in this case comes before the Collector on the allegation that he wanted to measure the lands held by the defendant with a particular rod, which he asserted was the rod current in the pergunna, but that he was opposed in making such measurement by the defendant.

The defence set up was that the rod mentioned in the plaint was not the current rod of the pergunna, and that the plaintiff had no right to measure the lands in question with such a rod. In this state of the pleadings, the only point in issue between the parties was whether the rod alleged by the plaintiff or that alleged by the defendant was the standard pole of the pergunna within the meaning of section 11. Now if the landlord is

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bound to make the measurement by such a pole, as I have already shown in the previous part of my judgment, the Collector is bound to determine this issue before he can pass a decision allowing or disallowing the measurement. If the rod with which the plaintiff sought to measure the lands in question was not the standard rod which he was bound to use, the defendant was fully justified in resisting the measurement upon that ground; and the Collector would be necessarily bound to determine what the proper rod ought to be before he can decide the case one way or the other. It has been said that there is but one question which the Collector has jurisdiction to decide under section 9, namely, whether the plaintiff has a right to measure the lands or not. With reference to this argument, I wish to observe, in the first place, that there is nothing in the words of that section to restrict the number of questions to be decided to one. All that it says is, that "the Collector shall proceed to enquire into the case in the manner provided for suits under Act X of 1859, and then pass a decision either allowing or disallowing the measurement." The number of questions to be decided must necessarily depend upon the pleadings in each particular case, and the Collector is therefore bound to determine every one of them so long as such determination is essential to the right determination of the case itself. Then, again, the last portion of section 10 declares that "the decision of the Collector on all matters arising in suits under section 9 shall be final, &c."; and this language is sufficient to show that the Legislature must have thought that the Collector would have to enquire into more "matters" than one in such suits. But be this as it may, it seems to me to be perfectly clear that the right of measurement given to the landlord by Act VI of 1862 is necessarily subject to the limitations prescribed by section 11 of that Act, and the question of the rod must therefore be considered as inseparable from that of the right itself. When the law creates a particular right, and at the same time requires that that right should be exercised in a particular manner, the Court, through the assistance of which that right is sought to be enforced, is bound to see that it is exercised in that manner, and in that manner only. In the case now before us, the only right which the law has vested in the

landlord is to measure the lands held by his tenants with the standard pole of the pergunna, and the Collector would be certainly wrong if he allows him to measure those lands with any other pole. And yet this would be the inevitable result if we hold that he has no jurisdiction to determine what this standard pole is when that question is distinctly raised before him.

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Again, the last portion of section 9 declares that, "if an under-tenant or ryot, after the issue of an order enjoining his attendance, neglects to attend and to point out the land, it shall not be competent to him to contest the correctness of the measurement made, or any of the proceedings held in his absence." But if the landlord is to be permitted to measure the lands with any rod he likes, I am at a loss to understand why the latter should be visited with such a severe penalty as this for refusing to attend during such a measurement. The object of the measurement must be presumed to be the ascertainment of the exact quantity of land in the occupation of the tenant, and this object can be directly attained by the measurement, only when it is made with the proper rod, that is to say, with the standard rod of the pergunna in which the lands are situated. Why, then, the ryot might justly say, am I to waste my time in waiting upon my landlord, when I see that he is going to measure my lands with an improper rod? And why, again, is he to be precluded from contesting the correctness of that measurement, or of the proceedings connected with it, if he refuses to attend? The legislature might have, if it liked, allowed the landlord to measure the lands with any arbitrary standard of his own, leaving the question of the proper rod, as well as that of the area which depends upon it, to be determined in some future litigation between him and the tenant. But when it positively declares that all measurements made under the Act shall be made according to the standard pole of the pergunna, there can be no doubt whatever that it had some object in view in making such a provision. Suppose, for instance, that the landlord wishes to measure the lands according to the mode of measurement prevalent in Turkey. The Bengal ryot is not expected to understand anything of such a process of measurement, and yet, as the law stands, he is to be visited with the severe

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penalties above referred to, if he refuses to attend while his landlord is going through a process which is perfectly unintelligible to him. It has been said that the words "it shall not be competent to him to contest the correctness of the measurement or of any proceedings held in his absence," do not mean that he will not be permitted to raise the question of the rod in any future litigation. I confess that I am by no means prepared to admit the correctness of this construction. The words "correctness of the measurement" evidently mean the correctness of the result arrived at by the measurement, and the section makes no exception whatever as to any particular ground upon which the correctness of this result can be impugned. The words are absolute as they stand, and the recusant ryot would be precluded, in my opinion, from contesting the result of the measurement, whether it be upon the ground that an improper rod has been used, or upon any other ground whatsoever. At any rate, it seems to me to be perfectly clear that the words "or any of the proceedings held in his absence" must necessarily cover all possible grounds of objection; for, as these proceedings evidently refer to those held after the decision of the Collector, they must, as a matter of course, include the matter of the rod with which the measurement is made subsequent to that decision.

The above view appears to me to be strongly corroborated by the provisions of section 10. According to this section the Collector himself is required to make the measurement, and it follows, therefore, that this measurement must be considered as a measurement made under the Act. If then a question is raised before the Collector as to what the standard pole of the pergunna is, he would be bound to determine that question before he can proceed with the measurement; for this measurement, being a measurement under the Act, must be made by the standard pole of the pergunna under the express provisions of section 11. It has been said that because the Collector would be bound to enquire into the length of the measuring rod in suits arising under section 10, it does not necessarily follow that he would be bound to do the same thing in suits arising under section 9. But the two sections are evidently cognate to one another. The right of measurement claimed under both the sections is one and the

same, and, indeed, it is in the first part of section 9 that that right is declared for the purposes of both the sections. The only material difference that I find between the suits instituted under these two sections is, that in the one case the landlord knows who his tenants are, whilst in the other he is obliged to invoke the assistance of the Collector to ascertain them for him. But this circumstance cannot, in my opinion, constitute any valid reason for making any distinction between them so far as the particular point now before us is concerned. If the right claimed in both cases is one and the same, it cannot be reasonably supposed that the legislature intended to allow that right to be exercised in two different modes under two sections so intimately connected with one another.

It has been said that there is no such thing in existence as the standard pole of the pergunna. There may be some foundation for this argument if we are to take the word standard in its strictest signification. But as we have no right to ignore the provisions of section 11 altogether, we must put the best interpretation upon the words of that section we can. I am inclined to think that those words were intended to signify the customary pole used in the pergunna for the purpose of measuring lands held or occupied by under-tenants and ryots. This view is fully supported by the decision of a Division Bench of this Court in *Mackintosh v. Watson* (1), and I may also add that it is in this sense that the words standard pole of the pergunna have been uniformly understood by all persons concerned, including the parties to the present litigation. But be this as it may, I do not think that this argument can in any manner affect the question now before us. The law requires that all measurements under Act VI of 1862 shall be made by the standard pole of the pergunna, and if no such pole is in existence, the Collector would be bound to disallow the measurement upon that ground, leaving the party aggrieved to apply to the legislature for the abrogation of a law which is incapable of being carried out in practice.

It has been further said that the Collector himself is the sole

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custodian of the standard poles of measurement in use in the different pergunnas situated within his collectorate, and as every question relating to such poles of measurement can only be determined by the inspection of his own records, every such determination must be taken to be a determination made in his ministerial, and not in his judicial, capacity. I confess that I am altogether unable to accede to the correctness of this proposition. There is no law that I am aware of which says that the Collector is the custodian of such poles, or that the records of his office are the only evidence upon which the length of such poles can and ought to be determined. Those records are frequently referred to, it is true, whenever there is a dispute about the length of the measuring rod; but there is no law which says that they are to be taken as conclusive evidence for the determination of such disputes. From what materials, it may be asked, have those records been prepared? And who were the parties by whom those materials were supplied to the Collector? Every one who has any experience on this subject will admit that they are nothing more nor less than the statements made to the Collector from time to time by the zemindars themselves; and even if we allow them to be admitted in evidence against the ryots who were no parties to them, either on the ground of their antiquity, or on the ground that they have been admitted as such by a long and uniform course of practice, I do not see the slightest reason for holding that we are bound to accept them as conclusive evidence on a question of such vital importance. But assuming, for the sake of argument, that they are entitled to the fullest weight which is sought to be attributed to them, I am still at a loss to understand why the decision of the Collector, on the length of the standard pole, should be considered as a decision passed in his ministerial capacity, merely because that decision is based upon such materials. The records of a Court of Justice, or of any other public office, might be legally entitled to be considered as conclusive evidence on a particular question of fact; but I am utterly at a loss to understand why the determination of that question should be held to be a determination made in a ministerial capacity, merely because it is made on the strength of such records. The officer making the determination might mis-

interpret those records in various ways, or he might mistake some other records for them, and it would, therefore, be certainly wrong to contend that such a determination does not require any judicial discrimination. Again, if the length of the measuring rod is to be at all determined by the Collector before he passes a decision under section 9, this determination must be considered as a determination made during the trial of the suit instituted under that section. How then can it be said that a part of the proceedings held by the Collector during the trial of such suits is to be taken as a proceeding held judicially, and that another part of those very proceedings, relating to a question of the highest importance to the parties, is to be considered as a proceeding held in his ministerial capacity. At what particular stage of the trial, it may be asked, does the Collector cease to be a judicial officer, and what reasonable ground is there for making such a distinction? It has been said that the order passed by the Collector on the length of the measuring rod is to be considered as an order not passed in the course of the trial held under section 9, but as a separate order passed under section 11. I am of opinion that there is no force whatever in this argument. There is nothing in the wording of section 11 which provides for the passing of any ~~separate~~ order of any kind whatever. All that it says is, that every measurement under the Act shall be made by the standard pole of the pergunna; and if we read these words apart from those of sections 9 and 10, there is not the slightest ground for holding that the Collector is to pass any order whatever as to the length of the measurement rod. If the provisions of section 11 do not apply to the suits brought under sections 9 and 10, there is no other section of Act VI of 1862 to which those provisions can apply; and this one fact is sufficient to show that the three sections must be read together as constituting the entire law on the subject of measurement.

Lastly, I wish to observe that the question of the measuring rod is the only question which can arise in the majority of suits instituted under sections 9 and 10. The abstract right of the plaintiff to measure, apart from the question of the rod with which that measurement is to be made, is put in issue in those cases only in which his right as a landlord is denied *in toto*, or

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in which an express engagement barring such measurement is put forward as a defence. These cases, it must be admitted, are comparatively rare. Why then are we to suppose that the legislature went to the length of providing for such a class of suits as those contemplated by sections 9 and 10, if it did not intend to provide for the disposal of the only question which ordinarily arises between landlords and tenants in this country in connection with the subject of measurement. It has been said that the decision of this question might be conveniently deferred until a suit for enhancement is actually brought by the landlord. I confess that I am wholly unable to find any valid foundation for this argument. If the question of the measuring rod is determined in the present suit and the lands are actually measured with the proper rod, thus determined, it might be reasonably expected that the parties would come to an amicable settlement between themselves and thereby obviate the necessity for further litigation either for enhancement or for abatement of rent. Why then are we to leave an important question like this unsettled and thereby multiply litigation, when it is perfectly clear from the above remarks that that question can be determined as satisfactorily in the present suit as in any other suit which the parties might afterwards choose to bring against one another. Surely the duty of the Court is to prevent multiplicity of suits if it can properly do so without usurping jurisdiction, and I see nothing in the provisions of Act VI of 1862 to justify the contention that the Collector has no jurisdiction to determine the length of the measuring rod in a suit brought under section 9 of that Act.

The next question to be determined in this case is, whether the decision of the Collector, on the length of the standard pole, is appealable or not. With reference to this question, I have but very little to say. I have already shown that the Collector is fully competent to determine the length of the standard pole in his judicial capacity, and it would therefore follow that this determination would be liable to be appealed to the Civil Court under the express wording of the last portion of section 10, which says that "the decision of the Collector on all matters enquired into or determined by him under the last preceding section" (namely

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withstanding that the applicant has the right to measure which is spoken of in the immediately preceding words; if this be so, I can discover nothing in the context to limit its operation in this respect. And, clearly, there may very well be good reasons why the proposed measurement should not be allowed to take place, independently of the general right of the applicant to measure, such, for instance, as may be afforded by the state of the crops. I suppose the legislature intended that the Collector should give effect to these, because it has used words sufficient to endow him with the requisite power, and has said nothing to qualify them. If, then, the Collector may, in coming to his decision, look at matters other than those which bear upon the question whether or not the applicant has a legal right to measure as defined in the 9th section, is the length of the rod, with which it is proposed to measure, one of them? *A priori*, one might certainly be disposed to imagine that it would be of small consequence to the ryot, or to any one else, what particular length of rod the proprietor selected for his unit of measurement. If only the actual length of that rod be known in terms of a given unit, the numerical results obtained by employing it could of course be readily converted into any desired scale by an arithmetical process. The legislature, however, has made it imperative on the proprietor to use a particular unit of measure, for the 11th section declares that, "all measurements made under this "Act shall be made by the standard pole of measurement of the "pergunna in which the land is situated." The purpose of this section is, as it seems to me, to give some sort of protection to the under-tenant or ryot, or occupant of the land. It is clearly implied, I think, in section 9 that it is the duty of the under-tenant or ryot to be present on the occasion of making the measurement, and that he may be in some way bound by that measurement, unless he has earned a right to object to its correctness by having contributed, so far as lay in his power, towards making it accurate. In this view it seems to be only just that he should not be called upon to work with, or to assent to, the use of any other instrument of measurement than one with which he is already familiar; and it appears to me to be part at least of the object of section 11 to secure to him protection in this

respect. If I am right in this opinion, it follows, I think, that the Collector, in the case of any application to him under section 9, is bound to give effect to section 11, and therefore to consider, as an element material to his decision, whether or not the proposed measuring rod is the standard pole of measurement of the pergunna, whenever this question is raised by the opponent of the application. If section 11 is to be disregarded by the Collector, it must become, so to speak, a dead letter, for there is, as far as I know, no other tribunal which can enforce it; and it will be hardly disputed that the recognized rules of construction forbid our coming to such a conclusion as this if we can reasonably avoid it. And, indeed, I am unable to perceive any reason why section 11 should be excluded from the Collector's consideration in this matter. It is undoubtedly part of the law which the Collector must have before his eyes whenever he entertains an application under section 9. And I cannot find any ground for holding that the only issue which can arise on such an application is the issue whether or not the right to measure, as specified in the first part of the section, exists. On the contrary, as I have already pointed out, the primary meaning of the words of the section seem to me to imply that, in the view of the legislature, there might be a good reason why the Collector should disallow the measurement even though the applicant possessed such right to measure.

But, further, assuming that the right to measure is the only matter upon which the Collector has jurisdiction to adjudicate, it appears to me that the legislature has made the length of the measuring rod an element in it. If section 11 has any operation at all, it necessarily, I think, affects the generality of the words which constitute the definition of the right to measure in section 9. While section 9 says that "every proprietor of an estate, &c., has a right of making a measurement of the lands comprised in such estate unless restrained from doing so by express engagement with the occupants of the lands," section 11, as I understand it, states just as positively, and without any qualification whatever, that every measurement made in exercise of this right "shall be made by the standard pole of measurement of the pergunna in which the land is situated."

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What is this but a limitation on the general right to measure? It appears to me as the effect of the two sections that the proprietor thus obtains a right to measure in a particular mode only; and, consequently, if he proposes to measure in any other mode, he is attempting to do that which the Act gives him no right to do, and upon objection made by the occupant of the land, the Collector ought to disallow the measurement.

Whether, therefore, the Collector can or cannot, under section 9, take cognizance of any other form of opposition to the making of the measurement than a denial of the right to measure, it appears to me in either alternative that the first question put to us must be answered in the affirmative.

It is with great hesitation and diffidence that I have come to this conclusion, because I know that three out of the seven Judges by whom this case has been heard dissent from it; and that circumstance alone necessarily obliges me to distrust the soundness of my own views. Actuated by this feeling I have reconsidered, with my best attention, the sections upon which the question depends; and I am bound to say, that I find myself still unable to put any other construction upon them than that which I first arrived at, and which I have now endeavoured to justify. So far as my knowledge of the English language enables me to speak, I should say confidently, that the framers of section 9 designed to submit to the adjudication of the Collector other issues than the mere right to measure, as that right is in that section defined. The words seem to me very distinctly to enunciate, that the application of a person who has such a right to measure, may, under some circumstances, be properly disallowed by the Collector. I do not forget that common sense (which is sometimes supposed to be quickened in its operation by being veiled under the phraseology of well known juridical writers) requires us to regard the intention of the legislature as the end which judicial interpretation of legislative enactments should be directed to effect. In truth, if the intention of the legislature is manifest, I need no authority to convince me that it furnishes the safest clue to the sense in which the legislature desires particular words to be understood. But, unfortunately, in the instance before us, the language which we are called upon to interpret,

and to give effect to, is itself the only source from which we can gather the intention of the legislature. The task of discovering this intention is therefore none other than that of interpreting the language; and the fulcrum of the lever, which is to remove our difficulty, is without a point of support.

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We are not now concerned with the "standard pole" itself. What may or may not be the standard pole of measurement in any given pergunna must be a mixed question of fact and law, such as admits of being determined in the ordinary way by any tribunal which is properly called upon to entertain it. And it is quite possible that, in some pergunnas, the Collector may have, within his own cutcherry, matter of record or *quasi*-record which may afford conclusive evidence on the point. Some desultory discussion on this topic took place during the argument of the case before us; but I only refer to it here for the purpose of saying that, in my opinion, it is not material to our decision on this reference.

The answer to the second question which has been put to us flows almost immediately from the answer given to the first. If it falls within the jurisdiction of the Collector to hear and determine an objection to the length of the measuring rod, his decision thereon may, by virtue of the last provisions of section 10, be appealed against by an application to the Civil Court, unless it is expressly saved from such appeal; and this it clearly is not. Hence I am of opinion that the second question also should be answered in the affirmative.

JACKSON, J.—We have not had in this case the advantage of argument on both sides, because the vakeel for the defendant, respondent, has joined the plaintiff's, appellant's, vakeel in seeking to obtain from the Court a recognition of the Collector's power to determine judicially the "pole" by which a zemindar is to carry out a measurement ordered under section 9, Act VI of 1862, B. C.

As I have been concerned in several of the decisions which have been cited, I wish, in the first place, to advert to what appears at first sight to be an inconsistency in those decisions, and I feel this the more necessary because I find myself quoted

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by Mr. Justice Macpherson in his referring order as having held in *Ramanath Rakhit v. Muchiram Paramanik* (1) that the Collector had not, and in *Tarucknath Mookerjee v. Meydee Biswas* (2) and *Rakhal Doss Mookerjee v. Tunoo Puramanick* (3) that he had, jurisdiction to decide the point.

In the earliest case, *Tarucknath Mookerjee v. Meydee Biswas* (2), I shortly stated my opinion that the order of a Collector, under section 11, was not subject to appeal, and I rested this opinion on the statement that the Collector was the depositary (as the fiscal chief of the district) of the standard pole of each pergunna, and that his declaration on this point was binding. I believed at that time, and I still believe, that almost everywhere there is, in the Collectorate, an actual standard for each pergunna or part of a pergunna, which the Collector would produce if called upon to do so.

In the next case, in which, as well as in the preceding case, I had the benefit of Mr. Justice Kemp's assistance, I used in giving judgment the word "decision" in respect of the determination by the Collector or Deputy Collector, and, according to the marginal note, we appear to have held that this was a decision without appeal. I would call attention, however, to the words in *Rakhal Doss Mookerjee v. Tunoo Puramanick* (3) near the bottom of the second column. I there speak of the question as to the standard pole as one of which the judicial determination would properly arise in executing the award of the Collector. The word "judicial" appears to have crept in by inadvertence, because in the very next paragraph, over the page, I point out that it is in a suit for enhancement that the parties will have the opportunity of establishing judicially what the standard pole of the pergunna is.

It has thus been my view throughout, though certainly more fully and distinctly stated in the case of *Ramanath Rakhit v. Muchiram Puramanick* (1) that the size of the pole was not a matter to be tried judicially under section 9 of Act VI of 1862, but one to be certified by him as a public officer, or settled in the execution of his award. I have always affirmed

(1) 3 B. L. R., App., 63.

(3) 7 W. R., 239.

(2) 5 W. R., Act X. Rul., 17.

that the real contest on this point must arise when the landlord proceeded to make use of the results of his measurement by enhancing the ryot's rent.

To the opinion thus gradually and maturely formed, I now fully adhere, and I regret to find that the opinion of the majority of this Bench is the other way, because, while a decision affirming my view would have finally disposed of the point (the wording of the recent Act being so much more unmistakeably in favor of that view), the point will inevitably arise again in cases under the Bengal Act VIII of 1869, and the present decision will conclude nobody.

The whole question involves itself into this, what is the connection between section 11 and section 9 of Act VI?

The appellant's argument is that section 11 is to be read in direct bearing upon the declaratory part of section 9 as an express limitation of the zemindar's right to measure; that this right is only a right to measure by the standard pole of the pergunna, and if the ryot can show that the zemindar intends to measure by a pole other than the standard, he puts him out of Court and shows that he is not entitled to the aid of the Collector.

Now, the first idea which presented itself to me, upon this contention, is that, if the legislature meant this, it was so very easy to say so. The provisions relating to measurement in a less stringent form were embodied in the Imperial Act X of 1859, section 26 (1). The Lieutenant-Governor's Council were not

(1) *Act X of 1859, sec. 26.*—"When rent is payable by an under-tenant or ryot at a certain rate or rates according to the quantity of land held or cultivated by him, or when any written engagement, conditioned for the payment of a certain amount of rent on account of land held or cultivated by an under-tenant or ryot, has expired or become cancelled by the sale for arrears of revenue or rent of the estate or tenure in which the land is situate, the person to whom the rent is payable has a right to measure such land for the purpose of ascertaining the quantity of land held by such under-tenant or ryot, as every proprietor of an estate or tenure has a right of making a general survey or measurement of the lands comprised in such estate or tenure unless restrained from doing so by express engagement with the occupants of the lands. If any person intending to measure any land, which he has a right to measure, is opposed in making such measurement by the occupant of the land, or if any under-tenant or ryot, having received notice of the intended measurement of land held or cultivated by him which is liable to such measurement, refuses to attend and point out such land, such person may

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satisfied with those provisions, and they repealed the section as to the Lower Provinces of Bengal, and inserted in the Amending Act three new sections, 9, 10, and 11, of which the first (section 9) is an alteration of the repealed section 26, and the other two contain fresh matter. It is rather remarkable that section 9, while it leaves virtually unaltered the procedure part of the old section, very materially alters the terms in which the right to measure is declared. The original section first laid down the cases in which the zemindar should be entitled to measure the lands of particular under-tenants or ryots, and then affirmed the right to make a general measurement of the lands in his estate, unless restrained, &c. Instead of this the new section 9, striking out the provision for measurement in particular cases, declared a right to make general measurements of the lands comprised in estates or tenures, or any part thereof, unless restrained by express engagement.

Now, as the Bengal Council were altering the form in which the right to measure was declared, if they had intended to limit that right by making it a condition precedent that the zemindar should intend to measure with the standard pole of the pargunna, surely the inference is irresistible that they would have inserted this restriction in section 9 instead of placing it where it is to be found in section 11, with a distinct section intervening. And not only so, but in this case the succeeding parts of the section must likewise have been altered, and provision must have been made for an award upon a dispute as to the pole of measurement; but the section, precisely like section 26, provides two orders for two contemplated cases, *viz.*, where the measurement is opposed, the Collector is to allow or disallow measurement, and where the ryot refuses to attend, is to enjoin or excuse his attendance at such measurement. From the absence of any such words, I am justified in concluding that as the words "enquire

make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under this Act, and shall pass an order either altering or disallowing the measurement, and if the case so require enjoining or excusing attendance of any

such under-tenant or ryot. If any under-tenant or ryot, after the issue of an order enjoining his attendance, neglects to attend, it shall not be competent to him to contest the correctness of the measurement made in his absence."

into the case" occur in both the sections, they mean the same thing in both situations, and that the case to be enquired into is that which the section itself in both cases suggests, namely, in the first class of cases, whether the applicant is entitled to measure, and is not restrained by express engagement from so doing; and in the second, whether the under-tenant is bound to attend on the measurement and has refused after notice. Both sections conclude with the provision that an under-tenant neglecting to attend shall be debarred from contesting the correctness of the measurement made in his absence, and the Amending Act adds the words "or any of the proceedings held." What the precise efficacy of these added words may be, I cannot tell. They cannot refer to the enquiry, because the penalty does not attach until after the issue of an order enjoining his attendance, and the order must follow the enquiry.

Then, it is clear, that no argument can be founded on the use of the words "correctness of the measurement," because they occur in the first Act, which was silent as to the pole, as well as in the Act by which the pole is introduced.

I do not feel myself under any necessity of suggesting the purpose for which the section 11 was introduced into the Act, or in what mode it was to be applied; but I can certainly see nothing which induces me to believe that it was intended, by coupling that section with the last words of section 9, to bind an under-tenant who has absented himself from the measurement as to the pole by which the area of his land is to be determined. What, indeed, is the meaning of the words "standard pole" as used in this section? In what sense is the word "standard" employed? If in its strict technical sense, then the standard must exist somewhere to refer to, and it must be decisive, leaving no room for evidence to be adduced by the parties. But if in a more popular sense, to denote the customary pole, what is the result? Let us suppose that a zemindar in Mauza Gopalpur wishes to measure the lands of a ryot, is not opposed, and measures actually with a *rassi* of 80 cubits; he then proceeds to measure another holding, is opposed, applies to the Collector, obtains an adjudication that the standard is of such dimensions that the *rassi* measures 85 cubits. He then goes on to that case in which the

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1870 ryot absents himself, and, profiting by his absence, the zemindar measures by a *rassi* of 60 cubits, by which result, according to our view of the case, the ryot is bound. Which of these is the correct standard ? and by which of them is the zemindar to measure on the next occasion, as he is bound by law to measure by the standard pole ? Or if three suits, or fifty, are commenced against different ryots, the Collector must determine according to the evidence in each case, and one ryot may succeed in making out a pole of 8, one of 9, and others of 10 cubits ; which of these is the standard pole ? The chittas of a measurement made under this Act should, I take it, set forth that the pole or *rassi* employed had been one of so many cubits or feet, as the case may be, being the standard pole or *rassi* of the pergunna. Now let us suppose the notice and application being silent as to the pole, that the ryot either does not oppose the measurement or contests the right to measure on grounds unconnected with the standard pole, and that in the latter case the Collector has simply affirmed the right to measure. The zemindar proceeds to measure assuming the standard or customary pole to be as above stated. Suppose the ryot then to say, "I do not admit or deny the pole or *rassi* with which you are measuring," and in these circumstances the area is recorded in the chittas,—can it be argued that the ryot would be bound by the measurement so made ? If he signed the chittas he would probably be taken to have admitted that the land measured did actually contain so many bigas measured by a *rassi* or pole of a particular kind but no more. If he did not sign the chittas, I apprehend he would not be bound by them in any particular, but the zemindar would have to prove his measurement. Now, when the law directs that a ryot, absent after notice to attend, shall not be permitted to question the correctness of the measurement made, I conceive it is only intended to place him in the same position as if he had signed the chittas. No difference is made between cases in which the standard has been put in issue, and those in which it has not. Can it be contended that the legislature intended to punish the ryot for his contumacy by allowing an *ex parte* decision against him of a question of which he had no previous notice ?

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But if the question of standard may be so decided, so may other questions, such as rates, the quality of the land, the advantages of position, and even the right of occupancy. For it is contended that because the Act prescribes by what pole measurements shall be made, if the zemindar gives out that he intends to measure by a specified pole and the ryot disputes his liability to be measured with such pole, this gives the Collector jurisdiction to determine judicially, not only whether the zemindar has a right to measure, but also whether the pole by which he intends to measure is the standard pole of the pergunna. But the Act in another place declares that certain ryots have a right of occupancy, hence if a zemindar gives notice that he intends to measure the lands of tenants not having such right, and those of A. B. among them, and if A. B. asserts that he has such right, this by parity of reasoning will give the Collector jurisdiction to determine, on an application to measure, whether A. B. has or has not a right of occupancy; and in like manner if A. B. were described as a ryot not having a right of occupancy, and after an order to attend the measurement, absented himself, and had his land measured under that description, he would be concluded by the entry in the chitta. (2).

Again, section 17, Act X of 1869, declares what shall be grounds for enhancing the rents of ryots having a right of occupancy. Suppose that the zemindar gives notice of his intention to measure the land held by A. B., on the ground, say, that he holds more land than he pays rent for, and the ryot denies this

(1) The following note is appended to the recorded judgment of L. S. Jackson, J. :—“ Of course, it is clear, that if the law declared that the zemindar should have a right to measure by a particular rod at a particular time of year, or to measure the lands of certain ryots, the Collector would have to determine whether the ryot in question belonged to such class, and would order a measurement by such rod, at such time.”

“ Here if the zemindar says he wishes to measure by a rod of

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allegation, is the Collector to try this question also, and yet these questions, all arising out of provisions of the Act, would find a place in a proposition for measurement just as naturally as a declaration of the pole with which, if the measurement was allowed, the landlord intended to measure. And suppose that, after the contest and adjudication, the ryot absenting himself, the zemindar afterwards measured with a different pole from that found by the Collector; or suppose that, after an adjudication by a Deputy Collector in the mofussil upon evidence that 8 cubits made a pole, it turned out that there was a standard pole in the Collector's record of 10 cubits. The illustrations of what this theory would bring us to are endless, and I cannot believe that any such thing was intended by those who framed the Act.

What the legislature designed in enacting the procedure as well as the declaration contained in section 26 of Act X, appears to me very comprehensible and very simple. The last clause of section 17 had declared it to be a ground of enhancing the rent of a ryot having a right of occupancy (and it might also doubtless be a ground for enhancing other ryots under section 13), "that the quantity of land held by him had been proved by measurement to be greater than the quantity for which rent had been previously paid by him." It was consequently necessary to enable zemindars to lay the foundation for such suits. The right to measure was therefore in certain cases (afterwards more loosely) declared, and to provide for cases in which the exercise of the right might be resisted, the Collector was empowered to receive applications and to enquire and after enquiry to allow or disallow the suit. This was the scope of the Collector's enquiry, under section 17 and under the Amending Act.

It is to be observed that all measurements made under section 17 were to be made by a "standard pole," not that Collector was to make them, but to order them to be made by a "standard pole." The zemindar would not be compelled to submit to measurement, nor the

proceedings. For, evidently, according to my reading of the law, the real contest on this point would arise when the zemindar, having assured himself of his ground, gave his notice, and commenced his suit for enhancement.

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But it suits both parties to obtain some expression of opinion as to the real standard, though I greatly doubt whether they contemplate being bound by that opinion. The Judicial Committee of the Privy Council in *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (1) speak of "those summary proceedings touching the fact or the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title." This is a characteristic of Indian litigation; parties continually seek to obtain irregular decisions on a question in dispute by availing themselves of a procedure contrived for a different purpose. Precisely in the same manner, under the guise of an application for a certificate under Act XXVII of 1860, petitioners and opponents both endeavour to lead the Courts (and they often succeed) into an adjudication of the right to property. But it is asked, why are we to remit the parties to another suit when they are before the Collector, and in this case the appellant's vakeel, Baboo Kali Mohan ~~Das~~, pathetically asked our consideration for the poor ryot, the respondent, who asked for a decision now. The answer is that the law does not contemplate and does not allow it.

As for the sake of determining titles to property, so in the case of claims to enhancement of rent, the law prescribes a regular suit upon an *ad valorem* stamp, in which suit all the issues necessary to be determined for a decision upon the right are to be raised, and has allowed application to the Collector upon an eight annas stamp only, for the purpose of having a measurement allowed or disallowed.

We have nothing to do with the policy of the Act, nor, I think, ought we greatly to concern ourselves with the result of our decision, which we are bound to give upon a right construction of the law. But it does add to the strength of my con-

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victions in this case to believe that the decision I propose to give would keep such proceedings within their proper limits, and we should hear less of applications to measure, and the apprehensions of ryots would thus be greatly quieted if extraneous questions were rigidly excluded.

I have stated thus my own views of the matter, but I desire to add that I entirely concur in the judgment of the Chief Justice, which I have had the advantage of seeing, upon the mere construction of the sections and in the answer which he would give to the question put.

The second question whether, if the Collector has authority to determine the pole of measurement in a judicial way, an appeal will lie to the Judge, must of course be answered in the affirmative. This really does not admit of argument.

KEMP, J.—I am of opinion that both questions must be answered in the affirmative. In the case before us the plaintiff, the zemindar, instituted a suit under section 9, Act VI of 1862 (B. C.), claiming the right to measure the land of the defendant.

The defendant did not in any way question the right of the plaintiff on the ground of any contract prohibiting the plaintiff from measuring his lands; on the contrary, the defendant did not dispute the right of the plaintiff to measure, but he opposed the measurement simply because the plaintiff wished to measure the land not by the standard pergunna rod, but by a rod of a smaller dimension. The parties were at issue on the question of the length of the standard rod.

The defendant, I may observe, obtained from the Collectorate the measurement of the standard rod.

Section 9 of Act VI of 1862 gives every proprietor of an estate or tenure, or other person in the receipts of the rents of an estate or tenure, the right to measure.

There is no dispute as to the plaintiff being the proprietor, and his right to measure is admitted, but it is a right which must be exercised properly and not arbitrarily. What did the opposition of the ryot consist in? He opposed the measurement because the zemindar, the proprietor, was about to measure his tenure not by the standard rod of the pergunna but by an

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"a general survey and measurement of the lands comprised in such estate or tenure, or any part thereof, unless restrained from so doing by express engagement with the occupants of the lands." It then provides that "if any person intending to measure any land which he has a right to measure is opposed in making such measurement by the occupant of the land; or if any under-tenant or ryot having received notice of the intended measurement of land held or cultivated by him, which is liable to such measurement, refuses to attend and point out such land, such person may make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under Act X of 1859." It appears to me that this part of the section is to be interpreted by reference to the introductory part, and that the right to make a measurement, unless restrained by express engagement, having been declared, the intention was to provide for the right being disputed, and to give a means of enforcing it. The case which the Collector is to enquire into is a case of a right to measure, and not any case which the person opposing may set up as the ground of his opposition. Here the ground of opposition was, that the rod with which the measurement was intended to be made was not the standard pole of measurement of the pergunna; but if we go beyond the right to measure, the case cannot be limited to this, and the Collector must have jurisdiction and be bound to enquire into any ground of opposition that may be set up. A vague and indefinite jurisdiction would be given to the Collector instead of a well-defined one of deciding upon the right to measure. The words which follow "and shall pass a decision either allowing or disallowing the measurement," I think appear from the context to refer to the right to measure. The words "and, if the case so require, enjoining or excusing the attendance of any such under-tenant or ryot" show that the allowance or disallowance is to precede the making of the measurement, and this part must be read as if the words "to be made" were inserted after measurement, and the section ran thus,—"either allowing or disallowing the measurement to be made." I do not see that the provision which follows, that "if the under-tenant or ryot neglects to attend and to point out the land, it shall not be

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competent for him to contest the correctness of the measurement made in his absence," can make any difference in the construction of the previous part of the section. That seems to refer to the mode of using the measuring rod, and the land it is applied to, rather than whether it is the standard pole of measurement. In Domat's Civil Law Prel. Book, Title I, section 2 (and I refer to this work, because I have seen it has been quoted in this Court as an authority for the interpretation of Acts of the legislature) it is said: "This principle of interpreting the laws by equity does "not only respect the laws of nature, but reaches likewise to the "arbitrary laws, they being all of them founded on the laws of "nature, as has been observed in the eleventh Chapter of the "Treatise of Laws. But to this principle of equity we must "add, in so far as concerns the interpretation of arbitrary laws, "another principle, which is peculiar to them, and that is, the "intention of the lawgiver, which determines how far the arbitrary laws regulate the use and interpretation of this equity. "For, in this kind of laws, the temperament of equity is restrained to what is agreeable to the intention of the lawgiver, "and is not extended to whatever might have appeared to be "equitable before the arbitrary law was enacted." To use the words of an eminent writer, Mr. A. L. B. "in the case of a statute "the primary index to the law which the lawgiver intended to "establish is the grammatical sense of the words in which the "statute is expressed;" and after a frequent study of the words of section 9, I am unable to see that there was any other intention than that the Collector should decide upon and enforce the right to measure. It may be said that the words are not explicit, and when the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. But I think the conduct of the legislature shows that no ground of this kind exists for interpreting section 9 in a different way from what I do. In section 37 of Act VIII of 1869 (B. C.), the legislature has expressly said that the Court shall hear and determine the right to make the measurement, which I cannot suppose it would

1870 have done if there was an occasion or necessity for the exercise
 Srimati of the jurisdiction which the other construction of section 9
 Manmohini would give to the Collector. If I had any doubt as to the con-
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 Premchand struction of the Act of 1862, this and the 41st sections in the
 Roy. Act of 1869 would make me hesitate in construing it as the
 majority of the Court does. The latest decisions of the Court
 were both pronounced in May 1869, one on the 17th and the
 other on the 31st by different Judges. Act VIII of 1869
 received the assent of the Lieutenant-Governor on the 21st of
 August, and it may, therefore, be that it was passed in its present
 form on the supposition that it would be interpreted in accord-
 ance with those decisions, which, being on such a question, pro-
 bably became generally known immediately; and I should hesi-
 tate the more because Act VI of 1862 is repealed wherever Act
 VIII of 1869 has taken effect, except so far as regards suits or
 proceedings which had been instituted, and our decision will not
 be a binding decision upon the law now in force. My opinion has
 been formed upon a consideration of the words of section 9,
 and I see nothing in section 11 to lead to a different opinion.*
 That says that "all measurements made under the Act shall be
 "made by the standard pole of measurement of the pergunna in
 "which the land is situated." The zemindar, when making the
 measurement, is bound to use the standard pole of the pergunna,
 if there be one, and the consequence of his not doing so may be
 that, when he seeks to enhance, he cannot make use of the mea-
 surement, and fresh measurement would have to be made. But
 if it had been intended that the Collector should decide what is
 the true length of the standard pole, I think it would have been
 provided for in section 11. If it is construed as qualifying
 section 9, and restricting the right to measure therein declared,
 the consequence will be that if it should happen that in any
 case it cannot be determined what is the standard pole of the
 pergunna, the right to measure will be lost.

The opinion I have come to is, that the first question should
 be answered in the negative, and that being so, I give no
 answer to the second question, which I presume means that the
 Collector decides the question, having jurisdiction to do so.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice E. Jackson, and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF CHATTERNATH JHA, alias
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SHEIKH MAHOMED HOSSEIN (PLAINTIFF) v. SHAW MOHSIN ALI
(DEFENDANT.)†

Mahomedan Law—Pre-emption—Partner, Right of, to Pre-emption on Sale of Villages or large Estates—Vicinage, Right of Pre-emption on the ground of.

According to the Mahomedan law, a partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such right on the ground of vicinage.

THE following question, which was raised in the first of these cases (No. 298 of 1869), was referred to a Full Bench by NORMAN and E. JACKSON, JJ. :—

“ Whether, according to Mahomedan law, a partner, not in a house or small enclosure, but in a considerable estate, consisting of a mauza with *gar-patis*, has a right to pre-emption when one of his co-sharers in such estate sells his share to a stranger? ”

The question was referred with the following remarks by

NORMAN, J.—By several recent decisions of this Court, it has been established that, under Mahomedan law, the right of pre-emption possessed by a neighbour extends only to houses and small parcels of land, and not to considerable estates.

In two recent cases—*Sheik Jehangir Baksh v. Lala Bhikari Lal* (1) and *Mahatab Sing v. Ramtahal Misser* (2),—it has been held, that the right of a shareholder to pre-emption exists, whether the parcel of land sold, and in respect of which the claim is made, be large or small.

There are many prior decisions to the same effect. But we

* Application for Review, No. 298 of 1869, against the judgment of Mr. Justice Norman and Mr. Justice E. Jackson, passed in Special Appeal, No. 158 of 1869.

† Special Appeals, Nos. 1663 and 1660 of 1869, from a decree of the Judge of Bhaugulpore, dated the 18th March 1869, affirming a decree of the Moonsiff of that district, dated the 24th August 1868.

(1) See p. 42, post.

(2) See p. 43, post.

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doubt whether it can be shewn that, under the Mahomedan law, there is any ground for that distinction; whether, under that law,

Before Mr. Justice Kemp and Mr. Justice Glover.

SHEIK JEHANGIR BAKSH (ONE OF THE DEFENDANTS) v. LALA BHIKARI LAL (PLAINTIFF).*

The 31st January 1869.

Messrs. R. T. Allan and C. Gregory for appellant.

Baboo Chandra Madhab Ghose and Kali Krishna Sen for respondent.

KEMP, J.—This was a suit in right of pre-emption. Both the lower Courts have given the plaintiff a decree.

The first ground taken in special appeal is that the lower Court was wrong in law in admitting a supplemental written statement. We think this contention is untenable. Under section 122, the Court called for an additional written statement. This statement did not add to, or vary, the plaintiff's claim, but simply supplied the names of two *dakhili* villages, which were admittedly comprised in the parent village, the subject of the suit.

The second ground taken is that, as the plaintiff refused to purchase the disputed properties when first offered to him, he has irretrievably lost his right of pre-emption. With reference to this contention, we find that the Principal Sudder Ameen doubted the fact of the plaintiff having declined the purchase when first offered to him; but be this as it may, under the Mahomedan law, the right of pre-emption does not accrue until a sale has been actually made.

The third ground is that, as the lower Court has found that the proper price was rupees 7,000, and the plaintiff had tendered a sum less than that, the right of pre-emption was lost to him. On this

ground, we find that the plaintiff tendered whatever might be found to be the proper price "*wajibi kimat*." The Court has directed the plaintiff to pay rupees 7,000, and that sum has been paid into Court. Under the Mahomedan law, it is not incumbent on the pre-emptor to produce the price at the time of making his claim; nay, he may lawfully contest the matter without producing the price during the sitting of the Judge; but after the decree has been pronounced, he should then produce it—Baillie's Digest, page 488. The plaintiff all along expressed his willingness to pay the fair price which has been fixed by the decree of the Court, or rupees 7,000, and which has been paid by the plaintiff.

The fourth ground taken is that plaintiff never purchased Mauza Byghora at all, nor is that village included in his former purchase of a one-anna share, and under which purchase he claims the right of pre-emption as a co-parcener. With reference to this ground, we observe that Byghora is a *dakhili* village of the principal village purchased by the plaintiff.

The last ground taken is that the right of pre-emption does not extend to large properties. A decision in *Roshun Mahomed v. Mahomed Kuleem (a)* has been quoted; but that decision has reference to a claim in right of vicinage.

No precedent in support of the special appellant's contention has been quoted.

In *Gopal Sahi v. Ojoodhea Pershad (b)*, we find a decision which holds that a share-holder in the property sold has the first and strongest right of pre-emption. The finding is in strict conformity with the Mahomedan law. In the *Hedaya*, Vol. III, p. 561, it is stated that "*shaffa*," in the language of the law, signifies the

* Special Appeal, No. 2479 of 1868, from a decree of the Subordinate Judge of Sarun, dated the 22nd July 1868, modifying a decree of the Sudder Ameen of that District, dated the 23rd July 1867.

(a) 7 W. R., 150.

(b) 2 W. R., 47.

there is any case in which a partner has a right of pre-emption in which, if he fails to exercise it, a neighbour may not also claim to exercise such right.

becoming proprietor of lands sold for the price at which the purchaser has bought them. This is termed *shaffa*, because the root from which *shaffa* is derived signifies "conjunction," and the lands are here conjoined to the land of the *shafee*, the pre-emptor. Again, at page 564, it is stated that the conjunction occasioned by a partnership in the property itself is of all others the strongest. Then at page 562 it is declared that the right of *shaffa* appertains first "to a partner in the property of the land sold." We can find nothing in the Mahomedan law which restricts the right of a coparcener in the property of the land sold to a small or large portion of land. Indeed, the right of a partner in the property of the land sold devolves, on his relinquishing it, even to a partner on the road (see page 564 of the *Hedaya*, Volume III). Lastly, we may observe that this objection was not taken in the Courts below.

We dismiss this special appeal with costs.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

MAHATAB SING (PLAINTIFF) v. RAM-TAHAL MISSER (DEFENDANT).*

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immunities and appendages of the land sold, and, second, in right of vicinage. The first Court decreed the plaintiff's case, holding that the plaintiff had proved the due observance of the necessary preliminaries, and that as a partner in the *jalkar* and *nimuk-sahir* which was still held joint, though the land had been divided between the plaintiff and the vendor of the defendant, the plaintiff was entitled in preference to the vendee defendant who is a mere stranger. The Principal Sudder Ameen has reversed this decision for reasons which are not very intelligible. The Principal Sudder Ameen observes that "by reason of the plaintiff's ignorance of the amount of consideration-money, because the whole of the property claimed under pre-emption was sold under one and the same kabala and in lieu of one and the same amount of consideration and the value of the *nimuk-sahir* or *jalkar* has not been specified, hence the value is uncertain and unknown, and therefore the value precludes or excludes the pre-emption." As observed by the Principal Sudder Ameen, the Plaintiff's claim is that, he held the Plaintiff's lands

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Baboo *Tarakhnath Sen* (Baboo *Jadabchandra Seal* with him) contended that there was nothing in the Mahomedan law to show that the right of pre-emption applied to large estates. It was only applicable to houses, gardens, wells, or small plots of land—3 Hedaya, pages 562, 569. It refers nowhere to large zemindaries—Baillie's Mahomedan Law, page 471. It applies only to a piece or fragment of land—Baillie's Mahomedan Law, page 474, note 1; *Uodan Singh v. Muneri Khan* (1); a case decided in the Sudder Dewany at Agra (2); *Ejnash Kooer v. Sheikh Amzud Ali* (3); *Chowdry Joogul Kishore Singh v. Poocha Singh* (4); *Abdul Azim v. Khondkar Hamed Ali* (5). In *Kantiram v. Woli Sahu* (6), the meaning of *shaffa*, as given in the Hedaya, has been fully explained. The right extends only to small portions—Macnaghten's Mahomedan Law, page 49. The cases opposed to this view are *Sheik Jehangir Baksh v. Lala Bhikari Lal* (7), and *Mahatab Sing v. Ram-tahal Misser* (8).

Mr. Twidale (Baboo *Hemchandra Banerjee* with him) contended that pre-emption on the ground of partnership extended to large estates—3 Hedaya, page 561. There is no limitation as to the extent of the land. The words "land" and "fragment of land" are used in page 591. "Shaffa takes preference to all lands and houses,"—page 591. Baillie's Mahomedan Law (1862, page 398) recognizes the right of

rance or pre-emption in favour of the plaintiff in respect of his property, and it is provided that if he does not claim his right, the plaintiff may sue for the recovery of the property.

We think, therefore, that the plaintiff has a right to sue for the recovery of his property, and we decree accordingly.

pre-emption in large villages. *Gholam Nubby Chowdry v. Gour Kishore Rai* (1), *Uodan Singh v. Muneri Khan* (2), *Omed Ray v. Nahched Rai* (3), *Sakina Khatun v. Gauri Sankar Sen* (4), *Mahadeo Dutt v. Poorun Bibi* (5), *Mussamut Munnee Begum v. Rajah Teknarain Singh* (6), *Roy Brinda Sohaye v. Nundkishore* (7), *Woopassee Bibi v. Buxoo Nussoo* (8), *Maharaj Singh v. Bhechook Lal* (9), *Moharaj Singh v. Lalla Bhechu Lal* (10), *Moonshee Syud Ameer Ali v. Bhabo Soonduree Debi* (11), *Baboo Moheshee Lal v. Christian* (12) were here referred to. Discussion on this point was raised in *Sheik Jehangir Baksh v. Lala Bhikari Lal* (13), and the point was decided in favor of the right of pre-emption being applicable to large estates—3 Hedaya, page 563.

Baboo Taraknath Sen, in reply, contended that the word used for land, *Akar*, was a word limited in its meaning, and strictly signified space covered with buildings. The point was neither raised nor decided in the cases cited on the other side.

The following question, which was raised in the last cases (Nos. 1663 and 1660, of 1869), had also been referred to the Full Bench (by HOBHOUSE and CH. J.J.), at the same time :—

“ When the claim for pre-emption is filed, does that claim extend to any property situated in a village ? ”

Mr. Paul (Mr. Twidale will be present) said that the claim for pre-emption was based, not upon the property in the vicinage. There is no distinction between the two parcels of property. The two cases in which the right of pre-emption are

(1) 1 Sel. Rep.

(2) 2 Sel. Rep.

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Law, page 48. He cited *Chowdhry Joogul Kishore Singh v. Poocha Singh* (1), *Ejnash Kooer v. Sheikh Amzudally* (2), *Nuzrut Reza v. Umbulkhyr Bibi* (3), Baillie's Mahomedan Law, page 476; *Fakir Rawot v. Sheikh Emambaksh* (4). The right of pre-emption is based on conjunction. If any part of one person's property joins with that of another, each of them has a right of pre-emption to the property of the other—*Abdool Ali v. Wahid Ali* (5), Baillie's Mahomedan Law, page 478.

Munshi *Mahomed Yusaff* contended that the law as to the right of pre-emption, on the ground of vicinage, was only in regard to houses and small parcels of land. There has been no decision allowing the right in cases of large estates. The word "shaffa," as defined in the Hedaya (3 Hedaya, page 561), is "to become proprietor of land at the price for which a purchaser has bought the thing sold." So also in the Kifaya, which is a commentary on the Hedaya, *shaffa* is defined as follows: الشفعة هي تملك البقعة—that is to say, *shaffa* is the being Malik (proprietor) of Bookat. The original word for which land has been substituted in the translation (3 Hedaya, page 561), is Bookat (بقطة) which means a bounded and which can be discriminated from the other. So also Baillie, page 471, Note 3, says, that "it is the Persian word *parah-zumeen*, a piece or fragment of land—*Akar*—Baillie's Mahomedan Law, page 471, and in the original Hedaya. "Shaffa is allowable only in respect of zaah (field, pasture or cultivated land) and Dar (a house)." So in Baillie's Note 2. Since the Mahomedan law does not allow pre-emption only to *Akar*, and *Akar* is a field, and since neither of them can be divided, it cannot convey the idea of an estate. The definition given in the Hedaya is not applicable to large estates. The learned counsel cited by the defendant do not

the author thought to have been synonymous. When treating of sales, the Hedaya (Book XVI) says, "Sale is the exchange of *Mål* for *Mål*, whether of the same nature or not." But the word used in the Chapter on Pre-emption is *Akar* and not *Mål*. *Mål* includes whole estates. Every presumption ought to be made against the right of pre-emption. Among the different examples given in the Hedaya of this right, not one is mentioned about large estates. No instance, except in the case of *Gholam Nubby Chowdhry v. Gourkishore Rai* (1), can be found where this right has been extended to large estates. It must be admitted that this right on the ground of partnership has been allowed—*Uodan Singh v. Muneri Khan* (2). It is a wrong view of the law to say that it is founded on conjunction only; convenience must also be added to conjunction to form the basis of the right—3 Hedaya, pages 562, 591, 606. [COUCH, C. J., What difference is there as to convenience with respect to large and small estates?]

Mr. Paul in reply.—*Akar* means immoveable property in general, as found from the vocabularies of the language. It has no technical meaning. In Richardson's Dictionary it is "land," and Hamilton has translated it as "immoveable property." The Hedaya does not say that *Akar* consists of *saar*, &c. But it is only a commentary on that work. In page 592, the word *Akar* is translated by Hamilton as land and in another place as ground. There is no authority for the other side except *Sheik Jehangir Baksh v. Lala Bhikari Lal* (3). The right of *shaffa* in large estates has been admitted, in some cases, to apply to large estates on the ground of partnership, and the contention is that it does not apply in cases of vicinage. But when both stand on the same principle, there cannot be any reason to restrict it in the one case only. Referring to the authorities cited from the Hedaya, the opinion that *shaffa* is based on convenience becomes untenable. The text upon which the right is founded is sufficiently clear, and we are only to interpret and follow it; but if the right be grounded on convenience, it becomes a matter of fact, and not a matter of law. The right is not founded on

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(1) 1 Sel. Rep., 350.

(2) 2 Sel. Rep., 85.

(3) *Ante*, p. 42.

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bad policy. In ancient days, neighbours were as if of the same family—*Mahatab Sing v. Ramtahal Misser* (1). The principle that the right is based on convenience is not correct. For the Chapter which treats of the different devices to defeat the right, no where mentions convenience as a method of defeating such right.

The opinion of the Court was delivered by

COUCH, C. J.—The question referred to the Full Bench in Special Appeals, No. 1663 and No. 1660 of 1869, is as follows : “ When the claim for pre-emption is founded on vicinage, will “ that claim extend to any property of the description of a share “ in a village ? ” It appears that there are a great many decisions of the Courts of this country in which an opinion has been expressed that when the claim for pre-emption is founded on vicinage the right is limited to property of small extent.

In 1856, the Judges of the Agra Sudder Court, when considering the right of pre-emption on the ground of vicinage (2), said : “ There can be no doubt that, in the Mahomedan law, lands are “ included amongst the articles concerning which *shaffa* or pre- “ emption operates, but it may admit of question whether entire “ mehals or estates were intended, or merely parcels of lands, “ gardens, and the like. The latter view appears to be supported “ by a passage in the Hedaya which quotes a saying of the pro- “ phet to the effect that *shaffa* affects only houses and gardens.” This case is referred to by a Full Bench of this Court, in 1863, in *Fakir Rawot v. Sheikh Emambaksh* (3), where the Judges say that they would not, on the mere ground of vicinage, support a claim of pre-emption in respect of an entire estate.

In *Ejnash Kooer v. Sheikh Amzudally* (4), we find the Court says : “ The plaintiff claims on the ground of vicinage alone. Now, “ it is clear that, if the Mahomedan law does not bear out his claim, “ there is no other custom which does; and we are of opinion “ that, even supposing the Mahomedan law in all its integrity, “ to apply to the case, plaintiff’s claim cannot be supported. A “ claim founded on joint tenancy is, no doubt, good ; but as

(1) *Ante*, p. 43.

(2) S. D. A. 1856 (Agra), 396.

(3) B. L. R., Supplemental Vol., 35.

(4) 2 W. R., 261.

“ regards vicinage not accompanied by joint tenancy, the law is
 “ unfavorable, and construes strictly such claims. The authori-
 “ ties are even at variance as to their admissibility ; but assum-
 “ ing it to be settled that some claims on mere vicinage are
 “ good, the principle seems to be that, when either houses or small
 “ holdings of land make parties, in fact, such near neighbours
 “ as to give a claim on the ground of convenience and mutual
 “ servience, the claim in right of pre-emption will lie. But this
 “ principle does not apply to large estates, which are not, in fact,
 “ such that any real vicinage of the proprietors results.”

This decision is approved of and adopted in *Nuzrut Reza v. Umbulyhr Bibee* (1), and in *Chowdhry Joogul Kishore Singh v. Poocha Singh* (2). In *Abdul Azim v. Khondkar Hamed Ali* (3), Mr. Justice Loch says :

“ Looking at the Chapter on *shaffa* in the Hedaya, the right
 “ appears to be limited to parcels of land, houses, &c., and does
 “ not contemplate the right to purchase a separate estate, be-
 “ cause a part of it is conterminous with that of the *shafee*. It
 “ is true that a person may have a bad neighbour as a zemindar, and
 “ so suffer as much vexation from him as from a bad neighbour
 “ next door or holding the next field; but still it appears to me that
 “ the law was intended to prevent vexation to holders of small plots
 “ of land who might be annoyed by the introduction of a stranger
 “ among them. I think I would apply the ruling laid down in
 “ the judgment of the Court quoted above to the present case,
 “ and allow the judgment of the lower Court to stand; for the
 “ property to which the right of pre-emption is claimed is a
 “ separate estate paying revenue to Government.” Mr. Justice
 Mitter says :—“ The property in dispute is an estate paying
 “ revenue to Government, and I am not prepared to say that
 “ this case is not governed by the decision relied upon by the
 “ respondent.”

These cases are all referred to, and concurred in, in a case of *Kantiram v. Woli Sahu* (4).

The Arabic word used to describe the subject-matter of pre-
 emption is *Akar*. There has been a considerable discussion

(1) 8 W. R., 310.

(2) *Id.*, 413.

(3) 2 B. L. R., A. C., 63.

(4) *Id.*, 330.

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1870 during the argument of this case upon what is the true meaning of that word. The Counsel for the appellant has contended that it applies to estates of all descriptions and magnitude; that there is under the Mahomedan law no limit whatever; that the right exists whether the estate sold be large or small, provided that any portion of it is contiguous to the estate of the party claiming the pre-emption; and that the decisions of this Court which put a limit on the right in this respect are wrong.

IN THE MATTER OF THE PETITION OF CHATTERNATH JHA, alias JHINGA JHA.

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We are, however, not prepared to say that there is not some ground for the limit which this Court has, in the above cases, put upon the right, even on the words of the text of the law itself. It is probably impossible now to discover the precise meaning which was put upon the word *Akar* at the time when the Arabic texts were composed. Looking not merely at the words used in the *Hedaya*, but at the illustrations given in the second and third Chapters of the same book, at the state of society when the law was first altered, and at the inconveniences against which it was probably directed, the better opinion might be that *Akar* should be construed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognise that the right of pre-emption, on the ground of vicinage, does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land. We do not consider that there is anything before us which would justify us in disturbing that long series of decisions.

In Review No. 298 of 1869, on Special Appeal No. 158 of 1869, the question is referred to us in the following terms: (*reads*)

In the case referred to, *Mahatab Sing v. Ramtahal Misser* (1) the question does not (according to the report) appear to have been raised; but in the other case, *Sheik Jehangir Baksh v. Lala Bhikari Lal* (2) the question was raised, and the Judges (KEMP and GLOVER, JJ.) say that they find nothing in the Mahomedan law which restricts the right of pre-emption of a co-parcener to small parcels of land.

We find that this decision is in accordance with the law as recognized from a very early period. In a case of *Gholam Nubby Chowdhry v. Gour Kishore Rai* (3) which occurred as early

(1) *Ante*, p. 43.

(2) *Ante*, p. 42.

(3) 1 Sel. Rep., 350.

as the year 1811, the right of pre-emption was claimed and established by a shareholder in respect of a share in an entire pergunna. In another case, *Uodan Singh v. Muneri Khan* (1), which occurred two years after, the right was applied to a whole mauza. Again, in 1840, in *Mahadeo Dutt v. Poorun Bibee* (2) we find it applied to a whole village, which, from the price, was evidently a considerable one. In 1857, in *Hakimmoodeen Bhooya v. Zuhiroodeen Bhooya* (3), it was applied to a talook; and again in 1858, in *Baboo Kustooree Singh v. Luchmeepersaud* (4), to a village.

It is true, that in none of these cases was any question raised as to the extent of the right; but the absolute silence of the reports upon any such limit as is now contended for, notwithstanding the numberless instances in which the right of pre-emption must have been claimed by a partner in respect of a share in a large estate, strongly shows that for a very long period no such limitation has been supposed to exist.

It was urged upon us that the two lines of decision as to a neighbour and a partner could not be reconciled; that the right was given by the Arabic texts to both in the same terms; and that if the right was limited in the one case it ought also to be so in the other, the only respect in which the three classes of claimants differ being the right of priority. Now, if we are to look exclusively at the language of the law as it appears in the Hedaya, there is certainly ground for this contention. But we think that we should not be justified, merely for the sake of logical consistency, in overruling what appears to have been the law consistently applied in this Court for a great number of years, and never until very recently questioned.

This view of the Mahomedan law of pre-emption in the case of partners has, no doubt, been acted upon in a great number of cases, and is in conformity with modern usage; and to disturb it now would be to disturb a great many titles. Moreover, the distinction between the case of a neighbour and the case of a partner does undoubtedly proceed upon a very sound principle, viz., that the right should be co-extensive with the inconveni-

(1) 2 Sel. Rep., 85.

(2) 6 Sel. Rep., 277.

(3) S. D. A., 1857, 454.

(4) S. D. A., 1858, 1754.

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[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Kemp.

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Sept. 6. ALI, alias CHAMMAN (JUDGMENT-DEBTOR).*

*Limitation Act (XIV of 1859), s. 19—Execution of Decree of High Court—
 Jurisdiction—New Grounds on Appeal.*

Where a decree of the lower Court is materially altered on appeal by the High Court, *e. g.*, where the amount of mesne profits allowed by the lower Court is cut down by the High Court, the decree becomes a decree of the High Court, and the period within which a proceeding must have been taken to enforce the same, so that it may not be barred by the Law of Limitation, is twelve years under section 19 of Act XIV of 1859.

The Court will take notice of a question affecting its jurisdiction, even when urged for the first time on appeal after judgment.

Mr. R. E. Twidale and Baboo Anukul Chandra Mookerjee for the appellant.

Mr. C. Gregory for the respondent.

THE facts of this case, so far as they are material to this report, are contained in the judgment of the Court, which was delivered by

KEMP, J.—This case was before this Court on the 1st April last. The question that then arose was whether execution was barred under section 20, Act XIV of 1859, inasmuch as the decree-holder had taken no proceeding to enforce his decree, or to keep the same in force within three years next preceding the application for execution. The case was remanded by Mr. Justice Norman to the Zilla Judge to find whether the decree

* Miscellaneous Regular Appeal, No. 245 of 1870, from a decree of the Judge of Patna, dated the 25th June 1870.

obtained by the decree-holder was a joint decree, and whether, as such, it was kept alive by proceedings taken against Mussamat Titu.

The Judge has found that the decree was not kept alive by those proceedings, and that the application is barred by limitation.

The point now raised in appeal here, and that too for the first time, is to be found in the seventh ground, *viz.*, "that the decree being a decree of the High Court, a Court constituted by the Royal Charter, twelve years and not three years is the period of limitation." Baboo Anukul Chandra, who appears for the appellant, informs us that, not being aware of the fact that this was a decree of the High Court, and not of the lower Court, he had not taken this objection before. As the objection, however, affects the jurisdiction of the Court, we think we are bound to take notice of it even at this late stage.

We find that the judgment-creditor, who was the plaintiff in the first Court, sued for possession and wasilat of 13 annas and some fractions against a number of parties, including Inayet Ali, the present judgment-debtor, Mussamat Titu, Mussamat Jumai, Mullick Imdad Ali, Hafiz Ahmed, and others. He obtained a decree in the first Court for ~~the~~ share claimed with mesne profits to be ascertained in execution.

On appeal to the High Court by Mussamat Jumai, Mussamat Titu, and others, the decree of the first Court was altered, and possession awarded on 10 annas and odd dams instead of 13 annas. No order was passed in reference to mesne profits. The order as to the costs of suit was altered; some of the defendants were held to have been unnecessarily made parties to the suit, and were allowed costs as against the plaintiff.

It is contended, and we think rightly, that this decree was not a decree of the lower Court, but of this Court. The decree of the lower Court was materially altered, and the wasilat which was left to be ascertained in execution was diminished by so much as represented the difference between the share claimed and the share decreed by this Court. We are referred by Baboo Anukul to *P. T. Onraet v. Sankar Dutt Sing* (1), in which case the learned Chief Justice lays down that a decree of

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the lower Court modified in regular appeal becomes a decree of the High Court. We think there can be no doubt in this case that the decree having been materially altered, and the wasilat cut down, the decree was a decree of this Court. It matters not that the present judgment-debtor, Inayet, was no party to the appeal; he was a party to the original suit, and benefited by the alteration in the decree of the first Court, and it is not the decree of the first Court, but the decree of the High Court, which is now under execution. It is clear that, if the defendants had thought it proper, on discovery of any fresh evidence, or for any other good reason, to apply for a review, they would have been obliged to apply to this Court, and not to any other Court.

Holding therefore that the decree in question was a decree of this Court, and this Court being a Court established by Royal Charter, the period within which the decree-holder is entitled to sue out execution is not three years, but twelve years. It is admitted that in this view the decree-holder is in time.

The appeal is decreed, and the judgment of the lower Court is reversed. Looking to the fact that the present objection was not taken at an earlier stage, we direct that each party pay his own costs in all the Courts.

Appeal allowed.

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Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

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MUSSAMUT WAHIDUNNissa AND OTHERS (PLAINTIFFS) *v.* MUSSAMUT SHUBRATTUN AND OTHERS (DEFENDANTS).*

Mahomedan Law—Dower—Lien—Mortgage—Hypothecation.

The widow's claim for dower, under the Mahomedan law, is only a debt against the husband's estate. It may be recovered from the heirs to the extent of assets come to their hands. It does not give the widow a lien on any specific property of the deceased husband so as to enable her to follow that property, as in the case of a mortgage, into the hands of a *bonâ fide* purchaser for value.

Semble—Under the Mahomedan law, there is no hypothecation without seisin; but a creditor, whether widow or any other creditor, if in possession of the husband's property with the consent of the debtor or of his heirs, might hold over until the

* Special Appeal, No. 892 of 1870, from a decree of the Judge of Patna, dated the 18th February 1870, reversing a decree of the Subordinate Judge of the said district, dated the 17th July 1869.

debt is paid; and that the cases cited to show that the widow had a right to hold until her dower was paid off, proceeded on this principle.

Per Hobhouse, J.—It is very questionable whether the Court is bound to apply the Mahomedan law to this case under the provisions of Regulation VII of 1832, the case not being one of succession, inheritance, marriage, caste or religious usage; but simply one of contract.

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THE facts of this case were as follow:—The plaintiff was the widow of one Mahomed Mehudi, deceased. He died in 1861, leaving the plaintiff and two sisters, defendants, his heirs. In the year 1862, the plaintiff sued the sisters, as well for her dower as for her own share of the inheritance as widow. In 1864, she got a decree for dower, and in 1865, a decree for possession of her share of the inheritance. The sisters, from the time of the death of Mahomed Mehudi, in 1861, up to 1868, remained in possession of their share of the inheritance separately from the widow's share decreed to her in 1865. Thereafter the sisters incurred debts, and a decree was obtained against them for the amount of those debts, and in execution of that decree, the defendant in this suit purchased the rights and interests of the sisters in the property in suit.

That property, it was admitted, formed part of Mahomed Mehudi's estate at the time of his decease, and it was also admitted that the defendant was a *bond fide* purchaser for a valuable consideration and without notice of any claims against the estate of the deceased, and he obtained possession of the property. The decree of 1864 was virtually, and for the purposes of this suit it was admitted, against the sisters as representatives of the estate of Mahomed Mehudi, and to the extent only that they had taken any part of that estate.

The present suit was on behalf of the widow to have it declared that the property, which the defendant purchased in 1868, was liable to be sold in execution of her decree against the sisters for dower obtained in the year 1864. The first Court gave the plaintiff a decree. On appeal, the lower Appellate Court held that the estate in the hands of the purchaser was not so liable, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Baboo *Mahesh Chandra Chowdhry*, *Srinath Das*, and *Boodh Sing* for the appellant.

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Mr. C. Gregory and Munshi Mahomed Yousaff for the respondent.

It was contended, on behalf of the appellant, that dower, under the Mahomedan law, is a debt. A claim for dower takes precedence of a claim for inheritance. The plaintiff is a creditor against her husband's estate for her dower, and, as such, her right takes precedence of the right of the heirs of her husband, and so of the right of any creditor of those heirs and of any purchaser in execution of a decree of such creditor. Any debt, and especially a dower, constitutes, under the Mahomedan law, a lien upon the estate of the debtor, and as long as the debts are not paid, there cannot be a legal distribution of the estate. If a distribution does take place, those who purchase from the heirs, after such illegal distribution, will purchase subject to the heir's liability to pay the debts.

The following authorities were referred to in the course of the argument by the pleaders for the appellant:

Macnaghten's Principles of Mahomedan Law, Chapter I, section 1, paragraph 5; *Mahomed Noor Buksh v. Badun Chund Bibee* (1); *Woomatool Fatima Begum v. Meerunmun Nissa Khanum* (2); *Ahmud Hussain v. Mussamut Khadija* (3); *Ameer-oon Nissa v. Mooradoot Nissa* (4).

On behalf of the respondents, the purchasers, it was contended that there was no difference—and this was not disputed by the other side—between a claim for dower and any other debt, and that therefore dower does not constitute a lien upon a particular property of the deceased which, at the time of his death, may have formed part of his estate, but is simply, like any other debt, something which the creditor can claim from the heirs of the debtor to the extent of assets received by them and not satisfactorily accounted for: and that the cases cited were clearly distinguishable from this, inasmuch as there, the widows had possession of their deceased husband's estates, and had a right to hold over until the debt was discharged.

HOBHOUSE, J., (after briefly stating the facts, continued):—It seems to me very questionable, in the first instance,

(1) S. D. A., 1852, 890.

(3) 3 B. L. R., A. C., 28.

(2) 9 W. R., 318.

(4) 6 Moore's I. A., 211.

whether we are bound to apply the Mahomedan law at all to the case before us. It is not, I may observe, a case of succession, inheritance, marriage, caste or religious usage, that is, a case of the description to which we are bound by the provisions of Regulation VII of 1832 to apply the Mahomedan law. It is, as it seems to me, as it seemed also to the Judges in the case of *Campbell v. Delaney* (1), a case simply of contract, and in such a case, it seems to me, as it seemed to Mr. Justice Campbell, that it can only be by a side wind that a question of inheritance, under the Mahomedan law, can at all be brought in. If the case is, as I think it is, a simple case of contract, then we should not deal with it under the provisions of the Mahomedan law, but simply as a case of contract to which we are to apply the principles of justice, equity, and good conscience.

However, I will assume it to be a case of Mahomedan law, and I still do not think that, under the strictest interpretation of the Mahomedan law, dower, any more than any other debt, can be held to constitute, under the facts of the case before us, a lien upon any particular item of the estate of a deceased Mahomedan debtor. The text—and in fact the sole text—relied upon, is that to be found in page 1, Chapter I, Section 1 of Macnaghten's Principles of Mahomedan Law. The text is this:—"Debts are claimable before legacies, and legacies (which, however, cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed."

It is argued from this, that as this debt had not been paid, therefore, there could not have been any legal distribution of the estate of the deceased Mahomed Mehudi, and that if there was no legal distribution, then the sisters, who were in this instance the heirs, had not in reality any estate which they could dispose of, and so that the defendant, who has bought only the rights and interests which the sisters had, has taken with them the liability of the sisters, namely, the liability to pay the debts of the deceased. It is not disputed for a moment that the liquidation of debts should precede the distribution of property amongst the heirs; that is laid down clearly in the paragraph

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(1) Marsh. Rep., 509.

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of the law on which the plaintiff relies; and, again, in the case No. 16, pages 94 and 95 of the same authority—Macnaghten. It is further laid down in the case No. 10, page 356, that the claim for dower is a claim prior to that of inheritance on the property of the husband; and in case No. 56, page 126, that a claim for inheritance cannot be maintained till the debt due for dower has been satisfied.

But here, in the first place, it cannot be urged that there can be no distribution, for, as a matter of fact, such distribution has actually been made, and that by reason of action taken on the part of the plaintiff herself, who, in the suit, which was terminated by the decree of 1865, prayed for and actually obtained distribution of the estate, namely, herself taking her one-fourth of that estate, and the rest of it being left in possession of the two sisters, the remaining heirs of the deceased Mahomed Mehudi.

But even had there been no distribution, still the question seems to me to be what, under the Mahomedan law, is meant by the estate of the deceased, when it is said that that estate is liable for the debts of the deceased? Is it meant to be exactly that property, be it in land, or be it in money, or whatever may be its nature, of which the deceased was seised when he died; or is it meant to be anything which adequately represents that estate? I think, on a proper interpretation of the text of the Mahomedan law, it is not meant to be the exact estate as it stood at the time of the husband's death, but anything which adequately and truly represents that estate at the particular time at which a claim is made upon it. I find, for instance, under the Law of Sale, Macnaghten's Mahomedan Law, Chapter III, page 42, that a "sale is defined to be a mutual and voluntary exchange of property for property." So that if a person, under this definition of sale, as in this case, parted with property in the shape of land, and got property in return in the shape of money, or money's worth, then the property which he got in return adequately and fully represents the property with which he parted. And, again, I find in Section 1, Chapter XI, page 72, and in the case No. 8 at page 88, that the "heirs are answerable for the debts of their ancestors, as far as there are assets."

"Subordinate Judge, as regards the widow Khadija's lien on the estate, for her unpaid dower, ought to be affirmed." It was further pointed out, "that the plaintiff ought to have sued for an account of the dower due to the widow, and to be let into possession upon payment of that amount."

The next case relied on is *Ameeroon Nissa v. Moorad-oon-Nissa* (1). That case is quoted at length in the decision to which I have just referred in *Ahmud Hossein v. Khadija* (2), and that was also a case in which the widow was in possession of her husband's estate. Their Lordships in the Privy Council seem to have held that a creditor in the position of a widow might take so much of the debtor's property as would cover the debt, and that the widow was in possession much as an executrix in English law might be in possession, and so was entitled to hold over for dower as a debt, subject to a suit for an account.

Now I think, that when all these cases are considered carefully, they are in fact what they have been described to be by the learned Judges of this Court who passed the decision to which I have referred above, of *Bibee Mehran v. Mussamut Kubiran* (3). They are, I think, all of them cases in which dower being admitted to be due, the widow was or had been in possession of the whole estate, and in which the heirs sought to oust the widow without having previously paid the amount of the dower or debt. Now, it seems to me, that in such a case under the Mahomedan law, had it not been the case of a widow especially, but that of any other creditor, such creditor, equally with the widow, would have been entitled to hold over the estate of which he was in possession until his debt had been paid off. "Hypothecation," it is said in section 15, Chapter 11, page 74, Maenaghten's Mahomedan Law, that is, an ordinary lien, as I understand it, "is unknown to the Mahomedan law," and there cannot even be any mortgage unless there be seisin; and in section 20 of the same Chapter it is further laid down that a creditor seised of the property may "satisfy his own debt to the exclusion of the other creditors."

And in the case No. 3, page 347 of the same work, the following

(1) 6 Moore's I. A., 211.

(3) *Ante* p. 60.

(2) 3 B. L. R., A. C., 28.

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doctrine is laid down : " All debts (contracted in health) are of equal validity, except those of mortgagees or pawnees, that is to say, persons with whom the property of the deceased may have been deposited in mortgage or pledge. The claims of such persons are entitled to priority, and they are authorized to satisfy their own demands out of the property in their possession ; after which the surplus (if any should remain) will be divided among the other claimants."

It seems to me that, under this doctrine, any creditor, be it the widow or any other creditor, who was, either by consent of the debtor when living, or by consent of the heirs of the debtor after the debtor's death, in possession of the debtor's estate for the satisfaction of his debt, would be entitled to remain in such possession until the amount of his debt had been paid off. I think, it is upon this doctrine of the Mahomedan law, that the learned Judges, in the cases on which the plaintiff's pleader relies, came to the conclusion that the widow, in possession of her husband's estate and holding over until payment of her dower against the heirs, was entitled to hold over until her dower was paid.

But here, as I have said before, the case is entirely different. The widow is not in possession. On the contrary, at her suit distribution was made, so far back as five years before the institution of this suit, of her husband's property. By that distribution the sisters, so far as they were heirs, were put in possession of the property they inherited. They dealt with it and incurred debts of their own. The property was sold, and the defendant paid a just and proper equivalent for it. That equivalent was thus really paid to the heirs, and the property, which it represented ceased, from that time, to represent the estate of the deceased. The equivalent paid for the property did instead represent that estate, and was in reality assets of the estates paid into the hands of the heirs, to be by them accounted for. The plaintiff, therefore, if she have any debt due to her from the husband's estate for her dower, must, I think, in satisfaction of that debt, follow the assets, which have been duly made over to the heirs of the husband. She must follow those assets and cannot follow particular property itself, for that in reality no longer exists.

as an asset of the estate, but has been properly and fairly exchanged for assets of a different description.

In this view of the case I would uphold the judgment of the Court below, and dismiss this appeal with costs.

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LOCH, J.—I prefer looking at this case from the Mahomedan point of view in which it has been placed before us, and, looking at it from this point, I concur in the conclusion come to by my colleague.

Looking to the principles of Mahomedan law, we find, 1st, that "debts are claimable before legacies, and legacies must be paid before the inheritance is distributed"—Macnaghten's Mahomedan Law, Chapter I, Rule 5. Again, "all the debts due by the testator must be liquidated before the legacies can be claimed"—*Id.*, Chapter VI, on Wills, Rule 6. Thirdly, "heirs are answerable for the debts of their ancestor as far as there are assets"—*Id.*, Chapter XI, on Debts, Rule 1. Rule 20 of the same Chapter lays down as follows: "If a person die leaving many creditors, and he may have pawned or mortgaged some property to one of them, such creditor is at liberty to satisfy his own debt out of the property of the deceased debtor which is in his own possession, to the exclusion of all the other creditors."

It may be here remarked that the decisions of this Court appear almost invariably to have treated the widow in possession of her husband's property in the light of a mortgagee or pawnee so far as her dower is concerned, and have held that she could not be deprived of possession till her claim for dower is satisfied.

The law makes no distinction between a claim for dower and other debts, and case XXIII, Macnaghten's Precedents of marriage, dower, &c., page 274, shews the course which should be pursued by the heirs or executors of a deceased person, and is in the following terms: "The claim of the widow for dower is just, and the claim of the other creditors for the payment of their debts out of the estate are also just. Under these circumstances, after the ascertainment of the amount of the dower and of the sum due to the creditors of the deceased, the whole property, moveable and immoveable, must be collected, and it must be examined with a view to find out whether or not it is sufficient to

1870 "satisfy all the claims. If so it must be appropriated in that manner, and if not, each person must get a proportional share.
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In case XXIV of the same Chapter, a distinction is drawn "between money and other property in cases of dower, *viz.*, that "the widow is at liberty to take the former description of property, over which she has absolute power; but as to the other property she is entitled to a lien on it as security for the debt, "and it does not become her property absolutely, without the consent of the heirs or a judicial decree. Where the debt is large and the estate small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate." This evidently contemplates the case of a widow in possession.

In case X, Macnaghten's Precedents of Debts, page 376, the question asked is, "Whether a widow has a lien on the personal property of her husband in satisfaction of her dower in preference to the other heirs?" And the answer is, "If the other heirs pay the widow the amount of her dower, she has no claim to the property left by her husband except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a prior claim on account of her dower on the property left by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs according to their respective shares of inheritance."

It is clear, therefore, and is indeed admitted by the parties before us, that a claim for dower is on the same footing as any other debt due by the deceased; but, while the appellant contends that all debts are a lien on the estate of the deceased, and that creditors can follow the property of the deceased into whomsoever's hands it goes, the respondent contends that debts of a deceased Mahomedan are in no higher position than the debts of any other person; that though the heirs are liable to the extent of the

assets which come into their hands, the creditors cannot follow property of the deceased which has been sold by the heirs or representatives of the deceased to a *bonâ fide* purchaser without notice for a valuable consideration.

It is admitted by the appellant's pleader that if the property were sold by the heirs to liquidate the debts of the deceased, the purchaser would secure a good title; but how is the purchaser to know for what purpose the property is offered for sale? A purchaser from the heirs of a deceased Mahomedan is not bound, as if he were dealing with a Hindu widow, to enquire into the existence of a legal necessity; and even when the property is sold in execution of a decree, as in the present instance, he is not bound to ascertain whether it is sold for the private debts of the judgment-debtors or for ancestral debts.

But the cases in Macnaghten, referred to above, contemplate a state of things different from that in the present case. They contemplate the state of the property before partition, and point out the course which should be followed by the heirs or executors of the deceased before partition of the inheritance. But a case of this kind might happen. The heirs, with every intention of paying off the debts of their ancestor, might not know who his creditors were, and after a ~~time~~ might, in perfect good faith, partition the property. If one of the heirs, after such partition, were to sell his share of such property to a stranger for any cause, say to raise money to pay the Government revenue, or discharge his own debts, or to meet family expenses, could a creditor, on obtaining a decree for the amount of a debt due by the ancestor, come down upon the property in the hands of a *bonâ fide* purchaser without notice? It appears to me that he could not, and if an ordinary creditor could not, could a creditor having a claim for dower seize the property? I think not, for the Mahomedan law does not rank dower in a higher position than other debts, and therefore what the ordinary creditor could not do, the dower-creditor could have no power to do, merely from the circumstance of his being a dower-creditor. A creditor could go against the heirs, who would be responsible to the extent of the property of the deceased which came into their hands, and would be liable to account to him for the assets, which, if not

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properly applied to the discharge of the ancestor's debts, would make them personally responsible. As they had received from the purchaser an equivalent for the property, they would have to account for its expenditure ; but the purchaser could not be required to give up the property, nor can the creditor look both to the money and to the property for the payment of his debt.

But it may be urged that in the present case the heirs, who were in possession of the property of the deceased, were aware of the existence of the debt claimed by the appellant on account of dower, and in fact she had got a decree against them in their presence for the amount, so that they had no right to sell this property without payment of her claim, or for the purpose of liquidating the debt due to her. But even if this be admitted, does the appellant stand in a better position than any other creditor ? Suppose that the heirs had sold the property, with the view of evading payment to her, though in the present case such is not the fact, would such conduct on their part render a *bond fide* purchaser without notice liable to be deprived of the property, which he has purchased in good faith for a valuable consideration ? The heirs may have acted improperly, but in the absence of collusion on the part of the purchaser who has paid his money for the property, their misconduct cannot make his purchase void and render the property liable to seizure and sale by the creditor. A claim for dower is not a lien on the property such as is obtained by a mortgage, which enables the creditor to follow the property wherever it goes. The Mahomedan law has nowhere placed a claim for dower as high as a mortgage, but has ranked it on a par with ordinary debts. It is true that our Courts have looked with favour on this class of debt, and, where the widow is in possession, have not allowed her possession to be disturbed until the dower is paid ; and, indeed, when the widow has been put out of possession they have declared her right to have her dower paid out of property ; but it has never been held that a claim for dower is of the nature of a mortgage, and that a dower-creditor, not having had possession, may follow the property into the hands of a third party, who has purchased in good faith without notice. If there has been no collusion on the part of the purchaser, the misconduct of the vendors cannot

affect the title of the purchaser, and the creditors must still look to the vendors as heirs of the deceased owner of the property for the payment of their debts, for the heirs would have to account to them for the money which they have received as the price and equivalent of the estate which should have been used for the payment of the debts of the deceased. The appeal is dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Loch and Mr. Justice Mitter. *See b Calp/17.*

LALA RANGLAL AND OTHERS (DEFENDANTS) v. DEONARAYAN
TEWARY (PLAINTIFF).*

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Aug. 4.

Evidence—Judgment in former Suit admissible for Strangers.

The judgment in a former suit against the same defendants in respect of the same subject-matter is admissible, though not conclusive, evidence against the defendants in a subsequent suit brought against them by other parties.

THIS was a suit for possession of a 1 anna 4 pie share of Mauza Gonda, Pergunna Goa Kulum Darshaut Roy, appertaining to Bhagwanpore, Pergunna Goa, by declaration of right, on the ground that the plaintiffs had purchased the right, title, and interest of Ram Golam Sing.

The defendants, who were purchasers of Mauza Bhagwanpore, set up that Gonda was not a separate village, but a *dakhili* village attached to Mauza Bhagwanpore, and that they were owners thereof by right of their purchase of Bhagwanpore.

The Moonsiff raised (*inter alia*) the following issue :

“ Is Mauza Gonda a separate and main Mauza, or is it *dakhili* (hamlet) of Mauza Bhagwanpore; and is Mauza Gonda included in, or excluded from, the purchase of defendants, the purchasers of Mauza Bhagwanpore? ” and held, on a reference to a decision in a case wherein one Ambika Prasad was the plaintiff, and the present defendants were the parties defendants, filed on behalf of the plaintiff, that it was proved that Mauza Bhagwanpore was distinct and separate from Mauza Gonda, and therefore the purchase of Bhagwanpore did not include the Mauza Gonda. He, accordingly, passed a decree in favour of the plaintiff.

* Special Appeal, No. 2050 of 1869, from a decree of the Subordinate Judge of Saran, dated the 4th June 1869, confirming a decree of the Moonsiff of that district, dated the 22nd December 1868.

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On appeal, the decree was confirmed by the Subordinate Judge.

The defendants appealed to the High Court, on the ground that the decree in the case of Ambika Prasad was not admissible as evidence in the present case.

Baboo *Girjasankar Mozumdar* for the appellant.

The respondent did not appear.

LOCH, J.—The question raised in special appeal is whether the judgment pronounced in the case of Ambika Prasad against the defendant, special appellant, relative to Mauza Gonda, can be used as evidence in this case.

It appears that defendants are purchasers, in execution of a decree, of Mauza Bhagwanpore, and claim a right to, and are in possession of, Mauza Gonda as the *dakhili* village attached to Bhagwanpore.

The plaintiffs are the purchasers of the rights and interests of Ram Golam Sing in Mauza Gonda, and sue for possession, alleging that it is a separate village from, and not the *dakhili* of, Bhagwanpore.

It appears that one Ambika Prasad, having purchased the rights and interests of Nanku Roy in Mauza Gonda, brought a suit for possession against the present defendants, and the contention before the Court, in that case, was similar to that in the present suit, the plaintiff alleging that Gonda was a separate village, and that the defendants had no right thereto by virtue of their purchase of Bhagwanpore, while the defendants asserted that Gonda was a *dakhili* of Bhagwanpore, and when they purchased the latter, they necessarily purchased the former. The Courts, however, held that Mauza Gonda was a separate village, and not the *dakhili* of Bhagwanpore, and consequently the plaintiff, Ambika Prasad, was entitled to a decree for possession, which decree has become final.

In disposing of the present case, the Courts below have made use of the judgment passed in the case of Ambika Prasad as evidence to prove that Gonda is separate from Bhagwanpore;

and it is contended before us that the said judgment cannot be used as evidence in the present suit; for, though the point to be decided is the same, and the present defendants were defendants in that suit, yet the plaintiffs are different, and if this be so, the present suit, in the absence of other sufficient evidence, must be dismissed.

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It appears to me that the decision in Ambika Prasad's case is admissible as evidence in the present case. The same question was raised then as now, *viz.*, whether Gonda was or was not separate from Bhagwanpore. The defendants in that case were the same as in the present, and they raised the same contention then as they do now. The judgment in that case was against the defendants. It decided that Gonda was separate from Bhugwanpore. Why should it not be evidence regarding the same matter against the same defendants in this suit? No doubt, it could not have been used as evidence against other defendants, nor can it be held to be conclusive evidence against the present defendants; but still it appears to me to be some evidence and admissible in this case—evidence which, if the defendants can do so, they may rebut; and in this view, I think I am supported by a judgment of a Division Bench of this Court, in *Doorga Doss Roy Chowdhry v. Nurendro Coomar Dutt Chowdhry* (1). Mr. Taylor, in his Treatise on Evidence, section 1495, says, that “judgments *inter partes* cannot be received in favour of a stranger, even as against a party thereto, because it is thought, with very questionable propriety, that the previous rule, *i. e.*, that no man should be bound by proceedings to which he is a stranger, might work injustice, unless its operations were mutual.” Starkie lays down the law thus, Volume I, 4th Edition, page 331: “Where the parties are not the same, one, who would not have been prejudiced by the verdict, cannot afterwards make use of it, for between him and a party to such verdict, the matter is *res nova*, although his title turn upon the same point. And the verdict ought not to be admitted to prejudice the jury against the former litigant. Besides, the former verdict may have been obtained upon the evidence of the party who afterwards seeks

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"to take advantage of it." From these statements of the law, it is clear that a judgment of the kind referred to is not conclusive between the parties; but I do not think it to be altogether inadmissible as evidence (1); and under this view of the law I think the case should be remanded to the lower Appellate Court, who should be instructed to treat the judgment referred to, not as conclusive between the parties to the suit, but as a piece of evidence to be used for what it is worth, and the lower Court, taking it into consideration with any other evidence put in by the parties now on the record, will dispose of the case.

MITTER, J.—I am of the same opinion.

That decisions like the one under our consideration have been frequently admitted in our Courts as evidence, is, I believe, a proposition beyond all dispute; and I do not see any reason why we should depart from this practice merely because it is opposed to the English Law of Evidence.

The principal objection urged against the admissibility of this decision is want of mutuality; but I entirely concur with Mr. Taylor in thinking that this objection is "of very questionable propriety." An admission made by A. is certainly receivable in evidence against him in a suit between him and B.; and yet it is perfectly clear that there is no mutuality of any kind whatever in such a case. I do not mean to say that the case of an admission stands exactly on the same footing as the one now before us; but I refer to it simply for the purpose of showing that the mere absence of mutuality is not a sufficient ground by itself for the exclusion of evidence.

The point involved in this case is precisely the same as that involved in the case of Ambika Prasad, and if the decision of a Court of competent jurisdiction on a question of fact directly raised before it, is capable of throwing any light on that question when it is raised in a subsequent litigation, I do not see any reason why the decision in the case of Ambika Prasad should be rejected as utterly valueless in the present suit. The special respondent was not a party to that case, it is true;

(1) See *Petrie v. Nuttall*, 11 Exch., 569.

but this circumstance cannot, in my opinion, afford any valid ground of complaint to the special appellant, who was admittedly a party to it, and who had, therefore, every opportunity to defend his own interests in the best manner he could. It has been said that if the special appellant had succeeded in the suit brought by Ambika Prasad, the decision in that suit could not have been used as evidence against the special respondent. But this case would have stood on quite a different footing; for it would have been obviously unjust and improper to allow the interests of the special respondent to be affected by a decision passed behind his back, and against which, therefore, he had no opportunity to protect himself.

The other objection referred to in the passage from Starkie, quoted by my learned colleague, namely, that "the former verdict "may have been obtained upon the evidence of the party who "afterwards seeks to take advantage of it," must also fail. There might have been considerable force in this objection when the parties to a suit were not at liberty to give evidence in their own favour; but it can no longer be of any validity whatever, now that the law on the subject is quite otherwise.

With reference to the second ground of special appeal, I am of opinion that the lower Courts are ~~certainly wrong~~ in treating the decision in the case of Ambika Prasad as conclusive in this case. Not only are the parties to the two suits not exactly the same, but the subject-matters are also different. Ambika Prasad sued for one-half of Mauza Gonda and the present suit is brought for the other half.

Case remanded.

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[FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

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Aug. 17.

THE QUEEN v. ABBAS ALI CHOWDHRY (PETITIONER.)*

Criminal Procedure Code (Act XXV of 1861), ss. 62 & 404—Judicial Power of Magistrate—Obstruction, Annoyance, and Injury—Nuisance.

An order of a Magistrate, under section 62, Criminal Procedure Code, e. g., prohibiting one of two rival proprietors of two different hauts from holding his haut on certain days of the week in order to prevent obstruction, annoyance, and injury, is not a judicial order; and is, therefore, not open to revision by the High Court under section 404, Criminal Procedure Code.

*Per PHEAR, J. (dissenting)—*The power conferred by section 62, Criminal Procedure Code, is of a judicial character within the meaning of the word "judicial" in section 404; and an order of a Magistrate in exercise of that power, is in the nature of an injunction, and is, therefore, subject to revision by the High Court, under section 404, Criminal Procedure Code.

THE question in this case argued before the Full Bench was, as to the effect of an order by a Magistrate under section 62 (1) of the Criminal Procedure Code, whether it is a judicial order, and therefore open to revision by the High Court under section 404 (2). It arose under the following reference:—

HOBHOUSE, J. (LOCH, J., concurring).—We think this case must be submitted to the Full Bench for a decision upon the point

* Miscellaneous Criminal Appeal, No. 35 of 1870, against an order of the Officiating Deputy Commissioner of Cachar, dated the 10th September 1869.

(1) *Act XXV of 1861, s. 62.*—"It shall be lawful for any Magistrate, by a written order, to direct any person to abstain from a certain act, or to take certain order, with certain property in his possession, or under his management, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or is likely to prevent, or tends to prevent, danger to human life, health, or safety, or is likely to prevent, or tends to prevent, a riot or an affray."

(2) *Act XXV of 1861, s. 404.*—"The Sudder Court may, on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial, or the record of any judicial proceeding of a Criminal Court other than a criminal trial in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right."

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material. It appears that a market had, for a long time, been held by certain persons on Tuesdays and Fridays, at a place called Fulhar, on one side of the river Barak, in Cachar; it appears also that the petitioners before us, at some time within a year previous to this application, established a similar market at a distance of about a mile from the first market, and on the opposite side of the same river, and held their market there on Tuesdays and Fridays also; it appears also that the Police reported various disturbances arising from the efforts of the rival market-keepers to induce the villagers to go either to the one market or to the other, and that boats, in which persons were lawfully employed in carrying their produce for sale, were intercepted by either the one party or the other party; it appears also that complaints were made of violence committed either on the one side or on the other side, in the attempt to prevent villagers from taking their produce either to the one market or to the other; the Magistrate also was of opinion that this disturbance and annoyance was likely to continue unless the two rival markets were held on different days; and as the market in Fulhar had been established ever since the time of the British rule, and, therefore, long before the market which the present petitioners set up on the opposite side of the river, and as also there were empty days on which the present petitioners could very easily hold their market without interference from any one else, so the Magistrate, under the provisions of section 62 of the Code of Criminal Procedure, directed the present petitioners to abstain from holding their market in Panchgram, in Cachar, on Tuesdays and Fridays.

The Magistrate further explains in his letter that the order upon the present petitioner was passed after evidence taken. And it is admitted by the pleaders on either side, *i. e.*, the pleader on the side of the petitioners, and the pleader on behalf of the Government, that there was such evidence taken, and that it resulted in the Magistrate's convicting certain persons of the offence of wrongful restraint in connection with the rival market, a conviction which was afterwards modified by this Court into a conviction against those persons of assault or hurt.

It would seem, therefore, that when the Magistrate in this instance directed the petitioner to abstain from the act in question,

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namely, the act of holding the market in Panchgram on Tuesdays and Fridays, he had legal evidence before him that such direction was likely to prevent obstruction, or risk of obstruction, annoyance, or injury to persons lawfully employed. And it seems probable also that he had evidence before him to show that such direction was likely to prevent riot or affray. But at any rate he had legal evidence before him to show that such direction was likely to prevent obstruction or annoyance to persons lawfully employed.

Under these circumstances, the question before us is whether the Magistrate had jurisdiction, under section 62 of the Code of Criminal Procedure, to pass the order in question upon the petitioner?

In *Sheeb Chunder Bhuttacharjee v. Saadut Ally Khan* (1), the Judges seem to have held that, in a case very similar to the one before us, the Magistrate had not authority to direct the discontinuance of any such market as the one in question. But in *The Queen v. Kalikaprasad* (2), the Judges seem to us to have held what to us appears to be the contrary of this.

In this state of things we think it proper to refer the question for the decision of a Full Bench, and the question is whether, under the circumstances stated by us, the Magistrate had authority to direct the petitioners in question to abstain from the act of holding their market of Panchgram on Tuesdays and Fridays?

We may as well mention that Baboo Jaggadanand Mookerjee, on behalf of the Government, has contended that the order passed by the Magistrate in this instance is not an order of the nature of a judicial proceeding such as is contemplated by section 404 of the Code of Criminal Procedure; and that, consequently, we have not jurisdiction to interfere with the order in question. We are of opinion that the order is of the nature of a judicial proceeding, and that, in fact, it has been directly so treated by the Magistrate in this instance. But we state the point in order that when the Full Bench shall have to consider the question which we have now submitted to them, they may

(1) 4 W. R., Cr. Rul., 12.

(2) 5 B. L. R., App., 82 note.

consider also, if they think proper so to do, this further question, whether the order in question is of the nature of a judicial proceeding, and is, therefore, an order which it is within the province of this Court to revise under Chapter XXIX of the Code of Criminal Procedure.

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Baboo *Bhawani Charan Dutt* for petitioner.

Baboo *Jaggadanand Mookerjee contra.*

The judgments of the Full Bench were as follow:—

PHEAR, J.—With regard to the last question put to us by the Division Bench, namely, whether or not the order of the Magistrate in this case is of the nature of a judicial proceeding, such as to give us jurisdiction to entertain the reference, I have the misfortune to differ from the rest of my colleagues, and this fact alone renders me, necessarily, distrustful of my own judgment.

Still I am bound to say that the little opportunity which I have just now had of considering the matter leaves me of opinion that the power which is given to the Magistrate under section 62 of the Criminal Procedure Code is of a judicial character within the meaning of the word judicial, as it is used in section 404. The Magistrate, by section 62, is directed to act, when he considers that any person, by the course of his conduct, “is likely to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any other person lawfully employed.” Thus the Magistrate, in a case falling under this section, has, in the first place, to arrive at a conclusion of fact between the offender on one side, and the person who is likely to be injured or annoyed on the other side, and the order which he passes, if he does pass an order under this section, is not merely (to use a word very familiar to us on this side of the Court) a ministerial act, nor is it such an order as a policeman makes in his capacity of peace officer, when he directs a person to pass on or to go to the other side of the street with the view to prevent or provide against the occurrence of any immediate

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obstruction, annoyance, or breach of the peace, but it is truly an injunction which, if it has been properly and duly made, will legally affect the person against whom it is issued in the enjoyment of his property as long as the order endures. I find that a Division Bench of this Court, in *The Queen v. Amiruddin* (1),

(1) Before Mr. Justice Norman and Mr. Justice E. Jackson.

THE QUEEN v. AMIRUDDIN AND OTHERS.*

The 26th July 1869.

NORMAN, J.—These cases have been sent up by the Judicial Commissioner of Assam.

It appears that the Deputy Commissioner of Seesbaugur, finding that great inconvenience and mischief were caused by cattle found straying on the high roads about the station and in the bazar, on the 13th of March last, issued an order warning owners of cattle to take proper care of them, and that if they let loose their cattle without any one to look after them, and caused such mischief, they would be punished under Act V of 1861 and other Laws and Regulations relative to contempt of orders. Notwithstanding this order, people continued to allow cattle and horses to run at large on the road. The Deputy Commissioner ordered that such cattle should be seized and impounded, and on the owners claiming their cattle, caused proceedings to be taken against them for disobedience of the order of the 13th of March. The parties now before the Court have been fined in divers small sums from one rupee to five rupees.

The Judicial Commissioner, there being no appeal, sent the proceedings before this Court, under section 434.

The main questions appear to be, first, whether that order was one which, under section 62 of the Code of Criminal Procedure, the Magistrate was competent to pass; and, secondly, whether the parties now before the Court can legally be punished under section 188 of the

Indian Penal Code for disobedience of that order.

The Judicial Commissioner supposes that the defendants were punishable under Act III of 1857. But that is not so. The preamble of that Act recites that "loss or injury is suffered by cultivators and occupiers of land for damage done to crops and other produce by the trespass of cattle, and that damage is done to the sides and slopes of public roads and embankments by cattle trespassing thereon, and that it is expedient to make provision for the disposal of cattle found straying," and it makes provision for such cases. But it contains no enactment providing for the punishment of persons causing nuisance to the public and interruption of traffic by allowing cattle to stray in public roads and bazaars.

On careful consideration of the 62nd section, we have come to the conclusion that the order of the 13th of March is not one which a Magistrate is competent to make under the provisions contained in it.

The order in question is of the nature of a bye-law, an attempted exercise of a supposed power of legislation on the part of the Deputy Commissioner. The Code of Criminal Procedure was passed, as appears by its preamble, to simplify the Procedure of certain Courts of Criminal Judicature. It certainly would be very extraordinary to find in such a Code powers given to a Magistrate to make regulations or bye-laws for the government of municipalities. It is clear that the order contemplated by section 62 is a particular and specific order addressed to a particular person or particular persons, to do or abstain from a particular act or

* Reference by the Judicial Commissioner of Assam to the High Court, under section 434 of the Code of Criminal Procedure.

took, as far as I can see, precisely this view of the force of the section. Mr. Justice Norman there says: "It is clear that the "order contemplated by section 62 is a particular and specific "order addressed to a particular person or particular persons, to "do or abstain from a particular act or particular acts—an act in "short, of the nature of an injunction or command which the "Magistrate is to make in a judicial capacity as the Judge in a "Criminal Court; not a regulation or bye-law." No doubt many of these orders, whether rightly or wrongly, are passed very summarily indeed, and with the slightest possible show of proceeding; but I do not think that this circumstance alters the character of the power or the nature of the jurisdiction under which the Magistrate makes them, though I can easily conceive it to be a special reason why such orders should be rendered subject, by the Legislature, to the revision of this Court, rather than exempted from it. To say the least of it, I think it strange, having regard to the very extensive powers of revision which this Court undoubtedly does possess under the Criminal Procedure Code, that a person aggrieved by an injunction of this particular kind should be forced to disobey it, and so to run the risk of being convicted of a serious criminal offence before he can question its legality.

I cannot myself at present avoid the conclusion that an order passed under this section is one which falls within the scope of section 404 of the Criminal Procedure Code, *viz.*, that it is, within the meaning of that section, "a judicial proceeding of a Criminal Court other than a criminal trial," which we have authority to call up to this Court.

JACKSON, J.—The question whether the order made by a

particular acts,—an act, in short, of the nature of an injunction or command which the Magistrate is to make in a judicial capacity as the Judge in a Criminal Court; not a regulation or bye-law.

We think, therefore, that the parties in question could not be convicted under section 188 of the Indian Penal Code of disobedience of the order of the Deputy

Commissioner by allowing their cattle to stray about the roads.

We, therefore, quash the conviction.

The Deputy Commissioner seems to have supposed that he could have proceeded against the offenders under section 34, Act V of 1861. That seems to be a mistake. But probably some of them might have been properly punished under section 283 of the Indian Penal Code.

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Magistrate, under section 62 of the Code of Criminal Procedure, is judicial in its nature is one which has not been raised before in any Division Bench in which I have sat, and therefore I have not had an opportunity of considering it. In the case of *The Queen v. Kalihaprasad* (1) which has been cited by the Magistrate, and also in the case referred to us, this question was not raised; but the question whether an order of the kind which has been made in this instance could be lawfully made by the Magistrate under that section was considered, and we were of opinion that the order was one within the Magistrate's competency to make. But now that the question has been fairly raised, I confess the inclination of my mind is to the opinion that the order is not one of a judicial character.

There are certain chapters and sections of the Procedure Code in which a specific procedure is laid down for the Magistrate in cases which might appear to be such as would come under section 62. In cases which did come precisely within the scope of those sections in which a specific procedure is laid down, I think the Magistrate would be bound to act according to that procedure; and where that procedure requires the hearing of the parties and the arriving at a conclusion upon the evidence, or the decision of any contested point, no doubt the enquiry becomes judicial, and the order is judicial. But it seems to me that, in regard to a great number of orders which come to be made under section 62, the Magistrate has to decide not between a person who is taking some order with his property, or omitting to take certain order with his property, and another person to be affected by such act or omission, but he has in reality to provide for the safety or comfort of many persons who at the time are not aware that their safety is in question, or that annoyance or obstruction is threatened. From the nature of the case it seems to me that very frequently it would be incumbent upon the Magistrate to make such order as is authorized in section 62 without any formal enquiry. The Magistrate might, for instance, receive intelligence that the fall of a building was imminent, or that some other circumstances existed which

were likely either to cause danger to the lives of persons or to cause obstruction, annoyance, or injury, or lead to an affray. The section, however, it may be noticed, does not require that something which is done or omitted to be done by a person in possession of property, should be "likely to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, or likely to cause danger to human life, health, or safety, or should be likely to prevent an affray;" but if the Magistrate considers that the direction which he proposes to give is "likely to prevent obstruction, annoyance, or injury," and so on, or is "likely to prevent danger to human life, &c., or is likely to prevent a riot or an affray," it is lawful for him to make such an order. The Magistrate, therefore, will often be called upon to act on the shortest notice, and without any delay; and I think there is another good reason why it should not be necessary to regard the act of a Magistrate under this section as being a judicial decision, which is simply this, that, the issuing of the order under the 62nd section entails no further consequences than that the person contravening that order does so at his peril, and is liable to be dealt with for such conduct under section 188 of the Penal Code.

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That then, it seems to me, is the proper way of trying the legality of an order issued under section 62 by a Magistrate, or by any other public servant, for the operation of these sections is by no means confined to the orders of Magistrates. I may mention that I have stated pretty nearly this view of the case on a former occasion in *The Queen v. Pitti Singh* (1).

There I pointed out that the Magistrate, "if he thought such a direction tended to prevent obstruction to persons lawfully employed, might order any person to take action with the wall in his possession in the sense of removing it; and if the order were disobeyed, and the obstruction anticipated were to arise, the person disobeying might be proceeded against under section 188, Indian Penal Code. If convicted, he might appeal or might bring his case before this Court by motion, and the

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"validity of the proceedings would then be enquired into." Therefore, I am now inclined to say that the act of the Magistrates under section 62 of the Code of Criminal Procedure, was not a judicial proceeding of a Criminal Court, and therefore does not come within the scope of section 404 of the Criminal Procedure Code.

KEMP, J.—I am of opinion that the order of the Magistrate in this case is not a judicial proceeding. It appears that the petitioner before us established a new market on the bank of the river Barak, in Zilla Cachar, and that parties proceeding with vegetables, &c., to the new as well as to the old market were obstructed and annoyed by the rival proprietors of the two markets. This was brought to the notice of the Magistrate, and he proceeded to the spot. The Magistrate took no evidence whatever, nor did he summon either of the proprietors of the markets, or put them on their defence. There is a memorandum on the record to the effect that certain parties, whose names were given, bore marks upon their persons of injury and violence. It is noted that one of them had his head broken, and that the other was wounded. Upon this the Magistrate, not with a view of preventing riot or affray but with a view of removing the obstructions and annoyances to persons lawfully employed, directed the petitioner to abstain from holding the new market upon the same days on which the old market was held. No evidence having been taken, and no party having been put on his defence, this order of the Magistrate was, in my opinion, not a judicial order, but an executive order, to prevent people, who were lawfully employed in bringing their goods for sale in the markets, from being obstructed and annoyed.

I concur in the judgment delivered by Mr. Justice Jackson.

BAYLEY, J.—I am of the same opinion with Mr. Justice Kemp and Mr. Justice Jackson. I do not think that this is a case coming within the scope of a judicial proceeding contemplated by section 404 of the Code of Criminal Procedure. Under section 62 of that Act, the Magistrate, by a written order, "may direct any person to abstain from a certain act,

“ whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance, or injury to any person lawfully employed, or a riot, or an affray.” Such an order might be required to be made by the Magistrate on matters of sudden emergency, where the case would not suffer the delay of a judicial proceeding by the taking and recording of evidence, and so forth. Such a judicial proceeding was not held by the Magistrate in this case. The facts shown are that parties who frequented the rival *hauts* had their boats with saleable articles intercepted on the way by the opposite party, and frequent disputes and affrays, in consequence, arose between the two proprietors, and people were found wounded in them.

In order to prevent such obstruction, annoyance, and injury to the parties, the Magistrate, by a written order, directed that one of the rival proprietors might change the days of his *haut* so as not to interfere with the day of the *haut* of the other proprietor, and thus remove the cause of such frequent injury, annoyance, and affrays. I think such an order is legally correct under section 62; and that such an order by the Magistrate under section 62 is not a judicial proceeding contemplated as capable of revision under section 404 of the Code of Criminal Procedure.

COUCH, C. J.—It has always appeared to me that the object of the Legislature in section 62 was to provide for cases where there might be “obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any person lawfully employed, or danger to human life, health, or safety, or any likelihood of a riot or an affray,” where it would be necessary to act speedily, probably at once, in order that the danger might be prevented, and where the case would not admit of the delay of a judicial proceeding caused by summoning the parties to answer, which delay might be such that the mischief intended to be averted might actually be done before any order could be made. I think this is the object of section 62 and of section 308, which seems intended to apply to cases of danger arising from the construction or state of a building, or other causes of that kind that

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ought to be at once removed. I agree with Mr. Justice Phear that if we look upon this provision, in the Code of Criminal Procedure, as in the nature of an injunction, where the Court would exercise its power in the same way as it would in the case of an injunction, it would be necessary to give the parties an opportunity of being heard and having the matter tried as in a judicial proceeding. But it seems to me that the object of the Legislature was to avoid doing this, and to invest the Magistrate with discretionary power, very considerable no doubt, but which might be properly exercised under the circumstances. In my opinion, that is why this cannot be regarded as a judicial proceeding, and that the Legislature in framing the Code of Criminal Procedure intended that it should not be, is clear from the terms of section 318. That is a section intended to prevent a breach of the peace, and it is there provided that, if the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists within his jurisdiction, he shall record a proceeding of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court within a stated period, and to give in a written statement of their respective claims, clearly showing that the Legislature, when it meant to direct the Magistrate to proceed judicially, pointed out the course that he ought to pursue. But we find no provision of the kind in section 62; the language of it seems to point out that it was intended to give the Magistrate a power to be exercised with the utmost promptitude, and if he should make an order which he had no authority to make, and the party on whom that order is made should not obey it, and be convicted, its legality may then be tried. That is the ground upon which I have always been of opinion that this is not a judicial proceeding, and although I feel some doubt as to its correctness in that Mr. Justice Phear takes a different view, I am confirmed in it by finding that it is shared by the three other Judges who form this Bench.

Exo Calif 619.

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

BHUBAN MOHAN BANERJEE AND OTHERS (DEFENDANTS) v. J. S.
ELLIOTT AND OTHERS (PLAINTIFFS.)

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Light and Air—Prescription—Easement.

In a suit for enforcing the removal of an obstruction to the alleged right of the plaintiffs to the light and air through certain windows in a room of a house, contiguous to the house of the defendants, it was proved that the plaintiffs had purchased the premises in 1847, and that the building of the room, in which the windows in question were, had been subsequently commenced in 1849; and the Judge of the Court below found on the evidence that the room and windows had been completed and in use for a period of twenty years prior to the date of suit, May 18th, 1870; that the plaintiffs had enjoyed the light and air through the windows for a period of twenty years without any interruption by the defendants; and, it being proved that the defendants had by building obstructed the light and air coming to the plaintiffs' widows, he granted an injunction commanding the defendants to take down so much of the wall as rose to the height of more than five feet above the level of the plaintiff's floor, and restraining them, the defendants, from continuing their building above the height of five feet.

Held, on appeal, *per Couch, C. J.*—By the English law before the Prescription Act (which is the law governing the case), the presumption of a grant, in the case of a claim to the access and use of light for a building, was a presumption of fact, the presumption being founded on the consent or acquiescence of the owner of the servient tenement. Acquiescence implies knowledge, and knowledge may be presumed where the owner is in possession. There must be knowledge for twenty years, at any rate, if the knowledge were for a lesser period, whether there was a grant, would be a question of fact, and no presumption could arise. The question of whether or not there was knowledge is one preliminary to the consideration whether or not a grant is to be presumed.

Held, on the evidence, that there had been no knowledge on the part of the defendants during the whole time, and therefore there had not been a twenty years' enjoyment of the light and air with their acquiescence.

Held per Markby, J.—The presumption of a lost grant is one of fact. An uninterrupted user for twenty years would be evidence from which, taken with other circumstances, it might be inferred that a grant had existed.

No ‘*patientia*’ or ‘*submission*’ on the part of the defendants being shown so as to constitute an acknowledgment of the existence of the right of the plaintiffs to the light and air, the defendants were entitled to succeed.

THIS was an appeal from the decision of Mr. Justice Norman. The plaintiffs were the members of the firm of Gisborne and Co., carrying on business as merchants in Calcutta. The defendants

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were described as also carrying on business in Calcutta. The suit, in which the plaint was filed on the 18th May 1870, was brought against the defendants to enforce the removal of an obstruction to the light and air entering at certain windows in a certain room, which light and air, the plaintiffs alleged, they had a right to by long usage. They alleged they had been in use and occupation of the room and of the light and air entering by the said windows for a period of twenty years, without any interference by the defendants.

The plaint stated that the plaintiffs were the owners of a house, No. 40, Strand, on the north side of which, on the upper story, was a room used as an office containing three windows through which light and air used to enter, and still of right ought to enter; that the defendants, who were in possession of the neighbouring property, had lately erected a building on the north side of the plaintiffs' premises, at a distance of four feet and a half from the north wall of the upper story of the plaintiffs' house, which they had carried to a height of six feet above the floor of the plaintiffs' room, and were proceeding to build the same up to a height of nine feet, the effect of which, the plaintiffs alleged, would be to block out the light and air from the plaintiffs' building, and to render the same useless as an office. The plaintiffs prayed that the defendants might be restrained by injunction from proceeding with the said building, so as to obstruct and interfere with the plaintiffs' right to light and air, and that they might be ordered to pull down the building, or so much thereof as obstructed or interfered with the access of light and air to the plaintiffs' room.

The defendants, in their written statement, admitted the building of the wall, but stated that it was on their own land, and that they had a right to build it to any height they chose; that the plaintiffs had not set forth in their plaint by what title they claimed that light and air ought of right to enter by the said windows; that to the best of the defendants' belief, no such right existed; that the access of light and air through the said windows had not been enjoyed by the plaintiffs for twenty years, the windows not having been in existence for twenty years before the alleged obstruction; that the three windows were part

of a row of seven windows, before three of which, to the west of the present three, the defendants had fourteen years ago built a wall at a distance of three feet from the windows to a height of twenty-four feet; that they had built that wall without permission from the plaintiffs, and though the wall interfered with the access of light and air to the plaintiffs' windows, yet the plaintiffs had never objected, nor had they, until the present time, disputed the right of the defendants to build on their own land as high as they pleased; and that the plaintiffs did not file their plaint in the present suit until May 18th, 1870, when the wall was nearly finished, though they might have filed it before.

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The defendants further submitted that they would suffer great loss by the removal of the wall; that the plaintiffs had no right to any access of light and air through the said windows; that if they had such right, the defendants had not infringed it; and that if the plaintiffs had such right, and the defendants had infringed it, the plaintiffs were not entitled to the relief asked for in the plaint.

The following issues were settled:—

1. Whether the plaintiffs were entitled to the light and air through the windows in question?
2. Whether the access of light and air had been obstructed?
3. Whether the plaintiffs were entitled to a decree directing the defendants to pull down the new wall or any part thereof?

The evidence showed that the premises, No. 40, Strand, were purchased by Messrs. Gisborne and Co. in 1847; that on the 2nd of November 1849, Messrs. Anderson, Wallace and Co., who were then engaged in repairing the premises and rebuilding parts of them, furnished an estimate for building an additional room, which was identified as that to which the present dispute related; but the exact date when the room was completed and fit for habitation did not appear.

Mr. Osmond, a witness for the plaintiffs, stated that, if an order for building such a room were given on the 2nd of November, about three months would be the time which it would take to complete the room. Mr. Rowe, another witness for the plaintiffs, agreed to this, and said that, after the walls were carried to their full height, the work might be finished in a month, allowing for

for some considerable time before the 22nd May, I may say, prior to the 7th of May 1850, and probably for some considerable time before that day, and that the room must have been covered in and lighted by the windows in question at a period not later than the 14th of April 1850, and not improbably as early as the month of February in that year.

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The Advocate-General was not able to point out, nor have I found, any case in which it has been decided at what precise point of time the enjoyment of light, through windows in the course of construction, may be considered to commence. I am very much disposed to think that the enjoyment of the access of light through the windows of a house in course of construction commences from the time when the room lighted by the windows is built and covered in, though the room is unfinished; because from that time, for any operations carried on within it, the light admitted through the newly constructed windows or window-openings is required and enjoyed. The defendants' witness, Apiludi, the mason employed in building the wall, alleged that on the 20th of April the wall was level with the floor of the plaintiffs' room. On the 22nd of April, it was raised to about three feet above the level of the bottom of the plaintiffs' windows. The wall on that side of the building was then stopped for about fifteen days. On the 8th of May the building was recommenced; and by the 18th of May, the day on which the plaint was filed, the wall had been raised to five feet and a half; and on the 23rd of May, when the work finally stopped, it was eight feet above the level of the plaintiffs' floor.

The raising of the wall to the height of three feet above the level of the plaintiffs' floor is not complained of, nor does it in fact constitute any obstruction of the light. Under these circumstances, I think it is proved that the plaintiffs for twenty years before an interruption commenced by work done after the 8th May, had enjoyed the access of light to their windows.

Mr. Evans for the defendants however contended that, according to the law as it stood in England before the Prescription Act (which Act does not apply to this country), when the land adjoining a house to which the access of light is claimed is in the occupation of tenants, no right can be claimed as arising from

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the mere enjoyment for twenty years against the reversioner who has no power to interrupt the enjoyment, and he referred to the case of *Daniel v. North* (1) in support of his position.

J. S. ELLIOTT. He proved that in 1849 and 1850, and for some years subsequently, the land now occupied by the defendants belonged to a certain Raja Ramchand, who lived at Moorshedabad, and he attempted to shew that the Raja knew nothing of the condition of the property. But it appeared that the Raja's gomasta was there constantly, and that the gomasta must have had full opportunities of seeing the plaintiffs' windows. The land was used as a place for the deposit of anchors and chains, and there was evidence that rent was paid for the use of it; but whether the tenancy was a monthly tenancy, or whether varying sums were paid for so much of the ground as from time to time might be occupied for the purposes of such deposit, was not very clear. I have no hesitation in acting on the opinion of Mr. Justice Erle in *Palk v. Shinner* (2), and saying that, under such circumstances, I ought to treat it as a question of fact whether the enjoyment of light was an enjoyment as of right, or under a claim of right, as against Raja Ramchand.

If there be, for the purpose of establishing a prescriptive right, the distinction suggested by Mr. Justice LeBlanc in *Daniel v. North* (1) between affirmative and negative easements, it will not, in my opinion, affect the question before me; first, because I must take it that Raja Ramchand knew of the existence of the easement; and, secondly, the mere use of the land, under circumstances which lead to the inference that the enjoyment was of an easement, mere license to deposit goods, or, if the land was actually demised, the demise being to tenants, probably holding merely as monthly tenants at most, does not shew that the Raja might not have interrupted the access of light to the windows of the plaintiffs if he had thought fit. The question then comes, whether there has been a substantial interference with the access of light to the plaintiffs' premises. The evidence adduced by the plaintiffs appears to be conclusive.

The plaintiffs and a number of brokers, Mr. Buskin, Mr.

Hills, and Mr. Griffiths, called as witnesses, deposed that, even in the present state of the defendants' wall, the light in the plaintiffs' room is so much obstructed, that the room is no longer fit for one of the principal purposes for which it has been hitherto used, namely, as a place for examining samples of silk and indigo. Mr. Cogswell and Mr. Hutchinson say that there is not now light sufficient for the examination of samples of produce by examining samples in such a light. Mr. Rowe and Mr. Osmond also stated that, for the ordinary purposes of an office, the light is seriously diminished; and that if the wall were raised two feet above its present level, as proposed by the defendants, the room would be rendered wholly unfit for an office. Mr. Flemington says:—"In the afternoon it gets so dark, that we cannot write in the same way as we used to do."

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I myself visited the house at 5 o'clock on the 20th of June. I entered the room and ascertained, by the test of reading, or rather endeavouring to read, a book printed in rather small type, first at the desk at which the partners sit, then immediately under the windows, so that the light should come from above on the book, and afterwards at a place outside the house, that the interference with the light is such, that it would cause considerable inconvenience to myself, if, at the hour of the day, I had occasion to write or work in that room. My experience in this respect accords with what the plaintiffs stated in evidence before me.

The evidence of Mr. Osmond shows that five feet is the highest point to which the defendants' wall can be raised without diminution of the light, and considering that the actual distance of the defendants' wall from that of the plaintiffs' is only four feet four inches, I think that the defendants' wall ought not to be raised higher than that. An injunction must issue commanding the defendants to take down so much of their wall as rises to the height of more than five feet above the level of the plaintiffs' floor, and restraining them from erecting on that wall any buildings exceeding the height of five feet, so as to interfere with the access of light and air to the plaintiffs' windows.

The defendants must pay the costs on scale 2.

From this decision the defendants appealed on the following

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grounds:—That it had been wrongly held by the lower Court that the plaintiffs were entitled to the access of light and air through the windows in the plaint mentioned; that it had also been wrongly held by the lower Court that the plaintiffs, and those through whom they claimed, had enjoyed the access of light and air through the said windows for twenty years before the interruption thereof by the defendants of which the plaintiffs complained, and that there was such use for twenty years, with the acquiescence of the defendants, or those through whom they claimed; that the plaintiffs were not entitled to a decree for a mandatory injunction, ordering the defendants to pull down a portion of the wall, and that the plaintiffs had by their conduct disentitled themselves to such mandatory injunction; that the Court below ought only to have restrained the defendants from continuing or erecting any wall opposite the lights of the plaintiffs at a greater height above such lights than the distance between them and such wall; and that the suit should have been dismissed with costs.

Mr. Kennedy, for the appellants, in support of the above grounds cited *Webb v. Bird* (1), *Ward v. Ward* (2), *Harbridge v. Warwick* (3), *Yates v. [redacted]* (4). In the Prescription Act the provisions with respect to light are different from the provisions as to other easements. Mere lapse of time is not sufficient to create a right. As to how acquiescence would be presumed in the landlord—*Palk v. Shinner* (5). As to the amount to which the plaintiff is entitled to have the building restrained, if at all—*Badel v. Perry* (6). The *onus* lies on the party wishing to establish the right—*In re Phene's Trusts* (7). There has been delay on the part of the plaintiffs to the prejudice of the defendants. They should have been prompt in coming into Court—*Durell v. Pritchard* (8). There being evidence to show that the owner of the servient tenement was absent, knowledge or acquiescence cannot be presumed against him.

Mr. Evans on the same side cited *Benest v. Pipon* (9),

(1) 10 C. B., N. S., 268; S. C. on appeal, 13 C. B., N. S., 841.

(5) 18 Q. B., 575.

(2) 7 Exch., 838.

(6) 3 L. R. Eq., 465.

(3) 3 Exch., 552.

(7) 5 L. R., Ch. App., 139.

(4) 1 L. R., Ch. App., 295.

(8) 1 L. R., Ch. App., 250.

(9) 1 Knapp's P. C., 60.

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Acton v. Blundell (1), and Gale on Easements, 128, 129. Notice of intention of interruption is sufficient; actual interruption is not necessary; acquiescence will not be presumed without proof of knowledge—*Daniel v. North* (2), Gale on Easements 162, *Gray v. Bond* (3). Acquiescence may be presumed, but the presumption is rebuttable—*Bagram v. Karformah* (4), *per Peacock, C. J.* The time at which the right to light and air begins is when the room is first used—Gale on Easements 174. As to the amount to which the wall should be abated—*Badel v. Perry* (5), *Robson v. Whittingham* (6). The diminution of light is too small to call for relief from the Court—*Lanfranchi v. Mackenzie* (7).

The Advocate-General (offg.), for the respondents, cited *Isenberg v. East India House Estate Company* (8), *Johnson v. Wyatt* (9). The right to light and air runs from the time of the existence of the windows; actual occupation or use is unnecessary to give the right, see *Yates v. Jack* (10), *Thomas v. Flight* (11). It has been found that the plaintiffs had an uninterrupted use of the light and air through the windows for twenty years with the acquiescence of the defendants, and they therefore had a right to the relief they asked for. After that length of time, a grant may be presumed to have been made and lost—*Arkwright v. Gell* (12), *Boyle v. Tamlyn* (13), Gale on Easements, 136, 281, *Dent v. Auction Mart Company* (14).

Mr. Wilkinson followed on the same side.

Mr. Kennedy in reply.

COUCH, C. J.—This is an appeal by the defendants in the suit from a decree of Mr. Justice Norman, whereby he ordered that

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| (1) 12 M. & W., 324. | (8) 33 L. J., Ch., 392. |
| (2) 11 East., 372. | (9) 33 L. J., Ch., 394. |
| (3) 2 B. & B., 667. | (10) 1 L. R., Ch. App., 295. |
| (4) 3 B. L. R., O. C., 47. | (11) 11 A. & E., 688. |
| (5) 3 L. R. Eq., 465. | (12) 5 M. & W., 203. |
| (6) 1 L. R., Ch. App., 442. | (13) 6 B. & C., 329. |
| (7) 36 L. J., Ch., 518. | (14) 2 L. R. Eq., 238. |

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J. S. ELLIOTT. " the defendants should forthwith take down such portion of the wall erected by them on the north side of the house and premises, " No. 40, Strand, in the town of Calcutta, belonging to the plaint-
 J. S. ELLIOTT. " iffs as is more than five feet above the level of the floor of the upper story of the plaintiffs' premises ; and that a perpetual injunction should be awarded to restrain the defendants from erect-
 " ing or raising the said wall or any part thereof more than five feet above the level of the said floor, so as to obstruct or interfere with the plaintiffs' right to light and air through the three windows situate on the north side of the upper story of the plaint-
 " iffs' said premises."

The plaint in the suit stated that the plaintiffs were the owners and in possession of the house, No. 40, Strand ; and that on the north side of the said house, which consisted of two stories, there was a room on the upper story containing three windows, which had been and was used as an office for the business of the plaintiffs' firm, through which windows the light and air used to, and until the acts of the defendants thereafter mentioned did, enter, and still of right ought to enter.

The defendants by their written statement denied the plaintiffs' right to the access of light and air through the windows, and the main question raised in the appeal was whether the plaintiffs were entitled to the right claimed. As the premises are situated within the limits of the ordinary original civil jurisdiction of this Court, the law to be applied to the case is the English law, as it was before the passing of the Prescription Act, 2 & 3 Wm. IV., c. 71, which does not extend to India. We are bound to apply this law whether we approve of it or not, and for myself I may say that I agree in what the late eminent Chief Justice of this Court said in *Bagram v. Karformah* (1), " I cannot say that the English law of presumption as to light and air, where nothing is done on the servient tenement which the owner of it could prevent by action, is the perfection of reason. But it has grown from time to time to meet man's wants, and it has been founded upon actual or supposed principles of convenience."

" the part of the defendants, that mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must, in a peculiar degree, depend on the nature of the accompanying facts; and the presumption in favor of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land." Park, J., said:—"The case indeed does not come up to *Daniel v. North* (1), because there was something in the nature of the easement there which makes a difference. A land-lord may not see windows thrown out, and a tenant may not feel the inconvenience; and this distinction is referred to by LeBlanc, J. But in the present case, there is reasonable ground to presume the knowledge of the land-owner, and the question was properly left to the jury." The easement claimed in this case was the right of landing nets on the shore of a public navigable river.

In *Cross v. Lewis* (2), no evidence was given as to the time when the plaintiff's house was built, but some of the witnesses had known it for thirty-eight years, and the windows obstructed had existed during all that period. The authority of *Daniel v. North* (1) was recognized, and decision was in favor of the plaintiff, on the ground that the origin of his right was not traced.

In the judgment of Mr. Justice Erle, in *Palk v. Shinner* (3), upon which Mr. Justice Norman appears to rely in his judgment in this suit, he says:—"If this case had arisen before the statute, there would have been good evidence to go to the jury of a user as of right for twenty years, notwithstanding the existence of the tenancy for years." The right claimed was a right of way, the words must be understood as used with reference to such

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" years acquiesced in by the owner of the servient tenement raises " a presumption of right which, in the absence of any evidence to " rebut it, ought to be acted upon by those, whether Judge or " Jury, who have to determine the facts;" and at page 53 : " I " understand the law to have been clearly laid down as far back " as the year 1786, that the enjoyment of light, with the defend- " ants' acquiescence, is such a decisive presumption of a right, by " grant or otherwise, that, unless contradicted or explained, the " jury ought to believe it."

Mr. Gale in his valuable work on Easements says :—“ In order “ that such user may confer an easement, the owner of the servient “ tenement must have known that the easement was enjoyed, and “ also have been in a situation to interfere with and obstruct its “ exercise had he been so disposed ; his abstaining from inter- “ ference will then be construed as an acquiescence,” citing *Gray v. Bond* (1) Gale on Easements 162.

These authorities, it appears to me, shew that, by the English law before the Prescription Act, all the presumption of a grant in the case of a claim to the access and use of light for a building was a presumption of fact; the presumption being founded on the consent or acquiescence of the owner of the servient tenement. For acquiescence or consent, knowledge is necessary. A man cannot be taken to consent to what he does not know of; but when he was in possession, his knowledge was taken to be proof of his acquiescence ; and in such cases, the jury were directed that they ought to presume a grant. And as is said by Parke, B., in *Bright v. Walker* (2), “ though in theory it was presumptive evidence, in practice and effect it was a bar.”

But it was otherwise when the owner was not in possession. In that case, if there was no direct evidence of his knowledge of the enjoyment, it was for the jury to say whether, from the circumstances proved, and having regard to the nature of the easement that had been enjoyed, it might fairly be presumed. If they

the servient tenement for only a part of that time, a grant ought to be presumed, does not appear to have been ever decided. I think as twenty years' enjoyment with acquiescence is necessary, there must be knowledge for that period. And at least if the knowledge were for a lesser period, it would be a question for the jury whether there was a grant, and not a presumption which they would be bound to make. There is, however, a *dictum* in the judgment in *Bright v. Walker* (1), which seems opposed to this view. Parke, B., says:—"Again, such claim" (a right of way) "may be defeated in any other manner by which "the same is now liable to be defeated, that is, by the same "means by which a similar claim arising by custom, prescription, "or grant would now be defeasible; and therefore it may be answered by proof of a grant, or of a licence, written or parol, for "a limited period comprising the whole or part of the twenty "years, or of the absence or ignorance of the parties interested "in opposing the claim, and their agents, during the whole time "that it was exercised."

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I am inclined to think that some words have been omitted here, and it should have been "during the whole or part of the time "it was exercised."

The view which Mr. Justice ~~Noaman~~ took in *Bagram v. Karformah* (2) that the right to the access of light is capable of being acquired by occupancy as an incident to property, without reference to the acquiescence of the owner of the servient tenement evidenced by the non-obstruction, if it was intended as a statement of the English law before the Prescription Act, is not, I think, supported by the decisions. There are no doubt expressions of Mr. Justice Littledale in *Moore v. Rawson* (3), which seem to support this view, but the question before the Court was whether a right to light might be lost by a discontinuance of the enjoyment. He held that, as the right was acquired by mere occupancy, it ought to cease when the occupancy was discontinued; that as it was acquired by mere user, it might be lost by non-user. He says:—"After he" (the owner of the dominant tenement) "has erected his building, the owner of the adjoining

(1) 1 C. M. & R., 219. (2) 3 B. L. R., O. C., 48. (3) 3 B. & C., 340.

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 — BIHUBAN MOHAN BANERJEE " land, and so obstruct the light which would otherwise pass to the
 " building of his neighbour. But if the light be suffered to pass
 J. S. ELLIOTT. " without interruption during that period to the building so erected
 " ed, the law implies, from the non-obstruction of the light for that
 " length of time, that the owner of the adjoining land has consented
 " that the person who has erected the building upon his land
 " shall continue to enjoy the light without obstruction, so long
 " as he shall continue the specific mode of enjoyment which he
 " had been used to have during that period." Where the owner
 of the servient tenement is in possession, this is quite in accordance
 with the decisions, and so it is when he is not in possession,
 and it is found by the jury that he knew of the enjoyment. I
 cannot think that Mr. Justice Littledale, who was a party to the
 decision in *Cross v. Lewis* (1) not long before this, intended to
 introduce a new doctrine. I do not see that the judgment of
 the Exchequer Chamber in *Webb v. Bird* (2), which Mr.
 Justice Norman also quotes in support of his view, does more
 than adopt the distinction pointed out by Mr. Justice Littledale
 between easements properly so called, and the right to light
 and air, namely, that a person who uses a way over the land of
 another is a wrong doer, and a person who erects buildings on his
 land with windows is not. But the passage which follows that
 part of the judgment shews that the right must be founded on
 the presumption of a grant.

Now the evidence in this case was that at the time the plaintiffs' room containing the windows in question was built, Raja Ramchand, the owner of the ground upon which the defendants' building is erected, lived at Moorshedabad, and did not come to Calcutta till 1260 or 1261 (1853 or 1854); that the ground was occupied by several tenants (the precise nature of whose tenancy does not appear, but it was probably a monthly one), and was used for placing chains, anchors, &c., upon. The witness for the defendants, Banamali Banerjee, said that Ramchand's gomastas used to be there, and gave the names of two, Gobind Moor kerjee, who is alive, and Brajanath Chatterjee, who is now dead;

(1) 2 B. & C., 686.

(2) 13 C. B., N. S., 841.

but on his cross-examination he said he called a man a gomasta who could read and write, and he appeared to know nothing of the nature of their employment, except that they received the rents. The defendant, Loknath Chatterjee, said that in 1251 (1844), and J. S. ELLIOTT, until 1255 (1848) a durwan, named Nandaram, collected the rents, but there was a sirkar who seldom came. Another witness, Kasi-nath Bysack, said there was a gomasta of Raja Ramchand, to whom rent was paid, and that the gomasta used to be on the ground looking sharp after them (the tenants); and if they took extra land for their anchors and chains, the rent was enhanced.

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This is all the evidence from which knowledge by the owner of the servient tenement of the enjoyment of the light is to be presumed. There was a piece of vacant ground, the owner of which lived at a distance of some 200 miles. It was used by various persons for placing anchors, chains, and other such articles upon, and a person was employed to collect rent from them, whose duty seems to have been to take care that no one used any part of the land without paying for it. I do not think I can infer, from the nature of this person's employment, that he was the general agent of the owner, so that his knowledge might be considered to be that of his master, or that ~~he~~ would tell his master of the construction of the plaintiffs' windows.

From 1260 (1853) when Raja Ramchand came to Calcutta, he might be presumed to have knowledge, but not, I think, before. In my opinion the question of knowledge is a distinct question, and preliminary to the question whether a grant ought to be presumed, and the Judges of this Court, as the Judges of fact, as well as of law, are to decide this question according to their belief upon the evidence. I think it is most improbable that Raja Ramchand knew of the existence of these windows until long after they were constructed, and, consequently, that there has not been twenty years' enjoyment of them, with the acquiescence of the owner of the servient tenement. Mr. Justice Norman says:—"I must take it that Raja Ramchand knew of the existence of the easement." I cannot assent to this, for I do not see that the Court was bound to do this. It was a question, I think, to be determined as any other question of fact; and being of opinion that the plaintiffs have not had the enjoyment

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which was requisite by the English law before the Prescription Act for the presumption of a grant, I must find the first issue against them. Consequently I am of opinion that the decree appealed from should be reversed, and the plaintiffs' suit dismissed with costs, including the costs of this appeal.

MARKBY, J.—I am of the same opinion. I do not consider it necessary to state my reasons in this case at very great length, because I adhere to the opinion which I expressed in the case of *Bagram v. Karformah* (1) as to what the question is which we have to consider in cases of this description. I think we have to consider whether the owners of the land, which is now the defendants', by a grant, formal or informal, express or implied, conferred upon the owners of the land, which is now the plaintiffs', the right to enjoy the passage of light, as the plaintiffs had enjoyed it prior to the new building being erected. In other words, whether the owners of the defendants' land intended to deprive themselves of the right of building on their land so as to interrupt the passage of light to the plaintiffs' house.

I only wish to add to what I then said, that I find I was wrong in stating that *Holcroft v. Heel* (2) was the first case in which Judges introduced the doctrine of inferring from modern user the existence of a modern lost grant. I find that, twenty years earlier, Lord Mansfield had laid down this doctrine. But Lord Mansfield differs from Eyre, C. J., who delivered the judgment in *Holcroft v. Heel* (2) in one very important particular. Eyre, C. J., would (contrary in my opinion to the later authorities) have made the presumption one of law. Lord Mansfield very clearly treats it only as an inference of fact. In *The Mayor of Hull v. Horner* (3) (the decision of Lord Mansfield is to which I refer), the plaintiffs had to establish their right to certain port dues. They could shew no grant, but only user, and one view of the case was that the port only came into existence in the year 1382, in which case the claims founded on immemorial user would be defeated. It was contended, however, that, inasmuch as there was evidence that the Corporation had collected

(1) 3 B. L. R., O. C., 18, *see* 28.

(2) 2 Wms' Saunders, 175.

(3) Cowp., 102, *see* 108.

the dues continuously since the year 1441, that is, for 350 years, it was still a question for the jury whether there had not been a grant of these dues from the Crown to the Corporation between the year 1382 and 1441, which grant was now lost. Mr. Dunning had argued that, if evidence of a usage which could not possibly have lasted up to the time of Richard I., was sufficient, the rule of the Common Law, that usage must extend to that date, was gone. But Lord Mansfield points out the distinction. He says:—“Now, with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory, which is not produced by record, my opinion is this, namely, that all evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in a case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence shewing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances.” I do not, of course, quote this opinion of Lord Mansfield as conclusive on the law at the present day. It may have been modified, and probably upon close scrutiny in some points would be found to have been modified, by later decisions. But I quote it, because it puts the very distinction on which I insist in very clear terms, and because on this point I consider Lord Mansfield’s opinion, and not that of Eyre, C. J., has been accepted by the later authorities. It is also clear that, but for the distinction pointed out by Lord Mansfield, Mr. Dunning’s argument would have been good; and, as I pointed out in *Bagram v. Karformah* (1), the Prescription Act would have been based on a

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J. S. ELLIOTT. wrong conception of the law. That this is so is very clear from what followed immediately on the decision in *Holcroft v. Heel* (1), where Eyre, C. J., held (contrary to Lord Mansfield) that the presumption was conclusive.

If *Holcroft v. Heel* (1) were good law, it could, as so acute a lawyer as Mr. Sergeant Williams at once perceived, only be supported on the principle that the time of prescription had been really shortened by analogy to the later Statutes of Limitation, (see 2 Williams' Saunders, 175). But Sergeant Williams does not (as the author of Gale on Easements seems erroneously to suppose, see page 134) say that that is his opinion. On the contrary, he goes on at page 175a to shew that in many cases a view has been taken contrary to that of Eyre, C. J., in *Holcroft v. Heel* (1), and then (as I pointed out in *Bagram v. Karformah*) (2), the authors of the last edition of the work at page 175c treat it as a settled question that the twenty years' user is "only evidence from which the 'jury might presume a grant.'

I may also observe that this view of the law explains the variation in the terms in which English Judges are in the habit of leaving questions of this kind to a jury; which variation is otherwise inexplicable. As the evidence in support of the right becomes stronger, they will force more strongly upon the jury their duty to draw every inference in favor of its existence; they will even, in very strong cases, use every exhortation short of a command; but always, as it seems to me, reserving to themselves the power to modify their language when the evidence of user does not so strongly point to the existence of the right. And length of time, acquiescence, the nature of the right claimed, and so forth, are all circumstances which have been dwelt on as matters fit to be considered when directing the jury upon this class of questions. That being the case, and the question to be considered being one of fact, all that I have further to say upon this question bears upon this case only. I am quite clear that, upon this question of fact, I ought to find in favor of the defendants. I consider that, in deciding this question, it is of the greatest importance to look to the nature of the easement which is

(1) 2 Wms. Saunders, 175.

(2) 3 B. L. R., O. C., 48.

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claimed. Had, for instance, the plaintiffs made a door on that side of their premises, and had they shown that they had uninterruptedly used a foot-way leading from that door to the street across the defendants' land for the same period that they have enjoyed the light in this case, I think, I should, notwithstanding that the defendants were absent, and the land in possession of tenants, have found for the plaintiffs, and have been much inclined to consider it highly improbable that the plaintiffs would have been allowed to commit an act so aggressive on the defendants' rights and those of the tenants uninterruptedly for so many years, without the defendants knowing of it; and I should probably have inferred that if they knew it, they submitted to it because they had in some way or other put it out of their power to prevent it. But in this case the full, complete, and exclusive enjoyment of the servient property by the defendants and their tenants has never been interfered with. Nothing has been done in any way to annoy or obstruct them. There has been no *patientia* or *submission* by the defendants; and either of these terms, to my mind better than "acquiescence," expresses the condition which is required, in order that enjoyment may be evidence of a right. Further, in this case, there has been opportunity, as far as appears, until the present building was erected, for the defendants to assert that their property was free of the servitude, or any necessity for them to interfere with the enjoyment of the light by the plaintiffs. To have erected an opaque screen close to the plaintiffs' windows would have been expensive; and unless the law requires it, both useless and unneighbourly. I do not think that in Calcutta the law does require it, and I think it would be most inconvenient if it did. I wish to point out that this reasoning would not necessarily apply in all its force to windows in houses of very considerable antiquity. It might, perhaps, be inferred that, in such a long course of years, some opportunity for the defendants to exercise their right of ownership, so as to interrupt the enjoyment by the plaintiffs of their access of light, would necessarily occur; and if it could be inferred that such an opportunity did occur, and that the defendants then abstained from the interruption, then it would follow, almost as a matter of course, that the plaintiffs were not only enjoying the

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J. S. ELLIOTT. access of light, but were enjoying it as of right, and that the defendants were submitting to that right; that is to say, the inference which arises at once, and almost irresistibly, in the case of a positive easement, would now arise in the case of the negative easement also. The same result might also be arrived at, if the plaintiffs could show by positive evidence that the defendants had abstained from interruption at a time when it is likely that they would have interrupted if they had not lost the right to do so, though probably (if I had to determine this question) I should hold that a considerable time must elapse (perhaps twenty years) before the defendants were concluded by their submission.

I make these remarks because though, as I have said, the question I am discussing is one of fact, and not of law, the learned Judges of the Appellate Court in *Bagram v. Karformah* (1) have expressed their fears that the consequences of dealing with this as a question of fact might be dangerous, and therefore I wish to show that the owners of houses having windows would not be altogether so unprotected as these learned Judges seemed to suppose. I do, however, admit that the law, as I suppose it to exist in Calcutta, does not adequately provide for the conflicting rights of contiguous owners of house property in a large and populous city. Nor do I believe that any satisfactory rules on this subject can be deduced solely from the principles of law which govern the acquisition of rights by grant or prescription. I think this is a question which would be best settled by a few simple rules for the construction of houses framed with the assistance of practical persons, and with reference to the climate, habits, and convenience of the particular locality.

Judgment reversed.

Attorney for the appellants: Mr. *Hechle*.

Attorneys for the respondents: Messrs. *Berners and Co.*

Before Mr. Justice Phear.

J. BRUKOWSKY v. THACKER, SPINK AND OTHERS.

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August 8.

Master and Servant—Action for harbouring or sheltering the Servant of another—Notice of Contract of Service.

An action will not lie for the mere harbouring or sheltering a person who is under a contract of service to another, even with notice of such contract of service.

Blake v. Lanyon distinguished (1).

THIS was a suit for Rs. 5,000, as " damages sustained by the plaintiff by reason of the defendants wrongfully enticing away and securing and harbouring a servant of the plaintiff." The plaint stated that the plaintiff, being desirous of securing the services of a first-class professional engraver and die-sinker, proceeded to England and contracted and agreed with one J. T. Wolff to act in that capacity for the purpose of carrying on and superintending that branch of the plaintiff's business; that the agreement was made for the term of three years, to commence on the day on which Wolff arrived in Calcutta; that Wolff arrived in Calcutta on 3rd February 1870, and "became, and was, and still is," the servant of the plaintiff under the said agreement; and that the defendant, well knowing that Wolff was the servant of the plaintiff, wrongfully and maliciously enticed and procured him, J. T. Wolff, unlawfully, and without the consent and against the will of the plaintiff, to refuse to work for the plaintiff, as by his contract he was bound to do, and to depart from the aforesaid service and employment of the plaintiff; and did also, well knowing the premises, and that the said J. T. Wolff had unlawfully refused to work for the plaintiff, and had departed from his service, wrongfully and maliciously, and without the consent and against the will of the plaintiff, at Calcutta, on or after the 3rd day of March 1870, secure, harbour, and detain, and still harbour and detain the said Wolff, and refuse to permit him to return to the plaintiff, although requested to do so by the plaintiff;" whereby the plaintiff lost the services of Wolff, and whereby the plaintiff alleged he had sustained damages to the above amount.

1870 The agreement was dated the 8th December 1869, and contained the following stipulations and conditions :—

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THACKER. "The said J. T. Wolff shall forthwith proceed to Calcutta, and shall, for the term of three years, to be calculated from the time of his arrival in Calcutta, become the engraver and manager or superintendent of the engraving and die-sinking branch of the business of the said John Brukowsky, and shall devote the whole of his time and attention thereto, and shall use his best endeavours to promote the business and connection of the said John Brukowsky, and shall in all things obey and fulfil the commands and directions of the said John Brukowsky. The said J. T. Wolff shall faithfully and diligently serve the said John Brukowsky, during the said term of three years, as such engraver and manager or superintendent as aforesaid, and shall not engage in any other business, pursuit, or calling whatsoever, but shall devote himself wholly and exclusively to the business of the said John Brukowsky. The said J. T. Wolff shall not receive any moneys whatever from any person or persons on account of the said John Brukowsky, unless he be authorized so to do in writing by the said John Brukowsky, and shall duly account for all moneys so received and paid over to the said John Brukowsky. That if the said J. T. Wolff shall not in all things well and faithfully obey and carry out all the commands and directions of the said John Brukowsky, the said John Brukowsky may at any time cease to employ the said J. T. Wolff by giving to him three calendar months' notice in writing, &c.

"The said J. T. Wolff shall be paid for salary a sum equal to one half part, or share, of the net gains and profits of the engraving and die-sinking branch of the business of the said John Brukowsky,—such half part, or share, to be paid monthly; the first of such payments to be made within a month after the said J. T. Wolff shall have commenced his employment. Provided always that nothing herein contained shall, in any manner, constitute the said J. T. Wolff a partner in the business of the said John Brukowsky, or render him in any way liable or accountable for any debt or obligation incurred, or to be incurred, in relation thereto. The said J. T. Wolff hereby agrees to repay the sums to be advanced to him by the said John Brukowsky for

the payment of his passage and outfit to Calcutta, by monthly instalments in the proportion of one-third of the salary to which the said J. T. Wolff will be entitled under this agreement, and which said instalments the said John Brukowsky is hereby authorized to retain and deduct out of and from the said salary.

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The defendants, in their written statement, denied "that they, or any, or either of them, wrongfully or maliciously enticed or procured the said J. T. Wolff, unlawfully or without the consent or against the will of the plaintiff, to refuse to work for the plaintiff, as in the plaint alleged, or to depart from the service or employment of the plaintiff; or that the defendants, or any, or either of them knew that the said Wolff had unlawfully refused to work for the plaintiff; or that the said defendants, or any, or either of them, wrongfully or maliciously harboured or detained, or that they, or any, or either of them, still harbour or detain the said J. T. Wolff, or refuse to permit him to return to the plaintiff, as in the plaint alleged."

The third paragraph of the defendant Spink's written Statement (1) was as follows :—" This defendant says that, on or about the 4th of March last, Mr. Brown, an assistant of the defendant's firm, came to the defendant, stating that a Mr. Wolff, an engraver, had made an application to him for employment. He said that Wolff was under an agreement with the plaintiff, Mr. Brukowsky, who had brought him out from England; but that he (Wolff) had stated that he declined working any longer at the plaintiff's shop, as he found he had been engaged to come to this country under false representations, and that he sought other employment."

The effect of the evidence is sufficiently stated in the judgment.

Mr. Woodroffe (Mr. Evans and Dr. Mendes with him) for the plaintiff.—If a man wrongfully and maliciously causes a servant to break a previous engagement by another person, he does a wrong making him liable to an action—*Lumley v. Gye* (2); and

(1) This defendant alone put in a written statement, the others being in England.

(2) 2 E. & B., 216.

1870 with notice of such previous engagement, is the same thing
J. BRUKOWSKY as wilfully and maliciously—*per Crompton, J.*, 224. So
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TIAOKER, enticing a servant from a previous engagement is actionable—*Fawcet v. Beaures* (1). So if he continue to employ him after notice that he is the servant of another, though he has not enticed him away—*Blake v. Lanyon* (2); Bacon's Abridgment, Title, Master and Servant, Letter O. Service is constituted by the contract alone; and it is not necessary to prove actual service—*per Crompton, J.*, 225; *per Erle, J.*, 232, *Lumley v. Gye* (3). The principle that if a person induce another to break a contract he commits an actionable wrong has received in this country an exemplification in one of the Regulations VI of 1823, section 5, clause 3 (4), relating to the inducing a ryot to break a contract for the cultivation of indigo. [PHEAR, J.—Those are merely special contracts.] The measure of damages for enticing away a servant is not the actual loss sustained at the time, but the injury done to the master by causing the servant to leave his service is to be taken into consideration—*Gunter v. Astor* (5).

The Advocate-General (Offg.) (Mr. Kennedy with him) for the defendants.—This contract is void for want of mutuality, for although the servant bound himself to come out to India, yet the plaintiff was not bound to give him employment for any fixed period, or to carry on the business; and a person who, under such circumstances, harbours the servant of another, is not liable to an action for loss of service—*Sykes v. Dixon* (6). [PHEAR, J.—There seems to be a promise by implication that the plaintiff was to pay the expenses of coming out, though there is no actual promise. The only consideration was, that money was to be advanced, and money was advanced.] There was nothing to bind the plaintiff to pay any compensation if he chose to give up the business the day following the servant's arrival. In *Hartley v. Cummings* (7), the agreement was held valid, but it is said there that it might

(1) 2 Lev., 63.

(5) 4 Moore, 12.

(2) 6 T. R., 221.

(6) 9 A. & E., 693.

(3) 2 E. & B., 234.

(7) 5 C. B., 247.

(4) Repealed by section 1 of Act X of 1836.

have been in restraint of trade to an extent which would vitiate it, and if so, no action would lie—*per Maule, J.* (1); *Pilkington v. Scott* (2) was decided on the ground that there was ^{J. BRUKOWSKY} _{THACKER.} a good agreement. Here we say there is not a valid agreement.

The *Advocate-General* asked that the case might be dismissed on this point.

Mr. Evans.—The question of want of mutuality cannot be raised now. The defendants admit that Wolff was the plaintiff's servant, in paragraph 3 of their written statement. [The *Advocate General*.—They don't admit he was the plaintiff's servant when he came to us.] They substantially admit it. The cases relied on are distinguishable. In *Sykes v. Dixon* (3), it was held that the agreement was void under the Statute of Frauds. In *Hartley v. Cummings* (4), there was permission to discontinue the business at any time during the seven years, without making any allowance to the servant. That is not the case here. In *Aspdin v. Austin* (5), there was nothing in the covenant to bind the master to employ the servant for two or three years, although the master was bound by express words to pay the servant the stipulated wages for those periods, if the servant performed, or was ready to perform, the condition precedent on his part. In *Keane v. Boycott* (6), the servant was an infant, and the service was for his benefit, and therefore it was held the contract was at most only voidable, and that by the infant himself; and the defendants were not permitted to allege that the contract was void. If this contract is voidable only, there has been some part performance by the plaintiff in carrying on the business, which is sufficient foundation for a contract. Though there is no express provision to carry on the business for a definite period, there is an express provision for remuneration to Wolff for his services.

PHEAR, J., refuses to stop the case here. .

The *Advocate-General* continues.—No enticing is shown by the plaintiff, and mere retention of a servant after notice is

(1) 5 C. B., 260.

(4) 5 C. B., 247.

(2) 15 M. & W., 657.

(5) 5 Q. B., 671.

(3) 9 A. & E., 698.

(6) 2 H. Bl., 511.

1870 insufficient to entitle the plaintiff to damages. *Lumley v. Gye* (1)
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THACKER. was decided on a particular state of circumstances, and lays down no general rule—*per Crompton, J.*, 231. The wrong does not lie in the detainer—*Adams v. Bafeald* (2).

PHEAR, J.—I am of opinion that the plaintiff has failed to establish any cause of action against the defendants. He has not shown to me that Thacker, Spink and Company have been guilty of any wrongful act towards him; in other words, he has not shown that they have done any act which, as against him, Mr. Brukowsky, it was their duty in law for any reason not to do. The material facts of the case necessary to the explanation of my judgment are very few, and are almost, I may say, beyond dispute. It is agreed on both sides that Mr. Wolff came out to Calcutta in the early part of February in this year, under a contract of service with Mr. Brukowsky. After a very short lapse of time, according to Brukowsky's own account, Wolff showed signs of dissatisfaction, which perhaps culminated to a maximum point about the 25th of February. At that date, or a little before it, he renewed his acquaintance with a Mr. Mullany, whom he had previously known in London, and who was then an assistant in the defendants' firm. With this gentleman he conversed on his prospects, and if we may believe Mr. Mullany (and I have no reason to doubt his words), expressed himself strongly with regard to the deception which he said Mr. Brukowsky had practised upon him in the matter of his contract. He saw Mr. Mullany several times, and on the 3rd of March was taken by him to Mr. Brown, one of the leading assistants of the defendants' firm. It is quite clear, I think, that up to that day Mr. Brown had no personal knowledge of Wolff. To Mr. Brown, Wolff detailed his alleged wrongs, and asked if he could obtain employment with the defendants; and Brown having thus learned the fact of the agreement between Wolff and Brukowsky from Wolff's own mouth, replied that he could not until Wolff had got rid of this engagement. Mr. Brown, however, consented to introduce him to Mr. Spink; and, accordingly, Wolff came again on the morning of

the 4th, and was then introduced to Mr. Spink. Mr. Spink told him pretty nearly the same as Brown had, and advised him strongly to arrange matters with Brukowsky. Mr. Spink had another interview after this with Wolff. Still matters were not arranged between Wolff and Brukowsky ; and eventually Wolff was furnished with employment by Thacker, Spink and Company, and from that time to this he has been, I may say, continuously working for them. In regard to that which I have related as being the substance of what occurred at the interviews between Wolff and Brown, and Wolff and Spink, I have accepted the word of Brown and Spink themselves, because I think these gentlemen can be entirely trusted ; and the version of Wolff (the only other person who can speak to what took place at those interviews) does not, in my opinion, materially differ from theirs in anything which concerns the fate of this case. Again, Brukowsky's own testimony accords substantially with what Brown and Spink represent in reference to their own behaviour. It is simply impossible to argue that anything which fell from either of these two gentlemen amounted in words to an attempt to persuade Wolff to leave the service of Brukowsky. Indeed, the plaintiff's counsel have, I think, felt ~~that~~ this was so, and have consequently pressed on me throughout the case that persuasion and inducement may be as intentionally effected and offered by the use of negative language as by a course of direct solicitation. No doubt, this proposition cannot be denied ; and familiar examples of this sort of proceeding can be easily adduced, such as those which have been quoted by the learned counsel during the trial. But I think it is quite impossible to say with reason that Thacker, Spink and Company, either through the voice of Messrs. Spink and Brown, or by the action of their subordinates, made any direct effort to get Wolff to break his contract. The utmost made against them by the evidence is that they were willing to avail themselves of Wolff's services, and would be glad to have him as soon as he could get free of his obligation to Brukowsky. There has been, in my opinion, a complete failure on the part of the plaintiff to make out that Wolff was enticed or allured by the defendants, either directly or indirectly, from the service of Mr. Brukowsky. I have no doubt that Wolff came away

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1870 from Brukowsky entirely of his own accord, in opposition to
J. BRUKOWSKY the expressed advice of Mr. Spink; and that the defendants
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THACKER. never entertained the purpose of leading him in any way to
break his contract. So that if we had here the precise form of
pleading which obtains in England, that particular head of the
plaint which would assume the shape of the count for enticing
and procuring Wolff to leave the service of the plaintiff, is not
made out.

There remains, however, another foundation on which it
is contended that the plaintiff's claim in this suit may be sup-
ported, supposing the necessary materials are to be found in
the evidence. This, expressed in technical language, is, that
Messrs. Thacker, Spink and Company received and harboured
Wolff at the time when they knew he was bound to the service of
the plaintiff. It seems to me that this statement, made in the broad
form in which I have just enunciated it, does not necessarily
involve a cause of action. The principal case cited and relied on
for the purpose of showing that it does so, is *Blake v. Lanyon* (1).
The judgment of the Court, as reported in that case, at first sight
goes very far to support the argument of the plaintiff's counsel.
The Court said: "An act will lie for receiving or continuing to
employ the servant of another after notice without enticing him
away. A person who contracts with another to do certain work
for him is the servant of that other till the work is finished, and
no other person can employ such servant to the prejudice of the
first master; the very act of giving him employment is affording
him the means of keeping out of his former service."

Two illustrations that I threw out during the trial are sufficient
in my mind to show that the doctrine here enunciated by the
Court is not generally applicable to the cases of all contracts of
service without discrimination; and it is to be observed that, in
Blake v. Lanyon (1), the servant was a manual labourer, who, con-
sequently, fell within the scope of the Statute of Labourers.
Now the effect of those Statutes was to declare it was unlawful
even to give shelter to, or to harbour, such a servant while he was
in the service of another person. Consequently, any one who

did so, with knowledge that the servant was in the service of another, committed a wrongful act which rendered him liable to a civil action for damages at the suit of the person aggrieved, and

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it appears to me noticeable that this case of *Blake v. Lanyon* (1) has never, until, I believe, the present occasion, been cited to prove that an action will generally lie for the mere act of sheltering and harbouring after notice. The principal point judicially determined in that case was, that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished." If this were so, it followed, on the footing of the Statute of Labourers, that the defendant in the suit was guilty of a wrongful act, and therefore if that act was to the prejudice of the first master, the defendant was liable to pay damages.

Mr. Justice Crompton, in *Lumley v. Gye* (2), refers to this case simply as an authority to show that "a person who has left his work unfinished is a servant for the purposes of such an action." It was not necessary for him to consider whether the "harbouring or sheltering" of a person, known to be under any sort of contract of service with another, would of itself constitute a cause of action, because each party in *Lumley v. Gye* (2) charged the defendant with enticing away from her Miss Wagner to break her contract: there was no question of harbouring and sheltering."

I do not think, after the consideration of the authorities available to give to the judgment of the court in *Lumley v. Gye* (2), that he justifies the finding of the court that the sheltering and harbouring of a servant after he has quitted service, even though he has done so without his master's knowledge, is a sufficient cause of action against the master.

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THACKER. latter can be the basis of an action. Also, further on in his judgment, the learned Judge speaks of the action as an action for maliciously "interfering with persons in the employment of another."

The cases of *Pilkington v. Scott* (1), *Hartley v. Cummings* (2), and *Sykes v. Dixon* (3) have been cited by the plaintiff's counsel for the purpose of showing that actions have been recently maintained for the wrongful hiring and harbouring of servants after the first actual service had been broken. But in none of these cases does the report fully give the facts which constituted the cause of action : in each the sufficiency of the first contract of service was the sole matter before the Court ; and in the second of the cases the jury appear to have found that the defendant had seduced the servant from actual service. It seems to me that it would be monstrous to hold, particularly in this country (I here take up Mr. Evans's argument), that the giving shelter to and the harbouring of a European who happened to be under a contract of service to another, became a cause of action the moment the person charitable enough to give such shelter and protection became acquainted with the other's contractual engagements. At all events I think it cannot even be said in all cases that a person who has intentionally and purposely induced a person to break a contract on the part of another is liable in damages in consequence of the contractee. I do not see how a person who may be induced to break a contract to serve Mr. Bruckowsky can be liable to serve the plaintiff. If the plaintiff's person's medical condition were such that it would be as well for him to die and ultimately be buried, that it

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have the defendants committed a tort against Brukowsky? Have J. BRUKOWSKY
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they committed a breach of duty which they, in the eye of the law, owed to Brukowsky? Now, duty may rest either on a foundation of contract, or upon some special relation between the parties, or it may be the result of the general obligation which every one is under not to do intentionally, without good cause, any act which he knows will affect his neighbour and will be productive of immediate injury to him. Under this latter head, I apprehend can be ranged all the particular forms of duty the breach of which is the foundation of suit in the various actions for fraud, negligence, and defamation. To put this into ordinary language, I may say that, even irrespective of contract or special relations, every one is aware that he is bound to act honestly towards his neighbour, and that if he intentionally acts dishonestly, and damage is the result, he must pay for it. I need hardly remark that it is necessary in English pleading to allege malice in all actions of this kind, in order to make the cause of action theoretically complete. Now; what is malice? It has been urged before me that Mr. Justice Crompton says, "whoever, wrongfully and maliciously, that is with no good purpose, corrupts," and so on. But clearly this passage must not be taken literally. I am confident that Mr. Justice Crompton did not mean that it is likely that his words would have pre-

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which is given by Mr.

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be real, telling both parties that they ought to settle their quarrel between themselves. It would, I think, be very much to the discredit of the law which is administered in this Court, if such behaviour were actionable and made a man liable to pay damages. There is nothing, from the beginning to the end of the evidence, which would lead me reasonably to suppose that if Messrs. Thacker, Spink and Company had closed their doors against Wolff he would have gone back to Brukowsky. There is, on the contrary, a great deal to indicate, nay to prove, that he could not have gone back, for it appears that he was almost literally without means there, and was forced to go elsewhere for subsistence. I don't think I should be justified in concluding, on the evidence before me, that Thacker, Spink and Company have procured the violation of a right to which Brukowsky was entitled. I here use the words which constitute the kernel of the judgment delivered by Erle, J., in *Lumley v. Gye* (1), and that judgment is as fortunate as the judgments of that very learned Judge almost invariably are in expressing perspicuously the true ground on which the cause of action rested. He escaped the inexactness of language which not only prevented the judgment from Justice Crompton from being entirely accurate, but rendered it specially liable to misapprehension. I quite agree with Mr. Justice Erle, that "he who causes a damage to another, by a wrong act, may be indemnify, and that such indemnity may be given for a breach of contract." In this case, it has happened that the defendants have caused a damage off of his own accord, and the

from the view which I take of them that I decide between the parties. I purposely abstain from saying anything about the merits of the quarrel between Wolff and Brukowsky. It may be that Wolff's memory and views are discolored by disappointment, and it may well be possible that Brukowsky has not been guilty of any fraud and deceit towards him. At any rate Wolff has clearly broken his contract, and therefore against him Brukowsky might rightfully have sought his remedy. By taking this course he would necessarily have got relief, unless his own conduct proved to be such as to bar him from it. He has chosen, however, to bring his suit against third persons, and has utterly failed, as I think, to make out that these are answerable on any legal grounds for Wolff's breach of contract. I must dismiss the suit with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiff: Mr. *Fink.*

Attorney for the defendants: Mr. *Watson.*

Before Mr. Justice Norman, Offg. Chief Justice, and Justice Markby.

IN THE MATTER OF RAMSABUCK MISCELLANEOUS PETITIONS FOR SOLVENTS. 1870
JULY 10.

SHEIKH PALTU AND OTHERS.

SHEIKH RAJU.

Insolvent.

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MATTER OF
RAMSEBUK
MISSER
AND OTHERS,
INSOLVENTS.

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show cause why the order of the Court in this matter, dated July 10th, 1866, dismissing the petition of insolvency of the insolvents, should not be set aside; that the matter of the rule *nisi* is still pending and undetermined by the Court; that Beni Prasad died, on the 21st September 1869, intestate, leaving the petitioner and Ramkrishna Das (a minor) his sons, heirs, and representatives him surviving; that on the 10th December 1869 the petitioner, as the son of Beni Prasad, and as guardian of his minor brother Ramkrishna Dass, obtained from the Court of Azimgurh a certificate, under Act XXVII of 1860, for the administration of the estate of his deceased father Beni Prasad; that the petitioner was desirous of prosecuting and carrying on the enquiry directed by the Court in the matter of the petition of Beni Prasad in the rule *nisi* of 12th June 1869; and the petition prayed that the petitioner, Janki Prasad, might be allowed to carry on and prosecute such enquiry in the place of his deceased father Beni Prasad.

A rule *nisi* was accordingly granted on the 17th January 1870 calling on Sheikh Mazaff Ali, Sheikh Ramzan Ali, Sheikh M. himuddin, Sheikh Paltu, Sheikh Kudrat Ali, Ramphal Das, Manohar Das, J. C. Misser, one of the surviving insolvents and the representative of the deceased insolvent Ramsebuk Misser, and A. B. Miller, Official Liquidator of the said insolvent, that the petitioner might not be allowed to prosecute such enquiry in the place of his deceased

by an indenture dated 22nd October 1862, which was filed with the plaint; that the defendant, since the date of the purchase, had been occupying a portion of the house with the leave and permission of the plaintiff, and paying rent to the plaintiff for such occupation; that, on 12th April 1869, the defendant ceased to pay rent, and set up a title to the house and premises adverse to the plaintiff; that, on 3rd May 1870, the plaintiff brought an ejectment suit against the defendant, in the Calcutta Court of Small Causes, but on the defendant setting up such adverse title and alleging that the other occupants of the house were as tenants, and on the plaintiff's being unable to prove the tenancy of the defendant, the plaintiff was nonsuited. The plaintiff alleged that her cause of action arose on 12th April 1869, and the plaint prayed that her title to the said house and premises might be declared good and valid; that she might recover possession of the same with mesne profits; and that she might have such further and other relief as might seem fit to the Court.

The plaintiff produced the title deeds of the premises. The defendant alleged that the premises in question had been purchased in October 1862 by one Madhusudan Dey, the uncle of the defendant, with whom the plaintiff was living as his mistress; that the said Madhusudan Dey made the purchase in the name of the plaintiff, and paid the whole of the purchase-money out of his own funds; that Madhusudan Dey was, during the rest of his life, in possession of the house and premises, and the defendant used to reside with him; that Madhusudan Dey died in July 1869, leaving the defendant, his only legal and personal representative according to Hindu law; that since the death of Madhusudan Dey, the defendant had been in possession and occupation of the premises, as such personal representative, residing in a portion of it and letting out a portion to tenants, who paid him rent for the same; that the plaintiff had not at any time been in possession of the premises, nor had he, the defendant, ever paid rent to the plaintiff for a portion of the house as alleged; that the title deeds of the premises in question had been left by Madhusudan Dey with the plaintiff for safe custody during his absence, and that they had since remained in the plaintiff's possession; and that the

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 KOYAL. plaintiff had shortly after the death of Madhusudan Dey brought several suits in the Calcutta Small Cause Court, for the recovery of possession of the said premises, but had failed in all such suits. The defendant submitted that, under the circumstances, the suit ought to be dismissed.

The case was partly heard on November 28th, UZLRUB appeared for the plaintiff, and Mr. Miller for the defendant.

Mr. Miller raised an objection that the suit was being *res judicata*. The question has been decided in the Small Cause Court, a Court competent to decide it, although it was a question of title—*Radhamony Bustomy v. Anundomoye Dabee* (1). The Act of 1864 makes no difference as to this. The *onus* of proving title lies on the plaintiff;—the defendant is in possession. [PHEAR, J.—The plaintiff shows the title deeds in her name, and the defendant admits them. I think the *onus* is on the defendant.]

The case was adjourned for the production of further evidence, and came on again for hearing on December 15th, when the defendant was examined. In his cross-examination it appeared that Madhusudan left a widow, but the defendant stated that she had been unchaste during her husband's life, and consequently he was the heir.

Mr. Lowe appeared for the plaintiff.

Mr. Kennedy (Mr. Miller with him), for the defendant, wished to raise two issues: 1st, whether the widow of Madhusudan, the plaintiff, is entitled to succeed, notwithstanding her unchastity during her husband's life; 2nd, whether the plaintiff not showing that she is suing on behalf of Madhusudan is entitled to rely on the title afforded by the deeds alone.

PHEAR, J.—On the facts which are now disclosed for the first time by the evidence, Mr. Kennedy asks me to raise two issues (*reads*). It appears to me that I ought not to allow either of these issues to be raised at this stage of the case. The facts which are necessary to establish them must have been known to the defendant from the commencement, and he must also have known that the burden of proof lay on him. He has not, however, in

(1) Gasper's S. C. C. Ref., 51.

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Statement set forth any fact indicating that he intended to prove the unchastity of Madhusudan's widow; and neither the widow nor the plaintiff has had the least opportunity of disproving such an allegation as that. Nor do I think it would follow the second objection to this suit to be made, for the plaintiff has already made out the best of all *prima facie* evidence. She has produced the title deeds of the house, a series of documents ending in a conveyance to herself, and by the admission of the other side, as well as by her own statement, she has had these title deeds many years. As the case stands, by the admission of the defendant, it is not simply a case of a *benamidar*, where one name merely stands for another, but it is a case where the plaintiff has all the ordinary *indicia* of title, while he, the defendant, is a trespasser. If it be the fact, as the defendant has contended, that the plaintiff holds the property for and on behalf of Madhusudan's widow, there is nothing in the law of this country, or the procedure of this Court, which should preclude this suit from enuring to the benefit of the widow, even though the plaintiff has not come into Court expressly alleging that she comes on behalf of the widow: so that it appears to me that, on the defendant's own showing, the plaintiff has a title on which she ought to succeed in this Court, unless the defendant can satisfy the Court, by positive evidence, that the plaintiff is in fact not suing on behalf of the widow, and it is in order to enable him to do this that he desires to raise the second issue; but here again he must have been aware of the facts, and should have set them out in his written statement. But in his written statement there is nothing of the kind to be found, there is no mention there of Madhusudan's widow. If this point had been raised in the defendant's written statement, the plaintiff might have come into Court otherwise prepared to meet it than she now is. I think, as I have already said, that I should be allowing too great a stretch of the elastic procedure of this Court, if I gave leave to the defendant to raise the issue now. I, therefore, think the plaintiff is entitled to succeed. Costs on scale No. 2.

Judgment for plaintiff.

Attorney for plaintiff: Mr. Mackertich.

Attorneys for defendant: Messrs. Sims and Mitter.

[PRIVY COUNCIL.]*

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Dec. 10.MUSSAMAT MITNA (PLAINTIFF) v. SYAD F
AND OTHERS (DEFENDANTS).ON AP /AL FROM THE HIGH COURT OF JUDICATURE, NO.
WESTERN PROVINCES, AGRA.*Practice—Settlement of Issues—Remand.*

Where, on an appeal, the Counsel for appellant admitted he could not succeed on the merits, as the evidence stood on the record, and their Lordships were of opinion that substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of Appeal, but was noticed and commented on by that Court, was held not to constitute a fatal mistrial of the cause so as to render a new trial necessary.

Baboo Rewun P^o[t]had v. Jankee Pershad (1) commented on.

THIS was an appeal from a decree of the High Court at Agra, dated 26th November 1867, affirming a decree of the Principal Sudder Ameen of Alahabad, dated 5th July 1867, dismissing the plaint with costs.

The suit was to recover the amount and enforce the security of a bond and mortgage for rupees 13,000 with interest, signed by the first respondent, on behalf of himself and the second and third respondents. The other respondents were interested as purchasers of decrees.

The first and second respondents admitted the claim; the other respondents alleged that the bond was executed, but as that the money mentioned therein was not paid, the attempt to enforce it was a fraud.

No issues were settled or recorded according to Act VIII of 1859, Section 139, but evidence, both oral and documentary, was put in by each side.

The Principal Sudder Ameen, in his judgment, stated: "I am decidedly of opinion that the present is a false and fraudulent

* Present:—LORD JUSTICE JAMES, LORD JUSTICE MELLISH and SIR JAMES COLVILE.

(1) 11 Moore's I. A., 26.

suit, based on a bond on which, though it was duly executed and registered, no consideration ever passed, and which is now advanced by the plaintiff at the instance of, and in collusion with, the two first defendants." He then gave his reasons for believing that no money passed, and dismissed the suit.

The plaintiff appealed to the High Court; the grounds of appeal containing no objection to the omission to settle issues, but containing a complaint that as the written statements of the respondents were filed on the same day as the case was decided, the appellant had no opportunity of filing proofs to show that they were false.

The High Court, in affirming the judgment of the Court below, stated, as to the above objection,—

"It is much to be regretted, we think, that, considering the great value of the matter in litigation, the Principal Sudder Ameen should have fixed a day for the final disposal of the suit, without having previously settled the issues to be decided. The omission to fix issues, whether on a day previous to that fixed for hearing and deciding the suit, or on such day, would, in most cases, undoubtedly be a defect and an irregularity calculated to affect the merits of the case, and would necessitate a remand of the case to the Court of ~~first~~ instance, in order that such defect of procedure might be cured. But, in this case, we think that the omission, although it is to be regretted, is not of that character. The only issue arising in the case is the simple one—'did any consideration pass on the bond, or is the suit a collusive one, brought with a view of defrauding the mortgagees and auction-purchasers?' From the plaintiff's statements, and the evidence adduced in support of them, we think it is quite clear that the parties perfectly understood the issues to be determined, and we do not consider, with reference to the evidence on the record, and the nature of the further evidence offered by the (plaintiff) appellant, that the plaintiff's case would, in any way, be benefited by such further evidence.

"We are of opinion, therefore, that there is sufficient evidence on the record to enable us to decide the case without remanding it to the lower Court for further investigation and re-decision.

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"On the merits, we are of opinion that the plaintiff's appeal must fail."

The Court then gave their reasons in detail, and dismissed the appeal.

The appellant, having appealed to England, stated in his case as filed the following reasons for seeking to set aside the decree:—

(1.) Because the execution and registration of the bond in suit were admitted; and because, by the evidence of the attesting and other witnesses, this appellant sufficiently proved the payment of the consideration in the said bond acknowledged, as well as the *bona fides* of the transaction on his part, so as to have entitled him to a decree in the Courts below, against the defendants generally: but certainly, in any case, against the two confessing defendants on the record.

(2.) Because the said High Court so far rightly declared that the Principal Sudder Ameen, previously to fixing a day for finally hearing and disposing of the said suit, ought to have settled and recorded the issues to be tried and decided, and that his omission in that behalf undoubtedly was a defect and irregularity (under the said Code of Civil Procedure), and would, in general cases, necessitate a remand of the suit to the Lower Court by the said High Court; and because, nevertheless, the said High Court (erroneously and unjustly) towards this appellant, as it is humbly submitted) did not so remand the suit, but proceeded alone to decide the same against this appellant, affirming the finding and decision of the Court below, as above mentioned.

(3.) Because, if it should be considered that the evidence on all the points in the case is not sufficiently full and satisfactory, or in any respect imperfect and doubtful, then it is humbly submitted that the case should be remanded to India, with directions that the said suit be forthwith tried on issues to be first regularly settled and recorded, in conformity with the provisions of Act VIII of 1859 (the Code of Civil Procedure aforesaid), and that evidence shall be taken under such issues from the parties respectively, according to the authority of the judgment of the Lords of the Judicial Committee in the case of *Baboo Rewun Pershad v. Jankee Pershad* (1).

(1) 11 Moore's I. A., 25.

The appeal having come on for hearing, Mr. *Leith* and Mr. *Doyne* for the appellant, admitting that the appellant could not hope to reverse the finding on the facts, contended there had been a mistrial, as no issues had been settled, and the case must go back. *Baboo Rewun Pershad v. Jankee Pershad* (1). The section is imperative (2). A subsequent section treats it as imperative (3). The High Court ought, when it observed the omission, to have settled the issues (4). The necessity of recording the issues was recognized under the old Procedure; *Srimut Moottoo Vijaya Raghunadha Gowery Vallabha Perria Woodia Taver v. Ranee Anga Moottoo Natchiar* (5). *Namboory Setapatty v. Kanoo Cola Noo Pullia* (6). *Mohun Lall Sookool v. Goluck Chunder Dutt* (7). Even with express consent of the litigants, the Judge ought not to omit to settle issues. [Lord Justice Mellish.—I don't agree to that; even in common law cases in this country cases go up to the House of Lords which are tried throughout upon other issues than those in the pleadings. Settling the issues under the Indian Act has the same effect as joining issue in common law, but by consent you may do anything.]

Sir *R. Palmer*, Q. C., and Mr. *Bell* for the respondents.—Even under the old Regulations the same Judge (8) who decided the case relied on by the appellant (5) did not consider the rule inflexible, and took no notice of a similar objection raised in another case—*The Zemindar of Ramnad v. The Zemindar of Yettiapooram* (9). The question as to whether the general principle laid down in *Baboo Rewun Pershad v. Jankee Pershad* (1) is applicable to a particular case must depend on the circumstances, and whether there is more than one issue to be tried. By the report in that case it would appear that there were several issues; but in this case the High Court, in observing on the omission to fix the issue, proceeds in its judgment to say: “the only issue arising in this case is the simple one—‘did any consideration pass on the bond, or is the suit a collusive one,

(1) 11 Moore's I. A., 25.

(6) 3 Moore's I. A., 359, see p. 379.

(2) Act VIII of 1859, s. 139.

(7) 10 Moore's I. A., 1.

(3) *Ib.*, s. 145.

(8) The Right Hon. Dr. Lushington.

(4) *Ib.*, s. 354.

(9) 10 Moore's I. A., 458.

(5) 3 Moore's I. A., 278.

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' brought with a view of defrauding the mortgagees and auction-purchasers.'

Their LORDSHIPS delivered the following judgment:—

It has candidly been admitted by the learned counsel for the appellants, that in this case they would despair of inducing their Lordships to interfere with the finding of the Courts in India upon the questions of fact and the conclusions which they have drawn from the evidence on the record. The question upon the appeal, therefore, is narrowed to this,—has there been in this cause such a mis-trial as renders it incumbent upon their Lordships to reverse the decisions under appeal, and to remand the case for the settlement of proper issues, and a retrial upon those issues?

Their Lordships are desirous to say nothing which may have the effect of introducing any laxity in the Courts of India in regard to the observance of those provisions of the Code which direct the settlement of issues,—provisions which their Lordships regard as most important. But they do not find in the Code anything which says positively that the omission to settle those issues is fatal to the trial. With respect to the former decisions of this Court, it is observed that the decisions upon the Regulations which preceded the passing of this Code of Procedure were not altogether uniform. Most of them show their Lordships' desire to maintain the strictness of the obligation on the Judges of the Country Courts to record the points to be tried; but there is one which has been cited by Sir Roundell Palmer, which certainly shows that they did not in all cases consider the omission to be fatal. Those Regulations, moreover, contained words to the effect that no evidence should be given except upon points which had been recorded. The case of *Baboo Rewun Pershad v. Janhee Pershad* (1), which is a case upon the Code of Procedure, appears to have been complex, and the explanation given for what took place in that case, certainly shows that their Lordships may have been exercising a discretion which cannot now be questioned. All these cases,

(1) 11 Moore's I. A., 25.

however, differ from the present case in this respect. In this case the omission to raise the issues was brought before the notice of the Appellate Court; the Appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Judge below had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been, in the opinion of the Appellate Court, correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a retrial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section of the Code. At all events, it appears to their Lordships that there is nothing in the Code which made it imperative upon the Appellate Court, or now makes it imperative upon their Lordships, to yield to that objection, and therefore, fully concurring in the observations made by the Appellate Court, that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mistrial of the cause which vitiates all the proceedings and renders a new trial necessary.

Their Lordships, in coming to this conclusion, have had regard to the circumstance that no objection seems to have been taken in the Court below to dealing with the case without the settlement of the issues. If the objection had been taken, their Lordships think that the appellant would have stood on higher grounds, and it would then have been very difficult to say that a trial proceeding in the face of the objection could be held to be regular for any purpose. They do not, however, mean to affirm that mere waiver, or rather the omission to take the objection, is in all cases sufficient to purge the irregularity. They are of opinion that if it had appeared that substantial justice had not been done, the objection might well have been taken when it was taken before the Appellate Court, and when taken

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ought to have prevailed. But being of opinion that there has not in this case been a failure of justice in consequence of the omission to settle the issues, their Lordships are not prepared to send it back for further litigation, and they must therefore advise Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

Agent for appellant: *Mr. Wilson.*

Agent for respondent: *Mr. Oehme.*

R/CAL. p 460.

[APPELLATE CIVIL.]

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Dec. 7.

Before Mr. Justice Bayley and Mr. Justice Paul.

SHEIK JAN ALI (ONE OF THE DEFENDANTS) v. KHONKAR
ABDUR KUHMA (PLAINTIFF.)*

*Declaratory Relief—New Point—Special Appeal—Act VIII of 1859, s. 374
Cause of Action.*

A suit was brought against the plaintiff by his tenants, for an illegal distress in attaching crops raised by them on the land let to them by him. The present defendant, in the course of that suit, presented a petition to the Court, in which he stated that he was the owner of the land on which the crops attached had been raised. The plaintiff brought the present suit for a declaration of his title and confirmation of possession, alleging that the defendant's statement affected his (plaintiff's) title by throwing a cloud over it. On special appeal it was objected, for the first time, that the plaint disclosed no cause of action, and the objection was admitted and prevailed.

*Per PAUL, J.—*A suit merely in anticipation of a threatened ejectment will not lie. There must be something in the case either in the nature of an invasion of some right, or in the shape of an impediment or obstacle in the way of full enjoyment of proprietary right, to found a claim to a declaratory relief; but a mere allegation, or a mere threat without action taken or founded upon it, will not be sufficient to entitle a party to a declaration of his title.

* Special Appeal, No. 886 of 1870, from a decree of the Subordinate Judge of Beerbhoom, dated the 14th February 1870, affirming a decree of the Moonsiff of that district, dated the 26th August 1869.

THE plaintiff in this case stated that he was in possession of certain lands by virtue of his purchase from the defendant No. 2; that he underlet the lands to defendants Nos. 1 and 3, and received kabuliats from them; that the said defendants having fallen in arrears, he attached the crops raised by them on the land; that the tenants disputed the attachment, and the attachment was ordered to be taken off; that subsequently the tenants brought an action against their landlord, the plaintiff, for an illegal distress, and they recovered damages against him; that in the last proceeding, defendant No. 4, presented a petition in which he stated that he was the owner of the lands, the crops whereof had been attached, and this objection of ownership affected the plaintiff's title by throwing a cloud over it; thereupon the plaintiff became entitled to sue in the Civil Court for the declaration of his title and confirmation of his possession. The plaintiff obtained a decree declaring his ownership and possession in both the Courts. From this decree the present special appeal was preferred on behalf of the defendant, on the ground, amongst others, that the plaint did not disclose any cause of action.

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Baboo *Abhai Charan Bose* for the appellant.—The plaint discloses no cause of action. The suit will not lie, inasmuch as there was only a bare allegation of ownership in a certain petition, which was not followed by any action done in furtherance of the alleged claim.

Baboo *Dabendra Narayan Bose* (with him Munshi *Mahomed Yusaff*) for the respondent.—It is too late now to take a new point on special appeal which was not taken in either of the Courts below: A suit would lie under the circumstances notwithstanding that no obstruction was thrown in the way of plaintiff's enjoyment of his property: moreover, any defect in that respect was cured and removed by the course adopted by the defendant No. 4, in still denying by his written statement that the plaintiff was entitled to the lands, and otherwise resisting the plaintiff's claim. The defendant could only raise this contention, if he admitted the plaintiff's title and possession, as the suit would then be unnecessary.

title, or, in other words, to have his title to the mauzas declared. In page 450, their Lordships observe as follows : " If the Bhaki " Birt tenure be valid, the plaintiff has no possession in the sense " in which he uses that term. He might have a right to rent for " a time on the footing of contract, or estoppel even from a Birt " tenant, if the latter accepted a lease, but that would rest on " special grounds, and would not flow from his general proprietary " title. Until this claim to a Birt tenure be removed, the " plaintiff cannot have the possession which he seeks, since in some " way or other the defendant stands between the plaintiff, as owner " of the *primâ facie* proprietary right, and the cultivators. Had " the defendant admitted the tenancy under the lease, the " plaintiff's title to the rent would have been established, but " that admission, unless qualified, would also have removed those " impediments to the plaintiff's proprietary title which he desires " to have removed." Again in page 451 their Lordships observe : " This lease being removed (the plaintiff having failed to " prove it, and the defendant renouncing it) what bar is there " to the assertion of the proprietary right to the collections, " unless the Birt tenure interpose one? On that bar the " defendant does rely, and unless it be removed, the plaintiff can " scarcely expect to lease or otherwise manage his zemindari " with effect. It is an impediment in the way of his possession, " which the suit is instituted to remove." Further, in the same page, the following observations occur : " But, as these Courts " have the divided jurisdiction of a Court of Law and a Court " of Equity substantially united in one Court, a claim for rent " in arrear and a claim to remove clouds on the title to demise " seem to be unobjectionable, and no authority was cited to " support the objection. In truth, the claim to rent under the " farming lease supports the proprietary title."

A careful study of the passages quoted will afford illustrations of the manner in which titles must be prejudicially affected or clouds thrown over them before the assistance of a Court of Equity for a declaration of right can be invoked. There must exist in the case something either in the nature of an invasion of some right or in the shape of an impediment or obstacle in the way of a full enjoyment of proprietary right, to found a claim

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by the learning and experience of practitioners in the lower Courts, and would not be susceptible of fuller development and better and more exhausting treatment at the hands of practitioners of superior intelligence who exercise their profession in a higher legal forum and before a superior judicial tribunal to which resort is permitted to suitors by the laws of special appeal. Further, if the argument pressed by the respondent be of any value, it would also follow that the superior Court would be bound to confirm judgments or decrees erroneous in law on the very face of them, to pass decrees on causes of action which have no legal existence, and in short to do other acts of injustice too numerous to specify. I therefore hold that where an objection or ground goes to the root of a plaintiff's case, admitting for the sake of argument all the allegations of plaintiff to be true, such an objection or ground may be taken and entertained at any time at which a suit has vitality, and before it has passed through its last stage of review and the functions of the Court regarding it have ceased. I further say that if any objection of the kind adverted to above is overlooked by the counsel of the parties, it will be the duty of the Court to consider it.

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Holding the views I have expressed regarding the two points argued, I decree the appeal but without costs.

BAYLEY, J.—I think that in this particular case the ground of special appeal, that the plaintiff had no cause of action against the defendant, special appellant, may be admitted, although it was not taken in either of the Courts below, because the law gives us discretion to admit a new ground in special appeal not taken below. It is quite clear from the plaint in this case, which we have heard and considered, that the object of the plaintiff was, under the pretence of getting rents under a kabuliat, to have a declaration of his title to the land. He sued the defendants Nos. 1 and 3 for rent under a kabuliat, and attached their crops, but was met by the defendant No. 4, special appellant, who alleged that the land was his by purchase. The defendant No. 4, however, did nothing otherwise to interfere with the plaintiff or in any way to intermeddle with the real question as between the plaintiff and the defendants Nos. 1 and 3.

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Now, the mere fact of the defendant No. 4 stating that he purchased the lands from defendant No. 2, did not bring him in the same position with regard to the plaintiff as was the position of the defendants Nos. 1 and 3, nor prevent him enjoying his rights which he had heretofore enjoyed. The suit by the plaintiff against the defendant No. 4, was simply to obtain a declaratory decree, and I quite agree with Mr. Justice Paul that it is highly necessary to discourage attempts to sue for title under the mere subterfuge of a suit for rent.

I agree in reversing the judgment of the lower Appellate Court, and dismissing the plaintiff's suit but without costs.

Appeal allowed.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

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August 10.

TARINI PRASAD GHOSE (ONE OF THE DEFENDANTS) v. RAM KRISHNA BANERJEE AND ANOTHER (PLAINTIFFS).*

Limitation—Act XIV of 1859, s. 1, cl. 9—Deposit—Cause of Action—Demand—Hatchitta.

Where money has been deposited by A. at interest with B. repayable on demand, and interest is paid accordingly, the cause of action arises not on the date of the deposit, but on the date of demand (1).

THIS was a suit brought, on the 14th August 1868, to recover rupees 2,927. The plaint stated that the plaintiffs had deposited the amount with the defendants, on condition that it would be paid back to the plaintiffs on demand. In proof of the deposit and its terms, he put in evidence a *hatchitta*, which he alleged had been granted by the defendants.

The defendant, Tarini Prasad Ghose, set up that he had not received any money from the plaintiffs, nor had he signed the *hatchitta*, and that he had no joint business with the defendant Ram Rattan, at the time when the *hatchitta* was alleged to have been signed; and that the suit was barred by lapse of time.

The defendant Ram Rattan set up that he had a money trans-

* Special Appeal, No. 115 of 1870, from a decree of the Judge of Nuddea, dated the 8th December 1869, reversing a decree of the Subordinate Judge of that district, dated the 29th January 1869.

(1) See *Parbati Charan Mookerjee v. Ramnarayan Matilal*, 5 B. L. R., 366.

action with the plaintiffs, but that it was contained in a separate *hatchitta*, and that the *hatchitta* in suit was a fabrication.

The Subordinate Judge found that the *hatchitta* was a spurious document, and accordingly dismissed the suit.

On appeal, the Judge held that the evidence in support of the *hatchitta* was meagre, and that the lower Court was justified in holding that the *hatchitta* alone was not sufficient to prove the plaintiffs' claim; but that the plaintiffs' claim was not founded on the *hatchitta* alone, and that there were strong presumptions in favor, not of the genuineness of the plaintiffs' *hatchitta*, but in support of the truth of their claim, which was that they had deposited with a joint firm of Ram Rattan and Tarini Prasad. He found from the evidence that the plaintiffs did advance to Ram Rattan and Tarini the amount claimed. He accordingly passed a decree in favor of the plaintiffs.

The defendant Tarini Prasad appealed to the High Court.

Baboos *Hem Chandra Banerjee* and *Tarak Nath Dutt*, for the appellant, contended that the suit, having been brought after a lapse of three years from the making of the note, was barred. The cause of action arose on the day the note was made. For a suit could be brought without any demand having been made. Hence the promisor was bound to ~~keep himself in~~ readiness from the moment he signed the note to meet his liability. The service of the writ upon the maker of the note was a sufficient demand—*Norton v. Ellam* (1), *Waters v. Earl of Thanet* (2). Hence limitation runs from the making of the note. Besides, if it were not so, there would be no limitation in a case of this nature. The law would entirely be in the hands of the holder of the note. For if he chose not to make a demand, a suit might be brought after a lapse of a century from the time the note was made. This would be against the policy of the law which does not encourage suits to enforce stale claims. The holder of such a note would be placed in a better position than that of a mortgagee. But that again was not the policy of the law. There must be a time when a cause of action would arise. No time is fixed by law. But it cannot thence be infer-

(1) 2 M. & W., 461.

(2) 2 Q. B., 769.

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red that the Legislature intended to leave it entirely to the option of the holder of the note. The opinion of Austin (1) may be a good answer to the recovery of costs by a plaintiff who has not made a previous demand, but it in no way settles when the cause of action would arise. The institution of the suit would be a demand. In a case where the note is payable at a time fixed therein, no suit would lie, as the cause of action would not have arisen. But no such answer would be sufficient in this case, for the demand is made by the institution of the suit. The practice of the English Courts of Common Law is in favor of this view.

Baboo *Rashbehari Ghose*, *Girish Chandra Mookerjee*, and *Biprodas Mookerjee*, for the respondents, were not called upon.

The judgment of the Court was delivered by

JACKSON, J.—This case has been argued with much ability for the appellant by Baboo Hem Chandra Banerjee, and I have had the advantage, on a previous occasion, of hearing the same arguments that he has addressed to us; but neither on the previous occasion nor now have they so commended themselves to my judgment as to incline me to disturb the judgment of the lower Appellate Court.

Four grounds of objection have been raised to the decision of that Court. The first is on the point of limitation. The suit, as framed, was a suit for money borrowed upon a *hatchitta*. It is alleged that the defendants, being then associated in trading business, had borrowed by one of them, the defendant Ram Rattan, a sum of money for the use of that business, which was to be repaid upon demand; and it was further agreed that the defendants were to pay interest at the rate of 24 per cent. per annum.

It is contended that the claim was barred by limitation, inasmuch as the suit being commenced after the lapse of three years from the date of the loan, limitation arose under the 9th clause of section 1, Act XIV of 1859; in other words, we are asked to sanction, in regard to transactions and suits for money lent in

(1) 1 Austin's Jurisprudence, 485, Edition of 1863, Vol. II., 157.

this country, the doctrine of the Common Law Courts in England, under which the cause of action in respect of money lent with or without interest, accrues the moment the money is lent, and limitation begins to run from that time.

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I need not give any other answer to this contention than that which is to be found in a passage from Mr. Austin's work on Jurisprudence, to which the pleader of the respondents called the attention of the Court, on the occasion when this case was first argued, and which is to be found at page 485 of the 1st volume, 3rd edition, of Mr. Austin's Lectures (1).

The passage runs thus:—

“ In cases of obligation arising directly from contract, it frequently happens that the performance of the obligation is due from the very instant at which the obligation arises; or (speaking more accurately) the time for performance is not determined by the contract, and performance is due so soon as the obligee shall desire it.

“ For example:—

“ If a moveable be deposited with me in order that I may keep it in safety, I am bound, from the moment of the deposit, to restore it to the bailor.

“ If I buy goods, and no time be fixed for the payment of the price, I am bound, from the moment of the delivery, to pay the price to the seller.

“ Now, in these and in similar cases, it is impossible that the obligation should be broken through intention or inadvertence, until the obligee desire performance, and until the obligor be informed of the desire. For, strictly speaking, he is bound to perform the given act, so soon as the obligee shall wish the performance, and so soon as he himself shall be duly apprised of the wish. But according to the rule which obtains in the Courts of Common Law, the creditor may sue the debtor, as for a breach of the obligation, without a previous demand: the debtor being liable in the action for damages and costs, just as he would be liable if performance had been required, and the obligation had then been broken through his own intention or negligence.

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" Now, as every right of action is founded on an injury, here " is a case of injury without intention or inadvertence. For, " without a previous demand, or without some notice or intima- " tion that the creditor desires performance, the debtor cannot " know that he is breaking his obligation, by not performing the " act to which he is obliged.

" This monstrous rule of the Common Law Courts is justified " by a reason which is not less monstrous. For it is said that a " previous demand were superfluous and needless, inasmuch " as the action is itself a demand.

" The reason forgets that a right of action is founded on an " injury ; that unlawful intention or inadvertence is of the essence " of injury ; and that in all the cases which I am now consi- " dering, there is no room for unlawful intention or inadver- " tence, until the creditor desire performance, and until the " debtor be apprised of the desire."

It is admitted that there is no authority for applying the doc- trine in question to suits in the Mofussil Courts in this country, and I should certainly not be the first to introduce it.

It seems to me that in a case of this description, where A. lends money to B., repayable on demand, with interest payable at a certain rate, and B., in pursuance of that agreement, pays interest to A., A. making no demand for repayment, no cause of action accrues to A., so that he becomes entitled to bring a suit so long as the borrower observes his part of the contract by paying interest : and so long as he is not apprised of the lender's desire to have back his principal sum. I think there is no cause of action : the principal money has not become due, and the statute does not begin to run. I think, therefore, that the suit was not barred by limitation.

It is next contended that, as this suit was based on a *hatchitta*, and in the judgment of the lower Appellate Court that instru- ment was not found to be completely proved, the suit ought to have been dismissed, and we are referred to several cases in the 1st volume of Hay's Reports. It seems to me that those cases are distinguishable from the present. In this case the *hat- chitta* was merely part of the evidence by which the plaintiff's case was to be proved, and on failure to prove that parti-

cular document, he was not debarred from proving his claim by other evidence.

Then it was alleged that there was no other evidence on which the amount of the loan and the conditions of the loan could be found. But it seems to me that there was evidence. On that point the judgment of the lower Appellate Court is satisfactory.

It is stated also that the plaintiffs' case failed as to proof of authorization from the defendant Tarini to Ram Rattan to borrow the money, or that the loan was incurred for the purposes of the joint business. It seems to me that, upon that point, there is sufficient evidence; and if it had not been for the judgment of the Court below, I should say that the *hatchitta* had been proved.

I think plaintiffs' case was clearly made out, taking the whole of it together, and that we are not called upon to reverse the judgment.

I am reminded by my learned colleague that a strong point in the plaintiffs' favor, and one remarked upon by the Judge, is the persistent refusal by the defendants to produce their accounts.

The special appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Phear and Mr. Justice E. Jackson.

GOLAKRAM DEB AND OTHERS (DEFENDANTS) *v.* BRINDABAN DEB (PLAINTIFF.)*

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August 29.

Mahomedan Law—Pre-emption—Tulub-ishhad—Invocation of Witnesses to the Pre-emptor's Demand.

According to the Mahomedan law, it is essential to the performance of the *Tulub-ishhad* that third persons should be formally called upon, either in the presence of the purchaser, or on the land, or if the vendor is in possession, in the presence of the vendor, to bear witness to the demand.

THIS was a suit to enforce a right of pre-emption.

The defence set up was (*inter alia*) that the preliminaries required by Mahomedan law had not been performed.

* Special Appeal, No. 884 of 1870, from a decree of the Subordinate Judge of Sylhet, dated the 9th February 1870, reversing a decree of the Moonsiff of that district, dated the 29th November 1869.

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The Moonsiff held that, according to the Mahomedan law, it was necessary for the *tulub-mawasabat* that a person should urge his right of pre-emption, but it was not required of him to say that he was *shafee*, or that he had purchased the land; that the witness did not say that the plaintiff claimed the property by right of pre-emption, but the plaintiff had simply cried out "*shafee, shafee, shafee;*" that this circumstance did not show that he claimed the property by right of pre-emption; that, under such circumstances, the plaintiff could not be held to have performed the *tulub-mawasabat*; and that the witnesses did not speak of the performance of *tulub-ishhad*. He accordingly dismissed the suit.

On appeal, the Subordinate Judge held that the observance by the plaintiff of *tulub-ishhad* and *mawasabat* had been proved. He found that the plaintiff, on hearing the intelligence of the sale, cried aloud, in the presence of witnesses, "I am *shafee*, I have purchased it;" and that he had gone to the purchaser and asked for a *kobala* from him. He, accordingly, passed a decree in favour of the plaintiff.

The defendant Golakram appealed to the High Court.

Baboo Grish Chandra Ghose for the appellant.

Baboo Gopal Lal Mittra for the respondent.

PHEAR, J.—I am of opinion that it is essential to the proper performance of *tulub-ishhad* that third persons should be formally called upon, either in the presence of the purchaser, or on the land, or if the vendor is in possession, in the presence of the vendor, to bear witness to the pre-emptor's demand. As I understand the Mahomedan law on this point, there must be a formal proceeding to which the witnesses are parties, and are, as it were, solemnly made *vouchees*, in order to complete the necessary foundation for asserting the pre-emptor's right.

I think this has been laid down now in a series of decisions of this Court, notwithstanding a passage in Mr. Baillie's book, which at first sight seems to go the length of saying that the witnesses are not necessary, excepting so far as the claimant, the pre-emp-

tor, will eventually require witnesses to prove that he made his demand.

A case, very similar to the present, came under the consideration of a Division Bench of this Court, upon which I sat with Mr. Justice Mitter, in the early part of this year—*Sheik Imamuddin v. Mussamat Shah Jan Bibi* (1). We then, as far as I remember, took the view which I have just expressed, and I see no reason for altering that view.

I think, therefore, that the judgment of the lower Appellate Court, as it stands, is not sufficient to entitle the plaintiff to a verdict. The Subordinate Judge says, that the plaintiff, after observing the *tulub-mawasabat*, went to the purchaser and asked for a *kobala* from him; “he has, by the circumstance, proved “the observance of the maxim of *tulub-ishhad*.”

The simple demand of a *kobala* is certainly not sufficient, and therefore it would be necessary, at all events, to reverse the decision of the Subordinate Judge. Whether or not we ought to send

(1) Before Mr. Justice Phear and Mr. Justice Mitter.

SHEIKH IMAMUDDIN AND OTHERS
(DEFENDANTS) v. MUSSAMAT SHAH
JAN BIBI AND ANOTHER (PLAINTIFFS).*

The 9th February 1870.

Baboos *Mahendra Lal Shome* and *Kishen Dyal Roy* for the appellants.

Baboo *Grish Chandra Ghose* for the respondents.

PHEAR, J.—I think that the judgment of the lower Appellate Court is defective for not having found in precise terms either that the condition termed *tulub-ishhad* had actually been satisfied, or that any of the facts had occurred which are essential to the due performance of that condition; and if it appeared to me that there was any evidence on the record on which the Court could legally find that

the condition had been satisfied, I should feel myself bound to send back the case, in order that the lower Appellate Court might come to a clear finding on this point. But remembering that, in order to satisfy the condition in question, the person claiming the right of pre-emption must promptly, —i. e., as soon as possible after hearing of the contract,—call upon third persons, either in the presence of the vendor, or in that of the purchaser, or at any rate on the land itself, to be his witnesses that he intends to assert his right of pre-emption, I think there is nothing on the record, as it has been read out to us, on which a Judge of fact could come lawfully to the conclusion that this had occurred.

I am therefore of opinion that the decision of the lower Appellate Court is bad in law, and that it ought to be reversed, and that the plaintiff's suit should be dismissed with costs in all the Courts.

MITTER, J.—I concur.

* Special Appeal, No. 2638 of 1869, from a decree of the Subordinate Judge of Tippera, dated the 23rd July 1869, reversing a decree of the Moonsiff of that district, dated the 20th October 1868.

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there was a principle involved which ought to be set right for the guidance of the Court in other cases.

THIS was an appeal from a decision of the Calcutta High Court, affirming on appeal a decision of the Judge of Mymensingh.

The facts were shortly these:

Bhairabchandra Chowdhry had four sons: Umeschandra, who died in 1256 (1849), leaving no issue, but the appellant his widow; two other sons, who died childless; and a fourth son, Grishchandra, who was married to the respondent.

In 1261 (1854), Grishchandra, being childless, executed a document, giving the respondent power to adopt, which document was not registered, a petition being presented by Bhairabchandra, who was a witness to the document, stating "that the eldest son of the petitioner has died without giving his wife any permission to adopt."

In the same year, Bhairabchandra granted to the appellant a lease of certain property for her life, and in the following year a deed of gift of other property for her life, in neither of which he referred to any power to adopt having been given her.

In 1265 (1858), Bhairabchandra died, and one of his childless sons died two days afterwards unmarried, his mother being his heir. She (the mother) assigned the share so coming to her to Grishchandra, and the appellant, being about to proceed on a pilgrimage, assigned to the respondent her household interest, and to Grishchandra the interest she had under her father-in-law's deed of gift, reciting in the latter the fact of her being a childless widow.

In 1267 (1860), Grishchandra died childless, leaving the respondent his sole widow, with power to adopt.

The appellant and her mother-in-law soon afterwards returned from their pilgrimage; and in 1268 (1861), the appellant presented a petition, stating that, under permission from her husband, she had adopted a son.

This was followed by an Act IV of 1840 case, which resulted in the parties being referred to a civil suit, and this suit was brought by the appellant to establish the adoption and get possession of the property.

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She alleged that the permission had been given by her husband both verbally and by deed; that that deed was not registered, as Bhairabchandra had asked the Registrar of Deeds whether it was necessary; that the deed remained with Bhairabchandra till his death, and was subsequently taken by Grishchandra, and then by the respondent. The giving of the power to adopt was denied. The issues as settled were: 1st, whether the suit was barred by limitation; 2nd, as to the *factum* and validity of the power to adopt; 3rd, as to the nature of the property.

Amongst other evidence the appellant relied on the following evidence of Dr. Elton, the Registrar of Deeds, who attended Umeschandra in his last illness: "Subsequent to his death, "I had frequent conversations with his father, who consulted me "in all family affairs, and he stated to me most distinctly that the "widow of his eldest son, deceased Umeschandra, had been "authorized by her husband to adopt; but that having himself "three healthy sons still living, which almost ensured an heir "direct from himself, there was no use in registering a deed re- "garding the widow of his late son having received authority "from her late husband to adopt."

The Judge who tried the case, in discussing the evidence, stated his idea that Dr. Elton had misunderstood what Bhairabchandra told him, and pointed out that at most this evidence was as to what he had heard from Bhairabchandra and not direct evidence of the fact, and he concluded by holding that the point as to the authority to adopt was not proved.

On appeal this decision was affirmed (1).

Appeal from that decision now came on for hearing.

Sir R. Palmer, Q. C., and Mr. Leith for the appellant.

Mr. Kay, Q. C., and Mr. Bell for the respondents.

Their LORDSHIPS, without calling on the respondents, delivered the following judgment:—

This is an appeal from the decision of the High Court of Judicature at Fort William in Bengal, affirming a decision of the local Court. The question was a mere question of fact,

depending upon evidence, and depending upon the inferences to be drawn from the acts and conduct of the parties.

Their Lordships do not feel themselves called upon to go as minutely into the details of the evidence which has been given on the one side or on the other, as if they had been a Court of first instance; or to satisfy themselves that if they had been such Court of first instance, they would have concurred in the judgment of the Court below as that which the weight of evidence was in favour of. They consider that, in accordance with the rule which has been more than once laid down at this Board, upon a mere question of fact—a question of fact which has been decided in the same way by both Courts in India—it is the duty of the appellant to satisfy them, beyond all reasonable question, that there was some miscarriage in the Court below in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given, or in respect of something as to which they could see that there was a matter of principle involved which this Board ought to set right for the guidance of the Courts of India in other cases.

In this case the question was a mere question of fact, and both Courts seem to have gone very minutely into all the questions of evidence. The Court below gave a very long and very elaborate judgment. The Court at Fort William admits, in favour of the appellant, that abundance of oral evidence had been produced to prove the fact of the permission to adopt, the question in the cause having been first given verbally and then in writing; but they say,—“ We entirely discredit the whole of the evidence, “ except that of Dr. Elton, knowing how easy it is, when family “ disputes arise, to raise claims, such as is made in the present “ case, and to support them with any amount of oral evidence, “ even that of the nearest relatives of the family, who gener- “ ally range themselves on one side or the other, and who “ cast aside all regard for truth in order to secure the success of “ the party whose cause they have espoused; and our past “ experience tells us that such is particularly the case in suits to “ uphold or set aside alleged acts of adoption in Zilla Mymen- “ sing,” the particular zilla in question. Now their Lordships do not feel themselves at liberty to say that this was not a

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true statement of the practice, and of a danger to be guarded against. The Court below goes on to say: "There are, however, reasons beyond this general one which, in our opinion, render this testimony utterly worthless." And then they say,—“ We find that Umeschandra died in 1256 (1849); “that from that time till 15th Aswin 1268 (30th September 1861), a period of twelve years, nothing was done by “the plaintiff in furtherance of the permission to adopt, which, “as she alleges, she had received from her husband,—no publicity was given to this instrument,—no care was taken to “register, nor to keep it in her own custody, and the instrument “itself is not to be found; but the plaintiff comes into Court “with a plausible tale, that she was too young to take care of “the paper when her husband died, and so made it over to her “father-in-law, from whose custody it passed on his death to “that of his son, and thus on his widow she casts the *onus* of “producing it, or the *odium* of having destroyed it. After the “death of her father-in-law she allowed her brothers-in-law to “take possession of the estate, made no attempt to make the adoption, an act which would have secured to her, as guardian of a “minor adopted son, a large share of the family property; but “she proceeded with her mother-in-law to Benares, apparently “with the purpose of spending the remainder of her life there, “when the unexpected death of her youngest brother-in-law “brought her back to the family residence, prepared to contest, “with his widow, the right to the possession of the property, and “supporting her claim by any amount of hard swearing which “unscrupulous parties about her do not hesitate to put forward “in her behalf. So long as any male member of her husband's “family remained alive, she took no steps to carry out her husband's permission to adopt; but no sooner has the last male member deceased, and the possession of the property devolved on “his widow, than the plaintiff suddenly starts up from her long “sleep, and tries to get possession by an alleged dormant permission to adopt.” The inference drawn by the Court below from that statement of facts was, that the whole conduct of the lady and the conduct of the family was inconsistent with the oral testimony which was given, and they preferred that infer-

" That by reason of some claim having been preferred, there was some delay; and while the property remained under attachment, the said Kanayi Lal Sen, who held a decree of the Small Cause Court of Hooghly against the said Mahendra Nath Shaha, sued out execution of his decree under a certificate of the Small Cause Court from the same Court of the Sudder Moonsiff, and got an order for the sale of the property attached by your petitioner.

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" That, under the provisions of section 270 of the Civil Procedure Code, your petitioner is entitled to be first paid out of the proceeds; but, on the application, under section 272 of Act VIII of 1859, of the said Kanayi Lal Sen, the Sudder Moonsiff, while admitting that the decree was not and could not be obtained by fraud, held that it was obtained by improper means, inasmuch as the suit in which that decree was passed having been against the surviving obligor and the representatives of a deceased obligor, full stamp duty was not paid, and, accordingly, passed an order against your petitioner.

" Your petitioner submits that the Sudder Moonsiff was not competent, at this stage, and on the application of a third party, to question the validity of a decree passed by him, and that his order has virtually rendered the decree inoperative, and is tantamount to a refu[redacted]

Mr. R. E. Twidale showed cause.

Baboo Baikant Nath Pal in support of the rule.

KEMP, J.—On the 22nd of July last, the petitioner, Braja Nath Shaha, obtained a rule in this Court for the opposite party, Kanayi Lal Sen, to show cause why the order of the Sudder Moonsiff of Hooghly, dated the 4th of July last, should not be set aside. There was a further order that the hearing of the rule should stand over, the parties consenting to its being heard afterwards before myself and some other Judge. I may mention that the reason for this order was, that the learned Chief Justice, Sir Richard Couch, considered it probable at the time that he would not be present in Court when it would again

1870 come on for hearing. The case has therefore been heard by this
BRAJA NATH SHAHA Bench.

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KANAYI LAL SEN. The petitioner states that he obtained a decree in the Sudder Moonsiff's Court of Hooghly, apparently, although he does not so state in his petition, under section 53, Act XX of 1866, the new Registration law, against Mahendra Nath, one of the original obligors, and against the representatives of Pitamber, another of the original obligors, who died previous to the suit being brought. The petitioner took out attachment in execution of that decree. The opposite party appears to have obtained a decree against Mahendra Nath Shaha, one of the judgment-debtors of the petitioner in the Small Cause Court of Hooghly. This decree was subsequent to the decree of the petitioner. Kanayi Lal Sen also took out execution and obtained an order from the Small Cause Court of Hooghly for execution of his decree by the Moonsiff of the said zilla.

The Moonsiff, subsequently, under section 272 of Act VIII of 1859, proceeded, on the objection of Kanayi Lal Sen, to enquire whether the decree obtained by the petitioner, under which the property had been attached by him, was obtained by fraud or other improper means. From the decision in vernacular filed by the petitioner, dated 4th of July 1870, it is clear that the Moonsiff, who was the same ~~Moonsiff~~, passed the decree in the original case, found distinctly that there was no fraud; but he held, that inasmuch as the petitioner had sued the representatives of one of the original obligors, who was dead at the time he brought the suit, on a stamp of one-fourth of the value prescribed for a plaint in such suits, the decree had been obtained by improper means. He, therefore, passed an order on the objection of Kanayi Lal Sen to the effect that Kanayi Lal's decree was to be satisfied first. This Court has been moved to set aside this order as passed without jurisdiction. We have, therefore, to consider whether the order of the Moonsiff, under section 272, was passed without jurisdiction. Now there can be no doubt that fraud is not an element in the case at all, for the Moonsiff finds distinctly that no fraud was committed. We have then to see whether any "improper means" were taken by the petitioner to obtain this decree, and we are of opinion that a mere error of the

enjoyment are also recommended. Indeed, the Dayabhaga, which exhibits the Law of Inheritance, is little else than a treatise on partition, and doubtless the principle which underlies and supports the law in this respect, is substantially the same as that which is stated by Mr. Williams in his Law of Real Property as the reason why the English Common Law gives the right of partition to co-parceners. I am quoting from the 4th edition of his Law of Real Property, page 81; 6th edition, page 92 :—“ When two or more persons together form an heir, they are called in law “co-parceners, or more shortly parceners. The term is derived, according to Littleton, from the circumstance that the law “will constrain them to make partition,—that is, any one may “oblige all the others to do so. Whatever may be thought of this “derivation, it will serve to remind the reader that co-parceners “are the only kind of joint owners to whom the ancient Common “Law granted the power of severing their estates without mutual “consent; as the estate in co-parcenary was cast on them by the “act of the law, and not by their own agreement, it was thought “right that the perverseness of one should not prevent the others “from obtaining a more beneficial method of enjoying the pro- “perty.”

Certainly this reflexion applies to the case of women just as strongly as to the case of men, and I may add it is eminently applicable to the two ladies who are the parties in the particular suit now before the Court. As a matter of fact, co-heiresses certainly do divide their common property amongst themselves in Bengal, and I think that there are texts which go to the extent of expressly giving them the right to do so, notwithstanding the limitation, in a certain respect, which the Hindu law puts upon their enjoyment of ancestral property. In the 404th text of Jagannatha’s Commentary, Book v., we have on the authority of Devala :—“ Next uterine brothers shall divide among themselves “the heritage of one who leaves no male issue, or daughters who “have an equal claim to it, or the father, if he survives his son.” Again, text 420, quoted from the same writer, runs thus :—“ To “unmarried daughters a nuptial portion must be given out of the “estate of the father, and his own daughter lawfully begotten “shall take like a son the estate of him who leaves no male issue ;”

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and the commentator thus ends a lengthened discussion of this text:—"If the daughters be numerous, a distribution is made; " such is their succession." Also in the Dayabhaga, Chapter III, section 2, there are several verses which, although they are not directly in point and therefore I will not quote them at length, yet speak of the daughters, in certain cases, taking a fraction of the inheritance. Therefore, I think it is quite clear that there is nothing in the Hindu law against a female proprietor, who is a co-heiress, claiming to have the inheritance divided, as between the persons who constitute the heir, notwithstanding the limitation which, no doubt, does exist upon a female heir's proprietary right, and there is everything to countenance it. That the partition will not be binding or operative against the ultimate heirs is no argument against the right such as it is. Nor indeed does the mere fact that there may be difficulty or complication in carrying out the partition furnish such an argument. In truth, when the sons by different mothers divide, the mothers being alive, more than one case of which has occurred since I have sat in this Court, much greater difficulty and complication of this character almost invariably occurs than in a case like the present. The different mothers' interests are essentially temporary; and upon the occurrence of their respective deaths, there must, of necessity, each time be a second partition. It has been attempted in England to establish the same objection to the right of a person, entitled to a limited interest, to partition, as that which the Advocate-General urged before me in this case. But the objection was over-ruled, and the leading case upon the point is *Baring v. Nash* (1). The portion of the Vice-Chancellor's judgment, which is applicable to the present point, will be found at page 555:—"Whatever is the "inconvenience of these partial partitions, the law has been "established that a tenant for years, though he has only that limit- "ed interest, may compel partition by writ; and, if that is clear, a "Court of Equity cannot, upon the inconvenience of a temporary "partition, permit a demurrer to a bill by a plaintiff having a "quantity of interest that would entitle him to the writ;" and he refers to a former case of *Wills v. Glade* (2), where the

(1) 1 Ves. & Bea., 551.

(2) 6 Ves., 498.

Lord Chancellor says:—"At all events you are entitled to a partition during the life of the tenant for life." I, therefore, think that there is no reason on any of the grounds which the learned Advocate-General pressed upon my attention why the plaintiff should not have a decree for partition in this case.

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There remains, however, a question of jurisdiction to be considered.

The learned Advocate-General said that, although the plaintiff seeks a partition of property which lies within the local limits of this Court's jurisdiction, still it was disclosed in the plaint that a very large portion of the joint property lay outside the jurisdiction; that the plaintiff's right to divide, if any, must be a right to divide the whole property and every part of the property; and that, consequently, the claim which she puts forward in the present suit would not be maintained alone; and further, if the plaint was amended by adding property which lay outside the jurisdiction to that which is within the jurisdiction, then the plaint could not be entertained, because leave to file it had not been granted according to the provisions of clause 12 of the Letters Patent. This leads me to consider rather more closely what is the nature of the right of partition. Mr. Hargreaves' Note in the 2nd volume of Coke upon Littleton describes in some detail the origin or the ground of the English right of partition, and the gradual growth, if I may say so, of the jurisdiction which the Court of Chancery, as well as the Courts of Common Law, ultimately exercised in the matter. I think it appears from the authorities quoted by him, and also from some later cases, that the right is a right of an equitable character; it is not a strict legal right to divide every portion of the property. It is only a right on the part of any one of several joint proprietors to have the aid of the Court for the purpose of securing to him the completest enjoyment which the property admits of, consistently with like rights on the part of the other co-proprietors. The nature of the property is itself an important element in the matter; for instance, it has been held in England that, if the property consists of one house only, then that house must be divided; or if of one estate only, that estate must be divided; but if there are several estates and one house, the plaintiff cannot claim as of right to have each estate divided, or the house

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vided. It is a matter for the discretion of the Court to determine how best the property as it exists may be partitioned between the co-proprietors, without unnecessarily detracting from the value of the property, or of the different portions thereof. To divide a particular portion of the property might be to diminish its value very greatly, as for instance in the case of a house. I am speaking of England, and not of another country. And one proprietor cannot claim that a particular part of the property to which he may have taken a fancy should be so divided as to cause needless detriment to the interests of the other proprietors. I apprehend the Court must, in each case, look to the interests and rights of all the parties, and give effect to them as far as it possibly can. At the same time, however, I have no doubt that a suit of this kind is a suit relating to land within the words of the 12th clause of the Letters Patent. The right to have the assistance of the Court does not depend upon a contract between the parties. It is founded on the fact that the parties are joint proprietors of the land which is sought to be divided; in other words, it is not a suit of the nature of a suit for specific performance of an agreement; it is a suit the right to bring which rests upon the ownership of the particular property. But when I have said this, I must add that I find nothing to make me think that the plaintiff must necessarily bring a suit, if he brings a suit at all, for partition of the whole of the joint property. Clearly, if the parties themselves have already effected a partition, it could not be in the power of the plaintiff to ask that that partition should be undone, simply in order that the whole estate might be divided *de novo*. I think that the plaintiff may confine his application to the Court to that particular part of the property which he is desirous of having divided; but then it follows from the view which I have already endeavoured to express, that in a suit so brought, it will always be open to the other parties to show that that part of the property ought not to be divided, or could not fairly be divided, without taking into consideration the rest of the property, and dividing it also. So, on the whole, it seems to me that this suit is well placed before the Court. I think that the Advocate-General has shown no reason going to the root of the suit, why

it should not be heard, and a decree passed in it. If, however, on the part of his client, he can go further than he has done, and would give me ground for thinking that a fair and equitable division of the joint property of these two ladies could not be come to without bringing in the mofussil property, and making that the subject of division together with the Calcutta property, I think I might possibly consider it right to stay the proceedings in this suit upon his undertaking to file a plaint within a reasonable time, embracing the whole of the property, and of course to ask for the necessary leave for that purpose. I must, however, mention that both parties seem to me to have agreed that a *de facto* partition of some sort of the mofussil property has already taken place. If this be a fact, it will influence my judgment, and will operate strongly against my being readily induced to think that a further division of this same portion of the property, by the hands of the Court, is necessary for the purpose of doing complete justice between the parties. Unless some such proposition is made to me on the part of the defendant, I think that, as the case now stands, I ought to make the usual decree for partition.

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Judgment for plaintiff.

Attorneys for the plaintiff: Messrs. Judge and Gangooly.

Attorneys for the defendant: Messrs. Swinhoe and Co.

Before Mr. Justice Phear.

LUDDY v. JOHNSON.

1870
Dec. 19.

Cause of Action—Jurisdiction—Letters Patent, s. 12—Action for Malicious Prosecution.

Where the plaintiff, in an action for malicious prosecution, alleged that the defendant had instituted criminal proceedings against him before the Magistrate of Moradabad, causing a warrant to be issued by the Magistrate, and having him arrested under that warrant in Calcutta, held, the whole cause of action did not

1870 arise at Moradabad ; that part of the cause of action arose in Calcutta, so as to entitle
 LUDDY the plaintiff, with leave of the Court, to bring an action in the High Court.

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THIS was an application to take a plaint off the file on the ground of want of jurisdiction. The action was one for malicious prosecution. The plaintiff alleged in his plaint that the defendant, the manager of a bank at Moradabad, had falsely and maliciously, and without probable cause, instituted criminal proceedings against the plaintiff before the Magistrate of Moradabad, by making a criminal charge against him in the Court of the said Magistrate, causing a warrant to be issued by the said Magistrate, and having the plaintiff arrested under that warrant in Calcutta.

Leave of the Court to institute the suit had been obtained under section 12 of the Letters Patent, 1865.

Mr. Kennedy, in support of the application, contended that the whole cause of action arose at Moradabad ; the arrest of the defendant is a mere matter of damages ; either for increasing the damages in an action in the Moradabad Court, or for forming the basis of a separate action in Calcutta.—*Barber v. Rollinson* (1), *Ireland v. Lockwood* (2). This is rather trespass on ~~the case~~—than trespass. Under section 12 of the Letters Patent, if part of the cause of action is within the jurisdiction, this Court has jurisdiction ; but this is a case where one cause of action arises wholly here, and another separate cause of action arises wholly at Moradabad, and this Court has not concurrent jurisdiction with respect to the latter cause of action. A separate action would lie for the arrest—*Guest v. Warren* (3). Even if a Magistrate acted without jurisdiction in granting a warrant, an action of trespass for false imprisonment would not lie against him—*Brown v. Chapman* (4). [PHEAR, J. —The words “cause of action” in the Letters Patent and Civil Procedure Code are somewhat extended, and not limited to the meaning given to the words in the English decisions.] It is contended that here the whole cause of action arose in Moradabad ;

(1) 1 Cr. & M., 330.

(3) 9 Exch., 393.

(2) Croke Cas., 570.

(4) 6 C. B., 365.

that this Court has no jurisdiction; and that the plaintiff should be taken off the file.

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Mr. *Graham contra*.—The plaintiff was arrested in Calcutta, therefore part of the cause of action arose in Calcutta; the mere filing of the complaint does not constitute the cause of action; the whole of the proceedings are to be considered, and the arrest is the most important of the proceedings; something more is wanted than the mere filing of the complaint. The cause of action includes every circumstance necessary to maintain the action—*DeSouza v. Coles* (1). All we have to show is that some part of the cause of action arose within the jurisdiction of this Court. Now the arrest of the plaintiff took place in Calcutta, and the defendant procured that arrest: some part of the cause of action, therefore, arose in Calcutta. It has not been shown that the arrest of a person is no part of the cause of action in an action for malicious prosecution. Leave of the Court to institute has been duly obtained.

Mr. *Kennedy* in reply.—The words “under the said warrant” show that the cause of action arose in the court from which the warrant was issued.

PHEAR, J.—Mr. Kennedy is probably right in saying that the technical designation of the cause of action in this case is trespass on the case, and not trespass; but it does not follow that the whole cause of action, within the meaning of Act VIII of 1859 and the Letters Patent, is comprised in the act of making the complaint before the Magistrate. The mere making of the complaint is not actionable. It is the malicious intention to injure the plaintiff, coupled with the actual injury that constitutes that which gives the plaintiff a right to a remedy. If the case had ended with the institution of malicious proceedings in the Magistrate’s Court, the injury to the plaintiff would have been simply injury to his reputation, and then the cause of action would have been confined to the local jurisdiction; but it seems to me that the substance of the plaintiff’s complaint, and the

(1) 3 Mad. H. C. Rep., 384.

1870 essence of his grievance, is that the defendant maliciously caused
LUDDY him (the plaintiff) to be arrested in Calcutta. That is his injury.
v. I think I cannot go so far as to say that that, the most important
JOHNSON. occurrence in the whole of the proceedings, is not a part of
the cause of action within the meaning of the Letters Patent.
Mr. Graham pointed out to me that the plaintiff, by the form of
his plaint, does not leave his cause of action resting only on the
statement that the defendant maliciously laid a false information
before the Magistrate, and so put the Magistrate in motion ;
but he expressly states that the defendant caused the plaintiff
to be arrested in Calcutta. In this view, I think, I ought not
to grant the application. To refuse it now, however, does not
prevent the question from being raised again at the trial of the
case, if the defendant shall be so advised. The application is
refused. The plaintiff's costs to be costs in the cause.

Application refused.

Attorney for the plaintiff: Mr. Carapiet.

Attorney for the defendant: Mr. *Machertich*.

Before Mr. Justice Phear.

SWARNAMAYI RAUR v. SRINIBASH KOYAL.

1870
Dec. 13.

Title, Suit for declaration of—Raising Issues during the hearing.

The plaintiff sued for declaration of her title to property, of which the defendant was in possession, but of which she produced the title deeds in favour of herself. Held, the onus was on the defendant to disprove the plaintiff's title.

On the evidence, the defendant wished to raise issues as to the unchastity and inability of the plaintiff to succeed, and as to her suing on behalf of another person, not having alleged that she was doing so, neither of which matters were referred to in his written statement, but leave to raise them was refused, and the Court held that the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title deeds in her favour.

THIS was a suit for declaration of the plaintiff's title to a house and premises, 4 Poddopooker, in Calcutta, and for recovery of possession thereof from the defendant. The plaintiff, in her plaint, alleged that she purchased the house in question from one Panchumani Debi, and that it was conveyed to her

description alluded to in the decision of the Moonsiff,—namely, 1870
 an error in suing the representatives or heirs of the deceased BRAJA NATH
 obligor is not obtaining a decree by improper means; we therefore SHAHA
 think that the Moonsiff had no jurisdiction under section 272, v.
 and that his proceedings, under that section, being without jurisdiction, SEN.
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 must be set aside.

The order of the Court, therefore, is that the order of the Moonsiff passed under section 272, on the 4th of July 1870, be set aside, and that the petitioner be declared entitled, under his decree and prior attachment, to satisfy his decree in the first instance. The costs of this application will be paid by the opposite party.

AINSLIE, J.—I think the only question that we have before us for consideration in this case, is the meaning of the word “improper” in section 272 of Act VIII of 1859, and reading in that section the words “fraud or other improper means” together, I think that it implies that there must be some misconduct on the part of the decree-holders in order to invalidate his decree under that section, and not a mere error in procedure on his part, or on the part of any pleader employed by him.

I concur in the judgment which has been delivered by Mr. Justice Kemp.

Rule absolute.



[ORIGINAL CIVIL.]

Before Mr. Justice Phear and Mr. Justice Paul.

IN THE MATTER OF ACT XX OF 1866 AND IN THE MATTER OF NIL- 1870
 KAMAL BANERJEE v. MADHUSUDAN CHOWDHRY. Dec. 20.

Small Cause Courts, Presidency Towns—Jurisdiction—Registration Act (XX of 1866), ss. 52 and 53.

Small Cause Courts in the Presidency Towns have no jurisdiction to entertain petitions and make decrees under the provisions of sections 52 and 53, Act XX of 1866.

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THIS was a case referred for the opinion of the High Court by the first Judge of the Calcutta Court of Small Causes. The case was referred in the following terms :—

“ The plaintiff, Nilkamal Banerjee, in person filed in this Court and presented before me the warrant of attorney, bond, translation of bond, and petition severally, herewith transmitted. I declined to receive the documents or to act upon them till I had taken the opinion of the High Court on the two following points, *viz.* :—

“ *First.*—Whether the Legislature intended to give this Court jurisdiction in cases of special registration under Act XX of 1866, sections 52 and 53.

“ *Second.*—Whether the stamps attached to this petition are sufficient.

“ With regard to the first point, no doubt the words ‘any Court which would have jurisdiction, &c.,’ in the first clause of section 53, seem to include the Presidency Small Cause Courts in all cases in which the amount secured, or the instalment sought to be recovered, is less than rupees 1,000. But, on the other hand, the last clause of the same section, which provides for the enforcement of the decree only under the Code of Civil Procedure, seems to indicate that, by the preceding words ‘any Court,’ the Legislature intended any Court whose procedure is regulated by that Code. By the terms of section 382 of the Code, the Small Cause Courts of the Presidency Towns are specially exempted from the operation of it.

“ Moreover, the object of these sections of the Registration Act was obviously to provide a speedy remedy in those special cases which came under them. The remedy provided is speedy as compared with the ordinary operation of the Civil Procedure Code. As compared with the ordinary procedure of the Small Cause Courts for the Presidency Towns it is tardy, and it is made so by the last clause of section 53. It is to be observed that the construction which I am disposed to put on the words ‘any Court which, &c.,’ would not destroy, in cases under rupees 1,000, the remedy which the Legislature has sought to create, but would merely confine it to the High Court, which has also jurisdiction in such cases, and to which, under that construction, sole jurisdiction would be given in that particular class of cases. The

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grant it or not. Here the partition sought for cannot be permanent, for, on the death of either the plaintiff or the defendant, the whole property will vest in the survivor, and then there must come the final partition amongst the grandsons, who are the persons ultimately entitled to the property. The estate is a very large one, and the costs of two partitions will be very heavy. Then the reversioners have not been made parties. It is submitted that they ought to be before the Court. Their rights are affected to some considerable extent, and it would be inequitable to decree a partition without their being heard. [PHEAR, J.—Supposing these ladies had amicably agreed to partition, could the reversioners have come forward and urged anything against their doing so?] They could by proving waste. A partial partition only is wanted here. This the plaintiff has no right to insist upon. She can have a partition of the whole property or none. She cannot be allowed to pick and choose. As regards the property out of the jurisdiction, the plaintiff cannot include it now in her plaint, as no leave was obtained to sue in this Court. [PHEAR, J.—Partition is a matter of equitable right, and the plaintiff, I think, has a right to come here and ask to have her share in the joint property be made separate for her. I do not think the question of the kind of inconvenience mentioned has ever been considered by the Courts as a bar to partition.]

Mr. Graham, in reply upon the second point raised.—The mofussil property has already been partitioned to all intents and purposes. The ladies are in the separate enjoyments of the rents and profits, and this is sufficient partition according to Lord Westbury in *Appovier v. Rama Subba Aiyan* (1).

PHEAR, J. (after taking time to consider.)—I have already intimated my opinion that one of two Hindu co-heiresses may ask for a partition against the other. It seems to me that the Hindu law, as it obtains in Bengal, favors partition among co-sharers, although joint user and

considerable property, real and personal; the real property being situate partly in and partly out of Calcutta. Srimati Rasmani Dasi inherited her husband's property, and continued in possession of it, making large additions to it down to the day of her death, which took place on the 19th February 1861.

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Kumari Dasi died in the life-time of Rasmani Dasi, leaving a son, named Jadunath Chowdhry. Upon the death of Rasmani, the plaintiff and defendant became owners of their father's property, and this suit was instituted for a partition of all the moveable and immoveable property situate in Calcutta, it being alleged by the plaintiff, and not denied by the defendant, that, with respect to the immoveable property situate out of Calcutta, the parties were in the separate enjoyment of the rents and profits issuing therefrom.

The plaintiff was the wife of Ramchandra Das, and had three sons living, namely, Ganesh Chandra Das, Balaram Das, and Sitanath Das. The defendant was the wife of Mathur Mohan Biswas, and had three sons living, namely, Dwarkanath Biswas, Trailakhanath Biswas, and Thakur Das Biswas. The grandsons of Rajchandra Das were not made parties to the suit.

The defendant, while expressing her readiness to submit to any decree the Court might pass, suggested the following, among other arguments, for the consideration of the Court against the partition claimed by the plaintiff:—

(1). Whether there ought to be a partition at all as prayed in the plaint.

(2). Whether all the grandsons of Rajchandra Das and Srimati Rasmani Dasi, or at any rate two of them, namely, Bhupal Chandra Biswas and Jadunath Chowdhry were not necessary parties to this suit.

Mr. Graham and Mr. Bonnerjee for the plaintiff.

The Advocate-General and Mr. Kennedy for the defendant.

The case having been opened, the Advocate-General denied, as a matter of law, that one member of a joint family has a right to ask for a partition. The Court, as a Court of Equity, has a discretion in cases of this description whether to

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IN THE MATTER OF THE PETITION OF CHINTAMANI PAL

MAN, J.—We are all of the same mind, that the rule laid down in *Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1) is not universal; our discretion is not fettered.]

CHINTAMANI PAL

The judgment of the Full Bench was delivered by

PYARI MOHAN MOOKERJEE NORMAN, J.—We think that it cannot be treated as a universal rule that no point can be raised on application for a review which has been already discussed and decided on the original hearing of the appeal, or that no new point which has not been raised on the hearing of the appeal can be argued on the application for a review. We think that in each case the Court to which application is made must consider and decide whether a review is necessary to correct any evident error or omission, or is otherwise requisite for the ends of justice.

"R2 Cal. f 265.
v. I.K. C.S. 580.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

SRIMATI PADMAMANI DASI *v.* SRIMATI JAGADAMBA DASI.

1871
Jan. 9.

Partition—Co-heiresses—Hindu Law—Jurisdiction.

Two co-heiresses, in joint possession of property by Hindu law, are in the nature of co-parceners, and one of them can enforce partition against the other, notwithstanding the limited character of their tenure, and although such partition might not be binding on the revertors.

A person suing for partition is not obliged to include in his suit the whole of the property, but may confine his suit to the portion of the property which he is desirous of having partitioned; therefore, where, in a suit for partition, it was shown that some portion of the property was out of the jurisdiction of the Court, objections that fresh parties would be necessary if the mofussil property were included, and that therefore the suit had not been properly brought, and that the leave of the Court had not been obtained previous to bringing the suit, were overruled.

THE plaintiff and defendant were the daughters of one Rajchandra Das, of Calcutta, who died on the 8th of June 1836, leaving a widow Srimati Rasmani Dasi, three daughters,—viz., the parties to this suit and Kumari Dasi, and a grandson by a deceased daughter, named Bhupal Chandra Biswas. He left

—Is it ground for review that an incompetent advocate was instructed, and the case was badly argued? Some evident error or omission must be shewn]. What we ask is that Judges should admit a review where justice requires it. The Judges sometimes refuse to hear the application—to see if justice does require it. They say “shew us that we are wrong; but we won’t let you argue.” Now the only means of showing that is by argument. [JACKSON, J.—I should not be bound by *Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1). PAUL, J.—Nor should I. NORMAN, J.—You must first give reasons to show that the decision was wrong when applying for review. JACKSON, J.—I should object to the Full Bench laying down any formula. PAUL, J.—Judges have expatiated on the abuse of reviews, and have not considered their use. NORMAN, J.—If you say, “I can show an evident omission or miscarriage of justice, or something erroneous,” you are entitled to be heard.] We are forbidden to point out a wrong conclusion from evidence in the judgment. We do not ask to re-argue. [NORMAN, J.—You must not begin by re-arguing but first point out an error. JACKSON, J.—We can only lay down a rule in this Full Bench, which will not bind the other Judges. NORMAN, J.—It cannot be laid down that no new point shall be raised.] The object of a review is to make a case for rehearing, *per* Lord Manners in *Pentland v. Stokes* (2). No doubt there are numerous questions such as weight of evidence and so forth which are more properly the subject of appeal than of review. What we ask is to be allowed to state our grounds of review beyond reading the petition—to be allowed to apply—to do something more than file a petition. [JACKSON, J.—It would be a good thing to apply for a review in open Court. PAUL, J.—What is the meaning of “review,” Act XXI of 1863, s. 45 (3). NOR-

(1) 5 B. L. R., 821.

(2) 2 Ball & Beatty, 75.

(3) *Act XXI of 1863, s. 45.*—“On such point or points of law being so reserved as in the last preceding section mentioned, or on its being certified by the Advocate-General at Fort William that in his judgment there is an error in the decision of a point or points of law decided by the Recorder, or that a point or points of law which has or have been decided by the said Recorder, should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law; and thereupon to alter the sentence passed by the Recorder, and to pass such judgment and sentence as to the said High Court shall seem right.”

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tion for review in No. 107, Mr. Datta should not be allowed to show cause in the manner he proposes; and whether, in the application No. 110, Mr. Money should not be allowed to show cause in the manner he proposes.

We would ourselves answer both these questions in the affirmative.

Mr. Money (Mr. Twidale with him) for the petitioners.—This is a reference by Loch and Hobhouse, JJ., to decide what may and what may not be argued on an application for a review. What is referred chiefly is, may new points be argued, or in what mode may cause be shown on an application for review. The case of *Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1) declares that no new point and no old point may be raised. In considering this point, other questions are involved, *first*, rights of suitors; *secondly*, the reputation of the Bench; for supposing a Judge finds after pronouncing his decision that he has made a mistake, and has given a wrong decision, if it be a rule that a review cannot be had on a point because it has been argued before, he cannot correct his mistake and prevent a glaring injustice; *thirdly*, the obligations of practitioners. Upon the first of these points, the object of establishing Courts of Justice is for the benefit of suitors. They pay large stamp fees and incur other expenses to begin their suit; their first right is to have justice and to have their cases fully and thoroughly enquired into and correctly decided; and if any injustice has been done to them, either through the fault of their pleader or a mistake of the Court, to have such injustice remedied. The learned counsel referred to the authorities cited before the Division Bench (2) and also to *Pentland v. Stokes* (3). [PAUL, J.—The right of review is admitted. NORMAN, J.—The admission of review rather depends on the discretion of the particular Bench before which it comes. The discretion of the Judges is not fettered. I would be willing to hear discussion if I thought it necessary.] What we are told is that we are not to mention what we might have mentioned before when we wish to show a point on which the judgment is wrong—refers to Mr. Paul's argument in *Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1). [NORMAN, J.

(1) 5 B. L. R., 321.

(2) *Ante*, p. 128.

(3) 2 Ball & Beatty, 75.

It is unnecessary to refer to other cases, for those already mentioned show clearly what has been the opinion of the Court as to the course which should be pursued in regard to parties desirous of showing cause for the admission of an application for a review of judgment. The question has been very fully argued before us by Mr. Money. We feel that while on the one hand the danger of allowing a second appeal in the shape of showing cause has to be avoided, it is necessary on the other hand to take care that the restriction put by the Court upon parties, does not amount to a denial of justice. Under the present practice, a party wishing to show cause for the admission of an application is stopped *in limine* by the Court, if he seek to urge points already discussed, or to raise points not previously taken at the hearing of the appeal, so that almost the only ground on which a party can hope for the admission of his application is by showing that there has been some evident error or omission in the judgment or decree of the Court. It appears to us, after much consideration of the subject, that the course now taken by the Court amounts almost to a prohibition of any review of judgment. The effect of the recent rulings on the subject is to prevent a person being heard at all; for it is self-evident that he cannot show cause why his application for review should be admitted if he be not heard. The grounds urged may not be sufficient in the opinion of the Court for admitting the application, but unless a party be heard, it is impossible to say that he has failed to show sufficient cause for the admission of his application. The question is one of so much importance, that as the opinions of the Judges are not unanimous on the subject, we think it right to submit it for the consideration of a Full Bench of this Court, and ask it to determine whether the ruling come to by a Division Bench of this Court in the case of *Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1) as regards the hearing of grounds for the admission of an application for review is consistent with law, and should be adopted by the Court as the rule by which the admission of applications for review is to be regulated.

The questions are, first, whether in the case of the applica-

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regarding the admission of reviews, we find, in section 376, the grounds on which a review may be sought; in section 378, the object which is to be attained by the review; and in section 380, the course to be followed when an application for a review of judgment has been granted.

By section 376, "any person considering himself aggrieved, by a decree of a Court, and who (first) from a discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or (second) from any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree."

The object to be attained is either the correction of an evident error or omission, or to satisfy the ends of justice. Section 378 prescribes as follows:—"If the Court shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review." The words "evident error or omission" do not, we think, mean merely the correction of a clerical error, or supplying the omission of a necessary word, but comprise any evident error or omission; nor do the words "requisite for the ends of justice" signify, in our opinion, as has been argued before us, something of the nature of an error or omission.

Here the learned Judge referred to and read the decisions in the following cases:—*Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1), decided on 10th February 1870, by Bayley and Markby, JJ.; *The Collector of Tippera v. Mussamat Mafiz-un-nissa Bibi* (2), decided 29th June 1870, by Phear and Mitter, JJ.; *Garib Hossein Chowdhry v. Wise* (3), decided 14th July 1870, by Bayley and Hobhouse, JJ.; *Beni Madhab Ghose v. Gurga Gabind Mandal* (4), decided 20th December 1869, by L. S Jackson and Markby, JJ.; and *Gangapersad v. Agra and Misterman's Bank* (5).

(1) 5 B. L. R., 321.

(4) 5 B. L. R., 345.

(2) *Id.*, 341.

(5) *Id.*, 340.

(3) *Id.*, 342.

A reference was made to a Full Bench in both cases under the following order :—

LOCH, J.—We are asked by Mr. Datta, counsel for the petitioner in this case, No. 107, to review our judgment of 25th May 1870, and in showing cause for the admission of his application for review, he proposes to re-argue the case, making use of the arguments that were used at the original hearing of the case, and to cite certain authorities that might have been, but which were not, cited at the previous hearing, and to show us by a re-statement of the facts of the case that the precedent which we supposed to govern that case did not, in truth, govern it; and he urges that, unless he be allowed to do so, it is impossible for him to be able to show cause for the admission of this application.

In the second case, No. 110, Mr. Money, for the petitioner, asks to be allowed to show cause for the application for a review of our judgment of 26th May 1870, and in doing so he proposes to enter upon points either not dwelt upon, or not taken, at the former hearing, these being points of law which, though not prominently, or not at all, brought to the notice of the Court when the case was before it on the former occasion, the Court is yet supposed to be familiar with, and should have borne in mind when deciding the case in question.

This raises the whole question, and a very important question it is, as to the mode in which cause may be shown in applications for review. There have been a course of decisions of this Court, which I will proceed to notice, and which may be said to have laid down the following rule :—That in showing cause, no point can be raised which has been already discussed and decided on the original hearing of the appeal; and no new point which has not been raised at the hearing of the appeal can be argued on the application for review. This is the ruling in the case of *Bhawabal Sing v. Maharaja Rajendra Pratap Sahoy* (1), and it has been followed by most of the Division Benches of this Court.

Looking to the provisions of the Code of Civil Procedure

(1) 5 B. L. R., 321.

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IN THE MATTER OF THE PETITION OF CHINTAMANI this side and on that side, and there was direct evidence on the question of possession, which was the question before him, which he notices, considers, and believes on the part of plaintiff.

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Subsequently, a petition of review was presented on behalf of the appellant, on the following grounds:—

1st.—Because when this Court admits that certain petitions and decisions have been by mistake used by the Judge against your petitioner instead of in favor of your petitioner, and when it is, therefore, impossible to say what effect this mistake may not have had on the mind of the Judge, when weighing the oral evidence, this Court ought to have remanded the case, because there was a substantial error in law in the investigation of the case which may have produced error or defect in the decision of the case upon the merits.

And because of error by the Judge in dealing with the evidence as specified in the ~~and~~ to the 8th grounds; and

9th.—Because, when the Judge mainly based his decision, as to plaintiff's possession under the gift, on the summary decisions for rent obtained by plaintiff, and considers that plaintiff was dispossessed by the reversal of those summary decisions, and this Court has held those decisions to be rather in favor of your petitioner, then the decision as to possession and dispossession falls to the ground.

Mr. Money (with him Mr. Twidale) argued in support of the petition. He referred to the following cases:—*Nusseerooddeen Khan v. Indurnarain Chowdhry* (1), *Maharaja Moheshur Sing v. The Bengal Government* (2), *Bhugwandeep Doobey v. Myra Baee* (3), *Wood v. Milner* (4), *The Attorney-General v. The Mayor of Liverpool* (5), *Oddie v. Woodford* (6).

(1) 5 W. R., 93.

(4) 1 J. & W., 636.

(2) 7 Moore's I. A., 283; see 304-7.

(5) 1 M. & Cr., 171; see 210-11.

(3) 11 Moore's I. A., 487; see 498.

(6) 3 M. & Cr., 584; see 624-5.

Mr. Datta (with him Baboo Debendra Chandra Ghose) appeared in support of the petition.

In the second case, on special appeal, on 26th May 1870, Loch and Hobhouse, J.J., sitting in a Division Court, delivered the following judgment :—

The questions before the Judge in the Court below were, admittedly, simple questions of fact, and, also admittedly, he has come to distinct findings upon those questions. But it is said that one of these findings is erroneous in law (the finding of possession), because the Judge has allowed certain evidence to influence him in coming to his decision, which either ought not to have been admitted at all, or which he has misconstrued, or which, when admitted, told rather in favor of the defendant than in favor of the plaintiff. The evidence referred to is the evidence of five decisions under Regulation VII of 1799, two petitions made use of in some way in reference to those decisions, and the *vivâ voce* evidence of one Mazhar Ali and one Kazi Ali Muddy. In the matter of the *vivâ voce* evidence in question, we think that the Judge has not misinterpreted, nor made an improper use of, that evidence. In the matter of the petitions, and four out of the five decrees, the Judge no doubt seems to have made a mistake. He seems to have used those decisions in favor of the plaintiff, which should rather have been used in favor of the defendant, and if the judgment had been a very meagre one, or if it had been a judgment reversing the judgment of the first Court, or if there had been no other and better evidence on the record, or even if the evidence in question had been considered without any reference to the circumstances surrounding it, we might have possibly said that the Judge had committed an error in law, which would have obliged us to remand the case, in order that he might consider the evidence on the record, exclusive of the petitions and the decisions in question. But that is not so here. The Judge had ample evidence on the record, and much better evidence than the decisions in question, upon which to come to a right judgment in the case; he was supporting a very elaborate decision of the Court below; he seems to have considered every single particle of evidence on

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[FULL BENCH.]

Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Paul.

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IN THE MATTER OF THE PETITION OF CHINTAMANI PAL AND OTHERS.

CHINTAMANI PAL AND OTHERS (APPELLANTS) v. PYARI MOHAN MOOKERJEE AND OTHERS (RESPONDENTS).*

AND

IN THE MATTER OF THE PETITION OF SALEH SHABI SABI-UD-DIN ABU SALEH.

SALEH SHABI SABI-UDDIN ABU SALEH (APPELLANT) v. ASADUNISSA BIBI (RESPONDENT).†

Review—Civil Procedure Code (Act VIII of 1859), s. 376.

It cannot be treated as a universal rule that no point can be raised on an application for a review which has been already discussed and decided on the original hearing of the appeal; or, that no new point, which has not been raised on the hearing of the appeal, can be argued on the application for a review. In each case, the Court, to which the application is made, must consider and decide whether a review is necessary to correct any evident error or omission, or is otherwise requisite for the ends of justice.

THIS reference to a Full Bench was made on an application for a review of judgment in each of these two special appeals.

In the first case, on special appeal, on 25th May 1870, Loch and Hobhouse, J.J., sitting in a Division Court, delivered the following judgment:—

The case of *Sonatan Roy v. Ananda Kumar Mookerjee* (1) appears to be directly in point. We concur in the opinion therein expressed. We, accordingly, dismiss this appeal with costs.

Subsequently, a petition of review was presented, on behalf of the appellant, in the following terms:—

“The facts of the case referred to in the judgment of this Honorable Court were not similar to those of the present case, and the Court was wrong in holding that the Civil Court has no jurisdiction to entertain your petitioner's suit.”

* Review, No. 107 of 1870; Special Appeal, No. 2667 of 1869.

† Review, No. 110 of 1870; Special Appeal, No. 14 of 1870.

(1) 2 B. L. R., App., 31.

The only question, then, is whether there is anything in the procedure of the Insolvent Court which would prevent the Commissioner of the Court for the Relief of Insolvent Debtors from permitting the proceedings in that Court, in which the personal representative of the deceased is interested, from being carried on by him. It appears to me that there is nothing, either in the Act, or in any rule of the Court, to prevent the Commissioner from allowing the proceedings to be carried on by such representative.

The ordinary course of proceeding in the Insolvent Court, on all matters analogous to the present, is by rule or summons. And I think that, on the same principle as that on which Courts of Equity originally permitted an executor to carry on an existing suit by bill of revivor, the Commissioner of the Court for the Relief of Insolvent Debtors in this country is competent to allow proceedings in that Court, which have been brought to a stand-still by the death of the party proceeding there, to be carried on by the representative of the deceased.

It is only necessary to add that it appears to me that by carrying on these proceedings, by placing him in the position of his father, Janki Prasad acquires all the rights and becomes subject to all the liabilities in relation to the suit which attached to his father Beni Prasad.

For these reasons, I am of opinion that the order of Mr. Justice Phear is perfectly correct, and that both appeals ought to be dismissed with costs, including the costs of the Official Assignee.

Appeal dismissed.

Attorneys for appellants : Messrs. *Watkins, Trotman, & Co.*

Attorney for respondents : Mr. *Dover.*

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summary nature of the remedy provided seems to render it credible that the High Court alone could enforce it.

"As to the second point, I would point out that Schedule III of Act VII of 1870 (the Court Fees' Act) repeals the words in section 53 of Act XX of 1866, under which fees were formerly charged in such cases. I am not aware that there is any other provision under which fees can be charged, unless it be sections 19 and 20 of Act IX of 1850. It seems doubtful whether these sections are applicable to special registration cases. Those cases are provided for in Schedule I, and section 4 of the Court Fees' Act as regards the High Court; but in section 4 of the Court Fees' Act, all mention of the Presidency Small Cause Courts is omitted. This also appears to me an additional reason for considering that the latter Courts were not intended to have jurisdiction in special registration cases. It seems to me, therefore, that the fee should either be two annas in the rupee or none.

"A further difficulty arises as to the fee if this Court is to execute decrees in such cases, but not to execute them under its own Act, but under the Code of Civil Procedure. I have the honor to solicit the opinion of the Judges of the High Court on the two points above stated."

The petition was in the ordinary form of a petition under section 53 of the Registration Act, XX of 1866, praying for enforcement of payment of the sum of rupees 498-15, with interest at 12 per cent., due on a bond dated 27th July 1868, which had been specially registered under section 52.

The petition bore stamps to the amount of rupees 21.

No one appeared for the plaintiff.

[REDACTED] for the defendant, contended that the Small Cause Courts had no jurisdiction to entertain a suit under section 53, "may be filed in the Small

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excepted from the provisions of Act VIII of 1859. Small Cause Courts in the Mofussil have jurisdiction—*Keshab Lal Mitter v. Masabdy Mundul* (1).

The argument on the second question is not material to this report, as the High Court expressed no opinion on it.

The opinion of the High Court was as follows :

PHEAR, J.—We think the learned First Judge was right in holding that the Legislature did not intend to give the Court of Small Causes jurisdiction to pass decrees under the provisions of sections 52 and 53 of Act XX of 1866.

The words of the first clause of section 53 are, no doubt, if taken alone, large enough to include the Court of Small Causes on the facts stated to us. But it seems clear from the second clause of the same section, that the summary procedure, by petition based on the registered obligation, is solely a substitute for the regular procedure by plaint, and was not intended to have operation in such a Court as the Court of Small Causes, which does not proceed by verified plaint. The direction in the last clause, relative to the enforcement of the decree in accordance with the provisions of the Code of Civil Procedure, confirms this view.

The petitioner's application must be rejected.

Attorneys for the defendant : Messrs. Beeby and Rutter.

[APPELLATE CIVIL.]

Before Mr. Justice Phear and Mr. Justice Mitter.

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IN THE MATTER OF JOHN THOMSON

Superintendence—24 & 25 Vict.

An order passed by the Recorder of Moulmein, under sections 16 or 17 of Act XXI of 1863, granting or withdrawing a license to practise as a pleader in the Small Cause Court of Moulmein, is an exercise of power which comes under the superintendence of the High Court.

The Recorder of Moulmein, under section 17 of Act XXI of 1863, has no power to withdraw a license granted by him to plead in the Court of Moulmein, "except for "any sufficient reason."

Mr. Paul moved for an order to make absolute a rule which had been issued to the Recorder of Moulmein, to show cause why his order dated 16th May 1870, directing the withdrawal for six months of a license granted by him to John Thomson to practise as an advocate of the Small Cause Courts of Rangoon and Moulmein, should not be set aside.

No one appeared to show cause.

The judgment of the Court was delivered by

PHEAR, J.—In this case, upon the application of the petitioner, Mr. John Thomson of Moulmein, a rule was issued by this Court to the Recorder of Moulmein, requiring him to show cause why his order, dated the 16th of May 1870, made in the Civil Regular suit, No. 67 of 1870, wherein Nur Mahomed is plaintiff, and Naku is defendant, directing "that the said petitioner's license as advocate of the Small Cause Courts of "Rangoon and Moulmein be withdrawn for a period of six "months" should not be quashed, on the ground that the petitioner had no opportunity of being heard with regard to the cause of his removal before the order was made.

Mr. Paul, on behalf of the petitioner, now asks that the rule be made absolute. No one appears to show cause on behalf of the Recorder.

It is true that the rule was not received by the Recorder until the 2nd of June, and therefore the full period of thirty days required by law had not yet elapsed. But that does not affect the con-

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Court, an order of the High Court of Judicature at Fort William in Bengal, directed to the Court of the Recorder of Moulmein.

"Order read at the sitting of the Court this day.

"*Court.*--As I am not, as at present advised, aware that this Court is under the superintendence of the High Court of Bengal, as regards the matter referred to (the suspension from practice of a pleader of the Small Cause Court of Moulmein), I must decline to take the order of the High Court into consideration.

"The Registrar will transmit a copy of this minute to the Registrar of the High Court of Bengal."

I have no doubt that the learned Recorder, in adopting the remarkable course which he has pursued in this matter, was rather actuated by over-solicitude for his own dignity and independence, than animated with the deliberate intention to show disrespect to this Court. I will venture, however, to add that, in my opinion, he is not happy in the attitude which he has assumed, and that the dignity of the Recorder would, in truth, have been better discernible than it now is, if that learned Judge had manifested a demeanour of, at least, some courtesy towards the High Court. But, fortunately, the behaviour of the Recorder towards this Court is not an element in the question which we have now to determine, and his omission to show cause leaves our duty, I think, very plain; though, at the same time, I desire to express my regret that he has not thought proper to put us in possession of the grounds upon which he declines to acknowledge the jurisdiction of this Court.

We must, in the absence of any countervailing evidence to the contrary, take the facts, as they are given by the petitioner in his affidavit, to be correct; and on those facts, the petitioner undoubtedly, seriously aggrieved by the way in which he has been treated by the Recorder.

The affidavit of

A. J.

"That, in delivering judgment in a certain case, in which one Nur Mahomed was plaintiff, and one Naku was defendant, the Recorder of Moulmein ordered that your petitioner's license, as such advocate, should be withdrawn for a period of six months. A copy of the said judgment of the said Recorder is hereunto annexed and marked A.

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"That your petitioner was not a party to the said suit, nor had he any interest therein, nor was he conducting the said suit on behalf of either of the parties thereto, but was simply called as a witness in the same.

"That the Recorder did not call on your petitioner to answer any charge, or give your petitioner any opportunity of being heard in his defence, nor was any charge, in fact, made against your petitioner.

"That your petitioner's license was thereupon withdrawn, and your petitioner has thereby been prevented from practising his said profession of advocate to his great loss and detriment."

Then it appears, from the alleged copy of the judgment, which is stated by the petitioner to have been delivered by the Recorder in the case referred to in the petition, that the Recorder, after discussing most of the evidence in the case, says:—

"I should dismiss the case here, were it not that I wish to add an observation on the conduct of Mr. Thomson in connection with it. Notwithstanding his denial that any compulsion, moral and physical, was used to compel the defendant's signature, no one, I think, could have heard the evidence, without a strong suspicion that the whole matter was pre-arranged by him, and Magistrate's summons applied for, could it have been [REDACTED] have been used merely as an amplification of [REDACTED] defendant, would not sign the note,

[REDACTED]
of the part

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this:—A man who, from his ignorance of the Burmese language and want of his acquaintance with civilization, must be regarded as a perfect savage, is brought to him with a request that he will prosecute him for a criminal offence. Mr. Thomson, without even a word of notice to the man, draws up a charge against him, and endeavors to get the Magistrate to issue a summons upon it. The Magistrate refuses the summons, and Mr. Thomson goes back to his office, where he is quite astonished to find that the defendant has consented to sign a note for rupees 1,500. To avoid any confusion, Mr. Thomson tells us he determined to write the note himself, and he was satisfied with having its contents explained to the defendant by one of the party, who had, according to Mr. Thomson's statement, brought him to the office, with a view of prosecuting him criminally.

“I cannot but think such conduct highly censurable in a professional lawyer, and this conviction leads me to make a further observation in connection with the present case. I have hitherto carefully abstained from any observation on the arrangements made among themselves by members of the bar, but I think it impossible to allow the present case to pass by, without pointing out the serious inconvenience of gentlemen of the Recorder's bar associating themselves in business with persons who are not members of that bar. The Court's confidence in the integrity and ability of the members of the Recorder's bar is, to a great extent, indispensable in the transaction of ordinary business. The admission into partnership, of persons who have not been so admitted, must necessarily lead to a diminution of that confidence. In the present case the connexion seems to me especially open to objection.”

“Mr. Law holds the office of public prosecutor, and stands at the head of the Bar. He is a learned and able pleader of the Supreme Court, and is well known throughout the country by his services to the law.”

which have established themselves in both branches of the profession at home. In no British possession, I may observe, is it of more importance than in this province, that the standard of the bar should be kept high, inasmuch as the European community is so small, that public opinion can hardly be said to operate at all, and the native population appears to place an almost unreasoning confidence in the probity and intelligence of those whom they are accustomed to look upon as representatives of a superior race.

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"My finding in the case is that the note sued on was obtained from the defendant by intimidation, and I dismiss the suit with costs.

"For the reason I have above given, I direct Mr. Thomson's license to be withdrawn for a period of six months."

So that, by the operation of the two last lines, added to a very lengthy judgment, delivered in a case to which the petitioner was not a party, without any specific charge having been made against him, and without his having had the smallest opportunity of answering a charge, had any been made, the petitioner finds himself suspended for six months from the practice of his profession.

Now I need hardly say that, to suspend from practice an advocate or pleader of any Court for misconduct, is a proceeding of a penal character, and we have the authority of the decision given by the Privy Council in *In re Pollard* (1) (a case not very unlike the present in some of its features), if any authority be needed for stating that no person should be punished for any criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given him.

It appears to be clear, then, that the learned Recorder in this case has fallen into an unfortunate and grievous error, such an error as we certainly ought, on the application of the petitioner, to set right, if we have the power to do so.

The learned Recorder, by his "minute," appears to assert very positively that we have no such power; and the respect which is due to the opinion of the Judge of such a Court as

(1) 2 B. L. R., P. C., 106.

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that over which he presides, has led me to seek for sufficient grounds to support this opinion. I have failed to find any.

I think that the Legislature has distinctly made the Court of the Recorder of Moulmein subject to the superintendence of this Court, and so has rendered it incumbent on this Court, and given this Court power, to take care that all the acts of the Recorder of Moulmein done in his capacity of Recorder be done regularly and according to law.

Section 15 of the Charter Act, 24 and 25 Vic., C. 104, passed on the 6th of August 1861, says:—"Each of the High Courts "established under this Act shall have superintendence over "all Courts which may be subject to its appellate jurisdiction." The first Letters Patent under this Act were issued in May 1862. At that time the Recorder's Court at Moulmein did not exist. The Recorder's Court was afterwards established by the Governor-General under the powers given to him for that purpose by Act XXI of 1863, and that Act, together with a subsequent Act III of 1866, is the source of the jurisdiction, powers, and privileges which the Court possesses. We are of opinion that the Act makes the Recorder's Court of Moulmein subject to the appellate jurisdiction of this Court.

It appears, from Act XXI of 1863, in the first place, that, for suits instituted in the Recorder's Court not exceeding in value rupees 3,000, no right of appeal whatever exists. Then the 27th section of that Act enacts that, "in all suits heard and "determined by a Recorder under this Act, in which the "amount or value of the suit shall exceed rupees three thou- "sand, and be less than rupees ten thousand, an appeal shall lie "to the High Court of Judicature at Fort William in Bengal, "subject to the rules contained in the Code of Civil Procedure "regarding regular appeals." It is true that the High Court is not the sole Court possessing immediate appellate jurisdiction over the Recorder's Court, for section 39 enacts that, "in all "suits heard and determined by a Recorder under this Act, in "which the sum or matter at issue is rupees ten thousand "or upwards, or in which the judgment, decree, or order "shall involve, directly or indirectly, any claim, demand, or "question, to or respecting property of the value of rupees ten

" thousand or upwards, an appeal shall lie to Her Majesty in _____
" Council."

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But, again, section 22 says:—" If in any suit any question of
" law or usage having the force of law, or the construction of a
" document affecting the merits of the decision shall arise, on
" which the Recorder shall entertain any doubt, the Recorder
" may, either of his own motion, or on the application of either of
" the parties to the suit, draw up a statement of the case, and
" submit such statement, with his own opinion, for the decision
" of the High Court of Judicature at Fort William in Bengal."

If a reference of this kind is made, the decision thereon of
the High Court is binding on the Recorder; for from the latter
end of section 25, we find that, when the High Court " has heard
" and considered the case, it shall transmit a copy of its judg-
" ment, under the seal of the Court, and the signature of the
" proper officer of the Court, to the Recorder, who shall, on the
" receipt thereof, proceed to dispose of the case conformably to
" the decision of the High Court."

Thus, excepting cases of rupees 10,000 and upwards, which,
I suppose, are comparatively rare, the only appeal which exists
as of right lies to this Court; and in all cases an appeal, in the
modified form of a reference under section 22, lies also to this
Court, and therefore it appears to us that the Act, under which
the Recorder's Court was established, unmistakeably made it
subject to the appellate jurisdiction of this Court; and so, we
think, brought it within the range of section 15 of the Charter
Act.

In our opinion, the fact that this Court does not possess appellate jurisdiction over all classes of cases tried in the Recorder's Court, and that the Privy Council shares with this Court appellate jurisdiction over the Recorder's Court, does not remove the Recorder's Court from the operation of section 15 of the Charter Act. If, however, it be objected that the words in that section, " which may be subject to its appellate jurisdiction," meant only, made subject by the Letters Patent of this Court, and that the words of section 15 of the first Letters Patent cannot be construed into having the effect of making any Court subject to this Court, which did not exist at the time when

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the Letters Patent were granted; still clearly this objection, if it be a valid objection, is removed by section 16 of the present Letters Patent of the High Court, which were granted in the year 1866. That section says:—“ And we do further ordain “ that the said High Court of Judicature at Fort William in “ Bengal shall be a Court of Appeal from the Civil Courts of “ the Bengal division of the Presidency of Fort William, and “ from all other Courts subject to its superintendence, and shall “ exercise appellate jurisdiction in such cases as are subject to “ appeal to the said High Court by virtue of any laws or regulations now in force.” I need hardly state that the Recorder’s Court of Moulmein was established under Act XXI of 1863, long before the year 1866. It follows, we think, from this fact that, since these Letters Patent have been issued, at any rate, whatever might have been the case before, the Recorder’s Court of Moulmein, by reason of the appeal given to this Court in Act XXI of 1863, certainly has been a Court over which the High Court, by the express terms of the Letters Patent, possesses an appellate jurisdiction, and consequently it is a Court to which section 15 of the Charter Act must apply.

Then comes the only remaining question,—namely, whether the act of which the petitioner complains is an act done by the Recorder in his capacity of Judge of the Recorder’s Court of Moulmein.

As to that I conceive there cannot be any reasonable doubt. In the “ minute,” which is the only guide we have to the learned Recorder’s own views as to the nature of his proceeding, some emphasis seems to be placed upon the passage within brackets “(the suspension from practice of a pleader of the Small Cause Court of Moulmein);” and I suppose that the learned Recorder intends thereby to suggest that the granting or withdrawing of a license to practise as a pleader in the Small Cause Court of Moulmein is not such an exercise of the power and authority possessed by the Recorder as will come under the superintendence of this Court. In the first place I would remark, with regard to this, that I can find no ground for making any distinction between the Small Cause Court at Moulmein and the Recorder’s Court. Act XXI of 1863,

throughout its text, nowhere speaks of any other Court than the Recorder's Court. It is true that, by section 35 of that Act, the Registrar has the power of a Judge of a Small Cause Court in suits of the nature of those described in Act XLII of 1860; but it appears to me that that section does not constitute the Registrar a Judge of a Small Cause Court. It only empowers him to try suits in the Recorder's Court, which are of a nature cognizable by a Small Cause Court, and below a certain value. But however this may be, the power which the Recorder possesses for licensing advocates is given by section 16 in these words :—“ No person shall be permitted to appear or “act as the advocate of any suitor in any Court held under “this Act, in any action or suit, or touching any matter whatever, “unless such person shall have been previously licensed by the “Recorder of such Court to act for the suitor of such Court “generally, or specially for the particular occasion, &c.”

And section 17 provides that “the Recorder of any Court “may, for any sufficient reason, withdraw any license which “shall at any time be granted by such Recorder to any person “to act generally or specially as an advocate under this Act.”

It appears to us as plain as words can make the matter, that the authority thus given to the Recorder is part of his authority as Judge of the Recorder's Court, and that it is bestowed upon him simply with the view to enable him the more effectively to administer justice in the Court over which he presides. We are also of opinion that the superintending power given to this Court by the 15th section of the 24 & 25 Vict., c. 104, enables us, and indeed makes it our duty, to take care that all acts done by the Judge of a Court, which is subject to the appellate jurisdiction of this Court, by virtue of his authority as Judge, be done regularly and according to law ; and that, while we cannot interfere with his discretion in cases wherein no appeal against the exercise of that discretion lies to this Court, still we have power to take such measures as may be necessary for insuring the due observance by him of such proceedings as are essential to the right application of his discretion.

From the facts before us, it appears that Mr. Thomson was licensed specially to act for suitors in the Recorder's Court, that

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is, he was licensed to act for suitors in causes which could be heard by the Registrar under section 35.

It may be doubted whether the framers of section 16, when using the word "specially," contemplated the case of the Recorder licensing an advocate for a particular special classs of cases; for the words are "specially for the particular occasion." But as the Recorder has thought proper to license Mr. Thomson as an advocate of the so-called Small Cause Court, which at the utmost I may take to be a division of his own Court, he cannot withdraw such license, excepting "for any sufficient reason;" and, as I have already said at the commencement of this judgment, he cannot rightfully and lawfully come to a conclusion that a sufficient reason does exist, without first specifying a distinct charge against Mr. Thomson, and giving him an opportunity to answer that charge.

We think, therefore, that the rule must be made absolute.

Rule absolute.

[PRIVY COUNCIL.]*

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Dec. 12.

RANI BISTUPRYA PATMADYI (PLAINTIFF) v. BA-SUDEB DHALL (OR NAND DHALL) BEWARTI PATNAIK AND OTHERS (DEFENDANTS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Practice—Infant Appellant coming of Age—Withdrawal from Appeal.

An infant appellant, in an appeal pending in the Privy Council, having come of age, and having petitioned the High Court in India to be allowed to withdraw from the suit,—*Held*, that it was competent to the respondent in England to have the appeal dismissed for want of prosecution, although the guardian had given security for the costs and paid the expenses of the appeal, and although the (former) infant was not served with notice of the motion, the Council being satisfied that he had in the High Court petitioned for leave to withdraw.

THIS was an application by the respondent to dismiss the appeal for want of prosecution, on the ground that there was no person who, as appellant, had a *locus standi* in the case.

* Present:—THE RIGHT HON. SIR JAMES COLVILLE, SIR R. PHILIMORE, AND SIR JOSEPH NAPIER.

The suit was one brought by the lady appellant, on behalf of her infant son, to establish his right as the duly adopted son of the Raja of Keonghur. The decision of the High Court (1) shows why that suit was dismissed.

Leave to appeal was granted in 1865, but in consequence of unavoidable delay in translations, &c. (as to which, however, there was no *laches*), the regular petition to the Privy Council to take the appeal into consideration was not filed until 1870. In the meantime the following proceedings had taken place in India.

31st July 1869.—The respondent petitioned the High Court, that, as the boy appellant had come of age, his name should be substituted as appellant, and he should be ordered to give security for costs (2); and notice of the application was ordered to be given to the Rani and her son.

25th August 1869.—A mooktearnama, purporting to be signed by the boy appellant, was produced by attesting witnesses before a Magistrate, the mooktearnama describing the boy appellant as being the adopted son of the Raja of Keonghur, and stating the fact of the appeal being pending, of his having attained his majority, of it being useless to go on with the appeal, and of his desire to withdraw, and therefore appointing a mooktear to appoint a vakeel to petition the Court accordingly.

10th September 1869.—A vakeel presented a petition to the Court accordingly on behalf of the boy appellant.

22nd September 1869.—The Rani petitioned the Court, stating that the boy was not living with her, that she submitted that great suspicion attached to the mooktearnama, and that she had paid all the expenses of the suit and given security for costs, and that an enquiry might be directed to examine the boy before the mooktearnama had been signed of his

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orders,—one on

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directing the Judge to send for the boy and examine him as to the execution of the mooktearnama.

6th October 1869.—The boy acknowledged the receipt of the order of 31st July.

13th December 1869.—The Judge reported that, having requested the boy's attendance he had sent to say he was unwell, and had asked that the enquiry might be made by the Moonsiff of Balasore; and that the Judge having sent the Moonsiff, the latter reported that the young man had appeared before him with witnesses, that he came of age in 1867, three years before the date of the mooktearnama, and concluded his report thus:—“The Baboo also admitted having executed the mooktearnama “in question.”

22nd January 1870.—The Rani petitioned the High Court, stating her belief that the withdrawal was not the free wish of the young man, and praying that at her expense he should be sent for and examined by the High Court; or that, if it had no jurisdiction, the appeal having gone home, a report should be made to Her Majesty in Council. The High Court followed the latter suggestion, and sent to England a supplemental record.

The Rani in October filed her case as appellant in the Privy Council Office.

The respondent, without filing his case, presented the present petition, praying for dismissal of the appeal.

Mr. Leith (Mr. Doyne with him) for petitioner.—There is no true appellant before the Court. The party really interested has withdrawn.

Mr. Bell for the Rani appellant.—This is a difficult case to pose on the Court. The facts of the case are such as have been used towards the discrediting of the Rani. The facts are as follows:

to be made, the infant coming of age should make it, as he would then be put on terms to pay the expenses incurred by the guardian: as it is, the lady will lose all she has spent on this suit.
[SIR J. COLVILE.—Why so? She can get it out of the estate.]

The estate is all in the respondent's hands: the story of the withdrawal is most suspicious: the dates show it is a clever plan on the part of the respondent: the Moonsiff made no proper enquiry. If the case were in Chancery, the personal attendance before the Court would be required. Here he is not even served with notice. This Board would hardly pass this order without directing further enquiry before the Courts in India, and the Rani is willing to bear the expense. She has an interest in the appeal, as the suit was not only to declare the son to be duly adopted, but to set aside the respondent's claims, and if the adoption fails the Rani is heiress.

Mr. Leith.—As to the proposal for further enquiry, the words of the mooktearnama (which the boy admits having executed) state his desire to retire from the suit.

Their LORDSHIPS delivered the following judgment:

In this case we understand that the lady represented by Mr. Bell, as guardian of an infant who was represented to have been duly adopted as the son of her late husband, instituted a suit to recover certain property from the respondent, who was in possession, under a claim that the infant was the son and legal heir of the deceased. The suit was heard by two Courts. It is unnecessary for us, upon this application, to consider further whether the decision both Courts passed against the title of the infant was right or wrong. We will assume that she may have had legitimate ground for applying in the Court below for leave to appeal to this Board.

That leave was granted in 1866, when the boy was still admittedly an infant. So far the proceedings seem to have been entirely regular. The transcript came home in 1867. The record was printed here, and the only thing which can be suggested as any irregularity may have been the lodging of the petition of appeal so late as 1870, after the infant had come of age, and was for all purposes *dominus litis*.

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It appears that the proceedings, which are embodied in the supplementary record, have taken place in India, and the effect of them is to show, that upon being called into that Court, the infant expressed his desire to abandon the appeal, and that the Court ultimately felt that it could not decide that question, and the appeal having been transmitted here, sent the whole of the proceedings for the adjudication of their Lordships.

In that state of things, the respondent applies that the appeal may be dismissed, and the application is resisted by the lady, who was originally the guardian of the infant.

At one time it appeared to their Lordships that it might possibly be necessary to ascertain more clearly that the son is a consenting party to this application, which could only be done by directing the Court in India to take further proceedings, in order to have the fact ascertained. But looking to these proceedings, and considering what the Court has done, it appears to their Lordships unnecessary to take that step, and to put the parties to the further delay and expense which it would involve. When the suggestions were made to Mr. Leith, their Lordships had not sufficiently adverted to the terms of the mooktearnama. We knew that the boy had made a clear admission to the Moonsiff, which had satisfied the Judge and the High Court that he was of age, and that he had executed that mooktearnama; but it did not, as it appeared to us at that time, follow that he had adopted all the statements in the petition which was presented under the mooktearnama. But when you come to look at the mooktearnama, of which he has admitted the execution, it seems very clear that he knew what he was about, and what his mooktear would do under that instrument.

He says: "Now I have attained majority, and considering that no other profit will arise by carrying on the said case than a useless expenditure of money, and with the desire of withdrawing from the said case, I do appoint Jagmohan Doss Putto Naik, inhabitant of Saooda Khotee of Pergunna Mayahagun, in Zilla Midnapore, as mooktear in my behalf, in order to engage a pleader of the High Court; and agree that the pleader of the High Court, Calcutta, who will be appointed by the said mooktear, will file a petition of with-

"drawal from the said case, and the said withdrawal will be one
"as if filed by me and completely valid."

Therefore, it seems to their Lordships, that they have sufficient evidence before them in these proceedings, that the young man is a consenting party to this application.

The question, then, is reduced to this—whether the lady, who is represented by Mr. Bell, has really such an interest in the appeal, or such a *locus standi* in this Court, as entitles her to resist this application, and to insist that the appeal shall go on, although the party in whose name it is brought wishes to withdraw from it.

Their Lordships are of opinion that she has not; if she has incurred costs there can be no appeal for mere costs; having incurred costs on behalf of the infant in this suit, she may have a claim to be recouped from his estate, if he has any; but that does not entitle her to prosecute this appeal in his name, against his will, with probably but faint chances of success.

It was thrown out that the decree had not dealt with the title of the defendant, and that she might have a preferable title to him; but the obvious answer to that argument is this—there has been a clear adjudication that the nominal plaintiff in this suit had no title. If the lady herself, as widow, has a better title, that title cannot be litigated in this suit, but must be litigated in an independent suit, in which, rejecting the adoption, she would come forward as the next heir of the deceased.

Therefore, we do not see that we should be justified in keeping this appeal upon our records. But considering the peculiar nature of the application and the position of the parties, it does not seem to us that we can do anything but dismiss the appeal *simpliciter*, saying nothing about costs. There is no proof that the infant has undertaken to pay the costs; and we also think that we ought not to give to either side the costs of this petition.

Appeal dismissed.

Agents for appellant: Messrs. J. H. and H. R. Henderson.

Agent for respondent Mr. Wilson.

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[ORIGINAL CIVIL.]

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Nov. 9.

Before Mr. Justice Norman, Offg. C. J., and Mr. Justice Markby.

KO SHOAY DOON v. SHOAY GAN.

Small Cause Court, Rangoon, Establishment of—Recorder's Court—Act XXI of 1863, s. 10—Act XI of 1865.

Act XXI of 1863, after establishing Recorders' Courts in British Burmah, and fixing the limits of their jurisdiction, enacts, by section 10, that, "save as in this Act provided, no Court other than the Recorders' Court shall have or exercise any civil jurisdiction whatever within the limits for the time being fixed as aforesaid."

Act XI of 1865, after declaring that the words "Local Government" should denote "the person authorized to administer the Executive Government in such part," enacts, by section 3, that the Local Government might, with the previous sanction of the Governor-General in Council, constitute Courts of Small Causes under that Act at any places within the territories under such Government. By section 3, the Judge of such Small Cause Court was to be appointed by the Local Government. Act XI of 1865 does not repeal section 10 of Act XXI of 1863.

By notifications dated 1st September 1869, the Governor-General appointed a Judge of the Small Cause Court at Rangoon, extended the provisions of Act III of 1864 to British Burmah, and invested the Chief Commissioner of British Burmah with the powers conferred on a Local Government by that Act.

By notification of 2nd October 1869, the Governor-General in Council sanctioned the establishment of a Court of Small Causes in Rangoon, under section 3, Act XI of 1865, extended the jurisdiction of the said Court to an amount not exceeding rupees 1,000, and notified that the territorial jurisdiction would be co-extensive with that of the existing Small Cause Court jurisdiction of the Recorder's Court at Rangoon.

Held, that the Small Cause Court at Rangoon so established was properly constituted. There is nothing to show that the words "Local Government," as used in Act XI of 1865, were intended to include a Chief Commissioner.

THIS was a case referred to the High Court by the Recorder of Rangoon. The case was stated as follows in the reference:

"The short point of the case is,—whether the Small Cause Court, now established, or assumed to be established, in Rangoon, is legally constituted?

"On March 10th, 1863, Act XXI of 1863 was passed 'to constitute Recorders' Courts for the towns of Akyab, Rangoon and Moulmein, in British Burmah, and to establish Courts of Small Causes in the said towns.' By section 10 of that Act it was declared that the Recorders to be appointed under the Act

should exercise civil jurisdiction within territorial limits to be from time to time fixed as therein prescribed; and the same section further enacted as follows: ' And save as in this Act provided, no Court other than the Recorder's Court shall have or exercise any civil jurisdiction whatever within the limits for the time being fixed as aforesaid.'

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" By section 31 of the same Act, power was given to the Governor-General in Council to appoint a Registrar to each Recorder's Court, and the Registrar so to be appointed was invested by section 35 with the powers of a Small Cause Court Judge in suits of the nature of those described in Act XLII of 1860 (the Small Cause Court Act then in force), where the value of the claim should not exceed Rs. 200, with power, nevertheless, for the Governor-General in Council to increase the jurisdiction to claims not exceeding Rs. 500.

" Under these sections (31 and 35) the Governor-General in Council, on the 15th April 1864, appointed a Registrar to the Court of the Recorder of Rangoon, and invested him with power to hear suits not exceeding Rs. 500 in amount or value. The Registrar so appointed continued to act until October 1866, when he was removed, and since then no Registrar has been appointed by the Governor-General in Council.

" By Act XI of 1865 (the Mofussil Small Cause Courts' Act), after reciting that it was expedient to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original Civil jurisdiction of the High Courts of Judicature, and declaring that in every part of British India in which the Act operates, the words ' Local Government' should denote ' the person authorized to administer the Executive Government in such part,' it was enacted (section 3) that the Local Government might, with the previous sanction of the Governor-General of India in Council, constitute, for the trial of suits under that Act, Courts of Small Causes at any places within the territories under such Government, with power to fix the territorial limits of such Courts. The suits cognizable by such Courts were specified in section 6 of the Act, and were thereby limited to the amount or value of Rs. 500, with power, nevertheless, for the Local Government (section 7) to extend the juris-

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diction to an amount not exceeding Rs. 1,000; and by section 12 it was provided that ' whenever a Court of Small Causes should be constituted under that Act, no suit cognizable by such Court should be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes.' By Section 13 the Judge was to be appointed by the Local Government.

" By the same Act (XI of 1865) Act XLII of 1860 was repealed; but by section 50 of the repealing Act, when in any previous Act reference is made to Act XLII of 1860, such reference is to be read as applying to Act XI of 1865. That Act was passed on 15th March 1865, and on 26th January 1866 an Act was passed to confer certain increased powers on the Registrars of the Recorders' Courts in British Burmah, and such increased powers were actually exercised by the Registrar until October 1866.

" Upon the removal of the Registrar of the Court of the Recorder of Rangoon in October 1866, the Recorder exercised civil jurisdiction both in suits above and in suits below Rs. 500, but suits under Rs. 500 continued to be heard separately in what was called the Small Cause Division of the Recorder's Court, though properly speaking there was no Small Cause Court, and there was no authority for the distinction.

" In the *Gazette of India* of the 4th September 1869, notifications of the Home Department (Judicial), dated 1st September 1869, appeared as follows :—

No. 1256.

" APPOINTMENT.—Mr. Donald Grant Macleod, B. A., L.L.B., Barrister-at-law, to be Judge of the Small Cause Court at Rangoon.

No. 1261.

" The Governor-General in Council is pleased to extend the provisions of Act III of 1864 to the province of British Burmah. The Governor-General in Council is also pleased to invest the Chief Commissioner of British Burmah with the powers conferred upon a Local Government by the said Act.

(Sd.) E. C. BAYLEY
Secretary to the Government of India.

" On the 1st October 1869, Mr. Macleod assumed charge of the office of Judge of the Court of Small Causes, Rangoon, as appears by the *British Burmah Gazette* for October 9th, 1869. In the *Gazette of India* of the 9th October 1869 appeared the following notification by the Home Department (Judicial), dated Simla, 2nd October 1869 :—

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No. 1467.

" Under Section 3 of Act XI of 1865, the Governor-General in Council is pleased to sanction the establishment of a Court of Small Causes in the city of Rangoon for the hearing of suits cognizable by such Courts under the provisions of the said Act. Under Section 7, the jurisdiction of the said Court is extended in suits of the nature described in Section 6 to an amount not exceeding Rs. 1,000. The territorial jurisdiction of the Court will be co-extensive with that of the existing Small Cause Court jurisdiction of the Recorder's Court at Rangoon.

(Sd.) E. C. BAYLEY,
Secretary to the Government of India.

" On the 7th February 1870, a plaint was presented in the Recorder's Court for Rs. 600, though the nature of the suit was such as a Small Cause Court, duly constituted under Act XI of 1865, with jurisdiction up to Rs. 1,000, would have had power to entertain. The plaint was presented in the Recorder's Court for the express purpose of raising the question now propounded ; and the advocate for the plaintiff (the Government Advocate of Rangoon) in presenting it, argued—

" *First.*—That section 10 of Act XXI of 1863 was not repealed by Act XI of 1865, either expressly, for it was not mentioned in it, or by necessary implication, for the later Act is neither contrary to, nor inconsistent with, the provisions of the earlier Act.

" *Secondly.*—That the words 'save as in this Act provided' in section 10 of the Recorders' Act had reference to the subsequent sections under which the Registrar was invested with the powers of a Small Cause Court Judge, and consequently the meaning of the section is, that except the Small Cause Court of the Registrar, no Court, other than the Recorder's Court, should have civil jurisdiction within the prescribed limits.

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“*Thirdly.*—That provision having been made by the Recorders’ Act for special jurisdiction in Small Causes (notwithstanding that Act XLII of 1860 was then in force) showed the intention of the Legislature that no Small Cause Court, except the Small Cause Court thereby constituted, should exercise jurisdiction within the local limits of the Recorder’s Court, the reasons for this being apparent on the face of the Act itself, by which the Recorder was placed in the same position with regard to the Registrar that the High Court stands in with regard to Judges of Small Cause Courts constituted under Act XI of 1865.

“*Fourthly.*—That at the time when Act XI of 1865 was passed, the Small Cause Court, constituted under sections 31 and 35 of the previous Act, was sitting in Rangoon and continued to sit and hear cases not exceeding Rs. 500 in value until October 1866, and was not superseded or affected by Act XI of 1865, and ceased only upon the removal of the Registrar.

“*Fifthly.*—That if Act XI of 1865 did not repeal section 10 of the Recorders’ Act, no notification of the Home Department, or of the Governor-General in Council, or of the Local Government, could repeal it.

“*Sixthly.*—That the Governor-General in Council was not, on the 2nd October 1869, the Local Government within the meaning of Act XI of 1865, but that the Chief Commissioner was ‘the person authorized to administer the Executive Government’ in British Burmah, if not before, at any rate since, the notification in the *Gazette of India* of 4th September 1869 investing him with the powers of a Local Government, and that, therefore, even if section 10 of the Recorders’ Act were no impediment to the establishment of a Small Cause Court under Act XI of 1865, it has not been established by the proper authority, and has no legal status.

“*Seventhly.*—That the appointment of Mr. Macleod to be Judge of the Small Cause Court on 1st September 1869, when there was no such Court in existence, was not effective, for the Court should have been first duly constituted and then the Judge duly appointed; and that that not having been done, there is no properly constituted Judge, even if there be a properly constituted Small Cause Court.

"The point upon which the advocate for the plaintiff chiefly relied was that section 10 of the Recorders' Act is still in force, and, therefore, no Small Cause Court can be constituted under Act XI of 1865, with civil jurisdiction within the local limits of the jurisdiction of the Recorder's Court.

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"On the other side, it has been pleaded in bar to the jurisdiction of the Recorders' Court, that Act XI of 1865 can stand together with Act XXI of 1863, and the Governor-General has power to make an appointment under either Act; that this Court is bound to take judicial notice of the orders of the Governor-General appearing in the *Gazette*, and to assume that what thereby appears to have been done has been rightly done, and that, consequently, under section 12 of Act XI of 1865, the Recorder's Court has no jurisdiction in suits not exceeding Rs. 1,000 in value, and cognizable by a Court of Small Causes under that Act.

"I deem it right to submit the question raised for the opinion of the High Court, inasmuch as if the contention of the plaintiff be correct in law, as I consider it to be, legislative action will be needed."

No counsel appeared on either side in the High Court.

The opinion of the High Court was delivered by

NORMAN, J.—We have been placed in some difficulty from the mode in which this case has been sent up, and have not had the advantage of hearing it argued by counsel.

There is, however, nothing in the case as stated, or in the Acts referred to, which would seem to justify the conclusion that the Small Cause Court is not properly constituted. On reference to section 1 of Act III of 1864, and the notification No. 1261 in the *Gazette of India*, of 4th September 1869, it is clear that the Governor-General in Council treats the Chief Commissioner not as the "person authorized to administer the Executive Government," but as the "Chief Executive Authority." There is nothing in Act XI of 1865 to show that the words "Local Government," as used in that Act, were intended to include a Chief Commissioner.

[PRIVY COUNCIL.]*

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KRISHNA DEBI GURU (DEFENDANT),

AND

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KRISHNA DEBI GURU AND ANOTHER (DEFEND-
ANTS).)

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Disputes settled by Family Arrangement—Interpretation—Document.

Where a dispute in a Hindu family as to legitimacy and the right to succession resulted in a family arrangement as to the mode in which the estate was to be held by the sons,—held, that such a document ought not to be construed narrowly by a strict interpretation of the literal meaning of the words, but that the object and general spirit are the best keys to the interpretation.

Where a family arrangement, if construed strictly, would have given a talook in the event of the death of a younger son to such of the lawful widows as should have male issue,—held that, as such a disposition would contravene the ordinary rules of devolution of Hindu property, and be contrary to the usages of Hindus, and as there was no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers was inadmissible.

THESE appeals, together with cross-appeals by the respondent, Hari Krishna, were consolidated by an order by the Queen in Council, and came on for hearing together.

Two suits were instituted in the Civil Court of Zilla Chica-cole: one by the respondent, Hari Krishna, against the appellant, Radhika; the other by the respondent, Nilamani, against Hari Krishna and Radhika.

The question in both suits was the proper mode of disposing of the "Tikali" estate, which had been in the possession of Gopinadha Debi.

* Present.—THE RIGHT HON'BLE LORD CAIRNS, SIR JAMES COLVILLE, SIR J. NAPIER,
AND SIR LAWRENCE PREL.

The estate was the self-acquired property of Padmanabha Debi, who died, leaving two sons, Gopinadha and Krishna Chandra. These sons were by different mothers, and on their father's death, it being alleged that these sons were illegitimate, the estate was, by orders of the Board of Revenue, placed under the charge of a person admitted to be the widow of the deceased.

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The estate was seized for arrears of revenue; and on the 18th November, 1838, the Acting Collector wrote to the widow, informing her that the estate had been proclaimed to be sold on the 26th of November; and such letter proceeded as follows:—
“ In the event of the talook being sold, yourself and Gopinadha will be deprived of any means of livelihood, and both of you would be ruined. We think it would be better if both of you enter into a compromise and try your best to obtain your talook to yourselves, and wish you would soon let us know your intention. As the sale of the talook cannot be postponed, you ought to send a reply soon.”

Thereupon the widow addressed a petition to the Collector, dated the 26th November 1838, as follows:—

“ I have this day made a settlement, reconciled both my sons, and caused an interchange of *karonama* (agreement) between them, to the effect that they, Gopinadha and Krishna Chandra, are equally entitled to the Tikali zemindari, which belonged to my husband; that the management of my zemindari should be held by Gopinadha until Krishna Chandra attains his majority; that after his attaining his majority, the said Gopinadha should give up to him a moiety of the said zemindari as his own, and retain the other half of the zemindari for himself; that until Krishna Chandra attain his majority, and divide the zemindari, Gopinadha should from this day pay rupees 80 per month for my household expenses, and rupees 160 per month for Krishna Chandra's household expenses, and take rupees 160 per month for his own (Gopinadha's) household expenses from the income of the talook, or from other income; that if there be any surplus after discharging in full the Sirkar's and Sowkar's debts due up to this day, and the Sirkar *jamabandi* for every year, my said two sons should divide such surplus in equal shares; and that Gopinadha should conduct the affairs of

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dost, cist, &c., through the agent to be appointed by me, on behalf of Krishna Chandra. I therefore pray that you will be pleased to stay the sale of our zemindari, to receive the Sirkar arrears due up to this day by instalments, as requested by my son Gopinadha, and to put the talook in possession of Gopinadha."

Such petition was signed by Nila Patta (the widow), by Gopinadha, by Krishna Chandra (then a minor of about 13 years), and by Krishna Chandra's own mother.

The agreement signed between the brothers, and referred to in such petition, was as follows :—

"Whereas, in respect of our paternal estate, consisting of the talook of Tikali and other property, we have, according to the permission of our senior mother, entered into the conditions as follows :—

"That the talook should be equally divided between both of us, and the whole affairs of the zemindari should be managed by you, until I attain the age of discretion.

"That after I attain my age of discretion, a moiety of the said zemindari should be placed in my possession, and you should retain the other moiety for yourself.

"That you should, from the income of the talook, and other profits derived from the *seri* lands in Gopalapuram and the Mutter of Battier and Lina Mugara (fees collected from travellers), pay me, till I attain the age of discretion, maintenance at rupees 160 a month from this date, and at rupees 80 a month to mother Nila Patta Mahadebi, and take for your maintenance rupees 160 a month.

"That if after the arrears of Sirkar *peshkash*, and the debts due to the Sowkars, are fully discharged, and the Sirkar *jambandi* is collected without arrears, there remains any surplus, the same should be equally divided by both of us; and if there are any debts, they should be paid by us equally.

"That if I appoint a gomasta for me, you should act in such manner as to lay open to him in full the sums received and disbursed.

"That as regards our residence, we should live in the houses at Raghunadhapuram and such other places as we may think comfortable to us, and receive the said maintenance.

“ That the expenses incurred, in the event of any of us living in our houses at Raghunadhapuram, in improving the buildings, should be paid from our common income.

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“ That the wages paid to the gomasta and peons employed in making collections, &c., in the talook, the expenses for repairs, and costs of suits, should be paid from the collections made in the talook.

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“ That a fixed sum, of not more than rupees 300 a year, should be paid from the joint estate on account of Radhayaka and other insignia of royalty.

“ That each of us should pay from his own amount of maintenance the expenses of maintaining his own servants and relations.

“ That you should pay to us from the common income rupees 200 on account of the expenses incurred by us at Chicacole, and pay also the interest, &c., due to Sowkars from the same common income.

“ That besides the jewels which have been mortgaged and redeemed, the other jewels should be redeemed by means of the common income, and be divided by both of us equally.

“ That if any one of us should, by the death of the other, become the sole proprietor, and the family of the deceased be deprived of the possession of the talook, the one who becomes the sole proprietor of the talook should pay maintenance, at rupees 150 a month, to the family of the other who lost possession of the talook.

“ As you have executed this day a document stipulating the said conditions, this document is executed to you; we shall, therefore, act according to said conditions.

“ It has further been agreed upon that you should, through proper course, realize the amount due by those who have been in the management of the talook, and the ryots and others, and pay the expenses incurable on that account from the common money, and that the amount so realized should be divided equally.”

When Krishna Chandra came of age, a new agreement was, in July 1844, entered into by the brothers, that the division of the estate should be postponed; that each brother should have

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equal rank, the documents relating to the estate in transactions with Government being issued in Gopinadha's name, but that both should manage and sign receipts. It provided by the 2nd clause, that after the death of Gopinadha, the younger brother should be recognized as zemindar of the whole; and after his death, it should go to "such of their lawful widows as shall have male issue. If the lawful widows of both have no male issue, and if there be any sons born out of lawful wedlock, the talook should be divided in equal shares. If any of us, or any of our sons, by legal wives, should succeed under the aforesaid terms, rupees 100 *per mensem* shall be paid to the family which shall have no title to the talook." It went on to refer to the money from the talook being common to both, but declared that each should be individually liable for his own debts.

They had no lawful sons. Krishna Chandra died in 1854, leaving the respondent, Nilamani, his lawful widow, and the elder brother took possession of the whole estate, and paid her maintenance of rupees 150 *per mensem*. Both the brothers had illegitimate sons.

Gopinadha died in 1856, leaving the appellant, Radhika, his lawful widow, and the respondent, Hari Krishna, his illegitimate son.

Hari Krishna thereupon brought his suit against the widows of his father and uncle, alleging himself to be the son of Gopinadha by a wife married in the *gandharva* form, but admitting his illegitimacy, and on that ground claiming the whole estate on the failure of lawful sons.

Gopinadha's widow, Radhika, defended on the ground that so long as there were lawful widows, an illegitimate son could not succeed, and she disputed the power of her husband and his brother to bind their lawful widows by the deed of 1844.

The other suit was instituted by Nilamani, as widow of the younger brother, to obtain a moiety of the estate.

The first question that arose was as to the legitimacy of Gopinadha, and the High Court, in reversing the decision of the Zilla Judge, decided that he was the illegitimate son of a Rajput by a woman of the *Kanaram* caste, and that it was clear he was not a Kshetriya. Even therefore if it had been proved, to

the satisfaction of the High Court, that Gopinadha had contracted a marriage with Hari Krishna's mother in the *gandharva* form, it would not have made Hari Krishna a legitimate son, but they were not satisfied of the proof.

The High Court proceeded to determine the suit according to the terms of the agreement of 1844, deciding, in the first place, that the property came to the two brothers, not by virtue of inheritance, but by virtue of the agreement of 1838, which was held to be a deed of gift to them from their father's lawful widow.

The conclusion the Court came to was that, by the agreement of 1844, which was binding on the widows, the property was, on the failure of such issue, to be divided between the lawful wives and the illegitimate children.

Against this decision, the present appeals were preferred.

Sir R. Palmer, Q. C., and *Mr. Pontifex* for the appellant, Radhika, contended that she, as the lawful widow of Gopinadha, was entitled to the estate subject to the maintenance of the brother's widow and the illegitimate son; that her husband was in fact legitimate, on the ground that his mother was a Kshetriya, his father also being of the same class, and that the agreement between the brothers of 1844 could not ~~not~~ ^{not} deprive her as the lawful wife of Gopinadha; but even on the proper construction of that, her title was proved.

Mr. Sergt. O'Brien and *Mr. Grady*, for the widow of the younger brother, supported the decree of the High Court.

Mr. Leith for Hari Krishna contended that the property, being joint and undivided, became, on his brother's death, the sole property of Gopinadha, to the exclusion of the brother's widow; and that Radhika, not being the lawful wife of Gopinadha, she being a Kshetriya and he a Sudra, Hari Krishna was, either as a legitimate or illegitimate son, entitled to succeed; and that even if not so entitled, as the sole illegitimate son, there being no lawful sons, he was alone entitled to the property under the agreement of 1844.

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The construction and effect of this agreement will be afterwards considered.

The agreement was acted upon until the younger son reached his majority. That was the period originally fixed for the actual division of the estate, and its separate possession in moieties. At that time, the actual division of the estate was judged by the sons to be inexpedient, and it was further postponed. Another document was at this time executed between the two sons, bearing date the 24th July 1844. This document states that disputes existed between them respecting the ancestral property in cash, the division of the talook, and the accounts of receipts and disbursements of the talook. It states that they had addressed several *arzis* (petitions) to the Collector; that he had explained to them the circumstances; and then it proceeds to state "the terms for our future guidance."

This document does not state any new compact or agreement to have been formed to vary the essential terms of the original compromise, but seems rather to have been designed as supplemental to it, and made with a view to carry out its provisions conformably to the Collector's explanations, with such variations of detail as the convenience of the parties required. After stating certain inconveniences, which would result from an immediate division of the talook, it provides "that the division "should be postponed at present;" but the reason assigned is to avoid the probability of loss from a present division. Consequent on that postponement, it contains some provisions as to equality of rank and dignity between the sons, whilst the elder retained the ostensible headship; but it provides that the affairs of the talook or zemindari should be managed by both unanimously.

A document of this character between natives should not be construed narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language, probably not very carefully studied.

The second clause of this document, if it were construed literally, would appear to give the talook, in the event of the death of the younger son, to such of the lawful widows as shall

have male issue; but as such a disposition would at once contravene the ordinary rules of devolution of Hindu property, and not be in accordance with the usages of Hindus, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers is obviously inadmissible.

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The document provides also that Krishna, after the death of his elder brother, shall be recognized as the zemindar of the whole talook.

This provision might take effect without any substantial alteration of the terms of the first agreement. It is consistent in its terms with a custom prevalent in some properties in this part of the country. The headship in such cases is constituted in one member of a family, whilst the beneficial enjoyment of the proceeds may be shared with the other members. It by no means follows, even from the literal terms of that section, that either brother deliberately agreed to exclude his own male issue, if he had any, as sharers, during the survivorship of the other brother. This clause contains a further provision, about which considerable doubt has been entertained, both as to the true translation of the words and its legal effect. This clause states an alternate contingent provision consequent on the failure of legitimate male issue by the widows of both sons; it provides that the talook shall be divided in equal shares, if there be sons born out of wedlock. This agreement further provides that rupees 100 a month shall be paid out of the zemindari to the family which shall have no title to the talook; but it contains no declaration of the cause of cessor of interest, so as to show in what event they thought such exclusion might arise. It is to be observed further that there is no express gift to illegitimate issue, and that the time of the division of the talook on that contingency is not defined.

The younger pre-deceased the elder son. The elder retained the headship and property of the family; there was no one entitled to dispute it with him, as Krishna left no male issue, unless the family had been a divided one, in which case the widow of the latter would have been entitled to her husband's share. She does not appear to have preferred any claim to it during the

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elder son's life-time ; but no inference unfavorable to her subsequent claim should be drawn from that circumstance alone, as Hindu females are often ignorant of, and unable to assert, their rights.

On the death of the elder son, a dispute arose as to the possession. His widow was placed or preserved in possession of the estate. This step decided nothing as to her proprietary right. As the widow of the surviving brother, apparently the sole proprietor, she was rightly placed in possession.

Her title to retain and enjoy the sole possession and usufruct was disputed by the widow of Krishna, who claimed a moiety as the widow of a deceased brother in a divided family. She preferred her suit, numbered 72 of 1861, against the present appellant, the widow of the elder son.

Another suit was brought about the same time by Hari Krishna against the same defendant, which suit is numbered 62 of 1861. The title was stated to be as son of the last owner, the elder son. He claimed the whole property, stating his title either as a legitimate or as an illegitimate son, to be preferable to the alleged title of either widow.

In No. 72, the plaintiff stated the property to be divided, and that allegation was one necessary to her recovery.

In No. 62, the plaintiff declared the property to be joint, and to have become solely owned by his father by survivorship.

The Judge dismissed both suits.

Both plaintiffs appealed to the High Court. The present appellant, the original defendant in both suits, was respondent in both appeals.

The appeals were allowed by the High Court, which reversed both decrees below, and made a decree declaring each widow and the son, Hari Krishna, whom it found to be illegitimate, to be entitled in equal shares, together with any other illegitimate sons of either brother. It directed the suits to proceed as an administration suit; and directed inquiries as to the illegitimate issue. The result of this inquiry is that, two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons, respectively.

From this decree the widow of the elder son, the original respondent in each suit, has alone appealed.

Much of the evidence which engaged the attention of both Courts below may be dismissed from the consideration of their Lordships.

The evidence as to the nature of the marriages, and the rules or laws of caste, together with the consideration of the effect on legitimacy of irregular marriages between persons of unequal caste, is, in the view which their Lordships take of this case, unnecessary to be stated, or observed upon.

The litigation was confined to persons, all of whom claimed under the sons respectively. The estate was taken possession of, and enjoyed by, these sons, under the compromise or family arrangement before stated. That compromise proceeded on the basis of legitimacy.

Whether both sons were legitimate, or only one legitimate, and to whichever of the two that status might really attach, was a question no longer material to the consideration of the rights devolving to persons taking under that compromise and family settlement, by which the assumed was to be taken as the real state of the family.

The case of *Abraham v. Abraham* (1) shows that a family ceasing to be Hindus in religion may still enjoy their property under the Hindu law; and the same principle is applicable, *inter se*, to the members of a Hindu family entering into possession of an estate under such a compromise as that which took place in this family.

The widow, though in one passage she terms the zemindari her zemindari, as in a certain sense it was, did not intend to convey, and did not, in fact, convey, the property to the sons; she executed no deed nor instrument of gift whatever. Neither son admitted his illegitimacy, nor consented to take a gift on that admission. The widow accepted maintenance, and surrendered possession. Possession was taken by her sons upon her abandonment of the estate; and this possession was taken also under their own agreement, which, as well as her petition which referred to it, proceeded on an acknowledgment common to all three of an ante-

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(1) 9 Moore's I. A., 195.

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cedent right in both the sons whom she describes as "her sons." She had no estate entitling her to be an absolute donor, in any view of her position. Whatever effect this transaction might have as against heirs of the common ancestor after the death of the widow, it bound her and the sons and all claiming under them.

These instruments do not purport to give any new quality of descent to the talook, even if such quality were capable of being derived from the agreement of two or more owners. There is no evidence to show that the nature of the estate and its descendible character were meant to be affected by this transaction.

The case depends entirely on the construction of the petition and the agreements before referred to. The talook itself is not the sole subject of the arrangement. A reference is made to one item—ancestral cash, as forming an element of dispute, and to other articles of property. The decision appealed against has given neither widow a preference over the other. In the opinion of their Lordships, the High Court erred in making the illegitimate sons sharers with the widows, and their Lordships have now to consider the more difficult part of this case, whether the widow of the elder and surviving son has a title by survivorship to the whole talook.

If this case could rightly be viewed, as it was viewed in the Court of first instance, as one governed by the ordinary presumption in Hindu law, that family property is joint; and by the ordinary law of the place where this talook was situate, as to the devolution by survivorship under such failure of male issue as occurred in this case, the decision of it would be attended with no difficulty, and the decree of the Court below dismissing the widow's suit would have to be restored; but, upon this subject, though not for the reasons assigned by the Judges of the High Court, their Lordships think such conclusion inadmissible.

The property was held under a family arrangement which silenced disputes, but contained no admission that such disputes were without foundation.

Neither son admitted that they were, *inter se*, antecedently heirs to each other in the then state of the family, nor admitted

a right of succession of either to the other beyond that which this arrangement itself specifies.

It is not stipulated in terms that the property shall be enjoyed as that of a joint undivided Hindu family; nor is any succession by widows on the true construction of the instruments provided for. The documents in question contain terms, some of which are consistent, and others inconsistent, with the rights to the possession, use, and enjoyment of an undivided estate.

The first agreement contains in the first condition words that impart division and consequent management. This division is not in terms referred to a time subsequent to the commencement of the management spoken of. The next sentence clearly points, on the majority of the younger son, to an actual division and a possession in moieties. It provides for each son (the younger being a mere child) an equal present income by way of maintenance, and further, that each should pay out of his own income his own expenses of maintaining his own servants and relations; and by the last article it provides for an equal division from that time of such surplus as might exist after defraying all the outgoings spoken of, which are to fall on the common money. These provisions are not such as would be applicable to a joint Hindu family property. On the other hand, it seems to have been supposed by both sons, that a survivorship by one would or might exclude the family of the other, and there are several other provisions which, though not absolutely inconsistent with mere managership, more resemble that of the constituted manager of a joint Hindu family.

The second agreement recites that disputes had arisen concerning the ancestral property in cash, the division of the talook, and the accounts of the receipts and disbursements of the talook; it proceeds to state that "the Collector having sent for both "of us to the nazar, and communicated the circumstances to us, "we understand the same; and the terms for our future guidance are hereunder specified." This language is certainly more consistent with disputes arising out of the existing arrangement than with a substitution for it by the sons alone, of their own authority, of some new terms of compromise. The disputes seem also to imply some precedent division of property consti-

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tuting rights in a surplus after receipts and disbursements are accounted for. So far they are consistent with the provisions of the first agreement as to the division of any surplus. Again, the 5th Article, which relates to future debts, the 6th, which provides for the division of future surplus profits of the talook, and the 7th, which refers to a settlement in respect to the ancestral money and the money already acquired from the talook, and implies a division of these funds, are all inconsistent with the hypothesis that the brothers were, or considered themselves to be, members of an undivided Hindu family.

Nothing is stated to show that the talook must be regulated by one law of succession, and the rest of the property by another. It seems, therefore, to their Lordships more proper to consider the provisions as to the talook as regulated by its peculiar nature, and influenced by the necessities of its proper management, and the maintenance of the dignity attached to it, rather than as furnishing alone the rule for the solution of the difficult question to be determined between the two widows.

The construction of these documents is beset with considerable doubt and difficulty; but their Lordships are, on the whole, of opinion that, although they postpone indefinitely the actual division of the talook by metes and bounds, and provide for its joint management, and, in certain events which have not happened, for its devolution otherwise than by the law which regulates the succession to separate property, they nevertheless contemplate its enjoyment in other respects by the two brothers as by members of a divided family, and the actual division of other family property. Their Lordships, accordingly, think that the finding of the High Court that the brothers were not members of a joint and undivided Hindu family must be taken to be correct. It follows that, at least wherever the agreements have not specifically provided for the contrary—even assuming that they could so provide—the succession to this property must be governed by the law which governs the succession to separate estate. How, then, is the law which makes each widow succeed to her husband's share affected by the terms of the particular instruments?

Equality between the two widows is consonant to the expressed

desire to maintain, as far as possible, equality between their respective husbands. The exclusion of widows by male legitimate issue, is an exclusion which would prevail equally in a divided or undivided family. The agreement provides, by language, not apt nor correct, for the devolution on sons of lawful widows: in case one has male issue, and the other none, a preference is declared; but where each is childless, the agreements prefer neither. In such a case, then, the law alone can regulate the succession. The instruments do not support, by any clear expression of intention, the claim of the widow of the elder son to exclude the other. There is no ground for confining the estates of the sons to life-estates. The mortgage is inconsistent with that view. The provisions as to the possession of the talook alone may refer merely to titular dignity and ceremonial usage. The equal division between widows and illegitimate sons is not likely to have been conceived by the framers or advisers of this compromise.

Their Lordships will, therefore, recommend to Her Majesty that the decree (or decrees, if separate decrees have been made in the two suits) of the High Court of the 22nd of April 1865 be reversed, and that in lieu thereof a decree be made in suit No. 62 of 1861, affirming the decree of the Zillah Judge of the 13th of March 1862, and dismissing the appeal therefrom to the High Court with costs; and that in suit No. 72 of 1861, a decree be made, declaring that, according to the true construction of the agreements of the 26th November 1838 and the 29th July 1844, the widow of Gopinadha the appellant, and the respondent the widow of Krishna, upon the deaths of Gopinadha and Krishna without male issue, became entitled from and after the death of Gopinadha, as Hindu widows, each to one moiety of the estate; and decreeing possession of the moiety of the estate in question to the plaintiff Nilamani Patti, but without excluding the widow of Krishna. Her Majesty's order, [REDACTED] has also been

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1870 should be no costs as between the widows either in the Courts below, or here on appeal.

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Appeal allowed.

Agents for appellant: Messrs. *Lawrie and Keen.*

Agents for respondents: Messrs. *Hillyer and Fenwick*; Messrs. *Burton Yeates and Hart.*

[ORIGINAL CIVIL.]

Before Mr. Justice Norman, Officiating Chief Justice.

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Dec. 16.

THE EAST INDIAN RAILWAY COMPANY *v.* THE AUSTRALASIAN INSURANCE COMPANY.

Insurance—Abandonment—Total Loss—Notice of Abandonment.

A cargo, consisting of railway sleepers, was insured by the plaintiffs in the ship *Heimdhall* from Geography Bay to Calcutta, and expressed in the policy to be warranted from all risks, except total loss. In proceeding up the river Hooghly, in charge of a pilot, on the 30th April, the vessel grounded on the Rungafulla Sand, heeled over, and lay imbedded in the sand. Endeavours were made unsuccessfully to get her off. On May 5th, Lloyd's surveyor inspected the vessel, and reported that, considering her position, the state of the tide at that season, and the expense of getting her off, it was unadvisable to go to further expense in doing so; and that the cost of repairs would, in all probability, amount to much more than the value of the ship when repaired. Some of the sleepers had been then jettisoned, and the surveyor recommended that the vessel and cargo should be abandoned and sold by public auction to the highest bidder. Attempts were made, but unsuccessfully, to get some of the cargo off, and the sleepers were of such a quality that they would not float. The consignees, accordingly, caused the ship and cargo to be sold by public auction in Calcutta, on 12th May. No notice of abandonment was given to the insurers, who realized the sum of Rs. 450. The plaintiff, however, succeeded in getting the vessel and cargo back, and he unloaded 78 sleepers in the river, with the

plaintiffs caused to be insured in the *Heimdahl* from Geography Bay to Calcutta, railway sleepers valued at £2,230-10, warranted against all risks, except total loss. The following were the facts as found by the Court:—

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The *Heimdahl* sailed from Geography Bay in March 1869, and arrived in the Hooghly on the 29th of April. At 7 o'clock on Saturday, the 30th of April, the *Heimdahl* proceeded up the river, in charge of a pilot. The wind was blowing from the north-west. While passing through the Rangafulla Channel she grounded on the Rungafulla Sand, at a point nearly opposite the Tidal Semaphore, between the Rangafulla Obelisk and Middle Point Mark. She struck heavily. The captain, by order of the pilot, let go the anchor, but the ship dragged her anchor, and as the tide rose she drifted further up the bank. As the tide fell the ship heeled over very much, and by the advice of the pilot, who feared that she might roll over, boats were got out, and every person on board, except the captain, the pilot, and four men, went on shore. After the first night the ship found a bed for herself in which she lay.

The pilot said that at the ebb tide she lay over very much, as far as she could lie without capsizing. At the flood tide she was upright, like a vessel on the stocks. Two steamers towing vessels were passing down when the *Heimdahl* struck. The pilot made signals for assistance. After high water the captain sent a boat to telegraph for assistance to Calcutta. On the following day, the 1st May, at high water, the *Cyclone*, a very powerful steam tug, attempted to tow the *Heimdahl* off the sand, but failed. She renewed the attempt on Monday, but equally without success. There was no bad weather, and the wind was on the whole moderate from the 30th of April to the 5th of May.

On the 5th, Captain Handley, Lloyd's surveyor, went to see her. The condition in which he found her appears from the report which he drew up at the time. The material parts of the report were as follows:—

"I arrived near the *Heimdahl* at nearly low water, and found her lying over on the starboard side with her shear streeke nearly in the water; at dead low tide she is nearly dry,

1870 and the sand has formed all round her as reported by the pilot
EAST INDIAN RAILWAY CO. and commander of the vessel, and the Government river
v. surveyor in charge of the *Marie*, surveying vessel, lying near
AUSTRALASIAN INSURANCE CO. her.

“ She is lifted or hogged up from the starboard fore chains to the after-part of the mizen chains, about five feet from the original shear, and all the topside's butts are quite open, some over a quarter of an inch. On going on board, I found the deck forced up in midships, but on the starboard side particularly so. The waterway, covering board, and upper deck butts are all open. The fore and mainmasts had lifted four inches, tearing away the mast coats, and the pumps also had been forced up, breaking their flanges from the deck fastenings : the coats of the deck-house aft had all started up : and the vessel had evidently broken her back and is virtually a wreck.

“ I sounded the pumps when I first went on board, and found 29 inches in the well ; the tide then was at half flood. When she grounded she had, according to the carpenter's report, four inches only in the well.

“ Owing to the spring tides now being over, and the powerful steamer *Cyclone* not being able to tow her off during the height of the said springs, breaking a new 13-inch warp three times in endeavoring unsuccessfully to move her, and as the sand has formed round her some six or seven feet high, I am of opinion that it is unadvisable to incur further expense in the endeavour to get the *Heimdahl* off. Many sleepers have already been jettisoned, and as the springs will not be on again for eleven days, and were it even possible, which I do not believe, when the next springs are on again, to tow her off, she is in that state that she would probably either sink when afloat, or, if it was possible to float her to a dock at great risk and expense, the cost of repairs would amount, in my opinion, to much more than the value of the ship after the necessary repairs.

“ I therefore recommend that the sails, ropes, boats, or other stores of any value there may be on board be saved, and the vessel and cargo of sleepers abandoned and sold by public

auction after due advertisement to the highest bidders on account of the concerned."

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Captain Handley stated in giving evidence, that he never saw a vessel float when so hogged as the *Heimdal* was. He thought if she came off the sand, she would have sunk in deep water; that if she floated, it would have cost Rs. 20,000 or 25,000 to repair her; and that when repaired, she would not have been worth above Rs. 9,000 or 10,000. Mr. Reed, the commander of H. M. surveying schooner, the *Marie*, and Captain Bowden, commanding the steamer *Cyclone*, who is also a pilot on the Hooghly, surveyed the vessel with Captain Handley and made a report which was as follows:—

"We found her all up in midships, and her back broken and the vessel a wreck.

"At low water we observed the sand had worked up round her 7 or 8 feet, and we think it impossible to get her off; and were it possible to do so, she would probably sink in the channel."

The *Heimdal* lay about a mile from the nearest land.

It was proved that attempts were made, but without success, to hire cargo boats in Calcutta to proceed to the wreck. Captain Handley said in evidence that an average cargo-boat would not have lived in the sea which he encountered when going down to the wreck. The sleepers being of Yarra timber, which is very heavy, their specific gravity being little less than that of water, would not float. The evidence showed that those which were thrown overboard became covered with sand and disappeared. It was proved that if an attempt had been made to land the sleepers in the ship's boats, the long boat could not have taken more than 8 or 10 sleepers at a trip, and could not have made more than two trips in a day with her own crew in her. If additional lascars had been hired, she might have made three trips at most. Captain Reed thought the Captain could not have got the cargo on-shore and stacked it, except at great expense. Captain Dando stated that, judging from the report of Captain Handley, he considered that he would not be justified in risking the lives of the crew by allowing them to remain on board the vessel, and therefore in any attempt to land the cargo, the expenses of providing a place in which the

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crew or laborers employed in removing the sleepers might be accommodated, would have to be considered.

The ship and cargo were sold by Messrs. Mackenzie, Lyall and Co. on the 12th May. The sleepers realized the sum of Rs. 450 only. On the 13th May, Mr. Mitchell, the purchaser, who had hired boats at Diamond Harbour, began by sending down the spars and relieving the ship of her top hamper and dead weight, which he sent over the side. He then began discharging the sleepers. He loaded one or two boats, and landed 78 sleepers in all. On the 14th, the ship floated, when it appeared that she was not nearly so much damaged as was supposed. She came up the river, and after striking on the Diamond Sand, was ultimately moored at Armenian Ghat, with the rest of her cargo of sleepers in safety.

The *Advocate-General* (offg.) (Mr. Cowell with him) for the plaintiffs, contended that, though the goods were not wholly lost, yet that as they were sold *bona fide* when it was supposed impossible that they could be saved, it was a constructive total loss, and therefore no notice of abandonment was necessary, and cited *Farnworth v. Hyde* (1). Though the judgment in that case was reversed on appeal, the decision of the Court below was not interfered with on this point. He also referred to *Roux v. Salvador* (2), *Read v. Bonham* (3), and *Rosetto v. Gurney* (4).

Mr. Kennedy (Mr. Evans with him) for the defendants, contended that this was not the case of a total loss. It is the duty of the master to save as much of the cargo as possible, if he can do it at a cost less than the value of the goods when brought to their destination. Here the goods were imperishable and actually brought into port—*2 Arnould on Insurance*, 968, *et seq.* Even where notice of abandonment is given, the assured has been held not entitled to recover for a total loss—*Currie v. The Bombay Native Insurance Company* (5). The course taken

(1) 34 L. J., C. P., 207; S. C., on appeal, (3) 3 B. & B., 147.
36 L. J., C. P., 33; 2 L. R., C. P., 204. (4) 11 C. B., 176.

(2) 3 Bing., N. C., 266. (5) 3 L. R., P. C., 72.

in the present case was that disapproved of by the Privy Council in the above case. The Captain is not the agent of the insurer to exercise any authority of the kind exercised here; nor is the Captain at liberty to look to the interests of one party more than another. Here he has looked more to the interests of the owner than of the insurers. The sale took place without the consent of the underwriters, to whom notice of abandonment should have been given. If no other arrangement had been made, they might have recovered the timber from the purchasers. [NORMAN, J., refers to *Cammell v. Sewell* (1).] That case limits the power of the Captain to sell to those cases in which it is impossible to save the ship without sacrificing some of the cargo, *i. e.*, to cases of absolute necessity, see *per Byles, J.*, page 749. In *Roux v. Salvador* (2) the goods were perishable; here there could be no change in specie, and therefore there was no such necessity for sale as would entitle the plaintiff to recover in this action—*Idle v. Royal Exchange Assurance Company* (3): see also note as to that case (4). The destruction of the ship and cargo must be inevitable to entitle the Captain to take such a course as that taken here without notice of abandonment, or it must be shown that the cost of salvage would exceed the cost of the goods when saved; which appears to have been the principle on which the Appeal Court decided *Farnworth v. Hyde* (5); see *Navone v. Haddon* (6.), *Gardner v. Salvador* (7), *per Bayley, J.*, 2 Arnould on Insurance 889, *Knight v. Faith* (8.) There had not been in this case a total loss before the sale; there may have been imminent danger, but no total loss.

The *Advocate-General* in reply.—There was no hope of getting the vessel off, and there was an absolute necessity for selling if any thing was to be got; see *Robertson v. Clarke* (9) and 1 Arnould on Insurance, 341. If the duty of the Captain is to look after the cargo, all cargo has an equal claim to his care—*Cambridge v. Anderton* (10) *per Paterson, J.* In

- (1) 5 H. & N., 728.
- (2) 3 Bing., N. C. 266.
- (3) 8 Taunton, 755.
- (4) 3 B. & B., 151.
- (5) 36 L. J., C. P., 33; S. C., 2 L. R., C. P., 204.

- (6) 9 C. B., 30.
- (7) 1 M. & R., 117.
- (8) 15 Q. B., 649.
- (9) 8 Moore's Rep., 622.
- (10) 2 B. & C., 691.

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some cases no notice of abandonment is necessary—*Roux v. Salvador* (1), *Farnworth v. Hyde* (2). In the case of *Roux v. Salvador* (1), the hides had not ceased to be hides, but they were not merchantable. [NORMAN, J., refers to *Anderson v. The Royal Exchange Assurance Company* (3).] The last case, where all the cases are discussed, is *Farnworth v. Hyde* (2), which is very similar to this case, and the decision in which was favorable to the plaintiff. Goods may be totally lost in law, and yet actually exist. This is the case where the cost of saving them would exceed the value when saved; the goods there actually exist, though legally lost. [NORMAN, J.—The goods were never totally lost; can you say the ship was lost, when she was afterwards recovered?] In *Farnworth v. Hyde* (2), the principle of the decision in the Court below was admitted, but it was found on the facts that the cost of saving the goods would have been less than their value when saved. If it had been otherwise there would have been a total loss. In *Farnworth v. Hyde* (2) in the Court below, it was decided that under these circumstances no notice of abandonment was necessary, and this was not disturbed on appeal. The sale here was right and necessary. In *Currie v. The Bombay Native Assurance Company* (4), the *bona fides* of the transaction was commented on. Here the sale was *bona fide* and justifiable, and therefore passes the property as much as if it had been destroyed, *per Smith, J.*, in *Farnworth v. Hyde* (2). It is as much lost to the owner by the sale, and therefore it is totally lost; see *Robertson v. Clarke* (5). The case of *Farnworth v. Hyde* (2), should govern this case; the facts of the present case are very similar to those in that case.

NORMAN, J.—(After stating the facts and the evidence as above, and observing of Captain Handley's report: "The report is not quite correct in saying that many sleepers had been jettisoned, very few having been thrown overboard at the date of the report," continued):—The issue, the proof of the affirmative of which lies on the plaintiffs, is whether the cargo of sleepers was totally lost.

(1) 3 Bing., N. C., 266.

(3) 7 East., 38.

(2) 34 L. J., C. P., 207; on appeal, (4) 3 L. R., P. C., 72.
36; L. J., C. P., 33; 2 L. R., C. P., 204. (5) 8 Moore's Rep., 622.

Total losses are of two kinds. The *first*, absolute total loss, where the ship or cargo is totally destroyed or annihilated, or where they are placed, by any of the perils insured against, in such a position that it is wholly out of the power of the assured to procure their arrival.

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Secondly, a constructive total loss, where the subject-matter of the insurance, though still in existence, is either actually lost to the owners, or beneficially lost to them. In the case of a constructive total loss, notice of abandonment must be given to the underwriters. In the words of Lord Ellenborough in *Tunno v. Edwards* (1), "When the thing insured subsists in specie, and there is a chance of its recovery, in order to make it a total loss there must be an abandonment." The reason of the rule is explained by Lord Abinger in the well-known case of *Roux v. Salvador* (2). After speaking of a capture and peril which may render a ship unnavigable, he says: "There may be some other peril by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these, or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of total loss and demand the full sum insured. But if he elects to do this, if the thing insured, or a portion of it, still exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be enabled to all the benefit of what may still be of any value. If he pleases, take measures at his own risk to recover what is supposed to exist in the ship, driving

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which it has been held that notice of abandonment was not necessary though the thing existed in specie.

In *Cologan v. The London Insurance Company* (1), wheat in a putrid state had been thrown overboard. Lord Ellenborough said : "Surely it cannot be less a total loss, because the commodity subsists in specie, if it subsists only in the form of a nuisance. There is a total loss of the thing if, by any of the perils insured against, it is rendered of no use whatever, though it may not be entirely annihilated." *Dyson v. Rowcroft* (2), where a cargo of rotten fruit had been thrown overboard, was a similar case.

In *Roux v. Salvador* (3), the cargo consisted of hides in a state of incipient putrefaction, and it was found by the special verdict that it was impossible to carry them, or any part thereof, in a saleable state to the termination of the voyage for which they were insured: if it had been attempted to take them on to Bordeaux, they would altogether have lost the character of hides before they arrived there.

Farnworth v. Hyde (4), so much relied on by the Advocate-General, is distinguishable from the present case. There a cargo of timber was shipped on board the *Avon* from Quebec to Liverpool. The ship sailed on the 1st of December, and a few days afterwards got aground in the St. Lawrence. After two previous surveys, on the 2nd May a third survey was held, when the surveyor recommended that the ship should be sold as she lay, and that as it would be necessary, in consequence of the exposed position, to discharge the cargo before the vessel was taken off, the most prudent course would be to sell the cargo at the same time. The vessel was sold accordingly on the 10th May. An estimate of the cost of forwarding the cargo to Liverpool, and of its deterioration in being so long in the water, was put in evidence. The cost of getting the timber to Liverpool, and of putting it into a ship, was also estimated.

loss of quantity, and told them that the right to sell the cargo depended upon whether the cargo could have been practically carried, in a commercial sense, to its destination, whether the cost of bringing the cargo, added to the amount of depreciation, would have left any appreciable margin of profit; and he left it to them to say whether it was right to sell the ship, and whether it was right to sell the cargo. The jury found both questions in the affirmative, and a verdict was entered for a total loss. On this finding the majority of the Court of Common Pleas held that the loss might be treated as a total loss, and that notice of abandonment was unnecessary. The Court assumed, on the finding of the jury, that the expense of forwarding the cargo to its destination would exceed its value when so forwarded. So that the value of the cargo, as it stood, as a cargo to be forwarded to Liverpool, would in fact be nothing. The decision of the Court of Common Pleas in *Farnworth v. Hyde* (1) was reversed in the Exchequer Chamber. The Court then pointed out a mistake in the mode of calculation, and showed that the evidence did not warrant the finding of the jury that the cargo could not be carried on to its destination, except at a cost exceeding its value. They therefore set aside the verdict for a total loss. The Court of Exchequer Chamber are careful to point out that they express no opinion whether, if the facts had been as supposed by the Court of Common Pleas, notice of abandonment would have been unnecessary. But even the judgment of the Court of Common Pleas leaves untouched the principle that, if there is a *spes recuperandi*, if any hope of bringing the goods to their destination otherwise than in a worthless state exists, a notice of abandonment is necessary.

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whether there is anything in the facts of the case which would affect the application of the general rule.
The defendants insured the vessel against total loss only, and they

1870 of considerable danger they were not actually lost, nor was it certain that they would be lost, or that any considerable cost would be incurred in bringing them to Calcutta. The repairs of the vessel alluded to in Captain Handley's report would not have been

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incurred in order to bring the ship to Calcutta. The sleepers existed in specie; they were in a vessel which, whatever may be said of her condition in other respects, was at least tolerably water-tight. It cannot be said to have been impossible that the ship might have been got off the Sand and brought on to Calcutta. It is not proved that the sleepers, or at least a considerable portion of them, could not have been brought on to Calcutta by country boats, or other means, at an expense which would not have exceeded their value. If any part of the cargo, however small, was brought to its destination, the loss would not have been a total loss. There are no materials before the Court which would enable me to make such a calculation as was adopted by the jury in the case of *Farnworth v. Hyde* (1). This is not merely a defect of evidence. The cost of bringing the cargo to Calcutta was not a matter capable of being ascertained. The chance of bringing it on to its destination was clearly worth something. The price realized at the auction proves that the case affords a strong illustration of the reasonableness of the rule which requires notice to the underwriters, because such notice would have enabled the underwriters' agents to determine whether, with reference to the probable cost, it would be worth their while to labour and incur expense in endeavouring to save the cargo, or whether it would be better for their interest to sell it as it lay.

But the Advocate-General also relied on certain expressions of the Judges of the Court of Common Pleas in the case of *Farnworth
v. Hyde* (1), as showing that, if it had been proposed to save the cargo by the Captain, the property would have been sold at auction, and thus would bear the expenses of the rescue.

that being so, it would be the duty of the master not to sell the sleepers without consulting them. It is not shown that the sale did not take place with the full knowledge and sanction of the plaintiff Company, or the vendor's agents; and if that were the case, the sale stands on the same footing as if it had been a sale by the owners themselves; and it is a mere fallacy to say that they have been deprived of their property by a sale which must be treated as their own act. But if the master did sell without consulting the plaintiffs or the owners of the cargo, I think there can be little doubt but that the sale was wrongful, and a wrongful sale by the master would not pass any property in the thing sold. The power of a master to sell the cargo is limited to cases of absolute necessity,—that is to say, where there is a total inability to carry the goods to their destination. *Cammell v. Sewell* (1) shows what is meant by such necessity. It was there pointed out by the Court, "that the master is an agent to carry and convey the cargo, not to sell it, and that it is only in cases of absolute necessity that he can sell it." Baron Martin, in the course of the argument, pointed out that "the master has no authority to sell the goods merely because it would be for the advantage of the owner that he should do so." In that case the goods which had been landed from a wrecked ship were stacked on two small islands on the coast of Norway, exposed to injury from wind and weather, and possibly some of them might have been washed away in storms. There was no harbour; the anchorage was bad, and ships could not have been readily obtained for the purpose of forwarding the cargo to its destination. There was a conflict of testimony as to whether a prudent owner uninsured would have sold the cargo on the spot. The Court, in saying that there was no necessity whatever for the sale, rely on the fact that the owners could have been and were readily communicated with. They say "there is no pretence for saying that there was any necessity for the sale, much less an absolute necessity."

There is no doubt in this case that the master acted in good faith, as he thought, for the benefit of all parties concerned, and after taking the best advice he could get. But good faith is not enough to validate the sale by the master if not otherwise justifi-

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(1) 3 H. & N., 618; see 635 & 644.

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EAST INDIAN RAILWAY CO. able. In *Tronson v. Dent* (1), a cargo of opium shipped at Calcutta for Hong-Kong, damaged by the perils of the sea, was sold by the master at Singapore. The Court say : "The master AUSTRALASIAN INSURANCE CO. is the agent of the shipowners ; he has the charge of the ship for them ; he has, therefore, a much more powerful control over the ship in cases of injury, than he can have over the cargo, because he is altogether entrusted by the shipowners with the charge of the ship ; but with regard to the goods which are shipped on board, it is not so ; he is bound to convey them according to the tenor of his bill of lading, or whatever contract he has entered into, to their place of destination ; and all the books of authority, English and foreign, say, it is only if an accident arises, if he is actually cast away, that he is to deal with the cargo, it being a necessity cast upon him, not by any act of others with whom he is connected, but by the events that have occurred, and because the cargo is not to be left to perish, or to be left unregarded and uncared for, and there is no one else on whom the duty of guarding the goods, or taking care, or doing the best with them, can be cast except upon the master ; but we find in Abbot on Shipping it is laid down that the master is to be very careful in this matter, and that his duty is to carry the goods to their destination.

" His duty is to carry the cargo, and convey it to the place of its destination, if the goods can be carried to the place of their destination in a merchantable state, although very much damaged. It is a grave question whether the master can, in any case, be justified in selling the cargo, because the goods would be more damaged in the course of conveying them from the place where he repairs his ship to the place of ultimate destination, than they have been already at the time he comes there.

" If they are in such a state that he cannot convey them in the shape of merchantable goods to the place of their destination, and they would utterly perish when they arrived at their place of destination, that is quite another consideration.

(1) 8 Moore's P. C., 419 ; see 449—452.

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"Perhaps it would be going too far to say, that it must be perfectly clear, in all cases, that the cargo would have been destroyed altogether if it had been carried on, for every case must depend on its particular circumstances; but the fact that the witnesses here say that the opium would have suffered further damage from being carried on, falls very far short indeed of saying it could not have been carried on so as to be merchantable opium when it arrived at Hong-Kong, though still more deteriorated. The master acted *bond fide*; and something was said in the course of the argument in this case upon that fact; but that has been put to rest altogether by the case of *Idle v. The Royal Exchange Assurance Company* (1). There the jury found that the master in selling the ship had acted fairly and *bond fide*, and for the benefit of all concerned, and that the sale was honestly, fairly, and properly conducted; but the Court of King's Bench, on a writ of error (2), held that the necessity and legality of the sale was not to be inferred from the *bona fides* of the master. No doubt, if there was not *bona fides* it would take another aspect; but the existence of *bona fides*, and the fact that the master acted to the best of his judgment, would not of itself be sufficient; it must be shown that there was an actual necessity."

I think that there is no good ground for saying that the position of the parties to this suit was in any way altered by the sale which took place.

The result is that I must find the issue raised in favor of the defendants, and must pronounce that, as there was no notice of abandonment given to the defendants, or their agents, the plaintiffs are not entitled to recover as for a total loss. The suit will be dismissed with costs on scale 2.

Suit dismissed.

Attorneys for the plaintiffs: Messrs. *Collis and Co.*

Attorneys for the defendants: Messrs. *Berners and Co.*

(1) 8 Taunt, 755.

(2) See note (d), 3 B. & B., 151.

[PRIVY COUNCIL.]

P. C.*
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Dec. 6, 7.

AMRIT NATH CHOWDHRY (ONE OF THE DEFENDANTS) *v.* GAURI NATH CHOWDHRY AND OTHERS (PLAINTIFFS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Joint Estate—Bhaugulpore Zemindaries—Primogeniture—Custom.

Where property is proved to be ancestral, the mere registration of one brother as proprietor is of little value as supporting a case of the property not being joint, and the burden of proving that the property is not joint rests on him who alleges that to be the case.

There was no sufficient proof of a family or local custom that the descent of the zemindari, the subject-matter of dispute, was regulated by the rule of primogeniture.

THIS was an appeal from a decree of the High Court at Calcutta, dated 5th October 1863, affirming a decree of the Principal Sudder Ameen of Bhaugulpore, dated 14th July 1862.

The suit was to recover possession of a moiety of an estate in Bhaugulpore, called Talook Majhouli, and of certain other property bought out of the rents and profits thereof.

The respondents (plaintiffs) claimed the property as the joint property of themselves and their cousin, the appellant, and his brother, both of whom were made defendants. The plaint alleged that the talook was acquired by one Lachminath; that it descended lineally from him to one Hurjee Chowdhry, who had two sons, Bacharam and Shiblal; that Shiblal was the father of the plaintiffs (respondents); Bacharam being the father of the appellant and his brother; and that the properties had all been held jointly.

The appellant, in his written statement, set up as a defence that the talook was the sole property of Bacharam; that Bacharam was separate in estate from his brother; and that the

* Present:—THE RIGHT HON'BLE SIR JAMES COLVILE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

other estates had been acquired by the private means of Bacharam. The following passage in the written statement was the only one apparently pointing to any contention as to any particular custom affecting the usual law of inheritance: "on account of the mehals being all jungles, I only am in possession."

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The other defendants relied on the same defence as the appellant. The issues settled were: 1st, whether Shibli was joint in estate with Bacharam; 2nd, by whom were the estates acquired; 3rd, of what description were the mehals, and was the appellant alone entitled to possession.

It appeared from the documentary evidence, that at the time of the decennial settlement, Bacharam's name alone was recorded as the registered proprietor, and that he had executed bills of sale of portions of the property as if he were the sole owner; that he had executed a bond (not a mortgage however) to secure to Shibli a loan of money, in which he described himself as zemindar of the property; and that suits relating to the estate had been brought in his sole name. It appeared, however, that to one of the bills of sale Shibli, in signing his name as witness, had added the word "sharer;" that previous to the registering of Bacharam perwannas had been addressed to his father as former owner of the property; and that in petitions by Bacharam he referred to the property as having descended to him from his ancestors.

Amongst other documents put in was a letter from the Collector of Bhaugulpore, dated the 7th September 1787, with a genealogical table, and which letter is referred to in their Lordships' judgment.

It was as follows:—

To

J. SHORE, Esq., *President, AND*

THE MEMBERS OF THE BOARD OF REVENUE.

GENTLEMEN,

"In obedience to your commands of the 20th February, I have herewith the honor to transmit to you such particulars as I have been able to collect of the history of the several zemindars of Zilla Bhaugulpore. Respecting those of Rajmehal, I must beg your indulgence of some time longer, owing to the delay I have met with in procuring

1870 any information from the canoongoe of that division, whose disregard AMRIT NATH CHOWDHRY of my perwannas I propose making the subject of a future address.

v. GAURI NATH CHOWDHRY. "Lest this account of the zemindars and their zemindaries should fall short of the expectations you may have formed, I must beg leave to state to you the deficiencies of the sources from which I have been obliged to draw my information.

"The records of the canoongoe's office, on which I relied for my principal assistance, and which, if complete, would have been sufficient to make me master of the most material points to which you directed my attention, are not in existence in any part of the district beyond the date of 50 years back, and in general not so far. The loss of them on this side of the Ganges is, with great probability, attributed to the Mahratta invasion, and the predatory incursions of the hill people, and on the other side, to various accidents, which must be equally admitted, since it is impossible to disprove them.

"My next recourse lay with the zemindars themselves, in whose possession I hoped to find some family records of their ancestry, which, together with their sanads, might serve as authorities for many essential facts I had to ascertain; but if any such as the first have been kept they are universally disavowed, and of the number of the latter said to have been granted very few are now forthcoming:

"The history therefore of their several descents and of successions to zemindaries is, for the most part, given upon the credit of their traditional accounts alone, and lest such means should be deemed inadequate to the purpose of tracing back the numerous branches of a family through nine or ten generations, it must be recollect that certain castes of the Hindus observe it as a rule, in the education of their children, to teach them to repeat and keep in remembrance the names of their ancestors; and I must observe that, on the many occasions I have had of comparing these accounts given by families, whose relationship was very distant and their interest in opposition, they have seldom varied in the steps by which they have followed their lines of descent back to one common stock.

"But their object in preserving these traditions, being solely to ascertain their genealogy for the purpose of proving their title to inheritable portions of land, no further particulars of their history, or that of their zemindaries, can in general be obtained from them; and in no instance have I been able to procure information of the quantity of land originally in cultivation or of its progressive improvement with sufficient probability to induce me to insert it."

" In general, and more particularly where instances occur of deviation from the customary rule of succession, which I understand to be that of primogeniture, where the zemindari has passed into the possession of a junior branch of a family, I have to explain the circumstances more clearly. Annexed is a genealogical table of the original proprietors' posterity, which method, on other occasions, can alone make intelligible the numerous divisions of land among relations, which being, in fact, defalcations from the original grant, I have thought it my business to particularize.

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" The Board will perceive that, whatever may be the Hindu and Mahomedan laws of inheritance, as they respect the zemindars, the divisions of property and successions to zemindaries here instanced are not reducible to any uniform rate, but appear to have been arbitrarily made, according as any particular branch or individual of a family acquired the ascendancy, or obtained the favor of the *aumil*; that zemindaries, after passing from the possession of senior into that of junior branches of a family, have remained there or reverted back again without it being possible, at this distance of time, to ascertain the causes of such irregularities further than is assigned by the present incumbents themselves, or gathered from uncertain traditions; that families are now in indigence or dependence which, had not such irregularities happened, would have been in possession of zemindaries now held by their junior relations, and that valuable tracts of land are held by no other right than what is afforded under Regulation of Government, which restricts the cognizance of the Dewanny Adawlut to causes wherein the ground of action originated subsequent to the year 1756.

" With regard to the events to which are ascribed the effect of rendering certain parts of the country inhabited and cultivated, and of establishing them into zemindaries, I can only say that the information is such as I was able to procure, and that I have given the fabulous where no better was to be had. But in no instance, however improbable, is there a single circumstance related which is not wholly credited by the Hindu inhabitants of the places respectively to which they relate.

" Upon a review of what I have the honor to send to the Board, I find the terms 'proprietor' and 'inheritor' occasionally applied to the zemindars. By those words I mean to signify generally their title to zemindaries, without defining at all the nature of their rights or tenures, or whether they in fact possess either, otherwise than as

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AMRIT NATH CHOWDHRY servants in the immediate employment of Government, upon which question, as it is not within my province to decide, I would not wish to be understood as offering an opinion.

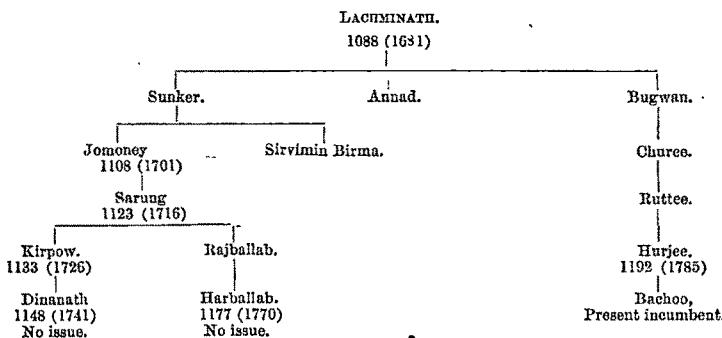
GAURI NATH CHOWDHRY. "Not knowing to what purpose the information required may be intended to be applied, I have confined my report, given in the accompanying sheets, to such points only as the orders of the Board directed me; but shall be happy to employ myself in answering any further enquiries respecting the district under my charge, which you, gentlemen, may think proper to make."

BHAUGULPORE, }
7th September 1787. }

(Sd.) R. ADAIR,
Collector.

The following was the Genealogical Table as filed by the respondents, and which is supposed to have been the one referred to in the Collector's letter:—

Genealogical Table of the Zemindar of Tuppeh Jittore.



A considerable amount of oral evidence was given for and against the allegation of joint possession, and letters were proved to have been written by the appellant in which he proposed to make a division. These letters, however, appeared to have been written to effect an amicable settlement, and the High Court disapproved of their having been allowed as evidence.

The Principal Sudder Ameen held that the property was ancestral, or bought from ancestral funds, and joint, and therefore that the plaintiffs were entitled to succeed. He concluded his judgment thus:—

"Although the defendants declare the aforesaid mehal to be jungle mehal, yet, in reference to the papers on the record, I do not see any particular proof in support of this assertion: though some of the witnesses declare the mehal to be jungle mehal, yet the witnesses of both parties have given their depositions according to the wish of the parties by whom they were produced; and their evidence on this point cannot, therefore, be relied upon. Under such circumstances, it is evident that the parties have equal claims to such a mehal."

The defendants appealed to the High Court, but in the grounds of appeal nothing was alleged as to the estate being descendible according to the rule of primogeniture.

The High Court (Mr. Justice Kemp and Mr. Justice Shumboonath Pundit) dismissed the appeal. Mr. Paul contend-ed that the law of primogeniture applied, it being a jungle mehal, on which point the Court gave the following judgment:—

"With regard to the plea of primogeniture, we would observe that this point was not taken in the Court below. The custom, which originated in consideration of financial convenience, and which is alluded to in the preamble of Regulation XI of 1793, according to which estates were not divisible, refers to extensive zemindaries or principalities denominated Raj, not to petty estates like Jittore, nor is there any proof that the estate of Jittore devolved entirely to Bacharam prior to the 1st July 1794. On the contrary, if the rule of primogeniture prevailed in this family, it is very questionable, referring to the admitted genealogical tree of the family, whether Bacharam would have succeeded at all. That he succeeded jointly with his brother Shibal as the heirs of their father, Hurjee, is clearly estab-lished, the name of the elder brother, Bacharam, being regis-tered on the rent-roll of the Collectorate for convenience' sake."

The defendant then obtained a review of judgment on the point raised as to primogeniture, and the Court (the same Judges), on the 20th February 1865, gave the following judgment:

"This application was admitted to argument on one point alone,—viz., whether the right of primogeniture prevails in this family or not.

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" Mr. Paul contends that the estate of Jittore descended uninterruptedly to the elder son; that the right of primogeniture obtains not only in this family, but as a local custom in the district of Bhaugulpore, and, therefore, both by *kulachar* (family usage) and *desachar* (local usage), his client is entitled to succeed, and that the estate is indivisible.

" It appears to us that this contention, which was not raised in the pleadings in the Court below, in which the applicant, in his verified statements, distinctly stated that the estate was self-acquired, and that it came into the hands of a perfect stranger to the family (that is, Harballab, from whom it was inherited by Hurjee, the grandfather of the applicant) is wholly untenable.

" To support the plea of *kulachar*, it must be clearly shown that the custom has been ancient and uninterrupted. Now the very letter, upon which the learned counsel relies, shows that the zemindari of Jittore was conferred by sanad in 1065 Fuslee (1658) to Bydonath, and that, after his decease, the estate was divided between his two sons. This fact is fatal to the plea of *kulachar*, which plea, as already observed, was not raised below.

" With reference to *desachar*, we observe that we have not been shown that the right of primogeniture is recognized throughout the district of Bhaugulpore. The applicant, in the Court below, tried to raise a plea of *desachar*, as based on the averment that the estate was jungle at the time of the settlement, wholly overlooking that the jungle-nrehals referred to in Regulation X of 1800 are confined to a particular district,—that is, Midnapore.

" *Desachar*, if it really exist, being a custom prevalent over a whole district, and not confined to one particular estate, must, from its universality, be more easily susceptible of proof than a plea of *kulachar*. The applicant, upon whom the *onus* lies, wholly failed to prove the existence of any such custom, and it is notorious that it does not exist in Bhaugulpore. The letter

of the Collector is founded upon surmises (1), and not upon any accurate data. We reject the application with costs."

The defendant then appealed to England, and the case came on for hearing *ex parte*.

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Sir R. Palmer, Q. C., and Mr. Leith for the appellant.—The finding as to the property being ancestral and joint is wrong. No doubt the presumption of Hindu law is that, where there is a joint family, an estate descends in co-parceny in the absence of evidence or custom to the contrary. The evidence as to the estate having been Hurjee's before Bacharam is unsatisfactory; but if it had been his the genealogical table shows, by the dates placed below the names, that the custom was, that property in that family went to the eldest son. It is a jungle mehal as meant in Section 2 of Regulation X of 1800. The custom of Bhaugulpore as to jungle mehals, as well as the custom of this particular family, is that the succession is according to the rule of primogeniture, and it is within the exception contained in Section 5 of Regulation XI of 1793.—*The widows of Raja Zorawur Sing v. Kunwur Pertee Sing* (2) and *Jugunnath v. Rughoonath Das* (3) were referred to.

The evidence was gone into at great length.

Their LORDSHIPS delivered the following judgment:—

This case, which has occupied the greater part of two days, appears to their Lordships, when reduced to its legitimate and reasonable dimensions, to be a very short case. The relevant and material facts are few, and not substantially in dispute for any purpose which their Lordships have to decide.

The contention on the part of the plaintiffs below—the respondents here—is, that a certain estate, a zemindari with accretions which, beyond all reasonable question, had been made by the investment of the profits of that estate, was an ancestral

(1) "The Collector admits that the sources from which he obtained his information were deficient, and the histories of the descents and successions in the various zemindaries in the district rested very much upon tradition. He also admits that instances had occurred of deviation from the customary rule of succession."

(2) 4 Sel. Rep., 57.

(3) 3 Sel. Rep., 311.

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estate which descended to them and the appellant, who was a cousin, in co-parceny. It is admitted that, by the common law of Hindustan, the descent is in co-parceny where no other custom or right is proved. The case of the plaintiffs was, that this property was ancestral property, which had belonged to their grandfather, one Hurjee, and descended from Hurjee upon the two sons, Bacharam and Shibli, the fathers of the respective parties.

The case mainly relied upon in the Court in India, on the other side, was, that there was no foundation whatever for this assertion; that the property was not ancestral property; that the grandfather never had any property at all, but that it was an acquisition by Bacharam himself, under a grant made to him individually; or, as we should say in English law, an acquisition by him by purchase, so that he became a new root of descent, and so that the common title alleged to be derived from the grandfather had no existence.

Now, it has been proved to the satisfaction of the Court below, and proved entirely to the satisfaction of their Lordships—indeed, was hardly disputed at last in the arguments at the bar—that this property was originally a zemindari, of which Hurjee, the grandfather, was possessed. Document after document, and all the evidence in the cause, go to show that Bacharam, in the first settlement, then in the decennial settlement, and then in the perpetual settlement, claimed to have it made with him by reason of his hereditary right to the zemindari as hereditary zemindar. That being proved, that it was Hurjee's property, and that Bacharam was entitled by descent; of course the next proposition would equally follow, unless there is something to exclude it,—that is, that he would not be entitled to it himself, but that he and his brother would succeed to it as co-parceners.

Well, has anything occurred to divest that right which, in a case of ordinary property, was certainly vested in the two jointly at the time when the history of this case begins? Their Lordships are unable to find anything to alter the right which existed at the time when the descent was cast. The fact that the settlement was made in the name of the elder son,—whether,

originally, when he was a minor, or not,—the fact that he has continued to be solely registered from that time to this, afford no conclusive evidence against the title of the shareholder. There is documentary evidence, on the other side, of his being recognized as a shareholder, but not very strong, or very conclusive, evidence. The mere fact that one of the two brothers was registered so as to be the proprietor to the outer world, does not seem to their Lordships to be of very great weight any more than it did to the Court below; and in respect to the actual enjoyment of the property there has been beyond all question a continuous enjoyment by both upon equal terms. The two lived together; the families lived together; they messed together; and all the marriage and funeral ceremonies and other ceremonies of their religion were performed at the joint expense out of the income of the property, and, apparently, as far as their Lordships can see, upon equal terms, and not as the bounty of an elder brother to a mere dependant who had no right whatever to the property.

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It appears to their Lordships, therefore, that the case, as principally alleged in the Court below, has entirely failed, and it becomes necessary to consider the other topics which have been very much relied upon at the bar here, as they were, at a late part of the case, in the Court below. It is alleged that, admitting it to have been Hurjee's property, admitting it to have been ancestral property in that sense, it was property which descended to Bacharam as the eldest male heir, by reason of its being subject to a custom of primogeniture. The custom of primogeniture is stated in two ways, first, as a custom of a district so as to bring it within the Regulation of 1800,—that is to say, it is the custom of a district, supposed to be a jungle mehal, in Zilla Bhaugulpore. Now of the existence, in any known district whatever, of anything which can be predicated as a jungle mehal in which the zemindari is situated, there is neither pleading nor evidence. There is nothing at all to show any custom, except a Collector's letter with respect to a custom extending to all the zemindaries throughout the whole zilla of Bhaugulpore; and certainly it would be very strange indeed to hold, merely upon

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that evidence, that there was a custom proved extending to the whole of the zilla of Bhaugulpore, or to the whole of any undefined district within that zilla, of which the Court below says it has never heard anything, it being, they say, perfectly notorious that no such custom exists within that district. Well, then, the evidence of that custom appears to their Lordships to be absolutely nothing. Then, there is the other custom,—supposed to be a family custom, a custom of this particular family, under which custom it is alleged that Bacharam succeeded at such a time,—that is, before the year 1794,—in such a way as to exclude the title of his younger brother. Of that family custom there really is no sufficient allegation, if there be any allegation at all. Their Lordships find nothing on the pleadings to raise such a custom as that, in the manner in which it ought to have been raised, if it was intended to have been pleaded and proved in this case. It is, in fact, inconsistent with the case almost entirely relied on by the defendant in the Court below,—that is to say, of the new acquisition made by him under the grant or potta from the Government. But if there be anything which is sufficient to raise it, which their Lordships do not see, there is an equal want of satisfactory evidence of any such custom. There is some trace in the Collector's letter of a sort of general custom extending through the whole of Bhaugulpore, all the zemindaries being held by that kind of title, but the genealogical tree, which is the only thing otherwise which is in evidence, is certainly, in their Lordships' judgment, insufficient to found a family custom, which the Court below have held must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back. Both these cases of family and local custom, the burden of which was entirely on the defendant, have failed, and that brings it back to the case which the plaintiffs below had to prove,—that is, the simple fact that this was ancestral property of their common grandfather.

That being so, and it being substantially admitted that there was no other source from which the acquisitions could be made,

the decree of the Court below seems to their Lordships to be 1870
right, and they will therefore recommend Her Majesty that the ASIRIT NATH
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decree be affirmed and the appeal dismissed.

Appeal dismissed.

Agent for appellant: Mr. Wilson.

[APPELLATE CIVIL.]

SCR Cal-477-

*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, and
Mr. Justice Ainslie.*

AUNJONA DASI (PLAINTIFF) *v.* PRAHLAD CHANDRA GHOSE 1870
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AND OTHERS (DEFENDANTS).*

Jurisdiction—Civil Suit—Act VIII of 1859, s. 1—Hindu Marriage.

A suit for a declaration that an alleged Hindu marriage is invalid, is a suit of a civil nature, and will lie in the ordinary Civil Courts.

THIS suit was instituted, on the 7th of August 1868, in the Court of the Moonsiff of Satkhira.

Its object was to obtain a declaration that the marriage of the plaintiff's youngest daughter, Karpoora, with Prahlad Chandra Ghose was invalid. Prahlad Chandra Ghose was the husband of plaintiff's elder daughter, and plaintiff alleged that she went with Karpoora to the house of the defendant to see his wife, and that, while they were in the house, Karpoora was forcibly carried off to the house of Tara Chand, and there married to Prahlad; she therefore sued to have the marriage declared illegal.

The defence was that the suit was not of a nature cognizable by the Civil Courts, and that the plaintiff had given her consent to the marriage.

* Appeal, No. 5 of 1870, under section 15 of the Letters Patent, from the decision of Mr. Justice Glover, dated the 13th July 1870, passed in special appeal No. 547 of 1870.

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The issues were settled accordingly. . . .
The Moonsiff held: *first*, that a suit to declare a marriage invalid was a suit of a civil nature, and was, as such, cognizable by the Civil Courts. That the mother had not consented to her daughter's marriage, and that no *muntras* having been pronounced, the marriage was invalid.

Prahlad Ghose appealed to the first Subordinate Judge of the 24-Pergunnas, who, relying on *Ramsaran Mitter v. Rakhal Das Dutt* (1), allowed the appeal on the ground that the Civil Court had no jurisdiction to entertain such a suit as the present.

(1) Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

RAMSARAN MITTER (PLAINTIFF), v.
RAKHAL DAS DUTT AND OTHERS
(DEFENDANTS).*

(The 30th April 1869.)

Baboo Gopeenath Mookherjee, for appellant.

Baboo Grish Chunder Mookherjee, for respondent.

JACKSON, J.—I do not think this suit can be maintained. The plaintiff alleged that the defendant had spread a report to the effect that his wife had been previously married to him, the defendant, in consequence of which representation the plaintiff had been put out of caste. He prayed the Court to restore him to his caste, and also to declare that the defendant had not been married as alleged to his wife.

The Moonsiff appears to have given a decree for the relief asked for, by declaring him to be a fit person to be taken back to his caste. This has been reversed by the Zilla Judge, who held that the decree as it stood could not be supported.

But the special appellant urges that the Court might have declared the

pretended marriage to be no marriage at all. I am not aware that such a suit can be maintained in the Civil Court. There is no question of property depending upon the validity or otherwise of the marriage in question, and it appears to me that the Court would have no authority to make any such declaration in the circumstances. I think the appeal must be dismissed with costs.

MARKBY, J.—I am of the same opinion. I only wish to add this, that it does not at all follow, if what the plaintiff says is true, that he is remiss in the matter. It seems to me that what he ought to have done was to have brought a suit against this defendant claiming moderate damages for the injury caused to him. The result would have been that there would have been an enquiry, and if he has been defamed, and so far as any judicial determination would benefit him, he would have had it. But I entirely agree with Mr. Justice Jackson that, except as incidental to rights of property or other similar cases, this Court has no authority to make a declaration as to the validity or otherwise of a marriage.

* Special Appeal, No. 2772 of 1868, from a decree of the Judge of Beerbhoom, dated the 26th August 1868, reversing a decree of the Moonsiff of that district, dated the 2nd April 1867.

The plaintiff then appealed specially to the High Court, on 1870
 the ground that the Court had jurisdiction to entertain the suit, AUNJONA DASI
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 and that *Ramsaran Mitter v. Rakhal Das Dutt* (1) was not law, PRAHLAD
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The following judgments were delivered:—

GLOVER, J.—I think that we should follow the ruling laid down in the case of *Ramsaran Mitter v. Rakhal Das Dutt* (1); and I am inclined to think with Mr. Justice Markby, that the plaintiff's remedy was to bring a suit against the defendant to recover, as guardian, possession of her minor daughter, or a suit for damages sustained in consequence of the injury caused by the loss of her daughter's services.

I am not aware of any power in this Court to declare a marriage null, except as incidental to the decision of some right to property involved in the suit. To do so in the general way asked for in this suit would be virtually to give a judgment *in rem*, which I conceive we have no power to do.

I would dismiss the special appeal with costs. By the rules of practice of this Court, the judgment of the senior Judge must govern the appeal, and we have, I think, no power to refer the question to a Full Bench, as my learned colleague proposes.

MITTER, J.—I am extremely sorry to differ from my learned colleague in this case.

The plaintiff in the Court below, now special appellant before us, is a follower of the Hindu religion, and this suit was brought by her as the guardian of her infant daughter Karpoora, for the purpose of having an alleged marriage of the said Karpoora with the defendant No. 1 set aside as null and void under the Hindu law. The Moonsiff who tried the suit in the first instance gave a decree for the plaintiff, but this decree has been reversed by the Subordinate Judge on appeal, on the strength of a decision passed by a Division Bench of this Court (1).

I am of opinion that the decision relied upon by the lower Appellate Court is not sound. I see no reason for holding that

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the Civil Courts of this country are not competent to entertain a suit of this description, merely because no question of property is involved in it. That the suit is a suit of a "civil nature" is beyond all question; and it is equally clear that it is not "barred by any Act of Parliament, or by any Regulation of the Bengal Code, or by any Act of the Governor-General in Council." How then can we refuse to entertain such a suit, when we are positively enjoined by the provisions of section 1, Act VIII of 1859, to take cognizance of all suits of a civil nature not barred by any express legislative enactment? That no question of property is involved in it does not appear to me to be of any importance whatever. Rights of property are not the only civil rights recognized by the law, and if there are other sorts of civil rights besides those of property, the Civil Courts are bound to protect them, notwithstanding that no question of property is involved in the case. Thus, for instance, suits for the restitution of conjugal rights are frequently entertained by our Courts, although they do not involve any questions of property, and we have got the authority of the Privy Council in the case of *Moonshee Buzloor Ruheem v. Shumsoonissa* (1) to show that such suits are clearly maintainable in the Civil Courts of this country. Suppose, for instance, that the validity of the marriage set up by the plaintiff in such a suit is disputed by the defendant, can the Court refuse to declare whether that marriage is legal or not, merely because no question of property, real or personal, is involved in the litigation? And, if it cannot, how can it refuse to make a similar declaration in a suit like the present, when it is perfectly clear that the conjugal rights of parties are by no means of less importance to them than those of property?

Considerable light is thrown upon this question by the provisions of section 8, Regulation III of 1793. That section runs as follows:—

"The Zilla and City Courts are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land, rents, revenues, debts,

(1) 11 Moore's I. A., 55.

accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits and complaints of a civil nature, &c., &c."

It is clear from the above that, so long as the provisions of this section were in force, the Civil Courts of this country had full and ample jurisdiction to take cognizance of a suit like the present, inasmuch as it is a "suit or complaint respecting marriage;" and it is also clear that a "suit respecting marriage" was considered by the framers of this section to be just as much a suit of a civil nature as a suit for the recovery of property, real or personal. Are we then to suppose that the power which the Civil Courts of this country had to deal with "suits respecting marriage" has been taken away from them merely because the provisions of section 8, Regulation III of 1793, have been repealed by Act X of 1861? I am by no means prepared to adopt this conclusion. I have already shown that the provisions of section 1, Act VIII of 1859, are sufficiently large to include a suit like the present, and the only reason I can find for the repeal of section 8, Regulation III of 1793, is that that section had become wholly superfluous after the Legislature had already defined the jurisdiction of the Civil Courts by section 1, Act VIII of 1859.

It has been said that the proper course for the plaintiff to adopt would be to sue for damages for the loss of her daughter's services. How far such a course would be congenial to the ideas and feelings of a native parent, or what amount of damages the plaintiff could recover for the supposed loss of the services of a girl of five or six years of age, I need not pause to enquire; but I feel no hesitation in saying that the remedy pointed out is by no means sufficient to meet the requirements of the case set up by the plaintiff. If the defendant is really guilty of the wrongful act for which this suit has been brought against him, there can be no doubt whatever that the question involved in this case is of the utmost importance to the future happiness of the infant concerned in it. So long as her so-called marriage with the defendant is not publicly set aside by a Court of competent jurisdiction, no man with a grain of common sense in him will venture to take her in marriage from the

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1870 hands of the plaintiff, her lawful guardian, and thereby run the
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bigamy under the provisions of the Penal Code ; but, if the plaintiff, who is fully competent by the laws of her country to marry her daughter to a suitable bridegroom, cannot do so without the declaration she has asked for in this suit, it is perfectly clear that the interests of the infant are in serious danger. No amount of damages which the plaintiff can recover for the loss of her daughter's services can remove this danger, and I do not, therefore, see any reason why the plaintiff should not be permitted to maintain this suit, merely because she might have sued for damages if she liked.

It has been said that Spiritual or Ecclesiastical Courts like those in England are the proper tribunals for the determination of matrimonial causes, and as there are no such Courts in the mofussil, suits like the present cannot be maintained in the Civil Courts unless some questions of property are involved in them. I confess that I am utterly at a loss to understand the force of this argument. In the first place, I am unable to see why the Civil Courts should be deemed less competent to deal with such cases than the Spiritual Courts referred to above, or why they should be deemed less competent to deal with them when they do not involve any questions of property, when it is beyond all dispute that they are fully competent to deal with them when such questions are involved. The additional element of property will only complicate the case, and if the Civil Courts are competent to deal with it when it is thus complicated, there seems to be no reason for supposing that they are not equally competent to deal with it without the complication. In the next place, if we have got no Spiritual Courts in the mofussil for the determination of matrimonial causes, it is but just and proper that those causes should be decided by some Court or other ; and I fail to perceive any reason why the Civil Courts should refuse to take cognizance of such causes if they find that they are causes of a civil nature not barred by any express legislative enactment. The institution of marriage among the Hindus is not only a religious sacrament, but it is also a civil contract, and important civil rights arise from it quite indepen-

dent of any right of property. I have already shown that a suit for the restitution of conjugal rights will lie in the Civil Courts of this country, even though no question of property is involved in it, and it follows, therefore, that the absence of such a question is no sufficient ground by itself for refusing jurisdiction if the suit is otherwise maintainable.

For the above reasons, I would refer this case to a Full Bench of this Court for the determination of the following point of law, namely :—

“ Whether the Civil Courts of this country are competent to take cognizance of a suit for the declaration of the invalidity of a Hindu marriage, no question relating to property being involved in the case ? ”

The plaintiff then appealed under section 15 of the Letters Patent from the judgment of Mr. Justice Glover, which, as that of the Senior Judge, prevailed.

Baboo *Kali Prasanna Dutt* (with him Baboo *Jadab Chandra Seal*) for the appellant, contended that the decision in *Ramsaran Mitter v. Rakhal Das Dutt* (1) was not law, and that the present suit was one involving important civil rights and liabilities. It was, therefore, a suit within the cognizance of the Civil Court. He referred to 13 Geo. III, c. 63, sections 36 and 37, empowering the Governor-General to make Laws and Regulations; 21 Geo. III, c. 70, section 23, empowering the Governor-General to legislate for the Provincial Courts; and Regulation IV of 1793, section 15, which enacted that “ in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus, are to be considered as the general rule by which the Judges are to be guided in arriving at their decisions.” This section recognizes the power of the Courts to entertain suits of the class mentioned. This is a suit regarding marriage, and therefore cognizable.

It is a suit of a civil nature: its cognizance is not barred by any Act of Parliament or Regulation, and it is, therefore,

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cognizable by the Civil Courts under Act VIII of 1859, section 1.

Cases of this nature have been tried in the Civil Courts of

Bombay—*Sri Sunker Bharti Sawmi v. Sidha Lingayah Charanti* (1).

Baboo *Bhagabati Charan Ghose* (with him Baboo *Srinath Das*), for the respondent, contended that, if there was no marriage, the plaintiff had no cause of action. If there was a marriage, then, by Hindu law, the marriage was irrevocable and indissoluble—Menu, chapter 8, verse 227; *Modhoosoodun Mookerjee v. Jadubchunder Banerjee* (2). No suit will lie respecting marriage, where no question affecting property is raised. This is a suit asking for a declaratory decree, without any substantial relief; it should therefore be dismissed.

He relied on *Ramsaran Mitter v. Rakhal Das Dutt* (3), *Sudharam Patar v. Sudharam* (4), and also cited *Chotun Bebee v. Ameerchund* (5) and *Modhoosoodun Mookerjee v. Jadubchunder Banerjee* (2).

The judgment of the Court was delivered by

NORMAN, J.—In this case Aunjona Dasi sues, as the mother and guardian of her minor daughter Karpoora Dasi, the defendant Prahlad Chandra Ghose, alleging that he (defendant) forcibly carried off Karpoora Dasi, who appears to be an infant of about five years of age, without her consent, to the house of one Tara Chand, and there went through a marriage ceremony with her. The suit is brought to declare this marriage invalid.

The first Court made a decree declaring the marriage invalid.

On appeal, the Subordinate Judge, Baboo Koylash Chandra Deb, on the authority of opinions expressed in *Ramsaran Mitter v. Rakhal Das Dutt* (3), held that a suit to declare a marriage invalid could not be entertained in the Civil Courts under Act VIII of 1859. From this decision, there was a

(1) 3 Moore's I. A., 198.

(4) 3 B. L. R., A. C., 91.

(2) 3 W. R., 194.

(5) 6 W. R., 105.

(3) *Ante*, p. 244.

special appeal to the High Court, and the point on which the Judges differed was this: whether the Civil Courts of this country are competent to take cognizance of a suit for the declaration of the invalidity of a Hindu marriage, no question of property being involved in the case. The opinion of Mr. Justice Glover, which was in the negative, being that of the Senior Judge, prevailed.

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Now the 1st section of Act VIII of 1859 enacts that "the Civil Courts shall take cognizance of all suits of a civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras, and Bombay, respectively, or by any Act of the Governor-General of India in Council." And section 15 of the Act provides that "no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

The question now before us is, whether a suit, praying to have it declared that a marriage is invalid, brought by one of the parties to that supposed marriage, is a suit of a civil nature.

Regulation III of 1793 established Courts of Dewanny Adawlut as Courts of Judicature for the trial of civil suits, and in order to see what civil suits were, as the term was understood in this country at the time of passing of that Regulation, and as it is understood in this country at the present time, it is necessary to refer to the 8th section of that Regulation.

The Zilla Courts, which are the Courts of Dewanny Adawlut referred to by section 2, were, by section 8 of the same Regulation, "empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land, rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits and complaints of a civil nature, in which the defendant may come within any of the descriptions of persons mentioned in section 7, provided the landed or other real property to which the suit or complaint may relate shall be situated, or in all other cases the cause of action shall have arisen, or the defendant at the time when the suit may be commenced,

1870 shall reside as a fixed inhabitant within the limits of the zilla
 AUXJONA DASI or city over which their jurisdiction may extend."

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Suits regarding marriage are therefore treated by section 8 of Regulation III of 1793 as being civil suits, or at least suits of a civil nature. By section 15 of Regulation IV of 1793, a rule is laid down by which Judges are to form their decisions, amongst other things, in suits regarding marriage and caste and all religious usages and institutions, namely, according to the Mahomedan law, in the case of Mahomedans, and according to the Hindu law, in the case of Hindus.

In the Courts of the Bombay Presidency, numerous cases will be found in Borradaile's Reports of suits relating to marriage. In *Kaseeram Kriparam v. Umbaram Hurree Chund* (1), Hurree Chund complained "that Kaseeram his father-in-law neglected to send his wife Ichha with her dower to his house." Kaseeram answered, and Ichha put in a petition, complaining of ill-usage, and alleging that that was a valid ground of divorce; and the Court was of opinion that there were sufficient grounds for a divorce between Hurree Chund and Ichha, and a precept to the Zilla Court was issued pronouncing one.

Again, in *Kasee Dhoollubb v. Ruttun Baee* (2) a divorce was granted to the plaintiff, who was a woman of the barber caste, on account of her husband's dissolute life and bad character, it being shown that the customs of that caste permitted a divorce for bad conduct of one of the parties.

In *Ardaseer Cursetjee v. Perozeboye* (3), which was a suit brought on the ecclesiastical side of the Supreme Court of Bombay for the restitution of conjugal rights, their Lordships of the Privy Council held:—"That the Supreme Court "of Bombay, on its ecclesiastical side, had no jurisdiction "to entertain such a suit, as there existed such a difference "between the duties and obligations of a matrimonial union "among Parsees from that of Christians; that the Court, if it "made a decree, had no means of enforcing it, except according "to the principles governing the matrimonial law in Doctors' "Commons, which were, in such a case, incompatible with the

(1) 1 Borr. Rep., 387.

(2) 1 Borr. Rep., 410.

(3) 6 Moore's I. A., 348.

"laws and customs of the Parsees." But in giving judgment, Dr. Lushington said : "It may be that such laws and customs do not afford what we should deem as between Christians an adequate relief; but it must be recollect that the parties themselves contracted for the discharge of no other duties and obligations than such as for time out of mind were incident to their own caste; nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages. Such remedies we conceive that the Supreme Courts on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow."

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There is also another case—*Nundlall Bhugwan Dass v. Tapeedass and Prubhoo Dass* (1)—in which the Sudder Court at Bombay held "that a marriage contract to be valid must, both by the rules of caste and laws of the ~~haster~~, be made with consent of parents on both sides."

It is clear, therefore, that suits relating to marriage have been entertained by the Courts of the Bombay Presidency as suits cognizable by the ordinary Civil Courts.

Suits relating to marriage deal with that which, in the eye of the law, must be treated as a civil contract, and with civil rights arising out of that contract. Suits for relief against contracts procured by force or fraud, are ordinarily cognizable by Civil Courts.

In a suit declaring the invalidity of a marriage, the Court could grant consequential relief. It might restrain the person alleging himself to have the rights of a husband from enforcing any claim to the custody or possession of the person of the woman founded on the supposed marriage.

If such relief could be granted, it is not easy to see why a declaratory decree under section 15 might not be made. Such a declaration may be of the greatest importance to a girl circumstanced as the infant plaintiff is. If the marriage is in fact no marriage, unless she can obtain a declaration from a Court of Justice that the marriage is null and void, unless she can obtain

1870 the protection which such a Court can give her, she may be
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at best she will be prevented from marrying any one else. The rights which a decree in this suit may protect, with which the defendant may be restrained from interfering, the preservation of the personal purity of the infant plaintiff, and her right and power to contract a valid marriage, are amongst the highest rights which a human being can possess; and it would be a matter deeply to be lamented if the Court had no power to protect and defend them. I have, however, no doubt of the existence of that power. I think that a suit, such as the present, is a suit of a civil nature which may be entertained in the Civil Courts of this country under the provisions of section 1, Act VIII of 1859; and that view seems to me to be sanctioned by the opinion of the Lords of the Privy Council in the case I have referred to.

I think that the Court must have jurisdiction in such suit to declare the marriage void if procured by fraud or force, and celebrated without the consent of the necessary parties, or without the formalities necessary to render it a binding marriage according to Hindu law. I must, therefore, pronounce that Mr. Justice Mitter's judgment is correct, the decision of Mr. Justice Glover must be reversed, and the case remanded to the lower Appellate Court for trial on the merits.

The appellant will have her costs of both the hearings in this Court.

Appeal allowed.

FULL BENCH.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

MUSSAMAT BUDRUNNissa CHOWDHRAIN AND OTHERS (DEFENDANTS) v. PROSUNNO KUMAR BOSE AND OTHERS (PLAINTIFFS).*

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Aug. 17.

Chur—Island—Reg. XI of 1825, s. 4, cl. 3—Act IX of 1847.

When a chur or island is thrown up in a large navigable river, originally surrounded by deep, unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the criterion for deciding whether the Government has the right of disposing of that island, or whether the owner of the land to which it is most contiguous has that right, is to consider the state of circumstances at the time of the formation of the island, that is, the time when it is thrown up, and not the state of things at any subsequent or fluctuating period, such as the subsequent silting up of the bed of the river between the island and the contiguous estate so as to form a fordable passage.

Act IX of 1847 does not alter the state of the law under Regulation XI of 1825, but merely lays down a procedure.

There is nothing in Act IX of 1847 to prevent the Government from taking possession of a chur, after it has silted up, if the chur be one that the Government would be entitled to under Regulation XI of 1825.

THIS was a suit to set aside certain survey proceedings, and for possession under clause 3, section 4, Regulation XI of 1825, of certain lands as an accretion to the plaintiffs' estate. The facts relating to the land, which were on the whole admitted, were thus stated by the Judge :—

"In 1863, upon an application to the Collector of Bhoolooah by certain ryots, a Deputy Collector proceeded to enquire into the circumstances of a newly-formed island chur on the east or left bank of the Titoolia River. He reported it to be surrounded by deep water at all times, but uncovered towards its northern extremity at low tide, while its south portion was even then three feet or more under water. After investigation of the claims put forward to it, he decided that it was a re-formation on its old site of a diluviated chur, Pota, which had belonged to

* Special Appeal, No. 474 of 1870, from a decree of the Officiating Additional Judge of Backergunge, dated the 13th December 1869, reversing a decree of the Moonsiff of that district, dated the 23rd June 1868.

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the defendants in this suit, and had been attached to their riparian estate, Gopalpore.

"The Collector of Bhoolooah, to whom this report, dated 19th June 1863, was submitted, appears to have erroneously held that the Deputy Collector reported the island chur to be only separated from the riparian estate by three feet or so of water at its lower end, and he, therefore, withdrew from all connection with it, as it was, under these circumstances, an accretion to the defendants' estate (30th September 1863).

"In 1864, the matter became again the subject of contention before the survey officers. The plaintiffs claimed it as in their possession as part of their riparian estate, an *ausut* (subordinate) talook, called Gupta Moonshi in Chur Itsha, adjoining defendants' estate Chur Potka in Gopalpore on the north. The defendants again claimed it as a re-formation of Chur Pota. The Survey Deputy Collector held, after investigation, that a deep channel (*dhone*) separated the island from the riparian estates; that the island was at that time (September) partly covered at all times of the tide, and was uncultivated. He held that the Collector's order was based upon a misconception of the Deputy Collector's proceedings of June 1863, and held that the island was in fact at the disposal of Government under section 7, Act IX of 1847. The Survey Superintendent of the Circle modified this finding, and, though he held that the Collector's order declaring it to be an accretion to defendants' Chur Potka was beyond his cognizance, allowed the defendants to hold possession of plot E in the island, as a re-formation of Chur Pota. The above are the facts and the proceedings out of which this suit has sprung.

"The suit was instituted on the 23rd November 1867, the main object being to obtain possession of the island as an accretion to plaintiff's estate of Chur Itsha, Kismut Moonshi Gupta, under clause 3, section 4 of Regulation XI of 1825, by reason of the silting up of the *dhone* or stream which separates them.

"The defendants, among other pleas, not necessary to notice here, raised the defence that this chur was merely a re-formation on the old site of their own land of Chur Pota, and that this had always been held to give title to the owner of the lands which had diluviated away."

The Moonsiff dismissed the plaintiffs' suit. On appeal the Judge passed a decree in favor of the plaintiffs.

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The defendants then preferred a special appeal, when the following question was referred to a Full Bench by L. S. Jackson and Glover, JJ.—“Whether, in a suit regarding the right to a chur or island thrown up in a large navigable river, originally surrounded by deep, unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the state of things existing at the time of the formation of such chur or island is to be the criterion, or the state of things at some later period, whether on re-survey, or at the time when the land was taken possession of, or when the dispute arose.”

The question was referred with the following remarks by

JACKSON, J.—It appears to me that the point arising in this case must be referred for the decision of a Full Bench.

The suit relates to a chur or island which originally formed in the bed of the river Titolia, and which, at the time of its formation, was surrounded by a channel unfordable on either side. The defendants appear to have claimed this chur on its appearance, on the ground of its being a re-formation of land formerly belonging to their estate, and also as an accretion to the same, although this ground of claim is somewhat indistinctly stated, and apparently as an after-thought interpolated in the written statement in this suit.

The Collector, on behalf of Government, appears to have caused some enquiry to be made into the formation of this chur, and, in consequence of some misconception as to the meaning of a report submitted to him by the Deputy Collector, to have abandoned the claim of Government and relinquished the land, leaving it in the hands of the defendants.

Subsequently to these proceedings, by a recent silting up of the river, the channel between the chur or island thus formed and the estate of the plaintiffs appears to have become fordable, and the plaintiffs now claim the island as having, in this manner, become an accretion to their original estate, and, therefore, their property under clause 3, section 4, Regulation XI of 1825.

The lower Appellate Court has favored the claim of the

1870 plaintiffs, and given them a decree, against which the defendants appeal specially to this Court.

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PROSUNNO KUMAR BOSE. I am bound to say, on looking at the case made by the parties to this suit respectively, I was inclined to consider that the defendants had the better case, inasmuch as this chur, which at the time of its first formation unquestionably by the terms of the clause already cited was the property, or, to use the words of the Regulation, at the disposal of Government, could not, it seemed to me, become subsequently vested in the plaintiffs by reason of a channel, not originally fordable, afterwards becoming fordable, and so establishing communication between the chur and the plaintiffs' estate. But the plaintiffs, respondeuts in this appeal, are supported by authority in their contention. They refer, in the first instance, to a passage in the judgment delivered by the late Chief Justice, in *Mohini Mohun Doss v. Juggobundoo Bose* (1), where I was one of the Judges, and, secondly, to two cases, *Wise v. Ameerunnissa Khatoon* (2) and *Wise v. Moulvie Abdool Ali* (3), both decided by Bayley and Campbell, JJ., in which that view of the case appears to have been taken.

The late Chief Justice observes at page 315 of the case first mentioned, "if, when the island first formed, the river Bawar was not fordable between the plaintiff's estate, which formed that part of the shore which was nearest to the island, the island might, according to clause 3, have been disposed of by the Government. If, before the Government disposed of it, the river between the plaintiff's estate Kootubpore and the island became fordable, then according to clause 3, it would belong to the plaintiff as the owner of Kootubpore." That, according to the view of the Chief Justice, is the effect of clause 3.

Then, in the cases of *Wise v. Ameerunnissa Khatoon* (2) and *Wise v. Moulvie Abdool Ali* (3), the matter appears to have been chiefly considered by the light of various sections of Act IX of 1847, and there also the learned Judges hold that, not the state of things at the original formation of such an island was to be

(1) 9 W. R., 312.

(2) 2 W. R., 34.

(3) 2 W. R., 127.

looked to, but the state of things subsequently discovered at the period of re-survey, or possibly when the land was first taken possession of.

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As to the remark of the Chief Justice, I am somewhat embarrassed by the circumstance that I assented to the judgment given on that occasion. At the same time, I certainly did not intend to bind myself to every portion of the argument on which that judgment (which was not a considered judgment) was based; and I am not prepared at this moment to give my assent to the proposition there laid down.

As to the cases of *Wise v. Ameerunnissa Khatoon* (1) and *Wise v. Moulvie Abdool Ali* (2), they appear to have been argued exclusively with reference to the provisions of Act IX of 1847. Now, it appears to me that those provisions, whatever bearing they may have had upon the cases then under consideration, really have no connection with the case before us. The first section of that Act is in these words:—"It is hereby enacted, that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment of lands gained from the sea or from rivers by diluvion or dereliction, or regarding the right of Government to the ownership thereof,—shall, from the date of the passing of this Act, cease to have effect in the provinces of Bengal, Behar, and Orissa, and that all such investigations pending before the Collectors and Deputy Collectors in the said provinces at the said date, shall forthwith be discontinued; and that no measures shall hereafter be taken for the assessment of such land, or for the assertion of the right of Government to the ownership thereof, except under the provisions of this Act."

It seems to me quite clear that that was an Act of procedure, and an Act to regulate the conditions under which, and the mode in which, the rights of Government to such lands were to be asserted. This is not a case in which the rights of Government to these lands are at all under consideration—at least, so far as we have gone in hearing this case. We have to do at

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present with the alleged rights of the plaintiffs, and it seems to me that, in order to ascertain what those rights are, we must look to the declaratory law of 1825 ; and, if the plaintiff fails to make out his title to these lands under Regulation XI of that year, their case is at an end.

I cannot at present bring myself to consider that, when lands are formed by the throwing up of a chur or island in a large navigable river, the channel on either side thereof not being fordable, and therefore become, according to established usage, as stated in the Regulation, at the disposal of Government,—which I understand to be another form of saying that they are the property of Government,—subsequently, by reason of the Government having omitted to assert its right by taking actual possession, and, by reason of a subsequent change in the position of things, by which a channel once unfordable becomes fordable, the right which had been vested in Government is to become divested, and the land is to become the property of a private individual. It seems to me that the two states of things described in the third clause of section 4, Act XI of 1825, are not conditions one succeeding another, but opposite conditions. It is not that, if the channel be unfordable, the land is to be at the disposal of Government, and, on the channel afterwards becoming fordable, it shall be the property of the zemindar to whose estate it is contiguous ; but that the decision of the question whether the land is to belong to Government or to belong to the adjoining zemindar, depends on the question whether, at the time of the formation of such island, the channel on both sides of it be fordable or unfordable. I understand that the state of things existing at the time of the formation of the island determines the right, and that that right, once vested, is like any other vested right, not liable to be changed by the subsequent change of circumstances.

With these views, it seems to me I am bound to refer to the Full Bench a point on which I find myself in conflict with the decisions of other Judges of this Court, and that, therefore, the case must go before the Full Bench for a decision of this question (*reads*).

If the opinion of the Full Bench should be the same as that

which I have expressed, the plaintiffs' case, I think, will be at an end; but, if not, the case will have to come before the Division Bench again, in order to the determination of the other questions which arise.

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Baboo *Anuhul Chandra Mookerjee* (with him Baboo *Gopal Lal Mittra* and *Srinath Das*) for the defendants.

The chur belonged to the defendants, who were in possession. If it belonged originally to Government, and Government relinquished its right leaving the chur to the defendants, the right which thus once became vested in the defendants cannot be divested again. The defendants have a better title than the plaintiffs.

The subsequent silting up of the channel will not divest property which has once become vested in a riparian owner by accretion. In *Golam Ally Chowdhry v. Gopal Lall Tagore* (1), Mr. Justice Phear, apparently, merely followed the ruling of the Chief Justice in *Mohini Mohun Doss v. Juggobundoo Bose* (2), though the case is not mentioned in the judgment.

The state of the chur at the time of its formation is to be looked at for the purpose of deciding whether it belongs to the Government or not. The year mentioned in clause 3, section 4, of Regulation XI of 1825, is the year of its formation. It cannot mean the year of re-survey; nor does it refer to any other period.

The true construction of section 4 of that Regulation is that put upon it in *Kali Prasad Mazumdar v. The Collector of Mymensing* (3.)

(1) 9 W. R., 401.

(2) *Id.*, 312.

(3) Before Mr. Justice Norman and Mr. Justice Mitter.

KALI PRASAD MAZUMDAR AND OTHERS
(PLAINTIFFS) v. THE COLLECTOR OF
MYMENSING AND OTHERS (DEFEND-
ANTS.)*

The 22nd April 1870.

THIS was a suit for possession of land which had re-formed on the site of the plaintiff's land which had been washed

away. The plaint stated that the stream of the river Jumonye, which flows through the east of the plaintiff's talook, mouza Beyarra, had gradually washed away a large portion of the land on the eastern part of the said mouza, leaving some *asli* (original) land towards the west thereof; that in 1868, the said river having again receded gradually to the east, eight thousand bigas of land re-formed on the site of the land which had diluviated, and in contiguity with the existing *asli* land; that the

* Regular Appeal, No. 18 of 1869, from a decree of the Judge of Rajshahye, dated the 15th September 1838.

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Act IX of 1847 merely lays down a procedure. It does not alter the substantive law as to the rights of parties to a new chur.

land so re-formed was the property of the plaintiff, and that the defendants had forcibly kept him out of possession. Hence the present suit.

The defendant Khaja Enyetoolah Chowdhry set up that certain land on the west of khas chur Shaporee was, after release by Government, held by the defendants Bendee Sirdar and others, owners of Beltoya, as the re-formation after diluvion of the land of Shaporee; that the remaining land was held by him and his co-sharers as part and parcel of Choto Peary and Nowda Peary, *alias* Boro Peary; that the lands in dispute had re-formed for upwards of 12 years, and he and his co-sharers were in possession of the whole of the re-formed lands through their farmer; that the suit was barred by clause 1, section 12, Act XIV of 1859; that after diluvion of a portion of Choto Peary and Nowda Peary, churs were formed in 1846-47 on the site of the diluviated land of the said mehals; and that the said lands have been held by him and his co-sharers as his and their property.

Kisto Kumar Sein Bendee and others set up that a portion of the land claimed appertained to their mouza Shaporee; that the plaintiff's suit was barred by lapse of time; that after diluvion, the lands of Shaporee and Choto Peary, &c., a chur formed in the river before 1846; and that they had taken possession of the *pywast* (re-formed) land as appertaining to Shaporee.

The Judge of Rajshahye raised, *inter alia*, the following issues:—

"Is it barred by the general, or by any special, law of limitation, or by clause 6 of section 1 of Act XIV of 1859?"

"Is the land accretion to plaintiff's village, mouza Beyarra, or to the Government khas mehal chur Shaporee, released Shaporee, and the villages Choto Peary, Boro Peary, and Sherajunge."

He found upon the evidence that the plaintiff had failed to prove his case, and accordingly dismissed the suit with costs.

The plaintiff appealed to the High Court.

Baboos Sreenath Doss, Romesh Chunder Mitter, and Tariny Churn Bhattacharjee for the appellants.

Mr. Paul (Baboos Juggadanand Mookerjee, Kissendyal Roy, Shosheebhoosun Sen, and Anand Chandra Ghosal with him) for the respondents.

NORMAN, J.—The Judge raised an issue whether the suit is barred by limitation, and I certainly think that if I were compelled to rest our decision on that ground, I might say that the plaintiff has not proved that he brought his suit within 12 years from the time when the defendants, their ryots and izardars, took possession of the lands in dispute, or of parts of those lands to the eastward, to which the rest subsequently accreted. It is clear that a great diluviation was going on in April 1853, which was fourteen years and eight months before the commencement of the suit. It is proved that as the land on the west of the stream diluviated, re-formation took place towards the east, which apparently assumed the shape of an island, and that such island formation was almost immediately occupied by ryots, whose houses, standing on the original lands of Choto Peary, had been washed away.

Even if Government is entitled to the chur under the law, the plaintiff has no right to sue for it.

The plaintiff contended that, assuming the land to have been formed as an island, his right of action accrued when the stream between the island and his land became fordable, and therefore he is not barred by limitation.

If that argument is well founded, the absurd consequence would follow, that though land originally formed as an island had been occupied and cultivated for twenty or even fifty years, still, if the channel between it and the main land filled up, the rights of the person in occupation of the island would be destroyed, and the riparian owner could acquire a right of possession which he might enforce by suit at any time within 12 years after the channel dried up or became fordable. We pointed out this consequence to the appellant's counsel, and he admitted that his argument must go to that length. I think that the true rule is, that a question as to the right to the possession of land either gained by gradual accession, or re-formation, or thrown up in a river, or the sea, must be determined by an enquiry into the condition of the land when it was originally gained by alluvion, or thrown up and became the subject of property and capable of cultivation, or occupation, as such. A very good illustration of this is to be found in the Roman Law Digest, Book XLI, title I, section 56; see also the same book, sections 30 and 38.

It is evident that some sort of right must then accrue to the first occupant.

If, after the land comes into existence, and is capable of cultivation, it is taken into possession and occupied by any one, his possession is at least adverse to that of any one else.

It is difficult to see how a right which has once accrued can be divested by any change in the condition of land adjacent to that in which such right exists, and therefore one would think that if land comes into existence and becomes the subject of property as an island in a navigable river, the fact that the channel between it and the main land dries up subsequently cannot destroy rights of property or possession which any person may have acquired in it while it continued to be an island. As an island, it must be presumed to be at the disposal of Government. If it is taken possession of and cultivated by any person, the Government may have a right against him. But his possession is good, and constitutes a right as against all persons except the Government.

The subsequent drying up of a channel between the island and the shore cannot affect his right to insist on his possession as a good title as against every body, except the Government, or one who can show a better title than himself. There is nothing in the 3rd clause of section 4 of Regulation XI of 1825 which militates against this view. The clause in question does not in fact provide for the case of an island thrown up in a river, which, at the time when it becomes capable of being occupied or cultivated, in other words, a subject of property, is separated from the lands most nearly adjacent to it by an unfordable channel further than to declare that such island shall be at the disposal of Government. But if the Government does not think fit to lay claim to it, the case will fall within the 5th clause of section 4, which enacts that in all other cases, viz., "in

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Suppose there is an accretion to the estate of a riparian owner in 1851, that proprietor is entitled to it under clause 3 of section 4, Regulation XI of 1825; then, suppose in 1853, the channel between this increment and the *asli* land becomes unfordable, and the channel on the opposite side of the chur becomes dry, and in the subsequent rainy season of 1854, both the channels become unfordable, water having rushed into both of

" all cases of claims and disputes respecting land gained by alluvion or by dereliction of the river or the sea which are not specifically provided for by the rules contained in this regulation, the Courts of Justice in deciding upon such claims and disputes shall be guided by the best evidence they may be able to obtain of established local usage, if there be any, applicable to the case, or if not, by general principles of equity and justice."

By Act IX of 1847, the right of the Government to come in and claim possession is postponed till the time of re-survey. But it is difficult to say how that Act can affect any question between the person in possession and any person other than the Government.

I confess myself unable to assent to the rule supposed to be laid down in *Wise v. Ameerunnissa Khatoon* (1), that the status of the land at the time of the re-survey is to be looked at in determining questions between rival claimants when the Government is not one of such claimants.

There is no evidence of any special local usage applicable to the case before us.

The defendant's case as proved is this. He is a person on the site of whose diluviated villages an island has re-formed more than 14 years ago; immediately upon such re-formation, he took possession of the re-formed

lands at a time when there was no one except the Government who could have possibly contested his claim, the land which at that time most nearly adjoined to such re-formations being the remaining lands of his own village of Choto Peary. The plaintiff is a person to whose estate the land so taken possession of has, after a long course of years, become adjacent partly by the gradual diluviation of the remaining lands of the defendant's estates of Choto Peary, and partly (if the plaintiff's story on that point is accepted, and for the purposes of the present argument I do accept it) by the *sata* or branch of the river between the island and the plaintiff's estate of Beyarra becoming fordable.

I have not the smallest difficulty in saying that as between these two claimants on general principles of equity and justice, I must pronounce that the defendant is entitled to the land in dispute.

The appeal must therefore be dismissed with costs.

MITTER, J.—I concur in dismissing this appeal. The plaintiff has completely failed to make out the case with which he came into Court; and I do not think that he is now entitled to rest his claim on clause 3, section 4, Regulation XI of 1825. No issue was joined on this point, and no evidence has been given. I decline to give any opinion on this point.

them, will it be said that that property would change from the first riparian proprietor to the second, eventually become the property of Government as an island, and thus the proprietary right be fluctuating as often as the stream changes its course? Act IX of 1847 also requires the several changes in the feature of the chur to be noted down in the map to be prepared at the residency; what can be the object of that, if not to ascertain how the land originally formed, and therefore to enable Government to see whether it has any right at all or not to lay hold of it as an island chur.

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Baboo *Kalimohan Das* for the plaintiffs.—The plaintiffs claim the chur on two grounds: (1), as a party who was in possession; (2), under clause 3, section 4, Regulation XI of 1825. The Judge has not decided the first ground of the plaintiffs' claim, but he gave them a decree under clause 3, section 4, Regulation XI of 1825, finding as a fact that the intermediate channel silted up long ago.

The ruling of Peacock, C. J., and L. S. Jackson, J., in *Mohini Mohun Doss v. Juggobundoo Bose* (1) is correct and good law. The words of the clause 'in any season of the year' points to the conclusion that the status at the time of formation is not to be taken into consideration. Suppose a chur is formed in the rainy season, surrounded by unfordable streams on all sides, and one of these streams becomes fordable in the dry season, how is the law to be applied to such a case? Act IX of 1847, and *Wise v. Ameerunnissa Khatoon* (2), and *Wise v. Moulvie Abdool Ali* (3) support this view. It was to meet this difficulty in the way of the Government that the Bengal Council passed Act IV of 1864. This Act has no retrospective operation. A chur can hardly be said to be formed or thrown up, unless it has undergone all the process of formation until it has attained full development on all sides: otherwise, although the undermost stratum of the chur may be already contiguous to a stratum of the adjacent estate, still because there is no fordable water over the stratum so situated at the day or month a portion of the chur emerges into view, the riparian owner is not to have

(1) 9 W. R., 312.

(2) 2 W. R., 34.

(3) 2 W. R., 127.

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the benefit of the law even if the channel silts up on the succeeding day or month. Was this the intention of the Legislature?

The chur is not even now in a condition fit for cultivation or occupation, and no right of property can vest in such a subject-matter—*Kali Prasad Mazumdar v. The Collector of Mymensing* (1). This case is one provided for in the 5th clause of section 4, Regulation XI of 1825; and as the defendants have no title whatever, and the lands are and have been long since contiguous to the plaintiffs' estate, the plaintiffs are entitled to a decree. The defendants are mere squatters—*Wise v. Ameerunnissa Khatoon* (2). Plaintiffs are not bound to make out a title against the Government or any other party, except the defendants in the case.

The following judgments were delivered by the Full Bench :

COUCH, C. J.—The question which has been referred to us in this case is this (*reads*).

Now, the third clause of section 4, Regulation XI of 1825, is : “When a chur, or island, may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land, tenure or tenures of the person or persons whose estate or estates may be most contiguous to it.” I cannot see in the words of this Regulation that any other period for determining whether the land is to be treated as a chur, or island, which is to be at the disposal of Government, or an accession to the land of the person whose estate may be most contiguous to it, is indicated than when it is thrown up, or at the time of its formation. The first part of the clause clearly points to that, and I do not think that the latter part, where it is said, “If the channel between such island and the shore be fordable at any season of the year,” can alter that interpretation, and render it right to hold the period to be one which may fluctuate; and that,

(1) *Ante*, p. 261.

(2) 2 W. R., 34.

although at the time when the land is thrown up or formed it may be an island, which should be at the disposal of Government, yet at a subsequent period that state of things may change, and the land belong to the person to whose estate it is most contiguous. If the time at which the island is thrown up or formed is not taken, I do not see in this Regulation any other time which can be. It certainly could not be intended that the right to this, whether in the Government, or in the person to whose estate it was most contiguous, was to remain in suspense until some persons took possession of it. The natural construction therefore seems to me to be that the time when the chur is thrown up or formed was intended to be the criterion. It would always be a question of fact in each case what is that precise time when the chur could be properly said to be thrown up or formed; but in answering the question referred to us, and in putting a construction on the Regulation, we have only to lay down what is the general rule; and I think the Regulation means that the time of the formation of the chur or island is the time when the right either of the Government or of the owner of the contiguous land is to be determined.

Then does Act IX of 1847 make any alteration as to what was the state of the law under that Regulation? That is stated to be "an Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction;" and the first section enacts "that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment of lands gained from the sea or from rivers, by alluvion or dereliction, or regarding the right of Government to the ownership thereof, shall, from the date of the passing of this Act, cease to have effect; and that all such investigations pending shall be discontinued, and measures that are afterwards to be taken for the assessment of the lands or for the assertion of the right of Government shall only be under the provisions of that Act."

Now, looking at the first section, the Act does not appear to have been intended to do more than make different provisions for the investigations regarding the liability of the lands to assessment or the rights of the Government, and it was not intended

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to alter in any way the right which existed in the law before that Act was passed. Then it provides by section 3 for the making of a new survey of the lands at certain times,—that is, whenever ten years shall have elapsed from the approval of any prior survey by the Government, and for the preparation of new maps according to the new survey ; and then section 7 states “that whenever, on inspection of any such new map, it appears to the local Revenue Authorities that an island has been thrown up” which, under Regulation XI of 1825, is liable to be taken possession of by Government, “the said local Revenue Authorities “shall take immediate possession of the same for Government, “and shall assess and settle the land.” These words do not appear to me to show that the right of Government does not take effect until they take possession, and that the period when the different rights are to be determined is after the re-survey or map is made. There is nothing to my mind in the provision which prevents the Government, when it appears on the survey that an island had been thrown up which the Government would be entitled to under Regulation XI of 1825, from taking possession of it, although before possession is actually taken there may have been a silting up so that there is no channel between the chur and the adjoining estate. In order to alter the law under the Regulation, I think there ought to be a clear manifestation of the intention of the Legislature, but there is no such intention manifested in this enactment. What the Act seems to me to have intended to do was to prevent the great inconvenience which might arise from surveys being made at different times, probably of small portions of land at a great expense, perhaps much greater than the property would be worth, and adopt a system of having the surveys at stated periods, so that whatever rights might be found to have accrued to the Government with regard to lands of this description, those rights might be enforced. It did not, I think, alter the period which had been fixed by Regulation XI of 1825 for determining whether the right existed or not,—*viz.*, the period of the formation of the chur or island,—and lay down the time of the survey or the preparation of the map as the period when those rights actually accrued. That being so, I do not think that the plaintiffs have, in

this case, got a title which they can enforce against the defendants. We are not now to determine any question as to the facts or what the rights of the parties on a full investigation of the circumstances of the case may appear to be. All that we have now to do is to answer the question which has been referred to us, and I think that the time of the formation of the chur,—that is, the time when the chur, or island, is thrown up, is the period we have to look to in determining whether the Government has the right to dispose of it, or whether the owner of the land to which it is most contiguous has that right.

I would answer the question in these terms.

BAYLEY, J.—I am also of opinion that the time when a chur forms is the period which should be taken as the criterion for determining the rights of the parties. I think Regulation XI of 1825 generally, and clause 3, section 4, especially, supports this view. The whole Regulation purports to lay down certain rules for determining the different rights that accrued to Government and the landowners respectively, under various states of circumstances,—*viz.*, in cases of disruption, in cases of accretion, in cases of re-formation on the original site, and in cases of dereliction of the river, and further, as here, in cases where land is thrown up as an island in the midst of a large navigable river. It is laid down that an island so formed shall be the property of Government if the channel between such island and the shore be not fordable at any season of the year; but that, if the intermediate water be fordable at any season of the year, it shall be considered an accession to the land of the person to whose estate it is most contiguous. In short, the Regulation defines, in its terms and by its context, the rights of parties according to the character of the particular chur land at the time when the land formed out of water, with reference to the means by which it may have formed, as those means are set forth in the various clauses of the Regulation, especially of section 4. It is in this view the law enacts that if the land formed be an island surrounded by unfordable water, the island so formed should, on its appearance as such, be the property of the Government. The character of the formation at the forming should be the criterion for determining the

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rights of the parties whether by accretion, disruption, re-formation, &c. I would not have considered it necessary to say anything more than express a concurrence with the learned Chief Justice, had it not been for the two cases decided by myself and Mr. Justice Campbell cited in support of a contrary view. Mr. Justice L. S. Jackson, in referring to those cases, states in his judgment that those cases were exclusively with reference to the provisions of Act IX of 1847. This is right. The arguments there were almost exclusively confined to the construction of Act IX of 1847, though in connection with Regulation XI of 1825.

In regard to the other precedents quoted, I think it necessary merely to refer to the one decided by Sir Barnes Peacock and Mr. Justice L. S. Jackson—*Mohini Mohun Doss v. Juggobundoo Bose* (1). In that case, although the opinion of the late Chief Justice has been given in a way that seems to contradict the view that I am now expressing, still I think it quite clear, that that case did not turn, as this does, on the question whether the state of the chur at the time of its formation, or at any subsequent period, is the criterion for determining the rights of the parties to it.

KEMP, J.—I concur with the learned Chief Justice..

JACKSON, J.—I also concur in the opinion stated by the Chief Justice; and in expressing that concurrence, I have very little to add to what I have already stated in referring this case for the consideration of the Full Bench. I was not at that time aware of the case, which has been cited, of *Kali Prasad Mazumdar v. The Collector of Mymensing* (2), which had been then, no doubt, decided, but had not been reported. If I had been aware of that case, I should have been considerably strengthened in my opinion.

The vakeel for the respondent in this case admitted, in the outset of his argument, that he did not contend that rights once vested could afterwards become divested by the occurrence of certain natural phenomena. That being so, one would have supposed that the whole case was conceded; but it appears from

(1) 9 W. R., 312.

(2) *Ante*, p. 261.

expressed by me. In that case, the Division Bench was made acquainted with the decision which I think had at that time been only very recently passed by an Appellate Bench of this Court,—namely, the decision in *Mohini Mohun Doss v. Juggobundoo Bose* (1), and felt itself bound by it. Indeed, if my memory serves me correctly, there was no contest in *Golam Ally Chowdhry v. Gopal Lall Tagore* (2) upon this point. Both parties assumed that it was settled, so far as a Division Bench was concerned, by the decision of the Appeal Bench. The real subject of decision in that case was the question which is dealt with in the latter part of the judgment,—namely, whether or not the fact of the silting up of the channel taking place after the whole chur had undoubtedly become the property of one of the riparian proprietors, could have the effect of transferring the ownership of a portion of the chur to another adjoining riparian proprietor.

I think that the answer to the question which has been proposed to us should be given as the Chief Justice suggests.

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[APPELLATE CIVIL.]

*J.R. 2 Cal. p. 46,
J.R. 2 Cal. p. 315.
J.R. 5 Cal. p. 603.*

*Before Sir Richard Couch, Kt., Chief Justice; Mr. Justice L. S. Jackson,
and Mr. Justice Glover.*

*W. R. ARBUTHNOT AND OTHERS (PLAINTIFFS) v. C. D. BETTS AND
OTHERS (DEFENDANTS.)**

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*Plaint—Issues—Amendment—Variance between Case in Plaintiff and Evidence—
Act VIII of 1859, s. 141.*

The plaintiffs sued the defendants for damages for breach of contract, alleging in their plaint that they had agreed to sell, and the defendants to purchase, certain Indigo seed, but that the defendants had refused to take delivery, although the plaintiffs were ready and willing to deliver the same.

Upon the evidence of [redacted] it appeared that there was no contract as alleged in the plaint, but the true fact, as shown by them, was that they (the plaintiffs) were to purchase se

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The Judge dismissed the suit, on the ground that the plaintiffs were bound to prove their case as stated in the plaint.

W. R. AR-BUTHNOT *Held*, that the suit ought not to have been dismissed on that ground. The issues raised admitted of the true question being tried,—*viz.*, whether, under the circumstances, the defendants were liable to pay the price of the seed; and, if they did not, the Court ought to have amended the issues, or framed additional ones. The object of the plaint is merely to bring the matter in dispute before the Court, but it is for the Court, upon the statements before it, to determine the real issue between the parties (1).

THIS was a suit for the recovery of damages for breach of contract, laid at rupees 13,011-1-8. In the plaint it was alleged that Mr. Betts, manager and partner of the Arangabad Concern, Moorshedabad, for self and on behalf of the other partners of the Concern, in February 1868, entered into a contract with the plaintiffs for the purchase of 1,012 maunds of Madras Indigo seed; that the contract bound the plaintiffs to the sale, and the defendants to the purchase, of that quantity of Indigo seed; that the plaintiffs were ready to deliver the seed; but that the defendants refused to take delivery,—hence the present suit.

The defendants, in their written statement, denied the plaintiffs' right of action. They stated that the defendants had given order to the plaintiffs for the purchase of 1,000 maunds of fresh and superior kind of seed, but that the plaintiffs had purchased seed of an inferior sort; that the defendants had, on inspection of the samples, refused to take over the seed; that the agreement had been broken on the part of the plaintiffs, and therefore they had no right of action.

Issues were framed upon the plaint and written statement.

From the evidence of two of the plaintiffs, it appeared that they did not enter into the contract alleged in the plaint, but agreed to buy for the defendants as their agents.

It was then objected, on behalf of the defendants, that the suit could not proceed in its present form, as the plaint distinctly stated that a contract of bargain and sale was entered into with the defendant, Mr. Betts; whereas the two plaintiffs, in evidence, denied that any such contract was entered into with the defendant, and stated that

upon which the Judge raised the following issue: "Whether, as two of the plaintiffs have stated that they acted as agents for the defendants in the purchase of Indigo seed, the suit can proceed in its present form or not?" And he held that the plaintiffs were bound to prove their case as stated in the plaint; that their denial of the existence of the relation of vendor and purchaser between themselves and the defendants was fatal to their claim; and citing *Narainee Dossee v. Nuohrrurry Mohonto* (1) and *Kunjabehari Lal v. Giridhari Lal* (2), dismissed the plaintiffs' suit.

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The plaintiffs appealed to the High Court.

Mr. Paul (Mr. Collis with him) for the appellant.

Baboos Srinath Das and Ashutosh Dhur for the respondent.

Both parties were heard on the preliminary point as to whether the High Court, if it were of opinion that the decision of the lower Court could not be supported, should remand the case under section 354, Code of Civil Procedure, or proceed to try the case on its merits.

COUCH, C. J.—I think, looking at the letters, and the invoice which was annexed to one of them, that of the 9th May 1868, that the plaintiffs were, as one of them stated, acting as agents for the defendants in making the purchase. The first letter is ambiguous in this respect, because, coming as it does from the plaintiffs, it says: "If you send us an order we will endeavour to execute it to the best of your interests." That might be an order to them, and indicates that they would sell the seed to Mr. Betts; but then from the following letters it appears that this is not what was intended, because the letter of the 13th February 1868 says: "I have this day despatched a telegram to you requesting you to secure at once, on the most favorable terms, one thousand (1,000) maunds best fresh indigo seed;" and then the telegram of 21st February is: "Bought 1,000 maunds seed, ten rupees per maund. Do you want more?" The telegram is not that of a person who is selling seed to the

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defendants, but of one who was acting as agent or broker in making purchases of seed. And the invoice which I have referred to makes it clear that it was in that character that the plaintiffs were acting, because I find that they include in the invoice the price of 425 bags of Indigo seed, at rupees 20 each bag, charges for freight, shipping, warehouse rent, fire insurance, telegrams, and petty charges; and they charge a commission at 5 per cent. upon those sums, making out their claim not as persons selling the seed to the defendant, but as agents for the purchase of it.

The plaint, therefore, was not correctly framed, but then the question arises, whether, notwithstanding that, the Judge was right in dismissing the suit.

Now the plaintiffs having acted as agents, if they had paid for this seed, as I think there is no doubt they did, they would have been entitled to recover from the defendants the money which they had paid, unless there was something in their conduct with regard to the purchase which would prevent it. And if they were the sellers, they would be entitled to recover the price of the seed, if it was of the quality and description which had been ordered, and which the defendants would be bound to take. As regards the substantial defence in this case, the form of the plaint made no difference. If the seed was not such as the defendants had ordered, they would not be bound to take it or pay for it; and if it was not such as they had employed the plaintiffs to purchase, the plaintiffs would not have acted properly as agents, and could not recover any money which they might have expended in purchasing such seed as they had not been ordered to purchase. They would have to suffer the consequences of their own negligence in not purchasing seed of the description which had been ordered.

So that, substantially, the question to be determined was, whether, under the circumstances, the defendants were liable to pay the price of the seed; and the issues which were raised are issues which admitted of that question being tried. The third issue was, "what were the exact terms of the contract entered into between the plaintiffs and the defendants." Upon that it was right and proper for the Judge to find what really was the contract between the parties, whether it was a contract for purchase

or of employment as agent to purchase from other persons. Then the fourth issue was, "have the plaintiffs fulfilled their part of the said contract,"—that is, the contract which would be found upon the third issue. The Judge might then have enquired and determined whether the plaintiffs had put themselves in a position to entitle them to recover this money. And the fifth issue is, "are the plaintiffs entitled to a decree, and if so, to what extent?" So that in reality no amendment of the issues would have been necessary.

Section 141 of the Code of Civil Procedure says that, "at any time before the decision of the case, the Court may amend the issues, or frame additional issues, on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties, shall be so made." What the Act directs, and what the whole procedure of the Code requires, is, that the real question in controversy between these parties shall be determined; and in order to determine that, the Court is authorized to frame such issues, and to make such amendments as may be necessary.

The Judge, I think, was wrong in saying that he was bound to try the suit in the manner in which the plaintiffs framed their plaint. The object of the plaint is to bring the matter in dispute between the parties before the Court, but, upon the settlement of issues, the Judge is to ascertain what is the real question to be tried; and at the hearing, if he can, either upon the issues already framed or upon amended issues, determine that question he ought to do so. Instead of dismissing the plaintiffs' suit on an objection taken to the frame of the plaint, the Judge ought to have enquired into the merits of the case. I think we must now hear the case upon the merits.

JACKSON, J.—I am of the same opinion. I think that the Procedure Code does not prescribe or even encourage parties to do anything more than state broadly and simply the facts upon which they rely, and the relief which they ask for. The Procedure Code, it appears to me, does not limit the parties to particular forms of action; and provided that the facts upon which the plaintiffs rely are fully disclosed in the plaint and

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1870 written statement, it rests entirely upon the Court to attach the legal consequences to those facts, and award to the plaintiffs the relief to which those facts entitle them. Section 32 points out that, even if the plaint on the face of it should not disclose a cause of action, yet, after questioning the plaintiff, if that cause of action appear, the Court may proceed with the trial; and the Court may, in any case where there is a deficiency in that respect, allow the plaint to be amended so as to disclose a sufficient cause of action. It is quite clear that it is not because one of the plaintiffs in his evidence made a statement as to his view of the relation between the parties which was at variance to that set up in the plaint, that the plaint was therefore to be thrown out and the suit to be dismissed. I think the Judge ought to have framed and tried the issues on the merits.

Appeal allowed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

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Feb. 3. IN THE MATTER OF THE PORT CANNING LAND INVESTMENT,
RECLAMATION, AND DOCKING COMPANY, LIMITED.
JAYA KRISHNA GANGOOY's CASE.

Director of Public Company—Trustee—Appointment of Partner of Director to do Work for Company—Rule that Trustees must not make Profits of their Trust—Solicitor.

Although a director of a Public Company is always clothed with a fiduciary character in regard to any dealings with property of the Company in his capacity of director, the rule that a trustee is not allowed to make a profit of his trust does not apply to such a director, *quâd* director only. When a partner of one of the directors of a Company did work for the directors as solicitor, and there was nothing to show that he had not been duly appointed by the directors, his claim in respect of such work was allowed.

Distinction drawn between a trustee and a director of a Public Company.

THE Port Canning Company being in voluntary liquidation, Baboo Jaya Krishna Gangooly sent in a claim to the liquidators for the sum of rupees 2,228-5, being the balance due to him in

respect of certain taxed and untaxed bills of costs for business done by the claimant as solicitor to the Company. The liquidators, Sadanand Balkrishna and Manakji Rastamji, refused to pay more than the out-of-pocket costs incurred by the claimant, and the matter was adjourned into Court.

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Mr. Lowe for the liquidators.—We object to pay more than the out-of-pocket costs, because the claimant was in partnership with Mr. Judge during the time he acted for the Company, and Mr. Judge was one of the directors. The case falls within the rule laid down in England that, where a trustee employs himself or his partner to conduct the business of the trust, neither he nor his partner is entitled to more than the out-of-pocket costs. [PHEAR, J., referred to *Clack v. Carlon* (1)]. In that case there was a special agreement between the partner and the trustee that the latter should not have any share in the profits to be realised from the trust business. Here there is no allegation to that effect.

Mr. Kennedy for the claimant.—There is nothing in the record to show that the claimant was Mr. Judge's partner, and the Court will not take judicial notice of the partnership. [PHEAR, J.—But there is no doubt that these gentlemen are partners. If, however, you contest the point, I will allow the liquidators an opportunity of formally proving the fact.] I have no objection to that, but shall ask for opportunity of showing the precise relation of the parties, and the manner and nature of the appointment of J. K. Gangooly. [PHEAR, J., said that opportunity, if necessary, should be given.] But I contend that the rule as to trustees does not apply. Directors of Companies are not trustees but agents—Thring's Joint Stock Companies' Act, pages 86 and 87; *Orr v. The Glasgow, Airdrie, and Monklands Junction Railway Company* (2), *Chambers v. The Manchester and Milford Railway Company* (3). The reason trustees are not allowed their costs is that they should not make a profit of their trust—*Cradock v. Piper* (4). They are

(1) 7 Jur., N. S., 441.

(2) 6 Jur., N. S., 877.

(3) 33 L. J., Q. B., 268.

(4) 1 Mac. & Gor., 664; see 679.

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IN THE MATTER OF THE PORT CANNING LAND INVESTMENT, RECLAMATION, AND DOCKING COMPANY, LIMITED. the persons in contemplation of the law owners of the estate ; and if they choose to act as attorneys for themselves, they cannot charge for their services, but they may charge for professional services for the *cestui que trust*—*Fraser v. Palmer* (1), *Clack v. Carlon* (2). The case of directors is different. They are allowed a remuneration for their services. But even as regards trustees, Lord Cottenham held, in *Cradock v. Piper* (3), that, if a solicitor-trustee acts for himself and his co-trustees in a suit, he would be entitled to his whole costs. [PHEAR, J.—Has not Lord Cranworth differed from that in *Broughton v. Broughton* (4)]. There is a difference between the report of the case in the *Jurist*, and that in the authorized report (5). According to the latter report, he says that he does not understand the reasoning of Lord Cottenham ; but that if the facts of *Broughton v. Broughton* (4) were similar to *Cradock v. Piper* (3), he would be bound to follow Lord Cottenham. [PHEAR, J., referred to *In re The Anglo-Greek Steam Navigation and Trading Company* (6).] That case cuts both ways. *Cradock v. Piper* (3) is rightly decided, and the principle there laid down clearly governs this case. He also cited *Broughton v. Broughton* before Stuart, V. C. (7), *Lincoln v. Windsor* (8), *Fraser v. Palmer* (1), *Moore v. Froud* (9).

Mr. Bonnerjee on the same side.—Assuming that the rule as to trustees applies here, it is clear that, where there is an agreement that the trustee-solicitor should be allowed his whole costs, the Court will enforce this agreement, and allow the costs—*Douglas v. Archbutt* (10). Under the Articles of Association of this Company, directors when employed in extraordinary work are authorized to charge for such work. It is submitted that, if Mr. Judge had himself acted as solicitor for the Company, he would have been legally entitled to all his costs.

Mr. Lowe in reply cited *Robinson v. Pett* (11), *Collins v. Carey* (12), *Ex-parte Newton* (13), and *Christophers v. White* (14).

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| (1) 4 Y. & L., 515. | (8) 9 Hare, 158. |
| (2) 7 Jur., N. S., 441. | (9) 3 My. & C., 45. |
| (3) 1 Mac. & Gor., 664 : see 679. | (10) 2 De Gex. & J., 148. |
| (4) 1 Jur., N. S., 965. | (11) 3 P. W., 249; 2 Wh. & T. L. C., 219. |
| (5) 5 De Gex. M. & G., 160. | (12) 2 Beav., 128. |
| (6) 12 Jur., N. S., 323. | (13) 3 De. Gex. & S., 584. |
| (7) 2 Sm. & G., 422. | (14) 10 Beav., 523. |

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PHEAR, J.—I think the result of the cases is that directors of public Companies are, generally speaking, better designated as agents of the Company than as trustees. As regards strangers, they are the agents of the Company through whom the Company necessarily acts. But as regards the shareholders they are still always clothed with a fiduciary character in reference to any dealings with property of the Company, which they have in their capacity of directors. And it not seldom happens, moreover, that they are, in special cases at any rate, in the strictest sense trustees of the shareholders. Whether or not, then, in any given matter a director of a Company is to be treated as a trustee, and if so to what extent, is, I apprehend, a question of fact. And I am not prepared to say, in the matter before me, that Mr. Judge was so far a trustee of the Port Canning Company as to fall under the rule which would forbid him or his partner to receive professional profits for work *bond fide* done on behalf of the Company. In *Cradock v. Piper* (1), Lord Cottenham decided that, in the case of a trustee being employed professionally on behalf of himself and his co-trustees who were parties to a suit, in the matter of the suit, the rule did not apply. In *Broughton v. Broughton* (2), Lord Cranworth commented upon the reasons given by Lord Cottenham for this decision, and expressed the difficulty which he felt in accepting them. Lord Cranworth, according to the authorized report (3), seems to have said that he should consider that he ought to follow the judgment in *Cradock v. Piper* (1) so far as it was a judicial decision, but no further; and inasmuch as in the case of *Broughton v. Broughton* (2) then before him, the work charged for was not work done in a suit, he did not, in fact, follow *Cradock v. Piper* (1). Indeed, Lord Cranworth took occasion to lay down the rule even in more comprehensive terms than those in which it had been enunciated in argument before him. He says :—

“The rule, as stated at the bar, that a trustee is not to be allowed to make a profit of his trust, is not in my opinion stated in a sufficiently strong manner. The rule is based on a rule of human nature, that no person, having a duty to perform, shall

(1) 1 Mac. & Gor., 664: see 679.

(2) 1 Jur., N. S., 965.

(3) 5 De Gex. M. & G., 160.

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" be allowed to place himself in a situation in which his interest " and his duty may conflict; and such is the case when a trustee, " though he might employ others to do certain things, and pay " them out of the trust-fund, does them himself, and takes pay- " ment from the trust-fund. The good sense of the rule is obvi- " ous, because it is one of the important duties of a trustee " placed in a fiduciary character to take care that no improper " charges are made for the performance of the business" (1).

Under that expression of the rule I think that, if Mr. Judge had really undertaken to manage a particular work of the Company, apart from the rest of the directors, and at their request, he would in regard to that work have placed himself in the situation of a sole trustee; and that if he, so circumstanced, employed his partner professionally concerning that particular matter, the partner would be forbidden by the practice of the English Court of Equity from taking the profits. But unless something of this kind be the fact, I do not think a director of the Company, *quâ* director only, is such a trustee as falls under the rule, for this reason among others,—namely, he is but one of a body or board of several directors who, unlike trustees, manage the concerns of the Company in meetings assembled by the voice of the majority. Whereas trustees must, generally speaking, act together, and every one of them is personally liable for such breach of trust or omission completely to fulfil the trust as he is in any degree privy to, and which but for his laches he might have prevented. A trustee by his own voice may prevent anything being done in the trust which he thinks wrong, and generally he can insist upon anything being done which he thinks right. This is clearly not so with a director, who may be overcome by a majority of his colleagues, and therefore I think that a director generally, in the absence of special circumstances, does not fall within the strict application of the rule. I have nothing in the present case to lead me to suppose that Mr. Judge even procured the employment of his partner by the board. If the claimant was employed as solicitor of the Company by the directors generally in due course, as I must assume he was, that

employment would be perfectly right and proper, and binding on the Company, even though Mr. Judge himself objected to the work being done for which he was so employed. It cannot need to make the claim good that this particular test of Mr. Judge's disinterestedness should be given when nothing to the contrary appeared. I think, therefore, that, on the facts before the Court, the claim ought to be allowed.

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[PRIVY COUNCIL.]

MUSSAMAT UDEY KUNWAR (WIDOW OF KALLYAN SING), DEFENDANT, *v.* MUSSAMAT LADU (WIDOW OF BULDEO BUKSH), ROSHAN ALI, AND SHUJAUT ALI, PLAINTIFFS.

P. C.*
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ON APPEAL FROM THE HIGH COURT OF JUDICATURE, NORTH-WESTERN PROVINCES, AGRA.

Practice—Reference to a Judge of another Sudder Court—Relinquishment of a Mother's interest in favor of a Daughter-in-law and Son—Effect of Son's subsequent death.

The Sudder Court being equally divided, referred a case for the opinion of the High Court of Calcutta. The High Court at Agra having been established in the meanwhile, held, that the Chief Justice of that Court had power to hear and determine the case.

A widow, being old, presented a petition in a suit by her daughter-in-law, as guardian of the former's infant son, relinquishing all her rights in the property to the daughter-in-law herself, and as guardian of the infant. The son died, and the mother now sued her daughter-in-law for possession as heiress of her son. Held that, by the petition, the mother had transferred no rights to the daughter-in-law as proprietor, but that the mother, as heiress of her son, was entitled to the estate.

BULDEO BUKSH, the husband of the respondent Mussamat Ladu (1), had two sons, Kallyan Sing and Shib Lal.

Kallyan was married to the appellant, and died before his father, leaving the appellant a childless widow.

* Present:—THE RIGHT HON'BLE SIR JAMES COLVILE, LORD JUSTICE JAMES, AND LORD JUSTICE MELLISH.

(1) The other respondents were formal parties on the record, and did not appear.

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The younger son was thereupon placed under the charge of the appellant, as if he were her son, and an attempt was made in the course of the suit to make out that there was an adoption; but the appellant's counsel admitted that no such adoption could be made, there being no leave given by Kallyan, and the boy being Kallyan's own brother.

Buldeo Buksh had three estates: Tainkya, Omeepore, and Umlera.

The two last were in mortgage to one Dildar Ali Khan, and litigation was going on between him and Buldeo as to the effect of the mortgage, when the latter died.

Thereupon the appellant, on behalf of herself and as guardian of Shib Lal, filed a plaint to redeem the mortgage, her name and Shib Lal's being entered in the Collector's books as heirs of Buldeo.

The mortgagee objected that the respondent, as widow of Buldeo, was the proper person to sue.

Thereupon the respondent filed a petition in the suit, stating that she had no claim to the proprietary right, the appellant herself, as guardian of Shib Lal, being proprietor (1).

The appellant went on with the suit, and got a decree; and an appeal was preferred, when Shib Lal died, whereupon the respondent petitioned the Sudder Court, stating that she, as heir of her son, was alone entitled, the appellant being only guardian, and praying to be substituted for her in the suit.

The Sudder Court refused leave, on the ground of her having relinquished her rights, and, the appeal being dismissed, a decree was given for redemption, and the appellant in this suit was entered in the Collector's books as owner in place of Shib Lal, and she took possession.

The respondent, Mussamat Ladu, then brought the present suit for possession, and the Judge dismissed the suit (save as to the third property, which was not in the mortgage), on the ground of the respondent having relinquished her rights as above.

On appeal to the Sudder, that Court (2) affirmed the decree.

The respondent applied for a review of judgment, which was granted.

(1) The words of the petition are set out in their Lordships' judgment, *post*, p. 289. (2) Messrs. Lindsay and Simpson.

The case came on before Messrs. Edwards, Pearson, Ross, and Roberts, in March 1865.

The first two of these Judges held that the decree should be reversed, and the other two held that the appellant was only entitled to one-half, the other going to the respondent as her son's heiress.

The Judges being equally divided, they held that, under Regulation VI of 1831, section 7, it should be referred for the opinion of one or more Judges of the High Court at Calcutta.

In the meantime the High Court at Agra being established, the Chief Justice, Sir Walter Morgan, gave a decision in the case, which, in the record, was headed "opinion," and which was as follows:

"I agree with the learned Judges who think that the plaintiff's petition of August 1859 cannot be regarded as a disclaimer or relinquishment of any portion of the rights which are asserted by her in the present suit. She is, undoubtedly, the heir of her son Shib Lal, and entitled to the inheritance, unless she has transferred her rights wholly or in part to the defendant.

"She is supposed to have done so by the petition, or at least to have made such allegations therein as must now preclude her from maintaining this suit. But in my judgment she did not contemplate at that time the event which has since occurred, and her real intention was to cure the objection which had been made by the mortgagee to the prosecution of the suit for redemption by the now defendant (a stranger), who had (beyond her maintenance) no right in the property and was not the lawful guardian of the minor whose rights were then in suit. The whole of the property was the son's, and neither of the widows had any right or interest which the one could relinquish in the other's favour.

"It is possible that a person may by his acts preclude himself from asserting not only his present rights, but all others which may hereafter accrue to him; but this result does not follow from doubtful or ambiguous acts or admissions.

"In the present case, even if the language of the petition had clearly shown an intention to disclaim all interest whatsoever, present and future, in the property, the Court might well hesitate to give to it this effect.

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"Looking at the occasion when it was presented, and at the condition of the old woman at that period, and at the language employed, I should regard it as little more than an admission made for the purpose of that suit, though made in terms which might perhaps well tend to throw discredit on any subsequent assertion of the plaintiff inconsistent with the allegations in the petition. The weight to be fairly attached to it, depends upon a consideration of the whole of the circumstances under which it was made, not less than upon its words. As a document relinquishing or disclaiming the rights which the plaintiff now sues for (*viz.*, the inheritance), it seems to me to deserve little or no weight."

From the decree it appeared that the parties were represented by their pleaders when his Lordship gave judgment in favor of the now respondent.

Mr. J. D. Bell for the appellant.—The regulation under which the Judges directed the reference (1) does not apply; the only one that can be alleged to be applicable is Regulation IX of 1831, section 9, but even that cannot apply. The Charter of the High Court at Agra gave no jurisdiction to the Chief Justice to hear such a reference. His Lordship acted without any jurisdiction. If that Charter is to be applied at all, the appeal ought to have come direct to the Privy Council (2). He also referred to sections 12 and 13 of the Act 24 & 25 Vict., c. 104, constituting the High Courts. As to the facts, it is clear, there was a total relinquishment of the respondent's rights in favor of her daughter-in-law and son. The respondent cannot now dispute the appellant's claim—*Jones v. Kearney* (3).

Sir R. Palmer, Q. C., and Mr. Leith for the respondent.

Their LORDSHIPS' judgment was delivered by

MELLISH, L. J.—The first question in this case is, whether there was any jurisdiction in the Chief Justice for the North-

(1) VI. of 1831, s. 7.

(2) 1 Dru. & War., 134. See 160.

(2) S. 10, Brought Civ. Pro., 348.

Western Provinces to make the decree, from which the appeal is brought, in the Court below? Now the matter has been inquired into, their Lordships are clearly of opinion that there was such jurisdiction. The appeal had been brought to the Sudder Adawlut of the North-Western Provinces, and the Judges of that Court had given a decision. Then an application had been made for a review, and an order was made that the case should be heard on review. It was so heard before four Judges, who were equally divided in opinion. By the law, as it then stood, as appears by the order made at the end of their judgment, they being equally divided in opinion, the case was, under the provisions of section 7, Regulation VI of 1831, referred for the opinion of one or more Judges of the High Court of Calcutta. There was, however, a power, by the 24th & 25th Vict., c. 104, for the Crown to erect a Court in the North-Western Provinces, and by Letters Patent of the 17th March, 1866, the Crown did erect a High Court in the North-Western Provinces, which had the effect of abolishing the jurisdiction of the Sudder Adawlut. The consequence was that no final decision having been given on review, that proceeding was a proceeding pending, which was therefore to be decided by the new High Court of the North-Western Provinces. The 27th section of those Letters Patent is as follows:—“We do hereby declare that any function which “is hereby directed to be performed by the said High Court of “Judicature for the North-Western Provinces, in the exercise “of its original or appellate jurisdiction, may be performed by “any Judge,” and accordingly, Sir Walter Morgan (the Chief Justice) did sit, apparently as a single Judge. He appears to have heard the parties, and given his final decision, and that was the decision of the High Court of Agra, which their Lordships are of opinion had, under these circumstances, jurisdiction, and the appeal therefore is brought from that decision.

Now, the action itself is an action brought by one Hindu widow, Mussamat Ladu, against another Hindu widow, Issamat Udey, the widow of her eldest son, to recover three several properties. The only question before their Lordships relates to two of those properties, because, as to the third property, all the Judges below agree that the plaintiff was

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entitled to recover, and there is no appeal as to that. The plaintiff brought the suit on the ground that the defendant was in possession of the property, but that she, the plaintiff, was entitled to it as heir-at-law of her son Shib Lal, and there appears no question that she was such heir-at-law. The property had originally belonged to Buldeo Buksh. He had two sons, of whom one, the husband of the defendant in the suit, died in the life-time of Buldeo Buksh. There appears to have been some attempted adoption, that is to say, Buldeo Buksh and Mussamat Ladu appear to have attempted to give their second son, who was an infant, as an adopted son to the widow of their eldest son. But it is admitted that for various reasons that adoption, if it were ever attempted, was wholly invalid according to Hindu law, if for no other reason, at any rate for this reason, that the husband of the widow who made the adoption had never given any permission to the widow to make such adoption, and it was admitted before us that the adoption was wholly invalid.

Well then, that being so, it is plain that the son Shib Lal on the death of Buldeo Buksh became solely entitled to the property, and upon his death his mother became entitled as his heir; and therefore, if the matter remained there, it is admitted that she would be entitled. But it is alleged that she had done certain acts and become a party to certain documents, the effect of which was, at any rate as to these two latter portions of the property, to prevent her from recovering.

Buldeo Buksh had mortgaged these two properties in question, and a suit had been commenced, first in the name of Shib Lal by his assumed guardian, probably in the first instance on account of this invalid adoption, against the mortgagees to redeem the mortgage, which was resisted by them on the ground, which it is now quite immaterial to consider, that the mortgage had been a real sale. Some proceedings had also taken place for the mutation of names; and it would appear that in those proceedings for the mutation of names, the Collector and the parties had wrongfully assumed that the two widows and the son were jointly heirs of Buldeo Buksh. Then it was said that the plaintiff being old and not wishing to inter-

fere with the affairs, she had agreed that Shib Lal and Mus-samat Udey should alone be entered as the owners of the property, and that her name should be omitted.

Then in the suit for the redemption of the mortgage, an objection was taken by the mortgagees that the suit was wrongly constituted, because Mussamat Ladu, and not Mussamat Udey, was the proper guardian of the infant, and the proper person to bring the suit. On that occasion Mussamat Ladu presented a petition on which the matter before us principally turns, the main object of which unquestionably was to enable the suit to be carried on by Mussamat Udey, either in her own name or as guardian of the infant, without joining the name of Mussamat Ladu, and the entire contention on the part of the appellant before us is, that by the proceedings which have been already described with respect to the mutation of names and by the language of this petition, Mussamat Ladu in fact abandoned all her right to the property in question, so that when she became in point of law entitled to the property as heir of her son, she could no longer avail herself of that right as against the defendant. The petition is in these terms:—"Humbly sheweth,
"The facts regarding the suit instituted in this Court by Mus-
"samat Udey Kunwar, the widow of my deceased son
"Kallyan Sing, to recover possession by redemption of
"mortgage of Mauzahs Omeepore and Umlera, Pergunna
"Chandouse, valued at rupees 81,000, against Mussamat
"Kurremoolnissa, Muhtab Koowur, and Chand Koowur, de-
"fendants, are as follows. Since the date of Kallyan Singh's
"demise, Buldeo Buksh my husband and myself gave our son
"Shib Lal to Mussamat Udey Kunwar to be adopted as her
"son, and since then she has been his guardian and protectress.
"Moreover, owing to my old age, infirmity, and imbecility, I
"also caused only the names of Udey Kunwar and Shib Lal
"to be entered in the proprietary column of the certificate of
"death of Buldeo Buksh, and I have no claim whatever to the
"proprietary rights in the two villages in question, Udey
"Kunwar, however, herself, and as guardian of Shib Lal,
"being their sole owner. I have now become very old and
"imbecile, and have no strength to go about, look after, or

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"understand my affairs, and Mussamat Udey Kunwar herself, "and as guardian of Shib Lal my son, is in every way proprietor and owner."

If that is to prevent her recovering the property now in question, it must do so either because it operated as a conveyance, or as a contract to convey the interest which she now claims, or because it operated by way of estoppel. There is no other way in which it can operate. Now, did it operate either as a conveyance or as a contract to convey the interest to which she has now become entitled as heir of her son? Their Lordships are of opinion that it is quite impossible that it could so operate, and that for two reasons: first, because at the time when she presented this petition she had not in fact any interest in the property at all, and certainly had not become entitled to any interest as the heir of her son, who was at that time alive; and in the next place, there is not the least reason to suppose that in the petition she in any degree contemplated a conveyance of any such right. That was not the right which they were then considering at all. The main object of the petition was simply to enable the redemption suit to go on, and to enable the persons who had begun it as plaintiffs—Udey Koonwar and Shib Lal—to carry it on. There was nothing in the language and nothing in the position of the parties which could lead any one to suppose that she had any interest that she might hereafter acquire as heir of her son in her contemplation at all. On these grounds, it appears quite impossible that it can operate either as a conveyance or as a contract to convey her subsequently acquired interest.

Well, now, is she in any way estopped? It is very difficult to see how she can possibly be estopped. There has been a difference of opinion among the learned Judges in the Court below as to the construction of this instrument,—whether it ought to be construed solely as relating to her rights as guardian and to convey them, and not to relate to the property at all? The language certainly, in some parts of it, does appear to refer very strongly to an interest as owner, and probably it may be that the meaning of the instrument rather refers to her supposed interest as owner, but it appears

assist the plaintiff—*Rajkisto Roy v. Dinobandhu Surmah* (1), *Ramasamy Chetty v. Venkata Chellapty Chetty* (2). In the case of a contingency or an act to be performed, the Statute runs from the time the contingency happens or the act is to be done—*Castle v. Burditt* (3), *Rex v. Addelerly* (4), *Bellasis v. Hester* (5). Fractions of a day are not recognized—*Jarman on Wills*, 3rd edition, page 39.

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Mr. Hyde, for the plaintiff, contended that the day on which the promissory note was made was not to be included in computing the period of limitation; and that the 13th November being a holiday (Sunday), the plaintiff had one more day allowed him in which to file his plaint. He cited *Isaacs v. The Royal Insurance Company* (6), *Radha Monee Chowdhrynee v. Bungshee Mohun Doss* (7), *Rumonee Soonduree Dossia v. Punchanun Bose* (8), *In re Ganesh Sadashiv* (9), *In re Palamy Andy Pillay* (10), *Mundy Chinna Comarappa Setti v. Ramasamy Setti* (11), *Girjabhusan Haldar v. Akhuy Nikari* (12), and *Madan Mohan Das v. Gaurmohan Sirkar* (13), and referred to Archbold's Queen's Bench Practice, 12th edition, 161, 162.

PAUL, J.—This is a suit on a promissory note, dated 14th November 1867, payable on demand. The plaint was filed on the 14th November 1870. The defendant, who is not personally present, through his counsel contends, firstly,

(1) Reference by the Judge of the Small Cause Courts of Hooghly and Serampore, June 14th, 1865.

(2) 2 Mad. H. C. Rep., 468.

(3) 3 T. R., 623.

(4) 2 Douglas, 463.

(5) 1 Ld. Raym., 280.

(6) 5 L. R., Exch., 300.

(7) 4 W. R., Act X Rul., 30.

(8) 4 W. R., 105.

(9) 5 Bom. H. C. Rep., 117.

(10) 4 Mad. H. C. Rep., 330.

(11) *Id.*, 409.

(12) 5 B. L. R., App., 57.

(13) *Before Mr. Justice Norman.*

MADAN MOHAN DAS v. GAURMOHAN SIRKAR.

The 22nd July 1870.

THIS was an application for the admission of a plaint. The suit was for the sum of rupees 4,003, being the

balance of an account stated between the plaintiff and defendant in respect of certain business transactions. The defendant, on July 22nd 1867, had given a written acknowledgment that the sum sued for was due from him to the plaintiff. None of it, however, had been paid. The question arose whether the suit was barred by limitation under clause 9, section 1, Act XIV of 1859.

Mr. Macrae, in support of the application, referred to *Mundy Chinna Comarappa Setti v. Ramasamy Setti* (a) and *Rumonee Soonduree Dossia v. Punchanun Bose* (b).

NORMAN, J., admitted the plaint.

(a) 4 Mad. H. C. Rep., 409.

(b) 4 W. R., 105.

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that he never made the promissory note; and, secondly, that, if he made it, the action founded on it is barred by limitation. On the first issue, I have no difficulty in finding on the evidence that the defendant did make the promissory note. On the second issue, Mr. Lowe has raised a point, which appears to me to be of a very elementary character, *viz.*, that, in an action on a note payable on demand, the cause of action arises when the note was made. I think the learned counsel on the other side, without in the slightest degree endangering his case, might readily concede thus far. Starting from this position, Mr. Lowe has contended that the three years prescribed by law for bringing an action from the time the cause of action arose, expired on the 13th November, and that the plaintiff was too late in filing his plaint on the 14th November. It is admitted that the 13th November was a Sunday. I am of opinion on both points against Mr. Lowe's contention. I am of opinion that the 13th November was a *dies non*; and assuming that the plaintiff's three years expired on that day, the plaintiff was entitled to file his plaint on the next day, *viz.*, on the 14th November. On this point, Archbold's Practice has been referred to; and following that authority, it is quite clear that, when a party has to perform an act by a certain day, and the last day falls on a holiday, and when the Court is shut, he is entitled to come to Court on the following day. Against this position, a decision of a Full Bench, in the case of *Rajkisto Roy v. Dinobandhu Surmah* (1), is cited. That case rules that, under Act XIV of 1859, a suit is barred by limitation, where the time for its institution expires on a holiday. The learned Chief Justice seemed to think that the period having been fixed by statute, the Court had no discretion to extend the time. With the greatest deference, I think that I am not called on to extend the time, but merely to consider whether the practice in this country and in England in cases of this sort should be followed or not.

In the case of *Ex parte Krishna Padhe* (2), I find it laid down that, when the last day for presenting an appeal falls upon a Sunday or close holiday, an additional day is to be allowed

(1) Reference by the Judge of the Small Cause Courts of Hooghly and Serampore, June 14th, 1865.

(2) 6 Bom. H. C. Rep., 50.

for the presentation of the memorandum of appeal. I think that the same principle must apply to a plaint. That case is a clear authority in support of the view which I take, that, supposing the last day falls on a holiday, a party is entitled to come into Court the next day.

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With regard to the second branch of the proposition, I think that the plaintiff is not barred by limitation, but that he was in time on the 14th of November. The case of *Lakshuman Sakharam v. Ranu bin Sidoji* (1) is a decision of Sir Richard Couch, the Chief Justice of this Court, who was then the Chief Justice of Bombay. It was there held that the date on which a debt becomes payable is to be excluded in calculating the period of limitation. I think that is a correct view of the law and follows the words of the Act, which are, "the period of three years from the time when the debt became due, &c." Now it is admitted that the debt was due on the 14th November, and three years from that time is the 14th of November. It is said that the law does not allow us to take notice of fractions of a day. Admitting that to be so, I am not bound to compute the time from any particular portion of the 14th November, the day on which the debt becomes due, and the plaintiff was therefore well in time on the 14th November 1870.

I am glad I am able so to construe the law in this case as to prevent what I must consider a dishonest defence from succeeding.

It is said that, because the law allows a defendant to shelter himself under a plea of limitation, that therefore the defence is not dishonest. The law, no doubt, allows a defence of this kind to be set up, with a view to prevent the agitation of stale demands, but there is nothing in the law which contravenes the principles of morality which are set at defiance by an individual who, taking advantage of a doubtful interval of 24 hours, unblushingly endeavours to avoid thereby the payment of a just debt.

For the reasons I have given, I decree the amount sued for to the plaintiff, with costs on scale No. 2.

Judgment for plaintiff.

Attorney for the plaintiff: Mr. Mackertich.

Attorneys for the defendant: Messrs. Trotman & Co.

[APPELLATE CRIMINAL.]

1871
Jan. 26.

Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.

QUEEN v. RUPAN RAI. *

Power of a Magistrate—Criminal Procedure Code (Act XXV of 1861); Ch. XV—Compensation to an Accused—False Evidence—Committal on a Charge of Perjury.

When a prosecutor fails to substantiate his charge by making contradictory statements, the Magistrate who tries the case under Chapter XV of the Criminal Procedure Code, can award compensation to the accused, although he commits the prosecutor to take his trial on a charge of giving false evidence.

THE Officiating Judge of Patna submitted the following case for the opinion of the High Court:—

“One Rupan complained before the Assistant Magistrate of Patna that certain persons forcibly rescued some cattle that he was taking to the thanna. In his preliminary examination, he stated that, of these persons, ‘Murat struck me thrice with a lathi;’ but when confronted with the accused persons, he subsequently deposed, ‘Dhodhi struck me three times with a lathi. No one else struck me. Murat did not strike me.’

“On the 18th October, the Assistant Magistrate dismissed this complaint, which he tried under chapter XV; and under section 270, ordered the complainant to pay to the three accused persons compensation amounting in the aggregate to rupees 100.

	Rs.
Dhodhi 40
Murat 40
Meghu 20
	<hr/> 100

Simultaneously, or I should more correctly state, on the next day, the Assistant Magistrate instituted proceedings against the complainant for having intentionally given false evidence, by reason of his having made these two contradictory statements, and he was committed for trial to the Court of Sessions.

* Reference, under section 434 of the Code of Criminal Procedure, from the Officiating Sessions Judge of Patna, under cover of his letter No. 491, dated the 21st December 1870.

"I submit that, inasmuch as the Assistant Magistrate had determined to prosecute Rupan Rai for having intentionally given false evidence in that he falsely charged Dhodhi and two others, it was not competent in him to prejudge the result of the Sessions trial, and award compensation, that being a point which would come before the Sessions Court for trial; and on which that Court might hold a contrary opinion. Further, if it should so happen that the Sessions Court should concur with the opinion of the Assistant Magistrate, it was fully competent to the Judge to give the requisite compensation.

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"I also submit that the mere fact of committing the prisoner on contradictory statements, without any evidence as to the truth or falseness of either, showed that the Assistant Magistrate could not confidently state that both charges were false.

"I would add in conclusion that Rupan was acquitted by the Sessions Court; there being no evidence forthcoming to show that the prisoner before the Court was the same man who deposited before the committing officer."

The opinion of the High Court was delivered by

JACKSON, J.—It appears to me that, in this case the Magistrate was competent to award compensation to the persons accused by Rupan, assuming them to have been tried, and lawfully tried, under chapter XV of the Criminal Procedure Code, notwithstanding that he afterwards committed, and even if he had then made up his mind to commit, Rupan to take his trial on the charge of giving false evidence.

In the first place, the acquittal of Rupan (which took place in the Court of Sessions) would not establish affirmatively the truth of either of the contradictory statements which he was charged with having made, nor would it negative the finding that his complaint was frivolous and vexatious.

In the second place, if that were the result of his acquittal, I should still be of opinion that a Magistrate, having jurisdiction, would be authorized by law in making his order under section 270, notwithstanding that the complainant was to take his trial for perjury.

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It would, no doubt, be a matter of regret if the Magistrate and the Court of Session came to opposite conclusions upon the same question.

But a like result not unfrequently occurs in cases where the decision of a civil suit is followed by a criminal prosecution of one of the parties, or of his witnesses ; each tribunal comes to its own independent conclusion, and the two are by no means invariably identical.

It seems to have been held by this Court in 1865 that a Magistrate might award compensation under section 270, and also give his sanction to a prosecution under section 211, Indian Penal Code.

Whether the Magistrate, in making this order, exercised a proper discretion is a different question, on which, I think, we need not give an opinion.

One thing, however, is clear, namely, that the compensation awarded in this case was altogether unreasonable and disproportionate to the circumstances of the parties, and it is unfortunate that the law provides no means of setting the matter right in this respect. A proper measure of amends would seem to have been about one-fifth of that actually ordered.

Upon the Judge's letter of reference, I think it right to observe that it seems very doubtful whether, as he supposes, the Court of Sessions, if it convicted Rupan, could make a similar order to that made by the Magistrate. The Judge probably refers to section 44, Criminal Procedure Code, but that section apparently does not support his opinion in this case.

Again, it is stated that Rupan was acquitted, on the ground that there was no evidence forthcoming to identify him with the person who had made the false or contradictory statements. It is difficult to believe that evidence upon this point could not have been easily procured if the Judge had adjourned the trial, and I conceive it would have been his duty to do so, in the circumstances, unless, which appears very probable, the acquittal really proceeded on the footing that the case ought not to proceed.

ORIGINAL CIVIL.

Before Mr. Justice Paul.

MADHUSUDAN CHOWDHRY v. BRAJANATH CHANDRA.

1871
Jan. 6.

Act XIV of 1859, s. 4—Limitation—Acknowledgment.

The defendant, who was the owner of a moiety of certain property (the plaintiff and another being owners of the other moiety), mortgaged his moiety to the plaintiff; the mortgage-deed, dated 11th June 1863, contained a covenant to pay off the principal and interest at the expiration of a year, and gave a power of sale in default of payment. The whole property, including the mortgaged portion, was conveyed to one J. D., on 27th November 1864, by a bill of sale executed by the three owners of the property. On the execution of the bill of sale, the sum of rupees 16,250, the half of the purchase-money which belonged to the defendant, was handed over to the plaintiff in part payment of a sum of rupees 19,555, which was therein recited as being then due on the mortgage. In a suit for the balance brought in November 1869, the defence was that it was barred by the law of limitation. *Held*, that the admission by the defendant contained in the bill of sale of November 1864 was a sufficient acknowledgment to take it out of the operation of Act XIV of 1859, section 4.

THIS was a suit brought on a covenant in a mortgage-deed to recover the sum of rupees 3,305, being the balance of principal and interest due thereon to the plaintiff.

By a deed of mortgage dated 11th June 1863, the defendant, who was owner of half of certain property (the plaintiff and Kalachand Chandra being owners of the other half), mortgaged the same to the plaintiff for a certain sum of money. This mortgage contained the usual covenant to pay off the principal and interest at the expiration of the year following the date of the deed, and a power of sale to be exercised in default of payment.

The deed of mortgage was admitted by the defendant.

The 16 whole annas of the property (including the mortgaged portion) was sold and conveyed by the three joint owners to one Jaimani Dasi by a bill of sale dated 27th November 1864, duly executed by the plaintiff, defendant, and Kalachand Chandra.

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On the occasion of the execution of the bill of sale, the sum of rupees 16,250 (which was the half share of the purchase-money, and belonged to the defendant) was handed over to the plaintiff, as stated in the bill of sale, in part payment of a larger sum of rupees 19,555, which was recited as being then due on the mortgage.

This part payment reduced the amount due for principal to rupees 3,305 at the time of execution of the bill of sale; and for this sum, with interest, the suit was brought on September 1st, 1870.

The defendant submitted, in the first place, in answer to the plaintiff's claim, that the plaintiff's suit was barred by limitation, because the mortgage-deed was executed in the month of June 1863, the covenant to pay came into operation in June 1864, and the suit was brought a few months after the expiry of six years from the time when the mortgage-money became due. The plaintiff submitted that, within six years of the period when the mortgage-money fell due, the debt for the balance of which this suit was brought was admitted by the defendant to be due from him by an acknowledgment in writing; the admission and acknowledgment being contained in the deed of sale of November 1864, executed in favor of Jaimani Dasi.

Mr. Evans for the plaintiff.—An admission to a third party is, under the Indian Act of Limitation, a sufficient acknowledgment to take the case out of the statute—*Nijamudin v. Mohammad Ali* (1).

Mr. Lowe for the defendant, *contra*, contended that the admission of a debt made to a stranger can only repel the Statute of Limitations when it can be properly left to the jury as equivalent to, or implying, a promise to the plaintiff to pay him, and cited *Everett v. Robertson* (2), *Howcutt v. Bouser* (3), *Cripps v. Davis* (4), and *Forsyth v. Bristowe* (5).

PAUL, J. (after stating the facts as above, continued)—The question is thus raised whether such an acknowledgment is suf-

(1) 4 Mad. H. C. Rep., 385.

(4) 12 M. & W., 159.

(2) 1 Ell. & Ell., 16.

(5) 8 Exch., 716.

(3) 8 Exch., 491.

ficient to take the case out of the operation of the Statute of Limitation, and it is necessary, therefore, to consider the terms of section 4 of Act XIV of 1859, which runs as follows :—" If, in respect of any legacy or debt, the person who, but for the Law of Limitation, would be liable to pay the same, shall have admitted that such debt or legacy, or any part thereof, is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission." The main object of a Statute of Limitations is to prevent the resuscitation of stale claims or demands; it can hardly be said, with the admission contained in the bill of sale executed by the defendant, to the effect that the sum of rupees 19,555 was then due on the mortgage, and a sum of rupees 16,250 was paid in part payment thereof, staring one in the face, that the present claim is a stale one. Therefore, *a priori*, it is not possible to impress on this admission the character of an insufficient acknowledgment; on the contrary, the admission is clear and distinct, and the acknowledgment thereof is in writing signed by the defendant. The effect of the words of the Act, as argued by Mr. Evans, who appears for the plaintiff, is that, if the debt is admitted by acknowledgment in writing, a new period of limitation begins to run. The acknowledgment to be made is provided for in general words, which contain nothing to indicate that the acknowledgment must be made to the creditor. This latter contention is raised by Mr. Lowe on the authority of English cases to which I shall presently advert.

The case of *Nijamudin v. Mohammad Ali* (1) was cited by Mr. Evans, in which the question, whether the acknowledgment must be made to the creditor, was fully discussed. In that case it was held that the acknowledgment need not be made to the creditor. I consider the view taken in this case correct, and I have no hesitation in acting on this decision as an authority which I should do well to follow on this occasion. The admission in the present case being made in writing, namely, in a deed to which the plaintiff and defendant are parties, is, in my opinion, in every way sufficient for the purpose of giving the

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plaintiff a fresh starting point from the month of November 1864, which is within six years of the institution of this suit.

Mr. Lowe relies on the principle laid down in the English cases. But there is considerable difference between the cases in England and the cases in this country. In England, in every declaration, it is necessary to allege that the defendant promised to pay. The plea is that the defendant did not promise to pay within six years. The replication is that he did promise to pay within six years. In all those cases, the point to be found out is whether there was a promise to pay or not. Now, the promise to pay, before Lord Tenterden's Act, arose in three ways: 1st, by implication from an acknowledgment; 2nd, by a distinct promise; and, 3rd, by a part payment. The last is untouched by Lord Tenterden's Act. The other two, though required to be in writing by Lord Tenterden's Act, must still conduce to the same point, *viz.*, there should be a promise to pay within six years. Where there is an acknowledgment of a debt to a stranger, it is left to a jury to say whether from that circumstance a promise to pay should be inferred. But such a question as a promise to pay, either expressed or implied, does not arise in this case, or under the law here, as all that is necessary here is an acknowledgment in writing signed by the party chargeable. The English cases, relied on by Mr. Lowe, are thus wholly beside the question of law to be decided in this case. It appears to me but just and reasonable that a law should be so construed as to afford every possible support to a just and lawful claim against an unjust and unconscientious resistance to that claim, and I am glad that I am able so to construe the law as to give effect to a claim which is perfectly true, and is most dishonestly resisted. On the whole, relying on general principles, as well as the authority of the case decided by the Madras High Court, I have no hesitation in deciding that the suit was brought within time, and the plea of limitation must be overruled.

My decree is that the suit be decreed for rupees 3,305-4, and that the interest be calculated from the 24th November 1864 to this date, in terms of the covenant contained in the mortgage-deed. The decree will bear interest at 6 per cent. Costs on scale No. 2.

On Mr. Lowe objecting and urging that the plaintiff was

not entitled to interest according to the covenant between the filing of the plaint and the date of this decree, the Court said :—

I overrule this objection, on the ground that I think that the mere institution of the suit does not deprive a plaintiff of the benefit to which he is entitled. Besides, as pointed out by Mr. Evans, under section 10, Act XXIII of 1861, it is discretionary with the Court, in a decree for money, to award interest at such rate as it may think proper on the principal sum, from the date of suit to the date of decree, in addition to any interest on such sum for any period prior to decree, and subsequent interest on the aggregate sum and on the costs from the date of decree.

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Judgment for plaintiff.

Attorneys for plaintiff: Messrs. *Beeby and Rutter.*

Attorney for defendant: Mr. *Linton.*

I.L.R. VIII.C.S. 545.

[PRIVY COUNCIL.]

RAJA CHANDRANATH ROY (PLAINTIFF) *v.* RAM-JAI MAZUMDAR, AS GUARDIAN OF CHANDRANATH, alias RAMCHANDRA CHUCKERBUTTY, A MINOR (DEFENDANT).

P. C.*
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Dec. 5.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.

Hindu Law—Purchase by a Widow for one of her own Relations—Benami—Practice—Issue.

A step-son made over property to his step-mother for her support. Out of the produce, she bought properties for her nephew in the name of other parties. Held, under the circumstances, that the purchased property, on her death, went to the nephew, and not to the step-son as heir of her husband.

* Present:—THE RIGHT HON'BLE SIR JAMES COLVILLE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

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Although the defendant, by his written statement, denied the fact of the purchases being with the widow's money, and it was proved that they were made with her money. *Held*, that this did not remove from the plaintiff the burden of proving that the purchases were made *benami* for her.

THIS was an appeal from a decision of the High Court at Calcutta, dated 2nd September 1863, on appeal from the decision of the Principal Sudder Ameen of Rajshahi, dated 30th June, whereby the latter decision was affirmed.

The suit was brought by the appellant's father, Raja Anandnath Roy, who was duly adopted by one of the widows of Raja Shibley Roy, Rani Dukhina Debi. The other widow was Rani Haripriya Debi, who died some time after the adoption, and the suit was to recover, as heir after her as his father's widow, landed property left by her.

The written statement, on behalf of the plaintiff, stated that, after his father's death, and after his character as adopted son had been established, he had given over to his step-mother, Haripriya, money and rent-producing property; that out of this, she bought two pieces of land in the name of her brother's widow, Shibsundari; one in the name of her brother's daughter, Krishnasundari; another in the name of Ramjai Mazumdar; and another in the name of Kali Chandra Bhumi; it charged that Ramjai, being Haripriya's mooktear, had set up the infant respondent, Ramchandra Chuckerbutty, as the duly adopted son of Shibsundari's husband, and that the purchases, in the names of Ramjai and Kali Chandra, purported to be for them as guardians of the infant; it alleged that all these purchases were *benami* for Haripriya; and being bought with the allowances received from the plaintiff out of his father's estate, entitled him, on her death, to have these properties as heir.

The respondent, Ramjai, as guardian of the infant as to the purchases in the name of Shibsundari and Krishnasundari, alleged that they were bought by Shibsundari herself, and that she had held possession as owner; and that on her death, the infant respondent, as her husband's lawfully adopted son, succeeded; and as to the property in Ramjai's own name and Kali Chandra's, that they had been bought by others for the infant respondent, and that none of them had belonged to Haripriya.

It appeared that, on the death of Haripriya, the plaintiff (appellant) took possession of the properties; and that in an Act IV of 1840 case, the right of possession was held to be in Ramjai as guardian of the infant, whereupon the plaintiff (appellant) brought this action.

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The evidence showed that the purchases had been really made by Rani Haripriya with money belonging to her, and it was proved that she bought them with the intention of their going to the infant respondent.

The Principal Sudder Ameen held that the properties therefore belonged to the infant; and on appeal to the High Court, this judgment was affirmed.

The Judges (1) in giving judgment said:—"We have heard the whole of the evidence upon which the appellant relies. It is admitted that the legal title in those disputed properties is vested in the defendants. From the evidence it is abundantly clear that the purchase-money, the sure test in *benami* transactions, came from the Rani; but it is equally clear, that it was her intention that the properties so acquired should, after her death, devolve on the defendants, and not on her step-son, the plaintiff. The whole conduct and acts of the Rani are consistent with her position as trustee for the minor, the adopted son of her brother. She, the Rani, had quarrelled with her step-son, the Raja, who is himself an adopted son of a co-wife; that the mother and son should not be very fond of each other under such circumstances is to be expected, and is in conformity with Hindu customs.

"The appellant's pleader has wholly failed to show us that the Rani ever exercised any proprietary right over the properties in dispute; had he done so, his client would have been entitled to succeed as her heir. The Rani was in possession, and collected the rents, as trustee for the minor. The whole of her conduct and acts, as disclosed by the evidence adduced by the plaintiff, are consistent with her position as trustee, and wholly irreconcilable with any independent or proprietary title.

"The defendant being in possession, the *onus* of proving his title is upon the plaintiff, the appellant. His pleader does not

(1) Mr. Justice Kemp and Mr. Justice Sumbhoonath Pundit.

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press the point of possession by the Raja, after the death of the Rani; indeed, upon this point, there is no reliable evidence whatever. His argument is that the properties were acquired by the Rani, with the profits of the estate given to her for her maintenance; that the beneficial title was in her; that she enjoyed possession as proprietor, and not as trustee; and that the Raja, as her heir, is entitled to succeed. The Court, for reasons stated above, is clearly of opinion that the Rani purchased these properties with funds over which she held absolute control, in the names of the defendants, and with the full intention that they should succeed to the estates; that her object in purchasing them *benami* was to prevent their coming into the hands of the Raja, and that all her subsequent acts were those of a trustee for the minor, her nephew.

"We therefore dismiss this appeal, and confirm the decision of the lower Court, with costs and interest payable by the appellant."

This was the judgment now appealed against.

Sir *R. Palmer*, Q. C., Mr. *Leith*, and Mr. *Doyne* for the appellant.—The High Court having found that the properties were bought by the Rani out of funds, or the income of lands coming to her from the appellant, her step-son, she could not alienate those properties. Even if she had the power of alienation, there is no evidence to show any such alienation, either during her life or by will, and they would go to her husband's heir-at-law. The conclusion arrived at by the High Court as to the purchases being by the Rani for the benefit of the infant is not justified when the defence taken by the pleadings is considered; the defence set up was a denial of the Rani having purchased at all; and where it is found that the money was supplied by the Rani, the burden of proof of the purchase being not *benami* is on the defendant, if it is open to him, on such pleadings, to set up a defence so opposed to his written statement.

The respondent did not appear, and the case was heard *ex parte*.

Their LORDSHIPS gave the following judgment:—

This was a suit brought by Raja Chandranath Roy, as son and heir-at-law of the late Raja Anandath Roy Bahadur, to

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recover certain properties, six in number, from Ramjai Mazumdar, the nominal defendant, being the guardian of Chandranath, alias Ramchandra Chuckerbutty, who is an infant; and the ground on which the suit was brought was that the plaintiff was the heir of the Rani Haripriya, who had been one of the widows of his father, of whom he was the adopted son, and to whom he had made some very liberal allowances; the properties in question having been purchased by her out of the income which she enjoyed. There is no doubt that, under these circumstances, he was her heir. But the question in dispute was, whether the properties in question had been purchased by her, as it is called, *benami*,—that is to say, had been purchased in the name of other persons, but so as to be her property? The Court below have decided that they were not so purchased, but were purchased with an intention that they should go after her death to the defendant.

Now, the first objection taken by Sir Roundell Palmer was that the defence relied on in the case was not open on the pleadings. For that purpose it is necessary shortly to refer to what the pleadings were. Now, the plaintiff states generally the circumstances under which the plaintiff says he became entitled; that Haripriya had purchased them in the way I have said *benami*; and accordingly as her heir, they came to him. Then the defendant in his answer, no doubt, sets up a case which was not maintained by the evidence at all, that they had not been purchased with the Rani's money, but had been purchased with the proper money of the persons in whose name the purchase was made. Then the material issue, which was directed to be tried by the Court, being the first issue, was "whether Rani Haripriya, the step-mother of the plaintiff, was entitled to, "and in possession of, all the contested properties by acquiring "them '*benami*' of the persons alleged by the plaintiff; or "whether they were acquired by the several persons alleged by "the defendant, and accordingly held in their possession, and "have afterwards come to the minor, Ram Chandra?" Now, it is obvious that this issue, in substance, is this:—Is the plaintiff's story, stated in his plaint, true, or is the defendant's story, stated in his answer, true? It is, of course, a possible thing

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that neither of the stories may be true, and the question then arises, which of these two alternatives of the issue is the really material one? Their Lordships think that the really material one is the first part of the issue,—viz., is the plaintiff's story true? It is not as if the defendant's defence was, as we should say in the Common Law, a plea in confession and avoidance, a plea which admitted that the plaintiff's story was true, and then avoided it. If that had been the case, and the defendant had failed to prove his case, of course the defendant must have failed, and the plaintiff ought to recover. But it is substantially what at Common Law we should call an argumentative traverse of the truth of the plaintiff's story, for it does not admit that one word of it is true, but sets up certain things perfectly inconsistent with it. The real truth is that the second alternative of the issue ought to be rejected, and the real question is "whether the Rani Haripriya, the step-mother of the plaintiff, was entitled to," which, I think, must mean was entitled to at the time of her death, because that is the material thing, "and in possession of all the contested properties by acquiring them *"benami"* of the persons alleged by the plaintiff." If the plaintiff has failed to prove the affirmative of that issue, if it appears on his own evidence that they were not so purchased, and did not so continue at the time of her death, the consequence is that the plaintiff must fail, and the defendant may say, "it is wholly immaterial whether I prove my case or not; you have not proved yours."

Their Lordships are therefore of opinion that it was perfectly open to the Court to decide the case on the grounds on which they do decide it. Their Lordships are also of opinion that the Court below have not at all miscarried in point of law; that if the real truth of the facts is this, that, though these properties were purchased, as unquestionably on the evidence their Lordships think they were, with the money of the Rani Haripriya, yet, nevertheless, if she purchased them with the express intention at the time that, after her death, they should go as to those which were purchased first to Shib Sundari, and as to those which were purchased afterwards to Ram Chandra, that would not be a purchase *benami* within the meaning of the

issue, that would not be a purchase on the terms that the property was to be absolutely hers, but would be a purchase with the intention of benefiting the person in whose name the purchase was made ; and their Lordships are of opinion that it would make no difference in point of law, whether she did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life. One may observe that, on the evidence, it would rather appear that she, during her lifetime, did bestow very considerable benefits on both the mother, Shib Sundari, and the boy ; so that practically, in all probability, she gave them quite as much as the proceeds of the property.

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Well then, the Court below, not having miscarried in point of law, so far from having miscarried in point of fact, the evidence is very strong indeed that the purchase from the very beginning was made with the intention that the property should not go to her heir-at-law, but should go to Shib Sundari, or if Shib Sundari was dead, should go to Ram Chandra. It is really quite sufficient to refer to a single witness at in the record :—“ The witness, on hearing the deposition, said that his answer to the question by the Court has not been taken down ; my answer is “ that the Rani used to say that all these properties were Ram “ Chandra’s, and her care was that they remain as Ram Chan- “ dra’s.” It is perfectly plain that she had purchased them with the original intention of benefiting him, in order that, after her death, they might go to him.

That being the case, their Lordships are of opinion that they must advise Her Majesty that this appeal should be dismissed.

Appeal dismissed.

Agent for appellant: Mr. Wilson.

[IN THE INSOLVENT COURT.]

Before Sir R. Couch, Kt., Chief Justice, and Mr. Justice Markby.

1870 IN THE MATTER OF THE PETITION OF RAMSABAK MISSER AND OTHERS.
Aug. 26. *Insolvent Court—Discharge—Dismissal of Petition—Jurisdiction.*

When an insolvent has obtained his discharge, a Commissioner has no jurisdiction on the application of some of the creditors to make an order dismissing his petition, and ordering the estate and effects of the insolvent in the hands of the Official Assignee to be made over to certain persons on behalf of the creditors. The petition being dismissed, the property re-vested in the insolvents.

The Court which passed the order dismissing the petition upon finding that such order had been obtained by fraud, has power to set aside the order.

THIS was an appeal from an order by Mr. Justice Phear, sitting as Commissioner of the Insolvent Court, dated April 4th, 1870, making absolute a rule *nisi* of June 12th, 1869. That rule was obtained on the petition of one Beniprasad, a creditor of the above-named insolvents. The petition stated that certain brothers, Ratan Chand and Lallumall, many years ago, carried on business as shroffs at various places in the North-Western Provinces, under the name and style of Ratan Chand Lallumall; that since the death of the survivors of the two brothers about 16 years ago, Beniprasad, the son and heir of Lallumall, had carried on the business in the same name at Azmatghar, in the North-Western Provinces; that the insolvents had for many years carried on business in Calcutta and elsewhere as shroffs and commission agents, and had extensive dealings with the firm of Ratan Chand Lallumall; that in May, 1850, the insolvents filed their petition of insolvency in the High Court, Calcutta, and in their schedule the firm of Ratan Chand Lallumall appeared as creditors in the sum of rupees 7,799-2-6; that on the 7th September and 5th October, the insolvents obtained their personal discharge, and on 11th March 1854, their final discharge under the Insolvent Act; that at the time of filing their petition, the insolvents were in possession of

certain talooks in various places held in the *benami* names of their relatives, and which were not included in their schedule; that Beniprasad, among other creditors, caused some of these talooks to be attached in execution of a decree obtained by him in the Court of the Principal Sudder Ameen of Azimghur for sums due to him by the insolvents; that thereupon the persons in whose names the talooks attached stood claimed the same, and they were released from the attachment; that, subsequently to the release, Sheikh Pultu, Sheikh Koodrut Ali, Ramphal Das, and Manohar Das, sons and heirs or representatives of some of the creditors, instituted regular suits in the Court of the Principal Sudder Ameen of Ghazipore against the insolvents and other persons who held property *benami* for the insolvents, for the purpose of setting aside the deeds under which such properties were held; that in these suits, the Official Assignee, as assignee of the estate and effects of the insolvents, presented a petition claiming such properties, but the suits were decreed in the plaintiff's favor, and the Assignee was directed to bring a regular suit to establish his claim; that, on or about April 23rd, 1863, the Assignee instituted a suit to establish his claim, and by a decree of August 11th, 1864, of the Sudder Dewanny at Agra, to which Court the suit was appealed, his claim was established; that, subsequent to the date of that decree, Sheikh Pultu, Sheikh Koodrut Ali, Ramphal Das, and Manohar Das caused a mooktearnama, dated October 20th, 1864, to be prepared in favor of Ramzan Ali, a servant of Sheikh Pultu and Sheikh Koodrut Ali, for the purpose of removing the Official Assignee, and appointing a special assignee on behalf of the creditors of the insolvents, which mooktearnama, Beniprasad, with about 56 of the other creditors, signed, and the same was attested by the Judge of Ghazipore, and duly registered on December 1st, 1864; that without the knowledge or consent of Beniprasad, a document dated 16th February 1865, purporting to be a mooktearnama executed by Beniprasad and other creditors in favor of Sheikh Nazaf Ali, Sheikh Ramzan Ali, and Mohimuddin, was put forward, and an application was made to the High Court, Calcutta, on behalf of Beniprasad and other creditors on the authority of the alleged mooktearnama; that, on such application, and

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on the consent of the Official Assignee, as assignee of the estate and effects of the insolvents, the Court, on July 16th, 1866, made an order, directing the estate and effects of the insolvents, then in the hands of the Official Assignee, to be made over to Sheikh Nazaf Ali, Sheikh Ramzan Ali, and Mohimuddin, on behalf of the creditors named in the alleged mooktearnama; that some time after the making of the order of 16th July, 1866, Beniprasad learnt that the estate and effects of the insolvents had been removed from the hands of the Official Assignee under the alleged mooktearnama of 16th February, 1865, and not under that really signed by him, of October 20th, 1864, and finding on examination that the alleged mooktearnama of February 16th, 1865, purported to be signed by him among other creditors, Beniprasad, on December 12th, 1866, instituted a suit in the Court of the Principal Sudder Ameen of Ghazipore against Sheikh Pultu, Sheikh Koodrut Ali, Ramphal Das, Manohar Das; Sheikh Ramzan Ali, Sheikh Mohimuddin, Sheikh Nazaf Ali, and the insolvent Jadunandan Misser and the representatives of the deceased insolvents, alleging that his alleged signature to the mooktearnama of February 16th, 1865, was forged, and praying, among other things, that, as the petition of the insolvents had been dismissed, the amount of his decree might be realised by attachment and sale of the property and effects of the insolvents; that the suit was dismissed, the Judge (to whom it had been transferred from the Principal Sudder Ameen) holding that he had no jurisdiction to entertain it; that an appeal in the suit to the High Court, Agra, was dismissed on the ground that Beniprasad's proper remedy was by application to the High Court, Calcutta, which had made the order of July 16th, 1866; that Beniprasad's signature to the alleged mooktearnama of February 16th, 1865, was forged, and that he had not authorized or empowered any one to sign it on his behalf, or to give his consent to such a mooktearnama, and that the same was a fabricated document; that the order of July 16th, 1866, was obtained without the notice to, or consent of, the insolvents, and was irregularly obtained; that the debt to the firm of Rattan Chand Lallumall was still due and unpaid; and that Sheikh Nazaf Ali, Sheikh Ramzan, and Sheikh Mohimuddin had

obtained and retained possession of the property, estate, and effects of the insolvents in collusion with, and for the benefit of, Sheikh Pultu, Sheikh Koodrut Ali, Ramphal Das, and Manohar Das. The petition prayed for a rule calling on Sheikh Nazaf Ali, Sheikh Ramzan Ali, Sheikh Mohimuddin, Sheikh Pultu, Sheikh Koodrut Ali, Ramphal Das, Manohar Das, the surviving insolvents, the representatives of the deceased insolvents, and the Official Assignee, to show cause why the order of the Court of July 16th, 1866, should not be set aside and discharged, and the estate and effects of the insolvents which were delivered over to Sheikh Nazaf Ali, Sheikh Ramzan Ali, and Sheikh Mohimuddin, should not be brought back and replaced in the hands of the Official Assignee, as assignee of the estate and effects of the insolvents; and also why they should not bring into Court the original mooktearnama of October 20th, 1864. The petition was verified by the affidavit of Beniprasad.

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A rule *nisi* was accordingly issued as prayed for, on 12th June 1869; and on the 4th April 1870, an order of Court was made that the rule *nisi* of June 12th, 1869, so far as it prayed that the order of July 16th, 1866, should be set aside as void, should be made absolute; and that Sheikh Ramzan Ali, Sheikh Nazaf Ali, Sheikh Mohimuddin, Sheikh Pultu, Sheikh Koodrut Ally, Ramphal Das, and Manohar Das should hold and retain the property, estate, and effects made over to Sheikh Ramzan Ali, Sheikh Nazaf Ali, and Sheikh Mohimuddin by the Official Assignee until the further order of the Court. PHEAR, J., in making the order, found that the mooktearnama of February 16th, 1865, was a fabricated document, and had been used for the purpose of imposing on the Court, and that the order made on the faith of the document was fraudulently obtained, and ought to be set aside.

From this order and the proceedings in this matter, Sheikh Ramzan Ali, Sheikh Nazaf Ali, and Sheikh Mohimuddin appealed, on the grounds, among others, that the Judge acted without jurisdiction, as well in issuing the rule *nisi* of June 12th, 1869, as in making the same absolute as to the part thereof which was made absolute by the order of April 4th, 1870; and that, even if the Judge had jurisdiction to make that

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order, he should not have further ordered the petitioners to hold and retain the property, estate, and effects of the insolvents until the further order of Court, they not having been called upon to show cause against such order.

Mr. Lingham, for the appellants, contended that the Insolvent Court had no power to set aside its order for fraud or misrepresentation. No power is given by the Statute. He referred to the following cases:—*Philipson v. Earl of Egremont* (1), *Bradley v. Eyre* (2), *Dodgson v. Scott* (3), *Rogers v. Hadley* (4), and *Earl of Bandon v. Becher* (5); as to the power to review, *Meddowcroft v. Heguenin* (6), *Perry v. Meddowcroft* (7), *Cameron v. Reynolds* (8), and *Webster v. Emery* (9). The Court will refuse to try a question of false return by a sheriff—*Goubot v. De Crouy* (10) and *Barber v. Mitchell* (11).

The legal effect of the dismissal of the petition, under section 7 of the Insolvent Act, is that when the petition is dismissed, the Court is *functus officio*,—see *In re Spiller* (12), *per Bacon, L. J.*; *In re King*, (13) *per Levinge, J.* The Court has no jurisdiction to make an order on the bankrupt after his petition has been dismissed. In the encumbered Estates Courts in Ireland, so long as the process of selling is going on, jurisdiction exists; as soon as the process is ended by the conveyance, the Court is *functus officio*, and cannot amend an order for fraud or mistake—*In re Tottenham's Estate* (14), see also *Rorke v. Errington* (15), *Re Walsh's Estate* (16), and *Power v. Reeves* (17). The creditors ought to have been made parties as they applied for the order.

Mr. Anstey and Mr. Kennedy for the respondent.—The Court had no power to dismiss the petition after the insolvents

(1) 6 Q. B., 587, see 605.

(11) 2 Dowl., 574.

(2) 11 M. & W., 450.

(12) 18 W. R., 296.

(3) 2 Exch., 457.

(13) Coryton's Insolvent Act, 18.

(4) 32 L. J., Exch., 248.

(14) Ir. Rep., 3 Eq., 528; S. C. in Court

(5) 3 C. & F., 479.

below, 2 *Id.*, 375.

(6) 4 Moore's P. C. C., 386.

(15) 7 H. L. C., 617; S. C., 6 Ir. Rep.,

(7) 10 Beav., 122.

Comn. Law, 302.

(8) Cowp., 406.

(16) 15 W. R., 1115; S. C., Ir. Rep.,

(9) 10 Exch., 901.

1 Eq., 399.

(10) 2 Dowl., 86;

(17) 10 H. L. C., 645.

had obtained a final discharge. The order of July 16th, 1866, was made in the absence of some of the insolvents who were necessary parties, and was therefore irregular. It is not necessary that the jurisdiction of a Court to deal with fraud should be expressly given by the Statute on which the Court itself is founded. It is part of the constitution of all Courts that they should have the power to repair the effect of fraud on their proceedings. Where parties have obtained an order by misrepresentations, the Court will, as a rule, set it aside altogether, see *Bulkeley v. Scutz* (1), *per Giffard, L. J.*, as to innocent misrepresentation; see also *Tommey v. White* (2) and *Stewart v. Agnew* (3).

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Mr. *Lingham* in reply.

The judgment of the Court was delivered by

COUCH, C. J.—I am of opinion that the order of Mr. Justice Phear, so far as it directs that the order of the 16th July 1866 be set aside, ought to be confirmed. The other part of it, in which he ordered that Ramzan Ali and the others should hold and retain the property or the proceeds thereof until the further order of the Court, ought to be omitted, as there was no power to make it, and the order will be modified in that respect. I think that the order of the 16th of July was a nullity on two grounds. The learned Judge had no power, under the Insolvent Act, to dismiss the petition in that stage of the proceedings, the insolvents having been already discharged; nor had he power to take the property out of the hands of the Official Assignee and direct him to make it over to the three persons who applied on behalf of the creditors. The petition having been dismissed, the property re-vested in the insolvents. The insolvents might have consented to some arrangement by which the property should remain in the hands of trustees, and that they should themselves be discharged. But they were not then before the Court, and the proceedings were irregular. The order was made without jurisdiction, and was a nullity. Then it appears to me that that being an order founded on an alleged consent of a great part of the creditors, and the Court having been led to

(1) 3 L. R., P. C., 198. (2) 4 H. L. C., 313. (3) 1 Shaw's App. C., 413.

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suppose that almost the whole of the creditors had consented, and that they wished for such an arrangement, when it is shown that they did not consent, but that some of the names were forged, the order so obtained must be treated as tainted by fraud, and is a nullity ; and being so, it cannot stand in the way of an application to the same Court to set the order aside. The Court cannot be deprived of jurisdiction by it, and the order is inoperative. The parties should be placed in the same position as they were in before the order was made. Mr. Justice Phear has so ordered. The importance of Beniprasad's having signed the mooktearnama is only on this account. If Beniprasad had actually signed the mooktearnama and had asked the Court to make the order which it had not jurisdiction to make, he might have been concluded afterwards from objecting that the Court had not jurisdiction. It might also have been said that he was not a party affected by the fraud, because he had applied to the Court for the order. This latter ground would apply in an ordinary suit ; but whether the same holds good in the Insolvent Court is a matter that I abstain at present from deciding, as it is not necessary that I should do so in this case. In my opinion Mr. Justice Phear was right in holding that Beniprasad did not sign the mooktearnama. It is true, as was argued by Mr. Lingham, that there is not much evidence on the part of Beniprasad that he did not sign. There is a petition verified by him in which he most distinctly declares that he did not sign, and did not authorise anybody to sign the mooktearnama. I think the learned Judge was at liberty to take into consideration that petition and verification. The oral evidence was only a continuation of the enquiry which had already been commenced. The petition so verified is opposed by the testimony of four witnesses, all of whom, Mr. Justice Phear, who had them before him, says, gave their evidence in a way which made him absolutely disbelieve them. The learned Judge says that every one of those four witnesses gave evidence in that way. We must pay regard to his statement.

I do not assent to the proposition which Mr. Lingham contended for, that even if the evidence on one side is untrustworthy, the Court must act upon it, because no evidence to contradict it is produced. That would be a most dangerous doctrine. It

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may be that there is slight evidence that Beniprasad did not sign, but the evidence on the other side is untrustworthy, and the Court must disregard it. I am influenced in my decision by the letters which passed after the order was made, because there is most distinct notice in the letter to Mr. Paliologus that Beniprasad denied having signed the mooktearnama, or having authorised any one to sign it. I cannot doubt that all these parties were fully aware that he put forward that denial, and we do not find in the subsequent letters which passed, any allusion to that, or any statement on their part that he had falsely alleged that he had not signed. Apparently what they did was, knowing his denial to be well grounded, they put forward a proposal by which he might be quieted, but that fell to the ground. It is not necessary to consider what would have been Beniprasad's position if he had agreed to the proposal which was made to him, or whether he did agree to it. That is a matter which may have to be considered hereafter when the Official Assignee may come to deal with the estate. This appears to me to be the answer to Mr. Lingham's objection that all the creditors are not parties to this proceeding. If all the parties were to be brought before the Court, the order could never be set aside. If an attempt is made to compel them to return any money which they may have received, it may be necessary to make them parties. All that the learned Judge was asked to do was to set aside the order, which was a nullity, and that is all that he has ordered. I think he was right, and that his decision should be affirmed, and that the appellant should pay the costs of all the respondents in this appeal,

Mr. Anstey applies that, not only Ramzan Ali, but the parties who nominated him, should be ordered to pay the costs. That cannot be done now; but if there are any grounds for the application, Mr. Anstey must make it in the Insolvent Court.

Appeal dismissed.

Attorneys for appellants : Messrs. *Trotman & Co.*

Attorneys for respondents : Messrs. *Carruthers and Dignam*, and Mr. *Dover*.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear

1871
Feb. 22.

MACLEOD v. MACLEOD.

Suit by Wife for Judicial Separation—Custody of Children.

When a wife obtains a decree for judicial separation, on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children.

THIS was a suit for dissolution of marriage, or judicial separation, by the wife, on the ground of the adultery and cruelty of the husband. The parties were married in September 1861; and there were three surviving children of the marriage—girls of the respective ages of $8\frac{1}{2}$, 7, and 5. The respondent did not appear. From the evidence of the petitioner; it appeared that her husband had, on several occasions, behaved in a most brutal manner, and treated her with great cruelty, in consequence of which she had left him in August 1867, and had since lived separate from him. It was proved that, on one occasion since, he had come to the house where she was living, and threatened her. It was also proved that he had since been and was at the time of suit living in adultery with a woman of bad character, and the children were living with him in the same house. The Court pronounced a decree for a judicial separation; and then a question arose as to the custody of the children.

Mr. Hyde, for the petitioner, asked the Court to order that the children should be delivered into her custody. He cited *Hyde v. Hyde* (1), *Duggan v. Duggan* (2), *Suggate v. Suggate* (3), *Milford v. Milford* (4), and *Cooke v. Cooke* (5). [PHEAR, J., referred to *Chetwynd v. Chetwynd* (6).] The principle is that the party who is in the wrong should not be allowed to have custody of the children. In this case the children are all girls,

(1) 29 L. J., P. & M., 150.

(4) 38 L. J., P. & M., 63.

(2) *Id.*, 159.

(5) 3 S. & T., 249.

(3) 1 S. & T., 492.

(6) 1 L. R., P. & D., 39.

and there is a great danger of contamination if they are allowed to remain where they are.

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PHEAR, J.—I think I ought to be governed in this matter by the English decisions in the cases referred to, especially those of *Hyde v. Hyde* (1), *Duggan v. Duggan* (2), and *Suggate v. Suggate* (3). These are summed up by the Judge ordinary in *Chetwynd v. Chetwynd* (4). He says:—“When parents cease to live together, the legal right to the custody of children of this age” (a girl nearly 10 years of age, and a boy of eight) “is with the father. But the Court has power to infringe upon this right; and when the common home has been broken up by the conduct of the father, it frequently exercises its power in favor of the injured mother. Several cases to that effect were cited in argument. It will be found, on reference to these cases, that it has been an invariable element in the decision that the wife herself has been free from blame. Thus in *Marsh v. Marsh* (5) the wife is spoken of by the Judge as the ‘unoffending wife,’ and there was no evidence, however slight, of misconduct on her part. In *Boynton v. Boynton* (6), the full Court spoke of the marriage ‘as being dissolved by reason of the misconduct of the husband, the wife not having been to blame.’ And again in *Suggate v. Suggate* (3), there was no imputation on the wife’s conduct towards her husband during the cohabitation, though an attempt was made to prove her habits to be such as not to fit her for the education of the children,—an attempt which the Court pronounced to have failed.”

It remains now to apply these principles to the facts in the case before me. Clearly, as far as the evidence which I have heard goes, there is nothing to impeach the conduct of the wife. The judicial separation which I have ordered, and indeed the separation which had occurred years before, is due entirely to the misconduct of the husband. He is not only totally regardless of his marital duties, and living in adultery with another

(1) 29 L. J., P. & M., 150.

(4) 1 L. R., P. & D., 39.

(2) *Id.*, 159.

(5) 1 S. & T., 312.

(3) 1 S. & T., 492.

(6) 2 S. & T., 276.

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woman, but he appears to have behaved most brutally to his wife for some years past, and to be an exceedingly foul-mouthed person. Also, from what the petitioner has stated in Court to-day, I should judge that the woman with whom the respondent is now living is an abandoned woman. It is not fitting that the young girls, the children of the marriage, should remain in the society and under the control of such persons as the respondent, and his paramour.

I think, therefore, that the decree of judicial separation must be accompanied by an order that the mother should have the custody of these children, and the respondent must be directed to deliver them up on service of the order. The terms upon which the father may have access to them can be settled hereafter. I am also in a position to say that the respondent must pay the petitioner rupees 15 a month for the maintenance of these children. There will be a further question of the petitioner's permanent alimony hereafter.

Application granted.

Attorney for petitioner: Mr. *Fink.*

[APPELLATE CIVIL.]

Before Mr. Justice Markby and Mr. Justice Mitter.

1870
July 12.

GABIND PRASAD TEWARI (ONE OF THE DEFENDANTS) *v.* UDAI CHAND RANA (PLAINTIFF) AND RAM CHANDRA DOBAY AND ANOTHER (DEFENDANTS).*

Declaratory Decree—Act VIII of 1859, s. 15.

On attachment of certain property in execution of a decree, A. preferred his claim under section 246, Act VIII of 1859, on the ground that he held a mortgage thereof from the judgment-debtor. Thereupon an order was passed for sale of the property subject to the mortgage. B. afterwards claimed the same property as his absolute estate, and his claim was allowed, and the pro-

* Special Appeal, No. 2520 of 1869, from a decree of the Subordinate Judge of Midnapore, dated the 4th August 1869, reversing a decree of the Sudder Moonsiff of that district, dated the 30th January 1869.

perty released from attachment. B. was not a party to these proceedings. Held, that A. could maintain a suit against B. for a declaration of his title as mortgagee.

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BIKRAM and Ram Chand Debji mortgaged a certain piece of land to Ram Chandra Rana. On attachment of the said land, in execution of a decree against Bikram and Ramchand, Ram Chandra Rana preferred a claim under section 246 of Act VIII of 1859, whereupon an order was passed that the property be sold subject to the mortgage. Subsequent to this, one Gobind Prasad filed a petition, under section 246 of Act VIII of 1859, claiming the said land as his absolute property. Ram Chandra Rana was no party to these proceedings. This claim was allowed. Hence the present suit by Ram Chandra Rana, for reversal of the order allowing the claim of Gobind Prasad, and for declaration of his right under the mortgage.

Bikram and Ram Chandra denied the execution of the mortgage. The defence set up by Govind Prasad was that the property in dispute was his absolute property ; that Bikram and Ram Chandra had no interest therein ; and that the suit would not lie as the plaintiff was no party to the proceedings under section 246, Act VIII of 1859.

The Moonsiff held that the suit would not lie, and accordingly dismissed it. On appeal, the Subordinate Judge remanded the case for trial on its merits. After remand the Moonsiff found that the plaintiff had not adduced any satisfactory evidence to show that the land in dispute belonged to the mortgagors, and accordingly dismissed the suit. On appeal, the Subordinate Judge held that the plaintiff had proved his case, and, accordingly, passed a decree declaring the right of the plaintiff as mortgagee of the land in dispute.

The defendant, Govind Prasad, appealed to the High Court (*inter alia*), on the ground that the plaintiff had no cause of action.

Baboo *Ashutosh Dhur* for the appellant.

Baboo *Mahendra Lal Shome* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—In this case, it appears that the plaintiff claimed to be a mortgagee of certain property of which the mortgagors

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were in possession. The property was about to be put up to sale in execution of a decree obtained against the mortgagors, but on the plaintiff putting in his claim under section 246, the property was ordered to be sold subject to this mortgage.

Subsequently the defendant in this suit put in a claim to the same property, claiming by a title antecedent and superior to the plaintiff's title under the mortgage, and that claim was allowed.

The plaintiff thereupon brought the present suit to establish his title under the mortgage against the defendant. The defendant from the first contended that no such suit would lie. The Moonsiff on the original hearing so thought, and on that ground dismissed the suit. The Subordinate Judge thought otherwise, and remanded the suit for trial on the merits. The Moonsiff again dismissed the suit, but the Subordinate Judge has given the plaintiff a decree. The defendant has now come before us, on special appeal, and he again objects that the suit will not lie.

We think the suit will lie. The defendant has asserted a title to land which is altogether inconsistent with that of the plaintiff. He has asserted it in a Court of Justice, and obtained relief upon the strength of it. It is true that the plaintiff is in one sense not affected by those proceedings, because he was not a party to them, but in another way he is, for he could scarcely make any use of his title in the market after such a decision in favour of the defendant.

This is a case in which the action of the defendant is itself injurious; and in which the declaration of the Court will be in itself a relief. We see no reason why that relief should not be granted.

The case of *Kenaram Chucherbutty v. Dinonath Panda* (1), was a good deal relied on, where it is said by Mr. Justice Phear that the Court has no power to make a mere declaration of right without anything more, unless it can see that consequential relief might have been given had the plaintiff thought fit to ask for it. But it is obvious that that case differs very considerably from the present, for Mr. Justice Bayley says that there was "no overt act of hostility" on the part of the defendant, and

the fact appears to be that the measurement by the survey officers, which the plaintiff appears to have considered adverse to his title, was in no way brought about by the defendant.

We do not attempt to interfere with the order obtained by the defendant releasing the property from attachment. That order, for the purposes of the execution, we treat as absolutely final. But we think that the plaintiff has a right to have his title cleared of a claim which must be injurious to it.

We dismiss the special appeal with costs.

Appeal dismissed.

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GABIND
PRASAD
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v.
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RANA.

[ORIGINAL CIVIL.]

Before Mr. Justice Norman, Officiating Chief Justice.

IN THE MATTER OF THE SHIP PORTUGAL.

1870
Dec. 16.

*Bottomry bond-holder—Sale of Ship—Master's Lien for Disbursements and Wages—Towage—Jurisdiction—24 Vict., c. 10 (*The Admiralty Act, 1861*)—26 Vict., c. 24 (*The Vice-Admiralty Act, 1863*.)*

A ship was chartered for a voyage from Calcutta to Jeddah and back. While at Jeddah, the master found it necessary to borrow money for the wages of the crew and other purposes; and, with the consent of the owner, tenders were invited by advertisement for a sum for which a bottomry-bond was to be given. Several tenders were made, and one by the charterer of the ship was accepted. A bottomry-bond was executed by the master, with the consent of the owner, in which was included the expense of certain repairs which had been found necessary at an intermediate port on the voyage from Calcutta, and for which the master had made himself liable. By the bond the master bound himself, his heirs, executors, and administrators for the payment of the sum named therein, and part of the consideration was expressed to be the payment of the debt which the master had incurred at the intermediate port. On arriving in the Hooghly, the ship was taken in charge by a pilot, under whose advice the master engaged a steamer to tow her to Calcutta. He was sued in Calcutta for the hire of the steamer, and had to pay the claim. When the ship arrived in Calcutta, the bond-holder obtained a decree on his bond, and had the ship arrested and sold; but on the application of the master, who had put in a claim for wages, the Court ordered that the proceeds should remain in Court, pending the consideration of the master's claim. In a suit by the master to recover the balance of wages due to him as master of the ship, and for the expense of the steamer which towed the ship up the river to Calcutta,—

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Held, the towage was a disbursement fairly made, and of which the bond-holder had the benefit; the master therefore had a lien on the ship for such disbursement.

Semble.—The master also had a lien for wages down to the time when he was duly discharged, and not merely down to the time of the arrival in port and arrest of the ship.

The master, however, having bound himself by the terms of the bond, was precluded thereby from setting up his lien against that of the bond-holder, to whom, on the face of the bond, he had constituted himself a debtor.

24 Vict., c. 10 (The Admiralty Act 1861), and 26 Vict., c. 24 (The Vice-Admiralty Act 1863), extend to India (1). The High Court, as constituted by the Charter of 1862, had not, by virtue of the Admiralty Act 1861, or otherwise, any jurisdiction over claims for disbursements by the master. But, after the passing of the Charter of 1865, the Vice-Admiralty Act 1863 applied to the High Court, as being "a Vice-Admiralty Court established, after the passing of that Act, in a British possession." *Held*, therefore, that the High Court had jurisdiction, as a Vice-Admiralty Court, to entertain the claim of the master for wages and disbursements on account of the ship.

THIS suit came before the Court in its Vice-Admiralty jurisdiction. The proceedings were instituted by Mahomed Hossein Kanwara, to recover the sum of rupees 921-6-4, being "the balance of his wages as master of the ship *Portugal*, and for moneys paid, laid out, and expended by him for and on account of the said ship;" and to recover the sum of rupees 716, being the amount of the hire of the steamer *Columbus* for the towage of the said ship from Mud Point to Garden Reach, on the return voyage to Calcutta from Jeddah, for which sum Mahomed Hossein had made himself liable as master, and for which Messrs. Gladstone, Wyllie and Co. had obtained a decree against him in the Calcutta Court of Small Causes. The promovent also submitted he was entitled to a further sum of rupees 78-12, being the costs incurred by Messrs. Gladstone, Wyllie and Co. in obtaining the said decree, and for which sum he was liable to Messrs. Gladstone, Wyllie and Co. The whole claim was for rupees 1,716-2-4, for which the appearer alleged he had made various applications to the owner of the ship, but had not been able to obtain payment of it, or any part of it. On an affidavit by the promovent to the above effect,

(1) See *The Asia*, 5 Bom. H. C. Rep., 64.

the Court issued an order under which the ship was arrested. All other facts material to this report will be found in 5 B. L. R., 258, and in the judgment of the Court in the present case. It appeared that there were mortgages on the ship prior to the advance on which the bottomry bond had been given. The following were the issues:—

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1. Whether the master has any maritime lien in respect of the items claimed by him, or any of them?
2. Whether, if so, he can compete with the holder of a decree as a bottomry-bond obtained before his action was filed?
3. If he can so compete, can he, having regard to the terms of the bond, compete with the bottomry bond-holder?
4. Whether the bond is valid, and if so, to what extent?

Mr. *Phillips*, for the promovent, contended that he was entitled to be paid his wages, as well from the arrest of the vessel to the date of sale, as up to the date of the arrest, and also for disbursements on account of necessary expenses defrayed by him. He claims the disbursements under the Admiralty Court Act, 1861, 24 Vict., c. 10; see *The Feronia* (1); and he is entitled to have these claims satisfied out of the moneys now in Court in preference to the claims of the decree-holder on a bottomry-bond. The question of priority has been decided by Phear, J., in this matter (2). [NORMAN, J.—All that Phear, J., says is, “that your client is entitled to have the proceeds kept in Court until he has made out his claim,” and you have now to make out your claim.] The impugnant, by the tender in Court made on the 30th May 1870, of rupees 377 in full of all claims, and by alleging in his written statement such tender, and that the sum tendered is what is really due to the promovent, has admitted that the promovent has a valid claim; and if the promovent has any claim as admitted, he has a right to recover the full amount.

The promovent as master has a lien on the vessel for wages down to the date of the arrest of the vessel, which takes priority to that of a bottomry bond-holder—Abbott on Shipping, 519; Merchant Shipping Act, section 191, Pritchard's

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Admiralty Practice, page 329, sections 79, 80; and cases there cited; see *The Madonna d'Idra* (1). The promovent is entitled to receive his wages from the date of the arrest of the ship up to sale. He is also entitled to be allowed necessary disbursements—*The Feronia* (2), *The Saracen* (3). The claim for wages is to be preferred to that of a bottomry bond-holder, even after a decree has been obtained—*The William Safford* (4).

The bottomry-bond is invalid, as the owner was present, and might have pledged his own credit, and therefore bottomry could not be resorted to by the master: if the owner resorted to bottomry that could not affect the master's lien—Tudor's Maritime Law, page 60. It is invalid also, because the bond was partly for a debt contracted not in contemplation of bottomry—Pritchard's Admiralty Practice, page 50, section 164; Abbott on Shipping, page 131; Pritchard's Admiralty Practice, page 54, section 191; page 57, sections 218, 220, 222; note, page 56, section 127—*The Augusta* (5), *The Royal Arch* (6). The bond-holder was indebted for freight, and therefore could not lend money to the master on bottomry. His duty was to pay his debt and then bottomry would not be necessary—Abbott on Shipping, page 132; *The Hebe* (7). The whole of the money secured by the bottomry bond was not paid, but stores were supplied instead of part of it. A bottomry bond must be for money. Those who supply necessaries to the ship have a different lien—*Royal Arch* (6); Pritchard's Admiralty Practice, page 31, section 2, note; section 4, note. If the bond is valid, then it is the owner's bond, and the master's claim is not affected—*Royal Arch* (6). *The Jonathan Goodhue* (8) is distinguishable,—the terms of the bond in that case are different, and here the master did not intend to bind himself; as the owner was present, it is clear he merely signed for the owner. The bond is in the ordinary form—Abbott on Shipping, page 132; *Edward Oliver* (9); see *The Portugal* (10).

(1) 1 Dods. Ad. R., 37.

(6) Swab., 278.

(2) 2 L. R., Ad. & E., 65.

(7) 2 W. Rob., 146.

(3) 6 Moore's P. C., 56.

(8) Swab., 524.

(4) 1 Lush. Ad. R., 69.

(9) 1 L. R., Ad. & E., 379.

(5) 1 Dods. Ad. R., 283.

(10) 5 B. L. R., 258.

The *Advocate-General* (offg.) (Mr. *Cowell* with him) for the impugnant.—The two questions arising here are: 1st, as to the expenses of towing; 2nd, as to the right to recover wages subsequent to the arrest of the ship. As to the towing, the expense is made by the other side a matter of contract; but this is not so. On the evidence, the promovent is not entitled to recover for towage. It might be a desirable thing for the owner to take a steam tug, but there is nothing to show there was any necessity to do so. There was no implied promise on the part of the bond-holder to pay for the towage. Towing in this case is not a maritime lien on the ship. This is not a claim by the owners of the tug to arrest the vessel, but it is a claim by the captain, who says he has paid it. The promovent did not put in his claim until the owner had departed. The master cannot claim lien as by transfer—Abbott on Shipping, page 626. Lien is extinguished by payment. As to wages, the only way in which these can be claimed is by the master's lien on the ship continuing. The captain must be retained in port, otherwise he cannot recover wages. Here he was not retained in port. See *The Jonathan Goodhue* (1). If the master binds himself by the bottomry-bond, and it is submitted he has done so here, he loses his lien for wages.

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Mr. *Phillips* in reply.—If the master is entitled to wages up to the arrest, he cannot have bound himself in the bond; for if he had bound himself in the bond, he would have been entitled to nothing. There is no authority for saying that the maritime lien of the master for wages stops when the vessel comes into port. [Mr. *Cowell*—Abbott on Shipping, page 620, is an authority]. As the master was bound not to leave his vessel, he was entitled to wages. As to towage, by the evidence there was a sufficient necessity, and we are entitled to treat this as a disbursement. See *The Mary Ann* (2) and *The Feronia* (3), where it was decided that the master had a maritime lien for disbursements. This is not an action against the bond-holder, where some promise would be necessary to charge him; no

(1) *Swab.*, 524.

(2) 1 *L. R.*, Ad. & E., 8.

(3) 2 *L. R.*, Ad. & E., 65.

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promise is needed to enable the master to charge the ship. The master does not need the sanction of persons having liens on the ship to enable him to bind the ship. The master is entitled to be paid disbursements, as well as his wages, in priority to the bond-holder—*The Daring* (1), following *The Mary Ann* (2). See also the Admiralty Act, 1861. [NORMAN, J.—Does that Act extend to India?] It is submitted it does; everything has been done by the Legislature to extend it. See 26 Vict., c. 24, s. 10, cl. 2. This Court has both an Admiralty and Vice-Admiralty jurisdiction. The jurisdiction is given by the Charter of 1862, s. 31, and the Charter of 1865, s. 32; it was to be the same as the Supreme Court had. The jurisdiction of the Supreme Court was, by the Charter of 1774, to be the same as the Courts in England—13 George III, c. 63; 33 George III, c. 52. [NORMAN, J.—All these statutes only give the Court the jurisdiction the Courts in England had then. In England, it has been extended; has it been here? The *Advocate-General*.—By the preamble of the Act, it seems to be limited to England.] The Charter speaks of the Court now as the High Court of Admiralty of England in Calcutta. It is a branch of the English Court of Admiralty, and the Vice-Admiralty Court is expressly subject to the same rules and laws. See 39 and 40 George III, c. 79, s. 25, under which commissions were issued to India. In *The Hydroos* (3), the Privy Council held that the Admiralty jurisdiction of the Supreme Court in Bombay was the same as in England, and that the Court was bound to proceed in accordance with the practice there, and had the same powers. If the Legislature had thought the Act of 1861 did not apply, they would have extended it when they extended it to the other colonies by 26 Vict., c. 24.

NORMAN, J.—This was a suit by Mahomed Hossein, the master of the ship *Portugal*, for wages and for disbursements, being the amount paid for the hire of a steam tug to bring the vessel up the Hooghly to Calcutta.

(1) 2 L. R., Ad. & E., 260.

(3) 7 Moore's P. C., 373.

(2) 1 L. R., Ad. & E., 8.

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The facts are shortly these:—The ship *Portugal* being in the port of Jeddah in the Red Sea, in April 1869, and the master being in need of money for the payment of the wages of the crew and other purposes, with the consent of the owner, Mahomed Naina Marica, circulated an advertisement, inviting tenders for money to be lent on bottomry. Different merchants tendered, the last and lowest tender being on the part of Hossein Ibrahim Bin Johar to lend six thousand rupees, at 25 per cent. interest.

An estimate of the expenses for which the bond was to be given was drawn up, which included rupees 1,217-11-3 for repairs done at Cannanore, due to the agent of Hossein Ibrahim Bin Johar. The amount of such estimate was rupees 5,554-14-9.

A bond was drawn up in the usual form, conditioned for the payment of this sum, by which Mahomed Hossein bound himself, his heirs, executors, and administrators for the payment.

The bond recites that a part of the consideration was the payment of the debt which he as master had incurred at Cannanore.

The ship having arrived at the Hooghly, a pilot took charge of her, and on her arrival at Mud Point, on the 17th September 1869, under the advice of the pilot, the master engaged a steamer to tow her up the river to Calcutta. He was sued for the amount of the towage, and ultimately settled the claim by the payment to Messrs. Gladstone, Wyllie and Co. of rupees 500, which, he says, he obtained by the sale of some property at Bombay. The pilot proved that the wind was to the northward, and that the state of the river was bad from the freshes; the ebb-tide was very strong, and there was very little flood-tide. The pilot says he advised the captain to take steam, as it would take a long time to get up, and the vessel steered very badly. He thought it would have been a great risk to take the vessel up without steam.

I think that, under these circumstances, the charge for towage was fairly incurred; and as the captain was compelled to pay by a suit in the Small Cause Court, it must, I think, be treated as a disbursement fairly made, of which the bottomry bond-holder had the benefit.

The question now comes, whether, as against Hossein Ibrahim Bin Johar, the holder of the bottomry-bond, who has obtained a decree in the Admiralty Court for the sale of the vessel, the

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master is entitled to a lien for this disbursement, or his wages subsequent to the arrest under the process from the Admiralty Court. The case gives rise to several questions. The first is whether the master can enforce a maritime lien for disbursements, such as for towage, in the High Court sitting as a Vice-Admiralty Court. At Common Law, the master had no lien for his disbursements, nor could the Court of Admiralty have adjudicated on such a claim. See Lord Stowell's judgment in *The Lord Hobart* (1), Maude and Pollock on Shipping, page 90. By 24 Vict., c. 10, it was enacted "that the High Court of Admiralty (of England) shall have jurisdiction over any claim by the master of any ship for disbursements made by him on account of the said ship." The 26 Vict., c. 24, commonly called the Vice-Admiralty Courts' Act, 1863, recites, amongst other things, that it is expedient to extend the jurisdiction of certain Vice-Admiralty Courts mentioned in a schedule containing a list of existing Vice-Admiralty Courts to which that Act applies, "or any Vice-Admiralty Court which shall hereafter be established in any British possession." And by section 10, enacts "that the matters, in respect of which the Vice-Admiralty Courts shall have jurisdiction, are as follows, *viz.* :— Secondly, claims for master's wages and for his disbursements on account of the ship." The High Court of Bengal was established by the Charter of 1865, and Admiralty and Vice-Admiralty jurisdiction was conferred on it by the 32nd clause of the Charter, which is as follows:—"The High Court shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or Vice-Admiralty, &c."

By the Charter of 1862, it was ordained "that the High Court shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty Court, &c."

I am certainly disposed to think that the High Court, as constituted by the Charter of 1862, had not, by virtue of the Admiralty Court Act, 1861, or otherwise, any jurisdiction over claims for disbursements by the master. But when the present High

(1) 2 Dods. Ad. R., 104.

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Court was constituted by the Charter of 1865, I am inclined to think that the Vice-Admiralty Courts' Act, 1863, applied to such Court as a Vice-Admiralty Court established after the passing of that Act in a British possession, and consequently that I have jurisdiction to entertain the claim of the master for disbursements, and to treat the same as a maritime lien. I should therefore say that the plaintiff has a lien on the ship for the amount paid by him for towage, as well as for his wages. I am rather disposed to agree with Mr. Phillips that the wages, for which the master would have a lien, would be wages down to the time when he was discharged from the ship by some person having authority for that purpose, and not merely till the arrival of the ship in port or its arrest by the marshal of this Court.

But then comes the question whether the plaintiff is not precluded by the terms of the bond in this case from setting up his lien against that of the bond-holder, to whom, on the face of the bond, he has constituted himself a debtor. Now I see nothing to take this case out of the operation of the rule laid down by the Court of Admiralty in the cases of *The Jonathan Goodhue* (1) and *The William* (2). I must say with Dr. Lushington in the last case, "How can I allow this man, who is personally liable to the bond-holder, and who has made over to him the very property on which he raises a claim, to say, 'I will take that property out of your hands for my benefit and for your injury.'?" I am of opinion that I should be acting contrary to every principle of law and equity were I to do so.

Mr. Phillips contended that, in the present case, the plaintiff has not rendered himself liable by the words of the bond, which differ, in some respects, from those of the bond in *The Jonathan Goodhue* (1). I think there is no real foundation for the argument. The terms of the bond are clear. The plaintiff binds his heirs, executors, and administrators.

Mr. Phillips also contended that there was an understanding or agreement that the plaintiff should not be bound.

I am compelled to say that I place very little reliance on the plaintiff's evidence where his statements are not supported by the documents produced by him, and still less when he is contra-

(1) Swab., 524.

(2) Swab., 346.

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dicted by Hosseiu Ibrahim Bin Johar. The bond was, in fact, given in part to provide money to pay a debt, for which the plaintiff must apparently have rendered himself liable, *viz.*, for the repairs done at Cannanore. As to that extent, the plaintiff was exonerated from liability by a payment out of the money raised on the bond. I think it most unlikely, and in fact I do not believe, that there was any such agreement or understanding on this point as pretended by the plaintiff.

Mr. Phillips next attempted to contend that the bond was void, to the extent at least to which it was given to cover debts, which were not advances required for the necessities of the ship.

I think it is not open to the plaintiff to raise this contention in the present suit. If the case which the plaintiff attempted to set up be a true one, the bond is not only void to the extent of the rupees 1,217 for repairs at Cannanore, but to a very much larger extent. If the plaintiff believed his case to be a true one, it comes to this, that he has stood by and allowed the holder of the bottomry-bond to establish his claim in full to the prejudice and in fraud of the mortgagees of the ship. I think he cannot be allowed, at this stage of the proceedings, to raise an objection for his own purposes as to which he deliberately kept silence while the bond which relieved him from liability, as regards the repairs I have mentioned, was being established as against the mortgagees. The only objection to the bond which the plaintiff has succeeded in establishing is, that it ought not to have included the rupees 1,217, and one other small sum of a similar character. But though the bond, as a bottomry-bond, creating a charge on the ship as against prior incumbrances, may not be valid to that extent, it is a very different question whether it may not be enforced as regards these sums against the plaintiff personally.

Except as to the amount admitted, the plaintiff's lien cannot prevail against that of the defendant. He must pay the costs of the suit on scale 2.

He will get the costs of the suit heard before Mr. Justice Phear, in which he succeeded.

Decree for impugnant.

Proctor for the promovent: Mr. Carapiet.

Proctors for the impugnant: Messrs. Berners & Co.

[APPELLATE CIVIL.]

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

IN THE MATTER OF THE PETITION OF JADUNATH MOOKERJEE.*

1870
Dec. 7.

Review—Admission of Special Appeal, Meaning of—Power of Lower Appellate Court—Act VIII of 1859, s. 370.

Upon the dismissal of a special appeal by the High Court, the appellant in special appeal applied to the High Court for a review of judgment upon the ground of discovery of fresh evidence. This application was rejected, on the ground that the Court could not take cognizance of the merits of a case in special appeal, and, therefore, could not admit a review upon fresh evidence. The special appellant then applied to the lower Appellate Court for a review of its judgment on the ground of discovery of fresh evidence. This application was admitted, and a review of the judgment was allowed.

On application to the High Court under section 15 of the Charter Act, held, the lower Appellate Court had no jurisdiction to admit the application for review.

AFTER the judgment passed by the High Court in review (1) in this case, Panchanan Mookerjee and Nibaran Chandra Mookerjee applied to the Subordinate Judge for a review of his judgment, on the ground of the discovery of fresh evidence. This application was allowed by the Subordinate Judge, who reversed his former decision, restored the case to the file, and fixed a day for hearing of the appeal.

Upon this the plaintiffs petitioned the High Court, setting out the facts, and praying that the order might be set aside. They obtained a rule calling upon the opposite party to show cause why the order of the Subordinate Judge, dated the 31st October 1870, admitting the review, should not be quashed, as having been made without jurisdiction.

Baboo Kali Mohan Das, Chandra Madhub Ghose, Hem Chandra Banerjee, Upendra Chandra Bose, and Rajendra Mis-
sry, appeared to show cause.

* Rule Nisi, No. 836 of 1870.

(1) 4 B. L. R., A. C., 213.

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Baboo *Kali Mohan Das* contended that the rule laid down in section 376, Act VIII of 1859, for the admission of reviews by the lower Appellate Courts restricts them to this, that when a special appeal has been admitted they have no power to entertain a review. Their power to receive an application for review of their judgments ceases only when a special appeal has been admitted. In this case the special appeal had not been admitted, it had been rejected as there were no grounds. The power of the lower Appellate Court is not the same as the power of a Court of original jurisdiction. A Court of original jurisdiction cannot entertain an application for review when an appeal has been simply preferred under section 376. But not so with the lower Appellate Court; not only must the special appeal have been preferred, but it must have been admitted before its jurisdiction can be taken away. See section 373, Act VIII of 1859, and section 25, Act XXIII of 1861. When a special appeal has been dismissed, an application for review of the judgment of the lower Appellate Court, on the ground of the discovery of fresh evidence, can be entertained by the lower Appellate Court. It is the lower Court which should receive such application. See *In the matter of the Petition of Gunga Bishen Sahu* (1) and *Panchanan Mookerjee v. Jadunath Mookerjee*-(2). "Admitted" is not synonymous with "preferred"—*Joogul Kissore Sing v. Oogro Narain Sing* (3). It was held by Loch and Mitter, JJ., in *Rao Baneeram v. Newaz Bibee* (4), that the application is to be made to the lower Court. See *Lucas v. Stephen* (5).

(1) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

IN THE MATTER OF THE PETITION OF
GUNGABISHEN SAHU.*

The 5th September 1869.

Baboo Tarak Nath Dutt for the petitioner.

PEACOCK, C. J.—There are no grounds for a review of the judgment of this Court on the special appeal. The appli-

cation for review is refused. If there is any ground for review upon the ground of discovery of new evidence, the petitioner should apply to the lower Appellate Court, and the Judge will doubtless consider any application that may be made to him.

(2) 4 B. L. R., A. C., 213.

(3) 5 Wym., 20.

(4) 8 W. R., 511.

(5) 9 W. R., 301.

* Application for Review, No. 952 of 1868; from the judgment of Peacock, C. J., and Mr. Justice Mitter, dated the 3rd June 1868, in Special Appeal, No. 2669 of 1867.

Baboo *Hem Chandra Banerjee* (on the same side) contended that there was a distinction between the registration of a regular appeal and the admission of a special appeal, and referred to the cases of *Bhurrut Chunder Mojoomdar v. Ramgunga Sein* (1).

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Baboos *Debendra Chandra Ghose* and *Bansi Dhar Sen*, in support of the rule, were not called upon.

NORMAN, J. (after stating the facts, continued)—We have to consider whether or not the Subordinate Judge, under the 376th section of Act VIII of 1859, had power to admit the review. The 376th section is as follows: “Any person “considering himself aggrieved by a decree of a Court of ori-“ginal jurisdiction, from which no appeal shall have been pre-“ferred to a superior Court, or by a decree of a District Court in “appeal, from which no special appeal shall have been admitted “by the Sudder Court, or by a decree of the Sudder Court “from which either no appeal may have been preferred to Her “Majesty in Council, or, an appeal having been preferred, no “proceedings in the suit have been transmitted to Her Majes-“ty in Council, and who, from the discovery of new matter or “evidence which was not within his knowledge, or could not be “adduced by him at the time when such decree was passed, or “from any other good and sufficient reason; may be desirous of “obtaining a review of the judgment passed against him, may “apply for a review of judgment by the Court which passed the “decree.”

The question we have to consider is what is meant by the words, “a decree of the District Court in appeal from which no “special appeal shall have been admitted.”

In order to see what the meaning of the word “admitted” is in that section, we have to look at the sections relating to special appeals. The 372nd section declares on what ground a special appeal shall lie to this Court. The 373rd section prescribes the mode in which the application for the admission of the special appeal is to be presented. The 374th section states what the application is to contain, and the 375th section, now repealed,

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provided how that application was to be dealt with. It was as follows: "If the application be not drawn up in the manner hereinbefore prescribed, the Court may reject it or may return it to the party for the purpose of being corrected. When the application is correctly drawn up, it shall be registered in a book to be kept for that purpose, which shall be in the form contained in the schedule D. hereunto annexed, and the case shall proceed in all other respects as a regular appeal, and shall be subject to all the rules hereinbefore provided for such appeals, so far as the same may be applicable." Now, in order to say how the case is to proceed after the application is registered, we must refer to the 343rd section of the same Act. That section provides that the Appellate Court is to send intimation to the lower Court of the appeal being registered; that on receipt of the intimation, the lower Court is to transmit to the Appellate Court all papers and receipts, or such papers as may be specially called for by the Appellate Court. The 344th section provides that a day is to be fixed for the hearing of the appeal. The 345th section provides that the notice of the day fixed for the hearing of the appeal shall be affixed in the Appellate Court, and that a like notice shall be sent by the Appellate Court to the lower Court. The 346th section states what are the consequences of the non-appearance of either of the parties. The 347th section states "that if an appeal be dismissed for default of prosecution, the appellant may, within thirty days from the date of the dismissal, apply to the Appellate Court for the re-admission of the appeal; and if it shall be proved to the satisfaction of the Court that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court may re-admit the appeal." The 348th section provides that "the respondent may, upon the hearing of the appeal, take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal from such decision." The 349th section treats of the manner in which the Appellate Court, after hearing the appeal, is to proceed to give its judgment; and the 350th section enacts as follows:—"The judgment may be for confirming or reversing or modifying the decree of

"the lower Court : but no decree shall be reversed or modified,
"nor shall any case be remanded to the lower Court on account
"of any error, defect, or irregularity either in the decision or
"any interlocutory order passed in the suit, not affecting the
"merits of the case or the jurisdiction of the Court."

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It is clear, therefore, that under the 375th section, if a special appeal was not rejected or returned for the purpose of being corrected, but was registered, upon such registration it became a case pending in the Court. In other words it was admitted, and would have to be dealt with as prescribed by the Act. The effect of section 375 was that if the party dissatisfied with the judgment of the lower Appellate Court chose to appeal on questions of law upon a state of facts as found by the lower Appellate Court to the highest Court of Appeal, he was precluded from afterwards making a new case by going back to the first Court and asking it to alter its finding of facts. The Legislature has evidently treated it as a matter of public interest that there should be an end of litigation somewhere.

Section 375 of Act VIII of 1859 was repealed by the 1st section of Act XXIII of 1861, and in the place of it section 25 of that Act was enacted.

Section 25 enacts that "if the application is not written on a stamp paper of adequate value, or if it be not drawn up in the manner laid down in section 374 of Act VIII of 1859, or if it do not state any ground on which a special appeal will lie under the provisions of section 372 of the said Act, the Court may reject the application, or may return it to the party for the purpose of being corrected. The order for rejecting the application may be passed by a single Judge of the Court."

Now that 25th section, no doubt, authorizes and empowers this Court, or a Judge of this Court, to examine the application for the admission of a special appeal, and, in the first instance and without admitting it, to determine whether it states any ground upon which a special appeal will lie, and, on finding that such is not the case, to reject the application. This Court, however, has not hitherto acted upon the power conferred upon it by the 25th section, and as a matter of fact, special appeals, if duly stamped and drawn up in the mode prescribed by section 374, and the

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grounds of appeal certified as required by the rules of the Court, are and have been received and registered as a matter of course. But they are thus admitted and registered under the rules and practice of the Court. They are not the less admitted.

It does not follow because the Court might have dealt with the application in a mode which might have resulted in the rejection of the application, that if such course is not taken the application can be treated as not having been admitted. I think that if a special appeal is presented to the Court and is registered, it must be considered as having been admitted by the Court.

The present special appeal was not only registered, but the case was heard in special appeal, and judgment was given against the party who now seeks to obtain an order for the admission of the review by the lower Court. I therefore think the Subordinate Judge had no jurisdiction to entertain the application for a review, and therefore that the rule to quash his order, as one made in a matter in which he had no jurisdiction, must be made absolute with costs, which are assessed at 24 rupees.

Our opinion is in consonance with two recent decisions,—one by Bayley, J., and Phear, J.—*Lucas v. Stephen* (1), and one by Phear, J., and Hobhouse, J.—*Oomanund Roy v. Maharajah Suttish Chunder Roy* (2): there are other decisions of the Agra High Court and of this Court to the same effect, and we know of no decision which is in conflict with that which we have pronounced.

LOCH, J.—I concur in the view taken by the learned Chief Justice in this case. It appears to me that there can be no doubt that when a petition is once registered, and the notices have been served, and the records have been sent for, that a special appeal must be considered as admitted.

The great contention before us is as to the meaning of the word “admitted” as used in section 376, and also the words “application for admission of special appeals” as used in section 373. I think the meaning I have given above to the word “admitted” is correct, and I come to that conclusion from the words used in section 25, Act XXIII of 1861, more particularly from the

(1) 9 W. R., 301.

(2) 9 W. R., 471.

missed with costs, on the ground that it was the duty of the plaintiff to disclose to the Court fully all the circumstances he knew which could have any influence on the mind of the Court in determining whether execution should issue.

Leave, however, was given to the plaintiff to renew his application. Accordingly the plaintiff again applied by petition setting forth the above facts, including the letter of 3rd Baisakh 1275, and obtained a rule *nisi* calling upon the first named defendant, Sadu Charan Sirkar, to show cause why, notwithstanding the said letter, the decree should not be executed in the manner originally proposed by the plaintiff. The defendant Sadu Charan resisted the application, and it was dismissed with costs by Mr. Justice Markby, on the 29th August 1870, the learned Judge holding as follows:—

“There being in this case a formal release from the debt, as formal (as far as I am aware) as could be given according to the custom of Hindus, I think I ought not to allow execution to issue and treat that release as a nullity merely upon the statement that no consideration passed. My present opinion is that, even if that be so, the release would not be inoperative.”

The plaintiff appealed upon the grounds that the letter of the 3rd Baisakh 1275 was not a good and binding release; that it did not operate as a bar to the plaintiff's executing his decree; and that the letter having been written without any consideration was of no effect whatever.

Mr. Kennedy, for the appellant, was stopped by the Court.

No one appeared for Sadu Charan Sirkar.

NORMAN, J. (after stating the facts, continued).—We are of opinion that the letter in question was not in effect a release. In the first place, there is no consideration of any sort or kind for giving up the debt. If it had been that, in consideration of the defendant going among his friends and raising money to pay part of the decree, the plaintiff gave up the remainder of the decree, I am of opinion that that would have been binding on the plaintiff, and he could not now execute the decree. But,

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as I have already said, that is not the character of the transaction. Whatever had been realised from the defendant had been taken out of Court many months before the date of the letter. It could only operate if some effect could be given to it analogous to that of a release under seal. The mode in which an adjustment of a decree can be made is pointed out by section 206, Act VIII of 1859. Now section 206 says, that "no adjustment of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court." I think if the plaintiff had come before the Court and said that he was satisfied with half of the amount of the decree, and requested that satisfaction should be entered as to the remainder, or asked that it should be noted that he had agreed not to take further proceedings as to the residue, it would have been sufficient. The adjustment made through the Court, or recorded in Court, might have had the effect of a release. The section proceeds, "or be certified to the Court by the person in whose favor the decree has been made or to whom it has been transferred." If a binding agreement had been certified to the Court, I think that it would have been enough. But the mere fact that the plaintiff admits that he told the defendant that he would not execute the rest of the decree, is not the certification of an adjustment of the decree. The plaintiff at the same time that he makes the admission says, "I am not legally bound by my promise. I do not admit that the decree is adjusted or settled." In my opinion the letter in this case did not operate as a release to the defendant. The result will be that the order of the first Court will be reversed, and execution will issue. The costs of the application to Mr. Justice Markby as an ordinary application will be allowed, but there will be no costs of this appeal, as the plaintiff has brought himself into the difficulty by writing the letter.

Appeal allowed.

Attorney for the plaintiff: Mr. *Hechle*.

Attorneys for the defendant: Messrs. *Swinhoe, Law & Co.*

[APPELLATE CIVIL.]

Before Mr. Justice Markby and Mr. Justice Mitter.

NABIN KISHOR ROY (DEFENDANT) v. JAGES PRASAD GANGOPADA-DHYA AND OTHERS (PLAINTIFFS)*

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Regulation XI of 1825, s. 4, cl. 3—Right of Property of a Riparian Proprietor to an island in a navigable River—“Fordable,” meaning of.

Under clause 3, section 4, Regulation XI of 1825, a riparian proprietor has no right to an island thrown up in a large navigable river, when the channel which intervenes between his land and the island is, under ordinary circumstances, and at the most favorable seasons, unfordable for 16 out of 24 hours.

Baboos *Kalimohan Das* and *Rames Chandra Mittra* for the appellant.

Baboos *Anuhul Chandra Moorherjee*, *Srinath Das*, and *Taruck Nath Dutt* for the respondents.

THE facts of the case sufficiently appear in the judgment of

MARKBY, J.—This was a suit brought to recover possession of 12,000 bigas of land. The land in question is a chur in the river Megna, a large navigable and tidal river. The particular portion of the Megna where the chur is situate is called the Gogra.

As the case is put before us, the plaintiffs claim this chur on these grounds:—They say that it has been a long time in existence; and that, under the various names of Kallygazee, Pangaria, or Sahoochea, they have been repeatedly recognized by the Government officer of revenue as in possession of, and entitled to, it; that it is now, and has been for some time, connected with the plaintiffs' acknowledged estate of Ababil by a fordable channel, and that they are, therefore, entitled to it under both branches of clause 3, section 4, Regulation XI of

* Regular Appeal, No. 24 of 1870, from a decree of the Subordinate Judge of Tippera, dated the 15th December 1869.

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1825. If it be treated as a chur connected with the mainland by a fordable channel, they contend they are entitled to it as riparian proprietors. If it be treated as an island at the disposal of Government, they contend that it has been disposed of by Government in their favour.

The defendants also assert that the chur has been a considerable time in existence, but they deny altogether its identity with either of the churs Kallygazee, Pangaria, or Sahoochea. They do not now attempt to make out a title to the chur, but they assert that it has been, ever since its formation, in their possession.

The Subordinate Judge found that the chur in dispute was that claimed by the plaintiffs in 1859 as chur Sahoochea, and that, in spite of the opposition of the predecessors in title of the defendants, the plaintiffs obtained from the Government a recognition of their right to that chur. He finds, however, that the plaintiffs never had possession of that chur, but that the defendants had possession of it in 1866, as found by the Magistrate in a criminal proceeding in that year, though the Subordinate Judge considers that the defendant's possession had been then only recently obtained. There is a great deal in the judgment about the defendant having had *de facto* possession and the plaintiffs having had "symbolical" possession, which I do not precisely understand. The Subordinate Judge, however, expresses a decided opinion that "the witnesses and kabuliats" "and sanads produced by the litigants are all false." Lastly, he adds, that "a glance at the map prepared by the Civil Court" "Ameen in the case of 1866 between these very litigants, will" "show that the channel between the main group (*i. e.*, the plaintiffs' acknowledged estate) and the new formation (*i. e.*, the disputed chur) is fordable." Accordingly he gives the plaintiffs a decree.

The Subordinate Judge having disbelieved all the oral testimony (and false to a very considerable extent it undoubtedly was), we are in this Court thrown back entirely on the various proceedings of the revenue officers in which the state of the numerous churs in this neighbourhood is, sometimes directly, sometimes incidentally, described.

I think that we have not been shown the slightest trace of the existence of this chur prior to the year 1859. In that year an inquiry was made by Mr. Lance, Collector of Bhoolooa, with reference to a chur said to have formed in this part of the river. I think it may fairly be concluded that this formation was the nucleus of the chur now under dispute. But for reasons I shall state hereafter, I do not think it was then in a state in which it could properly be described as a chur in the technical sense of the term. The result of Mr. Lance's inquiry was that about 5,000 acres were found "to be visible during the ebb tide, but "remained under water during the flood tide." The plaintiffs on that occasion claimed this formation as a contiguous accretion to their chur Ababil, but the Collector says he sent a Baboo to inquire, and that the Baboo reported that he himself in a large boat went round the chur, and that large boats and even sloops plied round the chur. The Collector also states that he is informed that this formation lies at a great distance from Ababil, so distant that it (Ababil) cannot be seen. On this information Mr. Lance decided to take possession of this formation in the name of Government.

The plaintiffs then appealed to the Commissioner, and they succeeded in inducing the Commissioner to come to what appears to me to be a very extraordinary conclusion,—namely, that this formation which the Collector finds to be far away to the south of Ababil, and which had scarcely then appeared above water, was identical with an old chur called Kallygazee shown by all the maps to be far more to the north and to the west of Ababil. The Commissioner does not seem to have made any further inquiry, nor does he show how he arrives at his conclusion; he merely says that there is no doubt about it. I think, however, that I cannot do otherwise than accept the facts accepted by Mr. Lance upon an inquiry carefully made.

There is not the slightest evidence that the plaintiffs took possession of this formation, for I agree with the Subordinate Judge in thinking the parol evidence to that effect unreliable; indeed it is obvious that in the state in which the formation then was, it was impossible to do so.

Some time about 1864, a survey map was made, and in that

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map this formation was marked as separate from Ababil and numbered 1,032, Ababil being numbered 992. Some objection appears to have been taken to this by the plaintiffs, and an inquiry was made, the result of which was that an officer named Braja Sunder Mitter went to the spot and reported that "the portion of this chur which was out of water during the ebb tide on that date" (and this is admitted to be the date on which this officer went to the spot,—that is to say, the 30th of March 1865) (1) "had been measured twice over." Accordingly, an alteration was directed to be made in the revenue survey. This would certainly seem to show that this formation was at that time treated by the officers of Government as a chur belonging to the plaintiffs. But it would also show that, on the 30th March 1865 (1), it was still only visible at ebb-tide.

The next proceeding which throws any light on the condition of this formation is the report of Baboo Gocool Chandra Roy, dated the 21st August 1865. He was on the spot from the 2nd to the 7th April of that year, for the purpose of ascertaining whether this formation was, as alleged by the defendants, who had put forward a claim to it, a re-formation of a chur called Balumara. One of the points the Baboo was directed to inquire into was the state of the river between this formation and the chur Ababil, and he reports as follows:—

"The river between this new chur and the released chur of Ababil is very large,—at no season of the year can this river be forded, and it can be crossed only by large boats either at the time of high water or low water, and it cannot be crossed in less than an hour of time. On the 6th April, I went in a boat, and my amlas accompanied me in a second boat, and I tried by various means to ascertain the breadth and depth of this river by measuring it with a rope, and yet I failed. The evidence of Gour Majee, and a second Gour Majee of Lukheepoor and Ashkur, and Mahomed Ali of Khidirpoor, and Ny-muddeen of Khundokarpoor on the eastern side of this river, proves that the river between this new chur and chur Ababil has all along been in existence,—that is, from long before the year 1863, and that large boats, pinnaces, &c., always pass by

"it. Dinga Mullick and Jaggutteer lie on the border of the large river, and large quantities of lands of these kismuts have gradually been, and are still being, washed away by the river."

The Baboo does not state whether the formation was visible at high water as well as at ebb, but it may be inferred that at that time it was so, because he speaks of the distance between it and Ababil at high water, which assumes that at least some part of it was then visible. And very soon after that the defendants must have got into possession of it, for we find that on the 6th October 1866, the defendants filed a suit for the purpose of obtaining from the Court a declaration of their title, which they followed up, according to the usual tactics adopted in these cases, by an application to the Magistrate under section 318 of the Code of Criminal Procedure, alleging that a breach of the peace was likely to occur in consequence of the plaintiffs disturbing them in their possession. The defendants succeeded in obtaining from the Magistrate an order that they should be retained in possession; but Mr. Henry Richardson, the Judge of Tippera, held in the civil suit that the present defendants, who were then plaintiffs, failed to prove any title to this formation, and this decision was affirmed by this Court on appeal. But there can be no doubt from the finding in this suit and that by the Magistrate under section 318, that the defendants were then in actual possession of the formation; and that it was to some extent continuously above water and capable of being turned to some account.

Reviewing this evidence, it seems to me that the only inference we can draw from it is, that up to and including the date of Baboo Braja Sunder's visit in 1864, the land which is the subject of dispute was only a sandbank covered with water at high tide and dry at ebb. That a chur was in course of formation is very probable, but I think that the first evidence that a chur was actually in existence is contained in the report of Baboo Braja Sunder's (1) visit in April 1865.

Now, I feel bound to express my entire dissent from the doctrine which has been put forward in this case, and which seems to have received some countenance from the revenue authorities, that the bed of a navigable river in this state can be the subject of

(1) Qy. Baboo Gakul Chandra Day's.

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private property. So long as it is washed by the ordinary flow of the tide at a season when the river is not flooded, I think that it remains *publici juris*; or, if vested in any one, that it is vested in the Crown; not under Regulation VII of 1825, and for mere fiscal purposes, but as representing, and, as it were, a trustee for the public. That land in this condition is not subject to private rights of ownership is universally recognised, and it might be most detrimental to the interests of navigation if it were otherwise.

I think, therefore, that we ought to treat the chur in this case as having come into existence some time after April 1864 and before April 1865; and hence it follows that all proceedings of either party or of the Government officers in reference to the formation prior to that period, avail nothing whatever for any purpose connected with this case.

The plaintiffs' title, therefore, must depend wholly on the evidence that the channel between Ababil and the present chur is "fordable" within the meaning of clause 3, section 4, Regulation XI of 1825.

The report of Baboo Gakul Chandra Roy, above quoted, shows conclusively what the state of the channel was in April 1865; it was then clearly unfordable. In 1856, pending the suit brought by the defendants for a declaration of their title, an Ameen visited the spot, and the map which he made is put in evidence, but not his report. The map shows a line of figures which we think we may assume to indicate the depth of the channel along that line, and these figures show a maximum depth of 3 cubits, or $4\frac{1}{2}$ feet. Unfortunately this same Ameen is admitted to have been guilty of malpractices on a subsequent occasion in reference to this very case, so that his figures are not very trustworthy; and we have no information whether his soundings were made at high or low water. At any rate I think that the conclusion of the Subordinate Judge, based on a glance at this map, is somewhat too hasty. The only other evidence on which we can with much safety rely subsequent to the report of Baboo Gakul Chandra, is the report of the officiating Collector, Mr. Whinfield, of 26th January 1869. That would be the time of the year when the river is at its lowest; and in paragraph 31 he says—"I passed down the channel called the

"Gogra about ten days since at about half ebb, and there saw what "appeared to be a channel at least a mile broad between Ababil "and the disputed chur, and I felt sure that a channel of such "width could not be fordable; but on afterwards visiting this "channel at the extreme ebb of the tide, I found that the water "had receded, leaving a great extent of sand dry on both sides, "and that it was easily fordable. Several men crossed the "channel in my presence at the points marked with dotted red "lines. I had a compass and the map with me and noted this "down at the time. Thus, whatever may have been the case "four or three years ago, the disputed chur is certainly an ac- "cretion to Ababil at the present time. Boats, and even large "boats, can still pass through the channel at high water, but "at ebb tide even small boats stick. My *pansi*, drawing "1½ cubits, stuck quite at the east entrance of the channel at low "water, though a couple of hours after I saw a Dacca *palwar* "going over the same ground when the flood tide came."

The question then really is whether Mr. Whinfield was right in his opinion that a channel in the condition which he describes, that is to say, which can be crossed on foot at the extreme ebb, and probably for some short time before and after, is "fordable" within the meaning of clause 3 of section 4 of Regulation XI of 1825.

I have given this question a good deal of consideration, because of its importance, and because I differ from the construction put upon the word by Mr. Whinfield. Upon the whole I have come to the conclusion that the Legislature did not intend to give to the riparian proprietor the property in an island formed in a bed of a navigable river, when the channel which intervenes is, under ordinary circumstances, and at the most favorable season, unfordable at least 16 hours out of every 24.

I think, therefore, that the plaintiffs have proved no title to this chur.

A good deal of reliance was placed in the argument for the plaintiffs on the fact that the defendants had been found to have no title; and it was contended that they were, therefore, mere squatters, that their possession was a knavish possession, and that, therefore, every presumption should be made in the plaintiffs'

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favor; and the case of *Kowtir Poresh Narain Roy v. Watson* (1) was referred to, where Sir Barnes Peacock cites a passage from Domat's Civil Law upon this topic. But the principle there under consideration has no application whatever to the present case. The defendant does not seek to establish out of his possession any title of his own; he merely claims the right which all defendants alike have in a Court of law, that no decree should pass against them until the plaintiffs have established their claim. To substitute the plaintiffs for the defendants in the possession of this chur, would be to substitute one set of squatters for another.

Moreover, as regards the respective merits of these rival claimants, I think that there is nothing whatever to choose between them. Each party may have considered that they had some claim to this chur, and may have been justified in asserting it. But I cannot help seeing that in the manner in which they have supported their claim, both parties have been somewhat unscrupulous.

Under these circumstances, we shall reverse the decision of the Court below and dismiss the suit, but each party will bear his own costs in this Court and in the Court below.

I have only to add that my judgment in this case is given on the construction of clause 3, section 4, Regulation XI of 1825, as the decisions stood at the time of the argument, and without reference to a recent Full Bench decision, (2) which I understand would make the case still more favourable to the defendants.

MITTER, J.—I am also of opinion that this suit ought to be dismissed without costs.

There is no satisfactory evidence on the record to show that the lands now in dispute are identical, either wholly or even partially, with the chur which was claimed by the revenue authorities under the various names of Kalagazee, Pangaria, and Sahoochea.

The story of long possession put forward by the plaintiffs is without any foundation whatever. The evidence of the witnesses examined by them is manifestly unworthy of credit.

(1) 5 W. R., 283.

(2) 6 B. L. R., 255.

The nature and condition of the property in dispute, together with the other circumstances of the case, clearly show that the defendants were the first persons who took actual possession, although their possession must have commenced shortly before the award made by the Magistrate under the provisions of section 318 of the Code of Criminal Procedure.

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As to the maps prepared by the revenue authorities, I am of opinion that they do not throw much light on the question of identity. They were not prepared scientifically, and it would be therefore dangerous to rely upon such rough sketches as they are in determining the identity of a mere sandy formation thrown up in the middle of a river like the Gogra, which is constantly shifting its bed.

But even if the plaintiffs had succeeded in showing that the disputed chur, or any portion of it, is identical with the chur designated as Kalagazee, *alias* Pangaria, *alias* Sahoochea, they have given no reliable evidence to prove that they were the lawful owners of the latter chur. The revenue authorities did not and could not determine any question of the title in favour of the plaintiffs, and I do not see any reason to justify the contention that the proceedings by which those authorities abandoned the Government claim to the churs Kalagazee, Pangaria, and Sahoochea, can be regarded as a transfer of the title of the Government to those churs in favour of the plaintiffs.

But be this as it may, there can be no doubt that chur Sahoochea was visible during ebb tide only up to the 30th of March 1865 (1). This fact is fully established by the rubokari of the Deputy Collector, Baboo Braja Sunder Mitter, of that date; and I entirely concur with my learned colleague in holding that a chur in this condition, if it can be called a chur at all, cannot be treated either as the property of the Government or as that of a private individual, under the provisions of Regulation XI of 1825.

As to the title set up by the plaintiffs under the provisions of clause 3, section 4, Regulation XI of 1825, I am of opinion that it has not been made out. My learned colleague has fully entered into the evidence bearing upon this point, so that any

(1) Qy. 1864.

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further remarks on my part are unnecessary. I wish to add, however, that it has been recently decided by a Full Bench of this Court (1), that before a plaintiff can be allowed to maintain a suit under clause 3, section 4 of Regulation XI of 1825, it is incumbent upon him to prove that the channel separating his estate from the chur claimed, was fordable at the time when the chur was first "thrown up." No evidence of any kind has been given to prove this fact, and the plaintiffs' claim must therefore fail upon all points.

Appeal allowed.

R. E. Cal. f. 391.
" W.C.S. 683.
V.M.C.S. 807.

Before Mr. Justice Kemp and Mr. Justice Glover.

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GAUR MOHAN CHOWDHRY (PLAINTIFF) v. MADAN MOHAN CHOWDHRY AND OTHERS (DEFENDANTS).*

Cause of Action—Limitation—Act XIV of 1859, s. 1, cl. 13 and 16—Suit for Turn of Worship of an Idol—Witnesses, Summoning of.

The plaintiff sued the defendants for declaration of his right to a turn of worship of an idol for $7\frac{1}{2}$ days in each month, alleging that the defendants, who were entitled to another turn, had in 1864 taken adverse possession of the idol and properties belonging to it, and had so deprived him (the plaintiff) of his turn of worship from that time.

Held, that the cause of action did not recur as the turn of worship came round. Such suit falls within the operation of clause 16, section 1, Act XIV of 1859.

THIS was a suit for a declaration of right to perform the service or worship of the family idol Damudar Jio for $7\frac{1}{2}$ days and to bring the idol home on festive days, on the allegation that the idol had been established by the ancestors of the plaintiff and defendants, and placed in a temple situate in a piece of *ijmali* land within the house of the defendant Madan Mohan Chowdhry; that both the parties held possession of the idol, and the properties dedicated to its service; that the defendant Madan Mohan's turn of worship was the first 15 days of every month, and that the plaintiff and the defendant Prasannamayi

* Special Appeal, No. 1639 of 1870, from a decree of the Subordinate Judge of Hooghly, dated the 18th May 1870, affirming a decree of the Moonsiff of that district, dated the 31st March 1870.

were each entitled to a turn of worship for $7\frac{1}{2}$ days; that on the 16th Falgun 1270 (February 27th, 1864), the plaintiff was dispossessed of the same. Hence the suit.

The defendant, Madan Mohan, set up in his written statement that the plaintiff had no right to the turn of worship, as his father had, on the 29th Falgun 1213 (March 11th, 1806), by a deed of *ladawi* (deed of relinquishment), relinquished the same in favour of the father of the defendant; and that the claim was barred by lapse of time.

The Moonsiff held that the plaintiff was not in possession of the turn of worship, and that the claim was barred by lapse of time.

On appeal, the subordinate Judge held that the claim was barred by lapse of time, as the defendant was in possession of the property belonging to the idol, and that the plaintiff had not exercised his right of worship, and had been out of possession of the idol's property for more than 12 years from the commencement of the suit. He accordingly confirmed the decree of the lower Court.

The plaintiff appealed to the High Court.

Baboos *Hem Chandra Banerjee* and *Ambika Charan Bose* for the appellant.

Baboos *Rames Chandra Mitter* and *Kali Mohan Das* for the respondents.

The arguments and grounds of appeal are sufficiently noticed in the judgment of the Court which was delivered by

KEMP, J.—The plaintiff is the special appellant in this case. He sued on the allegation that he was entitled to a turn of worship of a certain idol, which is kept at present in the female apartments of the house, occupied by the defendant Madan Mohan. In the plaint it is set forth that this idol was the ancestral idol of the family; that the defendants were entitled to the first fifteen days of the month's worship; that the plaintiff was entitled to $7\frac{1}{2}$ days' worship, and another party to the other $7\frac{1}{2}$ days; that the plaintiff's right of worship was suddenly interrupted by the

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defendant on the 16th of Falgun 1270 (February 27th, 1864); that this interruption gave the plaintiff a cause of action, and he therefore brought this suit to enforce his right to a turn of worship of the idol. Both Courts have dismissed the plaintiff's suit, holding that this suit is barred, inasmuch as the plaintiff has failed to prove that, at any time within twelve years prior to the institution of the suit, he enjoyed the right of worship.

In appeal to this Court, several grounds have been taken by the pleader for the special appellant. He contends, 1st, that the right of worship is a recurring cause of action; 2nd, that clause 16, section 1, Act XIV of 1859, applies to this suit, and that the period of limitation must be computed from the 16th Falgun 1270 (February 27th, 1864); and as the suit has been brought within six years from the time the cause of action arose, the suit is within time. The next ground taken is that the lower Appellate Court having found that Tarini was in possession, and that Tarini was the *shebait*, such finding was opposed to the evidence adduced by the defendant, which went to prove that not Tarini, but her son, Madan Mohan, was in possession. The last ground is that certain material witnesses, cited by the plaintiff, namely, Ram Kumar Gangopadhyaya, Pratap Chandra Gangopadhyaya, and Guru Prasad Roy, the brother-in-law of the principal defendant, Madan Mohan, were not examined, although the plaintiff cited them to prove that he had exercised the right sued for within a period which would save his suit from being barred under the Statute of Limitation, and that the lower Courts refused to send for these witnesses.

We think on the first point that this is clearly not a case of a recurring cause of action. Baboo Hem Chandra Banerjee has attempted by some sort of analogy to a rent suit to make out that this is a recurring cause of action. There is no doubt that a claim for rent is a recurring cause of action, but this is a claim to exercise a right of worship of an idol, and cannot be said to be a recurring cause of action. We think that the period of limitation applicable to this case is that laid down in clause 16, section 1 of Act XIV of 1859, and not the limitation prescribed under clause 13, section 1 of the same Act. Under clause 13, section 1, suits to enforce a right to share in any property,

annually with reference to the proportion of crop raised, after survey and measurement ; and that the rates asked were not fair and equitable.

The first Court passed a decree in favor of the plaintiff.

On appeal to the Judge, the defendant, besides objections on the merits, took the following objections (1), that the plaintiff did not sufficiently identify the land ; (2), that there was no proof of the due tender of a potta ; (3), that the plaintiff, being the proprietor of a fractional share of an undivided estate, could not sue alone. The Judge found the facts that the plaintiff was one of seven co-sharers ; that the other co-sharers were not parties to the suit ; that there was no dispute as to the plaintiff's share ; and that the defendant had admittedly been paying rents to the plaintiff separately for his share. The Judge, without going into the merits of the case, dismissed the plaintiff's suit on the three grounds taken by the defendant on appeal.

Baboo *Aushutosh Dhur* and Baboo *Bhawani Charan Dutt* for the appellant.—The lower Appellate Court was wrong in allowing the defendant to take so many objections before him, which were not taken before the first Court, although there was nothing to prevent the defendant from taking them in the first Court. There is nothing in the law to prevent a proprietor of a share of an undivided estate from suing for a kabuliat for his share when the ryot has been paying rent separately to him, and there is no dispute as to his share. The plaintiff sufficiently described the lands, and no further specification of boundaries was necessary.

Baboo *Hemchandra Banerjee* for the respondents.—A proprietor of a share only cannot sue for a kabuliat, without making his co-sharers parties, because there is no means of ascertaining his share correctly. The tenant may have to pay the plaintiff more than the plaintiff's proper share of rent. Any other view would be opposed to *Rani Sarat Sundari Debi v. Watson* (1), and would make a reference to

Upon the third point, the court is right in allowing the defendant

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potta, because it is a question of law, and it has frequently been held that all questions of law between the parties ought to be raised and fairly and fully tried with due regard to justice, notwithstanding any omission to raise them in the proper time and in the proper place. Without a tender of a potta, a suit for a kabuliat will not lie (1).

The judgment of the Court was delivered by

PAUL, J.—In this case the lower Appellate Court found that there was no dispute as to the plaintiff's share, *i. e.*, one-half pie of the zemindari, and that the defendant had admitted having paid rent to the plaintiff separately for his share.

The first point taken in appeal is that, under these circumstances, the plaintiff (who is the appellant), as proprietor of a fractional share of an undivided estate, could not sue the defendant for a kabuliat, and that therefore his suit has been improperly dismissed. On this point I really have no doubt whatever that the plaintiff could sue for a kabuliat; his action being simply one intended to put upon paper a separate engagement and contract already existing between himself as landlord, and the defendant as tenant. It is moreover the general custom of this country, as far as I know, to collect rents in certain specific shares, and to grant receipts for such fractional shares. To this almost elementary view of the subject, a decision of a Division Bench of this Court is cited as being opposed, *viz.*—*Rani Sarat Sundari Debi v. Watson* (2); but we find that the same decision is referred to in another case—*Udaya Charan Dhur v. Kali Tara Dasi* (3), as being correct with an exception which applies to this very case. We also find there is a case decided by Macpherson and E. Jackson, JJ.—*Ganga Narayan Das v. Saroda Mohan Roy Chowdhry* (4), holding that a person is entitled to sue for rent for a fractional share of lands, the rent of which has been admitted by the defendants to have been previously paid. The law there laid down is to the following effect:— If the plaintiff can in

(2) B. L. R., A. C., 159.

(3) B. L. R., App., 52.

(4) B. L. R., A. C., 230.

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" prove that the defendants have heretofore recognized him as being the proprietor of a particular share of the property, and " have paid to him separately a certain proportion of the rent, " then, no doubt, the suit will lie against them, without the other joint proprietors being made parties. But unless the plaintiff either proves that the defendants have paid their rent to him separately, or proves an express agreement on their part to pay to him separately, the suit will not lie in the absence of the other shareholders." So that, if we look to the weight of authority, we have the two last authorities that I have mentioned as supporting the position taken by the appellant in this case. But it is argued by Baboo Hemchandra Banerjee that these two decisions are in conflict with *Rani Sarat Sundari Debi v. Watson* (1), and therefore we ought to send up the question to a Full Bench for decision. I do not think, however, that the matter stands precisely so, because we find that one of the Judges who pronounced the decision in *Rani Sarat Sundari Debi v. Watson* (1), resiled from that position in the decision in *Ganga Narayan Das v. Saroda Mohan Roy Chowdhry* (2), which is the latest decision on the subject. This being so, our present view appears to be in conflict with the view of one Judge only, and the view of that one Judge is expressed in a few words. He says in the first place :—" It is clear that the plaintiff does not allege that she held any distinct portion of this land as a separate estate." But this is not our case here: and then " we do not find in Act X, or under any decision of this Court, any authority to the effect that one, who is entitled to a fractional share of an undivided estate, though he receives a definite portion of the rent from the tenant or ryot, is entitled to maintain a suit for a separate kabuliat in respect of such undivided share." This seems to imply that the point there decided was scarcely argued. We do not find any reasons given for the position there taken, except the absence of authority which, under the circumstances, does not appear to be a sufficient reason. Then, having regard to the point very clearly drawn in the other two cases, we are in

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no way restrained from expressing our own views, and deciding upon them.

Of the two other points that arise in the case, Baboo Hemchandra Banerjee, a gentleman of considerable experience, does not press the second, *viz.*, that the kabuliat did not state the boundaries. It was not necessary that it should do so. It contained all the particulars of area required by section 2, Act X of 1859, and the defendant was doubtlessly well aware what the lands were for the rents of which he was sued. If he were not aware of that fact, he could apply for better particulars; but I do not think that such want of specification in the boundaries is any ground for dismissal of the suit. It would be sufficient if, after enquiry, the boundaries were more fully stated in the decree.

The third point is that, inasmuch as the issue, *i. e.*, whether a potta was tendered before the institution of the suit had not been raised before the Court of first instance, the lower Appellate Court ought not to have raised such issue. Now it is clear that no issue was raised as to the tender of the potta, and it does not appear that the defendant ever wanted to raise such an issue in the first Court, which he could have asked for if he wished. I do not think that, under section 354, Act VIII of 1859, it was right for the Appellate Court in this case to raise an issue involving the tender of a potta, because it does not appear to me that such an issue was essential to the proper determination of the suit on the merits. Moreover, it is quite clear that, had the potta been tendered to the defendant, he would simply have given it back to the plaintiff, and there is a principle of law which rules that, if a man by his own conduct renders the performance of a condition precedent unnecessary, the other party is not bound to perform it. The attitude of the defendant in this suit being taken into consideration, it may safely be assumed that the tender of the potta to him would have been simply an unnecessary offer of a piece of paper. We consider, therefore, that the point as regards the tender of the potta cannot be gone into. There were anything in it, the objection should have been taken at an earlier stage. The provisions of the law do not seem to imply that a party can bring in Court,

where, without being in Court, he might enter into an agreement. Section 2 of Act X of 1859 says :—“ Every ryot is entitled to receive from the person to whom rent is payable a potta,”—that is, entitled to receive a potta when he requires it. Section 9 says that the tender of a potta gives a man a right to ask for a kabuliat. I think that both these sections point to a case where the landlord and tenant are agreed as to terms, or where the landlord tries to obtain from the tenant a kabuliat, he is willing to give, without giving him a document in return. But, be that as it may, we think that in this particular case the issue ought not to have been raised, and should not be gone into by the Appellate Court, because it was not essential to the right determination of the suit upon the merits.

The special appeal is allowed, and the case remanded for trial on the merits.

The costs will follow the result.

Appeal allowed.

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Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, and
Mr. Justice Ainslie.

DURGA CHARAN MAZUMDAR (PLAINTIFF) v. MAHOMED ABBAS
BHUYA (DEFENDANT.)*

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Act VI of 1862, (B. C.) s: 9—Measurement of Land—Possession—Receipt of Rents.

Where a person sues to have the assistance of the Collector to measure lands, of which he alleges himself to be the proprietor by purchase, he is not entitled to have such assistance if his title is disputed, and if he is found not to have been in possession or in the receipt of rents from the date of his purchase.

THE plaintiff in this case, which was brought in Sraban 1276 (July 1869), sued under section 9, Act VI of 1862 (B. C.) for assistance to measure the land of the defendant, his ryot. He claimed the proprietorship of the estate, the half of a small talook, under a purchase from the owner, one Akber Ali, dated the 6th Chaitra 1275 (March 18th, 1869.)

* Appeal, No. 4 of 1870, under section 9 of the Letters Patent, against the decree of Mr. Justice F. A. Glover, dated 18th July 1870, passed in Special Appeal, No. 291 of 1870, heard and decided by Mr. Justice F. A. Glover and Mr. Justice Mitter, on the said

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The defendant Abbas, a co-sharer of the estate and cultivating ryot, and the other defendant, denied the plaintiff's right as proprietor, and averred that Akber Ali, the plaintiff's vendor, was not owner of any portion of the talook.

The Deputy Collector made what he called a summary enquiry into the right of proprietorship, and found that Akber Ali was a part owner, and had received the rent of the land up to the year 1275, B. S. (1868), the date of sale to the plaintiff. He therefore passed a decree in favor of the plaintiff, reserving all questions of title.

The Judge, on appeal by Abbas, reversed this decision, thinking that the Revenue Courts had no jurisdiction when the party claiming the right to measure was admittedly out of possession, and when his title to the land was disputed by third parties.

On special appeal it was contended—

(1) That the Judge ought to have decided whether the plaintiff's vendor, Akber Ali, was in possession and in receipt of rent up to the date of sale, and

(2) That the decision of the Deputy Collector ought not to have been reversed in its entirety merely on the appeal of Abbas alone.

GLOVER, J. (after stating the facts)—On the first point I think that the Judge was right, and that section 9, Act VI of 1862 (B. C.), cannot be employed to give title by a side wind, or to virtually decide questions of proprietary right under cover of a right to measure. A plaintiff coming into Court under this section as proprietor, must show that he is a proprietor in possession; it is not enough that he may be able to prove his title, he must be in possession before he can claim the right to measure, and the only question the Revenue Court has to try under section 9 is—Who is in possession? The case of *Kalee Doss Nundee v. Ramguttee Dutt Sein* (1) lays down the same ruling, and *Pureejan Khatoon v. Bykuntchunder Chuckerbutty* (2) is exactly in point. In that case, as in the present, the defendants, who were ryots on the estate, pleaded that the lands did not belong

(1) 6 W. R., Act X Rul., 10. (2) 10 W. R., 96.

the nature of the defence set up, and this conclusion would be certainly contrary to all the recognised principles by which questions of jurisdiction are determined. The law says that "the Collector shall proceed to enquire into the case in the manner provided for suits under Act X of 1859," and he is therefore bound to decide all questions necessary for the right decision of the case, whether they are questions of disputed title or disputed possession. The Judge says:—"It may be that the rights and interests of Akber Ali are contested merely to oppose the plaintiff, but if such is the case he must seek his remedy in the Civil Courts, but he cannot obtain redress by suing for assistance to measure the lands." If this reasoning is correct, all that a tenant has to do is to deny the title of his landlord, and the Collector would be bound to hold his hands notwithstanding the gross fraud involved in the denial. Surely the jurisdiction of a Court of Justice cannot depend upon the honesty of the defendant, and I see no reason for making any distinction in this respect between the jurisdiction of the Revenue Courts and that of any other Court in this country.

The other ground upon which the Judge's decision is based requires a more careful consideration. I do not wish in this case to raise the question as to whether a proprietor, who is *de facto* out of possession, is competent to avail himself of the provisions of section 9 of Act VI of 1862. But assuming that this question ought to be answered in the negative, I do not see any reason why the plaintiff should not be permitted to maintain this suit merely because he himself has not received any rents from the defendants since the date of his purchase. The first Court has distinctly found as a fact that his vendor, Akber Ali, was in possession of the talook in question up to that date, and as this finding has not been reversed on appeal by the Judge, the plaintiff is fully entitled to assume it to be correct for the purposes of the present discussion. Suppose, then, that there had been no sale to the plaintiff, and that this suit had been brought by Akber Ali himself, could it have been contended for one moment that the mere fact of Akber Ali's not having received any rents from the defendants during the interval between Chaitra 1275 (March 1869), the date of the plaintiff's purchase, and Sraban 1276

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(July 1869), the date of the institution of this suit, would have been a sufficient answer to his claim? And would the defendants have been permitted upon that ground alone to say that Akber Ali was not a proprietor in the receipt of rents within the meaning of section 9, Act VI of 1862? If Akber Ali was in the receipt of rents from them in Chaitra 1275 (March 1869), there can be no doubt whatever that he was in possession through them up to that date; how then could it have been contended that they were not his tenants in Sraban 1276 (July 1869), or that he was not in possession through them at that time, merely because he did not receive any rents from them during the interval in question, particularly when it is borne in mind that that interval would have scarcely sufficed to enable him to make his *poonia* for 1276? (1869). It is a notorious fact that rents are not collected from the ryots in this country every month in the year; and if the mere fact of the non-receipt of rents during a short interval, like the one under our consideration, is sufficient to convert a proprietor in possession into a proprietor out of possession, no zemindar in this country would ever be able to maintain an action under section 9, Act VI of 1862. Suppose, again, that Akber Ali had brought a suit against these very defendants for arrears of rent; and suppose also that the period for which those arrears were claimed was the very period intervening between Chaitra 1275 (March 1869) and Sraban 1276 (July 1869), could it have been contended for one moment that Akber Ali was not a proprietor in possession, merely because he did not receive any rents from the defendants during the period in question? and would the defendants have been permitted to say upon that ground alone that they were not his tenants in Sraban 1276? (July 1869). Of course it would have been quite open to the defendants in such a suit, as in a suit for measurement under section 9, to prove that the relation which existed between them and Akber Ali in Chaitra 1275 (March 1869) had been subsequently determined in due course of law, or even that they had been paying their rents *bondâ fide* to some one else since that date; but in the absence of such proof, the Collector would have been bound, in my opinion, to decree the claim of Akber Ali, whether that claim was a claim for arrears

of rent or for measurement under the section above referred to. But if Akber Ali could have maintained a suit for measurement under the circumstances stated above, I do not see any reason why the plaintiff should not be permitted to maintain this suit under the section in question. That the plaintiff is the purchaser of the rights and interests of Akber Ali is not disputed in this case either by Akber Ali himself or by the other defendants, and it is therefore clear that he is legally entitled to occupy the same position as his vendor; why then, it may be asked, is the Collector to decline jurisdiction in the one case and not in the other? It has been said that the plaintiff himself has not received any rents from the defendants since the date of his purchase. But this argument cannot, in my opinion, affect the position of the plaintiff in the slightest degree; for that position is in the eye of the law precisely the same as that of his vendor, so far as the defendants in this case are concerned. Suppose, for instance, that a zemindar who is *de facto* in possession of his estate, dies, and a suit for measurement under section 9 is brought by his heir on the very next day, would the tenants of the deceased proprietor be permitted to get rid of the suit merely by urging that the plaintiff himself has not received any rents from them, and that they were not the tenants of his ancestor? I see no reason whatever for putting such a narrow construction on the words of the section in question, and I may add that to allow such a defence would be to countenance a gross fraud.

With reference to the decisions relied upon by the pleader for the respondent, I have only to observe that they do not seem to me to have any direct bearing upon the point now before us. There is nothing whatever in those decisions to show that a suit like the present cannot be maintained in the Revenue Courts, and it is therefore unnecessary for me to go into them in detail.

As to the second ground urged in this special appeal, I am not prepared to say that the provisions of section 337, Act VIII of 1859, are not applicable to this case.

For the above reasons I would remand this case to the lower Appellate Court to be tried on the merits.

The decision of Mr. Justice Glover prevailed as that of the

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senior Judge, and the case was appealed under section 15 of the Letters Patent.

Baboo *Ramesh Chandra Mitter* for the appellant.

Baboo *Kulimohan Das* for the respondent.

The judgment of the Court was delivered by

NORMAN, J.—I am of opinion that the decision of Mr. Justice Glover is correct, and must be affirmed.

The question entirely turns upon the construction to be put on section 9 of Act VI of 1862 (B. C.), which enacts that, "every proprietor of an estate or tenure, or other person in receipt of the rents of an estate or tenure, has a right of making a general survey and measurements of the lands comprised in such estate or tenure." Also that "if any person intending to measure any land which he has a right to measure, is opposed in making such measurement by the occupant of the land," he can apply to the Collector to inquire into the case.

The point is this, namely, whether a person who alleges himself to be the proprietor of an estate, not being in receipt of the rents, is entitled to ask for the assistance of the Collector in measuring his lands.

The plaint in this case states that the defendant No. 1 Abbas Ali, and the defendant No. 2 Akber Ali, had been in possession of a portion of a talook by cultivating it, and in respect of the remainder by receiving rents from the other defendants; that on the 6th Chaitra 1275 (March 18th, 1869), the defendant No. 2 Akber Ali, for the consideration of rupees 400, sold his share to the plaintiff, and that he (plaintiff) having purchased it, is proprietor, and is in possession.

The Deputy Collector treated the question as if the only issue was whether the plaintiff was the proprietor, and came to the conclusion that there was not the least doubt as to Akber Ali's "being one of the proprietors of the talook." But I may observe that although he refers to the evidence given before him as to Akber Ali being in possession in 1275 (1868), he does not

distinctly find that, in the year 1275 (1868), and down to the time of the sale to plaintiff, Akber Ali was in actual possession, and in receipt of the rents of his share of the talook. The purchase by the plaintiff not being denied, the Deputy Collector, thinking the proprietorship of the plaintiff to be sufficient to entitle the plaintiff to an order allowing the measurement, made an order to that effect.

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From that decision there was an appeal to the Judge. The Judge says "that he (plaintiff) purchased the rights and interests of Akber Ali, whatever they were, is not denied, but those rights and interests are contested. It appears that, ever since the purchase by the plaintiff, numerous disputes have arisen between the parties which have caused much litigation in the Criminal Courts. In consequence of this, the plaintiff has not been able to get possession of his purchase." The Judge adds: "In this case the plaintiff seeks to measure those lands of which he has never been in possession, and whether he has a right to possession as a purchaser of another's rights and interests, and which are contested as having belonged to the party from whom he purchased, can never be in the power of the Revenue Courts under this law to decide." The Judge therefore reversed the order of the first Court.

From that decision there was an appeal, and on appeal Mr. Justice Glover and Mr. Justice Mitter differed.

Mr. Justice Glover in his judgment says:—"Now the plaintiff in this suit is admittedly out of possession; he has neither got manual possession of the estate, nor has he ever received any rent from it; and it seems to me immaterial whether his vendor, Akber Ali, had possession and received rent or not, so far as a suit of this kind is concerned. It is clear that that possession was never transferred to the plaintiff, and until he acquires it, he cannot, in my opinion, sue for measurement."

Mr. Justice Mitter supposes, but as I think erroneously, that the first Court has distinctly found as a fact that his (plaintiff's) vendor, Akber Ali, was in possession of the talook in question up to that date," and he says, "as this finding has not been reversed in appeal by the Judge, the plaintiff is fully entitled to assume it to be correct for the purposes of the present discussion."

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The learned Judge goes on to say :—“ Suppose, then, that there “had been no sale to the plaintiff, and that this suit had been “brought by Akber Ali himself, could it have been contended “for one moment that the mere fact of Akber Ali’s not having “received any rents from the defendants during the interval “between Chaitra 1275 (March 1869), the date of the plaintiff’s “purchase, and Sraban 1276 (July 1869), the date of the insti-“tution of this suit, would have been a sufficient answer to his “claim ? and would the defendants have been permitted upon “that ground alone to say that Akber Ali was not a proprietor “in the receipt of rents within the meaning of section 9, Act “VI of 1862 ? ”

Now I do not for a moment suggest that it is necessary for a proprietor in the receipt of rents to be receiving rents every day in the year. If he once commences to receive rents, and thenceforth continues to receive them at the time when rents are ordinarily payable, he is undoubtedly the actual proprietor in receipt of the rents, although it may have been some months since any rents were in fact paid to him.

In the present case the purchase was made on the 6th Chaitra 1275 (March 18th, 1869). Now the Bengali year ends with Chaitra, and there would, I suppose, be a kist payable in or at the end of Chaitra, or some time in the month following. If he really got possession after his purchase, he would have received that kist ; and therefore it seems to me that it cannot be said that there is no reason for any presumption that the plaintiff is not in possession though he received no rent, because he had no opportunity of receiving rents between the date of his purchase on the 6th Chaitra 1275 (March 18th, 1869), and the middle or end of Sraban 1276 (July 1869), when the suit was instituted. Again, if he was in possession, evidence might have been given that he commenced or continued to receive rents after the commencement of the suit. It has been found by the Judge below that the plaintiff was out of possession. This is not a regular appeal, and we are not now trying the question whether the evidence on which the Judge came to that finding is or is not satisfactory. For myself, I think there is little doubt but that he had good grounds for that conclusion, looking to the manner in which the

case was put forward by the plaintiff and has been treated by the first Court. It appears to me clear that the section in question is intended to provide for cases where a proprietor, or other person in possession of an estate, is opposed in making measurement by the occupants of the land, and not for cases where the title of the person claiming the right to measure is a matter in contest. We should be very careful to prevent persons from taking an undue advantage of the provisions of such an enactment as section 9 of Act VI of 1862 (B. C.), by using it as a means of trying questions of title without paying the proper stamp duty, or of getting a sort of colourable possession by harassing or intimidating the ryots.

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It is clear in the present case that the plaintiff's vendor, even if he got some sort of possession in 1275 (1868), had been out of possession for a number of years, and possibly his claim might have been barred by limitation. For the above reasons, I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Bayley and Mr. Justice Paul.

MOHANT GAUR HARI DAS ADHIKARI (PLAINTIFF) *v.* HAYAGRIB DAS MOHANT (DEFENDANT.)*

1870
Dec. 18.

Malicious Prosecution, Action for—Onus Probandi.

In an action for malicious prosecution, it is for the plaintiff to prove the existence of malice and want of reasonable or probable cause, before the defendant can be called upon to show that he acted *bonâ fide*, and upon reasonable grounds, believing that the charge which he instituted was a valid one (1).

THE plaintiff sued the defendant for damages for malicious prosecution. He alleged that the defendant had maliciously preferred a false charge of dacoity against him, which charge had been dismissed.

The defendant in his written statement justified the charge, alleging its truth in fact.

* Special Appeal, No. 1381 of 1870, from a decree of the Officiating Judge of Midnapore, dated the 20th April 1870, reversing a decree of the Subordinate Judge of that district, dated the 17th May 1869.

(1) See *Walker v. South-Eastern Railway Company*, 5 L. R., C. P., 640.

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MOHANT by the evidence of witnesses to have been maliciously brought
GAUR HARI by the defendant against the plaintiff; that the decisions of the
DAS ADHIKARI Fowzdari Court and the Sessions Judge showed that the plaintiff
HAYAGRIB was released on its having been found that the prosecutor had
DAS MOHANT. concocted the charge; and that the said decisions being corroborative evidence clearly proved the evil motives of the defendant. He, accordingly, passed a decree in favour of the plaintiff, assessing the damages at rupees 1,000.

On appeal, the Judge held that it was not to be presumed that the defendant acted without probable cause; that it was for the plaintiff to adduce some evidence of want of probable cause; that the fact of the plaintiff being old and rich was not sufficient to shift the burden of proof; that from malice the want of probable cause could not be implied; that no satisfactory evidence had been adduced to show the want of a probable cause; and that the plaintiff had to make out a case for recovery of damages. He, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Jagadanand Mookerjee* and *Khettra Mohan Mookerjee* for the appellant.

Baboo *Bangshidhar Sein* for the respondent.

BAYLEY, J.—We think this special appeal must be dismissed with costs. This was a suit for damages brought for defamation of character and injury to reputation by reason of a charge of river dacoity preferred in the Criminal Court against the plaintiff Gaur Hari Das. The grounds of the suit were, firstly, that the charge was found originally by the police to be one of which they would not take cognizance; secondly, that the Magistrate would not commit Gaur Hari to the Sessions; and, thirdly, that the Sessions Judge remarked that the charge was trumped up and not proved as against the person who had been committed before him.

It appears that, after the decision by the Criminal Court, there was a regular suit brought by the defendant, Hayagrib Das Mohant, for the boat in dispute against Ganga Das and Gaur

Hari. In that suit the plaintiff got a decree as against Ganga Das, but Gaur Hari was excepted. Gaur Hari has now brought the present suit for damages.

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The defendant's answer was that he acted *bonâ fide*, and on belief of the existence of a reasonable and probable cause for the charge.

The first Court gave the plaintiff a decree for rupees 1,000 out of rupees 3,000, for which the suit was brought.

The lower Appellate Court has reversed that decision, and dismissed the plaintiff's case, considering that the defendant had reasonable and probable cause for the charge. The judgment of the Judge in this case is so very full and careful that it cannot be said that he has not considered the case in all its bearings. I shall quote the following passages from his judgment as supporting this statement, and showing that he has not only rightly considered the facts but has rightly laid down the propositions of law, and applied them to the facts as found. The Judge says:—"In this particular case, the proceedings were "commenced by the appellant's servant. Therefore the appellant's responsibility must begin from the time he became aware "of them, and the question is whether he acted maliciously and "without probable cause in continuing them before the Magistrate. It is not to be presumed that he did, and therefore it "was upon the respondent to produce some evidence of want of "probable cause before the appellant could be called upon to "justify. The only evidence to this which the respondent's "pleaders have been able to show me, is that of one witness, "who says that the respondent is over 60 years old, and the "evidence of five witnesses who say he is a man of position and "worth a lakh of rupees, and hence I am asked to infer that he "would not personally take part in the matter charged. The "evidence as to the extent of his property is loose and inconclusive, and not the best which was forthcoming." The Judge then rightly holds that the records of the Magistrate's enquiry and Sessions trial "were evidence to nothing beyond the fact of "the adjudication by the Magistrate and Judge, and the legal "consequence of that." Then as to the question of malice, the Judge observes:—"It is to be observed that, from the most

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MOHANT " express malice, want of probable cause cannot be implied. As-
GAUR HARI " suming malice, still if there was reasonable and probable
DAS ADHIKARI " cause for the prosecution, the appellant would not be liable."
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HAYAGRIB The Judge then enters fully into the question of probable cause,
DAS MOHANT, and decides it upon the facts and circumstances of the case.

He first finds that the plaintiff, Gaur Hari, espoused the cause of Ganga Das, and had been actively assisting in enforcing his claims. He then finds that, when the boat in question was in charge of the defendant's servants, it was forcibly taken out of their possession by Ganga Das and others; that the servants thereupon informed the defendant that Gaur Hari personally took part in the transaction; and that it was not unreasonable for the defendant to believe in what they said. The Judge then, taking the plaintiff's own assertion that he was an old man, wealthy, and of high position, says that those facts are not sufficient, even if true, to shift the burden of proof on the defendant. He then points out what the plaintiff could and ought to have proved in this case; for instance, that he was elsewhere at the time; that the defendant's informants were not credible, and there was no basis for the charge, and so forth. The Judge concludes by saying that satisfactory evidence ought to have been produced by plaintiff, but that no such evidence has been produced.

The only point in special appeal pressed upon us with some force is that the *onus* of proving probable cause for the prosecution should have been laid upon the defendant, and that the lower Appellate Court was wrong in throwing the burden of proving the want of probable cause upon the plaintiff. In support of this contention, we are referred to two decisions of this Court, *Heera Chand Banerjee v. Banee Madhub Chatterjee* (1) and *Biswanath Rakhit v. Ramdhan Sirkar* (2).

In *Heera Chand Banerjee v. Banee Madhub Chatterjee* (1), it seems that all the facts are not fully stated in the judgment; for the learned Judges there quote the maxim that "malice alone is not sufficient, because a person, actuated by the plainest malice, may nevertheless have a justifiable reason for the pro-

(1) 6 W. R., 29.

(2) See *post*, p. 375.

secution," and send the case back to the first Court to try the question ; firstly, whether the defendant is able to show he had a reasonable and probable cause for making the charge ; and, secondly, if he fails, to determine the measure of damages.

In the other case, *Biswanath Rakhit v. Ramdhan Sirkar* (1), it is stated :—“ If the charge were found to be false, it would lie

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(1) *Before Mr. Justice L. S. Jackson and Justice Sir C. P. Hobhouse, Bart.*

BISWANATH RAKHIT (PLAINTIFF) *v.* RAMDHAN SIRKAR AND OTHERS (DEFENDANTS.)*

The 13th January 1869.

Baboo Purna Chandra Shome for the appellant. ∵

Baboo Khettra Mohan Mookerjee for the respondents.

Judgment was delivered by

JACKSON, J.—It seems to me that the judgment of the Principal Sudder Ameen in this case is not correct. The plaintiff sued several defendants, one of whom, the defendant No. 4, he alleged to have brought against him a false and groundless and malicious charge of theft. This charge he alleged to have been brought at the instigation of another defendant, namely, defendant No. 1, the remaining defendants being the witnesses in that case. The Moonsiff who tried the suit found that there was no evidence of the alleged instigation by the defendant No. 1; and, therefore, absolved him from the plaintiff's claim, but gave judgment, with damages, against the remaining defendants. The plaintiff made no appeal against that part of the judgment which concerned the alleged instigator, but the

defendants against whom judgment had been given did appeal. On their appeal, the Principal Sudder Ameen says :—“ The decision of the Court of first instance should certainly be reversed, for it has not been established that the charge preferred by the defendants (appellants) was a malicious one. It appears, indeed, that the defendant, Naffar, had lodged a complaint against the plaintiff in the Criminal Court, but the plaintiff himself admits that the defendant, Madhu Sudan, was the instigator of that case. The Court of first instance has absolved the said Madhu Sudan from all liability, and the plaintiff has not appealed against that finding. Taking, therefore, this circumstance into consideration, it cannot be said that the criminal case and the charge against the plaintiff were preferred without cause,” and, therefore, he reverses the judgment of the Court of first instance.

The plaintiff appeals specially, and contends, *first*, that it was not necessary to prove express malice ; and, *secondly*, that the circumstance of the plaintiff having charged the defendant, Madhu Sudan, with the instigation, and the Court below having absolved Madhu Sudan, was not, as held by the Principal Sudder Ameen, ground for coming to the conclusion that the

* Special Appeal, No. 1989 of 1868, from a decree of the Principal Sudder Ameen of East Burdwan, dated the 28th April 1868, modifying the decree of the Moonsiff of that district, dated the 13th September 1869.

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MOHANT " upon the defendant to show that he had reasonable and sufficient cause for bringing that charge ; and on his failure to show GAUR HARI " such probable cause, malice might be inferred." The case is DAS ADHIKARI ^{v.} then remanded for trial as against one of the parties. There is, HAYAGRIB ^{v.} however, a subsequent judgment in *Sheikh Roshan Sirkar v. Das Mohant.*

criminal prosecution was not without cause. This contention appears to me to be valid. I don't, indeed, understand the Principal Sudder Ameen to have held that, because the so-called instigating defendant had been absolved, therefore the charge on the part of the actual prosecutor in the Criminal Court could not be said to be unfounded. I understand him rather to have meant that, because the plaintiff's own case was that the prosecutor had acted at the instigation of a third party, therefore it must be taken that the prosecutor had ground for the prosecution, inasmuch as his action was not spontaneous, but founded upon the instigation and information of that other person. It seems to me, however, that the plaintiff's case against the actual prosecutor was quite independent of the case made against the alleged instigator, and that the failure of his allegation that Madhu Sudan had instigated the false complaint would only be material in respect of the defendant, Madhu Sudan, himself. To take the case of a man being assaulted in the open streets. He might charge that he had met defendant, A. B., who had, without any provocation, attacked and assaulted him ; that he had subsequently learnt that such unprovoked assault was in consequence of the instigation of another person, named C. D. ; and that he, therefore, brought his action against A. B. and C. D. : against one for the assault, and the other for procuring the assault to be committed. The plaintiff might quite easily succeed in his case against the actual assailant, but might fail to prove that C. D. had procured the assault to be committed. In that case, undoubtedly, he would be entitled to a judgment against A. B., but not against C. D. And so it seems to me in the present case, that the plaintiff might be entitled to obtain damages from the actual party who preferred the criminal charge, although he failed to show such connection with that charge on the part of Madhu Sudan as would entitle him to a verdict against him also. I think the Principal Sudder Ameen ought to have tried whether the charge preferred by the defendant, Naffar, was false as alleged. If the charge were found to be false, it would lie upon that defendant to show that he had reasonable and sufficient cause for bringing that charge ; and on his failure to show such probable cause, malice might be inferred, and the plaintiff would be entitled to damages against him. It seems clear, however, that the plaintiff would not be entitled to any damages against those defendants who have been witnesses in the criminal charge ; his proper remedy against those parties, if any, being to obtain leave of the Magistrate to proceed against them for perjury. I think, therefore, that the case must go back to the Principal Sudder Ameen for a new trial as regards Naffar. That part of the decision dismissing the plaintiff's suit as against the witnesses must be affirmed with costs.

Nabin Chandra Ghatak (1), by Bayley and Hobhouse, J.J.,
who were also Judges in the case of *Biswanath Rakhit* v.

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(1) *Before Mr. Justice Bayley and Justice Sir C. P. Hobhouse, Bart.*

SHEIKH ROSHAN SIRKAR (PLAINTIFF)
v. NABIN CHANDRA GHATAK (DEFENDANT.)*

The 15th September 1869.

Baboos Srinath Banerjee and Akhil Chandra Sein for the appellant.

No one for the respondent.

BAYLEY, J.—We think that this special appeal must be dismissed.

The plaintiff sued for compensation for damages done to his reputation, inasmuch as the defendant, on the occasion of a theft in his house, gave information against the plaintiff to the Police.

The defendant's plea was that he joined with the other villagers in suspecting the plaintiff; that it was only after being called upon by the Police to name the person whom he suspected that he gave the name of the plaintiff, and that he did so, not from enmity, but because he, in common with the other villagers, suspected the plaintiff of the act.

The first issue in the first Court was "whether the defendant brought the charge of theft against the plaintiff out of enmity towards him, or whether he brought the charge in good faith."

The first Court gave the plaintiff a decree for rupees 10 out of rupees 80 claimed.

The lower Appellate Court has reversed that decision, holding, in fact, that, inasmuch as the defendant acted

on reasonable ground, he was not liable to damages. There are some other remarks in the judgment of the lower Appellate Court as to the amount of injury that is done by a charge of this kind to a person of the cultivator class to which the plaintiff belongs, but in respect of which we think it unnecessary to pass any opinion for the purpose of deciding this appeal.

The first ground taken in special appeal is, that the lower Appellate Court has misconstrued the plaint in holding that it did not state that there existed an ill-feeling between the plaintiff and the defendant.

On this point, I observe that the substance of the plaint is that, owing to certain acts of the plaintiff's master, an ill-feeling had come about between the plaintiff and the defendant, so that the only mistake that the lower Appellate Court has committed on this point is a technical one, and one which does not affect the merits of the case. The plaint itself rather points to the acts of the master as causing the ill-feeling less than to any direct ill-feeling otherwise existing between the plaintiff and the defendant.

The second ground taken is that the lower Appellate Court is wrong in stating that only one of the plaintiff's witnesses supported his statement to the effect that there was ill-feeling between his employer and the defendant. Now, enmity is a matter in which the best evidence is at the command of the parties themselves between whom that enmity exists, and such best evidence can only be had by those parties

* Special Appeal, No. 1769 of 1869, from a decree of the Additional Subordinate Judge of Dacca, dated the 19th May 1869, reversing a decree of the Moonsiff of that district, dated the 23rd February 1869.

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Ramdhan Sirkar (1), where this case is fully gone into, and where it is held that, if an accusation is made with good and reasonable cause, there would be no case for damages.

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giving their own evidence on oath. Motives and feelings can hardly be known to others than those who entertain them; and as the plaintiff in this case did not give his own, the best evidence as to the existence of any enmity and its causes and motives, it is immaterial whether the lower Appellate Court has made a mistake in stating that only one of the plaintiff's witnesses, whose evidence would thus be but secondary evidence in the case, supported the plaintiff's statement as to the existence of any ill-feeling between the parties.

The third ground in special appeal is that, as the plaintiff was acquitted by the Criminal Court, it was for the defendant to prove that he had a probable cause for the accusation; and to support this contention, the case of *Heera Chand Banerjee v. Banee Madhub Chatterjee* (1), decided by Trevor and Glover, JJ., has been cited. That judgment, however, is one in which the accused was not only acquitted by the Criminal Court, but the accusation was after investigation held by that Court to be unfounded. The words are "an accusation which has been held by a Criminal Court to be unfounded is sufficient *prima facie* evidence that that accusation was maliciously brought;" so that this case, even if one in the principle of which I concur, does not apply to the present one. I say nothing as to whether I concur in that judgment or not, and it is unnecessary for the present case to refer to the other grounds stated by the learned Judges in that case.

The next case cited is *Biswanath Rakhit v. Ramdhan Sirkar* (2). I do not differ with the law laid down by that judgment. The words are:—"I think the Principal Sudder Ameen ought to have tried whether the charge preferred by the defendant, Naffar, was false as alleged. If the charge were found to be false, it would lie upon that defendant to shew that he had reasonable and sufficient cause for bringing that charge; and on his failure to shew such probable cause, malice might be inferred, and the plaintiff would be entitled to damages against him."

Now the principle of law as laid down in that case will not apply to the present, for here the lower Appellate Court has found as a fact (and I think properly) that the accusation was not without good and reasonable cause, and was not maliciously made, but that it was made in good faith; good faith being equivalent to when a person has good and reasonable cause for his belief.

In the present case, the defendant was asked by the police, who came to investigate the matter, as to whom he (defendant) suspected of the theft in his house. Defendant's opinion coincided with that of other villagers that the plaintiff committed the theft, and he accordingly informed the police that he suspected the plaintiff. On this he was asked by the police to give information of this matter formally, and did so. If this conduct on the part of the defendant justifies a verdict for damages against him, either the police must abstain from requiring parties

To turn, however, from the cases to the text-book. In Addison on Torts, 3rd edition, page 614, it is said :—“The rule is that, ¹⁸⁷⁰
 “however complicated the facts may be on which the question
 “of reasonable and probable cause may depend, the Judge must
 “leave the facts to the jury, and on the facts found by them
 “determine for himself whether there is reasonable or probable
 “cause or not.” In this case the Judge in the lower Appellate

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robbed, to give any information as to the person on whom their suspicion may fall, or parties robbed must abstain from giving the police any clue to the detection of the offender by intimating their suspicions, and thus frustrate the ends of justice.

Under the facts, as stated by the lower Appellate Court, I agree in thinking that the defendant's giving information to the police in this case was not with any malicious purpose, and I would dismiss this appeal, but without costs, no one appearing for the respondent.

HOBHOUSE, J.—I think, upon the particular facts of this case, that the plaintiff was bound to start his case by proving the enmity, that is the malice, actuated by which, as he alleged, the defendant brought the charge of theft against him. The Judge has found as a fact that the plaintiff has not established this malice, and I think that, in the absence of the plaintiff's own testimony, which was evidently the best evidence in the case, the Judge was right in coming to this finding. But the contention on the part of the special appellant seems to be that, when a charge of theft had been brought in a Criminal Court, and when the plaintiff had been acquitted of that charge, malice must be inferred, and it was therefore for the defendant to show that he had reasonable grounds for making the charge. There are no

doubt some expressions in the decision of *Heera Chand Banerjee v. Banee Madhub Chatterjee* (1), which would favour this view of the case; but, as Mr. Justice Bayley has pointed out, what the Judges apparently had in mind was not simply a charge of which the accused had been acquitted, but, in the very words of the Judges, a charge which had been held by a Criminal Court to be unfounded, that is to say, a charge which had been found by a Court of competent jurisdiction to be a false charge, having no foundation at all. That also is the meaning of the decision of *Biswanath Rakhit v. Ramdan Sirkar* (2). “If,” the Judges remark in that case, “the charge were ‘found to be false, then it would lie ‘upon the defendant to show that he ‘had reasonable and sufficient cause for ‘bringing the charge,” and indeed there can be no doubt that, if a man brings a charge, which is found by a Court of competent jurisdiction to be false, then malice cannot but be presumed, but until malice is upon some evidence or other found, it will not be on the other side to shew that he yet had reasonable ground for bringing the charge. Here, however, the fact is that malice is not found, and the fact further is that there was evidently no sufficient evidence, because there was not the best evidence in support of the malice.

I agree in dismissing this appeal.

(1) 6 W. R., 29.

(2) *Ante*, p. 375.

1870 Court himself was the jury. He has, from the probabilities,

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which we cannot interfere in special appeal, that there was no
reasonable or probable cause for the charge.

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DAS MOHANTY. On the whole, then, I think that this special appeal must be dismissed with costs.

PAUL, J.—I have only a few words to add in this case. In an action for malicious prosecution, it lies upon the plaintiff to make out a *prima facie* case of malice and want of reasonable and probable cause before the defendant can be called upon to show that he acted *bona fide*, and upon reasonable grounds, believing that the facts within his knowledge constituted a valid charge. This is laid down in *Westropp v. Barnes* (1). The Judge, in his very careful and able judgment in this case, has correctly laid down the law to the effect I have stated above. He also found, firstly, that the plaintiff did not discharge the *onus* of proof cast upon him by the law; and, secondly, that independently of the *onus* of proof, the circumstances of the case tended to show that it was not unreasonable on the part of the defendant to believe the statements of his servants as to the plaintiff's share in the seizure of the boat. With these two findings a special appeal to any ordinary understanding would appear impossible; but certain cases—namely, in *Heera Chand Banerjee v. Banee Madhub Chatterjee* (2) and in *Biswanath Rakhit v. Ramdhan Sirkar* (3)—have been cited to show that the opinion expressed by the Judge of the lower Appellate Court on the law applicable to the case is erroneous. It is unnecessary to go fully through the two authorities cited by Baboo Jagadanand Mookerjee. The two authorities probably intended to lay down in substance this proposition which is correct in law,—viz., that, where the falsity of a charge is brought home to the knowledge of the defendant, the plaintiff has nothing further to prove, because it is obvious that, if the plaintiff starts his case by showing that the defendant laid the charge deliberately, while he knew it to be false, that is the highest degree of proof that a plaintiff can give of the existence of malice and want of a reasonable

(1) 27 L. J., Ex., 57.

(2) 6 W. R., 29.

(3) *Ante*, p. 375.

and probable cause; and I find that such was the case in 1870
Heera Chand Banerjee v. Banee Madhub Chatterjee (1), where MOHANT
 the defendant knew the charge to be false. I only make these GAUR HARI
 remarks, because cases are daily cited as laying down certain DAS ADHIKARI
 legal positions, and these are made use of without a careful
 study of the facts involved in them. Sometimes Judges lay
 down principles applicable to the particular facts of the case,
 believing that, when their judgments are reported, the facts will
 also be given.

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I agree in dismissing this appeal with costs.

Appeal dismissed.

[APPELLATE CRIMINAL.]

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

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Salt—Confiscation—Rowana—Pass—Act VII of 1864, s. 16 (B. C.)

If salt exceeding five seers is found within the limits prescribed by section 12 of Act VII of 1864 (B. C.), unprotected by a rowana or pass, the salt is contraband, and liable to seizure, and the parties transporting it are punishable under section 16. It matters not whether any attempt or intention to sell is proved or not.

THE defendants in this case were arrested by the police while conveying a large quantity of salt in two boats, without a rowana or pass, through the district of Noakhally, which is within the limits fixed by the Government within which salt cannot be carried without a pass.

Five of the defendants were in charge of one boat, which contained 124½ maunds of salt, and the remaining five men were in charge of the other boat, containing 60 maunds and 5 seers of salt.

The defendants were convicted by the Deputy Magistrate under the provisions of section 16 of Act VII of 1864 (B. C.),

* Criminal Motion, No. 133 of 1870, for revision of proceedings under section 404 of the Code of Criminal Procedure.

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OFATULLA.** and were sentenced, the first five men, to pay a fine of rupees 621-4, at rupees 5 per maund on the 124½ maunds, and the remaining five men to pay a fine of rupees 300-10 at the same rate on the 60 maunds; and in default of payment, to six months' simple imprisonment. The salt and the boats were ordered to be confiscated.

From this order the defendants appealed to the Judge, who acquitted the prisoners, and released the salt and the boats. The grounds of his decision are stated by Mr. Justice Mookerjee in his judgment.

A petition was then presented to the High Court under section 404 of the Code of Criminal Procedure to send for the record, and set aside the decision of the Judge as being contrary to law.

Mr. H. Bell (the Legal Remembrancer) (with him Baboo Jagadanand Mookerjee), for the Crown, contended that the salt had been improperly released by the Sessions Judge. Act VII of 1864 (B. C.) gives the Judge no authority to enquire whether the prisoners intended to sell the salt or not: the only issues which the Judge had authority to decide were: *1stly*,—Was the salt seized in a district in which it was illegal to transport salt without a pass? *2ndly*,—If it was seized in such a district, was the salt protected by a pass? The Judge having found these issues against the prisoners, was bound under section 16 of the Act to declare the salt to be contraband, and adjudge the penalty of confiscation. If the salt is contraband, the law leaves no discretion to the Judge. He must adjudge it to be confiscated. [JACKSON, J.—Suppose a boat laden with salt, and unprotected by a rowana, was driven by stress of weather within the prohibited limits, would the Magistrate be necessarily compelled to confiscate it? In such a case would he be allowed no discretion?] It was but reasonable to suppose that, under such circumstances, the salt department would not prosecute; but, supposing such a case to occur, section 39 of the Act provides a remedy. That section gives the Board of Revenue power to remit any penalties which had been adjudged under the Act. If the Magistrate or the Judge had a discretionary power to remit

penalties, where was the use of vesting a similar power in the Board? This was expressly held in the case of the *Queen v. Boidonath* (1).

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No one appeared on the other side.

MOOKERJEE, J.—This case comes before us merely for an expression of our opinion as to the correctness or otherwise of the view of the law taken by the Sessions Judge of Tipperah in setting aside the conviction of the prisoners, and the release of the salt confiscated by the Deputy Magistrate under section 16 of Act VII of 1864 (B. C.) It appears from the finding of both the Courts below, that the prisoners, with the two boats of salt, were found within the boundary of the Noakhally district; that in order to pass through that district, it is requisite, under the law, to have a rowana, and that the prisoners had none. The only question before us is whether such salt shall or shall not be considered contraband, and therefore confiscated to Government, and the persons in charge thereof held liable to punishment under section 16 of the enactment in question.

Looking to the stringent provision of the law, sections 15 and 16 of Act VII of 1864 (B. C.), I am of opinion that, if salt exceeding five seers is found within the limits prescribed by section 12, unprotected by a rowana required under sections 13 and 15, that salt must be held as contraband under section 16 of Act VII of 1864. Under section 29, if the Magistrate is empowered to examine into the cause of the seizure, and to adjudge the salt to be confiscated, I apprehend that, under this latter section, a Magistrate is not legally competent to say that, though salt is found in a prohibited district, unprotected by any rowana, and therefore the offence under section 16 is committed, he cannot convict the persons found transporting the salt, or confiscate the salt, merely because there was no attempt or intention to sell the salt within that prohibited district. But the Magistrate, I think, is quite competent to decide whether the offence has been committed or not, and therefore to enquire into the cause of the seizure of the salt. If he be of opinion that the salt was not found as a fact within the prohibited district, he would be quite

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competent to acquit the prisoners, though the police officer may maintain to the contrary.

In this case the Courts below found as a fact that the salt was within the limits of the district of Noakhally, where a rowana is required for the transport of salt above five seers. The prisoners also admit that they passed through the district, and the direction of their master was to sell the salt wherever they could dispose of the same to advantage. They do not deny that a rowana was required to pass through Noakhally, but they plead that they were ignorant of the law, and had taken the route through Noakhally, because it was a highway and was a shorter cut to Tipperah, where they intended ultimately to transport the salt if the same could not be sold to advantage elsewhere.

The Judge on appeal reversed this order of the Magistrate—

1st.—Because it was not proved that there was any attempt to sell the salt at Noakhally.

2nd.—Because eight of them were boatmen, and therefore not responsible for the cargo.

3rd.—Because the river was a highway by water, and was a shorter route.

4th.—Because the boat was found within the very precincts of the prohibited district.

5th.—Because the proceedings of the Magistrate were injudicious and harsh.

Now, as regards the first, I have to observe that the law does not require any such attempt or intention to be proved before a conviction can be had under section 16; the mere fact of the salt being found within the prohibited district is sufficient to constitute an offence. The law may be very severe and harsh, but that is no reason why Courts, which are required to give effect to them, should refuse to carry them out. We cannot assume the functions of the Legislature, and make or amend laws merely because we think they are harsh and inequitable.

As regards the second ground, section 16 of the law provides that “any person possessing or transporting or attempting to transport such salt shall be liable to a fine, &c.” The prisoners were, no doubt, transporting the salt, which is con-

traband, and I think therefore the Magistrate was right in
convicting them under the above section.

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The third ground appears to me to be no valid ground at all. If the prisoners had a desire to transport the salt by the shortest route, they ought to have applied for a rowana and then taken the salt by this route. They cannot of their own choice select a route which the executive Government had thought fit, under the powers vested in it by the law, to prohibit a passage through, except under a rowana.

With reference to the fourth objection, I do not see that it makes any difference whatsoever as to where the boats of salt were found,—*i. e.*, whether at a short distance from the confines of the prohibited district, or in the far interior of it. The prisoners, as I said before, admit that they have passed through the district of Noakhally. The fifth ground is a matter in which the Judge might interfere, if the law allows him to do so, on appeal, but is not, *ipso facto*, a ground to set aside the conviction at once.

Under these circumstances, and keeping in view the provision and terms of the law, I can come to no other conclusion than that the Judge has taken a wrong view of it. He must have seen that the law gives him no option to confiscate the salt or not, if the circumstances of the seizure are found to be exactly those which are contemplated in section 16, and the prisoners are found transporting what is contraband. Section 39 of this Act, however, gives a power to the Board of Revenue to mitigate penalties which the Magistrate may inflict under the previous section, if they shall see cause to do so. They may also direct the seizure, or any part thereof, to be restored. We are not asked by the petitioners to pass any order affecting the release of the salt in this particular instance, nor are we asked to interfere with the order passed by the Judge discharging the prisoners. We therefore do not interfere with the order passed by the Judge in this case.

JACKSON, J.—The charge is not pressed against the defendants, but we are asked to state whether the Judge is right in the law which he has laid down in this case. I would point out to

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OFATULLA. the Judge that the fact of the salt being found within the particular district, unprotected by a rowana, is made an offence under the law. The intention of the law is not only to punish those who are actually smuggling salt, but also those who give an opportunity to others to smuggle salt. Persons who trade in salt doubtless thoroughly know the salt regulations. They know, as the prisoners in all probability knew, that they were not allowed to take the salt into this prohibited district without a rowana. They admit they were selling the salt when they could, and there was of course great opportunity for them to purchase smuggled salt in place of what they sold.

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Mitter.

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Dec. 16. SHEIKH IZZATULLA (PLAINTIFF) *v.* SHEIKH BHIKARI MOLLA
(OONE OF THE DEFENDANTS.)*

Mahomedan Law—Pre-emption—Suit to enforce Pre-emption to a Portion of the Property sold.

Under a deed of sale the vendor conveyed to the purchaser five plots of land. In a suit by a third party to enforce a right of pre-emption in respect of one out of the five plots, held, that he could not divide the bargain and sue on the ground of pre-emption for a portion only of the property covered by the deed of sale.

THIS was a suit to enforce the right of pre-emption in 3 bigas and 16 chittacks out of 11 bigas and 3 kattas, being one out of five plots of land sold, under a deed of sale, by the defendants Gopal Mundi and Guru Dutt Mundi to the defendant Sheikh Bhikari.

The defence set up was that the preliminaries had not been performed, and that as the plaintiff had refused to purchase the property before sale to the defendants, he was not entitled to claim a right of pre-emption.

* Special Appeal, No. 1222 of 1870, from a decree of the Subordinate Judge of Purnea, dated the 26th March 1870, reversing a decree of the Moonsiff of that district, dated the 28th December 1869.

The Moonsiff held that the preliminaries had been performed, and that there was no reliable testimony to prove that the plaintiff had refused to purchase the property. He, accordingly, passed a decree in favour of the plaintiff.

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On appeal, the Subordinate Judge held that a person claiming a right of pre-emption has a right only to take over a bargain in its entirety; that he has no right to have the bargain divided, and the consideration apportioned between the several plots; and that as the plaintiff had done this, he had lost his right of pre-emption. He accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Baboo *Rajendra Nath Bose* for the appellant.

Baboo *Kishendyal Roy* for the respondent.

MITTER, J.—We think the plaintiff had no right to divide the bargain and to sue for a portion of the property covered by the bill of sale on the ground of pre-emption. The plaintiff must either place himself in the position of the purchaser by taking up the whole contract, or he must give up his right of pre-emption. This view was taken by a Division Bench of this Court in the case of *Raghunandan Sing v. Majbuth Sing* (1), and

(1) Before Mr. Justice Phear and Justice Sir C. P. Hobhouse.

RAGHUNANDAN SING (DEFENDANT)
v. MAJBUTH SING (PLAINTIFF)*

November 18th, 1868.

Baboo *Kishen Sakha Mookerjee* and *Rames Chandra Mittra* for the appellant.

Baboo *Chandra Madhab Ghose* and *Iswar Chandra Chuckerbutty* for the respondent.

PHEAR, J.—We think that the right of pre-emption is a right to take over the bargain which has been made.

We do not think that a person claiming to be entitled to a right of pre-emption under the Mahomedan law can ask to have a bargain divided, and the consideration which the original parties have agreed upon as an entirety to be apportioned between the several lots of the whole property to which it referred. This appeal must be decreed, the decrees of both the lower Courts reversed, and the plaintiff's suit for pre-emption dismissed with costs in all the Courts.

* Special Appeals, Nos. 1416 and 1533 of 1868, from the decree of the Principal Sudder Ameen of Sarun, dated the 13th March 1868, affirming the decree of the Moonsiff of that district, dated the 25th April 1867.

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the lower Appellate Court was therefore right in dismissing the plaintiff's claim, the plaintiff having sued for possession of one out of five plots of land sold by the first defendant to the second defendant. It is to be further observed that these five plots constitute one indivisible holding, and this fact throws an additional difficulty in the plaintiff's way, for the plaintiff cannot ask the Court to divide the jumma into two parts according to his own convenience.

It is unnecessary for us to express any opinion on the other point involved in this special appeal,—viz., whether the right of pre-emption under the Mahomedan law extends to a case in which a mere right of occupancy has been sold. We may, however, remark that no case of that nature has been brought to our notice by the pleader for the special appellant, though he was asked to mention one.

We dismiss the special appeal with costs.

Appeal dismissed.

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Dec. 8.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

IN THE MATTER OF THE PETITION OF TADIR HOSSEIN KHONDKĀR.*

Small Cause Court, Mofussil—Review—Act XI of 1865, s. 21—Procedure.

The Judge of a Small Cause Court in the mofussil cannot review his judgment, except as provided by section 21 of Act XI of 1865.

THIS was an application to this Court for an order calling on the Judge of the Small Cause Court to entertain an application for the admission of a review.

The plaintiff brought a suit on a bond for rupees 74-4 in the Small Cause Court, and obtained a decree on the 30th of May. Forty-five days after that decree, the defendant, having in the meantime paid the amount of the decree into Court, applied for a review of judgment on the ground that he had discovered that, on the day on which the bond was dated, and on which the plaintiff stated that he had paid the money to the

* Miscellaneous Application, No. VIII of 1870, under section 15, 24 and 25 Vict., from the Judge of Jessore, dated the 13th September 1871.

defendant, he (the plaintiff) had given a deposition in the Court of Hooghly, and, therefore, the defendant contended that on the discovery of this new evidence, he was entitled to ask the Court for a review of judgment.

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Mr. *R. T. Allan* for the petitioner.

Baboo *Banshidhur Sein, contra.*

NORMAN, J. (after stating the facts as above, continued).—The question turns on the construction of section 21 of Act XI of 1865, which enacts that, “in suits tried under this Act, all decisions and orders of the Court shall be final” subject to two provisions: Firstly, it is provided “that, in any case in which a decree shall be passed *ex parte* against a defendant, he may, within thirty days after any process for enforcing the decree has been executed, give notice to the Court by which the decree was passed, of his intention to apply to the Court at its next sitting for an order to set it aside.” Secondly, “that it shall be competent to the Court, if it shall think fit, in any case not falling within the proviso last aforesaid (that is, in any case not decided *ex parte*), to grant a new trial, if notice of the intention to apply for the same at the next sitting of the Court be given to the Court within the period of seven days from the date of the decision,” and so on.

Mr. Allan has argued that, notwithstanding the language of the 21st section, section 47, which enacts that, “except as hereinbefore provided, the provisions of the Code of Civil Procedure shall, so far as the same are or may be applicable, extend to all suits and proceedings under this Act,” empowers a Judge of a Small Cause Court to grant a review of judgment in the manner and subject to the conditions mentioned in section 376 of Act VIII of 1869.

It appears to me, however, quite plain that if Mr. Allan’s contention were correct, a decision of a Small Cause Court would be anything but final. I think that there is no ground whatever for contending that Act XI of 1865 gives to a Judge of a Small Cause Court any power to review his judgment, except as provided by section 21 of that Act. This view is in ac-

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cordance with the ruling of Sir Barnes Peacock and Mr. Justice Mitter in the case of *In the matter of the petition of Pitambar Sadhu Khan* (1); and I may add, in illustration of what was the view of the Legislature in the Act of 1865, that in Act XXVI of

(1) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

IN THE MATTER OF THE PETITION OF PITAMBAR SADHU KHAN AND ANOTHER.*

June 5th, 1869.

THE following reference was made by the Judge of the Small Cause Court of Hooghly :—

"This is an application for review of judgment passed on the 14th of January last in the original suit No. 7 of 1869, in which the petitioners were defendants, and the opposite party the plaintiff. The case was instituted in this Court for the recovery of rupees 30, on a simple contract debt, and was tried on its merits, and decided in favour of the plaintiff, who, having applied for immediate execution of the decree against the person of the defendant No. 1, Petambur Sadhu Khan, caused the amount of the decree with costs in full to be realised under a warrant of arrest issued by the Court. The money was duly paid, and the judgment-debtor released from jail on the 15th idem.

On release of the judgment-debtor from jail, the petitioners had applied for a copy of the decree on the 20th January last, which was granted to them on the same day.

On the day following, viz., the 21st January last, the petitioners had submitted the application in question for a review of judgment under section 21 of Act XI of 1865.

The plaintiff was required to show cause why the application of the pe-

tioners for a new trial should not be granted. Among other grounds on which my former judgment may not be reviewed, the plaintiff's pleader contends that, as the application of the petitioner for a new trial was not preferred within seven days from the date of the decision (it having been filed only on the 21st January, being the 8th day from the 14th idem, the date of the decision), it cannot be maintained by the Court, nor its merits tried. He further argues that section 21 of Act XI of 1865 provides that in cases decided on the merits, "it shall be competent to the Court to grant a new trial, "if notice of the intention to apply for "the same at the next sitting of the "Court be given to the Court within "the period of seven days from the "date of the decision; and if the same "be applied for at the next sitting of "the Court;" but no such notice having been submitted to the Court within the limited time, the application for a new trial cannot be granted, which was but a secondary step in the matter, and which was presented to the Court on the 21st January last, when the period allowed for preferring an application for a new trial had expired on the previous day under the law above quoted.

Under the circumstances stated above, two questions arise for determination, viz.:—

1stly.—Whether a notice of the intention to apply for a new trial is an essential step to be adopted by the petitioners before making a formal application at the next sitting of the

* Reference from the Judge of the Small Cause Court of Hooghly, dated the 30th March 1869.

1864, which was an Act to extend the jurisdiction of Small Cause Courts in presidency towns, section 15 of that Act, which empowered the local Government with the sanction of the Governor-General in Council, to "declare that the whole or any part or parts of the Code of Civil Procedure shall be applicable to any Court held under Act IX of 1850, or under this Act," contained an express proviso that "no right of appeal or review shall in any case be given by any declaration made under this section." It restricted the power of the local Government, preventing them from giving any right of appeal or review in Small Cause Courts in the presidency towns. I think, therefore, that there can be no doubt that, by Act XI of 1865, which was an Act for regulating the procedure of Small Cause Courts in the mofussil, it was never intended that the Judges of such Courts in the mofussil should have any power to grant a review. This application is refused.

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LOCH, J.—I will only add a few words. Mr. Allan has con-

Court; or, without this preliminary step of judgment is to be considered quite sufficient in the case, if it be presented to the Court within the period mentioned in section 21 of Act XI of 1865.

2ndly.—Whether the period of limitation within which such notice or application is to be presented should be computed inclusive or exclusive of the date of the decision; and whether a petitioner is in time if he comes to Court on the seventh day from, and exclusive of the date of the decision.

"Another question incidentally arises, which should also be determined in this case, *viz.* :—

"Whether a petitioner, under section 21 of Act XI of 1865, applying for a new trial, after the expiration of the period of limitation, the last day of which falls during an authorized vacation, or Sunday, is in time if he comes to Court on the first day the Court re-opens."

The judgment of the High Court being taken, an application for review was delivered by

PEACOCK, C. J.—We are of opinion that the notice of an intention to apply at the next sitting of the Court for a new trial was an essential step to be adopted; and that without such preliminary step an application to the Court cannot be entertained. In calculating the period of days within which notice is to be given, the date of the decision should be excluded. Neither the 21st nor the 22nd of January last fell on a Sunday or on a holiday, or during an authorized vacation. The Judge of the Small Cause Court is under a mistake in saying that the question as to a case on which the last day falls on a Sunday, or during an authorized vacation, incidentally arises in this case. Judges of Small Cause Courts should confine the questions which they propound for the opinion of the High Court to such as arise in a suit, and should not propound speculative questions.

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tended that the new trial, provided for by section 21 of Act XI of 1865, is not the same thing as a review; that if he sought a new trial, he would come under section 21; but that asking for a review of judgment, he comes under the provisions of the Civil Procedure Code. Looking, however, to Act IX of 1850 which is the law for Small Cause Courts in presidency towns, we find in section 53 the very same words used, and the new trial, if allowed, is of the nature of a review, for that section allows the Judges to order a new trial in every case in which it may appear to them to be necessary; but the difference between section 53 of Act IX of 1850, and section 21 of Act XI of 1865, is this, that whereas no time is specified in the former, in the latter the time is fixed, and very strictly fixed; and it may be remarked that, when the jurisdiction of the Small Cause Court of Calcutta was extended by Act XXVI of 1864, it was provided by section 15 of that Act, that no appeal or review was to be allowed under that section. It is clear therefore, as the Chief Justice has said, that the Legislature never intended to allow to mofussil Small Cause Courts a wider jurisdiction than it allowed to the presidency Courts.

I concur in the order rejecting this application.

Application refused.

[ORIGINAL SIDE.]

Before Mr. Justice Norman.

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Augt. 29.

IN THE MATTER OF AMEER KHAN.

Habeas Corpus ad subjiciendum—Jurisdiction of High Court—Power to Issue Writ into the Mofussil—Habeas Corpus Act, 31 Car. II, c. 2—Regulation III of 1818—Act III of 1858—Act XXXIV of 1850—13 George III, c. 63, s. 36—37 George III, c. 142, s. 8—21 George III, c. 70—3 & 4 Will. IV, c. 85, s. 43.

A Mahomedan subject of the Crown was arrested in Calcutta, taken into the mofussil, and there detained in jail, under a warrant of the Governor-General in Council in the form prescribed by Regulation III of 1818; held, that such arrest and detainer were not acts of State, but matters cognizable by a Municipal Court.

On an application to the High Court to issue a writ of *habeas corpus* to the superintendent (a European British subject) of the jail, held, that the Supreme Court had power to issue writs of *habeas corpus* to persons in the mofussil, and that the same power is continued to the High Court. Regulation III of 1818 was applicable only to natives and those subject to the jurisdiction of the Provincial Courts. It was passed under 37 George III, c. 142, s. 8, not 13 George III, c. 63, s. 36. It was passed by a legislative authority having full power in that behalf. Considering the circumstances under which it was enacted, Act III of 1858, which extended the effect of that Regulation to Calcutta, was not *ultra vires*.

As the person against whom the writ was applied for had acted under the written order of the Governor-General in Council, the Court would not direct the writ to issue.

AMEER KHAN, who had for many years carried on business as a merchant in Calcutta, was arrested on July 18th, 1869, at his house in Calcutta, and was from thence taken to Gya, where he was confined in jail. On August 25th, 1869, he was removed to the jail at Alipore, where he was detained at the time of the present proceedings. On August 1st, 1870, an application was made to Mr. Justice Norman for a writ of *habeas corpus* directed to Dr. Fawcett, the superintendent of the Alipore jail, commanding him to bring before the Court the body of Ameer Khan.

The writ was moved for upon the following petition of Ameer Khan: That he was upwards of 75 years of age, and a subject of Her Majesty, and that he was also a Suni Moslim inhabitant of the town of Calcutta, where he had for many years resided and carried on business as a merchant; that on 18th July 1869, he was arrested at his residence in Colootollah in Calcutta, by Mr. W. B. Birch, Assistant Commissioner of Police for the Town of Calcutta, but for what charge and on what authority he was not aware, as no warrant was produced or shown to him when he was so arrested, although he demanded to have the same shown to him; that immediately upon being so arrested he was removed from his house to the railway station at Howrah, out of the local limits of the jurisdiction of the High Court, and there detained till the evening of the same day, when he was removed to Gya and lodged in the jail there; that he remained a prisoner in the jail at Gya until he was removed in custody to Alipore, where he arrived on the 25th August 1869, and was lodged in

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the Alipore jail, where he ever since had been, and was at the date of his petition, confined a prisoner; that he had never been furnished with a copy or inspection of any warrant under which he had been so arrested, or of any warrant under which he had been so removed, or any warrant under which he was detained, neither had he been furnished with any copy or any statement of the nature of the charges made against him, and upon which he was arrested or detained, nor had he been informed of what he was accused, although he had repeatedly applied to the persons having him in custody to be furnished with all such copies, statements, and informations.

Affidavits were put in to show that a draft affidavit, in support of his petition, had been prepared under the instructions of Ameer Khan, the statements in which were true, and which he was willing and anxious to affirm; but that, though a commissioner had been appointed by the Court to take his solemn affirmation, he had been refused access to Ameer Khan by the officer in charge of the Alipore jail, who stated: "Ameer Khan is still in my custody, and I now detain him under a warrant from the Governor-General, and it is by the orders of the Government of India that I refuse to allow you to see Ameer Khan." In the draft affidavit, Ameer Khan supported the statements in his petition, and further stated "that he was a true and loyal subject of Her Britannic Majesty, and that he had never conspired with her enemies, or consorted or been in league with any person or persons, or sect of persons, who had for their object the intention of disturbing tranquillity in the territories of native Princes entitled to the protection of the British Government, or of imperilling the security of the British dominions by foreign hostility, or by internal commotion;" that he had never been furnished with a copy of the warrant (if any) on which he was arrested, or on which he was detained, nor had he been informed why he had been arrested, or with what crime he was charged, although he had petitioned therefor His Excellency the Governor-General personally and in Council, and also and repeatedly petitioned therefor His Honor the Lieutenant-Governor of Bengal; and that the only information which in that behalf he could obtain from them or any other public officer or servant was, that he was a prisoner detained under the provisions

of the Bengal Regulation III of 1818; and he further complained of hardship while in prison, and that both his health and worldly affairs had suffered by his confinement.

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There were further affidavits showing a failure by the prisoner's attorneys to obtain information on the subject of his arrest, what was the charge, and what was the warrant of arrest or detention, and stating the refusal of the Lieutenant-Governor of Bengal to admit the prisoner to bail.

There was also put in, on the prisoner's behalf, a certificate by the Registrar of the Court, to the effect that the Bengal Regulation III of 1818 was not, as far as he had been able to ascertain, registered in the late Supreme Court of Judicature at Fort William in Bengal.

Mr. *Anstey* (Mr. *Ingram* and Mr. *Evans* with him), on applying for the writ of *habeas corpus*, contended that the Court had power to issue the writ of *habeas corpus* into the mofussil, and cited *In re Coza Zachariah Khan* (1), *In re Sreenauth Roy* (2), *Rajah Mohinder Deb Rai v. Ramcanai Cur* (3), *Doe d. Breejesseree Seatanny v. Ramnarain Misser* (4). [NORMAN, J.—That was a writ *ad testificandum* only, not *ad subjiciendum*.] In the case of *The King v. Goculnauth Mullick* (5), the writ was refused, but on the express ground that the person to whom it was sought to have it directed was not subject to the jurisdiction of the Court. Here that objection cannot be taken. In *The King v. Monisse* (6), the Supreme Court at Madras held that it had power to issue the writ into the palace of an independent Native Prince. In *Ram Mohun Chatterjee v. Debychurn Sircar* (7), the Court directed the Sheriff to convey a person then in his custody into the mofussil. There it must be presumed that the Court had the power to order his release from the place in which he was confined in the mofussil, if good cause were shown for doing so. The arrest here was illegal; such arrest could only be justified

(1) Morton's Rep., 263.

(5) Clarke's Rules and Orders, Add., 36.

(2) *Id.*, 226.

(6) 1 Strange's Notes of Cases, 418.

(3) Smoult's Orders, 148.

(7) Smoult's Orders, 158.

(4) *Id.*, 201.

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under a warrant charging treason or treason-felony in accordance with the Habeas Corpus Act, 31 Car. II, c. 2; there was therefore good ground for issuing the writ. (The learned counsel then read the affidavits filed in support of the application, and commented on the facts therein appearing, drawing an analogy between the proceedings in, and circumstances of, the present case and the instances of the arbitrary exercise of power by the Crown in the reign of Charles I, and referred to a passage in 3 Howell's State Trials, 184, from a discussion in the House of Commons previous to the passing of the Petition of Right, showing the difficulties thrown in the way of obtaining the release of prisoners.) The prisoner in this case has not been informed of the offence for which he is confined; the only information he can get is, that he is imprisoned under the provisions of Regulation III of 1818. If that Regulation does authorize such proceedings as this, it is bad, as being beyond the power given to the Legislature; if it does not authorize them, they are illegal; but Regulation III of 1818 was not intended to supersede the ordinary judicial procedure by which this case might have been investigated, or to take away power from the Courts in order to give it to the Government. The reasons for which a person can be imprisoned under the Regulation are stated in the preamble: 1—"For the due maintenance of the alliances formed by the British Government with foreign powers. 2—For the preservation of tranquillity in the territories of Native Princes entitled to the protection of the British Government. 3—For the security of the British dominions from foreign hostility or internal commotion;" and section 1 enacts that the imprisonment must be for one of these reasons. The two first reasons cannot be given here, and if the third reason is given, it lies on the Crown to show that such reason existed when Ameer Khan was arrested. The provisions contained in the preamble of the Regulation should be adhered to, if he is confined under it. The preamble says: (*reads.*) But the prisoner is not told what his offence is, or what are the grounds for the determination of the Government to keep him in personal restraint. The preamble provides also that due attention shall be given to the health of prisoners confined under it, but from the affidavits it not only appears

that no such attention has been shown, but that he has been treated in a way calculated to injure his health. The Regulation, by section 2, requires a warrant of commitment in a certain form to issue, but no such warrant is shown to have been issued for the arrest of Ameer Khan. If no warrant was issued, then no warrant exists containing the particulars required by section 2 of the Regulation; and, consequently, the arrest is illegal, the formalities of that section not having been complied with. The law of England on the point is laid down in 2 Coke's Institutes, 52. The writ has always been granted where bail was refused, sometimes where bail was excessive—4 Coke's Institutes, 290 (and the same principle holds good in America), Hurd's Treatise on *Habeas Corpus*, 522, *Jones v. Kelly* (1), *Ex parte Croome* (2); see also Burn's Justice of the Peace, Title *Habeas Corpus*, 430, *The King v. Thompson* (3), *Rex v. Allington* (4), *Rex v. Venables* (5), *Gossett v. Howard* (6), and Paley on Convictions, Introduction, 33. In *Peacock v. Bell* (7), it is said, "nothing shall be intended to be out of the jurisdiction of a superior Court except that which especially appears to be so; on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court unless it be so expressly alleged;" and in *Grignon's Lessee v. Astor* (8), Baldwin, J., says, a superior Court is one "as to which there can be no judicial inspection behind the judgment save by appellate powers." See also the observation of Fortescue, J., in *The King v. The Chancellor of Cambridge* (9). The case of *In re The Maharanee of Lahore* (10), in which Regulation III of 1818 was held to apply to the Maharanee, is distinguishable from the present, as she was not a British subject, but an alien prisoner of war. The case of *In re Tuckut Roy* (11) is, it is contended, bad law. It was decided in February 1858, a time of panic and commotion. In that case, too, the grounds of the detention were made known, and there was a warrant of commitment in accordance with Regulation III of 1818. This

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(1) 17 Massachusett Rep., 116.

(7) 1 Wms. Saunders, 74.

(2) 19 Alabama Rep., 561.

(8) 2 Howard's Rep. (U. S.), 319.

(3) 2 T. R., 18.

(9) 1 Strange, 557.

(4) 2 Strange, 678.

(10) Taylor, 428.

(5) 1 *Id.*, 630.

(11) 1 Boul., 354.

(6) 10 Q. B., 359; S. C., on appeal,
Id., 411; see 452.

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 AMEER KHAN. Regulation, if it gave the power alleged, is bad, because it is in excess of the powers conferred on the Legislature. It ought not to be taken literally in a Court of Law, being dangerous to justice and to the rights of the subject—*In re Margaret Podger* (1), *In re Lord Cromwell* (2). No colonial legislature can pass an Act repugnant to section 29 of the Magna Charta. This Regulation is beyond the powers given to the Legislature by 13 George III, c. 63, s. 36. That statute gives power to pass such enactments as are just and reasonable, and not repugnant to the laws of the realm. A nominee assembly has less power than an elective assembly, and an elective assembly has no power to pass laws repugnant to fundamental principles or to the laws on which allegiance depends. See the opinions of Sir Phillip Yorke and Sir C. Talbot as to the power of the Connecticut Assembly to pass laws; Chalmers' Opinions, 341; also the opinions of Sir Phillip Yorke and Sir Clement Wearg, as to the power of the Governor of Jamaica to make laws, *Id.*, 397; and the opinion of Sir Edward Northey, dated 9th July, 1706, *Id.*, 349, on an Act to prevent free black men from voting; that of Mr. West, *Id.*, 439; also opinion of Sir William Murray, 22nd June, 1764. When a country is conquered or ceded to the British Crown, its inhabitants become British subjects, and are entitled to all the rights and privileges of British subjects—Chalmers' Opinions, 639, 640, 642, 644, and 647. All these opinions tend to show that allegiance and protection cannot be separated. Immediately a law is passed, which takes away the protection of the sovereign by infringing on the liberty of the subject, the allegiance of the subject is no longer due. The question as to whether the Indian Legislature has power to pass a retrospective Act, after being discussed, was answered by Lord Dalhousie in the negative; and Sir William Perry, in *Ramlal Thakursidas v. Dulubdas Pitamber* (3), seems to have been of the same opinion. This opinion was not controverted in the appeal to the Privy Council. See case of *Kielley v. Carson* (4). The power of the Legislature here is

(1) 9 Rep., 106.

(2) 4 Rep., 13.

(3) Perry's Or. Cas., 221.

(4) 4 Moore's P. C., 63.

limited, and they have, in several instances, transgressed it—
Forsyth's Constitutional Law, 17, 23, and 25.

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Another objection to Regulation III of 1818 is, that it has not been registered in the Supreme Court, which is made necessary by 13 George III, c. 63, before it can become valid, or have any force or effect. That statute was passed to prevent the recurrence of the outrages and oppressive tyranny which had taken place just before under Warren Hastings, and it gave a right of appeal to the Privy Council from any Rules or Regulations. Since Regulation III of 1818 was never registered, it never had the force of law. *Doe d. Pearymoney Dossee v. Bissonauth Bonnerjee* (1). The objection that it is too late to say this now, when the Regulation has been recognized in practice and by decisions, may be met by a decision of the Supreme Court of Van Dieman's Land, which was afterwards approved of in England, that an Act of the local legislature passed under the powers given by 9 George IV, c. 83, was, in almost similar circumstances to the present, illegal—*Symons v. Morgan* (2). Long usage does not give the Regulation any force if it was originally bad, *per Lord Camden in Entick v. Carrington* (3). [NORMAN, J., referred to *In re The Bombay Justices* (4).] The distinction between that case and the present is, that here the Government and its officers are treated as tort feazors. Dr. Fawcus became a tort feazor immediately he received and detained Ameer Khan. [NORMAN, J.—If Dr. Fawcus abused his authority he would be a trespasser *ab initio*; but the trespass was committed by some other persons, not by him.] In *Janokee Doss v. The King* (5), a person resident at Benares was held to be subject to the jurisdiction of the Supreme Court at Calcutta, on the ground that he was found to be co-operating in a misdemeanour committed within the jurisdiction. See also *Poorneah Khettry v. The King* (6). [NORMAN, J.—In the case of *In re The Bombay Justices* (4), it does not appear that any offence had been committed

(1) 1 Bignell, 10.

(4) 1 Knapp's P. C., 1.

(2) 28 Law Mag. & Rev., N. S., 280; (5) 1 Moore's I. A., 67.

Parliamentary Papers, 566 of 1848, 75. (6) 3 Knapp P. C., 348.

(3) 19 Howell's State Trials, 1067.

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within the local limits of the jurisdiction of the Court.] No, but here Dr. Fawcus is subject to the criminal jurisdiction of the High Court, and comes within the words of the decision in that case; see page 58 of the report. [NORMAN, J., referred to Act XXXIV of 1850.] If Regulation III of 1818 is bad, it cannot be made valid by being referred to in that Act. The Act is inoperative, the Regulation being void. That Act, too, only gives power to confine persons detained under Regulation III of 1818 in the presidency towns. It has no application to the mofussil.

The *Advocate-General* (offg.), *contra*, submitted that, as the affidavits showed that this was a matter of State, and that the prisoner was detained by the warrant of the Governor-General, under Regulation III of 1818, the Court had no jurisdiction in the matter.

On August 3rd, Mr. Justice Norman granted a rule *nisi* calling on the superintendent of the Alipore jail to show cause why a writ of *habeas corpus* should not issue, and directed that notice should be given to the Advocate-General.

On August 10th, *The Advocate-General* (offg.) and *The Standing Counsel* (offg.) appeared on behalf of Dr. Fawcus to show cause against the rule.

Mr. Anstey, Mr. Ingram, Mr. Evans, and Mr. Lingham appeared to support the rule.

In showing cause against the rule, the Crown made use of affidavits in contradiction of the statements on behalf of the prisoner that he had endured hardship while in custody, and that he had suffered in health, and showing that the removal of the prisoner from Gya to Alipore had taken place at his own request. In an affidavit by Dr. Fawcus, the superintendent of the jail at Alipore, it was further stated that Ameer Khan was in his custody "under a warrant in the form prescribed by Regulation III of 1818, and signed by Edward Clive Bayley, Esq., Secretary to the Government of India, in the Home Department."

Mr. Anstey objected to the admission of affidavits on behalf of the Crown in the stage of the case at which they were pre-

sented. He objected on the ground that this was not a case where a rule had been applied for to show cause why a writ of *habeas corpus* should not issue, in which case affidavits might possibly be admissible—*In re Eggington* (1); but that as a writ of *habeas corpus* had been applied for in the first instance, the Crown would have had the opportunity of putting any facts that were thought necessary into the form of a return to the writ, by which the Crown would have had the advantage that the statements so made would have had to be taken as true, that the prisoner would have no opportunity of controverting any affidavits put in at this stage, and that all that could now be gone into was the matter of law—*In re Mary Heath* (2).

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NORMAN, J., overruled the objection, referring to *Mary Heath's case*, and *In re Richard Blake* (3).

The Advocate-General submitted that this was a State matter, and that the Government were not, in respect of the proceedings which had been taken in the matter, subject to the jurisdiction of the High Court. The proceedings in this matter have been taken on an order of the Governor-General under a special Regulation, which is not in conformity with the ordinary rules of procedure of this Court. If the Government, acting as it has on its own responsibility, has done wrong, there is a remedy in the proper form provided for in such a case, but its actions are not to be called in question in this Court. See *per Peel, C.J.*, in the case of *In re The Maharanee of Lahore* (4), and *per Colvile, C.J., In re Tuckut Roy* (5).

Referring to the affidavits filed on behalf of the Crown, the Advocate-General contended that the Government, so far from having treated the prisoner with harshness, had been solicitous for his comfort and health, and that the requirements of the Regulation III of 1818 with regard to these matters had been complied with.

The Advocate-General then proceeded to argue the following points of law:—

(1) 2 E. & B., 731.

(2) 18 Howell's State Trials, 10.

(3) 2 M. & S., 428.

(4) Taylor, 428; see 433.

(5) 1 Boul., 354.

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1st.—That the Court has no power to issue a writ of *habeas corpus* into the mofussil.

2nd.—That Regulation III of 1818 was not invalid as being *ultra vires* of the Legislature, and not having been registered; and that Acts XXXIV of 1850 and III of 1858 were not void as being in excess of the power of the Legislature nor opposed to the prerogative of the Crown.

On the first point he contended that the authorities, cited in support of the Court having the power contended for, are all early ones, decided at a time when the relations of the Supreme Court and the Indian Government were not well defined or understood; they are therefore unreliable. Though the Supreme Court had the power of issuing writs of *habeas corpus* within the limits of its local jurisdiction, that power did not proceed on 31 Car. II, c. 2, but was exercised quite independently of that statute. Though the Court had express power given by the Charter of 1773, s. 21 (see Smoult and Ryan's Rules and Orders, 25), to grant other writs there named, among them the writ of *habeas corpus* is not mentioned. Whatever powers the Judges had under the Charter, which gave them the powers of Judges of the King's Bench at Common Law, the 31 Car. II, c. 2, was not intended to apply, and never has been applied, to this country. The terms of that statute show that it was enacted for particular purposes which are specified in it, and which had reference solely to the state of things then existing in England, when the Judges showed a reluctance to exercise the power they had to grant the writ at Common Law (*reads* 31 Car. II, c. 2, s. 10). By the statute, power is given to certain specified persons to grant writs of *habeas corpus*—to the Lord Chancellor or Lord Keeper, and the Judges or Barons of the superior Courts in England. The statute is therefore by its terms special, and not general; and in no case in which a writ has been granted here have the Courts proceeded on that statute. [NORMAN, J.—The statute assumes the power of the Judges to issue writs of *habeas corpus* at Common Law.] But before the statute they had a discretion to grant it; the statute took away that discretion. It is said that because this statute was part of the English law prior to 1726, that it was therefore introduced into

this country. But every statute in force in England in 1726 was not necessarily introduced. The law of alienage has been held not to apply—*The Mayor of Lyons v. The East India Company* (1). So with the Statutes of Mortmain—*Attorney-General v. Stewart* (2), there held not to apply to the Island of Grenada. In *Das Merces v. Cones* (3) and *Andrews v. Joakim* (4), the Statute of Superstitious Uses, and in *Abraham v. The Queen* (5), the Lord's Day Act, were held not to apply. It is contended, therefore, that the authority of this Court to grant writs of *habeas corpus* is not under the statute 31 Car. II, c. 2., but at Common Law; see case of *Rex. v. Ramgovind Mitter* (6). [NORMAN, J.—Has the statute never been held to have been extended to any colony? Section 6 is very general in its terms. The Act was for securing the liberty of the subject, and for preventing imprisonment beyond the seas.] There is no decision that I am aware of extending it to any colony. The expression “beyond the seas” implies that the Act would not apply in the colonies, because a power is given to the Courts at Westminster to prevent illegal imprisonment beyond the seas; it would be unnecessary to give local tribunals the power. It could not be contended that the penalty enacted for refusing to grant the writ could be enforced in this country. The power of the Court then is limited, and none of the cases cited on the other side decide the contrary; they are by no means decisive. *In re Coza Zachariah Khan* (7) decides nothing. There is no argument reported; it is not said whether the writ was *ad subjiciendum* or *ad testificandum*, and the whole case is obscure. In *Rajah Mohinder Deb Rai v. Ramcanai Cur* (8), the question was not raised. In *Doe d Breejesseree Seatanney v. Rammnarain Misser* (9), a writ *ad testificandum* was granted by consent, which involved no conflict of jurisdiction. Even in the case of a writ *ad testificandum*, it is not certain that the Supreme Court had the power to issue it

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| (1) 1 Moore's I. A., 175, see 220. | (6) Morton's Rep., 211. |
| (2) 2 Merivale's Rep., 161. | (7) <i>Id.</i> , 263. |
| (3) 2 Hyde, 565. | (8) Smoult's Orders, 148. |
| (4) 2 B. L. R., O. C., 148. | (9) <i>Id.</i> , 201. |
| (5) 1 B. L. R., A. Cr., 17. | |

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outside the local jurisdiction. [NORMAN, J.—They had power to issue *subpænas*.] That power is given by section 13 of the Supreme Court's Charter—Smoult and Ryan's Rules and Orders, 9; and because they could so issue *subpænas*, it does not follow that they could issue writs of *habeas corpus ad testificandum* out of the local jurisdiction: if such power had been considered necessary, it would also have been given by the Charter. The case of *In re Sreenauth Roy* (1) does not bear on the point. The writ in that case was issued on the ground that the Raja was an inhabitant of Calcutta. The return to the writ denied this, but did not specifically traverse the facts, from which it was to be inferred that he was an inhabitant of Calcutta, and this traverse, and therefore the return, was held insufficient. In that case there was a mere question of a civil right between two private individuals. The Supreme Court had criminal jurisdiction over the Raja in that case, but the prisoner in this case is confined under an order of the Governor-General, over whom the Supreme Court, and therefore this Court, has no criminal jurisdiction, except in cases of treason and felony—section 39, Charter of 1773; and in respect of whom, 21 Geo. III, c. 70, makes a further enactment, exempting him from the jurisdiction of the Court, “for or by reason of any act or order or any other matter or thing whatsoever permitted or done by him in his public capacity only as Governor-General.” The case of *In re Sreenauth Roy* (1) is therefore distinguished from the present. The case of *In re The Bombay Justices* (2) is also distinguishable. The Charter of the Bombay Supreme Court (see 2 Morley's Digest, page 638) is not materially different from that of this Court. In that case it was contended that, according to the second resolution there laid down, this Court had power to issue a writ of *habeas corpus* to Dr. Fawcus as being “a person out of such local limits who is personally subject to the civil and criminal jurisdiction of the Supreme Court.” The third resolution lays down that the Court had “no power to issue a writ of *habeas corpus* to the jailor or officer of a native Court.” The third resolution applies to all jailors of

(1) Morton's Rep., 226.

(2) 1 Knapp's P. C., 1.

native Courts, and therefore to Dr. Fawcett; and by the second resolution, the person must be subject to the "civil and criminal jurisdiction;" the words are conjunctive. Now Dr. Fawcett, even if he were shown to be a British subject, would not be subject to the civil jurisdiction of this Court on that account. Under the old law he would have been so subject; but since the Charters of 1862 and 1865, he is not so, as they put liability to the jurisdiction on other grounds. The words of the second resolution in the case of *In re The Bombay Justices* (1) do not therefore apply to Dr. Fawcett; see as to this *In re the Maharani of Lahore* (2), *per* Peel, C.J.

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II. This Regulation, III of 1818, is not invalid as being contrary to the provisions of Magna Charta and repugnant to the principles of the English law. It was contended, on the other side, that the power of the Governor-General in Council to make laws is founded exclusively on 13 Geo. III, c. 63, ss. 36 and 37; and that as Regulation III of 1818 had not been registered in accordance with that statute, it was invalid. But there are other statutes giving this power, under which very many of the Acts and Regulations have been passed, as 39 & 40 Geo. III, c. 79, ss. 18 and 19, which gave power to the Governor-General to impose corporal punishment in addition to the powers given by 13 Geo. III, c. 63; and 47 Geo. III, c. 68, ss. 1 and 2, which gave the same power to the Governors of Madras and Bombay. Most of the Regulations were passed under 21 Geo. III, c. 21, s. 23, and 37 Geo. III, c. 142, s. 8, and registration in the Supreme Court was not required for a Regulation passed under these two statutes. The requirements of the statutes must be taken, at this distance of time, to have been complied with. Even if registration were necessary to make Regulation III of 1818 valid, the fact that it is recognized and established by Acts XXXIV of 1850 and III of 1858 has done away with the necessity for registration. The date when the Company ceased to be agents for the Mogul in Bengal, Behar, and Orissa, though not exactly fixed, (see *per* Lloyd in *The Mayor of Lyons v. East India Company* (3)) was previous to the passing of 21 Geo. III, c. 70.

(1) 1 Knapp's P. C., 1.

(3) 1 Moore's I. A., 252.

(2) Taylor, 433.

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By Regulations IX and XLI of 1793, all the Regulations then passed were formed into a Code, and by 37 Geo. III, c. 142, all the Regulations were recognized and established, see opinion of Grey, C.J., Smoult and Ryan's Rules and Orders, 52. Regulation III of 1818 was passed with reference to natives, as to whom there was a clear power of legislating. [NORMAN, J.—Does it not apply also to British subjects?] European British subjects would not, at the time of the passing of the Regulation, have been in the contemplation of the Legislature with reference to the object of that enactment, and its terms show it was for native subjects. The expressions "zemindars," "talookdars," &c., were not intended to apply to European British subjects; at that time they could not hold land in the mofussil. 3 and 4 Will. IV, c. 85, gives further power to the Governor-General to make Laws and Regulations, and even supposing Regulation III of 1818 had been invalid, it would be established by that statute,—see sections 43 and 45; and taken in connection with the later Acts, XXXIV of 1850 and III of 1858, that statute confirms the Regulation, and treats it as perfectly good law, and a law then in force. This cures the want of registration, if registration were ever necessary. The Regulation is upheld by Colvile, C.J., in the case of *In re Tuckut Roy* (1), in giving the decision of the Court. [NORMAN, J.—Was there more than one Judge in that case? applications of this kind are usually made before a single Judge—Morley's Digest, Title Habeas Corpus, 277.—Mr. Anstey referred to *Rex v. Ramgovind Mitter* (2).] The case of *In re Tuckut Roy* (1) was not a case where a writ was granted; it was a case where a rule had been granted to show cause why a writ should not be issued; the rule was discharged by the Court. The granting or discharging a rule is always the act of the Court, not of a single Judge.

It was contended that the Government, in confining any one under Regulation III of 1818, ought to show that there was danger of foreign hostility or internal commotion, but that is entirely a question for the executive Government to decide, and one which they have decided by the steps they have taken.

(1) 1 Boul., 354.

(2) Morton's Rep., 211.

The prisoner is confined under a warrant in accordance with the Regulation, and the question cannot be gone into now.

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The powers of legislation given to the Government of India by 3 and 4 Will. IV, c. 85, are very large: there were limits that they might not make Acts in contravention of those already made, or against the prerogative of the Crown. [NORMAN, J.—Is not a writ of *habeas corpus* a prerogative writ? Mr. Anstey.—See *Bushell's case* (1) and *Darnel's case* (2).] The Regulation does not affect the prerogative of the Crown, see *per Colvile, C.J.*, *In re Tuckut Roy* (3), Blackstone's Commentaries by Stephen, volume 2, page 620. See his definition of prerogative, *Id.*, page 482. It cannot be contended that the Regulation absolves subjects from their allegiance, see *per Colvile, C.J.*, *In re Tuckut Roy* (1). In that case all the points arose which have arisen here, therefore the present question has been decided. The argument is fallacious which is based on the assumption that all the laws which are in force in England are also law here. The difference between the circumstances of the two countries has been ignored. A law which would not be good in England might very well be law here, whether we consider the country as ceded or conquered. (The Advocate-General then reviewed the state of this country at the time it was conquered by the English, and the manner in which they acquired criminal jurisdiction. He referred to Morley's Digest, Introduction 31, and continued): The position in which conquered or ceded countries are is laid down in several cases. In *Blankard v. Galdy* (4), it was held that, with regard to an uninhabited country, the laws of the conquerors apply; but if inhabited, the law of the conqueror is not established there until it is declared to be so established. The same was held in an *Anonymous case* (5). In *Campbell v. Hall* (6), it was decided that the Crown had no power to impose taxes in the Island of Grenada, which had been conquered from the French, it having been stipulated that it should be governed by its existing laws, and the Crown having given power to the Governor to summon a Council

(1) Vaughan's Rep., 135.

(4) 2 Salk., 411.

(2) 3 Howell's State Trials, 1.

(5) 2 P. Wms., 75.

(3) Boult., 357, 358.

(6) 1 Cowp., 209.

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for making laws there. What took place in this country was, that the East India Company took the administration of civil and criminal law from the Mogul, and the Mahomedan law was then the law of the Criminal Courts, and it remained so, subject to any Acts or Regulations made by the Governor-General as representing the Government.

It is said that Regulation III of 1818 is void as being contrary to Magna Charta, but has Magna Charta been introduced into this country? As to the Regulation itself, there is nothing either in its scope or object *malum in se*. It is the law of this country, and, therefore, a person can be lawfully imprisoned under it, so that it cannot be said to be contrary to Magna Charta. That the passing of this law absolved every subject from his allegiance cannot be seriously contended. It lies on the other side to show that it is so. [NORMAN, J.—Do you contend that Magna Charta was never introduced either in the mofussil or in the local jurisdiction; into Calcutta for instance?] It is contended it was not introduced into the mofussil; in the local jurisdiction it would apply to British subjects, but it is not so clear that it was introduced as regards native subjects. This, however, is a matter existing out of the local jurisdiction. The Parliament has power at any time to suspend the Habeas Corpus Act, and if they do, it cannot be said that the allegiance of the subject is at an end. So Parliament has given power to the Legislature here to pass Regulation III of 1818, which is practically the same as a suspension of the Habeas Corpus Act; and unless the argument is valid that, on the suspension of the Habeas Corpus Act, every subject ceases to owe allegiance to the sovereign, the argument that Regulation III of 1818 causes a cessation of allegiance in the subject is invalid.

The Regulation, too, is supported by the Acts XXXIV of 1850 and III of 1858, which extend its operation, and were passed at a time when it cannot be doubted the Legislature had power to pass them. By the latter of these Acts they enact by section 2, that "Regulation III of 1818 shall be in force within the local limits of the jurisdiction of the Supreme Courts of Judicature at Calcutta, Madras, and Bombay." This gives the right of arresting prisoners in the Presidency Towns. The removal of the prisoner

in this case, which is alleged to have been illegal, is justified by section 5 of Act III of 1858.

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It appears upon the affidavits that Ameer Khan is detained by a warrant in accordance with the law,—*viz.*, Regulation III of 1818,—and the detention being lawful, the rule ought to be discharged.

The *Standing Counsel (offg.)* on the same side.—Is this a case in which, assuming the Court has power to issue a writ of *habeas corpus*, it ought to do so, having regard to the matter disclosed in the affidavits and the circumstances of the case? It is to these rather than to precedents that the Court must look. The circumstances in the case of *In re Sreenauth Roy* (1) differed from those of the present case. There an offence had been committed in Calcutta, and the Court held they had jurisdiction; here Dr. Fawcett has committed no offence in Calcutta. In that case it was said that an action of trespass would lie, and therefore a writ of *habeas corpus* could be issued; but suppose a person had been enticed inside the limits of Calcutta, and had then come out and been seized outside, would a writ of *habeas corpus* issue? Many of the decisions of the Supreme Court as to its jurisdiction are not in accordance with law or justice; they show how jurisdiction was usurped, and are unreliable—*Punchanund Bose v. Davison* (2), *Martindell v. Toman* (3), *Bamasoondery Dossee v. Rajcoomarree Dossee* (4). Later decisions have gone on a contrary principle—*Emrit Loll v. Kidd* (5). The affidavits in this case do not connect Dr. Fawcett with the arrest at all, either as principal or accessory; no act has been done by him which, though lawful originally, has since become unlawful so as to constitute trespass; see *The Six Carpenters' case* (6). The special object of a writ of *habeas corpus* is to bring up the person detained, and to inquire whether he is properly in custody, not to punish the person who is detaining him.

The original arrest is not to be considered in issuing a writ of *habeas corpus*, but only the legality or otherwise of the deten-

{ (1) Morton's Rep., 226.

(4) Taylor, 70.

(2) *Id.*, 149.

(5) 2 Hyde, 117.

(3) *Id.*, 161.

(6) 1 Smith's L. C., 134.

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tion. It is submitted, then, that the legality or otherwise of the arrest is not a necessary element in this case; and that, if it is necessary, that cannot affect Dr. Fawcett, as he had nothing to do with it. [NORMAN, J.—Suppose, in *In re Sreenauth Roy* (1), the person detained had been handed over to some one else out of the jurisdiction, could not a writ have issued from the Court here?] It is submitted it could not: this is a Court of limited jurisdiction. The Court of Queen's Bench might issue a writ as in *In re Anderson* (1), but it is unnecessary to consider that. Where a party is criminally liable, the Court will not consider the question of the arrest—3 Burn's Justice of the Peace, Title Habeas Corpus, pp. 430-431, and cases there cited. The fact that Dr. Fawcett is a British subject does not make him subject to the civil jurisdiction, for the civil jurisdiction does not now depend on the question whether a person is a British subject or not. The fact of the capture having been made in Calcutta does not make Dr. Fawcett subject to the jurisdiction, for with that he had nothing to do. The writ of *habeas corpus* is not a wholly criminal process; see 3 Burn's Justice of the Peace, Title Habeas Corpus, page 431, 4 Blackstone's Commentaries, page 27; and it may well be that the Court has no power to issue a writ of *habeas corpus* against a man, although it has criminal jurisdiction over him. If it be a wholly criminal matter, Dr. Fawcett is not primarily liable to the jurisdiction of the Court; he should be committed and sent up in the usual way under the provisions of the Criminal Procedure Code. The jurisdiction of this Court is limited. [NORMAN, J.—If a European British subject were seized in Calcutta, and put in jail in the mofussil, would he not be entitled to a *habeas corpus* from this Court?] He would be entitled to a writ of *habeas corpus*; the question is—What Court could grant it? In the case of a European British subject being imprisoned in the mofussil, it might well be that this Court could issue a writ of *habeas corpus* to bring him up, as this Court has criminal jurisdiction over him in respect of offences committed by him; but in *In re Sreenauth Roy* (2), the writ was issued, not because the person detained had a right to it, but because the detainer was held subject to the jurisdic-

(1) 30 L. J., Q. B., 129.

(2) Morton's Rep., 226.

tion. The case of *In re the Bombay Justices* (1) merely decides that, where the Court has both civil and criminal jurisdiction, a writ of *habeas corpus* will issue—that is, because a writ of *habeas corpus* is partly civil and partly criminal. *The King v. Monisse* (2) is not in point; the writ there was issued to a place within the local limits of the jurisdiction. Those cases which have been cited as precedents are no guide whatever, and are no authority to the Court to issue a writ of *habeas corpus* in the present case.

It has been assumed that, on the establishment of English rule here, all the law of England was introduced; but this does not follow. How are conquered or ceded countries dealt with as to the laws governing them? In *Picton's case* (3), the principle in *Campbell v. Hall* (4) that the laws of a ceded country remain until expressly altered, was fully admitted; see also *Anonymous case* (5). [NORMAN, J.—Do you contend that the English statute law, except that totally inapplicable, has not been, prior to 1726, introduced into India?] Yes. Slavery existed here long after the Slavery Abolition Act in 1833. In 1834, power was given to the Government here by 3 & 4 Will. IV, c. 85, s. 88, to take into consideration the abolition of slavery in this country; but it was not then abolished, nor virtually until the passing of the Penal Code. It could not be said that a slave had a right to a writ of *habeas corpus* on the ground that, under Magna Charta, he had the same rights as a European British subject. If he had, how was slavery, so repugnant to the English constitution, continued until 1860? English law could not have been introduced bodily, or slavery would have ceased in 1833. If slavery could exist, why could not a law like Regulation III of 1818, for the confinement of seditious persons, exist also? It is much less repugnant to English law than slavery. Englishmen and native subjects never were on an equal footing; if so, natives would have been entitled to the privilege of being tried by a native jury, yet until 7 Geo. IV, c. 37, they were always tried

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(1) 1 Knapp, P. C., 1.

(4) 1 Cowp., 209.

(2) 1 Strange's Notes of Cases, 418.

(5) 2 P. Wms., 47.

(3) 30 Howell's State Trials, 934.

1870 by English juries. The laws of this country were not altered
IN THE MATTER OF AMEER KHAN. by the statutes. The Charters establishing Mayors' Courts in 1726, and 13 Geo. III, c. 63, merely give civil and criminal jurisdiction, but do not state what law was to be administered. [NORMAN, J.—They give certain powers to make laws not repugnant to the law of England. It seems to me that, under them, English Criminal law was to be administered.] The Mahomedan law, which existed here prior to 1726, was not then immediately and entirely subverted. [NORMAN, J.—The Charter of Charles II, dated April 3rd, 1661, gives power of civil and criminal jurisdiction over all persons according to the laws of England.] That refers only to the servants of the East India Company; it would not introduce English law universally. The country was not conquered or ceded until 1765, and till it was ceded or conquered the laws would remain unaltered; how then can it be said English law was introduced in 1726, when the country was subject to the Mogul? Prior to the time when Bengal became a British province, the law of England was not introduced. The most important statute subsequently is 13 Geo. III, c. 63. The words "His Majesty's subjects," in section 14, do not include native subjects, but only apply to British-born subjects; section 16 makes a further distinction; see also section 34. The extended privileges given by 7 Geo. IV, c. 37, as to jurors, show what was meant by British subjects; 13 Geo. III, c. 63, draws a wide distinction between "His Majesty's subjects" and "inhabitants of India." If it be said that the distinction was done away with by the proclamation of 1858, the answer is that such a result can only be effected by Parliament,—the Queen has no power alone to authorize it. No change was introduced by the Charter of 1774; see Smoult and Ryan's Rules and Orders, 9—17; the words "Our subjects" there only apply to British-born subjects. The preamble of 21 Geo. III, c. 70, shows that it was never supposed that English law had been introduced into Bengal, and by other portions of it their own laws are expressly reserved to natives in certain cases, see section 17. The enumeration of cases there does not exhaust their whole law, and it was not intended that in all other cases English law should

be introduced. *Musleah v. Musleah* (1) was decided on this principle, but Peel, C. J., afterwards resiled from this opinion in *Emmer v. Crump* (2); see also *Musleah v. Musleah* on review (3). These decisions, however, all assume that the English law applies because there is no other law; but the application of the English law has been limited in many cases. In *Bysack v. Bysack* (4) the law of perpetuities was held not to apply to this country. In the case of *The Mayor of Lyons v. The East India Company* (5), the law of alienage was declared inapplicable; and in *The Advocate-General of Bengal v. Ranee Surnomoyee Dossee* (6), the law of forfeiture for suicide was held not to be part of the law of this country. [NORMAN, J.—When by Charter the English Government assume to appoint authorities in Calcutta, and give them civil and criminal jurisdiction, and the power of making bye-laws not repugnant to English law, is it not a clear inference that they meant English law to be introduced?] If they had intended it they could have expressly introduced it, and not have left it to be implied. If English law was introduced by 13 Geo. III, c. 63, why does 21 Geo. III, c. 70, commence by being repugnant to the idea that English law had been introduced? If any difficulty was found as to what law was to be applied in cases to which no law was made expressly applicable, the difficulty ought to have been represented to the Legislature; whereas the Courts took upon themselves to introduce English law. The decision in *The Mayor of Lyons v. The East India Company* (5) was on the ground that it would be gross injustice to apply the law of alienage to Calcutta, and nothing is said there of the introduction of English law; see also *The Advocate-General of Bengal v. Ranee Surnomoyee Dossee* (6), *The Indian Chief* (7), *Jebb v. Lefevre* (8). The *lex loci* of Calcutta for European British subjects was the English law, modified to the position and state of the country. Other European nations had their own laws. Mahomedan law was in force in Calcutta for natives of the country and in the mofussil.

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(1) Fulton, 420.

(5) 1 Moore's I. A., 270.

(2) Montrion's Morton, 242, 255.

(6) 9 Moore's I. A., 387.

(3) Boul., 235.

(7) 3 Rob. Adm. Rep., 29.

(4) Bourke's Rep., 282.

(8) Clarke's Rules and Orders, Add., 56.

1870 21 Geo. III, c. 70, s. 17, does not abrogate the Mahomedan law; the exceptions in that section are not exhaustive,—see the *IN THE MATTER OF AMEER KHAN*. preamble to the Act. On the same principle, a clear devise in a will is not made void by a general inaccurate clause,—see *Jarman on Wills*, clause 26. So the enumeration of *Bandhus* in the *Mitakshara* has been held by the Privy Council not to be exhaustive. The whole body of English law was never introduced with regard to native subjects. If it is said it was introduced *in toto*, in what way is it to be limited? but it has been limited, therefore the inference is it was not wholly introduced—*Advocate-General of Bengal v. Ranee Surnomoyee Dossee* (1), *per Lord Kingsdown*. *The Indian Chief* (2), *Jebb v. Lefevre* (3), *The Queen v. Nelson and Brand* (4), *per Cockburn, C.J.* In all the decisions in which the question arose, it seems to have been assumed that it had been introduced. If the words “*liber homo*” are used as opposed to a slave, the fact that slavery existed here would show that *Magna Charta* was not introduced; if they are used as showing the distinction between a freeholder and a villain, and imply a superiority of tenure, that very language shows that *Magna Charta* is not applicable to this country. [NORMAN, J., refers to the definition of *liber homo* given by Coke, 2nd Institute, page 27.]

The Mahomedan law gave the sovereign absolute power over the subject, and the Governor-General had much the same power when Regulation III of 1818 was passed. The Statute 13 Geo. III, c. 63, was passed for the general improvement of the Company’s administration, not on account of the atrocities alleged to have been committed by Warren Hastings; those took place subsequently. No particular state of circumstances arose in 1818 to give any explanation of the passing of Regulation III of that year; the absence of any events showing the necessity of it makes it clear it was an act of State policy, and rather limited than extended the then power of the Governor-General. (The learned counsel here referred to the provisions of the Regulation with regard to measures for the health and comfort of the prisoner, and the power of appeal given him.)

Regulation III of 1818 does not give any new powers for

(1) 9 Moore’s I. A., 387; see 425.

(3) Clarke’s Rules and Orders, Add., 56.

(2) 3 Rob. Adm. Rep., 29.

(4) Page 10 of the Charge to the Grand Jury.

the first time, nor does it enact anything repugnant to the law of the realm, or beyond the power of its framers,—see the argument of Serjeant Spankie in *Buckingham's case* before the Privy Council (1), and *Ouseley v. Plowden* (2). The Statute 13 Geo. III, c. 63, had made registration of the Regulation in the Supreme Court necessary. 37 Geo. III, c. 142, makes registration no longer necessary, and Regulation III of 1818 was passed under the powers given by the latter statute.

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Nor is the Regulation III of 1818 void as being in derogation of the prerogative of the Crown. The word "prerogative" has a double meaning; the liberty of the subject may be in derogation of the prerogative of the Crown. The first attempt of the Indian Legislature to grant patents was held an encroachment on the prerogative, because leave ought to have been first obtained under 16 & 17 Vict., c. 95, s. 26. It is difficult to see how the Regulation can absolve the subjects from their allegiance, when by its terms it implies, that it is for attempting to throw off their allegiance that they are to be deprived of liberty. The point in this case has been decided in the case of *In re Tuchut Roy* (3). The circumstance that in that case the man was arrested in the mofussil and confined in Calcutta, and in the present case arrested in Calcutta and confined in the mofussil, cannot make any difference since the passing of Act III of 1858. The fact that this is not a case of arrest by the Court, but by warrant of the Governor-General in Council, must be taken into consideration. If the enlargement of the prisoner by writ of *habeas corpus* is against public justice, 31 Car. II, c. 2, does not apply, the *habeas corpus* at common law is applicable—4 Stephen's Blackstone, 27, 28. See also *Burdett v. Abbot* (4).

Mr. Anstey, in support of the rule, cited 8 Howell's State Trials, 38, note, and 19 *Id.*, 1152, note, to show the ill effects of arbitrary power in individuals, and instances of its abuse by persons who assumed pretensions to it. The law of England does not sanction such pretension to arbitrary power. The cases which

{ (1) Auber's Analysis, 18.
(2) 1 Boul., 145.

(3) 1 Boul., 354.
(4) 14 East, 1.

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have been cited on the other side have no application to this question; they are cases relating to things, this is a case relating to the rights of persons; they are cases of private law, this is a case of public law. The word "law" has been misused by the other side,—*viz.*, as meaning a habit or custom of life; it should here be used in its primary sense,—*i. e.*, a commandment. The question is not one of the *status* of persons, or under what law as to inheritance or contract they may be living; the question is one on which their allegiance may depend. The persons who first acquired this territory were, although living beyond the realm, subject to the sovereignty. Their own act put them out of the reach of the protection of the sovereign, but they took their laws with them—Chalmers' Opinions, 206, *et seqq.*, 517; *The King v. The Inhabitants of Brampton* (1), *per* Ellenborough, C.J., Clarke's Colonial Law, 8, note 4. If it is by the sovereign's act that his protection is withdrawn, the subject ceases to owe allegiance. In the Charter 10 & 11 Will. III, in 1798, the settlements of the English in India are called "plantations," and are mentioned as subject to the English sovereignty. The Statute 13 Geo. III, c. 63, was passed to prevent the recurrence of the atrocities and cruelties after Clive's time; as 21 Geo. III, c. 70, was passed on account of the abuses in Warren Hastings' administration. (The learned counsel then referred to the various early Charters granted to the East India Company, showing how English law was introduced—by Elizabeth, 31st December 1600; by James I, 31st May 1609; by Charles II, April 3rd, 1661, and 27th March 1668; in connection with which he referred to the cases of *Naoroji Beramji v. Rogers* (2), *Lopes v. Lopes* (3); and Clark's Colonial Law, page 7, note 9.

These Charters and the Statutes since passed had for their object to strengthen the power of the Courts against the Company,—see the Minute of Sir E. Ryan, dated October 2nd, 1829, in the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons on the East India Company,—in which he states that, with reference to the Regulations passed by the Governor-General in Council, parties made frequent appli-

(1) 10 East, 288.

(3) 5 Bom. H. C. Rep., 172.

(2) 4 Bom. H. C. Rep., 37.

cations in the Courts against the registration of such Regulations, as provided in the 13 Geo. III, c. 63; and it was always considered that they had a right to be heard. The time and circumstances in which decisions were given, and, in construing the Acts of Parliament, the history of those Acts must be taken into consideration. The whole of the English law was introduced as the *lex loci* by the early Charters and by 13 Geo. III, c. 63; and afterwards exceptions were made on the ground of greater convenience, and the different state of the two countries. Thus, at various times, Acts were passed by the Imperial Parliament, and decisions were given with respect to the applicability of particular portions of English law to India; and in certain cases, the native laws were reserved to the natives. What would be crime by English law was not to be crime here if justified by the religion of the people, hence the difficulty of abolishing slavery. It is said that slavery existed here long after it was abolished in England; it was not until the case of *The Negro Somersett* (1), that it was shown to be contrary to the law of England—*per* Lord Mansfield. Before that it could not be said to be contrary to the law of England, as could have been said of torture. A late opinion on slavery is that of Mr. Justice Best in *Forbes v. Cochrane* (2), given before the Slavery Abolition Act, 3 & 4 Will. IV, c. 85. Torture was never legal under the British rule in India; it was never used here in accordance with law; see on this subject *Picton's case* (3). Torture would cease on the entry of a British force into the country—*Mostyn v. Fabrigas* (4). These cases show that laws contrary to the principles of the law of England would, on the introduction of English law, be abrogated without special Act of Parliament. (The learned counsel then referred to Mr. Law's contention at the trial of Warren Hastings, that his conduct was justified by the Mahomedan law, and Mr. Burke's reply showing that although the Mahomedan laws were severe they were just, and did not permit an arbitrary exercise of arbitrary power—3rd volume, Burke's Speeches). If it is said this arrest has been made in accordance with Mahomedan law, it has failed to answer

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(1) 20 Howell's State Trials, 1.

(3) 30 Howell's State Trials, 870.

(2) 2 B. & C., 470.

(4) 1 Smith's L. C., 623.

1870 the requirements of that law; if it is good at all it must be by English law. (The learned counsel referred to the later Charters down to the establishment of the Supreme Court granted by Charles II, on 27th March 1669; by 2 Jac. II, 12th April 1686; 5 Will. & Mary, 11th November 1693; 10 & 11 Will. III, 5th September 1698; 5 Geo. I, c. 11; 7 Geo. I, c. 21; 13 Geo. I, 24th September 1726; 26 Geo. II, 8th January 1753; and 31 Geo. II, 19th September 1757, observing of them that they all contained provisions requiring that the laws made by the Company should be reasonable, not repugnant to the laws of England, and subject to confirmation by Parliament). The next statute was 13 Geo. III, c. 63, which establishes the Supreme Court, under the powers given by which the Regulation III of 1818 was passed. The argument that Magna Charta and other laws relating to personal liberty are on the same footing as merely local laws, and do not apply to India, is not valid; because whilst many laws which it would be inconvenient to introduce, or which would have a penal effect, might not apply, it would not follow that a statute which would be beneficial (as one regarding personal liberty) would not be applicable. "Beneficial laws may extend to things not in *esse* at the time of making the statute, penal ones never do"—*Dawes v. Painter* (1). On this principle, 56 Geo. III, c. 100, passed to amend the Habeas Corpus Act, applies to India. The right to a writ of *habeas corpus* is a natural right; the date of it is doubtful, but it is an ancient right—Croke. Car., 466. In Roman law, it is found in the *De homine libero exhibendo*,—Dig., 43, Tit. 49. It existed in Spain in the form of the writ of "manifestation," see 2 Hallam's Middle Ages, 222. It is a prerogative writ in some sense, because it is a writ granted by the sovereign as protector of his subjects—Bacon's Abridgment, Title Habeas Corpus, A; see *Richard Bourn's case* (2) and *Bushell's case* (3). It has been contended on the other side that the capture is immaterial; and that it is only necessary to justify the detention—but see Bacon's Abridgment, Title Habeas Corpus, A, where it is said to be in "the nature of a writ of error to enquire into the legality of the commitment, and orders the day, the caption, and the cause of detention to be return-

(1) Freeman's Rep., 175.

(2) Cr. Jac., 543.

(3) Vaughan's Rep., 136.

ed." (The learned counsel then read a portion of, and commented on, the Magna Charta,* observing that the reading "*vel per legem terræ*," was preferred to that of "*et per legem terræ*," on the question whether the Attorney-General had power to file *ex officio* informations, which it was held he had). The *lex terræ* is the law of England as it existed then. (He also cited the words of Lord Chatham on the words of the Charta; see Hurd's Treatise on Habeas Corpus). The other side contend that there was no trial by jury in the mofussil until the Criminal Procedure Code, and therefore Magna Charta does not apply; but it did exist, at least in the West of India, in the *punchayet*, which, according to an instance given by Palgrave, was similar to the ancient form of jury in England in time of Edward III. The sheriff was bound to impanel none but those who had seen the offence or knew the offender. The original writ to summon witnesses was not a *subpœna*, but a *habeas corpus* followed by a *distringas*. Thus it was not necessary to introduce trial by jury, as it already existed in the mofussil.

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As to the right of every subject of the Crown to the writ of *habeas corpus*, see 2 Hallam's Middle Ages, 342; Coke's 2nd Institute, 45b; 1st *Id.*, 123b : these were the later opinions of Lord Coke ; Preface, 15th Edition, 39, *Darnel's case* (1). All the statutes that apply to personal liberty have a permanent personal application, and are not like merely local statutes ; such statutes are extra-territorial. Besides *habeas corpus*, there are other writs which might be issued, and which are writs of right. One is the writ *de homine replegiando*, for the effect of which see *In re Martin* (2) and *In re Treblecock* (3), in which latter case the writ was maintained by Lord Hardwicke. Another writ is that of *mainprize*, which any one imprisoned is entitled to, on giving security to answer any charge—*Jenkes' case* (4), which led to the passing of the Habeas Corpus Act, 31 Car. II, c. 2. In the present

* *Nullus liber homo capiatur, imprisionetur, aut disseisietur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis ; aut ut lagetur, aut Exuletur aut aliquo modo destruatur ; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ,*

(1) 3 Howell's State Trials, 43 ; see also pages 8—16.

(2) 2 Payne's Cir. Rep., 348.

(3) 1 Attkyn's, 633.

(4) 6 Howell's State Trials, 1200.

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case there is no intention on the part of the Government to try Ameer Khan, and they have concealed the reasons for his arrest. The Statute 56 Geo. III, c. 100, was passed to amend and extend the application of the Habeas Corpus Act; this Act also applies to India, at least since the constitution of the High Courts. There are no words in the statute saying it shall not apply. The Letters Patent do not exclude it. It applies, together with the rest of the statute law applicable to the state of the country before 1726. Practice should not put any restriction on its applying; practice is not unfrequently wrong—*Wilson v. Bates* (1). It is submitted, however, it is not practice. "Acts of Parliament which alter other Acts in force in the colonies are also considered by inference as themselves applying there." This was the opinion of Dwarris, following the best authorities—Clark's Colonial Law, 16; see also Chalmers' Opinions, 197-220; *Blankard v. Galdy* (2); Comyn's Digest, Title Navigation, G. 3; *Anonymous Case* (3); 1 Blackstone's Commentaries, 108; *Reg v. The Mayor of Norwich* (4); Stokes' Law of the Colonies; 5. This precept has been acted on in the High Court of Bombay, and in this Court in *Griffin v. Deather* (5), decided on the Statute 24 Geo. II, c. 44, see Morley's Digest, Title Arrest. The only distinction taken is that beneficial laws are held to apply, and penal ones not—*Dawes v. Painter* (6); Introduction to Blackstone's Commentaries, 107; 2nd Report of West Indian Commission, 61; *Penn v. Lord Baltimore* (7). The portion of Magna Charta relating to weirs on the Thames and Medway, which is eminently a local law, was, *mutatis mutandis*, held to be extended to Ireland, because it was a beneficial law—Harris' Hibernica. Those not beneficial have been held to be not applicable here, as the statutes relating to superstitious uses, &c. English law may be kept out of a country, but when once introduced, there is no power to limit its application—*Campbell v. Hall* (8). In judging whether Acts apply or not to this country, it must be considered whether they are beneficial or not; and Courts of Justice established by Act of Parliament are not bound

(1) 3 M. & Cr., 197.

(5) Morton's Rep., 360.

(2) 4 Mod. Rep., 222; S.C., 2 Salk., 411.

(6) Freeman's Rep., 175.

(3) 2 P. Wms., 75.

(7) 1 Ves., 385.

(4) 2 Ld Raym., 3245.

(8) 1 Cowp., 204.

to take the law from any particular date, as 1726, but all the beneficial laws are applicable; thus Magna Charta, the statutes with respect to the liberty of the subject passed by the Plantagenets, the Petition of Right, the Bill of Rights 1688, and 56 Geo. III, c. 100, are all of them applicable to this country. The Privy Council, in *The Advocate-General of Bengal v. Sur-nomoyee Dossee* (1), say that those who live among British settlers are partakers of their laws. [NORMAN J.—But they expressly exclude India.] The state of things existing at the time of that decision does not exist now. “Reasons of State are not allowed to influence our judgments by the constitution of English law,” *per* Lord Mansfield in *The King v. Wilkes* (2); and as to the danger of arbitrary power in the State, and claim to summary jurisdiction, see 3rd volume of Sir W. Jones’ works, 48, in his charge to the grand jury. The present claim to summary jurisdiction goes farther than what is denounced by Sir W. Jones. In *Queen v. Ogilvie* (3), Peel, C.J., says: “On the construction of the *habeas corpus* we are bound to follow the decisions of the English Courts in preference to decisions of this Court.” Sir C. Grey, Sir E. Ryan, and the other Judges in 1829 gave their express opinion that the English law relating to *habeas corpus* was in force in India,—see 5th Appendix to the 3rd Report, 1200; see also the observations of Cockburn, C.J., in *The Queen v. Nelson and Brand* (4). Express power was given to the Company by 5 Geo. I, c. 21, s. 22, to arrest, seize, and deport persons who traded without authority in the East Indies. Power to deport implies power to arrest and detain, but power to arrest and detain does not necessarily imply power to deport,—see *Nicol v. Verelst* (5), which was a case decided on that Act of Parliament. If the power of making laws to restrain the liberty of the subject exists here, the *onus* of showing that it does exist is on those who assert such a power, and express authority must be shown for its exercise, for without express authority they cannot make laws at all. The cases of the arbitrary exercise of power of arrest cited

(1) 9 Moore’s I. A., 424.

(4) Pages 65 and 66 of the Charge to the Grand Jury.

(2) 19 Howell’s State Trials, 1112.

(5) 2 Wm. Bl., 1277; see 1283, *per* Grey, C.J.

(3) Taylor, 137.

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by the other side are cases where express authority was given by the Legislature. Here there is no express authority. In *Buckingham's case* (1), there was such express power given, and the Privy Council refused to interfere only because such special power had been given, and they thought that the complainant had mistaken his remedy, which was by action in the ordinary way under the statute. This is borne out by the fact that compensation was afterwards made to him. As to the introduction of English law, and the distinction between public law and personal law, between rights of persons and rights of things, see *The Secretary of State v. The Administrator-General of Bengal* (2), *per* Markby, J. All the Charters reserved the laws of England, and in giving the power of legislation, expressly stipulated that such legislation should be reasonable and not repugnant to the law of England. (13 Geo. III, c. 63; 21 Geo. III, c. 70; 10 Geo. III, c. 21; 33 Geo. III, c. 52, s. 45; 37 Geo. III, c. 142, which enacts that certain Regulations should be codified, without, as the other side contend, recognizing the validity of each separately; 39 & 40 Geo. III, c. 79, ss. 18 and 19, cited to show this.) 47 Geo. III, c. 155, s. 35, made all Europeans subject to any Regulations which might be made by the local legislature. Thus Regulation III of 1818, if good against Hindus, Mahomedans, &c., is also in force against all European British subjects. In *Bryant v. Foot* (3), it is shown that if a claim be bad or unjust in its inception, it is wholly bad, so it is with Regulation III of 1818, which is void for rankness and excess of authority in the framers—*Biddle v. Tarrany Churn Bonnerjee* (4), *per* Peel, C. J.; see also *Bonham's case* (5), *The City of London v. Wood* (6), *Day v. Savadge* (7), *Calvin's case* (8), *The Le Louis* (9), *per* Lord Stowell, *The Lord Cromwell's case* (10), *Stewart v. Lawton* (11), *The Baron de Bode v. The Queen* (12). The other side contend that English

- (1) Auber's Analysis, 18.
- (2) 1 B. L. R., O. C., 110.
- (3) 3 L. R., Q. B., 497.
- (4) T. & B., 391, 406.
- (5) 8 Rep., 114—118.
- (6) 12 Mod. Rep., 687.

- (7) Hobart's Rep., 87.
- (8) 7 Rep., 14.
- (9) 2 Dodson's Adm. Rep., 254.
- (10) 4 Rep., 13.
- (11) 1 Bing., 374.
- (12) 3 H. L. C., 449.

law was not in force in the mofussil in 1818. If so, where was the power to pass the Regulation III of 1818? It was passed either under Mahomedan or English law. No authority exists in Mahomedan law under which it could have been passed. If passed under English law it is void as being in excess of the power of legislation. Thus in either case Regulation III of 1818 is void. (The learned counsel here referred to the opinions of Lord Denman and Sir W. Horne, that slaves in the island of Tortola were entitled to the benefit of clergy and to the protection of the common law as subjects of the Queen—Forsyth's Opinions, 205, 457.) They were of opinion that the indictment was invalid because it gave the accused no notice of the offence with which he was charged.

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As to how far the repugnancy of an Act to the law of England affects its validity, see the Minute of Sir C. Grey of October 1829, 3rd Appendix to the 5th Report, 1126, and the Minute of Lord W. Bentinck, page 1188. Regulation III of 1818 was made, if made under any of the statutes, under 13 Geo. III, c. 63. That the Legislature here should have had powers to make a law enabling the Government to make arrests and detain suspicious persons, would be inconsistent with the principles of the Imperial and Colonial Legislatures: for the Imperial Legislature at various times was called upon to extend the powers given by 13 Geo. III, c. 63, as they did by 39 & 40 Geo. III, c. 79, s. 18, 55 Geo. III, c. 84, s. 6, and 33 Geo. III, c. 52, s. 45. Regulation III of 1818 is either void for dealing with a subject exhausted by these Acts of the Imperial Legislature, or it was not intended to apply to any case coming under the provisions of those Acts. In those Acts, power of arrest is given, but the arrest must be by warrant, and the causes of detention must be shown, and the prisoner be brought to trial; see the Minute of Sir C. Grey above referred to, 1128. Allegiance and protection are reciprocal, and any act which tends to reduce the protection of the Sovereign absolves the subject from his allegiance,—see *Calvin's case* (1). If an Act be passed contrary to international law, it would be void, and the Judges

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would not be bound to recognize it—*The Fox* (1), *Regina v. Serva* (2), decided in 1845; see also *Reg. v. Reay* (3), decided on the 21st May 1870; *Samaldars Bechardars v. The Collector of Ahmedabad* (4), decided on 20th July 1870, *per* Tucker, J.; and *The Thakoor of Palitana* (5), decided in August 1870 by the High Court at Bombay.

To come to later acts of the Imperial Legislature giving power to the Legislature here, there is 3 & 4 Will. IV, c. 85, s. 43; that power is limited by enacting that the Governor-General shall not make laws “affecting any prerogative of the Crown, or the authority of Parliament, or any of the unwritten laws of Great Britain on which may depend the allegiance of the subject;” and section 51 reserves the right to make laws for India, showing an intention to limit the power of the Governor-General in Council. As to what legislation the Parliament thought expedient, see sections 85, 87, 88, 89, and 109. The effect of the whole Act was to give every native of India the full rights of a natural-born British subject in the same way as conquest, which makes naturalized subjects of the conquered,—see *per* Lord Mansfield in *Campbell v. Hall* (6). That this effect was not produced before was due to the peculiarity of the tenure of India by the English. Before that time the Company had held India on a kind of feudal tenure; after that it became a trustee for the Crown. The argument drawn from the fact that the laws of alienage do not apply here is not a correct one, for the laws of alienage could not apply unless specially introduced; they are penal laws, and were not introduced into England until 13 Edward II, by the statute *de prerogativa regis*. All the cases against which the other side contend were decided subsequently to 1833. Next was passed 16 & 17 Vict., c. 95, by section 37 of which natives are capable of qualifying themselves for civil or military service. Section 26 makes the consent of the Queen necessary to the validity of any law of the Governor-General in Council affecting the prerogative of the Crown. There is nothing affecting the provision in former statutes that such

(1) Ed. Adm. Rep., 313, 314.

(4) Not reported.

(2) 1 Den. Cr. C., 104.

(5) Not reported.

(3) 7 Bom. H. C., Cr., 6.

(6) 209.

not therefore be pleaded. The suspension of the Habeas Corpus Act does not affect those who are not amenable to it, and it is only for those who are amenable to it that an act of indemnity passes. The suspension of the Habeas Corpus Act is always only for a limited time, not permanent or for an indefinite time, nor can it be suspended except by those having power to make it,—*viz.*, the Parliament. There was a power somewhat similar to this inherent in the King,—*viz.*, the power of imprisonment. Lord Mansfield, in 1757, declared that, in all such cases, the Judges had power to issue writs of *habeas corpus*; and the Judges always appear to have drawn a distinction between arrest by virtue of prerogative, and by course of law; in the former cases they required strict proof of the extent of the prerogative; in others, the production of the warrant or order of a competent Court was sufficient.

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They also made a distinction, as to allowing the return to be controverted, between cases which were excepted from the Habeas Corpus Act and those to which 56 Geo. III, c. 100, applied; in the former cases the practice was to take the return as conclusive; in the latter, contradictory matter was allowed—*Goldswain's case* (1), *per Gould, J.* The cause of imprisonment ought to appear on the return—*Bushell's case* (2), *per Vaughan, C.J.*, *Streater's case* (3); see also 2 Coke's Institutes, 52, where he says that the cause of suspicion must be shown with certainty. How is Dr. Fawcett protected by the plea that the Government have arrested Ameer Khan? In Westminster Hall a demurrer would be allowed to such a plea—*Evans v. Hutton* (4). [NORMAN, J.—That was a special demurrer, but I think the warrant ought to have been set out in this case.]

If the Governor-General has the power to detain a person in custody under Regulation III of 1818, does that protect Dr. Fawcett? It is stated in the affidavits that Dr. Fawcett admitted he had no legal warrant under the Regulation, but a warrant of the Lieutenant-Governor of Bengal; the caption

(1) 2 Wm. Bl., 1209.

(3) 5 Howell's State Trials, 389, 402.

(2) 6 Howell's State Trials, 699;

(4) 4 M. & Gr., 954.

S. C. Vaughan's Rep., 137.

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therefore was illegal. It is for the Court to say whether anything has arisen since to justify the detention. Ameer Khan is entitled to damages for his detention, and to the writ of *habeas corpus*—*Rogers v. Rajendro Dutt* (1). Dr. Fawcett can be sued here, though the Governor-General cannot.

But it is not necessary for the issue of a *habeas corpus* to show that an action for the damages will lie; a *habeas corpus* will issue in any case of false imprisonment, but it does not follow that an action for false imprisonment will lie in every case in which a writ of *habeas corpus* will issue. It was remarked that by the Habeas Corpus Act the diet-money is to be in shillings, which shows it is only a local Act; but the diet-money can be calculated according to the currency of the country—*Wise v. Dudley*, an American case in 1698, Washbourn's Judicial History of Massachusetts.

The learned counsel summed up his arguments as follows:—

1. Ameer Khan is, by construction of law and in fact, a natural-born British subject.
2. The Court, having jurisdiction, if a proper case be made out, cannot refuse the writ of *habeas corpus* to any natural-born British subject.
3. The Court has power to issue a writ of *habeas corpus* into the mofussil.
4. This power does not depend on the Charter, but on the powers given to the Judges generally—*Rex v. Hastings* (2).
5. This power has not been affected in any way by the substitution of the Charter of the High Court for that of the Supreme Court.
6. This is a proper case on the affidavits for the exercise of such a power.
7. Great wrong has been done in refusing to show the warrant of detention, or to give any reasons for such detention.
8. No law exists in this country under which the treatment of Ameer Khan can be justified.
9. If Regulation III of 1818 be relied on, it is not law, never was law, nor could be law. It is void as being repug-

(1) 13 Moore's P. C., 209, 213, 216, 223, 236.

(2) Morton's Rep., 209.

nant to English law, and in excess of the power of the Legislature who passed it.

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Mr. Ingram on the same side.—The questions for consideration here are : 1.—Has the Court power to issue a writ of *habeas corpus* in this case ? 2.—Is this a proper case for the exercise of that power? The case of *In re The Bombay Justices* (1) has been cited as deciding that a *habeas corpus* will not lie to a native officer ; the ground of the decision there was that the Supreme Court had no power to issue a writ to a mofussil Court over which it had no jurisdiction. But the Supreme and Sudder Courts are now amalgamated in the High Court, so that the question still is open whether the High Courts have such jurisdiction. (The learned counsel here referred to and read several passages from the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons in 1830, to show the opinions there as to the power of the Judges to issue writs of *habeas corpus*; see 5th Appendix, 3rd Report, pages 1220, 1224). These passages show that a writ of *habeas corpus* then (1829) lay to an English officer of Government, and to a native officer in employment of Government. With reference to the change in the constitution of the Courts in 1862, the proclamation of the Queen in 1858 must be considered ; that was issued after the case of *In re The Bombay Justices* (1), and before the change in the Courts. The effect of that proclamation is to make all the natives of India denizens of the country, and as such entitled to all the rights of natural-born British subjects. In *In re Tuckut Roy* (2), Colvile, C.J., upholds Regulation III of 1818, because it applied to natives in the mofussil,—see also the case of *In re the Maharanee of Lahore* (3). There are three classes of persons to whom Regulation III of 1818 on the first glance would seem to apply : first, inhabitants of Calcutta and all Englishmen ; second, all other natives of India who, as we contend, are since the change in the constitution of the Courts entitled to a *habeas corpus* ; third, State prisoners in the proper sense,—*e. g.*, the ex-King of Oudh. This is said to be a matter of State ; but independent

(1) 1 Knapp P. C., 1.

(2) 1 Bonl., 357.

(3) Taylor, 428.

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sovereigns and their property are the only matters that can be dealt with without judicial investigation ; to such a person the term " State prisoner," might apply ; it does not apply to Ameer Khan. There should be no interference with the liberty of the subject which ought not to be subject to judicial investigation ; Regulation III of 1818 is improperly put in force in such a case as this. Whether natives in the mofussil can be affected by this Regulation or not, it is contended that native inhabitant of Calcutta cannot ; the latter are on the same footing as Englishmen for all purposes, and entitled to all the privileges of Englishmen. The words of 13 Geo. III, c. 63, put the natives in this position, at least those resident in Calcutta. That statute gives an entire criminal system. The writ of *habeas corpus* is not mentioned there, though all other writs are, because the power to grant writs of *habeas corpus* is inherent in each Judge by virtue of his office, as representative of the prerogative of the Crown. The same criminal law as that of England was intended to be administered in the Courts in India—9 Geo. IV, c. 74. [NORMAN, J., to the Advocate-General.—If the natives in the original English factories were liable to English criminal law, as they certainly were, were they not also entitled to the protection of that law ? The Advocate-General.—They were liable to and entitled to the criminal law as part of the *lex fori*, but the substantive law was different, it not having been so introduced.] The opinion of Lord Stowell was that the territories of the East India Company were part of the kingdom of England — *The Maria Francoise* (1); see also the reference to this case by the Judges in the 5th Appendix to the 3rd Report, page 1144. Throughout that report the Judges seem to have adhered to two principles—the absolute necessity of registration of the statutes and regulations of the Indian Council ; and that natives resident in Calcutta are on the same footing as European British subjects ; see Sir C. Grey's opinion in the 5th Appendix to the 3rd Report, 1149 ; and the opinion of the other Judges, 1230. In these opinions the principle of *Campbell v. Hall* (2) is applied to all the Indian territories ; that case was decided in the same year

(1) 6 Rob. Adm. Rep., 288.

(2) 1 Cowp., 209.

as the Charter 21 Geo. III, c. 70, was passed. The same principle governs the case of *The Advocate-General of Bengal v. Ranee Surnomoye Dossee* (1), where it is said that when Englishmen establish themselves in a barbarous or uninhabited country, they carry with them their laws and sovereignty; that in coming here they came to a civilized Mahomedan country; and that English law was introduced and made applicable to natives of Calcutta at a fixed period,—*viz.*, 1726, see also *Killican v. Jug-gernauth Dutt* (2).

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If these opinions and authorities are correct, Ameer Khan has all the rights of an Englishman, and of these rights it is attempted to deprive him by Regulation III of 1818.

The power of the framers of that Regulation was a limited power,—see the opinions of Sir E. East and Sir E. Ryan on the extent of the power of the Indian Legislature, 5th Appendix to the 3rd Report, 1183. The words in 13 Geo. III, c. 63, section 44—“rules, ordinances, and regulations”—were designedly used, as Sir W. Jones avers; and the word “laws” advisedly not made use of. With the limited power given them, the Legislature had no power to pass a law like Regulation III of 1818. So it cannot now be revived. [NORMAN, J., to the Advocate-General.—Do you contend that the Regulation III of 1818 was made under the powers given by 13 Geo. III, c. 63? The *Advocate-General*.—No; probably it was made under 37 Geo. III, c. 142. NORMAN, J.—13 Geo. III, c. 63, seems to me to give the power of legislating for Calcutta only.] If made under 37 Geo. III, c. 142, the Regulation never had any existence, as that statute applied only to provincial Courts. It is bad on another ground, that it makes no distinction between Europeans and natives. It is void *pro tanto*, and therefore void *in toto*; it is void for uncertainty; before a law can be obeyed (see *Bonham's case* (3)), it must be certain, for how can a person be told to obey a law, and have to find out which part of it is bad and which good? The Regulation then never existed. A repealed Act must be treated as if it never existed—*Surtees v. Ellison* (4), *per* Lord Tenterden. An Act cannot

(1) 9 Moore's I. A., 387.

(3) 8 Rep., 114.

(2) Morton's Rep., 119.

(4) 9 B. & C., 752.

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be revived in part, it is either wholly revivable or it cannot be revived—*Ward v. Stephens* (1). The Statute 3 & 4 Will. IV, section 85, did not enable the Indian Legislature to revive the Regulation as far as natives of India were concerned. Allegiance and protection are reciprocal, and when protection is at an end, allegiance ceases. Regulation III of 1818 removes the protection of the sovereign and affects the allegiance of the subject—Blackstone's Commentaries, 10; *Calvin's case* (2); Forsyth's Opinions, Title Allegiance, Note 1. This Regulation is void too as affecting the prerogative of the Crown. Act VI of 1856 was declared to be illegal as affecting the Crown's prerogative of granting patents, and was declared void—see preamble to the Patent Act XV of 1859. Regulation III is with greater reason void as affecting a higher prerogative,—viz., the protection of the subject by the sovereign. All prerogative must be for the advantage and good of the people—Bacon's Abridgment, Title Prerogative. This Regulation being a highly penal one, must be restrictively construed: where a constitutional meaning can be given to legislation, such meaning should be given; thus construing the Regulation, Ameer Khan cannot be said to come within its terms as being a State prisoner,—see *per Peel*, C.J., in *In re the Maharanees of Lahore* (3). [NORMAN, J.—The Advocate-General contends that Regulation III of 1818 was passed under 37 Geo. III, c. 142, with reference only to natives in the mofussil.] 37 Geo. III, c. 142, must be taken in connection with 13 Geo. III, c. 63, and 21 Geo. III, c. 70. It enabled the Legislature to make rules, &c., for the regulation of provincial Courts; such rules, &c., were not intended to apply to Calcutta—Harrington's Analysis, 13—16. Natives of India in the mofussil became, after 1726, subject to the English law, both civil and criminal. Native inhabitants of Calcutta have their vessels registered under 17 & 18 Vict., c. 104, the Merchant Shipping Act, as if they were European British subjects. If they are thus treated for the purposes of that Act, why not for the purpose of granting a writ of *habeas corpus*?

The opinion of Mr. Ritchie, late Advocate-General of Bengal, was that for the purposes of the Merchant Shipping Act, a native

(1) 1 New Sessions Cases, 592.

(2) 7 Coke, 1.

(3) Taylor, 428.

of India is a natural-born British subject. State prisoners are persons who commit offences against the State, or persons who have committed an offence and are taken and confined by a State to which they owe no allegiance. Ameer Khan is not a State prisoner within the meaning of this Regulation ; he is a subject of this Government. The Regulation clearly applies to, and was passed for, a special class of persons in existence when it was passed ; this is confirmed by considering the period at which it has been revived,—*viz.*, in 1850 by Act XXXIV of 1850, and in 1858, by Act III of that year. The Bombay Regulation of the same nature, XXV of 1827, is even stronger in limiting it to a special class of persons. The Government was not legislating then for their subjects, but for those enemies who in such unquiet times might fall into their hands. Under 37 Geo. III, c. 142, there was no new power to legislate given. If the Legislature had not power to make Regulation III of 1818 under 13 Geo. III, c. 63—and it is admitted it was not made under that Act—37 Geo. III, c. 142, gave them no power ; it merely gives power to form laws already passed into a Code. Regulation III of 1818 was first revived by Act XXXIV of 1850. That Act shows that there were doubts whether a prisoner arrested in the mofussil could be legally detained in a Presidency town under Regulation III of 1818—*a fortiori*, they must have had doubts as to the arrest. See *In re the Maharanee of Lahore*, per Peel, C.J. (1). Both this Act and Act III of 1858 revive Regulation III of 1818, with regard only to the detention. Act III of 1858 removes doubts as to the detention. Tuckut Roy was arrested as an enemy and a State prisoner. He was captured in the house of the King of Oudh, who was exempted from the jurisdiction of the Courts ; *In re Tuckut Roy*, therefore, is distinguished. Bearing in mind that a State prisoner is one who is not bound by any allegiance to the Imperial Government, what is a State matter is shown by the cases of *the Nabob of Oude v. The East India Company* (2) ; *The Secretary of State v. Kamachee Boye Sahaba* (3) ; and *The East India Company v. Syed Ally* (4). A matter of State must be one referring to a person not subject to the Government or the Courts, and not to a person who owes allegiance.

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(1) Taylor, 433.

(2) 4 Brown's Ch. C., 180.

(3) 7 Moore's I. A., 476.

(4) *Id.*, 555.

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Then we come to the Queen's proclamation, November 1st, 1858, which gives equal rights to all the Queen's subjects, whether native or European. Since that proclamation, no Regulation which is contrary, as Regulation III of 1818 is, to the declaration made therein, is in force; the proclamation repeals it by implication. As to the proceedings of the Government in this case, see the charge of Cockburn, C.J., to the grand jury in the case of *The Queen v. Nelson and Brand* (1).

The *Advocate-General* proposed to put in an affidavit with a copy of the warrant under which Ameer Khan was detained, which was in the form prescribed by Regulation III of 1818, and dated May 7th, 1870.

Mr. *Anstey* objected that, at this stage of the case, no fresh affidavits should be admitted.

Norman, J., admitted the affidavit; and on the application of Mr. *Anstey*, also admitted an affidavit that Dr. *Fawcus* was a European British subject.

The affidavits were as follows:—

That of Dr. *Fawcus* stated that the warrant referred to in the 19th paragraph of his affidavit made in this matter on the 9th, and filed in this Court on the 10th August 1870, under which Ameer Khan was detained in custody in the gaol at Alipore, was in the words and figures following:—

“ No. 3.

“ TO THE OFFICER IN CHARGE OF THE GAOL AT ALIPORE.

“ Whereas the Governor-General in Council, for good and sufficient reasons, has seen fit to determine that Ameer Khan of Colootollah shall be placed under personal restraint in the Alipore Gaol, you are hereby required and commanded, in pursuance of that determination, to receive the person above named into your custody, and to deal with him in conformity with the orders of the Governor-General in Council, and the provisions of Regulation III of 1818.

“ By order of the Governor-General in Council,

“ E. C. BAYLEY.”

That of Mr. Carruthers stated:—

“ That Dr. *Fawcus*, the officer in charge of the Alipore Gaol at

(1) Page 165 of the Appendix to the charge to the Grand Jury.

Alipore, in the District of 24-Pergunnas, in the Presidency of Bengal, and now residing at Alipore aforesaid, was, he verily believed, an Assistant Surgeon in the employ of Her Majesty's Indian Government, and a natural-born European British subject, and was subject to the criminal jurisdiction of this Court alone, so long as he was commorant in the Bengal Presidency."

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On a subsequent day, in answer to a question by the Court, The Advocate-General admitted that the arrest in Calcutta had taken place with the sanction of the Governor-General in Council.

NORMAN, J., (after stating the facts, continued.)—The Advocate-General protested against this Court assuming any jurisdiction. He contended that the act of the Governor-General in Council in causing the arrest was an act of State; that the supposed wrong, if any, was not a matter cognizable by any Municipal Court, because the Governor-General in Council, in causing the arrest, had acted under the terms of the Act, and without reference to Municipal law. He referred to a passage in the judgment of Sir Lawrence Peel, C. J., in the case of *In re the Maharanee of Lahore* (1)—“ The conduct of the Government in so dealing with State prisoners is exempt from the jurisdiction of this Court, as well as of the Courts of the East India Company. For an oppressive use of this power, which is not to be supposed probable, the remedy would be by application to a higher, though distant, authority.” But Sir Lawrence Peel is merely speaking of the detention of a State prisoner, without charges made or evidence of guilt communicated. In the next paragraph, he says,—“ It appears to us that this lady, who is not a subject, who owes not even a temporary allegiance, who is brought into this country a prisoner of State during actual hostilities, and so remains, hostilities still raging, can claim no right to this high prerogative writ, grantable as of right to a subject, for the vindication of that liberty which the English law gives to all resident where it prevails.” The Advocate-General cited no case except that of *In re the Maharanee of Lahore* (1) in support of his position. I know of no authority for extending the immunity from the control of

(1) Taylor, 433.

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municipal law which exists in regard to acts done by Governors in their political capacity as regards foreign States or in time of war,—instances of which may be found in the case of *Elphinstone v. Heerachund Bedree Chund* (1), and *The Secretary of State v. Kamachee Boye Sahaba* (2),—to the case of a wrong alleged to have been done in time of peace to a subject of the Crown by any person or persons exercising the office of Governor. Of such a case Lord Mansfield, in *Fabrigas v. Mostyn* (3), said the Governor may be tried in England: “If he has acted rightly, according to the authority with which he is invested, he must lay it before the Court by way of plea, and the Court will exercise their judgment whether it is sufficient justification or not.” He adds—“I can conceive cases in time of war, in which a Governor would be justified though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose during a siege or upon an invasion of Minorca, the Governor should judge it proper to send a hundred of the inhabitants out of the island from motives of real and genuine expediency; or, suppose, upon a general suspicion he should take people up as spies; upon proper circumstances laid before the Court, it would be very fit to see whether he had acted as the Governor of a garrison ought according to the circumstances of the case. * * * To lay down in an English Court of Justice that a Governor acting by virtue of Letters Patent, under the Great Seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty’s subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.”

The Advocate-General and Mr. Paul, in showing cause against the rule, contended next that the High Court has no authority to issue a writ of *habeas corpus* into the mofussil. The question is the more important at the present day, because, although until the year 1862 the Court of Queen’s Bench at Westminster had power to issue writs of *habeas corpus* to all parts of Her Majesty’s dominions, even to those parts in which there were independent legislatures, as was done in the case of

(1) 1 Knapp P. C., 316.

(2) 7 Moore’s I. A., 476.

(3) 1 Cowp., 161; see 173.

In re Anderson (1), where a *habeas corpus* was issued to Canada, 1870
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otherwise, the provision in clause 37 of the Charter of 1862, that the proceedings of the Court should be regulated by the Code of Civil Procedure, would have to be treated as repugnant to clause 11 of that Charter. I may observe, moreover, that the issuing of the high prerogative writ of *habeas corpus ad subjiciendum* is not a matter of ordinary original civil jurisdiction. In England, it issues on the Crown side of the Court of Queen's Bench, and in the late Supreme Court the motion for such *habeas corpus* was made in the Supreme Court, and not on any side, such as the Plea side or Equity side of the Court. See Fulton's Reports, page 372, note. The limits within which such writs can be issued are, in my opinion, not affected by the 11th clause of the Charter of 1865. The answer to the question as to the local limits within which such *habeas corpus* may be issued, appears to me to depend on the jurisdiction which the late Supreme Court possessed under the Charter of 1774; and I propose to consider what was the position of the English in that which is now the Bengal Presidency, at the time when the Charter of 1774 was granted by His Majesty King George III. First, then, what was the law in force in Calcutta and applicable to British subjects resident in India in 1773, at the time of the passing of the 13 Geo. III, c. 63? Writing in 1720, Mr. West, afterwards Lord Chancellor of Ireland, says,—“The common law of England is the common law of the plantations, and all statutes in affirmation of the common law passed in England antecedent to the settlement of a colony are in force in that colony, though no statutes made since those settlements are there in force, unless specially mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear” (1). Lord Lyndhurst says, in *Freeman v. Fairlie* (2), “Those persons who established themselves in India carried with them the English law. It does not appear that the English law was established there in the first instance by any proclamation or Charter, but it was probable that the English carried with them, and acted upon, the law of England, from the necessity of their situation; because the two systems of law which at that time

(1) Chalmers' Opinions, 511, 517.

(2) 1 Moore's I.A., 342.

existed there, the Mahomedan and the Hindu laws, were so blended with the particular religions of the two descriptions of persons, as to render it almost impossible for that law to have been adopted by the English settlers. This, however, is rather matter of speculation than material to the question—what, so far as British subjects are concerned, is the law now existing in the settlement? Since it appears by all the Charters applicable to the state of the law, and by all the Acts of Parliament which refer to it, from the year 1601 down to the present time (and I refer particularly to the Charter of 1726), that the English law has been considered as the law of the settlement. It has been recognised as such by competent authority; and we are to consider, as far as British subjects are concerned, that the English law is not only now the law of Calcutta, but that it was so from the earliest period of that settlement.” The Mayor’s Court was established in Calcutta by the Charter of 1726. The same Charter empowered the East India Company to appoint a General, or Generals, of all the forces by sea and land, of or belonging to the towns, limits, or factories of Calcutta, Madras, and Bombay, and enacted that it should be lawful for the General to assemble and exercise in arms the inhabitants of the town or factory for the defence of the factories, and upon just cause to invade and destroy the enemies of the same. Surajah Dowlah attacked and took Calcutta on the 5th of August 1756. In January 1757, Calcutta was retaken by an English force, under the command of Clive and Watson. The Nabob’s army was defeated by Clive. And in February of the same year, a treaty was entered into between Surajah Dowlah and the Company, by which it was agreed that the Company’s settlements at Calcutta, Cossim Bazar, Dacca, and other places, should be restored to them, and that the Company should be allowed to fortify Calcutta in such manner as they should deem proper for their defence, and that a Mint should be established at Calcutta. Sir Elijah Impey says,—“ The inhabitants of Calcutta inhabited a narrow district, and that district an English town and settlement, not governed by their own laws, but by those of England, long since there established, when there were no Courts of Criminal Justice but those of the King of England, which

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administered his laws to the intent and in the form and manner in which they were established in England. The inhabitants resorted to the English flag, and enjoyed the protection of the English law; they chose those laws in preference to their own, and were hence accustomed to them. The town was part of the dominion of the Crown by unequivocal right, originally by cession founded on compact, afterwards by capture and conquest. Their submission was voluntary, and if they disliked the laws, they had only to cross a ditch, and were no longer subject to them. The state of an inhabitant of the provinces at large was that of a man inhabiting his own country, subject to its own laws. The state of a Hindu, a native of the provinces inhabiting Calcutta, which in effect was an English town to all intents and purposes, did not differ from that of any other foreigner; from whatsoever country he might have imigrated, he partook of the protection of the laws, and in return owed them obedience." By treaty with Jaffer Ally Khan, the lands to the south of Calcutta, as far as Calpee, in the 24-Pergunnas, were granted to the East India Company, the revenue to be paid to them in the same manner with other zemindaries. In 1763, in accordance with a previous treaty between Meer Mahomed Kassim Khan and the Company, Burdwan, Midnapore, and Chittagong were assigned to the East India Company for defraying the expenses of their troops. After the battle of Buxar in 1764, the Emperor of Delhi granted Ghazeepore and Benares to the Company. In August, 1765, the East India Company entered into an alliance, offensive and defensive, with Soojabood Dowlah, Nabob Vizier of Oude, and by the treaty the parties stipulated that the Emperor should remain in full possession of Corah and Allahabad, which were ceded to His Majesty as a royal demesne for the support of his dignity and expenses. The sovereignty and possession of Benares, Jounpore, and Ghazeepore, &c., were given up by the Nabob to the East India Company in September, 1765. The Dewanny of the provinces of Bengal, Behar, and Orissa was granted by the Emperor to the East India Company, to be held by them in perpetuity, the Company guaranteeing the payment of 26 lakhs of rupees yearly, the revenue of the province, which had for-

merly been paid by Nabob Nujjumood Dowlah Bahadoor. Mr. Morley says, (1)—“The firman which conferred in perpetuity the Dewanny authority over the provinces of Bengal, Behar, and Orissa on the East India Company, constituted them the masters and virtual Sovereigns of those provinces ; the office of Dewan implying not merely the collection of the revenue, but also the administration of civil justice.” By treaties with the Nabobs Nuzumood Dowlah in 1765, Sijefood Dowlah in 1766, and Moocburickood Dowlah in 1772, the entire military defence of Bengal was placed under the management of the Company. By general regulations made by the President and Council in Bengal in 1772, in each district, two Courts of Judicature, the Mofussil Dewanny Adawlut (Provincial Court of Dewanny for the trial of civil cases) and the Fouzdaray Adawlut for the trial of all crimes and misdemeanors, were established, and the Dewanny Sudder Adawlut and Nizamut Sudder Adawlut were established at the chief seat of Government. In a letter, dated the 3rd of August, 1773, Mr. Warren Hastings, the President of the Council, writes,—“Although we profess to leave the King as the final Judge in all criminal cases, and the officers of this Court to proceed according to their own laws, forms, and opinions independent of the control of the Government, yet many cases may occur in which an invariable observance of this rule may prove of dangerous consequence to the power by which the government of this country is held, and to the peace and security of its inhabitants. Wherever such cases occur, the remedy can only be obtained from those in whom the sovereign power exists. It is on them that the inhabitants depend for protection and for the redress of all their grievances, and they have a right to the accomplishment of this expectation, of which no treaties or casuistical distinctions can deprive them.” He goes on to point out that the Company, as Dewan, have an interest in the welfare of the country, and, “as the governing power, have equally a right and obligation to maintain it.” These words show that in 1773 the rights, powers, and duties of the East India Company, as the true rulers of the country, were fully understood and acknowledged by the head of that Government in India.

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Then came the statute 13 Geo. III, c. 63. By the 7th section, it was enacted that, for the government of the Presidency of Fort William in Bengal, "there should be appointed a Governor-General and four Councillors, and that the whole civil and military government of the said Presidency, and also the ordinary management and government of all the territorial acquisitions and revenues of the kingdoms of Bengal, Behar, and Orissa, should, so long as the same should remain in the possession of the Company, be vested in the Governor-General and Council of the said Presidency of Fort William, as the same now are or at any time heretofore might have been exercised by the President and Council, or Select Committee," as the case may be. The 13th section recites the Letters Patent of the 26th George II, establishing Courts of civil, criminal, and ecclesiastical jurisdiction at the Company's settlements at Madras, Bombay, and Fort William in Bengal, and that the Charter "does not sufficiently provide for the administration of justice in such manner as the state and condition of the Company's Presidency of Fort William in Bengal, so long as the said Company shall continue in possession of the territorial acquisitions before mentioned, do and must require." It proceeds to enact that it shall be lawful for His Majesty to establish a Supreme Court, "which said Supreme Court of Judicature shall have, and the same is declared to have, all civil, criminal, admiralty, and ecclesiastical jurisdiction, and to form and establish such rules of practice, and such rules for the process of the Court, and to do all such other things as shall be necessary for the administration of justice, and the due execution of all, or any, of the powers which by the Charter shall be granted and committed to the Court, and also shall be at all times a Court of Record, and shall be a Court of Oyer and Terminer and Jail Delivery, in and for the said Town of Calcutta and Factory of Fort William in Bengal aforesaid, and the limits thereof, and the factories subordinate thereto." It is clear, on reading this provision, that the Court was to be a great Court of Judicature for the Presidency of Bengal, as well as a Court of Record and Oyer and Terminer for the Town of Calcutta. By the 14th section of the Act, and the 13th clause of the Charter, the jurisdiction in civil cases is defined. It extends

to all British subjects residing in the provinces of Bengal, Behar, and Orissa, and persons employed in the service of the Company, or of any of His Majesty's subjects. By the 19th clause of the Charter, the jurisdiction in criminal cases is defined. It extends to the same classes of persons as those to which clause 13 relates, and empowers the Sheriff to arrest the bodies of such offenders, and bring them to Fort William. Section 17 empowers the Supreme Court, in cases where there has been an agreement that a matter should be determined in that Court, "to issue, either before or after sentence, a writ or precept commanding either party suing in violation of that agreement in the Country Courts, to surcease proceeding further in such suit." The 6th section of the Charter ordains that "all writs, summonses, precepts, rules, orders, and other mandatory process," shall run in the name of the Crown, and be sealed with the seal of the Court. The 39th section commands all "Governors, Commanders, Magistrates, Officers, and Ministers, civil and military, &c., in the execution of the powers by the Charter created, to be aiding, assisting in, and obedient in all things to the Supreme Court." There are several sections of the Charter which show that it was intended that the process of the Court should go into the mofussil, and might be addressed to natives. The 21 Geo. III, c. 70, s. 19, empowers the Supreme Court "to frame such process, and make rules for the service thereof, in suits against the natives of Bengal, Behar, and Orissa." From the date of the Charter in 1774, if not from an earlier period, the native inhabitants of the town of Calcutta were punishable by the English criminal law for any crimes committed by them within the limits of the settlement. I may answer Mr. Paul's argument on that point in the words of Lord Brougham, in *Warrender v. Warrender* (1),—"The *lex loci* must needs govern all criminal jurisdiction from the nature of the thing and the purpose of that jurisdiction." In *Somerset v. Stewart* (2), where the question was, whether a negro slave, who had been brought to England by his master, could be detained in slavery in England, Mr. Hargreave argued successfully that, from the

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(1) 9 Bligh's N. S., 119.

(2) Loft's Rep., 1.

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submission of the negro to the laws of England, he was liable to all their penalties, and consequently had a right to their protection.

In *Campbell v. Hall* (1), Lord Mansfield, delivering the unanimous opinion of the Court of King's Bench, said,—“The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, or lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations” (meaning thereby where English law has been introduced), “has no privilege distinct from the natives.” There were, therefore, at the time of the passing of the 13 Geo. III, c. 63, not only a great number of Europeans in India, but there were, at the passing of that Act, a great number of native inhabitants of Calcutta who could claim the benefits of English law, and the rights and privileges of Englishmen. The most precious of all rights which a British subject possesses, is the right of personal liberty, and if the Charter had contained no words providing any machinery by which that right could be vindicated, it could hardly have been said to provide for the due administration of justice, in such manner as the condition of the Company's Presidency at Fort William in Bengal required. The Advocate-General argued that the Habeas Corpus Act, 31 Car. II, c. 2, was not part of the statute law introduced into India. His argument may be well founded as to certain parts of that statute, which apply specially, or by name, to the Superior Courts of common law at Westminster. But other parts, which are general in their terms, apparently do apply to India, and if that is the case, it was an additional reason for putting such a construction on the Charter of 1774 as would enable the Supreme Court to issue a writ which the law gives to the subject as a matter of right. I may observe that, generally speaking, in cases where a person is illegally deprived of his liberty, he has three remedies: first, by civil action; secondly, by indictment; and thirdly, by the writ of *habeas corpus*. But as no action or criminal charge can be maintained in the Courts of this country against the Gov-

ernor-General for an illegal imprisonment, the only remedy for the wrong in such case is that afforded by the writ of *habeas corpus*. The right appears to be preserved as regards European British subjects committed by the Governor-General in Council by the 3rd section of the 21 Geo. III, c. 70, which contains a provision that, "with respect to such order or orders of the said Governor-General in Council as do or shall extend to any British" (meaning European British) "subject or subjects, the said Court shall have and retain as full and competent jurisdiction as if the Act had never been made." Therefore, as regards European British subjects, the right to demand a writ of *habeas corpus* from this Court would not be taken away by the section. The legality of an order by the Governor-General in Council for the arrest and deportation of a European British subject brought up by *habeas corpus*, came under the consideration of the Supreme Court (Sir R. Chambers, C.J., and Sir William Jones) in *The King v. Gordon* (1). I will now turn to the Charter. By the 4th clause it was declared that the Chief Justice and Puisne Justices were "appointed to be Justices and Conservators of the Peace and Coroners within and throughout the said provinces, districts, and countries of Bengal, Behar, and Orissa, and every part thereof; and to have such jurisdiction and authority as the Justices of our Court of King's Bench have, and may lawfully exercise within that part of Great Britain called England by the common law thereof." Blackstone, speaking of the writ of *habeas corpus ad subjiciendum*, says, (2)—"This is a high prerogative writ, and therefore, by the common law, issues out of the King's Bench by a fiat from the Chief Justice, or any other of the Judges, running into all parts of the King's dominions, for the King is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted." The words of the 4th section of the Charter have been treated as giving power to the Court to issue writs of *habeas corpus* from the time when the Supreme Court was first established. This appears from the language of Sir Elijah Impey, C.J., in the case of *Rex v. Warren Hastings* in 1775 (3), and *In re Coza*

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(1) East's Notes, 2 Morley's Digest, 223. (3) Morton's Rep., 206.

(2) Volume III., 131.

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Zachariah Khan in 1779 (1). That power was not questioned in the 21 Geo. III, c. 70. Indeed, the 3rd section of that Act, which declares that the Supreme Court shall retain full jurisdiction with respect to orders made by the Governor-General in Council, extending to British subjects, has apparently direct reference to writs of *habeas corpus*. Writs of *habeas corpus* have been issued in the mofussil in 1794, when a witness on his way from the Supreme Court to his home was arrested—*Rajah Mohinder Deb Rai v. Ramcanai Cur* (2); in 1800, in *Breejesseree Seutanny v. Ramnarain Misser* (3), to a jailor of the 24-Pergunnas, to bring up a prisoner as a witness; in 1815, to bring up a woman, plaintiff in a suit, who had been carried off by force out of Calcutta, with a view to compel her to withdraw her suit; *In the matter of Muddoosooden Sandell* (4). In 1829-30, the jurisdiction to issue such writs into the mofussil is treated as clear by Sir Charles Grey and Sir Edward Ryan. (See the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons, pages 1225 and 1281.) Writs of *habeas corpus* to bring up witnesses from the mofussil were issued by Sir Edward Ryan in 1839—*Doe d. Buddinauth Ghosaul v. Deverall* (5); by Sir Edward Ryan in 1840, to bring up a person who had been carried off from his house in Calcutta into the mofussil, from the custody of a person not otherwise subject to the jurisdiction than in respect of the wrong committed by him in the abduction.—*In re Sreenauth Roy* (6); in the time of Peel, C.J., to bring up a witness from a mofussil jail—*The Queen v. Shawe* (7). In the case of *In re the Maharanees of Lahore* (8), Peel, C.J., says,—“Enough is not shown to lead to the inference that her imprisonment was illegal; she is not resident where the English law is the general law as regards personal liberty. The English law as to personal liberty does prevail in Calcutta as to all its inhabitants. Beyond the local limits of Calcutta the English law on this subject is the personal law of a class, *viz.*, British

(1) Morton's Rep., 263.

(5) Morton's Rep., 184.

(2) Smout's Orders, 148.

(6) *Id.*, 226.(3) *Ibid.*

(7) Fulton, 328.

(4) East's Notes, 2 Morley, 29.

(8) Taylor, 433.

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subjects, which they carry with them. The common law of England, which gives the right to this writ, has been introduced into Calcutta with the general body of the English law. Nothing but an Act of the Legislature could here in Calcutta suspend its operation." The power of the late Supreme Court to issue writs of *habeas corpus* to persons in the mofussil has been asserted from the time of the promulgation of the Charter to the present day, and is admitted in the case of *In re the Bombay Justices* (1). I confess that it was not without surprise that I heard the Advocate-General challenge the jurisdiction. If the construction which has always hitherto been put on the 4th clause of the Charter of 1774 is erroneous, it is at least no longer open to any Judge of this Court to say so. No Judge in this country could be justified in pronouncing a decision contrary to the long course of decisions and the interpretation which has hitherto been universally received. If the propriety of these decisions is to be questioned, it must be in a higher Court. For myself, I have no hesitation in accepting those decisions as settling the law.

Regulation III of 1818, entitled a Regulation for the confinement of State prisoners, recites, amongst other things, that "reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper; and whereas it is fit that in any case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council;" and enacts that "when the reasons stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of

(1) 1 Knapp's P. C., 1.

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a judicial nature, a warrant of commitment, under the authority of the Governor-General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed." Regulation III of 1818 having been passed by a legislative authority which had no power to bind European British subjects, it seems to me that it must be taken as applicable, and enacted with reference only to natives and others subject to the jurisdiction of the provincial Courts. The Regulation appears to have been passed by the Vice-President in Council under the provisions of the 37 Geo. III, c. 142, s. 8. It has been objected that it was not registered as required by 13 Geo. III, c. 63, s. 36. But it appears to me that the legislative powers conferred by the 13 Geo. III, c. 63, s. 36, are intended to apply only to what is there described as the Company's settlement at Fort William, in other words, Calcutta and its dependent factories, where English law had been introduced, and not to what are in that Act described as the territorial acquisition of Bengal, Behar, and Orissa. Legislative powers for the government of Bengal, Behar, and Orissa, were first conferred by the 21 Geo. III, c. 70, s. 23. Those powers were extended by the 37 Geo. III, c. 142, s. 8, which enacted that "all Regulations which should be issued and passed by the Governor-General in Council at Fort William in Bengal, affecting the rights, persons, or property of the natives, or any other individuals who may be amenable to the provincial Courts of Justice, shall be registered in the judicial department, and formed into a regular code, and that the grounds of each Regulation shall be prefixed to it, and all the provincial Courts shall be and they are hereby directed to regulate their decisions by such rules and ordinances as shall be contained in the said Regulations."

The effect of Regulation III of 1818 and Act XXXIV of 1850, which enacts in substance that State prisoners under Regulation III of 1818 may be detained within the local jurisdiction of the Supreme Courts, &c., were considered by the late Supreme Court in *In re Tuckut Roy* (1). In that case it was decided that a native of Oude, a mohurrir in the employment of

(1) 1 Boul., 355.

the Queen of Oude, who had been arrested at Garden Reach, outside the local limits of the town of Calcutta, under a warrant issued by the Governor-General in Council under Regulation III of 1818, was lawfully detained, and could not be discharged upon *habeas corpus*. Mr. Newmarch argued, as Mr. Anstey has done in the case now before me, that the Act of 1850 was contrary to Magna Charta; that it affected the unwritten law, whereon might depend the allegiance of the subject. The common law, the unwritten law and constitution of England, has never been introduced into the mofussil. The provinces of Bengal, Behar, and Orissa, were countries which, at the time when they came into the possession of the English Government, had laws of their own, for the administration of which provision was made. When the East India Company took upon itself the office of Dewan, the 21 Geo. III, c. 70, s. 23, and the 37 Geo. III, c. 142, s. 8, made provision for the introduction of such changes in the ancient laws of the country as the Governor-General in Council might from time to time think fit to make. Express provisions against the introduction of English law were made by Regulation III of 1793 (see the preamble and section 31); Regulation IV of 1793, s. 15; and Regulation VII of 1832, s. 9. Down to the time of the introduction of the Penal Code, the Mahomedan criminal law, modified by different Regulations, made by the Governor-General in Council under the powers of the 21 Geo. III, c. 70, s. 23, and 37 Geo. III, c. 142, s. 8, continued to be the law by which all offences triable before the Mofussil Courts were punishable. By the 37 Geo. III, c. 142, s. 8, Parliament conferred on the Governor-General in Council a power of legislation concerning the rights, persons, and properties of the natives amenable to the provincial Courts, without restriction or limitation of any kind. The Regulation III of 1818 is one which falls within that class of laws which authorizes the infliction of penalties, the privation of liberty, even the destruction of life, with a view to the future prevention of crime, and insuring the safety and well-being of the public. It falls within the principle *salus populi suprema lex*. It is useless to urge that the Regulation makes no provision against the possibility that the party may

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be confined on charges which may be false and malicious, and which he has no opportunity of answering. With all its defects, if defects they be it was passed by a legislative authority having full power to enact it as it stands. It does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises, when by a legislative enactment it suspends the Habeas Corpus Act. There is nothing in the 3 and 4 Will. IV, c. 85, s. 43, which could make it questionable whether the Governor-General in Council had power to enact that a prisoner confined under a law already in force might be detained within the presidency town.

But a very different question arises under Act III of 1858, a question not decided, or even touched, by the decision in *In re Tuckut Roy* (1). The Act recites that it is expedient that the powers of Regulation III of 1818 of the Bengal Code be extended, and enacts that "the provisions of Regulation III of 1818 of the Bengal Code, relating to the arrest and confinement of persons as State prisoners, shall be in force within the local limits of the jurisdiction of the Supreme Court of Judicature at Calcutta." There is apparently no exception or restriction whatever. It applies to all persons within the local limits, whether European British subjects, or persons living within the local limits under the protection of, and subject to, English law. Act III of 1858 was passed by a Legislature which derived its power from the 3 & 4 Will. IV, c. 85, s. 43, which contains a proviso "that the Governor-General in Council shall not have the power of making any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of the Parliament, or the institutions or rights of the said Company, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the said Crown over any part of the said territories." In order to see what is meant by the words, "unwritten laws

(1) 1 Boul., 355.

or constitution whereon may depend in any degree the allegiance of any person," it is necessary to consider, first, what allegiance is. It is the true and faithful obedience of the subject to the sovereign. Every one born within the dominions of the King of England, whether in England or in the colonies or dependencies, being under the protection, therefore, according to our common law, owes allegiance to the King. Every British subject is born a debtor by the fealty and allegiance which he owes his sovereign and the State, a creditor by the benefit and protection of the king, the laws, and the constitution. "Allegiance," says Sir William Blackstone (1), "is the tie which binds the subject to the king in return for that protection which the king affords to the subject." Foremost amongst the privileges assured to the subject by the protection of the Sovereign is liberty and security of the person. The Crown cannot derogate from these rights. Bracton tells us that "the king is under the law, for the law makes the king." The king cannot interfere with the liberty of the subject, nor deprive him of any of his rights. How absolute soever the sovereigns of other nations may be, the King of England cannot take up or detain the meanest subject at his mere will and pleasure. I will proceed to consider what are the "unwritten laws and constitution" of the United Kingdom, which are alluded to in the section before me. It is well known that the provisions of the Great Charter and the Petition of Right are for the most part declarations of what the existing law was, not enactments of any new law. They set forth and assert the right of the subject, according to what was assumed to be the ancient unwritten law and constitution of the realm. The Great Charter itself was confirmed by upwards of thirty different statutes prior to the time of King Henry VI. One of these Acts, the 28 Edward III, c. 3, declared that "no man, of what state or condition he be, can be taken or imprisoned without being brought to answer by due process of law." The Petition of Right was addressed to King Charles I by the lords spiritual and temporal, telling him that, "against the tenor of the said statutes, divers of your subjects have of late been imprisoned without cause shown, and when for their deliverance they were

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(1) 2 Stephen's Blackstone, 413.

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brought before your justices by your Majesty's writ of *habeas corpus*, there to undergo and receive as the Court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the Lords of your Privy Council, and yet were returned back to their several prisons, without being charged with anything of which they might answer in due course of law;" and praying, "as their rights and liberties according to the law and statutes of the realm," that His Majesty would "vouchsafe to declare that the proceedings to the prejudice of the people should not be drawn into consequence or example, and that His Majesty would declare his royal will and pleasure, that in the things aforesaid, his officers should serve him according to the law and statutes of the realm." There are also the Act for the abolition of the Star Chamber, 16 Car. I, c. 10, and the Habeas Corpus Act, 31 Car. II, c. 2. Now if it be true, as laid down in *Calvin's case* (1), that *protectio trahit subjectionem et subjectio protectionem*, that allegiance and protection are reciprocally due from the subject and the sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects. The infraction of such laws may be carried to such an extent as to give rise to the right of self-defence on the part of the subject, a right which, says Sir Michael Foster, "the law of nature giveth, and no law of society hath taken away." No man can study the history of England, or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II, without seeing that on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend in no small degree the allegiance of the subjects. It would be a startling thing to find that rights of so sacred a character could be taken away by an act of the subordinate legislature. It would be strange indeed if a great popular assembly like the Parliament of England had put into the power

(1) 7 Rep., 1.

of a legislature which has not, and in the nature of things could not have, any representative character, the power of abrogating or tampering with such fundamental laws. I think that the 43rd section of the 3 & 4 Will. IV, c. 85, shows clearly that the Imperial Legislature has not forgotten the rights of the people. It is convenient that I should turn for a moment to the history of this piece of legislation. The 13 Geo. III, c. 63, s. 36, empowered the Governor and Council to make rules, ordinances, and regulations for the civil government of the settlement of Fort William, "not being repugnant to the laws of the realm." It was found difficult to give any precise interpretation to these words. These laws were to be registered and published in the Supreme Court, with the consent and approbation of that Court. The Judges claimed a right to hear the inhabitants of Calcutta by their counsel against the registry of Regulations made by the Governor-General in Council. This led to great inconveniences. A minute by Sir Charles Grey, in the 5th Appendix to the 3rd Report of the Select Committee of the House of Commons, 1833, page 1129, shows that it was felt that the due consistency of Indian law with the law of the United Kingdom ought to be secured by specific limitations of the subordinate legislative power. It was suggested (page 1127) that in view of possible incongruities between the ordinances of a subordinate legislature and the primary laws of the United Kingdom, the Judges, or English lawyers appointed by the Crown, might have a power of veto (page 1131), or of suspending a Regulation, until the authorities in England could be consulted, in cases in which any primary law of the United Kingdom should appear to be violated. The Governor-General in Council, Lord William Bentinck, in a letter to the Judges of the Supreme Court, dated the 20th of October, 1829, writes:—"We fully concur with you that, besides reserving a veto to the Governor-General, the restriction contained in the 33 Geo. III, c. 52, s. 51, should also, of course, be maintained. It will be entirely proper that the Judges of the Supreme Court, or a majority of them, should have the power of suspending the enforcement of any act of the Legislative Council which they may consider to be illegal." The

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minutes of the Judges and correspondence of the Governor-General resulted in the preparation of heads of a bill to be entitled "An Act for establishing a Legislative Council in the East Indies." The suspending power, as proposed, appears in the 6th section of this draft, and in the 8th, the phrase we have now to construe, which is repealed in the 24 & 25 Vict., c. 67, s. 22, for the first time makes its appearance. If I am right in my construction, the several provisions will be found in what I conceive to be their due order. There are provisions for the protection of the rights, firstly, of the Crown; secondly, of the Parliament; thirdly, of the East India Company; fourthly, of the people. It should be observed that the proviso is not that no law shall be made contrary to the Magna Charta, or any other similar statute. Had that been the case, probably it would not have been competent to the Indian Legislature to pass any enactment in the nature of a suspension of the Habeas Corpus Act. But the "unwritten law or constitution" of England is of more flexible character. It would admit of a relaxation of the rules securing private rights in times of public distress or danger, *ne quid detrimenti capiat respublica*. An Act for the suspension of the Habeas Corpus Act in such times is no violation of the constitution. The question then comes—does Regulation III of 1818 fall within the principle above stated? The Advocate-General showed that, before answering that question, it is necessary to consider the peculiar circumstances of the country. Mr. Ingram pointed out that at the time of the making of Regulation III of 1818, there were in the country numerous and powerful feudatories of the sovereigns of recently conquered and ceded provinces, nominally subjects of His Majesty, but from whom danger might at any time be apprehended. I may observe that at the time of the passing of Act III of 1858, the recent mutiny showed that there were in the ranks of the population fanatics, whose conspiracies or preachings might, if they were allowed to continue them without interference, cause great danger to the peace of the community at large. It is clear that if such persons were allowed in the presidency town a license and immunity which they did not enjoy in other parts of Her Majesty's Indian empire, they would resort to Calcutta, and thus the capital of

the empire would become a hot-bed of conspiracies, the refuge and chosen home of traitors, fanatics, and conspirators. The Regulation differs from Acts passed for the suspension of the Habeas Corpus Act in this—that it is not a temporary Act; but if the danger to be apprehended from the conspiracies of people of such a character as those I have mentioned is not temporary, but from the condition of the country must be permanent, it seems to me that the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor-General in Council an exceptional power of placing individuals under personal restraint when, for the security of the British dominions from foreign hostility, and from internal commotion, such a course might appear necessary to the Governor-General in Council. I am, therefore, of opinion that, in enacting Act III of 1858, the Indian Legislature did not exceed its powers.

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The questions raised are of so much importance, and I have felt so much difficulty in arriving at a conclusion satisfactory to myself, that I might have been inclined to issue the writ of *habeas corpus* in order that the points to which I have adverted in this judgment should be more fully discussed upon the return. But then comes the question, assuming that I have a general power to issue writs of *habeas corpus ad subjiciendum* to the officers of mofussil jails, should I be justified in issuing such a writ in the present case? If the only obstacle was a difficulty in enforcing the writ, I should feel bound to follow the example of the Court of Queen's Bench in *In re Anderson* (1), and to issue the writ without reference to the question whether the Court would be in a position to enforce obedience to it. But it is necessary to remember that by the 21 Geo. III, c. 70, s. 1, it is enacted "that the Governor-General and Council of Bengal shall not be subject jointly or severally to the jurisdiction of the Supreme Court, for, or by reason of, any act or order, or any other matter or thing whatsoever counselled, ordered, or done by them in their public capacity only." And section 2 goes on to enact that "for any acts done by the order of the Governor-

(1) 30 L. J., Q. B., 129.

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General in writing * * * the said order with proof that the act or acts done, has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts," and "the defendant shall be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil or criminal, in the said Court." Therefore, as the superintendent of the jail at Alipore holds the prisoner under the warrant in writing of the Governor-General in Council, it is clear that such order must prevail as against the command of any writ which this Court has the power to issue. It appears to me, therefore, that I ought not to issue a writ which it would be the duty of the superintendent of the jail to disobey. The distinction between *In re Anderson* (1) and that now before me is that, in the present case, the order of the Governor-General in Council, which this Court has no power to set aside or disregard, warrants the detainer. In *In re Anderson* (1), the difficulty was only in enforcing obedience to the writ. If the prisoner in obedience to that writ was brought before the Court, it had an undoubted authority to discharge him.

For the reasons given above, I am of opinion that no writ of *habeas corpus* to bring up the body of Ameer Khan ought to issue, and the rule will, therefore, be discharged.

Rule discharged.

Attorneys for Ameer Khan : Messrs. Carruthers and Dignam.

Attorney for the Government : Mr. Chauntrell, Govt. Solicitor.

Before Mr. Justice Norman.

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August 29.

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Mainprize, Writ of—Power of High Court to issue it.

A writ of *mainprize* could only be issued where the party applying for it was bailable, and had offered securities, but bail had been refused ; it could not be issued to a prisoner confined under Regulation III of 1818, which authorizes his detention absolutely and unconditionally, and gives him no right to demand to be released on bail.

The writ is one which could be issued only on the Common Law Side of the Court of Chancery in England. The power of the Common Law Side of

the Court of Chancery to issue such writ was not conferred on the Supreme Court; nor is there anything in the Charter of the High Court to give that Court power to issue it.

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AFTER Mr. Justice Norman had given judgment in this case, discharging the rule which had been issued to show cause why a writ of *habeas corpus* should not issue, Mr. *Anstey*, on behalf of the petitioner, applied, on the affidavits used in obtaining the rule, for a writ of *mainprize*, in order that Ameer Khan might be admitted to bail.

Mr. *Anstey* in support of the application.—When a writ of *habeas corpus* is refused, two remedies exist for the prisoner, either to sue out the writ *de odio et atia* or the writ of *mainprize*. The writ *de odio et atia* is disallowed in India by 9 Geo. IV, c. 74. But a writ of *mainprize* can be granted. The writ requires the prisoner, unless good cause be shown against it, to be released from custody on his giving security, two main-pernors undertaking, in such sum as the Court may require, to produce the prisoner to answer any charges which may be made against him. Thus it differs from release on bail, which is for a specific offence. The writ is mentioned in the Indian Insolvent Act, 11 & 12 Vict., c. 21, s. 58. The first question of *mainprize* arose in a case where, as in the present case, the Court was unable or unwilling to grant a writ of *habeas corpus*, and yet was not willing to keep the prisoner in perpetual confinement—*Jenkes's case* (1). See also *Crowley's case* (2), where *Jenkes's case* (1) is referred to by Lord Nottingham. In that case the writ of *mainprize* was refused, the Court holding it could not grant it since the passing of 28 Edwd. III, c. 9, but the prisoner was discharged. There Fitzherbert's *Natura Brevium*, 250, was referred to in support of the application. There was another case after the rebellion of 1745, where the writ was applied for; there the writ was refused, but not until the Attorney-General had named a day for trial.

The warrant in this case is not a warrant of arrest; it is a warrant of detention, and was issued on May 7th, 1870, long after

(1) 6 Howell's State Trials, 1200.

(2) 2 Swanston, 12.

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Ameer Khan had been arrested. There is no intention of bringing him to trial, and no specific charge is made against him. This is his only remedy, for this Court having held that it has jurisdiction to issue *habeas corpus*, the right to sue out the writ in the Queen's Bench is gone. Under the Queen's proclamation of 1858, this writ of *mainprize* cannot be refused. The balance of inconvenience is against the refusal of the writ, for the conditions of granting it are in the discretion of the Court, and may be such that the security cannot be broken.

NORMAN, J. (after stating the application, continued)—The proceeding is one which in England has become wholly obsolete. Mr. Anstey was not able to refer to any case in which such a writ has been granted in modern times. In *Jenkes's case* (1) Lord Nottingham, after careful consideration of the old precedents which had been referred to, came to the conclusion that though in old times the writ of *mainprize* had issued, the right to such writ had been abolished by the Statute 28 Edward III, c. 9. Lord Eldon, in *Crawley's case* (2), cites that opinion without appearing to dissent from it. Lord Coke says, the writ is taken away by 28 Edward III, c. 9 (3). Sir Mathew Hale in his *Pleas of the Crown*, Volume II, page 143, seems to think that there are cases in which the writ of *mainprize* may still issue. But without going into the question whether there is any case in which a writ of *mainprize* could be issued in England at the present day, there are two conclusive answers to this application.

In the first place, the writ only issues where the party is bailable, and has offered sufficient sureties to the sheriff or others who have authority to bail him, and he or they have refused to admit the applicant to bail,—see *Fitzherbert's Natura Brevium*, 563 (4). But the Regulation, under the provisions of which Ameer Khan is confined, authorizes his detention absolutely and unconditionally, and gives him no right to demand to be liberated on bail.

Secondly, the writ is one which issues only on the ordinary or Common Law Side of the High Court of Chancery in England.

(1) 6 Howell's State Trials, 1200.

(3) 2 Inst., 190.

(2) 2 Swanston, 12.

(4) 9th Edition, 149.

By the 17th clause of the Charter of 1774, it was ordained that the Supreme Court should be a Court of Equity having power to administer justice according to the rules and practice of the Court of Chancery in England. The powers of the Court of Chancery as a Court of Common Law to issue writs such as that now in question does not appear to have been conferred on the Supreme Court; nor is there anything in the Charter of the High Court on which any pretension to issue such writ could be founded.

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Application refused.

Before Mr. Justice Phear and Mr. Justice Markby.

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Nov. 26.

Habeas Corpus—Regulation III of 1818—Act XXXIV of 1850—Act III of 1858—3 & 4 Will. IV., c. 85, s. 43.—Allegiance—Prerogative—Appeal—Detention—Warrant—Arrest.

Assuming the power of a Judge of the High Court to issue a writ of *habeas corpus*, and assuming the right of appeal against an order refusing such writ, held, that, it appearing that the prisoner was in custody under a warrant in the form prescribed by Regulation III of 1818, the detention was legal. The detention to be legal need only be covered by an actually existing warrant of the Governor-General in Council in the form prescribed, without regard to the lawfulness of the arrest. The Regulation is not confined to prisoners of war or foreigners held in confinement for political reasons.

The substance of Regulation III of 1818 was expressly re-enacted by Act XXXIV of 1850 and Act III of 1858, and therefore as the result of these later Acts alone the detention would be legal. These Acts are not contrary to the powers conferred on the Indian Legislature by 3 & 4 Will. IV., c. 85, s. 43.

THIS was an appeal from the order of Mr. Justice Norman, discharging the rule *nisi* which had been granted to show cause why a writ of *habeas corpus* should not issue, commanding Dr. Fawcett, the Superintendent of the Jail at Alipore, in which Ameer Khan was confined, to bring before the Court the body of Ameer Khan. For the facts of the case see the report, *ante*, page 393 (1).

(1) After the order discharging the subject of an appeal. Mr. Justice rule had been made, Mr. Anstey asked Norman said he was willing to give that the order might be made the every facility for an appeal, but wished

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The grounds of appeal were as follow :—

1. That even assuming the detention in the jail at Alipore on and from May 7th, 1870, or any subsequent date, could be justified by the warrant of that date, such warrant was not any justification or authority for the previous arrest and detention without warrant in Calcutta on July 12th, 1869, and of the several other detentions and removals in custody without lawful warrant on and from that day, not only at Alipore but also at Howrah and Gya, down to the date when the warrant of detention of May 7th, 1870, reached the hands of the officer in charge of the jail at Alipore ; and therefore the learned Judge ought to have awarded the writ, so that the causes (if any) of such preceding detentions, removals, and of the original arrest should be returned, and it should be determined whether to remand or discharge Ameer Khan, and if so, whether on security or not, and to what amount.

2. That the learned Judge in the Court below committed an error in fact and law, by pronouncing in favor of the sufficiency of the cause shown against the rule for awarding and issuing the writ, whereas he ought to have held the same to be wholly insufficient, inasmuch as it was not denied or questioned in showing such cause that the arrest, removals, and detentions had been accompanied with and effected by the circumstances of oppression and cruelty set forth by Ameer Khan in his original petition and shown by the affidavits in support of the petition ; and therefore the learned Judge ought to have held that even if the arrest, removals, and detentions were otherwise unexceptionable, yet the

to be understood as abstaining from expressing any opinion as to whether an order in such a matter was appealable. On September 9th, Mr. Anstey, on behalf of Ameer Khan, applied to the Court of Appeal consisting of COUCH, C.J., and MARKBY, J., asking that the petition of appeal might be admitted, and an early day fixed for the hearing. The Court refused to receive the petition, and said it should be filed in the Registrar's office in the ordinary way ; the Court also refused to fix any day for the hearing of the appeal. On September 14th, the Appeal Court, consisting of the same Judges, refused an application made by Mr. Anstey for leave to appeal to the Privy Council from the order refusing to receive the petition of appeal, and from the order of Mr. Justice Norman. The petition was accordingly filed in the ordinary way, and came on for hearing, after the vacation, on November 19th.

same were avoided *ab initio* as having been done in fraud of the alleged powers under which they were surmised or awarded to have been done and against the apparent intent and meaning thereof, and in violation of the common law and constitution of England, and in disobedience of the tenor of the Queen's proclamation of November 1st, 1858, and that Ameer Khan was on that ground alone (if on no other) entitled to be discharged and released from custody.

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3. That the writ of *habeas corpus* is a writ of right, and not of grace, and ought not to be denied, withholden, or delayed to the subject when duly applied for, every such denial, withholding, or refusal being an obstruction of justice and a breach of the great Charter of Englishmen, and therefore the learned Judge ought to have awarded the writ, when it was applied for, and not have withheld or delayed the same until cause should be shown against the rule *nisi*.

4. That the learned Judge found that sufficient cause had been shown against the rule, whereas he ought to have held that no sufficient cause was shown; and that the writ ought to issue as prayed, and any cause which the persons showing cause against it might be advised to offer ought to be offered and shown upon the return to the writ.

5. That the learned Judge held in effect that the application for the writ was barred or precluded by the Act 21 George III, c. 70, sections 1 and 2, whereas he ought to have held that the application, the said sections or anything else in the said Act notwithstanding, was one of right and ought to have been granted, inasmuch as none of the enactments of the Act purported to affect in any way the said writ of *habeas corpus* or the title thereto which every imprisoned Englishman (as Ameer Khan submits he is) in every part of Her Majesty's dominions, and by whatever authority he is imprisoned (other than the sentence of a competent Court), has to apply for the said writ and obtain his deliverance by due course of law.

6. That the learned Judge held and determined in effect that although he had full power and jurisdiction to issue the writ into Alipore and to direct the same to the Superintendent of the jail at Alipore, yet that it would be the duty of the Superin-

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tendent in the present case to disobey it, whereas he ought to have held that inasmuch as it is for this Court alone to judge of the fitness and lawfulness of its procedure, it doth necessarily follow that it is the duty of the subject to obey any order or writ made or issued by the Court according to the exigency thereof.

7. That the learned Judge found that notwithstanding the imperial Acts passed from time to time for restraining and preventing the Indian Legislatures for the time being from passing any Regulations contrary or repugnant to the Magna Charta, or to the Statutes constituting the Supreme Court or High Court, or to the prerogative, or to any other portions of the statute or common law of England, and especially to any of the unwritten law or constitution of England whereon allegiance to any extent might depend, it was competent to the Legislature to pass Regulation III of 1818, Act XXXIV of 1850, and Act III of 1858, and that the said Regulation and Acts were valid and legal enactments, and binding on every subject of Her Majesty within the limits of the jurisdiction of the Legislature, whereas he ought to have held that the said Regulation and Acts were *ultra vires* of the Legislature, and illegal and invalid at least as far as respects all persons within the said jurisdiction not being alien enemies of the Queen.

8. That the learned Judge held that the unwritten laws and constitution of England are of so flexible a character as to justify the total and permanent suspension of the said laws and constitution by the said Regulation and Acts or by any Act of the Governor-General in Council, which is directed or extended to or for the prevention of any apprehended public mischief of a permanent nature, whereas he ought to have held that no such purpose can justify any such suspension or abolition, and that the proposition that it can justify such suspension is necessarily insensible, repugnant, and inconsistent, and a term of no force, or value, or meaning in law.

9. That the learned Judge ought to have held that, at all events, the arrest, imprisonment, and removals of Ameer Khan within Calcutta were illegal, or at all events apparently illegal, and therefore he ought to have ordered that the causes or alleged causes thereof should be returned to the High Court.

Mr. *Ingram* and Mr. *Evans* for the appellant.

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The *Advocate-General* (offg.) and The *Standing Counsel* (offg.), *contra*.

The *Advocate-General* raised a preliminary objection that no appeal lay from the order of Mr. Justice Norman. The power of appeal from Courts of original jurisdiction is given by section 15 of the Letters Patent of 1865; but that section does not include such a case as this. The refusal of a writ of *habeas corpus* is not a judgment within the meaning of that section. It is not a binding judgment; it is open to the party to apply to another Judge, and if refused, to all the Judges in succession [PHEAR, J.—You assume that.] In England no doubt it is so. [PHEAR, J.—Is not that by statute?] Before the *Habeas Corpus* Act it could be done, as all the Judges had equal powers, and one was not bound by the decision of another. Even if this were not so. Norman, J., holds that the *Habeas Corpus* Act applies here, under which the course of applying to another Judge could be taken. It is not the judgment which is appealed from, but the order made upon such judgment which was the order discharging the rule. As to what is a judgment, see *DeSouza v. Coles* (1) *per* Bittleston, J. The distinction between that case and the present is, that if there the appeal had been disallowed, there would have been no other remedy; here the refusal of the writ by one Judge is not final: there the judgment appealed from was binding, here it is not. [PHEAR, J.—Is not the issuing or refusing to issue a writ of *habeas corpus* the act of the Court?] That would be inconsistent with the being able to apply to another Judge, a course which it is contended is open to the party. See Morton's Reports, 212 note and 263 note. The procedure in that respect is the same as in England; no alteration has been made in it by the Legislature. This is a criminal or *quasi-criminal* matter. The Judge has to exercise his discretion as to whether he will grant or refuse the writ. If it is a matter of discretion, the exercise of it by a Judge is final as far as that Judge is concerned. At common law it is submitted it is a matter of discretion. So that if this writ has been refused at common law,

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IN THE if under the *Habeas Corpus* Act, the remedy is to apply to another
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General Practice, Part II, 686 ; *Hobhouse's case* (1).

Mr. *Ingram contra*.—A writ of *habeas corpus* is issued by the Court, and a refusal to grant it is an act of the Court. See *Habeas Corpus* Act, section 3. [PHEAR, J.—See section 7.] It must have been returned into Court.—Smoult's Rules and Orders, Volume II, page 22. If it was an act of Court the Judges could not be applied to successively, and the refusal to grant the writ is appealable. The case of *Ashby v. White* (2) decided that an order of a Judge refusing a writ of *habeas corpus* was appealable. See *The Aylesbury case* (3); a writ of error was granted there. [PHEAR, J.—You have filed your appeal, and are now in the same position as if a writ of error had been granted ; the Judges expressly state in that case that they abstain from saying that error could be maintained when the writ should be granted, as that was matter to be determined by the tribunal to which the writ would be returned.] This appeal can be entertained under the general words of section 15 of the Letters Patent, 1865. See *DeSouza v. Coles* (4). The affidavits in the case are not entitled as in any particular Court or jurisdiction. It is not necessary to entitle them at all. See the practice in the Supreme Court in *The Queen v. Rajah Rajnarain Roy* (5), and in the note it is said they should be entitled “In the Supreme Court” simply. So in England they would be entitled “In the Queen's Bench” only, unless on the Crown side.

This is not a criminal matter ; it cannot be a criminal matter as there is no charge made against Ameer Khan. An appeal lies in all cases except criminal matters. The Court issues writs of *habeas corpus* in term : see the practice of the Supreme Court, Morton's Rep., 212, note. [The *Advocate-General*—In the case of a rule it is different.] The refusal of an application before a single Judge is not final, and it is submitted an appeal lies. In the somewhat analogous case of the refusal to admit a

(1) 3 B. & Ald., 422, *per Abbott, C.J.* (3) 14 East, 92 note.

(2) 14 Howell's State Trials, 695 ; S. (4) 3 Mad. H. C. Rep., 384.
C., 1 Smith's L. C., 227. (5) Fulton's Rep., 372.

plaint, an appeal lies; but there is nothing in law which prevents the same application being made before another Judge; out of courtesy only it is never done.

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The *Advocate-General* in reply.—Can error be assigned in a matter of discretion? A writ of *habeas corpus* is not obtained for detention at some past time. The question is whether a present imprisonment is lawful or not. There is not the reason here that generally exists for granting an appeal,—*viz.*, that the party would otherwise be finally concluded by the order made. By the heading of section 15 of the Letters Patent, the section relates wholly to appeals from original jurisdiction, yet there is in the section an exception of criminal matters. This is a criminal matter. As to the rejection of a plaint there is special provision in section 36, Act VIII of 1859, for an appeal from such an order; but the present order is not in its nature appealable.

After taking time to consider, the Court, on November 17th, allowed the appeal to go on.

The appeal, accordingly, came on on November 18th, and was argued by Mr. *Ingram* and Mr. *Evans* for the appellant. The arguments of Mr. *Ingram* were substantially the same as those used in support of the rule before Mr. Justice Norman. Mr. *Evans*, in addition, pointed out that if Act III of 1858 is presumed to be applicable to Englishmen as well as natives, the first section repeals the provision in the Bombay Regulation XXV of 1827, section 1, clause 1, "that with reference to the individual the measure (taken to place him under restraint) shall not be in breach of British law," with respect to natives; but makes an exception in favour of European British subjects. In Calcutta there is no such distinction. So that it appears that in Calcutta a European British subject could be summarily arrested under Regulation III of 1818, while in Bombay under the corresponding Regulation XXV of 1827 he could not.

The *Advocate-General* (offg.) and The *Standing Counsel* (offg.) were not called upon.

The following judgments were delivered:—

PHEAR, J. (After shortly stating the facts, continued)—Ameer Khan, under the peculiar provisions of clause 15 of the

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High Court Charter, which give in certain cases an appeal within the Court itself, so to speak, against the judgments of the Judges, now prefers an appeal to us against the decision of Mr. Justice Norman.

Several most important questions of law have been raised before us, which I do not think it necessary that we should determine, because I am of opinion that quite independently of these questions, Mr. Justice Norman's decision is in its result right, and ought not to be disturbed.

The conclusion at which I have arrived is shortly this,—namely, that if Mr. Justice Norman, by virtue of any authority which he possesses as Judge of this Court, had power to issue the writ of *habeas corpus* in this case (as to which I express no opinion by way of doubt or otherwise), Dr. Fawcus has shown good reason why it should not be issued; and therefore supposing the appeal to be rightly before us we ought to dismiss it.

Dr. Fawcus states, in the first of the two affidavits which he has given in this matter, that the petitioner Ameer Khan is under personal restraint in the jail at Alipore in his (Dr. Fawcus') custody under a warrant in the form prescribed by Regulation III of 1818, and signed by Edward Clive Bayley, Esquire, Secretary to the Government of India in the Home Department; and in the second affidavit he sets out the warrant (*reads* the warrant and the preamble and 2nd section of Regulation III of 1818).

It thus appears that Ameer Khan is detained in custody by Dr. Fawcus, under a warrant of the Governor-General in Council, which is precisely in the form prescribed by the second clause of the second section of this Regulation. Therefore it would seem to follow immediately from the third clause of the same section that the detention is legal, and, consequently, if Ameer Khan were brought before the Court in obedience to a writ of *habeas corpus*, it would be the duty of the Court to remand him to Dr. Fawcus' custody. If this be so, it is clear that the writ ought not to issue. Whatever may be the state of the law with regard to cases which are covered by the 3rd and 10th sections of 31 Car. II, c. 2, it is sufficient to say that the present application is not one of them. In all other cases, as is stated in

Wilmot's Opinions, page 81, &c., the writ ought not to issue of course, but only upon probable cause verified by affidavit, although, no doubt, as the same very learned Judge also states, "upon probable cause so shown, the writ is as much a writ of right as a writ which issues of course." Indeed, it appears to me, that we must treat this appeal as being in substance a complaint to the effect that the learned Judge below has deprived the petitioner of his right, by refusing to issue the writ of *habeas corpus*, notwithstanding that the affidavits before the Court disclose probable cause for an examination into the legality of the custody in which he is detained; and then the complaint is answered by the copy of the warrant and the words of the Regulation which I have read. Besides, the reason of the thing is all one way. To use the words of Chief Justice Abbott in *Hobhouse's case* (1), "It would be a very strange inconsistency in the law of England if we were bound to do an act nugatory in itself, and that would be the case if upon a view of the copy of the warrant a writ was of course to issue, the only effect of which would be that upon the return to it the prisoner must be remanded."

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But the learned Counsel for the petitioner argued that the warrant set out in Dr. Fawcett's affidavit, although it pursues the words of the Regulation, nevertheless does not operate to validate the detention; and he places this proposition on three grounds which I will take in the following order:—

1. The warrant referred to in section 2, clause 3 of the Regulation III is a warrant to be issued to the officer, in whose custody the person named in it is to be placed, before that custody actually commences; whereas in fact this warrant, as the date upon it shows, was not issued to Dr. Fawcett until Ameer Khan had been in his custody many months.

2. Regulation III of 1818 is aimed at the cases of political prisoners who are aliens, and does not extend to natural-born subjects of the Queen in this country, even though reasons of State for their confinement be supposed to exist.

3. Regulation III of 1818 is itself void and inoperative in this matter as being *ultra vires* of the Legislature of this country,

(1) 3 B. & Ald., 421.

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at least so far as it may affect a person having the status which Ameer Khan has.

With regard to the first of these three grounds, it is perhaps in terms unimpeachable. Unquestionably, it appears clearly enough from the language of the section and the form of the warrant itself that the Legislature contemplated that the warrant would in practice be actually issued by the Governor-General in Council before the officer who was to have charge of the prisoner was called upon to receive him into custody. But it is equally clear that the warrant is not a warrant of arrest. It is a warrant of commitment, reciting that which is by virtue of the Regulation equivalent to a conviction. From its nature, I may say that the person committed by it must almost necessarily be under detention at the time when the warrant is formally drawn up. The argument then appears to take this form, that inasmuch as the prisoner, at the date when according to the warrant the commitment was made, was and had long been in Dr. Fawcett's custody without any warrant at all, either of arrest or commitment, he was then in unlawful custody, and that consequently the subsequent detention, based as it necessarily was, in one sense, upon this illegal custody, cannot be justified even under a commitment which would otherwise be valid. I do not think that this contention in its general form can be supported. It would not be sound in all cases even of that which I may term arrest upon arrest, irrespective of the fact of commitment. The House of Lords in *Hooper v. Lane* (1) no doubt held that, "if a sheriff by the illegal act of himself or his officer has taken a person unlawfully into custody so that the custody amounts to a false imprisonment, he cannot avail himself of that illegal detention to execute against his body writs which he holds at the suit of other plaintiffs." But this doctrine of law hangs upon peculiarities in the office and duties of the sheriff under English procedure: and it is to be observed that in the same case of *Hooper v. Lane* (1) the House of Lords also laid down that "there is no doubt of the right and duty of the sheriff to arrest any one against whom he has a writ and who can be found in his bailiwick, whether he is at large there, or is illegally detained

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there by a stranger." Now, on the materials before us, the utmost that can be contended on behalf of the prisoner is that, when the Governor-General in Council took action and issued his writ of commitment, Ameer Khan was already in the custody of Dr. Fawcus, illegally detained under the order of the Lieutenant-Governor of Bengal. If this were so, though it might well be that Ameer Khan has some remedy for his false imprisonment against the Lieutenant-Governor and his officers, so far as they are not protected by privilege of office, yet, according to the decision in *Hooper v. Lane*(1), on the supposition that the Governor-General in Council possesses the power to arrest, and unless under Regulation III of 1818, or otherwise, he is in a worse position than an English sheriff, Ameer Khan, while unlawfully under arrest and detained by Dr. Fawcus, could be lawfully arrested and detained by the direction of the Governor-General in Council. But even if it be assumed that the arrest of Ameer Khan was originally made at the instance of the Governor-General in Council and was unlawful, it is not now a question before us whether or not, irrespective of express enactment, the Governor-General in Council could take advantage of his own wrong, for clause 3 of section 2, Regulation III of 1818, which I have already read, runs thus:—"The warrant of commitment shall be sufficient authority for the detention of the State prisoner in any fortress, jail, &c." There is here no mention of the original reception of the prisoner, and I think it was the plain meaning of the Legislature that a detention covered by an actually existing warrant of the Governor-General in Council couched in the terms prescribed by the section should be legal without regard to the facts which had antecedently occurred. This seems to me the plain meaning of the words as they stand, and I do not think there is anything in other parts of the Regulation which would justify us in interpolating words of qualification. Any construction which rendered it necessary to look behind the warrant for its validity would have the effect of making this clause of the Regulation practically useless. Had it not been for this clause, the absence from the Regulation of any reference to the arrest might have had the effect of

(1) 6 H. L. C., 443.

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limiting the operation of the Regulation to those cases in which the Governor-General in Council had otherwise by law power to arrest. But this clause, if it means anything of practical effect, must, as it seems to me, mean that the prescribed warrant of commitment and detention is to render the detention legal irrespective of all questions as to the lawfulness of the arrest. The whole power of the Governor-General in this matter is the creation of the Regulation, and I think the local Legislature intended that it should be placed beyond all question; and for that purpose declared that the legality of the imprisonment should depend upon the legality and sufficiency of this instrument alone. I am, therefore, of opinion that the warrant which is now in question before us is such a warrant as by the Regulation is made sufficient authority for the detention of the prisoner, and that therefore the first of the three grounds fails to help the petitioner.

In support of the second ground, the learned Counsel pressed us with an elaborate and ingenious argument which I do not think it necessary now to follow in detail. I understood him principally to contend that the words of the Regulation were plainly capable of an interpretation which would exclude from its scope all natural-born or undoubted subjects of the Queen, or Company; and that any other than this limited interpretation was so fraught with consequences antagonistic to all the traditions of English lawyers, and all our accepted principles of right and justice, to the benefit of which the prisoner is entitled, that this Court could not in reason take it to have been intended by the Legislature. He also argued that unless the interpretation for which he contended were adopted, the Regulation would cover ground which was already the subject of an act of the imperial Legislature, namely, 33 Geo. III, c. 52, s. 45, and that it could never be supposed that the local Legislature, in the language which it has used, meant that which manifestly would be superfluous and without effect, if not absurd. I have given my best consideration to the learned Counsel's argument on this topic and the numerous illustrations with which he fortified it, but I feel myself unable to put upon the words of the Regulation the limited meaning which he attributes to them.

The title of the Regulation, "a Regulation for the confinement of State prisoners," is almost the only line in the enactment which, as it seems to me, really favours the view which the learned Counsel desires us to take. "State prisoners" unexplained, might, no doubt, easily enough be read in a sense which would include only prisoners of war or foreigners held in confinement for political reasons. But it appears clear to me that the words of the preamble and of the first enacting section carry us much beyond this. The preamble commences thus:—

"Whereas reasons of State embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint, individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case or may for other reasons be unadvisable or improper." Obviously these several classes of reasons are spoken of disjunctively. They cannot be made inter-dependent: each arises out of its own circumstances, and corresponds with a separate distinct emergency. One of them, then, may be taken apart from the rest. We may read by itself a portion of the recital thus:—"Whereas reasons of State embracing the security of the British dominions from internal commotion occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper." Can it be said for a moment that a citizen of Calcutta is not "an individual" who can be supposed to fulfil the conditions here expressed? If Ameer Khan, though born and resident in Calcutta, has been so plotting and behaving that Bengal or India can only be secured from internal commotion by placing him under personal restraint, while at the same time there are not sufficient grounds, or for some reason or another it may be unadvisable or improper to institute any judicial proceedings

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against him in the Courts of the country, then certainly his case, little disposed as one might be to expect it *à priori*, affords to the letter an instance of one sort of mischief which is mentioned in the preamble as a reason for the passing of the Regulation. And it therefore seems impossible to escape the conclusion that the powers bestowed by the Regulation on the Governor-General in Council for abating this mischief must extend to him; for the following section without any limitation enacts that "when the reasons (which must here mean any of the reasons) stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor-General in Council, and under the hand of the Chief Secretary or of one of the Secretaries to Government shall be issued to the officer in whose custody such person is to be placed." In my opinion, then, the second also of the three grounds above stated is unsound, and cannot be maintained.

It remains for us to consider the last of the three grounds. The learned Counsel reminded us that the Legislature of the country possesses only such limited powers of legislation as are from time to time bestowed upon it by the Imperial Legislature; and he said that the Imperial Legislature never had in fact given this Legislature a power which would enable it to interfere with or affect the rights and liberties of persons subject to the English Crown, in the manner attempted by Regulation III of 1818. He dwelt upon the unlimited power of imprisoning which this Regulation pretended to give to the Governor-General in Council, a power far more extensive than any which the English Parliament itself had ever, even in the greatest exigencies of State, conferred upon the constitutional Ministers of the Crown; and he argued very earnestly, with some copiousness of illustration, that the Imperial Legislature could not be considered as having delegated a legislative authority which would support this enactment, unless express words of delegation to that end could be found, and that certainly nothing of the kind existed in the Statute book. When we trace back the

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history of the local Legislature of India, it is undoubtedly matter of some surprise to find how narrow was the ground upon which the great structure of legislation built up in 1793, and some following years, at first rested. But, in truth, we are not now concerned with any consideration which might arise out of an historical inquiry of this nature. What the Governor-General in Council had done was afterwards ratified and confirmed, and the powers of the local Legislature enlarged by Parliament by 37 Geo. III, c. 142, s. 8; and in regard to the particular matter before us, whatever might have been the authority of the local Legislature in 1818 when Regulation III of that year was passed, and whether or not the necessary conditions precedent to its becoming the law in Calcutta have ever been fulfilled, the present force of the Regulation depends upon the effect of two subsequent Acts, namely, Act XXXIV of 1850 and Act III of 1858. (The learned Judge read the preamble and 1st section of Act XXXIV of 1850, and proceeded.) The meaning of this is plainly that, whether Regulation III of 1818 is or is not now of any legal force within certain specified local limits, it is expedient that it should have legal force, and that its powers should be extended to all the territories under the Government of the East India Company, and therefore it is enacted anew that "the warrant of commitment of any State prisoner under Regulation III of 1818 may be delivered to the sheriff of any gaol of the Supreme Courts of Judicature established by Royal Charter in the said territories, or to the commandant of any fortress, or to the officer in charge of any gaol or other place, in which it is deemed expedient that such State prisoner be confined in any part of the said territories; and such warrant shall be sufficient authority for the detention of such State prisoner in the fortress, gaol, or other place mentioned in the warrant." Here again, then, the warrant of commitment, issued in the prescribed form by the Governor-General in Council, is by express words made to legalize the detention of the State prisoner without reference to any of the circumstances of his arrest; and the State prisoner is the State prisoner of Regulation III of 1818. It appears that after the passing of this last Act, there still remained some opening for doubt whether

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“The provisions of Regulation III of 1818 of the Bengal Code, Regulation II of 1819 of the Madras Code, and Regulation XXV of 1827 of the Bombay Code as altered by section 1 of this Act, relating to the arrest and confinement of State prisoners, shall be in force within the local limits of the jurisdiction of the Supreme Courts of Judicature at Calcutta, Madras, and Bombay respectively.” I think that the local Legislature of India did by these two Acts, *viz.*, Act XXXIV of 1850 and Act III of 1858, expressly (not simply by implication or reference) re-enact the substance of Regulation III of 1818, and declare that its provisions should have force throughout all the territories under the Government of the East India Company, including the local limits of the jurisdiction of the Supreme Court at Calcutta. If then the power possessed by the local Legislature in 1850 and 1858 was such as would enable it legally to pass these Acts, it follows from the opinion which I have already expressed relative to the meaning and intended effect of Regulation III of 1818, that without any regard to the original validity of that Regulation itself, and merely as the result of these later Acts, the detention of Ameer Khan would be rendered lawful by the warrant of the Governor-General in Council which has been set out. Now, the power of legislation, which was passed by the Governor-General in Council both in 1850 and in 1858, was that which is the subject of section 43 of 3 & 4 Will. IV, c. 85; for although the arrangement effected with the East India Company by this Act was for the limited period of twenty years only, the power of legislating thereby given was continued beyond the twenty years by 16 & 17 Vict., c. 95.

The words of section 43 of 3 & 4 Will. IV, c. 85, are:—
 “And be it enacted that the said Governor-General in Council
 “shall have power to make laws and regulations for repeal-
 “ing, amending, or altering any laws and regulations whatever

" now in force or hereafter to be in force in the said territories
" or any part thereof, and to make laws and regulations for all
" persons, whether British or native, foreigners or others, and
" for all Courts of Justice, whether established by His Majesty's
" Charters or otherwise, and the jurisdiction thereof, and for all
" places and things whatsoever, within and throughout the
" whole or any part of the said territories, and for all servants
" of the said Company within the dominions of princes and
" states in alliance with the said Company; save and except
" that the said Governor-General in Council shall not have the
" power of making laws or regulations which shall in any way
" repeal, vary, suspend, or affect any of the provisions of this
" Act, or any of the provisions of the Acts for punishing
" mutiny and desertion of officers and soldiers, whether in the
" service of His Majesty or the said Company, or any provi-
" sions of any Act hereafter to be passed in anywise affecting
" the said Company or the said territories or the inhabitants
" thereof, or any laws or regulations which shall in any way
" affect any prerogative of the Crown, or the authority of Par-
" liament, or the constitution or rights of the said Company,
" or any part of the unwritten laws or constitution of the United
" Kingdom of Great Britain and Ireland, whereon may depend
" in any degree the allegiance of any person to the Crown of
" the United Kingdom, or the sovereignty or dominion of the
" said Crown over any part of the said territories." It is at once
apparent that the power thus bestowed is the fullest possible in
all directions, and for all purposes, except so far as the saving
clause imposes particular limitations. Therefore Acts XXXIV
of 1850 and III of 1858 will be valid unless they are such as to
fall within one or another of these limitations. The prisoner's
Counsel says, that they transgress the latter portion of the saving
clause. The argument of the learned Counsel on this head was
somewhat voluminous, and it is not easy to state with precision
and conciseness the positions of law which he successively took
up. I understood him in substance to urge that the Queen's
prerogative was infringed by these Acts, because in making the
warrant of the Governor-General in Council a sufficient autho-
rity for the indefinite detention of a prisoner, they pretended to

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ness in the imprisonment does not alter the matter in this respect.

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These considerations appear to me to dispose of the whole of the objection which the prisoner's Counsel based upon the exceptions in section 43 of 3 and 4 Will. IV, c. 85, and I need not therefore in strictness examine that objection further. But I think it right to say that in my judgment the words "whereon may depend, &c.," do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribe the nature of the allegiance, *viz.*, of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other; and obviously such laws and principles as these are not touched by the local Acts which are impeached before us. The learned Counsel for the prisoner says that Regulation III of 1818, as it violates the English laws of liberty, violates a part of the "laws or constitution, &c., whereon the allegiance of the subject depends," and he quotes a note of Mr. Forsyth at page 334 of his recent work on Constitutional Law, in support of this contention. Mr. Forsyth there says "allegiance by the English law is correlative with protection; *Calvin's case* (1), and where the sovereign can no longer *de jure* protect his subjects, their allegiance ceases; before this principle allegiance is changed by conquest, or by cession of territory under a treaty." Mr. Forsyth's purpose in this passage was merely to point out by reference to authority a criterion by which to test the sovereignty to which allegiance is due, on the occurrence of conflicting claims made by opposing powers upon the subject. He is not speaking of a domestic law which is to have force even in the absence of any opposing sovereign power. Indeed, the learned Counsel appeared to me at this stage of his argument to be endeavouring to convert a political sentiment into a principle of law. There can be no doubt he will without difficulty find Englishmen who will agree with him that interference with personal liberty may be conceived as being carried so far, even under the sanction of law, as to amount to an oppression of the

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On the foregoing reasons, it appears to me that the decision of Mr. Justice Norman, as I have before said, ought not to be disturbed, and, therefore, assuming that this appeal is rightly before us, I think it should be dismissed.

MARKBY, J.—I have come to the same conclusion as Mr. Justice Phear, and for reasons which are I believe similar.

In this case, I shall assume, without expressing any opinion whatever upon the point, that the writ of *habeas corpus* might have been issued on the present application, and in the same manner I shall assume that the learned Judge, having declined to issue the writ, an appeal will lie to this Court against his decision.

It is, however, as I understand, not contested by the learned Counsel for the appellant that we ought not to issue the writ if we see clearly that the prisoner on being brought up must be remanded.

I think it is clear upon the facts stated in these affidavits that the prisoner, if brought up, would, upon the production of the writ, have to be remanded. The prisoner is in Alipore Jail in the custody of Dr. Fawcett under a writ in the form given in section 2 of Regulation III of 1818, which section, after giving the form of the writ, concludes thus:—

“The warrant of commitment shall be sufficient authority for the detention of any State prisoner in any fortress, jail, or other place, within the territories subject to the presidency of Fort William.”

Assuming this to be a valid Regulation and to be applicable to the present case, I think the warrant itself is a conclusive authority for the detention of the prisoner, and that we have no power to inquire further into the matter. It was contended for the appellant against this view of the Regulation that it did not confer any power at all to arrest a prisoner, but only empowered the Governor-General in Council to regulate the place and manner of confinement of prisoners in custody; that the Regulation assumes the person to have been already made a prisoner, and that it was necessary, therefore, to show that when the warrant issued, the prisoner was lawfully under arrest. I think that this argument is answered by the plain words of the Statute. By section 1, the warrant may issue in any case in which "the reasons stated in the preamble may seem to require that an individual should be placed under personal restraint." And the preamble recites that "reasons of State occasionally render it necessary to place under personal restraint, &c." It seems to me clear that these words contemplate the arrest of a person who is still at large.

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It was next argued that at any rate the Regulation contemplated that the warrant should precede the arrest, and that it could not legalize an arrest which was unlawful. No doubt, in one sense, this is so, and it may be an irregularity in this case that the warrant was not issued prior to the arrest. But whatever effect this irregularity may have upon the legality of the original arrest or the detention prior to the issuing of the warrant, I do not think it affects the legality of the detention subsequent to the warrant. I base my decision on this point, not on any distinction between a warrant of arrest and a warrant of commitment, but upon the concluding words of section 2 above referred to, which appear to me expressly to make the warrant a sufficient authority for the detention of the prisoner, whether the prisoner was previously in custody or not, and, if previously in custody, whether that custody was lawful or not. If it is necessary to confer such extraordinary powers at all, it is essential that the exercise of them should be unquestioned by any person whatsoever. If it were otherwise there would be great

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peril to those who exercise these powers, and greater peril still to those who are called upon to obey them ; and I think these words were put in expressly to exclude all such objections as that now under consideration.

We then come to the question whether the Regulation is applicable. The first argument was that Ameer Khan is not a person, or at any rate is not necessarily a person, to whom the Regulation would apply, because it speaks throughout only of State prisoners ; by which, it was argued, is meant not the ordinary subjects of the realm, but political prisoners who had been vanquished in war or captured in some general disturbance. It appears to me, however, that the terms of the Regulation preclude this distinction. It was certainly intended to apply to subjects of the Indian Government, because it is expressly recited that it was intended to protect the British dominions, not only from foreign hostility, but also from internal commotion ; and though, no doubt, the Regulation does not contemplate that the power here conferred would be exercised in times of tranquillity, it recites expressly that it is desirable to give power to the Governor-General in Council to supersede the ordinary course of judicial proceedings, and in the enacting part (section 1) the power of so doing is given in the amplest possible manner without any restriction as to person or circumstance. Nor in this is there any inconsistency. If it is proper to confer any such power at all, it is obvious that it may be as usefully, perhaps more usefully, exercised to prevent commotion, as to quell it. I think the power of arrest and confinement is given quite generally, and the Governor-General in Council is made the sole judge of the necessity of using it. But it was contended that this Regulation would still not justify the detention of the prisoner in this case, because it appeared upon the affidavits that the prisoner was a resident within the local limits of the original jurisdiction of this Court, to whom this Regulation could not apply. If, however, any doubt can have existed on this point, it is set at rest entirely by section 2 of Act III of 1858, which expressly provides that the provisions of Regulation III of 1818 relating to the arrest and confinement of prisoners shall be enforced within the local limits

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affects the prerogative of the Crown. 2,—Because it affects that part of the unwritten law or constitution whereon allegiance depends. It has not been pointed out, as far as I have seen, in what way this Act of the Indian Legislature affects the prerogative of the Crown. It is not in any way necessary in this case to consider whether an Act which affected the right of a party to a writ of *habeas corpus* would or would not be valid. I express no opinion that it would not be so, but that is not the point we have to consider. If this Act is void, it must be void because it affects the liberty of the subject. But I see no ground for supposing that an Act affects the prerogative of the Crown merely because it affects the liberty of the subject. If that were so, then the Indian Legislature would have no power at all to legislate in criminal matters—a position which could not be entertained for a moment. I see no connection whatever between the prerogative of the Crown and the liberty of the subject. Indeed, it has been generally supposed that these two things were rather opposed to each other, and that this very writ of *habeas corpus* was one of those protections which were won by the people against that executive authority which under the name of prerogative resides in the Crown. The restriction which is the foundation of the second objection to the validity of the Act, is certainly couched in language to the last degree vague and obscure. Possibly a search into the discussions which preceded the Act might suggest a meaning; but I think that is a dangerous method of interpretation, and I would rather not resort to it. I think this objection is sufficiently answered by what appears to me to be a very clear principle; namely, that the allegiance of a British subject in no way whatever depends on the existence or non-existence of such a power as is conferred on the Governor-General by the Regulation of 1818. I wholly repudiate the doctrine contended for, that the allegiance of a subject to his Sovereign can by any possibility be legally affected by the mere withdrawal from the subject of any right, privilege, or immunity whatsoever. I think the notion of reciprocity expressed in the maxim *protectio trahit subjectionem, et subiectio protectionem*, upon which this argument depends, is one which is wholly inadmissible in any

legal consideration. It appears to me that if we are to admit such a doctrine as this at all, we must admit it, not only with regard to Acts of the Indian Legislature, but to Acts of the English Parliament. But whatever phrases may be picked up here and there in the text books, I never heard of an Act of Parliament being seriously questioned in a Court of Law on this ground. The somewhat analogous position in the first volume of Blackstone's Commentaries has been relied on, namely, where he says that human laws are subordinate to laws natural and divine, and that if human laws transgress these laws, a man is bound to disobey them. But I think this is just one of those mystifications to which that celebrated author has most unfortunately more than once committed himself. If it is intended as a moral precept, it is ill-expressed and wholly barren in results. But if it is intended as a legal maxim, it has, in my opinion, been over and over again shown to be a most mischievous error.

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If, therefore, we have any jurisdiction at all, I think it ought undoubtedly to be exercised in affirming Mr. Justice Norman's decision and dismissing this appeal.

Appeal dismissed.

Attorneys for appellants : Messrs. Carruthers and Dignam.

Attorney for the Government : Mr. Chauntrell, Govt. Solicitor.

[APPELLATE CRIMINAL.]

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.

IN THE MATTER OF THE PETITION OF DHANOBAR GHOSE.*

Act VIII of 1869, s. 422—Appeal.

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Upon an appeal from a sentence passed by a Magistrate, the Sessions Judge remanded the case for the purpose of additional evidence being taken by the lower Court. Such evidence having been taken by the Magistrate, the case was returned to the Appellate Court. The Sessions Judge then disposed of the case in the manner prescribed by section 419 of the Criminal Procedure

* Criminal Motion, Case No. 3 of 1871, against the order of the Officiating Sessions Judge of Nuddea, dated the 26th November 1870, confirming that of the Assistant Magistrate of that district, dated the 8th June 1870.

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Code. On an application by the prisoner to the High Court to be allowed to appeal on the merits of the case under section 408, Act XXV of 1861, *Held*, no appeal lay to the High Court on the merits.

Mr. M. Ghose (with him Baboos *Debendra Chandra Ghose* and *Grish Chandra Mookerjee*) for the petitioner.

The facts and arguments are sufficiently stated in the judgment of the Court, which was delivered by

NORMAN, J.—We do not think it necessary to go through all the points taken by Mr. Ghose in this case; they have been disposed of in the course of the argument. The case appears to have been, in many respects, very well conducted by the Assistant Magistrate, Mr. Cotton, who has shown great tact and firmness in dealing with the objections taken before him, and we see no reason whatever for questioning the propriety of the sentence, which has been confirmed by the Sessions Judge.

The prisoner, Dhanobar Ghose, was convicted by Mr. Cotton, the Assistant Magistrate of Choadanga, of criminal misappropriation, and sentenced to rigorous imprisonment for two years, and a fine of rupees 300, and in default of payment of the fine, to a further imprisonment for six months. An appeal was presented by the prisoner to the Judge of Nuddea. In consequence of certain defects in the evidence, the Judge directed that additional evidence should be taken upon particular points. Certain witnesses were examined before the Assistant Magistrate, the additional evidence was certified by him to the Appellate Court, and thereupon the Sessions Judge proceeded to dispose of the appeal in pursuance of section 422, Act VIII of 1869.

Mr. Ghose claimed a right on the part of the prisoner to appeal to this Court upon the facts, as if the prisoner had been convicted on a trial held by a Court of Session, and contended that such right was given to him by the provisions of section 408. Under section 422, Act XXV of 1861 (1), if the Appellate

(1) *Act XXV of 1861, s. 422.*—“In enquiry, or additional evidence upon any case in which an appeal has been allowed, it shall be competent to direct such enquiry to be necessary, to direct such enquiry to be

Court ordered additional evidence to be taken, and on the result of the further enquiry, additional evidence being certified to the Appellate Court, it was competent to the Appellate Court to proceed to pass such judgment, sentence, or order as to such Court might seem right. A Full Bench of this Court (1) held that, under the law as it stood before the passing of Act VIII of 1869, the sentence of the Appellate Court, hearing a case on fresh evidence under section 422, was a new sentence, and not a mere modification of the sentence of the lower Court; and that the Appellate Court, hearing a case on additional evidence under section 422, had power to enhance the punishment awarded by the lower Court. In the case of *The Queen v. Mohesh Chunder Chuttopadhyia* (2) and in some other cases, it was held, that from that conviction and sentence so treated by the Full Bench as a new conviction and sentence, an appeal lay under section 408.

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It appears to us that, whatever may have been the law under section 422, Act XXV of 1861, from a judgment upon an appeal under section 422, Act VIII of 1869, no such appeal lies. Under Act VIII of 1869, the Appellate Courts are limited to pronouncing judgment in the manner prescribed by section 419. They may alter or reverse the finding and sentence or order of the inferior Courts, but not so as to enhance any punishment that has been awarded. The prisoner, whose appeal is dismissed, or on whose appeal the finding and sentence of the lower Court is modified, is not a person convicted on a trial by a Court of Session. He is merely a person who has been convicted by the

made, and such additional evidence to be taken. The result of the further enquiry, and the additional evidence, shall be certified to the Appellate Court, and the Appellate Court shall thereupon proceed to pass such judgment, sentence, or order as to such Court shall seem right."

In Act VIII of 1869, s. 422, for the words in italics, the following are substituted, "to dispose of the appeal in the manner prescribed by s. 419."

S. 419 is as follows:—"The Appellate Court, after perusing the pro-

ceedings of the lower Court, and after hearing the plaintiff, or his counsel or agent, if they appear, may alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded."

(1) Unreported; decided by Peacock, C.J., Seton-Karr, L. S. Jackson, and E. Jackson, JJ. (Kemp, J., dissenting), see Prinsep's Cr. Pro. Code, 2nd ed., under s. 422.

(2) 2 W. R., Cr., 13.

1871 first Court, and whose appeal has been disposed of by the Appellate Court.
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For these reasons it appears to us that section 408 does not apply to the case of a person whose appeal has been dismissed after additional evidence was taken under the provisions of the 422nd section.

The application to hear the case on appeal is refused.

Application refused.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

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WILKINSON AND OTHERS v. GANGADHAR SIRKAR.

Receiver, Position and Functions of—Suit for Specific Performance.

The receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject-matter of the suit *pendente lite*; and the possession of the receiver is simply the possession of the Court. He has no personal rights in the property, nor can he take any steps with regard to it, without the sanction of the Court. If it is necessary for him to take action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as the agent of the owners of the property.

Where the receiver in a suit had, by order of Court, sold certain property in the suit, and had executed the contract of sale in his own name, a plaintiff praying for specific performance against the purchaser for refusing to complete the contract, was admitted with the receiver as co-plaintiff, he having obtained leave to sue.

THIS was an application by Mr. Evans for the admission of a plaintiff. The suit was one for specific performance of a contract to purchase certain land. The land in question was in the

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not take any steps, even for the purpose of defending his possession, without the sanction of the Court. Also, as a rule, so little personal interest of any kind has he in the matter, that he is not justified himself in making any application whatever to the Court. If it is necessary that he should take action of any sort, it is for the parties to the suit, or one of them, to come to the Court to put him in motion; and whatever the receiver rightly does, with regard to the property, I think it is clear that he does it simply in the character of agent for the owners of the property, or the persons interested in it, and, with the exception which I will mention presently, in no sense as principal. If that be so, then the general rule must come into play with regard to the receiver, as with regard to every other agent,—namely, that the principal, and not the agent, is the person to sue or be sued in any matter, either of contract or tort. No doubt, when a contract is made by an agent in his own name, without disclosing that he is an agent in the matter, and nothing appears to prevent him from claiming to be principal, it may often be necessary, for the safety of the defendant, that the agent should bring a suit on the contract, in the character which he appears to have under the contract. Also plenty of cases may be instanced where a person, who is agent in a matter, even on the face of the contract, may be personally liable in consequence of the contract, or of something arising out of it. In such a case he might well enough be sued as a defendant, even though the plaintiff knew he was merely an agent in the matter. But, excepting cases of the foregoing classes, I apprehend it is quite clear that the principal is the person to sue or be sued, and not the person whose only part in the matter was that of agent. It may, of course, happen that an agent is himself interested in the matter or property which is the subject of the contract which he has entered into on behalf of another. If so, it may be necessary that he should be a party to the suit, either as plaintiff or defendant, not because he was agent, but because he has this interest. With this explanation, I think I may say the rule is indisputable, that an agent, who neither has any interest in the property which is the subject of suit, or in the contract, and cannot be made personally liable, either in law or equity, in

respect to it, ought never to be made a party to a suit respecting that property, either at law or equity. And if that is the rule generally, it is a rule of a special exigency in all suits for specific performance. I will refer to the case of *Ferguson v. Wilson* (1), in which Lord Justice Cairns had occasion to make a remark of this very character. That was the case of a bill filed against the directors of a company to enforce specific performance of a contract for allotment of shares. There, of course, it was perfectly clear that the directors had entered into the contract simply as agents on behalf of the company. The suit was brought against the company and the directors jointly, very like the present suit reversed, which is brought by the receiver jointly with the parties interested instead of against them. The Lord Justice says, at page 89 :—“ Now I think that it ought “ to be very clearly understood upon what principle, and to what “ extent, directors in suits of this kind are liable to the jurisdiction of the Court. This is a bill filed upon a contract. With “ whom has the contract been made? The bill alleges that the “ contract is made with and binds the company. What is the “ position of directors of a public company? They are merely “ agents of a company. The company itself cannot act in its “ own person, for it has no person; it can only act through “ directors, and the case is, as regards those directors, merely the “ ordinary case of principal and agent. Whenever an agent is “ liable, those directors would be liable; where the liability would “ attach to the principal, and the principal only, the liability is the “ liability of the company. This being a contract alleged “ to be made by the company, I own that I have not been “ able to see how it can be maintained that an agent can be “ brought into this Court, or into any other Court, upon a pro- “ ceeding which simply alleges that his principal has violated a “ contract that he has entered into. In that state of things, “ not the agent, but the principal, would be the person liable.” Now here I suppose Mr. Wilkinson would be the last person to suggest that he is personally liable in the subject-matter of this suit. He, therefore, in my judgment, ought not to have been

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WILKINSON brought before the Court, either as plaintiff or defendant.
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SIRKAR. have leave to sue. I refused to give that leave for this reason, namely : the suit in which Mr. Wilkinson is a receiver, *Chandranath Biswas v. Biswanath Biswas*, is a suit for partition between the members of a joint family, and it has been so many years on the file of this Court as to constitute, in my opinion, a disgrace to our procedure. At the time when the application was made to me, there was no pretence for saying that there was any matter of litigation between the parties as to the subject of suit; neither were they seriously thinking of carrying out the partition. It suited the joint owners of this property to have the property remain under the management of the Court; for no other purpose was the suit still standing on the file of the Court. Now the application that the receiver should have leave to sue simply means this, that he should use the names of the owners of the property, and come into Court on their behalf, whether they consent to his doing so or not; and the consequence of such an order would be that the Court would compel the parties to the suit to abide by the result of the suit which the receiver was about to institute in their names, and would authorize the receiver to reimburse himself for the expenses of the proceedings in that suit out of the property of the owners. Now obviously nothing of this kind was in the slightest degree necessary in this particular case. Although the contract which the receiver entered into was stated to be one entered into in pursuance of an order of Court, it was a contract which he had entered into at the instigation of the parties themselves ; they, one and all of them, assented to it. The assistance of this Court was not needed in order to bring about a joinder of all the owners in one suit, or in order to insure the expenses being paid by them. The suit might have been carried on just as effectively by the voluntary action of the parties concerned, as it would be under the pretence of being directed by the order of this Court. However, the parties were not satisfied with my refusal to give the receiver of the Court that leave which he did not need, and succeeded after-

wards in obtaining the leave to sue from two other Judges of the Court sitting on an appeal bench. Immediately afterwards this plaint was presented, as I have already said, with Mr. Wilkinson's name only as plaintiff, showing how completely, as I think, all the parties had misapprehended the true position and liabilities of a receiver. I refused to admit that plaint on the grounds which I have endeavored to explain, and which I may reiterate shortly thus. The receiver has no interest in the property; he, in entering into the contract of sale, acted solely as agent, to the knowledge of every body concerned, and not as principal. Although the written contract, no doubt, was in a sense made in his own name, he is therein mentioned as the receiver of the Court in a particular cause, and he makes the contract in that character for the sale of property which is not his own, but belongs to the parties in the cause. It seems to me as clear as anything can possibly be, that he has no title and no right to sue for specific performance of this contract. In all suits for specific performance, it is above all things necessary that there should be mutuality between the parties, and I think it is plainly apparent on the face of this contract to all the world, that if the purchaser had sued Mr. Wilkinson to obtain a conveyance from him, he could not possibly have succeeded. If the purchaser could not sue Mr. Wilkinson for specific performance, how could Mr. Wilkinson sue the purchaser? I have been referred to cases which have been tried and determined in this Court, wherein the receiver has been plaintiff in his own name, without any of the parties to the suit being joined with him. I do not propose to examine them. Some of these suits may possibly have been rightly framed. It may happen that matters arise out of the receiver's possession which are such as to render it necessary for him to sue personally in regard to them,—*i. e.*, such that it would be wrong for any of the parties themselves to sue. I may instance the cases where tenants have attorned to him, or cases again where, rightly or wrongly, he may have let property in his own name. But at the same time I must say that certainly some of the cases which have been brought under my notice, one at any rate, have been in my judgment wrongly framed. Then there is a

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decision given by Mr. Justice Macpherson in this same matter (1). It was in an application made on petition by Mr. Hogg, then

(1) *Before Mr. Justice Macpherson.*

CHANDRANATH BISWAS v. BISWA-NATH BISWAS AND OTHERS.

The 28th February 1870.

MACPHERSON, J.—This is an application made upon petition by Mr. Hogg, the Court receiver, for an order that the purchaser of certain property which was sold by the receiver, under an order of Court, do complete the purchase according to the conditions of sale; and that, in default, he may be attached, or a resale of the property at his risk may be ordered.

The application is opposed on various grounds. The first is that the sale not being by the Court, the receiver has no right to make a summary application of this description, but must enforce his rights, such as they are, by bringing a suit against the purchaser. For the receiver, it is contended that as he is an officer of the Court, and the sale took place under an order of Court; the application is properly made.

It is clear that the Court cannot act against a person who is not a party on the record, unless he has come in and done some act which subjects him to the jurisdiction of the Court in this suit. The purchaser's position thus depends on whether the contract he entered into was entered into in the course of a sale by the Court or of a sale by an individual only.

In no book of practice can I find any authority for saying that a sale of property by a receiver is, in any sense, a sale by the Court; and nowhere do I find that a sale by a receiver has been treated as a sale by the Court. But it is true that, in some cases, sales by a

receiver have been confirmed by this Court, preparatory to possession being ordered to be delivered to the purchaser,—the receiver not being at liberty to give possession without an order. An instance of this occurred on the 21st of December last, when an order was made in the suit of *Mon-mothonath Dey v. Ashutosh Dey*, confirming a sale by the receiver and ordering the purchaser to be put in possession.

A consideration of the course adopted in the present instance and in other cases in which the sale is made, not by the Court, but by third parties by the permission of the Court, leads me to conclude that the two classes of sales stand on quite different footings.

When a sale is by the Court, the ordinary decree is simply that the property be sold with the approbation of the Court. The order made in this case is an order, by consent of all parties, that the receiver be at liberty to sell, and do sell, "for the best price he can get for the same by public sale, with the privity, consent, and concurrence of the solicitors of the plaintiff and of the defendants,"—the power given to the receiver being independent of any further interference by the Court, save that the conveyance is to be settled by a Judge if the parties differ.

When the sale is by the Court, the Registrar, following the practice of the Master, inquires into the title with a view to preparing the conditions of the sale. And after the sale, a purchaser who has not accepted the title is entitled to have an inquiry as to the title, and the Court will not knowingly pass off an absolutely bad title by

receiver, for an order that the purchaser of, I believe, the very property which is the subject of this plaint should complete the purchase.. Mr. Justice Macpherson dismissed the application with costs, as I think very properly. But in the course of the judgment which he delivered on that occasion, he made some observations, which are not altogether consistent with the view of the receiver's functions which I entertain. He thought that, when the receiver sells under an order of Court, inasmuch as he is in possession of the property, it is practically necessary that he should join in the conveyance. I must say I have a very strong opinion that this is not so. It is not necessary that any one should join in a conveyance of property, simply because he is in possession of it, though it is always necessary that he should be joined when he has any interest in it, which would be the case of course if he has any possession by right of lien ; and I think it probable that it was possession of this sort which was present to Mr. Justice Macpherson's mind when he delivered that judgment. But the receiver's possession, as I have already said, is not possession by any personal right. It is the possession of the Court, and he is totally devoid of any

means of special conditions. The receiver being empowered to sell with the consent of the parties, is under no restrictions whatever in this respect. In saying this, I do not mean to say that sales by the Court do not often, under special circumstances, take place under conditions similar to those under which the sale which is the subject of this application was made.

When the receiver sells under such an order, he joins in the conveyance; being receiver in possession it is practically necessary he should do so ; and the conditions of sale in this instance show that the receiver intended to join. When, however, the sale is by the Court, the parties alone convey, and the officer of the Court does not join.

Finally, when the sale is by the

Court, if the purchaser fails to complete, and the interference of the Court becomes necessary, one of the parties to the suit is the proper person to apply (and is the person who in practice does always apply) to the Court, and put the Court in motion. The Registrar or officer conducting the sale on behalf of the Court never applies. Here the receiver applies himself, showing thus that he does not consider that his position is the same as that of the Registrar conducting a sale held by order of Court.

The fact that Mr. Hogg is the Court receiver does not, as it seems to me, place him in a different position from that which any other person appointed receiver in the suit would have filled.

The application must be dismissed with costs, as being one which ought not to have been made in this form.

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interest in the property. It appears to me that the order of the Court that the property should be sold by the receiver does not impose any liability or responsibility on the receiver, which is not borne by the officer of the Court, who usually carries out orders for sale in the absence of any express nomination of the person who should do so. I apprehend that the order of the Court that the property in suit should be sold is merely operative on the parties to the suit. It binds them, willing or unwilling, to the sale of the property which will be made under the order. Some one must, of course, act as the agent; and when any of the owners abstain from taking part in it, or are under any disqualification, the person must be some one appointed by the Court. The order that the receiver do sell specifies that the receiver is to sell instead of the ordinary officer of the Court.

I now wish to explain why, with these views, I nevertheless admit this plaint, with the receiver as co-plaintiff. It is partly out of deference to the views of two Judges of the appeal bench, who appear to have thought that, in a suit on this particular contract, the receiver ought to be a party to the suit in the interest of the plaintiffs; and partly, but in a greater degree, because there is a stipulation made by the receiver in the contract in his own person, which is such that it may be fair to the purchaser that the receiver should be a party on the record when the suit is tried. I therefore admit the plaint (1).

Application granted.

Attorney for the plaintiff: Baboo *Denonath Bose.*

(1) Leave was subsequently obtained name of the receiver, and leaving the to amend the plaint by omitting the names of the parties as sole plaintiffs.

[PRIVY COUNCIL.]

MOHUR SING (DEFENDANT) v. GHURIBA AND
OTHERS (PLAINTIFFS).

P. C.*
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Dec. 6.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE, NORTH-WESTERN PROVINCES.

Evidence—Wrongful Admission of Evidence.

Where evidence, such as hearsay, is improperly admitted, the question for the Judicial Committee is whether, rejecting that evidence, enough remains to support the finding.

Disapproval was expressed by their Lordships of the reception by the lower Court of evidence which ought not to have been admitted.

THE respondents were formerly shareholders in property in Pergunna Kontana, but in January 1862 their shares were declared confiscated to Government on account of their rebellion.

In June 1862, this and other property was put up by Government for sale, and bought by Shukram Shadiram, mahajans, and the appellant's son Shir Sing, the latter of whom, when completing the registry, gave the appellant's name as the real purchaser of his share.

A division was made between the mahajans and the appellant, the property coming to the appellant being that of which the respondents had formerly been owners.

It appeared that in 1858 the appellant had been one of the witnesses who gave evidence against some of the appellant's friends who were executed.

In September 1863, the respondents applied to the Collector, stating that Shir Sing had bought the property for them with their funds, and that, under pressure from the appellant, Shir Sing had transferred it into the appellant's name. Nothing was done on this petition.

* Present:—THE RIGHT HON'BLE LORD JUSTICE JAMES, THE LORD JUSTICE MELLISH,
SIR JAMES W. COLVILLE, AND SIR LAWRENCE PEEL.

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In April 1864, the appellant petitioned the Collector, stating that he was unable to get any rent; that he was afraid to go for redress to the Deputy Collector, of whom he was in dread; and praying the Collector himself to entertain the suit; but this prayer was refused.

On the 23rd May 1864, the respondents presented a petition to the Magistrate of Meerut, charging the appellant with cheating under section 417 of the Penal Code, in refusing to transfer the property into their names. The Magistrate convicted both father and son, not of cheating, but of breach of trust; but the Sessions Judge, on the 23rd July 1864, quashed the conviction on the ground of its being a case for a civil, and not a criminal Court.

On the 28th September 1864, the present suit was brought to establish the respondents' right to the property on the ground of its having been purchased for them, and part of the purchase-money having been paid by them.

The defence was a total denial of the claim, and an allegation that the case was got up by way of revenge.

The evidence of the respondents, in addition to *vivâ voce* testimony, consisted of the proceedings relating to the purchase, and the proceedings before the Magistrate and Judge. The appellant put in, in the proceedings before the Collector, papers showing that the appellant had given evidence against the respondents' friends, whereupon they were hanged, and papers showing an unsuccessful attempt on the part of the respondents to have the appellant convicted of rebellion in 1858. He also examined witnesses.

The Principal Sudder Ameen decided against the appellant, declaring in strong language that his case was false, and referring to the general state of feeling in the district as to the appellants being in the wrong, and also referring to the conviction by the Magistrate, and to the Sessions Judge's having released the appellant simply on the ground that it was a case for a civil Court. The Principal Sudder Ameen expressed his opinion that the finding recorded by the Magistrate fully proved the respondents' case. He gave a decree for so much property as equalled in value the money actually paid by the respondents.

The Civil Judge of Meerut affirmed the decision extending it to a decree for the whole land in payment of the balance, with interest; and he also referred to the proceedings before the Magistrate, and the ground on which the Sessions Judge quashed the conviction.

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On special appeal, the High Court at Agra (1), on the 19th July 1866, affirmed the decision, modifying it by not making the respondent liable for interest. The special appeal relied on a *benami* purchase at a public sale not being cognizable by a Court (2), but the Court held that the cases were not parallel. This point was not raised in the appeal to England.

The appeal to England was nominally against the finding of the High Court, but the points taken were directed against the findings on the facts of the Courts below.

Mr. *Leith*, for the appellant, went very fully into the evidence, pointing out that the judgments of the Principal Sudder Ameen and of the Judge rested mainly on what had been found by the Magistrate, whose finding had been reversed, and he pointed out that most of the evidence was hearsay, and founded on reports current in the district.

The respondents were not represented.

Their LORDSHIPS gave the following judgment:—

This case has been before three Courts in India, of which the High Court of course merely dealt with the points of law which were raised on special appeal, and have not been very strongly pressed here. There are two questions in the cause. The first is whether the respondents, the plaintiffs in the Court below, have succeeded in establishing that when their *putti* was confiscated and sold under one of the penal Acts passed during the time of the mutiny, it was purchased by the appellant in the name of his son, upon the contract or understanding that upon payment of the whole purchase-money, of which the plaintiffs had already paid part, the rest being found by the appellant, they should be put in possession of the whole

(1) Morgan, C.J., and Pearson, J. (2) Act VIII of 1859, sec. 260, and Act I of 1845, sec. 21.

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MOHUR SINGH v. GHURIBA. of their ancestral rights in the *putti*? That is a question of fact; and if that agreement is made out to have been the understanding and contract between the parties, the second question is, what are the equities which should be applied to it?

Mr. Leith having to contend with the judgment of the two Courts which tried the question of fact, has very fairly brought to our notice certain grounds upon which their conclusion should be impeached, and it is impossible to deny that several of those grounds have some foundation. He has urged, first, that a considerable amount of the evidence admitted was mere hearsay evidence; secondly, that among the evidence which was improperly admitted was the conviction by the Magistrate, which ought not in any point of view to have been used as evidence against the party in the civil suit, according to the strict rules of evidence, and which having been reversed by the Judge, no matter on what grounds, had ceased to be a standing conviction against the appellant. The third ground taken was the state of feeling against the appellant in the district; and in particular the strong animosity existing between him and the 'Tehsildar' and Syud Ali Shah, who were two of the witnesses; and the last ground upon which the finding of the two Courts was impeached was the strong improbability that the appellant, who had been instrumental in bringing to justice certain persons of this village connected with the plaintiffs, should have been the person chosen to make the purchase on their behalf.

It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country before which, on a motion for new trial, it is shown that evidence improper to be admitted has been admitted before the Jury. The Court in that case are not judges of fact, and are unable to say what weight the jury may have given to the evidence that ought not to have

been admitted. But it is the duty of their Lordships who are judges of the fact in such a case as this to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees. Their Lordships, nevertheless, must express their regret that the Court of First Instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal.

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Now, setting aside all the hearsay evidence, setting aside the conviction, the proceedings in reference to which seem to have been of a somewhat singular character, and even, for the sake of argument, admitting that the Tehsildar's evidence is not to be entirely relied upon, though their Lordships are by no means prepared to say that that person is unworthy of credit, and resting solely on the evidence which was given by the bankers, and the person described as the Zemindar of Baroot,—it seems to their Lordships impossible to say that the finding of the Court below was wrong. The bankers' evidence is peculiarly valuable, because it is clear, upon the proceedings, that the whole of the village of Baroot was sold together. The bankers were the persons who were employed by persons interested in the other *putti* forming part of that village, to purchase it on their account. They admit such a contract. They speak from their own knowledge to the fact that the Sings bought in the same way for the benefit of the persons interested in the other *putti*, and they speak also to payment of the earnest-money. The other witness is apparently a witness of greater respectability than we usually find in such a case. It is impossible for their Lordships sitting here to estimate the force of the arguments which have been brought against the testimony of these witnesses by Mr. Leith: it is impossible for them to say what may be the feelings which have possibly prompted their evidence against the appellant. Certainly the general feeling of the district seems to be strongly against him, and the conviction that the transaction which the plaintiffs have put forward is really a true transaction appears to be general. But can we thence infer that the respondents' case is a false story? It is

1870 just as likely to be true, and one can conceive no story which, if
MOHUR SING true, would be more likely to create a general feeling against
v
GHURIBA. the appellant. If he felt that he was not likely to have a fair
trial before the local Judge with that feeling in the district
against him, his proper course was to petition the European
Judge to remove the case into his Court, and to try it in the
first instance. But if he has not done that—if he has taken
a trial in the ordinary Court, and that Court has found against
him, and the evidence properly received appears to their Lord-
ships to be trustworthy, or at least to be such that it is impossi-
ble for them to say that it is not trustworthy,—how can their
Lordships be called upon now to set aside the finding of that
Judge, confirmed, as it was afterwards, on appeal by the Zilla
Judge?

In the Court of First Instance, the Principal Sudder Ameen
seems to their Lordships to have mistaken the effect of the con-
tract, and to have held that the parties were entitled to recover
only such a proportion of the land as the sum which they had
actually paid might be taken to represent. The Zilla Judge,
Mr. Sapte, seems to have put a more correct interpretation upon
the contract. He treated it as a contract upon which, on pay-
ment of the balance, they would be entitled to the whole. He
did not fix a period at which this redemption, if one may so call
it, was to take place, but that was set right by the decree of the
High Court.

It therefore seems to their Lordships that, on the whole,
substantial justice has been done in this case, and they will
advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Agent for the appellant: Mr. Wilson.

22 R & C. of 1444.

KALI CHANDRA CHOWDHRY (ONE OF THE DEFENDANTS) v. SHIBCHANDRA BHADURI AND OTHERS (PLAINTIFFS).

P. C.*
1870
Dec. 8.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Evidence as to Adoption—Direct Evidence as opposed to Suspicion.

The Sudder Ameen having held an adoption proved, the Principal Sudder Ameen, on appeal, reversed that decision on the facts. The case came before the High Court on special appeal and the decision then given was appealed to England, and special leave was given by Her Majesty to appeal against the decision of the Principal Sudder Ameen. The decision of the High Court on the law was admitted to be good, but the Judicial Committee reversed the finding of the Principal Sudder Ameen on the facts.

Deeds, though unregistered (registration not being compulsory), when proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside on mere suspicion of perjury and forgery.

THIS was an appeal from a decision of the High Court at Calcutta, dated 12th April 1865, given on a special appeal, and an appeal from a decision of the Principal Sudder Ameen of Mymensing, dated 12th September 1864, given on appeal from a decision of the Sudder Ameen, dated 20th May 1863, whereby the latter decision was reversed. The appeal against the Principal Sudder Ameen's decision was specially admitted by the Queen in Council.

The appeal against the finding of the High Court on the points of law (1) was not attempted to be argued, and the hearing was therefore confined to the question of fact as found by the lower Appellate Court.

Hari Kumar Tui was owner of the property now in dispute. In February 1857, being childless, he applied to one Tilak Chandra Tui Das to give him one of his sons in adoption, and Tilak Chandra accordingly executed a *Dan Patra*

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1870. giving his second son to be adopted. The child was three years old, and the adoption took place accompanied by the usual KALI CHANDRA CHOWDHRY v. ceremonies, the infant being re-named as Beni Chandra Tui.

SHIBOCHANDRA BHADURI. Three years afterwards Hari Kumar, being on his death-bed, executed a will which, after reciting the adoption of Beni Chandra, gave his wife power, in the event of that child's death, to adopt six sons in succession, and he thereby appointed her guardian of the infant, and died.

The widow took upon herself the guardianship, but was shortly afterwards taken ill, and executed a will reciting the adoption and her husband's will, and appointing her brother Bhairab Chandra and her husband's sister Sonamani Dasi, guardians in her place. She then died.

The darogah reported that although the child had been taken in adoption, the proper ceremonies had not been performed, whereupon the Magistrate directed an enquiry as to who were Hari Kumar's heirs. The report, dated 12th May 1859 thereupon made, recited that the relatives and other persons had been summoned and examined; that the adoption had been proved to have regularly taken place; that Bhairab Chandra and Sonamani Dasi had been appointed guardians, and that there was no other relative, save Gadadhar Tui. The two guardians were thereupon recognized by the authorities, and the deceased's property was made over to them, and they managed it, giving leases and receiving the rents.

On the 13th June 1859, they granted a lease for ten years to one Harakrishna Tarraffdar of the property now in dispute, and he was put in possession.

On the 4th August 1860, Beni Chandra died, and Gadadhar Tui, as his heir, became entitled to the property.

On the 13th August 1860, Gadadhar executed, in favor of the appellant, a deed of sale of (amongst other property) the portion so leased to Harakrishna Tarraffdar (the only property now in dispute), which deed recited the vendor's title as heir on the death of the adopted son: this deed was registered, and Harakrishna attorned to the appellant.

An application being made for mutation of names by the substitution of the appellant's, it was opposed by a party

claiming by a prior title to the adopted son's, and by Hari Kumar's sister, on the ground that Gadadhar was not the heir. No other person opposed, and the application resulted, in August 1861, in the appellant being recognized as in possession and entitled to be registered.

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Shortly after this Gadadhar Tui died. On the 4th July 1862, the present suit was brought by Shib Chandra Bhaduri and others against the appellant and Harakrishna and one Kedar Nath Lahuri to obtain possession of the property on the ground that Gadadhar having been the heir of Hari Kumar had, on the 14th June 1859, sold the property to the defendant Kedar Nath Lahuri: that Kedar Nath being in possession was forcibly dispossessed by the persons falsely alleging themselves to be the guardians of the falsely alleged adopted son, and that on the 13th August 1860, the appellant and others had seized Gadadhar, put him in confinement, and fabricated the deed in favor of the appellant. The plaintiffs claimed under a deed of sale executed to them by Kedar Nath Lahuri.

The issues (so far as is material) were whether Beni Chandra had been adopted, and whether the deed on which the appellant relied had been executed as alleged by the plaintiffs.

In proving the deed from Gadadhar, on which the plaintiffs relied, the witnesses failed to prove the payment of the consideration-money, two of them stating that the agreement was that it should be paid when possession was obtained by the purchaser. Several witnesses deposed to having heard that the appellant had obtained the deed from Gadadhar by force, and two of the witnesses denied the adoption, although their names appeared upon the deed of gift. The several documents relating to the adoption and the deed of sale to the appellant were proved by several of the attesting witnesses.

The Sudder Ameen considering the adoption proved, and therefore that Gadadhar's conveyance during the life of the adopted son was invalid, dismissed the suit with costs.

The Principal Sudder Ameen in reversing that judgment said as follows :—

“ But as none of the documents of the adoption of Beni Chandra have been registered, and as from the time Beni

1870 " Chandra has been adopted by Hari Kumar, that is, from
 KALI CHANDRA CHOWDHRY " Falgun 1263, B. S. (March 1856), to the death of Hari
 v. CHANDRA CHOWDHRY " Kumar, 22nd Chaitra of 1265, (April 3rd, 1859) a period of
 SHIBCHANDRA BHADURI " three years, not questioned by any party (during this time),
 " it does not appear that Hari Kumar, or his wife, Jagadamba,
 " has made any statement admitting that Beni was
 " their adopted son, nor does it appear from any papers of
 " any Court that at any time the adoption was made by
 " Hari Kumar; and as all the witnesses in respect of the
 " *Dan Patra*, Poran Krishna Chuckerbutty, priest of Hari
 " Kumar and witness Rup Chand, barber, whose attendance to
 " perform the duties of a barber and priest at the time of adop-
 " tion is very necessary according to shasters, have stated con-
 " trary to the above facts, that after Hari Kumar's demise, a dis-
 " pute having arisen in the Fouzdari Court, on the subject of
 " the properties left by him from fear lest they should be confis-
 " cated by the Government, on allegation of being intestate pro-
 " perty, the *Dan Patra* and deed of permission, &c., were got
 " up, and that the adoption was not actually made; and as the
 " greater part of the witnesses who in support thereof have made
 " their statements are not of the same family and caste, whose
 " testimony at the time of the carrying out of the adoption is
 " most necessary, therefore the adoption of Beni Chandra is
 " really suspicious. From the depositions of several witnesses,
 " it appears that Beni Chandra was brought up by Sonamani,
 " wife of Sukhi Ram's brother, and the fact of Beni Chandra
 " having been brought up by Sonamani according to the con-
 " ditions of the wasiatnama of Jagadamba, is proved by the
 " said wasiatnama, which has been filed in this case. But
 " since under the Hindu shasters a brought up son cannot be
 " adopted,—on the contrary, so long as the receiving in adoption
 " after the performance of the rites and ceremonies according to
 " the injunction of the shasters be not proved,—the adopted son
 " cannot be considered as a rightful owner of the properties left;
 " and as the said wasiatnama, &c., filed with the copy of Gada-
 " dhar's petition for mutation of names under the signature of
 " Sadanando, mookhtear, were considered by the Sudder
 " Ameen as genuine, who, on the strength thereof, confirmed the }

it is impossible that others should have been called. Then, another objection that is made is that the priest of the family, who appears to have been the person who is alleged to have performed the ceremony, when called as a witness, denies that there was any adoption at all. It appears, however, that this very priest is himself a witness to the deed of gift, and he denies that that deed was a genuine deed, and says that he himself, in fact, was a party to the subsequent fabrication of it; his story being that the adoption was a thing which had not taken place at all in Hari Kumar's life-time, but was only thought of after his death. Their Lordships are of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them. Then it is said that the barber also gives evidence against it. Whether the witness who is supposed to be the barber was the barber or not, does not at all clearly appear. He does not himself say that he was a barber, he only says that he was a ryot who had the means of knowing, and who knew something about it, because, he says, he occasionally went to the house. But then it is a very strong confirmation of the truth of the adoption that, with one exception, all the witnesses who are called against the adoption, and profess to say there was no adoption, admit that this boy, Beni Chandra, was, some say one year and some two years before Hari Kumar's death, brought to Hari Kumar's house, and there lived with him, and was brought up, in fact, as his son,—one of them says with a view to adoption. Now, no doubt, that does not of itself make an adopted son, or make him the heir, but when you find a larger body of witnesses who appear to have had quite as much or better knowledge of the facts, come and say that the ceremonies of adoption were actually performed, and that they were present at them, and that the deeds were genuine deeds; then the fact that these witnesses who deny the adoption are obliged to admit that the boy was being brought up in the house during Hari Kumar's life-time very strongly confirms their evidence.

It is said also that the deeds were not registered. If they had been registered it would have been more clear, but it appears to

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be such a common thing not to register deeds, that their Lordships cannot think the mere circumstance of their not being registered is any ground why the adoption should not be believed. Then, indeed, the Judge who disbelieves the adoption himself, refers to the wasiatnama, which was executed by the widow, appointing the guardians, as a genuine instrument. If that is so, it is the strongest evidence of the adoption, for it in terms recognizes the adoption as having been made.

It is important also to consider on which side the possession went, because if the adoption was recognized soon or immediately after Hari Kumar's death, and between his death and the death of the adopted son, and the adopted son was the party in possession, and not the alleged heir, that is very much in favour of the adoption. Now the great weight of evidence clearly is that the adopted son was in possession. There was an inquiry before the Magistrate, which resulted in the adoption being recognized; the guardians of the infant took possession; they gave a lease of the property to the third defendant, Harakrishna Taraffdar, under which he took possession, and under which possession has, in fact, been kept up to the present time. Therefore, the possession has gone along with it, and though Gaddhara Tui certainly seems to have executed this kabala to the party under whom the plaintiffs claim, he did not, as far as their Lordships can see, during the life of the adopted son, take any other step whatever. It is proved by two witnesses that the purchase-money which he was to receive was not paid at the time, whether it has been paid afterwards is left in a great deal of doubt, and that circumstance tends to show that he was not the real owner in possession, but a person who was merely selling a possible title.

Under these circumstances their Lordships are of opinion that although no doubt it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing, on a mere possible suspicion of perjury and forgery.

There was an appeal to the High Court purely on points of

law, but those points have not been argued before their Lordships,—in fact, they have been abandoned.

Their Lordships will therefore recommend Her Majesty to affirm the decision of the High Court dismissing the special appeal; to allow the appeal so far as it relates to the decree of the Principal Sudder Ameen, to reverse that decree, and to declare that in lieu thereof a decree should be made dismissing the appeal from the Court of First Instance with costs; to declare further that any costs which the appellant may have paid in India other than the costs of the special appeal be repaid to him, the appellant to have the costs of this appeal except so far as they have been increased by appealing against the decree of the High Court.

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Appeal dismissed as to the High Court's judgment, but decree of the lower Court on the facts reversed.

Agent for the appellant: Mr. Wilson.

BODHNARAYAN SING AND OTHERS (DEFENDANTS);
AND BY REVIVOR,

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AJODHYA PRASAD SING AND ANOTHER (DEFENDANTS)
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ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

*Evidence, Hearsay, admitted under the Circumstances—Lunacy—Act XXXV
of 1858.*

Where the High Court founded their judgment upon evidence which did not justify the conclusion, the Judicial Committee reviewed the whole evidence, in order to ascertain whether the decree could be supported.

On an inquiry as to the fact of lunacy under Act XXXV of 1858, any finding as to the actual time when the lunacy began is beyond the jurisdiction of the judicial officer making the enquiry.

Where the fact of lunacy was admitted, and the question was the date at which it commenced, the evidence of a planter in the neighbourhood as to

* Present:—THE RIGHT HON'BLE LORD JUSTICE JAMES, LORD JUSTICE MELLISH, SIR JAMES COLVILLE, AND SIR LAWRENCE PEEL.

1870 common report for years in the village as to the lunacy having been admitted by the lower Court, the Judicial Committee refused to reject it.

AJODHYA PRASAD SING v. UMRAO SING. The rule as to admission of evidence laid down by Dr. Lushington in *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkataadry Naidoo* (1) followed.

THIS was an appeal from the High Court at Calcutta, dated 10th December 1863, reversing a decision of the Principal Sudder Ameen of Bhaugulpore.

The action was brought by the respondent as guardian of his lunatic wife to obtain possession of property which had belonged to her father, Tejnarayan Sing, and to set aside an agreement which her sons and their cousins had entered into dividing the property amongst them, and under which possession had been taken.

The facts were these:—

Tejnarayan Sing had two brothers, with whom he divided their ancestral estate. He died in 1820, leaving two widows, Kalabati and Indrabati, and one daughter, Sribati, by Indrabati.

The brothers' sons set up claims to the property as being ancestral and undivided, and therefore (as the Mitakshara applied) going to them by survivorship. The widows were, however, successful in establishing their rights as heirs, and were left for many years unmolested in possession.

In 1852 and 1856, in petitions filed by the widows, Sribati was referred to by them as the next heiress.

In September 1858, the first widow died, and Indrabati claimed the property for herself, with Sribati as the next heiress.

In December 1859, Indrabati died, and the appellants, who were the sons of Tejnarayan's brother, claimed the property.

Sribati had married Umrao Sing and had become the mother of the other respondents.

Disputes having arisen in consequence of the claims set up by the brothers, the daroga was directed to keep the peace, and he, on the 15th December 1859, reported that the parties had settled their disputes by arbitration.

The settlement he alluded to appeared to have been embodied

in a deed executed by Sribati's eldest son, on behalf of himself and his brothers, whereby they agreed to divide the property equally with their cousins, the appellants, in pursuance of an alleged division made by Sribati's mother.

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It did not appear that either Sribati or her husband were in any way parties to this deed.

On the 18th February 1860, Umrao Sing presented a petition under Act XXXV of 1858, stating that Sribati was heiress to the property, that she "has been a lunatic for some time back," and applying to be appointed her curator and guardian, so as to manage the estate. The Judge of the district directed an inquiry to be made by the Moonsiff according to Act XXXV of 1858, sections 6 and 8, as to the lunacy of Sribati. All parties interested appeared in the inquiry; the father and sons of the lady stating her insanity to have commenced after her mother's death, while the cousins alleged it to have commenced long before. The former persons called witnesses, the latter did not; and the Moonsiff, in reporting as to her being at the time of the inquiry insane, said, "From "the evidence it has become known that Mussamat Sribati has, "after the death of her mother, become insane in the month of Magh 1267 Fusli (February and March 1860), at Mouzah" &c. "The intervenors have produced no proofs before me from "which it may be learnt that the Mussamat has been insane for "a great length of time." On this report going before the Judge, he ordered Umrao to be appointed manager, it being proved that Sribati was then insane; but he said the point as to when she became insane was not one to be determined on that proceeding.

By this time the cousins had taken possession of the property claimed by Sribati.

Upon this, Umrao Sing, as his wife's curator, filed the plaint in this suit, alleging that Sribati had got possession of the property while sane after her mother's death, but that she had been dispossessed of a moiety by the appellants, who were the nephews of Sribati's father, under colour of a deed executed by her sons, which he alleged to have been extorted from them. The sons supported their father's statement, and the appellants

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relied on the fact of Sribati having been insane before her mother's death, and on the deed executed by her sons, who, in consequence of their mother's insanity, were the real heirs, being voluntary and binding.

The material issues settled for trial were whether the deed relied upon was executed by the elder son under compulsion, and as to whether Sribati became insane before or after the death of her mother.

The evidence was conflicting; but among other witnesses for the defence, a Mr. W. G. Duff, an indigo planter in the district, deposed:—"I have heard that Mussamat Sribati has "been insane for the period of 15 or 16 years; this is well known. "I have heard it in all the villages, and what I have heard is true." "I have so heard for the past 12 or 12½ years." He admitted that he never saw the lady, but he said that part of his land lay within the zemindari in dispute.

The Principal Sudder Ameen decided that the agreement between the sons and their cousins was proved to have been voluntarily executed and to be binding; and on the issue as to the time of the commencement of the insanity, he said:—

"By the deposition of Mr. Duff, the indigo planter of the "factory of Sungur, and of numerous other respectable wit- "nesses on the part of defendants, it is fully proved that. Mussa- "mat Sribati has been an insane long previously to the "death of Mussamat Indrabati; thus Mr. Duff, who is a "very rich man, and an unconcerned party, and whose evidence "is relied on by the Court, on the ground of its being satisfac- "tory to the Court, deposed that the plaintiff had been an in- "sane since fifteen years; hence it is proved that they are adults, "as they were certainly born prior to her being an insane. When "the said Sribati had been an insane long previously to the "death of her mother, she is not entitled to the right of inherit- "ance under the Shastra—*vide* Mr. Colebrooke's Treatise, pages "360 and 361. Rather, agreeably to the Dhurmashastra, compiled "by Mr. Elberling, *vide* page 77, it devolves on Rudeernarayan "Sing and other grandsons, the writers of the document, to the "extent of one six-annas share; consequently the present suit, "which is instituted on the part of the insane plaintiff, under the

“ guardianship of her husband, Umrao Sing, alleging that she
 “ had been subject to insanity subsequent to the death of Mus-
 “ samat Indrabati in 1267 Fusli’ (1860) is altogether groundless.
 “ It has been so alleged with a view to establish the heritage
 “ right of the insane daughter, and to nullify the right of in-
 “ heritance of the grandsons who have executed the ikrarnama ;
 “ but it is proved that she, plaintiff, had been insane since fifteen
 “ years, consequently she is deprived of the right of inheritance.
 “ The possession of the plaintiff, and of the husband as a *sur-*
 “ *burakar*, by the consent and aid of the grandsons who have
 “ executed the document, which, in respect of a moiety share
 “ under a compromise, will not be held sufficient to set aside the
 “ aforesaid document.”

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He accordingly dismissed the suit. On appeal to the High Court, a Division Bench (1) on the 10th December 1863 gave the following judgment, reversing the decision :—

“ We are of opinion that the sole question at issue was
 “ whether Sribati (now a lunatic), the wife of the plaintiff,
 “ was at the time of her mother Indrabati’s death insane, so
 “ as to be incapable, under the Hindu law, of succeeding to
 “ the estate; and that the proof of her having been so insane
 “ lay upon the defendants.

“ It appears to us that they have failed in proving this fact,
 “ for not merely is the evidence adduced by them upon this
 “ point very far from satisfactory, but it is directly opposed to
 “ the recorded opinion of the Moonsiff deputed by the zilla
 “ Judge in 1860 to investigate the matter of Sribati’s lunacy.
 “ It appears that on that occasion a question arose as to the
 “ commencement of the insanity, and that the plaintiff adduced
 “ a great number of witnesses to show that it had commenced
 “ after the death of her mother; the now defendants, being
 “ parties present, after the examination of many of the wit-
 “ nesses, withdrew from the inquiry, and offered no proof in
 “ support of their own allegation that the insanity had com-
 “ menced at an earlier period. The Moonsiff, reporting
 “ under section 8, Act XXXV of 1858, stated his decided
 “ opinion that Sribati had become insane after her mother

(1) Steer and L. S. Jackson, JJ. See Sevestre’s Rep., 1863, 786.

1870 " died, and this opinion formed by a subordinate Court ap-

AJODHYA PRASAD SINGH " pointed to inquire into the very matter, together with the

v. UMRAO SINGH. " omission of the defendants to call any witnesses at that

" time, are circumstances of the greatest importance. The

" Zilla Judge, it is true, on receiving the Moonsiff's report,

" did not determine the point as to when the lady had be-

" come a lunatic, as he thought he was not called upon to do

" so, but this document does not deprive the Moonsiff's opinion

" of its value. We must therefore declare that Mussamat

" Sribati succeeded to the one-third share of Tejnarayan

" Sing at the death of her mother, and that the plaintiff, being

" the manager appointed under Act XXXV, is entitled to

" recover possession from the defendants of the moiety thereof

" which they withhold.

" We express no opinion as to the effect of the ikrarnama

" referred to in the plaint and judgment of the Court below,

" as far as it affects the interests of Sribati's sons. " It does not

" purport to deal with the rights of Sribati herself, and there-

" fore need not be judicially inquired into in this suit.

" We reverse the judgment of the lower Court, and order

" the plaintiff's suit to be decreed with costs in both Courts,

" and interest as usual."

Against this decision the "cousins appealed to England : they died pending the appeal, which was thereupon revived by their heirs.

Sir R. Palmer, Q.C., and Mr. Leith, for the appellant.—The case is one depending on the facts, but the High Court has erred in attaching to the Moonsiff's report any weight. It was not his duty, according to the terms of the Act, to ascertain when the insanity commenced ; the sole question is as to the insanity at the time of the enquiry Act XXXV of 1858, sections 2 and 7. The Act does not empower the Court to inquire as to the time. The evidence of Mr. Duff is admissible, and no objection was taken at the time. But without it there is sufficient evidence, so that, even if wrongly admitted, the judgment of the Principal Sudder Ameen can be

upheld—Act II of 1855, section 57. The Principal Sudder Ameen, who saw the witnesses, is more capable of judging of the evidence than the Court of Appeal.

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Mr. *Forsyth*, Q.C., and Mr. *Bell*, for the respondents.—The Principal Sudder Ameen, who took the evidence, ceased to hold office before the final decision of the case, and the decision was given by his successor. Although the improper admission of evidence does not necessarily involve the reversal of a decision, yet here Mr. Duff's evidence is clearly the sole ground for the Principal Sudder Ameen deciding as he did. The presumption is in favour of sanity—*Taylor on Evidence*, Volume I, page 166. Mr. Duff's evidence is clearly inadmissible. The Moonsiff had evidence before him, and the report was a fair statement of the impression left on his mind when the parties were actually contesting the point as to when the insanity began. The deed relied on was clearly obtained from the eldest son by undue pressure, and with the intention of using it as evidence that the lady was considered by her own son as insane.

Sir *R. Palmer*, in reply.—It is impossible in this suit to determine the validity of the deed. It involves points not only between the appellants and the various respondents, but points that arise between the respondents themselves. As to Duff's evidence, the country Courts in India are not to be bound by the very strict rules which exist in England—*Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (1).

Their LORDSHIPS gave the following judgment :—

In this case an action in the nature of an ejectment was brought by the respondent, Umrao Sing, as the committee and in right of his wife (a lunatic), for the recovery of certain parcels of land which were admitted to be in the possession of the appellants. The plaint also asked that a certain ikrarnama should be set aside. Their Lordships may at once dispose of

(1) 7 *Moore's I. A.*, 137.

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the latter question by saying that it appears to them, as it appeared to the High Court of Bengal, to be one which cannot be disposed of in this suit; that it is a question which can only be determined between the appellants and the persons who are named as their co-defendants on the record. Their Lordships, therefore, will deal with the case as being nothing but an action in the nature of an ejectment for the recovery of the lands in question from the appellants.

The title upon which the plaintiff sued is based upon the fact that his wife, as the daughter of Indrabati, the last surviving widow of one Tejnarayan, became, on the death of her mother, entitled to the property as the next heir of her father, Tejnarayan; and the principal issue raised in the cause is, whether that lady had not lost her right to inherit by reason of her lunacy. It seems to be admitted on both sides (the point has not been argued here, nor was it argued in the Court below) that, by the Hindu law, if she was, when the succession opened to her,—that is to say, on the death of her mother,—insane, she did lose her right, and that it passed to the three persons who are mentioned in the record to be her sons.

The sole question, therefore, for their Lordships' determination, is a question of fact, whether the lady was or was not insane at the time of her mother's death, or whether, as alleged by the plaintiff, she became insane within two months after that event. This issue of fact was found in favour of the appellants by the Court of first instance, the Principal Sudder Ameen. His judgment was reversed by the High Court upon certain grounds, and it has been contended before their Lordships that those grounds are unsatisfactory, inasmuch as the Appellate Court has given undue weight to a certain document which had been admitted in evidence in the cause. Hence, there being two conflicting judgments, and a grave question touching the weight which ought to be given to a particular document, it has fallen to their Lordships to deal with this case according to their own view of the evidence taken in the cause, and to form their own conclusions upon it.

It seems to their Lordships desirable in the first instance to consider whether, by reason of the undue weight which the

High Court gave to the document in question, the value of its judgment is destroyed. That document is the report of the Moonsiff made upon the application for the appointment of the husband as committee. It appears that, within two months after the death of Indrabati, Umrao Sing applied to the Zilla Judge, under Act XXXV of 1858 of the Indian Legislature, to be appointed committee of his wife, alleging her lunacy. The Act directs that, in case the party lives at a certain distance from the sunder station, the Judge shall delegate the inquiry to a local officer, who in this case was the Moonsiff. The local officer has to report to the Judge, who passes the final order in the case. The Act, however, contemplates only the question of lunacy or sanity at the time of the inquiry; there is no provision in the Act that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

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In these circumstances the appellants, who had long been pressing their claims in respect of this property against the other branch of the family, thought it expedient to appear as objectors on this proceeding. It is not clear that the Judge passed any order allowing them to go before the Moonsiff, but in some way or other, they appear to have been admitted before the Moonsiff. They did not attend throughout the inquiry, and they failed to produce witnesses to prove that the lady had been a lunatic from the time at which they alleged she became so, or at any time before the death of Indrabati. The result, therefore, was that they did not go into their case before the Moonsiff. The Moonsiff, on the other hand, took evidence on the part of the respondent, who was seeking to be appointed committee, and came to the conclusion that the lady was of unsound mind. His report states what I have just said about his having taken the evidence, and then contains this passage:—“In this “case both parties acknowledge the lunacy of Mussamat “Sribati; but the dispute between them is on this subject. The “applicant writes that Mussamat Sribati became insane in the “month of Magh 1267 Fusli (February and March 1860), sub-“sequent to the death of her mother, Mussamat Indrabati, and “the intervenors state contrary to this, that she has been a

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" lunatic for a very long time,—that is to say, from anterior to " the death of Indrabati, her mother. From the evidence of " the witnesses which have been produced on the part of appli- " cant (from Nos. 1 to 29), it has become known that Mus- " samat Sribati, daughter of Mussamat Indrabati, deceased, " after her death, became insane, in the month of Magh " 1267 Fusli (February and March 1860) at Mauza Din- " nari, Pergunna Kundhour, in the house of her husband, " and that she continues in the same state up to this time. " From the evidence as to the lunacy taken by me before the " intervenors, it has been ascertained that the Mussamat " aforesaid is quite insane. The intervenors have produced no " proofs before me from which it may be learnt that the Mus- " samat aforesaid has been insane for a greater length of " time." This report having been made to the Judge, the appellants again objected before the Judge, but the Judge very properly held that he had no jurisdiction to decide the question between the parties; that the simple issue was whether Indrabati was a person possessed of any property, and if so, whether she was sane or insane, and required the protection of a committee; and accordingly he appointed the husband committee. The learned Judge, who delivered the judgment of the High Court, seems to have thought that the evidence before him being conflicting, the scale was turned by the document to which I have just referred. He says:—"The evidence adduced " by them (the appellants) is not only very far from satisfactory, " but it is directly opposed to the recorded opinion of the Moonsiff " deputed by the zilla Judge, in 1860, to investigate the mat- " ter of Sribati's lunacy." It appears to their Lordships that, if he meant to give to this finding, what we do not think he did mean to give, the effect of *res judicata* between the parties, he was clearly wrong. There was no adjudication by any competent tribunal upon the point in issue in this suit. The Moonsiff had no jurisdiction to decide it; nor had the appellants in strictness any *locus standi* before him. If, on the other hand, he meant to say that the conduct of the appellants, as evidenced by that proceeding, had been such as to lead to an inference that the case they afterwards made was untrue, he seems also

to their Lordships to have given an effect to their conduct which it does not fairly bear. All that appears is, that they went unnecessarily before a tribunal which could not have decided the question between them and the opposite party; and that, being there, they failed to produce their evidence. Their Lordships are of opinion that it is neither a necessary nor a legitimate inference from that fact that the evidence which the appellants have produced in this suit ought not to be believed. That being so, their Lordships think that the judgment of the High Court, whether the Judges came to a right conclusion or to a wrong conclusion, has been put upon grounds which do not justify that conclusion.

Their Lordships have then to consider the effect of the whole evidence. The issue is a remarkably simple one; it is whether this lady, admitted on both sides to be a lunatic, became a lunatic between the death of her mother and the period at which the husband applied to be appointed committee,—that is to say, two months afterwards; or whether she had been a lunatic for some considerable period before the death of Indrabati. Now their Lordships will concede that the burden of proof may be on the side of the appellants,—that it may be sufficient for the other party, in proving his title, to prove that this lady, now a lunatic, but who certainly had not always been a lunatic, was the nearest heiress to Tejnarayan; but it is evidently a burden which becomes of a much lighter character when the lunacy is admitted to have supervened within two months of the critical time, the death of Indrabati.

Then, again, the case of the respondent is open to the observation which has been made at the Bar that, if it is true, far better evidence of it might have been produced than has been produced by the respondent. For instance, if the woman became mad within two months of her mother's death, one would suppose that that madness must have been caused by some disorder which would require and receive medical treatment. We have, however, no medical evidence whatever. We have nothing to show that, having been sane up to a certain period, she became suddenly ill. Again, we have none of the near relations of the family produced. The mere fact that the husband verifies, in the ordinary way, the truth of the allegation in the plaint, is

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no answer to the suggestion that, if he had a true case, he, the nearest relation of this party, might have come forward and shown how the madness came on, and all the circumstances relating to it. He, again, has within his power all her family and female domestics; but there is not a single witness produced on that side, except the witnesses of the character so common in the Indian Courts,—*viz.*, male menial servants, dependants, and ryots living in the neighbourhood, who are all obviously persons less likely to have the circumstances deposed to within their knowledge, and to be far less trustworthy than the members of the family who might have been produced. On the other hand, it is said that the evidence produced by the appellants is of no better character. It does not seem to their Lordships that this observation is altogether just. There is certainly, at least, one person produced by the appellants who does stand to the parties in near relationship. No doubt, his testimony is open to the observation that, though the uncle of the lunatic, he is also the father-in-law of one of the appellants, but still he is a man of position; he is a man who from his relationship must have had the means of knowing what he deposes to, and he seems upon the whole to be the most trustworthy witness that has been produced to give direct evidence as to the date of the lunacy on either side. Again, there are the other witnesses mentioned by Sir Roundell Palmer, *viz.*, the two servants, one of whom was employed to take care of her, and they seem to have had more peculiar means of knowledge than those possessed by most of the witnesses on the other side. Then a great deal has been said touching the evidence of the witness upon whom the Principal Sudder Ameen seems, from the expressions in his judgment, to have placed the greatest reliance,—I mean the evidence of Mr. Duff. It has been argued that Mr. Duff's evidence, being mere hearsay, was not admissible at all. Their Lordships are not prepared to admit that this evidence is properly described as mere hearsay. The witness speaks of his own knowledge to the fact that, at a particular period, the insanity of Mussamat Sribati was rumoured and generally believed in the district with which he was conversant. Their Lordships do not feel it necessary to decide whether that testimony, if objected to, would

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have been receivable on the trial of such an issue as this in an English Court of Justice. It has been received in India; and their Lordships conceive that they ought to deal with it according to the principles enunciated by Dr. Lushington in the case mentioned in the course of the argument *Unide Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (1) as those which govern this Board, *viz.*, that, when evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been received in a cause, their Lordships, sitting as an Appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. In the present case their Lordships think that they ought not wholly to reject Mr. Duff's testimony. The next question is, what effect can legitimately be given to it. If we had to deal here with the broad question of sanity or insanity,—whether Mussamat Sribati were now sane or insane,—Mr. Duff's evidence would be of little or no value. But when it is an admitted fact that the woman is insane, and the question is whether she first became so before or after the date of the death of Indrabati, the testimony of a trustworthy witness, that long before that period she was, to his knowledge, reputed insane, is an important corroboration of the direct testimony given in the cause to the fact of her insanity at that time.

Their Lordships, moreover, deem it right to observe that, if Mr. Duff's deposition was struck out of the record, they would, nevertheless, be of opinion that the preponderance of the evidence is in favour of the conclusion that the lady was insane at the time of Indrabati's death. And they are confirmed in that opinion when they come to consider the *res gestæ* of the case. This family was originally a joint family, and there was an attempt at a partition as early as 1802. From that time forth, however, the two branches of the family represented by the appellants seem to have contended that the estates were to a certain extent joint, and that the descent of them was to be governed by the rules regulating the descent of joint property. Their Lordships do not say whether they were right or wrong. In the life-time of the two widows, there seems to have been an

(1) 7 Moore's I. A., 137.

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arrangement by which the widows were left in possession of the property, but it is said on some understanding that on their death it was to go as if it were joint estate to the male heirs. Whatever may be the merits of that contention, it seems to their Lordships impossible to resist the conclusion that the punchayet, which is alleged to have been held, was held. Possibly the circumstances which led to it may have been circumstances of violence tending to a breach of the peace, but with that we have nothing to do. In point of fact, their Lordships believe that the punchayet was held ; that the ikrarnama was executed in pursuance of that punchayet ; and that the possession of the lands, which is now admitted to be in the appellants, followed upon the execution of that instrument. It is unnecessary to consider whether that document was obtained by duress or fraud, or anything of that kind, for that is a question which can only arise between the sons of this lady, who executed it, and the appellants ; but if the transactions above mentioned did take place then, it follows that at that time, which was immediately after the death of Indrabati, the sons, and not the mother, were held out to be and were dealt with as the heirs. If the lady had not then been insane, it seems most improbable that some person would not have put forward her interest, or that the appellants would have dealt with those as heirs who really did not possess that character.

Therefore, weighing all the circumstances, their Lordships have come to the conclusion that the Principal Sudder Ameen was right in the view which he took of the evidence, that Mus-samat Sribati was of unsound mind at the time of her mother Indrabati's death, and that consequently the plaintiff in the action has failed to make out his title. Their Lordships must, therefore, recommend Her Majesty to reverse the decision of the High Court, and to order that, in lieu thereof, the appeal to that Court against the decree of the Principal Sudder Ameen dismissing the appellant's suit, be dismissed with costs. The appellants must also have their costs of this appeal.

Appeal allowed.

Agent for the appellants : Mr. Wilson.

Agents for the respondents : Messrs. J. H. & H. R. Henderson.

[APPELLATE CIVIL.]

Before Mr. Justice Loch and Mr. Justice Ainslie.

BRAJA LAL ROY (PLAINTIFF) v. SAYAMA CHARAN BHUTT
AND OTHERS (DEFENDANTS.)*

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Rent—Apportionment of Rent—Joinder of Parties.

Where a tenant held lands in six villages under a patnidar at an admitted rent, and the patnidar subsequently granted darpatnis to two different parties of two and four of the said villages respectively; the tenant having admitted a certain sum to be the rent payable in respect of the lands situated in the two villages, *held*, the darpatnidar of the other four villages could sue the tenant for the rent payable in respect of the lands situated in the four villages comprised in his darpatni, without joining as co-plaintiff in the action the darpatnidar of the two villages, and the rent payable to the darpatnidar of the four villages was properly estimated as the difference between the admitted rent of the land in all six villages, and the admitted rent of the land situated in the two villages.

THE defendant in this case held six villages under one Rakhal Das Banerjee, the patnidar, at a jumma of Rs. 1,342-1-16½. Afterwards Rakhal Das conveyed four of these villages to the plaintiff in darpatni, and the remaining two to one Jadunath Chatterjee. The plaintiff brought this suit to recover Rs. 1,048-13-16½ as rent of the four villages.

The defendant urged that he was not in occupation of the whole of the lands; that there was no specification in the plaint of the proportion of rent belonging to each of the four villages; and that the plaintiff could not bring this suit, as he was not a darpatnidar of the whole six villages.

The first Court passed a decree in favour of the plaintiff, on the ground that the occupation of the land by the plaintiff was proved, and that in a former suit the defendant himself, in his written statement, mentioned the very sums which the plaintiff

* Special Appeal, No. 1442 of 1870, from a decree of the Officiating Judge of Nuddea, dated the 20th July 1870, reversing a decree of the Deputy Collector of that district, dated the 31st March 1869.

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had in this case deducted on account of the two other villages which he does not hold, *viz.*, Rs. 293-3.

On appeal, the Judge dismissed the plaintiff's suit, on the ground that the plaint failed to disclose a title in the plaintiff to sue separately from Jadunath Chatterjee, the holder of the other two villages.

From this decision of the Judge a special appeal was preferred.

Baboos *Rames Chandra Mitter*, *Girish Chandra Mookerjee*, and *Rash Behari Ghose* for the appellant.

Baboos *Srinath Das* and *Mati Lal Mookerjee* for the respondents.

The judgment of the Court was delivered by

AINSLIE, J.—In this suit the plaintiff claims rent of certain lands situated in four villages. It is stated that six villages were granted in patni to one Rakhal Das Banerjee, and that in these six villages the defendant held lands at an annual rent of rupees 1,342.

Rakhal Das Banerjee sub-let the villages in darpatni,—four to the plaintiff, and two to one Jadunath Chatterjee.

In a written statement in a former suit the defendant stated the amount payable on account of the last two villages, and also in this suit, at the time of settling the issues. That amount,—*viz.*, Rs. 293-3, was admitted before the Deputy Collector. The plaintiff claims the difference between the total rent of rupees 1,342, and the rent of the land in those two villages.

The Deputy Collector has held that the rent payable to the plaintiff is sufficiently determined by the defendant's own admissions; he has also adjudicated on the plea of non-occupation set up by the defendant, and, deducting the amount paid as admitted by the plaintiff, he has given a decree for the balance with an order for ejectment on failure to pay the amount decreed within fifteen days.

The defendant appealed to the Judge, who has dismissed the

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suit without going into the merits, on the ground that the plaintiff fails to disclose a title in the plaintiff to sue separately from Jadunath Chatterjee; and says, "The grounds of the claim are so utterly inadmissible, that even though the defendant has gone far in admitting the claim (though not so far as to enable the Court to pronounce any decision on the merits), the whole of the costs must fall on the plaintiff."

In special appeal, it is contended that the defendant never pleaded that the lands of the six mauzas constituted an indivisible tenure, and that there was no issue as to plaintiff's right of separate suit, and that the defendant pleaded payment of a portion of the claim to the plaintiff. On the other hand, we have been referred to the cases of *Jagadamba Dasi v. Haran Chandra Dutt* (1), *Ganga Narayan Das v. Saroda Mohan Roy Chowdhry* (2), and *Kalinath Banerjee v. Mahomed Hossein* (3). In the first case, Mr. Justice Phear, while holding that a kabuliat given to a mother could not after her death be treated as two separate kabuliats in favour of her two daughters for their respective shares of their mother's estate, remarks that the original contract might probably have been varied by a subsequent parol agreement so as to give each daughter a separate right of suit. In the second case, Mr. Justice Macpherson, in commenting on the judgment of the lower Appellate Court, which held that a clear and undisputed definition of shares was sufficient to warrant separate suits, observes, "if the plaintiff can prove that the defendants have heretofore recognized him as being the proprietor of a particular share, and have paid to him separately a certain proportion of the rent, then no doubt the suit will lie against them." The third case is in no way in point. In both the earlier cases the defendants appear to have from first to last contested the plaintiff's right of suit. But this case is clearly distinguishable from those cases. The defendant claimed that the plaintiff should specify the separate rents of all the villages, with a view to showing that, owing to non-occupation of certain portions of the land in suit, he was entitled to abate-

(1) See *post*, p. 526.

(3) See *post*, p. 528.

(2) 3 B. L. R., A. C., 230.

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BRAJA LAL ROY ment; but when the issues were framed, he did not insist on

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the plea that the plaintiff could not sue separately from

Before Mr. Justice Phear and Mr. Justice Hobhouse.

*4 Cal. p. 101. JAGADAMBA DASI (PLAINTIFF) v. HARAN CHANDRA DUTT AND OTHERS
24 Cal. p. 557. (DEFENDANTS.)**

The 3rd July 1868.

Baboo Chandra Madhab Ghose for the appellant.

Baboos Anukul Chandra Mookerjee and Kali Prasanna Dutt for the respondents.

The facts of the case are fully stated in the judgment of the Court, which was delivered by

PHEAR, J.—According to the plaint in this case, on the 11th of Aghran 1255 (25th November 1848), three brothers, Baidonath, Purna Chandra, and Kali Kumar, executed a kabuliat in respect of certain lands in favour of Rashmani Dasi, agreeing thereby to pay an annual rent of Rs. 9,066 and odd annas to the said Rashmani Dasi. That kabuliat is still in force, but Rashmani Dasi is dead, and Kali Kumar is also dead. Rashmani Dasi left two daughters surviving her, the plaintiff, and one Padmabati Dasi. The plaintiff in this suit seeks to recover from Baidonath, Purna Chandra, and the representatives of Kali Kumar, one moiety of the rents due for the years from 1271 to 1274 (1864 to 1867) under the kabuliat which was originally executed by the three brothers in favour of Rashmani Dasi. Padmabati is not a party to this suit. On the objection of the defendants, the lower Appellate Court has dismissed the plaintiff's claim on the

ground that she has not made out a title to sue alone for a moiety of the rent due under the kabuliat, and against this decision of the Deputy Collector, the plaintiff now appeals to this Court. Had the kabuliat been originally given to the plaintiff and her sister jointly, not specifying any separate shares or interests on the face of it, still it might have been the case that the tenants did, at the same time in effect, agree to pay the rent in specified shares to the two sisters separately; and if that were so, then in the event of one of them suing separately for her share, probably she would be allowed in equity to supplement the agreement exhibited by the kabuliat by proving the contemporaneous parol agreement on the part of the tenants, and so to show herself entitled to recover a portion only of the rent named in the kabuliat without making her sister a party to the suit.

Again, taking the kabuliat to have been originally given, as the plaintiff says it was in this case, to her mother only, it might have been that on the death of Rashmani Dasi the tenants had come in and made a like agreement to pay the rent to the daughters separately in separate shares; and, if that had been the case, probably, as in the instance which I have just supposed, the plaintiff might, on proving this parol agreement, succeed in obtaining her own particular share, without making her sister a party to the suit. But neither of these two alternatives has occurred in this case. The plaintiff does not sug-

* Regular Appeal, No. 326 of 1867, from a decree of the Deputy Collector of Bassir-haut, Zilla 24-Pergunnas, dated the 12th of August 1867.

Jadunath Chatterjee. On the contrary, he appears to have admitted that the rent of his lands in the two villages held by

gest that either of them has taken place. She simply sues alone as representative of her mother, not in respect of the whole contract, but in respect of the half only,—that is, she claims to be entitled to treat a contract which, when originally made with her mother, was single and indivisible, as if it had become, by the death alone of her mother, separable into two contracts,—namely, one with herself, and one with her sister, each for the amount of half the rent. It seems to us she cannot do this. If she is entitled to come into Court as representative of her mother, she must represent her altogether, and sue upon the original contract as a whole. If she is not so entitled, but if complete representation can only be made to Rashmani Dasi by the joinder of Padmabati with her sister in the suit, then a difficulty of procedure no doubt occurs on the facts of the case as they have been represented by the pleader for the plaintiff,—namely, that Padmabati refuses to join with the plaintiff. Still this difficulty is not altogether insuperable, because by the elastic procedure of our Civil Courts, if one of two or more joint partners refuses to sue jointly with his co-sharers, he may be made a defendant, and when once all the persons concerned on the one side and on the other, are parties to the suit, the Court has full power to do complete justice between them. We think that on the state of facts disclosed by the plaint and written statements of the defendants, the plaintiff has made out no title to sue alone for one moiety of the rent. She ought to have sued together with her sister for the whole rent, and if she could not induce her

sister to become plaintiff with her, then she might probably have made her sister a defendant. At any rate, if this could not be done in the Revenue Court, she would have her remedy in the Civil Court. She could there have sued her sister and the present defendants for an apportionment of the rent between herself and sister according to their respective beneficial interests therein. But this course has not been taken. The defendants are quite justified in urging that they would not be safe if they paid either the whole or any specified share of the rent to the plaintiff. Any decision which should be come to on the record as it at present stands, could not possibly affect any right which Padmabati, the sister, enjoys either jointly with or separately from the plaintiff. We think, therefore, that the lower Court was right in saying that the plaintiff had made out no title to sue alone, or to sue without making her sister a party to the suit.

It has been pressed upon us by the pleader for the plaintiff that the Court itself, upon becoming cognizant of the state of the record relative to the plaintiff's cause of action, ought to have added Padmabati as a party. This argument is based upon the assumption that the Deputy Collector has the power which the Judge of a Civil Court has in this respect, by reason of the provisions of section 73 of Act VIII of 1859. It is not necessary now for us to determine judicially whether the Deputy Collector has the authority which is given to the Civil Courts by section 73, Act VIII of 1859. But assuming for a moment that he has such authority, we observe that in this case he was

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Jadunath was Rs. 293-3, and the issues on which he went to trial were only whether he was responsible to the plaintiff

never asked by the plaintiff to exercise his discretion in the matter; and, on the contrary, one of the grounds of appeal to this Court is substantially to the effect that it was perfectly unnecessary in this suit that Padmabati should be made a party at all, and that consequently the decision of the Deputy Collector, founded as it is upon the fact of her not being a party, is wrong in law. But even had he been asked by the party to exercise his power of adding another person to the record, either as plaintiff or defendant, and had he refused to do so, we think that, under the ruling of this Court (1), we, as a Court of Appeal, would have no power to interfere with his discretion,—always excepting, of course, any case in which we might see that this discretion had been exercised capriciously, or that it was otherwise absolutely necessary for the purpose of doing justice between the parties that the additional person should be put upon the record. We have no cause whatever for saying that, had the Deputy Collector, under the circumstances of this case, judicially exercised his discretion, and refused to add Padmabati as a party, he would in so doing have acted capriciously or in such a way as to endanger the proper administration of justice. We therefore think that this argument of the plaintiff's pleader ought not to induce us to remand the case.

(1) *Poran Mundul Mollah v. Sham Chand Ghose*, 1 W. R., 228; and *Doyaram Seal v. Issur Chunder Chuckerbatty*, 2 W. R., 158.

On the whole we are of opinion that the Deputy Collector was right, and that the plaintiff's suit was correctly dismissed. We dismiss the appeal with costs.

Before Mr. Justice Phear and Mr. Justice Mitter.

KALI NATH BANERJEE (PLAINTIFF) v.
MAHOMED HOSSEIN AND OTHERS
(DEFENDANTS.)*

The 31st May 1870.

THIS was a suit by a co-sharer of a zemindari for his share of the rent of a talook leased to the defendant. The suit was brought upon a kabuliat, which the defendant had executed to the plaintiff for the entire sixteen annas; but the plaintiff admitted that at the time of the execution of the kabuliat he was proprietor of only eight annas. The plaintiff made the owner of the other eight-anna share a defendant in the suit. The Deputy Collector dismissed the suit, on the ground that the plaintiff's agent having declared that the shares of the plaintiff and defendant had not been ascertained in any Court of Justice, it was not competent to one of two share-holders of an undivided estate to sue separately for his share of the rents of an under-tenant.

The Judge, on appeal, confirmed that decision, saying that, as at the time of the execution of the kabuliat, the plaintiff was the owner of an eight-anna share only, the kabuliat was executed to him as the repre-

* Special Appeal, No 261 of 1870, from a decree of the Judge of Chittagong, dated the 22nd November 1869, affirming a decree of the Deputy Collector of that district, dated the 16th July 1869.

for the whole of the balance. He had on a previous occasion made a similar statement as to the apportionment of the rents. I think it must be held that the defendant in this suit went to trial on the understanding that he was the tenant of the plaintiff, separately, for the four villages which originally bore a certain rent, and that the only contention was whether he was not entitled to an abatement of that rent for reasons which in no way affected Jadunath Chatterjee, and whether he had not paid to the plaintiff the full amount due to him as darpatnidar of the four villages. The plea on which the Judge has dismissed the suit appears to have been designedly abandoned in the first Court, and should not have been entertained in the lower Appellate Court. In this view I would remand the suit for trial by the Judge on the issues laid down by the first Court. Costs to follow the result.

Suit remanded to the Lower Court.

sentative of the proprietors of the entire sixteen annas.

A special appeal was then preferred by the plaintiff.

Baboo Chandra Madhab Ghose and Khettra Mohan Mookerjee for the appellant.

Mr. G. A. Twidale for the respondent.

The judgment of the Court was delivered by

PHEAR, J.—We think that this special appeal cannot be sustained. The plaintiff has disclosed in his plaint that he is not the person solely entitled to the rents due from the defendants, and the defendant has objected that

the other co-sharers are not co-plaintiffs with him. Instead of being co-plaintiffs, the co-sharers have been made co-defendants. But this is no answer to the defendant's objection. The Revenue Court is not able to administer equities either between co-defendants, or between a plaintiff and a defendant who ought to have been joined as a co-plaintiff.

The Court in this suit could only judicially declare what is due from the defendants as lessees to the plaintiff as lessor.

The lower Appellate Court was quite right in holding that the objection of the tenant-defendant must prevail, and consequently we dismiss this appeal with costs.

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[PRIVY COUNCIL.]

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Dec. 16, 18, SCOTT ELLIOTT AND OTHERS (DEFENDANTS).
 19.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
 FORT WILLIAM IN BENGAL.

Mortgage by one of a Joint Hindu Family—Surrender of Equity of Redemption—Act XIV of 1859, s. 1, cl. 13, 15; ss. 5, 10—Purchaser for valuable Consideration—Pleading.

A member of a joint Hindu family granted a usufructuary mortgage: he subsequently, without the knowledge of the co-partners, released the equity of redemption: on hearing of this the co-partners contested the validity of the release: *Held*, that the parties claiming from the person to whom the release was made took, so far as the co-partners were concerned, a title only as mortgagees.

Act XIV of 1859, section 1, clause 13, is intended to apply to suits between members of a joint family, not to a case where a mortgage having been made by one member on behalf of all to a stranger, that member afterwards, against the will of his co-partners, releases the equity of redemption.

To entitle a purchaser to claim the benefit of Act XIV of 1859, section 5, he must prove,—1st, that he is a purchaser of what is represented to him and what he fully believes to be not a mortgage but an absolute title; 2nd, that he purchased *bonâ fide*, that is to say, without a knowledge of the title having been originally a mortgage and of a doubt existing as to the mortgage having ceased; and 3rd, that he is a purchaser for valuable consideration.

A pleading setting up as a defence a purchase for valuable consideration should aver the seisin of the vendor, and the sale of his absolute title for good consideration.

Where an estate having been originally mortgaged by K., a member of a joint Hindu family, he subsequently, without the knowledge of the other members, released the equity of redemption to R., who afterwards sold to H., the owner of a factory, who afterwards sold to G. and Co. the factory with the lands appertaining thereto, amongst which was the property so released, and proceedings had for many years been taken by the other members to assert their rights,—

* Present:—THE RIGHT HON'BLE LORD CAIRNS, SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, AND SIR LAWRENCE PEEL,

Held, reversing the decision of the High Court that G. and Co. were not purchasers entitled to the protection of Act XIV of 1859, section 5. *Held* also, that section 10 does not apply in such a case, although K. acted fraudulently.

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JAMES SCOTT
ELLIOTT.

THIS was an appeal from a decision of the High Court at Calcutta, dated 15th May 1866 (1).

The appellants were the plaintiffs, and sued Messrs. Gisborne and Co. to recover a 14-anna share of the Mahianwan Talook, on the ground that the defendants and their predecessors were in possession as mortgagees, and had long since been overpaid the amonut due on the mortgage: the mortgage was dated 21st November 1828, and mesne profits were claimed from 1837, that being the year in which the debt was alleged to have been paid off.

The appellants claimed as members of a joint Hindu family, of which Kanhyā Lal was a member, he being entitled to two-annas in any joint property. The appellants excluded his two-annas from the claim now made.

In 1826, Kanhyā Lal, as proprietor of the talook, mortgaged it to Mr. Shawe of the Bhudari factory: Mr. Shawe attempted to foreclose, but was unsuccessful.

On 19th November 1828, Kanhyā Lal made an arrangement with the other members of his family (but of this neither Mr. Shawe nor any person out of the family appeared to have any knowledge), whereby he recited his debt to Mr. Shawe, the necessity of executing a mortgage of a portion of the property to Mr. Shawe's gomasta, Rassik Lal Das, for eleven years, and the fact of his having set aside one mauza (Ugda) for the support of the family until he could redeem the mortgage.

- On the 21st November 1828, he, purporting to be sole proprietor, executed to Rassik Lal an absolute deed of sale, Rassik Lal executing an ikrarnama by which he agreed to give credit yearly for all receipts from rents, &c., and, if the mortgage debt were paid at the end of the term, to return the property. Rassik Lal was to protect the property from being sold for Government revenue.

Rassik Lal was in fact *benami* for the Indigo factory (Messrs. Shawe and Hawes).

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Kanhya Lal was in debt to others, amongst whom was one Bholanath, who, having obtained a decree against him, seized the talook in 1832. Rassik Lal intervened, and alleged that the ikrarnama had been returned to him, the mortgage being thereby converted into an absolute sale. The ground on which the ikrarnama purported to be returned was that the proceeds on account of the drought were insufficient to pay the interest. The Judge directed the sale to proceed, but the Sudder, on appeal, directed him to stay the sale and enquire into the truth of the reason for returning the ikrarnama, but by that time (August 1833), the execution had been withdrawn, so no enquiry was made.

In the meantime, the other members of the family had intervened to stay the sale in execution, on the ground that they were interested as shareholders, and, being referred to a regular suit, they in May 1833 sued Bholanath to restrain him from selling more than Kanhya Lal's share, and in that suit they stated the mortgage to Rassik Lal as being for the joint family. That suit was nonsuited as the execution was withdrawn.

In 1838, the Act enabling British subjects to hold land in India having been passed (2), Rassik Lal conveyed the property to Shawe and Hawes absolutely for Rs. 17,011,—the same amount as the original mortgage debt.

Kanhya Lal, thereupon, in May 1838, brought a suit for possession against Rassik Lal, Shawe and Hawes, on the ground that the ikrarnama had only been returned to protect the property against his creditors, that it was still a mortgage, and that the debt had been paid by receipt of rent.

The defence set up was that the return of the ikrarnama put an end to the mortgage.

The suit was nonsuited for being wrongly valued.

On the 30th November 1838, the other members of the family sued for possession of all save Kanhya Lal's share: the defence was that the property was the separate property of Kanhya Lal: that suit was nonsuited on technical grounds, leave being given to sue *de novo*.

In September 1840, Hawes and Shawe were registered in the Collectorate books.

On the 5th and 6th February 1841, Hawes who had become by various conveyances sole owner of the Bhudari Factory and four other factories, executed indentures of lease and release to the then members of Gisborne and Co. These deeds were in the usual form of English conveyances by way of lease and release, and did not mention the Mahianwan Talook by name, or the parcels particularly, but described the premises thus:

“ All those five indigo factories or sets of works for the cultivation and manufacture of indigo called or known by the respective names or descriptions of Bhudari, Piallapore, Sahebgunge, Chuppergaut, and Atparah, otherwise Dawoo Dour, all respectively situate and being in the district of Bhagulpore and province of Behar. And also all that other indigo factory or set of works for the cultivation and manufacture of indigo called or known by the name of Peerpointy Factory, also situate and being in the said district of Bhagulpore and province of Behar aforesaid. And also all that other factory or set of works for the cultivation and manufacture of indigo called or known by the name of Lukipore, Ekdala, otherwise called Gyatolla, also situate and being in the zilla and province aforesaid, or howsoever otherwise the said several indigo factories or works or any or either of them now are or is or at any time heretofore were or was respectively situated, called, known, described, or distinguished, and all lands, cultivated and uncultivated, to the said several and respective indigo factories or sets of works respectively belonging or in anywise appertaining, save and except the proprietary rights of him the said William Hawes in and to the two several villages of Mundia and Mowahrah, now under assessment by the Government. And also all messuages, tenements, dwelling and other houses, out-houses, bungalows, stables, sheds, godowns, and other buildings of every kind, erected and built thereon. And also all vats, reservoirs, cisterns, pumps, boilers, presses, screws and other fixtures standing and being in and upon the said several and respective indigo factories or sets of works and premises or any of them or any part thereof; and also all implements, utensils, and materials for the cultivation and manufacture of indigo plant and indigo elephants, horses, bullocks, buffaloes, cattle,

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1870 " carts, carriages, goods, wares, chattels, and merchandize in and upon or belonging to the same several and respective indigo factories or sets of works, lands, hereditaments, and premises respectively. And also all indigo plant and crops growing and to be grown as well on the said lands belonging to the said indigo factories respectively, as also on any other lands for the purpose of being manufactured, and made into indigo at or upon the said factories or works and premises or any or either of them. And also all balances, debts, sum and sums of money due and owing by ryots or other persons to the said several and respective indigo factories or works or any or either of them or to the owners or proprietors thereof. And also all ways, paths, passages, wells, tanks, reservoirs, waters, lands covered with water, water courses, trees, woods, jungles, under-woods, and the ground and soil thereof, and all and all manner of rights, easements, emoluments, liberties, privileges, advantages, appendages and appurtenances whatsoever to the said several and respective indigo factories or sets of works, lands, hereditaments, and premises, and every or any part or parcel thereof respectively belonging or in anywise appertaining or therewith usually held and occupied, possessed, enjoyed, or accepted, reputed, deemed, taken or known as part, parcel, or member thereof, or of any part thereof respectively, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, use, trust, property, possession, possibility, claim, and demand whatsoever both at law and in equity of them the said William Hawes, Robert Molloy, and James Cullen, and each of them, in, to, out of, or upon the said several and respective indigo factories or sets of works, lands, hereditaments, chattels, and premises, and every or any part or parcel thereof, &c. And also all deeds, pottahs, muniments, writings, and evidences whatsoever relating to the said several and respective indigo factories or sets of works, hereditaments, and premises or any of them or any part or parcel thereof hereby appointed and released, or otherwise assured or mentioned or intended so to be, now in the custody of the said William Hawes, Robert Molloy, and James Cullen or any or either of them, or which they or any of them can procure

"without suit at law or in equity. To have and to hold,
" &c."

Under this deed Gisborne and Co. obtained possession however of the Mahianwan Talook.

In January 1843 the members of the Das family sued Kanhya Lal, Rassik Lal, Shawe, Hawes, and Gisborne and Co., stating that Kanhya Lal had, acting in their behalf, granted the mortgage, that he had fraudulently, in collusion with Shawe and Rassik Lal, converted the conditional into an absolute sale, and praying for possession on the ground of the defendants being satisfied mortgagees in possession.

The defence set up by Rassik Lal was that the property was, with the approval and advice of the plaintiffs as admitted by them (although he denied that they had any right in the property), absolutely sold, and that the claim was barred by limitation. The other defendants referred to his answer as showing that the claim was false.

That suit was nonsuited on technical grounds.

In August 1847, on an application for mutation of names and the substitution of those of Gisborne and Co., the nonsuited members of the Das family objected, but were referred to a regular suit.

On the 13th June 1850, they brought a suit for redemption of the whole save Kanhya Lal's share, on the ground of the produce having satisfied the claim, but were nonsuited for want of parties.

No further proceedings were taken until the 30th December 1864, when the present suit was brought by all the members of the family save Kanhya Lal, to redeem all save his share, and to obtain mesne profits since the alleged payment of the mortgage in 1837.

The defendants (Messrs. Gisborne and Co.) put in an answer which, so far as is necessary for the present case, is set out in the judgment of the Lords of the Judicial Committee (1).

The important issues were whether the property was joint or several, and whether the suit was barred by the Law of Limitation.

On the 28th August 1865, Mr. Madocks, the Judge of Bhagulpore, held that the property was joint; that there was no

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(1) See *post* pp. 542, 545.

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extinguishment of the mortgage by the return of the ikrar-nama; that the case was one within the sixty years law of limitation (1); and that the defendants were not purchasers without notice (2); and he gave a decree for mesne profits, limited however to six years preceding the suit.

On appeal the High Court (3), while agreeing with the Judge as to the property being joint, held that the defendants being purchasers within the meaning of section 5 of the Act were protected by the law of Limitation, and they dismissed the suit (4).

Against that decision the plaintiffs appealed.

Sir R. Palmer, Q.C., and Mr. Doyne (Mr. Leith with them) for the appellants.—This being joint property, the absolute conveyance by Kanhya Lal, if made, could not affect the interests of his co-partners. He had authority only to mortgage; there has been no foreclosure as to the shares of the other members. They were, at the date of Gisborne and Co.'s purchase, entitled to call for a reconveyance—Reg. I. of 1798, preamble and section 3. They could not be purchasers *bond fide* if they bought what was a mortgage title: if they had bought without notice of a mortgage having existed, it might be different. But under the purchase here, they could not take more than the vendor had to sell; there is not a word in the instrument that could be held to convey a greater interest than the assignors had—*Rodger v. The Comptoir D'Escompte de Paris* (5). If any words in the deed convey this property, it must be those that assign securities for money. It appears that the deed was not produced until the case came before the High Court, or the Judge would have been even more struck with the correctness of his decision. A purchaser from a mortgagee is in the same position as a purchaser from a trustee with notice of the trust. [Lord CAIRNS.—A *bond fide* purchaser from a trustee must prove,—1st, that he purchased as purchaser of the estate as belonging to the vendor; 2nd, that he purchased in good

(1) Act XIV of 1859, sec. 1, cl. 15. (4) 5 W. R., 253.

(2) Act XIV of 1859, sec. 5. (5) 2 L. R., P. C., 393, see 406.

(3) Norman and Campbell, JJ.

faith; 3rd, that he purchased for good consideration]. They could not think they were buying a good title: the former proceedings showed it was originally a mortgage, and that the surrender of the equity of redemption was disputed.

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The *Solicitor General* (Sir J. D. Coleridge), and Mr. Cotton, Q. C. (Mr. Bell with them) for the respondents.—The High Court did not go into the facts as to the joint estate: they did not consider it necessary to do so, deciding as they did, that the Law of Limitation applied, and their not disapproving of the finding on that point is not as if there were the decisions of two Courts on a question of fact. It is clear from the accounts of the produce filed by the plaintiffs that the reason assigned for the return of the ikrarnama was true. The words of this conveyance are sufficient to carry the fee or absolute estate. [Sir J. COLVILLE.—That might be so if the vendor had an absolute estate]. What is the use of the Statute of Limitations if it is not to apply to such a case as this? [Lord CAIRNS.—If a man buys in good faith from a mortgagee, believing he buys an absolute property and knowing nothing of a mortgage, it is different. Suppose there had been a mortgage, and the mortgagee forged a release of the equity of redemption, and the purchaser believed it to be real, it would be a case for the Statute protecting him]. The allegation by the plaintiffs is that they were defrauded by Kanhya Lal; if so, the 10th section of the Act applies taken with section 1, clause 13. [Sir R. Palmer.—That clause is not intended to apply to mortgages. Lord CAIRNS.—It seems to apply to suits where one member of a joint family sues on an ouster by another member]. There is nothing in this case to show that Gisborne and Co. had any notice that could lead them to suspect they were buying a mortgage title. The learned counsel then referred to the evidence to show that as to this property the family was not joint.

Sir R. Palmer, in reply, was stopped by the Court.

Their LORDSHIPS' judgment was then delivered by

LORD CAIRNS.—The claim in this case, which led to the deci-

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sion which is under appeal, was a claim in substance for the recovery of property at present in the possession of the respondents, Messrs. Gisborne and Co. The recovery of that property was sought by the appellants on the footing that it had been made the subject of a conditional sale in the year 1828; and that they, the appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of Kanhyा Lal as mortgagor, to one Rassik Lal as mortgagee. The appellants say that Kanhyा Lal was the member of a joint family, of a family joint as regards this property, and that they, the appellants, were the other members of that joint family, and that the mortgage was made either with their previous approbation, or their subsequent assent. Rassik Lal, beyond doubt, was the native agent of the firm of Shawe and Hawes, and the mortgage, beyond doubt, was made to Rassik Lal, because as the law stood at that time Englishmen could not have held immoveable property in this part of India in their own name. That law having subsequently been altered, Rassik Lal assigned over to his principals, Shawe and Hawes, the property which he thus held for them in mortgage. Subsequently Shawe relinquished his share to Hawes, and finally by a deed executed in the year 1841, the details of which will afterwards have to be referred to, Hawes passed over or conveyed the property to the present respondents, Messrs. Gisborne and Co.

Now the first question which arises in this state of things, is as to the right of the plaintiffs to redeem this property. Their possession as members of a joint family is denied by the respondents, who contend that there is no evidence that the family was joint, or that this property belonged originally to any person other than Kanhyा Lal, the mortgagee. Upon that question, Mr. Madocks, the District Judge, before whom the case first came, has delivered a very elaborate and careful judgment, in which he has come to the conclusion that the joint ownership of the property was made out in favour of the appellants, and

although it was not necessary for the High Court of Calcutta, in the view they took of another part of the case, absolutely to decide this question, they do not appear to have disapproved of the conclusion on this point, at which Mr. Madocks had arrived. The evidence having been so fully and satisfactorily commented upon by Mr. Madocks, their Lordships do not think it necessary to say more than this, that looking to the form of the Government's settlement of this property, looking to the history of the family which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the ikrarnama executed between Kanhya Lal and the other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the Mauza Ugda which was excepted out of the mortgage of 1828, although forming part of the whole estate, their Lordships are satisfied that this property was the joint property of the family, and that Kanhya Lal was mortgaging it with the assent of and as the manager for the whole family.

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Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. Gisborne and Co. In 1843, a suit was brought by the present appellants, or some of them, against Messrs. Gisborne and Co., making parties also Rassik Lal and Kanhya Lal. The plaintiffs in that suit were non-suited upon technical grounds, but in that suit the plaintiffs had stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. Barnes, a member of the firm of Gisborne and Co., and the other members of the firm of Gisborne and Co., stated that the plaintiffs' suit was totally false: and that the reasons of the falsity of the plaintiffs' suit were stated in the answer of Rassik Lal, another defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of Rassik Lal, and were content to adopt it as the statement of their case. Now Rassik Lal, as has been said, was the native agent of this indigo factory at the time of the mortgage in 1828.

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He must have known perfectly well everything connected with the title and the circumstances of the family, one member of which was making a mortgage to him; and what Rassik Lal, having these means of peculiar knowledge, said in the year 1843, was this, "Oh! Administer of Justice, let your presence consider the fact, that although the plaintiffs have no right and interest in the said mauzas, yet even it is clearly evident from the contents of the former plaint that the plaintiffs themselves have admitted that the said Kanhya Lal Das, by the advice and with the concurrence of the plaintiffs, sold the property in dispute to me,"—that of course means mortgage—"for the sum of rupees 17,011 with the object of liquidating the money due to the said gentleman from Kanhya Lal Das under the deed of mortgage, dated the 25th May, 1826." Rassik Lal was, therefore, content to affirm at this time, and Messrs. Gisborne and Co. were content to adopt his statement, that Kanhya Lal had mortgaged the property by the advice and with the concurrence of the plaintiffs,—advice and concurrence which would have been utterly useless and unmeaning, unless the plaintiffs had been joint owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of first instance, and they have the satisfaction of thinking that in that respect they are not differing from the opinion of the High Court of Calcutta, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years,—a year afterwards, in November 1829, the ikrarnama which contained the condition making the transaction a mortgage was returned by Kanhya Lal and Rassik Lal, with an endorsement. The endorsement is partly defaced, but it runs thus:—“(Defaced) the said mehal, according to the conditions of the ikrar (defaced), the Government revenue, and interest and the consideration being (defaced); therefore I have returned this ikrarnama to Rassik Lal Das, the purchaser. The mauzas

"stated in the ikrarnama, I have absolutely sold. Dated the
"27th Kartik, 1237. Kanhyा Lal Das, zemindar." It is
said that the meaning of this endorsement, which was partly
defaced, is, that it amounted to an assertion that the profits of
the zemindari were insufficient to pay the principal and interest
and the Government revenue, and that, therefore, the ikrarnama
was returned by Kanhyा Lal to Rassik Lal.

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Now, without going further, their Lordships are compelled to say that this is a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage, to run over eleven years. The mortgagee was bound, on the face of the deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven years, the land would be free; if not paid, at all events the mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the mortgagor for the release of the equity of redemption. It is said that the district in which the property was situate was a district which, as regards its produce, was liable to the uncertainties of dry seasons; but although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed, that this allegation of the return of the ikrarnama, and the production of it with the endorsement, was never heard of until about two years subsequently, when one Bholanath, having sued Kanhyा Lal upon a debt of his own due to Bholanath, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of Kanhyा Lal. Then it was that the return of the ikrarnama was set up, and that this endorsement was produced. The moment that defence was set up it was challenged,—challenged not merely by Bholanath, but by the other members of the joint family,—and steps were taken to dispute it. It is true that, from circumstances connected with

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the attempted sale of Bholanath going off, the question was not ultimately decided at that time, which is very much to be regretted. The primary Judge decided against the transaction,—decided that it was not a real transaction, but a fraudulent one to defeat the creditor. There was an appeal to the appellate tribunal. The appellate tribunal thought that an investigation of the circumstances should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the primary Judge thought that it was unnecessary to pursue that investigation. But both at that time, and at every time since when the return of the ikrarnama has been set up, the transaction has been challenged as an unreal and fictitious transaction.

Their Lordships are of opinion that it is an incredible transaction, on the face of it, and they cannot arrive at any other conclusion than that it was a transaction between Rassik Lal and Kanhya Lal for the purpose of defeating the proceedings of the creditor Bholanath.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That *onus* certainly is not discharged in this case, and their Lordships therefore are of opinion that on this point also the title of the appellants is made out, and that unless on some other ground yet to be considered they are precluded from redeeming, they are not precluded by the pretended return of the ikrarnama. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the Court in India.

We come now to the remaining part of the case, which is this: assuming the title of the plaintiffs to redeem to be made out, the respondents, Messrs. Gisborne and Co., claim the benefit of the Statute of Limitation, and assert that the time during which the title of the plaintiffs to redeem could be put in force has elapsed. In the first place, they say that the appellants are barred by the 13th section of the Law of Limitation,—that is to say, the section which speaks of suits for

enforcing the right to share in any property moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that section at length, for their Lordships are of opinion that it is a section which deals with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we should term in this country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the plaintiffs is a mortgage, which, as has been already said, was in its inception, in substance, the mortgage of the whole of the joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of whether the property is joint or not. It is merely a question of the title of the plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The respondents then allege that they are entitled to the benefit of the 5th section of the same law, "In suits for the recovery from the purchaser, or any person claiming under him, of any property purchased *bona fide* and for valuable consideration, from a trustee, depositary, pawnee, or mortgagée, the cause of action shall be deemed to have arisen at the date of the purchase." Now questions of very considerable importance have been raised and argued as to the meaning of this section. Their Lordships desire to say, that the provision of the section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of the section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que trust*, or of a person who has deposited, pawned, or mortgaged

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property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected. Their Lordships think that in order to claim the benefit of this section a defendant must show three things:—first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bond fide*; and third, that he is a purchaser for valuable consideration.

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 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.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the respondents have put their title. In the sixth head of their statement, they express themselves thus:—“The defendants, as purchasers for a just consideration, have all along held adverse possession of the disputed property for more than twelve years without notice of any legal right as co-partners,—*i. e.*, if any right had existed pertaining to the plaintiffs as well as to those persons from whom the defendants have acquired their right. Thus, in such a case, also the plaintiffs’ claim is, by reason of limitation, inadmissible.” There is no averment there of any fact; it is a statement that as purchasers they are entitled to the benefit of the statute, but when they come to their averment of facts, their statement is this: the second head is, “On the 16th May, 1838 A.D., Rassik Lal Das sold the said mauzas to Messrs. William Shawe and William Hawes for Rs. 17,011, and caused the

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The purchase-deed contains a recital of the manner in which the vendor, the first party to the deed, Hawes, had had conveyed to him the various factories which were to be handed over to Gisborne and Co. It then contains this recital of the contract between Hawes and Gisborne and Co. "And whereas the said John Dougal, George Dougal, Charles Jones Richards, Matthew Gisborne, and John Richards have contracted and agreed with the said William Hawes for the absolute purchase of the said several indigo factories or works and premises hereinafter described, at and for the price or sum of Company's rupees 210,000, and the same are intended to be conveyed and assured unto the said John Dougal, George Dougal, Charles Jones Richards, Mathew Gisborne, and John Richards, and their heirs in the manner hereinafter expressed." It is a contract for the absolute purchase, but the absolute purchase of those premises which are afterwards described in this deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory; then this addition, "All lands cultivated and uncultivated to the said several and respective Indigo Factories or sets of works respectively belonging or in anywise appertaining;" and further, "And all the estate, right, title, interest, use, trust, property; possession, possibility, claim, and demand whatsoever, both at law and in equity of them the said William Hawes, Robert Molloy, and James Cullen and each of them in, to, out of, or upon the said several and respective Indigo Factories or sets of works, lands, hereditaments, chattels, and premises, and every or any part or parcel thereof." Now assume that there was in this commercial house, as a part of their property in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them, and to the purchasers. No more fit or apt deed could have been devised than this for the purpose of conveying a title to that mortgage as the rightful title upon which the property was to be held by the purchasers. The deed, in other words, is perfectly consistent with it not having been the intention of any person to this transaction to do more than to hand over this along with

all the other property which the commercial firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships, therefore, can find in this deed no evidence of an averment on the part of the vendor or of any belief on the part of the purchaser that the property of Mahianwan was a property which the vendors claimed to hold by what we should call in this country a fee-simple title.

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Under these circumstances, their Lordships think that the first requisite in the law of limitation is not made out, and that the respondents here are unable to show, or at all events have not shown, that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case; for of course, unless the whole of the three requisites exist, the benefit of the statute is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. Gisborne and Co. are able to show that they are *bonâ fide* purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. Gisborne and Co. any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter. But what their Lordships have to observe is this: Messrs. Gisborne and Co. must be regarded as dealing in this case upon one of two footings. Either they were aware in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of Gisborne and Co. by way of allegation and averment and claim upon the one side and upon the other,—that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years, or if not aware of the contents of those papers, they must at all events have been aware of the original conditional sale of 1828, and of the alleged return of the ikrarnama with its endorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the respondents would desire

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Messrs. Gisborne and Co: to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing but the conditional sale and the alleged return of the ikrarnama. At another time their Counsel appeared desirous to refer to certain portions at all events of the proceedings which had taken place between the conditional sale and the year 1841. But assume that they were not aware of the details of that litigation ; assume that Messrs. Gisborne and Co. knew nothing but what has been called the bare title to the property, the conditional sale, the alleged endorsement upon and return of the ikrarnama, and the transfer subsequently from Rassik Lal to Hawes and Shawe. Their Lordships are of opinion that looking to the clear and undisputed mortgage in the first instance—looking to the transparent unreality of the transaction connected with the alleged return of the ikrarnama, the mere production of the endorsement upon that ikrarnama, as the description of the cause for its return, was amply sufficient to put any persons in the position of Messrs. Gisborne and Co. upon an inquiry and consideration as to whether that transaction could be a real transaction, or whether it could be a transaction which could form part of the title of a purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. Gisborne and Co. were perfectly aware of all the accounts in the factory and of all the details of the litigation and of all the claims that had been made before with regard to this property, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that with their attention so called they could not be considered to be *bond fide* purchasers.

Therefore upon both grounds, both upon the ground that they are not purchasers within the meaning of the law, and upon the ground that if they were purchasers, they are not, in the sense in which the words are used in the law, *bond fide* purchasers, their Lordships think that Messrs. Gisborne and Co. are not entitled to the benefit of this statute.

It would perhaps be right that their Lordships should advert

also to an argument which was adduced, although not very warmly pressed, that under the 10th section, Messrs. Gisborne and Co. might find protection. The 10th section says, "In suits "in which the cause of action is founded on fraud, the "cause of action shall be deemed to have first arisen at the "time at which such fraud shall have been first known by the "party wronged." This, in their Lordships' opinion, is not an action founded upon fraud in that sense. It is an action upon title to recover the possession of property to which the plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the statute to which reference has been made.

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This being the opinion at which their Lordships have arrived, they will humbly recommend to Her Majesty that the decree of the High Court of Calcutta should be reversed, and that in place of it an order should be made dismissing the appeal to the High Court and dismissing it with costs. That would set up again the decree of Mr. Madocks, the Zilla Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in detail. Their Lordships, therefore, will leave that decree to be the decree in the case, and will only further add that the appellants should also have the cost of this appeal.

Appeal allowed.

Agent for the appellants: Mr. Wilson.

Agent for the respondents. Messrs. Maynard & Co.

226 Cal. 644

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

ROGERS v. MONTRIOU.

1871
March 21.

Act XIV of 1859, s. 4—Acknowledgment—Limitation.

An acknowledgment not coming directly from the debtor himself but merely deduced as an inference from the tenor of a series of letters, is not a sufficient acknowledgment to satisfy section 4, Act XIV of 1859. To satisfy that section, there must be some principal writing of a particular date, which can be relied on by itself, when properly construed, as constituting an acknowledgment of the debt.

THIS was a suit brought to recover the sum of Rs. 2,586-9, which the plaintiff alleged to be due to him in respect of a payment made by him on a bond given to the Agra and United Service Bank by the defendant, in respect of which bond the plaintiff and another were sureties, and in the payment of which the defendant had made default. The plaintiff also sought to recover a further sum of Rs. 5,980 being the amount of certain payments made by him as premiums on a policy of insurance on the life of the defendant. The bond had been given on 12th July 1847, and the policy had previously been assigned to the bank as security for any sum which might be due to them from the defendant. Default having been made in the payment of the bond, the plaintiff and Mati Lal Seal, the other surety, on 30th June 1848, paid the amount of the bond in full to the bank, and the policy of insurance was re-assigned to the defendant. Since June 30th, 1848, the plaintiff had, at the request of the defendant, paid the half-yearly premiums upon the policy of insurance, at the rate of Rs. 130 each half-year. On 15th January 1856, the defendant assigned the policy to the plaintiff. The defendant had in 1849 made part payment of the sum due. The plaintiff also claimed interest on the first sum of Rs. 2,586-9,

from June 30th, 1848. He alleged in his plaint, which was filed on 24th February 1871, that the defendant had admitted the debt by acknowledgments in writing signed by him on 15th December 1870, 24th January 1871, and 25th January 1871.

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The suit was undefended.

The following were the letters in which the acknowledgment was said to be contained :—

On 20th March 1866 the plaintiff's attorney wrote to the defendant for payment of certain sums, amounting to Rs. 270, paid by the plaintiff in respect of the premiums on the policy of insurance. On 7th April 1866, the defendant replied :—

“I am going to the mofussil for a few days; and when I return at the end of next week, hope to be able, as I intend, to send you that sum (Rs. 270), on the insurance account.”

And again, on 27th August 1866, in reply to a like demand, the defendant wrote :—

“You are aware it is my desire to pay these premiums, and sheer inability is my sole reason for not having done so. I hope in the course of 15 days to be able to remit you the Rs. 270.”

On 13th December 1870 the plaintiff wrote to the defendant :—

“Although I am well aware that of late my letters to you have been such as you did not like, yet I trust that by this time calm reflection notwithstanding have led you to the conclusion that I am still entitled to consideration on your part, and to some return of the money in your account so many years since.”

On 15th December 1870 the defendant replied :—

“Your last communication does not deprive you of the right to my acknowledgment of obligations once received. To any gentleman whom you may depute I will give all information that can be of interest to you concerning myself or my affairs. Be assured I shall, at the first moment I can consistently do so (whenever that may happen), relieve you of the necessity or desire to address me.”

On 23rd January 1871 the plaintiff's attorneys wrote to the defendant :—

“Captain Rogers has requested us to write to you with reference to his long-standing claim against you. Out of the Rs. 5,000 odd which

1871 ROGERS he paid so many years ago on your account, he has only received Rs. 2,500, and moreover he has had to pay the premiums on the policy on your life ever since 1848.

MONTRIOU. We trust you will make some arrangement at once towards paying the amount due, or at any rate part of it, or our client will be compelled to take action in the matter."

In reply to this, on the 24th January 1871, the defendant wrote :—

"In reply to your letter addressed to me, upon the instruction of Captain Rogers, I beg to refer you to a letter in your client's hands which he received from me since his arrival in Calcutta."

On the same day the plaintiff's attorneys wrote to the defendant as follows :—

"We are in receipt of yours of to-day, but cannot accept it as any reply to our letter. Your letter to our client, as well as a copy of his which evoked your reply, are with us, and we cannot see that your letter to Captain Rogers is at all a reply to his. We shall feel obliged by a definite reply as to whether you are prepared to do anything or not towards liquidating Captain Rogers' claim."

The defendant on 25th January 1871 replied :—

"You require me to be more explicit, and I will be so. Many years ago Captain Rogers incurred (together with the late Mati Lal Seal) a liability on my account, which resulted in a debt to that gentleman. The transaction at the time and for many years was of little moment to him, but was a great benefit to me."

Mr. Marindin for the plaintiff contended that the 13th and 15th December 1870 constituted an acknowledgement of a debt due on the 23rd January, in reply to one of 23rd January, refers to 15th December. These two must be taken together to constitute a sufficient acknowledgment of a debt being parol evidence admissible to show what debt is due. The amount of the debt need not be stated; payment is necessary—*Umesh Chandra Mookerjee v. Kristna Row* (2), *Nijamatu* *barrled by limited premium upon* *for the* *had issued* *at the* *section*.

(1) 5 B. L. R., 633.

(2) 2 Mad. H. C. Rep. 307.

Ali (1), Young v. Mangala Pilly Ramaiya (2), and Shearman v. Fleming (3).

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PHEAR, J.—The plaintiff's claim, roughly speaking, consists of two parts: one in respect of a principal debt, which was incurred by the defendant so long ago as 1848,—*i. e.*, in respect of a sum which the plaintiff then had to pay as surety for the defendant; the other is the result of the summation of a series of debts, which arose by reason of money being paid half-yearly by the plaintiff for the defendant as a premium on a policy of insurance on the life of the defendant. The policy of insurance had been deposited with the plaintiff by the defendant as security for the payment of the principal debt, and the defendant had at the time, or soon afterwards, orally undertaken to pay all the premiums on it. Now clearly the first part of this claim is not a debt in action, unless the defendant has admitted the debt by some explicit acknowledgment in writing, and unless that acknowledgment is within the period of limitation which is applicable to the case. It is contended that the acknowledgment may be found in the course of certain correspondence which passed between the plaintiff and his legal advisers on one side, and the defendant on the other. On 13th December 1870 the plaintiff wrote to the defendant as follows (*reads letter of 13th December*). Then there is the answer to this, dated December 15th (*reads reply*). It seems to me that these two taken together do not constitute an acknowledgment on the part of the defendant that any debt was due at the time when either of them was written. It is singular, I may remark, that Mr. Rogers' letter does not even speak of a *debt*. On 23rd January 1871 the plaintiff's attorney wrote to the defendant as follows (*reads letter of 23rd January*). This, though not very explicit, does exhibit language in which the idea of something in the form of a debt seems to be involved. Then there is the defendant's reply to that letter, which is as follows (*reads defendant's letter of 24th January*). This obviously does not ad-

(1) 4 Mad. H. C. Rep., 384.

(2) 5 B. L. R., 619.

(2) 3 Mad. H. C. Rep., 308.

1871 vance the matter much. Next the plaintiff wrote as follows (*reads plaintiff's letter of 24th January*). And the defendant replied
ROGERS (reads the defendant's letter of January 25th). It is quite
v. clear there is no acknowledgment in this passage taken by
MONTRIOU itself; but Mr. Marindin argued very ingeniously that, if we go back to the letter of 15th December, and take the passage which I have already read from that letter, together with this passage, the two together do constitute an acknowledgment of the debt. I do not think this is so. At any rate I do not think it is such an acknowledgment as the Act requires. We may perhaps infer from the language employed by the defendant in these two letters an admission that a debt once was due from him to the plaintiff, and also (although this is by no means clear) that that debt had not been paid. But, nevertheless, the two together do not, I think, constitute such an acknowledgment as is required to satisfy the words of the Act. That is to say, that an acknowledgment, not coming directly from the defendant himself, but merely deduced as an inference from a series of letters, is not a sufficient acknowledgment under section 4 of Act XIV of 1859. To satisfy that section of the Act, there must, I think, be some principal writing on a particular date, which can be relied on by itself, and fairly construed, as constituting an acknowledgment of the debt. From that date a fresh period of limitation will begin to run. No doubt, letters written either before or afterwards may be taken with the principal letter, in order to ascertain what that letter means. But it appears to me that, under section 4, of Act XIV of 1859, it is intended that there should be some one principal writing of a specific date, itself constituting the acknowledgment. Nothing of this sort can be found here relative to the first part of the plaintiff's claim. I therefore think that the first part of the claim is barred. A large portion of the second part of the claim is similarly barred. There is a letter of April 7th, 1866, and another letter of 27th August of the same year, each of which perhaps may be fairly taken to amount to an acknowledgment on the part of the defendant that, at the dates of those letters respectively, a sum of Rs. 270 was due from him to the plaintiff in respect of the premiums,

or, as the defendant calls it, " premium account ;" and since that time, a debt of Rs. 130 has been rising up every six months. But it appears to me that the liability to pay these premiums was of the nature of simple contract falling within section 1, clause 9 of Act XIV of 1859. The plaintiff can only claim a repayment of these moneys, on the ground that they were moneys paid by him to the use of the defendant at the latter's request, and this request is to be implied from words spoken orally by the defendant. If this be the case, inasmuch as the plaint was filed on 24th February 1871, we can only go back, so far as regards this part of the case, to the 24th January 1868. That period includes six half-yearly payments of premiums, which make in the total a sum of Rs. 780; and the previous acknowledgment of 7th April 1866 stands, as, starting from that period, three years would run before the date of the filing of the plaint. The decree will therefore be for Rs. 780; and as this amount is within the jurisdiction of the Small Cause Court, no costs will

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Decree for plaintiff for Rs. 780 only.

Advocates for the plaintiff: Messrs. *Trotman and Co.*

[APPELLATE CIVIL.]

Mr. Justice Bayley and Mr. Justice E. Jackson.

(PLAINTIFF) v. RAJ GURU TRIAMBUKNATH DEO
AND OTHERS (DEFENDANTS).*

1870
Dec. 1.

Suit and Evidence—Shifting of Ground of Suit—Mitakshara Law—Alienation—Joint Property.

The plaintiff, a Hindu, sued to set aside a certain alienation, on the ground that the defendant was an illegitimate son of the plaintiff's grandfather, and therefore had no interest in the property. Not being able to substantiate this ground in the first Court, the plaintiff, on appeal, raised a new ground, viz.,

* Special Appeal, No. 722 of 1870, from a decree of the Officiating Judicial Commissioner of Chota Nagpore, dated the 22nd January 1870, affirming a decree of the Deputy Commissioner of that district, dated the 7th June 1869,

1870 that the alienation was bad, because, under the Mitakshara law, the owner of
 SRI PRASAD a share in a joint ancestral estate is not competent to alienate his share,
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without the consent of the other heirs.

Held, that such variance could not be allowed, and that the plaintiff must prove his case as laid in the plaint.

There is nothing in *Rajaram Tewari v. Luckman Prasad* (1) and in *Sadabart Prasad Sahu v. Fool Bash Koer* (2) to justify the contention that, where there is an alienation made by one shareholder, and another sharer sues to set aside that alienation, it follows as a consequence that the party who sues to set aside the alienation must obtain a decree.

THE plaintiff brought this suit to set aside a deed of *supurd-nama* (transfer), making over a moiety of Mauza Dattia to the defendant No. 1, on the ground that the defendants No. 2 and No. 3, who executed that document, were the sons of an illegitimate son of plaintiff's grandfather, and were therefore not entitled to any interest in their grandfather's property, but only to maintenance. The defendants No. 2 and No. 3 denied that their father was illegitimate, and stated that they held a moiety of the mauza, and that they made it over, in satisfaction of a decree obtained against them by defendant No. 1.

The first Court dismissed the plaintiff's suit.

The plaintiff appealed to the Judge, on the ground that the first ground had been proved, and also urged, for the first time, the second ground that, under the Mitakshara law, joint owners of an ancestral estate could not alienate their shares, without the consent of the others.

The lower Appellate Court dismissed the appeal, holding that the objection of illegitimacy had not been made out; and that the second ground, that the defendants could not alienate their share under the Mitakshara law, could not be allowed, as it was not taken in the first Court.

The plaintiff then preferred a special appeal to the High Court.

Baboo *Mahes Chandra Chowdhry* and *Upendra Chandra Bose* for the appellant.—The suit being one to set aside the alienation, on the ground that the property was ancestral, and that the person who alienated it had no right to do

(1) Case No. 228 of 1865; June 7th, 1867. (2) 3 B. L. R., F. B., 31.

so, it necessarily raised the question of the validity of the alienation; and the mere fact of the plaint alleging that the alienor was an illegitimate member, and as such incompetent to sell the property, cannot preclude the plaintiff from arguing a clear point of law arising out of the admitted facts of the case, notwithstanding even that the question was not urged in the first Court. Admitting, therefore, that the finding of the Courts below regarding the question of illegitimacy is perfectly right, the sale is still invalid even as regards the interest of the alienor in the family property, inasmuch as, under the Mitakshara law, a member of a joint family is not competent to alienate even his own share before partition, except for purposes of the family. The point has been settled by the Full Bench decision in the case of *Sadabart Prasad Sahu v. Fool Bash Koer* (1).

Mr. R. T. Allan and Baboo Rasbehari Ghose for the respondent, not called upon.

ment of the Court was delivered by

—We think this special appeal must be dismissed. The point now raised before us was not raised in the Court below. The prayer in the plaint was that, whereas the party who made the alienation was not the legitimate son, therefore the alienation was invalid, and should be set aside.

The lower Appellate Court distinctly records that the point was raised for the first time before that Court, and it is not denied by the special appellant that this was so; but it is argued before us that, whether it be so or not, the point is involved in the facts of the case, and we are pressed to decide whether, supposing the legitimacy to be admitted, it is not in the power of the plaintiff to sue and obtain a decree to set aside the alienation as being made without the consent of the other heirs in a joint Hindu family living under the Mitakshara law.

Now it is clearly laid down in the Privy Council case of *Eshenclunder Singh v. Shamachurn Bhutto* (2) that the Courts are to restrict the plaintiff to his prayer in the plaint, and not to

(1) 3 B. L. R., F. B., 31.

(2) 11 Moore's I. A., 7.

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give decrees which go beyond that prayer. Applying that test to this case, the prayer in the plaint is to have the alienation set aside, because it is invalid, not by reason of the absence of the consent of other heirs, but by reason of the illegitimacy of the party ; and if we decide the case, and allow the point now raised for the first time, we shall virtually declare that, although the plaintiff asked to set aside the alienation for the specific reason of the illegitimacy of the party, and failed to prove that fact, yet he is entitled to have that alienation set aside now after such failure, on the new ground of the absence of the consent of other heirs, which was not the point raised in the plaint. That comes, I think, within the prohibition and injunction of the Privy Council ruling cited ; and from what has been stated above, it is clear that the proposition now attempted to be urged is extraneous and separate from that on which the plaintiff based his prayer, and, being extraneous and quite separate, cannot be said to be involved in it.

Our attention has been drawn to two decisions—*Prasad Sahu v. Fool Bash Koer* (1) and *Raja R. v. Luchmun Pershad* (2); but there is nothing in those judgments, nor has the pleader for the special appellant shown us anything in them, which justifies the contention. Where there is an alienation made by one shareholder, another sharer sues to set aside that alienation, it follows as a consequence that a decree must be absolutely given to the party who sues to set aside the alienation.

We dismiss this special appeal with costs.

Appeal dismissed.

[IN THE INSOLVENT COURT.]

Before Mr. Justice Phear.

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Jany. 18.

IN THE MATTER OF PYARICHAND MITTER AND OTHERS.

Insolvent Court, Power of—Application to withdraw Petition.

The Insolvent Court has no power to allow an insolvent to withdraw his petition of insolvency, on the ground that he has made a compromise with

(1) 3 B. L. R., F. B., 31. (2) Case No. 228 of 1865; June 7th, 1867.

his creditors. Where, however, the Court is satisfied that all parties concerned desire to take the matter out of the hands of the Court, it will dismiss the petition, even though there is no ground arising out of the facts of the case why the petition should be dismissed.

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THIS was an application, on behalf of Pyarichand Mitter and others, insolvents, to Mr. Justice Phear, sitting as Commissioner of the Insolvent Court, for leave to withdraw their petition of insolvency. The application was by petition, in which the insolvents stated that they had settled with the creditors named in their schedule, who had all agreed on this course being taken. The petition was signed by the creditors. The assets in the hand of the Official Assignee, at the time of the application, amounted to about Rs. 10,000.

Mr. Evans for the insolvents.

PHEAR, J.—After the best consideration that I have been able to give to this matter, I find myself unable to change the views which I have already expressed as those long held by me as to the powers of the Insolvent Court under the Imperial Act.

Whenever the petition is filed, and the vesting order is made, the petitioner is on his side *prima facie* entitled to the benefit of the Act. On the other side, the Court becomes charged with the duty of administering his property among his creditors. After this, the petitioner cannot himself withdraw that duty from the Court. The matter is in the situation of a general administration suit after decree. The Court is bound to exercise a judicial discretion in distributing the petitioner's property equitably among his creditors. If there were any means of forcing the attendance of the creditors as a body before the Court, or if they did in fact come before the Court, no doubt their express consent to any particular application or disposition of the property would rightly and properly satisfy the Court that such an application or disposition was an equitable disposition. Now I am not asked specifically to direct a particular disposition of the property at the request of the creditors. I am simply asked not to proceed with the duty of distribution at all, but to send the whole matter of this insolvency out of

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Court by dismissing the petition, or allowing it to be withdrawn, on the ground that the creditors named in the schedule have signed a consent to the course being taken. It seems to me that, if I did this simply, the Court would in effect be abdicating, at the insolvent's request, the judicial functions which the Legislature has imposed upon it; and I need not here say how unsafe such a course is, even supposing it to be legitimate. We have very lately indeed had before us an eminent example of that fact (1).

The identification of creditors, named in a schedule, by affidavits, must necessarily in all cases be infirm; and I think that no advertisements can be properly depended upon as a substantial basis for the inference, that non-appearing creditors desire to give up their share of property in the hands of the Official Assignee. In the present instance, it appears that one at least of the creditors,—a creditor for a sum that is not mentioned, is out of the jurisdiction of the Court; and one is a Hindu lady. It may be, no doubt, the fact that all these creditors assent to the assets of the insolvent going back to him without a distribution, and that they don't wish to have the two or three annas in the rupee, which the Court could certainly on the face of this schedule give them; but it seems to me that at present, at any rate, I have not the means of ascertaining judicially whether this is the fact or not. If the Legislature had intended that the Court should, in distributing the assets, act ministerially under directions from the general body of creditors, or carry into effect any compromise made by the insolvent with his creditors, it would probably, I think, have provided apt machinery and procedure for the purpose. This, however, it has not done, and the inference that I draw from this omission is that the Legislature did not intend the Court so to act.

No doubt the Court is empowered on a hearing to dismiss the insolvent's petition, as well as to prescribe terms upon which he shall get the benefit of the Act; but in this, the Court must act judicially upon the materials before it, with reference to the merits of the petitioner's application. This has been laid down by an Appeal Bench of the Court in *In the matter of Gopal Chunder Seal* (2). Although the peti-

(1) *In the matter of Ramsabak Misser*, ante, p. 310. (2) 2 Boul., 119.

titioner cannot, after his property has vested in the Official Assignee for the purposes of this Act, of his own will alone, withdraw his petition, still the facts of the case may, at the hearing turn out to be such as to lead the Court to think that his *prima facie* right to the benefit of the Act is rebutted, and that it would be inequitable to his creditors that he should be allowed to have that benefit. To meet the justice of such a case, the Court is invested with power to dismiss the petition. Now, in the matter before me, it would appear that the insolvent's conduct has been altogether irreproachable. There is not the slightest insinuation even that his pecuniary embarrassment has been brought about by culpable trading or behaviour. He has conformed to the requirements of the Act, and he brings a substantial amount of property to the Official Assignee for distribution among his creditors. This is ample consideration for the benefit which the Court can give him; and there is no sort of ground arising out of the facts of this case why his petition should be dismissed. Now, having expressed this as my view of the operation of the Insolvent Act, I wish to say that, following the usual practice, and having regard to the proper functions of all Courts of Justice, I think that the Insolvent Court would, nevertheless, do rightly to dismiss the petition of the insolvent for the purpose of removing the matter out of Court, if it was satisfied judicially that all parties concerned desired that it should be taken from the Court. If in the present case I could be satisfied that all the creditors, in view of the fact that there are considerable assets in the hands of the Official Assignee, did desire that those assets should be given to the insolvent, and the matter of insolvency totally taken out of the hands of the Court, I should consider that I had power to meet the wishes of the creditors by dismissing the petition; but the materials now before me are a long way insufficient for that purpose. It is not for me to point out how the deficiency should be supplied, if it can be supplied. At the very least I must have something brought before me to show that the creditors have met together, have discussed the matter, and are deliberately asking the Court to send the matter out of its control. I don't think I need now add anything more, unless Mr. Evans, on behalf of the insolvent, is

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anxious for my opinion on any point which I may have failed to touch upon. I see no alternative at present but to dismiss the petition which asks for dismissal of the original petition. The case did, however, come before me on a regular day of hearing, and I am in a position to give the insolvent the benefit of the Act, if he is desirous of availing himself of it.

On Mr. *Evans* stating that the insolvent would wish to consider what steps he ought to take, the Court ordered the hearing to stand over till the February Court day. On a subsequent day the insolvents put in a fresh petition, and as the creditors were then represented by an attorney, who had been authorized to appear for them, and who consented to the prayer of the petition, they obtained an order dismissing their petition of insolvency.

Attorneys for the Insolvents : Messrs. *Berners, Sanderson, and Upton.*

Attorney for the Official Assignee: Mr. *Carapiet.*

1870
Dec. 13.

Before Mr. Justice Glover and Mr. Justice Ainslie.
CHANDRA KUMAR BANERJEE (PLAINTIFF) v. ISWAR CHANDRA NEWGI (DEFENDANT.)*

Mortgage—Usufructuary Mortgage—Redemption, Period of.

A. executed an ikrar by way of mortgage, whereby it was stipulated that B., the mortgagee, was to remain in possession of the mortgaged premises for a period of eight years; that the amount due was to be paid off from the usufruct; and that if, at the expiry of that period, any sum should remain due under the ikrar, A. was to pay the same.

In a suit for redemption brought before the expiry of the period mentioned in the ikrar on deposit of the amount due thereunder,—

Held, that the suit would not lie.

ONE Gabind Chandra Mandal executed an ikrar by way of mortgage, on the 5th March 1864, to Iswar Chandra Newgi, in satisfaction of a decree upon which execution had been issued. The ikrar was to the effect, that the debt of Gabind Chandra, under the decree, had been settled at Rs. 130-12-15, which was to be realized from the usufruct of the land mortgaged to him; that Iswar Chandra was to remain in possession of the mortgaged premises for a period of eight years without any objection on the part of Gabind Chandra or his heirs; that if the mortgagee

* Special Appeal, No. 1387 of 1870, from a decree of the Subordinate Judge of the 24-Pergunnas, dated the 30th April 1870, affirming a decree of the Moopsiff of that district, dated the 27th August 1869.

be prevented in any way from realizing the amount, or any part thereof, from the usufruct of the mortgaged premises, he was to be entitled to realize the same from Gabind Chandra; and that the ikrarnama was to operate as a decree.

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Gabind Chandra assigned his equity of redemption to Chandra Kumar Banerjee, who, after paying into Court the amount due on the ikrarnama, brought this suit on the 5th of April 1869, for an account of the rents and profits of the mortgaged premises, and for recovery of possession thereof after payment to the defendant of the sum of money due to him under the ikrarnama from the amount deposited in Court. The defence was that, under the terms of the ikrarnama, the defendant was entitled to retain possession of the mortgaged premises until the expiry of the period therein mentioned, and that the plaintiff could not till then sue for redemption.

The Moonsiff held that, under the terms of the ikrarnama, the plaintiff was not entitled to redeem before the expiry of the period mentioned in the ikrarnama, and dismissed the suit.

On appeal, the Subordinate Judge confirmed the judgment of the lower Court.

The plaintiff appealed to the High Court, on the ground that the ikrarnama was simply a usufructuary mortgage, and that the mortgagee had no right to retain possession.

Baboo Ram Chandra Mitter, for the appellant, contended that, upon the true construction of the ikrarnama, and upon principles of equity, the plaintiff was entitled to redeem; and relied upon *Runjun Sing v. Ameena Khatoon* (1) and *Dindayal Shah v. Ganesh Mahatun* (2).

(1) 6 W. R., 6.

(2) Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

The 19th May 1868.

DINDAYAL SHAHA AND ANOTHER
(PLAINTIFFS) v. GANESH MAHATUN
AND OTHERS (DEFENDANTS).*

Baboo Bhawani Charan Dutt for the appellants.

* Special Appeal, No. 2533 of 1867, from a decree of the Principal Sudder Ameen of Patna, dated the 31st July 1867, affirming a decree of the Moonsiff of that district, dated the 21st December 1866.

Baboo Ramanath Bose for the respondents.

The facts are fully stated in the judgment of the Court, which was delivered by

MITTER, J.—In this case two questions were raised: the first was whether the period for which the property had been let under the zuripeshgi

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Baboo *Upendra Chandra Bose* for the respondent was not called upon.

THE judgment of the Court was delivered by

GLOVER, J.—We see no necessity for calling upon the special respondent's pleader in this case. The plaintiff is the purchaser of an equity of redemption from the mortgagor, Gabind Chandra, against whom there was a decree obtained in the Civil Court by one Iswar Chandra. In execution of that decree, Gabind Chandra was arrested; and in order to save himself from the humiliation of going to jail, he made over certain small plots of land to the decree-holder, by an ikrarnama, in which he covenant-ed that these lands should remain in the possession of Iswar Chandra, in order that the decretal money might be realized

lease was five years, or twenty years, as alleged by the defendants. On this point the lower Appellate Court has found, as a fact, agreeing with the Moonsiff, that the lease was for twenty years.

The second point was whether the plaintiff, who purchased from the mortgagor, was not at liberty to repay the principal amount, or as much of that amount as remained due, and thereupon to re-enter on the mort-gaged premises. Upon the finding of the lower Appellate Court, the plain-tiff will not apparently be entitled to any deduction on account of the pro-fits realized during the alleged holding over of the defendant after his lease ex-pired. But he will be able, on payment of the amount due, to put an end to the zuripeshgi lease, which is, in all its essentials, a mortgage, and to re-cover the land.

It is contended, on behalf of the special appellant, that, under the terms of his lease, the mortgagee is entitled to remain in possession for the full period of twenty years. But in our opinion the contract is not open to such a construction. It only stipulates

that the mortgagee may hold the land instead of his money for twenty years; and that if, at the expiration of that period, the amount due is not paid off, he may proceed according to law; but it does not stipulate that the mort-gagor shall not repay the mortgage debt at any time before the twenty years are out. And our Courts, which are Courts of equity and good con-science, will be always ready to relieve the mortgagor in such a case, and to enable him to redeem his property.

The decision of the lower Appel-late Court must be modified, and it is declared that the plaintiff, on payment of the amount of the mortgage debt remaining due, will be at liberty to re-enter on the land.

It is by no means clear to us that the plaintiff has not been made the victim of a fraud concerted be-tween his vendor and the mortgagee by which the incumbrance on the property sold has been made larger than at least it was at first represented to be; but as the plaintiff made an allegation, which he was not able to support, we think that there should be no order as to costs.

from their usufruct, for a period of eight years from the date of the ikrarnama,—viz., the 5th of March 1864. The deed contained a further stipulation to the effect that, at the end of these eight years, if anything should still be found due on the amount of the original decree, the mortgagee was to recover that amount from the mortgagor, and also that neither the judgment-debtor, the mortgagor, nor any person claiming through him, should be allowed to make any objections to that arrangement. Since the execution of this ikrarnama, it appears that Gabind Chandra has sold his rights and interest in the land to the present plaintiff, and the plaintiff now comes into Court, asking to have the land released to him on payment of whatever might still be due of the original debt. Both Courts have found against the plaintiff, holding that Gabind Chandra, through whom the plaintiff claims, was bound by the terms of the ikrarnama, according to which he could not re-enter upon the land before the expiration of eight years.

In special appeal, it is contended that the lower Appellate Court has misconstrued the ikrarnama; and that on the terms of that document, and according to principles of equity, the plaintiff ought to be allowed to re-enter on the land upon payment in full of all that might still be found due under the original decree.

On the objection as to the misconstruction of the ikrarnama by the lower Appellate Court, it appears to us that the Judge was right, and has put upon the ikrarnama the only meaning which it could reasonably bear. The document most distinctly hands over this land to Iswar Chandra to do what he likes with it; and to get what he could from it during a period of eight years. There is no provision made in it that, if by any chance, such as a succession of good seasons or an increase in value of the produce of the land, the usufruct repays the amount of decretal money before the eight years expire, Gabind Chandra is to re-enter into possession; in fact, the only stipulation we find in the document is the other way,—namely, that, if there is anything still due at the end of the eight years, the decree-holder is to recover that sum from the mortgagor. Then as to equity we fail to see how the plaintiff is entitled to any particular consideration. He or the person through whom he claims mortgaged the land for a fixed period of eight years, and put it out of his power to re-enter upon

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the land before the expiration of those eight years. It may very well be that the mortgagee would not have consented to the arrangement, or have allowed his judgment-debtor to go free upon any other terms but those of the ikrarnama ; he might have intended to spend capital upon the land, or he might have been actuated by a desire to become a landed proprietor ; but whatever his reasons may have been, we can only go upon the terms of the contract before us, and these are distinct to the effect that for a period of eight years, neither the mortagor nor the persons claiming through him would have it in their power to re-enter into possession of the land. We have been referred, to a passage in Macpherson on Mortgages, 5th edition, page 129, in which it is said that it has been held that " even a special agreement that the mortgagee shall remain in possession until payment of the debt is made in one sum does not prevent the mortgage from being at an end, whenever the mortgagee has received both principal and interest." This passage refers to the case of *Punjum Singh v. Ameena Khatoon* (1). But that case appears by no means analogous to the present one, and moreover it was a decision upon a contract entered into previous to the passing of Act XXVIII of 1855. The same remarks apply to the case cited by the pleader for the special appellant—*Dindayal Shaha v. Ganesh Mahatun* (2); the decision in that case also turns on the fact that the contract was entered into before the repeal of the usury law. The case of *Surjan Chowdhry v. Mussamat Imambandi Begum* (3) is very much analogous to the case now before us, and appears to support the opinion we have come to.

The special appeal must be dismissed with costs.

Appeal dismissed.

(1) 6 W. R., 6.

(2) *Ante*, p. 563.

(3) Before Mr. Justice Kemp and Mr. Justice Glover.

The 16th December 1869.

SURJAN CHOWDHRY (DEFENDANT) v.
MUSSAMAT IMAMBANDI BEGUM
(PLAINTIFF.)*

Mr. R. T. Allan and Baboos *Anuhul Chandra Mookerjee* and *Annada Prasad Banerjee* for the appellant.

Mr. Paul and Mr. G. Gregory (with them Mr. C. Gregory) for the respondent.

The facts are fully stated in the

* Regular Appeal, No. 124 of 1869, from a decree of the Subordinate Judge of Patna, dated the 20th May 1869.

judgment of the Court, which was delivered by

KEMP, J.—The defendant is the appellant before us. The plaintiff sues to recover possession of the entire 16 annas of certain properties by redemption of a mortgage dated the 11th November 1862, corresponding with the 5th of Aghran 1270 Fasli, on deposit of a sum of Rs. 12,722-12-9, which the plaintiff alleges to be the balance of the peshgi money, principal and interest, due to the defendant. There is also an allegation in the plaint, that the plaintiff tendered the money to the defendant, who refused to receive the same. The date of the alleged tender and refusal are not given in the plaint, although the cause of action is stated as dating from such refusal. The facts of the case to be gathered from the written statements, and on which there is no dispute, are that the defendant, the appellant before us, who is a money-lender, a mahajan or banker by profession, lent a sum of Rs. 19,300 to the plaintiff, Imambandi Begum, and it was arranged between the parties that this principal sum of Rs. 19,300 was to be paid off in 1281 (1874). A lease was given to the appellant by the respondent, the term of which is from 1271 to 1281 (1864 to 1874). At the foot of the deed of zuripeshgi, there is a calculation, which shows that the assets of the properties leased were assumed to be Rs. 2,830; a small payment of Rs. 14 per annum was to be made by the lessee to the lessor, apparently to mark the tenancy, and it was stipulated that the lessee, the lender of the money, was to clear off both principal and interest of the amount advanced from the Rs. 2,830, which were assumed to be the full assets of the properties leased. At the commencement of 1282 (1875) as per schedule at the foot of the deed, it was calculated that one rupee and two

annas would be due, and it was stipulated that, on payment of this sum by the borrower, the lessee, the lender, would have to surrender possession without objection. The main contention below was to the effect, that this being a lease granted after the promulgation of Act XXVIII of 1855, and as it contains no stipulation for the re-delivery of possession within the term of the lease; and further, as all the risk of the assets assumed by the borrower falling short, owing to bad seasons and other circumstances over which he could have no control, were on the lender; and as also there was a stipulation that, whatever increase would be made in the jumma and produce, owing to the good management, or industry, or labor of the lender, was to be his right, the borrower is not entitled to demand re-delivery of possession within the time stipulated in the lease. The Subordinate Judge of Patna seems to have halted between two opinions, and to have doubted whether the decision passed by this Bench, in the case of *Khajah Lotf Ali v. Gajraj Thakoor* (1), or *Dindayul Shaha v. Ganesh Mahatun* (2) was to prevail. Since hearing the argument in this case, I have had an opportunity of consulting Mr. Justice Dwarkanath Mitter, by whom the judgment just referred to was delivered. That learned Judge informs me that that judgment was delivered on the supposition and assumption that the transaction in that case was one which took place previous to the passing of the Act XXVIII of 1855. I need not say that this assurance of the learned Judge has removed any hesitation which we might feel in delivering the present judgment. Deciding therefore this case, as we did the case of *Khajah Lotf Ali v. Gajraj Thakoor* (1) on its own merits, we find that the transaction took place subsequent to

(1) 11 W. R., 408. (2) *Ante*, p. 563.

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the passing of Act XXVIII of 1855; the lender took upon himself a considerable risk; the assets of the estate were just sufficient, and no more than sufficient, to pay off the debt, principal and interest, and that interest at the moderate rate of 9 per cent., with-in the term fixed by the parties. A succession of bad seasons, or even one bad season, might have rendered it impossible for the lender to recoup himself within the term of the lease, and it is very clear that, under the terms of that lease, whether he had satisfied his debt or not from the usufruct, he would have had to sur- render possession on the expiry of the term of the lease.

The Subordinate Judge has been mainly influenced in coming to the decision he has done by the fact—evidence of which has not been read to us, but which we assume as proved—that there has been a rise in the price of grain, and that that rise has not been brought about by the good management and labor of the lessee. Now in this case we observe that the mortgagor does not ask for an account. He does not ask the Court to decide as between the parties whether the mortgagee has made more out of the

estate than the fixed assets assumed by the parties when the lease was granted. He comes into Court with an allegation that he has tendered the money, which he says is still due under the arrangement made between the parties, and asks the Court to give him immediate posses-sion, although the term of the lease has not expired. We think he is not entitled to ask for possession until that term expires. The transaction between the parties is not a simple usufructuary mortgage; the transac-tion appears to us to be a complicated one—a mortgage which is coupled with an engagement that bears all the characteristics of an ordinary lease. All the risk was with the mort-gagee, the lessee; the interest charged was very moderate, and under the terms of the lease, any profits that he may have been able to make over and above the assets fixed by the parties are to be enjoyed by him. Taking this view of the case, we re-verse the decision of the Subordinate Judge, and decree the appeal, dis-missing the plaintiff's suit with costs in both the Courts, bearing interest payable by the respondent, plaintiff.

[APPELLATE CIVIL.]

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Mookerjee.

IN THE MATTER OF THE PETITION OF AMANATULLA, AGENT ON BEHALF
OF NASIBATUNNissa BIBI.*

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Act X of 1859, s. 23, cl. 7; ss. 34, 145, and 160—Suit—Complaint—Appeal.

A complaint under section 145 of Act X of 1859 is not a suit, and does not fall within the description of the suits in which, under section 160, an appeal is given to the Zilla Judge.

Baboo *Ramesh Chandra Mitter* for the petitioner.

Babooos *Hem Chandra Banerjee* and *Ambika Charan Banerjee*,
contra.

THE facts of this case and the arguments of the pleaders are sufficiently stated in the judgment of

NORMAN, J.—The facts of this case are as follows:— Nasibatunnissa Begum attached, under the provisions of sections 112 and 115 of Act X of 1859, certain crops standing on the lands of a tenure within her *ayma jote*, belonging to her under-tenant Kadir Buksh Mandal. Rasik Chandra Chatterjee and Jugal Shaha removed the attached crops, on which Nasibatunnissa preferred a complaint before the Collector of Howrah, under section 145 of Act X, alleging that these persons had illegally and forcibly removed the distrained property. On the investigation of the complaint, the Deputy Collector, to whom the case was made over by the Collector, found that the value of the crops, which had been improperly removed by Rasik Chandra Chatterjee and Jugal Shaha, was Rs. 688-6. He ordered them to make good that amount, and each of them to pay a fine of rupees 25, and in default each to be imprisoned in the Civil Jail for fifteen days. From that decision Rasik Chandra appealed to the Judge, who, having entertained the appeal, held that the amount of damages was

* Rule Nisi, No. 350 of 1871, against the order of the Judge of Hooghly, dated the 17th February 1870.

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not proved; and he reversed the order of the Deputy Collector so far as it awarded damages.

On the 27th of April last, an application was made to myself and Mr. Justice Mitter to set aside the order of the Judge, on the ground that he had no jurisdiction to entertain an appeal from the order of the Collector, and that his order made on appeal setting aside the Collector's order was an order made without jurisdiction.

The matter, after standing over for a long time, has now come before us for argument. Baboo Ramesh Chandra Mitter has appeared in support of the rule, and he shows that a complaint under section 145 is not a suit. Certainly it is not a suit within the meaning of the 7th clause of the 23rd section. It is a complaint against a person who has wrongfully carried off crops which were under distraint. It is not a suit "arising out of the exercise of the power of distraint, or out of any acts done under color of the exercise of such power." Baboo Ramesh Chandra pointed out that the procedure in suits under Act X is treated of in the sections from 34 onwards, and the procedure in the case of a complaint under section 145 is in no way analogous to a civil suit before the Collector; and that none of the steps prescribed for the conduct of suits in section 34 and the following sections are to be taken upon a complaint under section 145. He showed that under section 145 the person against whom the complaint is made is not summoned as in a civil suit, but is arrested; he is not treated as a defendant, but as an offender; he is not treated as a person against whom a decree passes, but he is convicted; and the judgment against him is not a decree, but a sentence of fine or imprisonment. Baboo Ramesh Chandra showed, by a careful examination of the sections of Act X relating to suits arising out of the exercise of the power of distress, that the proceeding under section 145 was not one of such suits; and we think that he is right in saying that a proceeding under section 145 is not a suit, and that it does not therefore fall within the description of the suits in which, under section 160, an appeal is given to the Zilla Judge. I may observe that the Collector's Court is a Revenue Court; the Court of the Zilla Judge is a Civil Court;

and unless there is some express power which gives an appeal from proceedings in the Revenue Court to the Judge in the Civil Court, no appeal lies. We think it quite clear that no appeal lies in the present case; and that the order of the Judge quashing that of the Deputy Collector was made without jurisdiction, and is illegal; therefore under the provisions of section 15 of the Charter Act, 24 & 25 Vict., c. 104, we direct that that order of the Judge be quashed.

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We express no opinion as to whether the Collector had any jurisdiction to award damages to the complainant under section 145.

Application granted.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

ANANTNATH DEY v. MACKINTOSH AND OTHERS.

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April 6.

Joint Undivided Property—Execution of Decree—Interim Injunction—Partition.

A. obtained a decree against B. and others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house, to the remaining moiety of which C. (a Hindu) alleged he was jointly entitled, and that he and his family were in possession. On A.'s proceeding to obtain execution of his decree, C. brought a suit, alleging that A. had obtained no title under his purchase, and praying for partition of the property. On application for an *interim* injunction to restrain A. from executing his decree pending the partition suit, the Court granted the application.

THIS was an application for an *interim* injunction to restrain one Mackintosh, a decree-holder, from executing his decree, pending a suit which had been brought for partition. The decree was one for possession of an undivided moiety of a dwelling-house, to the other moiety of which Anantnath Dey and others, the plaintiffs in the partition suit, alleged they were jointly entitled. Anantnath Dey and his family were in possession of the dwelling-house in question.

The Advocate-General and Mr. Evans for Anantnath Dey.

Mr. Marindin and Mr. Phillips for Mackintosh.

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Mr. Lowe for Manmathanath Dey.

PHEAR, J.—Mr. Mackintosh has obtained a decree against certain persons for possession of an undivided moiety of a dwelling-house, on a title of purchase from them, and he is seeking to obtain execution of his decree. The present plaintiff alleges that he is entitled jointly with others to the remaining undivided moiety, and his title to this extent is not disputed by Mr. Mackintosh. The plaintiff further alleges that he is by his family and dependants in actual possession of the house according to his title, and on that footing of right he has brought the present suit against Mackintosh and his vendors for the alternative purpose of ousting Mackintosh from all benefit of his decree, on the ground that he obtained no title by his purchase, or, if he has obtained such a title and has a right to have the decree executed, then of obtaining partition of the dwelling-house. The present application is an application for an *interim* injunction to restrain Mackintosh from taking possession under his decree until the decision in the partition suit.

Now I ought not to grant an *interim* injunction, if the mischief against which it is directed is capable of being compensated for by a money-payment, or if it is not of such a kind as will cause the plaintiff irreparable damage, supposing that he has the right which he seeks to enforce in his suit. I have advisedly have recourse to the principle of "irreparable injury," although I am perhaps giving to it a somewhat wider application than would be accorded to it in the English Courts of Equity on a motion of this kind, because I think that, under the circumstances of native society in this country, there may be such a thing as a trespass which works a truly irreparable injury, although it does not effect a lasting alteration of the subject of enjoyment, and is such as in England might be capable of being compensated for in pecuniary damages. If in this case the question concerned simply possession, without more, of ordinary immoveable property other than a family dwelling-house, I see no reason why the plaintiff should not wait until he had made out his title, and be then content with the compensation which would be afforded him in respect of the defendant's misdoing, in the shape of pecuniary

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damages. But here Mackintosh is seeking to obtain possession of an undivided moiety of a dwelling-house, a portion of the other moiety of which is admittedly in the rightful enjoyment of the plaintiff and his family; and certainly the plaintiff is in this position that he is entitled at any time to say that he will have his share divided off from the rest, and that he will not live in the house jointly with any given person who may be entitled to another share in it. He has exercised this right as against Mackintosh by saying that he will not live in the house jointly with Mackintosh, and asking for a partition. Of course if the parties who are jointly entitled to property cannot come to an amicable arrangement for a partition, some interval of time must elapse before a binding partition can be effected between them in the ordinary course of law. If the parties are already in joint possession, that joint possession will generally continue during this interval. But when one of the parties, as in this case, is a new-comer, a difficulty no doubt occurs. Assuming that Mackintosh has a good title to the moiety of which he is seeking to get possession, inasmuch as an interval must elapse before a partition can be effected, the question before me becomes at any rate narrowed to this: Is Mackintosh entitled during that interval to force himself into the family society of the plaintiff, and to make himself, so far as it is practically possible, a member of the plaintiff's joint family in the occupation of the dwelling-house? It appears to me clearly that he is not. I think that a forced joint occupation in this fashion of an undivided dwelling-house by an intruder, even though he be an owner, against the will of the resident Hindu co-parcener, amounts to a proprietary injury which the latter is not in equity called upon to sustain, and for which pecuniary damages would not be compensation. Money alone will not in any degree set the matter right, and therefore the injury is in its character irreparable; also, there can be no doubt, I think, that it is substantial enough to justify the interference of this Court.

And even if this application were to be decided merely by reference to the balance of inconvenience (1), which, on the one hand, is to be looked for as the result to Mackintosh of his

(1) See *Gomes v. Carter*, 1 I. J., N. S., 411.

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being kept out of possession, and on the other would be caused to the plaintiff by Mackintosh's intrusion into the plaintiff's family, it seems to me that I ought to oblige Mackintosh to bear the burden until the decision of the suit for partition, because whatever injury he may sustain by reason of the injunction can be fully repaired by money, whereas the plaintiff's grievance could not be.

This matter further presents itself to me in another aspect. I think that an objection *bona fide* made by a person in possession of an undivided share of a dwelling-house to the in-coming of a third person into the occupation as co-parcener, is an objection which may be made under section 229 of Act VIII of 1859; and, consequently, if the plaintiff in this case, instead of bringing the present suit, had simply confined himself to making a claim in this Court in the execution proceedings of Mackintosh against his vendors, and had objected in those proceedings that Mackintosh ought not to be allowed to obtain possession until a proper partition should be come to, I think his claim might have been registered and filed under that section, and if so would have come on to be tried under the provisions of that section as a regular partition suit. Had this course been taken, then under the same section the Court would clearly have had a discretion to stay execution, if it thought fit, until the determination of the suit so filed.

On the several grounds which I have mentioned, I will grant the plaintiff's application for an *interim* injunction, but it must be on the terms which I have suggested during the argument,—namely, that he should offer in his plaint by an amendment to be made for that purpose, or should otherwise undertake, to pay Mackintosh, in the event of his title being established, such compensation for being kept out of possession, *pendente lite*, as the Court may think fit. Costs reserved.

Application granted.

Attorney for Anantnath Dey: Mr. *Paliologus*.

Attorneys for Mr. Mackintosh: Messrs. *Grey* and *Sen.*

Attorneys for Manmathanath Dey: Messrs. *Beeby* and *Rutter*.

[APPELLATE CIVIL.]

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

NAWAB ASDUTDOWLA REZA HOSSEIN KHAN (JUDGMENT-DEBTOR)	1871
v. HAMINSADDOWLA ABED KHAN (DECREE-HOLDEE).*	<u>Feby. 28.</u>

Judgment-debtor—Act VIII of 1859, s. 273—Discharge—Stipend.

A judgment-debtor, in receipt of a monthly stipend, is not entitled to obtain a discharge under section 273 of Act VIII of 1859, unless he submits to place that stipend at the disposal of the Court, that provision may be made for satisfaction of the debt.

Baboos *Ashutash Dhar* and *Kumola Kant Sein* for the appellant.

Mr. *R. E. Twidale* for the respondent.

THE facts of this case are sufficiently stated in the judgment of the Court, which was delivered by

NORMAN, J.—This is a special appeal from the decree of the Judge of the 24-Pergunnas. The facts appear to be these. The judgment-debtor is a person enjoying what is called a stipend or annuity of rupees 200 a month; it does not very clearly appear what are the conditions under which he receives that stipend. The first Court finds that the judgment-debtor receives it from Government, and the Judge assumes that the creditor cannot touch it. The judgment-debtor, being arrested in execution of a decree for a sum of rupees 1,700, applied, under the provisions of section 273, Act VIII of 1859, for his discharge, on the ground that he had no present means of paying the debt, either wholly or in part, and that he was willing to place whatever property he possessed at the disposal of the Court.

* Miscellaneous Special Appeal, No. 398 of 1870, from an order of the Judge of the 24-Pergunnas, dated the 22nd September 1870, reversing an order of the 1st Subordinate Judge of that district, dated the 16th September 1870.

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The Judge of the 24-Pergunnas has held that the inability of the decree-holder to seize this stipend is no reason why the debtor should take advantage of that circumstance, and insist on retaining that stipend without making any attempt to pay his debt. The Judge has therefore directed that the debtor should set apart a fixed portion of his stipend and authorize the decree-holder to draw that amount monthly, and he ordered that if the debtor would not consent to this arrangement, the decree-holder should be at liberty to have his decree executed by imprisonment of the debtor.

We are of opinion that the decision of the Judge is perfectly correct. It is one of the conditions upon which the person arrested under a warrant in execution of a decree is to be entitled to his discharge, that he is to be willing to place whatever property he possesses at the disposal of the Court. If, therefore, the debtor refused to place this stipend or annuity at the disposal of the Court, in order that the Court might make provision for the payment of the debt due to the decree-holder in such a manner as it might seem just and proper with reference to the circumstances of the case, the judgment-debtor was not entitled to ask the Court for his discharge under the 273rd section.

The result is that in our opinion this special appeal must be dismissed with costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

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March 27.

IN THE MATTER OF THE INDIAN REGISTRATION ACT (XX OF 1866) AND
IN THE MATTER OF PERCY WYNDHAM AND OTHERS.

Registration Act (XX of 1866), ss. 31, 82—84—Refusal to register.

Although the Registrar-General may have a discretion to refuse to register without endorsing his refusal on the document, yet, in cases where he does so endorse his refusal, the last clause of section 82 is applicable, and the case falls within the provisions of section 84; the party aggrieved has a right of petition to the District Court. Where the property, the subject of a deed presented for registration, was without the jurisdiction of the High

Court, but the order of refusal was made by the Registrar-General, who was within such jurisdiction.—*Held*, the High Court was the District Court under section 84 to which the petition should be made (1).

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THIS was an application for an order directing the Registrar-General to register a certain deed dated 6th June 1870, which was one requiring to be registered under the provisions of the Registration Act. The application was made on behalf of Colonel P. Wyndham by way of petition. His petition stated that the property to which the deed related was situated in the registration districts of Bogra and Dinagepore in Bengal; that on 23rd September 1870, the deed was duly presented for registration to the Registrar-General for Bengal; that the Registrar-General issued summonses, under section 37 of Act XX of 1866, against the other parties to the deed; and on 28th February 1871 they attended by their attorney, Kalinath Mitter, and admitted the execution of the said deed, but the Registrar-General refused to endorse his signature on the deed, as required by the provisions of the Registration Act, although no reason was alleged for such refusal, and that thereupon the Registrar-General refused to register the deed, and made an endorsement of his refusal on the deed.

The affidavit of A. D. Campbell, one of the parties to the deed by whom the registration was opposed, stated:—That the said deed was incomplete without a certain other deed, which declared the trusts to which the property conveyed in the deed of 6th June was to be subject, and that the petitioner was not entitled to compel registration of the deed alone; that the petitioner, who was under the deed to be the manager of the property until it was sold, had, by his conduct, forfeited his right to manage the property; and that certain errors had been inadvertently made in drawing the deeds which ought to be rectified.

Mr. Lowe for the petitioner now applied that the Registrar-General might be ordered to register the deed.

Mr. Graham, *contra*, contended that the order of the Registrar-General was not appealable. It was made under section 31,

(1) See sections 71, 73, Act VIII of 1871.

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and no appeal lies in such a case—*Sarkies v. Sungram Singh* (1). The right of appeal to the District Court is given by section 84 in all cases, with two exceptions. The first exception (see section 82) is the case in which the registering officer “has a discretion to refuse to accept for registration.” In this case the Registrar-General had a discretion to refuse to accept the deed for registration, which discretion he has exercised. Even if it is a case coming under section 84, it is contended that this Court is not the District Court to which the appeal lies.

This deed is not complete in itself, and cannot be registered alone. The two deeds form one transaction, and registration ought not to be compelled of one deed, without the other.

The Court need not confine itself to the question of the execution of a document by the parties; but it may go into the merits of the case between the parties to see whether the party

(1) Before Mr. Justice Phear and Mr. Justice Mitter.

July 29th, 1870.

*SARKIES v. SANGRAM SINGH.**

THE judgment of the Court was delivered by

PHEAR, J.—I think that, under the circumstances of this case, Major Stewart's order of refusal to register was an order passed by him as Sub-Registrar within the meaning of section 83. Major Stewart was in fact at the time doing the Sub-Registrar's duties by appointment of his superior officers; and the document was tendered to him for registration, because he was the person who was duly officiating for the Sub-Registrar in the absence of the latter. It appears to me, therefore, that, by force of section 83, an appeal against his order of refusal lay to the Registrar-General.

* But even if my view on this point is not correct, and Major Stewart's order is properly a refusal to exercise the authority given him by the first part of section 32, it seems to me that the Act does not give any appeal against such a refusal. Neither does such order of refusal fall under the operation of section 84, for it is clearly not an order of refusal made on appeal under section 83, and I think also that it is not an order made under section 82, because the exception in the first part of the section appears to me expressly to exclude it. The document was one which the Registrar, by reason of section 32, might “in his discretion receive and register,” and must therefore, I suppose, be a document “which he had a discretion (as Registrar) to refuse to accept for registration” within the meaning of section 82. I think therefore that this petition of appeal should be rejected with costs.

* Appeal under Act XX of 1866, from an order passed by the Registrar of the Cossiahs and Jyntiah Hills.

wishing to enforce registration is entitled, under the circumstances, to have the deed registered. See *In the matter of Brajanath Pyne and Armala Dasi* (1) and *In the matter of the Petition of Sankar Dobay* (2).

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Mr. Lowe, in reply, contended that the only course was to apply by petition to the High Court. A suit will not lie to compel registration. See *Sarkies v. Sungram Singh* (3): see also Rule 16 of 26th May 1869 framed under section 80, Act XX of 1866. The deeds here have no connexion with each other. The deed that is not here is not one that needs registration.

PHEAR, J.—The deed ought to be registered, and I ought to direct the Registrar-General to register it, unless two objections, which have been made by Mr. Graham, are valid. One is that the Registrar-General had a discretion under section 31 of Act XX of 1866 to refuse to receive and register the document, and that consequently his refusal falls within the first exception of section 82, and so the case was not one of those cases which are the subject of the first clause of section 84,—viz., the clause which gives the right to apply by petition to the District Court.

After consideration I think this objection cannot be allowed to prevail. Section 82 is merely directory. It obliges the registering officer, except under circumstances therein expressly mentioned, to endorse the words “registration refused” on the document when he does refuse to register it. It is possible that in this case the Registrar-General would have been justified in not accepting for registration, and not making any endorsement of refusal in the deed had he thought fit to take this course. But as he has in fact endorsed his refusal on the document, the last words of section 82 are applicable,—i. e., “no registering officer shall accept for registration a document so endorsed, unless and until an appeal shall have been presented under the provisions herein contained and decided in favor of the appellant.” The Legislature must, I apprehend, have intended that all cases which fall under the operation of these words

(1) 3 B. L. R., O. C., 60.

(3) *Ante*, p. 578.

(2) 4 B. L. R., A. C., 65.

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should be within the benefits of appeal and petition given by sections 83 and 84. In this view I think that, whether or not it was compulsory on the Registrar-General to endorse his refusal on the document in question, inasmuch as he has done so, this is a case within section 84, and the person aggrieved by the order of refusal has a right to present a petition to the District Court.

The other substantial objection was to the effect that this deed was not complete in itself; that it referred to another deed, and ought not to be registered without that other deed. It appears to me that this objection also fails. I do not desire to say that a document might not be couched in such terms as to be incomplete and defective without some other document. But that is not the case here. The deed which Colonel Wyndham wishes to have registered appears to me to be complete in itself. It is, undoubtedly, one which the law requires to be registered before it can be used in evidence in any Court of Justice; and I think it has been established that it was completely executed and delivered by the parties. The only thing I have to ask is whether the point has been reached at which it should be published so to speak by registration. I do not think I am authorized to go into the merits of the case between the parties such as Mr. Graham desired me to consider. If there is any equity between Mrs. Wyndham and her husband, which entitles her to refuse to be bound by the terms of the deed when registered, that can be made the subject of a regular suit; I cannot deal with it now.

There was one other slight objection raised,—namely, that this is not the District Court within the meaning of section 84. But I observe, by the 5th clause of that section, that the order which the Court has to make is an order on the Registrar or the Registrar-General by whom the refusal to register has been made. Now the Registrar-General, who has refused to register this document, is within the jurisdiction of this Court, and has his office within that jurisdiction; the grievance complained of appears thus to have arisen within the jurisdiction of this Court, and it seems to lie in the power of the Court to enforce the order which would redress it. I think, therefore, that this Court must be the District Court within the meaning of section 84. I.

must, therefore, order the Registrar-General to register this deed.

Mr. *Lowe* applied for the costs of the application.

Mr. *Marindin*, *contra*, objected that the Registration Act made no provision for costs.

Phear, J., (after taking time to consider) said that he found on inquiry that the practice was to give costs in such a case; and in accordance with the practice, he would give costs.

Application granted with costs.

Attorney for the petitioner: Mr. *Mackertich*.

Attorneys for the opposing parties: Messrs. *Sims* and *Mitter*.

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28 Feb 94.
Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Phear.

BULDEO NARAYAN (DEFENDANT) v. SCR YMGEOUR (PLAINTIFF).

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March 27.

Trover—Recovery of Notes lost by Gambling—Act XXI of 1848—Illegal Consideration—Bonâ fide Holder for Value—Costs.

The plaintiff, the manager of the Oriental Bank, placed in the hands of D., a broker, thirteen government currency notes, for Rs. 1,000 each, on D.'s representation that there was some Company's paper at a certain place which he could procure at a more reasonable rate than in the Calcutta market, if the money were given him to purchase it. If the Company's paper was not procurable, the notes were to be returned to the plaintiff. D. did not go to the place stipulated to purchase the Company's paper; but, meeting the defendant and others, he went into a house hired for gambling, and lost at cards and paid away to the defendant some of the notes he had received from the plaintiff. The plaintiff now sued the defendant to recover the notes so entrusted to D., on the allegation that they had been entrusted by him to D. for a specific purpose, and that the defendant was not a *bonâ fide* holder for value. He (the plaintiff), stated in evidence "that, if the paper had been "bought, he would either have taken the papers at the most favorable market "price for the bank, or have sold them and given D. the profit." Held, the plaintiff was entitled to recover. The defendant was not a *bonâ fide* holder for value.

Per Paul J., in the Court below, and *per Norman, J.*, on appeal.—The notes were especially entrusted to D. for the purchase of the Company's paper. *Per Phear, J.*—Upon the case put forward by the plaintiff, the transaction was a short loan, and not a bailment, and did not bear the character of a trust. But, upon the evidence, the notes were the property of the bank,

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and remained so in D.'s hands, and therefore the plaintiff was entitled to recover on behalf of the bank.

In the Court below a decree was passed in favor of the plaintiff, with costs on scale No. 3. On appeal the decree as to costs was altered, it being ordered that each party should pay his own costs.

THIS was an appeal from a decision of Mr. Justice Paul, dated the 27th January 1871. The suit was brought by Mr. Scrymgeour, the manager of the Oriental Bank, to recover from the defendant six Government of India currency notes, for Rs. 1,000 each, on the ground that the defendant had no title to them, he not being a *bond fide* holder of the notes for valuable consideration. The plaintiff alleged that the notes were entrusted to Mr. David Duff, a broker, for a specific purpose, and were to be returned to him if they were not applied for such purpose. It appeared from the pleadings and evidence that, on the 16th November 1870, Duff, who was a friend of the plaintiff's, and who had been entrusted with money on former occasions to buy Company's papers for the plaintiff, came to the plaintiff, and represented to him that there were some Company's papers for sale at the Alipore Court; and that, if the plaintiff gave him a sum of Rs. 13,700, he could get the same much cheaper than if he bought them in the market at Calcutta. The plaintiff agreed to let him have the money, on the express understanding that it was solely for the purpose of enabling him to secure the Company's papers at the Alipore Court; and that, if the papers were purchased, he, David Duff, was to bring them to the plaintiff in lieu of the Rs. 13,700 to be advanced by him; but that, if the papers were not bought, Duff was to return the money to the plaintiff immediately as delivered to him by the plaintiff, and without changing or otherwise dealing with the same. David Duff acceded to these terms, and the plaintiff thereupon ordered the cashier of the Oriental Bank, of which he was the manager in Calcutta, to hand over to Duff notes to the extent of Rs. 13,700, and the notes, the subject-matter of this suit, were some of those handed to Duff. Instead of proceeding to the Alipore Court to buy the Company's papers, Duff, who seemed to have been previously acquainted with the defendant, met him soon after he had got the money from the plaintiff, and proceeded with him

to a house at Talla, in the suburbs of Calcutta, and there played at cards with the defendant and three other persons. When Duff came out of the house at Talla, he had not any of the notes he had obtained from the plaintiff in his possession, and he accounted for his loss by alleging that they had been forcibly taken from him by the defendant and his associates; the defendant, on the other hand, alleging that he, Duff, had lost them in fair play—Rs. 6,000 to the defendant, and the balance to one Mati Misser; and that, on making over the money to the defendant and Mati Misser, he had willingly, and without any compulsion, signed his name on the backs of all of them. The defendant, however, was not examined in Court as to this or any other point in the case, nor was any evidence offered on his behalf. Soon after David Duff had lost the money, he brought a criminal charge against the defendant Mati Misser and the two other persons he had met at the house at Talla; and Mr. Superintendent Younan, of the Detective Police, had, on arresting the defendant and others, obtained possession of all the notes the plaintiff had handed over to Duff. After the admission of the plaintiff in this suit, the plaintiff applied for, and obtained, an *interim injunction* delivering the money into the hands of the Police. The criminal charge against the defendant was dismissed.

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The following issues were settled:—

- “ 1. Whether the six notes, or any or either of them, were delivered by the plaintiff to Duff for the purposes and on the trusts mentioned in the plaintiff's written statement?
- “ 2. What is the legal effect of such delivery?
- “ 3. Whether the notes in the plaint mentioned, or any of them, are in the possession of the defendant?
- “ 4. Whether the defendant obtained the six notes, or any of them, in payment of money fairly won by play, or in any other manner?
- “ 5. Whether the defendant was, at the time alleged by him in his written statement, the *bonâ fide* holder for value of the said notes.”

PAUL, J.—The plaintiff in this case is Mr. Scrymgeour, the

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Calcutta agent of the Oriental Bank. The defendant is one Buldeo Narayan, of Banstolla Street, Calcutta. What the defendant's occupation is, is not mentioned in his written statement, and I have very little knowledge of him beyond the fact that he obtained six notes of Rs. 1,000 each by gambling from Mr. Duff, who is a stock-broker in this city. I shall refer afterwards more particularly to the statements in defendant's written statement.

The plaintiff sues for the recovery of six currency notes of Rs. 1,000 each under the following circumstances :—Mr. Scrymgeour says that, on the 14th November 1870, he placed in Mr. Duff's hands thirteen currency notes of Rs. 1,000 each, and seven of Rs. 100 each, in all Rs. 13,700 ; that Mr. Duff was to go to the Alipore Court, where, it was alleged, Company's papers were to be sold, and to purchase them, if they could be bought on favorable terms, and bring them to Mr. Scrymgeour ; if Company's papers were not procurable, Mr. Duff was to return the money to Mr. Scrymgeour. Mr. Scrymgeour swears no further arrangement took place. He says his intention was to assist Duff, who, I believe from his evidence, is a family man, and who is apparently not very well off. He further says that, if the papers had been bought, he (Mr. Scrymgeour) would either have taken the papers at the most favorable market price for the bank, or have sold them, and given Duff the profit in either case. Mr. Duff, however, never went to Alipore, and the bank notes remained in Duff's possession. Instead of returning all the bank notes to Mr. Scrymgeour, Duff betook himself into the suburbs of Calcutta, and gambled, and paid away notes for Rs. 13,000. Duff only returned notes for Rs. 700 to Mr. Scrymgeour. I have no hesitation in believing Mr. Scrymgeour's evidence, and holding that he never intended the money as a loan, and that he entrusted it to Duff for a limited purpose. I am of opinion that the papers, if purchased, would not have become the property of Duff, and that Mr. Scrymgeour's intention to give Duff the profits did not alter the complexion of the transaction, and change it from a trust to a loan. I find, therefore, on the first issue, that the six government currency notes were delivered by Mr. Scrymgeour to Mr. Duff on the trust and for the

purposes stated in the plaint and plaintiff's written statement; and I find it proved by Mr. Scrymgeour's evidence that the money was entrusted to Mr. Duff to enable him to purchase and bring Company's papers to the plaintiff; or, if the Company's papers were not purchased, to return the money to the plaintiff. I find on the second issue that the legal effect of the delivery of the currency notes to Mr. Duff, as found on the first issue, was not to alter the property of Mr. Scrymgeour in the notes. On the third issue I have no doubt that the identical notes which were placed in Mr. Duff's hands by the plaintiff were gambled and paid away by Duff to the defendant. The six notes were produced by Mr. Carapiet on the 16th November, on behalf of the defendant, to Mr. Younan, who kept them, and who has produced them in Court. Mr. Duff made a memorandum of the notes at or about the time he received them. This memorandum has been produced and filed, and Mr. Duff also states that he had no other notes of such large amounts, and that he paid away the very notes he had received from the plaintiff. From all these circumstances, and the general features of the case, I entertain no doubt whatever but that the notes sued for were the identical notes received by Mr. Duff from the plaintiff; and I accordingly find so on the third issue.

The fourth issue is whether the defendant obtained the government currency notes, or any of them, in payment of money fairly won at play. In regard to this issue, Mr. Marindin for the plaintiff admitted that the defendant had obtained the six notes in payment of money won at play. There is nothing to indicate the nature of the play, whether it was fair or foul, nor do I know the characteristics of the play. The cards were the cards of the defendant, and there is no evidence of fairness offered, though the burthen of proof lay on the defendant, as the matter was within his knowledge. On the other hand, there is nothing to show unfair play. On the fourth issue, then, as the affirmative lies on the defendant, I find the money was won in play, but it was not established by evidence that it was fairly won. I will now make a few remarks in reference to the conclusion to which the evidence leads me regarding the place where the play took place, and the nature of the gambling. I find that Mr. Duff, in the middle of the day, when he should have been at his business, was invited by Mati

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Misser, and carried off to a house in the suburbs of Calcutta, where he met two other persons,—namely, the defendants in these two suits (1); and that in card-playing, during a short period of time, Mr. Duff lost nearly Rs. 13,000 to the defendants in this and the other suit. The defendant in his written statement gives a graphic account of the place, and states that he hired for the day the house in the suburbs (to which Mr. Duff went) for the convenience of Duff. In the 3rd paragraph of his written statement, the defendant says as follows :—“The defendant became acquainted with the said David Duff in the month of October 1870, at the house of a friend, at Telkal Ghat at Howrah; and on several occasions, the defendant, with several persons, played with the said David Duff at cards, when the defendant lost, and the said David Duff won Rs. 1,050 from the defendant.” From this statement it appears that Duff had played with the defendant on several previous occasions. The defendant further says in the 4th paragraph :—“The said David Duff, on the last of the said occasions, stated that, as it put him to great inconvenience and loss of time to cross the river, he should be glad if all the parties could meet on this side of the river, where he would gladly join and play with them at cards; and whenever they would engage such a place, he would, on notice being sent to him, join them and play at cards.” In the 5th paragraph of the written statement, the defendant says as follows :—

“On the 14th November, the defendant engaged a garden-house at Talla in the suburbs of Calcutta to pass the day, and sent one Mati Misser to the said David Duff to call over if he should be desirous of playing at cards; and about 2 o’clock in the afternoon of the said 14th November, the said Mati Misser returned accompanied by the said David Duff; and after a little it was arranged that they should sit and play at cards as before.” Then the written statement goes on to show that the parties played, and Mr. Duff lost about Rs. 13,000. From these allegations I gather that the house to which Duff went was expressly hired for the day for the purpose of gambling, and I have no doubt that, if any other congenial spirit had visited

(1) Another suit was brought by Mr. Scrymgeour, against other defendants, to recover the rest of the Notes.

that house and wished to play, he might readily have done so. I hold on these facts that the house hired for the day was a common gaming-house, hired by the defendant and others for the express purpose of procuring persons to play there. I have been warned by Mr. Kennedy that I should not come to this conclusion without evidence, but I think the facts I have above detailed afford sufficient evidence entitling me to draw the conclusion I have done.

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The next question raised by the fifth issue is the most important in the case,—namely, whether the defendant is a *bona fide* holder for value. I must observe, in commencing my remarks on this point, that if the law permitted the defendant to place himself in the position of a *bona fide* holder for value, and thus enabled him to resist the plaintiff's claim, the law would be in a most deplorable state. I do not think the law is so; nor is the view of the law so strenuously insisted on by Mr. Kennedy supported by the authorities cited by him. The cases in which the holders' *bona fides* is considered and admitted are generally mercantile cases. Looking at the fountain-head of the principles which break in on the common law, and establish the proposition that, in some instances, property of one individual without his consent passes to another, it is clear to my mind that these principles were founded entirely on reasons of expediency, having regard to the due circulation of money, and the interests of commerce, trade, and business. Such a case as the present was never contemplated by the rule laid down in *Miller v. Race* (1), else a reservation would have been undoubtedly made in the rule. Mr. Marindin has well put it that personal property does not pass from the real owner without his consent, except in the case of negotiable securities, cash, and notes, and then only when the person who says he has become the owner is prepared to show that he is a *bona fide* holder for value. The defendant does not, in my opinion, come, as I shall presently show, within the operation or protection of the rule in *Miller v. Race* (1) and the succeeding cases. Mr. Marindin cited *Hall v. Featherstone* (2), as showing that the *onus* of proof in circumstances like the present lies on the defendant, and that he is bound

(1) 1 Burr., 452; S. C., 1 Smith's L. C., 468. (2) 3 H. & N., 284.

1871 to show that he is a *bond fide* holder and for value. It is necessary I should examine both branches of the proposition. I shall consider them separately: 1st, whether the defendant was a *bond fide* holder; and 2nd, whether he was a holder for value.

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After the decision of *Miller v. Race* (1), confusion and great inconvenience arose in consequence of the rule which was engrafted on the case to the effect that a person who had acted negligently and without due caution could not be considered a *bond fide* holder. The hardship and inconvenience became so great and glaring that the cases of *Gill v. Cubbitt* (2) and other succeeding cases, which laid down the rule which was engrafted on *Miller v. Race* (1), were fairly challenged and overruled in *Raphael v. The Bank of England* (3). *Raphael v. The Bank of England* (3) does not appear to me to go further than the case of *Egan v. Threlfall* reported in a note to *Gill v. Cubbitt* (2). In that case it was clear the defendant had very good reason to believe the negotiator had not come by the notes fairly; and Mr. Justice Holroyd put the case to the jury in the way (as it appears to me) afterwards in substance adopted in *Raphael v. The Bank of England* (3). Mr. Justice Holroyd put the case to the jury as follows: "If they were of opinion that the defendant had received the note fairly and *bond fide* in the ordinary course of business, and had given value for it, he would be entitled to a verdict; but if, on the other hand, he had received it out of the ordinary course of business, and had not in fact given full value for it, the plaintiff would be entitled to a verdict." If Mr. Kennedy's contention that this defendant is not a common gambler is correct, it follows that he did not receive the money in the ordinary course of his business, and he must be taken to have received the money, as he alleges he did, namely, winning the same at a sitting at cards. This mode of receiving money cannot be considered to be in the ordinary course of business; it is an exceptional and peculiar method of receiving a large sum of money. I do not think that the protection afforded by the class of cases to which I have referred, which was intended to apply to merchants and shopkeepers, can be extended to a person

(1) 1 Burr, 452; S. C., Smith's L. C., 468. (3) 17 C. B., 161.

(2) 5 Dow. & Ry., 321.

situated like the present defendant. In *Raphael v. The Bank of England* (1) it appeared the notes were lost twelve months previously, and the jury found that Raphael took the notes *bond fide*. But in the course of the argument, I threw out that, if instead of Raphael, who was a money-changer at Paris, the owner of a gambling-house at Baden-Baden had been the plaintiff, could he have claimed the same favorable position as Raphael? It seems to me that such a person would not have come within the meaning of a *bond fide* holder as described by Mr. Justice Cresswell in *Raphael v. The Bank of England* (1). His Lordship there said "*bond fide*" means "really and truly for value." I consider the doctrine that negotiable securities and money pass in the ordinary course of business, &c., is not applicable to a person who acquires it by gaming. I therefore hold that the money in question was not received *bond fide* within the meaning of the cases of *Egan v. Threlfall* reported in a note to *Gill v. Cubbitt* (2) and of *Raphael v. The Bank of England* (1), and that consequently the defendant has not made out the first branch of the proposition, that he was a *bond fide* holder.

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The next question is whether the defendant gave value for the money he received from Mr. Duff, such value as will enable him to resist the prior equity of the plaintiff, who was defrauded of his money. In a certain sense, as between gamblers, money paid away in gambling may be said to be paid away for value, but the question is whether this value is a legal value as against a person who has been deprived of his negotiable securities and money by the fraud of the person who pays the same over in payment of a gambling debt. Mr. Kennedy has cited several cases as showing that money paid under contracts which are void, such as gambling contracts are, is not recoverable, and that moneys payable in respect of such contracts by persons as the agents of the parties sued can be recovered in an action. These cases appear to me to have no bearing on the question of "value" as between an innocent party who has been defrauded of his property, and the gambler who has, by gaming, obtained the same. The case of *Clarke v. Shee* (3) is distinctly applicable to this case, and I should be justified in holding that no value was

(1) 17 C. B., 161.

(2) 5 Dow. & Ry., 324.

(3) 1 Cowp., 197.

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given by the defendant under the circumstances of the present case on the authority of that case without going further. In *Clarke v. Shee* (1), an action on the case was brought for money had and received under the following circumstances:—David Wood, being clerk to the plaintiff, a brewer, and receiving money from the plaintiff's customers, and also negotiating notes for the plaintiff in the ordinary course of business, paid several sums with the said money and notes at different times to the amount of £459 4s. 4d. to the defendants upon the chances of the coming up of tickets in the State Lottery, contrary to the Lottery Act of 1772. It was contended that the plaintiff could not maintain the action, but it was held that the plaintiff could, and that he was under the circumstances of the case entitled to recover. Lord Mansfield in his judgment says (amongst other things) as follows:—“The next question is whether the plaintiff can maintain this action. This is a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action.” After making some other remarks, His Lordship states as follows:—“Where money or notes are paid *bonâ fide* and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover. It is of public example and benefit that he should; but otherwise, if they cannot be followed and identified, because there it might be inconvenient and open a door to fraud. In *Miller v. Race* (2) and *Golightly v. Reynolds* (3), the identity was traced through different hands and shops. Here the plaintiff sues for his identified property which has come to the hands of the defendants iniquitously and illegally, in breach of the Act of Parliament. Therefore they have no right to retain it, and consequently the plaintiff is well entitled to recover.” As to this case, Mr. Kennedy maintains that, inasmuch as the money was obtained illegally

(1) 1 Cowp., 197.

(2) 1 Burr., 452; S.C., 1 Smith's L.C., 468.

(3) Loftts' Rep., 88.

in breach of an Act of Parliament, that therefore the money was properly ordered to be refunded ; and that as a gambling contract is only void but not illegal, money paid in pursuance thereof cannot be recovered by the party whose money has been paid away. I maintain, however, that Lord Mansfield used the word "iniquitously" not as synonymous with "illegally," but as meaning "unconscientiously," if the word "iniquitously" is read in conjunction with the remarks with which the judgment opens as stated above. There is a case of *Snow v. Saddler* (1) relied on by Mr. Kennedy as showing affirmatively that payment of money on a bet is a payment for value, and cannot be recovered by a third party, whose money has been so paid away ; but that case lays down no such doctrine. In that case one witness said that the defendant received it from a stranger at the Doncaster races for bets won, or in change out of payment of bets lost on some of the races ; according to another witness present at the same declaration, "from his bankers at Oxford, or at Doncaster." The jury were directed to find for the defendant if they believed the last witness ; they found, however, for the plaintiffs. The direction to the jury was very limited and narrow ; they were left no option but to find for the defendant or not according as they believed the last witness or not. The last witness contradicted the previous one, and it may well be that the jury disbelieved him. The Court granted a new trial on payment of costs, and no reasons were given. What became of the case afterwards is not known. I consider the case at *nisi prius* was decided on a very narrow ground, which was properly overruled, and it is not possible to deduce any principle from the decision of the case, which furnishes no reasons for a new trial. I may further add that, if in that case that part of the evidence of the first witness, which was to the effect that the defendant received the money in change out of payment of bets lost on some of the races,—*i. e.*, out of a larger sum of money paid by the defendant in respect of a lost bet,—it is clear that the £20 sued for would, under these circumstances, have been received for value, being, so to speak, part of the defendant's own money paid back. In this view the

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direction to the jury was clearly wrong, as it prevented the jury deciding on the facts I have alluded to,—facts which, if accepted, would be sufficient to show that value was given for the money sued for. Then there is *Easley v. Crockford* (1), a case very like the one last cited. The marginal note of that case runs thus:—“ In 1830, the plaintiff had his pocket picked of “ a £200 bank note at a public meeting. The note was paid to “ the defendant as he said upon a bet on the Derby in 1832, but he “ could not say by whom. Held that the plaintiff was entitled to “ recover in trover.” The two cases last considered are nearly alike, yet in the one case a new trial was granted, and in the other refused. However, I must admit that in the latter case *Gill v. Cubbitt* (2) was followed. These cases were decided before the Wagers’ Act 8 & 9 Vict., C. 109, and the Indian Act against wagers, Act XXI of 1848, were respectively passed. I prefer following the ruling of Lord Mansfield in *Clarke v. Shee* (3). There can be no doubt that the notion of a *bona fide* holder for value was engrafted upon the Common Law from the principles in force in equity. In *Phillips v. Phillips* (4), Lord Westbury fully and clearly discusses the plea of a purchaser for valuable consideration without notice; and in the course of his judgment His Lordship makes these remarks:— “ Now the defence of purchaser for valuable consideration is “ a creature of a Court of Equity, and it never can be used in a “ manner at variance with the elementary rules which have been “ already stated. It seems at first to have been used as a shield “ against the claim in equity of persons having a legal title.” I do not think it can be fairly maintained that the title gained by a gambler is to be used as a shield against the prior title of the person defrauded. Further, it appears to me that where the right to regain property hinges on the equity which a party who has been defrauded has, a Court of Equity which enforces such a right cannot do so in breach or violation of the same right to which an innocent purchaser can appeal with equal justice. The point is very clearly put by Mr. Justice Story in his work on Equity Jurisprudence, volume 2, page 997:—“ Where

(5) 10 Bing., 243.

(6) 5 Dow. & Ry., 324.

(1) 1 Cowp., 197.

(7) 31 L. J. Ch., 321.

" Courts of Equity are called upon to administer justice upon " grounds of equity against a legal title, they allow superior " strength to the legal title where the rights of the parties are in " conscience equal." I therefore take it that the rights of the parties must be equal where a Court of Equity refuses assistance to a plaintiff who has been manifestly defrauded. I am free to admit that equality should not be weighed too nicely. In this case, however, the scale entirely preponderates in favor of the plaintiff against the defendant, and it is impossible to say that the rights of the parties in this suit are in any way in conscience equal. If the property in suit was trust property, of which a *cestui que trust* was defrauded by a trustee who held under a deed which did not disclose the trust admitted otherwise to exist, I apprehend a plea of a purchaser for value would not be sustained by proof that the value in respect of which the property was transferred was a gambling debt. It is said by Mr. Kennedy that an antecedent debt is a proper consideration. He cited the case of *Thorndike v. Hunt* (1). In that case, at page 570, Lord Justice Knight Bruce observes as follows:—" Then was the transfer a " transfer for valuable consideration?—a question which must un- " doubtedly be answered in the affirmative. There was a debt " due from the trustees; they were called upon to pay it, and if " it had not been paid they would have been liable to execution. If " the fund had been transferred into Court, the property might " have been obtained from them by other means. It would be " impossible now to place the plaintiffs in the same position as if " the trustees had not made the transfer of the fund." The money won at play by the defendants was not a legal debt in respect of which the debtor would be liable to execution, nor could it be enforced in any other way; therefore the antecedent gambling debt would not, according to this case, constitute valuable consideration for the transfer of the notes from Mr. Duff to the defendant. If the plea put forward by the defendant could be maintained, a gang of evil-disposed persons might commit robbery of property such as cash and negotiable securities, and, when such property was found and identified, say and prove that the same was gambled away by one to another, and thus defeat

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every attempt at tracing and recovering stolen notes and other negotiable securities. If I am wrong in my construction of the case of *Clarke v. Shee* (1), I say there is enough to enable me to hold that the money sued for was won in a common gaming-house, and as such was illegally won within the admitted construction put by Mr. Kennedy on the case of *Clarke v. Shee* (1) decided by Lord Mansfield. For these reasons I find against the defendant on the 5th issue.

On the whole, I find that the bank notes specifically sued for were entrusted by the plaintiff to Mr. Duff upon certain terms; that, in breach and violation of those terms, the same were used by Mr. Duff, and transferred to the defendant, who is not a *bonâ fide* holder for value in respect of the money so improperly transferred. I give the plaintiff a decree for the six notes of Rs. 1,000 each, or their value. As this is an important case, and the plaintiff has been put to much expense, and his legal advisers have been obliged to exert themselves very much, I award the costs on scale No. 3. I give a decree for the notes, and the parties may apply under Act VIII to take the notes out of Court.

From this decision the defendant appealed on the following grounds:—

1. That it ought not to have been held that the notes were the property of the plaintiff.
2. That it ought not to have been held that the notes were in the possession of Duff upon trust for the plaintiff.
3. That it ought not to have been held that the *onus* of proof of the fairness of the play lay on the defendant.
4. That it ought not to have been held that there was no valuable consideration for the transfer of the notes.
5. That it ought not to have been held that the property in the notes had not passed to the defendant.
6. That the costs of the suit ought not to have been ordered on scale No. 3, but on the usual scale.

Mr. Kennedy and Mr. Lowe for the appellant.

Mr. *Marindin* and Mr. *Evans* for the respondent.

Mr. *Kennedy*.—This was the case of a loan for the benefit of Duff; he was not a trustee for the plaintiff. The transaction was a loan, not a bailment, and the money might have been recovered as for money lent. The defendant is *bona fide* holder of the notes; he took them without any notice of their belonging to any one other than Duff. This constitutes a *bona fide* holding, and the defendant is entitled to the notes. These notes are in the same position as bank notes, except as to identification—*per Lord Mansfield in Miller v. Race* (1). The fact of the notes having been taken in a gambling transaction does not make the defendant less a holder for value—*Quarriar v. Colston* (2), *Clayton v. Dilly* (3). *Clarke v. Shee* (4) is not in point; the transaction there was illegal. Here the transaction, in respect of which the notes were transferred, was not illegal. Act XXI of 1848 does not make gambling illegal: it only makes a wagering contract void. There is a great distinction between an illegal contract and a contract which is merely avoided by the statute. The cases subsequent to 8 & 9 Vict., c. 109, draw this distinction; and those cases, where the contract is merely avoided, show that the subject of the transaction cannot be recovered; such contracts are not however invalid to such an extent as to enable the plaintiff to recover in a case like this—*Rosewarne v. Billing* (5) and *Snow v. Saddler* (6). In cases where the transaction has been done in accordance with usage, and completed, the Court will not interfere—*Knight v. Fitch* (7), *Knight v. Cambers* (8), *Jessopp v. Lutwyche* (9), and *Oulds v. Harrison* (10). [PHEAR, J.—In *Fitch v. Jones* (11), Erle, J., says that the effect of the Gaming Act is not to make the contract illegal, but to destroy the consideration, so that, so to speak, the transferor makes a present of the subject of transfer. Suppose in this case the plaintiff to say, “The notes were not Duff’s to make any one a present of; they were mine, and

(1) 1 Burr., 452; S. C., 1 Smith's L. C., 468.

(6) 3 Bing., 610.
(7) 15 C. B., 566.

(2) 1 Phillips, 147.

(8) *Id.*, 562.

(3) 4 Taunt., 165.

(9) 10 Exch., 614.

(4) 1 Cowp., 197.

(10) *Id.*, 572.

(5) 15 C. B., N. S., 316.

(11) 5 E. & B., 238.

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I therefore sue to recover them"]. That would be a different suit to this; this is a suit for trover. If money had been paid for a gambling debt by a third person, that would have been a payment for value. [NORMAN, J.—Can you cite any case showing that a short loan has been held not to amount to a trust?—*Pott v. Clegg* (1)]. It is for the other side to show some case in which it has been held to amount to a trust. Some authority should be shown for saying the transaction in the present case amounted to a trust. It is submitted it was merely a loan to Duff for his own benefit. A gambling debt, except so far as it is prohibited by statute, is as good as any other valuable consideration. See *Ramloll Thackoorseydass v. Soojumnaall Dhondmull* (2).

Mr. *Lowe* (on the same side).—The transfer was a mere loan. The transaction is on a par with cases where one man goes to another and borrows money for the purpose of releasing Company's paper, or of obtaining shipping documents. He borrows the money for a time, because without it he could not obtain the Company's paper, or the goods which are the subject of the shipping documents. If the plaintiff's case were a true one, the plaintiff's name would be on the notes, and not Duff's.

Mr. *Marindin* for the respondent.—Two questions arise in this case: *first*, whether the notes, at the time they were handed over to the defendant, were the property of the plaintiff; *second*, whether, if they were the property of the plaintiff, the defendant is a *bonâ fide* holder for value. The first question sub-divides itself into—*first*, whether the money was the plaintiff's money or the money of the bank. It is submitted it was the plaintiff's money; his evidence shows it was; the cashier paid it on the plaintiff's private account; there was no cross-examination to this point; there is nothing to disturb the position that the money was the plaintiff's. *Second*, whether, if the money was the plaintiff's, the transaction between the plaintiff and Duff was a loan or a bailment. There may be a

(1) 16 M. & W., 321.

(2) 6 Moore's P. C., 300.

qualified property given in money, as well as other things, and the fact that it was given for the transferee's use and benefit does not give him unqualified property in it, or prevent the transferor from recovering it—*Reg. v. Henderson* (1). That was a case of specific goods being delivered on trust for sale; the goods were not merely entrusted to be sold in the bailor's behalf; if the goods had sold for more than the specified price, the bailee would have had the profit. Another class of cases are those in which money has been entrusted to a person for a particular purpose, and the bailee has become insolvent; and it has been held that the money does not pass to the assignee—*Edwards v. Glyn* (2), *per* Erle and Crompton, JJ., where they held there was a special trust. [NORMAN, J.—In that case something remained to be done; the money was in some degree under the control of the sureties; the Judges talk of what would have been the effect if there had been a complete transaction.] Even supposing Duff was to buy the Company's paper for his own benefit, yet, in the interval between his receiving the notes and buying the paper, the money was not merely lent to him; but until he did the particular thing for which the notes were given, he was liable to return them in specie—*Tooke v. Hollingworth* (3) and *Moore v. Banthrop* (4). The notes were given here for a particular purpose; it is unnecessary to consider whose the Company's paper would have been if it had been purchased.

To come to the second question,—Whether, supposing it was the plaintiff's money, the transfer by Duff to the defendant changed the property, considering the circumstances under which it was made. The general rule is that a party cannot give, by transfer, a greater interest in a thing than he himself possesses; the exceptions are those cases of which *Miller v. Race* (5) is the leading one. It is not shown that these notes were fairly won at play. It is said the *onus* is on the plaintiff to show they were

(1) 11 Cox's Cr. C., 593.

(4) 1 B. & C., 5.

(2) 28 L. J., Q. B., 350.

(5) 1 Burr., 452; S. C., Smith's

(3) 5 T. R., 215; S. C., on appeal,

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2 H. Bl., 601.

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unfairly won, but it is submitted that is not so ; it is for the defendants to show that they are not only *bonâ fide* holders, but *bonâ fide* holders for value—*Hall v. Featherstone* (1), *Clarke v. Shee* (2), *Fitch v. Jones* (3). *Snow v. Saddler* (4) decides nothing, and it was decided before gaming was made illegal. *Easley v. Crockford* (5) seems contrary to this, but that case was decided on the authority of *Gill v. Cubitt* (6), which is overruled to some extent by *Raphael v. The Bank of England* (7). By 8 & 9 Vict., c. 109, in England, and here by Act XXI of 1848, gambling contracts are made absolutely void ; the transfer under such a contract is merely voluntary. The former Acts as to wagering contracts—viz., “9 Anne, c. 14, and 5 & 6 Will. IV., c. 41, &c.,—only say the money should be considered to be given on an illegal consideration, not that the contract was absolutely void. By Act XXI of 1857, section 10, there is a penalty for using a house as a common gaming-house ; so that gaming is absolutely illegal ; and it is not only that gaming contracts are void. The defendant gave no value for the notes, and is not a *bonâ fide* holder for value. The transferee of money, &c., so won stands in no higher position than the transferor, in this case Duff, in whom there was no property in the notes, but who had been entrusted with them for a special purpose.

Mr. Evans on the same side.—The whole contract is void by Act XXI of 1848 ; therefore there is no title in the defendant ; he cannot be a *bonâ fide* holder for value, but is merely in the same position as if he had picked the notes up—*Fitch v. Jones* (3). The cases are laid down, in 2 Wm's. Saunders, 47 c—f. Whatever rights may have been given to Duff by the transaction, the notes were not his by any such proprietary right as enabled him to deal with them except in one particular way. He must be treated as a bailee of money for a particular purpose. [PHEAR, J.—Can

- (1) 3 H. & N., 284.
 (2) 1 Cowp., 197.
 (3) 5 E. & B., 238.
 (4) 3 Bing., 610.

- (5) 10 Bing., 243.
 (6) 5 Dow. & Ry., 324.
 (7) 17 C. B., 161.

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you maintain an action of trover in the case of money?] In the case of bills, which are the same, it can be maintained—see *Robson v. Rolls* (1). [PHEAR, J.—When can you get the money back?] When there is breach of the condition of the bailment—see *Toovey v. Milne* (2) and *Edwards v. Glyn* (3). [PHEAR, J.—There is one element about those cases which is absent here; the money actually came back to the lender—see *per Erle, J.*, in *Edwards v. Glyn* (3). The circumstances all form one transaction there]. The notes were given to Duff for a particular purpose, and as he did not apply them to that particular purpose, he, being a bailee for a special purpose, made himself liable. It is by no means clear that this is not a case of fraud; and if the notes did pass by fraud, nothing at all passed to the defendant, and the notes become re-vested in the plaintiff. We have to prove our title, and that in any way we can; it is not as if the defendant had any title to the notes. Transfer, except for the special purpose, does not change the property, unless the element of a *bond fide* holding for value is brought in—Story on Bailments, page 7, note; *Reg. v. Henderson* (4). There any profit over and above a certain fixed sum was to go to the bailee, and an action of trover would have lain against the bailee and the pawnbroker (unless protected) for the goods. So it would lie against Duff in the present case; and if against Duff, it will lie against the defendant.

Mr. Kennedy in reply.—None of the cases cited *contra* decide that, in a case of a transfer similar to that between the plaintiff and Duff, the money would not be divested from the transferor. On this ground, *Tooke v. Hollingworth* (5) and *Moore v. Barthrop* (6) are distinguished. In the latter case the subject of the transfer was a cheque, not money or notes. In order to create a loan, there must not

(1) 9 Bing., 648.

(5) 5 T. R., 215; S. C., on appeal,

(2) 2 B. & Ald., 683.

2 H. Bl., 501.

(3) 28 L. J., Q. B., 350.

(6) 1 B. & C., 5.

(4) 11 Cox's Cr. C., 593.

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only be a lender but a borrower, and the latter must accept it as a loan for the special purpose. In all the cases cited, the borrower re-vested the subject of the loan in the lender; and until the assent of the borrower is given (and his returning it shows it was not given), there is no possession in the borrower—*Fitch v. Jones* (1). But that is not the case here. Whose was the Company's paper to be when purchased? The plaintiff could not have asserted his right to it, but he could have done so if Duff had been his agent. If Duff had been bankrupt, would it not have passed to his assignee?—*Ex parte Coombe* (2). If the doctrine of principal and agent in such a case as this were a good one, it would have been acted on in that case. In *Reg. v. Henderson* (3), the bailee did sell the watches; the conversion of the property was rather the conversion of the proceeds than of the watches. [NORMAN, J.—By 24 & 25 Vict., c. 96, it is no longer a defence that the prisoner received the goods in character of a bailee—*Reg. v. Hore* (4)]. Taking into consideration that the plaintiff supplied Duff with funds, what was the effect of the gambling? The Courts will not disturb the transaction if it has been completed. The money has actually passed; *Knight v. Cambers* (5) and other similar cases show this. [PHEAR, J., refers to *Lemaire v. Elliot* (6)]. Where money has been paid under a mistake of law, it cannot be recovered in a suit for money had and received; but in cases where money has been paid under a mistake of fact, it can generally be recovered—*Oulds v. Harrison* (7). Costs No. 3, which were given in this case, should only be given in very exceptional cases. This is not a case in which they should have been given.

NORMAN, J.—This is an appeal by the defendant from a decree of Mr. Justice Paul in a suit by Mr. Scrymgeour, the manager of the Oriental Bank, to recover six currency notes for Rs. 1,000 each, which had been obtained by Mr. David

- (1) 5 E. & B., 238.
- (2) 4 Madd., 249.
- (3) 11 Cox's Cr. C., 593.
- (4) 3 Fos. & Fin., 315.

- (5) 15 C. B., 562.
- (6) 7 Jur., N. S., 1206.
- (7) 10 Exch., 572.

Duff from the plaintiff, and won by the defendant from Duff
by gambling.

The first question raised by Mr. Kennedy, who appeared for
the appellant, was whether the notes, when lost by Mr. Duff
at gambling, were the property of the plaintiff.

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The plaintiff deposed that he had known Mr. Duff since 1853. He says:—"I remember his applying to me to supply him with "funds for a particular purpose. Mr. Duff mentioned to me that "certain government paper was ready for delivery. I entrusted "him with money on the 14th of November for the purpose of "purchasing or lifting the government paper. It was said to be "at the Alipore Court. He was to bring the paper to me. If "the paper was not purchased, he was to bring back the money. "Duff was not to use it for any other purpose. The sum was "Rs. 13,700. I did not pay him the money with my own hands. "I gave him an order. This is it." The order signed with the initials of Mr. Scrymgeour does not specify the name of any payee; it is simply—"Pay thirteen thousand seven hundred rupees." On the back is a receipt signed by Mr. Duff for Rs. 13,700. The only entry of the transaction which has been produced is an entry in a rough book or register of the payment out of notes, which shows that the payment was made by the order of Mr. Scrymgeour, but it does not show to whom the Rs. 13,700 were debited. This sum is not marked as carried to the private account of Mr. Scrymgeour, nor is the entry ticked, as all other entries appear to be, of payments of money to, or on account of, particular persons. It is entered in a column headed "Change." Mr. Scrymgeour says Duff never gave him any paper purchased with the money, and did not return the money to him. He says:—"I got 700 rupees from him on the evening of the 16th." On cross-examination, Mr. Scrymgeour said:—"The notes were never in "my possession, except as manager of the Oriental Bank. I "was responsible for these notes. I became possessed of "them as my own property from the moment the cashier took "the notes in his hands, and paid them over. I gave this money "for a special purpose only. He asked me to entrust him with "the money. He did not ask me to supply him with funds for

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" this particular purpose of purchasing Company's paper. He " was to purchase paper and bring it to me. It was then to be " settled whether I should buy it over for the bank or not, or he " should sell it and give me the money. The eventual benefit " would probably go to Duff. I would have nothing to do with " any loss. Duff would bear the loss. It is the ordinary custom " with bankers to entrust brokers with money, to allow them to " take the money for the purpose of lifting Company's paper. I " entrusted the man as I would have done any other broker for " that particular purpose, not to enable him to buy paper at a " profit. It was afterwards to be settled if I was to purchase the " paper at the market price. The probability of a loss was never " contemplated. He was not to be at liberty to sell to any " one without depositing the paper with me. He was to buy the " paper at the best rate he could find. It was to be matter of " adjustment at what rate I should purchase. I was not bound to " purchase. It was not necessary for me to decide one way or " the other. I should have bought or insisted on his selling without " letting the paper go out of my possession. The understanding " was that the papers were to be sold on that day. I have often " authorized brokers to get money for the purpose of taking " delivery of Company's paper. In making these arrangements " with brokers, they were to take delivery of paper the bank had " agreed to purchase. It was the bank's money I gave those " brokers. In those cases it was previously settled ; in this case " it was to be settled when he returned with the papers. In the " other cases the brokers had bought for the bank ; in this case it " was left, because it was not certain whether the papers would be " ready for delivery. If he was not pleased with the price, he " would not have bought. The probability is, I would have " taken at the lowest market rate, and given Duff any differ- " ence, and with that view I assisted Duff. If he had not bought " the paper, I wanted Duff to bring back the notes. I expected " he would bring back the identical notes. If he had changed " the notes, I would have taken cash, and been satisfied." In answer to questions by the Court, Mr. Scrymgeour said :— " I put the money into Duff's hands for a special purpose. He " was to buy the paper, or bring back the money. Nothing more

" was said. The rest was left to an after-arrangement. If he " had bought cheap, I would have bought at the most favorable " market rate. He would have got the difference. If I had not " taken it, I would have sent him out to sell immediately, and I " would have got back the exact amount. The rest would be his. " I did it to assist him, but without running any risk myself."

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These answers to the Court represent little more than the view which Mr. Scrymgeour wished the Court to take of his position as regards Mr. Duff. In the ordinary case, where a bank buys government paper which is in pledge, if the agent of the bank hands to the broker, through whom the purchase is effected, a sum of money to pay off the lien and take up the paper, the money so handed to the broker is the money of the bank. The broker becomes the agent or servant of that bank, for the special purpose of carrying the money to the pledgee of the paper, and paying off the incumbrance. Mr. Scrymgeour's case differs widely from this. The paper was not the paper, nor, if bought by Duff, was it to become the paper, of Mr. Scrymgeour or of the bank. The money was not taken by Duff to pay off any incumbrance on property in which the bank was interested. It was paid to; and taken by, Mr. Duff to enable him to buy the paper for himself. Suppose Duff had bought and paid for the paper, if the paper turned out to be stolen paper or forged paper, neither Mr. Scrymgeour nor the bank would have listened for a moment to any statement by Duff that he was a mere trustee or bailee of the money; that he had acted in good faith and without negligence, and ought not to be held responsible. For what would he be held responsible? Not for negligence. As he was to have the profit, so the loss on the purchase of the paper would fall on Duff, and of that loss the bank would have no right to complain. The bank would say— " Pay us the money we advanced you."

Suppose, again, between the time of the purchase of the paper at Alipore and the arrival of Duff at the bank, a sudden fall had taken place in the value of government paper, and the paper would not realize what Mr. Duff had paid for it, the bank would not have listened to that as excusing Duff from bringing back or repaying the amount of money he had received. Mr.

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Scrymgeour felt this difficulty, and attempted to say that "the probability of loss was not contemplated." Suppose the paper had been sold by Duff under Scrymgeour's direction, to what purpose would the proceeds have been applied? Or again, suppose Mr. Scrymgeour had agreed to take over the paper at a certain price. In either case the proceeds to the extent of the money advanced would go to Scrymgeour. What then would be the liability to the discharge of which they would be applied? I think it clear that the only terms in which the transaction could be described would be that the money must go to repay or be credited against the loan by Mr. Scrymgeour to Mr. Duff. Mr. Marindin admitted that if the paper was purchased by Duff, he would be liable to Mr. Scrymgeour as for money lent. He and Mr. Evans contended, however, that this liability was one which would only arise at the moment of the purchase of the paper; that down to that time Mr. Duff would hold the money entrusted to him as the money of the bank; that he received the money, and would continue to hold it on a special trust to apply it in purchasing the paper; and that, on the purchase of the paper, he would hold the paper on trust to bring it to the bank, and deposit it with Scrymgeour.

I think that this was the true nature of the transaction as between Scrymgeour and Duff; that as between these two parties it was never intended that Duff should have a right to apply the money to any other than the specific purpose of procuring the paper. The case of *Toovey v. Milne* (1) seems to me to show that money lent for such a purpose may be treated as clothed with a specific trust. I may remark that the money was not to be applied for the sole use or benefit of Duff, but for a purpose in which Scrymgeour was interested,—viz., in procuring paper to be placed at his disposal. The paper was not to be merely a security to Scrymgeour. Scrymgeour contemplated that he would have the opportunity of purchasing if the state of the bank's balance, when the paper was brought to him, rendered an investment in government paper desirable. Suppose, instead of the money, Scrymgeour had handed his watch or bills of exchange endorsed in blank to Mr.

(1) 2 B. & Ald., 685.

Duff, and authorized him to exchange the watch or the bills for the paper, there would be no doubt that the watch or the bills would have remained the property of Scrymgeour. Till the moment arrived when, in pursuance of the authority given to him, Duff exchanged the watch or bills for the government paper, Duff would have held the watch or bills on a special trust. If he applied the watch or bills to any other purpose, he would be guilty of a breach of trust, for which he might be made criminally responsible. See on this point—*Reg. v. Henderson* (1).

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If, therefore, the money handed to Duff for the purpose of being exchanged for paper became necessarily the property of Duff when handed to him, it must be because there is some essential difference between money and other goods. I think the only difference is, that money which passes by delivery cannot ordinarily be identified and distinguished. It is generally mixed with the funds of the receiver, so that no particular coin can be traced or distinguished as burdened with a trust. But where money can be identified, as where it consists of currency notes or money in sealed bags, it may be specially impressed with a trust, exactly in the same way as any other chattel. There are, no doubt, difficulties in the view of the case that the transaction was other than an ordinary short loan. Suppose Duff, without any negligence or misconduct on his part, had been robbed of the money on his way to Alipore. It is said that Scrymgeour would have been able to hold him responsible. I think there is very little doubt but that, as a matter of fact, Scrymgeour would in such case have treated the money as money lent at the time Duff got it from the cashier. Whether he would have been right in doing so is another question. Money lent, when no time is fixed for the repayment, is payable instantly; and the lender may at once sue. Suppose Scrymgeour had sued Duff for money lent after the latter had entered into a contract for the purchase of the paper, and before he had had time to go to Alipore to "lift" it. I think Duff might have been able to say successfully,—“I do not owe you any money. You have entrusted me with money to buy and bring you

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government paper. I have taken steps to do so." Scrymgeour could probably have countermanded the authority to purchase paper if it had not been acted upon. But while the authority lasted, I think Duff was under no obligation to restore the money to Scrymgeour, or to apply the money to any other purpose than that for which, by the terms of the agreement and advance, it was understood that he was to use it. It seems to me not an immaterial circumstance, as showing that the transaction was not treated by Scrymgeour as a loan, that, according to the only book which has been put in, the money handed to Duff under the orders of Scrymgeour does not appear to have been debited or credited to any one. The entry is in the column of "Change," which has been explained to be the column in which notes are entered, which are simply exchanged for cash, or the like. I am disposed to think that if we are to assume that Duff would have been liable to make good the money if lost by him otherwise than by his own default, that liability may be rested on a ground different from the supposition that the money was an ordinary loan. In the case of the watch or bills, which I have supposed, the taker would be liable for any loss as an ordinary bailee, with reference to the terms of the bailment. If the liability of Duff, with reference to the currency notes handed to him, would have been larger, it may be because there was an absolute engagement on his part to bring the papers or return the money, and an understanding that he would take all risks, as he was to get the substantial profit.

There is no doubt but that if Duff, while in possession of the money, had passed it away to any person in the ordinary course of business in payment of a debt or the like, the person taking the money from him would not have been bound to make any enquiry whatever as to the title of Duff. But the defendants are not in that position. Act XXI of 1848 avoids all contracts by way of gaming or wagering. The defendant having won the money by gaming cannot be treated as having obtained the notes under any contract, or for any valuable consideration. They are in the same position as if Duff had given the notes to them. They have no better title to the notes than Duff had. Duff had no title to the money, except for the special purpose

for which it was entrusted to him. I think the defendants have no better right, and therefore that the decree in favor of the plaintiff, Scrymgeour, was correct.

Mr. Justice Paul has awarded to the plaintiff costs on scale No. 3, which is very unusual. Costs on scale No. 3 are rarely given, and can only be given in important cases. I think the plaintiff may think himself very lucky to get back his money without costs. The defendant had no means of knowing anything of the special trust upon which Duff held the money. The plaintiff, on the other hand, by entering into an arrangement of a most unusual character, quite out of the ordinary course of business, enabled Duff to appear to the world as the owner of the money entrusted to him. By the possession of money entrusted to Duff by Scrymgeour on the 17th of October, in precisely the same manner as the notes now in question were entrusted to him, Duff, who was allowed by Scrymgeour to appear as the owner of the money, had been enabled to indulge in gambling with the defendants, and had won of theirs a sum of no less than Rs. 1,000. Though the defendants, as mere volunteers, cannot resist the claim of the plaintiff, I think they were fairly justified in putting him to the proof of his right, and in taking the opinion of a Court of law on that which is undoubtedly a difficult and doubtful question as to the right of the plaintiff to recover against them. I think that the decree of Mr. Justice Paul, so far as it awards costs to the plaintiff on scale No. 3, should be set aside, and that each party should bear his own costs, both of the original suit and of this appeal. In other respects the decree will be affirmed.

PHEAR, J.—Mr. Marindin is doubtless perfectly accurate in saying that two principal questions arise on this appeal, namely :—

(1.) Were the notes, when handed to the defendants by Mr. Duff, the plaintiff's notes ?

(2.) Did the defendant *bonâ fide* take the notes from Mr. Duff for value ?

The first of these questions seems to involve considerations of much nicety.

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There is a great deal in the case to suggest that the notes never were at any time the property of the plaintiff personally. But at present I will take the fact to be that Mr. Scrymgeour drew the notes from the bank on his private account, and then handed them, or caused them to be handed, to Mr. Duff for an expressed purpose. Mr. Scrymgeour states that purpose thus:—*(reads from the deposition detailed by Mr. Justice Norman, from "He asked me to entrust him," to "without running any risk myself")* (1).

Now it is clear that if this transaction at the outset amounted to a loan of money, then the first question must be answered in the negative, and the plaintiff's suit must fail.

At first sight there appeared to me to be only one alternative to this supposition, on the assumption that the money was advanced by Mr. Scrymgeour personally,—namely, this, that the notes remained the notes of Mr. Scrymgeour, and that Mr. Duff filled the character of his agent in the matter of "lifting" the government paper. And I must say that I was reluctant to entertain this view, because it seemed to me that the situation occupied by Mr. Scrymgeour in it was not such as a man of his credit and respectability would be likely to take up. I suppose "lifting" is equivalent to buying; and it is quite obvious that it would not be honest in Mr. Scrymgeour, manager of the bank, to buy the paper out of his own funds, or with money got from the bank on his credit, at a cheap rate, with the view to selling it immediately afterwards to the bank at a dearer rate, and putting the difference into his own pocket. Also, the honesty of the proceeding would be scarcely improved if Mr. Scrymgeour, instead of taking this difference himself, made a present of it to his friend. It is true that this difference may be considered as by possibility amounting to nothing more than a fair remuneration for the work, skill, and time done, exerted, and consumed in the expedition to purchase to Alipore. It does not, however, appear that any estimate on this head was formed, expressly or mentally, by either party; and even if it had been, I think the transaction would not altogether be such

(1) *Ante*, pp. 601, 602, 603.

a one as that the manager of the bank could take part in it with credit.

But Mr. Marindin pointed out most ingeniously that Mr. Scrymgeour is not necessarily in this dilemma. He argued that there is a middle view which we ought to take, namely, that the notes were not lent as money at the moment when they were handed to Mr. Duff, but were to become so at the moment when he used them to lift the paper; and inasmuch as this contingency never happened, Mr. Scrymgeour was the person in whom the property in the notes resided at the time when Duff transferred them to the defendant. Both Mr. Marindin and Mr. Evans presented the same argument in a different aspect, by urging that the notes in the hands of Duff were clothed with a special trust; and that trust having failed, or having been disregarded by Duff, the plaintiff was entitled to obtain re-possession of the notes. I must say that, of these two forms, the first best recommends itself to me by its precision of language. The phrase, "The notes in the hands of Duff were clothed with a trust," although copied from C. J. Abbott's language in *Toovey v. Milne* (1), is to me somewhat vague. If it has a definite meaning here, I suppose the meaning to be that Duff had dominion over the notes, but had obtained that dominion on trust to exercise it for the benefit, sole or partial, of some one other than himself. Now, does this correspond with the actual facts? Mr. Scrymgeour's representation, as I understand it, is in effect that he caused the notes to be handed to Duff, upon the understanding that Duff would, without unnecessary delay, "lift" the government paper and bring it to him (Mr. Scrymgeour), in order that the latter might retain it as security for the repayment of the value of the notes advanced. Thus Duff's duty with regard to the notes concerned himself alone. He was to buy paper, which, on being bought, was to become his own. He was afterwards, no doubt, to repay the amount of the notes, and to deposit the paper with Scrymgeour until he did so. But these are the common incidents of a loan transaction. In order to give the smallest clothing, in the shape of a trust, to the advance of these notes, I must imagine that Duff took and held them

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under an obligation to invest them, or apply them in some way for the benefit or advantage of Mr. Scrymgeour. But clearly, as I think, the only obligation he was under in this respect was to repay the amount of the notes at once, or to give the specified security for repayment. Would the case have been materially altered if the object of the advance had been that Duff should buy certain perishable goods, say a cargo of fish or of fruit; and if Duff had promise to bring, without delay, some government paper from his own strong box to leave with Mr. Scrymgeour as security for repayment of the money advanced until the fish, &c., should be sold, and the sale proceeds realized? And yet I suppose that no one would say that the advance in such a case was clothed with a trust. As well there, as in the case before us, the lender, by the terms of the contract, would obtain an equitable lien on the government paper to the extent of the money advanced. In the one case the lien would attach at once, in the other as soon as the paper was bought, but in neither would there be any trust investing the money itself. If it be said that, until the paper is bought, the money is in Duff's hands on trust to procure the lien, I think this is simply a misuse of a technical term; and I do not think that the stipulation, if there was such a stipulation, to the effect that when the paper should be bought by Duff, and be lying for Mr. Scrymgeour as security for the advance made by him personally, then Mr. Scrymgeour, as agent of the bank, was to have in a manner a right of pre-emption in the paper on behalf of the bank, carries the case any further towards the direction of a special trust.

It appears to me, therefore, on the whole, that the transaction, when viewed in the aspect which the plaintiff desires us to attribute to it, was a mere ordinary loan, a short loan, that it was not a bailment of any sort, and did not in any degree bear the character of a trust. I cannot in this state of things avoid the conclusion that when the notes were paid into Duff's hands, they became his money, and he at the same moment became pecuniarily indebted to Mr. Scrymgeour to the extent of their value. I think it would be refining too much to give effect to Mr. Marindin's suggested idea of a postponed loan. If we did so here, we should be obliged to do so in all cases of advances

made by a bank, without the simultaneous transfer of security for the same, and we should thus, as it appears to me, introduce into all mercantile dealings made with the aid of borrowed money a dangerous element of confusion and doubt.

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An illustration, which cannot be otherwise than imperfect as a test, was adduced by the plaintiff's counsel from the operation of the insolvent laws. But I think that, so far as it goes, it tells against the plaintiff. It appears to me that, on the foregoing facts, if after receiving the notes, and before lifting the paper, Duff had been adjudicated an insolvent, these notes would necessarily have passed under the vesting order to the official assignee. They continued as so much money in his hands to be used in the way of his business. The profits of the intended transaction, if profits were made, would benefit Duff's estate, and the loss, if loss accrued, diminish it. It is said, however, that *Toovey v. Milne* (1) and *Edwards v. Glyn* (2) afford authority to the contrary. In each of these cases the assignee of a bankrupt sued a person who had advanced money to the bankrupt, and who had afterwards got the money back again before it had been used by the bankrupt for any purpose whatever. To make the defendant, under such circumstances, give back the money to the assignee, in order that it might be distributed among the bankrupt's creditors, would be very like an act of confiscation for the benefit of strangers, and naturally the Courts have been astute to avoid it. Yet what after all do these two cases amount to? In *Toovey v. Milne* (1) the money sued for was advanced to enable the bankrupt to settle with his creditors. This purpose failed, and the money was repaid to the person who advanced it. Abbott, C.J., in his judgment said that "the money was advanced for a special purpose; and being so clothed with a specific trust, no property passed to the assignee of the bankrupt." And clearly this was so. The money, when in the hands of the bankrupt, was held by him on a trust imposed by the advancee of the money in favor of the bankrupt's creditors upon condition that they would accept it in full discharge of their claims. This trust (in favor of third persons, be it observed)

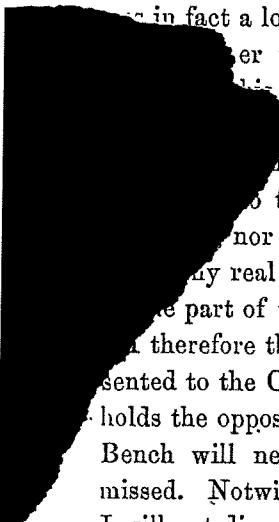
(1) 2 B. & Ald., 683.

(2) 28 L. J., Q. B., 350.

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" sureties had an equitable right. They had a right to say, ' What
 " we have done in enabling you to get the money advanced on
 " our credit was for this special purpose; and when it failed, you
 " ought to return it.' In this case the bankrupts had no equitable
 " right to use the money. I think a Court of Equity would have
 " restrained them from using it, and therefore I am of opinion
 " that the money did not pass to the assignees." So far as I
 perceive the force of this reasoning, it appears to me that Mr.
 Justice Crompton looked upon the sureties as being creditors of
 the bankrupt, and as having a special equitable lien upon the
 parcel of money by virtue of the matter of the garantie which
 they had given at the request of the bankrupt. If this be
 correct, he must have considered that the advance of the money
 was in fact a loan, notwithstanding that it was returned unused.


 The other two Judges, Lord Campbell distinctly said :—" I
 consider this as an advance of money by the defendants to the
 bankrupts, and that it constituted a debt between the bankrupts
 and the defendants." And in this view Mr. Justice Wightman
 seems to hold so that it seems to me neither of the cases, *Toovey v. Edwards* (1), nor *Edwards v. Glyn* (2), when closely looked into,
 give any real support to the contention which has been made
 in the case in the part of the present plaintiff.

I therefore think that the plaintiff's case, as it has been presented to the Court, entirely fails. The Chief Justice, however, holds the opposite opinion, and consequently the decree of this Bench will necessarily be to the effect that the appeal be dismissed. Notwithstanding the views which I have just expressed, I will not dissent from the Chief Justice in regard to this decree, because I am inclined to think that the decision of the learned Judge below ought to be upheld upon a ground which has not been taken before us. It seems to me that, however Mr. Scrymgeour may disguise the facts to his own mind, the common sense of the matter, deducible from his own evidence, and the book which has been put in, is that Mr. Scrymgeour, as agent of the bank, advanced the bank's moneys to Duff in order that he might procure the government paper from the Alipore Court for the bank at the lowest market rates. Duff was employed from a friendly desire that he should get some benefit out of the trans-

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action, and no questions were to be asked as to how much it actually cost Duff to lift the government paper. Assuming this to represent the true character of the transaction, I will not comment on it, except so far as to say it is plain that Duff was only an agent of the bank, and the notes in his hands remained the property of the bank until they should be exchanged for the government paper, which would itself, on being purchased, belong to the bank. This being so, the bank was entitled, at any moment before the purchase was actually effected, to claim the notes of Duff; and no one who took from Duff without consideration could, I apprehend, in this matter stand in a better position than Duff himself. I also agree with the Chief Justice that the defendants who admittedly obtained the notes from Duff by play must be treated as volunteers. It therefore seems to follow that the bank is entitled to recover these notes from the defendants. It can make no possible difference to either Duff or the appellants that Mr. Scrymgeour sues in his own name under the name of the bank, whose agent he is; and I do not see why it lies in the mouth of Duff, or any one taking from him as a volunteer, to make this objection. On the whole, therefore, I dissent from the decree which the Chief Justice thinks should be made in this appeal.

Judgment affirmed except as to costs.

Attorney for the appellants : Mr. Carapiet.

Attorneys for the respondents : Messrs. Robertson & Co.

[APPELLATE CIVIL.]

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

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HARGOBIND DAS AND OTHERS (DEFENDANTS) v. BARODA PRASAD DAS (PLAINTIFF).*

*Act XI of 1859, s. 11—Separate Account—Objection before Collector—
Suit to set aside Collector's Order—Civil Court—Jurisdiction.*

The plaintiff and A. and B. were joint owners of an estate paying revenue to Government. The names of A. and B. were alone recorded in the rent-roll of

* Special Appeals, Nos. 1306, 1307 and 1940 of 1870, from the decrees of the Judge of Sylhet, dated the 9th May 1870, modifying the decrees of the Subordinate Judge of that district, dated the 15th July 1869.

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the Collector. A. and B. alienated certain specific portions of the lands of the estate to their wives, and applied to the Collector, under section 11 of Act XI of 1859, to open a separate account for payment of the proportionate share of the revenue payable in respect of the lands so alienated. The plaintiff objected to such separation, on the ground that the lands had never been divided, but always held ijmal, and that A. and B. claimed a larger share than they owned; but his objection was rejected by the Collector, on the ground that he was not a recorded proprietor, and the application of A. and B. was granted. The plaintiff now sued in the Civil Court for a declaration of the extent of his share in the joint estate, and to have the order of the Collector set aside. Held, that the Civil Court had jurisdiction to entertain such a suit, and that it was not necessary to make the Collector a party.

Mr. Piffard (with him Baboos *Hem Chandra Banerjee*, *Manini Mohan Roy*, and *Hari Mohan Chuckerbutty*) for the appellants:

Baboos *Ashutash Dhar* and *Kali Mohan Das* for the respondent.

THE facts of this case and the arguments of the learned Counsel for the appellant are fully stated in the judgments of the Court.

JACKSON, J.—We think we need not call upon the respondent to answer the objections raised in this special appeal. We have heard the learned Counsel for the special appellant at great length, and we have given very full consideration to all the points which he has urged for the special appellant. The special appeal is from a decision of the Judge of Sylhet. The suit was instituted in the Court of the Subordinate Judge of Sylhet. The plaintiff alleged that he was the proprietor of a four-anna ijmal share in a certain estate, with the exception of certain plots of land, and claimed generally, as regards those ijmal rights in the four-anna share, for a declaration of his title; he claimed also as regards two plots of land a two-anna share under a different title. The cause of action stated by the plaintiff was that the defendants, Hargobind Das and Gowar Chandra Das, the owners of the remainder of this ijmal estate, had alienated certain specific plots of ground in the names of their wives, and had presented a petition to the Collector, under

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section 11, Act XI of 1859, asking that a separate account might be opened for that separate portion of the estate which they so made over to the wives, and might be dealt with as a separate estate on the Collector's rent-roll. The plaintiff said that these proceedings of the defendants were fraudulent, inasmuch as they made over a large quantity of land at a very small amount of jumma; that he, the plaintiff, being a co-sharer of the estate, had not recognized that jumma as being the proportionate jumma for those lands; that the transaction took place while he, the plaintiff, was a minor; that his mother protested before the Collector against this separation; that the Collector rejected that application without any enquiry, and went on to accede to the request of the defendants, and constituted these separate lands as a separate estate, and ordered a separate account to be kept in his office for the share of the lands so made over by the defendants to their wives. The plaintiff now sues to set aside all these proceedings, and he sues to recover possession of a two-anna share of two plots of land, of which, he says, he has been dispossessed, and to recover wasilat.

Both the lower Courts have concurred on the question of fact which was raised in this litigation. They were satisfied that the plaintiff's statement that the lands of the estate were ijmal, and not separated amongst the sharers of the estate, was the true story, and that the defendants' statement that there had been separation was incorrect. Both the lower Courts have accordingly decreed the plaintiff's suit on all points.

The Judge, in the first instance, had some hesitation as to whether a suit could be brought in the Civil Court to set aside the proceedings of the Collector, under section 11, Act XI of 1859. But, on reviewing his judgment on this point, and following a precedent of this Court, he came to the conclusion that he had authority, and he accordingly decreed the plaintiff's claim.

Then the third objection which was alleged, was that the Civil Court cannot interfere with any proceedings of the Collector, under sections 11, 12 and 13 of Act XI of 1859, whether those proceedings are regular or whether they are

irregular. In support of this view, a decision of this Court was put before us—*Shurufoonissa Bebee v. Hushmut Ali* (1). There is some expression of opinion to this effect in the decision in that case. The question, however, did not really arise, as is evident from the remainder of the decision, because it was found that the plaintiff had no right whatever in the land for which he had brought the suit. There has been a subsequent decision of this Court—*Madan Mohan Mazumdar v. Baistab Charan Mandal* (2)—in which Macpherson, J., alluding to the former

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(1) 9 W. R., 533.

(2) Before Mr. Justice Lach and Mr. Justice Macpherson.

The 20th December 1869.

SHEBAYET MADAN MOHAN MAZUM-DAR (PLAINTIFF) v. BAISTAB CHI-
RAN MANDAL AND OTHERS (DEFEND-
ANTS).*

*Charan Dutt for the Plaintiff,
Charan Dutt for the Mitter, and Iswar Chandra
Purboorbutty for the appellant.
Baboo Srinath Das, Bhagabati
Chatterjee, and Bhawani Charan
the respondent.*

HANDRA GANGULI (DEFEND-
ADAN MOHAN MAZUMDAR
(F.).

Baboo Srinath Das and Mati Lal
Mookerjee for the appellant.

*the Baboo Krishna Sahha Mookerjee,
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to the Colhar Sein for the res-
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be any forrent of the Court was de-
ascertain.*

Macpherson, J.—I think that both
these appeals should be dismissed with
costs.

As regards the appeal No. 340, the Judge is clearly right in holding that the plaintiff's cause of action arose in 1860, when the Collector's order, which it is the object of this suit to set aside, was made. That order appears to have been regularly made, and the name of Fakirchand, who held a mortgage from the proprietor under whom the plaintiff claims, having been then on the register, thus making the mortgagee recorded proprietor, the plaintiff is as much bound by the proceedings as if the name of the actual proprietor himself had been on the register. The suit having been instituted more than seven years after the Collector made his order, is barred by limitation, as the lower Appellate Court has decided.

As regards the appeal No. 371, the suit out of which it arises was instituted less than six years after the date of the order which it is sought to set aside. It is therefore not barred by lapse of time. It is argued that no suit will lie in the Civil Courts in respect of an act done by the Collector under section 11 and the following sections of Act XI of 1859. But it is nowhere enacted that such a suit

* Special Appeals, Nos. 340 and 371, from the decrees of the Officiating Judge of Jessore, dated the 19th November 1868, reversing the decrees of the Sudder Ameen of that district, dated the 26th August 1867.

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decision, stated that he did not think that under no circumstances whatever could the Collector's proceedings be interfered with, and in fact the learned Judges in that case went on to set aside the proceedings of the Collector as having been without jurisdiction. In that case the Collector had been applied to by one of the recorded sharers of a joint estate to open out a separate account as regards his separate share. One of the recorded sharers had appeared before the Collector, and made objections to the application. The Collector, disregarding the provisions of section 12, Act XI of 1859, which

will not lie, and in my opinion it will lie. And it will lie, although the Collector is no party to the suit,—though doubtless any decree obtained would be more effective if against the Collector and binding upon him.

In this case, I think the Judge has rightly held that there was an irregularity in the proceedings of the Collector which vitiates them, because, in my opinion, an objection to the proposed separation of the account was made by, or on behalf of, a recorded proprietor, and therefore the Collector ought to have suspended proceedings, and have referred the parties to the Civil Court. It is contended that no objection was in fact taken to the application which was granted. But the Collector considered that objection was taken, and he disposed of it himself. It appears that Purna Chandra first applied for a separate account on the 14th August 1859; but this application was struck off (on what date does not appear) because the applicant's name was not on the register. On the 12th of October 1860, Aladhmani, the widow of the mortgagee Fakirchand, whose name stood on the register as proprietor of the share, filed a petition of objection, under section 12 of Act XI of 1859. On this petition an order was made that it should be

filed with the record. On the 12th of February 1861, Purna Chandra, having had his name registered, applied again for a separate account. The usual notification was issued, but no fresh objection was raised. The Collector, however, considered that the objection taken by Aladhmani was still pending, and had reference to the renewed application of Purna Chandra; and he sent for her petition and, treating it as if she objected to the new proceedings of the matter in Aladhmani's absence; and decided that, the objection notwithstanding, Purna Chandra was entitled to the separate account for which he asked.

It seems to me that, though the objection on the part of Aladhmani was not regularly taken, the Collector considered that it was, and dealt with it as if it had been, and that we must now hold that substantially the application was objected to within the meaning of section 12 of Act XI of 1859. If this be so, the Collector had clearly (under section 12) no jurisdiction to proceed as he did, when an objection had, as he believed, been taken.

I therefore agree with the lower Appellate Court in thinking that the proceedings of the Collector were illegal, and that the first Court was justified in giving the plaintiff a decree,

directs that in such case the Collector shall refer the parties to the Civil Court and ordered the separation of the share of the estate. Macpherson, J., held that such proceedings were against the law, and that the acts of the Collector were therefore void, and should be set aside. In this case also it seems to us that upon the finding of the Courts below, the proceedings of the Collector were without jurisdiction. The law (section 11, Act XI of 1859) distinctly allows the Collector to act only where the application is made by a recorded sharer of a joint estate whose share consists of a specific portion of the land of the estate. It has been found by both the Courts that the shares of this estate have not been separated, and that the defendants are not the proprietors of a specific portion of the land of the estate, but that the plaintiff has an ijmali four-anna share of all the lands in the estate, with the exception of a few specific portions. As regards this application, on the part of the defendants, was made to the Collector, it does not appear that any enquiry was made by the Collector. There does not appear on these sections to be any provision in which any enquiry shall be made in order to ascertain whether the facts stated in the petition are correct. It is provided that the Collector shall publish a notice of the application, and if no objection is urged by any recorded co-sharer, the Collector shall comply with the application. The objection which was made on this occasion on the part of the plaintiff, while he was a minor, was rejected, not after any enquiry, not after ascertaining whether it was true that the defendants held a specific portion of the estate, but solely on the ground that the plaintiff's name was not recorded as a co-sharer in the Collector's rent-roll. The plaintiff therefore did all he could to prevent the Collector from carrying out the provisions of this law to his injury. The Collector being unable, as the law stands, to afford any remedy, it seems to me that he is fully entitled to come into the Civil Court for a redress of the injury which he has sustained under these proceedings.

It has also been objected that the Collector not having been made a party to these proceedings, no order can be passed as regards the Collector, and that the proceedings have thus

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1871 become void. In fact, however, the Collector is not in any way HARGOBIND DAS a necessary party to these proceedings. The real question is BARODA PRA-
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We think that this special appeal should be dismissed with costs. Hargobind Das and Gowar Chandra Das will bear the costs of the case.

MOOKERJEE, J.—I concur in dismissing the appeal. I am of opinion that the Civil Court has jurisdiction to try the suit, being one for a declaration of the plaintiff's right to an ijimali or joint possession of a zemindari, and for possession of two plots of land from which the plaintiff alleges he has been dispossessed. The contention raised by the learned Counsel for the appellant to the effect that the determination of the Collector, under sections 11 and 12 of Act XI of 1859, was final, and that the only remedy left to the other co-sharer is to have an account opened for himself, is evidently wrong. The contention of the plaintiff, which both the Courts find to be correct,—namely, that there was no specification or partition of the lands of the zemindari, and that therefore the Collector had no jurisdiction to proceed under section 11 of the enactment in question,—goes to the very foundation of the authority of the Collector. Section 11, Act XI of 1859, enacts that "when a recorded sharer of a joint estate, whose share consists of a specific portion of the land of the estate, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application

to that effect." Now where the Collector has proceeded to a separation of shares consisting of particular and specific portions of zemindari lands by opening a separate account with one of the sharers without any enquiry whatsoever, merely on an *ex parte* statement of the sharer, who desires to have such a separation under section 11, it is, I apprehend, open to the party who is aggrieved by such a separation to contend by a Civil suit that no separation ought to have been granted, because the lands are held ijmalī by all the sharers, and there has never been any apportionment of the lands. Further, I am of opinion that it is not correct to say that the Collector passed any decision at all in this case. The law makes no provision for any enquiry by the Collector, and therefore a Collector's order is not a decision.

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We find that section 12 enacts that whenever any recorded sharer objects to the opening of the separate account prayed for by his co-parcener on any of the grounds specified in that section, the Collector shall refer the parties to the Civil Court, suspending all proceedings till the objection is judicially determined by a Court competent to decide questions of right between the parties,—*i. e.*, the Civil Court. The Collector in this case refused to entertain the objections of the plaintiff on the ground that the plaintiff was not recorded proprietor. The plaintiff therefore comes to the Court, to which he would have been inevitably referred, if his name had been recorded in the Collector's rent-roll. Now, if we accede to the defendants that their contention is right, we shall have to hold that because the name of the plaintiff was not recorded in the Collectorate, he has no remedy at all. The consequence perhaps will be that a joint ijmalī-holder of a zemindari will at once be made a zemindar of a specific portion of it without any butwara, either under Regulation XIX of 1814 or any partition privately made by the parties and assented to by them. It is preposterous to suppose that because the Legislature empowers the Collectors to open a separate account with a recorded sharer of a joint estate possessing certain definite portions of the lands as his share of the zemindari when there is no objection on the part of the other sharers, that therefore even where there are objections, and most valid and material ones, to the proceedings of the Collector,—

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namely, that the Collector had no jurisdiction under section 11 of the Act, that if the Collector proceeds nevertheless to open the separate account, the party, *i. e.*, the sharer aggrieved, will have no remedy, but must remain content to see that his possession over all the lands of the zemindari as an ijmal-i-holder is at once at the fiat of the Collector converted into an exclusive possession of perhaps a very inadequate and unfair portion of the same. Moreover, according to section 1, Act VIII of 1859, the Civil Court is empowered to "take cognizance of all suits of a civil nature when their cognizance is not barred by any Act," &c. There is no law which bars the cognizance of suits of this nature, but there is, on the other hand, a clear and positive enactment to the effect that if there is any objection by another shareholder, that objection must be decided judicially by the Civil Court before the Collector can proceed. It is said that the plaintiff has mistaken his remedy, and that his proper course was to have obtained a registration of his name in the Collectorate, and then to have applied to that officer to open a separate account with him. But this argument carries with it its own refutation. The plaintiff does not say that his share consists of a specific portion of the land of this estate, and his allegation is also that the male defendants have falsely and fraudulently set forth the best lands, of the zemindari as appertaining to his specific portion therein. If he applies to the Collector, he can only do so on an allegation that his share of the zemindari consists of separate lands which is simply not his case. I therefore think there is no force in the contention of the appellant, that the Civil Courts have no jurisdiction to entertain suits of this nature. In this view of the law, I am supported by a decision of this Court—*Madan Mohan Mazumdar v. Baistab Charan Mandal* (1). The other objections raised in this appeal have been met and disposed of by my learned colleague, and I agree in the reasons given by him for rejecting them as untenable.

Appeal dismissed.

(1) *Ante*, p. 617.

Before Mr. Justice Phear.

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Hindu Will, Construction of—Power to adopt—Double Adoption—Decision of Appeal Bench how far binding.

The decision of an Appeal Bench of the High Court upon a point of law, or the construction of a document in the case before them, is not necessarily binding on a single Judge of that Court, where the same question again arises in another suit before him.

A Hindu testator died, leaving a widow, and leaving also a will, which contained the following clause :—"My wife is supposed to be pregnant with child; if a daughter be born, she will in that case adopt the twain mentioned below (the plaintiff and one S. G.), and whatever property there shall exist, consisting of moveable and immoveable, my executors shall divide into three equal shares, and give the same to the daughter and adopted sons on their attaining the age of majority." S. G. died. No child was borne by the widow. The plaintiff, having attained his majority, brought a suit for declaration of his title, alleging that he had been duly adopted under the will; but that, whether he had been adopted or not, he was entitled under the will to a share in the moveable and immoveable property of the testator. No valid adoption took place.

Held, that there was no gift by implication to the plaintiff. The testator only intended him and S. G. to take under the will in the event of their being adopted—*Prasonomoye Dossee v. Dossmoney Dossee* (1) not followed.

THIS was a suit brought to obtain, amongst other things, a construction of the will of one Nabin Chandra Ghose, who died in April 1852, possessed of considerable property, both moveable and immoveable. The plaintiff alleged that, in pursuance of a power contained in the will of Nabin Chandra Ghose, he was adopted by the testator's widow, Prasannamayi Dasi, and his executrix, Dasmani Dasi; and he claimed under the will by virtue of the adoption a considerable share of the testator's property. The defendant, who was in possession of the property, denied the fact of the adoption. In 1866, Prasannamayi Dasi brought a suit in the High Court, alleging that the provision for adoption in the will was only to be carried out in case she bore a daughter, which she had not done, and praying that she might be

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declared entitled to the property of which her husband had died possessed, except so far as he had specially bequeathed it. Mr. Justice Phear gave a decree in favor of the plaintiff; but on appeal the decree was reversed, and the Court found that the plaintiff was not entitled, until the adoption, to more than Rs. 8 a month. The whole of the facts and the will are fully set out in the report of that suit (1). The plaintiff further stated that he had lately attained his majority; that hitherto the defendant, as executrix, has been in the possession of the property; and that she refuses to hand it over to him. The plaintiff alleged that the defendant had committed considerable waste; prayed that his title might be declared; that the will might be construed; that an account might be taken; an injunction issue; and a receiver be appointed.

The portion of the will material to this report is as follows:—
 “ My wife is supposed to be pregnant with child; if the conception be true, and she be delivered of a male child, then there shall be no necessity for the adoption of children as mentioned below; but if a daughter be born, she will in that case adopt the twain mentioned below, and whatever property there shall exist, consisting of moveable or immoveable, &c., my executor shall divide into three equal shares, and give the same to the daughter and adopted sons on their attaining the age of majority; and if a son be born and happen to die before attaining the age of majority, in that case she shall adopt the son of my sister mentioned below, and for that purpose I give her—that is to say my wife—permission that she, *i. e.*, my said wife, shall, in conformity with our (shaster) law and usage, adopt the illustrious Sadanand Ghose, the third son of Srijut Ramratan Ghose, an inhabitant of Malallunga in Calcutta, and Abhai Charan Ghose, the youngest son of Srijut Srinath Ghose, an inhabitant of Autpore,—that is to say the two sons of my two uterine sisters,—in doing which there shall be no deviation; should my wife not adopt the children after my decease, then the executors named hereinafter shall, according to this will, and in pursuance of the permission given by me, cause the said two children to be received in adoption. If any of the said adopted sons depart

this life before attaining the age of majority, then one of the uterine brothers of the deceased adopted son shall be received in adoption according to law in the room of the deceased adopted son."

The plaintiff failed to prove that he had been duly adopted.

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Mr. *Kennedy* (Mr. *Hyde* with him) for the plaintiff contended that the gift to the plaintiff was not contingent on the adoption. The plaintiff was entitled to a share of the moveable and immoveable property, whether the adoption took place or not. The will made a gift by implication to the plaintiff. He cited *Prosonomoye Dossee v. Dossmoney Dossee* (1) and *Warren v. Rudall* (2). The adoption if made would have been illegal—*Monemothanath Dey v. Onauthanuth Dey* (3).

Mr. *Marindin* and Mr. *Evans* for the defendants.—The adoption not having in fact taken place, the gift to the plaintiff fails. The language of the testator throughout assumes the adoption of the plaintiff; and thus has reference to a different state of things from the present. In *Monemothanath Dey v. Onauthanuth Dey* (3), the testator speaks of the donees as his adopted sons referring to an adoption which had taken place, and not to a future one. Although one of the sons was not in fact adopted until after the death of the testator, and although the double adoption might not have been valid according to Hindu law, yet the testator expresses his opinion of, and satisfaction of, such an adoption. Here the testator absolutely contemplates the simultaneous adoption of two persons. The testator died intestate, and the defendant is entitled to one-half of the whole estate.

Mr. *Kennedy* in reply.—There is a gift to specific persons, as the testator's adopted sons. That would be a good gift to them at least for life. The adoption is not to take place in any case. It need not take place at all. It would not have been valid if made. He referred to *Brown v. Higgs* (4).

(1) 2 I. J., N. S., 18.

(3) 2 I. J., N. S., 24.

(2) 4 Kay & J., 603.

(4) 5 Ves., 495.

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PHEAR, J.—(After briefly stating the plaint continued).—There is no doubt that the allegation of the adoption of the plaintiff cannot be made out. Mr. Kennedy, the plaintiff's Counsel, admits as much. Whatever was done in the way of effecting an adoption was in fact done by Dasmani, and not by Prasannamayi, who alone possesses the power to adopt. But it is contended that the plaintiff, whether adopted or not, is entitled to the testator's property, or to a moiety of it under the terms of the will. Thus the first thing I have to do in the case is to look at the will, and to ascertain therefrom what disposition the testator has made of his property.

In a former suit which was brought by the widow, Prasannamayi, against Dasmani, and which was tried before me, it became my duty to put a construction upon the same portion of this will as that which is now in question, and unfortunately the construction which I then arrived at was, in the opinion of the Appeal Bench before whom the case subsequently came, an incorrect one. Of course, I need scarcely remark the decision of the Appeal Bench in that suit does not bind the parties in this suit. The parties now before me are entitled to have their case decided quite independently of any consideration arising merely out of the fate of that case. But is my judicial discretion, relative to the interpretation proper to be put upon the will, necessarily controlled by the opinion as to this will, which was pronounced by the Appeal Bench in the former suit? The answer to this seems to depend upon the more general question, is the opinion of an Appeal Bench in one matter relative to an issue of law, or the construction of a writing, binding upon another Bench sitting as a Court of first instance in another matter? I am forced to make this enquiry, because I find it almost impossible, from the published report of the judgment of the Appeal Bench, to possess myself completely of the view which was really taken by that Bench, relative to the effect of the will; and so much of the judgment as I distinctly apprehend, fails, unhappily, to convince me that my own construction was erroneous. Am I then obliged to determine this case, in subordination to the judgment of another Bench, which I only imperfectly understand, and do not accept, instead of in accordance with

my own judgment? I think not. The Appeal Bench is doubtless so far superior to the Division Bench which first hears a cause that, as regards the parties thereto, its decision prevails. Also the conditions under which an appeal hearing takes place are generally such as to give the decision then come to, a claim to respect which will almost invariably insure its being followed by individual Judges in analogous cases. But, nevertheless, the Appeal Bench is not, I think, a superior Court, in the sense of a Court endued with authority to lay down the law for the guidance of all Benches which sit to dispose of cases in the first instance. A consideration of the mode in which it is constituted seems to me to show this. And, indeed, the decision of an Appeal Bench does not necessarily carry with it even the weight of numbers, for a case is present to my mind, in which (under somewhat peculiar circumstances, no doubt) the single voice of the presiding Judge on an Appeal Bench had the effect of overruling the opinion of three other Judges in the same matter. It appears to me, then, that, as between the parties to the present suit, I am bound to put the best construction I can upon the will of Nabin Chandra Ghose, of course availing myself of such aid as I am able to derive from the judgment delivered in the case of *Prosonomoye Dossee v. Dossmoney Dossee* (1), but not acting in unwilling obedience thereto.

The whole will is as follows:—(reads the will) (2).

A very superficial perusal of the document suffices to show how imperfect it is. Obviously however the leading intention of the testator was to give his wife power, and so far as possible, to oblige her, in the event of her supposed pregnancy not furnishing a son, to adopt Sadanand Ghose and Abhai Charan Ghose, the sons of his two sisters respectively. In the former suit I thought it open to question whether or not the words used by the testator did operate to confer on the widow this power to adopt in the events which had happened, but it seemed to me not necessary to determine this point, inasmuch as no adoption had in fact taken place; and therefore I did not do so in the judgment which I gave, although the learned Judges, who sat on the Appeal

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Bench, appear to have been misled into thinking that I did determine it. The Appeal Bench did not share my doubt on this head, and found it necessary, in view of the construction which it placed on another part of the will, to declare that the widow had power to adopt. Fortunately for me, in the present case, not only has no adoption taken place, but there is nothing else in the situation of the parties to make it incumbent on the Court for any reason to consider whether the widow has a power to adopt or not. The one principal question which I have to answer is whether or not, in the events which have happened, the will contains a gift of a share of the testator's property to the plaintiff, Abhai Charan Ghose, one of the two persons designated by the testator for adoption, even though he is not adopted. Now it is plain that there is in the will only one disposition of the *corpus* of the property made in express words, namely, this:—"My wife is supposed to be pregnant with child; if a daughter be born, she will in that case adopt the twain mentioned below (the plaintiff and Sadanand Ghose), and whatever property there shall exist, consisting of moveable and immoveable, &c., my executors shall divide into three equal shares, and give the same to the daughter and adopted sons on their attaining the age of majority."

And this gift by its nature is necessarily contingent on, at least, the happening of the birth of the daughter, an event which has not occurred. But the Appeal Bench was of opinion that, although there was no express gift to the persons designated for adoption, there was an implied gift. The late Chief Justice is reported to have said:—"It is not necessary for the Court to say whether, if the widow had adopted the two sons, they would have been regularly adopted sons according to the Hindu law, and so capable of being the heirs of the testator; for assuming that they would not be regular adopted sons or heirs, there is a gift to them by implication." In the report the learned Chief Justice proceeds to make out the implication thus:—The testator goes on to say:—"Until both my adopted sons shall have attained the age of majority, my wife shall receive from the executors Co.'s Rs. 8 per month, afterwards on the said adopted sons attaining the age of majority, should they

not agree, and be in union with my wife, then they shall give her at once out of my estate Rs. (5,000) five thousand, or some landed property in Calcutta, equivalent to that amount; my adopted sons shall offer no objection to whatever my wife may choose to do with that money or landed property." I confess that I am totally unable to follow this reasoning, or to perceive the mode in which, according to the opinion of the learned Chief Justice, the implication arose. Doubtless, in this passage and in after-parts of the will, the testator gives directions with regard to his property, which are, so to speak, founded on the assumption, that at the time when those directions will come to be carried into effect, that property will be in the hands of the persons designated by him for adoption; and if the property could not, under the circumstances contemplated by the testator, get into those hands, except by virtue of a gift in the will which the testator had for any cause failed to express, then it would probably be the duty of the Court to hold that such a gift was implied in the words which the testator used. Now, so far as I can discover from the will that which was in the mind of the testator, I should say that he supposed the adoption of the named persons by his wife would make them his adopted sons and heirs under the Hindu law; there is not the slightest thing to show that he contemplated the possibility of any after-result occurring from the proceedings of adoption. So that, it seems to me, in the clause quoted by the learned Chief Justice, the testator was providing for a case in which the property would, by the operation of law, have come into the hands of the persons named. If this be so, it seems to me that no implication whatever arises relative to a gift from the testator, merely from the fact that he assumes the property to be in those hands. He simply provides for the anticipated contingency of these persons being his legal heirs by adoption, and omits to say anything of the alternative. I don't see in this any indication that he intended them to take his property in all events, *i. e.*, whether they became his adopted sons or not. And the clauses, afterwards cited by the Chief Justice, do not, so far as my perception carries me, furnish a single element which can help to form a foundation for such an implication. I should be disposed to say, if I spoke merely of my own intelligence, and if I could do so

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without disrespect to the learned Judges who sat on the Appeal Bench, that nothing could be clearer from the will than this,—namely, that the testator did not, in the events which have happened, himself directly give, or intend to give, to Sadanand Ghose and Abhai Charan Ghose anything, though he no doubt expected them to get everything. He directed his widow to adopt them, and assumed that they would inherit as adopted sons. This, at any rate, seems to me to be the conclusion naturally deducible from the testator's language, and it is certainly fortified by the fact that, when he contemplated the event of a daughter being born, he felt it necessary to make express provision for her, and accordingly directed his estate to be divided into three parts—one part for her, and one part for each of the two adopted sons.

I am perfectly aware of the principle followed by the English Courts in the class of cases where a reference by the testator to a person as heir, who is not in fact heir, has been held to amount to a devise by implication. For instance, in *Parker v. Nickson* (1), the testator by a codicil to his will said:—"I acknowledge Thomas Nickson, my second cousin, to be my next of kin and heir-at-law of all my real and personal property in the parish of Manchester." And Lord Westbury was of opinion that these words were a good devise to Thomas Nickson in fee-simple of all the testator's lands in the parish of Manchester. The Lord Chancellor said:—"Nothing is better settled in our law than that the words—'I make A. B. my heir', or 'I declare A. B. to be my heir,' or even the words—'A. B. is my heir,' amount to a devise to A. B. in fee of all the inheritable lands of the testator. Thus, in *Taylor v. Webb* (2), the words were—"I do make my cousin, Giles Bridges, my sole heir and my executor;" and it was said by Roll, C. J.:—"We may collect the testator's meaning to be, by making the party his heir, that he should have his lands; and it is all one as if he had said 'heir of his lands;' and Jerman, J., said:—"The word 'heir' implies two things: first, that he shall have the lands; and, secondly, that he shall have them in fee-simple.' In the first volume of Mr. Powell's book on Devises, edited by Mr. Jarman (page 309), it is said, and

(1) 9 Jur., N. S., 451.

(2) Style's Rep., 301.

I think correctly:—‘ If one claim under the description of ‘ heir,’ he must show that he is heir in that sense in which the testator has used the term. Now, an heir may be in four ways, heir with relation to the ancestor of the person so described as heir general; secondly, heir by particular description of the testator as heir special; thirdly, heir with relation to property, or to the thing to be interested; fourthly, heir by inference.’ On the second head, a reference is made, although not very correctly, to the language of Hobart, C. J., in the case of *Counden v. Clerk* (1), who says,—‘ If one devises in these words—‘ I give to my heir male, who is my brother, A. B.’ This will be a good devise, although the testator have a son who is heir general.’ In the case of *Spark v. Purnell* (2), it is said:—‘ Though none can be truly heir, but he that the law makes so, yet there is an heir by appellation and vulgar acceptance, which intimates the state of a true heir; therefore, if, by my will, I appoint that J. S. shall be heir of my land, he shall have it in fee, for such estate as the ancestor hath, such he is to inherit.’ It was contended for the plaintiff that the word ‘ acknowledge’ was not sufficient to constitute a devise, and that it indicated an intention only to recognise a degree of relationship. But the answer is that he is acknowledged next of kin and heir-at-law to all the testator’s real and personal property in the parish of Manchester, which words plainly show that he is named heir and next of kin, not with relation to the testator’s personality, but with relation to property to be taken and enjoyed. This is put beyond doubt by the only subsequent part of the will. Neither is the word ‘ acknowledge’ an insufficient expression. It is enough to indicate an intention that the person named shall be recognised as filling that character, which would entitle him by law to the whole of the real estate.”

But the reasoning of those cases does not apply to the case now before me. When an Englishman in his will acknowledges one to be his heir, or speaks of him as taking in the capacity of heir, there can be no other meaning in the testator’s words than an unqualified intention that that person should have his pro-

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party. On the other hand, when a Hindu directs that one should be adopted as his son, and assumes that this person, when so adopted, will take his property as heir, this in my judgment is something more than an indirect way of pointing out the person to whom he intends his property to go. So far as it implies anything unexpressed on the part of the testator, it implies the intention that the person named should take upon his attaining the character of adopted son, not that he should have the property irrespective of his capacity to render the peculiar consideration for it, which the lawful adoption alone would enable him to give. I need hardly say that no rule is so necessary to be observed in construing a will, as the rule that nothing which the testator has not expressed should be held to be implied, unless the implication is in reason inevitable from the testator's words. The Court has no authority to supply an omission which the testator has in fact made, however firmly convinced it may be that by so doing it would be carrying out the testator's intentions. I can't help thinking that the Appeal Bench in *Prosonomoye Dossee v. Doss-money Dossee* (1) transgressed this rule. It seems to me that it passed from that which the testator actually did in a particular case, to that which it was supposed, possibly with correctness, he would have done in a different case (namely the case which was before the Court) had he foreseen that it would happen. In truth, I conceive that the Appeal Bench, by its judgment in this particular respect, made a will for the testator, instead of confining itself to the task of interpreting the will which he had made.

I ought here to say that I have been unable to satisfy myself from the report in the Indian Jurist, whether or not the Appeal Bench thought that the implied gift involved the condition that formal adoption of some sort should take place. One passage in the judgment seems to favor the supposition that the Appeal Bench did consider that formal adoption by the widow would be necessary to the complete fulfilment of the terms of the gift. If this be correct, the present plaintiff would be as little entitled to succeed under that judgment as under the construction which I put upon the will.

On the whole, after renewed consideration of the will, with the advantage of the light thrown upon it by the reported judgment of the Appeal Bench, I am of opinion that the testator simply intended that his widow should adopt Sadanand Ghose and the plaintiff, and that these persons should take his property as heirs under the Hindu law by virtue of the adoption. I see no trace of an intention, expressed or implied, that these persons, or either of them, should take the property whether they were so adopted or not. It follows, therefore, that, inasmuch as the plaintiff has not in fact been adopted by the widow, he is not now entitled to the property; and this suit must be dismissed with costs.

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Suit dismissed.

Attorney for the plaintiffs: Baboo *Ashutosh Dhur.*

Attorneys for the defendants: Messrs. *Beeby and Rutter*, and Baboo *O. P. Gangooly.*

[APPELLATE CIVIL.]

Before Mr. Justice E. Jackson and Mr. Justice Mitter.

TRAILAKHANATH ROY AND ANOTHER (DEFENDANTS) *v.* KASHI-NATH ROY AND ANOTHER (PLAINTIFFS.)*

1870
Dec. 4.

Suit for Contribution.

A. and B. jointly executed a bond in favor of C. When the bond fell due, A. alone executed a second bond for a larger amount in favor of C., covering the amount of the debt under the former bond together with a further advance to him, (A.). At the same time C. cancelled the former bond. *Held*, that thereupon A. could maintain his suit against B. for contribution.

THE plaintiffs and the defendants Nos. 1 and 2 borrowed money from the defendant No. 4, and executed a bond in his favor. Afterwards the plaintiffs alone executed a bond in favor of the defendant No. 4 on account of that debt. The plaintiffs then brought the present suit against the defendants Nos. 1 and 2, for contribution of their share of the joint debt.

The defendants Nos. 1 and 2 set up that, as the plaintiffs had

* Special Appeal, No. 835 of 1870, from a decree of the Subordinate Judge of East Burdwan, dated the 9th February 1870, reversing a decree of the Moonsiff of that district, dated the 26th August 1869.

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not paid the debt, they were not entitled to recover any money from the defendants, and that the execution of a fresh bond without his (the defendant's) permission was no payment of the joint debt, and therefore the plaintiffs had no cause of action.

The defendant No. 4 stated that the plaintiffs had given a fresh bond for the original debt, and for an additional sum of money paid to them in cash.

The following was the only issue raised : " If the plaintiffs have paid the joint debts of both the contracting parties by giving a fresh bond, without the consent of the debtor-defendant, whether the plaintiffs are entitled to recover from the debtor-defendant his share in the debt under the former bond."

The Moonsiff held that, as the debt had not been paid, the plaintiffs were not entitled to recover from the defendant, and accordingly dismissed the suit.

On appeal, the Subordinate Judge held that, as the genuineness of the bond which had been given by the plaintiffs to the defendant No. 4 had not been disputed, and as that bond had been given in liquidation of the joint debt of the plaintiffs and defendants Nos. 1 and 2, the plaintiffs were entitled to recover from the defendants their share of the joint debt. He accordingly passed a decree in favor of the plaintiffs.

The defendants Nos. 1 and 2 appealed to the High Court, on the grounds that there was no cause of action—

1. As the plaintiffs had not discharged the debt for which the joint liability had been incurred ;
2. As the new bond had been entered into without the knowledge or consent of the defendant ;
3. As it was not proved that the creditors demanded payment of the joint debt from the plaintiffs, and that they had accordingly discharged the debt ; and
4. That the plaintiffs had entered into a new bond merely for their own advantage.

Baboo Romesh Chandra Mitter for the appellants.

Baboo Mahini Mohan Roy for the respondents.

MITTER, J.—The plaintiffs in this case and the defendants Nos. 1 and 2 borrowed a certain sum of money from the defendant.

No. 4 under a bond, by which they made themselves jointly liable for the debt. On the expiration of the stipulated time for repayment, the plaintiffs alone executed a second bond in favor of defendant No. 4, and a part of the proceeds of this bond being applied to the liquidation of the debt due under the first bond, the residue was paid to them in cash. The suit has been brought by the plaintiffs for contribution against the defendants Nos. 1 and 2. The creditor, as has been already observed, was made a defendant in the case, and his answer was that the debt due under the first bond had been satisfied by the plaintiffs in the manner alleged by them. The defendants Nos. 1 and 2 urged in their written statement that the debt due under the first bond, which is admitted to be a genuine instrument, has not been *de facto* paid by the plaintiffs, inasmuch as there has been no actual payment of money, and that the plaintiffs had no right to execute the second bond, which is also admitted to be genuine, without their consent. I confess that I am utterly at a loss to understand what the defendants Nos. 1 and 2 mean by saying that the plaintiffs had no right to execute the second bond without their consent. But be this as it may, I am of opinion that, upon the admitted facts of this case, the plaintiffs are entitled to recover.

The only question which we have to determine in this case is, whether the joint debt created by the first bond has been actually satisfied by the plaintiffs or not? If this question is answered in the affirmative, the right of the plaintiffs to obtain contribution from the defendants Nos. 1 and 2, who were jointly responsible with them for that debt, would follow as a matter of course. After giving my best consideration to this point, I am clearly of opinion that the contention of the defendants Nos. 1 and 2, who are now special appellants before us, is without any valid foundation. I think it may be safely affirmed as a proposition of law, that the pledge of a man's credit is a sufficient legal consideration. If a man chooses to advance money upon the credit of another, the repayment of that money is a matter entirely between himself and his debtor, but the latter is nevertheless competent to deal with the proceeds of the loan in any manner not prohibited by law, for he is to all intents and purposes the lawful owner of those proceeds.

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In the present case, it cannot be disputed that the plaintiffs had every right to execute the second bond in favor of defendant No. 4, and to take from him the amount covered by it on the pledge of their own personal security. It was the business of the creditor to see whether it would be safe for him to advance money upon such a security; but if the creditor was satisfied with it, the defendants Nos. 1 and 2 can have nothing to do in the matter. It is clear, therefore, that the proceeds of the second bond lawfully belonged to the plaintiffs, and the plaintiffs were therefore fully justified in treating those proceeds as their own money. Now, the plaintiffs say that they have paid off a joint debt which was due from them and the defendants Nos. 1 and 2, with a part of the proceeds of the second bond which they have executed upon their own responsibility, though in favor of the same creditor. The joint bond has been cancelled. The payment has been endorsed on the back of it in the usual manner, and it is now filed by the plaintiffs in this suit as a document returned to them by the defendant No. 4 as a paid-off bond. These facts have been not only proved by legal evidence, but they are admitted by the creditor as well as by the defendants Nos. 1 and 2. How then can it be contended that the joint debt has not been *de facto* extinguished, or that the plaintiffs have not actually satisfied that debt?

Suppose, for instance, that the plaintiffs had executed the second bond in favor of somebody else, and not in favor of the defendant No. 4; and suppose also that they had paid off the joint debt due under the first bond with the proceeds of the second. Could it have been contended for one moment that such a payment would not have been a legal payment of the debt, or that the plaintiffs could not have sued the defendants Nos. 1 and 2 for contribution on the basis of such a payment? I am aware of no authority by which such a position can be maintained, nor can I find out any reason why we should make any distinction between the case supposed and the case now before us, merely because the creditor in whose favor the second bond was executed happens to be the same person who had advanced money under the joint bond.

It has been said that the plaintiffs have not paid anything in

cash out of their own pockets. But this circumstance is of no importance. The debt due under the first bond was satisfied out of money which was legally the money of the plaintiffs, and whether the plaintiffs actually took that money in the first instance from the defendant No. 4, and then paid it back to him in satisfaction of the joint bond, the fact would still remain the same,—namely, that this latter bond has been satisfied in full. The mere ceremony of taking the money first and then giving it back to the defendant No. 4 cannot affect the question one way or the other; and it would be obviously improper to insist upon the performance of such a ceremony as a *sine quâ non* to the validity of the payment.

It has been further urged that the plaintiffs might never be in a position to pay the debt contracted by them under the second bond, and that it would be, therefore, unjust to decree contribution in their favor. This argument also is of no force whatever. The plaintiffs might or might not satisfy the debt due from them under the second bond, or the defendant No. 4 might hereafter excuse them the payment of that debt. But these are contingencies which cannot possibly affect the interests of the defendants Nos. 1 and 2. These defendants, it is clear, can never be called upon to pay any part of that debt; and it is equally clear that they cannot be molested any further on account of the debt due from them under the first bond. Whatever doubts might have been possibly entertained upon this last point, the conduct of the defendant No. 4 in this case would be a sufficient guarantee against any such molestation; and it is therefore a matter of no consequence to the defendants Nos. 1 and 2 whether the amount due under the first bond has been paid by the plaintiffs in cash, or whether that amount has been included in a subsequent bond for which the plaintiffs alone are liable.

Suppose, for instance, that the defendant No. 4 had sold his rights under the first bond to a stranger, but on credit. Whether the purchaser would pay the purchase-money to the defendant No. 4 or not, it is perfectly clear that he would be fully competent to sue the parties bound by that bond for the amount due under it. But if the purchaser could maintain such an action, I do not see any reason why the defendants Nos. 1 and 2 should

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be permitted to take any exception to this suit for contribution. The plaintiffs have pledged their own credit exclusively by the second bond. The creditor has accepted that pledge as a sufficient satisfaction of the first bond, and there was no law that I am aware of which could prevent him from doing so. The particular mode in which the plaintiffs have satisfied the joint debt can be of no consequence whatever to the defendants Nos. 1 and 2, provided that that debt has been satisfied according to law; and I do not see any reason to hold that the first bond has not been legally paid off. The defendant No. 4 cannot sue upon that bond any longer, particularly after his admissions in this case; and as the defendants Nos. 1 and 2 have enjoyed their share of the money which was advanced upon that bond, they are bound in law to give back to the plaintiffs a proportionate share of that money, the plaintiffs having discharged the whole of the joint obligation.

Suppose, for instance, that the plaintiffs in this case had been the assignees of the first bond. Suppose also that the defendant No. 4 had given them credit for the purchase-money, either on their own personal security, or on the security of some property duly hypothecated to him for that purpose. Suppose even that the defendant No. 4 had made a gift of his rights under the first bond in favor of the plaintiffs, can it be contended that the plaintiffs could not have maintained a suit against the defendants Nos. 1 and 2 for their share of the debt? Of course those defendants would be entitled to plead in such a suit, which is to be brought in the shape of a suit for contribution, that they are not liable to pay anything more than that share, but the action would be clearly legal. It has been held by a Full Bench of this Court in *Degumbari Debi v. Eshan Chandra Sein* (1) that, if one of two persons jointly bound under a decree takes an assignment of the decree from the judgment-creditor, he would not be entitled to recover from his co-debtor anything more than a proportionate share of the amount of purchase-money actually paid. But this ruling does not seem to be any way favorable to the defendants Nos. 1 and 2. On

(1) Case No. 890 of 1866; February 3rd, 1868.

the contrary, it recognizes the principle that the assignee of the decree, though he is himself one of the parties bound by it, is entitled to sue his co-debtor for contribution, although it has modified the measure of the contribution to a certain extent. Such modifications, however, would be quite out of place if the case is the case of a donee or heir, and not that of a purchaser. One of two joint obligors might succeed to the interests of the obligee, either under a testamentary devise from him or as his heir, and it is perfectly clear that the devisee or donee would be entitled to recover from his co-debtor to the full extent of the benefit derived by the latter from the joint loan. But be this as it may, if the plaintiffs could maintain this suit, either as the assignees or as the heirs of the defendant No. 4, there seems to be no reason whatever why they should not succeed in this case. They have paid the joint debt, and that debt is no longer in existence. The defendants Nos. 1 and 2 have been discharged from their share of the liability for that debt, and the creditor has accepted the second bond as a good and valid exchange for the first. Whether the money due under the second bond is ever paid or not, is a matter entirely between the plaintiffs and the defendant No. 4; and as the first bond might have been satisfied by the plaintiffs with the proceeds of another bond executed by them in favor of any other person, I see no reason for holding that the joint debt has not been *de facto* satisfied by them, merely because it has been paid off with the proceeds of a subsequent bond executed in favor of defendant No. 4.

A faint attempt was made by the pleaders for the special appellants to make out that there is something unfair in the mode in which this suit has been brought. But I do not see the slightest ground to justify such a contention. The facts are all admitted, and it is quite clear that the defendants Nos. 1 and 2 are perfectly safe from a double demand for the same debt. The plaintiffs and the defendant No. 4 did think it mutually convenient to enter into the transaction represented by the second bond, and there is no law which could prevent them from doing so. By that transaction a joint debt, admittedly due to the defendant No. 4, both from the plaintiffs and the defendants Nos. 1 and 2, has been extinguished or paid off;

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and it is not even pretended that the plaintiffs are mere benamidars for the defendant No. 4, for in that case a question might have arisen whether a benamidar could sue in his own name. In this state of facts, I do not see that any unfair advantage has been taken against the defendants Nos. 1 and 2, either by the plaintiffs or by the defendant No. 4; or that there would be any hardship or injustice, if we compel the defendants Nos. 1 and 2 to pay only that portion of the joint debt by which they have been actually benefited.

The last point urged is that the plaintiffs cannot maintain this suit for contribution, inasmuch as they paid off the debt due under the first bond, at a time when there was no pressure upon them. I confess that I am unable to understand the force of this argument. It is admitted that the debt had become due at the time when it was paid off by the plaintiffs; and as debtors are under the legal pressure of the obligations entered into by them for the payment of their debts, it is manifestly erroneous to raise any question of voluntary payment in this case. It has been said that the plaintiffs ought to have at any rate asked the defendants Nos. 1 and 2 to pay their portion of the joint debt, before they took upon themselves to satisfy that debt in the mode alleged by them. But the plaintiffs were under no legal obligation to do so, nor can their right to recover contribution be affected by the omission. The debt was a joint debt, and it is therefore clear that the plaintiffs were just as much liable to satisfy it as the defendants Nos. 1 and 2, so far as the creditor was concerned. The plaintiffs had a perfect right to discharge that liability without consulting with, or waiting for, anybody; and as for the defendants Nos. 1 and 2, they have not been put in a worse position than that in which they would have been if the original creditor had sued them for the joint debt. In discharging a debt which has already become due, a man is not bound to wait until legal proceedings are taken out against him, nor is there any reason why he should be obliged to allow the interest upon that debt to accumulate, or even to allow the debt itself to run on (if he is in a position to satisfy it) until such proceedings are taken out.

Much stress has been laid upon the last point on the strength of

a decision passed by a Division Bench of this Court, in *Krishna Kishor Poddar v. Kailas Chandra Mookerjee* (1); but as that

(1) Before Mr. Justice Bayley and Justice Sir C. P. Hobhouse, Bart.

The 6th July 1869.

KRISHNA KISHOR PODDAR (PLAINTIFF) v. KAILAS CHANDRA MOOKERJEE AND OTHERS (DEFENDANTS).*

Baboo Kali Mohan Das and Rasbehari Ghose for the appellant.

Baboo Srinath Banerjee for the respondents.

BAYLEY, J.—I am of opinion that this appeal should be dismissed with costs.

The facts, dates, and figures in this case have been so fully, and admittedly correctly, given in the judgments of the first and second Courts, that it is unnecessary for me to enter into any details as regards them.

The only point which requires our decision is whether the plaintiff, who sued to recover a certain sum of money from the defendants in the nature of contribution, is entitled to recover the same from them.

Both the lower Courts have found that there was no necessity for the plaintiff to make the payment.

It appears that there was an arrear of Rs. 1,011 due on account of a farming lease in a zemindari which the plaintiff purchased on the 12th January 1867. Of that amount a certain sum was decreed by the Deputy Collector in favor of the plaintiff, as being the amount due from the defendants for a period subsequent to the plaintiff's purchase of the zemindari, and the plaintiff brings this suit for

recovery of the balance of the amount paid by him.

Now the proper test to determine whether or not the plaintiff is entitled to recover the money that he sues for, is to see whether there was any legal necessity arising to the plaintiff from reasonable probability of any injury resulting to him, in case he did not make the payment. What he purchased was the zemindari right. What was about to be sold for non-payment of arrears was the farming right. The sale of the farming right would not in any way affect the plaintiff's zemindari right, which would remain uninjured by the sale.

Certain cases have been cited to us, in support of the special appellant's plea, that the payment by the plaintiff was not a voluntary payment—*Kazee Ramzan Ali v. Maharaja Soorjibhan* (a), *Futtick Chunder Banerjee v. Golam Ali Chowdhry* (b), *Fatima Khatun v. Mohammed Jan Chowdhry* (c); but the first two were cases of payments made with reference to rights acquired in execution of Civil Court decrees; and in the Privy Council case, *Fatima Khatun v. Mohammed Jan Chowdhry* (c), it was clearly found by their Lordships that there was no payment at all. Thus, and also as to other facts, these cases do not apply to the present case. The only point, therefore, taken in special appeal, that the payment by the plaintiff was not volun-

(a) 7 W. R., 403.

(b) 10 W. R., 453.

(c) 1 B. L. R., P. C., 21.

* Special Appeal, No. 698 of 1869, from a decree of the Judge of Dacca, dated the 19th December 1868, affirming a decree of the Officiating Sudder Ameen of that district, dated the 14th April 1868.

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point does not appear to have been taken in any shape in either of the Courts below, I would not allow it to be taken here for the first time. I have already shown that that point is not entitled in my opinion to any substantial weight, and it is clear that the plaintiffs might have shown that the alleged state of facts upon which it is based did not actually exist, if it had been urged at the proper time. It would be, therefore, unjust to allow the special appellants to press it now as a substantial ground of special appeal.

For the above reasons I think that a reference to a Full Bench is not necessary, and I would therefore dismiss this special appeal with costs.

JACKSON, J.—I agree with my learned colleague in the view which he takes of this case. The real question is whether the plaintiffs have actually paid off the bond, so that the lender cannot bring any further suit against the debtors. The fact is determined by the endorsement on the bond itself, on which the lender has acknowledged that it has been paid off. Whether it was

tary, being thus disposed of, in respect to the period previous to the plaintiff's purchase, the pleader for the special appellant wishes to take another ground not taken in his petition of appeal,—viz., that there was a portion of arrears due after his purchase, which made it necessary for him to make the payment. This fact, however, has not been shown to us, and I do not think that the special appellant ought now to be allowed to take the objection; for if the point, as has been alleged by the pleader, was one patent and obvious on the records, the better reason it is why that objection should have been taken in the petition of appeal.

On the whole I see no error in law in the decision of the lower Appellate Court, and I would therefore dismiss this appeal with costs.

HOBHOUSE, J.—The sole question

before us in this case, as Mr. Justice Bayley has put it in other words, is whether the plaintiff, when he paid the money which he sues to recover from the defendants, paid it under compulsion, or whether he paid it voluntarily. The compulsion which he sets up is, firstly, that his zemindari was in jeopardy; and, secondly, that a part at least of the money in question was due after he had purchased the zemindari. Now, on both these questions, which are questions of fact, the lower Appellate Court has found against the plaintiff; and as we are not shown that this is not a good decision upon the evidence, and indeed that objection is not taken in the grounds of special appeal, I think that this appeal must fail.

I may add that the cases on which the special appellant relies are all based on the fact that the plaintiffs were under a legal compulsion to pay.

paid in actual cash or not seems to me immaterial. The debt was due and had not been paid ; the lender was at liberty to come upon the security or the principal in the transaction. The plaintiffs, who were the securities, paid off the debt, and they are now entitled to recover the money from the original borrowers. I would therefore also dismiss this special appeal with costs.

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Appeal dismissed.

Before Mr. Justice Macpherson and Mr. Justice Mookerjee.

MADHAB CHANDRA GUHO AND OTHERS (DEFENDANTS) v. KAMALA KANT CHUCKERBUTTY AND OTHERS (PLAINTIFFS.)*

1871
March 21.

Declaratory Decree—Order of the Magistrate under Chap. XX of Criminal Procedure Code (Act XXV of 1861)—Suit—Civil Court's Jurisdiction.

The plaintiff built a bridge over a certain *khal* (canal), which was removed by order of the Magistrate under Chapter XX of the Criminal Procedure Code ; the defendant, it was alleged, set the Magistrate in motion. The plaintiff now sued the defendant for a declaration of his right to erect the bridge in question, and to have the order of the Magistrate set aside.

Held, that no such suit would lie.

The Judge in the Court below held that the suit would lie to try the plaintiff's right to erect a bridge over the *khal*. *Held*, on appeal, the suit ought to have been dismissed.

Baboo Anand Chandra Ghosal and Srinath Banerjea for the appellants.

Baboo Kali Mohan Das and Durga Mohan Das for the respondents.

THE facts of this case are set out at length in the judgment of the Court, which was delivered by

MACPHERSON, J.—In this case the plaintiffs had erected a bridge, extending from one bank of a *khal* (canal) to the other,

* Special Appeal, No. 1385 of 1870, from a decree of the Judge of Tippera, dated the 26th of May 1870, reversing a decree of the Moonsiff of that district, dated the 29th August 1869.

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both banks being their own property. This bridge was removed by the Magistrate, who proceeded under Chapter XX of the Code of Criminal Procedure. The Magistrate in removing the bridge is said to have been put in motion by the defendants, whose object in getting the bridge pulled down was to prevent people from going over by it to a *haut* (mart), which is held on the plaintiff's land. The defendants appear to have a *haut* of their own which is held some little distance off, but in the same neighbourhood. The bridge having been removed, the plaintiffs instituted the present suit. The plaint expressly, on the face of it, seeks to set aside the order of the Magistrate and for a declaration of the right of the plaintiffs to re-construct the bridge pulled down.

The first Court, without going into the case, decided that such a suit will not lie. The Judge has held in effect that the suit will not lie in the exact form in which it was brought,—that is to say, that it will not lie so far as it seeks to set aside the order of the Magistrate, or so far as it seeks to have the bridge rebuilt; but that it will lie so far merely as it prays for a declaration of the right and title of the plaintiffs. The Judge remanded the case to the Moonsiff to try the question of the right of the plaintiffs to erect a bridge. He says “I am of opinion that this “suit will lie to try the plaintiff's right from any usage, or on “other grounds, to erect a bridge over the river in dispute. “Should they obtain a decree of right,—*i. e.* declaratory decree, “—they should petition the Magistrate accordingly, who, I “have no doubt, would direct what the height of the bridge “ought to be; for, should another bridge be built of the same “description as that ordered to be pulled down, no declaratory “decree of right to erect a bridge would prevent its being “again ordered to be pulled down if it still proved an obstruc- “tion to navigation.” The Judge rightly considering that the Full Bench in the case of *Ujalmayi Dasi v. Chandra Kumar Neogi* (1), only held that a civil suit will not lie to reverse the Magistrate's order, was of opinion that although the order of the Magistrate must stand, the Civil Court could, nevertheless,

go into the question of the rights of the parties, and make such a declaration as to them as the plaintiffs sought.

I am of opinion that the Judge is wrong, and that the suit ought to have been dismissed. In the first place the decree which the Judge says the plaintiffs may be entitled to, differs substantially from the decree which the plaintiffs sought. They asked for such a decree as would give them back the bridge which had been removed. But the Judge holding them not entitled to such a decree deems them entitled to a naked declaration of right to have a bridge there. It is very questionable whether upon this ground alone the Judge's order of remand is not bad. However that may be, I think the remand is wrong, because such a decree as the Judge contemplates is a mere declaratory decree giving no consequential relief, and from which in fact no relief could be obtained. A declaration such as the Judge proposes would practically in no degree improve the position of the plaintiffs. It at best would be binding only upon the defendants in the present suit, whose sole interest in the matter, as the case at present stands (if it can be said to be an interest) is that they set the Magistrate in motion in the proceedings which he has taken. Supposing such a declaration were made by the Court, what would it avail the plaintiffs against subsequent proceedings under Chapter XX of the Criminal Procedure Code taken hereafter by the Magistrate against a new bridge built by the plaintiffs? The bridge which the plaintiffs had, has been removed, and doubtless if they rebuild it as it was, it will again be removed. But if they build it on a new plan, in such a manner for instance as to prevent its being considered by the Magistrate to be an obstruction to the navigation of the *khal*, it is quite possible it may not be objected to by the Magistrate, and that it may answer all the purposes of the bridge, the removal of which is now complained of.

The precise question now before us does not seem to have been decided yet. Certainly it was not decided or even approached in the case of *Tarak Nath Mookhopadhyay v. The Collector of Hooghly* (1), which seems to be in some degree relied upon by the Judge as supporting the view which he takes. That was a

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case which turned wholly upon the proceedings of the Magistrate having been irregular and without jurisdiction. And the point decided in that case was the personal responsibility of the Magistrate for acts done by him irregularly without jurisdiction and without due care. The Full Bench decision, which has been already alluded to, merely decides that the Magistrate's order cannot be set aside: and the case of *Baroda Prasad Mustafi v. Gora Chand Mustafi* (1) also does not decide this question.

Looking at the decided cases, and at Chapter XX of the Criminal Procedure Code, it appears to me that it must be considered now as established that the decision of a Magistrate when regularly arrived at, (and for the purposes of the present appeal it must be taken that the proceedings were regularly held,) is conclusive as regards the particular act done by him; and I do not think that a suit will lie for a naked declaration of right, without any consequential relief, against persons who are not further interested than that they were the persons who put the Magistrate in motion.

I think the Judge's decree ought to be set aside, and that the plaintiffs' suit ought to be dismissed with costs in all the Courts.

MOOKERJEE, J.—I concur. The Judge was also of opinion that the Magistrate's order passed under Chapter XX of the Criminal Procedure Code, was passed with jurisdiction, and could not be set aside by a civil suit. The Judge should have stopped there, and dismissed the suit. His order of remand is clearly wrong, and must be set aside.

Appeal allowed.

Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.

1871
February 23.

MANISWAR DAS (PLAINTIFF) *v.* BABOO BIR PERTAB SAHU
(DEFENDANT.)*

Act VIII of 1859, ss. 205 & 243—Attachment of Maintenance or "Babooana"—Execution of Decree by Attachment of Future Maintenance.

Where a judgment-debtor was possessed of a decree entitling him to maintenance from a third party, held that his judgment-creditor could attach

* Miscellaneous Regular Appeal, No. 405 of 1870, from an order passed by the Subordinate Judge of Sarun, dated the 12th September 1870.

the amount before it accrued due, by prohibitory order forbidding such third party to pay the judgment-debtor, and directing him to pay to such person only as the Court might direct; or an arrangement might be made for the collection or administration, if necessary, of the amount of maintenance.

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THIS was an application for attachment of the amount of future maintenance or *babooana* which would fall due to Baboo Birpertab Sahu, the judgment-debtor, from the Maharaja of Hathwa, under a decree of the High Court dated 28th April 1863.

The Subordinate Judge held, citing *Kasheeshuree Debia v. Greesh Chunder Lahoree* (1), that future maintenance could not be regarded to be such property as could be legally attached under section 205, Act VIII of 1859.

The judgment-creditor appealed to the High Court.

Mr. R. T. Allan for the appellant.

Baboo Mahesh Chandra Chowdhry for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—The question which arises in this case is whether a creditor holding a decree against a party who is entitled to an allowance by way of maintenance under a decree of Court, can proceed against such maintenance as a fund out of which his debt may be satisfied.

It is clear on the one hand that such sums as have already become due on account of maintenance may be attached and applied to the payment of debts by order of Court. It is also clear upon the decided cases that an order to attach and sell prospectively a right to maintenance could not be sustained.

It appears to me, however, that there is a means of making an allowance available in conformity with the Code of Procedure without making the order which I have stated cannot legally be made.

The execution-creditor's difficulty in this case is, that the debtor never allows the sum to become available,—that is, to remain due,—but, by receiving it promptly from the Maharaja, on whose estate the maintenance is a charge, defeats the judgment-

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creditor and prevents his taking the sums accruing due. It seems to me, under these circumstances, that the Court may properly make an order, in view of any instalment of allowance about to become due under the decree, that the Maharaja should not pay such sum to the judgment-debtor, and may forbid the judgment-debtor to receive such sum, so that the amount may either be paid to such person as the Court may direct, or an arrangement be made under section 243 for the collection or administration, if necessary, of the amount of the maintenance.

Of course, in making any such order, the Court would have to be guided both by a consideration of the reasons for which the maintenance was accorded, so that the party entitled to it may not be deprived altogether of the means of supporting himself and his family, and also to the claims of other creditors.

I think therefore that the decision of the Subordinate Judge must be set aside, and that he should be directed to take up the case *de novo* and pass such order as the circumstances may render desirable with advertence to these considerations. Each party must pay his own costs.

Appeal allowed.

[PRIVY COUNCIL.]

P. C.*
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Jan. 18.

LALJI SAHU AND ANOTHER (PLAINTIFFS) *v.* THE
COLLECTOR OF TIRHOOT (DEFENDANT).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

*Compromise and Decree thereon—Review of Judgment—Concurrent Judgments
on Fact.*

The manager of the Court of Wards effected a compromise with claimants on the estate; a decree was passed on the basis of that compromise, but before the parties wished the decree to be made; in the decree leave was reserved to apply for a review if the compromise was not sanctioned by the Commissioner, and was prejudicial to the parties. The compromise was sanctioned by the Commissioner, but afterwards the manager found that he had been deceived by

* Present:—THE RIGHT HON'BLE LORD CAIRNS, SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, AND SIR LAWRENCE PEEL.

his servants, and that the claim had been allowed erroneously. *Held*, that the Court having granted a review, and the claim being proved to be exaggerated, a decree was properly given for the true amount.

Where both the lower Courts had agreed as to the facts, the Privy Council refused to examine the evidence, the controversy being merely as to the weight to be attributed to it.

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THIS was an appeal from a decree of the High Court at Calcutta, whereby a decision of the Principal Sudder Ameen, dismissing the suit of the appellants, was affirmed save as to a sum of Rs. 12,751-13, which the respondent admitted to be due.

The appellants, bankers, &c., in Tirhoot, had sold large quantities of cloth, &c., to the late Maharaja of Durbanga. On his death, Mr. Forlong being the manager, they claimed about one and a half lacs of rupees, and Mr. Forlong wrote a letter stating that, after looking into the Raja's accounts, he would pay what was justly due.

On the 31st December 1861, they brought their action to enforce payment against the Collector and two of the Amlas of the Raja. Mr. Forlong, on behalf of the Collector, disputed the amount, and witnesses were examined for the plaintiffs.

Other parties having successfully sued for other claims, Mr. Forlong reported to the Collector that it would be advisable to settle amicably, and he pointed out that some of the items appeared to be supported by signed accounts in the Maharaja's office and some by unsigned accounts. He pointed out that some of these only should be relied upon, and that, after deducting what was due from the plaintiffs for rents to the estate, they should be allowed to recover Rs. 48,816.

The appellants went before the Principal Sudder Ameen, stating that Mr. Forlong had recommended a settlement for that sum as a compromise, and praying the Court to postpone the case until the Commissioner had sanctioned the compromise.

This the Principal Sudder Ameen refused, and passed the following order.

"It is very expedient and proper to decide this case (by adjourning which a censure from the Superior Court is apprehended) on that statement of the plaintiffs with this instruction "that hereafter in the event of this decision being contrary to the

1871 "order of approval of the Commissioner and being prejudicial
LALJI SAHU "to either of the contending parties, they will be at liberty to
^{v.}
COLLECTOR OF "present a petition for review of judgment and thus obviate the
TIRHOOT. "damage accruing to them."

Two months afterwards (September 1862) the Commissioner approved of Mr. Forlong's proposal.

In November 1862, Mr. Forlong wrote to the Commissioner, complaining that he had been grossly deceived by some of the servants in the office, and while taking blame to himself for trusting too implicitly to the reports made to him, he applied to the Commissioner to allow him to apply for a review of judgment, on the ground of his having been led by fraud to consent to the compromise, which leave being given, he applied to the Principal Sudder Ameen for a review. He also filed a cross suit for the rent due by the appellants.

The appellants opposed the review on the grounds of the compromise being binding and of their not being parties to any fraud.

The review being granted, they amended their plaint by striking out the credit given in their plaint for the rents.

The Principal Sudder Ameen directed enquiries into the accounts in the Maharaja's office, and decided that the documents relied on were false and fraudulent save as to Rs. 12,751, which he found to be supported by true documents, but on the ground of the suit being principally supported by false documents, he dismissed the whole claim.

On appeal to the High Court, Mr. Forlong did not insist on the claim as to the Rs. 12,751 being disallowed, and to that extent the High Court gave a decree.

The plaintiffs then appealed to the Privy Council.

Sir *R. Palmer*, Q. C., and Mr. *Leith* for the appellants.—In his letter complaining of the fraud of his servants, Mr. Forlong admits the high character of the appellants in other transactions, and says that he was from this and from the fraud of his own servants led to make a mistake. We have nothing to do with his mistake. The compromise was entered into after he had a full

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opportunity of making enquiries, and such enquiries as he made were from his own servants. An attempt has been made to strengthen the case by putting in correspondence between the Rani and other relations and the manager, but that is not evidence. The Principal Suder Ameen had no right to grant a review, and on the evidence taken by him the claim ought to have been considered proved. [Sir J. COLVILLE.—You could not appeal against the order granting a review under the Code, I believe?] No, we could not (1). [Sir J. COLVILLE.—Do you rely on the compromise being final and binding?] That is our contention. Besides admitting as evidence what ought not to have been admitted, the Courts below have come to a wrong conclusion on the facts. [Lord CAIRNS.—The case comes as it were from a finding of a jury. Where the Judge of first instance and the Judges of appeal, one of whom is a native, agree as to their view of the native testimony, it would surely be a strong measure to ask us to reverse those findings of fact. If there was no compromise, how can we open up this case on the facts?] If that be the opinion of the Board, we refrain from going fully into the details of the evidence.

Mr. *Field*, Q. C., and Mr. *Bell*, for the respondents, were not led upon.

The judgment of their LORDSHIPS was then delivered as follows :

Their Lordships are clearly of opinion that there was no compromise concluded here in such a way as to prevent the character and particulars of the claim being reconsidered upon the petition to review. On the contrary, provision was made in the original order to keep alive the right of either party, if dissatisfied, to have a petition of review. We then find that upon that petition of review the Court of first instance was entirely dissatisfied with the evidence in support of the plaintiffs' claim. We find that the Court of Appeal, there being no ground of appeal on the question of rejection or reception of evidence, arrived at the same conclusion. They considered that the

(1) Act VIII of 1859, s. 378.

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evidence was of a suspicious and unsatisfactory nature, and it would be quite impossible for this tribunal upon a question of fact of this kind, and where the controversy is as to the weight to be attributed to evidence, to differ from the decision of the two Courts below, unless their Lordships found that there had been some violation of the ordinary principles upon which causes ought to be tried. We do not find that there was any miscarriage of that kind in this case, and therefore we must humbly advise Her Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Agent for appellant: Mr. Wilson.

Agents for respondents: Messrs. J. H. and H. R. Henderson.

[APPELLATE CIVIL.]

*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, and
Mr. Justice Ainslie.*

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Jany. 8.

G. GRANT (ONE OF THE DEFENDANTS) *v.* BANGSI DEO, SON OF JANGIL DEO (PLAINTIFF), AND THE DEPUTY COMMISSIONER OF SANTAL PERGUNNAS (THE OTHER DEFENDANT).*

Ghatwali Tenures of Beerbhoom—Right of creating Encumbrances.

A ghatwal in the district of Beerbhoom is not competent to grant a lease of the whole or a portion of his ghatwali tenure in perpetuity.

Ghatwali tenures in Beerbhoom are grants of land by the Government to individuals for the performance of certain police duties. These tenures are heritable, but the incomes arising from them cannot be charged or encumbered by the ghatwal in possession so as to bind his successor.

THE plaintiff in this case sued Mr. G. H. Grant, a farmer under the Court of Wards, for possession of certain maurasi and mokurrari villages. He alleged that his grandfather had obtained a maurasi and mokurrari potta for the villages in question from one Bissen Narayan, a ghatwal and great grandfather of ghatwal Udit Narayan Deo, who was represented by the Court of Wards; that on account of the insanity of Udit

* Regular Appeals, Nos. 73 and 125 of 1870, from the decrees of the Sub-ordinate Judge of Beerbhoom, dated the 24th March 1870.

Narayan, the entire estate came under the management of the Court of Wards ; that the Court of Wards had given a farming lease of the ghatwali estate to Mr. Grant, who had dispossessed him of the disputed villages situated in this ghatwali. The plaintiff also made the Court of Wards, as representing the ghatwal, a defendant.

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Mr. Grant, the defendant farmer, among numerous objections, denied the alleged act of dispossession, pleaded limitation, and disputed the authority of a ghatwal in Beerbhoom to make any lease in perpetuity of the whole or any portion of his tenure.

The answer of the Court of Wards was substantially the same as that submitted by its farmer Mr. Grant.

The suit was tried by the Subordinate Judge of Beerbhoom, who, among other issues, fixed the two following :

“ Whether the ghatwal of the disputed villages granted a “mokurrari lease thereof to the plaintiff’s grandfather for “maintenance, and whether under that lease the plaintiff and “his ancestors held possession of those villages for generations “until ousted by the defendant Grant;” and “whether the ghat- “wals of the district of Beerbhoom are authorized to grant “such mokurrari leases, and whether such leases can bind the “ghatwals.”

On the first of these issues, the Court found that these villages had been held by the plaintiff’s ancestors as maurasi and mokurrari, and that the defendant Grant had dispossessed the plaintiff. The Court observed :—“ Mr. Grant, defendant No. 1, having “of his own authority wrongfully dispossessed the plaintiff’s “father of the disputed mauzas and chucks, the plaintiff is “entitled to recover possession thereof”—*Rungololl Deo v. The Deputy Commissioner of Beerbhoom* (1).

On the other issue the Court said: “ It is to be observed “here that the precedent in question rules, that if a ghatwal “*bona fide* granted a lease in perpetuity, it should remain good “and valid not only during the incumbency of the said ghatwal “but also after his death, so long as his heirs continue to hold “the ghatwali : that the lease granted by the former ghatwal

1871 "can be set aside by a regular suit. Beyond this the Court
 GRANT "of Wards or any surbarakar under them cannot, of their own
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 BANGSI DEO. "authority, oust any person in possession of any land under a
 "lease granted by the ancestor of the present ghatwal."

Against this judgment the defendant Grant preferred a regular appeal to the High Court.

Mr. *Graham* (with him Mr. *R. E. Twidale*) for the appellant.

Mr. *R. T. Allan*, Baboo *Srinath Das* for the (plaintiff) respondent, and Baboo *Annada Prasad Banerjee* for the Deputy Commissioner.

The memorandum of appeal contained fourteen grounds, but the learned counsel for the appellant, Mr. *Graham*, only asked the judgment of the Court on one ground,—viz., that, under the provisions of Regulation XXIX of 1814, the ghatwals of Beerbhoom are not competent to grant perpetual leases of any portion of the ghatwali land, and such leases, if granted, are not binding on the successors of the grantor of the lease; and that, under the preamble of Act V of 1859, and with reference to the nature and origin of the ghatwali estates, the lease in this case, if executed, was not binding on the present ghatwal.

The judgment of the Court was delivered by

NORMAN, J.—The plaintiff, the younger of two sons of Jangli Deo, who was the great grandson of one Rup Narayan Deo, the proprietor of a ghatwali estate called Taluka Rohini, in the district of Beerbhoom, sued for the recovery of possession of five villages, part of this ghatwali talook, which he claimed as having been assigned to his ancestors for their maintenance in hereditary right. The title set up in the plaint is under an alleged lease said to have been granted by Bissen Narayan, the brother of his ancestor Kishen Narayan Deo, to his grandfather Behari Deo, son of Kishen Narayan, out of the ghatwali estate of Rohini, of which Bishen Narayan was then the owner at a fixed rent of Rs. 31-12.

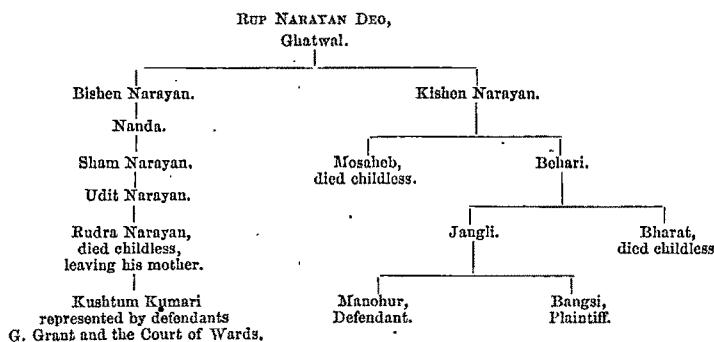
He values his suit at Rs. 29,224, Rs. 18,945 being the value of the land and Rs. 10,279, the amount of the mesne profits for the period of dispossession.

The defendants, Mr. Grant, lessee under the Court of Wards, and the Deputy Commissioner of the Sonthal Pergunnas representing the Court of Wards on behalf of Kushtum Kumari, the mother of Rudra Narayan Deo in whom the ghatwali estate is now vested, by their written statements raised several defences.

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The principal defence, that which was mainly argued before us in appeal, was that as regards ghatwali tenures in Beerbhoom, the ghatwal has no authority to grant a lease in perpetuity.

In order to the better understanding of the facts, it is convenient to refer to the pedigree of the parties which is as follows:—



The plaintiff did not prove a lease by Bissen Narayan to Kishen Narayan, as alleged, but a lease granted in 1240 (1833) by Sham Narayan to Jangli Deo, to hold, generation after generation, at an annual rent of Rs. 11. The ghatwali estate having been attached in execution of a decree, the sezawal (collector of the rents of the estate) dispossessed the lessee, on which Mosaheb Deo, the uncle of Jangli Deo, made an application to the Collector, who, by order dated 12th July 1838,—*i. e.*, in 1245,—directed that he, Mosaheb Deo, should be restored to possession, paying an enhanced rent of thirty rupees sicca or Company's rupees thirty-two.

Udit Narayan, who was the ghatwal prior to 1857, became insane. On his death the Court of Wards, on the 13th of April 1867, caused a proclamation to be made requiring the tenants of the ghatwali estate to pay their rents to the Court of Wards on behalf of his infant son Rudra Narayan, and from that time it is not disputed that the plaintiff and his family have been out

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of possession. But prior to this date,—namely, on the 3rd April 1854,—the rights and interests of the plaintiff's father, Jangli Deo, were sold in execution of a decree against him and were bought by one Gridhari, who has come forward as a witness in the present suit, and stated that he had no real interest, and that he bought *benami* for Jangli Deo. Strange to say the Subordinate Judge stopped the defendant's vakeels who were cross-examining the witness as to the nature of his dealings with Jangli Deo who appeared to have been indebted to him, saying that the questions were not relevant, and this though it appeared from his own statement that he had been collecting rents, he says, as tehsildar from 1260 to 1263, that is from 1853 to 1856.

The Subordinate Judge decides all the issues in favor of the plaintiff. He disposes of the question relating to the power of a ghatwal to grant a lease in perpetuity by saying that if a ghatwal *bond fide* grants a lease in perpetuity, it remains good and valid not only during the life of the ghatwal, but also after his death, so long as his heirs continue to hold the ghatwali. He says also: "The lease granted by a former ghatwal can be set aside by a regular suit. The Court of Wards or any surbarakar under them cannot, of their own authority, oust any person in possession of any land under a lease granted by the ancestor of the present ghatwal."

From that decision the defendant Grant has appealed.

It is necessary first to notice the point which might arise if it be true as supposed by the Subordinate Judge that Mr. Grant, the lessee under the Court of Wards, wrongfully dispossessed the plaintiff or his father without suit. If the plaintiff had sued for restoration to possession, on the ground that he had been dispossessed otherwise than by due process of law, and sought to exclude the question of title, as appears to have been the case in *Rungololl Deo v. The Deputy Commissioner of Beerbhoom* (1), the suit should have been brought within six months after the time of the dispossession—see section 15 of Act XIV of 1859.

In the suit now brought, it is incumbent on the plaintiff to show that he had a right to possession subsisting at the time of the commencement of the suit.

He must therefore show that the lease under which he claims is valid and binding against the present ghatwal. A point very closely resembling that with which we have to deal was considered by the late Sudder Court in the case of *Hurlal Singh v. Jorawun Singh* (1). In that case a ghatwali estate had been divided by a previous ghatwal amongst his family, and one of the family, who was in fact the eldest son of the ghatwal, sued for partition and separate possession of the one-third share which had been assigned to him. After full consideration the Court dismissed the suit, deciding that "ghatwali lands are grants for particular purposes, especially of police, and to divide them into small portions amongst the heirs of the ghatwals would be to defeat the very end for which the grants were made." Mr. Rattray says that "the lands are held conditionally on the due performance of certain defined duties. They belong to the office, and should not be frittered away into portions inadequate to a remuneration of the duty demandable from the occupants of the whole as a whole. I would not allow the division even with the sanction of an entire family or clan."

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In the case of *Rungololl Deo v. The Deputy Commissioner of Beerbboom* (2), the Court say that they think that the ghatwals of Beerbboom are, under section 2, Regulation XXIX of 1814, possessed of estates of inheritance without the power of alienation.

The late Sudder Court, in the case of *Sartukchunder Dey v. Bhugut Bharutchunder Singh* (3), held that ghatwali tenures of Beerbboom, being not the private property of the ghatwals, but lands assigned by the State in remuneration for specific police services, are not alienable or attachable for personal debts. The language of the judgment is quite general, but the case before the Court was of an attachment of the ghatwali estate in the hands of Bharat Chandra Sing, ghatwal, under a decree against the former ghatwal Digbijai Sing. This case came under the consideration of the High Court (Sir Barnes Peacock and Mr. Justice L. S. Jackson), in the case of

(1) 6 Sel. Rep., 169-171.

(3) S. D. A. (1853), 900.

(2) Marsh. Rep., 117.

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BANGSI DEO. *Binode Ram Sein v. The Deputy Commissioner of the Sonthal Pergunnahs* (1). The Court, in holding that the rents of a ghatwali tenure are not liable in the hands of the heir in possession to attachment for debts of his ancestor, the former holder of the tenure, say that "under the Regulation the holder of the tenure is to enjoy the whole income of the tenure," and that "it must have been intended that each ghatwal should be entitled to the whole income of the estate, and that such income should not be charged or incumbered by a previous ghatwal." With this opinion we entirely agree. We think that the supposed lease by Sham Narayan was an incumbrance which, as a ghatwal, he was incompetent to make, and that the succeeding ghatwals were not bound to recognize such lease.

Mr. Graham was content to take our judgment on this point, and therefore we did not go into the many other objections to the judgment of the Court below.

We reverse the decision of the Subordinate Judge, and dismiss the suit with costs in both the Courts.

Appeal allowed.

Before Mr. Justice Bayley and Mr. Justice Mitter.

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May 2. *SPENCER (PLAINTIFF) v. PUHUL CHOWDHRY AND OTHERS
 (DEFENDANTS).**

*SPENCER (PLAINTIFF) v. SHEIKH KADIR BUKSH AND OTHERS
 (DEFENDANTS).**

Jurisdiction—Civil Suit—Act VIII of 1859, s. 1—Objection raised for the first time in Special Appeal—Batwara—Regulation XIX of 1814, s. 20.

Section 20, Regulation XIX of 1814, which says, "the determination of the Board of Revenue or Board of Commissioners on the paper of partition shall be final," refers to those questions only which can be legally determined by the revenue authorities, and will not prevent a regular suit being instituted to establish a right and title to the land, which a party has lost by a batwara, notwithstanding that the plaintiff may have failed to make his objection before

* Special Appeals, Nos. 2358 and 2359 of 1869, from the decisions of the Subordinate Judge of Bhagulpore, dated the 28th July 1869, reversing two decisions of the Moonsiff of Agra, dated the 29th January 1868, decreeing the plaintiff's suits.

the Collector within fifteen days as required by clause 2, section 4, Regulation XIX of 1814. There is nothing in the batwara law or in any other Regulation to prevent the Civil Court from entertaining a suit for the declaration of the plaintiff's right to a larger share than that recorded in his name in the paper of partition.

An objection urged by the respondents, for the first time, in special appeal—that inasmuch as it was the plaintiff's own fault that he did not appear before the Collector and make his objection in time, his suit, which is one merely for declaration of title, and therefore is in the discretion vested in the Court by the 15th section of Act VIII of 1859, ought not to be entertained,—was not allowed.

Where a batwara had been made, and the plaintiff had had a specific share allotted to him, but which share was less than his proper share in the estate, and the plaintiff brought his suit against the co-sharers generally, without specifying in whose share the quantity he had lost was included, *held*, the Court could, in such suit, declare the plaintiff's title to the same, treating him as a shareholder to that extent only in the patti in which it may have been included.

THE plaintiff brought the first of these two suits for confirmation of his possession and for a declaration of his right and title to a share of 2 annas 11 gandas and 1 kowri out of the entire sixteen annas of Mauza Gourpore, in Pergunna Nyepore; and the second for a similar share of Mauza Dwarkapore in the same pergunna. He stated that Gourpore and Dwarkapore were one mauza formerly, which was purchased by one James Thomas in the year 1837, from Mussamat Khanum Jan, the then recorded proprietor, and which has ever since been in the possession of the Keonta Factory, which is the plaintiff's property; that the mauza was then divided into Gourpore and Dwarkapore in the Collector's rent-roll, and a separate jumma assessed on each at the instance of some of the proprietors; that subsequently the defendants applied for a batwara, or partition, of the jumma and lands, under Regulation XIX of 1814, without giving a correct specification of the plaintiff's share; that the plaintiff presented a petition of objection stating his share, but the petition was rejected on the 28th May 1867, and batwara was ordered on the 24th October 1867, and was carried out in spite of his objection; and that by the batwara a share less than his proper share by about 8 gandas 2 kowries $3\frac{1}{2}$ dunts was allotted to him in Gourpore, and by 3 kowries $6\frac{1}{2}$ dunts in Dwarkapore.

The defendants in both the suits, among other things, contended

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PUHUL CHOW- that the suit was barred by the law of limitation, and that the
DHRY. defendants did not hold any portion of the lands in excess of
their respective shares.

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SHEIKH KADIR The first Court laid down in substance the following issues:—
BUKSH. 1st.—Whether the plaintiff's suits are barred by the law of
limitation.

2nd.—Whether the plaintiff's share amounts to the quantity
claimed by him, and to what extent was his share reduced in the
partition effected under Regulation XIX of 1814.

3rd.—Whether the quantities allotted to the defendants cor-
respond with their respective shares.

4th.—Is the plaintiff entitled to a decree if the quantity given
to him under the batwara is less than his proper share?

Upon these issues the Moonsiff decided that the suits were not
barred by lapse of time, and stated that the defendants did not
contest the plaintiff's possession, which had also been proved by
various documents; and upon the question of title he held that
the plaintiff had proved his case by a decision of Court dated the
19th September 1832, by which Mussamat Bibi Khanum's right
to the share claimed by the plaintiff was declared, and that that
share was sold to the factory on the 1st June 1837, and that by
the batwara the plaintiff had lost about 3 kowries. As to the de-
fendants' case, he held that there was great confusion about their
shares, and that it appeared that each of the defendants claimed
a little more than his proper share. He held, therefore, that the
plaintiff was entitled to the declaration he sought, and decreed
accordingly.

On appeal, the Subordinate Judge dismissed both the suits.
In the first case, relating to Mauza Gourpore, he said the plaintiff
had not objected to the batwara on the publication of the
notice by the Collector under clause 3, section 4, Regulation XIX
of 1814, nor when he was furnished with copies of the batwara
papers under clause 2, section 19, although the plaintiff had men-
tioned Gourpore in a petition of objection which he presented
to the Deputy Collector, but that petition was presented in the
other case which related to Dwarkapore, and not in this case; the
plaintiff therefore seemed to have acquiesced in the batwara; and
as the batwara had been sanctioned by the Commissioner, whose

determination was final under section 20 of that Regulation, _____
the suit would not lie, in accordance with *Ramsahaya Sing v. SPENCER*
Syud Muzhur Ali (1), *Shaikh Zaker Ali Chowdhry v. Jugdes-* *v.* *Puhul Chow-*
suree (2), *Huopershad Roy v. Mohunt Ram Churn Sing* (3).

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—
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BUKSH.

In the Dwarkapore case he held similarly that the suit would not lie, because, although a petition of objection was presented, it was presented after the expiration of four months from the date of the Collector's notification, whereas section 20 of Regulation XIX of 1814 required that it should be presented in fifteen days, and the suit was brought after the parties had been put in possession of their respective shares. He said also that the main purport of the plaintiff's petition of objection was that one Iknath, who claimed a 5 gundas share, was really entitled to 4 gundas, and that the plaintiff, after the rejection of his petition by the Collector, took no further steps, but acquiesced in the batwara, which was afterwards made in due course and confirmed by the Commissioner. Upon the question of possession he added, "Admitting for argument's sake that this suit is maintainable, still the plaintiff has failed to establish that he was in possession of a larger share than that awarded to him under the batwara." And further he said,—“The plaintiff says he is in possession of 2 annas and 11 gundas, while Iknath is in possession of 4 gundas; while the witnesses make out that the plaintiff is in possession of the share claimed by him and Iknath of five gundas; therefore it must be concluded that the plaintiff is in possession of one gunda share less than that claimed.” Accordingly he dismissed both the suits.

From these decisions two specials appeals were preferred to the High Court.

Mr. Paul for the appellant.

Mr. C. Gregory for the respondents.

The High Court sent down certain issues to be tried by the lower Appellate Court under the following order.

(1) 2 B. L. R. App., 41.

(3) 6 W. R., 314.

(2) 1 W. R., 323.

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SPENCER v. PUHUL CHOWDHURY. BAYLEY, J.—After hearing Counsel, and with their consent, all questions of law are reserved.

SPENCER v. SHEIKH KADIR BUKSH. The lower Appellate Court will find on the batwara record, or such other evidence as either party may adduce—

1. Whether the villages Gourpore and Dwarkapore had been divided into two distinct mehals bearing two distinct numbers on the towzi before 13th October 1866.

2. Whether any application or applications had been filed by Iknath Sing for the batwara of the villages Gourpore and Dwarkapore on or before the 27th January 1867; and if so, what was the purport and effect of the same.

3. Whether the advertisement referred to in clause 2, section 4, Regulation XIX of 1814, had been duly published in respect of the batwara of the villages Gourpore and Dwarkapore. If so, when, and in what mode was that advertisement published.

4. Whether the Collector had taken any steps for the batwara of the villages Gourpore and Dwarkapore; and if so, what were those steps.

The lower Appellate Court, having determined these issues, will send its findings back to this Court with the least possible delay, out of its turn on the file. English precept to accompany, returnable in one month.

The cases came on before the High Court again for argument with the determination of the lower Appellate Court on those issues.

Mr. *G. Gregory* (Baboo *Tulsi Das Seal* and *Amernath Bose* with him) for the appellant.—The suits have been improperly dismissed. A suit will lie to establish a claim to land. The finality contemplated in section 20 of Regulation XIX of 1814 relates to the shares made by the batwara: any dispute as to these must be decided by the revenue authorities. It does not relate to title or the extent of interest in the land. Suppose an undivided estate belongs to A., B., C., and D. equally, and a partition is made into four equal parts at the request of A., B., and C., in the absence of D., no suit will lie at the instance of D. to disturb the division made; but suppose D.'s share in the estate was fraudulently or erroneously represented to be an eighth part of the

estate instead of a fourth, a suit will lie for a declaration that D. was entitled to a fourth part and not to an eighth part, whether D. should have objected to the partition or not, provided he bring his suit within twelve years of the partition, and is not shown to have acquiesced in the partition made by any act done by him, or by his conduct. The three cases cited by the Subordinate Judge may be disposed of in one word. The first, *Ramsahaya Sing v. Syud Muzhur Ali* (1) does not decide the question at all. In the other two, *Shaikh Zaker Ali Chowdhry v. Jugdassuree* (2) and *Huropershad Roy v. Mohunt Ram Churn Sing* (3), it is true, it was held that the suits would not lie; but it was under peculiar circumstances, and there the plaintiffs who sued to set aside the batwara were themselves among the parties who had petitioned the Collector to have a batwara. Suppose a proprietor who owned an eight-annas share was absent for a fortnight from his estate for a short change of air, and on his return found that a partition had meanwhile been applied for, and that his share was represented to be only two annas, it would be monstrous to say a suit would not lie. Section 20, from its context, would not bear such an interpretation. This view is supported by the case of *Kunj Behari Sing v. Neru Sing* (4). A great many other illustrations

(1) 2 B. L. R., App., 41.

(2) 1 W. R., 323.

(3) 6 W. R., 314.

(4) Before Mr. Justice Bayley and Mr. Justice Paul.

The 20th March, 1871.

KUNJ BEHARI SING (DEFENDANT) v.
NERU SING AND OTHERS (PLAINTIFFS).*

Baboo Durga Das Dutt for the appellant.

Judgment was delivered by

BAYLEY, J.—There is no ground whatever for these appeals.

Both the Courts below have come

to a finding of fact, whether right or wrong, that the defendants (appellants) have neither title nor possession. The lower Appellate Court has gone upon the oral and the documentary evidence, has considered the registered leases, Collectorate dakhilas, and other documents produced in the case, and it is after a consideration of the whole evidence that it has come to the conclusion that the plaintiff has made out his case, and the defendant has failed to rebut it.

It is urged that the batwara proceedings of the Collector are final. They are so for the purpose of fixing proportionate-area and proportionate assessment of Government revenue, but

* Special Appeals, Nos. 2420 and 2421 of 1870, from the decrees of the Subordinate Judge of Bhagulpore, dated the 17th August 1870, affirming a decree of the Moonsiff of that district, dated the 18th May 1870.

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might be adduced of the hardship it would work to put such a narrow construction on the section in question.

Mr. C. Gregory for one of the respondents.—The lower Appellate Court is right in holding, upon the authorities cited, that a suit will not lie to set aside a batwara.

Supposing a suit would lie with reference to section 20, Regulation XIX of 1814, there are other grounds on which these suits could not be maintained. The plaintiff never made any objection from the beginning to the time when the parties were put in possession of their respective shares; he must be deemed, therefore, to have acquiesced in the batwara, unless he can show there was something to prevent his objecting in proper time, which he has not done. A still further objection is as to the form of action. The plaintiff sues all the proprietors together, whereas each share is now a separate and independent estate. The plaintiff must find out in whose share the portion he has lost is to be found. Without this, no proper decree could be made. There is proof of the plaintiff's possession. The evidence adduced by him is not satisfactory, and has been rejected by the Subordinate Judge on appeal. The plaintiff seeks for a declaration merely. In such a suit, if he does not prove his possession, his suit must be dismissed.

Mr. G. Gregory in reply.—Upon the question of acquiescence, if the dates are to be compared, it will be found that the plaintiff's petition to the Collector objecting to the shares was only three days too late, and not four months, as erroneously supposed by the Subordinate Judge. But that objection, though it may be too late for the purposes of the Regulation, is still quite enough to show that the plaintiff did object as to the shares claimed by the defendants, and to destroy any presumption of acquiescence. In the face of that notice, no one could pretend that the plaintiff acquiesced. The objection as to the form of action, if valid

they are not to preclude parties from coming into Court for the enforcement of their civil right under section 1, Act VIII of 1859. Both the appeals are dismissed, as

both are admitted to be governed by one decision in special appeal. Special Appeal No. 2420 without costs, as no one appears; No. 2421 with costs.

at all, is a technical one. But it is not valid. The suit is brought in proper form. It may not be possible for the plaintiff to know in which patti or share the portion he has lost may be included. It may turn out, on enquiry, as indeed the first Court has found to be fact, that each defendant has got a little more than his share. Is the plaintiff then to sue all the proprietors one by one? A Court of Justice must not multiply litigation. It would be useless to send the parties to another suit, to try the same question between the same parties, and probably upon the same evidence. The question as to the form of suit in a case like this is not without difficulty. The remarks of the Subordinate Judge, on the plaintiff's evidence of possession, are wildly wrong. Putting the plaintiff's evidence aside, the defendant's own witnesses swear distinctly to the plaintiff's possession of the share he claims, and to the fact of his receiving rents for the same. The evidence is all one way, and no deliberation is required. See *Davis v. Hardy* (1).

The judgment of the Court was delivered by

MITTER, J.—We are of opinion that the lower Appellate Court has erred in law in holding that the failure of the plaintiff to appear before the Collector within the period prescribed by clause 2, section 4, Regulation XIX of 1814, is sufficient to bar the maintenance of this suit.

It is true that section 20 of that Regulation says—"The determination of the Board of Revenue or Board of Commissioners on the paper of partition shall be final." But this section evidently refers to those questions only which can be legally determined by the authorities mentioned therein. Now it is beyond all dispute that revenue officers, acting under the batwara law, have jurisdiction to assess a certain jumma on certain shares, but have no jurisdiction to determine any disputed question of right and title in shares. It follows, therefore, that the provisions of section 20 cannot be urged as a bar to the maintenance of the present suit so far as the question of right and title is involved in it; while, on the other hand, the Civil Court has no power to interfere with the division of the lands and jumma, which is a matter within the exclusive jurisdiction of the revenue authorities. That por-

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tion of the plaintiff's prayer by which he seeks to have a re-distribution of the lands and Government revenue must therefore fall to the ground. But there is nothing in the batwara law or in any other Regulation, that I am aware of, to prevent the Civil Court from entertaining this suit for the declaration of the plaintiff's right to a larger share than that recorded in his name in the paper of partition. Suppose, for instance, that a batwara is made by the Collector at the instance of certain parties who have no real interest in the estate, can it be contended that the real owner of that estate would be prevented by such a batwara from bringing a civil suit for the establishment of his right merely because he did not appear before the Collector within the fifteen days allowed by the 2nd clause of the 4th section of the Regulation, and that even when he is fully prepared to show that his failure to do so arose from causes perfectly beyond his control, such as absence in a foreign country, minority, lunacy, &c.? Such a construction is no way warranted by the provisions of section 20. This view was taken by a Division Bench of this Court in *Kunj Behari Sing v. Nuru Sing* (1).

It has been urged by the respondents that the plaintiff has to thank himself for the injury he complains of, inasmuch as there was nothing to prevent him from appearing before the Collector within the time required by law, and that this Court ought therefore to refuse to entertain this suit, which is one merely for declaration of title, in the exercise of the discretion vested in it by the 15th section of the Code of Civil Procedure. This objection cannot be allowed at this late stage of the proceedings. It was not raised in the Court of first instance, and as that Court has given a decree to the plaintiff upon the merits, it would be improper for us now to dismiss this suit on the strength of an objection which, it must be admitted on all sides, does not affect the real justice of the case.

It has been further urged that the plaintiff is not entitled to have his right declared in an undivided 2 annas 11 gundas and 1 kowri share in the zemindari, notwithstanding the batwara which was duly made according to law, and as this is what he has asked for in his plaint, the suit cannot be maintained in its present

form. This objection is a technical one only. There is no dispute as to the plaintiff's title to a 2 annas and 10 gundas share, and as the revenue authorities have assigned to him, in lieu of that share, certain specific lands with a certain amount of Government revenue assessed thereupon, none of the litigant parties can complain if the plaintiff's right to those lands is declared in this suit.

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The real contest between the parties is about the extra or additional share of 1 ganda and 1 kowri claimed by the plaintiff. But if the plaintiff can show that he is justly entitled to that share also, and if at the same time it is found to have been allotted by the revenue authorities to any one of the defendants, we see no legal reason why the Court should refuse in this suit to declare his title to the same, treating him as a shareholder to that extent only in the patti in which it may have been so included. Justice requires that our Courts should always try, as far as they legally can, to avoid causing multiplicity of litigation, and in the absence of any valid objection affecting the real merits of the case, we should be wrong to dismiss this suit merely for a formal defect in the plaintiff's prayer—a defect which can be easily cured by our decree without interfering with the substantial rights of any of the parties concerned in this litigation. If the plaintiff's allegations are correct, there can be no doubt whatever that some of the defendants at least, if not all of them, have got by the batwara a larger share than that to which they are justly entitled, and there is nothing whatever in the circumstances of this case to prevent the Court from doing complete justice between the parties, by declaring in this very suit that the plaintiff is entitled to the additional share in question out of the pattis assigned to those defendants by the batwara.

Lastly, it has been urged that there is no satisfactory proof that the plaintiff is still in possession of the additional share in question, and as the suit is one for declaration of title and confirmation of possession, the Court is bound to dismiss it in the absence of such proof. This objection is founded upon a mistake. The plaintiff has given ample evidence to prove his possession. That evidence is strongly corroborated by the testimony of several witnesses examined by the defendants themselves. But

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be this as it may, it is clear that this was not one of the issues raised by the defendants in the Court of first instance, and they are not entitled to raise it now at this late stage of the cause. If the plaintiff can show that he has a title to the additional share in question, and that that title is not barred by lapse of time, he should not be denied the declaration he has sued for, merely because he might have been ousted by the defendants under colour of the batwara proceedings.

We therefore remand this case to the lower Appellate Court for a decision upon the merits with reference to the issues laid down by the first Court, and with reference to those issues only.

This judgment admittedly governs Special Appeal No. 2359.

Case remanded.

[ORIGINAL CIVIL.]

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Phear.

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S. J. LESLIE (DEFENDANT) v. PANCHANAN MITTER (PLAINTIFF).
Limitation—Act XIV of 1859, s. 1, cl. 10 & 16—Agreement in writing which could not be registered—Acknowledgment.

On 9th April 1864, the defendant, L., an attorney, entered into an agreement with the plaintiff and one P. K. D., by which the plaintiff engaged to employ himself as cashier and accountant of L., and the plaintiff and P. K. D. engaged that they would, from time to time, on the requisition of L., advance money to him subject to the proviso that there should be at no one time a larger sum due by L., on account of such advances, than $\frac{3}{4}$ value of all bills, stocks, and other property which L. would make over to the plaintiff and P. K. D., provided also that the said advances should not exceed in total at any time Rs. 10,000. L. was to pay interest on such advances at 9 per cent., and the plaintiff and P. K. D. were to have a lien for such advances on all bills, stocks, and other property of L.'s which the plaintiff and P. K. D. should have in their custody as security for such advances. L. was to be at liberty to realize such bills and sell such stocks as he should deem necessary, provided that the money was to be paid to the plaintiff and P. K. D. in payment of such advances. Should there be any surplus money remaining after the settlement of the account, such money was to be credited to the account of L. The agreement was made before the Registration Act of 1864 came into force, and it was admitted that it could not have been registered. In a suit against L. to recover money advanced by the plaintiff and P. K. D.—*Held*, that there was such an agreement by L. to repay the advances as to

constitute a contract in writing signed by the party to be bound within the terms of clause 10, section 1 of Act XIV of 1859, and therefore the period of limitation was six years as provided by clause 16, section 1 of that Act.

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THIS was a suit for the sum of Rs. 10,693-4-3, being money due on an agreement made between the plaintiff and defendant and Srimati Prasanna Kumari Dasi, who was also made a defendant. The plaintiff also sought to recover the said sum as money owing to him by the defendant for money lent by him to the defendant, and for work and labour done by him for the defendant at the defendant's request, and for money paid by the plaintiff to the use of the defendant at his request, and for interest, and for money found to be due to the plaintiff from the defendant on an account stated between them. The plaint was filed on 22nd February 1870. The plaintiff stated that on 9th April 1864, the plaintiff and defendant and Prasanna Kumari Dasi entered into the following agreement which was duly executed by all the parties :—

“ Articles of agreement made and entered into between Sheppard John Leslie of Calcutta solicitor of the first part, Panchanan Mitter of Baranasi Ghose's Street in Calcutta of the second part, and Srimati Prasanna Kumari Dasi of Rutton Sircar's Garden Street in Calcutta wife of Nilmani Mullick of the third part, witnesseth.

1. “ That the said Panchanan Mitter shall and will employ himself for the term of twelve months from the 1st day of April 1864, as cashier and accountant to the said S. J. Leslie, and shall and will retain and keep under him an establishment consisting of a native cashier, two collecting sirkars, and one durwan, and shall and will devote his whole time to such employment.

2. “ That the said Srimati Prasanna Kumari Dasi shall and will stand and be security for the said Panchanan Mitter, and shall and will make good any losses sustained by the said S. J. Leslie, on account of the neglect or default of the said Panchanan Mitter.

3. “ That the said Panchanan Mitter and Srimati Prasanna Kumari Dasi shall and will be securities for the said cash establishment of the said Panchanan Mitter, and shall make good all losses sustained by the said S. J. Leslie by reason of any act, default, or neglect of the said cash establishment or any of them.

4. “ That the said Panchanan Mitter shall receive from the said S. J. Leslie monthly and every month, during the continuance of these

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presents, the sum of Rs. 250 for his personal allowances, and for his said cash establishment, which said salary is to be paid on the 15th of every succeeding month.

5. "That such cash establishment shall be appointed by the said Panchanan Mitter, with the consent of the said S. J. Leslie, and shall be liable to dismissal or fine at the option of the said S. J. Leslie, and all fines which the said S. J. Leslie may impose, on sufficient cause being shown, shall be deducted from the said monthly sum of Rs. 250.

6. "That the said Panchanan Mitter and Srimati Prasanna Kumari Dasi shall, from time to time, on requisition being made to either of them, advance to the said S. J. Leslie, such sums of money as he may request, provided that there shall be at no one time a larger sum due by the said S. J. Leslie, on account of such advances, than three-fourths value of all bills, stocks and other property which the said S. J. Leslie will make over to the said Panchanan Mitter and Srimati Prasanna Kumari Dasi, provided also that the said advance shall not exceed in total at one time Rs. 10,000.

7. "That the said S. J. Leslie shall pay interest on all such advances at the rate of 9 per cent. per annum, and that the said Panchanan Mitter and Srimati Prasanna Kumari Dasi shall have a lien for all such advances on all bills, stocks and other property of the said S. J. Leslie, which the said Panchanan Mitter and Srimati Prasanna Kumari Dasi shall have in their custody as security for such advances. The said S. J. Leslie will be at liberty to realize such bills and sell such stocks as he shall deem necessary, provided that the money will be paid to Srimati Prasanna Kumari Dasi and Panchanan Mitter in payment of such advances; should there be any surplus money remaining after the settlement of the account, such money will be credited to the account of the said S. J. Leslie.

8. "That monthly accounts shall be delivered to the said S. J. Leslie, of all bills delivered to the said cash department for realization, and of the amount realized and of the cash dealings and transactions of the office of the said S. J. Leslie."

That the plaintiff, in pursuance of the agreement, entered into the service of the defendant Leslie as cashier and accountant, and continued in his service until August 1865, the term of the agreement having been extended by mutual consent; that during that time the plaintiff kept up the cash establishment, and from time to time advanced to the defendant, out of his own funds, such sums as he required, the defendant making payments to

him occasionally both on account of the principal and interest due; that by agreement between the plaintiff and the defendant Prasanna Kumari Dasi, and in consideration of the said defendant having entered into the said agreement, she was jointly interested with the plaintiff in all sums payable to the plaintiff under the agreement by way of salary; that there was due for salary at the time of the suit, Rs. 1,754-8, and for advances with interest Rs. 8,938-12-3, making altogether Rs. 10,693-4-3.

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The defendant Srimati Prasanna Kumari Dasi refused to join with the plaintiff in bringing the suit. The agreement was made before the Registration Act of 1864 came into force.

In his written statement the plaintiff set out the following letter from his attorneys, Messrs. Barrow, Sen, and Co., to the defendant Leslie and his reply, as being an acknowledgment that some account was due. Both the letters were dated 16th December 1867.

"We are instructed by Baboo Panchanan Mitter and Srimati Prasanna Kumari Dasi, to request a settlement of the account between you, by payment to us of the sum of Rs. 6,735-4-3, and interest at 4 per cent. from the time of the respective advances made by you. We beg to say that our instructions to take proceedings are imperative, unless the amount is paid by the day after tomorrow. We trust, however, there will be no necessity for this."

To this letter the defendant Leslie replied:—

"Will you please furnish me with the account in which your client makes out the balance you now demand? I have repeatedly asked for an account, but, though frequently promised, it has never been furnished."

The defendant Leslie admitted the agreement, but alleged that it expired on 31st March 1865, and was not renewed by mutual consent; that the plaintiff had not performed his part of the agreement by devoting his time to the service and by keeping up the stipulated establishment; that advances of money were made from time to time to him by the plaintiff, but that he had made repayments which would be found to balance the account between them. He also alleged that the claim of the plaintiff (if any) was barred by the law of limitation.

Mr. Phillips and Mr. Macrae for the plaintiff.

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Mr. *Anstey* and Mr. *Evans* for the defendant.

MARKBY, J.—I think that the objection on the Statute of Limitation has failed. The case is one which falls under a very peculiar rule laid down in several cases which are referred to in Thomson on the Law of Limitation, page 144 of the last edition, which lay down that as no period is fixed by clause 10, section 1 of Act XIV of 1859, within which suits may be brought for breach of a contract which could not be registered by any law in force at the time of its execution, the law of limitation applicable to such suits is clause 16; and there is no contention that this is a contract which could have been registered. I therefore think that the clause which is applicable is clause 16. But the argument of Mr. Evans is that this is a suit, not upon that written contract, because there is no express provision that the advances will be repaid, but that it must be either upon a contract implied from the agreement, or from the advance itself. He contends that any stipulation which is to be implied from a written contract is not itself a stipulation for which there is a written engagement. It has been contended that this is similar to a case of mortgage where there is no express covenant to repay the money advanced, and that in that case if there is any implied contract it is not a specialty-debt. I do not, however, see the analogy between the two cases. The case Mr. Evans referred to is that of *Ivens v. Elwes* (1). That case seems to me rather to be against the view which he contends for. The question there was whether the recital under seal that the debt was due, converted the debt which otherwise was not due into a specialty-debt. The only question which was considered by the Vice-Chancellor was what was the intention of the parties. He seems to intimate that if, according to the true construction of the deed, the debt could be considered to be, as declared to be, due, he could have so held although there was no special covenant to pay. It seems to me that this view is supported by the case of *Wood v. The Governor and Company of Copper Miners in England* (2), where it was held that in the case of

(1) 1 Jur., N. S., 6.

(2) 7 C. B., 906.

specialty what must be looked to was not the particular words, but the intention of the parties. However that may be in a case in which the question arises on a deed, I have no doubt that it is so where the question arises in a written contract. Looking to the intention of the parties, I have no doubt that it was their intention,—an intention which I think is clearly, though not expressly, stated, that the plaintiff should lend money to Leslie, whenever Leslie required it, up to a certain amount; that he was to repay himself from the fees as they were collected, and that Leslie should pay him the balance. I think there is no difference between an engagement which is implied from a written contract and an express written contract. An express intention and an implied intention are the same when once the intention is ascertained. The real question is what is the real intention of the parties. In accordance, therefore, with the decisions to which I have referred, I hold that this case falls within clause 16 of the Limitation Act, and the plaintiff had six years to sue.

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As regards the salary claimed by the plaintiff, I am of opinion that there is no written engagement on the part of Leslie to pay anything which accrued due for salary after March 31st 1865, and if the plaintiff went on after that it must be under some other authority than has been put forward in this suit. I don't read the letter of the 10th December 1867 as containing any acknowledgment by Leslie that such salary was due. The letter seems to me to express a desire on the part of Leslie to be informed what the real nature of the claim was, and he reserved to himself the right to resist any claim which might be made.

From this decision the defendant appealed (*inter alia*) on the following grounds:—

1. That the learned Judge committed an error in law in holding that the alleged agreement of April 9th, 1864, whereby the defendant agreed to give a lien to the plaintiff upon the alleged advances of money for which the suit had been brought, was a written contract within the meaning of section 1, clause 10 of Act XIV of 1859; whereas he ought to have held that the said clause was not applicable to the said agreement.

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2. That the learned Judge committed an error in law in not holding the said alleged agreement to have been a simple contract of loan and not containing any promise by the defendant to pay the said monies or any part thereof, and therefore to have been barred by lapse of time under Act XIV of 1859, before the commencement of the suit.

3. That the learned Judge held that the said suit was not barred by limitation, whereas he ought to have held that it was so barred.

Mr. Hyde and Mr. Evans for the appellant contended that the period of limitation applicable to this case was three years. There is no express stipulation in the agreement to repay the money, and if such stipulation is to be implied from the agreement, it does not constitute a written agreement to repay. This is not a suit therefore on a written contract, but it is for money lent on a verbal arrangement, to which suit clause 9, section 1 of Act XIV of 1859 applies. The suit is therefore barred—*Wynch v. Grant* (1), *Ivens v. Elwes* (2), *Adey v. Arnold* (3).

Mr. Phillips for the respondent was not called upon.

NORMAN, J.—This is a suit by Panchanan Mitter against S. J. Leslie, who is an attorney of this Court, to recover Rs. 8,936-12-3, for monies lent, and Rs. 1,754-8, for salary. The salary appears to be barred by limitation, but Mr. Justice Markby has made a decree in favor of the plaintiff for the amount of the monies advanced to Mr. Leslie, subject to an account. From that decision Mr. Leslie has appealed, and I propose to state very shortly the facts on which the question raised by the appeal turns,—viz., whether the claim of the plaintiff for monies advanced by him is barred by limitation.

(His Lordship here read the terms of the agreement, and continued):—

That agreement was made on the 9th of April 1864, before the Registration Act of 1864 came into operation. The last

(1) 2 Drew, 312.

(3) 2 De. Gen. M. & G., 432.

(2) 1 Jur., N. S., 6.

items in the account are in December 1864. The suit was brought on the 22nd February 1870, nearly six years after the cause of action arose. The appellant contends that the suit is barred under the 9th and 10th clauses of section 1 of Act XIV of 1859. We must therefore see whether the suit is for the breach of any contract in writing signed by the party to be bound thereby. The money is due under a contract by Mr. Leslie. Was that contract a contract in writing? The money was advanced under a contract, and that contract contains a condition or agreement for the repayment of the same by Mr. Leslie. Now, on looking at the contract between the parties as reduced into writing, the first thing which it is necessary to observe is this, that Panchanan Mitter and Prasanna Kumari Dasi are to advance, that is to say to place in Mr. Leslie's hands, money which Mr. Leslie is to hold upon the terms of a loan, that is to say, subject to a condition for repayment on demand. The next point is that, while that money is forborne to Mr. Leslie by Panchanan Mitter, it is to be forborne on terms which are expressly stipulated on. It is to be forborne on the terms of carrying interest at 9 per cent. to be paid by Mr. Leslie to Panchanan Mitter. Thirdly, the money is to be held by Mr. Leslie on condition that Panchanan Mitter and Prasanna Kumari Dasi are to have a lien for the repayment of it, on all bills, stocks, and other property of Mr. Leslie which Panchanan Mitter and Prasanna Kumari Dasi should have in their custody as security for the advances; and lastly, it is provided that Leslie may himself realize such bills and sell such stocks as may be necessary, provided the money be paid to Panchanan Mitter and Prasanna Kumari Dasi in payment of such advances. Now it is not necessary in order to constitute an agreement in writing, that that agreement in writing should be expressed in a particular form of words. In order to make an agreement it is not necessary to use the words "I agree," or "I promise," or "I stipulate." If the agreement can be collected from the written instrument, and if it can be gathered that the party bound himself by such instrument, that, if the instrument is under seal, amounts to a covenant, or, if the instrument is not under seal, to an agreement.

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There are two old cases which illustrate this. One is *Giles v. Hooper* (1). The case there was this. There the plaintiff as lessor demised the house to the defendant for years, yielding and paying a certain rent, free and clear from all manner of taxes, charges, and impositions whatsoever, and it was held that the words "yielding and paying, &c.," made a covenant, and that the lessor was discharged from payment of all taxes imposed by Act of Parliament and long after the commencement of the lease, and that the lessee was bound to pay the whole rent without any deduction for any old or new charge or imposition whatsoever.

Several similar cases are cited in Comyn's Digest, title Covenant, A. 4. In *The Duke of St. Albans v. Ellis* (2), it was held that from a covenant by the lessee to plough the premises in a due course of husbandry, except the rabbit-houses and sheep walk, an implied covenant not to plough those portions arises.

Now I think it impossible to doubt that when Mr. Leslie executed this instrument as he did, he agreed that the money paid by Panchanan Mitter and Prasanna Kumari Dasi to him should be received by him as an advance; that until repayment was made, he should be liable to pay for the use of the money, or the forbearance of the creditors, interest at 9 per cent.; and that he bound himself to hold the money as a person to whom money is lent holds it,—namely, on condition of repayment on demand.

I think that the case falls within the meaning of the words in clause 10, section 1 of Act XIV of 1859, and that there was a contract in writing signed by the party to be bound thereby of which there has been a breach, and as this written contract could not be registered at the time it was entered into, I think that Mr. Justice Markby was right in holding that the period of limitation applicable to it is six years.

The effect will be that the appeal will be dismissed with costs.

Appeal dismissed.

Attorney for the appellant: Mr. Linton.

Attorneys for the respondent: Messrs. Gray and Sen.

(1) Carthew's Rep., 135.

(2) 16 East, 352.

[PRIVY COUNCIL.]

RANI SARATSUNDARI DEBI, WIDOW OF RAJA JOGEN-
DRANARAYAN ROY (DEFENDANT) *v.* BABOO PRASANNA-
KUMAR TAGORE AND ON HIS DECEASE RAMANATH
TAGORE AND OTHERS, HIS EXECUTORS (PLAINTIFFS).

P. C.*
1870
Dec. 16.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Accretion—Chur Lands—Local Investigation.

In a dispute as to the position of chur lands, where the change of the course of the river threw doubt upon their position, the judgment of the Court of first instance, given after local investigation, was upheld against the decision of the High Court, founded on inspection of the maps and on the arguments adduced before it.

The facts out of which this litigation arose are fully detailed in their Lordships' judgment, the essence of the case being this: Baboo Prasanna Kumar Tagore having sued the ancestor of the appellant's husband, Raja Jogendra Narayan Roy, for certain chur lands on the banks of the Brahmaputtra, a compromise was come to in 1849, founded on a map made in 1835 by which lots Nos. 5 and 7 in that map were declared to belong to the Raja. When the decree came to be executed, disputes arose in consequence of the changes in the course of the river as to what really constituted these lots.

Local enquiries were made, and the Principal Sudder Ameen personally inspected the locality, and decided that the appellant's husband was right in his contention as to the position of the lots in dispute. On appeal to the High Court, their Lordships (Kemp and Seton-Karr, J.J.), reversed the decision on the 9th April 1863 in the following judgment.

* Present:—THE RIGHT HONS. SIR JAMES WILLIAM COLVILLE, SIR R. PHILLIMORE
AND SIR JOSEPH NAPIER.

1870 " We have carefully considered the maps filed in this case, as
RANI SARAT- well as the explanations and arguments of the pleaders on both
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v. sides, and we have come to the conclusion that the order of the
PRASANNAKU- Principal Sudder Ameen is entirely wrong. The Principal
MAR TAGORE. Sudder Ameen has paid no attention to the change in the main
stream of the Brahmaputra which the map of the Court Ameen
itself shows to have taken place, he has not sufficiently attended
to the order of the Judge of the late Sudder Court (Mr.
Torrens), and he has not duly considered the landmarks, by which
in both maps, when duly compared, the situation of Churs Nos. 5
and 7 may be satisfactorily identified. The situation of these
two being made out, the identification of Chur No. 6 divided
into 3 plots becomes comparatively easy. Now we have no hesi-
tation in fixing Churs Nos. 5 and 7 as lying to the east, and not
to the west, of the main or open stream of the Brahmaputra, that
river having formerly or in 1835 run to the east of those churs,
and we direct that the respondent be maintained in possession of
these two chucks, namely 7 and 5, as marked by us in red ink with
three crosses in the Court Ameen's map. As regards the centre
chuck, or Chur No. 6, which is still to the west, and not to the
east, of the main stream, the respondent will be entitled to retain
just 1,663 bigas of that chuck to be marked off, if possible, in
one block, commencing from the main stream and going in a wes-
terly direction. The lower Court will very carefully attend to
these orders, instead of blindly adhering to its own opinion as it
appears to have done.

" The decision of the lower Court is thus reversed with costs
in favor of the appellant."

This being a judgment on a miscellaneous appeal, the High
Court practice was stated to be that in such cases no leave could
be granted to appeal to England (1), and a special application
for leave to appeal was made to Her Majesty in Council, which
was granted.

Sir *R. Palmer*, Q. C., and Mr. *Leith*, for the appellant, con-
tended that this was a case peculiarly calling for an adherence

to the judgment of the Court which had personal knowledge of the disputed land.

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Mr. *Doyne* and Mr. *Mortimer* for the respondents, contended that a careful examination of the maps and a knowledge of the mode in which churs were formed (a subject with which Judges who had held the position in the Civil Service which the Judges of the High Court who tried the case had held, were fully conversant) would demonstrate that the High Court's judgment was correct.

Their LORDSHIPS then delivered the following judgment:—

The appellant and the respondents in this case are the representatives of two zemindars, who, some six-and-thirty years ago, engaged in litigation concerning the title to certain chur land thrown up by the River Brahmaputra.

This litigation was begun by a suit, brought in 1834, by Prasanna Kumar Tagore, whom it will be convenient to describe as the respondent, for the recovery of 5,000 bigas of the land in question. In the course of that suit, and in the year 1835, a map of the land in dispute, with the land and water immediately surrounding it, was made by an Ameen, named Gowri Prasad Moitro, under the authority of the Court; and in that map the different churs are delineated, and marked with different numbers, from 1 to 7 inclusive.

This first suit was successful; and Prasanna Kumar Tagore obtained a decree for about 5,000 bigas of chur land. In 1845 he brought a second suit for 14,000 bigas of like land, and obtained a decree from the Court of First Instance. The defendants then appealed; and pending their appeal, and in July 1849, the parties came to a compromise, which was embodied in a decree of the Sudder Dewanny Adawlut, dated the 3rd of July 1849, and was thereby directed to be carried into effect.

This compromise is set out in the record. Its effect was that the churs marked in Gowri Prasad's map as Nos. 5 and 7, with 1,663 bigas and 15 kattas of Chur No. 6, were to belong to those

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who are represented by the appellant; and that the Churs Nos. 1, 2, 3, and 4, with the rest of Chur No. 6, were to belong to the respondent. The boundaries, if the parties differed about them, were to be settled by arbitration; and, if the parties could not agree to appoint arbitrators, were to be fixed through the Court Ameen in execution of the decree.

If then this map, which was the basis of the compromise, had correctly described the land as it then existed, nothing remained to be done but to measure off the 1,663 and odd bigas from Chur No. 6, and to put the parties into possession of their respective shares.

Unfortunately the land, which was the subject of the compromise, was in some sort the creation of the River Brahmaputra, which is said after each annual flood to be apt to shift its course, and to effect considerable changes in the alluvial deposits on either side of its channel. And thus it came to pass, that as soon as the parties proceeded to carry out the compromise, a contest arose whether, either between 1835 and 1849 or at some subsequent period, the river had not so changed its course as materially to alter the configuration of some of the seven churs, and their bearings to its main stream. The only effect, therefore, of the compromise was to convert a dispute touching the title to lands into one touching the identification of parcels; the principal question being not how Chur No. 6 was to be divided, but where Churs Nos. 5 and 7, which unquestionably belonged to the appellant's zemindari, were to be found. And this dispute has given rise to the intermittent litigation which, after lasting for more than fifteen years, was, in 1863, closed by the decree now under appeal.

The following is a short summary of that litigation:—Some time after 1849, and before April 1853, the respondent was put into possession of a considerable part, if not of the whole, of so much of the land contained in the seven churs as then lay on the western side of the Brahmaputra; and the possession so taken was confirmed by an order of the then Principal Sudder Ameen of Rungpore, dated the 19th April 1853. But that order was, on the appeal of the other party, set aside by Mr. Dunbar, one of the Judges of the Sudder Dewanny Adawlut,

whose order of the 24th of September 1853 directed the Principal Sudder Ameen to re-open the enquiry, but apparently did not disturb the possession already given to the respondent. Some delay in giving effect to this order took place, in consequence of the respondent's having contrived to strike the execution case off the file; but it was restored under an order of the Sudder Dewanny Adawlut, dated the 14th February 1855.

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The case was then investigated by the Principal Sudder Ameen; each party filed a map before him; he himself held a local investigation and made or caused to be made the map of 1855; and finally, on the 27th of June 1856, passed an order overruling the objections made to the record of his investigation by the respondent in the petition set forth in the record, declaring the possession given to the respondent to be null and void, and directing that possession should be given to the parties in accordance, as their Lordships understand the order, with the present contention of the appellant. No change, however, seems ever actually to have been made in the possession of the land, of which possession was given by the Moonsiff. The respondent appealed against the last-mentioned order, and the question was again re-opened by Mr. Torrens' order of the 30th of January 1857, which remitted the case to the Principal Sudder Ameen, with directions that in respect of those parcels which he had given to the then respondent (the present appellant), he should again allow execution of the decree, and after that prepare a map (better than the present map), so that it might clearly appear for the perusal of the Appellate Court, and in other respects what was the former and present course of the River Brahmaputra over the disputed lands, as stated in the map of Gowri Prasad Ameen.

The execution of this order was somewhat delayed by the rainy season, during which a local investigation was impossible, but on the 2nd of December 1857, the Principal Sudder Ameen passed an order for the appointment of an Ameen acquainted with measurement by the compass. From one cause or another, however, nothing effectual was done under this last order until December 1860, when Kalidas Moitro, the Ameen, proceeded to the spot, made a careful local investigation, prepared the map

1870 which bears his name, and on the 13th of April 1861, filed the elaborate report which is in the record. That report, though it did not precisely adopt the representations of either party, in the main supported the contention of the appellant. It was adopted by the Principal Sudder Ameen, who, on the 1st of August 1861, passed a decree finding that Churs Nos. 5 and 7 were where the appellant placed them, and not where the respondent placed them, directing that possession should be given accordingly, and also giving the necessary directions for ascertaining and making over that part of Chur No. 6 (as to the position of which there seems to be no controversy) which under the compromise belonged to the appellant.

The respondent appealed against this decree. The High Court reversed it, finding that Churs Nos. 5 and 7 were where the respondent placed them, and varying the Principal Sudder Ameen's decree accordingly. The present appeal is against that decree, and the first question for their Lordships' determination is whether it can be supported. It rests entirely upon the assumption that Churs Nos. 5 and 7, which unquestionably were on the west of the main stream of the Brahmaputra when the map of Gowri Persad was made in 1835, are now by reason of the altered course of that river on the eastern side of it. If that is not made out, the reasons assigned for the judgment wholly fail.

Upon what does this assumption purport to be founded? On "an examination of the maps filed in the cause, and on the explanations and arguments of the pleaders on both sides." What the latter may have been their Lordships are unable to say. But having given full consideration to the able argument of Mr. Doyne on behalf of the respondent, and having carefully examined the maps, they are unable to see any satisfactory grounds for coming to the conclusion contrary to the finding of those who have investigated the question on the spot; that the river has since 1835, by making for itself a new channel to the west of its former channel, so changed its course as to put either of the churs described by Gowri Prasad as Nos. 5 and 7, or whatever may remain of either of them, on its eastern instead of its western bank.

It would be strange indeed if this conclusion necessarily resulted from a mere comparison of the maps, since it is opposed to the expressed convictions of the Ameen Kalidas Moitro, who made the last and most scientific of the maps, and to that of the Principal Sudder Ameen, who conducted the local investigation and made the map of 1855. Mr. Doyne, indeed, has argued that the conclusion of the High Court may have been an inference, and would have been a legitimate inference, from the application of what he treats as the known law of the formation of churs to certain newly-formed chur land appearing in parts of Kalidas Moitro's map. But the High Court has not assigned this as one of the grounds of its judgment. Nor are their Lordships, considering the disturbing forces which may exist in a river of so vast a volume and of such irregular action as the Brahmaputtra, and also the positions of the several portions of chur land indicated in the map, by any means satisfied that the inference is legitimate, or so certain that it ought to outweigh the positive findings of the Ameen.

Again, the High Court observed that the Principal Sudder Ameen had not, in their opinion, "duly considered the landmarks by which in both maps, when duly compared, the situation of Churs Nos. 5 and 7 may be satisfactorily identified." The Court has omitted to state specifically to what landmarks it refers as instances of this omission. The instance most pressed in argument has been that of the tamarind trees appearing on the east side of the river in Ganga Prasad's map. But the real position of those trees, if they still exist, was also the subject of controversy; and after investigations on the spot, the Ameen rejected the respondent's theory concerning it. There is nothing to show that he was wrong in this. It is obviously impossible to draw that conclusion from Ganga Prasad's map, which, it is admitted, was not made by compass, or according to scale.

Another point made in the argument, though not adverted to in the judgment, is the bearing of the village of Kompopur to the land alleged by either party to be Chur No. 5. It cannot be said that the Ameen has neglected to consider this landmark. And his explanation of the discrepancy in this respect between his map and that of Ganga Prasad—viz., that the village, of

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which the position is very loosely indicated, is erroneously placed on the latter to the south instead of to the east of the River Jhelye—appears to their Lordships to be plausible.

Their Lordships then are unable to see any satisfactory grounds for the assumption which is the foundation of the judgment of the High Court. They would themselves be very slow to interfere with the judgment of an Indian Court upon a question of this nature. But they have to deal here with conflicting judgments, of which one is founded on a long and careful local investigation; and the other, overruling the former, is supported by no reasons that their Lordships can pronounce to be satisfactory. And their Lordships may observe that the considerations which make them reluctant to set their judgment against that of an Indian Court upon such a question as this, ought to influence in some degree the Appellate Court in India, and to prevent its interference with the result of a local enquiry, except upon clearly defined and sufficient grounds. Such grounds the Appellate Court may have thought it had in this case, but it has failed to express them. Against its judgment their Lordships have now to weigh the elaborate report of the Ameen and the judgment founded upon it. The integrity of the Ameen is unquestioned; his careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, their Lordships think it sufficient to say that they see no ground for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this case depends,—viz., whether the lands which represent Churs Nos. 5 and 7 of Ganga Prasad's map are now on the east or still on the west of the main channel of the Brahmaputra. On the contrary, they believe the conclusion of the Ameen to be correct. And they are fortified in that conviction by the following considerations.

It is to be observed that this controversy was by no means of recent date. The question was not whether the change alleged had been effected by the action of the river between 1835 and 1863. It appears by the respondent's petition in the record and the maps that his contention was certainly as early as 1855,

and possibly as early as the Moonsiff's proceeding, that the lands which represented the Churs Nos. 5 and 7 of the compromise were then on the eastern side of the main course of the river. That this was in fact the case in 1849 is in the highest degree improbable. Though it is too clear that the parties by a compromise made upon loose data merely shifted the ground of contention instead of determining their disputes, it is almost inconceivable that they should have drawn and executed, as they did, the instruments of compromise upon the footing of Ganga Prasad's map, without adverting to so great a change in the position of the churs relatively to the main channel of the river, if such a change had then taken place. The change then, if it ever really took place, must have taken place between 1849 and the Moonsiff's proceeding, or the year 1855; and in that case it might easily have been proved. It would then have been recent, and notorious, yet in 1855 the Principal Sudder Ameen after local investigation decided against the respondent.

Again, their Lordships upon the evidence see no reason to doubt that the land which the respondent treats as Chur No. 5 is in fact the Pukamari Chur, and an accretion on an estate which never belonged to the appellant's family, and now belongs to Government, an estate of which the Munshi Chur, one of the landmarks of the map of 1835, formed part. There is nothing which induces their Lordships to believe that any of those whom the appellant represents were ever in possession of that chur. Yet the High Court, without adverting to this point, affirmed it to be the Chur No. 5 of the compromise, and directed that the respondent should be maintained in the possession of it.

Upon the whole, then, their Lordships have come to the conclusion that it is their duty to advise Her Majesty to allow this appeal, to reverse the decree of the High Court; to direct that in lieu thereof the appeal to that Court from the decree of the Principal Sudder Ameen be dismissed, and the last-mentioned decree affirmed with costs. The appellant must also have her costs of this appeal.

Appeal allowed.

Agent for appellant: Mr. Wilson.

Agent for respondents: Mr. G. F. W. Mortimer.

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[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

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May 1st.

S. M. JAGADAMBA DASI v. S. M. PADMAMANI DASI.

*Jurisdiction—Suit for Land—Letters Patent of High Court, cl. 12,
Construction of.*

Under clause 12 of the Letters Patent, the High Court has jurisdiction to entertain suits for land, whether the land is situated wholly or in part only within the local limits of its ordinary original jurisdiction, leave of the Court having been first obtained in the latter case (1).

THIS was a suit for partition of certain moveable and immoveable property. A portion of the immoveable property was situate outside the jurisdiction of the Court, and leave had been obtained to sue in accordance with section 12 of the Letters Patent. The suit was set down for settlement of issues, and an issue was raised by the Advocate General, whether the Court had jurisdiction to entertain the suit.

Mr. Marindin and Mr. Macrae for the plaintiffs.

The Advocate General, Mr. Evans, and Mr. Bonnerjee for the defendant.

The Advocate General contended that the Court had no jurisdiction with respect to the immoveable property situated out of the limits of its ordinary original civil jurisdiction. The Court had no such jurisdiction under section 12 of the Charter of 1862. By section 12 of the Charter of 1865 the power to entertain

(1) *Letters Patent, 1865, cl. 12.—* “The High Court of Judicature in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court.”

suits was enlarged, but not as regards suits for land, only as regards all other suits. There are two divisions of suits mentioned in this section,—viz., suits for land, and all other suits,—and the words “within the local limits” are common to both divisions. There are two different ideas in the sentence,—one as to the situation of land, and another as to the arising of a cause of action or part of a cause of action. The words “either wholly or in case the leave of the Court shall have been first obtained in part,” apply only to the latter division; they apply only to the participle “arisen,” not to the participle “situated.” It was not intended to enlarge the jurisdiction with respect to land, for the law with respect to such land is different in the mofussil from the law administered by the High Court. In the case of *Prasannamayi Dasi v. Kadambini Debi* (1), Norman, J., puts his decision on the ground of convenience; but such matters as the inconvenience which may arise from a decision should not be taken into consideration in forming it.

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The Counsel for the plaintiffs were not called upon.

PHEAR, J.—The issue raised by the Advocate General as to the jurisdiction of the Court to entertain this suit, depends on the question whether or not in clause 12 of the Letters Patent, that which I may call the enlarging passage, and which runs in these words, “either wholly or in case the leave of the Court shall have been first obtained in part,” applies only to the immediately preceding participle “arisen,” or to both that participle and the previous participle “situated.” The present Officiating Chief Justice in *Prasannamayi Dasi v. Kadambini Debi* (1) held that this enlarging passage applied to both the words “arisen” and “situated;” and it appears to me that there is no serious consideration of grammar or propriety of language which should prevent such a construction being put upon the clause. I confess that originally I used to read the enlarging clause in connection with the word “arisen” only, and supposed that the first “or” which follows the word “situated” was so disjunctive as to make a parenthesis, so far as the word “situated” is concerned, of all the words which follow it up to and including the words

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"in part." But the construction which the Chief Justice puts on the clause appears to me certainly not incorrect, and it might well enough have been rendered impossible by the Legislature, if the Legislature had had the point prominently before it and had desired to do so. For if this enlarging passage, instead of coming immediately after the word "arisen," had been inserted after the previous word "shall," it would have been clear beyond all contest that it applied solely to the sentence of which the word "arisen" was the verb, and not to the other. It would have been embraced in that sentence which would in consequence have run thus, "or in all other cases if the cause of action shall, either wholly, or in case the leave of the Court shall have been first obtained in part, have arisen," &c. The Legislature did not do that, but it has used a sentence framed in a way certainly to lead to the supposition that much care had been given to its structure, and the practice has undoubtedly since the decision of the Chief Justice been uniformly one way. Under these circumstances I am not prepared to dissent from it and to make a new ruling. In truth, I am at present inclined to think that there are more reasons in favor of holding that decision to be a correct one than there are on the other side.

Judgment for plaintiff.

Attorneys for the plaintiff: Messrs. *Swinhoe & Co.*

Attorneys for the defendant: Messrs. *Judge and Gangooly.*

LR 4 Calp. 321.

Before Mr. Justice Paul.

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Jany. 28.

THE ADMINISTRATOR-GENERAL OF BENGAL v. LALA
DYARAM DAS.

*Act VIII of 1859, ss. 111, 119—Non-appearance of Defendant—Ex parte
Decision.*

A defendant filed a written statement in a suit, and when the case was called on for final disposal an application was made by Counsel on his behalf for an adjournment, but the application was refused, and, no one appearing for him, the case was proceeded with and a judgment was obtained by the plaintiff. The defendant afterwards applied for an order setting aside the

judgment, on the ground that he was prevented from appearing when the suit was called on. *Held*, that the application was within section 119 of Act VIII of 1859, and the Court had no power in granting the order to impose terms as under section 111.

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THE defendant in this suit had obtained a rule *nisi* calling on the plaintiff to show cause why the decree obtained by him in the suit should not be set aside, and the suit be re-heard, on the ground that the defendant had been prevented by sickness from being present when the case was called on, and the decree had been made against him *ex parte*.

The case had been called on on 6th January for final disposal, and Mr. Evans, Counsel for the defendant, applied for an adjournment, on the ground that a telegram had been received on the previous day by the defendant's attorney, stating that the defendant, who had gone to fetch his witnesses, had been taken ill at Lucknow on the way back, and was consequently unable to be present at the hearing. The application for an adjournment was refused. Mr. Evans then being asked whether he appeared, said that he did not; he had received no instructions in the case; and the suit being heard *ex parte*, a decree was given for the plaintiff for the whole amount of his claim. The defendant arrived in Calcutta on the evening of 6th January, but after the suit had been decreed. On 7th January the defendant, on an affidavit of the above circumstances as to his non-appearance, obtained the rule *nisi*. The defendant had appeared in the suit on a former occasion when the hearing was adjourned, and he had put in a written statement.

Mr. Marindin now showed cause. The defendant appeared sufficiently to take the case out of the meaning of an *ex parte* case under section 119, Act VIII of 1859. It cannot be an *ex parte* case if the defendant has actually appeared in the suit—*Goluckbur v. Bishonath Geeree* (1). The defendant does not state in his affidavit what his defence was, whether his witnesses were material, or what they were to prove. If he is allowed to have the case re-heard at all, he should only be allowed to do so on terms, as provided for by section 111, Act VIII of 1859.

[PAUL, J.—Have I power to order that under Act VIII? I think I should have had power to make the order under the Supreme

(1) Marsh. Rep., 32.

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Court Procedure.] See Rule 16 of January 1865 (1). [Mr. *Evans*.—The old rules do not apply against the explicit procedure of Act VIII of 1859, but only in cases not provided for there.] See *Kumara Upendra Krishna Deb v. Nabin Krishna Bose* (2), where a defendant was considered to have appeared. [PAUL, J.

—Suppose a defendant appears at the settlement of issues, and does not appear afterwards, is that a sufficient appearance, and does not section 119 apply? Mr. *Evans*.—The summons in this case was for final disposal.] The defendant has put in an appearance here, and section 119 does not apply. It only applies to a defendant who has never appeared—*Gorachand Goswami v. Raghu Mandal* (3).

Mr. *Evans*, in support of the rule, contended that there had not been such appearance that it could be said the suit was not heard *ex parte* within the meaning of section 119, Act VIII of 1859. He cited *Bhimacharga v. Fakirappa* (4). Applying the principle of the decision in that case, the defendant in the present case had no one instructed and able to answer material questions on his behalf when the case was called on for final disposal, and the hearing was therefore *ex parte*. The defendant in such a case is entitled to have the suit re-heard.

PAUL, J.—I have already pointed out during the course of the argument that, under Act VIII of 1859, there is no appearance other than that referred to in Schedule B of that Act, which is either for the first hearing of the suit when the issues are to be settled, or for the final disposal of the suit. In this case the summons was for the final disposal of the suit, and the case came on on 6th January, when Mr. *Evans* appeared, and when he said that he and his attorney were not prepared to go on with the case, because they were not instructed. I therefore think that the time for appearance was not the occasion on which the adjournment took place, but when the case came on for final disposal. The defendant did not appear personally, nor did he appear through Mr. *Evans* or the attorney, who expressly informed the Court that they did not appear at the hearing. Some confusion is no doubt created by the old practice of the

(1) *Broughton's Civil Procedure*, (3) 3 B. L. R., App., 121.
3rd Edition, App., 77. (4) 4 Bom. H. C. Rep., 206.
(2) 3 B. L. R., O. C., 113; see p. 115.

Supreme Court, but such practice is unknown to Act VIII of 1859, and therefore is not contemplated by any of its provisions. Some cases were cited by Mr. Marindin, but I do not think they are in point. The case of *Bhimacharga v. Fakirappa* (1), cited by Mr. Evans, is more in point, and I am therefore of opinion that the defendant has brought himself within the provisions of section 119 of Act VIII of 1859, and that he is entitled to have the judgment set aside.

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The next question is, on what terms is he entitled to have that done? and on that point I am referred to section 111 of the Act, and Mr. Marindin has argued that inasmuch as by section 111, when a case is heard *ex parte* and the defendant comes in and applies to be heard, the Court may direct that on "payment of costs or otherwise" the defendant may be heard, the Court has the same powers under section 119. It is not necessary for me here to state whether, under section 111, the Court can compel a defendant to bring the money which forms the subject-matter of the suit into Court, because I think that in the present case I must be guided by section 119, which, I am of opinion, is in no way connected with, and is entirely independent of, section 111; and section 119 does not provide for costs. There may be a very good reason for that, because if a man comes himself before the Court, and can satisfy the Court that he was not able to attend at the hearing owing to illness or other good cause, he ought not, it may be supposed, to be made to pay costs. I hold that under section 119 the Court has no power to order the defendant to pay costs, and I think that the costs should be costs in the cause. I have been referred to certain old rules of the late Supreme Court, but I do not wish to embark on a sea of confusion, and prefer to follow the clear provisions of section 119 of Act VIII of 1859. The judgment will therefore be set aside, and the costs of the former hearing, and of and incidental to this application, will be costs in the cause.

Rule absolute.

Attorneys for the plaintiff: Messrs. *Collis & Co.*

Attorneys for the defendant: Messrs. *Gillanders and Chunder.*

[FULL BENCH.]

*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Macpherson,
Mr. Justice Glover, Mr. Justice Paul, and Mr. Justice Mookerjee.*

1871 THE QUEEN v. SHEOGOLAM DAS AND ANOTHER (APPELLANTS).*

April 29.

*Jurisdiction of Magistrate and Sessions Judge—Registration Act (XX of 1866),
s. 95.*

The Sessions Judge has jurisdiction to try a case of abetting false personation of a witness before a Registrar of Assurances, under section 95 of the Registration Act (XX of 1866) (1).

The word "instituted" in that section should be construed to mean commenced.

THIS case was referred to a Full Bench by Macpherson and Mookerjee, JJ., under the following circumstances.

The prisoners were found guilty by the Sessions Judge of Shahabad of having committed an offence under section 94 of Act XX of 1866 (the Registration Act), in that they abetted false personation, and were sentenced to rigorous imprisonment and fine. They were committed by the Joint Magistrate for trial at the Sessions upon the charge, on which they were tried and convicted.

The prisoners appealed to the High Court, and the appeal was heard before Macpherson and Mookerjee, JJ., and was disallowed upon all points, save one, which was referred for the decision of a Full Bench.

The question referred was,—Whether the conviction ought to be quashed on the ground that the Sessions Judge had no jurisdiction to try the case.

It was contended that, under section 95 of Act XX of 1866 (2),

* Criminal Appeal, No. 201 of 1871, from an order of the Sessions Judge of Shahabad, dated the 18th March 1871.

(1) See Act VIII of 1871, s. 81.

(2) *Act XX of 1866, s. 95.—* * **

"All prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or Subordi-

nate Magistrate of the first class; and

all fines imposed under this Act may

be recovered in manner prescribed in section 61 of the Code of Criminal Procedure."

the case ought to have been instituted and tried before a person exercising the powers of a Magistrate or Subordinate Magistrate of the first class, and that the Sessions Judge had no jurisdiction to try it. In support of this view a decision of a Division Court, in the case of *The Queen v. Asanulla* (1), was relied on.

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(1) *Before Mr. Justice Phear and Mr. Justice Hobhouse.*

The 21st July 1863.

QUEEN v. ASANULLA AND OTHERS
(PETITIONERS).

The judgment of the Court was delivered by

PHEAR, J.—It appears to me in this case that, if we accept the account of it which has been given by the Deputy Magistrate of Rungpore, a great deal of irregularity and impropriety is manifest in the course of the proceedings. Mr. Ferry reports as follows:—“It appears the plaintiff, ‘Myajan, had complained before ‘Mr. James Anderson, on the 15th ‘of February last, praying for a criminal prosecution in the matter, and ‘Mr. Anderson, as Registrar, drew ‘up a robakari consigning the case ‘to the Magistrate’s Court. Then ‘afterwards on the same day, whilst ‘sitting in Mr. Glazier’s Bench as ‘Joint Magistrate in charge, during ‘Mr. Glazier’s absence on duty in ‘the interior of the district, he passed orders for the Police investigation into the matter. The case was ‘subsequently, on Mr. Glazier’s return, made over before trial to me ‘by him on the 23rd of March. Thus ‘it was Mr. Anderson embodied in ‘his officiating capacity the powers ‘of a District Magistrate and Registrar to direct the criminal trial of the ‘case.”

Now, I think it is clear from the Criminal Procedure Code that a Magistrate has only jurisdiction to enter-

tain a criminal charge upon one of two contingencies,—namely, either that the complaint is made before him by a person properly qualified to complain and prosecute, or that he himself, of his own knowledge and discretion, starts the proceedings supposing the case to be one of those in which the Code gives him authority to do so. Now here the Registrar of the district might very well have acted the part of prosecutor and made the complaint, but the Sub-Registrar of himself could not. Consequently Mr. Anderson’s robakari was of no effect, either as a complaint under the Procedure Code or in any other way. It was, I think I may almost venture to say, something approaching to a farce, that Mr. Anderson, as Sub-Registrar in the Registrar’s Kutcheri, should draw up a robakari for the information of Mr. Anderson, officiating as Joint Magistrate in the Magistrate’s Kutcheri; but whether it is right to designate this ineffectual proceeding by this term or not, it is, I think, certain, even on the meagre facts of the case which the record exhibits, that nothing whatever did really come of it. Mr. Anderson, upon perusing his own robakari, referred the matter to the Police. I need not say that this does not amount to the institution of a prosecution, in any sense, under the Criminal Procedure Code. We are not concerned with the Report of the Police; but it appears that upon its being given in to the Magistrate, Mr. Glazier, after his return

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But it appeared that a different construction had been put upon the law by five Judges of the High Court in a "Criminal letter"

to the kutcheri, he issued a warrant for the arrest of the prisoners or a summons for them to appear and answer some charge, and then handed the matter over to the Deputy Magistrate. In truth, we cannot make out from the record very precisely what happened, but undoubtedly the Magistrate seems at that time to have acted as if there was actually a matter of complaint before him. If we take literally the account given by the Deputy Magistrate in his Report, it would seem as if there was in fact no matter of complaint at all before him. However, upon looking closely into the record, although we cannot discover that there was any complaint filed as by a private prosecutor, we have learnt that there is a mooktearnama signed by Myajan in which he authorises a mooktear to appear for him, and recites that he has made a complaint before the Magistrate, and it is in the matter of that complaint that he desires to be represented by the mooktear. Had it not been for this indication of something like a legal commencement of the criminal proceedings which were continued before the Deputy Magistrate, I should have felt myself obliged to conclude that the charge against the prisoner originated in the action of Mr. Glazier himself in the exercise of the powers vested in him by the provisions of Section 68 of the Criminal Procedure Code, and had this been the case, I should have considered that the legality of the subsequent proceedings before Mr. Perry was, under the circumstances of the case, open to much question. As, however, the mooktearnama to which I have referred is actually on the

record, and has been sent up to us as part of the record by the Joint Magistrate, I cannot resist the inference that there was a complaint properly made by Myajan either before the Deputy Magistrate, or the Magistrate himself, which could form a proper foundation for their proceeding. If there were not, there would be no meaning in the mooktearnama itself. And further as the Deputy Magistrate in his report speaks of Myajan as plaintiff, by which word I suppose he means prosecutor, I feel obliged to assume that there really was something in the shape of a legitimate initiation of a prosecution before the one Magistrate or the other. This being so, I come indirectly, by a process of reasoning only, unaided by any express statement on the record, to the conclusion that the criminal proceedings in this case were properly instituted, and there can be, I think, no doubt that after the point of time where the prisoner under a warrant or summons appeared before the Deputy Magistrate to answer the charge, every thing was regular and unimpeachable. I regret very much that a want of attention to the provisions of the Criminal Procedure Code should have left in this case so much opening for the prisoner to contend that the earlier conduct of the prosecution was irregular and informal to the extent of rendering the whole proceedings void for want of jurisdiction. I have given my reasons for thinking that that contention cannot, even in the imperfect state of the record, be supported.

The prisoner's pleader has further argued that even supposing the prosecution was rightly instituted before

of the 18th July 1867, No. 836 (1), issued by Peacock, C. J., and Loch, L. S. Jackson, and Macpherson, JJ.

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Baboo *Taruknath Dutt* for the prisoners.—The offence here is a new offence created by the Registration Act. But for that law it was no offence at all, and the section of the Criminal

the Magistrate or the Deputy Magistrate, still that this was a case in which the Magistrate had no power to proceed to a conviction, and that he ought instead of so doing to have committed the accused for trial to the Sessions. In support of this position he has pointed to the universal practice of Magistrates in this respect, to the provisions of the Criminal Procedure Code in analogous cases of personation, and to the inadequacy of the Magistrate's powers relative to inflicting the full amount of punishment given by section 94 of Act XX of 1866. And on these grounds he has asked us to infer that the words "as to the institution of prosecutions" in section 95 of Act XX of 1866, do not authorize the Magistrate to finally hear and determine the matter of the charge. I think this argument is not substantial. It seems to me that the word "prosecution" as used by the Legislature in this place, means the entire proceedings in trial of a person who is accused of a criminal offence. It is, in short, employed to designate a criminal trial, as the word "suit" designates a civil trial with all its proceedings, from beginning to end, and this contradiction appears in many places both of the Penal Code and the Criminal Procedure Code. I will refer to section 205 of the Penal Code as an instance. Now when the Legislature enacts that a suit of a specified character shall be instituted in a particular Court, say in the Principal Sudder Ameen's Court, it is undoubtedly taken to mean that the suit shall be

tried out in that Court. So it seems to me, here, that the natural meaning of the words in section 95 of Act XX of 1866—namely, "all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate, &c."—is that the whole of the criminal trial, from complaint to adjudication on the charge, shall be carried out before and by that person. There is not in this or in any subsequent Act any limitation put upon the operation of these words; and the limitation of the Magistrate's jurisdiction as to trial, which is given by the Criminal Procedure Code, applies only to the particular offences therein mentioned, and, consequently, does not include within its scope the offence in question, which was first created by Act XX of 1866. I think, therefore, that the Deputy Magistrate had full power, under the provisions of section 95 of Act XX of 1866, to entertain and to finally adjudicate on the charge made against the prisoners in the present case. The sentence passed by him did not exceed in amount of punishment that which the ordinary powers of a Subordinate Magistrate of the first class authorize him to pass, and therefore it is not necessary to decide whether Act XX of 1866 would enable him to go beyond that limit in cases to which section 94 of that Act applies.

On the whole, I am of opinion that this application should be rejected.

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Procedure Code, which regulates the jurisdiction of the several Criminal Courts, applies only to the trial of offences contemplated in the Penal Code; therefore the argument that the punishment provided by the 95th Section is beyond the competency of the Magistrate, has no force.

The true meaning of the word "instituted" is that the case should be commenced, tried, and brought to a conclusion, resulting either in conviction or in acquittal by and before a Magistrate. See *The Queen v. Asanulla* (1).

The judgment of the Full Bench was delivered by

NORMAN, J.—In this case the prisoners Sheogolam Das and Ramsunder Das were charged with abetting the false personation of a witness in registering a kabuliat before the Sub-Registrar of Assurances at Buxar. The offence is punishable under the 94th section of the Indian Registration Act of 1866 with a term of imprisonment which may extend to seven years. In pursuance of the provisions of section 95 the prosecution was instituted before the Joint Magistrate, and by him the prisoners were committed for trial before the Sessions Judge.

The question before us is, whether the Sessions Judge had authority to try the prisoners; whether in fact the conviction by the Sessions Judge ought to be quashed on the ground that he had no jurisdiction. The reference has been made to us in consequence of a decision of Mr. Justice Phear and Mr. Justice Hobhouse in *The Queen v. Asanulla* (1), in which those learned Judges appear to have held that the whole of the criminal trial under section 95, from complaint to adjudication on the charge, must be carried on before and by a Magistrate or Subordinate Magistrate of the first class. If that be so, of course the Joint Magistrate had no power to commit the prisoners to the sessions. We, however, cannot agree in the interpretation which has been put by those two learned Judges upon the word "instituted" in the 95th section of the Indian Registration Act of 1866. We

(1) See *Ante*, p. 693.

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think that if the full and true meaning of that word is given by construing it as "commenced," that the section in question would preclude Deputy Magistrates and others not having the powers of a Magistrate or of a Subordinate Magistrate of the first class from entertaining any charge of an offence under the 94th or other sections of the Act. Construing the word in that way, we construe it according to its literal and grammatical meaning, and it is evident that such must be the true construction; for on reference to the 21st section of the Code of Criminal Procedure it is clear that a Magistrate has no power to sentence a prisoner to the full period of imprisonment to which he would be liable under section 90, and subsequent sections down to section 94, of the Registration Act. The 21st section of the Code of Criminal Procedure provides that "the Criminal Courts of the several grades according to the powers vested in them respectively by this Act shall have jurisdiction in respect of offences punishable under the Indian Penal Code or under any special or local law (except offences which are by any such law made punishable by some other authority therein specially mentioned) and in the investigation and trial of the offence hereby declared to be within their jurisdiction shall be guided by the provisions of this Act." Therefore the jurisdiction of the Magistrate in respect of an offence under any special law is the same as in respect of an offence punishable under the Penal Code. Now the Magistrate of a district, or other officer authorized to exercise the powers of a Magistrate, is only empowered to punish with imprisonment for a term not exceeding two years. Therefore if we were to construe the word "instituted" as if it was intended to include the whole adjudication upon the charge, we should be construing the Act in a way which would make the 95th section repugnant to sections 90, 91, 92, 93, and 94 of the same Act; because the Legislature would first impose a penalty of seven years' imprisonment in certain cases, and then declare that the offence should be triable only by an officer who would not have power under the law to inflict a punishment with imprisonment for a term exceeding two years.

For these reasons I think it perfectly clear that the rule, as

1871 laid down in a letter No. 836 of 18th July 1867 (1) is correct; and
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*Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch,
Mr. Justice Macpherson, Mr. Justice Paul, and Mr. Justice Mookerjee.*

1871
May 2.

THE QUEEN v. BAKTEAR MAIFARAZ.*

Functions of Criminal Courts—Jurisdiction of Assistant Magistrate—Penal Code, s. 169—Code of Criminal Procedure, ss. 11, 169, 171, 422.

When an Appellate Court directs further evidence to be taken by a Subordinate Court under section 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice, as described in section 169, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of section 171.

The words "whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or officer," in section 11 of the Code of Criminal Procedure, are not an exhaustive enumeration of the functions of Criminal Courts.

THE facts of this case, as stated by the Sessions Judge of Nuddea, were as follows:—

It appears that the offence with which the prisoner stood charged in this case arose out of a deposition before the Assistant Magistrate of Mehipore, taken under orders of the District Magistrate in his appellate jurisdiction. The Assistant Magistrate, considering there were grounds for suspecting that the prisoner was committing perjury when giving evidence before him as a witness, held a preliminary enquiry under section 171

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea.

of the Criminal Procedure Code (1), and made over the prisoner to the District Magistrate for investigation of the charge preliminary to commitment. The Magistrate on receipt of the record sent it back to Mehirpore for investigation by Baboo Pyari Mohan Banerjee, Deputy Magistrate of that station. The Deputy Magistrate left the station before the order could be carried out, and the sub-divisional officer referred the matter for further orders, when the District Magistrate passed the order that "there is no reason why the case should not be investigated by the sub-divisional officer;" and so it returned to the latter, who then held a judicial investigation, and committed the prisoner to the sessions on a charge of perjury.

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It was contended that though the Assistant Magistrate, acting under orders of the Appellate Court, in taking the prisoner's deposition on oath, was holding a judicial proceeding (Explanation 3 to section 193), he had no power to record any judgment upon it, and that he was, consequently, not sitting as "a Court" within the meaning of section 171.

The Judge considered that this objection was perfectly sound, and that it clearly rested with the Court, which on a view of the whole case was to form an opinion upon the deposition of each witness, to say whether any one of them should be put upon his trial for giving false evidence under section 171. He therefore made this reference with a view to having the commitment order cancelled.

The case was referred to a Full Bench by LOCH and MITTER, JJ.

(1) *Criminal Procedure Code, Section 171.* — "When any Court, civil or criminal, is of opinion that there is sufficient ground for investigating any charge mentioned in the last three preceding sections, the Court, after making such preliminary enquiry as may be necessary, may send the case for investigation to any Magistrate having power to try, or commit for trial, the accused person for the offence charged, and such Magistrate shall, thereupon, proceed according to law, and the Court shall

have power to send the accused person in custody, or to take sufficient bail for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such investigation."

Section 11.— "The words 'Criminal Court' shall denote every Judge or Magistrate lawfully exercising jurisdiction in criminal cases, whether for the decision of such cases in the first instance, or on appeal, or for commitment to any other Court or officer."

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The judgment of the Court was delivered by

NORMAN, J.—The Magistrate of Nuddea, on hearing an appeal against the decision of an Assistant Magistrate, directed a further enquiry, and that additional evidence should be taken by the Assistant Magistrate under section 422 of the Code of Criminal Procedure. While taking evidence in pursuance of that direction, the Assistant Magistrate, being of opinion that a witness who was examined before him had given false evidence, sent the case for investigation to the Magistrate, assuming to act under the provisions of section 171. The accused person was ultimately committed to the Court of Session. But the Sessions Judge doubts the legality of the commitment, and has referred the case to this Court under section 434, in order that the commitment may be quashed.

We think that when an Appellate Court directs further evidence to be taken by a Subordinate Court under section 422 of the Code of Criminal Procedure, it is competent to the Subordinate Court before which such evidence is given, if any offence against public justice, as described in section 169, is committed before such Court by a witness whose evidence is being recorded therein, to send the case for investigation to a Magistrate under the provisions of section 171.

We think that the Assistant Magistrate, to whom the case was sent back, and before whom the evidence in the present case was taken, was lawfully exercising jurisdiction in a criminal case. The words "whether for the decision of such cases in the first instance or on appeal, or for commitment to any other Court or officer," in section 11 of the Code of Criminal Procedure, are not, in our opinion, intended as an exhaustive enumeration of the functions of Criminal Courts.

The jurisdiction of the Assistant Magistrate was that of a judicial officer exercising a particular function, not merely an authority delegated to him by the Magistrate.

The trial must therefore proceed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

A. B. MILLER v. THE CHARTERED MERCANTILE BANK OF
INDIA, LONDON, AND CHINA.

1871
May 12.

*Deposit of Title-deeds—Insolvent Act (11 and 12 Vict., c. 21), s. 24—
Voluntary Assignment—Costs.*

The firm of C. N. and Co^l, Calcutta, had an account with a Bank, of which R. was the manager, under an arrangement that the Bank should discount bills accepted by C. N. and Co. to a certain amount, and that C. N. and Co. should keep in the Bank a certain fixed cash balance. In November, R., finding that the limit of the discount accommodation had been exceeded, and the cash account overdrawn, declined to discount any more bills unless security were given for the amount then due to the Bank. A., the only partner in the firm of C. N. and Co. then in Calcutta, verbally promised on 24th November to deposit with the Bank the title-deeds of the premises in which C. N. and Co. carried on their business; and in consideration of such promise, R. discounted further bills from 24th to 29th November. A. sent to R. a letter, on 25th November, as follows:—"In pursuance of the conversation the writer had with you yesterday, we now deposit the title-deeds of landed house property as security against our discount account." The letter enclosed certain title-deeds, of which R. acknowledged the receipt. R. subsequently discovered they were not the title-deeds which A. had promised to deposit, and of this he gave A. notice by letter on 28th November. C. N. and Co., on 5th December 1870, suspended payment, and by the usual order their estate and effects vested in the Official Assignee, who thereupon, finding that the Bank claimed a lien on the deeds, brought a suit against the Bank for recovery of them. *Held*, that the deposit of the title-deeds was not void under section 24 of the Insolvent Act.

Held, also, that the Bank was entitled to retain the deeds as security both for the balance of the discount account existing at the time of the promise to deposit, and also for the bills discounted between the 24th and 29th November.

Sembler.—The Bank was entitled to hold the deeds actually deposited, as if they were the deeds which formed the subject of the verbal promise to R.

THIS was a special case, stated for the opinion of the Court in accordance with a written agreement between the parties, dated 22nd March 1871.

The suit was brought to recover certain title-deeds which had been deposited with the defendants by Mr. Alcock. The plain-

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tiff sued as Official Assignee and assignee of the estate and effects of Messrs. Charles Nephew and Co., in which firm Mr. Alcock was a partner.

The special case was as follows:—

The late firm of Messrs. Charles Nephew and Co. had an account with the Chartered Mercantile Bank under an arrangement that the said Bank should discount bills accepted by the said Messrs. Charles Nephew and Co. to the amount of £12,000; and that the said Messrs. Charles Nephew and Co. should keep in the said Bank a cash balance of £2,000, which account, at the time of the writing of the letter of the 2nd November 1870 hereinafter mentioned, was considerably overdrawn.

2. On the 17th August 1870, Mr. J. M. Reid, manager of the said bank, wrote to T. Alcock, who was the only resident partner in Calcutta of the said firm of Charles Nephew and Co., the following letter—

“CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA,
Calcutta, 17th August, 1870.

THOMAS ALCOCK, Esq.

DEAR SIR,—I have to-day received your favor in reply to mine of yesterday. I fancy you will recollect that the arrangement made was that your discount account was to go to £12,000, and a balance of £2,000 in cash to be kept, and these were the limits fixed by yourself; and at the time this arrangement was made your whole account was to be kept here. Since that time the nature of the bills offered for discount seems to have entirely changed. At present, out of £12,000 discounted, only about £1,700 are covered by shipping documents, whereas formerly nearly all discounts were covered. I am quite aware that Narain Sing must have a large stock of goods, but it does not follow that these goods are unencumbered. With a large business, such as I have to manage here, it is necessary that I should have some definite arrangements laid down for working accounts, and if you wish that any change should be made in the footing upon which yours now stands, I shall be glad to hear from you. I may mention that the bills mentioned in your letter did not reach me.

Yours truly,

J. M. REID, *Agent.*”

3. On the 23rd November last, Messrs. Charles Nephew and Co. having applied to the Bank to discount their acceptance for Rs. 9,808-6, Mr. Reid wrote the following letter:—

"Calcutta, 23rd November, 1870.

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MESSRS. CHARLES NEPHEW AND CO.

DEAR SIRS,—In reply to your favor of date, I must beg to decline to discount the acceptance for Rs. 9,808-6 which you send me, as the amount of your discounts at present exceeds by over half a lakh the amount originally agreed upon,—viz., Rs. 1,20,000.

J. M. REID, Agent.

P.S.—I return the bills enclosed."

To which he received the following reply:—

"Calcutta, 24th November, 1870.

J. M. REID, Esq.,

Manager, Chartered Mercantile Bank of India,

London, and China.

DEAR SIR,—The opening of the Suez Canal compels us to render our indent constituents more accommodation than formerly, as goods now arrive so rapidly. We have therefore to ask you as our banker to give us increased accommodation, and we will at once place in your hands £4,000 worth (four thousand pounds worth) of precious stones, which you can retain as security.

CHARLES NEPHEW AND CO."

4. On the 24th November 1870, Mr. Reid wrote to Messrs. Charles Nephew and Co. as follows:—

"Calcutta, 24th November, 1870.

MESSRS. CHARLES NEPHEW AND CO.

DEAR SIRS,—In reply to your favor of this date, I regret to say that the security offered is not of such a nature as to place the Bank in a position to make an advance upon it.

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I was very much disappointed, on looking at your account yesterday, to find that although our agreement was discount accommodation to the extent of Rs. 1,20,000, bills had actually been passed to the extent of Rs. 1,88,000. This amount I shall be glad to see brought down to the sum agreed upon.

J. M. REID, *Agent.*"

5. In consequence of this letter, Mr. Alcock called on Mr. Reid, who positively declined to discount any further bills, unless some security was given for the amount then due to the Bank. Thereupon Mr. Alcock promised to deposit the title-deeds, which he stated were in his office, of the premises in Old Court House Street, occupied by Charles Nephew and Co., and which premises he represented as worth five lakhs of rupees and unencumbered. On the strength of this promise, Mr. Reid discounted the following drafts for Messrs. Charles Nephew and Co. :—

		Rs. As.
24th November,	Seymull Ghasiram 9,808 6
25th	Munnalal Huralall 9,725 0
" "	Narayan Sing and Co. 2,000 7
" "	" " 8,932 10
28th	Shibchandra Mullick 7,500 4
29th	Omrao Sing, Sirdar Sing 9,826 0

6. These bills would not have been discounted but for Mr. Alcock's promise that Messrs. Charles Nephew and Co. would deposit security, which they did, writing the following letter :—

" *Calcutta, 25th November 1870.*

J. M. REID, Esq.,

*Agent, Chartered Mercantile Bank of India,
London, and China.*

DEAR SIR,—In pursuance of the conversation the writer had with your good self yesterday, we now deposit the title-deeds of landed house-property as security against our discount account. We are having a list of the deeds with the value of each house made out, and some shall be sent in either to-morrow or Monday.

We undertake to give your Bank a pucca mortgage on the property if called upon to do so.

We remain yours faithfully,

CHARLES NEPHEW AND CO."

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7. In that letter were enclosed the title-deeds therein mentioned. Mr. Reid acknowledged the receipt of the deeds in the following letter :—

" *Calcutta, 25th November, 1870.*

MESSRS. CHARLES NEPHEW AND CO.

DEAR SIRS,—I have to acknowledge receipt of your letter of date, with a parcel said to contain title-deeds of landed and house property.

J. M. REID, *Agent.*"

8. Mr. Reid did not at the time of the receipt of such deeds examine them, and it was not until looking at them on the 28th November last that he found such deeds were not the deeds of the premises in Old Court House Street, whereupon he wrote the following letter :—

" *Calcutta, 28th November, 1870.*

THOMAS ALCOCK, Esq.

DEAR SIR,—On looking at the documents forwarded to me on the 25th, I find that they appear to be the title-deeds belonging to some property of which Narayan Sing seems to be the owner. I understood it was the title to the house in which you carry on your own business which was to come to me. I presume there has been a mistake in sending me the parcel.

J. M. REID, *Agent.*"

9. To which letter Mr. Reid received the following reply :—

" *Calcutta, 29th November, 1870.*

DEAR SIR,—I shall call on you on Thursday after the mail to arrange to give the Bank a pucca mortgage that will be quite satisfactory to your good self.

THOMAS ALCOCK."

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 AND CHINA.
10. On the 29th November 1870, Mr. Reid wrote to Mr. Alcock as follows:—

"Calcutta, 29th November, 1870.

THOMAS ALCOCK, Esq.

DEAR SIR,—Your note of this date does not at all answer mine on the subject of the title-deeds left here. I understood they were to be the title-deeds of the house in which you carry on your own business. Please let me know at once as to this.

J. M. REID, Agent."

11. Mr. Reid had no further communication with Mr. Alcock, for Messrs. Charles Nephew and Co., on the 5th of December, suspended payment, and on attempting to effect a compromise with their creditors, their affairs were found to be and are in great confusion, and Mr. Alcock absconded on or about the 15th December.

12. On the 17th January, Messrs. Carruthers and Dignam wrote to Mr. Reid as follows:—

*"7½, Hastings Street,
 Calcutta, 17th January 1871.*

ESTATE NARAYAN SING AND AMRIT SING.

DEAR SIR,—We are instructed by Mr. Miller, the Official Assignee, to enquire whether you have in your custody any title-deeds or documents relating to immoveable property belonging to the insolvents above named or either of them. If there are any such deeds or documents (as we understand there are) in your custody, we shall feel obliged by your informing us by whom they were delivered to your Bank, for what purpose they were so delivered, and when delivered. Please also inform us whether you (or your Bank) claim to have any charge or lien upon the deeds or documents or upon the property to which they relate.

We are, dear Sir, yours faithfully,

CARRUTHERS AND DIGNAM,
Attorneys for the Official Assignee."

13. Upon which the following correspondence passed:—

"Calcutta, 18th January, 1871.

DEAR SIRS,—Mr. J. M. Reid, agent, Chartered Mercantile Bank, has handed us your letter of yesterday's date on behalf of the Official

Assignee and assignee of the estate of Narayan Sing and Amrit Sing, insolvents, and in reply to your enquiries we are instructed to inform you that the Bank has in its custody title-deeds purporting to relate to immovable property belonging to Narayan, Amrit, and Danpat Sing, and which deeds were delivered to the Bank on the 24th November last by Mr. Alcock, of the late firm of Messrs. Charles Nephew and Co., as security for the debt due by such firm to the Bank, and until payment thereof the Bank claims a lien on such deeds as well as on the property to which they relate.

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We remain yours faithfully,

BERNERS, SANDERSON, AND UPTON."

"Calcutta, 4th February, 1871.

Re CHARLES NEPHEW AND CO.

DEAR SIRS,—With reference to your letter of the 17th ultimo to Mr. J. M. Reid, agent of the Chartered Mercantile Bank, enquiring on behalf of the Official Assignee whether our clients (the Bank) held any and what deeds of the insolvents, and our reply of the 18th instant, we shall be obliged by your informing us whether the Official Assignee disputes our client's lien on the deeds and their claim to the property to which such deeds relate, as Mr. Reid is leaving Calcutta for England on the first proximo.

Yours faithfully,

BERNERS, SANDERSON, AND UPTON."

"7½, Hastings Street,

Calcutta, 9th February, 1871.

ESTATE CHARLES NEPHEW AND CO.

DEAR SIRS,—We are in receipt of your letter of 4th instant respecting our letter of 17th ultimo to Mr. Reid, agent of the Chartered Mercantile Bank, and it appears to us from your letter in reply thereto that the deposit of the deeds by Mr. Alcock on 24th November was fraudulent and void as against the Official Assignee under the provisions contained in section 24 of the Insolvent Act. You will of course understand that we use the word 'fraudulent' simply in the sense of the section quoted, and not as casting any imputation upon any person. The Official Assignee claims to have the deeds returned to him, and we shall be glad to hear from you what are the exact circumstances under which the deeds were made over to the Bank. When the Assignee is in

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possession of the full facts, he will be able to determine whether he ought, in the interest of the general body of creditors, to maintain or to give up his claim, and we presume there will be no difficulty in ascertaining the facts without the intervention of the Court.

Yours faithfully,

CARRUTHERS AND DIGNAM."

"Calcutta, 14th February 1871.

Re CHARLES NEPHEW AND CO.

DEAR SIRS,—We are in receipt of your letter of the 9th instant, and being instructed by our clients, the Chartered Mercantile Bank, to furnish the Official Assignee with the exact circumstances under which the deeds they claim were made over to the Bank by Mr. Alcock, enclose copy of case we submitted to Mr. Marindin, with his opinion.

Having occasion to see the Official Assignee this morning on other matters connected with this estate, we communicated the contents of such case and opinion to him, and informed him we should send him copies.

We shall be obliged by your stating whether the Official Assignee any longer contests our client's lien and right to retain the deeds.

We remain yours faithfully,

BERNERS, SANDERSON, AND UPTON."

"7½, Hastings Street,

Calcutta, 24th February 1871.

Re CHARLES NEPHEW AND CO., INSOLVENTS, ex parte THE CHARTERED MERCANTILE BANK.

DEAR SIRS,—On receipt of your letter of 14th instant, and under instructions from the Official Assignee, we submitted the case and copy of opinion of Mr. Marindin for the opinion of counsel on behalf of the Official Assignee, referring to the case of *Nunes v. Carter* (1); and we now send you enclosed copy of the opinion of Mr. J. Pitt Kennedy thereon. As the state of the accounts between the two insolvent firms of Charles Nephew and Co. and Narain Sing and Co. will, it is believed, show a balance due to the former firm greatly exceeding the value of the property to which the title-deeds in question relate, the Official Assignee does not feel at liberty to relinquish his claim to the deeds, more particularly as he might be held personally responsible to the creditors of the first-named firm if he should do so.

(1) 4 Moore's P. C., N. S., 222.

In order, however, to prevent inconvenience to the agent of the Bank, our client is willing to join in taking the opinion of the Court on a special case to be stated. * * * *

If you agree to this course, please let us know as early as possible.

Yours faithfully,

CARRUTHERS AND DIGNAM."

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"Calcutta, 28th February, 1871.

Re CHARLES NEPHEW AND CO.

DEAR SIRS,—We have communicated the contents of your letter of the 24th instant to the Chartered Mercantile Bank, and our clients agree to the question of law being decided by the Court.

The course to be adopted will, we presume, be that provided by sections 328 to 331 of the Civil Procedure Code.

Yours faithfully,

BERNERS, SANDERSON AND UPTON."

The questions agreed to be stated for the opinion of the Court were as follows:—

1. Whether, under the circumstances that have happened, and as the same are mentioned and set forth in the case, the deposit by Thomas Alcock, one of the insolvents above named, in manner and at the time in the case mentioned, of the title-deeds therein mentioned, was fraudulent and void as against the said A. B. Miller as such Official Assignee and assignee as aforesaid, under the operation of Section 24 of the Indian Insolvent Act (1).

(1) 11 & 12 Vict., c. 21, sec. 24.— "If any insolvent who shall file his petition for his discharge under this Act, or who shall be adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or to any other person in trust for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be, or if made with the view or intention, by the party so conveying, assigning, transferring, charging, delivering or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed, and is hereby declared to be, fraudulent and void as against the assignees of such insolvent."

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2. Whether, in case the answer of the High Court to the last-mentioned question shall be in the negative, the said Bank is entitled to retain the said title-deeds as security for any debt due to or advances made by the said Bank, save for advances made by the said Bank to the said insolvents between the 24th and 29th November 1870.

Mr. *Evans* and Mr. *Crichton* for the plaintiff.

Mr. *Marindin* and Mr. *Millett* for the defendants.

Mr. *Evans*.—The deposit of the deeds was a voluntary assignment within section 24 of the Insolvent Act. There was no consideration for it: the antecedent debt is no sufficient consideration to make the deposit good. The section speaks of assignments void against "creditors," therefore in every case there must be an antecedent debt, inasmuch as there is a creditor. Reid was not bound in any way to discount bills; he did so on account of a fraudulent act of Alcock's, which he thought was a fulfilment of the agreement between them. [PHEAR, J.—The Official Assignee claims as assignee of Parke Pittar and Co., not of Narayan Sing and Co. Now, if Alcock sued to recover these deeds, the Court would not allow him to take advantage of his own fraud. Can it then allow the Official Assignee, who represents him, to do so?] The Official Assignee is in a different position from Alcock; he represents the interest of the creditors as well as the insolvents. There was no such property in the deeds on the part of the Bank as that, when the vesting order was made, the property would not pass to the Official Assignee—*Nunes v. Carter* (1). There was no legal or equitable assignment to the Bank at the time Alcock's property vested in the Official Assignee. This deposit was no fulfilment of the former agreement, therefore there could have been no consideration.

Mr. *Crichton*, on the same side.—The deeds that were deposited were not the same as were contracted to be deposited. When a mortgagor has contracted to deposit certain securities, and has deposited others instead, there can be no lien on those actually

deposited, unless some further understanding supervenes—*Ex parte Hunt* (1). In the present case there was an intention shown by the letters to deposit other securities than those actually deposited. Reid never in fact accepted them before the insolvency, and when that took place he could not take up a different position, and say he had accepted them.

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As to the assignment being voluntary, a much wider meaning may be given to the word "voluntary" in the Indian Insolvent Act, which deals both with non-traders and traders, than in the English Act, which deals with non-traders only. "Voluntary" means without demand on the part of the creditor, and without compulsion on the part of the debtor. Here there was no legal pressure, and without that the doctrine of fraudulent preference applies. Declining to discount future bills is no pressure. The contest here is not between Alcock and Reid, but between the Official Assignee and Reid, and the Official Assignee represents the interests of the creditors as much as those of the debtor. See *Wilson v. Balfour* (2).

Mr. Marindin, for the defendants.—Was this act of deposit fraudulent and void under section 24 of the Insolvent Act? If it was not altogether void, was it void as to the existing antecedent debts? It is submitted it is not void. The word "voluntary" governs the whole section both in English and Indian Acts. See 9 Geo. IV, c. 57, s. 32. What, then, is the meaning of "voluntary?" There is no foundation for saying it must be more widely construed here because the Indian Act applies to trades as well as non-traders. The case of *Nunes v. Carter* (3) is distinguishable as having been decided on a section in the Jamaica Act, which does not contain the word "voluntary." This deposit was a security given to cover antecedent debts and future advances—*Margareson v. Saxon, per Alderson*, B. (4). Where there is a pre-existing debt, and security is deposited under pressure, or if there is a consideration moving for future advances, the deposit is not voluntary—*Crosby v. Crouch* (5). It does not prevent their being part of the

(1) 4 Jur., 342.

(4) 1 Y. & C., 529.

(2) 2 Camp., 579.

(5) 11 East, 255.

(3) 4 Moore's P. C., N. S., 222.

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same consideration that the deeds were deposited after some advances had been made—*Edwards v. Glyn* (1). Although some bills were in fact discounted before the deposit, this makes no difference. It is said the deposit was not complete, so as to effect any equitable charge on the deeds, until Reid's acceptance of the deposit. There is nothing, however, to show that it was a mere mistake of Alcock's. Even if it were, he would not be entitled to relief without giving up the deeds he had really intended to deposit. It is submitted that Alcock really intended to deposit the deeds actually sent. Reid, too, goes on discounting bills after he discovered he had not got the deeds agreed upon. *Ex parte Coombe* (2) merely amounts to this, that a mere parol contract to deposit a lease does not create a charge on the land without the actual deposit, and this follows from the Statute of Frauds; it is the deposit itself that creates the lien. *Ex parte Hunt* (3) merely decides that nothing passes by a grant that was not intended to pass by it. See *Ex parte Powell* (4). *Wilson v. Balfour* (5) does not affect this case. In that case there was an entirely voluntary act of the debtor without any pressure whatever; there was no actual handing over, and therefore no equitable deposit. It is inconsistent, too, with later cases—*Ex parte Geaves* (6), *Ex parte Imbert* (7), Griffith and Holmes on Bankruptcy, 391. [PHEAR, J., refers to *The Unity Joint Stock Banking Association v. King* (8)]. Although Reid had the deeds which were not intended to be deposited, yet he would be entitled as against the owner, Narayan Sing, to hold them as a lien for what was due to the Bank from Alcock. There is no doubt the transaction was a complete one. Reid had every intention to hold on to the deeds.

Mr. Millett, on the same side.—There are two questions in this case. Firstly, is this deposit a voluntary assignment? Secondly, if not voluntary, is Reid entitled to retain the deeds, they not being the deeds stipulated for? The cases already cited were decided on the English Insolvent Act of 1826, but later

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| (1) 2 E. & E., 29; S. C., 28 L. J., Q. B., 350. | (5) 2 Camp., 579. |
| (2) 4 Madd., 250. | (6) 8 De Gex., M. & G., 291. |
| (3) 4 Jur., 342. | (7) 1 De Gex., & J., 391; S. C., 3 Jur., N. S., 801. |
| (4) 6 Jur., 490. | (8) 4 Jur., N. S., 470. |

cases under the Bankruptcy laws are just as applicable, in showing the meaning of the word "voluntary." These cases show that the act of assignment may be a spontaneous act of the debtor; pressure is not necessary to take it out of the class of voluntary assignments—*Brown v. Kempton* (1), *Strachan v. Barton* (2), *Johnson v. Fesemeyer* (3). The real motive which induced Alcock to deposit the deeds was the future advances, or advances made at the time of the deposit. *In re Gordon* (4) is a somewhat similar case. It may be inferred from the facts of the case that Reid, although he did not substantially accept the deeds as the security agreed on, yet intended to hold on to them until he could get a better security. The conduct of Alcock was not a mistake, it was a fraudulent act; if it had been a mistake, he would have corrected or referred to it in his letters. The Official Assignee, therefore, cannot take advantage of Alcock's fraud and recover the deeds.

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Mr. Evans, in reply.—There was no complete assignment of the deeds so as to prevent the deposit from being void against the Official Assignee. On the facts of the case, there was no such assignment. The position of the Official Assignee is different from that of Alcock: the assignment might be good as against Alcock himself, but void against the Official Assignee—*Bryan v. Child* (5). The Official Assignee is in the position of a creditor in this case. There are cases in which, although a transaction is completed, equity will not allow it to be carried out—*Johnson v. Fesemeyer* (3), *In re The Hibernian Joint Stock Banking Company* (6). There was no complete acceptance by Reid; he merely gave a receipt for something which he had not even verbally agreed to accept. Then the mere deposit does not create the lien—2 Story's Equity Jurisprudence, 1020. Deposit with a parol agreement amounts to an agreement to mortgage, and no doubt the saying that the deposit creates the lien arises from the fact that the agreement could not have been enforced and the case taken out of the Statute of Frauds unless an actual deposit had been made. But there must be an inten-

(1) 19 L. J. C. P., 169.

(4) 1 Hyde, 201.

(2) 11 Exch., 650.

(5) 5 Exch., 368.

(3) 3 De Gex. & J., 13.

(6) 14 Ir. Ch. Rep., 113.

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tion on the one side to deposit a stipulated security, and on the other an acceptance of the security stipulated for. If the deposit was made by Alcock for antecedent debts, there is not sufficient to show that Reid agreed to give future advances except on the deeds originally agreed to be deposited. The deeds really deposited did not entitle Alcock to future advances; they are in Reid's hands under no agreement, either express or implied, and he cannot treat them as if there were an agreement. [PHEAR, J.—It does not follow that a Court of Equity would allow Alcock, or any one claiming through him, to take the deeds out of Reid's hand without fulfilling the original agreement. Then the question comes to this: Was the original agreement one which Reid could have enforced against the Official Assignee?] Reid is not in the same position as if he had the deeds agreed on; not having got those deeds, there was no consideration whatever for the deposit. It would be void for that reason under 13 Eliz., c. 5. It is a mere voluntary delivery within two months of bankruptcy, and therefore void. *Edwards v. Glyn* (1) is not in point; there the question was merely as to a loan with a special trust. [PHEAR, J.—I always understood that case simply to decide that a request for a return of the money made by the surety of the debtor was, independently of pressure on the part of the creditor himself, sufficient to take the payment out of the category of voluntary payments.] This is a different case. The debtor does something which he has reason to think his creditor has not consented to; there was not the slightest pressure on him to do what he did; and his creditor, Reid, did not intend to treat the deposit as the security agreed upon.

Mr. Evans asks for costs of the application. An equitable mortgagee seeking to enforce his lien must pay costs.

Mr. Marindin, as to costs, *contra*.

PHEAR, J.—In this special case two questions are put to the Court. As to the first question, I may say shortly that I think the transaction was not voluntary within section 24 of the Insolvent Act. The first question is as follows (*reads*). It appears to me that the deposit of the deeds was made for a consideration which entirely deprives the transaction of the

(1) 2 E. & E., 29; S. C., 28 L. J. Q. B., 350.

character of a voluntary transfer, and saves it from being void under section 24. It seems that Mr. Alcock had been accommodated by the Bank with money greatly in excess of the sum which had been agreed upon in this respect between him and the Bank previously. He then applied for further advances, and asked the Bank to discount fresh bills. Mr. Reid refused ; he declined to discount any further bills (so the case states) unless some security was given for the amount then due to the Bank. The result of this was that on 24th November Mr. Alcock gave a verbal promise that he would deposit with the Bank the title-deeds of the premises in Old Court House Street. On the strength of this promise Mr. Reid discounted several drafts on that day and on the succeeding days ; and on 25th November the verbal promise was carried into effect in this way,—namely, that a bundle of title-deeds was sent by Mr. Alcock to Mr. Reid with this letter (*reads Mr. Alcock's letter of 25th November*). I think this transaction was one which must be treated as if this letter and the accompanying deeds had been delivered at the time when the promise was made. And in this view, I have no doubt there was ample consideration to support the agreement, and to prevent it from being in any degree voluntary within section 24 of the Insolvent Act. Thus I must answer the first question in the negative.

Then comes the second question, which is as follows (*reads*). It appears to me that by the terms of the letter just read, the deeds were deposited as security for the then existing and current balance of the discount account. I have already said there was consideration for that, and therefore the second question must be answered also in favor of the Bank.

There is in the special case an opening for what I may call an intermediate question. Such question was not, however, put to me in the special case, and therefore, strictly speaking, I need not answer it; but there was a discussion on both sides with regard to it. It is, whether the deeds which were actually sent with the above-mentioned letter to Mr. Reid ought to be taken to have formed the subject of the original agreement between the parties for an equitable mortgage. I will not now go into the facts bearing on this. I only mention it in order to say that the inclination of my opinion

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is that this Court as a Court of Equity would, under the facts which have occurred, treat those deeds as if they actually had been the original subject of the agreement between Mr. Alcock and Mr. Reid. I think they were sent instead of the title-deeds of the premises in Old Court House Street with a fraudulent motive; and if that be so, Mr. Alcock himself would certainly be estopped in a Court of Equity from saying that these were not the deeds intended to be deposited, if Mr. Reid chose to take them as being such deeds. And further, if there were any difficulty in taking that view, it appears to me that Mr. Reid would be entitled to say that these deeds were substituted by Mr. Alcock for the deeds originally agreed to be deposited, and that he (Mr. Reid) accepted the substitution. I threw out also during the argument that the Court would certainly not enable even the Official Assignee to take those deeds out of Mr. Reid's hands without his doing all that could be done to give the Bank the benefit of the deposit originally agreed upon; so that, under all aspects in which I can view the matter, I think the Bank is entitled to hold these deeds as if they actually were the deeds which formed the subject of the original agreement. It is not absolutely necessary, however, in this special case, that I should express this opinion judicially, because the parties have made the result depend on the answers of the Court to the two first questions.

Next, as to costs, I think on the whole that the Bank must pay its own costs. Mr. Marindin acknowledged that the Official Assignee had behaved very fairly in this matter, and had put the Bank to no sort of unnecessary expense. The deposit of the title-deeds of course only gave the Bank an equitable charge on the property. To avail themselves of this, it must have come into Court in some form or another, and I think it is therefore not unreasonable that they should bear their own costs in this matter. The Official Assignee will have his costs out of the estate.

Attorneys for the plaintiffs: Messrs. Carruthers and Dignam.

Attorneys for the defendants: Messrs. Berners, Sanderson and Upton.

[APPELLATE CIVIL.]

Before Mr. Justice E. Jackson and Mr. Justice Mitter.

TARINI CHARAN MOOKERJEE AND OTHERS (PLAINTIFFS) v. RAJA PURNA CHANDRA ROY AND OTHERS (DEFENDANTS).*

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Dec. 14.

*Small Cause Court—Jurisdiction—Act XXIII of 1861, s. 271—24 §
25 Vict., c. 104, s. 15—Superintendence by High Court.*

The plaintiff brought a suit, which was cognizable by a Small Cause Court, in a Moonsiff's Court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court. He obtained a decree, but the decree was reversed on appeal. On special appeal the Court set aside the decrees of both the lower Courts as having been passed without jurisdiction.

THIS suit was brought in the Moonsiff's Court of Serampore to recover from the defendants the amount of compensation deposited by the Government in the Collectorate for one biga and 4 kattas of lakiraj land belonging to the plaintiffs taken for public purposes, but which the defendants had fraudulently taken away upon the allegation that the property was their māl land. The suit was valued below Rs. 500. The defendants set up in their written statement that they had taken away the money which had been deposited in their names, and that they had not received any money for the land described in the plaint.

The Moonsiff passed a decree in favor of the plaintiffs.

On appeal, the Judge reversed the order of the Moonsiff, and dismissed the suit.

The plaintiffs appealed to the High Court.

Baboo *Iswar Chandra Chuckerbutty* and *Kedar Nath Chatterjee* for the respondent, contended that under section 27, Act XXIII of 1861, no special appeal lay to the High Court.

Baboo *Krishna Sahha Mookerjee* and *Tarrah Nath Sen*, for the appellant, contended that the suit not being for the

* Special Appeal, No. 249 of 1870, from a decree of the Additional Judge of Hooghly, dated the 6th December 1869, reversing a decree of the Moonsiff of Scrampore, dated the 24th June, 1869.

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recovery of any debt, damage, or demand, or for the breach of any contract, but for the compensation paid in respect of lands taken by the railway authorities, and wrongfully appropriated by the defendant, the point in dispute being to whom did the land so taken belong, the Small Cause Court had no jurisdiction. But if the suit is cognizable by the Small Cause Court, the plaint filed in the Civil Court of Serampore, where there is a Small Cause Court, ought to have been returned; and the trial held by both the lower Courts is void for want of jurisdiction, and ought to be set aside.

MITTER, J.—This suit was instituted in the Court of the Moonsiff of Serampore, for the recovery of a certain sum of money, alleged to have been improperly taken away by the defendants from the Collector of Hooghly, who held that money in deposit on account of certain lands taken by Government for public purposes. The Moonsiff gave a decree for the plaintiffs, but this decree has been reversed by the Judge on appeal, for the reasons set forth in his judgment.

The defendants, who are now special respondents before us, object that there is no special appeal in this case, inasmuch as it is a case for a sum of money below 500 rupees. I am of opinion that this objection is sound. The suit was clearly a suit cognizable by the Small Cause Court, and as the amount involved is below 500 rupees, no special appeal can lie to this Court under the express provisions of section 27, Act XXIII of 1861.

But I am further of opinion that there has been a failure in the investigation of this case by the lower Appellate Court. That Court seems to have paid no attention to the chittas prepared by the resumption authorities on the former occasion. Neither the *taidat*, nor the resumption decree, gives the boundaries, it is true; but this defect is not to be found in the chittas. The boundaries given in this last document, bear a very close resemblance to the boundaries of the disputed lands as they are described in the plaint; and it seems that the question of identity might have been placed beyond all dispute by an actual testing of the chittas in the *locus in quo*. Besides, the Judge

seems to have misunderstood the purport of the evidence given by the plaintiffs' witnesses. Those witnesses have not said that the plaintiffs were in possession for six or seven years only.

What then is the proper order which we ought to pass in this case? I am of opinion that the decision of both the lower Courts ought to be set aside for want of jurisdiction, under the powers vested in this Court by the 15th section of the Charter Act. If this suit was really cognizable by the Court of Small Causes, neither the Moonsiff of Serampore nor the Judge had any jurisdiction over it, inasmuch as there is a Small Cause Court at Serampore. It has been urged that one of the parties to this suit—namely, Mr. Quentin—was living in Chinsurah at the time of its institution, and that the Small Cause Court of Serampore had therefore no jurisdiction over it. I am of opinion that this objection is not valid. Mr. Quentin has been made a defendant, as the manager of an estate belonging to a minor; and it is therefore doubtful whether Mr. Quentin or the minor is to be considered as the real defendant. But be this as it may, the suit would still be cognizable by the Small Cause Court of Serampore, even if we treat Mr. Quentin as the real defendant. The other defendants were living within the local limits of the jurisdiction assigned to that Court, and this fact would be sufficient to bring the suit within the category of "suits cognizable by the Small Cause Court," as described in section 6 of Act XI of 1865. Section 8 of that Act shows that the Courts of Small Causes are competent to try all such suits "as those described in section 6," and section 12 gives exclusive jurisdiction to those Courts to try those suits. This point has been already decided by a Division Bench of this Court in the case of *Khoda Baksh Mistri v. Beni Mandal* (1).

(1) *Before Mr. Justice L. S. Jackson and
Mr. Justice Glover.*

**KHODA BAKSH MISTRI (PLAINTIFF)
v. BENI MANDAL AND ANOTHER (DEFENDANTS).***

The 20th July 1870.

THIS case was referred for the opinion of the Judge by the Moonsiff of Alipore, with the following remarks:—

"This suit was brought on a bond jointly executed by the defendants, one of whom was a resident of the town of Calcutta, and the other lived within the jurisdiction of the Moonsiff's Court of Alipore. The cause of action had arisen in Calcutta. The plaint was originally filed in the Small Cause Court at Sealdah, and registered, but

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* Reference to the High Court by the Judge of the 24-Pergunnas, dated the 7th June 1870.

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For the above reasons, I would set aside the decisions of both the lower Courts, as void for want of jurisdiction. The plaintiffs ought to pay the costs of the defendants.

afterwards returned on the ground that the Small Cause Court had no jurisdiction." The plaint was then presented to the Moonsiff of Alipore, who, being of opinion that he had jurisdiction to entertain the suit, referred the case to the Judge of the 24-Pergunnas for the opinion of the High Court.

The Judge of the 24-Pergunnas, being of opinion that the Moonsiff's view of the law was incorrect, referred the following question for the opinion of the High Court :—

Whether section 12, Act XI of 1865, is applicable to suits to which the jurisdiction of the Small Cause Court may be extended by a special order of the High Court.

The judgment of the High Court was delivered by

JACKSON, J.—In this case, the plaintiff sued upon one cause of action two defendants, one of whom resided in the local jurisdiction of the Small Cause Court at Sealdah, and the other within that of the Moonsiff of Alipore. Both defendants, indeed, are stated to have been generally subject to the last-mentioned jurisdiction.

The plaint was, in the first instance, presented in the Small Cause Court at Sealdah, and after being registered there was returned to the plaintiff. It was then presented in the Court of the Moonsiff of Alipore ; and as a difference of opinion has arisen between the Moonsiff and the Judge of the 24-Pergunnas, he has referred the matter to this Court, the Moonsiff being of opinion that he has no jurisdiction, and the Judge considering that he has. The Judge's view is that this case is not directly cognizable by the Court

of Small Causes at Sealdah, but it might become so in the event of the High Court granting permission to that Court to try it.

It has been held in a previous case, on a reference from the Judge of the Small Cause Court at Sealdah, as shown by a letter from the Registrar of this Court to the Judge of that Court, dated 13th July 1863, that the provisions of section 4, Act XXIII of 1861, applied to Courts of Small Causes in the Moonsiff, and, consequently, the Small Cause Court ought not to have rejected the plaint in this case, by reason of all the defendants not residing within the jurisdiction of that Court.

The Judge appears to have lost sight of the distinction between a suit being cognizable in a particular Court, and a Court having power to try a suit under the particular circumstance of one of the defendants not residing within the jurisdiction of the Court. It is clear that this was a suit cognizable by the Court of Small Causes at Sealdah, but that before proceeding to try it, in the particular circumstance stated,—namely, of one of the defendants being beyond the jurisdiction of that Court,—that Court would have to apply to the High Court for authority to proceed to try the case. The suit, therefore, being cognizable in that Court, it seems to me that under the 12th section of Act XI of 1865, the Moonsiff was debarred from entertaining it, and that consequently his opinion is the correct one.

I should mention that the Madras High Court appear to have come to a similar conclusion in the case *Sabhapati Mudali v. Muttusvami Mudali* (1).

JACKSON, J.—I concur. I think that the plaintiff should bear the costs of this litigation so far as he has brought his suit in the wrong Court, and he asks us to quash all the proceedings to enable him to bring his claim in the right Court, and because the whole litigation has been caused by his own neglect to look after his own interests before the Collector.

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CHARAN MOO-
KERJEE
v.
RAJA PURNA
CHANDRA
ROY.

Before Mr. Justice E. Jackson and Mr. Justice Moorjerjee.

HARIS CHANDRA GUPTO (DECREE-HOLDER) v. SRIMATI SHASHI MALA GUPTI (JUDGMENT-DEBTOR).*

1871
Feby. 15.

Act VIII of 1859, s. 246—Act XXIII of 1861, s. 11—Appeal—Third Party—Execution—24 and 25 Vict., c. 104, s. 15—Jurisdiction—Superintendence.

A. obtained a decree against B. in her representative character for a debt contracted by her mother. The decree declared that execution should be taken out against the property of the mother, and not against any part of her (the mother's) deceased husband's estate. In execution, A. attached and put up to sale certain property as belonging to the mother. B. objected to the sale, alleging that the property was not her mother's, but was inherited by her from her father. The Moonsiff disallowed her objection on the ground that only the right, title, and interest of the defendant's mother was put up for sale. On appeal, the Judge set aside the Moonsiff's order. *Held*, that for the purposes of her objection, B. was a third party unconnected with the decree, and that her objection should have been disposed of under section 246 of Act VIII of 1859. Section 11 of Act XXIII of 1861 did not apply. There being therefore no appeal, the Zilla Judge's order was set aside as passed without jurisdiction, and the Moonsiff's order was also set aside as not having been passed under section 246, Act VIII of 1859, under which section the objection had been preferred.

THE plaintiff held a mortgage bond from the defendant's mother Gurusundari, and obtained a decree. The suit on the bond was brought during the life-time of Gurusundari, but she died before judgment. The plaintiff made her two daughters parties to the suit, and the decree was passed against them. On appeal, the Subordinate Judge ordered that the decree should be against the property of the debtor (mother), not

* Miscellaneous Special Appeal, No. 458 of 1870, from an order of the Judge of Dacca, dated the 7th September 1870, reversing an order of the Moonsiff of that district, dated the 31st March 1870.

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against any part of her deceased husband's estate. In execution the decree-holder attached and put up to sale certain property as belonging to Gurusundari. The judgment-debtor objected to the sale of the property, on the ground that it did not belong to her mother Gurusundari, but was inherited by her from her father. The decree-holder contended that the defendant's father had left all his property by a will to her mother. The Moonsiff, before whom the objection was made, disallowed it, holding that under the terms of the decree the right, title, and interest of the late Gurusundari to and in the attached property could only be put up to sale, and that consequently such sale would in no way prejudice the right of any other party. The Moonsiff did not try the question raised, nor did he state under what section of the Civil Procedure Code he had disposed of the objection. The defendant appealed against this order to the Zilla Judge. The respondent, decree-holder, contended before the Judge that there was no appeal against the order of the Moonsiff disallowing the defendant's objection, because the defendant, for the purposes of her objection, was to be considered in the light of a third party. The Judge, however, set aside the order of the Moonsiff. Against this order of the Judge the decree-holder appealed specially to the High Court, on the ground that the Zilla Judge had no jurisdiction to entertain an appeal against the order of the Moonsiff in this case.

Baboo *Hari Mohan Chuckerbutty* for the appellant.

Baboo *Nalit Chandra Sein* for the respondent.

The judgment of the Court was delivered by

MOOKERJEE, J.—In this case the decree-holder having attached a certain property in execution of a decree that he had against the opposite party, the judgment-debtor objected, under section 246, Act VIII of 1859, that that property should not be sold in execution of this decree, inasmuch as that property was inherited by her from her father; and that the original decree having been passed for a debt incurred by her mother, properties inherited from the mother were only liable to be sold in execution. This objec-

tion was not, however, tried by the first Court under section 246, under which it should have been tried. The objector, though a judgment-debtor, combined in her person two sorts of rights; she might have been in possession of property belonging to the mother, who was the original judgment-debtor, but she was also in possession of properties belonging to the father. The Moonsiff was therefore bound to decide this objection under section 246. But he does not try the objection under that section; he merely says, "The petitioner has brought this suit on the allegation that her mother has no right whatever to the properties under attachment, and when it is not unknown that, under the terms of the decree, the right, title, and interest of the late Gurusundari to and in the attached properties shall only be put up to sale: consequently such sale would in no way prejudice the right of any other party. Hence there is no necessity for entering into any enquiry regarding the disposal of the objection advanced by the female objector. It is therefore ordered that this be put up with the record."

On appeal by the claimant to the Judge, the Judge has reversed the Moonsiff's decision on the ground that the decree-holder has failed to prove a certain will by which he wanted to show that the property belonged to the mother.

The judgment-creditor appeals to this Court, urging that the lower Appellate Court had no right to entertain an appeal against an order passed by the Moonsiff under section 246, and asks us to quash the order of the Judge as having been passed without jurisdiction. We think that if the first Court had passed a decision under section 246, the Judge would have had no jurisdiction to entertain an appeal, but the parties aggrieved by that order should have resorted to the Civil Court for redress. But we find that though the objection was brought under section 246, the Moonsiff has declined to exercise his jurisdiction under that section, and has not decided the case at all under it. But though the Moonsiff has not decided this case under section 246, he has passed an order between parties who are, legally speaking, not parties to the suit in which the decree was passed, and therefore even under section 11, Act XXIII of 1861, the Judge had no right to entertain the appeal. The decision of

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the Judge must, under either of these sections, be set aside as having been passed without jurisdiction.

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Then we have to see whether the decision of the Moonsiff is a decision under section 246, and is a proper decision under that section. We see that it is not a decision under that section and is not at all a proper decision in the case. He has refused to exercise the jurisdiction given to him by law in these matters under section 246. He ought to have proceeded to enquire whether the judgment-debtor or this claimant was in possession of the property by right of inheritance from the father, or was in possession as an heir of the mother, and ought to have passed a proper decision under section 246. It is not sufficient to say that because the right, title, and interest of Gurusundari are put up for sale, that therefore a claim by a party who contends that the property belongs to her, and that she is in possession of it by a different right, should not be investigated at all. But as the claim appears to be a claim properly preferred under section 246, the procedure of that section ought to have been strictly followed.

Although, therefore, we are bound to set aside the decision of the Judge as having been passed without jurisdiction, we also set aside the decision of the first Court, and direct him to try this case as between these parties under the provisions of section 246.

Each party will bear his own costs of this appeal.

JACKSON, J.—I would point out to the Judge that the mistake he seems to have fallen into, is owing to his not being aware that a defendant intervening in the manner in which the present claimant did, has been held in several decisions of this Court to be in fact a third party. The Judge will find this view of the law taken in *In the matter of the petition of J. B. Rainey* (1) and *Maharajah Dheraj Mahatab Chund Bahadoor v. Mussamut Pearee Dossee* (2).

(1) See *post*, p. 725.

(2) 6 W. R., Mis. Rul., 61.

*Before Mr. Justice Bayley and Justice
Sir C. P. Hobhouse, Bart.*

The 24th August 1869.

IN THE MATTER OF THE PETITION OF
J. B. RAINHEY.*

BAYLEY, J.—In this case we think that the rule ought to be made absolute with costs.

We are moved, under section 15 of the Charter Act, to set aside the order of the Judge of Jessore, dated the 29th May 1869, passed on an appeal from the decision in review of the Moonsiff of that district, dated the 8th March last.

The facts are these:—A certain decree-holder executed his decree as against the property of his judgment-debtor, Mrs. Barbara Rainey.

On this, the petitioner, Mr. Rainey, intervened, and claimed the property as his own, stating that the property did not in fact belong to the judgment-debtor, who happened to be his mother, but that he had held possession of the property in his own right, and did not inherit it as any part of his mother's assets.

The Moonsiff first overruled the intervention of the petitioner, but on review he admitted the petitioner's claim, on the ground that the property was not that of the judgment-debtor. It was against this order that the Judge admitted an appeal, and reversed the order.

Mr. Gregory for the applicant contends that the final order of the Moonsiff being under section 246, Act VIII of 1859, no appeal lay to the Judge; and in support of this contention, he cites two cases—*Kartick Chunder Mookerjee v. Mookta Ram Sircar* (1)

and *Maharajah Dheraj Mahatab Chund Bahadoor v. Mussamut Pearree Dossee* (2).

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Baboo Ashutash Chatterjee, on the other hand, contends that the order of the Moonsiff was not under section 246, but under sections 203 and 211, Act VIII of 1859.

I am of opinion that the Moonsiff's order was clearly under section 246, and the rulings of this Court holding that section 246 provides for what has been done in the present case,—viz., that “where property is seized as belonging to A. as representative of B., deceased, and A. claims the property as his own and denies that it ever belonged to B. or B.'s estate, A.'s claim is properly dealt with under this section.” There is no other section in the Code with similar provisions. Sections 203 and 211 only provide in respect to legal representatives of deceased persons, how decrees may be executed against such persons to the extent of the property inherited by them.

I think, therefore, that the Judge was wrong in receiving the appeal in this case, and that therefore his order should be set aside, and this rule made absolute with costs, leaving the opposite party to take such steps as he may be best advised.

HOBHOUSE, J.—I am of the same opinion. It seems to me that whether Mr. Rainey was or was not in this case the legal representative of Mrs. Rainey within the meaning of sections 203, 210, and 211 of the Code of Civil Procedure, is immaterial. It may even be that in this case he admitted himself to be, generally speaking, such legal representative (I do not say that it was so, but that it may be so), still

* Motion No. 691 of 1869.

(1) 10 W. R., 21.

(2) 6 W. R., Mis. Rul., 61.

1871 what he in effect said as regards this property was that he claimed it as his own. Then the question was, when in execution of decree a person claimed as his own, property which was said to belong to the judgment-debtor, how was the Court to proceed? and I agree with Mr. Justice Bayley that he could only proceed under the provisions of section 246 of the Code. That section treats "of claims to attached property," and says that in the event of any such claim being preferred, the Court shall proceed to investigate the same as if the claimant were a defendant; so that in this case the Court was bound to proceed in the matter of Rainey's claim as if he were a defendant. Then in the terms of the section there is a provision showing what the point is that the Court has to determine between this claimant so made defendant and the decree-holder; and the point is whether the property in question was in the posse-

sion of the party against whom execution is sought, and if it finds that it was not in such possession, the Court is to pass an order releasing the property from attachment.

The question, therefore, was whether in this case Mr. Rainey or Mrs. Rainey had been in possession of the property in question; and when the Court found in favor of Mr. Rainey, this was clearly a final order under the provisions of section 246 which could only be disturbed under the special provisions of that section, by having recourse to the Civil Court in a regular suit, and not by having recourse to an Appellate Court. The case of *Maharajah Dheraj Mahatab Chund Bahadoor v. Mussamut Pearcee Dossee* (1) seems to me to be directly in favor of the view that I have taken.

I agree in making the rule absolute with costs.

(1) 6 W. R., Mis. Rul., 61.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

KALI CHARAN GIR GOSSAIN (JUDGMENT-DEBTOR) v. BANGSHI
MOHAN DAS BABOO (DECREE-HOLDER).*

1871
April 3.

*Execution—Debsheba—Shebait—Palas, Sale of—Act VIII of 1859, s. 246—
24 & 25 Vict., c. 104, s. 15—Superintendence by High Court.*

Rights of worship of a Hindu idol cannot be sold in execution of a decree for the personal debt of a shebait (1).

Where an order was made by a Moonsiff under section 246 of Act VIII of 1859, and a regular appeal was preferred, and then a special appeal to the High Court, the Court, while refusing to entertain the appeal on the ground that the Moonsiff's order was final, or to set aside the order under section 15 of 24 & 25 Vict., c. 104, expressed an opinion that the order was contrary to law, and left it to the Moonsiff to act upon such opinion.

THE decree-holder in this case took out execution of his decree against certain properties as belonging to the judgment-debtor. The latter objected to the sale, on the ground that the properties belonged to a *debsheba* (service of an idol). The Moonsiff held that the judgment-debtor had failed to prove that they did so belong to the idol, and overruled the objection. He also held that, as the judgment-debtor had an interest, as *shebait*, in the *palas* of *debsheba*, or rotations of service, such interest could be sold. On this point the Moonsiff said : "It has not been denied by the "vakeel, in his deposition taken to-day, that the judgment-debtor "has a certain right and interest in the *palas* of *debsheba*, or "rotations of service ; that ever since time immemorial the *palas* "have been sold and purchased as the rights of persons performing the *sheba*, and that *puja* or service, &c., is performed by "other persons ; consequently, the right to perform the actual "service being exempted from sale, I do not see any reason "why rights and interests which the judgment-debtor has in the " *debsheba* should not be sold." Against this order of the Moonsiff the judgment-debtor appealed to the Judge. The Judge

* Miscellaneous Special Appeal, No. 410 of 1870, from an order of the Judge of Dacca, dated the 18th July 1870, affirming a decree of the Sudder Moonsiff of that district, dated the 16th June 1869.

(1) See *Dubo Misser v. Srinibas Misser*, 5 B. L. R., 617.

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confirmed the order of the first Court. The plaintiff then preferred a special appeal to the High Court.

Baboo *Durga Mohan Das*, for the respondent, took a preliminary objection to the hearing of the appeal, on the ground that the order of the Moonsiff, being under section 246 of Act VIII of 1859, was final.

Baboo *Mati Lal Mookerjee*, for the appellant, brought to the notice of the Court, that part of the Moonsiff's order which declared that certain *palas* or rights of service in the judgment-debtor could be sold. He referred to *Jugger Nath Chowdhry v. Kista Pershad Surma* (1), as showing that rights to perform *puja* were not subjects of sale, and asked the interference of the Court in the exercise of its superintending powers to quash so much of the order of the Moonsiff as related to the sale of rights of worship.

The judgment of the Court was delivered by

MOOKERJEE, J.—In this case the judgment-debtor appeals against the order of the Judge of Dacca, affirming an order of the Moonsiff, rejecting the plaintiff's objection to the sale of certain properties belonging to a *debsheba*, and especially to the sale of certain *palas*, or rotations of service, of a certain idol. Objection is taken by the respondent, judgment-creditor, to the effect that as the application was virtually under section 246, the order of the Court of first instance was final, and it can only be contested by a regular suit. We think that this objection is valid, and that there does not lie an appeal to this Court, nor did an appeal lie to the District Judge.

But we find on referring to the order of the Moonsiff that the Moonsiff has found that the properties Nos. 1 to 9 were not proved to his satisfaction to belong to the *debsheba*. His order as regards those properties appears to be perfectly correct. But it is said that the Moonsiff then proceeded to order that certain *palas*, or rights of service in the judgment-debtor, ought to be sold, exempting the right to perform the actual *puja*. We do not see how rights of worship of a Hindu idol can be

(1) 7 W. R., 266.

sold by a Court to the highest bidder in execution of a decree for the personal debt of a *shebait*. It has been held all along that such a right of service or *pala* cannot be sold, for it may happen that the purchaser of the rights of the *sheba* may be of a different religion, and may not be disposed to perform the services, and the object of the endower in creating the endowment may thus be defeated and rendered null and void. We perfectly agree with the principle laid down by a Division Bench of the Court, in the case of *Jugger Nath Roy Chowdhry v. Kisto Pershad Surma* (1), and we hold that the Moonsiff in execution of the decree against the judgment-debtor, *shebait*, should not proceed to sell his rights of service of a Hindu idol. We are not, however, quite certain that the Moonsiff has passed an order ordering the sale of the *pala*. If he has, he is certainly wrong in ordering a sale of right of that nature. If it was the intention of the Moonsiff to sell the *pala*, we hope that, after this expression of our opinion, he will not proceed to sell the *pala*.

We reject this appeal with costs.

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[ORIGINAL CRIMINAL.]

Before Mr. Justice Paul.

THE QUEEN *v.* NAKUR SIRKAR.

Evidence, Admissibility of—Record of Proceedings in Calcutta Small Cause Court.

1871
Feby. 25.

The summons book of the Small Cause Court, Calcutta, is admissible in evidence, though not signed by the presiding Judge.

THE prisoner in this case was charged with "intentionally giving false evidence in a judicial proceeding." The offence had been committed during the hearing of a case before the Second Judge of the Small Cause Court. The Second Judge of the Small Cause Court was called as a witness for the prosecution, and the summons book of the Small Cause Court was produced to show the proceedings at the trial in that Court. The book did not bear the signature of the Judge before whom

(1) 7 W. R., 266.

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the perjury was alleged to have been committed; but it was shown that it was kept in accordance with the practice of the Small Cause Court, and was the only record of that Court.

The *Standing Counsel* for the prosecution.

Mr. *Phillips* for the prisoner.

On the examination of one of the witnesses for the prosecution, the summons book of the Small Cause Court was tendered as evidence of what took place before the Judge.

Mr. *Phillips* objected that, under section 81 of Act IX of 1850 (1), it was inadmissible in evidence, on the ground that it was not authenticated by the signature of the Judge. He referred to *The Queen v. Shib Chandra Das* (2), in which Norman, J., had refused to receive a similar document.

The said Second Judge was thereupon recalled by the Court, and he stated that the document tendered was to the best of his belief an accurate statement of the proceedings at the trial before him.

(1) *Act IX of 1850, s. 81.*—"The clerk of every Court holden under this Act shall cause a record of all summonses, and of all orders and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the Court, to be fairly entered from time to time in a book or books belonging to the Court which shall be kept at the office of the Court, and shall be duly authenticated by one or more of the Judges; and such entries in the said book or books, or a copy thereof, bearing the seal of the Court, and purporting to be signed and certified as a true copy by the clerk of the Court, shall be admitted in all Courts and places as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding without any further proof."

(2) *Before Mr. Justice Norman.*
THE QUEEN v. SHIB CHANDRA DAS.

The 7th May 1870.

Evidence, Admissibility of—Record of Proceeding in Small Cause Court.

The record of proceedings in the Small Cause Court is not admissible in evidence, unless authenticated by the signature of the presiding Judge.

THE prisoner was charged with the offence of intentionally giving false evidence in a judicial proceeding, and using as genuine a document knowing it to be false. The offence had been committed during the hearing of a case before one of the Judges of the Small Cause Court. One of the witnesses for the prosecution had been summoned to produce the record of the proceedings in the Small Cause Court. On his examination, he pro-

Mr. *Phillips* submitted that the record was the only evidence, and could not be supplemented by oral evidence.

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PAUL, J.—It is in evidence that there is no other record kept in the Small Cause Court, and it is therefore open to the Court to take evidence *aliunde*. If it is not a record within the meaning of section 81, Act IX of 1850, we have it that there is no record; and in that case the proceedings must be proved in the best way possible. They may be proved by the Judge, and the defendant's statement taken down by him and corroborated by the summons book kept in the regular course of practice of the Small Cause Court.

But I am of opinion that this is a record authenticated by the Judge in person, sufficient to satisfy section 81. The form follows that drawn by the Judges of the Small Cause Court with the approval of the Judges of the Supreme Court under section 41 of Act IX of 1850.

It was held by the Supreme Court, on a writ of error, that the Small Cause Court was a Court of Record; and the summons book of the Court, identical with the one now objected to, was then produced and admitted as a record (1).

duced the summons book, which was the only record of the proceedings, and was kept according to the usual practice in that Court; such record was not signed by the Judge.

The *Standing Counsel* (offg.) and Mr. *Hyde* appeared for the prosecution.

Mr. *Woodroffe*, Mr. *Branson*, and Mr. *Bonnerjee* for the prisoner.

The *Standing Counsel* submitted that the record as produced was admissible in evidence. It was the usual

and only record kept by the Small Cause Court.

NORMAN, J., refused to receive it in evidence on the ground that it was not authenticated by the signature of the Judge.

On the Standing Counsel intimating that he could not support the case without such evidence, the jury were directed to return a verdict of "not guilty."

(1) The prisoner was found guilty, and sentenced to seven years' rigorous imprisonment.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

1871
Jany. 27.

PANNALAL SEAL v. SRIMATI BAMASUNDARI DASI
AND OTHERS.

Hindu Widow—Fraudulent Assignment—Right of Widow in Property of her Husband—Accumulations.

A Hindu, R. C., died possessed of considerable property, and leaving five sons. One of them died leaving a widow, B. She brought a suit to recover her husband's share in R. C.'s estate, together with the profits thereon. The suit was conducted by G. R. A large amount became due to him for costs. To secure this, B. executed a bond and warrant of attorney to confess judgment. The suit failed. In order to obtain the means of bringing another suit, B., by deed dated 4th April 1859, assigned her interest in the estate in the right of her husband, and all benefit to be derived from the suit to be instituted, to G.,—one half absolutely, the other in trust to retain thereout what he might advance to her for maintenance and for the costs of suit with interest at 12 per cent., and to pay her the residue. In November 1859, G. by deed sub-assigned to H. S., in consideration that H. S. should undertake the maintenance of B. and the management of the suit, retaining only five-sixteenths out of the eight-sixteenths assigned to him (G.) absolutely. On 19th August 1861, B. obtained a decree in the Supreme Court declaring her entitled to the accumulations on her husband's one-fifth share in the estate of his father, R. C., and to all profits made on such accumulations since her husband's death. In September 1861, G. R. caused judgment to be entered on the bond and execution to be issued, and the Sheriff seized, and was about to sell B.'s interest in the estate of her husband. Thereupon, B. being entirely without means, P. S., brother of H. S., paid off G. R., and in consideration thereof took an assignment by deed, dated 18th December 1861, in the name of one I. S. from B., of five-eighths of the half-share reserved to her by the deed of 4th April 1859, but subject to the assignment by that deed to G. On 20th December 1869, Rs. 84,685 were paid into Court as B.'s husband's share of the accumulations on R. C.'s property at the date of his death, and Rs. 1,55,255 as the profits made thereon since her husband's death. P. S. now sued for a declaration that the deed of 18th December 1861 was binding upon B. and the reversionary heirs, and for an order that the precise amount due to him be ascertained and paid to him out of the moneys paid into Court. At the trial he abandoned his claim against the Rs. 84,685,

on the ground that he could not prove legal necessity on the part of B. when she executed the assignment. *Held*, the deed could be supported only so far as it charged the profits made since B.'s death with the repayment of the Rs. 12,500 advanced, with interest at 12 per cent. P. S. was entitled to have that amount paid out of the Rs. 1,55,255 in Court.

A Hindu widow is entitled absolutely to the accumulations of income from her husband's estate.

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DASI.

THIS was a suit brought for the purpose of having a certain deed of assignment, dated the 18th December 1861, declared valid and binding on the defendant Bamasundari Dasi, and the reversionary heirs of one Madhusudan Chunder. The circumstances under which the assignment was made fully appear from the following statement of the facts.

One Ramtanu Chunder died, on 29th February 1836, leaving five sons, Nilmani Chunder, Gokul Chandra Chunder, Madhusudan Chunder, Biswanath Chunder, and Golak Chandra Chunder, and leaving a will, dated 18th June 1835. Madhusudan died, on 25th October 1847, intestate and without male issue, leaving the defendant Bamasundari Dasi, then an infant of eleven years of age, his sole widow surviving him, and leaving a daughter, the defendant Amirtamayi Dasi, by a widow who had pre-deceased him.

After the death of Ramtanu the sons continued to live together, had joint possession of their father's property, and together carried on the lucrative business which Ramtanu left behind him.

On Madhusudan's death, Bamasundari still remained for a time in the family house as a member of the joint family. Eventually, however, she separated herself, and brought a suit against her late husband's brothers to recover the share of the property to which she was entitled as her husband's heiress. She had no means of any sort other than the property which she thus sought to recover. Mr. G. Rogers, a solicitor of the Supreme Court, undertook to prosecute such a suit on her behalf without any immediate payment of the costs of the suit, she agreeing to pay such costs when she should be able to do so. A considerable sum thus became due to Mr. Rogers from Bamasundari, which she secured by giving a bond bearing interest at 15 per cent. per annum to one Rajbalab Seal and one Archibald Rogers, and also a war-

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rant of attorney to confess judgment on the bond. The suit prosecuted by Mr. Rogers failed, but one Charles Grose immediately came forward and undertook to institute a new suit on the terms contained in an indenture, dated 4th April 1859, made between Bamasundari of the first part, Charles Grose of the second part, and one Robert O'Dowda of the third part, whereby Bamasundari assigned all her right, title, and interest, as widow of Madhusudan, in the estate of Ramtanu Chunder, and the profits and accumulations thereof, and whatever she might be entitled to recover from the said estate in right of her husband Madhusudan, and all benefit to be derived from the suit then to be instituted, as to half of such interest to the said Charles Grose absolutely, and as to the remaining half-share to the said Charles Grose, to retain thereout whatsoever sums he might advance to her for maintenance and for the costs of the suit with interest at 12 per cent., and to pay over the residue to her.

In pursuance of this contract, Grose caused a suit to be instituted in Bamasundari's name against the Chunders, but very soon and before a decree was obtained, Grose became unable to perform his part of the engagement. In this emergency he had recourse to Baboo Hiralal Seal, and by a deed dated 14th November 1860, he assigned to Hiralal Seal all his rights under the assignment of April 4th, 1859, in consideration that Hiralal Seal should take upon himself the maintenance of Bamasundari and the management of the suit, and should become responsible for the costs thereof, in trust to Hiralal Seal to retain out of the eight-sixteenths absolutely assigned to him (Charles Grose), five-sixteenths for his own remuneration, and to pay the other three-sixteenths to him (Charles Grose), and out of the other eight-sixteenths to reimburse himself for all payments with interest at 12 per cent. per annum, and to pay the balance to Charles Grose to enable him to account for the same to Bamasundari.

In her second suit, Bamasundari on 19th August 1861 obtained a decree in the Supreme Court declaring her right to the accumulations on her husband's one-fifth share in the estate of his father Ramtanu Chunder which had accrued at the date of the death of her husband Madhusudan, and also declaring her right as a Hindu widow to all profits made on such accumulations

since her husband's death, and an account of the said accumulations and profits.

In September 1861, Mr. G. Rogers caused judgment to be entered on the bond given to Rajbalab Seal and Archibald Rogers, and caused execution to be issued, and the Sheriff seized and was about to sell Bamasundari's right, title, and interest of and in the estate of her husband Madhusudan. Mr. Rogers, however, agreeing to take Rs. 12,500 in satisfaction of his claim, the plaintiff agreed to advance this amount on Bamasundari executing an assignment in the name of the defendant Iswar Chandra Sen, *benami* for the plaintiff, of five-eighths of the half share of her whole claim so reserved to her in the assignment to Charles Grose of April 4th, 1859. Accordingly, on December 18th, 1861, the deed of assignment was executed of which it was sought to establish the validity in the present suit. It was made between Bamasundari of the first part, Iswar Chandra Sen as agent of and *benami* for the plaintiff of the second part, and Charles Sanderson, trustee for Iswar Chandra Sen, of the third part; and, after reciting the above acts and the decree of the Supreme Court, witnessed that in consideration of the payment of Rs. 12,500 by Iswar Chandra Sen to Bamasundari, she sold, assigned, and transferred to Iswar Chandra Sen and Charles Sanderson (but in trust in so far as regarded the said Charles Sanderson), and for the absolute use and benefit of Iswar Chandra Sen, his heirs, executors, administrators, and assigns, five-eighths of the half share reserved to her in the estate of her husband and in the accumulations and profits thereon, but subject to the assignment to the said Charles Grose of April 4th, 1859.

Under the decree of the Supreme Court of 19th August 1861, which was afterwards confirmed by the Privy Council, accounts were taken, and Bamasundari was found entitled to Rs. 84,685 as her share of the accumulations on Ramtanu Chunder's property between the death of Ramtanu Chunder and the death of Madhusudan, and to Rs. 1,55,255-13-4 as gains and profits in respect or by the use of her share of the accumulations from her husband's death to February 25th, 1864. By a decree of 8th August 1864, affirmed on 8th January 1866, Bamasundari was declared entitled to those sums to be held possessed and enjoyed by her as a Hindu

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widow in the manner prescribed by Hindu law; and in pursuance of this decree the said sums were paid into Court on 20th December 1864 to the credit of Bamasundari in the suit brought by her against the sons of Ramtanu.

On 22nd February 1866, the defendants Amirtamayi Dasi and her infant son Gowri Charan, as reversionary heirs of Madhusudan, brought a suit in the Court of the Principal Sudder Ameen of Hooghly, against Bamasundari, Charles Grose, Hiralal Seal, Biswanath Chunder, Prasamayi Dasi, the mother and guardian of Prankrishna Chunder, the infant adopted son of Nilmani Chunder, and also against the present plaintiff Pannalal Seal and Iswar Chandra Sen, to set aside the assignment to Charles Grose of 4th April 1859, and any assignment made by Charles Grose under it; and asking that Pannalal Seal's claim should be disallowed, and for an order that the money should be paid into Court and kept there during Bamasundari's life for their benefit as reversionary heirs. The suit was, on the application of Charles Grose and Hiralal Seal, transferred to the High Court, and, on 23rd February 1869, was dismissed as against the present plaintiff Pannalal Seal and Iswar Chandra Sen on the ground of multifariousness; but as against the other defendants, on appeal, the assignment to Charles Grose of 4th April 1859 and all assignments under it were declared to be void so far as they related to the half share, which had been assigned to Charles Grose absolutely, and not binding on the reversionary heirs of Madhusudan; but the other half share was, as regards the reversionary heirs, charged with the payment to Charles Grose or his assigns of all such costs and expenses mentioned in the assignment, together with twelve per cent. interest thereon (1).

The plaintiff in his plaint submitted that the inheritance which the reversionary heirs were entitled to protect did not embrace the whole fund in Court, but only so much of it as was the right of Bamasundari at the time of her husband's death,—viz., Rs. 84,685,—and that the assignment to him of 18th December 1861 was good not only against the remainder of the fund in Court, but

(1) See 4 B. L. R., O. C., 1.

also as against the reversionary heirs and as against the sum of Rs. 84,685 as being an alienation by a Hindu widow for necessity.

The plaintiff further stated in his written statement that the assignment of 18th December 1861 was intended to be an absolute sale and transfer of Bamasundari's interest; that the terms of the arrangements were negotiated between Bamasundari and one Gabind Chandra Bungo, a Sircar in the employ of the defendant Hiralal Seal; that Mr. W. H. Owen, acting as attorney for Bamasundari (for whom he was one of the attorneys on the record in the suit above mentioned) and for the plaintiff, drew up the indenture of assignments; that the indenture was duly explained to Bamasundari by an interpreter of the High Court, and that she executed it with full knowledge of the circumstances under which it was made and of her own free will; that the plaintiff had paid the consideration-money, Rs. 12,500, on the day the deed was executed.

The evidence is sufficiently stated in the judgment.

Mr. Graham, Mr. Evans, and Mr. Bonnerjee for the plaintiff.

Mr. Kennedy and Mr. Lowe for Bamasundari.

Mr. Goodeve for Amirtamayi Dasi and for Gawri Charan.

The Advocate General for Hiralal Seal.

Mr. Macrae for Grose.

Mr. Graham, in opening the case, stated that the plaintiff gave up any claim against the Rs. 84,685, as he was not in a position to make out a sufficient case of necessity for the alienation by Bamasundari to bind the reversionary heirs. He submitted that the plaintiff was entitled to claim under the deed against the accumulations, and that to them Bamasundari was as against the reversioners absolutely entitled. Accumulations, the learned counsel contended, do not form part of the *corpus*. This was laid down by the Privy Council—*Sreemutty Soorjeemony Dossee v. Denobundoo Mullick* (1). A different principle was suggested by Macpherson, J., in *Grose v. Amirtamaiji Dasi* (2), but his judg-

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(2) 4 B. L. R., O. C., 40.

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ment is not borne out by the decree, which is silent as to accumulations. In a former case, *Khantamani Dasi v. Biswanath Chandra Chuckerbutty* (1), Macpherson, J., made a decree as to accumulations in accordance with the principle of the Privy Council decision.

Mr. Kennedy, for Bamasundari, while admitting that a Hindu widow was entitled to the accumulations of her husband's estate absolutely, contended that, in executing the deed in question, Bamasundari had no legal adviser, and was unduly influenced by Hiralal Seal, on whom as to the execution of the deed she was wholly dependent. Her circumstances were known to Hiralal, as he made use of this knowledge to pay her. Pannalal Seal was merely benami for Hiralal, and never appeared in any transaction relative to the deed. The purchase was made with Hiralal's money. It was paid by Hiralal's cashier and not Pannalal's. If Hiralal was the real actor, as it is contended he was, it is impossible to support the deed. The Court will set aside the deed where it is not proved that full value was given by the purchaser—*Baker v. Monk* (2), *Clark v. Malpas* (3), *Wood v. Abrey* (4), *Kanai Lal Jowhari v. Kamini Debi* (5), *Longmate v. Ledger* (6), Sugden's Vendors and Purchasers, Chapter VII, section 1, clause 13, *Gordon v. Crawford* (7), *Farmer v. Farmer* (8). There are many cases in which the Court will give relief where there has been an insufficient consideration—*Heathcote v. Paignon* (9), *Gould v. Okeden* (10), *Kenrick v. Hudson* (11), *Bowen v. Kirwan* (12). But if the plaintiff can recover at all, he can only recover the amount he actually expended with interest, which was offered to him by Bamasundari, but refused.

Mr. Goodeve, for Amirtamayi Dasi, and for the infant Gawri Charan Kurmokar, submitted that the deed could not be supported, for the reasons urged by Mr. Kennedy, but if sup-

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| (1) Unreported. | (7) Rad. of Law and Equity, 92. |
| (2) 33 Beav., 419; S. C., on appeal, | (8) 1 H. L. C., 730. |
| 10 Jur., N. S., 691. | (9) 2 Brown's Ch. C., 166, see 175. |
| (3) 31 Beav., 80. | (10) 4 Bro. Par. C., 198. |
| (4) 3 Madd., 417. | (11) <i>Id.</i> , 22. |
| (5) 1 B. L. R., O. C., 31. | (12) Rep. temp. Sugden., 47. |
| (6) 2 Giffard, 157. | |

ported, the plaintiff would not be entitled to claim a larger amount than he had actually expended with interest. But he further contended that the plaintiff could not touch the accumulations, as they must be taken by Hindu law to have become part of the *corpus* of the estate. He referred to the decree in *Bisson-nath Chunder v. Bamasoonderee Dossee* (1), as opposed to, and subsequent to, the decree relied on in *S. M. Soorjeemoney Dossee v. Denobundoo Mullick* (2), and the prefatory remarks of their Lordships of the Privy Council to the decree in the earlier case; the remarks of Macpherson, J., in *Grose v. Amirtamayi Dasi* (3), which explained an earlier and unreported decision by the same Judge relied on by the plaintiffs; Vyavastha Darpana by Shama Churn Sircar, page 64; 2 Macnaghten's Hindu Law, page 58; 1 Strange's Hindu Law, page 246; the note at page 23, Vol. 1, Select Reports; and *Gooroochurn Doss v. Goluckmoney Dossee* (4). He contended that, both upon principle and on authority, the accumulations must be taken to have become part of the *corpus*, and that the decree of the Privy Council relied on (arrived at, according to the report, without the authorities bearing upon the question having been cited), with the narrowing remarks of their Lordships in recommending it, which decree was not followed in the later case before the Privy Council, and which decree had been cited before the Court in the case of *Grose v. Amirtamayi Dasi* (3), ought not to be held to determine the question.

He further contended that it was not open to the plaintiff to seek to charge the accumulations as the property of Bamasundari absolutely, as on comparing the *testatum* of the deed under which the plaintiff claimed with the recital of the decree of the Supreme Court, it was clear he only took, if anything, the estate of Bamasundari as defined by that decree, which declared that (*inter alia*) she was entitled to the estate of a Hindu widow in the profits made since her husband's death—*Jenner v. Jenner* (5).

(1) 12 Moore's I. A., 41.

(2) 9 Moore's I. A., 123.

(3) 4 B. L. R., O. C., 40.

(4) Fulton's Rep., *per* Peel, C.J., 173; *per* Grant, J., 182; and *per* Seton, J., 189.

(5) L. R., 1 Eq., 361.

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The *Advocate-General*, for Hiralal, asked for an enquiry to be directed in respect of the prior lien to which Hiralal claimed to be entitled.

Mr. Macrae asked for a similar enquiry in respect of Grose.

Mr. Evans in reply.—The decree in *S. M. Soorjeemoney Dossee v. Denobundoo Mullick* (1) is clear and is an express decision on the question now raised as to accumulations. In the case of *Bissonnath Chunder v. Bamasoonderee Dossee* (2), Bissonnath Chunder was not the reversionary heir, and this question was therefore not before the Court. If the contention of Mr. Goodeve is correct, it follows that although the widow might have spent the accumulations since her husband's death, as they arose, yet by reason of the male members of the family wrongfully withholding these moneys from her they have become attached to the *corpus* and lost to her.

As to want of advice or knowledge on the part of Bamasundari, no special fraud or suppression of facts is proved. Hiralal was manager of the suit only, not of Bamasundari's affairs—*Hunter v. Atkins* (3); *Pratt v. Barker* (4); *Monohur Doss v. Khoosum Begum* (5). It is sought to invalidate the assignment on the ground of distress and urgent necessity, but distress and urgent necessity are necessary ingredients to make an alienation by a Hindu widow valid acts to reversioners, and so cannot be ground for setting it aside.

It is impossible to give evidence of the market value, for under the peculiar circumstances the interest assigned was utterly unsaleable in the market, and had not the plaintiff purchased it, as he did, it must have been wholly lost to Bamasundari. He referred to *Perfect v. Lane* (6), and *Monohur Das v. Khoosun Begum* (5).

PHEAR, J. (after stating the facts continued).—Pannalal Seal now brings the present suit, alleging that the assignment

(1) 9 Moore's I. A., 123.

(4) 1 Sim., 1.

(2) 12 Moore's I. A., 41.

(5) Coryton's Rep., 122.

(3) 3 My. & K., 113; see also

(6) 3 DeGex F. & J., 369.

2 White & Tudor, L. C., 540, 541.

of December 1861 was a benami transaction in which Iswar Chandra Sen stood for him, Pannalal. He maintains that he is entitled, against both Bamasundari and the reversionary heirs, to the full benefit of that assignment, and he prays that the precise amount of money covered by the indenture may be ascertained and paid out to him.

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No one disputes the right of Pannalal to sue on this contract, because it appears now to be certain that Iswar Chandra was a mere nominal party to the indenture, representing either one or the other of the Seals, and that both of these are parties before the Court, and will be bound by the representations made by them in their pleadings.

Seven issues have been framed in the suit. But the foremost and principal question which I have to determine may be stated thus,—namely, whether or not it is equitable that the indenture executed by Bamasundari on 18th December 1861, in favor of Iswar Chandra Sen, should be enforced against her according to its terms.

It is worth remarking at the outset, that if the deed is carried into full effect in respect of the whole fund in Court, the person represented by the name Iswar Chandra Sen, for a consideration of Rs. 12,500 paid in 1861, will in 1871 obtain a sum of upwards of Rs. 75,000, subject to the claim, on this as well as on Bamasundari's other three annas, of Grose and Hiralal Seal for such costs and expenses of suit as are not paid by the Chunders under the decree and for maintenance of Bamasundari—a result which seems to manifest an extremely good bargain on the side of the lender. Nevertheless Bamasundari must be bound by her contract, if at the time of making it the parties were dealing upon equal terms. In considering whether this were so or not, I think, it is quite clear, that I must place the *onus* of proving the affirmative on the plaintiff. Bamasundari, at the time of making the contract was undoubtedly a *purdanashin*, an ignorant woman in the direst distress, and almost helpless; and the bargain on the face of it is of the nature of a wager. I apprehend it is quite clear that a person who desires to avail himself of the benefit of a contract made under such circumstances as these must show that the bargain was at least fairly made.

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Now what does Pannalal Seal, in the evidence adduced by him in this case, tell us about the bargaining? In the first place, with whom did Bamasundari in fact bargain? The plaintiff alleges that he was the principal who made the bargain and lent the money, and his brother Hiralal Seal, by his written statement, supports this case. But the deed itself states, in the most positive terms, that Iswar Chandra Sen was the lender of the money, and that the bargain was to be for his sole use and benefit. This statement then must be false according to the plaintiff's present contention; and it constitutes, to say the least of it, a very awkward fact in the plaintiff's case, that it commences according to his own representation with an untrue statement made for the purpose of keeping secret the part which he had in the transaction of loan. On the face of this case, it seems to me that the plaintiff is certainly bound—*i. e.*, it is certainly incumbent on him now in order to set himself right before the Court—to make the real facts of the matter as clear as possible. Why was there this concealment of the real party to the transaction? What purpose was to be served by representing the most important fact in the transaction falsely? What really were the details of the dealing between Pannalal and Bamasundari? Now the witnesses—the only witnesses—who could put this before the Court in a way which would leave it beyond all question, are Hiralal Seal and Pannalal Seal, both of whom are by no means unfamiliar with the witness-box. Yet they have not offered to give their evidence, and no reason has been suggested for their non-appearance in Court in this case. They do not venture into the witness-box to support on oath, *vivâ voce*, the allegation which they have made in their written statement. I think I cannot avoid raising on this circumstance an inference most adverse to the honesty of the plaintiff's case. Then, what do the witnesses, whom Pannalal has called, say in the matter. The subject of the assignment to Iswar Chandra Sen was, at the time of the assignment, in the hands of Mr. Grose as trustee for Bamasundari and of Baboo Hiralal Seal as sub-trustee, so to speak, under Grose. I have already said, Baboo Hiralal Seal has not come into Court to tell us what took place within his knowledge. Mr. Grose, however, has given his testimony, and it amounts simply to this,—namely, that he not only had nothing

to do with making the bargain between Pannalal and Bamasundari, but that he was somewhat rudely pushed out of the way when that bargain really was effected. His evidence extends to some length, and I will not reproduce it in detail, but among other things, he says, "I heard of the arrangement between Bamasundari and Pannalal after it took place, not before. I heard of it from Mr. Owen when he asked me to come to his office to sign a document. Hiralal Seal said it was not convenient for him—he said he would try to get a friend—to advance the money—he hoped for success. He left the impression on my mind that he would succeed, that the money would be advanced, but not by him. He has lots of wealthy friends. I pressed him very much to advance it. Bamasundari was in great distress; she had no resources at the time." He afterwards adds, "I did not tell Bamasundari what he had said. I had no communication with her, because the very next morning Owen told me all was arranged. The last day I called three times on Hiralal Seal and three times on Remfry. Next morning Owen told me not to meddle. I did not know whether the matter was settled or not." Then, who did act as the instrument for making this bargain between Pannalal and Bamasundari? Why, it was Gobind Chandra Bango, the confidential servant of the Seal family. He says this: "Messrs. Remfry and Rogers had advertised for sale Bamasundari's interest. Grose spoke about it to Hiralal Seal. Hiralal Seal answered, 'I will not give any more money in that matter.' But Mr. Grose pressed him very much, and said, 'Unless you do so, the property will be sold off; that will ruin the woman altogether.' The Baboo said, 'I am not going to lay out any more money in this, but I will try and see if some other person won't do it.' Bamasundari sent for me; I went to her. I believe Juggeswar came for me. I went to her and saw her face to face. I did not see her features; she was in the room, I was outside. She had heard of the advertisement, and asked me to speak to the Baboo to avert it. I said, 'My Baboo does not wish to give any money on account of this.' But she commenced weeping, begging, and entreating me to tell the Baboo some way or other to save her; if he could not do it, to get some one else to do it. I then also lived at Ramkistopore. The follow-

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ing day I went to my Baboo, and told him what she had said. On hearing it, he said, 'I have spoken to my brother; go to him. He has agreed to give you; go to him.' I did so. The brother was Pannalal Seal. I went to him. He asked me, 'On what terms am I to advance this money?' Rs. 12,500 were required. I don't remember from whom I heard; it might have been Mr. Owen. Pannalal wanted me go to Bamasundari and ask her how much of her share she was willing to make over to him. I told him I was ready to go, but it would be better if he told me his wishes to communicate to her. He said, 'Here she is going to lose the whole. Unless the money is paid they will sell 8 annas; let her give me 6 annas, and I will pay the money.' I went to Bamasundari and told her what I had been directed. Bamasundari said, 'No; I will give him a 4-anna share. I have given 8 annas to Hiralal and Grose, and I will now give an additional 4 annas, which will leave me 4 annas. I returned to Pannalal and told him. Pannalal ultimately said, 'Go and tell her if she will agree to 5 annas I will give the money, otherwise I won't.' I told Bamasundari what he had told me. She said, 'Very good, go and say so.'" And then afterwards he says, "I went to Mr. Owen and told him all, and requested him to make out a writing." If this is really that which took place, and the plaintiff relies on it as the ground on which he stands, anything more unlike fairness in bargaining I cannot very well conceive. The agent is, as I have said, the confidential servant of the lenders, and he lets out that the only principle which governed his master in his proposals was the extreme necessity of the unfortunate helpless widow;—"She is going to lose all; let her give up to me 6 annas out of the 8 annas." Pannalal must, I think, be taken to have known that his brother was in the position of a trustee as regards Bamasundari. He certainly must have learnt that Grose was so, and obviously after what had happened Grose was, of the parties concerned, the only person who could have given her anything like independent advice. But we see that Pannalal Seal deals directly through his own servant with this lady. He deliberately puts Grose on one side, and his brother keeps out of the way. In this fashion a bargain is made with this unfortunate woman behind the purdah which has the effect

of sweeping away the substance of what she had succeeded in recovering of her husband's property. This is what appears from the plaintiffs' own case ; but I will add that it seems to me on the facts which have been disclosed impossible to avoid the conclusion that Baboo Hiralal Seal himself was the lender of the money and the real principal in this transaction. It is, I think, almost impossible to believe the story which has been put forward on his behalf when he himself abstains from supporting it *vivā voce*. He could not, I conceive, at that juncture have stood by unconcerned with the remark that he was not going to advance any more money in this matter. Why, his chance of getting repaid the costs which he had expended in the litigation and the money which he had advanced for Bamasundari's maintenance in a great degree depended upon his preserving this eight-anna share of Bamasundari and keeping it out of the hands of the execution-creditor. It is said, probably with truth, that at that time it was very uncertain what would be the outturn of the accounts, but that very fact, as it seems to me, made it the more important to Hiralal Seal that whatever might be the result of the accounts, it should be kept at any rate from being lost and wasted. And if he felt assured that in the end nothing would be coming to the decree-holder under the decree,—that in fact the money already laid out by him was so much money sunk,—is it credible that he would have allowed his brother also to throw away Rs. 12,500? Then if we enquire what is Pannalal Seal, we find that he is at this moment a member of the joint family of which his brother Hiralal is the head. He is not very far advanced in age now, and ten years ago he was certainly a very young man. Is it probable that he was at that time trading or dealing with his own separate property entirely independently of his elder brother ? Have we the slightest evidence before us tending to indicate that he had at that time Rs. 12,500 separate funds independent of the family funds ? It is said by one of the witnesses, no doubt, that all the brothers (Pannalal among them) had separate funds and a separate cashier, but we have nothing to suggest, even, what was the extent of Pannalal's private fortune at that time ; and it is remarkable that it is not Pannalal's private cashier

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DASI. but the cashier of the family who actually advanced the money. I can't say I have the smallest doubt that the whole transaction was substantially Hiralal Seal's bargain. It seems to me on the whole that this is the plainest possible case. Everything turns one way. There is nothing to put against it on the other side. There is not even, as I have already said, that show of fairness which would have resulted if the persons who stood in the position of trustees for the unfortunate woman had pledged their responsibility for the fairness of the bargain by taking their natural part in the transaction. It seems to me that the whole affair teems, I may say, with facts of concealment, overreaching, and oppression. I need no authority to support me in holding that this is a transaction which cannot be carried out by a Court of Equity according to its terms.

I think, however, that I ought to follow the course taken by the Appeal Bench in *Grose v. Amirtamayi Dasi*(1), and declare that the deed of December 1861 operates to charge as much of the fund in Court, as Bamasundari had power to charge, with the repayment of the sum advanced,—*i. e.*, Rs. 12,500 with interest. I will state the amount of interest hereafter. I will also reserve the consideration of the point how far this suit is affected by the existence of Bamasundari's suit.

I have only further to express an opinion on the contention which Mr. Goodeve mainly insisted upon ; and with regard to this, I think the case of *S. M. Soorjeemoney Dossee v. Denobundoo Mullick* (2) is really decisive of the matter, and that the later case of *Bissonnath Chunder v. Bamasoonderee Dossee* (3) does not have the effect of putting forward a different construction of Hindu law, as Mr. Evans pointed out. The Privy Council decision in *Bissonnath Chunder v. Bamasoonderee Dossee* (3) merely dealt with the point which was raised in appeal, and while, as a consequence of their decision on this, they affirmed the decree of the lower Court, they did not mean thereby to declare that the decree was on points which were not appealed against properly expressive of the state of the law. In short, I think that the accumulations made out of the income which ought

(1) 4 B. L. R., O. C., 34.

(2) 9 Moore's I. A., 123.

(3) 12 Moore's I. A., 14.

rightly to have gone from time to time into the hands of the widow, but were wrongfully withheld from her, are really her separate property. The judgment in *S. M. Soorjeemoney Dossee v. Denobundoo Mullich* (1) is an authoritative assertion of this. Mr. Graham admits that the present is not a case in which the inheritance can be held bound as against the reversionary heirs, and therefore the Rs. 84,000 is not so bound. The charge is limited to the Rs. 1,55,000, and does not fall on the Rs. 84,000. I think the charge must be confined to what have been here called accumulations.

Interest on Rs. 12,500 was afterwards ordered at 12 per cent. and the plaintiff was ordered to pay the costs of all parties, except Hiralal Seal.

Attorney for the plaintiff: Baboo *P. C. Bonnerjee*.

Attorneys for Bamasundari Dasi: Messrs. *Rogers and Remfry*.

Attorney for Amirtamayi Dasi and Gawri Charan: Messrs. *Pittar and Camell*.

Attorney for Grose and Hiralal Seal: Mr. *Paliologus*.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Phear.

BISWANATH CHANDRA AND OTHERS (DEFENDANTS) *v.* KHANTO-MANI DASI (PLAINTIFF).

1871
March 10.

Hindu Widow—Right of Widow in Property of her Husband—Allegations of Unchastity and Waste—Payment of Money out of Court.

A decree was made in favour of K., a Hindu widow, in a suit brought by her against B. C., which declared that she was entitled to one-fifth share of the accumulations of the estate of the father of her husband from his death to the death of her husband to be held by her as a Hindu widow, and to one-fifth of the subsequent accumulations absolutely. Execution of the decree was taken out, and the sum to which K. was declared entitled was paid into Court by B. C., in March 1869. Macpherson, J., in delivering judgment,

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BISWANATH CHANDRA v. KHANTOMANI DASI. expressed a doubt whether the suit was brought for the benefit of the plaintiff, and stated that he would consider any application to protect any right the reversionary heirs might have in the amount recovered by the plaintiff. No steps, however, were taken by B. C., by suit or otherwise, to protect the interests of the reversionary heirs in the sum paid into Court, but on K.'s applying, in March 1871, to have the money paid to her out of Court, B. C., on behalf of himself as reversionary heir, filed an affidavit in opposition to K.'s application, charging her on information and belief with leading an immoral life, and of having assigned half the amount in Court to H. S., and expressing his apprehension of waste, and that if the money were allowed to be taken out of Court, it would be lost to the reversioners. *Held*, that K. was entitled to have the money paid out of Court to her (1).

THIS was an appeal from a decision of Mr. Justice Paul, dated March 10th, 1871, granting an application for the payment of money out of Court, and refusing a simultaneous application that the recovery might be retained in Court. The former application was made on behalf of the plaintiff to obtain a sum of Rs. 1,01,302-14-10 which had been paid into Court by the defendants in satisfaction of certain decrees obtained by the plaintiff on the 10th day of April 1866 and 5th August 1868 (2). It appeared that the plaintiff, as the widow and heiress of a person of the name of Gokul Chandra Chandra, brother of the defendant Biswanath, sued the defendants for her husband's share in certain joint property, and obtained a decree. In delivering judgment in that suit, Mr. Justice Macpherson was reported by the Court officer to have said that the suit was not for the benefit of the plaintiff, but for that of a trafficker in suits, and that he would consider any application that might be made to preserve the amount recovered by the plaintiff for the benefit of her husband's reversionary heirs. The decree, however, was quite silent upon this point. The sum of Rs. 1,01,303-14-2 was paid into Court by the defendants on the 10th March 1869, but they had not since then made any application such as was suggested by Mr. Justice Macpherson, and the money remained in Court.

(1) See *Gabindmani Dasi v. Sham-lal Bysak*, B. L. R., Supp. Vol., 48.

(2) The decree of April 10th, 1866, declared the plaintiff entitled to her husband's share in the property; that

of August 5th, 1868, was made after the accounts had been taken and

declared the specific amount to which she was entitled.

The defendant Biswanath, as the immediate reversionary heir of Gokul Chandra, opposed the present application. He filed an affidavit in opposition, in which, after setting forth Mr. Justice Macpherson's judgment, he stated, upon information and belief, that the plaintiff had assigned half the share that might be recovered by her in the suit to Hiralal Seal, in consideration of his conducting the suit for her, and that she was leading an immoral life, and expressed his apprehension that if the money were allowed to be taken out of Court, it would be lost to the reversioners.

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Mr. Bonnerjee (with him Mr. Kennedy) for Biswanath.—This is not a case in which the Court would part with the money. [PAUL, J.—The plaintiff has been declared absolutely entitled to the money as a Hindu widow, how can I refuse her application?] Macpherson, J., has found that the suit was not for her benefit. [Mr. Lowe.—The judgment was never settled by Macpherson, J., and we must consider that there is no judgment extant. [PAUL, J.—They have made the notes of the judgment taken down by the Court officer exhibits in their affidavit, and as you have not contradicted that part of the affidavit, they are entitled to refer to the judgment.] If the money goes out of Court, half of it will go to Hiralal Seal. [PAUL, J.—In *Cossinauth Bysack v. Hurrosoondery Dossee* (1), Lord Gifford has held that the estate of a Hindu widow is more than a life-estate. So in *Hurrydoss Dutt v. S. M. Uppoornah Dossee* (2), the Privy Council held that a Hindu widow was entitled to direct possession of her husband's property. She is not a trustee for the reversioners.] That is so in ordinary cases, but here there is danger to the interests of the reversioners—*Grose v. Amirtamayi Dasi* (3). [PAUL, J.—You must not simply make vague allegations of danger, but show in the words of the Privy Council that the danger arises "from the mode in which the party in possession is dealing with it."] The assignment to Hiralal Seal is an improper dealing. The case falls within the principle of *Grose v. Amirtamayi Dasi* (3).

(1) Clarke's Rules and Orders, (2) 6 Moore's L. A., 433.
App., 91. (3) 4 B. L. R., O. C., 1.

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Mr. *Lowe* and Mr. *Graham*, for the plaintiff, were not called upon.

PAUL, J.—In this case I am very clearly of opinion that the application should be granted. The facts are comprised within a very narrow compass. Khantomani Dasi being the widow of Gokul Chandra Chandra, in 1865 filed a suit against Biswanath Chandra and others, sons of Ramtanu Chandra, deceased. A decree was made in her suit in April 1866, which declared her entitled to one-fifth share of the accumulations of the estate left by Ramtanu Chandra from the death of Ramtanu to the death of Gokul Chandra, to be held by her as a Hindu widow, and to one-fifth of the subsequent accumulations absolutely, and proper accounts were directed.

Difficulties and appeals were interposed by the defendant Biswanath Chandra to the carrying out of the last-mentioned decree, but in August 1868, the Appellate Court confirmed the decree of April 1866, and, with reference to another decree, which had been passed on further directions upon the taking of the accounts according to the decree of April 1866, declared that the plaintiff was entitled to be paid to her direct by the defendant the sum of Rs. 1,01,302, principally in 4 and 5 per cent. Company's papers and the residue in cash to be held by her as a Hindu widow. The matter of the accumulations subsequent to the death of Gokul Chandra was subsequently settled for a small sum of Rs. 400, which was accepted by the plaintiff and paid to her by the defendant Biswanath Chandra. The decree of 5th August was not obeyed till execution was taken out, and then on 10th March 1869 Biswanath Chandra deposited the sum of Rs. 1,01,302 in manner directed by the decree of April 1866. On that day the plaintiff's right to receive the sum of Rs. 1,01,302 became perfected by the money being paid into Court; and if any circumstances of danger then or previously arose, it was the duty of the defendant to have filed a bill to restrain the plaintiff from taking the money out of Court in accordance with the decree of April 1866. For two years the defendant has done nothing to restrain her, and now when she applies for that to which she is undoubtedly entitled, he attempts by affidavit to prevent her doing so.

The principle that a Hindu widow is entitled to the uncontrolled possession of property, moveable and immoveable, of her deceased husband, is clearly laid down by Lord Gifford in *Cossinauth Bysack v. Hurrosoondery Dossee* (1). It was in conformity with this principle that the decree of August 1868 was made. The general apprehension of danger that, if personal property be entrusted to a Hindu widow, there is every probability of its being parted with, and if so, it may not be recovered, is an element which cannot be allowed to exist or considered consistently with the views of the Privy Council in the case last cited. The danger must be established not as matter of probable speculation, but as one of reasonable certainty to the satisfaction of the Court. The Hindu widow has an estate larger than a life-estate; she has a far larger estate. For religious purposes calculated in her opinion to benefit the departed spirit of her deceased husband, she may sell an adequate portion of the property of her husband which comes into her possession. The Hindu widow is not restricted to the special investment in Company's papers; she may invest personal property more advantageously to herself in mortgages and otherwise, so as to enhance her income. It is a fallacy to say she would have the same benefit from the estate of her husband if the property continued to remain in Court invested in Government securities. In order to prevent a possible danger, I must take care not to interfere with or restrict the Hindu widow in the full enjoyment of her rights as conferred upon her by the Hindu law. It is said she is leading an immoral life. There is no evidence she is, and Biswanath Chandra does not swear to it as of his personal knowledge. I am reluctant to take information and belief of a deadly enemy, such as Biswanath Chandra is, as evidence of immorality. I cannot consider his statements as the faintest evidence of the fact, especially as Biswanath Chandra will not condescend to put forward the name of his informant. In England, at the present time, information and belief without stating the name of the informant is considered wholly insufficient and unsatisfactory, and

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affidavits so framed are not heeded. Then the leading of an immoral life by a widow does not constitute a forfeiture. It may well be a Hindu widow may be immoral and yet economical, and unless immorality was so gross as to lead to apprehension of waste it would be no ground for restraint. Then it is said on information and belief of Biswanath Chandra that she has assigned half the property in Court to Hiralal Seal. This part of the affidavit, for reasons I have already given, carries no weight with me. By Hindu law, when a woman has been kept out of her husband's property, and is without means, she is entitled to sacrifice a portion to save the rest; she is entitled to sell or mortgage, and consequently to assign, which may either amount to a sale, mortgage, or simply a charge. It does not appear whether the assignment was absolute or by way of mortgage or simply a charge. It may have been and probably was to secure advances, and would not be bad, but would bind the estate of the lady against the reversioners. As I have not before me even a suggestion of the nature of the assignment nor any materials to indicate that it is invalid, I cannot, while so left in the dark, presume anything against its validity. In *Doe d. Goluckmoney Dabee v. Digumbur Dey* (1), Sir Lawrence Peel held that there was no *prima facie* presumption, one way or the other, as to whether an alienation by a Hindu widow was invalid. If the property does come to the possession of Hiralal Seal, as suggested, there is no real danger of its being lost. If the circumstances of the alienation, when fully placed before the Court, would entitle the plaintiff to have the property in the hands of Hiralal Seal secured, I apprehend there will be no difficulty in recovering so much of the property as may pass into Hiralal Seal's hands and in having the same secured. It must not be forgotten that this widow left the family mansion without means and helpless, and it is in the highest degree probable, I may say certain, that before she ventured to institute her suit against a wealthy and powerful opponent, such as Biswanath Chandra, she obtained the use of funds and of substantial funds from the third party to carry on her litigation. These would be

probably obtained by charging the property to be recovered, and if the assignment now stated is in furtherance of that charge, it would be most unjust to interfere with it on a motion, where materials are most scantily put forward by the defendant Biswanath Chandra, and where, if any presumption is to be made, it is decidedly in favor of the validity of the assignment. A judgment of Mr. Justice Macpherson has been read which reserves liberty to the defendant to come in and apply to compel the plaintiff to bring the money into Court, she having previously received it under the decree of the 5th August 1868; and certain observations of the learned Judge are relied upon to the effect that the suit then under consideration and in which his Lordship was about to pronounce the decree of the 5th August 1868, was not to be for the benefit of a trafficker in suits. If the conclusion were otherwise than as stated, the decree would not have been made in its present form. I must take it there was a mere suspicion which was passing through the learned Judge's mind to which he gave expression; it follows then that that which lay in suspicion would have to be made out as a conclusion from facts to be brought to light and proved. This has not been done. If I am to be swayed by suspicion, the case is not advanced since that decree. In *Hurry Doss Dutt v. S. M. Uppoornah Dossee* (1), the right of the widow to the custody of property is clearly laid down. In that case on a bill "*quia timet*" filed by the reversioner, it was held that a Court of Equity will not interfere unless it is shown that there is danger from the mode in which the tenant-for-life in possession is dealing with the property. There the widow kept 36,000 rupees in her hands uninvested: that circumstance was insisted on as showing danger—the widow might be tempted to spend it; but the Court held otherwise, and observed that the widow in retaining the money uninvested for the purpose of an eligible investment had done nothing in derogation of the rights of the reversioners. Here there are no facts to show that there is any real danger; the widow has not up to this moment obtained possession of any property. The case of *Grose v. Amirtamayi Dasi* (2) has been much relied on.

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(1) 6 Moore's I. A., 433.

(2) 4 B. L. R., O. C., 1.

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In that case a suit had been instituted, and all the facts brought to light, and in fact the widow had no right to give away one half of the property as remuneration to the person assisting her. Her alienation as to this half was clearly invalid; her dealing therefore with the estate was improper, and, consequently, it might well be that an injunction issued to restrain her from taking out this portion of the estate. The other half, the Court held, was properly charged for the principal sum actually advanced and interest due thereon. This case, if of any authority in the present case, is one somewhat against the contention of the defendant.

I have not that intense horror of traffickers in suits which is at times expressed in our Courts of Justice, for I know from my personal knowledge and experience that borrowers insist on the person lending taking an interest in the matter to be recovered; they prefer it, as the suspicious mind of the native recognizes in the creation of such an interest, the greater chance of the lender pursuing the object of litigation to its termination. Courts of Justice, it is to be hoped, are strong enough to put down attempts on the part of traffickers to overreach or defraud the persons they assist, and it is better to deal with iniquitous and grossly immoral cases on their own merits than to lay down a general rule, the application of which cannot fail at times, and, I should say, often, to work injustice.

There being in my opinion nothing shown to resist the undoubted claim of the plaintiff under the decree of the 5th August 1868, I grant her application with costs to be paid by the defendant.

The counter application of the defendants was refused and the defendants appealed from both decisions.

Mr. *Kennedy* and Mr. *Bonnerjee* for the appellant.

Mr. *Graham* and Mr. *Lowe* for the respondent.

NORMAN, J.—I think there is no ground for this appeal. The facts of the case are shortly these: Khantomani Dasi brought a suit against Biswanath Chandra, to set aside a certain deed of

compromise which she alleged to have been fraudulently obtained from her, and to establish her title to the accumulations of her husband's estate during his life-time, and after a very severe contest she obtained a decree in August 1868 against Biswanath Chandra for the sum of Rs. 1,01,302, with interest. Under that decree Biswanath Chandra's property having been attached on the 5th March 1869, he paid into Court the sum decreed with interest, amounting to Rs. 1,10,300 to the credit of the cause. In his original judgment Mr. Justice Macpherson had intimated that Biswanath Chandra might apply that the money might be secured to the reversionary heirs, in consequence of its having appeared during the course of the trial that Khantomani Dasi had made an assignment to Hirralal Seal for the purpose of raising funds to carry on the litigation, such assignment extending to one moiety of the property to be recovered. The now defendant, Biswanath Chandra, was warned by that hint of Mr. Justice Macpherson to take steps to protect his interest as reversioner. He had a second opportunity by the terms of the order under which the money was brought into the Court by the defendant; and a third opportunity by what took place before this Court on Friday last, of putting a plaint on the file to protect himself as reversionary heir of Khantomani Dasi, if he had thought fit. Instead of doing that, now at the expiration of two years after the money was brought into Court, when the plaintiff, who, as plaintiff in the suit, is absolutely entitled to the money, asks to have it paid out to her, the defendant Biswanath Chandra comes before the Court, and assuming a new character as reversionary heir for the protection of himself and the other reversionary heirs, asks that the money paid by him may be detained in Court. The answer to that seems to me to be this, that the suit of Khantomani Dasi to establish her right to her husband's estate has been tried out and decided and is at an end, and has resulted in a decree that the money should be realized from Biswanath Chandra and paid to Khantomani Dasi, who as a Hindu widow has full power to receive the money and deal with it as a Hindu widow can deal with property. No question can be made in that suit as to the interest of Khantomani Dasi and the reversionary heirs. If the reversionary

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heirs desire to raise any such question, they must do so by a suit for that purpose. We cannot allow them to treat the present execution proceedings as a fresh suit and to raise issues which do not arise out of any matters in issue in the original suit.

All we can do is to carry out the decree in the suit of Khantomani Dasi as it stands, and leave Biswanath Chandra as reversioner to take such proceedings for the protection of his interests as he may be advised. Biswanath has had abundant time to file a proper suit and apply for an injunction, but has taken no steps. I may add that he has failed to show that the money would be in danger of being lost if it was paid out. He does not show that the persons to whom the money may be paid will be unable to repay it, if called upon to do so, in such suit as Biswanath Chandra may be advised to institute.

It appears to me that the order which has been made by Mr. Justice Paul is correct, and that there is no ground whatever for this appeal, which must be dismissed with costs.

The same order will apply to the other appeal which has been preferred from the order made on the application of Khantomani Dasi.

PHEAR, J.—I concur in thinking that these appeals should be dismissed with costs.

Appeal dismissed.

Attorneys for the appellants: Baboos *Dhur* and *Mitter*.

Attorney for the respondents: Baboo *P. C. Bannerjee*.

PRIVY COUNCIL RULES AND ORDERS.

PRIYV COUNCIL RULES AND ORDERS.

Order in Council for the regulation of the Form and Type to be used in the printing of the Cases, Records, and Proceedings in Appeals and other matters pending before the Lords of the Judicial Committee of the Privy Council.

AT THE COURT AT WINDSOR CASTLE,

The 24th day of March 1871.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY
IN COUNCIL.

WHEREAS there was this day read at the Board a Representation from the Lords of the Judicial Committee of the Privy Council, dated the 20th January 1871, humbly recommending to Her Majesty in Council that certain Rules be established by the authority of Her Majesty, by and with the advice of Her Privy Council, to be observed in the form and type used in the printing of all Cases, Records, and other proceedings in Appeals and other matters pending before the Judicial Committee of the Privy Council, HER MAJESTY having taken the said Representation into consideration, and the Schedule of Rules hereunto annexed, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution. Whereof the Judges and Officers of all the Courts of Justice in Her Majesty's dominions from which an Appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

ARTHUR HELPS.

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RULES AND
ORDERS.*Schedule annexed to the foregoing Order.*

I. All Cases, Records, and other proceedings in Appeals, or other matters pending before the Judicial Committee of the Privy Council, are henceforth to be printed in the form known as demy quarto, and not in demy folio, as hath heretofore been used.

II. The size of the paper used is to be such that the sheet, when folded, will be eleven inches in height and eight inches and a half in width.

III. The type to be used in the text is to be Pica type, but Long Primer is to be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type is to be forty-seven, each line being five inches and three quarters or 146 millimetres in length.

V. The foregoing Rules do not apply to cases now pending in which the printing of the Record is begun before the receipt of this Order, but in all cases printed after the receipt of this Order the form and type herein prescribed are to be used exclusively.

VI. The price in England for printing 75 copies in the form herein established is to be thirty-eight shillings per sheet (eight pages) of pica, with marginal notes, not including corrections, tabular matter, and other extras.

VII. The form of paper and type of the present Order in Council, with the pages hereunto annexed, are to serve as a specimen sheet or pattern for the printing of the proceedings before the Judicial Committee of the Privy Council: (1).

A. H.

(1) The specimen sheet is not inserted here, but may be seen on application to the printer.



APPENDIX.

Ex. 5 Cal. P. 889

APPENDIX.

Before Mr. Justice Markby and Mr. Justice Mitter.

SHAMACHARAN NEOGI (PLAINTIFF) v. NABINCHANDRA DHOBA AND OTHERS
(DEFENDANTS).*

1870
March 4.

Act XX of 1866, s. 18, cl. 1, and s. 50—Registration—Priority of Registered Document over Unregistered one.

A. entered into an agreement with B. to convey to him a certain portion of land for a consideration of rupees 98, of which rupees 60 had been paid as earnest money. The agreement contained a proviso that on A.'s refusal to convey the property within the time mentioned in the agreement, this document should operate as a conveyance, and A. should forfeit his claim to the balance of the consideration. Before the expiry of the time mentioned in the agreement, A. sold, by a registered deed, a portion of the property mentioned in the agreement. On suit by B. for possession of the property and for declaration that the agreement operated as a conveyance—

Held, that under clause 1, section 18, and section 50 of Act XX of 1866, the subsequent registered conveyance had priority over the unregistered agreement.

Baboo *Ashutosh Dhar* for appellant.

Baboo *Krishna Sakha Mookerjee* and *Purna Chandra Shome* for respondents.

THE facts of the case are fully stated in the judgment of the Court, which was delivered by

MARKBY, J.—The plaintiff in this case sued either for completion of an agreement to purchase 5 bigas and 18 kattas of land made with the defendant Haris Chandra Byragi, or in alternative, to recover possession of that land.

It appears that the contract was made on the 31st Aswin 1275 (October 15th, 1868), and on a deposit of 60 rupees; the defendant Harish Chandra Byragi promised to convey the land to the plaintiff on payment of the balance of the purchase-money on the 31st Bhadra (September 14th) ensuing; with the alternative somewhat peculiar, that if he did not complete the agreement of executing the conveyance that document would itself operate as a conveyance, the balance of the purchase-money being forfeited.

The form of the document sufficiently explains itself.

On some day in Sraban (July and August), Haris Chandra Byragi sold some portion of the same property to Nabin Chandra Dhoba, and actually executed

* Special Appeal, No. 2447 of 1869, from a decree of the Subordinate Judge of Hooghly, dated the 23rd July 1869, reversing a decree of the Moonsiff of that District, dated the 17th February 1869.

1870 a conveyance to him, which was registered. Nabin Chandra Dhoba came forward in the present suit and claimed to be made a defendant. I agree with the Judges in the case of *Mofuzel Hossein v. Golam Ambiah* (1) that it was not necessary to entertain the application.

SILAMACHARAN NEOGI v. NABINCHANDRA DHOBA. The suit of the plaintiff has been dismissed, on the ground, that "he only got, at the time when the sale was made to Nabin Chandra Dhoba, a mere contract to sell the property, and Nabin Chandra Dhoba being a *bonâ fide* purchaser for valuable consideration, the plaintiff cannot recover possession of the land, and compel Haris Chandra Byragi to execute a conveyance; all that he can do is to get damages against Haris Chandra Byragi for breach of contract;" and the question now before us is whether that proposition is correct in law.

I think that it is certainly correct to this extent, that the plaintiff has got no title of which he can avail himself as against Nabin Chandra Dhoba. The difference between a contract for sale of the property, and an actual conveyance of the property, is perfectly clear; and, as I understand it, the reason why in some cases the person who has only got a contract of sale is considered to have a title against the person who has the actual conveyance is this, that the transaction, though in form a contract, is in fact a conveyance; that that which gives the right to acquire is actually a mode of acquiring; and in the present case the document between the plaintiff and the defendant is, though in form a contract, of such a nature that he could hold under it as against subsequent purchasers.

But now, as soon as we hold that, the plaintiff falls into another difficulty, because clause 1, section 18 of the Registration Act would apply, and under section 50 of that Act "Every instrument of the kinds mentioned in clauses 1, 2 and 3 of section 18, shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered instrument relating to the same property whether such other instrument be of the same nature of the registered instrument or not."

It is not necessary for us to say how the present contract would have stood had the first purchaser registered his conveyance. But between a purchaser who has a registered conveyance, and one who has only a contract of sale, the former must prevail.

The appeal is dismissed with costs in favor of Nabin Chandra Dhoba.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice L. S. Jackson.

MAJOR FORBES AND ANOTHER v. GIRISH CHANDRA BHUTTACHARJEE
AND ANOTHER.*

Au

Penal Code (Act XLV of 1860), s. 425—Cattle—Trespass.

Mere neglect on the part of an owner of cattle to keep them from straying into fields, is not causing cattle to enter a compound within the meaning of section 425 of the Penal Code. The section requires that, before the owner is convicted of the offence, it must be proved that he actually caused the cattle to enter knowing that by so doing he was likely to cause damage.

THE facts were thus stated in the reference:—"The cattle of the accused are said to have been in the habit of trespassing into the compound of Major Forbes, the prosecutor's master, and to have caused mischief by damaging the feuce, and by eating the crops, and injuring the flowers and shrubs.

"The Joint Magistrate, considering that the accused were guilty of mischief, an offence punishable under section 426 of the Penal Code, has sentenced Girish Chandra to suffer one month's rigorous imprisonment, and Shiraz Sheikh one week's rigorous imprisonment.

"This Court is of opinion that the offence under section 425 has not been shown to have been committed by Girish Chandra. Even admitting that his cattle were in the habit of trespassing into Major Forbes' compound,—though, with the exception of the rather vague assertion that his two cows have often been driven from the compound, the only direct evidence against him is that, twice within the last year, they have been taken to the pound,—still admitting that there has been frequent trespass and a want of care on the part of the owner of the cattle, this Court holds that the charge will not hold good, in that section 425 does not apply to cases of mere carelessness; and that before the accused can be punished criminally, it is for the prosecution to show that the intention was to cause wrongful loss or damage.

"In the present case it is not alleged that Girish Chandra had any intention to injure or damage, but it is said that he must have known that his cattle by trespassing were likely to injure property."

Mr. Ghose (Baboo Girishchandra Mookerjee and Biprodas Mookerjee with him) in support of the reference.

COUCH, C. J.—In this case the Magistrate says:—"It is quite clear, on the prosecutor's statement, that a prosecution for mischief against the owners of the trespassing cattle will properly lie; for, though it is quite possible, and, in fact, most probable, that they did not intend to do actual damage, it is

* Reference, under section 434 of the Code of Criminal Procedure, from the Sessions Judge of Nuddea, by his letter No. 100, dated the 1st July 1870.

1870 proved that they must have known that it was likely to occur, and, in fact, MAJOR FORBES were warned of what damage had been done by the prosecutor; again, it is no excuse to plead that they did not actually take the animals to the compound, and drive them in. In the case of Shiraz, he was seen watching them while they grazed; while it is plain that Girish Chandra, by the mere act of letting loose his animal to stray at large, turned them into Major Forbes' compound, for there it is they daily repaired, and were daily seen."

I understand the Magistrate then to find at the utmost, that there was no intention on the part of Girish Chandra to do damage, but that he let loose the cow, and that the cow had on previous occasions strayed into the compound of Major Forbes. I think that is not a causing cattle to enter upon the compound within the meaning of section 425 of the Penal Code. This section requires something more than neglect on the part of the owner of the cattle to keep them from straying. He must in some way cause the cattle to enter the field, knowing that by so doing he is likely to cause damage. It does not appear to me that, taking the finding of the Magistrate to be supported by the evidence, there was here an offence for which Girish Chandra was liable to be punished.

It was not even shown that the cow was let loose. So that, supposing the letting the cow loose, with a knowledge that it had such a propensity to go into Major Forbes' compound, that it would inevitably go there on being let loose, would be "a causing" within the meaning of section 425, there was no evidence here that the accused person did so. All that seems to have been shown was, that there was a neglect to keep the cow fastened up, so as to prevent it from straying into any place. That is not a case within section 425. If Major Forbes has got a compound which is open to the incursions of the cows of the neighbouring people, he ought to protect it in some way, and not seek the aid of the criminal law. Where the owner of the cattle does nothing which may fairly be considered as "a causing" the animals to go into the compound, he is not liable to be punished. I think, upon the finding of the Magistrate, that this is clearly not a case within the criminal law, and the conviction must be annulled.

JACKSON, J.—I am of the same opinion. That which is set up against the accused person amounts merely to negligence in suffering his cow to go abroad, with the knowledge, no doubt, that the cow was likely to enter the compound of Major Forbes, or some other person, and there do some damage. Now this negligence is not the same thing as by an illegal omission causing a thing to be done. I entirely concur in thinking that the section requires an active causing; and that it is that active causing, coupled with the intention or the guilty knowledge, so to say, that constitutes the offence under the section.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

TARAPRASAD MITTRA (PLAINTIFF) v. RAM NRISING MITTRA (DEFENDANT).*

1870
Sept. 1.

Regulation VIII of 1819—Purchaser, Right of, in Patni Talook sold for Arrears.

The purchaser of a patni talook, under Regulation VIII of 1819, sued for a kabuliāt at an enhanced rent. The former patnidār had brought a similar suit, and the Court had declared that the rent was not liable to enhancement. *Held*, that the purchaser was bound by that decree.

THE plaintiff and one Hari Charan Bose purchased at a sale held before the Collector, under Regulation VIII of 1819. The plaintiff then brought the present suit against the defendant for a kabuliāt at an enhanced rate. The defence was, that the former patnidār had sued for rent, and that the High Court had passed a decree in that suit, declaring that the rent of the defendant was not liable to enhancement.

The Deputy Collector held, that as there was evidence of the loss of the defendant's dakhillas and other documents regarding the property, secondary evidence was admissible, and that the decree of the High Court was admissible as evidence. He, accordingly, held that the rent of the defendant was not liable to enhancement, and dismissed the suit.

On appeal, the Judge held that the plaintiff was bound by the decree passed in the suit of the former patnidār, and, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Baboo Kalimohan Das for the appellant.

Baboo Mahendra Lall Shome for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—The only question raised in this appeal is, whether the purchaser of a patni talook, under the provisions of Regulation VIII of 1819, is, or is not, bound by an adverse decision between the defaulting owner and the defendant, the suit being one for enhancement.

It is admitted that there is no authority which places the purchaser in the very advantageous position contended for, nor is that privilege conferred upon him by the terms of Regulation VIII of 1819; but we have been referred to several decisions in which it has been held that the purchaser of an estate sold for arrears of Government revenue is not so bound; and the pleader of the special appellant argues that he is entitled to place his client, the

* Special Appeal, No. 1034 of 1870, from a decree of the Officiating Judge of Nuddea, dated the 7th of January 1870, affirming the decree of the Deputy Collector of Bongram, dated the 17th August 1868.

1870 patni talookdar, on the same ground of vantage as the zemindar. It seems to me, however, that there is a great difference between the cases. Indeed, the grounds of decision in the cases of purchasers and zemindars have not always been uniform. In some cases the decision against the previous landlord has been declared to be wholly inadmissible ; in others it has been merely held to be not conclusive, but to be entitled to considerable attention.

It seems to me that, in the case of a person purchasing an under-tenure sold at the suit of the landlord, the purchaser is entitled to acquire rights higher than an ordinary purchaser by private contract, only to the precise extent to which such privileges are conferred by the express terms of law. I find no warrant for holding that a purchaser of a patni talook is entitled to set at nought all decisions arrived at against the defaulting patnidar ; and I think there are good reasons why he should not be so authorized. It does not appear necessary to go into those reasons at present. It is sufficient to say that there is no authority which favours the special appellant; and, therefore, I think that the special appeal ought to be dismissed with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

1870
Sep. 12.

NIAMATULLA v. GOPAL SAHA.*

Jurisdiction of Magistrate—Criminal Procedure Code (Acts XXV of 1861 and VIII of 1869), ss. 244 & 180 & 308.

The accused was charged before a Deputy Magistrate with an offence under section 431, Penal Code. The Deputy Magistrate examined the complainant, took bail from the accused, but refused to examine the complainant's witnesses, although present, and delayed the investigation unnecessarily for a long time. The Magistrate of the District then called for the proceedings, and, having looked at them, considered that there was no case for the interference of the Criminal Courts, and discharged the prisoner, although he was present and under bail.

Held, that the Magistrate was not only competent but bound to discharge the prisoner, if his conclusion that no offence was made out was correct.

But *held also*, that the Magistrate's conclusion was wrong, and that the act complained of, if true, did amount to an offence under section 431 of the Penal Code, therefore the Magistrate's order was set aside, and further enquiry ordered.

Baboo Bama Charan Banerjee for Niamatulla.

The facts of this case appear in the judgment of the Court, which was delivered by

JACKSON, J.—In this case a complaint was laid before the Deputy Magistrate of Shabazpore, in which it was alleged that the persons accused had committed an offence under section 431 of the Indian Penal Code, by doing an act which

* Reference, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge, under his letter, No. 41, dated the 13th August 1870.

had rendered a certain navigable channel impassable for travelling or conveying property. It was also alleged that by this act the accused persons had deprived the complainant himself of cultivating the land lying in the neighbourhood, which would otherwise have received water from the said channel; and the Magistrate was asked to take cognizance of the offence under the section mentioned above, and also to deal with the case under the provisions of the 308th section of the Code of Criminal Procedure.

The Deputy Magistrate summoned some of the accused persons. He directed an enquiry also by the Police, and one of the accused persons attended. The Magistrate had also examined, at considerable length, the complainant, who was a person named Niamatulla, describing himself as a *mirdha* (shepherd) under certain zemindars.

After taking these several proceedings, and placing one of the accused persons upon bail, the Deputy Magistrate, although witnesses cited by the complainant were in attendance, refused to examine them, and declared that he could not come to any conclusion without having first made a local enquiry, and for that, or for some other reason, the case remained pending before this officer for the space of three or four months, the accused person being all the time in attendance upon bail.

The Magistrate of the district having come to know of this, and observing that the case had been a long time before his Deputy, called for the proceedings, and having looked at the statement of the complainant, considered that there seemed to be no cause for the interference of the Criminal Courts, and ordered the accused to be discharged.

The complainant, dissatisfied with this order, came before the Sessions Judge, who referred the case to the High Court, under the 434th section of the Code of Criminal Procedure, with a recommendation that the Magistrate's order be set aside.

This recommendation is based upon several grounds, one of them being that, two of the accused being present under a criminal charge, and bail having been taken from them, the Magistrate was not competent to discharge the accused without hearing the evidence against them. The Magistrate, it seems, added words implying an acquittal of the accused persons which he could not properly do unless he had tried the case.

Another ground is that the Magistrate was wrong in coming to the conclusion that there was no *prima facie* criminal case made out.

Upon the first of these points, it appears to me that if we assume the Magistrate to have come to a correct conclusion that there was no case of a criminal character made out against the accused, he was not only competent but was bound to order the discharge of the accused. By section 244 of the Code of Criminal Procedure, amended by Act VIII of 1869, the provisions of section 180 are made applicable to cases tried under the 14th Chapter of the Code; and this offence, being one in respect of which a warrant may issue, is triable under that Chapter, and, consequently, I think the words in the concluding part of section 180, "nothing contained in this section shall prevent

1870

NIAMATULLA
v.
GOPAL SAHA.

1870 the Magistrate from at once dismissing the complaint if in his judgment there be no sufficient ground for proceeding with it" will amply warrant the Magistrate in dismissing the case, although the accused persons were really in attendance; and it seems to me that the circumstance of the accused persons having been detained for so long a period as they were, from what I must consider the unjustifiable dilatoriness on the part of the Deputy Magistrate, furnished only an additional ground for the Magistrate acting upon the view which he had taken.

But the question remains whether the Magistrate was right in considering whether there was no case at all for the interference of the Criminal Court under section 308.

On this point, I feel bound to say that, so far as the case has gone, I differ from the Magistrate of the district, and concur with the Sessions Judge.

Whether the evidence, when taken, would make out the charge or make out any of the matters alleged by the complainant, is another question; but it seems to me that the complainant in his examination did clearly allege the commission of an act which amounts to an offence under the 431st section of the Penal Code. The case referred to by the Magistrate of the cutting of a *bund* in the Hooghly district, which was the subject of a civil suit, and was appealed to this Court, differs very much from this case. The *khal* in this case was alleged to be a navigable channel, used by the public for purposes of conveyance and traffic, and if any person erected a *bund* across that *khal*, so as to render it impassable, that would appear to be an act punishable under section 431.

Then the Magistrate observes that the complainant, in the same breath, spoke of the case as one cognizable under section 308 of the Code of Criminal Procedure. It seems to me there is nothing inconsistent in that. It might very well be that the act done by the accused, if brought home to them, might be an act which would affect the public in the way of stopping up a public and navigable channel, and it might also constitute an unlawful obstruction, or it might be a case to be dealt with under the 22nd Chapter of the Criminal Procedure Code. Section 320 declares that "if a dispute arise concerning the right of use of any land or water, the Magistrate or other officer as aforesaid, within whose jurisdiction the subject of the dispute lies, may enquire into the matter; and if it shall appear to him that the subject of dispute is open to the use of the public or of any person or any class of persons, the Magistrate or other officer may order that possession thereof shall not be taken or retained by any party to the exclusion of the public, or of such person or of such class of persons as the case may be, until the party claiming such possession shall obtain the decision of a competent Court adjudging him to be entitled to such exclusive possession."

It might be that the accused persons by putting up this *bund* were asserting a right to the exclusive use of this water, and preventing the public or the complainant from having lawful enjoyment thereof; but whether the case come under the 308th section or the 22nd Chapter of the Code of Criminal

Procedure, that would not justify the Magistrate from refusing to enquire into the charge under section 431 of the Penal Code. 1870
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I think, therefore, that we must set aside the order of the Magistrate of the district, and direct that the case be enquired into, the evidence of the complainant's witnesses taken, and an order passed according to law.

Before Mr. Justice Kemp and Mr. Justice Glover.

QUEEN v. GURU CHARAN CHANG AND OTHERS, PRISONERS (APPELLANTS.)* 1870
Nov. 19.

Rioting—Culpable Homicide—Penal Code (Act XLV of 1860), ss. 148 and 304.

The prisoners who, in resisting a sudden attack made upon them by certain persons, for the purpose of cutting their crop, and when they had no time to complain to the Police, inflicted a wound on one of them with a bamboo, from the effects of which the man died, were convicted by the Sessions Judge, under sections 148 and 304 of the Indian Penal Code.

The High Court acquitted the prisoners, holding that the force used, or the injuries inflicted, were not such as to exceed their right of private defence of property.

Baboo *Girija Sunhar Muzumdar* and *Debender Chandra Ghose* for the prisoners.

Baboo *Jagadanand Mookherjee* for the Crown.

KEMP, J.—This is an appeal on behalf of Guru Charan and others, who have been convicted under sections 148 and 304 of the Indian Penal Code, and been sentenced to three years' rigorous imprisonment under each of these sections, or in all to six years' rigorous imprisonment. It is very clear, from the evidence of the prosecution, that the land in dispute belonged to Guru Charan; that he had sown a crop upon it in Falgun; that the opposite party came in force and proceeded to cut the crop; and on Guru Charan and the other prisoners who were residents of the same village remonstrating and protesting against the cutting of the crop, the head man of the opposite party directed the lattials on his side to beat Guru Charan. Guru Charan and his party exercising the right of private defence of property appeared to have hastily armed themselves with sticks and bamboos taken from *machâns*, and to have opposed the cutting of the crops; and in the riot which took place, two men, Massim and Haranulla, on the side of the aggressing party, were wounded. It appears that Massim had a wound in the leg which mortified; and an amputation being found to be necessary, the limb was amputated, and the patient was going on well for some time, when lock-jaw set in, and he died. We think that, looking to the fact which is supported by the evidence of all the witnesses for the prosecution, that the crop was raised by Guru Charan; that the attack on the part of the opposite party was a sudden one; that Guru Charan had no time to have recourse to the Police or to the authorities for protection of his property; that he, Guru Charan, acting under the right of private defence of property, was justified in resisting a forcible attempt to cut and carry away his crop; and that, in carrying out that right of private defence, and in the riot which ensued, a man on the side of the opposite party

* Criminal Appeal, No. 698 of 1870, from an order of the Sessions Judge of Dacca, dated the 13th August 1870.

1870 was wounded, and subsequently died, as stated above, from the effects of lock-jaw. Taking all these circumstances into consideration, and with reference to the ruling in *The Queen v. Sachee* (1), we think that the prisoners were at the time of the riot in actual peaceable possession of the land in dispute; that the acts of the opposite party, in attempting to cut the crops by force, were clearly illegal; that these acts were such acts as the prisoners had a right to resist; and that, although force was used in carrying out that resistance, we do not think that that force or the injuries inflicted upon Massim were such as to exceed the right which the prisoners had, the right to exercise in defending their property.

We therefore acquit the prisoners, and direct that a warrant be issued for their immediate release.

Before Mr. Justice Bayley and Mr. Justice E. Jackson.

1870 RAMDHAN MANDAL AND ANOTHER (DEFENDANTS) *v.* RAJBALLAB PARAMANIK AND OTHERS (PLAINTIFFS).*

December 1.

Evidence—Witnesses—Practice.

It is not right for the lower Court to select five out of twenty witnesses tendered for examination. It is the bounden duty of the Judge to receive all the evidence tendered, unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of the case, or otherwise to obstruct the ends of justice.

Baboo Bhawani Charan Dutt for the appellants.

Baboo Nilmadhab Sen for the respondents.

BAYLEY, J.—After hearing the pleaders on both sides, we are clearly of opinion that in this case it was the duty of the lower Appellate Court not to have selected five out of the twenty witnesses required to be summoned by the defendant, but to have called and examined all of them. It has been repeatedly ruled that, unless the object of a party, in summoning a large number of witnesses, clearly appears to be to impede the adjudication of the case, or otherwise obstruct the ends of justice, it is the bounden duty of the Court to receive all the evidence tendered. In this case the Judge states that the defendants' pleader said that his witnesses were in attendance six times, and their examination deferred on frivolous grounds eleven times. There are clear traces on the record of the witnesses having been present from time to time, and not examined. It is not to be expected that, if there is any unnecessary delay on the part of the Court, a party should be bound to go on attending from time to time, and harassed as apparently the witnesses have been in this case. We think that, under all the circumstances, it was imperitive on the lower Appellate Court in this case to examine all the witnesses whom the defendant wanted to be examined.

Both these cases therefore must go back to the Judge, in order that he may call and examine the remaining fifteen witnesses cited by the defendant, and upon their evidence pass such decision as he thinks just and proper in the case.

JACKSON, J.—I concur in the remand for examination of witnesses.

* Special Appeals, Nos. 1128 and 1129 of 1870, from the decrees of the Judge of Berbboom, dated the 16th March 1870, affirming a decree of the Moonsiff of that district, dated the 25th November 1869.

Before Mr. Justice Kemp and Mr. Justice Ainslie.

MAFIZUDDIN, alias ARSHAD ALI CHOWDHRY, (PLAINTIFF) v. KARIMUNISSA BIBI (DEFENDANT).*

1870
Nov. 29.

Act XXVI of 1867—Valuation of Suit—Jurisdiction.

An Appellate Court has no power to set aside a decision arrived at by the Court of first instance as to the valuation of the property in suit (1).

Mr. R. E. Twidale and Moulvi Syad Marhamat Hossein for appellant.

Baboo Debendra Narayan Bose and Girish Chandra Ghose for respondent.

The judgment of the Court was delivered by

AINSIE, J.—The question raised by the special appellant in this appeal is whether the Subordinate Judge had the power to interfere with the finding of the Moonsiff on the point of valuation of the property in suit? The pleader for the special appellant relies upon Note B., under Article 11 of Schedule B. of Act XXVI of 1867 in which it is said “that the Court may, either of its own motion, or on the application of any party to the suit, issue a commission to any proper person, directing him to make such local or other investigation as may be necessary, and to report thereon to the Court, and the decision of the Court as to the market-value or annual net profits shall be final.” It appears to us that, with reference to the terms of the Act quoted above, it was not open to the Subordinate Judge to try the question of valuation, and that we are, therefore, bound to set aside his judgment on that point, and to remand the suit for trial on the merits. It appears that, in this case, the first Court has proceeded precisely in the manner pointed out in the note in question, by deputing a Civil Court Ameen to hold a local investigation as to the annual profits and market value of the land in suit, on the question raised by the defendant in the suit as to the jurisdiction and proper stamp for the plaint.

The costs will follow the result.

* Special Appeal, No. 1134 of 1870, from a decree of the Subordinate Judge of Dacca dated the 23rd April 1870, reversing a decree of the Moonsiff of that district, dated the 5th July 1869.

(1) See *Syed Wajid Ali Khan v. Lala Hanuman Prasad*, 4 B. L. R., A. C., 189; *Uma Sankar Roy Chowdhry v. Syud Munsur Ali Khan Bahadur*, 5 B. L. R., App., 6; *Sheo Gobind Rawut v. Abhai Narayan Singh* *id.*, 17; and *Emauddin Khan v. Ramkisore Kowar*, *id.*, 30.

1870
Dec. 12.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

ISHAN CHANDRA MOOKERJEE AND OTHERS (PLAINTIFFS) v. LOKENATH ROY AND OTHERS (DEFENDANTS).*

Act XXVI of 1867—Act VIII of 1859, s. 350—Jurisdiction—Valuation of Suit.

Under Act XXVI of 1867, the decision of a Court of first instance, as to the valuation of the subject-matter of a suit, is final.

Baboo *Kalimohan Das, Srinath Banerjee, and Nalit Chandra Sein* for the appellants.

Baboo *Grish Chandra Ghose* for the respondents.

JACKSON, J.—This was a suit for the establishment of the plaintiff's right to certain permanently settled zemindary lands. In the first Court there was a dispute as to the valuation of this suit, the defendant contending that the valuation had been placed below the proper market value by the plaintiff, because he had not ascertained it by calculating ten times the revenue of the whole estate, but only by calculating ten times the revenue of the share which he claimed.

The Moonsiff very properly decided that this contention was wrong under the law, and that the valuation had been properly placed by the plaintiff on a calculation of ten times the revenue of the share which he claimed. The case was afterwards tried upon limitation and upon the merits, and was finally decided.

Both parties are said to have preferred appeals, which were heard by the Subordinate Judge. The Subordinate Judge appears to have taken up the question of valuation. We suppose it was urged before him orally, though it does not appear on the record in the grounds of appeal. On this question, the Subordinate Judge decided that a certain decree of the Principal Sudder Ameen of Tippera, and certain zemindari papers filed by the defendant, proved that the market value of the property was larger than what had been stated by the plaintiff, and as such, the suit should have been brought in the Subordinate Judge's Court. The Subordinate Judge decreed the appeal, and remanded the original suit to the Moonsiff, with orders to return the plaint to the plaintiff, who would present it to the proper Court.

On special appeal, two objections to the decision of the lower Appellate Court are taken: *first*—that the decision of the Moonsiff on the question of the proper valuation of the suit was final; and, *secondly*, that even if there

* Special Appeal, No. 1184 of 1870, from a decree of the Additional Subordinate Judge of Dacca, dated the 22nd March 1870, reversing a decree of the Moonsiff of that district, dated the 31st December 1868.

was an appeal, the Subordinate Judge should not rely upon the decision of the Tippera Court, in which the question of valuation was nowhere decided, and that the lower Court should not rely upon the papers of one side in the suit without going into the case and ascertaining how far such papers were reliable.

It seems to us that both the grounds of appeal are good. The law as regards the valuation of suits, when this plaint was filed, was, as the Subordinate Judge has pointed out, to be found in Act XXVI of 1867, Schedule B, No. 11, Notes A. and B., and more especially in the 3rd portion of Note B. That law lays down that in suits for immoveable property paying revenue to Government, where the settlement is permanent, ten times the revenue so payable shall be taken to be the market value thereof, unless and until the contrary shall be proved.

And the law goes on to say, that, "in order to ascertain the market value, the Court may, either of its own motion, or on the application of any party to the suit," make certain enquiries, "and the decision of the Court as to the market value shall be final."

In this case it seems that no enquiry was made by the Court of its own motion, but that a certain objection was made with regard to the market value in the first Court, and that objection was held to be bad. Under such circumstances, it appears to us that the decision of the Court as to the market value becomes final.

It is argued before us that the decision would only be final, where some commission had issued under the terms of this section, but we do not think that the words of the law are intended to have that effect. The Court is not bound to issue any commission. The Court may make such enquiries as it thinks necessary, but whatever decision has been come to shall be final. Upon the decision so passed there is no appeal to the Subordinate Judge.

Another argument used is, that the Subordinate Judge has authority to interfere in the matter of jurisdiction, more especially as referred to in section 350, Act VIII of 1859. Admitting this to be so, the question as to whether the Moonsiff had jurisdiction or not, must depend upon the decision which he arrived at as to the market value of the property. Had he decided that the market value of the claim was of a value beyond his jurisdiction, the Subordinate Judge might have held that he had no jurisdiction. But having decided that the value was within his jurisdiction, and that decision being final, the Subordinate Judge could not rule that on that point the Moonsiff had no jurisdiction.

We think that the Subordinate Judge's decision should be set aside, and the case be remanded to the Subordinate Judge to decide the other points raised in appeal.

Costs will follow the final result.

1870

ISHAN
CHANDRA
MOOKERJEE
v.
LOKENATH
ROY.

Before Mr. Justice Mitter and Justice Sir C. P. Hobhouse, Bart.

1870
Aug. 26.

LALA RAMDHARI LAL, FOR SELF AND AS GUARDIAN OF PREMPUT LAL,
MINOR (PLAINTIFF) v. JANESSAR DAS AND OTHERS (DEFENDANTS).*

Mortgage.

The following terms in a deed—"that, for the security of the payment of this debt the lands mentioned in this deed are pledged by me; and that until the principal money and the interest recited in this deed are paid off, I would not on any account transfer the property pledged to any body by sale or *hibabilawaz*, or gift or mortgage in any other way"—were held to amount to a mortgage (1).

Baboos *Kalimohan Das* and *Kali Krishna Sen* for appellant.

Baboos *Anukul Chandra Mookerjee* and *Rames Chandra Mitter* for respondents.

THE judgment of the Court was delivered by

MITTER, J.—We are of opinion that the deed in question did create a mortgage in favor of the plaintiff. The terms of the deed itself are clear on the point. It says "that, for the security of the payment of this debt, the lands mentioned in this deed are pledged by me; and that until the principal money and interest recited in this deed are paid off, I would not on any account transfer the property pledged to any body by sale or *hibabilawaz*, or gift or mortgage in any other way."

There can be no doubt whatever that these terms are quite sufficient to create a mortgage, and the property must be therefore held to be subject to all the incidents of a mortgage. The plaintiff would be therefore entitled to have the money advanced by him to the defendant, *Rhit Bhanjan Sing*, realized by the sale of the property.

An objection has been taken by the respondent, under section 348 of the Code of Civil Procedure, *viz.*, that there is no proof on the record to show that the lands mortgaged are identical with the lands claimed in the suit. On this point we have simply to observe that it was distinctly admitted in the Court of first instance that the lands mortgaged were identical with the lands referred to in the plaint, and no objection appears to have been taken against that admission before the lower Appellate Court.

* Special Appeal, No. 904 of 1870, from a decree of the Officiating Judge of Shahabad, dated the 17th February 1870, affirming a decree of the Subordinate Judge of that district, dated the 12th July 1869.

(1) See *Rajkumar Ramgopal Narayan Sing v. Ram Dutt Chowdhry*, 5 B. L. R., 264.

The case must, therefore, go back to the Court of first instance for the determination of the question, whether the mortgage-debt had been satisfied from the usufruct of the property before the plaintiff was dispossessed by the respondent? or to what extent?

1870

LALA RAM-
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JANESSAR DAS.

The Court of first instance will lay down an issue on this point; and after taking evidence from the parties, will then determine what portion, if any, of the mortgage-debt still remains unsatisfied.

We think the plaintiffs are entitled to the costs of this litigation up to this point.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

IN THE MATTER OF THE PETITION OF RYAW PETEE.*

Jurisdiction—Recorder of Moulmein—Amherst.

1870

Nov. 30.

Under Act XXI of 1863, the Recorder of Moulmein has no power to order execution to issue on a judgment of the late Court of the first class Assistant Commissioner of the district of Amherst.

An order was passed by the Recorder of Moulmein, on the 25th May 1869, in a certain suit, wherein Naga Yan and Naga Shevay Sing were plaintiffs, and Ryaw Petee was defendant, directing issue of execution against the defendant on a judgment of the late Court of the first class Assistant Commissioner of the district of Amherst, dated 3rd January 1860.

Upon the petition of the defendant, the High Court issued a rule *nisi* to show cause why the order of the Recorder of Moulmein, directing execution to issue against Ryaw Petee on the judgment of the first class Assistant Commissioner of Amherst, should not be set aside.

Mr. Sanderson showed cause.

Mr. Montriou in support of the rule.

The judgment of the Court was delivered by

JACKSON, J.—We think it quite clear that the Court of the Recorder in Moulmein had no jurisdiction to issue execution upon a decree made by the late Court of the Town Assistant Commissioner. The Recorders' Act (XXI of 1863) contains no provision such as is to be found in the High Courts' Act (1), and other Acts of the kind, enabling the Court of the Recorder to deal with suits or proceedings previously pending in any other Court, or enabling that Court to continue, in the way of execution or otherwise, any matters commenced or decided in other Courts. The learned Recorder assumes that the

* Rule *nisi*, No. 774 of 1870.

(1) 24 & 25 Vict., c. 104.

1870 extinct Court of the Town Assistant Commissioner had been absorbed in the Recorder's Court, but there appears to be no foundation for this opinion. It is probable that the decree upon which execution has not been had may afford Ryaw Petee, a cause of action of which the Recorder may take cognizance, but that is a matter we need not decide at present. We think that the order complained of must be set aside, and the rule made absolute with costs.

Before Mr. Justice Kemp and Mr. Justice Paul.

1870 GURU DAS NAG AND ANOTHER (PLAINTIFFS) v. MATILAL NAG AND OTHERS
Dec. 15. (DEFENDANTS.)*

Hindu Law—Next Heir of a Hindu who has disappeared—Cause of Action—Declaration—Limitation.

A., a Hindu infant, disappeared and had not been since heard of. In a suit brought within twelve years from the date of his disappearance, by the next heir, for a declaration of right, and alleging waste by those in possession and an apprehension that, if the infant should not return within twelve years, he (the plaintiff) would be barred by the Law of Limitation,

Held, that there was no cause of action.

This was a suit instituted on the 2nd March 1869, for declaration of right of inheritance to certain land and buildings, on the ground that one Biressar Nag, a minor, who was entitled to the property, disappeared in Baisakh 1269 (1862); that the defendants, who were the great-grandsons of the grandfather of Biressar, were in possession of the property, and were committing waste; that the plaintiff, who was a nearer relative of Biressar, would be entitled to the property on the death of Biressar; that in order to preserve the estate, and from an apprehension that, in case the minor should not return within twelve years, the plaintiff might be barred by lapse of time, the present suit had been brought.

The defence set up was (*inter alia*) that the plaintiff had no cause of action before the expiry of twelve years from the date of the minor's disappearance.

The Moonsiff held that, if any one declared himself to be the heir of a person who had disappeared, and sought to obtain possession of the property left by him, he could not advance his claim to the property so long as the person so disappearing was not considered dead according to the Hindu law; that until a period of twelve years had elapsed from the date of such disappearance, he could not be considered dead; and citing *Janmajay Mazumdar v. Keshab Lal Ghose* (1), dismissed the plaintiff's suit, on the ground that the plaintiff had no cause of action.

On appeal, the Subordinate Judge confirmed the decree of the lower Court.

* Special Appeal, No. 1246 of 1870, from a decree of the Judge of Small Cause Court vested with the power of a Subordinate Judge of Hooghly, dated the 4th April 1870, affirming a decree of the Moonsiff of that district, dated the 21st February 1870.

The plaintiff appealed to the High Court, on the ground that the suit would lie, as it was only for protecting the property of the minor from waste, and not for possession ; and as it was brought in order to save the plaintiff's right from being barred by lapse of time.

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v.
MATILAL NAG.

Baboo *Abinas Chandra Banerjee* for the appellant.

Baboo *Gopal Lal Mitter* for the respondents.

The judgment of the Court was delivered by

KEMP, J.—This was a suit on the part of the plaintiff, special appellant, alleging that one Biressar Nag disappeared in 1862, and has not been heard of since. The property in dispute appears by the plaint to have descended from Ramtanu Roy to Kaliprasad Nag, and from Kaliprasad Nag to Biressar, who is said to be a minor at the present time. The plaint goes on to allege that the great grandsons of Kaliprasad Nag are in possession of the property ; that they have broken down, and otherwise destroyed the family houses, and that they are about to alienate the estate. The plaintiff, therefore, partly to preserve the *corpus* of the estate of the minor intact, and partly from a fear that, if the minor do not turn up within twelve years, he, the plaintiff, may from that circumstance be barred by the Statute of Limitation, institutes the present suit. Both Courts have found that the suit will not lie. In this Court, section 3 of Act XL of 1858 has been quoted, and it has been pressed upon us that the plaintiff is entitled to be heard as next of kin, or at all events, as claiming a right to have charge of the property in trust for the minor. It is further contended that the property is of small value, and the Court may allow the plaintiff to institute this suit on behalf of the minor, although a certificate of administration has not been granted.

We think that this suit was not brought on that footing at all; for had it been so, no doubt the Court would have put the plaintiff to some terms with reference to costs. The plaintiff has come into Court without a cause of action, and the lower Courts were perfectly correct in dismissing the suit.

The special appeal is dismissed with costs.

Before Mr. Justice E. Jackson and Mr. Justice Mitter.

LALMOHAN SING (PLAINTIFF) v. TRAILAKHANATH GHOSE AND OTHERS
(DEFENDANTS).*

1870
Dec. 14.

Act X of 1859, s. 24—Assignee of Landlord—Gomasta.

An assignee of a landlord can sue a gomasta, employed by the latter, for the recovery of monies received by the gomasta in the course of his employment, under section 24 of Act X of 1859.

* Special appeals, Nos. 658 and 659 of 1870, from the decrees of the Judge of Beerbhoom, dated the 17th January 1870, reversing the decrees of the Moonsiff of that District, dated the 30th September 1869.

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Baboo Mohinimohan Roy for appellant.

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Baboo Mahendra Lal Shome and Kedarnath Chatterjee for respondents.

MITTER, J.—The only question to be determined in this case is, whether the assignee of a landholder can maintain a suit against a gomasta employed by the latter, for monies received by the gomasta in the course of his employment.

I am of opinion that this question ought to be answered in the affirmative.

Section 24, Act X of 1859, runs as follows:—

“Suits by zemindars and other persons in the receipt of rent against any agent employed by them in the management of land, or in the collection of rents, &c., &c., shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of this Act and shall be cognizable by no other Court.”

The words “suits by zemindars or other persons in the receipt of rent” together with the words “employed by them” which come immediately afterwards, might, at the first sight, appear to justify the contention that the operation of the section was intended to be confined to those cases only in which the plaintiff himself is a *de facto* landholder, and the person sued is the agent who was employed by him directly in the collection of rents. But on closer examination it will be found that such a construction would not be a proper one.

I do not think that it was intended by the Legislature, that the right of suing under section 24 should be confined to the employers only, and not extended to their legal representatives.

The object of the section was to define a particular class of suits, and to appoint a particular tribunal for their trial. For the fulfilment of this object, it was not necessary for the Legislature to make any special reference to the legal representatives of the parties expressly mentioned therein; inasmuch as such representatives would be entitled, according to the general principles of law, to stand in the precise position occupied by their predecessors. If a landholder is competent to sue his gomasta under section 24, the right of his legal representative to sue under that section would seem to follow as a matter of course. The cause of action would survive to the legal representative if he happens to be the heir, or pass to him by transfer, if he is an assignee; and as that cause of action is cognizable by the Collectors only, the Court of the Collector would be the proper Court to try the suit in either case.

The contrary interpretation would be productive of the greatest confusion.

If the assignee of a landholder is not in a position to maintain a suit under section 24, the Civil Court would be bound to entertain his claim; for he must have his remedy somewhere. But what period of limitation would be applied to such a suit when it is brought in the Civil Court? Section 33 of Act X of 1859 says, that suits, under section 24, may be brought at any time during the

continuance of the agency, or within one year from the termination thereof. But if the assignee of a landholder cannot be permitted to sue under section 24, the provisions of section 33 would be necessarily inapplicable to the suit brought by him in the Civil Court; and this latter suit must be therefore governed by Act XIV of 1859. This Act, however, has not made any special provision for such a class of suits, and we must therefore apply to them the six years' rule of limitation prescribed by clause 6 of section 1 of that Act. At any rate, it has been held by a Full Bench decision of this Court in *Poulson v. Madhusudan Pal Chowdhry* (1) that the periods of limitation prescribed by Act X of 1859 have not been altered or modified in any manner by Act XIV of 1859; and it is clear that any period of limitation, which we might select from the latter Act, would be different from that laid down in the 33rd section of Act X of 1859. Can it be contended for one moment, that it was ever intended by the Legislature that the period of limitation would vary in the two suits, namely, the suit brought by the landholder himself in the Court of the Collector, and the suit brought upon the same cause of action by his legal representatives against the same defendant in the Civil Court?

Several cases have been decided by this Court, in which it has been held that the heirs and other legal representatives of the agents described in section 24 of Act X of 1859, as well as those of their sureties, can be sued under that section in the Revenue Court. These cases, no doubt, are not conclusive upon the point now under our consideration. But they are based upon the same principle of interpretation for which the plaintiff has been contending in this case. The heirs and other legal representatives of the agents or of their sureties have not been specifically mentioned in section 24. But if those persons can be sued under that section, there seems to be no reason why the right of maintaining such suits should not be extended to the heirs and other legal representatives of the "zemindars and other persons in the receipt of rents."

Suppose, for instance, that a zemindar dies, leaving his estate to his heir or to a devisee. Can it be contended for one moment, that the heir or devisee would be obliged to sue his ancestor's gomasta in the Civil Court, when it is clear that the ancestor himself could have sued that very gomasta in the Collector's Court, at any time before his death, provided that the claim was not barred by the provisions of section 33 of Act X of 1859? Or that the suit of the heir or devisee would be subject to a different rule of limitation, although it may be based upon the same cause of action?

Suppose again, that the zemindari of a zemindar is sold for arrears of Government revenue, immediately after he has ascertained that the gomasta employed by him in the collection of the rents of that zemindari, has embezzled a large sum of money, in the course of his employment. Can it be argued that the zemindar would not be permitted to sue under section 24 of Act X

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(1) B. L. R., Supl. Vol., 101.

1870 of 1859, merely because he is no longer a zemindar in the actual receipt of rent?

LALMOHAN SING v. I see no reason whatever for adopting such a narrow construction of the section; and if we extend the operation of that section to suits brought by the heirs or devisees of landholders, there seems to be no ground for holding that it is not to be extended to their assignees also.

For the above reasons, I would reverse the decision of the lower Appellate Court, and remand this case to that Court in order to try it upon its merits. The costs of the litigation up to this stage ought to abide the ultimate result.

This judgment will govern special appeal No. 659 of 1870.

JACKSON, J.—I also think that these cases should be remanded to the lower Appellate Court to be tried on the merits, the costs of these appeals to this Court and of the lower Appellate Court to abide the final result of the case.

Before Mr. Justice Phear and Mr. Justice Paul.

1870
Dec. 14.

ROBERT AND CHARRIOL v. ISAAC.

Damages—Remoteness.

The plaintiffs chartered a ship of the defendant; and by the charter-party it was stipulated, that the said ship, being tight, staunch, and strong, should receive from the plaintiffs a full cargo of rice or grain; and being so loaded, should therewith proceed to St. Denis, the freight to be paid there on right delivery of cargo: the penalty for non-performance of the charter-party was to be the estimated amount of freight. The plaintiffs began to load on May 3rd, and continued doing so until June 10th, having then shipped very nearly the full cargo; they then stopped loading in consequence of a notice from the defendant that the ship was leaking; in consequence of the leakage, the cargo had to be shifted, and a portion of it, found to be damaged, had to be replaced after the leak was stopped. The charges of shifting the cargo and the cost of the cargo substituted were paid by the defendant. Considerable delay occurred in consequence of the leak, and the loading was not completed until the end of July. On May 28th, when the plaintiffs had loaded a portion of the cargo, and had obtained bills of lading, they drew a bill of exchange at 60 days for the value of the cargo covered by the bills of lading on their agent at St. Denis, which they sold to the Comptoir d'Escompte de Paris, hypothecating the cargo for the amount of their draft. Other similar drafts were subsequently drawn and sold. When the plaintiffs received notice of the leakage, they, in anticipation of the delay which would occur in consequence, arranged with the Comptoir d'Escompte that the bills should not be forwarded forthwith, but should be held by the Comptoir d'Escompte, and renewed by the plaintiffs on the completion of the loading, the plaintiffs paying interest on the bills in the meantime at 9 per cent. per annum. On renewing the bills, the plaintiffs, in consequence of the difference in the rate of exchange, were out of pocket rupees 400. In an action against the owner for breach of the charter-party in not supplying a ship tight, staunch, and strong, as stipulated, the plaintiffs sought to recover, as damages arising out of such breach of the charter-party, the interest paid by them on the drafts in pursuance of their arrangement with the Comptoir d'Escompte, the sum they had to pay on renewing the bills, a further sum for interest on bills they could not negotiate in consequence of

not being able to obtain bills of lading from the defendant, and the value of the stamps on the bills which had been cancelled in pursuance of the plaintiffs' arrangement with the Comptoir d'Escompte. Held that such damages were too remote.

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THIS was a case referred, for the opinion of the High Court, by the Officialating First Judge of the Small Cause Court. The case was referred as follows :—

"The plaintiffs, Messrs. Robert and Charriol, chartered the defendant's ship *Colway* under a charter-party, dated the 11th March 1870, in which it was agreed that the said ship, then lying in the river Hooghly, being tight, staunch, and strong, should receive on board from the charterers a full cargo of rice or grain; and being so loaded, should therewith proceed direct to St. Denis, Réunion, for orders, to discharge there, or at three other ports on that island; freight to be paid there on right delivery of cargo. It was also agreed that thirty running days commencing from the date of notice being given to the plaintiffs of the ship being ready to receive cargo, should be allowed for loading, and that the cargo should be sent alongside as required. It was further agreed, that the penalty for the non-performance of the charter-party should be the estimated amount of freight. In the present action the charterers sue the owner for damages arising through breach of the charter-party. By a letter dated 3rd May, the defendant notified to the plaintiffs that the ship was ready to receive cargo. The plaintiffs then began to send cargo on board, and continued to do so, from time to time as required, up to the 10th June, when, in consequence of the ship being found to be leaking, they received notice to stop loading. At the time when this notice was given, nearly the whole cargo had been shipped. In consequence of the leakage of the ship, the cargo had to be shifted, and a portion of it, 736 bags of rice, found to be damaged, had to be replaced after the leak was stopped. The cost of shifting the cargo was paid by the defendant, as was also the cost of the 736 substituted bags of rice, together with the charges of its shipment. Some delay occurred in shifting the cargo and stopping the leak, and the loading of the ship was not finally completed until the end of July.

"On the 28th May, when the plaintiffs had loaded a portion of the cargo, and had obtained bills of lading, they drew a bill of exchange at 60 days for the value of the cargo covered by the bills of lading, on their agent at St. Denis, which they sold to the Comptoir d'Escompte de Paris, hypothecating the cargo for the amount of their draft. Other similar bills of exchange were in like manner drawn and sold on the 4th and 8th June.

"After the plaintiffs learned that the ship was leaking, and perceived that she might be delayed in, and perhaps prevented from, proceeding on her voyage, they requested the Manager of the Comptoir d'Escompte not to forward the drafts drawn on their Réunion agents, being apprehensive that, if these drafts should be forwarded without the cargo, their agents might be put to inconvenience in meeting them. It was accordingly arranged between the plaintiffs and the Comptoir d'Escompte that the drafts should not be sent

1870 forward, but should be renewed by the plaintiffs when the loading of the cargo was completed, the plaintiffs in the meanwhile paying interest upon them at the rate of 9 per cent. per annum. In accordance with this arrangement, a sum of rupees 1,102-3 was in fact paid by the plaintiffs to the Comptoir d'Escompte as interest on the said drafts.

" When the drafts were renewed on the completion of the loading of the ship, the rate of exchange was less favorable to the plaintiffs by two centimes in the rupee than it had been when the original drafts were drawn. Owing to this difference in the rate of exchange, the plaintiffs were out of pocket rupees 401-0-9 in renewing the drafts.

" The plaintiffs now seek to recover from the defendant the sums above mentioned as damages arising out of the defendant's breach of the charter-party in not supplying a tight ship. They likewise claim to be paid a sum of rupees 174-2-3 as the amount of interest due on sundry drafts which they could not negotiate with the Comptoir d'Escompte, inasmuch as the bills of lading for the cargo, for the value of which the said drafts were made, had been withheld by the defendant from June 8th, when the leakage of the ship was ascertained, down to the 30th July. The plaintiffs further claim a sum of rupees 55, being the value of the stamps on the drafts which were cancelled in accordance with the arrangement above set forth, made between the plaintiffs and the Comptoir d'Escompte.

" The above sums make up a total of rupees 1,752-14-6, but the plaintiffs in bringing their claim abandon all excess, and sue for the sum of rupees 1,000 only.

" It appeared in evidence—

" 1st.—That it is not an invariable rule of merchants to draw against their shipments.

" 2nd.—That the plaintiffs did not give notice to the defendant, prior to the date of contract, that it was their intention to draw upon their agents at Réunion, and to sell their bills, hypothecating the cargo in security.

" 3rd.—That the rate of freight was lower at the date when it was ascertained that the ship was leaking, than it had been at the time when she was chartered.

" The plaintiffs' case is, that the course followed by them in drawing, negotiating, and renewing their bills, and hypothecating the cargo, was in accordance with ordinary mercantile usage, and was the only safe and economical course to follow; and that the loss which they have sustained in the shape of payments, by way of interest on their drafts, difference of exchange, &c., are damages naturally and necessarily flowing from the defendant's breach of contract.

" The defendant, on the other hand, contends that the damages claimed by the plaintiffs are too remote to be recoverable, not being such as can reasonably be supposed to have been in the defendant's contemplation at the time he

contracted as likely to arise from a breach of the contract, inasmuch as no notice was then given that bills were to be drawn and negotiated, and renewed in the event of the ship being delayed in proceeding on her voyage. The defendant likewise contends that the plaintiffs' remedy, on discovering the defect in the ship, was to have transferred their cargo to another vessel, when they would have been entitled to be repaid the expense incurred in the transhipment of cargo, and any difference in the rate of freight in excess of that fixed by the original charter-party; but that having elected, after the state of the defendant's ship was ascertained, to send their cargo by it, they could have no claim against the defendant beyond that practical injury to the cargo by leakage, which claim had been already satisfied.

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"I was of opinion that, as no notice had been given to the defendant by the plaintiffs of the course of dealing which they intended to follow, or that they would hold him liable in case of delay for the interest accruing on their drafts, they cannot claim to be paid interest and the other costs incurred in respect of the renewal of their drafts. I was also of opinion that the plaintiffs' claim for loss sustained by reason of the rate of exchange being higher when the drafts were renewed, than at the time when they were originally drawn, was not maintainable, inasmuch as the parties could not have known beforehand that the rate of exchange would rise. It might have fallen, and the plaintiffs would then have had the advantage of the difference. I also held that the plaintiffs' claim, in respect of the interest on drafts which they could not negotiate by reason of bills of lading being withheld until the loading of the ship was completed, could not be maintained, the defendant having no notice of the plaintiffs' intention to hold him chargeable therefor.

"I was not referred to any case in which a similar claim to that now brought has been considered. The plaintiffs' counsel cited *Prehn v. The Royal Bank of Liverpool* (1) as an authority supporting his contention, but the cases seem to me clearly distinguishable.

"In giving judgment in the case I was requested by the plaintiffs to reserve, for the opinion of the High Court, the question whether, on the facts of the case as above stated, I am right in holding that the damages which the plaintiffs seek to recover are too remote. I have accordingly the honor to refer this question for the consideration of the Judges of the High Court."

Mr. Macrae, for the plaintiffs, contended that the damages sustained by the plaintiffs were damages arising so far directly from the breach of the charter-party by the defendant as would entitle the plaintiffs to recover them in the present action. The owner, in authorizing the master to deliver the bills of lading he did, must have known that such bills of lading would be negotiated. He cited *Black v. Baxendale* (2) and *Prehn v. The Royal Bank of Liverpool* (1).

Mr. Graham, for the defendant, was not called upon.

(1) 5 L. R., Exch., 92.

(2) 1 Exch., 410.

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The opinion of the High Court was delivered by

PHEAR, J.—We are asked in this case to give an opinion whether or not, on the facts of the case as therein stated, the learned First Judge of the Small Cause Court was right in holding that the damages which the plaintiffs seek to recover were too remote.

The plaintiffs as charterers sued the owner of the ship to recover damages for breach of the charter-party; and the breach of the charter-party seems to be this, *viz.*, that the charter-party stipulated that the ship should be tight and staunch; whereas, after the operation of loading had commenced and been continued some time, the ship was found to be leaking, the loading was stopped, the cargo had to be shifted, and some portion of it was found to be damaged. But the consequence of this breach of the charter-party for which the plaintiffs sue is not one of the results which I have just now mentioned; it is something quite different, and is stated as follows (*reads the reference from "On the 28th May * * * made between the plaintiffs and the Comptoir "d'Escompte"*). Now it is obvious that the damages which these sums represent are not damages which necessarily follow from the circumstance that the ship was not staunch and strong, and they therefore cannot be fastened on the owner of the ship as a consequence of his breach of the charter-party in this respect, unless some other fact be added to connect them with it. As I understand the case which has been stated to us, the plaintiffs say that the fact of the ship not being tight, staunch, and strong, caused a delay in the loading, and that it was a necessary consequence of this delay that the charterers should be obliged to stay the forwarding of any drafts which they might have drawn against the cargo, and to renew them if the time of the renewing of those drafts expired, or threatened to expire, during the delay, and therefore that the owners of the ship are bound to pay to the charterers all the costs which have resulted from their taking this course.

Now it seems to me that there is nothing whatever stated, from the beginning to the end of the case, which would justify the inference that the owners of the ship executed the charter-party in view of a course of proceedings of this kind; and there is certainly nothing in a contract of charter-party generally from which the owners must be presumed to expect that the charterer *quâ* charterer would, in the ordinary course of business, be involved in the transactions out of which the plaintiffs' losses arose. I will say further, that there is nothing in the case to show that there was any necessity, or even expediency, other than the circumstances of his own affairs, which should oblige the charterer, after he had actually drawn against the cargo, from delaying to forward his bills and shipping documents to their destination. Of course, whatever he might do in this way he could do as shipper, and not simply as charterer; and I apprehend that nothing is more common than for shippers to send their drafts and shipping documents to their destination before the ship, on board which the cargo is loaded, is ready to leave the port. In short, I can find nothing in the case stated to us to indicate the slightest ground upon

which the owner of the ship should be made liable to recoup the charterer the particular losses for which the plaintiffs here sue, as being in any way a proximate consequence of the temporary want of seaworthiness of the ship. The plaintiffs' suit will be dismissed with costs of the Small Cause Court, and the costs of this reference on scale No. 2.

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Attorneys for the plaintiffs: Messrs. *Grey* and *Sen.*

Attorneys for the defendant: Messrs. *Pittar* and *Camell.*

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

RAM DAYAL SING (DEFENDANT) *v.* BABOO LATCHMI NARAYAN (PLAINTIFF).*

Bhaoli Tenure—Act X of 1859, ss. 3 & 4.

1870
Dec. 1.

Semble.—A tenant who has paid at the same *bhaoli* rate, i. e., in kind, for a period of 20 years, is entitled to the presumption of section 4, Act X of 1859, and to exemption from enhancement under section 3.

Moulvie *Mahomed Yusaf* for appellant.

Baboo *Srinath Das* for respondent.

JACKSON, J.—The plaintiff in this suit is the zemindar. He alleges that the defendant holds within his estate a quantity of land amounting to 80 bigas or thereabouts, which is held partly by the *nakdi* or cash rent, and partly upon the *bhaoli* principle, that is, the principle of division of crops between the landlord and tenant; and then he sets forth that the division of crops and the amount to be paid causing continual disputes between the landlord and tenant, he is desirous of having the rate once for all fixed and determined in the way of cash payment; that he has accordingly tendered a potta at a rate which he considered reasonable, and called upon the defendant to give him a kabuliat; and that the defendant having refused to comply with his demand he brings this suit.

The defendant's statement varies much from that of the plaintiff in respect of the proportion at which the land has been held *nakdi* and *bhaoli*, and he alleges that he has held by far the greater portion of the land at one uniform rate of division of crops for a number of years; and he therefore claims the benefit of section 4, Act X of 1859, and of the exemption provided by section 3 of the Act.

The Deputy Collector who tried the suit found the plaintiff entitled to a kabuliat from the defendant, not at the rate which he claimed, but at a somewhat lower rate; and if the finding of the Zillah Judge had been in accord-

* Special Appeal, No. 1149 of 1870, from a decree of the Judge of Patna, dated the 11th March 1870, reversing the decree of the Deputy Collector of that district, dated the 3rd October 1869.

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ance with that of the first Court, we should have been bound to reverse the judgment on that ground, in conformity with the ruling of the Full Bench in *Golam Mahomed v. Asmat Ali Khan Chowdhry* (1), inasmuch as the plaintiff could not be entitled to recover a kabuliati at another rate than that at which he had tendered the potta; but the case coming on appeal by both parties before the Zillah Judge, the Judge was of opinion that the plaintiff was entitled to the rates which he claimed, and he therefore gave the plaintiff a decree for a kabuliati at the rate claimed.

The grounds of special appeal argued before us have been two. In the first place, that in the circumstance of the defendant's holding, namely, of his having held *bhaoli* for a number of years, the plaintiff would not be entitled to ask for a kabuliati at *nahdi* rates from him at all; and, secondly, that the evidence on which those rates were assessed was not such as the Judge ought to have proceeded upon.

In respect of the Judge's ruling upon the first point, the pleader for the respondent has referred us to *Mahomed Yacoob Hossein v. Sheikh Chowdhry Wahid Ali* (2), and also to another case of *Thakoor Pershad v. Nowab Syud Mahomed Baker* (3), in which that first ruling is followed. There the learned Judges appear to have held that payment for a number of years at one uniform *bhaoli* rate would not be a payment at an unchanged rate such as would protect a ryot under the provisions of section 3, Act X of 1859.

Now if it were necessary for us to decide the case on this question, I confess I should have considerable difficulty in assenting to the rulings in these cases, because, if the rulings are correct, the Legislature must have intended that ryots, who have held land upon one principle, that is to say, upon one fixed ratio of division of the produce of their land with the landlord, from the time of the Permanent Settlement, would be entitled to no protection whatever, but would, after these 80 or 90 years, be subject to a suit for enhancement or for commutation of their rent at such money rates as the landlord might be enabled to prove.

I cannot believe that the Legislature could have intended any such injustice to ryots in those parts of the country where the *bhaoli* system is prevalent, as it is in many parts of Behar. In those parts of the country there being no such thing as a rate of rent in money, ryots holding from the time of the Permanent Settlement would have no protection whatever unless the Legislature meant to include under the words "rate of rent" the mode or principle of *bhaoli* payment. But it is not necessary for us to determine the case upon this point; if it had been so, I should have been inclined to propose a reference to a Full Bench.

Upon the second question we have to consider whether the Judge had before him such evidence as would justify a finding in favor of the plaintiff. I think it quite clear that this suit must be dealt with as a suit for enhancement. As

(1) Case No. 1175 of 1867; March 19th, 1868. (3) 8 W. R., 170.

(2) 4 W. R., Act X Rul., 23.

the plaint stands it really seems to amount to no ground of action at all. What the plaintiff says is, that as the mode of payment at present in force leads to perpetual disputes, I have thought it fit to commute the ryot's rent into a fixed money payment, and tendered him a potta at that rate, and I demand that he should give me a kabuliāt. But it seems pretty clear that the landlord did seek to obtain from the ryot a kabuliāt binding him to pay a money rent in excess of any thing that he had been paying; and the pleader for the respondent admitted that he founded his claim (the defendant being a ryot having a right of occupancy) upon the first clause of section 17, Act X of 1859,—namely, that the rate of rent paid by such ryot is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. Now had the Judge before him any evidence to show that the ryot was paying a rate of rent below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent? It seems to me that he had none at all. The Judge discusses at some length the amount of the produce, but as to the money equivalent he goes entirely upon the kabuliāts or engagements of seven ryots holding in the same blocks of land as the defendant, which he says seem to be *bonâ fide*, and then he proceeds to say:— “If they have agreed to pay a money rent at those rates instead of the previous rent in kind, it must be assumed that the rents are reasonable and in proportion to the produce;” but why was the plaintiff entitled to have this assumed as against the defendant. It appears to me that that portion of the Judge's decision is untenable.

We asked if there was any other evidence to support the finding of the Judge on this point. None was shown, but we were referred to the claim of the defendant for damages in a suit where the landlord had unlawfully attached the crops, and there it is said that the defendant, then the plaintiff, claimed damages 50 per cent. higher than the present statement. But that does not affect the case. The plaintiff when suing for damages would naturally put his case as high as he could, but he made no statement, no admission then, as to what the rates were; and even allowing that the kabuliāts of these seven ryots are good for what they purport to be,—namely, *bonâ fide* admissions of seven ryots in the same blocks of land, they would not amount to what the law prescribes,—namely, evidence that the rate of rent paid by the defendant is below the rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. Does it appear that these ryots had rights of occupancy, or to what class of ryots they belonged, or that they cultivated land possessing similar advantages, or being of the same quality? Nothing of the kind is shown.

On this point, therefore, the plaintiff, having entirely failed to make out his case, could not be entitled to obtain the decree which the Deputy Collector had given him, and, therefore, in reversing the judgment of the Court below, I

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1870 do not think we ought to confirm that of the Deputy Collector, but dismiss the plaintiff's suit *in toto*. The appellant will get his costs.

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GLOVER, J.—I concur in this judgment.

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

1870 IN THE MATTER OF THE PETITION OF THE MUNICIPAL COMMISSIONERS FOR
Nov. 14. THE SUBURBS OF CALCUTTA.*

Slaughter-house License—Act VII of 1865 (B. C.), s. 7.

R. was fined by the Deputy Magistrate for using an unlicensed slaughter-house. He subsequently gave an ijara or lease to A. to carry on the business. R. was prosecuted again for evading the law by "slaughtering cattle or allowing cattle to be slaughtered" without a license. He was fined rupees 200 by the Deputy Magistrate. On appeal to the Sessions Judge, he was acquitted. On the motion of the Municipal Commissioners for a rule to set aside the order of the Sessions Judge, it was held,—

Per JACKSON, J.—That R., by giving a lease to B., had parted with his interest, and had ceased to have any power to allow or disallow the slaughtering of cattle. That Section 7 provides penalties only, and does not describe an offence or relate to a conviction. It is quite another question whether the act itself is an offence, irrespective of section 7, and whether R. could be dealt with as an abettor.

Per MITTER, J. (dissenting).—The Judge has found that the lease was given by R. with the avowed object of continuing the slaughter-house, and admittedly for the express purpose of evading the law; the case therefore falls within the express words of the section, "or allows cattle to be slaughtered."

THIS was a petition presented to the High Court on behalf of the Municipal Commissioners for the Suburbs of Calcutta. The petition stated that one Sheikh Rahamatulla having been convicted by the Deputy Magistrate of Sealdah, for using a place at Narkuldanga as a slaughter-house, without a license from the Suburban Municipality, was sentenced to pay a fine of fifty-one rupees; which sentence was finally upheld by the High Court on the 28th May 1870.

That the said Sheikh Rahamatulla, after the order of the High Court upholding the sentence of the Deputy Magistrate was passed, apparently closed the slaughter-house, but soon after gave an ijara of the same to one Sheikh Abbas Ali, under a kabuliat expressly authorizing him to continue the slaughter.

That Abbas Ali, notwithstanding that he was warned by the Commissioners from using the house without a license, re-opened his business on the 23rd July 1870.

That upon this the petitioners complained to the Deputy Magistrate against both Sheikh Rahamatulla and Sheikh Abbas Ali, and the Deputy Magistrate

* Criminal Motion, Case No. 198 of 1870.

finding that Rahamatulla was the prime mover and the real owner, and Abbas only a creature of his, fined the said Rahamatulla rupees 200.

That the said Sheikh Rahamatulla appealed against the decision to the Sessions Judge of the 24-Pergunnas, who, upon such appeal, remitted the fine under the following judgment:—

"This case is nearly identical with that of Amanat Ali, appeal No. 251, which I decided on the 29th ultimo. In both cases the proprietors of old-established slaughter-houses having leased them to other parties who have slaughtered cattle in them, have been convicted of using the houses as slaughter-houses. It is sufficiently clear on the evidence that Rahamatulla, being afraid to incur further liability to penalties under the Slaughter-House Act, has evaded the law by making it over to another person, who undertook to continue the use of the slaughter-house. The fact of the lease and the conditions of the lease show that he divested himself of the power of using the house. I am of opinion, as I have already said, that the law making the use of a house punishable, will not apply to the case of one who lets out a house on hire to another person in order that it may be used. I reverse the finding and sentence of the Deputy Magistrate and direct the refund of the fine."

"I observe that the record contains no specific charge, and that there is no specific finding of the offence committed."

Baboo *Anukul Chandra Mookerjee* appeared in support of the petition, and submitted that upon the Judge's own finding, *viz.*,—that Rahamatulla tried to evade the law by making over the management of the house to a creature of his, and that he was the prime mover in the transaction, the Judge ought to have confirmed the sentence of the Deputy Magistrate. He asked for a rule *nisi* requiring the other side to show cause why the order of the Sessions Judge should not be set aside, and that of the Deputy Magistrate restored.

MITTER, J.—I am of opinion that the record of this case ought to be sent for, and that the defendant Rahamatulla should be called upon to show cause why the Judge should not be directed to re-try this case.

It is not disputed that the defendant Rahamatulla is the owner of the slaughter-house in question; nor is it disputed that at the time when Rahamatulla gave a lease of that house to Abbas Ali, the license to use it as a slaughter-house had been revoked by the Municipal Commissioners under the provisions of Act VII of 1865 of the Bengal Council.

If then the Judge has found, as I think he has, that the lease was given by Rahamatulla for a consideration reserved with the avowed object of enabling the lessee to use the house as a slaughter-house, he, Rahamatulla, was clearly guilty of the offence described in the 7th section of the Act.

It is quite clear that the defendant Rahamatulla had the control of the house at the time when he gave the lease to Abbas Ali; and it is admitted that that lease was given for the express purpose of evading the provisions of the law.

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1870 This being so, I think the case falls within the express words of the section
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 PETITION OF convicted under the provisions of that section.
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JACKSON, J.—I am very sorry to be unable to concur with my learned colleague in this matter, because I understand the Judge to have quite clearly come to the conclusion that the defendant Rahamatulla, by giving the premises in lease to Abbas Ali, has parted with his interest in the slaughter-house, and has ceased to have any power to allow or disallow the slaughtering of cattle on those premises. That being so, I think it cannot be said that, under the terms of section 7 of the Act cited, Rahamatulla has slaughtered cattle or allowed cattle to be slaughtered in that slaughter-house. I understand the Judge to mean that if Rahamatulla by giving a lease of the premises with the intention that cattle should be slaughtered therein, and also reserving to himself a profit upon the premises to be so used, could be made liable under the section, then he had brought himself within its terms. I concur with the Judge in both these views.

Section 7 is a section for the levying of penalties; it does not describe an offence, nor does it relate to the conviction for an offence, and so far as that section merely is concerned, a person who was willing to pay the penalties provided by the section, and whose business was sufficiently profitable to enable him to do so, might probably continue the business of slaughtering cattle upon his premises, subject only to the payment of the penalties. It is quite another question, whether, if the act of slaughtering cattle or allowing cattle to be slaughtered in an unlicensed slaughter-house, or a slaughter-house of which the license has been revoked or suspended, is in itself an offence irrespective of the penalties provided in section 7, and, whether, the person who lets those premises for the purpose of being employed as a slaughter-house is liable to be dealt with as an abettor.

The only question in this case is, whether Rahamatulla was liable to the penalties under that section. The Deputy Magistrate, it is true, has found that Rahamatulla in fact had an interest in the slaughter-house, that the lease was a merely colorable and ostensible transaction, and that although the name of Abbas Ali had been used, Rahamatulla was the proprietor; but it is quite manifest from the words used by the Judge that he was not of the same opinion, but that so far as this section is concerned, he thought that Rahamatulla had protected himself from liability to penalty, and had in that way evaded the law. Whether or not it may be possible to take other proceedings against Rahamatulla, is a question which we need not enter into now.

I am of opinion that the Judge meant to find that Rahamatulla was not, within the terms of that Act, a person who slaughtered cattle or allowed cattle to be slaughtered on his premises, and consequently was not liable to the penalty, and therefore I think there is no ground for interfering in this case.

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Before Mr. Justice Kemp and Mr. Justice Mitter.

KRISHNA CHANDRA SHAHA AND ANOTHER (DECREE-HOLDERS) v. OMED ALI
AND OTHERS (JUDGMENT-DEBTORS).*

1870
Dec. 6.

Execution of Decree—Instalment—Limitation.

The decree provided that the amount should be paid in three instalments, and in default of payment of one instalment, the decree-holder was empowered to execute his decree for the whole amount. When the instalment for December 1865 fell due, the judgment-debtor paid a portion, and obtained an extension of time up to December 1866. On application on 21st September 1869 for execution of the decree for the instalments of 1866 and 1867,

Held, that the instalment for 1866 was not barred by lapse of time.

Baboos Kalimohan Das and Jogendra Chandra Bose for the appellants.

Dr. Mendes for the respondent.

KEMP, J.—One Krishna Chandra Shaha obtained a decree against Sheikh Boodhye and others, for a sum of rupees 550, on the 8th September 1865. The decree stipulated that the aforesaid sum was to be paid by instalments: the first instalment of rupees 175 in Paus 1272 (December 1865); the second instalment of rupees 200 in Paus 1273 (December 1866); and the balance of rupees 175 in Paus 1274 (December 1867). The decree, which was on confession of judgment, further provided that the decree-holder was empowered, in the event of the judgment-debtor defaulting in the payment of any one kist, to execute the decree for the whole debt. It appears that, when the kist of Paus 1272 (December 1865) fell due, the judgment-debtor paid a portion of it in cash, and asked for and obtained an extension of time up to Paus 1273 (December 1866). The decree-holder then took out execution of the whole decree, on the ground that there had been a default, and subsequently an arrangement was entered into by the parties, by which an extension was given, and the present application is to execute the decree with reference to the instalments due in 1273 and 1274 (1866 and 1867), and the application being made on the 21st September 1869, it is within three years from the date fixed in the arrangement made,—that is to say, within three years from Paus 1273 (December 1866).

The first Court held that the application was within time, but the second Court, without giving any other reasons for its judgment, relied solely upon *Krishna Kamal Sing v. Hiru Sirdar* (1).

In special appeal it is contended that the decree is not barred, and that the circumstances of this case are not on all fours with those of the case quoted by the lower Appellate Court.

* Miscellaneous Special Appeal, No. 284 of 1870, from an order of the Officiating Judge of Backergunge, dated the 20th May 1870, reversing an order of the Moonsiff of that district, dated the 4th March 1870.

(1) 4 B. L. R., F. B., 101.

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We think that there is no doubt that the decision of the Full Bench is not in point; that decision referred to a case in which a lump sum had been decreed, and it was held that the parties could not substitute an instalment bond for the terms of the original decree, while in this case the decree authorises the decree-holder in the case of a default either to proceed to execute the whole of the decree at once or to recover each instalment separately as it fell due. The decree-holder appears to have adopted the latter means of recovering the amount of his decree, and to have taken steps to keep his decree alive within three years from the date on which the instalment fell due. The present application being within three years from that date, the decree-holder is within time.

The decision of the lower Appellate Court is therefore reversed, and the order of the first Court restored with costs.

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.

1870
Dec. 8.

ASHIAHARI CHOWDHRY (PLAINTIFF) *v.* JAGESWAR KUMAR AND OTHERS (DEFENDANTS).*

Execution of Decree—Instalment-bond—Cause of Action.

In execution of a decree, seven out of nine judgment-debtors, with the consent of the decree-holder, filed an Instalment Bond, agreeing to pay the amount of the decree with interest thereon in two instalments. The decree-holder neglected to take proceedings to keep alive the decree, and his application to execute the decree was disallowed. In a suit brought by the decree-holder against the persons who had executed the instalment-bond for the amount of principal and interest due thereon,

Held, that the suit was maintainable.

THE plaintiff sued to recover the principal and interest, amounting to rupees 103-8, due on a kistbandi, dated the 5th July 1867, which was executed under the following circumstances.

The plaintiff had formerly instituted a money-claim against nine persons, and obtained a decree without interest, by their confession, on the 4th August 1864. Execution of this decree was taken out on the 1st June 1867, and after the service of notice, seven of the judgment-debtors, the defendants in the present case, filed a kistbandi, with the (plaintiff's) decree-holder's consent, on the 5th July 1867, stipulating that the judgment-debt should be paid up by them in two instalments of rupees 25-4-6, one in October, and the other in November 1868, with interest at the rate of 6 pies *per* rupee *per mensem*, and that in case of default, payment should be enforced by execution of the decree. The decree-holder not having taken proper steps, the application for execution was struck off on the 5th July 1867, the date on which the kistbandi was

* Reference, No. 28 of 1870, from the Judge of the Small Cause Court of Midnapore, dated the 20th September 1870.

filed. On the 27th June 1870, the decree-holder again put in an application for execution; but on the authority of *Krishna Kamal Sing v. Hiru Sirdar* (1), it was held by the Small Cause Court that, as no proceedings had been taken within three years from the date of the decree, execution was barred by lapse of time.

The plaintiff now brought a fresh suit for the recovery of the amount due on the kistbandi against seven of the defendants who were parties to it. The defendants' objections were—

1. "That the kistbandi had merged into the original decree."
2. "That because the execution was barred by limitation, no fresh suit could be brought upon the kistbandi, which forms a part of the decree."

The opinion of the High Court was delivered by

NORMAN, J.—We think it quite clear that the suit on the kistbandi is maintainable.

Before Mr. Justice Kemp and Mr. Justice Ainslie.

Ver. 3 Cal. 135-1.

**ULFUTUNNissa (DECREE-HOLDER) v. MOIIAN LAL SUKAL AND OTHERS
(JUDGMENT-DEBTORS.)***

1870
Nov. 28.

Execution of Decree—Interest on Costs—Procedure.

The Court, in executing a decree, has no power to allow interest on costs when not mentioned in the decree. The proper course for obtaining such interest is to apply to the Court which passed the decree to amend it.

Baboo *Kashi Nath Sen* for the appellant.

Baboo *Harimohan Chuckerbutty* for the respondent.

AINSIE, J.—The special appellant in this case is a decree-holder seeking the realization of interest on costs which has been refused by the lower Appellate Court, on the ground that the decree does not specify interest. We have been referred to several cases—*Masudan Lal v. Bhikari Sing* (2), *Mussamut Hookum Bibee v. Khajah Mahomed Moosa Khan* (3), *Beer Chunder Joobraj v. Ramcoomar Dhur* (4); but looking at the terms of the decision in *Masudan Lal v. Bhikari Sing*, as delivered by the late learned Chief Justice Peacock, we are inclined to think that this special appeal should be dismissed. It was there said by the learned Chief Justice:—"We have no doubt that, in executing a decree, the Court which executes it has no power to alter or add to it." We think that this is a proper rule to be observed in all cases; and that when there is an omission in a decree, the proper course is for the parties to apply to the Court which made the decree to amend it; but in the stage of execution, the decree must be executed simply as it stands.

We therefore dismiss this special appeal with costs.

* Miscellaneous Special Appeal, No. 211 of 1870, from a decree of the Judge of Chittagong, dated the 21st March 1870, reversing a decree of the Subordinate Judge of that district, dated the 25th September 1869.

(1) 4 B. L. R., F. B., 101.

(3) 6 W. R., Mis., 14.

(2) Case No. 249 of 1865; September 15th, (4) *Id.*, 26.

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ASHIHARI
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v.
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KUMAR.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
July 30.

QUEEN v. NOURJAN AND JAGGAT TARA.*

Penal Code (Act XLV of 1860), ss. 372, 373—Disposing of Minor for Prostitution—Obtaining Possession of Minor for Prostitution.

S., a married Mahomedan girl under 16, while living with N., her grandmother, and in the absence of her husband, formed an adulterous intrigue with two Hindus, with the knowledge of N.; S. and N. were then induced by the Hindus to remove to another village, that S. might take up the trade of prostitute; they there met J., a public woman, with whom they went to reside, and who introduced visitors to S., and received the money paid by them, in exchange for the board and food supplied to S. and N. N. was convicted, under section 372, Indian Penal Code, of disposing of a minor for the purpose of prostitution, and J. was convicted, under section 373, Indian Penal Code, of obtaining possession of a minor for the purpose of prostitution.

Held per JACKSON, J.—That on the facts proved, no offence was committed under the Penal Code.

Per GLOVER, J.—N. and J. were both guilty under sections 372 and 373, respectively, and their appeals should be dismissed.

GLOVER, J.—These prisoners have been convicted under sections 372 and 373 of the Penal Code,—Nourjan, of having disposed of a minor for the purpose of prostitution, and Jaggat Tara, of obtaining possession of the girl for the purpose of prostitution and of letting her for hire for the same purpose.

The girl, Shonaban, is a daughter of the adopted son of the prisoner, Nourjan; and is married. She does not appear to have lived much with her husband, the witness Rahim Khan, but to have remained in her grandmother's house. Whilst there, and whilst her husband was employed in another part of the district, she formed an intrigue with two Hindus, and she did this with the knowledge of her grandmother. These two Hindus, not liking to be talked about as the lovers of a Mahomedan girl, induced the grandmother to remove Shonaban to another village, and to set her going as a prostitute there, which being done, the two Hindus proposed to continue their intimacy with the girl. Nourjan, accordingly, took the girl to Bhanderea, where they met the prisoner, Jaggat Tara, a prostitute of the place, and put up with her. During the time Shonaban lived in Jaggat Tara's house, she was made to receive visitors, and the proceeds were taken by Jaggat Tara. After a week of this life, both prisoners took the girl to the police station, for the purpose of having her registered as a public prostitute.

I consider these facts clearly proved by the evidence, and that they are sufficient for conviction under sections 372 and 373, Penal Code.

Nourjan, the grandmother, has been convicted under section 372, and it appears to me that the words of the section, "otherwise disposes of," cover her

* Criminal Appeal, No. 401 of 1870, from the order passed by the Sessions Judge of Backergunge, dated the 11th May 1870.

case. It is proved that she left her house at Amooa, and proceeded to Bhanderea for the express purpose of making her grand-daughter a prostitute; that she afterwards went and lived with the girl at the house of a professional public woman, and allowed her grand-daughter to follow the ways of the house and receive visitors. It appears to me that she did all this in furtherance of her original intention, and that when she thought her granddaughter sufficiently initiated into her new trade, she, in company with Jaggat Tara, took the girl to the thanna to have her name entered on the list of public women. Nourjan appears to me to have taken an active part throughout in this most shameful business; and it was by her own individual act that the girl went to Jaggat Tara's and lived there as a prostitute. I think she was properly convicted.

Jaggat Tara has been convicted under both sections 372 and 373. If the evidence be credible, and I have already said that I think it is, both these offences are brought home to this prisoner. She certainly obtained possession of the girl Shonaban, and that too for the purpose of prostitution, even if she did not actually hire the girl of her grandmother; and having so obtained her, it is clear that she made money by the transaction, and received from the girl's visitors the hire of the girl's person.

I would reject the appeals of both prisoners.

JACKSON, J.—In this case I have the misfortune to differ from Mr. Justice Glover; the question in which we differ being a point of law, that is to say, whether the facts established by the evidence are sufficient to support the conviction under the 372nd and 373rd sections of the Indian Penal Code.

I think we may most safely take the facts of the case from the evidence of the girl Shona. This girl is the daughter of an adopted son of the prisoner Nourjan. She appears to be under the age of 16, but has been for some years married to a Mahomedan named Rahim. She has occasionally resided with her husband for short periods, and the marriage appears to have been consummated, but she generally lives with her grandmother; and while she so lived, it seemed that she formed an adulterous intrigue with two Hindus.

These persons appear to have considered that scandal would arise if it became known that they visited a Mahomedan married girl for the purpose of illicit intercourse, and they persuaded the girl and her grandmother that it would be advisable that the girl should take up the trade of a prostitute, and that if she did so, they could visit her without disgrace or inconvenient consequences. Thereupon, the girl herself and her grandmother proceeded to a village at some distance, where they went to the kutcheri of the zemindar. There they met the other prisoner, Jaggat Tara. An arrangement was arrived at between them, under which the girl and her grandmother took up their abode for some days at the house of Jaggat Tara; that the girl assumed the dress and appearance of a courtesan, and received visitors on the introduction of Jaggat Tara, who received the money paid by these men for the girl's favors, and by whom the girl and her grandmother were fed. At the end of

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1870 a few days, she proposed to take the girl to the nearest thanna for the purpose of registration as a prostitute, and there enquiry was made by the police officers, who sent for the girl's husband and made her over to his charge.

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NOURJAN AND JAGGAT TARA. On these facts, the grandmother has been convicted under the 372nd section of disposing of a minor for the purpose of prostitution, and sentenced to three years' rigorous imprisonment, and Jaggat Tara has been convicted under the 373rd section of obtaining possession of a minor for the purpose of prostitution, on which charge she has been sentenced to two years' rigorous imprisonment, and also under section 372, of letting for hire a minor for the purpose of prostitution, on which charge she has been sentenced to further imprisonment for one year.

As to the case of Nourjan, it seems to me clear that she has not disposed of the person of her grand-daughter. The girl appears to have acted entirely as a free agent upon the persuasion of the two Hindu men I have mentioned ; of her own choice, primarily for the purpose of the more conveniently carrying on the intrigue with them, but ultimately for her own ends, she leaves her home and goes to reside in another village. The conduct of the grandmother in consenting to, conniving at, and in some degree profiting by this arrangement, is morally, no doubt, infamous, but it does not, so far as I can see, amount either to the offence of which she has been convicted or to any other offence under the Penal Code.

As to Jaggat Tara, in like manner, it seems to me that neither of the two offences of which she has been convicted is made out. She has not, I think, obtained possession of any minor, because, as I have stated, she met the girl ; the girl accompanied her to her house, and acted entirely as a free agent. She certainly had not let her out for hire. That which she did, was to receive the sums of money paid by the girl's visitors, apparently in exchange for the board and lodging which she gave. That which section 372 contemplates, is the selling, letting to hire, or otherwise disposing of any minor with intent that such minor should be employed as stated, that is to say, making over to a person either in perpetuity, or for a term, for a consideration, or otherwise transferring the possession of a minor. Nothing of the sort has taken place here. That which did happen is, I believe, a common arrangement enough ; that is to say, that prostitutes, the younger women, live with a brothel-keeper, and receive such visitors as she introduces, are fed and clothed by her, and allow her to receive the wages of their shame.

I think, therefore, that the conviction of the prisoners has been erroneous, and that the sentence which has been passed on them must be reversed.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

IN THE MATTER OF VEERAPAH CHETTY AND AGA SYUD ABDUL HOSSEIN.*

1870

Dec. 6.

Execution—Sale—Decree-holder, Purchase by.

The mere fact of the decree-holder having bid and purchased at the execution-sale, without having obtained the leave of the Court, does not, *ipso facto*, invalidate the sale.

THE following case was submitted, by the Recorder of Moulmein, for the opinion of the High Court:—

“ I have taken time to consider this petition as one of great importance, as affecting in fact to a large extent the title to landed property in Moulmein.

“ The petitioners, as the judgment-creditors of Messrs. Gardner, Brooke and Co., took in execution a house belonging to that firm, and at the judicial sale which ensued became the purchasers. Thirty days from the date of the sale having elapsed, they now move for a formal order confirming the sale. The difficulty I find in disposing of the motion arises out of a case which has been cited—*Bandhu Roy v. Hanuman Sing* (1), in which Mr. Justice Norman stated the practice on the point prevalent in the High Court in its original jurisdiction.

“ This case was first brought to my notice when the petition of Tsan Hla was before me, and I considered the language used by the High Court so plain as to leave this Court (the practice of which is, by section 21 of Act XXI of 1863, made dependent on that of the High Court in its original jurisdiction) no option but to reject the application. Mr. Aubrey, however, who appeared upon the present petition, has argued so strongly, and I think so reasonably, against the applicability of the law to British Burmah on the ground of the radical difference obtaining here in the proceedings connected with judicial sales, that I am induced to make the matter the subject of a reference. He has, moreover, contended that under the provisions of Act VIII of 1859, in cases in which objection is not taken by an interested party within thirty days from the sale, the sale must be confirmed as a matter of course, and that at least it must be considered as within the rule *fieri non debuit factum valet*. The precise point would not appear to have been before their Lordships at the time of the decision cited.

“ The Civil Procedure Code contains no clause restricting the right of the attaching creditor to bid at the sale, and the practice is rested by his Lordship on analogy to home practice in equity, confirmed by considerations of expediency.

“ The difference in the mode of executing money-decrees upon land here and at home, prevents us from having, I think, the benefit of analogy in a matter

* Reference, No. 197 of 1870, from the Recorder of Moulmein, dated 9th April 1870.

(1) 3 B. L. R., A. C., 320.

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in pari materia. There is nothing at home equivalent to the judicial sale in India in execution of a money-decree.

"Nor is there in the practice prevalent here with reference to judicial sales the danger his Lordship has pointed out in the case before him. It is true, as Syud Abdul Hossein, his Lordship observes, that where an abstract of title is prepared, it is possible for the party preparing it to describe the property in such a manner as to deter purchasers. Here, however, that practice does not obtain, nor is there in Moulmein any other preliminary to a judicial sale of land than the announcement by the Court that the right, title, and interest of A. B. in certain premises, described by reference to a Government grant, are to be sold. I cannot therefore see in the fact of the attaching creditor bidding for property in Moulmein, the ill effect anticipated by the learned Judge. The judgment-creditor bidding for the property has no doubt the same desire as any other intending purchaser to obtain the property as cheaply as he may, but he has no other opportunity than a stranger of affecting the property in the particulars referred to by Mr. Justice Norman. It seems to me, therefore, that the only result that can be produced by his bidding is that which his Lordship describes as a desirable one, *viz.*, the enhancement of the price of the property sold. The judgment-creditor says in effect at every bid,—I am willing to estimate the property of my judgment-debtor at so much, and the more he bids the more it seems to me he relieves the estate of the judgment-debtor and enables it to satisfy other claims. The present case is an instance of what I mean. There were but three bidders present, and the property fetched its full value. It is alleged with considerable probability, that had the attaching creditor not been desirous of purchasing, the contest would have ended much sooner and a much lower price have been obtained."

"The policy of the Court of Chancery to which his Lordship refers, has, I may add more especially in the matter of opening biddings (for which the case cited, *Owen v. Foulks* (1), is also, I believe still an authority), never been supported on any principle, and has been unhesitatingly pronounced by some of the ablest text writers, including the learned author of Smith's Chancery Practice, cited by his Lordship (see 6th edition, page 592), to be unsatisfactory.

"I may add that, by an order of this Court, the attaching creditor is treated in every respect as a stranger with reference to section 253 of the Civil Procedure Code.

"In the present case the question I would submit to their Lordships is—Does the fact of the petitioner having bid at the sale without the leave of the Court, *ipso facto*, invalidate the sale?"

The opinion of the High Court was delivered by

NORMAN, J.—We have no doubt that this question must be answered in the negative.

(1) 9 Yes., 348.

Before Mr. Justice Loch and Mr. Justice Mitter.

RAM NARAYAN MOOKERJEE AND ANOTHER (PLAINTIFFS) v. SRIMATI SARADA DEBI AND ANOTHER (DEFENDANTS).*

1870
Dec. 9.

Jurisdiction—Small Cause Court.

A suit, the object of which is, not only the recovery of money due upon a bond, but also a declaration of the plaintiffs' lien on the property mortgaged by the bond, is not cognizable by the Small Cause Court.

Baboo Aushutosh Dhar for appellants.

Baboo Hem Chandra Banerjee for respondents.

MITTER, J.—With reference to the preliminary objection taken by the respondent, we are of opinion that the present suit is not one cognizable by a Small Cause Court.

The suit was not only for the recovery of the money due upon the bond, but also for a declaration of the plaintiffs' lien on the property mortgaged by it.

On the merits, there can be no doubt whatever that the case has not been properly tried by either of the Courts below.

A written statement was put in by the defendants' pleader on the 17th of February last, but that written statement was rejected by the first Court, on grounds which have not been brought to our notice. On that day the plaintiff examined two of his witnesses; and on the next day, the 18th of February, a fresh written statement was allowed to be put in. Notwithstanding these irregularities, no issues were drawn up, and the plaintiff had no opportunity of proving his case with reference to the objections raised by the defendant, nor could he know at the time when he examined his witnesses what was the line of defence which the defendant intended to rely upon.

Under these circumstances we think that this case has not been fairly tried in either of the lower Courts, and we therefore reverse the decision of both those Courts, and remand this case to the first Court, in order that it may frame the proper issues, and try the case on the merits, after receiving evidence from both parties.

Costs will abide the ultimate result.

* Special Appeal, No. 1338 of 1870, from a decree of the Judge of West Burdwan, dated the 30th April 1870, reversing a decree of the Moonsiff of that district, dated the 18th February 1870.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

1870
Sept. 5.

PYARI CHAND MITTER v. FRAZER.

Promissory Note—Contract or Obligation—Registration Act (XVI of 1864) s. 16—Act XIV of 1859, s. 1, cl. 10.

A promissory note is a "contract or obligation" under section 16, Act XVI of 1864, and as such might have been registered under that Act; consequently the period of limitation prescribed by section 1, clause 10 of Act XIV of 1859, *viz.*, three years, applies to it.

THIS was a suit on two promissory notes, dated June 17th, 1865. A rule had been obtained by Mr. Graham on behalf of the defendant, calling on the plaintiff to show cause why the plaint should not be taken off the file, on the ground that the only cause of action shown therein was barred by limitation. The plaint was filed on 7th June 1870, and the question was whether clause 10, section 1 of Act XIV of 1859, which makes three years the period of limitation for suits brought on certain contracts "which might have been registered," would apply to a promissory note as an instrument which might have been registered under section 16 of Act XVI of 1864.

Mr. Ingram, for the plaintiff, now showed cause, and contended that the word "contract" in section 16 of Act XVI of 1864 must be considered to apply only to contracts between private individuals, and would not include a promissory note, which, as a negotiable instrument, was, so to speak, public property. The words "other obligations" refer only to obligations of the same kind as are included in the words "bond or contract," which immediately precede them. In the later Registration Act XX of 1866, promissory notes are expressly made registrable, from which the inference is that they were not so before.

The Advocate-General (offg.) in support of the rule was not called on.

NORMAN, J. (after stating the facts, continued).—In moving for the rule, the Advocate-General pointed out that, under section 16 of Act XVI of 1864, which was the Registration Act in force at the time when these promissory notes were made, they might have been registered as falling within clause 7 of that section as a "contract or other obligation."

Mr. Ingram has attempted to contend that the words "contract or other obligation" must be taken in a restricted sense, as confined to contracts made between two parties actually contracting at the time they were made, and not to contracts of the nature of bills of exchange or promissory notes, which are transferable, and in that respect differ from ordinary contracts. I think it is quite clear that a promissory note is a contract; but if there were any doubt whether the word "contract" in section 16 is wide enough to include a promissory note, the word "obligation" would certainly include it. There is no exception in

ection 16 as to any contract or species of obligation which the party is not to have the option of registering; and as the enactment is very beneficial in its nature, and in no way limits the rights of the holders of bills of exchange and promissory notes, but simply gives the liberty of registering, there is no reason why the words "contract or other obligation" should be construed as limited to any particular species of contract or obligation. In schedule A, clause 10 of the Stamp Act, the words "bill of exchange, letter of credit, draft, cheque, or promissory note," are followed by the words "or other order or obligation for the payment of money;" it is clear that the word obligation is used in a sense wide enough to include a promissory note. I am therefore of opinion that these promissory notes might have been registered under section 16 of Act XVI of 1864 at the time they were made. As they have not been registered, the period of limitation, with respect to them, is three years, and this suit not having been brought within that time is barred by limitation. The plaint must be taken off the file, and the suit dismissed with costs on scale 2.

From this decision the plaintiff appealed.

Mr. *Ingram* and Mr. *Cunningham* for the appellant.

The *Advocate-General* (*offg.*) and Mr. *Goodeve* for the respondent.

The judgment of the Court was delivered by

COUCH, C. J.—Clause 10 of section 1 of Act XIV of 1859 provides (*reads*). The words are "engagement or contract which could have been registered, &c." The object appears to me to have been to encourage parties to avail themselves of the registration law: it puts a written instrument, which might be registered, and is not, in the same position as if there were no writing at all. Now could these promissory notes have been registered at the time they were made? It depends upon whether they come within the words of section 16 of Act XVI of 1864, which are as follows (*reads*). I cannot, looking at the provisions of that Act, see any grounds for limiting the ordinary meaning of these words; they evidently refer to contracts for the payment of money from the use of the word "bond," and a promissory note is clearly a contract relating to money. The words must, I think, be taken in their ordinary meaning. No doubt, there is a difficulty created by the powers given by section 28 as to the mode of registration, but I do not think I should be justified by that in holding that a promissory note cannot be registered; for the same argument might apply against the registration of bonds, because it seems singular that the obligation to register should be on the party executing the bond. The Act appears not to be at all aptly drawn with regard to any instruments that require registration. But I don't think that that justifies a different interpretation. It was pressed in argument that one would think it contrary to the policy of the Legislature that such documents as promissory notes should be required

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to be registered; but the opinion of the Legislature as to the policy of requiring them to be registered is shown by the later Registration Act XX of 1866, which expressly includes them.

I am unable to see any ground justifying me in limiting the meaning of the words of section 16; though the question is one not without difficulty. The effect is only this, that a promissory note, not being registered, has such an operation that a party must sue on it for his money within the same time as if he had lent the money without security. I do not see that there is anything impolitic in doing this; it does not affect the negotiability of the promissory note; all it amounts to is that, where the note is not registered, the party suing on it is in the same position with regard to the time within which he must sue as if he had merely lent the money. The order of Mr. Justice Norman is confirmed, with costs to be paid by the appellant.

Attorneys for appellants: Messrs. *Gray* and *Sen.*

Attorneys for respondents: Messrs. *Pittar* and *Camell.*

Before Mr. Justice Phear and Mr. Justice Mitter.

1870
July 23.

IN THE MATTER OF THE PETITION OF RAJNARAIN SEIN.*

Penal Code (Act XLV of 1860), s. 499—Defamation.

The accused, an inspector of police, was sent to enquire if it was true that one Brojonath was a leader of dacoits. He reported that it was false, and that the Banias of the village were trying to get him punished from an ill feeling. He added: "I learnt from private enquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath." Commitment of the accused for trial for defamation under section 499 of the Penal Code supported under the circumstances of the case.

Mr. M. L. Sandel for the petitioner.

Baboo Aushotosh Dhur, contra.

THE accused, an inspector of police, was sent to enquire whether it was true that one Brojonath Saha was a leader of dacoits. He reported that it was false. He said in his report: "There are in the village of Juggutbulbhore a great number of Banias who are inhabitants of the village and are wealthy men, also there are Sha Baboos who are wealthier than the Banias. For a long time past lawsuits are going on between the two parties; but as Brojonath is a rich and influential man, he gained almost all the cases, and now the Banias are trying to get him punished some way or other. Especially the moral character of Brojonath has been the main cause of this petition. I learnt from private enquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath."

* Miscellaneous Criminal case, No. 75 of 1870, from an order made by the Sessions Judge of Hooghly, dated the 6th June 1870.

So some of the Banias are trying to beat him down, although they cannot give out the character of their own females, and have therefore given such a form to the petition as to make out a case cognizable by the police."

Deejobur Pal complained to the Magistrate on behalf of two of the females of the village of Juggutbullubhpore of the Bania caste. The Magistrate dismissed the case.

The Sessions Judge of the 24-Pergunnahs, on the petition of the complainants, remarked that the imputation was calculated to do harm to the Bania females of Juggutbullubhpore as a collection of females; that according to the case of *Sealy v. Ramnarain Bose* (1) it lay on the speaker to prove that he made the statement with due care and attention; that the statement was, on the face of it, made without due care and attention; that it was not for the public good to make such a sweeping imputation; and that it was sufficient, as far as the public advantage of defeating a false charge, that the existence of intrigues with certain females, not further described, or with any particular females of whom the inspector could make the statement with certainty, should be alleged. He therefore directed the Magistrate to commit the prisoner to the Sessions for trial for defamation under section 499 of the Indian Penal Code.

The prisoner then petitioned the High Court to have the order of commitment set aside.

The judgment of the High Court was delivered by

PHEAR, J.—If there were no other grounds wherewith to support a commitment than those which have been set forth by the Judge, we should think it singularly difficult to say that a commitment would be a good exercise of discretion which the Legislature has reposed in the Sessions Court under section 35, Criminal Procedure Code. For if we look at the report which is before us, it appears that the statement is defamatory, it certainly has been made by an officer in execution of his duty, and is true, made directly as a result of an order from his superior; and it is also clear that the accused is not guilty of the charge, it does not, as I think, appear from the document itself that the statement was made recklessly or unjustifiably; so that if there were no further evidence appearing in the case of the prosecution than the document before us, I think the accused would be covered by the 9th exception to section 499 of the Indian Penal Code. He would appear to be almost precisely the subject of illustration (b) to that section. But we have had some other portion of the evidence read to us, to which the Judge made no reference, and from that it certainly does seem to us that there are materials on which the accused may well enough be sent to trial on the charge for which the Sessions Judge commits him.

We cannot therefore interfere with his commitment, and we accordingly reject this petition.

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TER OF THE
PETITION OF
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Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
Nov. 29.

KHAJA MAHOMED ISA KHAN AND OTHERS (DEFENDANTS) v. BABOO KISHO LAL (PLAINTIFF).*

Lessor and Lessee—Lease—Breach of Covenant to put Lessee in Possession—Measure of Damages.

In a lease for a period of nine years, without payment of salami, entered into between A. and B., A. bound himself by the following covenant:—"In the event of B. not being put in possession of the leased premises, A. will have to make good anything in the shape of "khisara or nuksan (loss) to which B. may be put in consequence." On A. failing to put B. in possession of the premises mentioned in the lease, B. brought a suit against the party in possession, but failed to recover possession.

In a suit by B. against A. for recovery of damages for breach of contract, measuring the amount of damages at the expenses he had to incur in the suit for possession, and also the whole of the profits which he expected to derive from the lease,

Held, that the plaintiff was entitled to recover only nominal damages.

Mr. R. T. Allan for appellants.

Baboo Annada Prasud Banerjee for respondent.

THE facts are sufficiently stated in the judgment of the Court which was delivered by

JACKSON, J.—The plaintiff in this case is a banker. It seems that he took from three ladies, named Mussamats Ayisha Begum, Ilahi Khanam, Sukina Khanum, a lease of their interest, amounting to 15 annas and 6 pice, in Mauza Amrath, for a period of nine years, without any advance or rent ("salamee"), at an annual jumma of rupees 1,415, under a lease dated January 1863. The plaint alleges that the lessors failed to put the plaintiff into possession; that the plaintiff finding another party, who set up a title, in possession of the mehal, commenced a suit to recover possession; that the lessors omitted to render him any assistance in that suit, consequence of which the suit was defeated. He now, therefore, sues from two of the lessors and from Mahomed Isa Khan and M. Begum, who are described as representatives of the third lessor, damages for breach of contract; and as the measure of those damages, he claims to recover the amount of expenses to which he was put in the litigation I have mentioned, and also the whole of the profits which he expected to derive from the lease, i.e. the mehal.

He has got from the Court below a decree for his entire claim, that they were made women are sweepers, offered by the plaintiff is a copy of a lease, which appears to be in the evidence above, and, notwithstanding

* Regular Appeal, No. 109 of 1870, from a decree of the Judge of ^{Cl} Cl. 7, this duty; in it said to be de-

by one of the defendants, Ilahi Khanum, to a different party, at a considerably higher rate than the rent reserved under the plaintiff's lease; and upon this piece of evidence, the Court has awarded damages, only providing that, in respect of years not yet come or expired, the plaintiff is to receive the amount due on account of those years as the years fall in.

Against this decree, the representatives of Ayisha Begum have appealed to this Court.

It appears to me that the claim of the plaintiff is altogether untenable. The question of the liability of Mahomed Isa Khan and Mussamat Makima Begum, as the heirs of Ayisha Begum, has not been raised before us. We have only to consider whether the award of damages is right or no.

The lessors have, no doubt, failed to carry out in giving possession the contract of lease into which they had entered with the plaintiff. The plaintiff considers that, in consequence of that failure, and under the clause in his lease to which I shall presently advert, he is entitled to recover from the defendants everything in the shape of loss or damages which he has incurred in consequence of that failure.

The learned vakeel who appeared for the respondent, was at first inclined to rest his client's claim to those damages on general principles, and to contend that, as a matter of law, the plaintiff would have been so entitled without express words being contained in his contract; he now appears to resile from that contention, and to rest the plaintiff's claim entirely upon the specific clause in the contract.

That clause is in these or nearly in these words:—"In the event of plaintiff "not being put into possession of the leased premises, the lessors will have "to make good anything in the shape of *khisara* or *nuksan* to which the "lessee may be put in consequence;" and it is contended, for the respondent, that, in making this agreement, the parties had in contemplation such expenditure as the plaintiff claims in the present suit.

I cannot see any trace of the parties having had any such thing in their contemplation, and it appears to me improbable that they should. It is not denied that the lessee, when he found that he could not get possession, might have thrown up his lease, and retired from the matter altogether. Upon what principle, therefore, is he entitled, when he had that option, to say, "As a matter of advantage to myself, I prefer to litigate the title of my vendor with the party in possession; and, failing in that litigation, I will make my lessors pay my expenses?" It seems to me he has no right whatever. If he entered upon this contest, he did so at his own risk; and having failed, he must take the costs on himself.

Then as to the profits, what consideration had the defendants for taking upon themselves the risk of the plaintiff obtaining the profits which he claimed here? Absolutely none. There was no money advanced.

The rent reserved was much less than the profits which the plaintiff claims that he was entitled to. I am at a loss to see on what ground a party, who

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gives a lease such as that which is the subject of the present suit, can be called upon to recoup the party who fails to recover possession, the whole advantage which he might have had if he had obtained possession under the lease. There is no authority, as admitted by the respondent's vakeel, for any such right as a matter of law; and I certainly fail to see anything in the terms of the lease which would justify the claim in this particular case. It is not contended that there was any misconduct on the part of the lessors, or that they wilfully misrepresented things, and so led him into any expense which he might not otherwise have incurred. So far as we know anything to the contrary, the lessors *bonâ fide* believed that they had title, and under that belief granted the lease to the lessee. He and they were both disappointed; he loses the lease, and they the rent. All that the plaintiff is entitled to under the circumstances, we think, is nominal damages; and those damages we fix at rupees 200.

The judgment of the Court below will therefore be reversed, and judgment will be entered for the plaintiff for rupees 200. Each party will pay their own costs in the Court below, and the appellants will get the costs of this appeal.

Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

1870
 Sept. 10.

THE QUEEN v. RAMJAI MAZUMDAR.*

Private Prosecutor—Counsel—Pleader—*Criminal Procedure Code (Act XXV of 1861)*, ss. 419, 434.

Private prosecutor not allowed to appear on a reference to the High Court, under section 434 of the Criminal Procedure Code (1).

RAMJAI MAZUMDAR was charged with having dishonestly misappropriated rupees 2,887-8, being the property of his employer, Rani Saratsundari. The Deputy Magistrate, on the 19th July 1870, discharged the accused, under section 225 of the Code of Criminal Procedure; but, by mistake, a printed charge-sheet was filed with the record. On appeal by the complainant, the officiating Judge, finding the charge-sheet bearing the signature and seal of the Deputy Magistrate, and dated 18th July 1870, declared that the order of the Deputy Magistrate, discharging the accused, was passed without jurisdiction, and therefore void, and accordingly directed the Magistrate to instruct the Deputy Magistrate to complete the commitment proceedings, and to forward the record for trial at the next ensuing sessions. On the explanation by the Deputy Magistrate that the charge-sheet had been drawn up, signed, and filed under mistake, the Sessions Judge of Rajshahi referred the case to the High Court for an order that the order of the Deputy Magistrate, dated 18th July 1870, and the order of the officiating Sessions

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rajshahi, under his letter No. 430, dated the 5th September 1870.

(1) See *In the Matter of Chandi Charan Chatterjee v. Chandra Kumar Ghose*, 5 B. L. R., App., 70.

Judge directing the Deputy Magistrate to commit the accused to the Sessions Court for trial, be quashed.

Baboo *Mohini Mohan Roy* for the accused.

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Baboo *Mahendra Lal Shome*, for Rani Saratsundari's sirkar, sought to address the Court; but being stopped on the ground that the private prosecutor had no right under the law to appear by counsel, and be heard in support of the prosecution, he contended that, on general principles and under the 419th section of the Code of Criminal Procedure, his client had a right to be represented. He contended that the word "plaintiff" in that section was not to be read "appellant." The Rani's sirkar first set justice in motion by his complaint before the Magistrate, and it was on his motion that the Sessions Judge interfered in the matter, and therefore he had a right to support the order he had obtained. He referred to *Chandi Charan Chatterjee v. Chandra Kumar Ghose* (1).

Loch, J.—I think in this case the private prosecutor has not a right to appear, first, because he was not a party to the rule; and, secondly, he cannot come under section 419 of the Criminal Procedure Code; for whatever may be the interpretation put upon the word "plaintiff" in that section, and whether that word is rightly used or not in that section, it is a section which relates simply to cases of appeal, which is not the case here. In certain cases a private prosecutor might, under the provisions of section 435, move the Court of Session, but there is nothing in that section which says that he may come up to this Court; and, looking at the circumstances of this case, it is clear that he cannot come up here and be heard. He could not appear in the Court of Session, because the case was one in which that Court could not interfere under the provisions of section 435; and if he could not appear there, he cannot have a right to come up to this Court to be heard on the reference. If he be heard at all, he can be heard only by the permission of the Court.

The order of the Magistrate of the 18th July 1870, committing the petitioner to the Court of Session, must be set aside; and also the order of the Judge of the 12th August 1870, directing the Deputy Magistrate to re-commit the petitioner, must be set aside.

Before Mr. Justice Loch and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF H. B. FENWICK.*

1870

Nov. 21.

Act VI of 1857, s. 8—Right of Way.

When land is taken by the Government under Act VI of 1857, the land is absolutely vested in the Government under section 8, free from any right of way previously enjoyed by the public over such land.

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of 24-Pergunnas, under his letter No. 130, dated the 16th November 1870.

(1) 5 B. L. R., App., 70.

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WICK.

THE following reference was made to the High Court by the Sessions Judge of the 24-Pergunnas :—

" Within the boundaries of the land, acquired by Government under the provisions of Act VI of 1857, and made over to the Justices for the purposes of the water-works at Manirampur, is a spot on the river bank known as the Karbala Ghat, to which the residents of the neighbourhood were in the habit of resorting for the purposes of bathing. It is not a masonry-built ghat; but it is said in the evidence to be the most convenient spot for bathing in the immediate neighbourhood. The fence which the Justices lately made round the land, and which extends to the river side, excludes the public, and prevents access to the spot in question. It seems that complaints were made to the Magistrate regarding this exclusion; and that after some proceedings (to which it is unnecessary to refer), he tried the case under the provisions of section 320 of the Criminal Procedure Code, and by his order, dated the 27th September 1870, held that the public had always enjoyed the right of way over the land to the ghat, and that the Justices were not entitled to possession of the land to the exclusion of the public. He seems to have considered that he could not look beyond the evidence which established the previous use of the land, and that the Justices must establish in the Civil Court their right to exclude the public.

" Mr. Fenwick, it appears, under the instruction of the Justices, refused compliance with the order, and consequently the Magistrate, by his order dated 29th of the same month, under section 188 of the Penal Code, sentenced him to a fine of rupees 51. From that order he preferred an appeal to the ^{High} Judge of the 24-Pergunnas, who was of opinion that the appellant was bound by the law to obey the order of the Magistrate, and therefore he was properly held liable to the penalty of fine.

" On his intimating this opinion, the appellant presented a petition praying for a reference to the High Court, in regard to the order passed under section 320. The Judge accordingly referred the matter to the High Court, with a recommendation that the order of the Magistrate, dated the 27th September, under section 320 of the Code of Criminal Procedure, should be set aside as being erroneous, on the ground that the acquisition of land by the Government, under the provisions of Act VI of 1857, divested the public of the right of way. He referred to the case of *The Collector of the 24-Pergunnahs v. Nobinchunder Ghose* (1) as being a case of greater hardship. The Judge also recommended that the order of the Magistrate, imposing a fine of rupees 51 on Mr. Fenwick, should be quashed, and the fine remitted."

Mr. Adkin for the petitioner.

The judgment of the High Court was delivered by

LOCH, J.—It is clear from the provisions of section 8, Act VI of 1857, that the title to the land is absolutely vested in the Government. That section

(1) 3 W. R., 27.

sets forth that, "when the Collector or other officer has made an award, or directed a reference to arbitration, he may take immediate possession of the land, which shall thenceforward be vested absolutely in the Government, free from all other estates, rights, titles, and interests."

We concur therefore in the view expressed by the Sessions Judge, and set aside the order passed by the Magistrate on the 27th September last under section 320 of the Criminal Procedure Code, and also set aside the order of the 29th idem imposing fine under section 188 of the Indian Penal Code,

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Before Mr. Justice Kemp and Mr. Justice Paul.

NAND KISHOR DAS MOHANT (DEFENDANT) *v.* RAM KALP ROY (PLAINTIFF).*

1871
Jan. 5.

Special Appeal—Grounds.

The grounds of special appeal must not be vague and indistinct, conveying no information to the respondent what the point of law is that he has to meet.

This was a suit for confirmation of possession. In the plaint it was alleged that the talook in dispute was the self-acquired property of the plaintiff. That in execution of a decree against his brother, the right, title, and interest of the judgment-debtor in this property had been sold, and purchased by the decree-holder, but the judgment-debtor had no interest in the talook.

The defence was that the property was not the self-acquired property of the plaintiff; and that he had no private funds wherewith to purchase this property.

The Subordinate Judge found that the plaintiff and his co-sharers lived in commensality as members of a joint and undivided Hindu family; the khatta books filed by him to prove that he had separate funds were of recent fabrication. He accordingly dismissed the suit.

On appeal, the Judge held that the plaintiff had proved that he carried on business separately from the family; and that he was in possession of this estate on his own account. He reversed the judgment of the lower Court and passed a decree in favor of the plaintiff.

The defendant appealed to the High Court on the following grounds:—

1. "The Judge of the lower Appellate Court is wrong in declaring the plaintiff's claim, without finding distinctly upon the title of the plaintiff, who is admitted to be out of possession of a portion; and with regard to the confirmation of possession, there is no cause of action.

2. "The Judge is wrong in accepting the conduct of other parties as evidence against the defendants.

3. "The Moonsiff's decree of 1844 obtained *ex parte* was rightly rejected by the Subordinate Judge as between parties other than the defendant or his

* Special Appeal, No. 1344 of 1870, from a decree of the Judge of West Burdwan, dated the 10th June 1870, reversing a decree of the Subordinate Judge of that district, dated the 30th March 1870.

1871 judgment-debtors, and the Judge was wrong in receiving the same as evidence

NAND KISHOR of separate fund, separation, and the like.

DAS MOHANT 4. "The Judge is wrong in holding that the purchase in the plaintiff's
v.
RAM KALP name, &c., gives rise to the presumption that the purchase was the self-acquired
Roy. property of the plaintiff.

5. "The old documents are not attested, nor their custody proved, and the
Judge is therefore wrong in using them as evidence.

6. "The decree in Lachman Roy's case has been misconstrued, nor does it
show separation in 1263 (1857); and if it shows anything, it shows that this
suit and that were collusively instituted.

7. "The Judge was wrong in holding that the *onus* of proof can be shifted
on the defendant."

Baboo *Aushutosh Dhar* (Baboo *Rajendra Nath Bose* with him) for the
appellant.—The grounds of appeal are: That the Judge has, on a
misconception of the grounds on which the first Court rejected the
khatta books, accepted them without considering the real grounds on
which the first Court rejected them. [PAUL, J.—That is no ground of
special appeal.] Supposing the first Court discredits a witness on the ground
that he is a relation of the plaintiff, and the second Court, mistaking that
ground, holds the first Court is wrong in rejecting that witness on the ground of
his living at a distance, would not that be a misdirection and ground of special
appeal? [PAUL, J.—The first Court rejected these khatta books, and the
Appellate Court accepted them.] 2. The second ground is that the first Court
having rejected the old khatta books which showed the nucleus of a separate
fund belonging to the plaintiff as not being attested, the Judge was wrong in
receiving them as evidence. [PAUL, J.—What do you mean by not being
attested?] These khatta books must be spoken to by some witnesses to show
they were written in the ordinary course of business, and contain entries of
transactions as they passed; the mere putting in a quantity of papers written
in the form of accounts is not evidence. [PAUL, J.—Did you dispute their
genuineness in the Court below?] The first Court found they were fabrications.
[PAUL, J.—It has been ruled by the Privy Council in the case of
Bebee Tokai Sherob v. Beglar (1) that when a document is not disputed in
the Court below, it is admitted without proof.] This is not the practice now
followed; the plaintiff is bound to prove his documents.

Baboos *Jagadanand Mookerjee* and *Hem Chandra Banerjee*, for the re-
spondent, were not called upon.

PAUL, J.—If the rule, which is now being adopted by the Chief Justice in
hearing applications for the admission of special appeals, required an illustration
of its utility, this case will afford a very striking example. In this

(1) 6 Moore's I. A., 510.

case the decision turned entirely upon certain questions of fact upon which the Appellate Court came to a very clear conclusion as follows :—“That by judicial documents, the plaintiff has proved that he carried on business separate from the family ; that he has always been in possession of this estate on his own account ; that the family separated in 1857 ; and that he has been in possession since the separation.” The questions of fact were thus very clearly and very distinctly found by the lower Appellate Court, and that Court also devoted considerable time and trouble to the dissection of the case, and to the consideration of the evidence. Under these circumstances, one would have thought that the most contentious mind in the world could hardly have discovered anything justifying a resort to a special appeal.

On reading the grounds of special appeal, I was induced to enquire by whom they were drawn ; and to my great surprise, I heard that they had been drawn by a pleader, Baboo Rajendranath Bose, who has no excuse whatever for having drawn and filed them. This gentleman, having been long connected with a firm of attorneys of the late Supreme Court, and having had considerable experience in drafting, must know perfectly well that the grounds of special appeal as drawn are no grounds at all.

My surprise was considerably enhanced by the arguments which were addressed to us in support of the special appeal by Baboo Aushutosh Dhar, a leader of this Court, and an attorney of the late Supreme Court, and a gentleman of ability and experience, and by his persistent efforts to induce us to believe that the grounds of special appeal were most admirable, and so sound a law as to lead to a reversal of the decision of the lower Appellate Court.

The grounds of special appeal resolve themselves either into vague grounds which give no information to the respondent as to what the point of law is to meet, or into sharp and ingenious criticisms of the reasoning of the decision of the Court below. For instance, ground No. 2 says :—“The Judge is wrong in accepting the conduct of other parties as evidence against the defendants.” That ground, I say, is vague and general ; it gives the respondent no intimation as to what is the point which is intended to be argued, the nature of the conduct, or the particular piece of conduct and of what person, what cannot be accepted in evidence, are not specified, nor is it stated that the consideration of the conduct had so materially influenced the Court in its judgment as to amount to misdirection. This ground is apparently purposely so worded that, on the argument of the appeal, advantage may be taken of something turning up in the evidence which may support the suggestion contained in it. This has been attempted to be done in this case, but most unsuccessfully. To give another instance, the 5th ground says : “The old accounts are not attested, nor their custody proved, and the Judge is therefore wrong in using them as evidence.” That is no ground of special appeal, unless the ground suggests that these documents were disputed in the Courts below, and their custody was impugned. In the case of *Bebee Tokai Sherob v. Beglar* (1), it will be found to be substantially laid down by the

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NAND KISHOR DAS MOHANT v. RAM KALP ROY. Privy Council that the rules which regulate the conduct of cases in the Mofussil Courts do not necessitate the proving of documents which are not disputed. The remarks of the Privy Council are as follows : "It is said on the part of the appellant that that will was not properly in evidence, for although a will was produced (or rather an official copy of a will was produced), there was no examination of witnesses, &c., &c. If it would be necessary to decide that question, their Lordships would be inclined to hold that the will was sufficiently in evidence for the purposes of this suit. The Regulation provides that, where documents are produced, and they are not disputed, they shall be received without proof." Therefore, I am right in holding that the ground as drawn is no ground of special appeal.

The other grounds I do not notice in detail, because they fall within one or the other of the two criteria within which I have said these grounds of special appeal come.

I desire here to point out that the grounds of special appeal should be specific, and should indicate clearly the error of law assigned, or the substantial error or defect in law in the procedure or investigation which is imputed ; and in the latter case, it should be made to appear on the face of the ground of appeal that such error or defect probably produced error or defect in law in the decision on the merits, by stating what bearing the supposed error or defect had on the merits of the case.

If the grounds of special appeal are not so drawn, I think the special appeal should be dismissed, without further consideration being accorded to the case. It must also be borne in mind that mere criticisms of the reasoning employed by Courts below are not grounds of special appeal. The fact that a Judge's mind was influenced by circumstances which in another mind would not have the same weight, or produce the same effect, is not a matter which can form a ground of special appeal. In the practice of an honorable Judge, much stress cannot be placed on the propriety of drawing and defining grounds of special appeal which are so in law, and which are at least well founded and capable of being supported by some distinct matter or facts in the case.

It appears to me that, beyond taking up the time of the Court unnecessarily, no possible advantage has accrued to the appellant, either from the special appeal, or from the arguments addressed to us. The case turned upon questions of fact properly investigated and carefully decided in the Court below, and these specious grounds of special appeal were merely put in to delay the interests of justice for the purpose of causing delay.

These being my views, it is unnecessary to add that the special appeal should be dismissed with costs.

KEMP, J.—I concur in dismissing the special appeal with costs.

Before Mr. Justice Phear and Mr. Justice E. Jackson.

ABDULLA KHAN (ONE OF THE DEFENDANTS) v. UPENDRA CHANDRA
(PLAINTIFF).*

1870
Aug. 31.

Reg. I of 1798, s. 2—Reg. XVII of 1806—Mortgage—Liability of Mortgagee in Possession.

On a question of the right of a mortgagor to redeem by deposit of the principal sum due only, the length of possession by the mortgagee is immaterial.

The plaintiff stated that he had been put in possession of the property in dispute under a mortgage; that, after payment of the outgoings, he had rupees 41 left towards the satisfaction of the mortgage debt; that the mortgagor's equity of redemption had been sold and purchased by the defendant; that on the plaintiff's application for foreclosure the defendant deposited in Court the amount of principal and interest due on the mortgage, but afterwards took away from Court a sum of money, so that the balance in Court was not sufficient to satisfy the principal and interest due. This suit was accordingly brought for declaration that the equity of redemption had been foreclosed, and that the plaintiff was entitled to possession. The Subordinate Judge dismissed the suit. On appeal, the Judge held that the defendant, by withdrawal from Court of a portion of the money deposited, had forfeited his right to redemption, as the balance did not cover the amount due on the mortgage. He accordingly reversed the decree of the lower Court, and passed a decree in favor of the plaintiff.

The defendant appealed to the High Court, on the ground that the mortgagee was bound to account; that by the withdrawal of a portion of the sum, the defendant did not forfeit his right to redemption; and that the deposit of the principal was sufficient.

Mr. C. Gregory and Baboo Debendra Narayan Bose for the appellant.

Baboo Romes Chandra Mitter, Chandra Madhab Ghose, and Srinath Banerjee for the respondents.

The judgment of the Court was delivered by

PHEAR, J.—We think that the lower Appellate Court has fallen into error in this case, and that its judgment ought to be reversed.

No doubt, as Baboo Romes Chandra argued, Regulation I of 1798 and Regulation XVII of 1806 must be taken together. The second section of the first of these Regulations provided that, if the borrower deposited in

* Special Appeal, No. 967 of 1870, from a decree of the Judge of Chittagong, dated the 28th March 1870, reversing a decree of the Subordinate Judge of that district, dated the 29th May 1869.

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Court, within the period stipulated in the mortgage-deed, the whole amount due to the lender, he would preserve his right of redemption just in the same way as if he had tendered, or paid it actually, to the lender.

Regulation XVII of 1806 extended the period within which a deposit of this kind should be effective to preserve the right of redemption, from the so-called stipulated period of the mortgage-deed up to the time when the final foreclosure might be effected by the lender under the terms of the 8th section of that Regulation.

It is admitted by the special respondent in this case that the plaintiff did deposit in Court a sum greater than the principal sum borrowed before the occurrence of final foreclosure. But the special respondent says the amount due to him at the time of such deposit within the meaning of section 2, Regulation I of 1798, was the principal sum borrowed, together with a sum by way of interest, in the total a greater sum than that deposited.

Now, on reference to the 2nd section, we find that there are two classes of cases distinguished by the Legislature.

The first class is that in which the lender has not obtained possession of the land, and therefore has nothing for which to account to the borrower. In that case the section says that the sum to be deposited as the amount due is the principal sum, together with the stipulated interest thereon, not exceeding the legal rate of interest.

But the second class of cases is that in which the lender has held possession of the land, and therefore has receipts and profits to account for; and the section says that only the principal sum borrowed need be deposited in order to satisfy the previous part of the section, which directed that "the amount due" should be deposited.

We think that it is an immaterial question in this matter how long the lender has been in possession of the land. If he has been in possession at all so as to be liable to render an account to the borrower, the case falls within the second class, in which the amount of interest is left to be settled on an adjustment of the lender's receipts and disbursements during the time in which the lender has been in possession.

Now, if we look to the merits of the mortgage transaction in the particular case which is before us, it is clear that it was the intention of the parties that the interest upon the money lent should be obtained by the lender from the usufruct of the property mortgaged.

The mortgage-deed, as it has been read to us, first gives a short estimate of what the net profits of the mortgaged property are, namely, rupees 288, after deduction of specified outgoings; and then the borrower stipulates that this shall be taken by the lender in lieu of interest; also further, the borrower engages that, if the actual net receipts fall below the sum of rupees 288, he, the borrower, will make up the difference at the time stipulated in the document for the repayment of the principal; and also that, if he does not at that time repay both the principal and the amount which he might in this way have

become liable to pay, then the lender should stand absolute proprietor of the mortgaged property.

It is quite clear from this arrangement that the lender became liable to account to the borrower for the rents and profits of the mortgaged property.

In the plaint the mortgagee says that he has had possession; that he has received rents, and paid some outgoings (the Government revenue, I think); and that in this way he had left in his hand a sum of rupees 41 odd. By this very statement he shows that there is matter of account as to the profits of the mortgaged property between him and the mortgagor. Nothing therefore can be plainer, I think, than that this is a case falling within the second of the two classes of cases mentioned in section 2, Regulation I of 1798, and that, consequently, a deposit of the principal sum only, without interest, would be sufficient to preserve the borrower's right of redemption, if the deposit were made according to that Regulation within the period stipulated in the mortgage-deed; and, therefore, according to the Regulation of 1806, within such extended period as would expire upon final foreclosure.

As I stated at the commencement, undoubtedly a sum equal to the principal sum lent was deposited in Court by the mortgagor, or the mortgagor's representative, before final foreclosure.

Under these circumstances the mortgagor will preserve his right of redemption, and the plaintiff in this suit has not a right to recover possession of the property as absolute owner.

The plaintiff has in this suit simply asked for possession, his suit fails, and ought to be rightly dismissed by the first Court.

We therefore reverse the decree of the lower Appellate Court, and dismiss the plaintiff's suit. The defendant will have his costs in all the Courts.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

BABOO JADUNATH SING AND ANOTHER (DEFENDANTS) v. KALI-
PRASAD AND ANOTHER (PLAINTIFFS).*

1870
Nov. 21.

Act VIII of 1859, ss. 229, 230—Title—Possession.

A. and B. obtained a decree against their father, C., for possession of their share of ancestral property. In execution, they dispossessed D., who held under a mortgage from C. On an application under section 230, Act VIII of 1859, held, upon proof of such holding, the Court ought to have gone into the question of the validity of the mortgage against A. and B.

BABOO BHAGWAN SING, in consideration of a large sum of money, executed a zuripesbgi lease, to Bansidhar, of his share in Mauza Shampur. Bansidhar assigned his right under the zuripesbgi to Kaliprasad, who was put in possession thereof. Baboo Raghunandan Sing and others sued their father, Baboo

* Regular Appeal, No. 77 of 1870, from the decree of the Judge of Sarun, dated the 23rd September 1869.

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1870 Bhagwan Sing, for their share of the ancestral property, according to the Mitakshara law, *inter alia*, of Mauza Shampur. Kaliprasad intervened in the suit, under section 73, Act VIII of 1859, on the ground of his mortgage; but the Court excluded him from amongst the defendants, and passed a decree in favor of the sons, with this limitation, that they would get possession to the extent and in the same manner as had been held by their father. In execution of this decree, Kaliprasad preferred his claim, under sections 229 and 230 of Act VIII of 1859, on the ground that Baboo Raghunandan and others had no right to evict him until payment of the amount due under the mortgage; and prayed that, pending the determination of his claim, execution of the decree might be stayed.

The defence set up was (*inter alia*) that the property being ancestral, Bhagwan Sing had no authority to mortgage it without the consent of the sons.

The Judge declined to enter upon this question, holding that, if the property was not liable for the debts of Bhagwan Sing, and the deed of mortgage was invalid under the shastras, they must bring a regular suit to set it aside. He held that the only question for decision was whether the plaintiffs had held the property in dispute under the mortgage or not. He found the proceedings between the father and sons were collusive; that the deed of mortgage was a genuine document, and that the plaintiffs held possession under it.

He, accordingly, passed a decree in favor of the plaintiffs.

The defendants appealed to the High Court.

Baboo *Mahes Chandra Chowdhry* for the appellants.

Baboo *Annadaprasad Banerjee* and *Anukul Chandra Mookherjee* for the respondents.

JACKSON, J.—It appears to me that, in this case, the Zilla Judge, in the view which he took of the rights and conduct of the parties, doubtlessly, restricted the subject-matter which it was necessary to decide, and that consequently his decision is at variance with the law. Under sections 230 and 231 of the Code of Civil Procedure, the purpose of which sections has been laid down by the decision of the Full Bench in *Radha Pyar Debi Chowdhraian v. Nabin Chandra Chowdhry* (1).

The facts are simply that certain persons, Raghunandan Sing and others, who are the sons of a person named Baboo Bhagwan Sing, brought a suit against their father to obtain a declaration of their right to hold their separate shares by partition of certain joint family property. The petitioners under section 230 in this case, whom I may call the claimants, intervened in that suit, alleging themselves to have acquired a mortgage over some of the property to which the suit related from Baboo Bhagwan Sing, and they prayed that their incumbrance might be recognized and maintained.

The Court declined to go into the question of this mortgage, confined itself to the question between the plaintiffs and the father, and finally gave judgment

APPENDIX.

out of which
continued in
enquiry into,
are by partition, but thought proper to accompany that decree
that the plaintiffs should get possession only of the property
the same manner as held, by the father. This declaration was,
tended to protect the intervenors, now claimants, and possibly
who might be found to have valid incumbrances upon this property.

1870

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to make the mortgage on which they relied, and that they
themselves were enftiled in virtue of their right and under the decree
to actual possession of their shares; and thereupon the Court below
refused to enter into the question of right as between the parties, and deter-
mined the suit under section 230 merely upon the question of the mortgage
having been actually executed by Baboo Bhagwan Sing; and on that point
having found in favor of the claimants, decided the suit in their favor.

Now the contention of the decree-holders who appeal to this Court is, that
Zilla Judge ought to have gone fully into the question of title, and de-
cided all questions between the parties. It appears to me that he should have
done so. The decision that I have cited lays it down quite clearly. The
words of the Chief Justice are:—"It appears to me that, looking to that
language," that is, the language of section 230, "the title may be gone into in
accordance with the application made under that section." Further on, the Chief Justice observes:—
"Then at these words, it appears to me that we may collect that it was
the intention of the Legislature in a case of this kind that, if the Court should
be satisfied that there was a probable ground for the application, the title
should be tried between the parties, and the mode of proceeding provided is
that the applicant may come and show that he was really entitled to the
decreed obtained by the decree-holder for the recovery
against the wrong person, and was not binding in any way
upon a person who has been dispossessed of land or fisheries in
a decree against a third person, not a party to the case, is bound
to prove anything more than that he was really and *bonâ fide* in possession,
and dispossessed in execution of the decree. Now, it does not follow from
the Court having the power to go into the question of title that the applicant
or the plaintiff in such a case is bound to prove more than that he was really
and *bonâ fide* in possession. If he proved that, it would be evidence of title
upon which he might rest his case; and if he did not choose to go into evi-
dence of his title, we cannot say that he was bound to do it." I think there

1870 has been some misapprehension as to the meaning of these words of the Chief Justice, and it has been supposed that the plaintiff or claimant would be at liberty to prove merely his *bona fide* possession, and thereupon would be entitled to succeed, but that was not the meaning of the learned Chief Justice.

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He merely meant that the plaintiff would be at liberty, if that would suit his purpose, to prove possession, and thus throw it upon the opposite party to prove that he had a better title than the possession so proved. The Chief Justice proceeds:—"Nor with regard to the first branch of the second question, whether the decree-holder can put the plaintiff to proof of his title, although we say that the decree-holder can do so, he cannot insist upon direct proof of title, and the plaintiff may, if he thinks fit, rely upon his possession; but as to the latter branch of that question, whether the decree-holder can go into evidence of title in himself, we must say that he can. If he has a good title, he is at liberty to give evidence of that title, and to prove that he is really the person to whom the property belongs, and that it should not be taken in execution of the decree." So that the decree-holder was at liberty to go into his own title, and show that he was entitled to the property, notwithstanding that possession might or might not be *bona fide* with the plaintiffs.

Then it has been supposed that the title of the decree-holder is limited by the terms of his decree. It seems to me that that is not so. It seems to me that the decree-holder, on the question being raised under this section, would be fully competent to go into the whole of his title, and is bound to do so, because any future suit between the same parties claiming under him in respect of the same cause of action is taken away by the section.

I have referred in this case to the judgment of the learned Chief Justice rather than to the terms of my own judgment in that case for obvious reasons. But there is much more to be said in support of the view which I have taken. Why should the decree-holders in this case be remitted to bring a fresh suit to establish their rights? It is said that, by doing so, they would be placed in the condition of plaintiffs, instead of occupying the position of defendants, which they do in the present proceedings, and that they would have to prove their case. The answer to that appears to be very simple; if they brought a fresh suit to recover this property, they would have to start their case in the same manner as in the present proceedings—namely, by showing that they were the sons of Bhagwan Sing, and members of a joint Hindu family under the Mitakshara, having vested interests in the property at the time the incumbrance was created, and thereupon the *onus probandi* would be thrown upon the mortgagees to establish the validity of their mortgage. It may be that they would be able to show that, either the decree-holder had assented to the mortgage, or that the mortgage was created for their benefit, or the benefit of the family, but that they would have to do whether the decree-holders brought a suit, or whether the question was decided in the present proceedings.

It has been said that the decree, in execution of which the claimants were dispossessed, did not provide for the decree-holders being put into actual possession. It seems to me that the reservation which I have referred to in that decree was irregular and unnecessary. It was unnecessary, because the decree being one between Bhagwan and his sons, manifestly could not affect third parties. It was irregular, because it purported to be a reservation in favor of parties who were not either plaintiffs or defendants, and whose rights had not been enquired into. But whether regular or otherwise, it was a declaration made in a suit to which these claimants were not parties; and, as such, it seems to me they were not entitled to take any benefit from it.

In any view of the case, it seems to me that the claimants here are between the horns of a dilemma. Either they were dispossessed in execution of decree, or they were not. If they were not, but were dispossessed without color of right, the present is not the suit to which they should have resorted, but to a possessory suit. If they were dispossessed in execution of a decree, then they have themselves brought the case within the provisions of sections 230 and 231; and according to the ruling of the Full Bench referred to above, the enquiry contemplated by those sections,—namely, the enquiry into the whole question of right between the parties—must be made.

I think, therefore, that the Judge ought to have gone into the question of title. His judgment, therefore, must be set aside, and the proceedings must go back to him for that purpose.

Before Mr. Justice Loch and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF SHIB PRASAD PANDA.*

1870
Nov. 23.

Evidence—Documents—Prisoner, Right of, on Trial.

A prisoner applied for copies of certain documents filed in Court, for the purpose of his defence. *Held*, the Magistrate had erred in refusing his application.

Per Locn, J.—A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence. And it is for the officer trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by the prisoner are or are not admissible as evidence.

THE petitioner was convicted by the Magistrate of Balasore, under section 116 of the Indian Penal Code, of having offered a bribe to the sub-inspector of police, Mangal Sing, and sentenced to imprisonment for a period of nine months. This finding and sentence were confirmed by the Sessions Judge of Cuttack on appeal.

The case came before the High Court under the provisions of section 405 of the Criminal Procedure Code, and the point of law urged for the prisoner was, that the prisoner was prevented from making use of certain records or

* Application No. 122 of 1870, for revision of proceedings under section 405 of the Code of Criminal Procedure.

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SAD PANDA.

documents which were necessary for his defence, and therefore the conviction should be set aside.

It appeared that, after the prisoner's examination by the Magistrate, the case was postponed till the 5th August to enable the prisoner to produce evidence for the defence. Before that date arrived, he applied to the Magistrate for copies of ten papers, consisting of proceedings of Court and petitions. The Magistrate, it was alleged, sent only for six of these documents; at any rate only six were before him on the trial. Two subsequent petitions were put in on the part of the prisoner before the day of trial, praying that the other four documents might be sent for, but the Magistrate refused to comply with the prayer of the prisoner, and, after reading a petition put in by him on the 5th August as a written defence, pointing out certain reasons for concluding the charge to have been falsely got up, the Magistrate, for reasons stated in his proceeding of the 5th August, convicted the prisoner under the provisions of section 116 of the Indian Penal Code.

The prisoner preferred an appeal, and in his petition stated that he had asked to be supplied with copies of certain documents necessary for his defence, which the Magistrate refused to grant him. The Sessions Judge called for the record, and directed the Magistrate to supply the copies required by the prisoner, adding, however, to his order, that should there be any objection to the copies being granted, the Magistrate should submit an explanation. The explanation submitted by the Magistrate was to the effect that copies of the documents were unnecessary, as they had nothing to do with the case. The Judge then disposed of the appeal and confirmed the sentence passed by the Magistrate on the prisoner.

Mr. Money (with him Baboo Taruknath Sein) for the petitioner.

Loch, J. (after stating the facts as above, continued):—We think the Magistrate acted contrary to law when he determined whether the documents, of which copies were required by the prisoner, were necessary or not. A prisoner is entitled to have copies of all documents for which he asks and which he thinks necessary for his defence, and it is for the authority trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by a prisoner are or are not admissible as evidence. We think also that the Judge was wrong in being satisfied with the so-called explanation given by the Magistrate.

On referring to the documents, of which copies were required by the prisoner, we find that six were before the Court. These were—

1. A judgment of 21st March 1870, in which the prisoner's son had been fined on the report of the sub-inspector, Mangal Sing, for obstructing an enquiry into a case of abortion.

2, 3, and 4 were judgments of the Joint-Magistrate and Sessions Judge, dismissing charges of bribery brought against certain parties by the sub-inspector, Mangal Sing.

5. The result of an inquiry made into the character of one Gadda Das, a notorious bad character, on the representation of the prisoner and other persons, the result of the inquiry being that Gadda Das was bound down to good behaviour for three years.

6. A judgment dismissing a charge brought against the prisoner for theft of paddy at the instigation of the said Gadda Das.

The four documents not before the Court were—

7. Copy of a petition sent to the Commissioner by the prisoner and others, praying for an investigation into the characters of Gadda Das and others, and denouncing them as bad characters.

8. Copy of a petition of 24th July 1870, presented by Gadda Das to the Magistrate in this case to the effect that the prisoner had offered the sub-inspector rupees 100 to let off Berno Naik, Sonatan Uttar, and Darsan Satputtya, apprehended in a case of robbery, and to have him, Gadda Das, substituted in his stead.

9. A petition to the Magistrate against the sub-inspector, Mangal Sing, for having illegally confined the prisoner's son and gomashta in a case of abortion.

10. Deposition of Sonatan Uttar given in the charge of theft brought against the prisoner at the instigation of Gadda Das.

The object of filing documents 1 and 9 was to show that there existed an understanding between the prisoner and the sub-inspector, Mangal Sing. Documents 2, 3, and 4 were required to show that Mangal Singh was in the habit of bringing up charges of bribery against zemindars and other respectable people, and had failed. Documents 5 and 7 were to show that one Gadda Das, a notorious robber and bad character, and that Sonatan Uttar, one of the prisoners arrested by the sub-inspector, and for whose release it was said that he had offered the bribe of rupees 100, had also been denounced by the sub-inspector, and that consequently it was very unlikely he would pay his own expenses in order to enter upon terms to have him released, particularly as the said Sonatan Uttar had also given evidence against him in the paddy-theft case as shown by documents 6 and 10.

Now there can be no doubt that the prisoner has been prejudiced from the want of the documents 7 and 10, which might have been of material assistance to him in his defence. He was charged with offering a bribe to Mangal Sing, sub-inspector, to obtain the release of three persons then arrested on a charge of robbery, one of whom was Sonatan Uttar, and he urges in his defence the improbability of his taking such a step, when he had, with other respectable people, denounced in a petition to the Commissioner this very Sonatan as a pest to society and a follower of the notorious bad character, Gadda Das, and who, in collusion with Gadda Das, had given false evidence against him, charging him with the theft or forcible removal of certain paddy crops; and we think this plea was deserving of the consideration of both the lower Courts. We think that it is unnecessary to return the record to the

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SHIB PRA-
SAD PANDA.

Judge for a consideration of these documents, for, after reading the evidence in the case, we think that little reliance can be placed on it, the complainant, Mangal Sing, as apparent from the copies of proceedings 2, 3, and 4 filed by the prisoner, being very much in the habit of getting up cases of bribery against respectable persons, and the judgment of the Magistrate in this case appears to be based on his general knowledge of the character of the prisoner, whom he describes as an intriguing man.

The sentence and order passed by the lower Court are set aside, and the prisoner will be released.

MITTER, J.—I am of the same opinion. I think the Magistrate was wrong in refusing to grant to the petitioner copies of the papers referred to in the petition. Three of those papers at least would have been of considerable use to the petitioner in establishing his defence, and I am therefore of opinion that he has been seriously prejudiced by the refusal of the Magistrate to grant him copies thereof. I would accordingly set aside the decisions of both the lower Courts and direct the immediate release of the petitioner. I have gone through the whole evidence on the record, and I am clearly of opinion that it is utterly unworthy of credit.

Before Mr. Justice Bayley and Mr. Justice Mitter.

1870
Dec. 19.

GAJJO KOER AND OTHERS (DEFENDANTS) v. SYAD AALAY AHMED (PLAINTIFF).

Act II of 1855—Corroborative Evidence—Jummabandi Papers.

Jummabandi papers can be used only as corroborative evidence.

Baboo Budh Sen Sing for the appellants.

Mr. R. E. Twidale for the respondent.

The judgment of the Court was delivered by

MITTER, J.—This was a suit for arrears of rent. The defence set out that the defendant was not in possession of the quantity of land mentioned in the plaint, and that the rate at which rent was claimed was not the true rate.

In this state of the pleadings, it is quite clear that it was for the plaintiff to make out that the defendant was really in occupation of the whole of the land mentioned in the plaint, and that he was liable to pay rent to the people of the lands at the rate specified therein. The only evidence which the plaintiff thought proper to file (if evidence it may be called) consists of the statement of his agent. The statements of that agent are as follows:—

“to the truth of the facts stated in the plaint, and to the authenticity

* Special Appeals, Nos. 1294, 1295, 1296, 1297 of 1870, from the decrees of the Jyoti Bhagalpur, dated the 7th April 1870, affirming the decrees of the Deputy Collector of the district, dated the 31st August 1869.

"*jummabandi* filed, which I wrote." Now, there is nothing in this to show that the plaint was ever read to the witness at the time he made this statement, nor was there one single question put to him, either by the plaintiff or the Court, to show when and under what circumstances the *jummabandi* papers were prepared, and whether the agent under examination had any knowledge whatever as to the rate of rent at which the defendant was bound to pay, or what were the facts, whether all or how many, stated in the plaint, to the correctness of which he intended to swear. But, be that as it may, the case has been decided by both the lower Courts, solely and exclusively on the strength of these *jummabandi* papers. It is true that the agent of the plaintiff swears that these papers are authentic documents, and that he wrote them. But assuming this statement to be correct as far as it goes, the *jummabandi* papers may be only used as corroborative evidence, *viz.*, of the same value as that which is attached to books of account under Act II of 1855. These papers were admittedly prepared by the zemindar's own agent in the absence of the ryots; and if the mere fact of the agent coming forward to swear that he wrote the papers is to justify a Court accepting every fact recited therein as true against the ryots, no ryot in this country would be safe. The Court of first instance appears to have laid some stress upon the fact that the *jummabandi* papers in question were filed and accepted in previous suits, but it is admitted that the defendant in this case was not a party to those suits; and whether the *jummabandi* papers were held genuine in those cases or not, the defendant cannot be bound by the decisions passed in those cases; nor can the fact of the *jummabandi* papers, having been accepted in those cases, relieve the plaintiff of his responsibility to prove this case *de novo* as against the defendant who was not a party to those proceedings.

For the above reasons we are of opinion that the decisions of both the lower Courts are erroneous; and, as there is no other evidence on the record, and as we have reason to think that the parties have been misled by a too early expression of its opinion by the first Court on the question of *onus* of proof, we think that the case should be remanded to that Court for further investigation. The parties will be at liberty to produce such further evidence as they think fit. It will be for the plaintiff to make out clearly and satisfactorily that the defendant is really liable to pay to him at the rate claimed in the plaint. This he may do by producing his collecting agents and his cashier, or tendering his own testimony, or by any other evidence in his power. It is not for us to advise him which course to take, but he must recollect that, before he can obtain a decree, he must satisfactorily prove his case, and that the *onus* of proving it is entirely on him.

The costs of this appeal will abide the result.

1870
GAIJO KOER
v.
SYAD AALAY
AHMED.

Before Mr. Justice Phear.

1871
Jany. 10.

VONLINTZGY v. NARAYAN SING AND OTHERS.

Bills of Exchange Act (V of 1866)—Practice—Leave to Appear and Defend—Costs.

The Court will give leave to a defendant to appear and defend in suits under Act V of 1866, where he shows a defence apparently real; but where there is a doubt as to the *bona fides* of the defence, payment of money into Court will be ordered, or security directed to be given.

The Court has, in giving leave to defend, a discretion to order security for costs, not only where it doubts the *bona fides* of the defence, but also if it considers the matter of defence raised is unnecessary, though allowable.

If the plaintiff has not been heard at first against the defendants' application, the Court will always allow him to come in afterwards and show that the leave ought not to have been granted, or, if granted at all, on more stringent terms.

THIS was a suit under Act V of 1866 on a bill of exchange drawn and accepted by the defendants, who carried on business under the style of Narayan Sing & Co. Application was now made on behalf of one Dhanpat Sing who had been sued as a partner in the defendants' firm, for leave to come in and defend the suit. The application was supported by the affidavit of Dhanpat Sing, who stated that he was not a member of the defendants' firm, nor indebted to the plaintiff. No notice of the application had been given.

Mr. Macrae, for Dhanpat Sing, referred to Parkinson's Practice in Judges' Chambers, and cited the case of *Mathews v. Maryland* (1).

PHEAR, J., in granting the application, observed:—The practice which I have always thought right under the Indian Act is that which was laid down by Mr. Baron Bramwell in the case of *The Agra and Masterman's Bank v. Leighton* (2). In that case leave had first been given to the defendant to appear and plead. Then the plaintiff took out a summons to rescind that order or to obtain an order that the defendant should pay the amount sued for into Court. Upon that summons the following order was made: “No order upon payment into Court or security for £3,000 in six weeks.” The defendant took out another summons to vary that order, which was adjourned into Court. On the hearing of this last application, Mr. Baron Bramwell said (3): “The intention of the Bills of Exchange Act (4) was that, where there was no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but that if the defendant had a real, I do not say good, defence, he should have leave to appear and set it up. As cases, however, sometimes occur where an apparently real defence is shown, but its sincerity is doubtful, there the defendant is let in to defend only on the terms of his bringing the money into Court. But further, it often happens that a man comes in before the Judge, and shows a good defence as between the

(1) 27 L.J., Exch., 148.

(3) See p. 61 of Report.

(2) 2 L.R., Exch., 56.

(4) 18 & 19 Vict., c. 67.

parties to the bill, and also states his belief from certain circumstances of more or less credit, that the plaintiff is not a holder for value. Afterwards the plaintiff comes in and shows that belief to be groundless. In such a case, the leave to appear is rescinded, because it appears that the leave was originally given to the defendant on a supposed state of facts which is shown to be erroneous."

The words of the Indian Act are slightly larger than those of the English Act, but in spirit the two Acts are precisely the same. It is only when there is a doubt as to the *bona fides* of the defence set up, that payment of money into Court should be ordered, or security for the same be directed to be given. Restrictions as to the time of pleading, or as to the issues to be raised, may in any case be imposed, whenever they may seem to the Court to be required for the purpose of preventing unnecessary expense or delay; and I think the Court has a discretion to order security for costs to be given, not only where it doubts the *bona fides* of the defence, but also when it considers that matter of defence is raised, which does not appear to be strictly necessary, though it is not such as the Court ought to disallow. If the plaintiff has not been heard at first against the defendant's application, he may always be allowed to come in afterwards for the purpose of showing that the leave to appear and defend ought not to have been granted, or that the terms upon which it has been granted ought to have been made more stringent than they were.

* *Application granted.*

Attorneys for Dhanpat Sing: Messrs. Robertson, Orr, Harris, and Francois.

Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.

RAM SHAHAI CHOWDHRY v. SANKER BAHADUR.*

18
Jan'y

Evidence—Particeps Criminis—Refusal to summon Witnesses for the Defence.

Refusal to summon witnesses cited by an accused, on the ground of their being implicated in the charge, vitiates the trial and conviction (1).

THE following reference was made by the Sessions Judge of Tirhoot:—

The facts of the case are simple. The prisoners are charged with cutting a Government road, and were punished by fine under section 431. They denied the charge, and called certain witnesses in their defence. The Deputy Magistrate did not think it necessary to summon their witnesses as they had been named as being implicated in the cutting. As this is an error which vitiates the trial, and an application has been made to me to refer the case under section 434, I accordingly request that the High Court will pass such order as they may think proper.

* Reference, under Section 434 of the Code of Criminal Procedure, from the Sessions Judge of Tirhoot, under his letter No. 38, dated the 31st December 1870.

(1) *In the matter of the Petition of Mohima Chandra Shah, post, p. 78.*

1871

The following was the judgment of the Court:—

RAM SHAHAI
CHOWDHRY

v.
SANKER
BAHADUR.

JACKSON, J.—We concur with the Sessions Judge in thinking that the accused persons were entitled to have the witnesses named by them for their defence examined. It does not appear that the Magistrate thought it worth while to prosecute those persons as parties to the offence even if he had grounds for so doing; and he could not legally declare before-hand that he would not believe them on their oath. We must quash the conviction.

Before Mr. Justice Phear.

1871
Feb. 23.

JADU ROY v. FARRELL.

Practice in Execution, by High Court, of Decree of another Court.

THIS was an application for execution of a decree. The decree had been obtained in the Court at Patna, on 28th December 1869, against the defendant, for rupees 3,047-7-11. The defendant was resident in Calcutta; and on the application of the plaintiff, a copy of the decree signed by the Judge of Patna, and that Judge's certificate that no execution had been had, had been duly forwarded to the High Court, Calcutta, in order that execution might be taken out there. The decree being more than a year old, the plaintiff now applied to the High Court for a rule calling on the defendant to show cause why execution should not issue.

Mr. Hyde for the plaintiff, the execution-creditor.

PHEAR, J., (in refusing the application) said, that the functions of the High Court, in respect of the execution of a decree of another Court, were limited to effecting execution, and to the matters arising out of the proceedings in execution. Whether or not the applicant had a right to obtain execution must be judged of by the Court in which the record was; the application should be made to the Court at Patna, where the decree was passed. On such application being made, and leave being granted, the High Court would issue execution.

Attorney for plaintiff: Mr. Palilogus.

1871
Feb. 4.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

JAHA BAX v. GOVERNMENT.*

Forfeiture of Recognizance—Recognizance to keep the Peace.

On the application of A., a recognizance was taken from B. that he would keep the peace for six months under a penalty of rupees 500. Before the expiry of the period, B. assaulted C.

Held, that there was a forfeiture of the recognizance.

* Reference, under section 434 of the Code of Criminal Procedure, from the Sessions Judge of Dacca, under his letter No. 20, dated the 10th January 1871.

Baboo Ram Charan Mitter for Jaha Bax.

1871

JAHĀ BAX
v.
GOVERNMENT.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—In this case one Jaha Bax was called upon to give recognizances for rupees 500 that he would not break the peace for a term of six months. It appears that, within that time, he was charged with assault. He was fined for the assault, and he was called upon to pay up the amount of the recognizances. He appealed to the Sessions Judge, and the Sessions Judge has sent the case up to this Court for revision, on the ground that the breach of the peace which actually occurred, and upon which the recognizances were forfeited, was a very small matter, and that the actual applicant on the occasion, when the recognizances were taken from Jaha Bax, was a different person from the person who was afterwards assaulted. The Sessions Judge thinks that the recognizances to keep the peace having been obtained by one Kadir Bax, they cannot be escheated if the defendant assaults somebody else. There is no warrant in law, however, for any such ruling. The bond is general. It is a bond to keep the peace generally, and the amount can be escheated if the peace is broken under any circumstances.

The Sessions Judge is also wrong in saying that this bond was only taken from the defendant in consequence of one breach of the peace against Kadir Bax. It was taken in consequence of repeated breaches of the peace, and in consequence of the notorious character of the defendant as a breaker of the peace. There is no doubt that the amount of the recognizances is somewhat heavy in comparison with the actual assault which has now been committed. But it is admitted that we have no authority to interfere on that point.

We differ from the Sessions Judge and think that there is nothing wrong in law in the order of the Joint-Magistrate. We therefore decline to interfere.

Before Mr. Justice Loch and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF RAMJAI MAZUMDAR.*

1870

Nov. 4.

Criminal Procedure Code (Act XXV of 1861 and Act VIII of 1869), ss. 68, 225, 404, 435—

Fresh Proceedings after Discharge.

Where an accused person was discharged by a Deputy Magistrate under section 225 of the Code of Criminal Procedure, after a preliminary enquiry, the Magistrate of the district may proceed against him afresh under section 68 of the Criminal Procedure Code.

Per MARKBY, J.—Section 435 (Act VIII of 1869) provides for the revision of proceedings which have already been commenced; section 68 (Act XXV of 1861) provides for the institution of proceedings *de novo* (1).

* Criminal Motion case, No. 137 of 1870.

(1) See *In re Jagabandhu Myti v. Gobardhan Bera*, 4 B. L. R., A. Cr., 1.

1870

IN THE
MATTER OF
THE PETITION
OF RAMJAI
MAZUMDAR.

Mr. *Piffard* (with him Baboo *Chandramadhab Ghose*) for the petitioner.

LOCH, J.—The question we are asked to determine is whether the proceedings held by the Magistrate in this matter on the 28th September 1870 were without jurisdiction. The order which he made on that date was under the provisions of section 68 of the Code of Criminal Procedure.

The case, divested of all extraneous matter, is simply this: the party, for whose arrest the Magistrate has now issued a warrant, was formerly under trial before the Deputy Magistrate in charge of a sub-division of the district, and he was discharged under section 225 of the Criminal Procedure Code. The Magistrate now, as the Magistrate of the district, has taken up the case under the provisions of section 68 of the Criminal Procedure Code, and has ordered his arrest, considering that from his own knowledge the party has committed an offence triable under the provisions of the Indian Penal Code.

It is urged that the Magistrate has no jurisdiction to act according to that section; that the Deputy Magistrate who tried the case and discharged the petitioner could alone act in this case, and therefore the proceedings of the Magistrate should be set aside.

The application to this Court is made under the provisions of section 404 of the Criminal Procedure Code, in order that the order passed by the Magistrate may be quashed. It has also been pointed out to us that the Magistrate might have proceeded under the provisions of section 435 of the Criminal Procedure Code, but that section is not applicable, because in this case the Subordinate Magistrate had made an enquiry, and was not satisfied with the result of that enquiry; whereas that section gives authority to the Magistrate to interfere only when an accused person is discharged, or the complaint is dismissed without enquiry. When the Magistrate of the district passed this order there was no complaint before him, and, as he states in his proceedings, he acted upon his own knowledge. The mere fact that there had been a proceeding held before a Deputy Magistrate previously, under which the petitioner had been discharged, does not, in my opinion, prevent the Magistrate of the district from taking up this case under the provisions of section 68.

I think, therefore, that the present application must be rejected.

MARKBY, J.—I also think that we cannot grant the application. The order complained against is legal. The history of the case is certainly involved in some confusion; but I entirely agree with Mr. Justice *Loch* that we ought to treat this case as he has treated it in his judgment,—that is to say, as simply one in which a complaint had been made before a Magistrate in charge of a sub-division, and that complaint was dismissed; then, subsequent to that, the Magistrate of the district resolved to take up the case under section 68, no person at that time appearing to prosecute; and the question we have to decide is whether that course could lawfully be taken.

Now the first objection which Mr. *Piffard* advanced in this case was a very broad one; it was that the powers conferred by section 68 can only be exer-

cised in cases where there has been no complaint by any person before a Magistrate. But I think that that objection is disposed of by the decision upon which I rely for my judgment in this case—*The Queen v. Tilkoo Goala* (1). It was there held that the discharge of a person accused of an offence triable by a Court of Session was no bar to his being apprehended and brought before a Magistrate under section 68, with a view to commitment; and I think that that case proceeds upon a right principle,—namely, that the mere discharge of a person, upon a preliminary inquiry before a Magistrate, in no way affects the legality of fresh proceedings against him, whether those proceedings be taken at the instance of a private prosecutor, or under section 68 at the instance of the Magistrate himself.

It was then argued that, at any rate, the Magistrate of the district could not proceed under section 68 in any case in which the more special provisions of section 435 for revising cases in which a discharge has been given by an inferior Magistrate apply. It seems to me that the same argument was used in the case to which I have referred; and I entirely concur in the opinion which was there expressed by Mr. Justice Jackson, that the powers given by section 435 and the powers given by section 68 are distinct and independent powers. Therefore it seems to me in this case quite unnecessary to enquire into the question whether or not this is a case to which the provisions of section 435 apply. Whether they do apply or whether they do not, I think the power under section 68 remains the same; section 435 provides for the revision of proceedings which have already been commenced; section 68 provides for the institution of proceedings *de novo*.

I think it has not been shown to us that the Magistrate's proceedings were illegal; that is the only point which we have to consider; I think, therefore, that we should not set them aside.

1870

IN THE
MATTER OF
THE PETITION
OF RAMJAI
MAZUMDAR.

Before Mr. Justice Phear.

BUTTOKRISTO DOSS *v.* KHETTRA CHANDRA BHUTTACHARJEE.

Act XX of 1866—Unregistered Document, Admissibility of, in Evidence.

1871
Feb. 2.

THIS was a suit to recover the sum of rupees 1,500, with interest, which had been lent by the plaintiff on an agreement by the defendant to mortgage certain property. The agreement was made on the understanding that no prior mortgage of this property existed. The mortgage was executed in Bengali form, and the defendant agreed to return on a day fixed to register it. He, however, did not do so, and the plaintiff subsequently found that there was a prior existing mortgage over the whole of the property. By the mortgage, the money due on it was not to be repaid until the expiration of a year; but, on finding there had been a prior mortgage, the plaintiff brought an

1871 action for the sum lent. The suit was undefended. On the examination of the BUTTOKRISTO plaintiff, it appeared that the instrument had not been registered.

Doss

v.
KHETTRA CHANDRA BHUTTACHAR JEE. Mr. Marindin, for the plaintiff, referred to *Lachmipat Sing Dugar v. Mirza Khairat Ali* (1). By section 49 of Act XX of 1866, the instrument is not to affect the land until registered. We do not use it to show our interest in the land, but as the best evidence that the money we sue for is owing.

PHEAR, J.—I think the document is admissible.

Before Mr. Justice Norman, Offg. Chief Justice, Mr. Justice Loch, and Mr. Justice Ainslie.

1870 DEBNARAYAN DEB (PLAINTIFF) v. KALI DAS MITTER (DEFENDANT).*

Dec. 5.

Mesne Profits—Co-sharers—Local Investigation—Depositions—Ameen's Report—Execution of Commission—Act VIII of 1859, s. 180.

Plaintiff and defendant and certain others were co-sharers of an abad. Each agreed to cultivate certain portions and afterwards to give up any excess land cultivated by him. Defendant cultivated 399 bigas in excess of his share. Plaintiff sued him and got possession of the excess land on payment to the defendant of a compensation for the expense of cultivation, and then brought his suit for mesne profits. Held, that he was not, under the circumstances, entitled to mesne profits.

An Ameen had been deputed to make a local investigation, and had examined certain witnesses, but could not examine the rest or complete his investigation and draw up his report owing to the plaintiff not paying the necessary expenses. Held, that the depositions of the witnesses without the Ameen's report were not admissible in evidence.

Baboo Aushutosh Dhar and Debendra Narayan Bose for the appellant.

Baboo Kali Mohan Das and Mohini Mohan Roy for the respondent.

THE judgment of the Court was delivered by

NORMAN, J.—The plaintiff sued, claiming mesne profits in respect of 399 bigas of land in Abad Kistorampoor. The plaint stated that the plaintiff was owner of 6 annas 8 gandas in that estate; certain other persons, his co-sharers, namely, Ramanath Mitter and Nilrattan Mitter, of 3 annas, 4 gandas each, and the defendant of 3 annas 4 gandas; that an agreement having been made that each of them should cultivate portions of the estate, the defendant cultivated 399 bigas in excess of his share, for which the plaintiff sued, and obtained a decree in April 1865, and got possession in December 1867.

* Appeal, No. 3 of 1870, under section 15 of the Letters Patent, against the decree of Mr. Justice E. Jackson, dated the 29th April 1870, passed in Special Appeal, No. 131 of 1870, heard by E. Jackson and Glover, JJ., on the 29th of April 1870.

(1) 4 B. L. R., F. B., 18.

The defendant's answer, so far as it is material to the present question, is that the land was jungle; that, by an agreement between himself and the other shareholders, each took certain portions of land, and cleared them, there being no stipulation that any one should claim rent or mesne profits against any of the others; that he had had great trouble, and had been put to much expense in cultivating the land; that the plaintiff had reaped the benefit of his labor and money; that he had cleared the jungle, which was very thick; that the plaintiff, upon payment of a small sum as his share of the expense to which the defendant had been put in bringing the land under cultivation, had obtained a decree for possession; that had he not cultivated the lands, they would have remained in a state of jungle for years, and the plaintiff would have made no profit from them.

At the trial on the day fixed for the hearing, the plaintiff gave no evidence, but asked for a local investigation.

The Court accordingly issued a commission to an Ameen, directing him to make an investigation, and report the result to the Court.

The Ameen commenced his investigation on the 2nd of April 1869. On the first day he examined two witnesses; the second day was a holiday; on the third and fourth days he examined eleven witnesses; on the fifth day, he stated that the deposit made by the plaintiff to meet the expenses of the investigation was exhausted, and he applied to the plaintiff to make a further deposit. The plaintiff's mooktear stated that there were nine witnesses still to be examined, and wanted the Ameen to go on with his enquiry without any further payment. He said that the witnesses remained concealed, and that he intended to produce them at some future inquiry; on which the Ameen, without making any report, stated the circumstances, and transmitted the depositions to the Court.

Mr. Justice E. Jackson, the senior Judge, differing from Mr. Justice Glover, held that the plaintiff was not entitled to obtain a decree for wasilat; that it was for the plaintiff to show that he was entitled to a decree for wasilat, and that he had failed to do so; secondly, he held that the local investigation was not completed, owing to the default of the plaintiff, and he was of opinion that the lower Courts could not look at the Ameen's incomplete proceedings as evidence in the case.

From this decision there was an appeal to three Judges.

I think that there can be no doubt that the learned Judge is right on both points.

The plaintiff and the defendant are co-sharers; the defendant, by an arrangement with the plaintiff and his other co-sharers, cultivates, as he well and lawfully might, a portion of their joint property. The arrangement is, the land being jungle, and apparently unmeasured, that if he brings into cultivation a portion larger than his share, he shall give up the excess lands. He does so; and upon giving up such excess, he receives from the plaintiff a compensation in respect of the money which, out of his separate funds, he had spent in improving the joint property.

1870

DEBNARAYAN
DEB
v.
KALI DAS
MITTER.

1870

DEBNARAYAN DEB v. KALI DAS MITTER. Now the decree under which that compensation was paid was not put in, but I think the presumption is, in the absence of any evidence to the contrary, that the compensation would represent the amount paid by the defendant out of his own funds in excess of what he had been able to realise out of the joint property, in satisfaction of what he had expended on it. If the case is otherwise, it was for the plaintiff to prove it, but he gave no evidence to establish any such case.

I think then the presumption is that the plaintiff is not entitled to anything more than what was given him by the former decree. If wasilat was payable, it was for the plaintiff to show it; but he has not attempted to do so.

As to the second point, it is a matter which is, I think, free from doubt.

Section 180 of the Civil Procedure Code makes provision for the case of a commission for local investigation; it provides that the Court may issue a commission to an officer of Court, or other person, directing him to make such investigation, and to report thereon to the Court. It provides that the Commissioner shall have power to examine any witnesses who may be produced to him by the parties, or any other persons whom he may of himself think proper to call upon to give evidence in the matters referred to him; it gives him power to call for and examine documents and other papers relevant to the subject of inquiry; and the section goes on to say that "the Commissioner, after such local inspection as he may deem necessary, and after reducing to writing, in the manner hereinbefore prescribed for taking the depositions of witnesses in the presence of the Judge, the depositions taken by him, shall return the depositions, together with his report in writing subscribed with his name, to the Court." It further enacts that "the report and depositions shall be taken as evidence in the suit, and shall form part of the record."

Now, in the present case, the commission was never fully executed; no report was ever made; and there is nothing in section 180 which empowers the Court to receive the depositions of the witnesses alone, without the report of the Ameen, as evidence in a case.

I am of opinion that there is nothing in section 180 that would warrant us in treating the depositions taken under the imperfect investigation which took place in the present case, as part of the record, or as evidence in the cause.

The result therefore is that the plaintiff has given no evidence whatever in support of his claim, and I am of opinion that the judgment of the Senior Judge is correct on this point also, and that this appeal must be dismissed with costs.

Before Mr. Justice Glover and Mr. Justice Ainslie.

PARBATI CHARAN MUKHOPADHYA (DEFENDANT) v. KALI NATH MUKHOPADHYA (PLAINTIFF).*

1870
Dec. 14.

Obstruction to a Public Road—Special Damage—Special Appeal—Cause of Action.

No suit lies for obstructing a public road, unless the plaintiff can show that he has suffered particular inconvenience from such obstruction.

An objection as to the plaintiff having no cause of action may be taken at any stage of the suit.

Baboos Rajendra Nath Bose and Nemi Charan Bose for the appellant.

Baboos Nabakrishna Mookerjee, Tarak Nath Sein, and Banshidhar Sein for the respondent.

GLOVER, J.—The plaintiff brought this suit on the allegation that the defendant, one Parbati Charan, had encroached to the extent of two haths in breadth, and $5\frac{1}{2}$ feet in length, on a public road leading to the house of the plaintiff, by building a wall thereon, and prayed to have that wall pulled down. The defence set up by the defendant was that he had not encroached upon the road at all, but had built on his own land. The Court of first instance dismissed the plaintiff's suit, but the Judge, on appeal, reversed that decision and gave the plaintiff a decree. It is contended, in special appeal before us, that the plaintiff had no right to bring this suit, and that no special damage having been alleged in the plaint, he has no claim to have the wall pulled down.

On turning to the record, we find that the plaint nowhere alleges that the plaintiff has suffered any special injury from the act of the defendant. It states, no doubt, that inconvenience has been caused to the public generally, and likewise alleges in a general sort of way that the carts and gharrys of the plaintiff would be prevented from going to and from the plaintiff's house in consequence of the wall being built, but it does not say that the plaintiff's carriage or carts ever were obstructed on any particular occasion, or that any thing ever occurred which caused any actual loss to the plaintiff or any damage to his interests. It is contended now that there is another document on the record supplementing this plaint, and in which it is said that there are some words which refer to the plaintiff's carriage or conveyance having been actually interrupted on its way to the plaintiff's house, and that these two papers taken together disclose a sufficient cause of action on the ground of special damages to justify us in going into evidence on that point; but this second petition we find to be merely an application praying the Court

* Special Appeal, No. 1456 of 1870, from a decree of the Judge of the 24-Pergunnas, dated the 26th May 1870, reversing a decree of the Moonsiff of that district, dated the 22nd September 1869.

1870

PARBATTI
CHARAN MU-
KHOPADHYA
v.
KALI NATH
MUKHOPA-
DHYA.

to strike out the name of one of the two defendants against whom the suit had been originally brought, from the record, and the object of this petition was to save the suit from being altogether dismissed on the ground of multifariousness. It clearly never was intended as an amendment of the original plaint. It was put in for a special purpose only, and not to amend any defects in the statement of the cause of action in order to show that special damages had been caused to the plaintiff by this obstruction of the road. It appears, therefore, clear that no ground of special damage was alleged by the plaintiff when he brought this suit, and that being so, we see no reason why we should not follow the rulings of several Division Benches of this Court, and notably that in the case of *Baroda Pershad Mostafee v. Gora Chand Mostafee* (1). In that case the rule was very clearly laid down that no one has a right to sue for obstructing a public road without showing that he has suffered some particular inconvenience in consequence of that obstruction. The Chief Justice says: "If the plaintiff can maintain a suit like this, any member of 'the public can do so, and the defendant may be ruined by innumerable 'actions by persons who have not sustained a farthing of damages." The Criminal Law, in section 308 and the following sections of the Code of Criminal Procedure, has provided a remedy, and if the plaintiff had gone to the Magistrate and shown that the defendant had obstructed a public thoroughfare in the way he is alleged to have done, the Magistrate would have promptly interfered and removed the obstruction.

Again, it is contended that this objection as to there being no cause of action was not taken at any previous stage of the case, and that it ought not to be considered now that the case has arrived at its final hearing in special appeal. But it is clear that this objection is one which affects the jurisdiction of the Court, and it has been ruled in several cases by this Court that a question of jurisdiction may be taken at any time, even in the special appeal stage. It appears to us that the plaintiff has made out no case, and that the decree which has been passed in his favor by the Judge of the 24-Pergunas cannot be supported. We therefore reverse the decision of the lower Appellate Court, and dismiss the plaintiff's suit with costs.

Before Mr. Justice Phear.

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Feby. 20.

GAPI NATH NANDI *v.* SHIB CHANDRA NANDI AND ANOTHER.

Arbitration, Reference to—Agreement to withdraw Suit—Restoration to file of Court.

A suit was, by order of Court, referred to three specified arbitrators, who were to make an award within six months, and, in case of difference of opinion, all matters in dispute were to be referred to the decision of an umpire. The arbitrators had only one meeting, at which an agreement was come to by the parties to settle all matters in dispute among themselves, and withdraw the matters from arbitration, which was accordingly done, but nothing appeared to have been afterwards done. No award was made by the original

arbitrators within six months from the reference. On application by the plaintiff to have the suit restored to the file of the Court,—

Held, that the suit was still pending, the arbitrators not having determined it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court.

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THIS was an application that the above suit should be set down for re-hearing. From the affidavit of Gapi Nath Nandi it appeared that the suit was for dissolution and account of a partnership between the plaintiff and defendants, and the plaint had been filed in July 1869. On September 20th, 1869, an order was made by the Court, with the consent of the parties, directing that all matters in dispute between them should be referred to arbitration. The arbitrators were named, and were to file their award within six months from the date of the order, and, in case of difference of opinion between the arbitrators, the matters in dispute were to be referred to the final decision of an umpire, who was to make his award within two months of the reference to him. The arbitrators only met once, but did not make any award, and at that meeting the parties entered into an agreement in the Bengali language, dated March 1870, whereby they agreed to settle all matters and accounts in difference among themselves. The agreement was left with the defendants; but the defendants had not come to any settlement as agreed on, and matters were in exactly the same position as at the time of reference to arbitration.

Mr. Kennedy now applied on behalf of the plaintiff to have the case put down on the file of the Court for re-hearing.

Mr. Marindin, *contra*.—By reference to arbitration the suit was taken from before the Court. The proper course would be to bring a fresh suit on the footing of the razinama. The original cause of suit is over and done with. But another suit could be brought—*Kallynauth Shaw v. Rajeeblochun Mozoomdar* (1). There was consideration for giving the razinama, and it is binding. The parties are in the same position as if an award had been made, but not filed within the proper time. That would have been binding on the parties though no actual decree of Court had been given.

Mr. Kennedy in reply.—In the circumstances of this case, the case of *Kallynauth Shaw v. Rajeeblochun Mozoomdar* (1) does not apply. There the cause of suit was entirely over, and had ceased, but here there was merely a reference to arbitration, and the suit does not thereby come to a conclusion. It may come before the Court again.

The learned counsel was stopped by the Court.

PHEAR, J.—It seems to me that this case ought to be restored to the file of the Court. The affidavit states that after the institution of the suit all matters

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in dispute between the parties to the suit were referred to three specified arbitrators, who were to make their award within six calendar months after the reference to arbitration; and in the case of a difference of opinion between the arbitrators, an umpire was to be appointed. It is admitted that no award was made within the six calendar months, and that no enlargement of the time was effected.

It appears to me clear that the suit is not at an end. The arbitrators did not determine the matter while they had jurisdiction to do so. Mr. Marindin argued with some earnestness that what has taken place between the parties really amounts to an agreement that the suit should be withdrawn. If that were so, the proper course for his client to pursue would have been to apply, on the footing of that agreement, that the suit should be withdrawn by the plaintiff, or otherwise put an end to. Such a proceeding would have afforded the Court an opportunity of exercising its judgment as to whether or not the parties had come to a binding agreement that the suit should be withdrawn. It seems to be adverse to Mr. Marindin's contention that the plaintiff, who is *dominus litis*, although alleged to be a party to the agreement, is the person who is now asking that the suit should be continued. If he had undertaken to withdraw the suit and had thereby brought the other parties into new positions relative to each other from which they could not now extricate themselves, I imagine this Court, on a proper application, might have compelled him specifically to carry out his agreement by withdrawing his suit. As, however, he has not, in fact, withdrawn it, and as the arbitrators do not appear to have given an award within the time limited for that purpose, it seems to me that the suit is still pending, and that the only course likely to lead to justice being done between the parties is that I should order the suit to be brought again before the Court. Question of costs reserved.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

Nov. 16.

SHEIKH GOLAM ALI, FATHER AND GUARDIAN OF SHEIKH AHMUD ALI AND OTHERS (DEFENDANTS) v. KAZI MAHOMED ZAHUR ALUM (PLAINTIFF).*

Suit to close Windows—Right of Property—Zenana.

A suit to close doors recently opened in the house of a neighbour, on the ground that such doors overlook the Zenana, or female apartments, of the plaintiff, does not lie.

THIS was a suit to enforce the closing of some doors newly opened by the defendant in the upper story of his house, on the ground that the same overlooked, and thereby caused exposure of, the zenana, or female apartment, of the plaintiff's house to the detriment of the plaintiff.

The defendant admitted the opening of the doors in question.

* Special Appeal, No. 995 of 1870, from a decree of the Subordinate Judge of Shahabad, dated the 23rd of February 1870, modifying the decree of the Moonsiff of that district, dated the 20th August 1869.

The moonsiff held that the opening of the doors had exposed the plaintiff's house to view, which caused great injury to the plaintiff, inasmuch as the females could not move about freely in the house. He, accordingly, passed a decree that the defendant do close the doors.

The Subordinate Judge on appeal upheld the decree.

The defendant appealed to the High Court.

Baboo *Anukul Chandra Mookerjee* for the appellant.

Baboo *Annada Prasad Banerjee* for the respondent.

JACKSON, J.—The Subordinate Judge in deciding this case, upon appeal from the decision of the Moonsiff, appears to have considered it quite unnecessary to refer to anything in the shape of authority in such cases. The point involved in this case, however, is one which has been frequently considered before, and the later decisions have been all carefully reviewed and considered in *Mahomed Abdur Rahim v. Briju Sahoo* (1). To one of the judgments there considered, I was a party. I entirely adhere to the opinion I expressed in that case, and also to the view expressed by Mr. Justice Markby in the decision to which I am referring.

It is difficult to conceive a less reasonable claim than that put forward by the plaintiff in the present case. It seems that he and the defendant occupy premises on different sides of the street or road, but not exactly fronting one another, and that in the intervening space between the erection complained of and the apartments of the plaintiff, are on the defendant's side certain other buildings, and on the plaintiff's side, and exactly between the two, the house and premises of a courtezan. It does not appear what the precise distance between the house of the plaintiff and the house of the defendant is, but it is clear that it is considerable. Any inconvenience occasioned by the defendant exercising his undoubted right of improving his own premises may easily be avoided by some arrangement in the power of the plaintiff himself, and evidently it is his business to adopt such an arrangement, and not to interfere with the rights of the defendant.

I do not at all desire to say that cases may not arise in which the Courts would be justified in interfering in order to prevent parties from exercising their right of property so as to injure or seriously inconvenience their neighbours. The present case is not by any means one of that description. I think the judgment of the lower Appellate Court must be reversed and the plaintiff's suit dismissed with all costs.

I wish to add that some reference was made by the vakeel for the special respondent to an alleged custom which authorised him to ask for the interference of this Court, but we were unable to elicit from the pleader any precise information as to the nature of this custom.

GLOVER, J.—I concur. Privacy is not an inherent right of property like a right to ancient lights and air. In this case, moreover, the houses of plaintiff and defendant were separated by a public road and by the house of a third party.

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MAHOMED
ZAHUR ALUM.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

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Feby. 4.

IN THE MATTER OF THE PETITION OF MAHIMA CHANDRA SHAH.*

Evidence—*Summoning of Witnesses for the Defence—Criminal Procedure Code (Act XXV of 1861), s. 253.*

It is the Magistrate's duty to summon witnesses for the accused who can speak to the facts of the case, and he ought not to determine beforehand what credit he will give to their evidence (1).

Mr. Montrivou (with him Baboos Srinath Das and Kalidas Bhunj) for the petitioner.

JACKSON, J.—This is an application, on behalf of one Mahima Chandra Shah, who was tried by Baboo Purna Chandra Ghose, the Deputy Magistrate of Dacca, and convicted, on the 14th December 1870, under section 342 of the Indian Penal Code and also under section 384 of that Code; and who has been sentenced to imprisonment and fine. The charge against him was, wrongfully confining the complainant and committing extortion.

It is said that a number of the defendants of the applicant, Mahima Chandra Shah, and of his relation, Sita Nath Shah, went to the house of the complainants, and forcibly seized them and carried them off to the house of the said Sita Nath Shah and Mahima Chandra Shah, and there confined them, and extorted from them the sum of rupees 110.

The Deputy Magistrate, who tried this case, states that the witnesses for the prosecution were examined before him on the 9th and the 10th of December, and a portion on the 12th; and that, when the case was about to close, an application was made to him, on behalf of Mahima Chandra Shah, that two witnesses, who were considered by him to be important for the defence, should be summoned and examined. These two witnesses were, one a man of the name of Kalikinkar, who had been said by the case for the prosecution to be a defendant in some way of some of the defendants, but who was stated to have been a person who interceded on behalf of the complainants and who lent them the money which was paid to the defendants, and which formed the subject of the charge of extortion. The other witness was one Rai Charan Chowkidar, who was also mentioned by the witnesses for the prosecution and the complainants as having seen them being dragged to the *kutcherry* of the defendants. The Deputy Magistrate was of opinion that Kalikinkar's evidence was not material, because he was not said to have been actually present when the money was paid. And as regards Rai Charan Chowkidar, the Deputy Magistrate states that he would not believe his denial, even if he gave evidence that he had not seen what the witnesses for the prosecution stated had occurred.

There was an appeal subsequently from the order of the Deputy Magistrate

* Criminal Miscellaneous Case, No. 4 of 1870; against the order of the Sessions Judge of Dacca, dated the 29th December 1870, confirming the sentence passed by the Deputy Magistrate on the 14th December 1870.

(1) See *Ram Shahai Chowdhry v. Sanker Bahadur, ante*, p. 65.

to the Judge ; and the Judge also in passing orders in the case stated that, in his opinion, it was not necessary to call these witnesses, because, as far as he could see from the case before him, even if they did give evidence for the defence, he would not believe them. The application to us has reference more especially to these applications to the lower Courts to examine these two witnesses for the defence.

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The law as regards the summoning of the witnesses for the defendant in a case of this description, is to be found in Chapter XIV, section 253, Criminal Procedure Code. It is as follows : "The Magistrate shall summon any witness and examine any evidence that may be offered in behalf of the accused "person to answer or disprove the evidence against him, and may, for this "purpose, at his discretion, adjourn the trial from time to time, as may be "necessary." The first question then for the Magistrate to consider was, whether these witnesses were, upon the facts stated for the prosecution, important witnesses upon the trial, and such as the defendant was entitled to have summoned and their evidence taken in order to disprove the evidence offered against him. There can be no doubt, upon the evidence for the prosecution, that these witnesses were, if the story for the prosecution is true, eye-witnesses of the offence which was alleged against the defendant. It is impossible to state beforehand what credit will be given to the evidence of the witnesses. We think, therefore, that under the law the Magistrate was bound to summon these two witnesses for the defence, and to have them examined. He has a discretion to adjourn the trial from time to time as may be necessary for the summoning of such witnesses. But if those witnesses are really witnesses who can speak in any way to the facts of the case, and who may be material for the defence, the Magistrate should exercise that discretion and should summon them.

The Sessions Judge was also, we think, wrong in law in rejecting the application of the defendant that these two witnesses should be examined. The Appellate Court has power, under the law, to order that further evidence shall be taken if it is necessary. And we think that our proper course in this case is to order the Appellate Court to send down directions to the Magistrate to have the evidence of these two witnesses taken in the presence of the defendant, and to have their evidence sent up to the Appellate Court ; and that the Appellate Court, after considering that evidence as well as all the rest of the evidence in the case, will record a fresh judgment and decision as regards the defendant Mahima Chandra Shah.

I may add, that although in this case there has been already a conviction, and to some extent an opinion given by the Judge that he would not believe the evidence of these two witnesses whatever they may say, I have no doubt whatever that the Sessions Judge will, notwithstanding, give a full and fair consideration to whatever evidence may be given by these witnesses ; and after taking their evidence into proper consideration, will pass fresh orders upon the appeal of the defendant.

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As regards the remaining defendants, although no application has been made before us, the learned Counsel for the defendant Mahima Chandra Shah has pressed upon the Court, that the further trial as regards them should also be allowed before the Appellate Court; we think it is not necessary at present to pass any order as regards them. Should the result of this further trial before the Appellate Court be that Mahima Chandra Shah is held to be guiltless, it may possibly be that that may have some effect upon the case as against the other defendants. If so, their case can be taken into consideration when any application is made on their behalf. But it by no means follows that even if Mahima Chandra Shah is guiltless, all the other defendants are innocent.

Mahima Chandra Shah will remain upon the bail which has been already ordered, until the Appellate Court has decided the case as regards him.

Before Mr. Justice Norman, Offy. Chief Justice, and Mr. Justice Loch.

1870
Jany. 21.

IN THE MATTER OF THE PETITION OF PRANKRISHNA CHANDRA AND ANOTHER.*

Penal Code (Act XLV of 1860), ss. 380-447—Criminal Trespass.

Entrance of a member of a Hindu joint family into the family dwelling-house is not criminal trespass.

The entry of a stranger into a family dwelling-house, with the permission and license of one of the members, is not criminal trespass.

ON the 8th of August 1870, Prankrishna Chandra applied to the Joint Magistrate of the 24-Pergunnas for an order that his adoptive mother, Srimati Puspamanī Dasi, and his wife, Srimati Kamini Dasi, who (he alleged) had been wrongfully confined by Biswanath Chandra at the family dwelling-house at Behala, be at liberty to come out from the said dwelling-house with their personal property. Thereupon the Joint Magistrate passed an order, directing Biswanath Chandra to allow the ladies their liberty, unless there was special authority or reason to the contrary. After the passing of the order, Prankrishna Chandra informed the sub-inspector of police that Biswanath had collected a number of lattials to commit a breach of the peace. The sub-inspector proceeded to Behala to see that the Joint Magistrate's order was executed without a breach of the peace. Upon the arrival of the police, Prankrishna, with Jadab Chandra Haldar, entered the family dwelling-house, and came out of the zenana, accompanied by the ladies, with their personal property. On objection being made by Biswanath to the removal of the personal property, it was left there agreeably to the direction of the sub-inspector.

On the following day Biswanath Chandra preferred a charge against Prankrishna, Jadab Chandra, and Madhusudan Kurumokar, under sections 380 and 447 of the Indian Penal Code. The Magistrate convicted them of an offence punishable under section 448 of the Penal Code, and passed a sentence that

* Criminal Motion Case, No. 163 of 1870, from an order of the Sessions Judge of 24-Pergunnas, dated the 3rd December 1870.

each of the accused do pay a fine of rupees 200. On appeal, the Sessions Judge confirmed the sentence of the Magistrate. Prankrishna and Jadab Chandra applied to the High Court for a reversal of the sentence (*inter alia*) on the following grounds:—

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- That as the complainant Biswanath and the accused Prankrishna were in joint possession of the family dwelling-house, the entry of the latter into the said dwelling-house was not criminal trespass.
- That as Jadab Chandra had entered the said family dwelling-house with the permission and at the special request of the said Prankrishna, he was not legally guilty of the offence defined in section 441 of the Indian Penal Code.

Baboos *Rames Chandra Mitter* and *Shyama Lal Mitter* for the petitioners.

Baboos *Ashutosh Dhur* and *Nilmadhab Sen* contra.

The judgment of the Court was delivered by

NORMAN, J.—This case does not appear to have been tried either by the Joint Magistrate or the Judge on appeal, with a sufficiently careful advertence to the definition of criminal trespass in section 441. Prankrishna being a member of the joint family committed no trespass by entering the house which was the joint property of himself and the complainant, Biswanath Chandra. Nor did Jadab Chaudra, who entered with Prankrishna and by his license, commit the offence of trespass by merely entering the joint family house.

Prankrishna entered the room which was ordinarily occupied by Biswanath Chandra, and that entry into Biswanath's room was, we think, rightly treated by the Joint Magistrate as a trespass. To make it a criminal trespass, the entry must have been "with intent to commit an offence or to intimidate, "insult, or annoy" Biswanath. The Joint Magistrate says that "there can be "no doubt that this was done with the intention, as legally understood, of annoy- "ing Biswanath." We do not understand what the Magistrate means by the qualification of the term "annoying." If he means something less than annoyance, as the term is ordinarily understood, we think it is not sufficient.

It was contended for the defendants that they acted in good faith. If they did so act in good faith with intent to vindicate Prankrishna's supposed rights, or those of the ladies of his immediate family, though under a mistaken notion as to the rights of Prankrishna, they certainly cannot be said to have acted with intent to annoy Biswanath. The Joint Magistrate seems to leave out of the question the supposition that they intended "to commit an offence," which, if anything, would we suppose be the offence of theft.

We notice that Jadab Chandra did not enter the room of Biswanath. If guilty at all, he can only be so as a person aiding and abetting the offence of Prankrishna.

We think that there should be a new trial of the appeal before the Judge.

Before Mr. Justice Kemp and Mr. Justice Glover.

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Jany. 20.

SRIMATI TALAN BIBI (JUDGMENT-DEBTOR) v. SRIMATI TENU BIBI
(DECREE-HOLDER).*

Act XXIII of 1861, s. 27—Special Appeal—Decree for Land under a Compromise in a Suit cognizable by the Small Cause Court.

In a suit for recovery of a sum of money below rupees 500, the parties entered into a compromise, whereby the defendant made over a certain piece of land in lieu of the money claimed, and a decree was passed accordingly. In execution of the decree, disputes arose between the parties. Upon special appeal by the judgment-debtor to the High Court,—

Held that, under section 27, Act XXIII of 1861, no special appeal lay to the High Court.

Baboo Ramanath Bose for the appellant.

Baboo Krishna Sakha Mookerjee for the respondent.

The judgment of the Court was delivered by

GLOVER, J.—The decree-holder sued the judgment-debtor for money due on a bond, and the case was decided on a solehnama executed between the parties, whereby the judgment-debtor gave to his creditor one-half a biga of land in lieu of the money due. The decree-holder afterwards took proceedings to recover, when the judgment-debtor contended that the decree could not be executed for money, because the money-claim had been by consent altered into one for land. The Judge, on appeal, held that the solehnama could be executed for recovery of the money, inasmuch as it was embodied in a decree of Court, and he referred, in support of his decision, to the case of *Chunder Narain Ghose v. Gouri Nath Bose* (1). The judgment-debtor appeals specially against this decision.

A preliminary objection is taken by the decree-holder, to the effect that this suit was originally one of a nature cognizable by the Small Cause Court, and that therefore no special appeal lies; against this view it is contended that, although the original suit was for money on a bond under rupees 500, the decree gave the creditor authority to take possession of one-half a biga of land, that the nature of the suit was thereby changed, and was no longer one cognizable by a Small Cause Court. The original suit was one for money on a bond for a less sum than rupees 500, and the mere fact of the decree, giving certain lands instead of that money, did not change the nature of the suit. Section 27, Act XXIII of 1861, lays down that no special appeal will lie in any suit of a nature cognizable by the Small Cause Courts; and in this instance, the nature of the suit remained from first to last the same. We therefore think that the preliminary objection is good, and that the special appeal must be dismissed with costs.

* Miscellaneous Special Appeal, No. 326 of 1870, from an order of the Officiating Judge of East Burdwan, dated the 12th July 1870, reversing an order of the Moonsiff of that district, dated the 10th January 1870.

(1) 4 W. R., S. C. C. Ref., 7.

Before Mr. Justice Kemp and Mr. Justice Glover.

IN THE MATTER OF THE PETITION OF GOLAB KHAN.*

1871
Feby. 18.

Mooktear—Act XX of 1865, s. 16—Charge, copy of—Magistrate, power of, to suspend
Mooktear.

Mr. S. Vertannes for the petitioner.

THE judgment of the High Court was delivered by

KEMP, J.—It appears that the Officiating Magistrate of Midnapore has suspended Golab Khan, a mooktear, from practice in his Court, or in any Court subordinate to him in that zilla. The Judge forwards the letter of the Magistrate, with the remark that he thinks the mooktear deserves to lose his sanad. Mr. Vertannes, who appears for Golab Khan, has drawn the attention of the Court to section 16, Act XX of 1865, and he urges that, under that section, it was necessary for the Magistrate to send a copy of the charge to his client, and also a notice that, on a day to be therein appointed, such charge would be taken into consideration.

It appears from the record that the only notice Golab Khan received was one dated the 16th November 1870, in which he is directed to show cause why he ought not to be suspended from practising as a mooktear. No charge was set out in this notice, and therefore the requirements of section 16 have not been complied with. We, therefore, direct that the Magistrate will proceed according to law, and send a copy of any charge he may wish to make, or that may be made against the mooktear, to the mooktear, and also a notice fixing the day on which such charge will be taken into consideration. The day appointed should be within a reasonable time, so as to give the mooktear an opportunity to prepare his defence. In the meantime, pending the investigation, Golab Khan will remain under suspension.

Before Mr. Justice Bayley and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF C. G. D. BETTS AND MAHOMED ISMAIL
CHOWDHRY.†

1871
Jany. 21.

Evidence—Records—Conviction quashed.

The prisoners were convicted, under section 154 of the Indian Penal Code, upon evidence taken in another case to which the prisoners were not parties. The conviction was set aside.

* Appeal against the order of the Sessions Judge of Midnapore confirming that of the Magistrate of that district, directing the petitioner, Golab Khan, to cease to practice as mooktear.

† Revision of Proceedings, under section 404 of the Code of Criminal Procedure, in the Criminal Motion Cases, Nos. 147 and 148 of 1870.

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Mr. R. T. Allan and Baboo *Mahini Mohan Roy* for the petitioners.

Baboo *Juggadanand Mookerjee* for the Crown.

The judgment of the Court was delivered by

BAYLEY, J.—It is clear (and the Government Advocate does not contend that it is otherwise), that the conviction in these two cases has been had on the evidence taken in the original riot case, in which these petitioners were not before the Court; at any rate, they were neither convicted nor acquitted in that case.

Now, a charge, under section 154 of the Indian Penal Code, ought to be a clear and distinct charge of the offence specified in that section. After such charge, the prisoner should be called on to plead, and, if his plea is 'not guilty,' then legal evidence for the prosecution should be gone into. The records of another case would not of themselves be legal evidence for the conviction. This separate evidence, in support of the charge under section 154, being given, and a *prima facie* case being made out for the prosecution, the prisoner must then be allowed opportunity to rebut that evidence. After which, judgment should be passed. In this case, however, no such procedure has been observed, and there is no evidence to support the charge, except the reference to the records of the riot case, and the presumptions arising therefrom.

The proceedings of the lower Courts are set aside, and the fines ordered to be refunded.

Before Mr. Justice Bayley and Mr. Justice Mitter.

1870
Dec. 19.

SYAD REZA ALI (PLAINTIFF) v. PURNANAND CHUCKERBUTTY (DEFEN-
DANT.)*

Plaint, Return of—Act X of 1859, s. 42—Mistake in the Plaintiff—Amendment of Plaintiff.

A suit cannot be dismissed merely on the grounds that the plaintiff did not contain a specification of the land in the defendant's possession, and that there was an error in the plaint in the description of the defendant's residence.

Mr. C. Gregory for the appellant.

Mr. R. E. Twidale for the respondent.

The judgment of the Court was delivered by

MITTER, J.—We do not think that the first ground taken by the appellant is of any force. There is no proof given to show that the petition for re-hearing was filed more than fifteen days after the first process in execution was

* Special Appeal, No. 1114 of 1870, from a decree of the Judge of Purnea; dated the 3rd March 1870, affirming a decree of the Deputy Collector of that district, dated the 27th September 1869.

executed. But we are clearly of opinion that the lower Courts have committed an error in law in dismissing the plaintiff's suit, simply on the ground that the plaint did not contain a specification of the quantity of land in the possession of the defendant, and that there was some error in the plaint as to the description of the defendant's place of abode. If the plaint did not contain any specification of the quantity of land alleged to be in the defendant's possession, the Court might have, under section 42 of Act X of 1859, returned it to the plaintiff, or allowed it to be amended. But after the plaint had been received and admitted, and after the defendant had appeared, the lower Courts had no right to dismiss the suit on such a technical ground.

The other objection as to the mistake in the statement relating to the defendant's place of abode is also too technical. It is clear that the defendant has appeared to answer to the claim of the plaintiff, and whether there was any mistake in the description of the defendant's place of abode or not, it could not affect the decision of the case on the merits.

We therefore reverse the decision of the lower Appellate Court, and remand the case to the first Court for a fresh trial. Costs to abide the ultimate result.

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See cal. 1503.

Before Mr. Justice Bayley and Mr. Justice Mitter.

LALA GABIND PRASAD (DEFENDANT) *v.* DOULAT BATTI, WIFE OF GABIND PRASAD (PLAINTIFF).*

1870
Dec. 12.

Hindu Law—Maintenance—New Point not taken in Ground of as Appeal.

A Hindu kept a Mahomedan mistress, and by such conduct compelled his wife, under her religious feeling, to leave the house. She went and resided with her mother, and continued to live in chastity. *Held*, the husband was bound to give maintenance to his wife.

Baboo Anandgopal Paulit for the appellant.

Mr. R. E. Twidale for the respondent.

The judgment of the Court was delivered by

BAYLEY, J.—We think this is a case in which the lower Appellate Court has properly come to the conclusion that a Hindu husband, who keeps a Mahomedan woman, and by such conduct compels the wife, under her religious feeling, to leave the house, is bound to give maintenance to that wife. It urged that the cause shewn is not a sufficient cause for leaving the husband's house, and a passage is quoted from the last edition of Shama Charan Sirkar's Vyavastha Darpana to the effect that a wife may desert her husband when he is an outcast or degraded (1), but the passage has no bearing on the facts of this case. The question here is whether the conduct of the husband did not render

* Special Appeal, No. 1161 of 1870, from a decree of the Judge of Bhaugulpore, dated the 23rd May 1870, reversing a decree of the Moonsiff of that district, dated the 12th March 1870.

1870 it impossible for the wife to live with him any longer consistent with her self-respect and religious feelings, and if so, whether she was entitled to maintenance when living with her mother, and, as it is found, chastely. We think the wife is, in such a case, entitled to maintenance.

LALA GABIND PRASAD v. DOULAT BATTI.

We are then asked to entertain a new point, not taken in the petition of special appeal, to the effect, that there was no evidence on the record of the Mahomedan concubinage, but we are not disposed to admit this ground at this late stage of the case. The lower Appellate Court has clearly found as to the conduct of the defendant on this point.

The respondent, on the other hand, contends that the sum of Rs. 3 was not a sufficient amount for maintenance, but this is a question of fact, and not one of law. It is a question which the lower Appellate Court was quite competent to deal with having regard to the position of the husband, who is a mooktear and owner of a small land jumma.

We dismiss the special appeal with costs.

Before Mr. Justice Mitter and Mr. Justice Ainslie.

1871.
Feby. 11.

THE QUEEN v. KALI CHARAN DAS AND OTHERS (APPELLANTS).*

Penal Code (Act XLV of 1860), s. 304—Culpable Homicide not amounting to Murder—Mitigation of Sentence.

In his charge to the Jury, the Judge should draw a distinction between the two classes of culpable homicide mentioned in section 304 of the Penal Code, and direct them to find specially under which, if either, the prisoner was guilty.

Baboos *Mahini Mohan Roy* and *Biprodas Mookerjee* for the appellants.

The judgment of the Court was delivered by

MITTER, J.—The prisoners in this case were found guilty by a jury of culpable homicide not amounting to murder, and sentenced by the Judge to transportation for life, under the provisions of section 304 of the Indian Penal Code. It appears, however, that the Judge, in charging the jury, did not ask them to find, specifically, whether the prisoners had done the act with the intention of causing death, or of causing such bodily injury as was likely to cause death; or whether they had done it simply with knowledge that it was likely to cause death, but without any intention to cause death, or to cause such bodily injury as was likely to cause death. Section 304 evidently draws a distinction between these two classes of culpable homicide, for, in the one case, the offender is liable to be sentenced to transportation for life, whereas the maximum punishment that can be inflicted in the other is a sentence of rigorous imprisonment for ten years.

* Criminal Appeal, No. 877 of 1870, against the order of the Sessions Judge of Nuddea dated the 8th November 1870.

Under these circumstances it is quite clear that it was the duty of the Judge to point out this distinction to the jury : and as that has not been done in this case, we must take it for granted that the prisoners have been found guilty of the lighter description of culpable homicide not amounting to murder. This view is supported by a decision of this Court in *The Queen v. Amir Khan* (1), and we therefore reduce the sentence passed on each and all of the prisoners to one of rigorous imprisonment for ten years. We see no reason to mitigate the sentence any further.

1871
QUEEN
v.
KALI CHARAN
DAS.

(1) Before Mr. Justice E. Jackson and Mr. Justice Mitter.

THE QUEEN v. AMIR KHAN AND OTHERS
(APPELLANTS.)*

The 22nd July 1869.

Baboo Rasbehari Ghose for Amir Khan.

JACKSON, J.—It has not been shown that there was any misdirection to the jury on any point of law which could in any way vitiate the proceedings of this trial.

The pleader for the appellant Amir Khan, urges several points, which, he says, amount to a misdirection; but he has not satisfied us that there has been any error in law in the course of the summing up by the Judge to the jury.

The jury found the prisoner, Amir Khan, guilty of culpable homicide not amounting to murder, under section 304 of the Indian Penal Code; and the Judge has sentenced this prisoner to transportation for life. The pleader for the prisoner has referred us to section 304, and has pointed out very correctly that the punishment laid down in that section for culpable homicide not amounting to murder differs in different cases. The sentence may be one of transportation for life or imprisonment of either description for a term which may extend to ten years, and also fine if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or, imprisonment of either description for a term which may extend to ten years, or fine, or both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause

death, or to cause such bodily injury as is likely to cause death. The Judge should therefore have called upon the jury to state which description of culpable homicide the jury considered proved against the prisoner; and as the Judge did not do so, we think it must be held that the conviction was for the lighter offence. Looking also to the circumstances of the case, it does not appear that the sentence passed is more severe than the offence warranted.

There seems to have been only one blow struck, and the blow was inflicted in a moment of passion and anger; and although there was no real provocation, there was some cause to excite the prisoner's rage. But the prisoner's conduct, after he struck down Madhab Mandal, was extremely bad. He made no attempt to raise him up, or restore him, but only thought of how he was to get rid of the body.

After finding that Madhab was dead, he, with the assistance of others, carried off the corpse, cut off the head, and threw both the head and body into a neighbouring tank.

The sentence we would pass on the prisoner is rigorous imprisonment for ten years. The Judge will see that a warrant to that effect is issued.

The two other prisoners, Nekra Dome and Narayan Dome, have also appealed, and the pleader for the prisoner, Amir Khan, was allowed to address the Court on their behalf. But we see no reason to interfere with the conviction and sentence in their case. They were chowkidars; and as they assisted the first prisoner in trying to escape from justice, they have been very properly severely punished.

Their appeal is therefore rejected.

* Criminal Appeal, No. 425 of 1869, from an order passed by the Sessions Judge of East Burdwan, dated the 6th May 1869.

Before Mr. Justice Kemp and Mr. Justice Glover.

1871
Feby. 25.

THE QUEEN v. ISHAN DUTT AND OTHERS (APPELLANTS).*

Evidence—Cross-Examination—Witness for Defence (1).

Baboo *Mahendra Lal Seal* for the appellants.

KEMP, J.—I think it right to remand this case to the Sessions Judge, with directions to insist upon the attendance of the witness Saudamini Naptini. It appears on the record that this woman was named before the Magistrate by the prisoners as a witness for their defence in the Sessions Court. A summons was issued, but it appears from the return to that summons that the witness Saudamini refused to accept service, and that she absconded. On this return the Magistrate passed a formal order "that it be kept with the record," and no further steps appear to have been taken by him to enforce the attendance of this witness. At the trial before the Sessions Court the prisoners through their pleader demanded as a right to have this witness summoned. I think that they were entitled to do so under section 375 of the Code of Criminal Procedure, which enacts that "an accused person shall not be entitled of right to have any other witnesses summoned than the witnesses named in the list delivered to the Magistrate by whom he was committed." Now it is clear that in this case this witness was named in the list delivered to the Magistrate by the accused, and therefore the prisoners as a right were entitled to have her examined. Moreover, she appears to be a material witness, and we cannot dispose of the case satisfactorily without her evidence being taken. The case is, therefore, remanded for the purpose of enforcing the attendance of Saudamini and taking her evidence. After taking her evidence the Judge will call upon the prisoners for their defence, take a fresh opinion from the assessors, and pass a fresh decision.

The next point taken by the pleader for the prisoners is that the Judge is wrong in not having permitted the pleader for the prisoners to cross-examine the witness Kedarnath Mitter, sub-assistant surgeon of Rampore Haut. The Judge says in his judgment "that the prisoners' pleader wished to cross-examine this witness as to the result of any conversation he might have had

* Criminal Appeal, No. 48 of 1871, from an order passed by the Sessions Judge of Beer-bhoom, dated the 2nd December 1870.

(1) See *Ramdhhan Mandal v. Rajballab* p. 65; and *In the matter of the Petition of Paramanick, ante*, App., p. 10; *Ram Sahai Mahima Chandra Shah, ante*, App., p. 78. *Chowdhry v. Sanker Bahadur, ante*, App.,

with his patient, but that the Court demurred to this, as the witness was only examined in chief as to his professional examination and treatment of the wounds." "Any examination," the Judge observes, "of this witness as to the facts of the case could only be carried on by the prisoners' pleader on the witness being called as a witness for the defence, and not in cross-examination of his evidence given as a medical man on behalf of the prosecution." The pleader for the prisoners, in support of his contention, has called our attention to several passages of Taylor on Evidence (1). It appears from that authority that in America a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination; and that if he wishes to examine him respecting other matters, he must do so by making him his own witness, and by calling him, as such, in the subsequent progress of the cause. Now, in this case, the sub-assistant surgeon stated circumstances in his direct examination which were connected solely with the injuries inflicted upon the witness Becharam, and the points upon which the pleader for the prisoners wished to examine the said witness Kedarnath are not connected with any circumstances stated in the direct examination of the witness, and therefore, if we were to apply the rule which obtains in America, the prisoners would have to make Kedarnath Mitter their own witness by calling him for the defence and then examining him respecting other matters than those connected with the circumstances stated in his direct examination: but there is another passage to be found in page 1155 of the same work (2), which lays down that if a witness called by one of the parties is a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question. I think that in this case, as the witness Kedarnath Mitter was a competent witness, and as he was called by the prosecution, although he was questioned by the prosecution only as to such matters as came within his professional knowledge, and he refers only to his professional examination of the wounds inflicted upon Becharam, and to their treatment, the Judge ought to have allowed the pleader for the prisoners to cross-examine that witness without making him a witness for the defence. We therefore direct that, on the re-trial of the case which we have ordered with reference to the evidence of the witness Saudamini, the Judge will recall the sub-assistant surgeon, and permit the pleader for the prisoners, or the accused themselves, if no pleader should appear on their behalf, to cross-examine this witness.

GLOVER, J.—I concur in sending back this case. The prisoners did all they were bound to do in summoning their witnesses, and if one of the most important of them evaded summons, as it appears from the Nazir's return that she did, it was the Magistrate's duty to have taken all the measures required by the Procedure Code to enforce that witness's attendance. The prisoners were in jail at the time, and are not to be supposed to have known of the return,

(1) 5th Ed., p. 1243.

(2) *Id.*, p. 1240.

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1871 and could not therefore have applied to the Court sooner than they did. I think that Saudamini's evidence should be taken, and that the Sessions Judge should pass a fresh decision in the case after recording that evidence.

QUEEN v.
ISHAN DUTT.

As to the other point raised,—namely, the right of the prisoners to cross-examine the sub-assistant surgeon,—I have some doubts as to the correctness of the objection. As, however, Mr. Justice Kemp thinks that the sub-assistant surgeon might have been so cross-examined, I do not desire to object to the case being remanded on this point also.

Before Mr. Justice Kemp and Mr. Justice Paul.

1870
Dec. 15. JADU NATH KUNDU CHOWDHRY (PLAINTIFF) v. BRAJA NATH KUNDU AND OTHERS (DEFENDANTS).*

Sale in Execution of a Decree passed without Jurisdiction.

Under a decree passed by a Court, which had no jurisdiction to try the suit, the right, title, and interest of the judgment-debtor, A., in a certain property, was sold and purchased by B. The decree was, after the sale, set aside as having been passed without jurisdiction. In a suit by A. against B., for confirmation of possession, on the ground that B. was about to take possession of the property under the purchase,—held, that the sale in execution was a nullity, as the decree had been passed without jurisdiction.

Jan Ali v. Jan Ali Chowdry (1) and *Peareemonee Dossee v. The Collector of Beerbboom* (2) distinguished.

In execution of a decree, the right, title, and interest of the (present) plaintiff was sold. The decree under which the sale took place was afterwards set aside on appeal as having been passed without jurisdiction. The plaintiff then brought the present suit for confirmation of his title.

The Subordinate Judge held, citing *Peareemonee Dossee v. The Collector of Beerbboom* (2) and *Jan Ali v. Jan Ali Chowdry* (1), that the sale could not be set aside, as it was held under a decree subsisting at the time of the sale; though such decree might have been set aside afterwards for want of jurisdiction, and accordingly dismissed the suit.

On appeal, the Judge confirmed the decree.

The plaintiff appealed to the High Court.

Baboo Tarak Nath Dutt for the appellant.

Baboos Ashutosh Dhur, Kali Prasanna Dutt, and Mahendra Lal Seal for the respondents.

* Spécial Appeal, No. 885 of 1870, from a decree of the Additional Judge of Hooghly, dated the 16th February 1870, affirming a decree of the 2nd subordinate Judge of that district, dated the 22nd September 1869.

(1) 1 B. L. R., A. C., 56.

(2) 8 W. R., 300.

KEMP, J.—In this case the plaintiff, being in possession, sues for confirmation of his title, which, he states, is threatened by an attempt on the part of the defendants (special respondents) to take possession under a sale in execution by which they had become purchasers of the property. Both Courts have dismissed the plaintiff's suit, holding that, although the decree under which the special respondents purchased had been cancelled as passed without jurisdiction, still the sale in execution of that decree would stand; and two precedents are quoted by the first Court—*Peareemonee Dossee v. The Collector of Beer-bhoom* (1) and *Jan Ali v. Jan Ali Chowdry* (2). The Judge, on appeal, adopts the reasons of the first Court, and refers to the precedents quoted above.

On referring to those cases, we find that they both contemplate sales in execution under decrees passed with jurisdiction; but the case before us is very different; the decree under which the sale was made was passed without jurisdiction; the sale is therefore a nullity. The appeal is decreed, and the decision of the lower Appellate Court reversed.

Each party will pay their own costs in all the Courts.

1870

JADU NATH
KUNDU
CHOWDHURY
v.
BRAJA NATH
KUNDU.

Before Mr. Justice Norman, Offy. Chief Justice, and Mr. Justice Loch.

MIRZA RAMJAN BEG (DECREE-HOLDER) v. J. COOK (JUDGMENT-DEBTOR).*

1870

Dec. 8.

Small Cause Court, Mofussil—Wages under Rupees 50—Act XI of 1865, s. 12.

Suits for wages under rupees 50 alleged to be due from an European British subject to a native can be tried in a Small Cause Court in the Mofussil.

THIS was a reference to the High Court from the Judge of the Small Cause Court of Berhampoor.

The question referred was whether a suit for wages below rupees 50 against a British-born subject is not cognizable by a Judge of the Small Cause Court, under the provision of section 12 of Act XI of 1865; the objection raised being that the power of trying suits for wages up to rupees 50, in which British-born European subjects are concerned, was conferred on officers exercising the power of a Magistrate by Act of Parliament, 53 Geo. III, c. 155, s. 106 (3).

* Reference, No. 30 of 1870, from the Judge of the Small Cause Court of Berhampoor, dated the 23rd September 1870.

(1) S W. R., 900.

(2) 1 B. L. R., A. C., 56.

(3) 53 Geo. III, c. 155, s. 106.—“And be it further enacted that, in all cases of debt not exceeding the sum of rupees 50 alleged to be due from any British subject to any native of India, resident in the East Indies, or parts aforesaid, and without the jurisdiction of the several Courts of Request established at Calcutta, Madras, and Bombay, respectively, it shall and may be lawful for the Magistrate of the zilla, a district where such British subject shall be resident, or in which such debt shall have been contracted, to take cognizance of all such debts, and to

examine witnesses upon oath, and in a summary way to decide between the parties, which decision shall be final and conclusive to all intents and purposes; and in all cases where any such debt shall be found to be due from any British subject to any such native of India, the amount thereof shall and may be levied in the same manner, and subject to the same regulations and provisions in respect to the commitment of the debtor, as are hereinbefore made and provided in respect to the levying of fines in case of the conviction of a British subject before such Magistrate.”

1870

The opinion of the High Court was delivered by

MIRZA RAM-
JAN BEG
v.
J. COOK.

NORMAN, C. J.—We think that there is nothing in section 12 of Act XI of 1865 to lead to the inference that suits for wages under rupees 50 against European British subjects cannot be tried in a Small Cause Court, though it may preserve the jurisdiction of Magistrates in such cases which was created by the 53 Geo. III, c. 155, s. 106.

Before Mr. Justice Loch and Mr. Justice Mitter.

1870
Nov. 18.

GAUR LAL SIRKAR (PLAINTIFF) v. RAMESWAR BHUMIK (DEFENDANT).*

Rent Law—Right of Occupancy—Sale of Tenure—Zemindar's Consent to Sale of Tenure.

A zemindar does not, by the mere receipt of rent from a purchaser from a tenant having a right of occupancy, sanction the sale to the purchaser, so as to give him a right of occupancy.

THE plaintiff sued to recover possession of two permanent jummas held by Ramkumar Sen and Nabakishor Sen within the defendant's patni mehal. On the death of Ramkumar and Nabakishor, their sons, Jibankrishna Sen and Ramjadab Sen succeeded to their said jummas, and on the 8th Chaitra 1266 B. S., (March 20th, 1860) sold them to the plaintiff. The plaintiff got his name registered in the defendant's serishta, and remained in possession of the lands, paying rents to the defendants. The defendants brought a suit against the plaintiff for ejectment, according to section 25 of Act X of 1859, and obtained a decree from the Revenue Court on the 25th August 1868, and dispossessed the plaintiff. He therefore brought this suit for recovery of possession.

The defence, *inter alia*, was that the plaintiff's vendors had no transferable right in the tenures; that his purchase was false; that he had no right of occupancy in the tenure; that the defendant did not register the plaintiff's name in his sherista, nor authorise anybody to do so; that the jote jummas, which had been entered in the names of Ramkumar Sen and Nabakishor Sen, were, after their death, and after the abandonment of the village by their representatives, held in khas by the defendant; and that the plaintiff after that held them for a short time without any right or title.

The first Court dismissed the plaintiff's suit. The plaintiff appealed to the Judge.

The Judge dismissed the appeal, holding, *inter alia*, that the sale to the plaintiff was without the zemindar's authority, and was therefore without any effect; and with regard to the objection that the zemindar, by receiving rent from the plaintiff, had acknowledged his rights, he said, "it is sufficient to say "that, although a landowner, by receiving rent from a tenant for a series of

* Special Appeal, No. 1214 of 1870, from a decree of the Officiating Judge of Moorshedabad, dated the 20th March 1870, affirming a decree of the Moonsiff of that district, dated the 80th December 1869.

"years, does undoubtedly acknowledge the tenancy of the rent-payer, it by no means follows that he also recognises the right of such rent-payer to succeed to all the privileges of the previous occupier."

The plaintiff then preferred a special appeal.

Messrs. *R. E. Twidale* and *G. A. Twidale* for the appellant.

Baboo *Mahini Mohan Roy* for the respondent.

The judgment of the Court was delivered by

Locch, J.—We see no sufficient ground for interfering with the judgment of the Court below. The plaintiff in this case has filed among other papers a *roha*, alleged to have been given to him by the zemindar's *tehsildar*, acknowledging his purchase of the tenure, and stating that he had entered his (the plaintiff's) name in the zemindar's *sherista* in the place of his vendor's. But the Judge considers that this document is open to suspicion, and that it is very questionable whether the *tehsildar* had authority to grant it. Excluding therefore this document, we have only the fact of rent having been paid by the plaintiff to the zemindar. That, however, would not give him a right of occupancy, or a right to be restored to the tenure in which he has no right of occupancy. We do not think it can be said in this case that, by the mere receipt of rent on the part of the zemindar, he sanctioned the sale. It might have been a temporary arrangement between the plaintiff and his vendor, of which the zemindar might have known nothing; and as it was necessary to entitle the plaintiff to recover that he should show that the tenure which he purchased was a transferable tenure, and as the lower Court has held that he failed to prove this, we dismiss the appeal with costs.

1870
GAUR LAL
SIRKAR
v.
RAMESWAR
BHUMIK.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

MANI LAL SAHU AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF SARUN
AND OTHERS (DEFENDANTS).*

1870
Dec. 8.

Regulation XI of 1825, s. 4, cl. 3—Island—Re-formation on site of old Land—Right of Government.

Under clause 3, section 4, Regulation XI of 1825, Government has no right to land thrown up as an island in the bed of a navigable river, when such island is formed on the site of land which had been washed away.

THIS was a suit for recovery of possession of 155 bigas and 13 kattas of alluvial land which the Government, it was alleged, had wrongfully taken possession of as an island, and also for possession of 74 bigas of land which had recently formed by the diluvion of the mainland of the plaintiffs'

* Special Appeal, No. 688 of 1870, from a decree of the Judge of Sarun, dated 31st December, affirming a decree of the Subordinate Judge of that district, dated 12th May 1869.

1870

MANI LAL
SAHU
v.
COLLECTOR
OF SARUN.

mauza. The defence set up by the Government was that the land in dispute was in reality an island formed in the river and surrounded by unfordable streams, and therefore the property of Government under clause 3, section 4, Regulation XI of 1825; that if any portion of the mainland had been cut away, the plaintiffs could apply for reduction of the revenue, but they could lay no claim to the land which had accreted to the island.

The Subordinate Judge found that in 1863 the *dearah* (land re-formed) was thrown up in the shape of an island; that the plaintiffs had filed no documentary evidence to show what quantity of land was submerged at the time of the survey, whether it re-formed in front of their landed tenure, or that after the survey a portion of their mainland had been washed away and had again been thrown up by the river; that the evidence did not prove the plaintiffs' assertion; that the stream on the north of the chur having ceased to flow would not benefit the plaintiffs, as the right of Government to the chur accrued under clause 3, section 4, Regulation XI of 1825, on its formation. He accordingly dismissed the suit.

On appeal, the Judge confirmed the decision of the lower Court.

The plaintiffs appealed to the High Court.

Baboo *Kalikrishna Sen* and *Rames Chandra Mitter* for the appellants.

Baboo *Annada Prasad Banerjee* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—In this case the plaintiffs claim to recover possession of 155 bigas of land in two parts, consisting of 81 bigas and 74 bigas respectively, the latter being the more recent formation. The land was described as having formed in the bed of a river in contiguity to the plaintiffs' estate, and in fact as being a re-formation of land previously belonging to the plaintiffs.

It appears that in consequence of there being an unfordable channel surrounding this land at the time of its formation, it was dealt with as belonging to Government, and a settlement made with the parties who are defendants along with Government.

The Judge finding that the channel which surrounded this land at the time of its formation had been unfordable, and applying clause 3, section 4, Regulation XI of 1825, gave judgment for the Government, and the parties who got the settlement and the plaintiffs have come up here in special appeal.

The decision of the lower Appellate Court was no doubt consonant with the previous rulings of this Court upon the subject of lands formed by alluvion and accretion, but a recent decision of the Privy Council has made a considerable change in the law that we are bound to administer—*Lopez v. Maddan Thakoor* (1). This case has been relied upon by the special appellant.

The senior Government pleader, Baboo Annada Prasad Banerjee, sought to narrow its application by contending that it applied to a case between rival

proprietors, and did not apply to a case like the present. It seems to me that that would be too restricted an application of the decision of the Privy Council. They appear distinctly to lay down that clause 3, section 4, contemplates only cases where the land which has come into existence has been gained or derived from a large navigable river or from the sea, and in respect of which there have been no previous rights of property. They seem to hold that the circumstance of the river having flowed over and diluviated the surface of an estate, would not deprive the owner of his property in the site so long as that remains and is identifiable, and they declare that "something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another."

Now in this case it is quite clear that the plaintiffs alleged the land in question to have re-formed upon the site of the land previously belonging to them, and in fact, an issue has been framed embracing that allegation, *viz.*, the second issue of fact in the Court of first instance, and if the plaintiffs succeeded in making out the case which they set up in that way, *viz.*, that it was land re-formed upon the site of land of theirs, it seems to me that under the ruling of the Privy Council they would be entitled to a decree. The Courts below do not seem to have come to a finding upon this issue, and therefore I think it will be necessary to send the case to the lower Appellate Court in order to try the case with reference to this judgment.

1870
MANI LAL
SAHU
v.
COLLECTOR
OF SARUN.

Before Mr. Justice Loch and Mr. Justice Mitter.

THE QUEEN *v.* BANDA ALI (PRISONER)*

1871
Jany. 24.

Punishment, Enhancement of—Commutation of Sentence—Whipping—Rigorous Imprisonment.

Upon conviction of the offence of house-breaking, the accused was sentenced by the Deputy Magistrate to six months' rigorous imprisonment, and to be whipped. On appeal, the Judge found that, as this was the first offence, the additional punishment of whipping was illegal, and setting aside so much of the sentence, passed a sentence of three months' rigorous imprisonment, in addition to the six months' rigorous imprisonment passed by the Deputy Magistrate.

Held, that the commutation of the punishment was illegal.

Loch, J.—It appears to me that the view taken by the Sessions Judge is not correct, and that his order is in effect an enhancement of the sentence passed upon the prisoner by the Deputy Magistrate. The prisoner was convicted of house-breaking, and sentenced to rigorous imprisonment for six months, and to be whipped. As this was a first offence of the kind, so much of the sentence as directed the prisoner to be whipped, passed by the Deputy

* Revision of Proceedings held by the Sessions Judge of 24-Pergunnas, under section 404 of the Code of Criminal Procedure.

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QUEEN
v.
BANDA ALI.

Magistrate, was illegal, and has rightly been set aside by the Sessions Judge; but when the Sessions Judge went further, and sentenced the prisoner to three months' imprisonment in addition to the six months already given him by the Deputy Magistrate, his order was, undoubtedly, an enhancement of the sentence passed upon the prisoner by the Deputy Magistrate. The whipping was in addition to any other punishment to which the prisoner might be liable under the Penal Code. This additional punishment was illegal in the present case, and the Judge could not legally, as in fact he has done, commute it to further imprisonment of three months.

I think the order of the Sessions Judge as regards the additional imprisonment for three months, to which he has sentenced the prisoner, must be set aside.

MITTER, J.—I am of opinion that the additional sentence of three months' rigorous imprisonment passed by the Sessions Judge in this case is contrary to law.

Section 419 of the Code of Criminal Procedure says:—"The Appellate Court may, after perusing the proceedings of the lower Court, and after hearing the plaintiff or his counsel or agent, reverse or alter the sentence of that Court, but not so as to enhance the punishment that shall have been awarded."

I think that the Appellate Court is bound, under this section, to satisfy itself beyond all reasonable doubt that the alteration which it proposes to make in the sentence of the lower Court would not amount to an enhancement of the punishment already awarded by that Court. If the alteration is restricted merely to the degree of the sentence, no difficulty whatever can possibly arise. But if, on the other hand, it goes to affect the nature of the sentence, as in the present case, the difficulty becomes almost insurmountable. Things dissimilar in nature do not admit of any direct comparison with one another; and if there is no fixed scale or standard by which the comparison can be made, the task must be given up as a hopeless one.

The learned Judge says, that a sentence of rigorous imprisonment for nine months is equivalent to one of rigorous imprisonment for six months, coupled with whipping. But from what materials this calculation has been made, I am wholly unable to make out. Granting that whipping is generally looked upon as a more degrading punishment than imprisonment, it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not, under any circumstances, amount to enhancement of punishment. A poor wretch, who has got a large family to support, might prefer to be let off with a few stripes, instead of being incarcerated in jail for any lengthened period of time; and in his case at least the Appellate Court is bound to show satisfactorily that it is not really enhancing the punishment, before it undertakes to substitute the one punishment for the other without his consent.

But, be this as it may, it seems to be perfectly clear that the Legislature has not supplied us with any data from which the comparative severity of the

two sentences under our consideration can be determined; and it is, therefore, impossible to say how many strokes of the cat-o'-nine-tails would be equivalent to a sentence of rigorous imprisonment for a given period of time. It cannot be contended for one moment that each individual Judge is at liberty, in a case of this kind, to act according to an arbitrary standard of his own. Every discretion vested in a Court of Justice must be exercised in a reasonable manner and upon reasonable grounds; and the power of altering the sentence conferred upon the Appellate Court by the provisions of the section above quoted is, by no means, an exception to this rule. If we hold with the learned Judge that a sentence of twenty stripes is equivalent to one of rigorous imprisonment for three months, there seems to be no reason whatever why another Judge should not be permitted to hold that the same sentence is equivalent to one of rigorous imprisonment for as many years. An Appellate Court can alter the sentence of the lower Court, it is true; but if it is not in a position to say, upon some reasonable grounds, that the alteration which it proposes to make would not amount to enhancement of punishment, it is bound to reject that alteration as contrary to the express provisions of the law.

Whether a sentence of fine can be substituted for one of imprisonment or not, is a question upon which I wish to express no opinion. The Legislature has, in some cases, laid down the limits within which those two punishments can be awarded in the alternative, and within those limits the Appellate Court may make any alteration in the sentence of the lower Court it may think proper. But the case now before us stands on a quite different footing. Here there is no legal or rational standard of comparison of any kind whatever; and in the absence of such a standard, the learned Judge had no power to take it for granted that a sentence of twenty stripes was equivalent to one of rigorous imprisonment for three months.

But there is another ground upon which the Judge's view appears to me to be erroneous. It is admitted on all sides that the sentence of whipping passed by the Deputy Magistrate in this case was altogether illegal. Such a sentence is, in the eye of the law, an absolute nullity; and the learned Judge ought to have, therefore, excluded it from his consideration in estimating the amount of punishment awarded by the Deputy Magistrate. That punishment was one of six months' rigorous imprisonment, and it was this punishment only that the learned Judge had to deal with in fixing the final sentence, the other punishment,—namely, that of whipping—being absolutely null and void, and therefore liable to be considered as if it had never been passed at all. If the Deputy Magistrate had not sentenced the prisoner to whipping, in addition to rigorous imprisonment for six months, it is perfectly clear that the learned Judge could not have added a single day to the period of imprisonment. How then can it be contended that the mere fact of the Deputy Magistrate having passed the additional sentence of whipping, which sentence was wholly illegal and void, enabled the learned Judge to increase that period from six to nine months. The learned Judge admits that he did so, because he thought that six months'

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The case put by the learned Judge in which the sentence of the lower Court is found to be altogether illegal, stands on a quite different footing. It may be that the Appellate Court may in such cases quash the sentence as absolutely null and void, and direct the lower Court to pass a new sentence according to law, or it may even pass such a sentence upon its own authority. But I do not wish to express any opinion on this point, one way or the other. It is sufficient for me to say that the three months of rigorous imprisonment added in this case to the six months already awarded by the Deputy Magistrate clearly amounted to enhancement of punishment, and that the case falls therefore within the express words used in the last portion of section 419.

In conclusion, I have simply to observe that the argument based upon the provisions of section 12 of the Whipping Act has no bearing upon this case. That section refers to the Court by which the case is tried in the first instance, and not to a Court of Appeal.

For the above reasons I would reduce the sentence passed by the Sessions Judge to one of rigorous imprisonment for six months only.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

THE QUEEN *v.* NGA CHO.*

Act XXVII of 1870, s. 10, 294A—Lottery Office.

No charge for the offence (of keeping a lottery office) under section 10, Act XXVII of 1870, 294A., can be entertained without the authority of the local Government.

* Reference under section 484 of the Code of Criminal Procedure, from the Recorder of Moulmein, under cover of his Registrar's letter No. 59, dated the 23rd December 1870.

The judgment of the High Court was delivered by

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Loch, J.—This case appears to have been taken up and disposed of by the Magistrate without the authority of the local Government having been obtained to the institution of the proceedings. Now, though it be an offence under section 10, Act XXVII of 1870, 294A., to keep a lottery office not authorized by Government, &c., &c., yet section 14 of the Act provides that no charge under 294A. shall be entertained by any Court, unless the prosecution be instituted by order of, or under the authority from, the local Government. The proceedings in this case must consequently be set aside.

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Sl L 5 Cal 4926.

KALI KUMAR MITTER (PLAINTIFF) v. RAMGATI BHATTACHARJEE
AND ANOTHER (DEFENDANTS.)*

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Dec. 8.

Damages, Suit for—Jurisdiction—Civil Court—Act VIII of 1659, s. 1—Act XI of 1865, s. 6,
cl. 3—Mofussil Small Cause Court (1).

A suit will lie in the Civil Court to recover damages for abuse.

Baboo Kasi Kant Sen for the appellant.

Baboo Srinath Das for the respondent.

The judgment of the Court was delivered by

Loch, J.—We think that the Judge is wrong in refusing to exercise jurisdiction in this case.

We think that a suit for recovering damages for abuse will lie in the Civil Court, and we find there are various decisions of this Court to support this view. We refer to *Moulvee Gholam Hossein v. Hur Gobind Dass* (2) and *Shaikh Tukeye v. Shaikh Khoshdel Biswas* (3).

It was urged by the respondent that the present is a suit of a nature cognizable by a Court of Small Causes, and that therefore no appeal will lie; but referring to section 6, Act XI of 1865, we see that this is not a suit of that nature, for clause 3 of that section provides as follows:—"No action shall lie in any such Court" (namely, a Court of Small Causes) "for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury." Now, here it is not alleged that any pecuniary damage has resulted, and we therefore reject the objection taken in bar of this appeal.

The case will go back to the Judge, in order that he may dispose of it on the merits.

Costs will follow the ultimate result.

* Special Appeal, No. 1580 of 1870, from a decree of the Judge of the 24-Pergunnas, dated the 26th May 1870, reversing a decree of the Moonsiff of that district, dated the 18th December 1869.

(1) See *Ali Buksh Doctor v. Sheikh Samiruddin*, 4 B. L. R., A. C., 31; and *Bharrat Chandra Chuckerbutty v. Mahendra Chandra Chuckerbutty*, *Id. App.*, 59.

(2) 1 W. R., 19.

(3) 6 W. R., 151.

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Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.

IN THE MATTER OF THE PETITION OF HIRALAL MOOKERJEE.*

Suit against Representative of a Deceased Person—Act VIII of 1859, s. 203.

The plaintiff sued the defendants on the ground that they were in possession of his deceased debtor's property. It being found that the defendants received no assets from the deceased, *held*, the suit was rightly dismissed.

If the suit had simply been against the defendants as heirs or personal representatives of the deceased, and if they had alleged that no assets had come to their hands, the plaintiff would have been entitled to a decree against them as representatives of the deceased : if he had prayed for such a decree, without going to trial on the question whether or not the defendants had assets ; and in that case he might have proceeded, in enforcement of his decree, under the provisions of section 203 of Act VIII of 1859.

THE following reference was made by the Judge of the Small Cause Court at Krishnaghur :—

“This is a case brought against the representative of the deceased obligor of a bond, and the defendant's plea is that he has received no assets from the deceased. I found on the evidence that this plea was established, but the Government pleader, who appears for the plaintiff, has requested me to refer the case to the High Court for the decision of the following question, *viz.* :— In a suit against the representative of a deceased debtor, can the Court put in issue the question of assets or no assets ; or, if the representative character of the deceased is established, is the Court bound to give a decree against the defendant as representing the estate of the deceased, leaving the question of assets to be decided in execution of the decree, in the way indicated by section 203 of the Civil Procedure Code.”

Baboo Rasbehari Ghose for the plaintiff.

The judgment of the Court was delivered by

NORMAN, J.—In order to answer the question which is now before us properly, it is necessary to state briefly how it arises.

Hira Lal Mookerjea sued Digamberi Koluni, the mother, and Mahes Chandra, the brother, of one Giri Dhar, on a bond for rupees 45, executed by Giri Dhar, alleging that Giri Dhar died in Chaitra 1276 (May 1869), and that the defendants are in possession of his property. The defendants alleged that the bond was a forgery, and that there were no assets of Giri Dhar in their hands. The Judge of the Small Cause Court says that it is established on the evidence that the plea that the defendant received no assets from the deceased is correct, and he refers, for the decision of this Court, the following question (*reads*).

* Reference, under section 22 of Act XI of 1865, from the Judge of the Small Cause Court at Krishnaghur.

So far as regards the case immediately before us, the question appears to me to be a very simple one. The plaintiff makes it the foundation of his case against the defendants that they were in possession of property belonging to the deceased; he does not even state that they were the heirs of the deceased. The defendants had clearly a right to take issue upon a statement which, if true, would have made them personally responsible; and if, as was the case, the defendants succeeded, it appears to me plain that they were entitled to a decree dismissing them from responsibility altogether. It certainly would be most unreasonable to compel them to litigate the same question over again with the plaintiff in execution of the decree under section 203.

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If the suit had simply been against the defendants, or either of them, as the heirs or personal representatives of the deceased, if they had alleged that no assets had come to their hands, the plaintiff, on proof of the due execution of the bond by the deceased, would have been entitled to a decree against them as representatives of the deceased; if he had prayed for such a decree, without going into the trial of the question whether or not the defendants had assets, in that case he might have proceeded in enforcement of his decree under the provisions of section 203. But as he did not choose to content himself with such a decree, but attempted to prove in this suit that assets had come into the hands of the defendants, for the purpose of making them personally liable, he must take the consequences of his own failure.

This in no way conflicts with the decisions of the Madras Court—*Rayappa Chetti v. Ali Sahib* (1) and *Avul Khadar v. Andhu Sett* (2), referred to in the argument before us.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

SRIMATI BIMALA DEBI (ONE OF THE DEFENDANTS) v. SRIMATI TARASUNDARI DEBI (PLAINTIFF).*

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Dec. 20.

Limitation—Cause of Action—Contribution—Joint Debts—Hindu Widow.

N., G. and H. were three brothers living together as a joint Hindu family. After the death of N. and G., decrees were obtained against N.'s widow and satisfied by her, in respect of monies borrowed by N. and H., as the managing members of the family, and spent on family purposes while G.'s widow was living in the family. In a suit by N.'s widow for contribution against G.'s widow,—

Held that, although no legal necessity had been shown for borrowing, the defendant was bound to pay her share under the circumstances of the case, as the money had been spent for family purposes while she was living in the family. The cause of action arose, not on the date of the decrees against the plaintiff, but at the time when she had to pay over their amount.

* Special Appeal, No. 1880 of 1870, from a decree of the Judge of Dacca, dated the 13th April 1870, reversing a decree of the Subordinate Judge of that district, dated the 13th April 1869.

(1) 2 Mad. H. C. Rep., 336.

(2) 2 Mad. H. C. Rep., 423.

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Baboo *Srinath Das*, *Rames Chandra Mitter*, and *Bhagabati Charan Ghose* for the appellant.

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Baboo *Annada Prasad Banerjee* and *Kali Mohan Das* for the respondent.

THE facts of the case and the arguments are sufficiently stated in the judgment of the Court, which was delivered by

JACKSON, J.—We have heard this case at some length, and I need not say that I have given very careful consideration to all that Baboo Rames Chandra Mitter has so ably urged ; but I must say that he has not been able to satisfy us that the decision of the lower Appellate Court is wrong in any way in law.

The question which was before the Judge was whether one Bimala Debi was liable to pay her share of certain debts, which were contracted when she was living with her brother-in-law as a joint Hindu family, those debts having been found to have been incurred for the benefit of the joint family, and the widow of one of the brothers having subsequently been made liable in execution of decree for more than her own portion of those debts.

There were three brothers, Nilmadhab, Girish Chandra, and Harro Chandra. The widow of Nilmadhab sues the widow of Girish Chandra. Her allegation is that, on three several occasions, her husband, Nilmadhab, in connection with Harro Chandra, as managing members of the joint family, borrowed certain sums of money for the purposes of that family, and expended them on account of that family ; that the creditors brought actions upon the loans so incurred ; and that she, as the widow of Nilmadhab, has had to pay money, which was the excess of her husband's share, and for which the widow of Girish Chandra is liable.

The fact has been found by the Appellate Court that the money was borrowed and expended for the purposes of the family. Though the lower Courts have come to different conclusions on the question, we are more concerned at present with the decision of the lower Appellate Court. The Appellate Court, as regards the question of limitation, as pleaded by the defendant, held that the plaintiff's cause of action arose when she was forced to pay up the money in execution of decree. On the merits, the Judge of the lower Appellate Court held that he was satisfied upon the evidence that the money was borrowed for the family, and expended for the family, and that it was not necessary under such circumstances to show that there was any actual necessity to make such expenditure, and that the conduct of the present defendant, Bimala Debi, with regard to a document which is said to be the will of Nilmadhab (though it is not perhaps exactly a will as regards all the property therein stated), supported him in his conclusion that the whole property of Nilmadhab, even that standing in his name, was the joint family property. It is on each of these three points that it has been pleaded before us that the lower Appellate Court is wrong.

First, as regards limitation, it is said that the cause of action to Nilmadhab, arising out of this transaction, commenced when he expended the money which he had borrowed, and that no fresh cause of action arose to the present plaintiff, his widow, when she was called upon to pay up the money borrowed by her husband, even though it was in excess of that for which he was liable. *Ram Krishna Roy v. Madan Gopal Roy* (1) was quoted in support of this

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(1) Before Mr. Justice Bayley and Justice Sir C. P. Hobhouse, Bart.

RAM KRISHNA ROY (PLAINTIFF) v. MADAN GOPAL ROY AND OTHERS (DEFENDANTS.)*

The 20th July 1869.

Baboos Srinath Das and Chandra Madhab Ghose for the appellant.

Baboos Annada Prasad Banerjee and Hem Chandra Banerjee for the respondents.

The facts are fully stated in the judgment of the Court, which was delivered by

HOBHOUSE, J.—This was a suit for contribution.

The plaintiff alleged that, in the year 1267 (1860), he was the manager of a joint family, of which the defendants were members; that, on the 21st Aswin of that year (October 6th, 1860), he borrowed 1,000 rupees as such manager, and applied the money in the payment of certain joint family expenses; that the person from whom he borrowed the money got a decree against him, and was about to execute it, when, on the 25th Magh 1271 (February 6th, 1865), he (plaintiff) again borrowed a sum of money and paid off the original debt; that then the second creditor got a decree against him for the second loan, and that he paid off that decree out of his own

private funds on the 30th Aswin 1273 (October 15th, 1866). He therefore sued his partners for contribution, laying his cause of action as stated in his plaint on the 25th Magh 1271 (February 6th, 1865).

The defendants, amongst other pleas, urged that the suit was barred by the application of the Statute of Limitation, and upon that point both the Courts below have dismissed the plaintiff's suit. The lower Appellate Court in delivering judgment does so in these terms: "The cause of action in cases "of contribution has been more than "once held to accrue from the date "the shareholder pays the common "charge from his own funds.

"In this case it is argued that the first "loan was made by plaintiff as agent "of the estate. If this had been so, it "is not to be supposed he would have "allowed execution to be taken out "against himself only. There is "no doubt that that a loan of rupees "1,000 was incurred by him in his "private capacity, and if, as he states, "it was in order to pay monies for the "common expenses of the joint family, "his right of action accrues from the "date he incurred that liability. The "suit is clearly barred by limitation."

In special appeal, it is urged that this decision is erroneous in law, inasmuch as upon the facts of the case the plaintiff's cause of action accrued when he had actually paid the money,

* Special Appeal, No. 941 of 1869, from a decree of the Officiating Judge of Dacca, dated the 1st February 1869, affirming a decree of the Subordinate Judge of that district, dated the 18th June 1868.

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argument. That case is somewhat a peculiar case. It was there found that the person who there stood in the position in which Nilmadhab stands in this case, borrowed certain money on his own private account. In this case, although it has been attempted to be argued that Nilmadhab here also

and it is said that he paid the money on the 30th Aswin 1273 (October 15th, 1866). This contention a little differs from the contention in the Courts below, because there the cause of action was laid on the 25th Magh 1271 (February 6th, 1865), and here it is attempted to be laid in Aswin 1273 (October 1866); but whether it is 1271 or 1273 (1864 or 1866) the plaintiff would be equally in time, and we need not, therefore, discuss this difference of contention.

The pleader for the special appellant relies on two cases, *Boykant Nath Saha v. Gour Monee Dassee Chowdrain* (1) and *Nobbo Kristo Bhunj v. Raj Bulbh Bhunj* (2). These cases seem to us simply to result in this maxim,—viz., that, in suits for contribution, the cause of action accrues on the date on which the sums of money which are sought to be recovered were paid. We are quite ready to adopt this maxim, but, adopting it, we still think that the plaintiff is not in time. The question to be determined is as to when, in this particular instance, the monies in question were paid; were they paid in 1273 as contended for by the plaintiff, or were they paid in 1267 (1860) as contended for by the defendants? This is of course a question of fact, and we think that the lower Appellate Court has substantially found that fact against the plaintiff, and even if the Court had not so found it, we think that the plaintiff has found it for himself. He said in his plaint that in the year 1267 (1860) he had borrowed

the 1,000 rupees in question, but he said more than this. He said that in that same year he had paid away those monies, and he filed an account which purported to show how and when it was that those monies had been paid on account of the joint estate. Therefore it seems to us that upon the plaintiff's own showing he so paid those monies in 1267 (1860) and that his cause of action therefore arose on that date.

It is, however, contended that when the plaintiff borrowed the monies in 1267 (1860) he borrowed them not in his own private capacity but as manager of the joint family. This again is obviously a question of fact, and on that question the lower Appellate Court has not only substantially, but has distinctly, found against the plaintiff. The Court says: "There is no doubt that that loan of rupees 1,000 was incurred by him in his own private capacity," and we are not shown that this is not a good finding of fact upon the evidence on the record.

The case of *Kalee Shunkur Sandyal v. Huro Shunkur Sandyal* (3), cited for the defendant, is, we think, in point, and shows that, whether the lower Appellate Court was right or wrong in the exact grounds on which it based its decision, that decision is not erroneous in law. The payments were, to our minds, admittedly made in 1267 (1860) and the plaintiff not having sued within six years of that date, was out of Court.

We dismiss the special appeal with costs.

(1) 2 W. R., 159.

(2) 3 W. R., 134.

(3) 7 W. R., 29.

borrowed money on his own private account, yet it is quite clear that the money was not borrowed on his private credit and for his own purposes: it was borrowed for the family, and was expended for the family. One of the persons who joined in the borrowing gives distinct evidence upon it, and gives the reasons for which the different loans were contracted. The Judge has believed that evidence, and we see no reason to doubt it; and this evidence certainly takes this case out of the facts of the case quoted. The limitation, which it is now contended ought to be applied to this case, is not the limitation which the defendant set up in her answer. She there declared that the limitation commenced from the date of the decree against the plaintiff, and not from the date on which she was obliged to pay up the money in execution. A cause of action arose, we think, to the plaintiff, when the plaintiff suffered damages on being obliged to pay money beyond what she was properly liable to. She suffered no damages whatever until she was made to pay up the money which she thought ought not to have been paid by her. Her cause of action arose when she paid that money.

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The next question which is raised is that the plaintiff has not sufficiently shown that there was a necessity for her husband's borrowing this money. The fact is, no doubt, that it was borrowed for the family, and expended for the family at the time when the present defendant was actually a member of the family, and was living jointly with them. It seems to me impossible to suppose that she was not acquainted with the fact of the expenditure. The only objection which is apparently raised is that it was somewhat extravagant expenditure. It does not appear that she at any time protested against it. It does not appear that even, after the expenditure was made, she thought in any way of separating herself from her husband's brothers; she continued to remain with them joint for many years subsequently. Now, that one of the brothers is dead, she tries to repudiate her share of the expenditure, and to fasten it upon the widow of the brother who is dead. It seems to us that, on the facts as found by the Judge, there can be no doubt that there was at least a tacit consent on the part of the defendant to this expenditure.

It was urged, in the course of the argument, that the defendant must be considered in the same position as a minor, and that every act undertaken on her behalf must be considered with the same strictness as the acts of a guardian acting for a minor. I cannot, however, admit that this widow is in any way in the same category as a minor. The widow is perfectly competent to act for herself, whereas the minor cannot. She could, at any moment, demand separation, and possibly an account. She did nothing of the sort; and even in her answer, she does not allege that she objected to the extravagant expenditure of the money. Her answer is that the plaintiff's husband and the other manager, Harro Chandra, borrowed and spent the money for some other matter, and she even charges the husband of the plaintiff with having appropriated a sum beyond his share. It would appear that these

1870 assertions were mere assertions, and they certainly have not been proved to the satisfaction of the lower Court.

Srimati Bimala Debi v. Srimati Tarasundari Debi. Lastly, it is urged that the Judge could not draw the inference which he has drawn from the conduct of the present defendant, with reference to the alleged will of Nilmadhab. In that will the debts are alluded to, and the whole family property is alluded to; and it is distinctly stated that all the property, whether standing in his own name, or in another's name, is joint, and that all the family are entitled to share in whatever is due to the family, and they are to pay what is due from it. The defendant has several times made use of this document, has put it into Court, and has put it forward as her title-deed. These debts are not categorically mentioned in the deed; and under those circumstances it is in no way final or conclusive proof as against the liability of the defendant. But it shows that she then accepted the statement of Nilmadhab as regards the state of the family property; and it certainly does not look as if she then was protesting that Nilmadhab had been appropriating a large portion of her share of the property. There seems to be no reason, as far as we can see from the facts of the case, that the transactions were anything but honest and fair, and that the debts were incurred for the benefit of the family. We think, therefore, that the Judge was right in making the defendant liable for her share of the debt.

The appeal is dismissed with costs.

Before Mr. Justice Bayley and Mr. Justice Mitter.

1871 KARTIK NATH PANDAY AND OTHERS (PLAINTIFFS) v. RATAN DAS AND OTHERS (DEFENDANTS.)*
Jany. 4.

Rent, Bond-fide Payment and Receipt of—Act X of 1859; s. 77.

Baboo Rames Chandra Mittra and Tarak Nath Paulit for the appellants.

Mr. R. E. Twidale and Baboo Debendra Narayan Bose for the respondents.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

MITTER, J.—The plaintiffs in this case, alleging themselves to be the proprietors of a twelve-anna share of Mauza Udoypur, brought this suit against the defendant, Ratan Das, upon a kabuliat bearing date the 27th Sraban 1275 (August 10th, 1868).

The defence set up was that the plaintiffs were entitled only to a seven-² anna share of the rent; that the kabuliat was not a genuine instrument duly

* Special Appeals, Nos. 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, and 1556 of 1870, from the decrees of the Judge of Bhaugulpur, dated the 31st May 1870, affirming the decrees of the Deputy Collector of that district, dated the 30th November 1869.

executed by the defendant, but that it was fraudulently engrossed by the plaintiffs upon a blank stamp, which the defendant had signed, and which he had made over to the plaintiffs for some other purpose. 1871
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Certain third parties appeared in the case as intervenors under the provisions of section 77, Act X of 1859, alleging themselves to be the proprietors together of a five-anna share, and asserting that they were in receipt and enjoyment of the rents on account to that extent.

The Court of first instance gave a decree to the plaintiffs for a seven-anna share only. It came to the conclusion that the kabuliat, which constituted the basis of the plaintiffs' suit, was not a genuine document; that the plaintiffs were not in possession of more than a seven-anna share; and that the intervenors were in receipt and enjoyment of the rent up to the date of the commencement of the suit.

Against this decision the plaintiffs appealed upon several grounds, one of which was that the first Court came to an erroneous conclusion in holding that the kabuliat was not a genuine instrument. The lower Appellate Court, without entering into this question at all, has dismissed the plaintiffs' suit, on the ground that the batwara proceeding, awarding a twelve-anna share of the mauza to the plaintiffs, had not been carried out by delivery of possession, and that there was evidence on the record to show that the intervenors were in receipt and enjoyment of the rents of a seven-anna share.

We are of opinion that the lower Appellate Court was wrong in refusing to enquire into the question relating to the genuineness or otherwise of the kabuliat. That document was the basis of the plaintiffs' claim, and an enquiry into its genuineness or otherwise was necessary for determining with any degree of satisfaction, whether the alleged receipt and enjoyment of the rent by the intervenors was *bonâ fide* or not. It is clear that, if the ryot defendant did actually execute the kabuliat, any payment of rent subsequently made by him to the intervenors would not be, so far as he is concerned, a *bonâ fide* payment, and a question might then arise whether such payment of rent would be a sufficient protection to the tenant against the claim of the landlord based upon the kabuliat. It has been said that the genuineness of the kabuliat would not necessarily go to show that the receipt and enjoyment of the rent by the intervenors were not *bonâ fide*. But if it can be shown that the intervenors, with full notice of the fact that the tenant defendant had executed that kabuliat in favor of the plaintiffs, and, without the sanction of any competent authority, subsequently prevailed on the ryot to pay his rents to them, such receipt of rent would clearly not be a *bonâ fide* receipt within the meaning of section 77, Act X of 1859.

We are, therefore, of opinion that an enquiry into the genuineness of the kabuliat above referred to is of the utmost importance for the proper decision of this case. If that kabuliat is a genuine instrument, it would then be necessary to determine whether the subsequent payment of rent by the tenant to the intervenors was *bonâ fide* on his part, and whether such a payment

1871 would be a legal defence to the plaintiffs' suit. It would next be necessary to decide whether the intervenors were aware of the existence of that document, and whether, with the knowledge of its existence, and without the sanction of any competent authority authorizing them to take possession of the property, they chose to collect rents from the tenant defendant; and whether such a receipt of rent would be, within the terms of section 77, such a *bonâ fide* receipt and enjoyment of the rent as would entitle them to ask the Court to dismiss the plaintiffs' suit.

We think these points ought to have been considered and decided by the lower Appellate Court, and we therefore remand the case to that Court for re-investigation, with reference to the above remarks.

The costs of this appeal will abide the result.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

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March 8.

THE QUEEN v. MAHIMA CHANDRA DAS AND OTHERS (APPELLANTS).*

Evidence of Accomplices—Judge's Summing-up—Evidence of Accused's Bad Character—Improper Admission of Evidence—Discharge of Prisoner on Appeal—Recording Depositions.

Mr. M. Ghose (with him Baboos Nalit Chandra Sen, Hari Mohan Chuckerbutty, and Tarakanto Chuckerbutty) for Mahima Chandra Das.

Baboo Jogendra Nath Bose for Nagar Bansi.

Baboo Jagadanand Mookerjee for the Crown.

THE facts are fully stated in the judgment of the Court, which was delivered by

JACKSON, J.—These prisoners have been convicted of several dacoities upon boats, which took place on the river Padda, about the 14th or 15th Asar of last year (27th or 28th June 1870), and have been sentenced to different terms of imprisonment. The trial was held by the Sessions Judge of Dacca with a jury, who were unanimous in finding a verdict of guilty. The prisoners have appealed to this Court. Mr. Ghose appeared on behalf of Mahima Chandra Das, and a vakeel of this Court for Nagar Bansi. The remaining prisoners were unrepresented.

The verdict of the jury is final on all questions of fact, and the only question for consideration is whether there is legally sufficient evidence to support the conviction, or whether there has been such illegality in the proceedings, in the course of the trial, as requires this Court to annul the conviction.

* Criminal Appeals, Nos. 38 and 53 of 1871, against the order of the Sessions Judge of Dacca, dated the 22nd November 1870.

As regards some of the prisoners, there is ample evidence, and there can be no doubt, in the mind of any reasonable person, of their guilt. The fact of the occurrence of the dacoities is clearly proved. They were reported to the Police immediately after their occurrence. There is some evidence that the prisoners were, at the time, associated together, being dependants and servants of the prisoner, Mahima Chandra Das; though, upon this point, the witnesses should have been required to give more distinct and exact information. An approver witness, Gabind Sirkar, has given a detailed account of the manner in which the prisoners assembled and went about in a boat from place to place committing these dacoities at night. There is corroboration to his evidence as regards several of the prisoners. There is evidence that, previous to the dacoities on two boats, which were tied to the bank near each other, the prisoners, Afazuddin and Kalai, went on board one of the boats on the pretence of asking for fire. They were, therefore, together on the spot about the time when the dacoities took place. There is further evidence that the day after the dacoity, the prisoners Afazuddin, Panchu Hajam, and Ibrahim, were seen together in a boat; were observed, on being hailed, to throw money into the river; that when the attention of the chowkidar was turned to them, and attempts were made to arrest them, Afazuddin and Panchu Hajam jumped into the river, and swam to the other side; that Afazuddin, when seized, admitted that he had thrown into the river money which he had obtained in the dacoity, and offered to dive for it, and pick it up. The evidence of the approver is further confirmed by the admissions made by the prisoners, Ibrahim, Kalai, Panchu Hajam, Mahes Hajari, and Nagar Bansi, not only before the Police, when they each gave up a share of the money which each had obtained in the dacoity, but also before the Deputy Magistrate, before whom they were taken. It is also confirmed by the discovery of a cloth in the house of Afazuddin, which was proved to be a portion of the property stolen in one of the dacoities. As regards all these prisoners, there is, therefore, ample evidence that they were engaged in the dacoity. As against the prisoners, Mahima Chandra Das, Guru Charan, and Dhonei, the evidence is not so clear as against the two latter; there is not that corroboration of the approver's evidence, which it is the rule to require; and though there is some corroboration as against Mahima Chandra Das, it is not of a very distinct and certain character.

The first point which Mr. Ghose argued on behalf of Mahima Chandra Das, but which, in fact, affects also the cases of Guru Charan and Dhonei, is that the Sessions Judge did not place sufficiently strongly before the jury the necessity for requiring corroboration of an approver's evidence before convicting upon it. The Sessions Judge stated the law to the jury in the following terms:—"There can be no doubt that, in a case like the present, the evidence of a pardoned accomplice requires corroboration before it can suffice to sustain a conviction. But the prosecution maintains that this corro-

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boration exists in the evidence of many other witnesses as to the acts and circumstances related by them." The Sessions Judge details these facts, and then adds :—" I do not think that corroboration of the approver's evidence, where he speaks of wholly innocent and legal acts, relieves the prosecution of the necessity of producing something corroborative of the statement made by him as to the dacoities on Karhai's and Dhopai's boats. I think that the approver's evidence respecting the transactions should be corroborated by something connected with those particular transactions." The Sessions Judge then points out against which of the prisoners there is corroboration, leaving out however one important item of the evidence ; and he adds that there is some reason to doubt the whole truth of the approver's story on account of its strangeness ; and finally he concludes, " you should consider very carefully the evidence given by Gabind, approver, before accepting it as conclusive of the guilt of any of the prisoners." I think that, in these remarks to the jury, the Sessions Judge did distinctly point out to them that they ought to require corroboration of the approver's evidence before they convicted upon it ; and that that corroboration should be upon some point relating to the dacoities, and not to other facts, which were innocent and legal. This latter remark especially alluded to Mahima Chandra Das, because the prosecution had adduced evidence to prove that about the time when the dacoities took place, the prisoner, Mahima Chandra Das, was with the approver Gabind Sirkar and other persons going about in a boat on the river, collecting rents from his villages, and stopping at Bohor, on his way to Dacca. Mr. Ghose argued that the Sessions Judge should have pointed out to the jury that they could not convict without further corroboration. I think that he performed his duty in telling them that they ought not to convict without sufficient corroboration ; and therefore upon this ground, I should not have interfered with the conviction of the prisoners. The law upon the subject has been clearly laid down in the case of *Elahi Buksh* (1). It was there ruled, firstly, " that a conviction may be legally had on the uncorroborated evidence of one or more accomplices ;" secondly, " that it is necessary that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require." Mr. Ghose pointed to the illustrations of the law given in that case, and contended that the Sessions Judge had acted against the rules there laid down. But the Sessions Judge, in this case, did not tell the jury that the evidence of the approver alone was sufficient to justify them in finding the prisoners guilty. He did advise them not to convict upon the uncorroborated evidence of a pardoned accomplice. He did not tell them that the uncorroborated evidence of an accomplice, given under a tender of pardon, was admissible, and that it was for them alone to form an opinion upon it ; that a conviction founded upon such evidence would be legal, and that such evidence, without corroboration,

might be acted upon with as much safety as that of any other accomplice. On the contrary, the Sessions Judge distinctly pointed out to the jury the necessity for corroboration and the necessity that that corroboration should be upon circumstances implicating the prisoners in the crimes charged upon them. The Sessions Judge then clearly performed his duty. If the jury, notwithstanding his charge, convict upon the uncorroborated evidence of an accomplice, this Court cannot, upon the view of the law laid down in the Full Bench decision referred to, interfere with that conviction. Such convictions have been held to be legal even in England where the jury system has been long in force. They are not illegal here.

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But Mr. Ghose, on behalf of the prisoner, Mahima Chandra Das, has taken further objections to the summing up of the Sessions Judge as against his client. Firstly, he urges that the different portions of the evidence which affected his client were not distinctly stated to the jury, and observations made upon those portions of the evidence; secondly, he points out that evidence of an inadmissible character, such as that his client was a notorious dacoit, and hearsay evidence was allowed by the Sessions Judge to be given, and no remark was made by the Sessions Judge that this should not be allowed to have any weight in the decision of the jury; thirdly, that the Sessions Judge omitted to point out to the jury the evidence of the prisoner's witnesses, and passed them over with the remark that that evidence was not important, whereas it was of the most vital importance to the prisoner, proving as it did, if believed, that the prisoner could not have been present, as alleged by the approver, at the dacoities with which he was charged. It seems to us that the evidence, as given in the trial and the summing up of the Sessions Judge, is open to these remarks. The Sessions Judge did allude to the evidence for the defence, and did pass it over with the remark that it was of no importance. The evidence was the more important, because, although several of the dacoits, when first arrested and taken before the Deputy Magistrate, confessed their guilt, and named their accomplices, they distinctly stated that the prisoner, Mahima Chandra Das, had gone with them to Dacca, and had left the boat there, and remained at Dacca, and that the dacoities were committed after he had left the boat, and on their return from Dacca. It is not as if they had merely left out his name, or as if they wished to screen him as their master from all implication in the dacoities, because they not only mention his name, but some of them state that a portion of the plunder was set apart to be made over to him. Still their statements are that he was not present at the dacoities; and so far they confirm the fact that the prisoner was at Dacca at the time the dacoities were committed. The approver, Gabind Sirkar, is the sole individual among the dacoits, who alleges that Mahima Chandra Das was present, and took part in the dacoities. The Sessions Judge should have pointed out all these facts to the jury, and their bearing upon the evidence for the defence. Again, the Sessions Judge should not have allowed the witness, Loknath, head constable, to give hearsay evidence and evidence to character.

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MAHIMA CHANDRA DAS. He says that, on the report of the dacoity, he proceeded to the spot, and there he "learned that Mahima, Guru Charan, who used to be one of a noted gang of dacoits, Dhoihi Khan and Panchu Hajam, had gone out together in a boat on the day before the night of the dacoity;" that he went next morning to the house of Guru Charan, and was informed that he had gone with Mahima Chandra to Dacca, and at Komerpur he was informed that Afazuddin and Kalai had gone with Mahima; and, lastly, that he knew well that Mahima was a *badmash* himself, and that he had taken Guru Charan, who is a notorious dacoit, to be a ryot close to his own house. Section 57, Act II of 1855, enacts that the improper admission of evidence shall not of itself be ground for a new trial in any case if it shall appear to the Court, before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. Had the Sessions Judge in his summing up pointed out that this was not proper evidence, and that the jury, in coming to their verdict, must shut it out from their minds, its admission alone might have formed no ground for a new trial. But the absence of any such remarks, coupled with its improper admission, is very likely to have prejudiced the prisoner in the minds of the jury. Coupling this with the fact that the Sessions Judge told the jury that the evidence of the witnesses for the defence was of no importance, whereas that evidence was to some extent corroborated by other facts proved upon the trial, we are of opinion that the conviction of the prisoner upon this trial cannot stand.

Mr. Ghose has asked us to acquit the prisoner. The mode in which this Court should act upon appeal in cases of this description is laid down in the case of *Elahi Buksh* (1) above alluded to. It was ruled that "this Court may, in all cases in which a finding of guilty is set aside upon appeal, if it considers it necessary, order a new trial. But if the Court is satisfied that the evidence is wholly insufficient to support any conviction against the prisoner, and would, upon the same evidence, have reversed a conviction, if the case had been tried without the intervention of a jury, there is no necessity, and it would be improper, to grant a new trial. In such a case the Court, having set aside the verdict, may order the prisoner to be discharged." Now it seems to me that upon the evidence on the record, the conviction of Mahima Chandra Das could not be confirmed if there was an appeal before us on the facts. Independent of the corroboration to his defence, which has been above alluded to, there is no trustworthy corroboration of the evidence of the approver. The evidence as to his presence with the approvers, when collecting rents the day after the dacoities took place, is supported by a pretended receipt for rent, which is produced. The Judge seems to have placed no reliance upon the evidence on this point. He does not allude to it in his summing-up. If true, it contradicts the prisoner's *alibi*, and so far is very important. But we are satisfied that no reliance can be placed upon it. It is very probable that Gabind Sirkar went and gave the receipts which are ascribed to him, but the

(1) Criminal Appeal, No. 75 of 1866 : May 29th, 1866.

receipt in the hand-writing of the prisoner, Mahima, is evidently a made-up document, and no inference can be drawn from it. We think then that we ought not to direct a new trial in the case of this prisoner, but should order his discharge. The cases of Guru Charan and Dhonai are different. They have not attempted any defence. The account of their presence at the dacoities charged has been from first to last the same, and there is no reason to doubt their having been present, and having taken part in the dacoities charged; and although as regards Guru Charan, evidence has been admitted, which should not have been allowed, still there can be no doubt of his guilt.

We dismiss the appeal of all the prisoners, except Mahima Chandra Das, and we direct his discharge.

The Sessions Judge is requested to point out to the Deputy Magistrate, before whom these prisoners came in the first instance, and who recorded their admissions, that the record of the examination shews that such examination was, if properly conducted, not properly taken down. The questions put should have been recorded, as well as the answers; and a proper certificate appended to each examination. The utter disregard of the provisions of the law upon this point, and as to the attestation of examinations, evinced by some of the Deputy Magistrates in the Dacca district, is deserving of severe censure. This is not the first time we have been obliged to notice it. The result of the carelessness of the authorities on this subject is that the confessions are open to question as evidence in consequence of the illegal manner in which they are recorded. The provisions of the law being distinct, should be distinctly carried out.

Mookerjee, J.—I am of the same opinion. I think also that the Sessions Judge had properly warned the jury, and had brought to their notice the fact that the approver, Gabind, was an accomplice witness deposing under an offer of pardon. The Sessions Judge has therefore acted according to the directions laid down in the case of *Elahi Buksh* (1); but I quite concur with my learned colleague in holding that the Sessions Judge should have put the evidence for the defence properly before the jury, instead of saying that that evidence is not important. He was also wrong in laying before them evidence to the character of the accused. The jury might have been, in all probability, prejudiced against the prisoners. Evidence to character should be only taken and considered by the Sessions Judge, and should influence him in awarding punishment. If the accused are persons of notorious bad character, the Sessions Judge, in passing sentence, should see what punishment is adequate and sufficient. That evidence should not be laid before a jury. If the conviction had been bad, by the assistance of assessors, I would have had no hesitation in discharging the prisoner, Mahima Chandra. Under the circumstances of this case, I see no reason to direct a new trial of the prisoner Mahima. I would direct his release. As regards the other prisoners, I quite agree with Mr. Justice E. Jackson in upholding the conviction and sentence.

(1) Criminal Appeal, 75 of 1866 : May 29th, 1866.

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Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1871
Jany. 5.

**MUSSAMAT TARA KUNWAR (ONE OF THE DEFENDANTS) v. MANGRI MEEA,
(PLAINTIFF) AND ANOTHER (DEFENDANTS.)***

Mahomedan Law—Pre-emption—Suit for Pre-emption.

On the foreclosure of a mortgage, after the expiry of the year of grace, but before a decree for possession has been obtained by the mortgagee, a suit to enforce the right of pre-emption, in respect of the property mortgaged, is maintainable.

THIS was a suit to recover possession of a tiled house, on the ground of pre-emption. The plaintiff stated that Mussamat Mangri, one of the defendants, had executed a deed of conditional sale in favor of Mussamat Tara Kunwar; that Mussamat Tara Kunwar had caused the usual notice of foreclosure to be served, and that the year of grace had expired.

The defence set up was that the plaintiff's father, and not the plaintiff, was the owner of the house contiguous to the house in dispute, and, consequently, the plaintiff had no right of pre-emption, and that the plaintiff had not, on receipt of the intelligence of the foreclosure, performed the preliminaries.

The Moonsiff found that the plaintiff's father, and not the plaintiff, was owner of the house contiguous to the property in dispute, and, consequently, the plaintiff had no right of pre-emption. He accordingly dismissed the suit.

On appeal, the Subordinate Judge found that the plaintiff was the owner of the house contiguous to the property in dispute, and that the preliminaries had been performed. He accordingly passed a decree in favor of the plaintiff.

The defendant, Tara Kunwar, appealed to the High Court, *inter alia*, on the ground that the suit was premature, inasmuch as no suit had been brought for possession after the expiry of the year of grace.

Mr. R. T. Allan for the appellant.

Baboo Mahini Mohan Roy for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—Two questions have been raised in this appeal,—one is, whether the suit is not premature by reason of the sale to which the plaintiff took exception not having been completed, and of pre-emption not having been properly perfected.

It seems that the owner of this property executed a deed of conditional sale or *bye-miyadi*; that the period of grace had commenced to run; that notice of foreclosure had been issued, and the year of grace had elapsed; and that no proceedings had been taken to redeem. That being so, it appears to me that

* Special Appeal, No. 1414 of 1870, from a decree of the Subordinate Judge of Sarun, dated the 5th May 1870, reversing a decree of the Moonsiff of that district, dated the 28th December 1869.

the right of property of the mortgagor had become in point of fact extinguished; and that it needed nothing more than either a quiet transfer of possession, or a suit to reduce the property to possession. That being so, I think the party entitled to pre-emption was at liberty to advance his claim.

The second question raised was one of fact. It was stated that the plaintiff claimed to be the owner of the house or property by virtue of the ownership to which pre-emption was claimed; but that, according to the defendants' allegation, the owner was really the plaintiff's father. The father, it seems, appeared and disclaimed any right of property, and alleged that of his son. It seems that witnesses also appeared, who proved that the plaintiff was the owner of the property.

Under these circumstances I think the Court below was quite at liberty to adjudicate in favor of the plaintiff, and the special appeal must be dismissed with costs.

1871
MUSSAMAT
TARA KUNWAR
v.
MANGRI
MEEA.

Before Mr. Justice Norman, Offg. Chief Justice, and Mr. Justice Loch.

GABIND CHANDRA BISWAS v. HEM CHANDRA BARDER AND OTHERS.*

1871
Mar. 4.

Criminal Procedure Code (Act XXV of 1861), s. 273—Jurisdiction—Grievous Hurt.

A Magistrate has no power, under section 273 of the Code of Criminal Procedure, to refer a case of grievous hurt for trial to a Deputy Magistrate having only the powers of a Subordinate Magistrate of the second class.

THE following reference was made to the High Court by the Officiating Magistrate of Jessore:

"The defendants, Hem Chandra Bader and two others, came to the house of Gabind Chandra, complainant, and struck him with a bamboo on his head, also on his arm, hand, side, and back. The Joint-Magistrate, who received the complaint, requested the sub-assistant surgeon to examine the complainant, and give his opinion of the nature and cause of the injuries from which he was suffering. Accordingly, the sub-assistant surgeon reported that he had found a depression on the left side of the head; that the outer layer of the bone of the head was broken, and that there was probability of the man's getting disease of the head from the injuries he had received.

"Mr. Ellis, Deputy Magistrate, dismissed the case, and discharged the accused under section 250, Code of Criminal Procedure, as the evidence was suspicious and contradictory.

"I consider it to be an undoubted fact that the man Gabind Biswas received a dangerous wound upon the skull, and the medical report leaves it beyond a doubt that the man has been severely beaten. The case was therefore originally not triable by Mr. Ellis, who has only second grade power. It is clearly a case falling under section 324. I therefore solicit the order of the Court to revive the trial.

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, from the Officiating Magistrate of Jessore, under the cover of his letter No. 84 J., dated the 21st February 1871.

1871 "The reference is made under section 404, Code of Criminal Procedure, as I consider there has been an error in law in the dismissal by a Magistrate of a man accused of an offence which that Magistrate had no power to try."

^{v.}
HKN CHAN-
DRA BARDER.

The judgment of the High Court was delivered by

NORMAN, J.—It appears that, at the time when the Joint-Magistrate Mr. Quinn made over the case for trial to the Deputy Magistrate, Mr. Ellis, he had notice by the report of the sub-assistant surgeon that the complainant, if his story was true, had suffered injury amounting to grievous hurt. The case was therefore not triable by a Deputy Magistrate having only the powers of a Subordinate Magistrate of the second class. Mr. Quinn had therefore no power under section 273 to refer the case to Mr. Ellis, and Mr. Ellis' orders on the case must be quashed, he having had no jurisdiction to enquire into or try the case.

Before Mr. Justice Norman, Offy. Chief Justice, and Mr. Justice Loch.

1871
Feby. 13.

THE QUEEN v. KALINATH BISWAS.*

Criminal Procedure Code (Act XXV of 1861), s. 298—Recognizance to keep the Peace.

A. was bound over to keep the peace for a year. Before the expiry of the period, he was involved in fresh disputes with other persons. The Deputy Magistrate, instead of referring the case to the Court of Session under section 298 of the Code of Criminal Procedure, directed A. to enter into another recognizance for a further period of one year.

Held, the order was illegal.

On the 19th February 1870, the then Deputy Magistrate of Ferozepur ordered Kalinath Biswas to enter into a recognizance to keep the peace for one year.

On the 10th November 1870, the present Deputy Magistrate found it necessary to bind Kalinath Biswas for a further period of one year in the same sum, and directed that another recognizance should be executed.

This order of the 10th November appearing to the Sessions Judge to be illegal, he referred the case to the High Court that the order of the Deputy Magistrate might be quashed.

The judgment of the Court was delivered by

NORMAN, J.—Kalinath Biswas, being bound over to keep the peace under section 281, shortly before the expiration of the recognizance, was found by the Deputy Magistrate of Ferozepur to be involved in fresh disputes likely to involve a breach of the peace with parties other than those in respect of disputes with whom he was already bound. The Deputy Magistrate ordered him to enter into fresh recognizances to keep the peace for one year.

The Sessions Judge, under section 434, has sent up the order, being of opinion that the Deputy Magistrate had no power to make it. In that opinion we concur. We think that the Magistrate, finding that Kalinath was involved in fresh disputes with other persons, making it necessary, with a view to securing the peace of the district that he should be bound over for a period extending beyond one year, should have proceeded to refer the case to the Court of Session under the provisions of the 298th section.

We quash the order of the Deputy Magistrate.

* Reference, under section 434 of the Code of Criminal Procedure, from the Officiating Sessions Judge of Backergunge, by his letter No. 4, dated the 24th January 1871.

Before Mr. Justice Phear.

SRIMATI UMASUNDARI DASI v. UMACHARN SADKHA

Bengali Mortgage—Plaint—Money-decree.

THIS was an application for leave to file a plaint. The plaint suit was brought to recover (*inter alia*) the sum of Rs. 2,300, w money due upon two Bengali deeds of mortgage which had bee the defendant in favor of the plaintiff as security for money ntiff to the defendant. The deeds of mortgage were similar, an following provision:—"If I should fail, within the term of six months to pay off the whole of your money with interest, in that case you may sue me to law, and by sale of the said huts recover, with interest of your money. Should the whole of your money be not thereby recovered, in that case you will get it by the sale of whatever other property I may have elsewhere. Should even then all the money be not realized, I shall be held responsible for the remainder,—that is to say, I shall myself be liable to pay the same. If I should make any objection thereto, it shall be false and inadmissible." The plaint prayed for a money-decree.

PHEAR, J.—Refused to admit the plaint.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

MAHOMED RIJAH AND OTHERS (PLAINTIFFS) v. THE COLLECTOR OF TAGONG AND ANOTHER (DEFENDANTS).*

Stamp—Insufficiency of Stamp—Act XVIII of 1869.

The Civil Court is authorized, under the present Stamp Law (Act XVI of 1869), to receive the proper amount of stamp which should have been affixed or potta under the law in force when it was executed.

Baboo Akhil Chandra Sen for the appellant.

Baboo Amada Prasad Banerjee and Jagadanand Mookerjee for the respondent.

Baboo Jadab Chandra Seal for the other respondent.

The judgment of the Court was delivered by

JACKSON, J.—We think that the lower Appellate Court is wrong in holding that a Civil Court is not authorized, under the present Stamp Law,

* Special Appeal, No. 1560 of 1870, from a decree of the Officiating Judge of the Court of Session, dated the 7th May 1870, affirming a decree of the Additional Subordinate Magistrate, District, dated the 25th February 1870.

1871

MAHOMED
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v.
COLLECTOR OF CHITTAGONG.

the proper amount of stamp which should have been affixed on the plaintiff's potta under the law in force when it was executed. Under the present law, the power of the Civil Court differs to some extent from its power under Act X of 1862. Act XVIII of 1869 allows the Civil Court to receive the proper amount of Stamp not only in cases of insufficiency of stamp, but also in cases where documents have not been stamped at all.

1871
Feby. 20.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

HARI NATH DAS (PLAINTIFF) *v.* SHEIKH ASMUT ALI (DEFENDANT).*

Jurisdiction of Civil Court—Suit for Possession.

A Civil Court alone has jurisdiction to try a suit which is brought to recover possession of land with mesne profits from one who is alleged to be in possession as a trespasser notwithstanding the defence set up is that in respect of part of the lands the defendant had permanent ryoti tenure.

This suit was brought for possession of land for mesne profits. The defence was that the defendant was in possession as a mortgagee of the whole plot of land; and that as regards a portion of it only, he had a permanent ryoti tenure, and that therefore on both these grounds the plaintiff could not succeed in obtaining possession. No objection was raised as to the jurisdiction of the Court.

The Moonsiff decreed the claim of the plaintiff, finding that the defendant's allegations of an usufructuary mortgage and permanent ryoti tenure not at all established, while the plaintiff had proved his case.

On appeal to the Judge, the same pleas were again urged by the defendant as raised in the Court of the Moonsiff. The Judge, however, took the objection *suo motu* to the jurisdiction of the Civil Court, and dismissed the suit of the plaintiff, holding that the action should have been brought in the Collector's Court under Act X of 1859.

Baboo Akhil Chandra Sein for the appellant.

Mr. G. A. Twidale for the respondents.

JACKSON, J.—The decision of the Judge seems altogether wrong. The suit is properly brought in the Civil Court. It does not lie under Act X of 1859. It is a suit not only for ejectment, but also for mesne profits, and on this ground alone the suit could not be brought in the Revenue Court, as has been frequently held by this Court. The case will go back to the Judge for a decision.

Costs of this appeal will abide the ultimate result.

* Special Appeal, No. 1789 of 1870, from a decree of the Additional Judge of Chittagong, dated the 24th June 1870, reversing a decree of the Moonsiff of that district, dated the 26th August 1869.

MOOKERJEE, J. (after stating the facts as above, continued)—Now the question of jurisdiction should be determined from the allegations contained in the plaint, if the question is raised *in limine* before the merits of the case are gone into. Looking to the plaint, I find the plaintiff states that the defendant was a *kursa ryot* of the plaintiff; that his tenancy has been determined three years ago; and that, notwithstanding the determination, the defendant has retained possession as a trespasser, and the plaintiff seeks to get possession with *wasilat*. If these allegations are correct, as the Court of first instance has found them to be, I cannot understand how the plaintiff could have come to the Revenue Court. After the determination of the lease, and according to the allegations contained in the plaint, the defendant was no longer a tenant of the plaintiff; there is no relationship of landlord and tenant between the parties, and the plaintiff is right in coming to the Civil Court which is the only Court which can give him full redress, and is competent to decide all the pleas raised by the defendant. The plaintiff is not to be at the mercy of the defendant, and it is not competent to the defendant to oust the Civil Court of its jurisdiction simply by stating that he is a *ryot* with permanent rights. The plaintiff also asks for *wasilat* which a Revenue Court cannot award. For that reason also the plaintiff was right in seeking the assistance of a Civil Court. I would also remand the case for an adjudication on the merits.

1871
HARI NATH
DAS
v.
SHEIKH AS-
MUT ALLI.

Before Mr. Justice Loch and Mr. Justice Paul.

RAJA SATTYANAND GHOSAL (PLAINTIFF) *v.* ZAHIR SIKDAR (DEFENDANT).*

1871
April 27.

Interest on Arrears of Rent—Act X of 1859, s. 20.

It is in the discretion of the Court to allow interest on arrears of rent.

The plaint alleged that, within the plaintiff's zemindari, Salimabad, the defendant held certain lands at the annual rent of Rs. 62; that there was a balance of Rs. 24-2 due to him for the year 1273 (1866), for which he sued, together with the arrears for 1274 and 1275 (1867 and 1868). The entire amount claimed was Rs. 148-2 for principal, and Rs. 45-10-9 for interest, up to date of suit, making up the sum sued for,—viz., Rs. 193-10-9, and he asked for interest from the date of suit to realization.

The defendant admitted the jumma, but pleaded payment of the arrears, with the exception of Rs. 4-8, for the year 1274 (1867), and rupees 62 for 1275 (1868). He said he had paid the money in various sums from time to time, but without specifying how each sum was to be credited.

The plaintiff admitted these receipts, but from the sums paid he first deducted interest for previous years, then credited the balance against the oldest arrears, and claimed the above-mentioned balance with interest.

* Special Appeal, No. 2140 of 1870, from the decree of the Judge of Backergunge, dated the 27th June 1870, affirming a decree of the Deputy Collector of that District, dated the 25th April 1870.

1871 The first Court dismissed the plaintiff's suit, except as to the sum admitted
RAJA SATTYA- by the defendant, holding, that the law (Act X of 1859) "rendered arrears of
NAND GHOSAL rent liable to interest, but nothing made it compulsory on the ryot to pay
v.
ZAHIR SIK- interest except by written agreement."
DAR.

The lower Appellate Court confirmed that judgment.

The plaintiff appealed.

Baboo *Abhai Charan Bose* for the appellant.—Both Courts are wrong (1st), because the defendant did not urge the plea in any Court; (2ndly), because section 20 of Act X of 1859 makes it imperative on the Courts to give interest the words being "any arrear under the Act, unless otherwise provided by written agreement, shall be liable to interest at 12 per cent per annum."

Baboo *Kasikanth Sein* for the respondent.—It is discretionary with the Court to give interest—*Kasheenath Roy Chowdhry v. Mynuddeen Chowdhry* (1).

The judgment of the Court was delivered by

LOCH, J.—We think there are no grounds for disturbing the judgment of the lower Appellate Court in this case. The giving of interest is not compulsory, but is a matter entirely within the discretion of the Court.

We dismiss the appeal with costs.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

1871
Feb. 24. **KUNDA MISSER AND OTHERS (PLAINTIFFS) v. GANESH SING AND OTHERS (DEFENDANTS.)***

Presumption of Uniform Rate—Act X of 1859, s. 4—Rent, Enhancement of.

A tenant is not entitled to the presumption, under section 4 of Act X of 1859, of having held his tenure at a uniform jumma from the permanent settlement, when it appears from his pleadings that his holding first began under a potta at a period subsequent to the permanent settlement, and he does not allege that he held the land previous to his obtaining the potta.

Baboo *Lakhi Charan Bose* for the appellants.

Mr. R. E. Twidale for the respondents.

THE facts of this case are sufficiently stated in the judgment of the Court, which was delivered by

MOOKERJEE, J.—This is a suit for arrears of rent at an enhanced rate for

* Special Appeal, No. 1044 of 1870, from a decree of the Judge of Bhagulpore, dated the 3rd March 1870, affirming a decree of the Deputy Collector of that district, dated the 11th November 1869.

3 biggas and 6 biswas of land. The plaintiff states that he served a notice on the defendant at the end of Chaitra 1272 (April 1866) requiring him to pay rent at the rate of four rupees per bigga. The defendant pleaded that no notice was served upon him, and that he held a potta dated 1259 (1852) from Kadir Khan and Nadir Khan, the former proprietors of this land, and that he had been paying rent according to that potta from that time downwards; and that the plaintiff in 1270 (1863) admitted the potta, and received rent accordingly.

1871
KUNDA MIS-
SER
v.
GANESH SINGH.

This case was once before this Court in special appeal, and it was remanded, in order that the witnesses to the potta who were in attendance in the Deputy Collector's Court might be examined. On remand, the Judge has examined those witnesses, and has changed his opinion, and has now found that the potta is a genuine document. He then remanded the case to the Deputy Collector to ascertain what was the rate prevalent in the mauza, and also directed that the defendant might have an opportunity to show whether on any other ground the enhancement was barred. On remand, the Deputy Collector allowed the defendant to file several other *dakhilas* extending beyond 1259 (1852), and, on proof of those *dakhilas*, found that, inasmuch as the defendant has proved that the rent had been paid at a uniform rate for the last twenty years previous to the suit, the enhancement was barred under section 4, Act X of 1859.

On appeal, the Judge affirmed the decision of the Deputy Collector, and the plaintiff comes up to this Court in special appeal, urging that from the written statement of the defendant and from the potta produced by him, it is clear that the defendant's tenure commenced only in 1259 (1852), so that he is not entitled according to his own showing to a presumption under section 4, that the land has been held at the rent which he now pays from the time of the permanent settlement. On a careful perusal of the written statement filed by the defendant as well as of the potta, we find that this contention is good. The defendant nowhere alleges that his tenure was in existence previous to 1259 (1852); on the contrary, there are words which convey a clear and distinct meaning that he obtained the potta in 1259 (1852) for the first time. The defendant's case, therefore, being that he has been in possession from 1259 (1852) under the potta set up by him, we do not think that he is entitled to a presumption under section 4. The latter portion of section 4 says that, "unless it be proved, that such rent was fixed at some later period." Now the potta and the written statement show that the rent, which the defendant has been paying, has been fixed at some period later than the date of the permanent settlement. Therefore the defendant cannot claim any such presumption in his favor; his own title-deeds and his own admissions show that his tenure commenced in 1259 (1852). The intention of the Legislature appears to me to be that, where a ryot states that his tenure dates so far back as the date of the permanent settlement, and pleads that he has been paying rent at a uniform rate from that time, he is entitled to the benefit of a presumption under Act X, if he can

1871 show that he has been paying rent at the same rate for twenty years next
KUNDA MIS- preceding the year of suit. But it is merely a presumption which the Legisla-
SER ture thought it necessary to give to a ryot, because the permanent settlement
v.
GANESH SING. had been made at a very early period, and because it would be impossible
at this distance of time for a ryot to show, by any strict proof, that he has
been paying rent at the same rate from that time. But when from the defend-
ant's own statement and his title-deeds, it is apparent that his tenure com-
menced from a date later than the permanent settlement, surely he is not
entitled to any presumption that the tenure existed from before.

The case must, therefore, go to the Court of first instance for a determination
of the other issues in this case.

Costs of this appeal will abide the final determination of the suit.

Before Mr. Justice Ainslie and Mr. Justice Paul.

1871
April 6.

THE QUEEN *v.* BISWAMBHAR DAS.*

Criminal Procedure Code (Act XXV of 1861), s. 370—Report of Chemical Examiner.

PAUL, J.— . . . Under section 370 of Act XXV of 1861, a report from the chemical examiner is evidence in a criminal trial, if it bear the signature of the examiner; and, according to this section, the original report, bearing the signature of the examiner, should be put in evidence. On the present occasion we observe that a copy of the report has been sent up by the Magistrate; this is wholly irregular. In future, care should be taken that the original report be submitted.

Before Mr. Justice Kemp and Mr. Justice Glover.

1871
Feby. 3.

RAJKRISHNA MOOKERJEE (PLAINTIFF) *v.* KALI CHARAN DOBAIN AND OTHERS
(DEFENDANTS.)†

Act X of 1859, s. 17—Suit for Enhancement of Rent—Onus Probandi.

In a suit for enhancement of rent, on the ground that "the produce and productive powers of the land have increased otherwise than by the agency or at the expense of the ryot," the *onus* is upon the plaintiff to prove the grounds upon which he seeks enhancement.

In coming to a conclusion as to whether the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot, the average of four or five years ought to be taken; the increase of an exceptional year should not be the guide.

* Criminal Appeal, No. 162 of 1871, against the order of the Sessions Judge of Beerbhoom.

† Special Appeals, Nos. 1609 to 1628 of 1870, from the decrees of the Additional Judge of Hooghly, dated the 23rd May 1870, affirming the decrees of the Deputy Collector of that district, dated the 28th February 1870.

Baboos *Hem Chandra Banerjee* and *Ambika Charan Banerjee* for the appellant.

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Baboos *Mahini Mohan Roy* and *Pyari Mohan Mookerjee* for the respondents. KALI CHARAN
DOBAIN.

^{v.}

THE facts of the case are fully stated in the judgment of the Court, which was delivered by

KEMP, J.—This was a suit to enhance the rent payable by the special respondents after service of notice. The former rent appears to have been Rs. 104-15, and the enhanced rent, now demanded, is Rs. 268-11-17, on a holding of 33 bigas 18 katas of land.

The ground upon which the zemindar seeks to enhance is, that the value of the produce and the productive powers of the land have increased otherwise than by the agency or at the expense of the ryots. In the first Court, the Deputy Collector found, that the ryots had made out their plea under section 4 of Act X of 1859; and with reference to the ground upon which enhancement was claimed, he found that the plaintiff had failed to prove that the value of the produce, or the productive powers of the land had increased otherwise than by the agency or at the expense of the ryots. The suit was therefore dismissed. On appeal to the Additional Judge of Hooghly, he laid down the issue properly,—namely, he said that the question for the Court to decide was whether the plaintiff was entitled to receive from the defendants rent at the increased rates, and on the grounds mentioned in the notice served on the latter,—namely, that the value of the produce and the productive powers of the defendants' land had increased without the agency or at the expense of the ryots; but, in deciding this point, it is very clear that the Judge throughout his judgment has thought that the plaintiff had not only to make out that the productive powers of the land and the value of its produce had increased otherwise than by the agency or at the expense of the ryots, but that he had also to prove that there was a net increase in profits to the ryots after making certain deductions and allowances which are detailed at great length in the decision of the Judge, for we find that in two passages of his judgment, he states "that the plaintiff has failed to prove that the defendants' profits are greater than formerly;" and, again, in the latter portion of his judgment, where he says that he must decide the case on the evidence before him, he says that "there is no evidence to show what is the amount of the defendants' increased profits, or that there are any," and therefore that the case must be dismissed.

In special appeal, it is contended that the Judge has wholly misapprehended the requirements of the law under clause 2, section 17 of Act X of 1859; that as the plaintiff has proved that the value of the produce and the productive powers of the land have increased, without the agency or at the expense of the ryots, the plaintiff had made out sufficient grounds to entitle him to a decree; and that the proper mode of determining the case, the plaintiff having

1871 made out those grounds, was to follow the rule of proportion as laid down in the celebrated case of *Thakooranee Dossee v. Bisheshur Mookerjee* (1), decided by a Full Bench of the whole Court.

RAJKRISHNA MOOKERJEE v. KALI CHARAN DOBAIN. We think that this case must be remanded, for the Judge, in the first place, to try whether the tenure is protected under section 4 of Act X of 1859,—a point upon which the Deputy Collector came to a distinct finding, and held that the tenure was protected. The Judge has not noticed this part of the case at all. If he finds that the tenure is not protected under section 4, then the *onus* will be on the landlord to prove the ground of his right to enhance, and to show that the value of the produce and the productive powers of the land have increased otherwise than by the agency or at the expense of the ryots. With reference to this part of the case, we direct his attention to the Full Bench ruling in *Pulin Behari Sein v. Watson* (2). He will do well to study carefully the remarks of the learned Chief Justice in that case before coming to a finding upon this issue.

All that is necessary for the plaintiff to establish, if the first issue is found in his favor,—namely, that the tenure is not protected under section 4, is that there has been an increase in the value of the produce and the productive powers of the land, and that such increase has been caused otherwise than by the agency or at the expense of the ryots. If he establishes this, then, under the ruling in the case of *Thakooranee Dossee v. Bisheshur Mookerjee* (1), the Judge must apply the rule of proportion as laid down in that case, and award a proportionate increase. In coming to a conclusion as to whether the value of the produce or the productive powers of the land have increased without the agency or at the expense of the ryots, he will not take any one exceptional year in which a temporary increase may have been caused by accidental causes, such as bad harvests and the like, but he must take an average of,—say four or five years, as he may think fit, and apply the principle of proportion as laid down in the case of *Thakooranee Dossee v. Bisheshur Mookerjee* (1). He will do well to weigh the observations made by Mr. Justice Macpherson in that case, *viz.*—“It is necessary that the officer making the enquiry in such a case must be satisfied that the enhanced value of the produce of the land proved by the zemindar is likely to be a durable one, and not an accidental and exceptional high price of a particular year in consequence of drought, scarcity, bad harvests, or other irregular causes.” The case is remanded for the Judge to dispose of it with reference to these remarks.

Costs to follow the result.

(1) B. L. R., Sup. Vol., 202.

(2) Case No. 76 of 1867; 31st January 1868.

Before Mr. Justice Norman, Officiating Chief Justice, and Mr. Justice Loch.

KASIMUNISSA BIBI (JUDGMENT-DEBTOR) v. HILLS (DECREE-HOLDER).*

1871
Feby. 13.

Act VIII of 1859, s. 209—Execution—Cross-decree—Set-off

The purchaser of a decree sought to execute the decree, but was opposed by the judgment-debtor who sought to set-off two other decrees obtained by herself and her two sisters, against the judgment-creditor. These decrees were obtained about the date of the purchase, but it did not appear whether previously or subsequently. *Held*, in neither case, could they be the subject of set-off.

Baboo Girish Chandra Ghose for the appellant.

Baboos Ambika Charan Bose, Bhawani Charan Dutt, and Biprodas Mookerjee for the respondent.

THE facts are sufficiently stated in the judgment of the Court, which was delivered by

NORMAN, J.—In this case Kasimunissa Bibi had brought a suit against Golam Kadir, which was dismissed with costs in 1866. Golam Kadir transferred that decree to Mr. Archibald Hills on the 13th Bhadra 1275 (30th August 1868.) Kasimunissa Bibi, with certain other persons, her sisters, obtained two other decrees, against Golam Kadir, the exact dates of which do not appear; but, as the suits are numbered 222 and 223 of 1868, they were probably, I may say almost certainly, and we may take them to be in the absence of any proof to the contrary, of later date than Mr. Hill's purchase. Mr. Hills, as purchaser of the decree of Golam Kadir against Kasimunissa Bibi, applied for execution of his decree under section 208, Act VIII of 1859, on the 5th of March 1869. Kasimunissa opposed and claimed to set-off the decrees obtained by herself and her sisters against Golam Kadir; the sisters, as it appears, having put in a petition, giving their consent to the set-off.

The Subordinate Judge, in the first instance, and Mr. Pepper, the Additional Judge of Nuddea, affirming the decision of the Subordinate Judge, determined that Mr. Hills, the decree-holder, was entitled to proceed, and that Kasimunissa could not set-off the decrees obtained by herself and her sisters against the decree which was being executed by Mr. Hills.

From that decision Kasimunissa has appealed to this Court.

We are of opinion that the decree of the lower Courts is correct. In the first place, as I have already pointed out, it is not made to appear that the decrees in favor of Kasimunissa and her sisters had been obtained by them at the time when Mr. Hills purchased the decree of Golam Kadir in August 1868. On that ground the case is distinguishable from that decided

* Miscellaneous Special Appeal, No. 411 of 1870, from an order of the Additional Judge of Nuddea, dated the 23rd July 1870, affirming an order of the Subordinate Judge of that district, dated the 31st December 1869.

1871 by the Full Bench—*Kaim Ali Jamadar v. Lakhikant Chucherbutty* (1).

KASIMUNISSA Bibi v. HILLS. There is a second objection, which is this:—Supposing the decrees of Kasimunissa and her sisters to have been obtained before Mr. Hills' purchase, these decrees and the decree of Golam Kadir against Kasimunissa were not “cross-decrees between the same parties,” and therefore section 209 does not in terms apply to the set-off of such decrees. In making his purchase, Mr. Hills would not therefore take it subject to any then existing right of Kasimunissa to set-off the decree obtained by herself jointly with her sisters, and we think that no subsequent consent of the sisters of Kasimunissa to set-off their joint decree against the decree of Golam Kadir against her can in any way affect the rights of Mr. Hills, who was no party to that arrangement. The 209th section distinctly recognizes the rights, not only of original decree-holders, but of holders of decrees; and if we allow this set-off, we shall plainly be disregarding the right acquired by Mr. Hills under his purchase.

For these reasons we think that the decree of the lower Courts should be affirmed with costs.

Before Mr. Justice Loch and Mr. Justice Mitter.

1870 IN THE MATTER OF THE PETITION OF NAFAR CHANDRA PAL CHOWDHRY
Dec. 1. AND ANOTHER.

Surety—Liability of Surety for Costs—Reg. XVI of 1797, s. 4.

H. obtained a decree in the High Court against S. for certain moveable and immoveable property. S. appealed to the Privy Council. While that appeal was pending, H. applied for the execution of her decree, and N. became her surety for rupees 10,000. The decree, however, was not executed. The Privy Council reversed the decision of the High Court, and dismissed the suit of H. with costs. S. then sought to execute his decree for costs against N., the surety. Held, that N. was not liable.

Baboo Srinath Das for the appellants.

Mr. R. T. Allan and Baboos Mahendra Lal Shome and Girish Chandra Mookerjee for the respondent.

THE facts of this case and the arguments are sufficiently stated in the judgment of the Court, which was delivered by

Loch, J.—The facts of this case are these:—One Hiramani Barmani sued to recover possession of her husband's share of the moveable and immoveable property against Surendra Nath Roy. Her suit was dismissed by the first Court, and on the 1st February 1864, she, on appeal to the High Court,

* Miscellaneous Regular Appeal, No. 289 of 1870, from an order of the Additional Judge of Nuddea, dated the 25th July 1870.

obtained a decree. Surendra Nath appealed to the Privy Council; and, while the case was pending there, Hiramani prayed to be allowed to take out execution in 1864. Before taking out execution, she was required to give security. Prankrishna Pal became the surety, and nothing further seems to have been done, and the execution case was struck off the file of the Court executing the decree. In 1867, Hiramani again applied to take out execution of her decree, and again she was required to furnish security for the moveable property, and Nafarchandra Pal Chowdhry became surety to the extent of Rs. 10,000, on the 9th September 1867. On the 16th September 1867, the Judge directed enquiry to be made as to the sufficiency of the security. On the 28th July, or, as is said by the respondent, 28th May 1868, the security was accepted as sufficient, and the decree-holder was permitted to execute her decree. The decree of the High Court was, however, on the 7th July 1868, reversed by the Privy Council, who dismissed the suit of Hiramani, and no execution, on the part of Hiramani, was ever taken out. Surendra Nath Roy now seeks to execute his decree for costs against the sureties, and the lower Court has held that they are liable to him for costs.

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CHOWDHRY.

In appeal from that order, it is urged that, as no execution has ever been taken out, the sureties cannot be held liable. On the other hand, it is urged that whether execution was taken out or not is immaterial; that the sureties had entered into a contract with the Court, they voluntarily bound themselves, and this engagement of theirs must be looked upon as a kind of mortgage of their property or, as said by another pleader for the respondent, a decree by confession of judgment; that the parties are bound by the order of the Court accepting the security, and directing the execution to proceed; that they having voluntarily executed the security bond could not resile by stating that no consideration was given; that the question of consideration does not enter at all into a matter of this kind, and the parties, who are thus bound by the order of the Court, cannot be relieved from their responsibility, unless by an order of the Court; that in fact the sureties have by their own acts taken the place of the decree-holder, and have rendered themselves liable for every thing that she was liable for; that in fact they are in the position of a party who becomes surety for a criminal; and if the criminal escape, the surety would be liable to forfeit the amount of his security-bond; that the contract was between the surety and the Court, and the Court had made an order accepting the security, and directing execution to be taken out; and that if Hiramani, did not avail herself of that order, the surety is still liable, unless his liability is cancelled by an order of the Court.

The argument for the respondent cannot, I think, be sustained. Hiramani on obtaining her decree, applied to the Court in the usual way to be allowed to execute her decree; and under the provisions of section 4, Regulation XVI of 1797, the Court were empowered to order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favor the same was passed for the due performance of such order or decree as Her Majesty should think fit to make on the appeal.

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CHOWDHRY.

Security was accordingly tendered and accepted by the Court. But for reasons best known to herself, the decree-holder did not take advantage of the order of the Court, and took no steps to execute the decree. So that, in fact, the property remained untouched by the decree-holder, and the judgment-debtor received no injury whatever. Now the object of the security is no doubt to indemnify the appellant for any loss he may suffer owing to the execution being taken out by the decree-holder during the pendency of the appeal in the Privy Council, and the security was given for the very purpose of enabling the decree-holder to execute her decree. If she did not choose to execute her decree, the terms of the security-bond would have themselves fallen to the ground; it was only on her executing the decree that the surety became liable; the decree-holder might have come to the Court the day after the security was accepted, and stated to the Court that, for certain circumstances, "I don't wish to execute my decree," and the position of the parties would have remained as before. So here, though the order was passed, yet as Hiramani did not choose to execute her decree, the position of the parties remained unchanged, and the surety could not in any way be made liable for costs, or anything else which were awarded by the decree of the Privy Council.

I think, therefore, the order of the lower Court must be set aside with costs.

Before Mr. Justice Loch and Mr. Justice Ainslie.

1870
Dec. 15.

IN THE MATTER OF THE PETITION OF JAGESWAR DHAR AND ANOTHER.*

Act XXVII of 1860—Recall of Certificate granted without Jurisdiction.

Baboo Umesh Chandra Banerjee for the petitioner.

No one appeared on the other side.

The judgment of the Court was delivered by

LOCH, J.—We think that the papers must go back to the Judge. On the 25th of July 1870, the Judge granted a certificate, under Act XXVII of 1860, to one Bhagabati, the widow of Natabar.

On the 29th of August following, the petitioner before us applied to have the certificate cancelled, on the ground that the Judge had no jurisdiction to grant it, inasmuch as the deceased, at the time of his death, was not ordinarily residing within the jurisdiction of the 24-Pergunnas, but in the Town of Calcutta. The Judge thought that he could not re-open the case, and he therefore rejected the petition.

We think, however, that, on representation being made by the petitioner to the Judge, he might have called on the petitioner to give evidence in support of his allegation, and served notice on the opposite party, to whom the certificate had been granted, to show cause why it should not be recalled.

* Miscellaneous Regular Appeal, No. 331 of 1870, from an order of the Judge of the 24-Pergunnas, dated the 29th August 1870.

We direct that the papers be sent back to the Judge, in order that the applicant may be allowed to give evidence in support of his statement, and should he satisfy the Judge that his allegation is correct, and if the other side be unable to show cause against it, the Judge will recall the certificate granted by him to Bhagabati.

1870
IN THE
MATTER OF
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OF JAGESWAR
DHAR.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

IN THE MATTER OF THE PETITION OF SRIMATI BIDHUMUKHI DEBI AND OTHERS.*

1871
Jany. 21.

Warrant, Issue of—Sufficient Evidence—Specification of Offence—Abduction per se no Offence.

A warrant, which did not specify a punishable offence, and which had been issued upon a statement not sufficient to make out any offence, quashed.

ONE Srinath Haldar complained to the Magistrate of Dacca, that Baroda Kant Haldar and Prasanna Gupta had carried away, from his lawful guardianship and custody, a minor girl named Bidhumukhi. On this the Magistrate at once issued warrants for the arrest of the two men as well as of the girl. The warrants were as follows : “ Whereas Baroda Kant (*alias* Nath) “ Haldar and Prasanna Gupta stand charged with the offence of abducting a “ girl named Bidhumukhi, you are hereby directed to apprehend the said “ Baroda Kant Haldar and Prasanna Gupta and the girl Bidhumukhi. Here- “ in fail not. ”

The Magistrate had also provided Srinath Haldar, the complainant, with an order that the girl, when arrested, should be placed on his charge.

On the 20th September last, Mr. Ghose (with him Mr. Bonnerjee and Mr. Sandel) applied to the High Court (Couch, C. J., and Loch, J.), for an order calling for the proceedings of the Magistrate of Dacca, in order that the warrants issued by that officer might be quashed as being contrary to law, and that, pending the ultimate decision of the High Court, the execution of the several warrants issued be suspended. Mr. Ghose contended that there was no legal evidence before the Magistrate to justify the issue of a warrant; that as the warrant charged Bidhumukhi with having committed no offence, and charged the others with having only abducted a girl, abduction *per se* being no offence punishable under the Penal Code, the warrant was illegal. The order prayed for was granted.

On the case coming on for hearing again, after the arrival of the proceedings of the Magistrate, before E. Jackson and Mookerjee, JJ., Mr. Ghose (with him Mr. Sandel) urged the same reasons which were advanced on the occasion of the first application.

The judgment of the Court was delivered by

JACKSON, J.—We think the warrants in this case, as they stand, are upon the face of them illegal. In the first place, there is not sufficient on the

* Application under section 404 of the Code of Criminal Procedure.

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DEBI.

deposition of the complainant, Srinath Haldar, to make out that any offence has taken place. In the second place, there is no such offence as abduction under the Indian Penal Code, but abduction with certain intent is an offence. The warrants for the arrest of the persons without stating the intent are accordingly bad. Lastly, we think that the orders of the Magistrate of Dacca directing the apprehension of the girl Bidhumukhi, and that she should be made over to Srinath Haldar, the prosecutor, her grand-uncle, are equally illegal. They seem to have been passed in great haste, and without sufficient cause. There is nothing to show that Srinath Haldar is the lady's lawful guardian. We think that the warrants, as they stand, must be set aside.

We pass no further order in the case, as we are told that no further proceedings are to be taken in the matter.

Before Mr. Justice L. S. Jackson and Mr. Justice Ainslie.

1871
March 3.

SHEIKH NAZIMUDIN HOSSEIN (PLAINTIFF) v. LLOYD (DEFENDANT).*

Limitation Act (XIV of 1859), s. 1, cl. 12—Landlord and Tenant—Mokurrari.

Where a landlord sued, after the lapse of more than twelve years from the date of his knowledge that a tenant was setting up a mokurrari title, for a declaration that the alleged mokurrari title was invalid, held, that the suit was barred by lapse of time.

Mr. Piffard for the appellant.

Mr. R. T. Allan for the respondent.

THE facts of the case are sufficiently stated in the judgment of the Court, which was delivered by

AINSLIE, J.—The plaintiff, who is special appellant in this Court, instituted this suit to eject the defendants from 33 bigas of land, on the allegation that this land was held by Justin Finch on a lease for life, and that the tenancy determined on his death in 1861. No copy or counter-part of the lease has been produced, and it is now admitted that there is no such lease. The defendants have put forward a lease, granted, in 1794, to one Louis Kech or Kirke, assigned by him to Joseph Finch in 1808. On the production of this document, the plaintiff denied its genuineness, and now contends further that, even if it be genuine, it creates no permanent tenure.

The case of the plaintiff, as stated in this Court by Mr. Piffard, is as follows:—That the plaintiff, having acquired the estate, called upon Geoffrey Finch, the owner at that time of the Shahpore Undi factory, to show his title to hold certain lands; he was then informed that a mokurrari lease, in favor of Justin Finch, was in his possession, but that it was then in Calcutta; and Finch promised to produce it. In reliance on this assertion and promise, the plaintiff received

* Special Appeal, No. 1817 of 1870, from a decree of the Additional Judge of Tirhoot, dated the 8th June 1870, affirming the decree of the Subordinate Judge of that district, dated the 15th December 1869.

rents, and granted receipts as for a permanent tenure. This went on from 1241 (1833—34) to 1861, when a partition of the estate, in which the Finchs had acquired a share, took place, and it became necessary to examine the various deeds affecting the property. The plaintiff then learnt that there was no mokurrari deed in favor of Justin Finch, but was informed that he had a lease for life, and he now seeks to eject the defendants who have held the factory since Justin Finch's death. It is contended by Mr. Piffard that no question of limitation arises when the defendant admits that the plaintiff is his landlord; and, secondly, that, even if limitation could be pleaded, the plaintiff would be in time, as he was kept from asserting his rights by a fraud, and that the discovery of that fraud only took place in 1861. The right to re-enter on the expiry of a terminable lease granted to Justin Finch is abandoned, and the case, as now put, is in the form of a claim to a discovery of the title of the defendants, and a trial of the title that may be set up.

It appears that the factory was built before 1798, when the plaintiff's father acquired the village at a revenue sale. The greater part of the land in suit is covered by the buildings connected with the factory; and, as Mr. Piffard for the special appellant, abandons the claim to eject, the only question to be tried is whether the lease put in by the defendants is genuine and valid. Of its genuineness there seems to be no doubt whatever. It can only be in respect of this deed that the Judge observes:—"It is clearly proved who the original mokurraridars were, and that they were succeeded in due course by Joseph Finch, then by Geoffrey Finch, after whom Frederick and Justin held undisturbed possession of the lands."

As regards the validity of the deed, the Judge observes that it is needless to discuss it, the suit being barred by limitation. It is admitted that the plaintiff's father acquired the estate in which the lands in dispute lie at a revenue sale in 1798, and that the factory was then built. It has not been shown how the property was dealt with for the next 35 years; but from 1833, it was treated as a mokurrari, and this continued unchanged down to 1861 for nearly 27 years. Here, if ever, limitation must operate to prevent the landlord from denying the nature of the tenure. The rule that a tenant cannot plead limitation against his landlord, as laid down in *Watson v. Ranee Shurut Soonduree Debia* (1), in which previous decisions are cited, appears to be too general in its terms. That this view was not taken by their Lordships of the Privy Council, in the case of *Raja Sahib Prahlad Sen v. Durga-prasad Tewari* (2) and in *Raja Sahib Prahlad Sen v. Run Bahadur Sing* (3), is clearly deducible from the judgments in those cases, though not expressly stated in so many words. The lower Courts having found, on the issue of limitation, in favor of the respondents who claimed as mokurraridars, their Lordships observe in the first case that there is no evidence to show that the appellant had any knowledge of the claims so made at any time more than 12 years before institution of suit, and therefore his suit was within time;

(1) 7 W. R., 395.

(3) 2 B. L. R., P. C., 135; S. C., 12 Moore's

(2) 2 B. L. R., P. C., 128; S. C., 12 Moore's I. A., 332.

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and, in the 2nd, that the knowledge of the mokurrari lease had been wrongly inferred from a circumstance which did not warrant the inference. Now, if there was any general rule of law by which a person, claiming as mokurraridar, is debarred from pleading limitation against his landlord, surely their Lordships would have disposed of these cases on that ground, and would not have gone into the question of notice of the claim. The fact was that their Lordships considered it necessary to enquire into the date on which the landlord received notice that the intermediate holders were setting up a title as mokurraridars, with a view to determine the issue of limitation, shows clearly that the issue is one which can be raised between parties so related. Having this authority to support the view now taken, it is not necessary to discuss the question at length, but I must confess that I do not see on what grounds it can be said that a mokurraridar's title, by which the landlord's power to deal with his estate at his own pleasure and to the best advantage is limited, is not *pro tanto* an adverse title. It has been contended that a title to be adverse must be such as is inconsistent with any title whatever in the opposite party, and the cases cited appear at first sight to go to that length; if on a close examination these cases appeared to support the contention, and there were no decision of the superior Court on the point, I would be inclined to submit the question to a Full Bench; but, as matters stand, it appears to me that it is clearly settled by the decision of the Judicial Committee, and that we have only to follow that decision. I therefore hold that this suit is barred by limitation, unless the plaintiff can remove the bar by his plea of fraud which remains to be considered.

Mr. Piffard contends that there is evidence that the consent of the landlord to the holding of Justin Finch, as a mokurraridar, was obtained by a false statement, in respect of the existence of a mokurrari lease said to be in Calcutta, and that this evidence stands uncontradicted. On this point the Judge has recorded no opinion, but it is unnecessary to remand the case; for, on looking at the evidence, it is clear that the plea cannot be maintained. The point, though not now taken for the first time, was evidently not much relied on below, and the bare statement of Nazimuddin is so inconsistent with the course of dealing between the parties, and it is so utterly improbable that the landlords, who have held the estate from 1798, and have for so long been treating the tenure as a mokurrari, and have not even attempted to show that, at any time since 1798, the land in suit has been held on a lease for a term, should have really been led to believe that any lease to Justin Finch existed of which they had no personal knowledge, that the statement of this witness cannot possibly support a finding that a fraud was practised on the plaintiff, by which he was prevented from ascertaining the true state of the case, and that such fraud was only discovered in 1861.

In my opinion the appeal must be dismissed with costs.

JACKSON, J.—I concur in holding that the plaintiff in this case is barred by lapse of time. By his own showing he had notice, so long ago as 1833, that the defendant claimed to hold the land upon the very title which the defendant now asserts, namely, a mokurrari lease, and he permitted the defendant to continue holding, as he had previously held, for five and thirty years down to the bringing of the present suit, a period of about 70 years. I think therefore that the only possible conclusion was the dismissal of the suit. The appeal will consequently be dismissed with costs.

Before Mr. Justice Norman, Offy. Chief Justice, and Mr. Justice Loch.

KIAMUDDIN v. ALLAH BAKSH.*

Theft—Penal Code, s. 378.

1871
April 15.

NORMAN, C. J.—The point in this case is as follows:—Kiamuddin, the gomasta of a shop called the shop of Mozoffer Meah, was coming out of the Small Cause Court with some books, a khatian and a jumma kharach account, belonging to that shop. Allah Baksh, who had a share in that shop, took these books out of the possession of Kiamuddin, and kept them against the will of Kiamuddin, saying they were his.

The Deputy Magistrate says: “The fact of Allah Baksh having a right to the papers is not questioned in this case. He may have every right to them, but so long as they are legally in the possession of another person, he cannot get possession of them except through the Civil Court. It matters little either whether he is any special gainer by taking possession of the papers, when the fact remains that he did take them, and that against the will of the complainant.”

The Deputy Magistrate found Allah Baksh guilty of theft, and sentenced him to a fine of ten rupees, and ordered the papers to be returned to the complainant. It appears to me that this conviction cannot be sustained. Kiamuddin was the servant of the prisoner, Allah Baksh, and his partners. By section 27 of the Indian Penal Code, it is declared that “when property is in the possession of a person’s servant, it is in that person’s possession” within the meaning of that Code. The khatian and jumma kharach account must therefore be taken to have been in the possession of Allah Baksh and his co-sharers at the time when Allah Baksh took them from Kiamuddin. Section 378 does not include under the offence of theft the case where one joint proprietor takes into his own sole possession property belonging to himself and his co-proprietors, which had been previously in their joint custody. If the law were as supposed by the Magistrate, no master could safely take a rupee from the hand of his servant. No partner in a business could safely take a rupee from the till for the most urgent necessity. It may be that the accused did, or intended to do, some wrong to his co-sharers in taking possession of the books; but, if so, the offence, if any, is not theft. I am of opinion that the conviction and order of the Deputy Magistrate must be quashed, and the fine refunded.

LOCH, J.—To constitute the offence of theft, there must be not only a taking against the will of the person in possession, but a taking dishonestly. The definition of “dishonestly,” as given in section 24 of the Penal Code, is the doing anything “with the intention of causing wrongful gain to one person

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Backergunge, in his letter No. 222, dated the 27th March 1871.

1871 or wrongful loss to another person." Did Allah Baksh take the book from the gomasta dishonestly as defined above? He does not appear to have done so with any intent to injure his co-partners or to derive gain to himself. It is true that the gomasta says in his examination that the papers showed an entry of Rs. 500, by not showing which the accused would gain. But there is nothing to show that Allah Baksh intended to make away with these papers, and the gomasta admits that they were heretofore in the possession of Allah Baksh and his two co-sharers. I do not think the charge of theft is made out, and I concur with the Chief Justice in quashing the conviction and directing the repayment of the fine.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

1871
Feby. 28.

TRIPURA SUNDARI (PLAINTIFF) v. RASIK CHANDRA KANUNGUI
(DEFENDANT.)*

Contract—Specific Performance—Unregistered Document.

The plaintiff contracted with the defendant for the purchase of a piece of land, and paid him part of the purchase-money, it being agreed that the balance should be paid after registration of the bill of sale.

The defendant kept the document with him, but failed to get it registered. In a suit by the plaintiff to enforce specific performance, *held*, the suit would lie.

Mr. R. T. Allan and Baboo Akhil Chandra Sein for the appellant.

Baboo Chandra Madhab Ghose and Bama Charan Banerjee for the respondent.

The facts of this case and the points raised in special appeal are noticed at length in the judgments of the Court.

MOOKERJEE, J.—In this case the plaintiff states that the defendant had contracted to sell to him a certain piece of land; that the plaintiff advanced a sum of Rs. 99 as part of the consideration-money, which was fixed at Rs. 111, and he promised to pay the balance of the consideration-money after the registration of the bill of sale. The plaintiff also states that the defendant kept the kobala with him for the purpose of registering the same, but that he did not present the deed, as he agreed to do, at the registry office, and has not got it registered. He therefore sues for a specific performance of the contract which the defendant had entered into with him.

The defendant denies the contract, denies the execution of the kobala, and in fact denies all the allegations set up by the plaintiff in his plaint.

* Special Appeal, No. 1877 of 1870, from a decree of the Officiating Judge of Chittagong, dated the 2nd April 1870, reversing a decree of the Moonsiff of that District, dated the 16th February 1870.

The Court of first instance held that, under the Full Bench Ruling in the case of *Sheik Rahamutulla v. Sheik Sariutulla Kagchi* (1), the plaintiff was not entitled to possession, but it gave a decree to the plaintiff for specific performance of the contract,—namely, that the defendant should execute to the plaintiff a kobala as he contracted to do. On appeal by the defendant the Judge dismissed the entire claim of the plaintiff. He seems to consider that the Full Bench Ruling alluded to above applies entirely to the circumstances of the case. He says,—“ It has been urged by respondent's pleader that the “circumstances of this case are peculiar; that plaintiff actually obtained a “kobala or deed of sale from defendant; and that it was fetched fraudulently from her relation by defendant, when the said relation was endeavouring to have it registered at the registry office. Under such circumstances “the pleader urges that even if the Full Bench Ruling bars the obtaining of “a decree for possession and declaration of right on specific performance, “there is no reason why a decree should not issue for the restitution of the “document fetched from her with a view to a renewed attempt at registration.” The Judge goes on to say,—“ This Court is clear that there was no such “relief sought by the plaintiff in the lower Court, and that the asking of such “relief was never contemplated till the bearing of the Full Bench Ruling “came to light in this Court.” He therefore thinks that, under the enunciation of the law in the decision of the Full Bench, he can give no relief to the plaintiff.

On referring to the plaint in this case, we find that although the plaintiff seeks to recover possession of the land which the defendant had contracted to sell, he also prays that the Court will be pleased to order a specific performance of the contract by requiring the defendant to execute a bill of sale. He does not sue upon the unregistered document, which cannot be, under the Registration Law, adduced in evidence before a Court of Justice. But the main gist of his action appears to be that the defendant having contracted to execute a bill of sale of this property to him has not done so,—namely, that he has not given him a proper bill of sale as he had promised to do. I do not see that a claim like this falls within the purview of the principle laid down in the Full Bench Ruling. I consider that although it is stated in this case that the defendant had executed a deed of sale, what the plaintiff really means to say is, that the defendant not having delivered that deed to him, and not having registered it, he has not carried out the terms of the contract he entered into with him. He is therefore, I think, at liberty to prove the contract which was originally made by the defendant with him, and on proof of that contract I think he is entitled to relief. If we consider the law to be otherwise, and say that because a document had been executed by the defendant, which he has not, however, delivered to the plaintiff, that the plaintiff, from the mere fact of the defendant having put his signature to a document, cannot say that the defendant has not performed his part of the contract, we should be opening

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a door to fraud of all sorts, and assisting a party guilty of fraud in depriving an innocent man of his remedy. The case appears to me to be a clear one: it is a case of non-fulfilment of a contract entered into by the defendant with the plaintiff, and I am of opinion that, under Act VIII of 1859, the plaintiff is fully entitled to ask the Court to compel the defendant to fulfil his part of the contract,—namely, by requiring the defendant to give him a proper bill of sale. The mere execution by the defendant of a deed which he has retained in his possession is no fulfilment of the contract that he has entered into with the plaintiff.

I would therefore remand the case to the Court of second instance in order that the other issues in this—*viz.*, as to whether there was a contract or not—may be tried, and the case decided according to the result of that enquiry. I cannot see why, in such a case as this, the plaintiff cannot also ask for possession to be given to him along with the kobala. It cannot be denied that after obtaining a kobala from the defendant the plaintiff will be at liberty to sue for possession of the land covered by that deed. Looking to section 8 of Act VIII of 1859, I cannot understand why then the plaintiff cannot ask for possession and specific performance in the same suit, and why it should be necessary for him to institute a separate suit for possession. Costs to abide the final result.

JACKSON, J.—I also think that this case ought to be remanded. The suit was on two grounds: one was to recover back a document which the plaintiff alleges that the defendant took away from him for a certain purpose, but which he now falsely says is lost. The claim is either to recover that document, or if that document has been lost by the defendant, to require the defendant to execute a similar document. The other prayer was for possession. I quite agree with the Lower Court in thinking that the suit for possession cannot at present be decided. But I do not see why the plaintiff should not recover the document. This document is a most valuable one to him. It was in his possession, but it was taken away by the defendant for a certain purpose. It seems to me quite immaterial whether it was taken away for registration or taken away for any other purpose. The defendant having taken it away for a certain specific purpose, is bound to restore it, and the plaintiff is entitled to bring a suit to recover it. Under these circumstances, I would remand this case to the Lower Appellate Court in order that it may try the question whether the defendant did take away the document or not. If on enquiry it is found that he did take away the document, it will order the defendant to restore it, or, if necessary, to execute a fresh document. The argument which has been used in this case that by doing so the Court would be using a document in evidence which is not registered is wholly unsound. The document itself is not used in any way whatever.

BRAJANATH DHAR v. BHABO MOHAN DHAR.

1870
May 11.*Court Fees Act (VII of 1870), Schedule II, cl. 1 (a.)*

THE following case was referred to the Chief Justice, under section 5 of the Court Fees Act VII of 1870, by Mr. Belchambers, the Taxing Officer of the Court:—

"In this case the plaintiff's attorneys, Messrs. Sims and Mitter, sent to the office khatta books containing accounts of several years for translation of various portions. In such cases the translator is required to sign each portion translated by him, after adding the words "Translated by me this day of ;" and when the books are used in evidence, each translated portion is spoken to separately, and marked and charged for as a separate exhibit. It has also always been the practice to charge the translation fee on the principle of each portion being a separate document, with this result that when a portion consists of fewer words than a folio, the charge is for a whole folio, or when a portion consists of one or more folios and the fraction of a folio, the fraction is charged for as a whole folio. Messrs. Sims and Mitter object to this mode of charge, and contend that for the purpose of charging the translation fee all the separate portions should be treated as forming one document, so that instead of charging for several fractions of folios as so many whole folios, the fractions should be added up, and the charge should be for the exact number of folios." The Taxing Officer disallowed the objection, subject to the opinion of the Chief Justice.

The opinion of the Chief Justice was as follows:—

COUCH, C. J.—The separate portions ought not to be treated as forming one document. The objection has been rightly disallowed.

Ex Sca. f 734

IN THE GOODS OF W. G. CHALMERS.

1870
July 11.*Court Fees Act (VII of 1870), Schedule I, cl. 11.*

THE following case was referred to the Chief Justice, under section 5 of the Court Fees Act VII of 1870, by Mr. Belchambers, the Taxing Officer of the Court:—

"On the 25th of February 1869, the Administrator-General obtained letters of administration of the property and credits of the above-named deceased, limited until the paper writing purporting to be his last will and testament should be proved.

"A fixed duty of Rs. 10 prescribed by the schedule to the Indian Succession Act, 1865, was paid in respect of such limited letters of administration.

1870. “The Administrator-General having now proved the will and obtained an order for general letters of administration, with will annexed in lieu of the former limited letters of administration, which by the same order are directed to be cancelled, the question arises whether any and what fee is payable in respect of the general letters of administration now obtained.

“It was submitted on behalf of the Administrator-General, that as the duty of Rs. 10 was the full duty payable by the law then in force, the subsequent alteration of the law by Act VII of 1870, the Court Fees Act, should not be allowed to affect the amount of the duty; in other words, that the payment of full duty of the Rs. 10 under the Succession Act should be taken as equivalent to the payment of the full *ad valorem* duty prescribed by the Court Fees Act.”

The opinion of the Chief Justice was as follows:—

COUCH, C. J.—The fee of two per cent. must be paid on the amount of the property in respect of which the letters of administration are to be granted irrespective of the Rs. 10 paid on the former letters of administration. The petition should state the amount of the property, and the Taxing Officer will compute the fee on the amount stated.

Messrs. Carruthers and Dignam for the Administrator-General.

1870
May 14.

IN THE GOODS OF GEORGE.

Court Fees Act (VII of 1870), Schedule I, cl. 11.

THE following case was referred to the Chief Justice, under section 5 of the Court Fees Act VII of 1870, by Mr. Belchambers, the Taxing Officer of the Court:—

“By a deed of settlement, dated 21st July 1866, and made between Olivia Hovenden Tiery, widow, and Charles Lazarus, certain shares of, and in, real and personal estate were granted, conveyed, and assigned to Mr. Lazarus, upon trust to pay the income to Mrs. Tiery, during her life, for her separate use; and after her death to hold the property for all her children for the time being in such manner and form as she should by deed or will appoint. Mrs. Tiery afterwards intermarried with Mr. James George. In July 1869, shortly previous to her death, Mrs. George in exercise of the power reserved in the deed of settlement, made a will, and appointed her husband and the trustee of the settlement executors. The husband alone applied for and obtained probate of the will, but the probate was detained in the office pending the decision of the question whether the *ad valorem* fee prescribed by the Court Fees Act, 1870, was chargeable in the present case.

“It was submitted on behalf of the executors that the above fee is payable in respect of property which passes under the will, and not in respect of property which, as in this case, does not pass under the will.

"By the deed of July 1866, Mrs. Tiery settled the property on her children, reserving to herself the income during her life, as also power to determine by IN THE GOODS OF GEORGE.
deed or will the manner in which the property should, after her death, be enjoyed by those for whom it was held in trust."

The Taxing Officer thought that as the power was not an absolute power of disposition, the property did not pass under the will, and therefore duty was not payable in respect of it.

The opinion of the Chief Justice was as follows:—

COUCH, C. J.—The words in the schedule, if read literally, would require that the *ad valorem* fee should be paid in respect of this property, but I think that they must be understood to mean property which the deceased was possessed of or entitled to, and that the *ad valorem* fee is not payable. I consider the case to be substantially the same as if it had arisen upon the English Act, where it has been decided that probate duty is not payable—*Drake v. The Attorney General* (1); and I decide that the *ad valorem* fee is not payable in this case.

IN THE GOODS OF W. P. MOSSON.

1870
Dec. 6.

Court Fees Act (VII of 1870), Schedule I, cl. 11.

THE following case was referred to the Chief Justice, under section 5 of the Court Fees Act VII of 1870, by Mr. Belchambers, the Taxing Officer of the Court:—

"On 3rd May 1870, the Administrator-General obtained letters of administration of the property and effects of William Patteneys Mosson, deceased, with a copy of an exemplification of probate of the will of the deceased annexed, such probate having been granted to the executor and executrix by the District Registrar of Cork (Ireland), on the 4th December 1869.

"The full *ad valorem* duty prescribed by the Court Fees Act, 1870, Schedule I, Clause 11, was paid on the amount or value of the property in respect of which letters of administration were obtained by the Administrator-General.

"On 12th November, the Administrator-General produced to the Court a document referred to in the will of the testator, as one which he conceived should, under section 51 of the Indian Succession Act, be considered as part of the will, and obtained an order for letters of administration (with a copy of the exemplification of probate of the will annexed, and of the above-mentioned document as part of the will) in lieu of the former letters of administration which by the same order were cancelled.

"The fresh letters of administration being in respect of the same estate in which *ad valorem* duty was paid when the first letters of administration were

1870 obtained, the Administrator-General claims exemption from payment of the
IN THE GOODS duty a second time."

OF MOSSON.

The opinion of the Officiating Chief Justice was as follows:—

NORMAN, J.—I think it clear that only one *ad valorem* stamp fee is payable by the Administrator-General. But I think it is right, and in fact necessary, that the letters of administration under which he acts should bear an *ad valorem* stamp. Section 9 appears to me to show how the difficulty which has arisen should be met. Application should be made to the Collector showing that the former letters of administration have been cancelled and new letters issued simply in order to correct a mistake under the orders of the High Court. He will probably issue a new stamp without charge. Should there be a difficulty in taking that course, which for myself I do not apprehend, the matter may be again brought before me.

Before Mr. Justice Phear.

1871
March 25.

THE AGRA AND MASTERMAN'S BANK (LIMITED) v. T. M. ROBINSON.
 IN THE MATTER OF THE LAND MORTGAGE BANK OF INDIA.

Administration of Estate of Deceased—Dividend—Date from which amount of Debt is to be estimated.

In the administration by the Court of the estate of a deceased, the dividend in respect of a debt against the estate is to be estimated on the amount of the debt at the date of the order for payment, and not at the date of proof.

THIS was an application in Chambers, in respect of a claim of the Land Mortgage Bank of India, against the estate of W. F. Fergusson, deceased. The debt was incurred in 1864, when the Land Mortgage Bank had advanced to P. Saunders, F. Read, and the deceased W. F. Fergusson Rs. 1,00,000, which sum was secured by the mortgage in favour of the Bank of certain lands and tea gardens in the zillah of Nowgong by deed of 29th December 1864. The sum advanced was to bear interest at the rate of 9 per cent. Payments were made from time to time in respect of the interest of the debt, but on 31st December 1867, when W. F. Fergusson died, the sum of Rs. 1,10,188-8 remained due for principal and interest. Subsequently a payment of Rs. 61,547-10-3 was made by F. Read, and on 15th May 1868, the sum due amounted to Rs. 52,000. For this sum the Land Mortgage Bank, on 30th January 1869, instituted a suit against T. M. Robinson and F. T. Fergusson, the executors of the will of the deceased W. F. Fergusson; but they did not proceed with the suit, as a suit was afterwards brought by the Agra and Masterman's Bank against the said executors in which a decree was made for the administration of the estate of the deceased. The debt of the Land Mortgage Bank was proved and allowed in full in March 1870. Subsequently, by a further payment in October 1870 made by F. Read, the claim was reduced to Rs. 31,162-6, which was the

amount of the debt at the date of the present application. At that date no order for a dividend out of the estate of the deceased had been made.

PHEAR, J.—I think the Bank is only entitled to a dividend upon such sum as is due to it from the estate at the time when the order for a dividend is made.

No order for distribution has yet been made, and since the debt was proved against the estate, it has been diminished by Mr. Read's payment; the claim therefore ought to be reduced to that extent. The decision of Vice-Chancellor Gifford *In re the Oriental Commercial Bank, Ex parte Maxoudoff* (1), is an authority for this view.

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AGRA AND
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SON.

Before Mr. Justice Bayley and Mr. Justice Kemp.

IN THE MATTER OF THE PETITION OF TUFANI SING.*

1871
Jany. 6.

Review, Ground of.

Baboo *Mahesh Chandra Chowdhry* for the petitioner.

Mr. C. Gregory and Baboo *Hem Chandra Banerjee* contra.

BAYLEY, J.—We are of opinion that there is no ground for this review. We are asked to pass an order enabling the applicant to have the plaint back in order to file it in the proper Court. The case was discussed at great length when the special appeal was argued, but no such request was then made before us. It was held by us on the plaintiff's own showing that the Court in which the suit was brought, was admittedly a Court which had no jurisdiction to try it. If a party brings a suit in a Court which, according to his own showing, has no jurisdiction to try the case, it does not lie in him, failing in that Court, to ask to have the plaint back in order to file it in the proper Court. However, as the matters stand in the case, this request, as an alternative plea, was never made or otherwise raised before; and I think that to allow such a point to be raised at this stage would be against the proper legal principle,—viz., that there must be some end to litigation.

* Application for Review, No. 148 of 1870, against the judgment of Mr. Justice Bayley and Mr. Justice Kemp, dated the 12th August 1870, in Special Appeal No. 66 of 1870.

(1) L. R., 6 Eq., 582.

Before Mr. Justice Kemp and Mr. Justice Paul.

1870
Decr. 22.

TARA MANI DASI (JUDGMENT-DEBTOR) v. RADHA JIBAN MUSTAFI (DECREE-HOLDER).*

Compromise—Declaratory Decree—Execution—Powers of a Court executing a Decree of another Court.

B. sued his brother C. for possession of certain lands. B. and C. came to an amicable settlement, one of the terms of which was that C. during his life should retain possession of certain of the lands, and that after his death they should pass to B. A decree was given in accordance with the terms of the compromise. On C.'s death, his widow refused to put B. in possession of the lands. B. sought to obtain possession of the lands with mesne profits by executing the decree under the compromise against C.'s widow.

Held, that he ought to proceed by regular suit.

Baboo *Chandra Madhab Ghose* and *Khettra Nath Bose* for the appellant.
Baboo *Mahesh Chandra Chowdhry* and *Mahini Mohan Roy* for the respondent.

THE facts of this case and the arguments on both sides are sufficiently stated in the judgment of the Court, which was delivered by

PAUL, J.—In this case Radha Jiban Mustafi and Sarbeswar Mustafi being two brothers had certain dissensions existing between them, in consequence of which Radha Jiban Mustafi sued Sarbeswar Mustafi for possession of certain lands. Pending the suit a compromise was arranged between the parties, the terms of which, as far as they affect this contention, were shortly these: that Radha Jiban and Sarbeswar were either to take immediate possession of certain lands or to keep possession of them; that Sarbeswar Mustafi should enjoy certain other lands (the subject-matter of this execution) during his life, and that upon his death these lands, in the event of his pre-deceasing Radha Jiban, were to devolve upon Radha Jiban. A decree was passed in the suit on the footing of the terms of this compromise.

Sarbeswar died, and his widow not having given to Radha Jiban possession of the lands (subject of this execution), Radha Jiban applied for execution, claiming possession of the lands as well as mesne profits from the death of Sarbeswar to the time of getting possession.

The Subordinate Judge has decided this case entirely relying on a certificate which was forwarded to him by another Court,—a certificate which states that the decree is to be executed for possession and mesne profits. This certificate has no efficacy beyond so far as it states that the decree has not been satisfied, and the decree itself must be looked to for the purpose of ascertaining what is to be executed in accordance therewith. On looking at the decree we find no mention made of mesne profits; therefore, so far as the decision of the Court below has proceeded, it may be at once said that that decision was ero-

* Miscellaneous Regular Appeal, No. 338 of 1870, from a decree of the Subordinate Judge of Hooghly, dated the 30th July 1870.

The *Official Assignee* applied for his commission to be paid, the payments to servants being a distribution of assets in the nature of a preferential dividend.

1871

IN THE MAT-
TER OF PARKE
PITTAR.

PHEAR, J. (after taking time to consider)—I allow all the claims put in excepting those of Wooster's and Hill's which stand over. The claims are allowed, however, up to the date of the insolvency only—17th December 1870—instead of to the end of that month. The application for payment under this section of the Act must be taken to imply consent to a dissolution of the contract of service by the filing of the petition—see *Thomas v. Williams* (1). Mr. Smith's claim must I think be allowed, notwithstanding that he was not in the insolvents' service at the date of the insolvency, having left their service about a month previously, but of course only for so much as accrued within the six months previous to the insolvency. The *Official Assignee* will be at liberty to pay the claims as allowed. The *Official Assignee* will be entitled to his commission, and the costs of application will be paid out of the estate.

PHEAR, J.—(On May 2nd, said,) I omitted to say yesterday that a portion of Mr. Tracy's claim, consisting of Rs. 200, the balance of a sum of Rs. 400, should be paid to him by the insolvents as extra salary or remuneration for services rendered by him before the date of the insolvency, the amount to be laid before their creditors at the time of the distribution among the creditors previous to the insolvency, cannot be allowed. This is in accordance with the principle as the Act means to give a preference to. This amount is not to be allowed, but it can of course be proved upon the estate as an ordinary debt claim. The remainder of Mr. Tracy's claim is allowed.

*Claim of W. Hill.*1871
May 15.

In support of this claim were put in on 13th April, 1871, affidavits for Rs. 2,450. The claimant was manager of the works of the insolvents up to the date of their insolvency. His affidavit states that he received Rs. 350 a month up to the 11th day of April 1867, when he was dismissed. The insolvents, wrote him a letter, in which he proposed to him a new engagement with a commission as would increase his salary to Rs. 500. According to the affidavit, it appeared that he had received Rs. 3,100, during the six months previous to the insolvency, the sum of Rs. 3,100.

PHEAR, J. (after taking time to consider)—I think the claim of Mr. Hill cannot be allowed as a preferential claim under section 42. It appears by the account brought in that Mr. Hill received more than Rs. 3,000 during the six months previous to the insolvency, which would more than cover his salary during that period at the rate he claims at,—viz., Rs. 500 per month. The claim is disallowed so far as concerns this servant's schedule, but may of course be proved against the estate in the ordinary way.

Before Mr. Justice Kemp and Mr. Justice Glover.

1871
April 6.

MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR (DECREE-HOLDER) v. LAKHI BIBI AND OTHERS (JUDGMENT-DEBTORS).*

Execution—Act VIII of 1859, s. 216—Limitation—Act XIV of 1859, s. 20—Notice—Decree—Bonâ fide Proceedings.

The service of a notice under section 216 of Act VIII of 1859, if made *bonâ fide* with a view to take further proceedings, is sufficient to keep a decree alive (1). The question in this case was whether service of a notice under section 216 of Act VIII of 1859 was a proceeding within the meaning of Act XIV of 1859, section 20.

Baboo *Nilmadhab Sein* and *Ashutosh Mookerjee* for the appellant.

Baboo *Gapi Nath Mookerjee* and *Ramanath Bose* for the respondent.

The facts of this case sufficiently appear in the judgment of

GLOVER, J.—The decree-holder is the special appellant in this case. He obtained his decree on the 16th of February 1852. There is no date record of the first application for execution, but it is admitted that, in the years 1852-53, execution was taken out and the decree-holder received part of the sum due to him, and proceedings were struck off on the 10th December 1853. The next application for execution is dated 2nd December 1861, and this was struck off on the 18th June 1862. A third application was made on the 2nd of February 1865, and it was struck off on the 31st October of the same year. A fourth application was made on the 5th of February 1868, which, after certain proceedings, was struck off on the 31st October 1868.

The present application was made on the 17th of January 1870. The question is, "Was any *bonâ fide* application on the part of the decree-holder made between the 31st October 1868 and the 2nd of February 1865," for if the decree-holder can show that at any time, his subsequent acts after February 1865 would be deemed to limit the limitation. Now the Court of first instance has held that the decree-holder were not *bonâ fide*, simply because he had done since 1853, and the Judge on appeal has decided that he had done without action taken thereupon to realize the sum due, and so could not keep a decree in force. Both these decisions appear to be correct. From the account annexed it appears that Mr. Alcock, one of the Solvers, business at Simla, mislead to pay him such a sum as Rs. 1,000/- when Mr. Degun Singh (2) that the mere issue of notice was not enough to start that his salary was delayed.

* Miscellaneous Special Appeal, No. 486 of 1870, from the *Judge of East Burdwan*, dated the 26th November 1870. It has been decided by a Full Bench of this Court, *v. Degun Singh* (2) that the mere issue of notice was not enough to start that his salary was delayed.

(1) See Act IX of 1871, 2nd Schedule
(2) Case No. 778 of 1865; 11th Septem-

decrees-holder *bonâ fide* with the intention of taking further steps and of keeping the decree alive, would be a sufficient process under the Act to save the decree-holder from limitation. The fact that nothing effective had been done under that notice would not show that that notice was not *bonâ fide*. It may very possibly be that the decree-holder served a notice on his judgment-debtor imagining that he had got a clue to certain property of his judgment-debtor from which the money due under his decree could be realized, and he might afterwards have found that he had been mistaken, and that the property that he wished to attach was not the property of his judgment-debtor, and so he might allow the proceedings to be struck off, time after time, in the same manner and for the same reason without taking any effective action in the matter. What the lower Courts had to decide was whether the proceeding of the decree-holder on the 4th of May 1862 was really and *bonâ fide* taken with the honest intention of executing his decree and was not a mere sham application put in simply to save limitation, and what the Judge had to do in view of the appeal was of course to decide the same question, and not merely to set aside the case out on the ground that an infructuous proceeding is not a *bonâ fide* proceeding to keep a decree in force. Many proceedings may be infructuous, and at the same time be perfectly *bonâ fide*.

It must be remanded to the Court of first instance to try the question whether the notice served by the decree-holder on the 4th of May 1862 was a sufficient notice. If that was so, the decree-holder would apparently be entitled to limitation.

I am in this order of remand. I think it necessary to call the Raja, or other who tries this case to a proceeding to be found on the 2nd of June 1862, which date would fall within the period between December 1861 and the 2nd of February 1865. It is recited that the Raja, the decree-holder, did not sue his judgment-debtors, and that the latter made no objections to the decree. In 1868 it appears that some property was actually sold by the Raja in under section 246 and obtained a release of

1871

MAHARAJA
DHIRAJ MAH-
TAR CHAND
BAHADUR
v.
LAKHI BIBI.

1871
March 18.

Before Mr. Justice Bayley and Mr. Justice Mitter.

ABHAYA CHOWDHRY v. T. BRAE.*

Recognizance to keep the Peace—Judicial Enquiry—Evidence—Report of Police Officer.

The existence of a dispute likely to cause a breach of the peace must be first proved by legal evidence before the Magistrate can proceed to call upon the parties to enter into recognizances to keep the peace.

The report made by a Police officer that there is a likelihood of there being a breach of the peace, is not legal evidence to prove the existence of any dispute likely to cause a breach of the peace.

UPON the report of a Police officer, the Magistrate of Pubna passed an order directing Abhaya Charan Chowdhry to enter into a recognizance to keep the peace.

Upon the application of Abhaya Chowdhry, on the ground that the order was illegal, inasmuch as he held no judicial enquiry as to whether there was a probability of a breach of the peace, the Judge of Rajshahi remitted the case for the opinion of the High Court.

Baboo Mahini Mohan Roy for Abhaya Chowdhry.

Mr. Rochfort for T. Brae.

The opinion of the High Court was expressed by

BAYLEY, J.—We think that in this case the order was illegal, and must be set aside. His proceedings should be governed by the judgment in *Kashi Kishor Roy v. Tarini Kali*, 10 Cal. 187, where the decision of the Officiating Chief Justice has been very clearly recorded in the following terms:—“that there is a clear reason for requiring a recognizance ‘existing of dispute likely to occasion a breach of the peace’.” Now the question is, is there a finding on legal evidence that there is such a Police report which

It is pressed upon us that there are many other cases on the file showing that there were disputes with regard to this land, but those other cases can be no evidence of an intended breach of peace on this special occasion, nor was any document connected with any of those cases referred to by the Magistrate as the ground of his action. Each case must be decided upon legal evidence bearing upon its own facts and with reference to its own surrounding circumstances.

We set aside the order of the Magistrate, but we express no opinion as to any title or possession of either party under decrees or otherwise. That is a matter beyond the scope of this reference under section 434, or motion under section 405, of the Criminal Procedure Code.

The order of the Magistrate is set aside.

1870*

ABHAYA
CHOWDHURY
v.
T. BRAE.

Before Mr. Justice E. Jackson and Mr. Justice Mookerjee.

JASIMUDDIN (PLAINTIFF) *v.* SHEIKH MANSUR ALI AND OTHERS
(DEFENDANTS).*

1871
Jany. 6.

XIII of 1835—Sale of Tenure for Arrears of Rent—Encumbrances.

The plaintiff sold certain lands in talook Q. under a howladari patta. Q. was sold for arrears of rent under Act VIII of 1835, and purchased by the defendant. After purchase, the defendant dispossessed the plaintiff from his lands, on the ground that he had purchased them free from all encumbrances created by the late defaulting talookdar. The plaintiff filed a suit to recover possession of his lands from the defendant. The sale of a tenure, under Act VIII of 1835, does not necessarily acquire it free from all encumbrances. Case remanded for trial of the genuineness of the plaintiff's title.

Plaintiff's case for the appellant.

Defendants' case for the respondents.

Delivered judgment on the judgment of the Court, which was delivered

The plaintiff brought this suit for possession of a certain land, on the ground, that it is covered by his howladari patta dated 1835, and that the land is situated in Talook Majid Mali, which has been sold under the provisions of Act VIII of 1835, and purchased by the defendant, who has dispossessed him from this howala.

The defendants, among other pleas, contended that this patta was a false and fabricated document, and that the plaintiff's claim was a false one; that the sale having been held under Act VIII of 1835, they acquired the talook free from all encumbrances, and that therefore the plaintiff has no right to recover possession of this land.

* Special Appeal, No. 1382 of 1870, from a decree of the Additional Judge of Chittagong, dated the 22nd April 1870, reversing the decree of the Moonsiff of that district, dated the 25th August 1869.

*1871 The first Court gave a decree for the plaintiff, finding that the patta produced by him was genuine, that it was registered, that possession was held under that patta, and that, the defendants having dispossessed him, the plaintiff was entitled to recover.

MIR JASIM-
UDDIN
v.
SHEIKH MAN-
SUR ALL.

On appeal, the Judge, after having required the defendants to produce the patta constituting the original tenure which had been sold, takes up the case on another day, and says:—"The original *talooki* patta of 1856 has been filed. It contains no clause the effect of which would be to render such tenures as "might be created by howladari pattas, such as that relied on by the plaintiff, "superior to the result of a sale of the talook for its own arrears." And he considers that the sale under Act VIII of 1835 has cancelled the patta, because it was a sale of the tenure for its own arrears.

We find, however, that the original *talooki* patta has not been filed. It has been contended in special appeal before us, that the sale of this tenure under Act VIII of 1835, did not, under the Full Bench ruling of this Court in *Shaha Badan v. Futtah Ali* (1), confer upon the purchaser any right in the tenure free from all encumbrances imposed upon it by the former owner, and that, therefore, it has not the effect of rendering inoperative the tenure created by the defaulting talookdar, but that the purchaser is entitled to rent.

We find this contention to be good. The sale under Act VIII of 1835 does not convey to the purchaser the tenure free from all encumbrances unless there was a stipulation in the documents by which the tenure was created providing for the sale of such tenure for arrears. The patta of the tenure sold has not been filed in this case, nor do we find that the documents contain the stipulation referred to. The objection raised by the defendant was that the howladareship of the plaintiff was false. The howla patta of the plaintiff, if it were genuine, would not fall by the operation of section 10 of the Act. We are of opinion that the mere fact of the sale gives rise to a question of law. The learned Judge has said in his judgment "that the question of the genuineness of the patta cannot be gone into." As we are of opinion that the view taken by the learned Judge of the law is not correct, the case must go back to him for a final decision upon the question of the patta. The Judge should enquire into the genuineness or otherwise of the patta and decide the case according to the result of that enquiry. We therefore remand the case to the Judge for a final decision on the merits with reference to the above remarks.

Costs to follow the final result.

(1) Case No. 992 of 1866, March 13th, 1867.

Before Mr. Justice Kemp and Mr. Justice Glover.

QUEEN v. SHEIKH RAMZAN.*

1871
April 22.

Evidence of Previous Conviction—Kaifut.

A kaifut or report from the Record Office that A. had been convicted of a crime, is no evidence of a previous conviction.

THE judgment of the Court was delivered by

KEMP, J.—There can be no doubt that the prisoner has been properly convicted of theft under section 380, Penal Code. There may be a question as to how much he stole, but it is clear that he took at least 2 rupees.

The prisoner has been sentenced to four years' rigorous imprisonment, evidently on account of his having been twice before convicted of theft in 1870; but there is no evidence on the record of these convictions. It is enough for the prosecution to file a kaifut from the Record Office, setting forth the fact that one Sheikh Ramzan had been twice before convicted of theft. There should have been sworn testimony to the fact and also to the examination of the prisoner before the Court with the Sheikh Ramzan convicted.

Let the two previous convictions be expunged from the record, as the prisoner has been convicted does not seem to call for a sentence as four years' rigorous imprisonment. We reduce it to three years' imprisonment.

L. S. Jackson and Mr. Justice Ainslie.

THE VICTIMS (PLAINTIFFS) v. GAPI SING (DEFENDANT).†

1871
Feby. 23.

Adverse Possession—Limitation—Onus Probandi.

The plaintiff held a mauza from the proprietor in 1869, and now sued to obtain possession of the same. The defendant, who was proved to have held under a ticca lease down to 1856, claimed to hold under a mokurrari lease, which he said was granted by the plaintiff's vendor in 1859. The plaintiff failed to prove possession by his vendor within the time limit of the suit brought, and therefore the Courts below dismissed his suit. On special inquiry the Court held that the defendant, before succeeding on the question of limitation, should have shown that the plaintiff had notice of the mokurrari title set up. The case was sent back to the Court below to try the validity of that title.

THIS was a suit brought on the 10th December 1869 to set aside an alleged mokurrari lease and obtain possession of a four-anna share of Mauza Manpore, in Pergunna Kuswar. The plaint stated that, under the former

* Criminal Appeal, No. 193 of 1871, from an order of the Deputy Commissioner of Singbloom, dated the 17th March 1871.

† Special Appeal, No. 1892 of 1870, from a decree of the Judge of Sarun, dated the 1st June 1870, affirming a decree of the Moonsiff of that district, dated the 20th January 1870.

1871

DHANUK
DHARI SING
v.
GAPI SING.

proprietor, the defendant held the mauza under several ticca leases from Fasli 1246 to 1267 (1839 to 1860); that the proprietors remained in khas possession from 1268 (1861); that on the 12th May 1869, Jan Bibi, one of the proprietors, sold her four-anna share to the plaintiffs; that the defendant opposed the plaintiffs' obtaining possession of their share, alleging that he was in possession under a mokurrari lease executed by Jan Bibi and others on the 19th Baisakh 1257 Fasli (May 1st, 1850).

The defendant set up in his written statement that the mokurrari lease was valid and genuine, and that as he had held the property under it from 1257 Fasli (1850), and paid rent, the suit was barred by lapse of time.

The Moonsiff held that as the plaintiffs could not show that either they or their vendors were in possession within twelve years from the date of suit, they were barred by lapse of time.

On appeal, the Judge found that the kabuliats, dated respectively February 1839 and 25th July 1847, regarding the property in dispute, filed by the plaintiffs, were admitted by the defendant to be genuine; that there was no evidence to prove the genuineness of the kabuliat dated 25th April 1847; that there was no evidence of the possession of the plaintiffs' vendor before 1268 Fasli (1861); and that the plaintiffs had failed to prove that their vendors for the thirteen years previous to the suit. He held that they were barred by lapse of time, and confirmed the judgment of the lower court.

The plaintiffs appealed to the High Court.

Baboo *Tarrakhnath Dutt* for the appellants.

Baboo *Khettranath Bose* for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—The law of limitation appears to me to have been applied to this case.

The plaintiffs are purchasers from the owner of the land, and are entitled to receive directly the rents payable by the same. For the purpose they sought to get rid of an alleged mokurrari lease so set up by the defendant.

The date of the mokurrari so set up was in the year 1257 (1850).

The Judge finds that the plaintiffs had not shown that they were in possession of the land in dispute at any time within twelve years next before the commencement of the suit.

It appears, however, that the plaintiffs had been previously in occupation of this and some other land under a ticca lease, of which the term extended down to 1263 (1856), because their kabuliat to that effect was put in and was admitted by the defendant to be genuine. Now it would be for the defendant, under those circumstances, to show that the plaintiffs had notice that he held or claimed to hold under a mokurrari title set up, before he could successfully plead limitation. The Judge will find the observations applicable to this subject in the

case of *Rajah Sahib Pralad Sen v. Run Bahadur Sing* (1). It is not contended that there was any such evidence, and this being so, the decision of the Judge must be set aside. The case will have to go back to the lower Appellate Court in order that it may try whether the defendant had a real valid mokurrari title or not.

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DHANUK
DHARI SING
v.
GAPI SING.

Before Mr. Justice Markby.

SMYTHE v. SMYTHE.

1870
Sept. 16.

Dissolution of Marriage, Suit for—Adultery and Desertion—Delay in bringing Suit—Permanent Alimony.

wife brought a suit for dissolution of marriage on the ground of her husband's adultery and desertion. The desertion took place twenty-four years before the suit was brought, after since the husband had made his wife an allowance. Latterly his circumstances considerably improved. The Court gave a decree for dissolution, but in determining the suitable amount of permanent alimony, it took into consideration the circumstances of the wife and at the time of the desertion, and refused to give the wife the full advantage of the greatly improved circumstances of the husband.

In this case there was a suit brought by the wife for a dissolution of marriage on the ground of her husband's adultery and desertion. The wife's petition stated that the marriage took place in Calcutta on 30th July 1845; that there were two children by the marriage, of the ages of 23 and 24 years respectively; that she separated from her husband on or about the 24th December 1846, while she was living in Calcutta; that she has remained ever since in Calcutta, her husband without any reasonable cause deserting her; and notwithstanding her repeated entreaties has lived separate from her; that subsequent to such desertion, the respondent has浪游 in various parts of India and in divers places, especially in Calcutta and Madras, and has been absent from his wife for a long time, and that he had for about the last twenty years been separated from his wife; and that he had for about the last twenty years been separated from his wife. The petition alleged the absence of mutual affection between the parties, and prayed for a dissolution of the marriage and such alimony as the Court should think fit.

In her written statement the petitioner further stated that she had no property except certain sums which she from time to time received from her husband respondent, but that such sums were quite disproportioned to his means, and were not sufficient for her proper support.

In a subsequent petition for alimony *pendente lite*, filed on 4th August 1850, the petitioner stated that the respondent was possessed of an extensive shop, indigo factories, talooks, and other property, from which he realized at least Rs. 2,000 a month; and that she was possessed of no separate property nor any means whatever. The respondent in his written statement admitted the adultery and desertion, and alleged that after the separation—viz., about December 1850—an agreement had been come to under which the respondent agreed to pay the petitioner Rs. 58 a month; and that he

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SMYTHE
v.
SMYTHE.

had ever since continued to pay to the petitioner sums varying in amount with his circumstances; and that since 1862 he had paid to the petitioner Rs. 110 a month, and was willing to continue that allowance. In a subsequent affidavit filed in answer to the petition for alimony *pendente lite*, the respondent stated his income to be only Rs. 800 a month.

On 18th August 1870 the Court ordered the respondent to pay the petitioner Rs. 110 as alimony *pendente lite*. In evidence it was proved that the petitioner kept a lodging-house in Calcutta at a rent of Rs. 115 a month; that she had received Rs. 500 from her brother's estate in 1855 or 1856, and Rs. 1,000 from her mother's estate in 1853; which she had spent; and that besides the furniture of her house, which she valued at Rs. 100, and the allowance she had had from the respondent, she had nothing.

From the respondent's evidence, it was shown that in 1868 his receipt amounted to Rs. 42,000, and in 1869 Rs. 28,000. He gave his agent in Allahabad Rs. 250 a month.

Mr. *Ingram* and Mr. *Hyde* for the petitioner.

The *Advocate-General* (offg.) and Mr. *Evans* for the respondent.

A decree for dissolution was made, and the only question was whether alimony was proper to be allowed. The case stood over during the Durga Puja vacation, when the decision was given as follows:

MARKBY, J.—Upon a consideration of all the facts in this exceptional case, I have come to the conclusion that there is a proper sum to allow for alimony. I consider that it is in proportion to the income of the husband than in most cases, but I think that, looking to the great length of time since the parties first separated, the wife can hardly expect payment of the improved circumstances of her husband. I shall date of the order *nisi*.

Attorney for petitioner: Mr. *Hechle*.

Attorneys for respondent: Messrs. *Pittar* and *Camell*.

Before Mr. Justice Ainslie and Mr. Justice Paul.

1871
April 14.

KUMAR PARESH NARAYAN ROY (PLAINTIFF) *v.* GAUR SUNDAR BHUMLI (DEFENDANT).*

Rent—Enhancement,—Act X of 1859, s. 17,—What sufficient Notice of Grounds.

Baboo *Mahini Mohan Roy* for the appellant.

Baboo *Bhawani Charan Duit* for the respondent.

* Special Appeal, No. 1650 of 1870, from a decree of the Judge of Nuddea, dated the 20th April 1870, reversing a decree of the Deputy Collector of that district, dated the 15th December 1868.

AINSLEY, J.—The case now before us appears to be exactly similar to the case of *Radha Ballab Ghose v. Behari Lal Mookerjee* (1).

(1) Before Mr. Justice Bayley and Justice Sir Baboos Ashutosh Chatterjee and Mahini C. P. Hobhouse, Bart.

Mohan Roy contra.

The 20th December 1869.

RADHA BALLAB GHOSE AND OTHERS

(DEFENDANTS) v. BEHARI LAL
MOOKERJEE (PLAINTIFF).*

THIS was an application by the defendants for review of judgment.

Baboo Kedar Nath Chatterjee for the petitioners.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Glover.

The 20th May 1869.

RAM SING AND ANOTHER (DEFENDANTS) v. BHAJAN DOBAY DAS (PLAINTIFF).†

Baboo Kharan Banerjee for the applicants.

Defended by

On the question of notice of enhancement, the Judge refers and the

replies given in the case

under section 17th sec-

tion 17th sec-

section is

produced

increased

ex-

the rent has

Judgment was delivered by

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KUMAR
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v.
GAUR SUNDAR
BIUMIK.

HOBHOUSE, J.—The point taken in review is that, whereas this Court held a particular notice to be a sufficient notice of enhancement, it is shown by a ruling in the case of *Ram Saran Sing v. Bhajan Dobay Karpar-daz* (a), that that notice was not sufficient, because it did not contain every one of the

paid by neighbouring ryots; but the notice to which the Judge refers does not say the rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. The notice does not bring the case within the other ground of enhancement contemplated by section 17. The Judge says,—“I consider it ‘proved that the productive powers of the ‘land have increased,’ but his finding does not bring the case within the meaning of the first ground of enhancement, and he does not find anything as regards the rates paid by other ryots. The Judge has not found that notice was given, bringing the case within the meaning of section 17; nor does the fact found by the Judge justify the enhancement. It appears to me, therefore, that the decision of the Judge must be reversed upon these grounds.

But in addition to that the Judge says that there is no evidence adduced by the defendants as to their having held the land at a uniform rate of rent from the date of the permanent settlement: he does not say so *prima facie* case was made out to

1871

KUMAR
PARESH NA-
RAYAN ROY
v.
GAUR SUNDAR
BHUMIK.

The notice which was issued to the ryot in this case was to the effect that his rent is liable to be enhanced on the ground that he was paying at a rate lower than that paid by "equal ryots," the Bengali words used being *Toollo Projah*; and this seems to be sufficient to show that the enhancement was under the 1st clause of section 17, Act X of 1859. When the case came before the first Court, the defendant does not appear to have taken any objection that the notice was insufficient, and that he did not understand its terms; and from the second issue laid down by that Court it is perfectly clear that the parties went to trial upon the merits, and not on any technical question.

We think we ought to follow the judgment of this Court in the case above referred to. We therefore decree this appeal, and remand the case to the Judge to try it upon the merits. Each party will pay his own costs of this appeal.

words to be found in clause, 2 section 17, Act X of 1859.

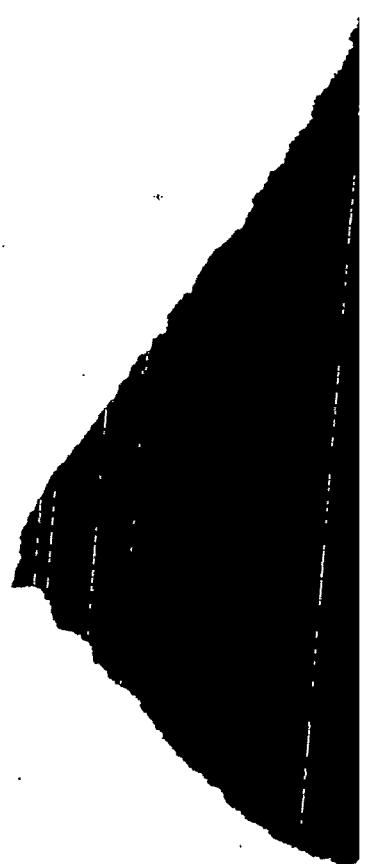
We considered, relying on a judgment in *Khondkar Abdoor Ruhman v. Wooma Chundee Roy* (a), which was before us, that the question before us was whether in this particular case the defendant ryot was aware of that provision in the Act to which he was pleading, when having been served with the notice he was at issue in the Courts below with the plaintiff. We thought that if the ryot knew to what pro-

vision in the law of enhancement he was pleading, then, although the notice was not in the exact words of the law, yet it was sufficient, because the object of the notice, viz., that the ryot might know the legal grounds on which enhancement had been attained. We were of opinion that the ryot in this case knew the legal grounds on which enhancement was sought; and this being so, we adhered to our former opinion that the plaintiff was entitled to his relief.

We accordingly decree this appeal with costs.

(a) 8 W. R., 330.

REVENUE CIRCULARS.



REVENUE CIRCULARS.

DECEMBER, 1870.

1870

REV. CIR.

V. H. SCHALCH, Esq., AND A. MONEY, Esq., C.B.

No. 1.

Under instructions from Government, the Board of Revenue have withdrawn the Waste Land Rules, 12 A, 12 B, and 12 C, Section 4, and Article XVI of the Board's Rules, under which grantees and their agents of waste lands were allowed to relinquish portions of their grants, and which were passed as a temporary convenience in a special emergency, are hereby withdrawn.

No. 2.

Having been made to Government as to the authority by which, in the terms of Financial Resolution, No. 1821, dated 12th July 1869 (published at page 116 of the *Gazette of In-*

acting allowance than is sanctioned by the rules may be granted to Uncovenanted Servants under certain circumstances, the Lieutenant-Governor has ruled that all cases in which, in the opinion of the local officers, such a relaxation of the rules is necessary, should be reported for the special orders of Government, without which the Accountant-General has no authority to pass any extra allowance.

2. It is not intended, however, to take away from the heads of departments the power conferred on them by the Financial

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REV. CIR.

Resolution of 30th December 1869, No. 3443 (published at page 2 of the *Calcutta Gazette* of the 5th January last), of granting, if necessary, as much salary as is available to an officer acting in an appointment *of which the salary is less than rupees 100 a month.*

3. The scope of the present ruling is that when, under the condition laid down in the Financial Resolution of 12th July 1869, heads of departments may deem it necessary to grant more allowances than the rules authorize to an officer acting in an office *of which the salary is rupees 100 or upwards,* they must report the matter for the sanction of Government.

No. 3.

THE following is added as clause 23A, at page 2 of the Board's Rules:—

23A.—A fee of rupees 50 is allowed to the Governor of the High Court in every case of the Court where the value of rupees 1,000, whether as appellant or respondent. For cases of a higher value than rupees 1,000, the full legal fees.

No. 4.

IN Rule 13, Section XIII, p. 189 of the Board's Rules, substitute the words "be addressed to the Board directly" in lines 4 and 5, substitute the words "if the amount of the sum" in line 6, and substitute the words "the Accountant-General, and in other cases to the

No. 5.

IN supersession of previous orders, all Assessing Officers are informed that the commission on registry fees is liable to Income Tax, under Part II of the Income Tax Act, provided the aggregate of such commission and of the salary of the recipient exceeds rupees 500 per annum.

No. 6.

1870

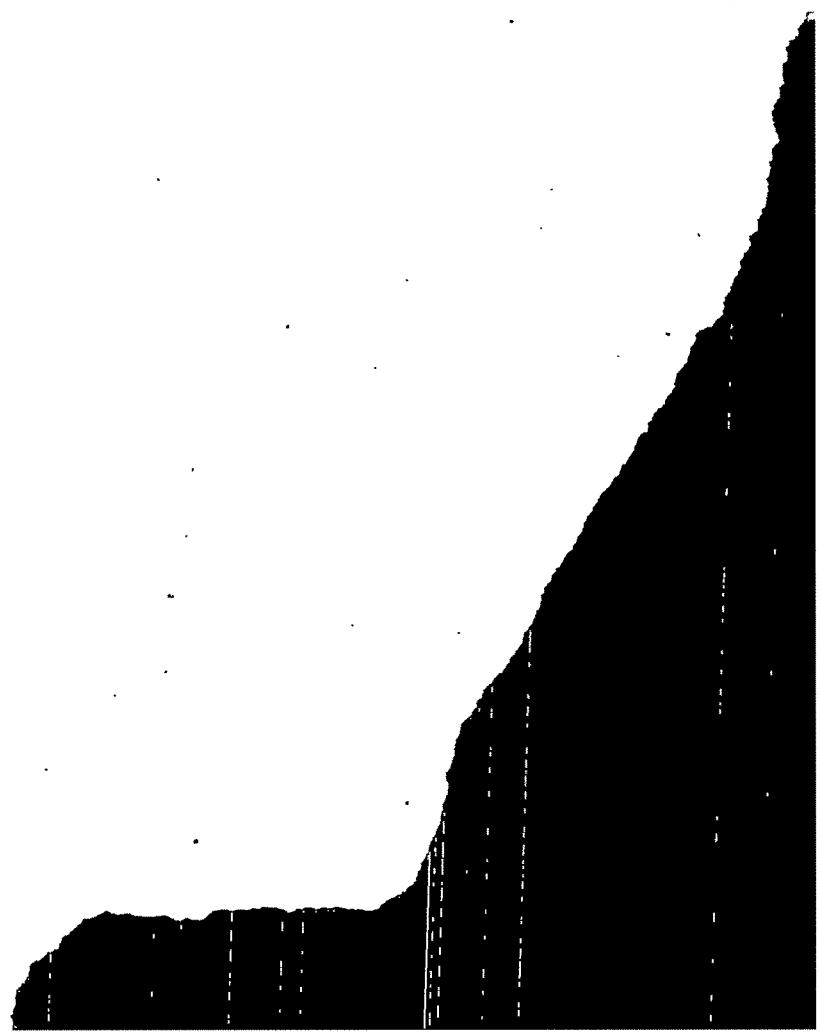
REV. CIR.

THE Board observe that Commissioners are frequently apt to recommend officers for favorable notice, in their yearly Land Revenue Report, on insufficient grounds. In all such future Reports, every gazetted officer employed in revenue work under a Commissioner should be placed by him in one of four classes, headed Bad, Average, Good, Very Good. In this last class only officers of exceptionally good qualifications should be entered, and remarks should be made only as regards those in the first and the last classes. As regards these, it should also be stated in detail what kind and what general amount of revenue business the officer has done during the year under report.

No. 7.

Following is added as Rule 13 C, at page 189, Board's

"The application for a refund, or part of a refund, where the amount of the same does not exceed Rs. 100/-, and which is made by the Collector himself, must be investigated by the Collector himself. Should an application for a refund be made by the Collector during his absence from his head-quarters, or if he is unable, in consequence, to make the necessary investigation, the propriety of the refund applied for, its amount and date of return."



JANUARY, 1871.

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REV. CIR.

V. H. SCHALCH, ESQ., AND A. MONEY, ESQ., C.B.

No. 1.

NUMBEROUS instances have come to the Board's notice of dis-
agreements on the part of local officers of the provisions of Section 5,
Section 18, and Section VIII, page 153, Board's Rules. It would appear that
the meaning of those provisions is not generally understood. It
is hereby explained that a transfer of a tract of country from one
District to another, by the orders of Government, does not give it authority to the Collectors of the districts
to affect their rent-rolls, without the Board's sanction, unless the estates, the whole or the greater part of
which have been thrown by the transfer of territory into a
new District, stand on the rent-roll of which it has been
placed. In case of ever a transfer of an estate from one
District to another, whether in consequence of a
change of District boundaries or from other causes, the
Board's sanction must be taken under the rules above cited.

No. 2.

The following Resolution of the Government of Bengal, dated
the 2nd December 1870, is published for general information:—

“ Read a letter (No. 4121 dated the 12th October) from the
“ Government of India in the Financial Department, suggesting
“ that the powers described in Section 16 of the Indian Coinage
“ Act (XXIII. of 1870) should at once be vested in such officers
“ as this Government may select for the purpose.

“ Read also a letter (No. 640C, dated the 22nd November)
“ from the Board of Revenue, recommending that the powers

1871 " referred to above should be conferred on all officers in charge
 REV. CIR. " of treasuries, both at head-quarters and at sub-divisions, and
 " on Collectors of Stamps and Customs.

" 2. It appears to the Lieutenant-Governor unadvisable that
 " the powers defined in Section 16 of the Act should be conferred
 " in the first instance on officers in charge of sub-divisional
 " treasuries. The exercise of these powers will, accordingly, for
 " the present, be confined to those officers who are in charge of
 " treasuries at sunder stations of districts, and on Collectors of
 " Stamps and of Customs in Calcutta. They will, as requested
 " by the Government of India, be directed not to exercise
 " power entrusted to them too rigidly in the case of coin which
 " has lost weight, even a little in excess of two per cent., but
 " no account to neglect to cut or break any coin which is
 " terfeit, or reduced in weight otherwise than by
 " wear.

" Order.—Ordered that the Collectors of Customs, and all officers in charge of
 " Stamps at the Presidency, and all officers in charge of
 " treasuries, be vested with the powers defined in para. 2 of
 " XXIII of 1870."

2. The special attention of all officers is invited to the instructions contained in para. 2 of
 which should be carefully complied with.

No. 3.

PENDING the passing of the Rules for the sale of Stamps under the Court Fees' Act (VIII of 1870), no discount

Vide page 1657 of the Calcutta Gazette, dated 14th September 1870. subsidiary to the General Rules passed for the sale of Stamps previously made by Act XVIII of 1869, have been submitted by the Board for the sanction of Government.

2. In the meanwhile, however, the sanction of Government has been obtained with advertence to para. 8 of the General Rules under Act XVIII of 1869, referred to above, to the application of the existing rules regarding the payment of discount, which are contained in section 5, Chapter XXI of the Board's Manual,—viz., that discount will not be allowed to pur-

chasers of bi-color stamped papers, inclusive of bi-color Bill of Exchange Stamps, when the total value of such purchase does not amount to Rs. 25, and with regard to Adhesive Stamps, when the total value does not amount to rupees 5.

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3. As regards para. 11 of the General Rules under Act XVIII of 1869, the following headings should be adopted, in accordance with the orders of Government, for the form of Register required to be kept by every ex-officio, or licensed vendor of Stamps :—

Serial Number of Stamp.	Date of Sale.	Value of Stamp.	Name and Resi- dence of Purchaser.	REMARKS.

No. 4.

Of Districts, within the saliferous tracts of ~~Bengal~~, are requested to examine carefully, and without delay, the Quarterly and Annual Salt Report by the Bengal Police, for submission to the ~~Government~~ instruct their subordinate Sub-divisional Officers ~~to~~ otherwise.

FEBRUARY, 1871.

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V. H. SCHALCH, Esq., AND A. MONEY, Esq., C. B.

ERRATUM.

For "1868," in the last line of Rule 7, page 340, Board's Rules, read "1869."

No. 1.

THE following is to be added as Rule 3A., Section XIV, Chapter VIII, page 155, Board's Rules:—

"Whenever the collection of revenue from an estate borne upon the Towjee is held in abeyance pending a settlement of the estate, consequent upon its purchase by Government at a sale for arrears of revenue, the Collector, in the explanation given in his Return No. X of the balances due from the estate, shall invariably report on what date the estate has been made over for re-settlement, and within what period he expects the settlement to be completed. This information is to be repeated in each succeeding Quarterly Statement until the estate is settled."

No. 2.

CIRCULAR Order No. 5, of January 1867, is hereby cancelled. The necessary alteration should be made in Rule 18, Section XVII, Chapter V, page 78, Board's Rules.

No. 3.

THE 2nd clause of Rule 4, Section III, Chapter XIX, page 266, Board's Rules, should be struck out, and the following should be substituted:—

"Collectors will forward the English and vernacular notices together to the Board for transmission to the publishers of the Gazettes. They should be headed 'Notice of Sale' and should be very plainly signed and dated."

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No. 4.

IN order to facilitate the comparison between the entries made by District Officers in Return No. X, and those made in the Cash Accounts submitted to the Accountant-General, the Board are pleased to direct that receipts from "fines and forfeitures," which do not appear at present under the head "Forest" in Table V of Return No. X, shall be entered in it in future, under a separate head (Clause 1).

No. 5.

IN line 4, Rule 9, Section II, Chapter VII, page 148, Board's Rules, after "the revenue" add "and road cess."

No. 6.

RULE I, Section XII, at page 32 of the Board's Rules, is hereby rescinded, and the following substituted for it:—

I. All officers in charge of the Government Treasuries are authorized by orders of the Government of India to act under Sections XVI and XXVIII of the Indian Coinage Act, No. XXXIII of 1870.

Ia. On the tender to any such officer of silver coin purporting to be that of the Government of India, he shall, if he has reason to believe that it is genuine coin, but has been called in by proclamation, or has lost by reasonable wearing more than 2 per cent. in weight, by himself or another cut or break the coin, and either return the pieces to the person tendering the coin, or, at the option of the latter, receive it at the rate of one rupee per tolah.

Ib. If such officer has reason to believe the coin to be counterfeit, or to have been reduced in weight otherwise than by reasonable wearing, he shall cut or break the coin and return the pieces to the person tendering it.

Ic. All officers condemning coin under these rules must personally see it cut or broken and rendered unfit for currency.

Id. These rules, so far as they relate to light weight coins, must be considered permissive. It is not the desire of Government to interfere with the circulation of good coin which passes

unquestioned in currency, even though it may, in exceptional cases, have lost something more than 2 per cent. by fair wear. On the other hand, where there is reason to suspect reduction of weight by other means, and still more in the case of counterfeit coin, the law should be rigidly enforced.

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No. 7.

IN line 4 of Rule I, Section VII, page 280, and in line 5 of Rule V, the same Section, at page 281 of the Board's Rules, the words "Section 2, Act VII (B. C.) of 1862" should be substituted for the words "Section 30, Regulation II of 1819."

No. 8.

ACT VI of 1857 having been repealed by the new Land Acquisition Act X of 1870, Chapter I. of the Board's Rules is hereby cancelled, except as regards cases in which the proceedings commenced under the former Act have not yet been brought to a close.

2. The Board are now distributing to all Commissioners and Collectors copies of the pamphlet containing the directions for the administration of Act X of 1870. Collectors should supply all officers in their districts, who may be concerned in the working of the Act, with copies of the pamphlet. A copy should also be supplied for record in each sub-divisional office. Special care should be taken of the copies of the pamphlet which are not required for immediate use.

3. Collectors are requested to indent upon the Superintendent of Stationery for the requisite supplies of copies of the forms, Appendices A to M, of the directions.

No. 9.

THE following rule is added as Rule 11, Section III, Chapter VII, page 150 of the Board's Rules:—

Diluviated estates, the property of Government, are not to be removed from the Rent Roll. A similar course is to be followed in the case of diluviated estates other than the property of Government, so long as the revenue is paid by the proprietors. On failure of a proprietor to pay, the fact must be reported to the Board.

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No. 10.

IN Rule 4, Section IX, Chapter XXIII, page 328, Board's Rules, substitute "1,200" for "1,000" in line 2, and note that the altered rate will have effect from the 1st April 1871.

No. 11.

THE following is added as Rule 21A, in Section XIII, Chapter XI, page 189 of the Board's Rules :—

All applications for copies of documents deposited with the Registrar-General, Lower Provinces, under the above Rule, should be made to the local officers, who will transmit them to the office of the Registrar-General, with a memorandum showing the fee to be charged in each case.

No. 12.

THE Government of India in ruling, in Orders No. 4044, issued from the Financial Department, and dated 28th December 1870, that telegraphic messages should be regarded as oral communications, and consequently applications made by telegraph should not be liable to stamp duty under Act VII of 1870, have pointed out that, "as no public officer would take final action on "an unauthenticated telegram, the telegraphic message would be "followed by the transmission of a copy or other written communication of its contents, chargeable with stamp duty under "the Act, and thus the requirements of the law will be met."

2. All officers subordinate to the Board are requested to be careful, before despatching a message by telegraph to a public officer, at the instance of a private individual, of the nature of an application or appeal on the part of the latter, to see that the amount representing the value of the stamp required to be affixed to a written application or appeal to the like effect has been deposited in his office, in addition to the cost of transmitting both the message by telegraph and the subsequent advice by post.

3. It should be stated in the advice, for the information of the officer addressed, that the stamp duty, alluded to in paragraph 2, has been paid in by the applicant.

MARCH, 1871.

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REV. CIR.

V. H. SCHALCH, Esq., AND A. MONEY, Esq., C.B.

No. 1.

THE following has been substituted for Rule 3, Section VII, Chapter XXIII, page 326, Board's Rules :—

Fines are payable daily until compliance with the requisites and measures must therefore be taken regularly for levying them promptly by recourse to the process specified for the recovery of arrears of revenue in Sections 18, 20 to 24 of Act V. of C., of 1868. The attention of Collectors is specially invited to the provisions of Section 24, whereby the practice or custom in force for the time being in respect of arrest in execution of decrees for money, in respect of the execution of decrees by imprisonment, in respect of claims to attached property, and in respect of execution of decrees out of the jurisdiction of the Courts by which they were passed, is made applicable to every execution issued for levying the monies expressed in the certificate recorded by the Collector.

No. 2.

IN continuation of Circular Order, No. 4, of July 1870, the following addition is made to Clause 21, Section XIII, Chapter XI, page 189 of the Board's Rules :—

Security bonds of ministerial officers, which require frequent examination and testing by the local authorities, need not be sent to the Registrar General for deposit.

No. 3.

THE following should be inserted at page 162 of the Board's Rules :—

4a. In all cases payment of arrears, which have accumulated

1871 during a period exceeding two years, requires the sanction of
REV. CIR. Government.

No. 4.

A revised form of Return No. XXX for 1870-71 will be supplied by the Superintendent of Stationery to all district officers. The return should be carefully filled in and submitted as soon after the due date as practicable.

2. The Board trust that the Commissioners will be able to transmit, on an early date, their Reports on the administration of the Income Tax in their respective Divisions.

No. 5.

THE Government of India, Financial Department, Circular Order No. 1437, dated 9th March 1871, directs that "On and after the 1st April next, on account of income tax, in accordance with the provisions of the Bill introduced into the Council of State by the Governor-General on the 9th of the current month,

No. 6.

UNDER instructions from Government, the alterations in clause 5, at page 335 of the Board's Rules, and the Tables in regard to carriage for Troops introduced by Circular Order, No. 4, of November 1867, are cancelled; and the original Appendix at page 339 of the Rules, of which a fresh copy is issued herewith, is again adopted.

APPENDIX.

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REV. CIR.

[SEE SECTION I, CLAUSE 5.]

Table showing the Weight of Baggage allowed to be carried by Troops on a March,—extracted from General Order No. 964 of 1854.

	Service Equipment, exclusive of Camp Equipage.	On occasion of ordinary relief, &c., weight of Camp Equipage not supplied by Government, inclusive.
	Maunds.	Maunds.
Colonels	40	134
Lieutenant-Colonels married	25	104
... and those of equal rank, unmarried		76
... married	10	86
... and those of equal rank, unmarried		48
... married		66
Surgeons and Veterinary Surgeons	5	38
... ... unmarried		23
Chefs	3½	5
Commissioned Officers	1½	
and Quarter-Master Servants		
Regiments	2½	18
Active Doctors	½	1
and Buglers, married		½
Payboys	½	¾
... ...		36
Adjutant's Office	18
Quarter-Master's Office	5
Pay-Masters, Her Majesty's Regiments	10
Regimental Forge	18
" Treasure Chest	18
 MESSES.		
Mess Property, European Regiment	352
" Native	168
" " Troop or Company of Artillery or Detachments of Recruits having an established Mess	66
" Serjeants, European Regt... Additional for each Officer present	10
4		5
 BAZARS.		
Per Troop or Company, European or Native, Cavalry, Infantry, Sappers, or Reserve Company of Artillery	5
A Troop of European Horse Artillery	10
" Native	12
A Company of European Foot Artillery, with Battery	7
Ditto Native ditto ditto	10

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No. 7.

DISTRICT Officers are informed that purchasers of Government estates should be allowed to take copies of the measurement chittas appertaining thereto, the chittas themselves being retained in the possession of Government for reference if necessary hereafter. The jummabandi papers relating to the estates may be made over to the purchasers, after a period of three years of rent due to Government have been collected.

No. 8.

DISTRICT Officers are requested to report, as early as possible, if there are in their respective districts any cases of acquisition of land under declarations issued under Act VI of 1857, in amended declarations, under the new Act X of 1870, as necessary. The one question on which each case must be determined is whether notices have issued under Section 4 of the new Act. If they have not, a fresh declaration under the new Act must be at once submitted for the orders of Government. If they have, the proceedings must be continued and completed under the old Act.

No. 9.

THE following is added as Clause 2, Section VII, Chapter VIII, at page 153 of the Board's Rules:—

The principle of the above rule applies to estates on the fluctuating towjee. When in such estates losses of revenue occur in the course of the year, through death or desertion of ryots, they should be treated as irrecoverable balances, and no alteration in the demand on the rent-roll should be made until the end of the year, when the Board's sanction should be obtained to any abatement of demand for the following year, which may be necessary.

No. 10.

WITH advertence to Circular Order No. 13, of June last, the following Circular No. 3921, dated 29th December 1870, from the Officiating Secretary to the Government of India, in

ment. If they
Act should
old Act

REVENUE CIRCULARS.

1

which
since :—

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after Financial Resolution, No. 1035, dated 7th June 1870,

which prescribes rules for the recovery and adjustment of charges for work done by a Government factory for any public Department, the heads of Departments are required to make provision in their budget estimates for printing work to be done in the Government Press. This course would lead to a double charge for printing,—first, in the grant for the Government Press ; and, secondly, under the several offices concerned ; while the object desired, as regards printing, was simply to limit the annual cost of the orders upon the Superintendent of Government Printing for work to be executed by him for heads of Departments. His Excellency in Council is, accordingly, pleased to direct that the figures for the budget be taken from the estimate of the Superintendent of Government Printing, and that the estimates of the several Departments for work to be done by the Superintendent be excluded from their budget estimates of the rest of their expenditure, and be detailed in an appendix to the budget estimate of the Superintendent of Government Printing.

2. The Comptroller-General and the Superintendent of Government Printing will be responsible for seeing that the requisitions of heads of Departments, during the year, do not exceed the amounts which may be passed for them in the appendix to the estimate of the Superintendent of Government Printing ; and the former officer, in giving effect to the first and second rules in the Financial Notification, No. 1035, dated 7th June 1870, will take care that proper departmental audit is obtained for the expenditure which may be incurred against the estimates, as mere provision for it in the appendix to the estimate of the Superintendent of Government Printing will not exempt heads of Departments from the obligation of obtaining competent sanction for any special printing expenditure. For example, the sanction of the Government of India in the Foreign, Home, Military, or Public Works Department, would be necessary for adjusting the cost of any book which might be printed by the head of a department

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3. These instructions will apply equally to the work done by the Government Press at Allahabad, or the like press establishment for other Departments or Governments ; the local Accountant-General being charged in such case with the responsibility which, in the foregoing orders, attaches to the Comptroller-General in respect of the Press of the Government of India.

No. 11.

THE following is circulated in supersession of C. O. No. for October 1870 :—

With reference to paragraphs 7 and 8 of the Rules of Government of Bengal for the administration of Act XV of 1870, all officers engaged in conducting proceedings under the Act are informed that when a prosecution has been instituted before the Magistrate for the recovery of income tax from a defaulter, the prosecuting officer is not debarred from instituting such prosecution on good and sufficient grounds.

2. In order, however, to prevent any injudicious exercise of this authority, the Board prescribe that no prosecution under section 31 or 38 of the Act, shall be withdrawn, except with the sanction of the Collector of the district.

3. In according such sanction Collectors will be guided by the following general rules :—

(I.) A prosecution may be withdrawn on tender by the defaulter of the sum in which he was originally assessed, if the Collector shall have satisfied himself by personal inquiry that good reason existed for non-payment within the period prescribed by law.

(II.) A prosecution may be withdrawn without payment of his tax by the defaulter, when the Collector has satisfied himself that the defaulter was not a fit object for assessment. It will be understood, that this rule accords no permission to the refund without the sanction of Government, of any sum which may have been recovered from the assessee by any process.

(III.) A prosecution may be withdrawn whenever a Collector deems it expedient, either in consequence of failure in the

APRIL, 1871.

V. H. SCHALCH, Esq., AND A. MONEY, Esq., C.B.

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No. 1.

IN accordance with Government Order No. 857, dated 6th March 1871, the following is to be substituted for Clause 7A, Chapter XI, Section XIII, of the Board's Rules, at page 188 :—

“The law does not require any Court, Judge, or Magistrate, “to attest powers of attorney and such like documents; nor does “it, except in the case mentioned in Section 49, Act II of 1855, “attach any peculiar efficacy to such attestations, as compared “with attestations by private witnesses. If, however, the attesta-“tion of any Court, Judge, or Magistrate, is desired in any “case, the application should be complied with on payment of the “fee of rupees 2 required for a Notarial Act, by Act XVIII “of 1869. This fee should, in all cases, be realized by stamps,— “that is, the person requiring the attestation should make the “application on a stamped paper of the value of rupees 2.”

No. 2.

THE following words are added to Clause 3, Section VIII, page 282 of the Board's Rules :—

“the rate being payable under the Act by the farmer of the “estate. When an estate is held under the direct management “of the Collector, he must pay the rate on the part of Govern-“ment from the revenue of the estate.”

No. 3.

CLAUSES 1 and 3, and the last paragraph of clause 5, Section VII, Chapter II, at page 25 of the Board's Rules, are hereby rescinded, and the following substituted for them :—

1871

REV. CIR. 1. Currency Notes, whether of the Circle within which the treasury, at which they are presented, is situated, or of any other Presidency or Circle, are to be received freely in payment of Government dues.

2. Notes of the Circle within which the treasury at which they are presented is situated, are to be received freely in exchange for cash up to the available means of the treasury,—*i. e.*, to whatever extent they can be cashed without serious inconvenience.

3. Notes of other Circles and Presidencies may be cashed under the restriction specified in the preceding clause, for the convenience of travellers.

3A. Notes of any Presidency or Circle, which may have in any way reached the district treasury, are to be freely issued on demand, in discharge of Government obligations, or in exchange for cash. Currency Notes may also be issued in exchange for Notes of different values of the same Circle.

The present Clause 2 will be entered after the above clauses as Clause 3B.

No. 4.

IN Clause 9, Section IV, Chapter XI, at page 176 of the Board's Rules, the word "Commissioners" should be inserted after the word "expenses" in line 1, and struck out of line 3.

No. 5.

THE following addition should be made to Rule XXXI, page 8 of the Salt Manual:—

"Any rowannahdar selling more than five seers of salt to any person, shall be bound to furnish the purchaser with such protective documents as may be required."

No. 6.

THE Board have ruled that Clause 6, Section V, Chapter XXI, page 307 of their Rules, is not to be taken as having reference to any adhesive stamps, which may be sold for the purposes of the Court Fees' Act.

No. 7.

1871

REV. CIR.

THE following should be added at page 7 of the Salt Manual :—

27A. From and after the 1st of May 1871, the salt covered by a rowannah shall not be delivered, except to the person whose name appears in the document, or to his duly constituted agents.

27B. Government officers, or persons empowered to issue retail rowannahs, in delivering salt upon any protective document, must distinctly state on it, if delivery be made to the holder of the document, that the delivery is made to the merchant mentioned in it; or, if the person receiving delivery be his agent, that the delivery is made to such and such a person, the duly constituted agent of the merchant or merchants mentioned in the document. In both cases, the signature of the person receiving delivery should be taken to this statement.

No. 8.

THE following is added to Clause 19, Section IX, Chapter II, at page 30 of the Board's Rules :—

The rules in force for the examination of treasure, received from mofussil treasuries, at the Bank of Bengal, are given in the Appendix.*

No. 9.

THE following has been substituted for Clause 11, Section III, Chapter VII, page 150 of the Board's Rules :—

Diluviated estates, the property of Government, are to be retained on the rent-roll, without specification of demand on account of revenue. Diluviated estates, other than the property of Government, are to be kept on the rent-roll, bearing the full revenue assessed upon them, so long as that revenue is paid by the proprietors. On failure of a proprietor to pay, the fact must be reported to the Board.

* Post, pp. 27 & 28.

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No. 10.

THE attention of all Divisional and District Officers is drawn to the accompanying copy of a Circular issued by the Postmaster General of Bengal:—

No. 95
L. M. 10, No. 2, dated 30th December 1870.—“Postage on “parcels which contain *records in transmission through the post from one Court to another*, is no longer to be charged, either “by stamps, or in cash, to sender or to addressee.”

“2. All other kinds of parcels hitherto chargeable, under “rule 25 of the Rules regarding official correspondence, will be “charged, as usual, under that rule.”

No. 11.

THE attention of all Collectors is called to Section 42 of the Land Acquisition Act X of 1870, under which 15 per cent. must be given in addition to the sum paid as the value of the land on the basis of the data indicated in Section 24. Collectors should be careful, when making an offer for the land to be taken, to see that that offer is based strictly on the grounds prescribed by the law. They should also, at the time of making the offer, inform the proprietors that they will receive 15 per cent. over and above the substantive compensation which may be awarded to them. If this be not borne in mind, it will sometimes happen that 15 per cent. will go to the proprietors in excess of what they agreed to, or of what the Collector intended to award.

No. 12.

THE addition made by Circular Order No. 1 for January 1868 to Clause 10, page 284 of the Board’s Rules, has been cancelled, and the following added to Clause 4, page 281—

“The principle on which the proprietor’s share should be “calculated is explained in Clause 10, Section IX below.”

2. The word “dependent” has been inserted before “proprietor” in the second line of the *first* calculation in Clause 4, page 281 of the Board’s Rules.

No. 13.

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THE following has been substituted for Clause 14, Chapter II, Section VIII, page 27, Board's Rules—

If forwarded by post, the advices and correspondence of the agents, addressed to the Controller-General, or to the Controllers of Money Order offices, should be sent on "Her Majesty's Service;" but when addressed to the Money Order Agents, such correspondence should be sent "on service Bearing."

No. 14.

THE following alterations are made in Clause 1A, Section X, Chapter VI, page 126 of the Board's Rules—

Substitute "three-fourths" for "half" in line 3 of the above Clause, and "quarter" for "half" in line 8 of the same.

No. 15.

THE following addition is made to Chapter XXI, Section VI, page 308 of the Board's Rules—

4A.—All spoilt or unsaleable stamps should be returned to the Superintendent of Stamps for destruction, with an explanation of the circumstances under which their destruction was rendered necessary.

No. 16.

ASSESSING officers are requested not to assess, under the present year's income tax, firms with branches in Calcutta, until they receive new estimates of the Calcutta profits of those firms from the Collector of the latter place.

No. 17.

THE following is added to Clause 1, Section XI, Chapter V, page 65, Board's Rules—

"but in no case is a license to be granted for the distillation "of country spirits in a private distillery, without the Board's "sanction previously obtained."

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REV. CIR.

THE following amendment has been made in Clause 4, Section IX, page 283 of the Board's Rules—

Expunge from “such proprietor,” in the 2nd line, to the end of the Clause, and substitute—“such proprietor has a right to “a permanent engagement whenever he may so desire, unless the “alluvion shall be at the time held in farm, or be not fit for per-“manent settlement. Whenever settlement is not made with “the owner of the proprietary right, he shall be entitled to “malikana.”

No. 18.

THE following is added as Clause 15, Section I, Chapter XXV, Board's Rules—

“Nominations to the appointment of Manager of a Ward's “Estate must be submitted to the Board of Revenue for con-“firmation.”

No. 20.

THE words “calculating the time required for transit by post,” in the eighth line of Clause 5, Section III, Chapter XIX, at page 266 of the Board's Rules, should be omitted, and the words “the Board will” should be substituted for the words “the Collector must” in the ninth line.

No. 21.

IN the first line of Clause 2, Section IV, Chapter II, at page 23 of the Board's Rules, the words “whether permanent or temporary” should be added after the word “establishments,” and the word “all” before the word “allowances.”

The addition made to the same Clause by Circular Order No. 3 of November 1870, is hereby cancelled, and the following substituted for it:—

“The Government of India has ruled that the cost of “establishments of ameens, appointed for the special and tem-“porary duty of making measurements of estates to be brought “under settlement, is an ordinary contingency for which a Col-“lector may provide in his Budget estimate, without procuring “previous sanction from higher authority.”

APPENDIX.

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(SEE SECTION IX, CLAUSE 19.)

Rules for the Guidance of the Bank's Officers and Mofussil Agents or Poddars, with reference to the Examination of Treasure received from Mofussil Treasuries on Government Account.

1. Weighment of boxes must be made, when practicable, on receipt of a remittance from a mofussil treasury. The result of this weighment must be entered on the receipt given to the officer, or poddar, delivering over the remittance.

2. All treasure remittances from the mofussil will be examined in a room separate from the general business.

3. The contents of each bag are to be emptied into another, and passed through the scales.

4. Mofussil oddars must see that the index of the scales be steady before the contents be thrown out.

5. The treasure is then to be secured in separate chests, and kept distinct from other treasure, under the joint keys of the secretary and treasurer, and of the mofussil treasurer's agent, until regularly examined and brought to account.

6. Nothing must intervene between the mofussil treasurer's agent and the bank's examining oddars, so that an uninterrupted view may be obtained by the mofussil agent of the examination of the treasure in his presence. The mofussil treasurer's agent should sit within the railed enclosure along with the bank's examining oddars.

7. Upon completion of a remittance, light coins should be weighed against full weight coins, and a certificate of the result granted on the spot to the mofussil treasurer's poddar.

8. Weighing and examining a remittance must be conducted separately, not simultaneously, the one must be completed before the other be commenced, unless when two oddars are deputed to represent a treasury.

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REV. CIR.

9. If the work of weighing or examining be not finished within the day, all bags not finally taken over by the bank will be placed in chests under double keys, the one to be retained by the mofussil treasurer's agent, the other by the bank's authorities.

10. The bank poddars, who commence weighing and examining a mofussil remittance, must continue at the same duty until completion of the examination of the remittance, or such portion of it as has been taken over for examination, their places must not be filled by others, unless through unavoidable sickness.

11. Where a remittance is not accompanied by a poddar, the examination will be proceeded with by the bank's officers in usual course.

12. The mofussil poddars or agents must sign, in a book kept for the purpose, a memo. of the uncurrent and spurious coins, and any deficiency found after examination of their respective remittances, before finally leaving the bank.

13. Should mofussil poddars or agents find any of the above rules not complied with, or should impediments of any kind be placed upon a free and open scrutiny of the proceedings during the examination by the bank's officers or poddars, they are to immediately report the same to the secretary and treasurer.

G. W. MOULTRIE,

Offg. Secretary & Treasurer.

BANK OF BENGAL,

General Treasury,

The 31st March 1870.

MAY, 1871.

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ERRATUM.

*For "4 A" in Circular Order No. 15 of April 1871, read
"4 B."*

V. H. SCHALCH, ESQ.

No. 1.

THE following is added as Clause 4, Section V, page 153 of the Board's Rules :—

"4. Whenever a Government estate is transferred from the rent-roll of one district to another, the transferring officer must send with it a short tabular memo., giving merely the name of the estate, the number it bears in the Board's khas mehal register, and the number on his own rent-roll. The receiving officer, after having entered the estate on his own rent-roll, will add to the tabular memo. the number under which he has so entered it, and will then forward the memo., bearing the signature of both Collectors, to the Board."

2. This will supply the Board with the information necessary for the regular correction of the khas mehal register, and will obviate the anomaly at present existing of entering such transfers in Return No. XXXIX, which is intended to show estates which have newly come into the hands of Government, and such estates only.

No. 2.

AN instance has just been brought to the notice of the Board in which a Collector cashed his Establishment Bill before it was

1871
REV. CIR. due, in consequence of its becoming payable on a holiday. To prevent the recurrence of such an irregularity, Collectors are reminded that they have no authority to cash the Salary Bill of an Establishment until the first working day following the close of the month for which the pay is drawn.

No. 3.

THE following is added as Clause 6A. at page 340, Board's Rules :—

When taking charge of estates under the Court of Wards, Collectors must always ascertain with special care the ages and birthdays of the proprietors, and must record and report, through the Commissioner, for the Board's information, the evidence on which their conclusions have been based.

No. 4.

THE following is added to Clause 15, page 344, Boards' Rules :—

To avoid the risk of the provisions of the law referred to being overlooked in the case of estates under judicial attachment, which have not been placed under the Collector's management, the High Court have directed, by their Circular Order No. 2 of the 10th January 1871, that all orders, passed by the Civil Courts, for the attachment of estates, shall be immediately notified to the Collectors of the districts within which such estates are situated.

No. 5.

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REV. CIR.

DISTRICT Officers are requested to furnish the Member in

rnish the Member in charge, as soon as possible, with a list in the form marginally indicated, showing the several estates in their respective districts from the revenues of which deductions are made, and credited to the three per cent. Fund for the Improvement of Government Estates, and also to specify the classes of settlement under which those estates are held, and how the money has been applied.

2. The information herein called for should be

supplied with the greatest possible despatch.

No. 6.

IT is hereby notified that, under the orders of Government, the sale of Government estates is suspended until further orders. Only small plots of relinquished Railway C. class lands will continue to be sold, as heretofore, free of revenue.

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REV. CIR.

No. 7.

THE attention of all Divisional and District Officers is drawn to the subjoined copy of a Circular issued by the Post Master General of Bengal, No. 3—L. M. 10 No. 1, dated 24th April 1871 :—

“ From a memorandum received from the Director-General, it appears that the Orders, in terms of which this Office Circular No. 95, dated 30th December 1870, was issued, were erroneous. Circular No. 95, dated 30th December 1870, is therefore cancelled, and parcels containing records in transmission from one Court to another by post will be charged the same postage as parcels of any other description.”

2. Under these circumstances the Board’s Circular Order No. 10 of April last is cancelled.

A. MONEY, Esq., C.B.

No. 8.

THE Board’s Circular Order No. 7 of April 1871 has been cancelled.

No. 9.

THE accompanying copy of a letter No. 1783, dated the 27th March last, from the Government of India, in the Financial Department, to the Chief Secretary to the Government of Bombay, is published for general information.

2. The attention of all Collectors is drawn to the decision at which the Government of India have arrived on the point in question, and they are especially requested to make it known, as widely as possible, among the mercantile community of their respective districts, informing them at the same time that any breach of the law in this respect will render them liable to be prosecuted under Sections 22, 24, or 29 of the General Stamp Act, 1869, as the case may be.

*Government of India, Financial Department, Separate Revenue,
Stamps, to the Chief Secretary to the Government of Bombay,
No. 1783, dated Fort William, the 27th March 1871.*

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REV. CIR.

With reference to your communication No. 1085, dated 6th March 1871, I am directed to state that the Acting Remembrancer of Legal Affairs, in paragraph 5 of his letter dated 25th February 1871, has given a correct description of the writing which should be charged with stamp-duty under Article 5, Schedule II of the General Stamp Act of 1869.

If the account be written by, or entered up in the books of, the obligee, and signed by the obligor, then the transaction amounts to an acknowledgment of the balanced account or debt by the obligor on the part of both the parties thereto, and such acknowledgments are liable to be charged under the above-mentioned Article.

2. I am to suggest that measures may be adopted to enforce the law in accordance with the views expressed above.

No. 10.

DISTRICT Officers are informed that, in every successful case of objection under the Income Tax Acts, the value of the stamp should be at once refunded then and there. Collectors should have a notice to that effect put up in each Assessing Officer's office for the information of the public.

V. H. SCHALCH, Esq.

No. 11.

IN Return No. XIII (Settlements confirmed by the District Officer), add a Column after Column 3, and after Column 4, headed "Rate per Bigha."

No. 12.

THE following is substituted for the last sentence of Clause 3, Section III, page 338 of the Board's Rules—

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"The expense may be charged off at once in the Civil Accounts to debit of the Military Department; or, in cases where the service is performed by a contractor, the Collector, instead of paying the amount from Civil Funds, may send a bill to the nearest Commissariat Officer, who, if the bill be supported by the voucher prescribed in paragraphs 9 and 10, Section 47, Military Regulations, will pay the amount."

Clauses 3A and 3B are cancelled.

No. 13.

THE following is to be added as Clause 2B, Section IX, Chapter VI, page 126 of the Board's Rules—

2B.—"The authority alluded to in the last preceding clause, has been delegated by Government to the Board of Revenue, in respect to Uncovenanted Officers of the Revenue Department."

No. 14.

As disbursements on public works by Civil Officers, without the knowledge of the Public Works Department, and without funds having been previously provided, tend to financial embarrassment, and prevent the restriction of outlay within the grants assigned for the purpose, the Government of India, Financial

* Resolution No. 1973, dated 14th April 1871. Department, "desires that, in future, no expenditure whatever on public works shall, under any circumstances, be incurred by Civil Officers, excepting under the strictest observance of the rules laid down on this subject." Officers incurring any expenditure in disobedience to these orders, will be held personally responsible for such expenditure.

No. 15.

PARTICULAR attention is requested to the following instructions Regarding certain Returns at present submitted by the local authorities in connection with the land-revenue administration—

Return No. VI b.—This Return should be submitted half-yearly in future (*i. e.*, on 1st April and 1st October of each year), and not monthly as at present. The Return should be struck out of the list of monthly Divisional and District Returns, and brought under the head “Half-yearly” in the Appendix at pages 262 and 263 of the Board’s Rules, with a note that it is due in April and October.

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REV. CIR.

Return No. XVIII.—This Return should, in future, be forwarded by the Commissioner to this office, with any remarks which he thinks ought to be communicated. The Return should have the mark § placed against it in the list of Divisional and District Revenue Returns at pages 262 and 263 of the Board’s Rules.

Return No. XX.—This Return should only be submitted annually in future, and not quarterly as at present. It should be struck out of the list of Quarterly Divisional and District Returns, and brought under the head “Yearly” in the Appendix at pages 262 and 263 of the Board’s Rules.

Return No. XLI a.—The submission of this Return should be discontinued, and it should be struck out of the list of Divisional and District Returns in the Appendix at pages 262 and 263 of the Board’s Rules.

Return No. XXII.—The submission of this Return should also be discontinued, and the Return should be struck out of the list of Divisional and District Returns in the Appendix at pages 262 and 263 of the Board’s Rules. Return No. VIII, if properly checked, will enable Commissioners to maintain a sufficient supervision over the District Officers in their disposal of butwarrahs.

Return No. VII.—Some extra columns will be inserted in this Return to keep this office better informed than at present of the rate of despatch of business by Commissioners. Printed copies of the revised form of Return No. VII should be indented for from the Superintendent of Stationery, who has been directed to prepare them for immediate use.

Return No. XXIII.—This Return should be struck out of the list of Divisional and District Revenue Returns in the Appendix at pages 262 and 263 of the Board’s Rules.

¹⁸⁷¹
REV. CIR. *Return No. XXXI.*—A slight alteration will be made in Table III, for the purpose of showing the debts which become due to an estate while under the management of the Court of Wards. The Superintendent of Stationery will be directed to prepare printed copies of the revised form for use.

Return No. XXXII.—The submission of this Return should be discontinued (except from the Districts of Chota Nagpore), a yearly memorandum being submitted by the Collector with his Returns No. XXXI, giving a list of all the Wards and Attached Estates under his charge during the year. The following note should appear against Return No. XXXII in the Appendix at pages 262 and 263 of the Board's Rules—"From the Districts of Chota Nagpore only."

Return No. XXXVIII.—The submission of this Return, as a general periodical statement, should be discontinued. It should be submitted only when a District Officer is able to recommend the sale of Khas Mehals. The following note should appear against this Return in the Appendix at pages 262 and 263 of the Board's Rules—"To be submitted only when the District Officer is able to recommend the sale of Khas Mehals." Under recent orders, it will be recollect, all such sales have been for the present suspended.

No. 16.

THE following emendations are made in Section IV, page 23 of the Board's Rules—

Substitute the following for present Clause 2A.—

2A.—"Officers intending to procure supplies of any kind from "a Government Factory, other than the Alipore Jail Press, or "any factory in charge of the Military Department, must make "provision in their Budget Estimates precisely as if they intend- "ed to purchase in the open market. Whether the payments "are actually made in cash, or are adjusted by a debit to the "office supplied with the articles, and a credit to the supplying "department, the necessity for making such provision is the same."

The following is to be added as Clause 2B—

2B.—“Printing charges need not be provided for in District Budgets, and provision for stores and supplies required from the Military Department is necessary, only when their value is likely to be in excess of rupees 50 under any one general head.”

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A. MONEY, Esq., C. B.

No. 17.

PENDING the arrival from England of Stamps specially designed for the purposes of the Court Fees Act, the particular attention of all Revenue Officers is drawn to the necessity of seeing that all Adhesive Stamps, which are now, or may subsequently be, used under the Court Fees Act, are punched as soon as the petitions and other papers to which they are affixed have been filed in their respective offices, so that the Stamps may not be used again. The punching should be done in the manner described in Section 30 of the Court Fees Act.

No. 18.

WITH the view of stopping the sale of liquor on credit to Railway subordinates, District Officers are requested to insert the under-mentioned Clause in future licenses to be given by them for the vend of spirits at places where there is a Railway station—

“That no liquor shall be sold, except for ready money.”

2. Any infraction of this rule should be at once visited by cancellation of license.

HIGH COURT CIRCULARS, &c.

HIGH COURT CIRCULARS, &c.

CIRCULAR ORDER, No. 14.

To

ALL SESSIONS JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 3rd December 1870.

A DIVERSITY of practice appearing to prevail among Sessions

Judges with regard to the communication of any remarks, which they may make, on commitments made to them, to the Officers concerned, the Court desire to inform all Sessions Judges and Judicial Commissioners that, as a general

rule, the communication of such remarks is neither necessary, nor even very desirable, and should be made in cases, the peculiar circumstances of which appear to render necessary the adoption of such a course, but need not invariably take place.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

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CIRCULAR
ORDERS.

To

CIRCULAR ORDER, No. 34.

THE ZILLAH JUDGES OF ALL THE
REGULATION PROVINCES, EXCEPT ORISSA.*Dated Calcutta, the 10th December 1870.*

THE Government of India being desirous of information on

HIGH COURT, &c.,
CIVIL SIDE.

Present:

The Hon. J. P. Norman,
Offg. Chief Justice.
 The Hon. G. Loch,
 " H. V. Bayley,
 " L. S. Jackson,
 " E. Jackson,
Judges.

the question of the increase which will be required in the strength of the Subordinate Judicial Agency in Bengal, in consequence of the transfer of rent-suits from the Revenue to the Civil Courts, under the operation of Act VIII (B. C.) of

1869, the Court directs that the Judges of the Districts* to which additional Moonsiffs have been appointed will report how far that assistance has been found sufficient to cope with the work thrown upon the Moonsiffs of their Districts; and that the Judges of the other Districts to which the new law has been extended will state how far they have succeeded in meeting the accession of work with their former staff of Moonsiffs.

2. The Court also requests all the Judges of the Districts in which Act VIII (B. C.) of 1869 is in force, to report the actual number (if any) of additional Moonsiffs required in each of their Districts after full and careful consideration of the necessity for making any proposition involving increased cost to the State.

3. The reports must show fully the grounds of any recommendations made, and should be submitted in time to reach this Office by the 1st January next.

By order, &c.,

(Sd.) F. B. PEACOCK,

Registrar.

* Backergunge, Chittagong, Dacca, Gya, Jessore, Midnapore, Mymensingh, Tipperah, and 24-Pergunnahs.

CIRCULAR, No. 35.

To

 1870
 CIRCULAR
 ORDERS.

ALL CIVIL JUDGES, LOWER AND EXTRA

REGULATION PROVINCES.

Dated Calcutta, the 12th December 1870.

THE High Court of Judicature hereby authorizes the closing

of the Subordinate Civil Courts
in the Districts under its jurisdiction,
with the exception of those
comprised in the Province of
Behar*, on the dates specified
in the annexed list, being the
Christian and Native Holidays

permitted to be observed in the ensuing year 1871.

2. The Courts are not to be closed except on the days specified, and this order is not to be taken as justifying the refusal to do any act or make any order for which emergent application may be made, or which may be lawfully made or done out of Court.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

* Bhangulpore, Gya, Patna, Sarun, Shahabad, and Tirhoot.

List of Authorized Holidays for the Year 1871.

NAMES OF HOLIDAYS.	ENGLISH DATE.	BENGALI DATE.	DAYS OF THE WEEK.	NO. OF DAYS.	REMARKS.
New Year's Day and the two days following	1st to 3rd January	18th to 20th Pous	Sunday to Tuesday	3 days.	
Day after the Eclipse of the Moon	2nd January	19th Pous	Saturday	1 day.	
Business Holidays	25th and 26th January	13th and 14th Maith	Wednesday and Thursday	2 days.	
Shabu Ratree	17th and 18th February	6th and 7th Falgoon	Friday and Saturday	2 days.	
Bed-u-Zohla ..	3rd and 4th March	20th and 21st Falgoon	Friday and Saturday	2 days.	
Dole Jatra ..	7th and 8th March	24th and 25th Falgoon	Tuesday and Wednesday	2 days.	
Burunge Gunga Sona ..	19th March	6th Choitra	Sunday	1 day.	
Mihlurrum, including Sree Ram Nobonree	28th March to 1st April	16th to 18th Choitra	Tuesday to Saturday	5 days.	
Good Friday and the day following	7th and 8th April	25th and 26th Choitra	Friday and Saturday	2 days.	
Mohalishin Sauranante	12th April	3rd Choitra	Wednesday	1 day.	
Akheri Chaharshtumba ..	17th May	4th Joistho	Wednesday	1 day.	
Queen's Birthday	24th May	11th Joistho	Wednesday	1 day.	
Dashahara Gunga Sona ..	29th May	10th Joistho	Monday	1 day.	
Fateh-douz-joom ..	2nd June	20th Joistho	Friday	1 day.	
Ruth Jatra	7th Assar	1278 Tuesday	1 day.	
Oulta Ruth ..	28th June	15th Assar	1278 Wednesday	1 day.	
Day after the Eclipse of the Moon	3rd July	20th Assar	1278 Monday	1 day.	
Jumano-Jutome ..	8th and 9th August	24th and 25th Sharbon	Tuesday and Wednesday	2 days.	
Dusserah Vacation, including Mohinaloya, {	13th October to 14th November.	28th Assar to 29th Kartick	Friday to Tuesday	33 days.	
Jacchhee Pojali, Shab-e-Barat, De-wale, and Bhratridhia.		1278			
Kartick Pojali	{ 30th Kartick and 1st Ang-	Wednesday and Thursday	2 days.	
Jugruthdhaitree Pojali	{ 1st and 2nd Kartick	1278 Monday and Tuesday	2 days.	
The Eclipse of the Sun	{ 5th and 6th Aughran	1278 Tuesday	1 day.	
Eid-ul-fitr	{ 29th Aughran and 1st Pous	Thursday and Friday	2 days	
Christmas Day and the two days following	25th to 27th December	{ 1278	Monday to Wednesday	3 days.	
		11th to 13th Pous			

(Signed)

F. B. PEACOCK,
Registrar.

No. 3816.

FROM

F. B. PEACOCK, Esq.,

1870

CIRCULAR
ORDERS.

To

*Registrar of the High Court of Judicature
at Fort William in Bengal,*

THE SUPERINTENDENT OF STATIONERY.

SIR,

Dated Calcutta, the 17th December 1870.

WITH a view to enable the Civil and Criminal Authorities
 HIGH COURT, &c., subordinate to Civil and Sessions Judges
 CIVIL AND CRIMINAL SIDES. to make Periodical Returns to the latter
^{Present:} in such forms as shall be available for
 The Hon'ble G. Loch, Judge. the preparation of the *Quarterly* Returns
 enjoined on such Judges by C. O. No. 31, dated 4th November
 last, the Court have prepared *slip forms* (A, B, C, & D),* of
 which specimens are sent herewith, and direct me to request you
 will be so good as to provide at once a sufficient supply of the
 same for the use of Subordinate Judges and Moonsiffs as well as
 of District Magistrates and Sub-divisional Officers.

2. As regards the *Civil* forms (A, B, & C), I am to point out
 that Statement B, which relates to appeals only, will not be
 required for Moonsiffs whose Courts are purely Courts of ori-
 ginal jurisdiction: of this form, therefore, a smaller supply will
 suffice. Specimens of the three forms above mentioned, in both
 Bengali and Oordoo,† are sent herewith. These Returns will be
 submitted by the various subordinate Courts to the Judge month-
 ly. Each Officer will, therefore, require 24 as a year's supply,
i. e., one for despatch and one for record in his Office each month.
 To this number six more may be added to meet contingencies,

* *Forms, Civil and Criminal.*

A. Statement of *Civil* work in the Court of Subordinate Judge, or Moonsiff, as the case
 may be.

B. Statement of Appeals before the Courts of Subordinate Judges.

C. Statement of miscellaneous work.

(Two forms bear this letter, one for Subordinate Judges, the other for Moonsiffs.)

D. Statement of Offences reported and Persons tried.

† Note.—The only Oordoo Judgeships are Bhaugulpore, Gya, Patna, Sarun, Shahabad,
 and Tirhoot; the rest may be supplied with Bengali forms.

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CIRCULAR
ORDERS.

accidents, &c. A year's supply, therefore, to each Subordinate Civil Officer should not exceed 30 copies.

3. Form D, which is *Criminal*, will be required by Sub-divisional Officers, and a specimen in Bengali and Oordoo is accordingly forwarded.

4. As the above Return will be required to be made *quarterly*, and as two copies will be necessary for each Officer, one for his Office draft and the other for the despatch copy, eight copies would be necessary, to which might be added four copies to provide for accidents and other contingencies. It will, therefore, be sufficient if twelve copies of each form are provided by you as a year's supply for each Officer requiring them.

5. For your information and guidance in applying the above principle, and with a view to check local indents, I am to append hereto a list showing the number of Subordinate Judges and Moonsiffs in each Judgeship, as well as the number of Magistracies and Sub-divisions subordinate to the High Court.

6. In requesting you in the first paragraph of this letter to lay in a sufficient stock of these Statements, the Court are particularly anxious to avoid a very large stock of Vernacular slips being at once printed. It is their intention to direct Judges and Magistrates, in making their indents, to specify the number of Slip Statements that they will require in English and in the Vernacular, and, after these forms have been in use a short time, you will probably not find much difficulty in estimating with tolerable exactness the number of both kinds which you will require to keep in store.

7. I am to remind you, in conclusion, that all indents from Subordinate Judges and Moonsiffs are to be submitted through their superior, the District Judge, as provided in paragraph 3 of C. O. No. 16, dated 17th June 1870.

I have, &c.,

(Sd.) F. B. PEACOCK,

Registrar.

P. S.—A set of those forms, when printed or lithographed, should be sent for record in this Office.

CIRCULAR MEMO., No. 7.

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CIRCULAR
ORDERS.

COPY forwarded to all Zillah Judges and District Magistrates, for information and guidance, with the request that, in making their indents upon the Superintendent of Stationery, they will pay particular attention to the instructions given to that Officer in the 4th paragraph of the annexed letter, and to invariably inform him of the number of Slip Statements required by them in English and the Vernacular.

By order, &c.,

(Sd.) F. B. PEACOCK,

Registrar.

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CIRCULAR
ORDERS.*Statement showing the number of Subordinate Judges, Moonsiffs,
and Sub-divisions.*

DISTRICTS.	Number of Subordinate Judges.	Number of Moon- siffs (including addl. Moonsiffs.)	Number of Magistracies.	Number of Sub-divisions.
Backergunge	1	6	1	4
Beerbboom	1	7	1	...
Bhaugulpore	1	5	2	9
Burdwan, East	1	11	1	3
" West	1	7	1	1
Chittagong	2	14	1	2
Cuttack	1	4	3	5
Dacca	3	12	2	3
Dinagepore	1	9	2	...
Gya	1	4	1	3
Hoooghly	2	9	2	2
Jessore	1	5	1	5
Midnapore	1	6	1	3
Moorshedabad	1	5	1	3
Mymensingh	2	11	1	4
Nuddea	1	6	1	5
Patna	1	2	1	3
Purneah	1	6	1	3
Rajshahye	2	6	2	3
Rungpore	1	8	2	1
Sarun	1	4	1	2
Shahabad	1	3	1	3
Sylhet	1	6	1	3
Tipperah	1	12	2	1
Tirhoot	1	4	2	5
24-Pergunnahs	2	10	1	7
Assam
Kamroop	1	2	1	2
Gowalparah	1	2	1	1
Durrung	1	2	1	2
Nowgong	1	2	1	...
Seebagur	1	2	1	2
Luckimpore	1	2	1	3
Chota Nagpore
Hazareebagh	1	3	1	2
Maunbboom	1	4	1	1
Lohardugga	1	2	1	1
Singbboom	1	...	1	...
Cachar	...	1	1	1
Cossyah Hills	1	1
Cooch Behar
Julpigooree	1	1	1	2
Darjeeling	1	...	1	1
	45	205	50	102

CIRCULAR ORDER, No. 37.

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CIRCULAR
ORDERS.

To

**ALL ZILLAH JUDGES AND JUDICIAL COMMISSIONERS
AND JUDGES OF SMALL CAUSE COURTS.**

Dated Calcutta, the 22nd December 1870.

THE Court directs that, until the rules contemplated in the

HIGH COURT, &c.,
CIVIL SIDE.
Present:
The Hon. J. P. Norman,
Offj. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" Louis S. Jackson,
" E. Jackson,
Judges.

Court Fees' Act (VII of 1870)
shall have been published, adhesive
Court fee stamps be received in lieu
of cash payments for Peons' fees
in all the Civil Courts of the
Regulation and Non-Regulation
Districts of Bengal, and that a

Memo. book be kept up in each Court showing the value of
the stamps put in, as is done with regard to the stamps used for
plaints and appeals.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

Routine of Business to take effect from Monday, the 12th December 1870.

1ST BENCH—(Group D.)	2ND BENCH—(Group B.)	3RD BENCH—(Group A.)	4TH BENCH—(Group C.)	5TH BENCH—(Group E.)
The Chief Justice, Mr. Justice Loh, and Mr. Justice Ainslie.	Mr. Justice Bayley and Mr. Justice Mittra.	Mr. Justice Kemp and Mr. Justice Paul.	Mr. Justice L. S. Jackson and Mr. Justice Glover.	Mr. Justice E. Jackson and Mr. Justice Morokoff.
Miscellaneous or Special Appeals.	Miscellaneous or Specia- l Appeals.	Regular Appeals ..	Regular Appeals ..	Miscellaneous or Specia- l Appeals.
Miscellaneous or Special Appeals.	Miscellaneous or Specia- l Appeals.	Regular Appeals ..	Regular Appeals ..	Miscellaneous or Specia- l Appeals.
Wednesday ..	Regular Appeals ..	Miscellaneous or Specia- l Appeals.	Miscellaneous or Specia- l Appeals.	Miscellaneous or Specia- l Appeals.
Thursday ..	Regular Appeals ..	Miscellaneous or Specia- l Appeals.	Miscellaneous or Specia- l Appeals.	Miscellaneous or Specia- l Appeals.
Friday ..	Special Appeals ..	Regular Appeals ..	Regular Appeals ..	Regular Appeals.
Saturday ..	Criminal Appeals, References and Cases for Revision, and Motions in Criminal matters.			

Miscellaneous Appeals will be re-enrolled by the memorandum of Groups given below those from any district in a Group being placed in the list of the Bench indicated, except in remand cases, which will be referred for order to the senior Judge of the Bench which remanded the case. Criminal Appeals and References, and cases for Revision under the Code of Criminal Procedure, and Motions in criminal matters will be heard and determined by the several Division Benches, according to the Groups of districts given below; those from any district in a Group being placed in the list of the Bench indicated, subject to the proviso that, if any Bench shall not sit on Saturday, the business which would have come before it may be taken by any other Bench. Each Bench shall take up such portion of the business of the Miscellaneous Department as shall belong to its Group, except appeals to Her Majesty in Council, which will be taken by Mr. Justice L. S. Jackson at such time as he may appoint. Each Bench shall also undertake the Revision of all Letters and Statements (civil and criminal) of its Group, and shall also dispose of all matters arising out of such revision. Each Bench will make its own arrangements for the disposal of its Miscellaneous business and for the revision of the Civil and Criminal Statements belonging to its Group. Each Division Bench will make up by each Bench on the first day fixed for that class of business in each week, and will be proceeded with on every day fixed for Miscellaneous Appeals, until all the Miscellaneous Appeals included in the list for that week are disposed of. Temporary arrangements will be made, as required, by each Division Bench, for hearing Appeals or Applications for review of the judgments of each Bench, once every fortnight, on a day or days not fixed for Regular Appeals. Reviews and Applications for review will be heard by both Judges, unless either or both judges on the Appellate Side, in cases of difference of opinion; and of Appeals from Original Jurisdiction. Motions relating to the districts in the different Groups will be heard by the Benches, respectively, on such day or days as the several Benches which granted them may appoint: provided that nothing in this rule shall prevent any one Bench from hearing urgent motions appropriated to any other Bench when that other Bench may not be sitting on its fixed motion day. One Court, before Mr. Justice Phen, will be held for the exercise of the Ordinary Original Civil Jurisdiction; but temporary arrangements will be made for the sitting of a second Court for the exercise of Original Civil Jurisdiction whenever a second Court may be required. Mr. Justice Phen will be held on the same day of the cases to be taken in each Court. Due notice will be given of the days of sitting, and (if two Courts are held on the same day) of the cases to be taken in each Court.

In Remand Appeals in which the sum or matter at issue appears in the proceedings to be above the amount or value of rupees 10,000, and which appear to involve questions of importance or difficulty, the Chief Justice will sit with the Judges composing the Bench before which such appeals stand for hearing, on days to be specially fixed. Motions involving questions of difficulty or importances under the 16th section of the 24 and 25 Vio. C. 104, may be made before the Chief Justice, and the Judges composing two First Bench, on Mondays.

Group A.—Gya, Patta, Sarun, Shanthabhad, and Tirhoot.

Group B.—Assam, Patta, Burmugly, Dinalopore, Maldah, Purnnah, Rajshahy, Pubna, Rungpore, and Bograh.

Group C.—Buerbhoom, Burdwan (West), Cuttack, Jhalakote, Chota Nagpo, Hooghly, and Mithnapore.

Group D.—Backergunge, Jessor, Moshshedabad, Nuddea, and 24-Pargumans.

Group E.—Cosyrah and Gynneah Hills, Cooch, Chittagong, Dacca, Furreedpore, Lynmansingh, Syhet, Tipperah, and Noakhali.

REGULATIONS AS TO THE EXAMINATION OF PERSONS DE-
SIROUS OF BEING ADMITTED ATTORNEYS OF HER
MAJESTY'S HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.

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RULES AND
REGULATIONS.

1. AN examination for the admission of Attorneys shall be held half-yearly on such days as the Examiners, or any five of them, shall appoint.
2. Every person applying to be admitted an Attorney of the High Court shall, within two weeks before the 1st of January or the 1st of July, leave, or cause to be left, with the Registrar of the Court, in case the applicant's qualification for admission depends on his service to an Attorney, his articles or contracts of service, properly stamped (if entered into since the General Stamp Act, 1869), and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the Attorney or Attorneys with whom he shall have served his clerkship, or if his qualification depends upon his being an Attorney or Solicitor of Her Majesty's Superior Courts of Law or Equity in England, or in Ireland, or the High Court of Madras or Bombay, due and sufficient proof of his admission in such Court.
3. In case the applicant should show sufficient cause to the satisfaction of the Examiners why the second regulation cannot be fully complied with, it shall be in the power of the said Examiners, upon sufficient proof being given of the same, to dispense with any part of the second regulation that they may think fit and reasonable.
4. The applicant shall, at the same time, in all cases, produce satisfactory testimonials to his good character and ability.
5. Every person applying for admission shall also, if required, sign, and leave, or cause to be left, with the said Registrar answers in writing to such other written or printed questions as shall be proposed by the said Examiners touching his said service and conduct; and also, if required, attend the said Examiners personally for the purpose of giving further explanation touching the same; and shall also, if required, procure the Attorney or Attorneys with whom he shall have served his clerkship as

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RULES AND
REGULATIONS.

aforesaid, to answer either personally or in writing any questions touching such service or conduct, or shall make proof to the satisfaction of the said Examiners of his ability to procure the same.

6. Every person so applying shall also attend the said Examiners at such place or places, and at such time or times, as shall be appointed for that purpose, and shall answer such questions as the said Examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an Attorney.

7. Upon compliance with the aforesaid regulations, and if the major part of the said Examiners actually present at and conducting the said examination (one of them being the said Registrar) shall be satisfied as to the fitness and capacity of the person so applying to act as an Attorney, the said Examiners so present, or the major part of them, shall certify the same under their hands in the following form, *viz.* :—

In pursuance of the rules of the High Court relating to the admission of Attorneys, we, being the major part of the Examiners actually present at and conducting the examination of A. B., of &c., do hereby certify that we have examined the said A. B., as required by the said rules, and we do certify that the said A. B. is fit and capable to act as an Attorney of the said Court, and that we are satisfied with the assurance of his good character.

Questions as to due Service of Articles of Clerkship to be answered by the Clerk.

1. What was your age at your last birth-day immediately preceding the date of your articles?
2. Have you served the whole term of your articles at the office where the Attorney or Attorneys to whom you were articled or assigned carried on his or their business? and if not, state the reason.
3. Have you, at any time during the term of your articles, been absent without the permission of the Attorney or Attorneys to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any, and, if any, what profession, business or employment other than your professional employment as clerk to the Attorney or Attorneys to whom you are articled or assigned?

1870
RULES AND
REGULATIONS.

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business or employment other than the profession of an Attorney or Solicitor?

Questions to be answered and Certificate to be given by the Attorney or Attorneys with whom the Clerk may have served any part of the Time under his Articles.

Has A. B. served the whole time of his articles at the place where you carry on your business? and if not, state the

Has the said A. B., at any time during the term of his articles, been absent without your permission? and if so, state the time and occasions of such absence.

Has the said A. B., during the period of his articles, been engaged or concerned in any, and, if any, what profession, business or employment other than his professional employment as

Has the said A. B., during the whole term of his clerkship, above-mentioned, been faithfully and creditably employed in the professional business of an Attorney or Solicitor?

Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how long time, in any, and, if any, what profession, trade, business or employment other than the profession of an Attorney or Solicitor?

And I do hereby certify that the said A. B. has duly and faithfully served under his articles of clerkship (or assignment, as the case may be), bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted an Attorney.

Directions to Candidates.

Each candidate on attending the place of examination will have a number given to him, and will take the seat designated

1870 by such number. He will also be furnished with papers of
RULES AND REGULATIONS. questions on the several subjects of examination which must be answered in writing.

The answers to the questions under the several heads are to be written on separate papers, prefixing to each answer the number of the question; and each paper should be written in a plain and legible manner, and signed.

When the candidate has finished his answers, he will deliver them to the Examiner or Examiners present at the examination, together with his copy of all questions. No candidate is to communicate with, or receive assistance from, any one, or copy from the paper of another, or from any books or writing, and a person who is found to have infringed this rule will be considered not to have passed his examination.

After the examination has begun, no candidate is to leave the room (without permission obtained), until he shall have delivered his answers, and any candidate who leaves the room without permission will not be allowed to return.

(Sd.)

R. COX

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G.

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F.

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3. Every such copy shall be examined and certified as correct before it is issued from the Office of the Court.

1870
RULES AND
REGULATIONS.

4. The charge for such copies shall be one rupee per 1,440 English words, and one rupee for 2,000 words in Bengali or Urdu.

5. When a Vakeel retained to appear and plead for any party to a suit or appeal is prevented by sickness or engagement in another Court from appearing and conducting the case of his client, he may appoint another Vakeel 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 argument to proceed in the absence of the Vakeel or Vakeels originally engaged.

6. In any case in which the party employing a Vakeel or his Agent after due notice fails to pay the amount of the estimated costs for preparing briefs containing the papers connected with the case on appeal necessary to enable the Vakeel to conduct the case properly, the Vakeel or Vakeels after notice to such party or his Agent and by leave of the Court may withdraw from the case.

7. A Vakeel may also, for any other sufficient cause, or after such notice to his client as may enable him to appoint another Vakeel, by leave of the Court, but not otherwise, and on such terms as the Court shall order as to refunding any fees he may have received, withdraw from the further conduct of the case.

8. A list of all appeals filed shall be made out weekly, and a copy thereof hung up in the Library.

In such list the number of the appeal, the names of the parties and of the Vakeel who filed the appeal, shall be given.

RULES FOR THE ADMISSION AND ENROLMENT OF
MOOKTEARS ON THE APPELLATE SIDE OF THE HIGH
COURT.

I. Persons who have hitherto practised as Mooktears on the Appellate Side of the High Court, and also persons desiring so to practise, may apply to be admitted and enrolled as Mooktears in the High Court.

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RULES AND
REGULATIONS.

II. No person so applying shall be admitted except he shall satisfy the Court as to his character and competency.

III. Every person so applying, on being approved by the Court, shall, before he is admitted and enrolled as a Mooktear, be required to give security in the sum of Rs. 2,000 for his honesty and good conduct; for his compliance with the rules and orders of the High Court, and for the faithful discharge of his duties towards the Court and towards his employers.

IV. Every person admitted and enrolled as a Mooktear of the High Court shall be at liberty—

(1.) To instruct Counsel or Vakeel;

(2.) To inspect the records of any Civil or Criminal case in which he is engaged as Mooktear, and, if necessary, to obtain copies of any papers or documents in order to the preparation of a brief or instructions for the Counsel, or Vakeel, employed or to be employed in the case;

(3). To deposit in the Office money or securities on behalf of his clients;

(4). To withdraw monies or securities deposited on account of his clients;

(5). To receive back original or other documents filed in any case after the case shall have been completely disposed of;

(6.) And, generally, to do all other such duties on behalf of his clients as Mooktears are now, according to the existing practice in the Court, empowered to do.

Provided that no monies, securities, or documents shall be handed out to any Mooktear except on production of a special or general Power of Attorney under the hand of his client and duly registered authorizing him to receive the same.

Mooktears within the first fortnight in January in every year, or on the occasion of taking out or renewing their certificates, shall be required to satisfy the Registrar as to the state of their securities.

RULES REGARDING COSTS IN SUITS IN FORMA PAUPERIS INSTI-
TUTED IN THE ORIGINAL SIDE OF THE HIGH COURT.

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RULES AND
REGULATIONS.

1. In suits *in forma pauperis* brought under the provisions of Chapter V of Act VIII of 1859, no costs will be allowed to the pauper against the opposite party, unless by special order.
2. No fees shall be payable by a pauper to his counsel or attorney, nor shall any such fees be allowed on taxation of costs against the opposite party, unless by special order of the Judge who tries the case.

(Sd.)	J. P NORMAN.
"	G. LOCH.
"	H. V. BAYLEY.
"	F. B. KEMP.
"	L. S. JACKSON.
"	J. B. PHEAR.
"	E. JACKSON.
"	W. MARKBY.
"	F. A. GLOVER.
"	D. MITTER.
"	W. AINSLIE.

The 25th November 1870:

RULES FOR THE PROMPT TRIAL OF UNDEFENDED AND OTHER SUITS FOR ARREARS OF RENT, IN THE CIVIL COURTS, UNDER ACT VIII OF 1869.

1. Every summons in any suit for arrears of rent not being a suit in which enhancement is sought, brought under the provisions of Act VIII of 1869, B. C., shall command the defendant to appear at the expiration of fourteen clear days after the service thereof.
2. Every such suit entered in the Register as directed by Section 42, shall be marked thus—"Rent Suit," "Baki Kházánár Mokuddama," "Baki Malguzari."
3. Immediately on the return of the summons in any such "rent suit," the suit shall be entered in a list of causes in form annexed to be stuck up in the Court House specifying the day for hearing, which shall be on the day fixed for the appearance of the defendant or on the earliest day on which the Court shall sit after such day.

1870

RULES AND
REGULATIONS.

4. Each such suit shall be called on in its turn at the sitting of the Court and before suits of any other description, upon the day for the hearing thereof; and in every case in which it shall be shown that the defendant has been duly served with the summons in proper time to enable him to appear and defend the suit, but the defendant does not, either in person or by any authorized Agent or Pleader, appear or make answer to the suit, the case shall be forthwith taken up and heard *ex parte*, unless in any particular case the Court, for special reasons to be recorded in the proceedings, shall think fit to order otherwise.

5. Provided nevertheless that no suit for arrears of rent shall be called on and tried *ex parte* when the summons shall not have been served at least fourteen clear days before the day of hearing.

6. When it shall appear that the summons has not been duly served, or that fourteen clear days have not elapsed from the date of the due service of the summons, the case shall stand over until a day to be fixed immediately after the expiration of fourteen clear days from the date of the due service of the summons.

7. In cases where the defendant appears and makes answer or desires to contest the claim, the case may either be taken up and tried at once if it appear to be likely to be a short one, or may be placed in the ordinary list of defended causes, and come on in its turn, if such latter course appear to the Judge to be expedient with reference to the state of his file or the convenience of the parties.

List of Rent Suits in the Court of the of

Number of Case on the Register.	Names of Parties.	Claim.	Date fixed for Trial.

CIRCULAR No. 1.

To ALL CIVIL AND SESSIONS JUDGES AND
MAGISTRATES OF DISTRICTS.

1871
CIRCULAR
ORDERS.

Dated Calcutta, the 4th January 1871.

THE Government of India having decided* that the charge

HIGH COURT, &c.,
CIVIL AND CRIMINAL
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

for transmitting judicial records through the post, from one Court to another, shall be as heretofore borne by the State, and the new Post Office Rules† requiring pre-payment of banghy postage whenever that mode of transmission is adopted, the Court directs that all Civil and Sessions Judges and District Magistrates will put themselves in communication with the Accountant-General of Bengal, with a view to provision being made for the funds necessary to meet the requirements of the rules above-mentioned.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

CIRCULAR No. 2.

To ALL ZILLAH JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 10th January 1871.

THE Court directs that all orders by all Civil Courts for the attachment of estates and shares of estates for the recovery of arrears or demands of the descriptions mentioned under Section 5, Act XI of 1859, shall be immediately notified to the Collector of the District within which such estates or shares of estates are situated.

HIGH COURT, &c.,
CIVIL SIDE.
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

* Government Order, Financial Department, No. 3118, dated 21st November 1870.

† *Vide page 498, Calcutta Gazette of 16th March 1870.*

1871

CIRCULAR
ORDERS.

To

CIRCULAR No. 1.

ALL CRIMINAL AUTHORITIES.

Dated Calcutta, the 11th January 1871.

THE Court directs the discontinuance, in the Office of the

HIGH COURT, &c.,

Magistrate of the District, of the

CRIMINAL SIDE.

General Register of Warrants pre-

Present:

scribed by the late Sudder Court's

The Hon. J. P. Norman,

Circular of the 15th May 1835, No.

Offg. Chief Justice.

The Hon. G. Loch,

167, and the High Court's Circular,

" H. V. Bayley,

" L. S. Jackson,

" E. Jackson,

dated 1st October 1866, No. 11.

Judges.

2. Each Criminal Court is enjoin-

ed to keep up its own Register, and see that its own warrants are duly returned. The form in which the Register shall be maintained is that laid down in Circular Order No. 167, dated 15th May 1835, omitting Column 6 as required by Circular Order No. 11, dated 1st October 1866, and the manner in which entries are to be made will be found described in the rules appended to that form.

By order of the High Court,

(Sd.) F. B. PEACOCK,

Registrar.

CIRCULAR No. 3.

To

ALL CIVIL AUTHORITIES IN THE LOWER PROVINCES.

Dated Calcutta, the 17th January 1871.

THE attention of Civil Courts subordinate to the High Court

HIGH COURT, &c.,

is drawn to the provisions of Section

CIVIL SIDE.

30 of the Court Fees' Act (VII) of

Present:

1870, prohibiting the use in any pro-

The Hon. J. P. Norman,

ceeding of any document requiring a

Offg. Chief Justice.

The Hon. G. Loch,

stamp under that Act until such stamp

" H. V. Bayley,

has been cancelled, and prescribing the

" L. S. Jackson,

mode in which cancellation is to be

" E. Jackson,

Judges.

effected.

2. The Civil Courts subordinate to the High Court are at the same time directed, at the suggestion of the Government of India, to cause the labels affixed to documents *issued* by them and liable to a fee under the Act, to be cancelled *at the time that they are affixed*, such a course being calculated to protect the revenue and prevent all evasions of the law.

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CIRCULAR
ORDERS.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

CIRCULAR MEMO. No. 1.

Dated Calcutta, the 17th January 1871.

WITH reference to Court's letter No. 3816, dated 17th December 1870, to the Superintendent of Stationery, copy of which was forwarded by their Circular Memorandum No. 7 to all Zillah Judges and District Magistrates, the following corrigendum is circulated for information and guidance of those Officers :—

Page 2, line 3, for "Twelve copies" read "Twenty copies."

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

CIRCULAR No. 2.

To

ALL SESSIONS JUDGES, LOWER AND EXTRA
REGULATION PROVINCES.

Dated Calcutta, the 18th January 1871.

IT having been brought to the notice of the High Court that

HIGH COURT, &c.,
CRIMINAL SIDE.
Present:
The Hon. J. P. Norman,
Offy. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

warrants for the realization of fines imposed by Courts of Session are sometimes issued from the Magistrate's Office, the attention of all Sessions Judges is called to section 61 of the Code of Criminal Procedure (Act VIII of 1869), which pro-

1871
CIRCULAR
ORDERS.

vides for such warrants being issued by the Sessions Judge alone,—Section 384 of the Code of Criminal Procedure having been modified.

2. As, however, the present system of issuing one warrant for the carrying into effect a two-fold sentence,* one portion of which has to be given effect to by one Officer and the other portion by another, has been found to be inconvenient and to lead to difficulties, Sessions Judges are directed, in future, in all such cases, to cause to be issued a warrant in duplicate fully filled up, one copy being forwarded to each of the two Officers, *viz.*, the Magistrate and the Officer in charge of the Jail, whose duty it is to see the warrant carried into effect. That portion, however, of the sentence with which the Officer to whom the particular copy is addressed has no concern, will first be written in and then scored through with red ink, as an intimation to him that no action on his part is necessary in regard to such portion. If at any time before the expiration of the alternative sentence the whole fine shall be levied, the Magistrate shall report the fact to the Officer in charge of the Jail and direct the discharge of the prisoner, or, if a portion of the fine shall be levied within such time as aforesaid, the Magistrate shall forthwith report the fact for the orders of the Sessions Judge.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

* *Vide* Forms 6, 7, 8, also 10 and 11, appended to Circular Order No. 6, dated 23rd February 1870.

CIRCULAR No. 3.

To

 1871
 CIRCULAR
 ORDERS.

ALL CRIMINAL AUTHORITIES.

Dated Calcutta, the 2nd February 1871.

IT having been brought to the notice of the Court that difficulty has been experienced in the preparation of the tabular forms prescribed by Circular Order No. 32, dated 8th November last, so far as regards the Criminal Returns, the following instructions

HIGH COURT, &c.,
 CRIMINAL SIDE.
Present:
 The Hon. J. P. Norman,
Offg. Chief Justice.
 The Hon. G. Loch,
 " H. V. Bayley,
 " L. S. Jackson,
 " E. Jackson,
Judges.

are issued for the information and guidance of Sessions Judges and Magistrates.

2. The classification list alluded to in column 2 of this Statement, of which a copy accompanied the Circular Order in question, is merely that given by the Statistical Committee, and was clearly not intended to be an exhaustive, but rather a suggestive, list of offences. It is nowhere recognised or prescribed in the Circular itself, and was not meant entirely to supersede the existing Schedule provided by Circular Order No. 19, dated 31st December 1861. The Court have, however, determined to reconstruct that Schedule on the principle of the classification list, and to adapt it to its requirements by a re-arrangement of its descriptive headings, according to the order of the sections of the Indian Penal Code. This has been done in the new Schedule circulated herewith.

3. As regards 'attempts,' the Court are of opinion that when the attempt is one for the punishment of which express provision is made (such as attempts to commit murder, culpable homicide, or suicide), whereby, in fact, such attempts are constituted substantive offences, they should come in their order accordingly; but that attempts punishable under the general provisions of section 511, Indian Penal Code, should be inserted where they occur, immediately after the offences at which they are attempts. Finally, offences under special and local laws should be exhi-

1871
CIRCULAR
ORDERS.

bited arranged alphabetically, as indicated in the accompanying list after the offences classified as above-mentioned.

4. With reference to column 15 of this Statement, headed Judicial Statement (Criminal), 3. "average number of days during which each case lasted," the Court consider that the average duration should be calculated from date of complaint or information to date of conviction, acquittal, or discharge; and where there are several persons accused in the same case in respect of whom final orders are not passed at the same time, as will sometimes happen, then to the date of last order.

5. This Statement was intended to exhibit *every sentence* passed, and, where two penalties were inflicted on the same offender, to exhibit them both. With a view, however, to secure uniformity in the mode in which the columns are to be filled up, and to provide against the same offenders being reckoned more than once in the general result, the Court lay down the following instructions:—If a man has been sentenced to rigorous imprisonment with solitary confinement and fine, he will appear in columns 5 and 9; if to rigorous imprisonment without solitary confinement, but with fine, then in columns 6 and 9; if to simple imprisonment and fine, then in columns 7 and 9; if to rigorous imprisonment and whipping, then in columns 5 or 6 and 11. In adding the entries together to ascertain the total number of *persons punished*, it will be necessary to exclude columns 9 and 11, as the persons referred to therein will be accounted for in other columns.

6. This is a return to be made by the Appellate Courts of the district, and is intended to exhibit *their* action, i. e., the orders made by *them*, and one of the orders which a Sessions Judge or a Magistrate of a district can make (rather, however, as a Superintending Court than as an Appellate Court) is that of reference to the High Court. Orders of this nature, accordingly, will be shown in column 9, the previous columns showing either final orders made or orders interlocutory or preparatory to *their own* final orders. Column 7 will thus show orders quashing or

Judicial Statement (Criminal), 5.

annulling convictions where the Local Appellate Court has power to make such order, e. g., section 427, Criminal Procedure Code (Act VIII of 1869); and column 8 will include orders made by such Courts under section 422.

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CIRCULAR
ORDERS.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

SCHEDULE of Offences under Act XLV of 1860.

No.	DESCRIPTION OF OFFENCES.	Sections of Penal Code Applicable.
15	Offences against the State	Sections 121 to 130.
"	relating to the Army and Navy ...	" 131 to 140.
"	Unlawful assembly ...	" 143 to 145,
		149 to 151,
		157, 158.
		" 147, 148, 152,
		and 153 to
		156.
		" 160.
		" 161 to 169.
		" 161, 170, and
		171.
		" 172 to 190.
		" 193 to 200.
		" 201 to 229.
		" 231 to 254.
		" 255 to 263.
		" 264 to 267.
		" 269 to 278.
15	safety	" 279 to 289.
16	convenience	" 290 and 291.
17	decency or morals... ...	" 292 to 294.
18	relating to religion	" 295 to 298.
19	Murder	" 302 and 303.
20	Culpable homicide	" 304.
21	Abetment at suicide	" 305 and 306.
22	Thuggee, &c.	" 311.
23	Causing miscarriage	Attended with aggravating circumstances " 312 to 315.
24		Other cases " 312.
25	Injury to unborn children	" 316.
26	Exposure of infants	" 317.
27	Concealment of births by secret disposal of the dead body	" 318.
28	Hurt	With aggravating circumstances " 325 to 331,
29		and 333.
		" 323, 324, 332,
		and 334 to
		338.

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CIRCULAR
ORDERS.

SCHEDULE of Offences under Act XLV of 1860--continued.

No.	DESCRIPTION OF OFFENCES.	Sections of Penal Code Applicable.
30	Wrongful restraint	Section 341.
31	" confinement	" 342 to 348.
32	Criminal force or assault	" 352 to 358.
33	Kidnapping or { With aggravating circumstances	" 364, 366, 367.
34	forcible abduction { Other cases	" 363, 365, 368, 369.
35	Slavery	" 370 and 371.
36	Buying or selling a minor for the purpose of prostitution	" 372 and 373.
37	Forced labor	" 374.
38	Rape	" 376.
39	Unnatural offences	" 377.
40	Theft { With aggravating circumstances	" 382.
41	{ Other cases	" 379.
42	Extortion ... { With aggravating circumstances	"
43	{ Other cases	"
44	Robbery ... { With hurt	"
45	{ Other cases	"
46	With murder	"
47	Dacoity ... { With attempt to cause death or grievous hurt	"
48	{ Other cases	"
49	Criminal misappropriation of property ...	"
50	" breach of trust	"
51	Receiving or habitually dealing in stolen or plundered property	"
52	Cheating	" 417 to 420.
53	Fraudulent deeds and disposition of property ...	" 421 to 424.
54	Mischief { With aggravating circumstances	" 429 to 433, and 435 to 440.
55	{ Other cases	" 426 to 428, and 434.
56	Criminal trespass ... { Resulting in death or other grievous hurt	" 459 and 460.
57	{ For commission of serious offences	" 449, 450, 451, 452, 454, 455, 457, and 458.
58	{ Other cases	" 447, 448, 453, 456, 461, and 462.
59	Forgery or uttering or possessing forged documents or papers...	" 465 to 471, and 474.

D. MITTER,
E. JACKSON,
J. B. PHILIP,
LOUIS JACKSON.

HIGH COURT RULES, &c.

of Offences under Act XLV of 1860—continued.

J. V. BAXTER.

DESCRIPTION OF OFFENCES.	Sections of Penal Code Applicable.
Counterfeiting or making or possessing a counterfeit seal, &c., for purposes of forgery ... without delivery	Sections 472 to 476.
Raidulently destroying or defacing a will or other documents ...	" 477.
Using a false trade or property-mark, and knowingly selling property so marked ...	" 482, 486, 487, and 488.
Counterfeiting or making or possessing a die, plate, or instrument for counterfeiting a trade or property-mark ...	" 483 to 485.
Removing, destroying, &c., a trade or property-mark with intent to cause injury ...	" 489.
Criminal breach of contract of service ...	" 490 to 492.
Relating to marriage ...	" 493 to 498.
Resulting in death or other grievous hurt ...	" 500 to 502.
Offences in cases ...	" 506.
Contemn ...	" 504 to 510.
False evidence ...	" 511.
Offences above specified	
Relating to Act XX of 1860 ...	
law relating to breach of Pres. 4, breach of laws relating to	
Hairway laws, breach of	
10.—Salt laws, breach of	

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ORDERS.

To

CIRCULAR No. 4.

ALL SESSIONS JUDGES, REGULATION AND
EXTRA-REGULATION PROVINCES.*Dated Calcutta, the 2nd February 1871.*

THE following directions are issued, for the guidance of Sessions Judges,

HIGH COURT, &c.,
CRIMINAL SIDE.

Present:

The Hon. J. P. Norman,
Offy. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

in the preparation of their Criminal Administration Reports, with reference to the new forms prescribed in Circular Order No. 32, dated 8th November 1870, and in supersession of previous

orders on the subject.

The Report is to contain, *inter alia*, the following parts:

ORIGINAL JURISDICTION.

STATEMENT of Number of Offences ascertained to be committed in year under report, as compared with previous year.

OFFENCES	1869.
Against the State or Public (Cap. VI to XV, I. P. Code) ...	
Against the person (Cap. XVI, XIX, XX to XXII) ...	
Against property (Cap. XVII and XVIII)	
Under Special Laws	
TOTAL ...	

*The Number of Persons brought to Trial during the
Year 1870, who have been Convicted, Acquitted or Discharged, and remaining
under Trial.*

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CIRCULAR
ORDERS.

OFFENCES	PERSONS				
	Under Trial.	Acquitted or Discharged.	Convicted.	Died, Escaped, Transferred.	Remaining under Trial.
Against the State or Public (Cap. VI to XV, I. P. Code)					
Against the person (Cap. XVI, XIX, XX to XXII)					
Against property (Cap. XVII and XVIII)					
Under Special Laws ...					
TOTAL ...					

STATEMENT showing the Number of Witnesses and their Attendance.

COURTS IN DETAIL.	NUMBER OF WITNESSES DISCHARGED			
	On 1st Day.	On 2nd Day.	On 3rd Day.	After 3rd Day.
Magistrate of the District ...				
Joint-Magistrate				
Assistant Magistrate ...				
Deputy Magistrate				
TOTAL ...				

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CIRCULAR
ORDERS.

APPELLATE JURISDICTION.

TABLE showing Appeals from Sentences and Orders of Courts of Original Jurisdiction, preferred in the District, disposed of, and pending in the year under report, as compared with the previous year.

From Sentence or Order of	PREFERRED.		DISPOSED OF.		REMAINING FOR TRIAL.	
	1869. 1870.		1869. 1870.		1869. 1870.	
	Before Court of Session.	Before Magistrate of the District.	Before Court of Session.	Before Magistrate of the District.	Before Court of Session.	Before Magistrate of the District.
Magistrate of the District ...						
Joint-Magistrate ...						
Assistant Magistrate ...						
Deputy Magistrate						
TOTAL ...						

TABLE showing the Number of Appeals preferred to the Court of Sessions or to the Magistrate of the District, from the Subordinate Criminal Courts, the Ratio of Appeals to Decisions, the Number of Decisions Affirmed, and the Ratio of Affirmed to Decided.

Appeals from Sentence or Order of	Number of Appeals Preferred.	Ratio of Appeals to Sentences or Orders.	Number of Sentences or Orders Affirmed.	Ratio of Affirmed to Passed.
District Magistrate, &c. &c.				

Separate reports, similar in character to that submitted with the Civil Administration Report, should be submitted in respect of all officers employed in the administration of criminal justice. In respect of every such officer, figures should be shown exhibiting the amount of work done, the extent to which he has been employed in other duties, the result of appeals from his decisions, and also the result of commitments made by him, in so far as such result indicates any want of discretion on his part or the converse. To such results should be appended the opinion of the District Magistrate in respect of the officer, which should be followed in each case by that of the Sessions Judge.

In prescribing these materials for the Administration Report, the Court has expressly refrained from directing the use of any particular form of covering letter, considering that such a matter is best left to the judgment of the several authorities concerned.

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CIRCULAR
ORDERS.

By order of the High Court,

(Sd.) F. B. PEACOCK,

Registrar.

Letter No. 186, dated the 1st March 1871, from the Registrar of the High Court, Appellate Side, to the Magistrate of Moorshedabad.

IN reply to your office letter, No. 1925, dated the 7th ultimo, in which inquiry is made as to the intention of the words "each Criminal Court," in Circular Order, No. 1, dated the 11th January last, I am directed to state that the Court, in explanation of the Circular Order, desires it to be understood that it is not intended, that when more than one officer is exercising the functions of a Magistrate at any place, every such officer should keep a separate register; but that, for the purposes of the Circular Order, every such Magistrate's Court should be regarded as a branch of the principal Magistrate's Court at the same station, the register remaining in the custody of such principal Magistrate.

MEMO. No. 2.

THE accompanying copy of Circular Order No. 2, dated 10th January 1871, should be substituted for the copy previously issued, which should be destroyed.

By order of the High Court,

HIGH COURT, &c., }
The 3rd April 1871. }

(Sd.) W. M. SOUTTAR,
Offg. Registrar.

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ORDERS.

To

CIRCULAR No. 2.

ALL ZILLAH JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 10th January 1871.

HIGH COURT, &c.,
CIVIL SIDE.
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.

The Hon. G. Loch,
" H. V. Bayley,
" Louis S. Jackson,
" E. Jackson,
Judges.

THE Court directs that all orders by all Civil Courts, for the attachment of estates and shares of estates, shall be immediately notified to the Collector of the District within which such estates or shares of estates are situated.

By order of the High Court,

(Sd.) F. B. PEACOCK,

Registrar.

To

ALL ZILLAH JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 26th April 1871.

I AM directed to request you will be so good as to state, for the information of the Court, what the practice is in the Courts of your district as regards the remuneration of the Nazir when he conducts sales in execution of decrees of Court. Is he allowed any remuneration, if so, at what rate, and from what source is it derived?

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

CIRCULAR No. 4.

To

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ORDERS.

ALL ZILLAH JUDGES.

Dated Calcutta, the 2nd February 1871.

THE recent Circular order, dated 8th November 1870, No.

HIGH COURT, &c,
CIVIL SIDE.

32, by which new forms of Annual Statements are prescribed, having provided no form for the submission of the Annual Reports, the following directions are now issued for the guidance of all Zillah Judges in

supersession of previous orders on the same subject.

I. Report on the Administration of Civil Justice.

This report will present the main features of the year's administration under the heads, and in the tabular shapes following:

ORIGINAL JURISDICTION.

Table showing the Suits instituted, disposed of, and pending in the past year, as compared with the preceding year.

	Instituted.		Disposed of.		Pending.	
	1869.	1870.	1869.	1870.	1869.	1870.
Increase				
Decrease				

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ORDERS.

Table showing Suits commenced and Suits disposed of in 1870, and pending at the close of that year in the various Courts of the District.

	Commenced.	Disposed of.	Pending.
Judge ...			
Additional Judge ...			
Subordinate Judge ...			
2nd Subordinate Judge ...			
Moonsiff of ...			
Moonsiff of ...			

NOTE.—A suit transferred to another Court is not thereby disposed of.

Table showing Number and Value of Suits of different kinds commenced in all Courts of the District in the past, as compared with the preceding year.

Description of Suits.	No. in 1869.	No. in 1870.	Value, 1869.	Value, 1870.
Suits of Small Cause Court Class ...				
Rent Suits ...				
Other Suits ...				
Increase ...				
Decrease ...				

Table showing Miscellaneous Cases of a judicial nature other than Regular Suits or Proceedings in execution, disposed of by, and pending in, each of the Courts in

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CIRCULAR
ORDERS.

	Disposed of.		Pending.	
	1869.	1870.	1869.	1870.
Zillah Judge ...				
Additional Judge ...				
Subordinate Judge ...				
2nd Subordinate Judge ...				
Moonsiff of ...				
Moonsiff of ...				

Table showing Number of Decrees completely and partially executed in 1870, in the several Courts of the District.

	Completely.	Partially.	Amounts realized.
Zillah Judge ...			
Additional Judge ...			
Subordinate Judge ...			
2nd Subordinate Judge ...			
Moonsiff of ...			
Moonsiff of ...			

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APPELLATE JURISDICTION.

Table showing Appeals from Decisions in Original Suits instituted in the District, disposed of, and pending in the past year, as compared with the preceding.

Table showing the Number of Appeals preferred to Zillah Courts from each of the Subordinate Courts in the District, the Ratio of Appeals to Decisions, the Number of Decisions affirmed, and Ratio of affirmed to decided.

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Appeals from	Appeals preferred.	Ratio of Appeals to Decisions.	No. of Decisions affirmed.	Ratio of affirmed to decided.
Subordinate Judge ...				
2nd Subordinate Judge.				
Sinall Cause Court Judge, with powers of Subordinate Judge				
Moonsiff of ...				
Moonsiff of ...				

Similar Statements for Miscellaneous Appeals of all kinds.

Aposite observations as to increase or decrease of business, or the like, to accompany each Table, where necessary.

These Tables to be followed by a Report on the condition of the Judicial Buildlings, the Records of the several Courts, the Judge's Library, and the Securities of those public Officers from whom security is required.

The character, qualifications, and official merits of the several Subordinate Judges and principal Ministerial Officers to be made the subject of a separate Report, in which the work done by, and the result of appeals from, such Officers are to be analyzed and commented upon, only as aids to forming a judgment as to their respective deserts and fitness for promotion, or continuance in the public service. This, however, is not to debar Zillah Judges from recording in their Administration Reports any instance of special and distinguished merit on the part of any of their Subordinates which they consider deserving of conspicuous mention, and entitling the person indicated to the favorable notice of the Court or of Government.

By order of the High Court,

(Sd.) F. B. PEACOCK,

Registrar.

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ORDERS.

CIRCULAR No. 5.

FROM

THE OFFICIATING REGISTRAR OF THE
 HIGH COURT OF JUDICATURE AT
 FORT WILLIAM, IN BENGAL,

To

ALL JUDGES OF COURTS OF SMALL CAUSES.

Dated Calcutta, the 25th February 1871.

THE Court directs that Judges of Small Cause Courts will

HIGH COURT, &c.,

CIVIL SIDE.
 Present:

The Hon. J. P. Norman,
Offg. Chief Justice.
 The Hon. G. Loch
 " H. V. Bayley,
 " L. S. Jackson,
 " E. Jackson,
Judges.

submit annual Returns of their work to the Judges of the Districts in which their Courts are respectively situated, in the four forms appended hereto,* in supersession of the Returns hitherto made to the

Court direct under the provisions of Circular Order No. 12, dated 19th December 1862. The Returns now prescribed will begin with the work of the past year, 1870.

2. These instructions will not interfere with the *monthly* Returns Nos. 1 and 2 prescribed by the same Circular Order, which will continue to be made to the High Court as heretofore.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Offg. Registrar.

* Nos. 6, 7, 8 and 10 (Judicial.)

Judicial Statements—6—(Small Cause Courts.)

*Statement showing the Number and Description of Civil Suits instituted in the Court of Small Causes at
in the year 18*

CLASS OF TRIBUNALS,				REMARKS.	
On written obligation.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
On unwritten.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
On account stated.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
Money had and received.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
Goods sold.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
Breach of contract not mentioned above.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
Rent not falling under the Rent Law.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
Moveable property or value thereof.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	
Damages.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	

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ORDERS.**Judicial Statements—7—(Small Cause Courts.)***Statement showing Value of Suits disposed of in the Court of Small Causes at*
in the year 18

VALUE OF SUITS.	Number of Suits disposed of in Small Cause Court.	REMARKS.		
		P	R	O
Not exceeding Rupees 5	64	64	64	64
" " 20	111	111	111	111
" " 100	111	111	111	111
" " 500	111	111	111	111

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Judicial Statement—8—(Small Cause Courts.)

Statement showing the general Result of the Trial of Suits in the Court of Small Causes at in the year 18

CLASS OF COURTS.	Suits remaining from last year.	Received by transfer.	Total for disposal.	Transferred to other Courts.	Plaint rejected or returned.	Dismissed for default.	Withdrewn with leave.	Decreed on confession.	Decreed ex-parte.	Dismissed ex-parte.	Judgement for plaintiff in whole or part.	Judgement for defendant and.	Total disposed of.	Over 2 months.	Over 4 months.	Contested.	AVERAGE DURATION OF SUITS.	REMARKS.	
	Instituted in 18																		Retired to arbitration.
																			Decided.
																			Uncontested.
																			Retired to arbitration.

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**CIRCULAR
ORDERS.**

Judicial Statement—10—(Small Cause Courts.)

Statement showing the Execution of the Decrees of the Court of Small Causes at in the year 18

CLASS OF COURTS.	APPLICATIONS TO EXECUTE DECREES.	NATURE AND NUMBER OF COERCIVE PROCESSES ISSUED.		ORDERS UNDER SECTION 248, CODE OF PROCEDURE	REMARKS.
		MOVEABLE PROPERTY.	IMMOVABLE PROPERTY.		
	Pending.	Filed.	Received by transfer.	Total.	Decrees completely executed.
					Decrees partially executed.
					Decrees executed by possession being given.
					Pending at the end of
					Decrees issued by possession
					Imprisonment of person.
		Attached.	Sold.		
					Orders under Section 248, Code of Procedure
					Section 248, Code of Procedure

CIRCULAR ORDER No. 6.

To

ALL ZILLAH JUDGES AND
JUDICIAL COMMISSIONERS.

1871

CIRCULAR
ORDERS.*Dated Calcutta, the 17th March 1871.*

AN instance having been brought to the notice of the High

HIGH COURT, &c.,
CIVIL SIDE.
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

Court of culpable carelessness and
negligence on the part of a Moonsiff, in hearing witnesses and re-
cording evidence in cases under
Section 15, Act XIV of 1859,
which misconduct has since led to
the removal of the Moonsiff from

office, the attention of Zillah Judges and Judicial Commis-
sioners is drawn to the necessity of satisfying themselves that
evidence is properly recorded in such cases. The Court directs
that Judges on their inspection tours will give special attention
to the subject, and that they will not omit to notice it in their
report.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Offg. Registrar.

CIRCULAR ORDER No. 7.

To

ALL CIVIL AUTHORITIES.

Dated Calcutta, the 22nd March 1871.

THE accompanying copy of a Circular letter No. 95, dated the

HIGH COURT, &c.,
CIVIL SIDE.
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

30th December, issued by the Post
Master General of Bengal, and
based upon the Financial Resolu-
tion of the Government of India,
No. 3118, dated 21st November
1870, is hereby circulated for the
information and guidance of all

Civil Courts subordinate to the High Court, in supersession of
Circular Order No. 1, dated the 4th January last, which was

1871 issued before the Court had received intimation of the instructions now notified, and which is hereby cancelled.
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By order of the High Court,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

(From J. Tweedie, Esq., Officiating Post Master General of Bengal, to all Post Office Officials,—Circular No. ⁹⁵ L. M. 10, No. 2, dated Fort William, the 30th December 1870).

Postage on Parcels which contain *records in transmission through the post from one Court to another* is no longer to be charged either by stamps or in cash to sender or to addressee.

2. All other kinds of Parcels hitherto chargeable under Rule 25 of the Rules regarding official correspondence will be charged, as usual, under that rule.

CIRCULAR No. 8.

To

ALL ZILLAH JUDGES AND
JUDICIAL COMMISSIONERS.

Dated Calcutta, the 6th April 1871.

I AM directed to forward herewith, for your information and

HIGH COURT, &c.

CIVIL SIDE.

Present:

The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" Louis S. Jackson,
" E. Jackson,
Judges.

guidance, and for communication to the Moonsiffs subject to your control, the amended Rule given below, which has been framed at the instance of His Honor the Lieutenant-Governor of Bengal, for the guidance of the police

employed on escort duty in connexion with remittances made by Moonsiffs, and to state that the present instructions should be regarded as superseding those conveyed in Circular Order No. 9, dated 13th July 1868, which is hereby cancelled.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

AMENDED RULE,

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Rule 26.—Where Moonsiffs' Courts exist, a day in each month will be fixed by the Judge on which the money will be paid over to the police for transmission to the treasury.

Clause I. The Moonsiff will give notice at the police station on the day before the guard is required, and the police officer in charge will himself, on the day appointed, proceed to the Moonsiff's Cutcherry with a guard as directed in the above instructions.

Clause II. The money will then be counted in the presence of the officer in charge of the guard and placed in a bag, which will then and there be sealed and made over to the guard, who will forthwith proceed with it to the treasury or sub-divisional treasury. The officer in charge will be furnished with a memorandum of the amount.

Clause III. The police officer will cause the bag and seal to be inspected in his presence by the treasury officer to whom it is addressed; and while held responsible for the total amount in the bag, he will not, provided the bag and seal show no signs of being tampered with, be called on to replace any light or spurious coin that it may contain.

Clause IV. The above rules apply to small remittances made by Moonsiffs in bags. Larger remittances will be sent more securely packed.

Clause V. The provisions of the paragraphs 12 and 18* apply

* Paragraphs 12 and 18 alluded to above.

12. "Under ordinary circumstances the strength of escorts shall be as follows:—

For Prisoners.

For 1 to 3 prisoners ... 2 Constables. For sums not exceeding Rs. 30, a
,, 4 to 6 „ ... a3 ditto. single constable of known integrity
and trustworthiness.

a Of these, one man to act as head constable.

For Treasure.

N. B.—If such an officer be not available, two constables should be sent.

For any amount above Rs. 30, and not exceeding Rs. 250, two constables.

For Rs. 250 and up to Rs. 500, three constables

N. B.—One of these should act as head constable.

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ORDERS.

equally to the transport of all remittances from Moonsiffs' Courts. If a remittance be in copper coin, and exceeds six

For Prisoners.

For 7 to 12 prisoners, 1 head constable and 4 constables.

For 13 to 18 prisoners, 1 head constable and 6 constables.

For 19 to 24 prisoners, 1 head constable and 8 constables, and so on in proportion.

N. B.—When a guard of more than 8 men is deemed necessary, additional head constables should be allowed in proportion.

For Treasure.

When the sum of money transmitted under the escort of the police does not exceed Rs. 500, it should be carried by the police themselves without the employment of coolie labor.

For any amount above Rs. 500, and not exceeding Rs. 1,000, four constables.

N. B.—One of these should act as head constable.

For any sum above Rs. 1,000, and not exceeding Rs. 10,000, a regular guard of at least one head constable and four constables.

For upwards of Rs. 10,000, and not more than one lakh, one head constable and eight constables.

For one to two lakhs, two head constables and twelve to sixteen constables.

Above two lakhs, one sub-inspector and two head constables, and sixteen to twenty constables, and so on, for each lakh above two lakhs, four constables in addition, and officers in proportion.

When treasure is escorted by rail, a head constable and two constables are deemed sufficient, but during the transit of the treasure to the railway van, or from it, a proper guard of full strength as above must be provided.

When treasure is conveyed by steamer, a guard of one head constable and six armed constables should be detailed with any amount not exceeding one lakh. The men should furnish one sentry by day and two by night if necessary. With a despatch of treasure exceeding one lakh, the guard should be increased in proportion up to a maximum of twelve constables.

"18. All arrangements as regards carriage will devolve upon the officer to whom the escort is supplied, and will not in any way form part of the duty of the police. Prisoners and treasures should not, unless under special circumstances, be sent together."

seers and one pow in weight, coolie labor should be employed.

Clause VI. Should any necessity arise for a second remittance during the month, the same course will be pursued on due notice being given at the police station.

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ORDERS.

CIRCULAR ORDER No. 10.

To

ALL CIVIL AUTHORITIES, LOWER PROVINCES.

Dated Calcutta, the 13th April 1871.

THE attention of all Civil Courts subordinate to the High

HIGH COURT, &c.,
CIVIL SIDE.
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" E. Jackson,
Judges.

Court is drawn to the necessity for satisfying themselves that cancellation of the adhesive stamp, in the mode prescribed by law, has been duly effected in the case of documents filed in Court between the 1st April last, when

the Court Fees Act came into force, and the time of the receipt of Circular Order No. 3, dated 17th January 1871, which called attention to the provisions of Section 30 thereof.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Offg. Registrar.

CIRCULAR No. 12.

To

ALL CIVIL AND SESSIONS JUDGES.

Dated Calcutta, the 19th April, 1871.

HIGH COURT, &c.,
CIVIL AND CRIMINAL
Present:
The Hon. J. P. Norman,
Offg. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" L. S. Jackson,
" A. G. Macpherson,
Judges.

IN consequence of the altered state of the law, introduced by the Bengal Civil Courts Act (VI) 1871, the instructions conveyed in Circular Order No. 20, dated 1st August 1870, can no longer be acted upon, and the

Circular in question is hereby cancelled.

By order of the High Court,

(Sd.) W. M. SOUTTAR,
Offg. Registrar.

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ORDERS.

To

**ALL ZILLAH JUDGES AND
JUDICIAL COMMISSIONERS.**

Dated Calcutta, the 6th April 1871.

THE Returns transmitted by the local Courts of the service

**HIGH COURT, &c.,
CIVIL SIDE.**

Present:

The Hon. J. P. Norman,
Offg. Chief Justice.

The Hon. G. Loch,
" H. V. Bayley,
" F. B. Kemp,
" L. S. Jackson,
" E. Jackson,
" F. A. Glover,
" D. N. Mitter,
" W. Ainslie,
" G. C. Paul,
" O. C. Mookerjee,
Judges.

of writs of summons, and of notices of hearing of appeals issued by the High Court for service within the jurisdiction of local Courts, are, in many instances, so insufficient as to necessitate postponements, the re-transmission of such process for further proof, or the issue and transmission of fresh process for service.

2. The Courts frequently send up nothing but the Nazir's return, which is often no more than a mere report of oral statements made to him by others as to the mode of service. Such returns, without proof of the statements contained therein, are of no value.

3. By the Civil Procedure Code, whenever it is necessary that summons should be served beyond the limits of the jurisdiction of the Court which issued it, the Court which is called upon to serve the summons is, by section 59, placed in the same situation as if it had itself issued the summons, and ought to satisfy itself that the summons has been effectually served as directed by the Act.

4. The duty of the local Courts is, notwithstanding repeated admonitions, so often imperfectly performed in this matter that it appears to the High Court necessary to remind them that no Court can rightly proceed to hear a suit or an appeal *ex parte* until it has been proved to the *satisfaction* of that Court that the summons to a defendant to appear, or notice to a respondent of the hearing of an appeal, as the case may be, has been duly served,—*i. e.*, has been served strictly in such manner as the law provides.

5. The service should be personal in all cases in which personal service is practicable, and the Court ought not in *ex parte* cases to act upon anything short of personal service, until it is satisfied that personal service could not reasonably be effected.

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6. The nature of the proof of service which the Court ought to require in each case, according as it falls under one or another of the various sections of the Civil Procedure Code relating to service of summons on defendants, may be shortly stated as follows:—

(1). When the summons or notice is served on the defendant or respondent personally, the service, and the signature of the defendant on the back of the summons or copy, should be proved by the affidavit or solemn declaration recorded in writing of the person who actually effected the service; and the identity of the person served, with the party to whom the process is addressed, should be proved by the affidavit or solemn declaration of some one personally acquainted with the party to be served.

(2). If the service be made under section 49 of Act VIII

NOTE.—The party causing the service to be effected must give proof to this effect. It is a matter of which, ordinarily speaking, the serving officers would have no knowledge.

of 1859 on an agent, it should be proved that this person was empowered to accept service, either by reason of his being one of the class of recognised agents described in section 17 of Act VIII of 1859, or by virtue of appointment for that purpose in writing.

(3). If the service be made under section 53, it should be proved by the affidavit or solemn declaration of the officer effecting the service, and, if necessary, of some other person or persons acquainted with the facts, that the defendant or respondent could not be found and had no agent empowered to accept the service, and that the person to whom the process was delivered was an *adult* male member of his family, and was actually residing with him at the time of such service.

(4). If the service be made under section 55, it should, in like manner, be proved that the defendant, or respondent, could not be found, and that there was no agent empowered to accept the service, nor any other person on whom the service could be

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made, and that the defendant, or respondent, *was actually dwelling* (a) The facts leading to this inference should be stated. *in* the house, on the outer door of which a copy of the process was fixed, at the time when it was so fixed.

(5). If the service be made under section 57, it should, in

(b) It should be stated how long and until when he resided in the house, and what has become of him.

which the defendant, or respondent, last resided (b), and that the service was made in all respects in conformity with the order for substituted service, which should accompany the process.

(6). If the service be made under section 61, it should be proved, in like manner, that the summons or notice could not be served on the defendant, or respondent, in person, and that he had no agent empowered to accept the service, and that the person to whom the process was delivered was an agent of the defendant, or respondent, in charge of the land or other immovable property forming the subject-matter of the suit.

(7). If the service be made under Section 63, it may be proved that the summons or notice was left at the *registered* office of the Company, or was delivered to any Director, Secretary, or other principal officer.

(8). If the summons or notice, when tendered, be declined by the defendant, or his agent, or a male member of his family, besides the proof required as to identity, &c., as stated above, it should be proved that the party was informed that the document tendered was a summons or notice, and that he was made acquainted with the nature and contents thereof.

(9). The Court should in all cases obtain the proof which is above described as requisite, according to the case, either by the affidavit or verified statement of the person by whom the service was effected, and of any person who may have accompanied the serving officer for the purpose of identifying the party to whom the process was addressed, or otherwise directing or assisting the serving officer; or, if deemed necessary, by the examination in Court as witnesses of such persons as the Court may think fit to examine.

(10). When the summons which has been served is the summons of another Court transmitted to the serving Court for the purpose of service only, then, upon service being effected, this latter Court should re-transmit the summons to the Court by which it was issued, together with the Nazir's return and the affidavits, verified statements, or depositions of the serving officer and the witnesses relative to the facts of the service.

7. The foregoing directions apply to, and must be followed in the cases of, all notices and judicial processes which, by section 108 of Act VIII of 1859, are required to be served in the manner directed for the service of summons upon a defendant to appear and answer.

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By order of the High Court,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

Certificate by Judge of due service of Summons, under Section 59.

"I do hereby certify that I did, on the
"day of 18 , cause a copy of the within
"summons (or notice) to be served upon the above-named re-
"spondent,"

or

" that the above summons (or notice) was not,
"in my opinion, duly served upon the above-named defendant,
"or respondent, for the following reasons:—"

ZILLAH

The of 18 .

}

Judge.

*Directions for Serving Officers, and forms of Returns to be made by
Nazirs.*

I. Nazirs, in serving summonses and other process under Act VIII of 1859, must carefully attend to the directions of the Act as to the service of process. Their attention is parti-

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cularly called to the fact that, wherever it is practicable, the service of process placed in their hands should be personal.

II. They will be held responsible for the due and regular service of all process entrusted to them for service by themselves and their subordinates, and in each case for the correctness of the statements made in the return.

No peon should be retained for the service of process who cannot read and write, or who is not capable of fully and intelligently carrying out these rules in so far as they relate to actual service.

III. Forms of returns to be made by Nazirs are annexed, which should be followed as nearly as the circumstances of the case admit.

IV. In all cases if the summons or other process is served personally, and the person served signs any acknowledgment of the service, the return shall state that fact, and refer to the signature of the party signing, thus—"that the said

" did, at the time of such service, in the presence
" of and sign
" the acknowledgment of the service endorsed on the summons
" (or other process) hereto annexed."

V. If the summons or other process was tendered and declined, it will be necessary to show that the contents of the same were brought to the knowledge of the party served.

The return must state—

" that the summons (or other process) was tendered and returned,
" and that the defendant or respondent refused to receive the
" same, whereupon
" informed him what the document was, and acquainted him with
" the nature and contents thereof."

FORM No. 1.

*Return of Service of Summons or Notice on Defendant in person,
under Section 49 of Act VIII of 1859.*

I do hereby certify that I did, on the day of

(a.) This word to be used if the summons has been declined. deliver (or tender (a) or cause to be delivered or tendered) a copy of the

summons hereto annexed under signature of
and the seal of the

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Court [with (if the document is in English, and the party to be served be a native) a translation thereof in the language and character] to the defendant (or respondent) (name and describe him by his residence and occupation and caste, and father's name if known : state facts as to signature, &c.)

FORM No. 2.

Return of Service of Summons or Notice on Agent, under Section 49.

I do hereby certify that I did, on the day of
 deliver (or tender (a) or cause to be
 (a.) *Ante.* delivered or tendered) a copy of the
 summons (or notice) hereto annexed, under the signature of the
 and seal of the Court [with
 (b.) If necessary "as I am informed and believe," (if the document is in English, and
 the party to be served be a native) a
 translation thereof in the language and
 character] to (name and describe him) in person, who is (b) an
 agent of the defendant (or respondent) em-
 powered to accept service of the same [or if a recognised agent,
 state how he is so]. (State facts as to signature.)

FORM No. 3.

Return of Service of Summons or Notice on a male member of the family, under Section 53.

I do hereby certify that, as the defendant (or respondent) cannot be found, and has, as far as I am aware, no agent to accept service of summons (or notice), I did on the
 day of deliver (or tender (a) or cause to be delivered
 (a.) *Ante.* or tendered) a copy of the summons
 (or notice) hereto annexed under the
 signature of the Court [with (if the document is
 in English, and the party to be served be a native) a translation

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thereof in the language and character] to the (state if relation or servant, and his apparent age) of the said defendant residing with him.

FORM NO. 4.

Return of Service of Summons or Notice, under Section 55.

I do hereby certify that, as the defendant (or respondent) cannot be found, and there is, as far as I am aware, no agent empowered to accept service of summons, nor any other person on whom the service can be made, I have fixed (or caused to be fixed) a copy of the summons (or notice) hereto annexed under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native) a translation thereof in the language and character] on the outer door of the house in which the defendant (or respondent) is now residing.

(State whether this is of server's own knowledge, or from information and belief.)

FORM NO. 5.

Return of Service of Summons or Notice, under Section 57.

I do hereby certify that I have, under an order of the Court of the made under Section 57 of Act VIII of 1859, served (or caused to be served) the summons (or notice) hereto annexed, by fixing up a copy thereof under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native) a translation thereof in the language and character] upon a conspicuous place in the Court-house of the , and also upon the door of a certain house (describe it) in which, as I was informed and believe, the defendant (or respondent) last resided.

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FORM No. 6.

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ORDERS.*Return of Service of Summons or Notice, under Section 61.*

I do hereby certify that, as the defendant (or respondent) cannot be found, and has, as far as I am aware, no agent empowered to accept service of summons, I did on the day of deliver (or tender (a) or cause to be delivered or tendered) a copy of the summons hereto annexed, under the signature of the and seal of the Court [with (if the document is in English, and the party to be served be a native,) a translation thereof in the language and character] to (name and description) who is (or as I am informed and believe, is) an agent of the defendant in charge of (state what land or immoveable property), which is the subject-matter of the suit.

FORM No. 7.

Return of Service of Summons or Notice, under Section 63.

I do hereby certify that I did on the day of leave a copy of the summons (or notice) under the signature of the and seal of the Court at the registered office of the Company at No. Street [or did deliver (or tender) a copy to Mr. (state what his position is) an officer of the Company.]

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ORDERS.

To

CIRCULAR No. 11.

ALL CIVIL AND SESSIONS JUDGES
AND JUDICIAL COMMISSIONERS.*Dated Calcutta, the 13th April 1871.*

THE Accountant-General having complained that great delay occurs in the submission to his office of deposit registers and other returns of Civil Courts, the High Court, at the request of the Lieutenant-Governor of Bengal, directs the Civil and Sessions Judges and Judicial Commissioners under its control to require all Moonsiffs in

HIGH COURT, &c.,
CIVIL AND CRIMINAL.*Present:*

The Hon. J. P. Norman,
Offg. Chief Justice.

The Hon. G. Loch,
H. V. Bayley,
" L. S. Jackson,
" A. G. Macpherson,
" E. Jackson,
Judges.

their districts to submit their Treasury Accounts for each month punctually on the 27th of each month.

2. These returns should include the transactions of the 27th.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

CIRCULAR No. 13.

To

ALL CIVIL AND SESSIONS JUDGES,
MAGISTRATES, SUBORDINATE JUDGES,
AND SUB-DIVISIONAL OFFICERS.*Dated Calcutta, the 11th May 1871.*

As the Court's Circular orders are now issued in sufficient

HIGH COURT, &c.,
CIVIL AND CRIMINAL.*Present:*

The Hon. J. P. Norman,
Offg. Chief Justice.

The Hon. G. Loch,
H. V. Bayley,
" L. S. Jackson,
" A. G. Macpherson,
" E. Jackson,
Judges.

numbers to supply with a copy not only the Chief Court of each district, but also all the Courts of the district, civil or criminal, the Court, at the request of His Honor the Lieutenant-Governor, and in supersession of the instructions communicated by Circular Memo-

randum No. 3, dated 4th June 1869, directs that officers subor-

dinate to the High Court will no longer indent on the Alipore Jail Press direct for printed copies of Circulars.

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By order of the High Court,

(Sd.) W. M. SOUTTAR,
Offg. Registrar.

CIRCULAR No. 14.

To

ALL ZILLA JUDGES AND JUDICIAL COMMISSIONERS.

Dated Calcutta, the 12th May, 1871.

THE Court directs that cases of the Small Cause Court Class,

HIGH COURT,
CIVIL SIDE.

Present:

The Hon. J. P. Norman,
Offy. Chief Justice.
The Hon. G. Loch,
" H. V. Bayley,
" E. Jackson,
Judges.

where the value does not exceed Rs. 50, decided by Moonsiffs in the exercise of the powers vested in them by the Government Notification* of the 20th February last; be shown separately in the Quarterly Statements A. and

B., prescribed by Circular No. 31, dated 4th November last. This will not necessitate the introduction of a fresh column, as one already exists with the superscription "Small Cause Court

Moonsiff of $\begin{cases} \text{Not exceeding} \\ \text{Rs. 50.} \\ \text{Exceeding} \\ \text{Rs. 50.} \end{cases}$ Class ;" but it will require a distinction to be made, such as is indicated on the margin, in that column, between the cases decided by Moonsiffs as Small Cause Court Judges, and those decided in their capacity of Moonsiffs.

2. All Zilla Judges and Judicial Commissioners, in whose districts Moonsiffs have been vested with the powers described in Section 29 of the Bengal Civil Courts Act, 1871, are also enjoined to require from such Moonsiffs *monthly* returns of the

* At page 417 of the *Calcutta Gazette* of the 22nd February 1871.

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work performed by them in the exercise of their special jurisdiction, in the Forms Nos. 1 and 2, prescribed by Circular Order No. 12, dated 19th December 1862, to be submitted, not to the High Court, as the returns of Small Cause Court Judges are, but to the Judge of the District. Samples of the forms are sent herewith.

3. All the Zillah Judges and Judicial Commissioners in question are at the same time instructed to exercise a strict supervision over the Moonsiffs, in respect of these cases, by frequently sending for their books, and watching how the evidence is taken, and in such other respects as may be possible.

4. It is also declared that pleaders of the Junior Grade appear in such cases before the Moonsiffs' Courts.

By order of the High Court,

(Sd.) W. M. SOUTTAR,

Offg. Registrar.

No. 1.
*Statement of Cases on the file of the Court of Small Causes of
 during*

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Description of Cases.	Pendings at the end of														Pendings at the end of																												
	TOTAL.		Ex-parte.		Confession.		On their Merits.		Total of Cases decided on Trial.		Otherwise disposed of.		Total of every description disposed of.		Pending at the end of		1		2		3		4		5		6		7		8		9		10		11		12		13		14
1. Money claims, whether on bond or other contract ...																	Total ..																										
2. Rent of houses ...																																											
3. Claims for personal property ...																																											
4. Claims for damages ...																																											

The

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Judge of the Small Cause Court.

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*Statement of Applications for Execution of Decrees on the file of the Court of Small Causes at
No. 2.*

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during

SUPREME COUNCIL ACTS.

ACTS OF 1871.

GOVERNMENT OF INDIA.

Act No. I.

THE CATTLE-TRESPASS ACT.

An Act to consolidate and amend the Law relating to Trespass by Cattle.

WHEREAS it is expedient to consolidate and amend the law relating to trespasses by cattle; It is hereby enacted as follows:—

CHAPTER I.—*Preliminary.*

Short title. 1. This Act may be called ‘The Cattle-trespass Act, 1871.’

Local extent. It extends to the whole of British India except the Presidency Towns and such districts or tracts of country as the Local Government, with the sanction of the Governor-General in Council, may exclude from its operation.

Commencement of Act. And it shall come into force on the passing thereof.

Repeal of Acts. 2. The Acts mentioned in the Schedule hereto annexed are repealed.

References to repealed Acts. References to any of the said Acts in Acts passed subsequently thereto shall be read as if made to this Act.

All pounds established, pound-keepers appointed, and villages determined, under Act No. III of 1857 (*relating to trespasses by Cattle*), shall be deemed to be, respectively, established, appointed, and determined under this Act.

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3. In this Act :—

'Officer of Police' includes also Village Watchman, and Interpretation-clause. 'Cattle' includes also elephants, camels, buffalos, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids.

CHAPTER II.—*Pounds and Pound-keepers.*

4. Pounds shall be established at such places as the Magistrate of the District, subject to the general control of the Local Government, from time to time, directs.

The village by which every pound is to be used shall be determined by the Magistrate of the District.

5. The pounds shall be under the control of the Magistrate of the District; and he shall fix, and may from time to time alter, the rates of charge for feeding and watering impounded cattle.

Appointment of pound-keepers.

6. The Magistrate of the District shall also appoint for each pound a pound-keeper:

Provided that, in the Presidency of Fort St. George, the heads of villages, and, in the Presidency of Bombay, the police pâtîls, or (where there are no police pâtîls) the heads of the villages, shall be *ex-officio* the keepers of village pounds.

Ex-officio pound-keepers in Madras and Bombay.

Every pound-keeper appointed by the Magistrate of the District may be suspended or removed by such Magistrate.

Pound-keepers may hold other offices.

Any pound-keeper may hold simultaneously any other office under Government.

Pound-keepers to be public servants.

Every pound-keeper shall be deemed a public servant within the meaning of the Indian Penal Code.

Duties of Pound-keepers.

7. Every pound-keeper shall keep such registers and furnish To keep registers and furnish returns such returns as the Local Government from time to time directs.

To register seizures.

8. When cattle are brought to a pound, 1871
Act I.
the pound-keeper shall enter in his register,

- (a) the number and description of the animals,
 - (b) the day and hour on and at which they were so brought,
 - (c) the name and residence of the seizer, and
 - (d) the name and residence of the owner, if known,
- and shall give the seizer or his agent a copy of the entry.

To take charge of and
feed cattle.

9. The pound-keeper shall take charge
of, feed, and water the cattle until they are
disposed of as hereinafter directed.

CHAPTER III.—*Impounding Cattle.*

10. The cultivator or occupier of any land,

Cattle damaging land. or any person who has advanced cash
for the cultivation of the crop or pro-
duce on any land,

or the vendee or mortgagee of such crop or produce, or any
part thereof,

may seize or cause to be seized any cattle trespassing on such
land, and doing damage thereto or to any crop or produce there-
on, and take them or cause them to be taken without unnecessary
delay to the pound established for the village in which the land
is situate.

All officers of police shall, when required, aid in preventing

Police to aid seizures. (a) resistance to such seizures and (b) res-
cues from persons making such seizures.

11. Persons in charge of public roads, pleasure-grounds,

Cattle damaging public
roads, canals, and embank-
ments. plantations, canals, drainage-works, em-
bankments and the like, and officers of
police may seize, or cause to be seized, any

cattle doing damage to such roads, grounds, plantations, canals,
drainage-works, embankments and the like, or the sides or
slopes of such roads, canals, drainage-works or embankments,
or found straying thereon,

and shall take them without unnecessary delay to the nearest
pound.

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12. For every head of cattle impounded as aforesaid, Fines for cattle im- the pound-keeper shall levy a fine ac- pounded. cording to the following scale :—

Elephant two rupees.
Camel or buffalo eight annas.
Horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow or heifer four "
Calf, ass or pig two "
Ram, ewe, sheep, lamb, goat or kid one anna.

All fines so levied shall be sent to the Magistrate of the District through such officer as the Local Government from time to time directs.

A list of the fines and of the rates of charge for feeding and List of fines and charges for feeding. watering cattle shall be stuck up in a conspicuous place on or near to every pound.

CHAPTER IV.—*Delivery or Sale of Cattle.*

13. If the owner of impounded cattle or his agent appear and claim the cattle, the pound-keeper shall deliver them to him on payment of the fines and charges incurred in respect of such cattle.

Procedure when owner claims the cattle and pays fines and charges. The owner or his agent on taking back the cattle, shall sign a receipt for them in the register kept by the pound-keeper.

14. If the cattle be not claimed within seven days from the date of their being impounded, the pound-keeper shall report the fact to the officer in charge of the nearest police-station, or to such other officer as the Magistrate of the District appoints in this behalf.

Such officer shall thereupon stick up in a conspicuous part of his office a notice stating—

- (a) the number and description of the cattle,
- (b) the place where they were seized,
- (c) the place where they are impounded,

and shall cause proclamation of the same to be made by beat of drum in the village and at the market-place nearest to the place of seizure.

If the cattle be not claimed within seven days from the date of the notice, they shall be sold by public auction by the said

officer, or an officer of his establishment deputed for that purpose at such place and time and subject to such conditions as the Magistrate of the District by general or special order from time to time directs:

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Provided that if any such cattle are, in the opinion of the Magistrate of the District, not likely to fetch a fair price if sold as aforesaid, they may be disposed of in such manner as he thinks fit.

15. If the owner or his agent appear and refuse to pay the said fines and expenses, on the ground that the seizure was illegal and that the owner is about to make a complaint under section twenty, then, upon deposit of the fines and charges incurred in respect of the cattle, the cattle shall be delivered to him.

16. If the owner or his agent appear, and refuse or omit to pay, or (in the case mentioned in section fifteen) to deposit the said fines and expenses, the cattle, or as many of them as may be necessary, shall be sold by public auction by such officer, at such place and time, and subject to such conditions as are referred to in section fourteen.

The fines leviable and the expenses of feeding and watering, together with the expenses of sale, if any, shall be deducted from the proceeds of the sale.

The remaining cattle and the balance of the purchase-money, if any, shall be delivered to the owner or his agent, together with an account showing—

- (a) the number of cattle seized,
- (b) the time during which they have been impounded,
- (c) the amount of fines and charges incurred,
- (d) the number of cattle sold,
- (e) the proceeds of sale, and
- (f) the manner in which those proceeds have been disposed of.

The owner or his agent shall give a receipt for the cattle delivered to him and for the balance of the purchase-money (if any) paid to him according to such account.

Receipt.

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Act I. Disposal of fines, expenses and surplus proceeds of sale.

17. The officer by whom the sale was made shall send to the Magistrate of the District the fines so deducted.

The charges for feeding and watering deducted under section sixteen shall be paid over to the pound-keeper, who shall also retain and appropriate all sums received by him on account of such charges under section thirteen.

The surplus unclaimed proceeds of the sale of cattle shall be sent to the Magistrate of the District, who shall hold them in deposit for three months, and, if no claim thereto be preferred and established within that period, shall, at its expiry, dispose of them as hereinafter provided.

Application of fines and unclaimed proceeds of sales. 18. Out of the sums received on account of fines and the unclaimed proceeds of the sale of cattle, shall be paid—

(a) the salaries allowed to pound-keepers under the orders of the Local Government;

(b) the expenses incurred for the construction and maintenance of pounds, or for any other purpose connected with the execution of this Act;

and the surplus (if any) shall be applied, under orders of the Local Government, to the construction and repair of roads and bridges and to other purposes of public utility.

19. No officer of police, or other officer or pound-keeper appointed under the provisions herein contained shall, directly or indirectly, purchase any cattle at a sale under this Act.

No pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this Chapter, unless such release or delivery is ordered by a Magistrate or Civil Court.

Pound-keepers when not to release impounded cattle.

CHAPTER V.—*Complaints of illegal Seizures.*

20. Any person whose cattle have been seized and detained under this Act may, at any time within ten days from the date of the seizure, make a complaint to the Magistrate of the District, or any Magistrate

Power to make complaints.

authorized to receive and try charges without reference by the Magistrate of the District.

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21. The complaint shall be made by the complainant in person, or by an agent personally acquainted with the circumstances. It may be either in writing or verbal. If it be verbal, the substance of it shall be taken down in writing by the Magistrate.

If the Magistrate, on examining the complainant or his agent, sees reason to believe the complaint to be well founded, he shall summon the person complained against, and make an enquiry into the case.

22. If the seizure be adjudged illegal, the Magistrate shall award to the complainant, for the loss caused by the seizure and detention, reasonable compensation, not exceeding one hundred rupees, to be paid by the person who made the seizure, together with all fines paid and expenses incurred by the complainant in procuring the release of the cattle;

and if the cattle have not been released, the Magistrate shall, besides awarding such compensation, order their release, and direct that the fines and expenses leviable under this Act shall be paid by the person who made the seizure.

23. The compensation, fines and expenses mentioned in section twenty-two may be recovered as if they were fines imposed by the Magistrate.

CHAPTER VI.—*Penalties.*

24. Whoever forcibly opposes the seizure of cattle liable to be seized under this Act,

and whoever rescues the same after seizure, either from a pound, or from any person taking or about to take them to a pound, such person being near at hand and acting under the powers conferred by this Act,

shall, on conviction before a Magistrate, be punished with imprisonment for a period not exceeding six months, or with fine not exceeding five hundred rupees, or with both.

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25. Any fine imposed for the offence of mischief by causing cattle to trespass on any land may be recovered by sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the property of the person convicted of the offence, or were only in his charge when the trespass was committed.

26. Any owner or keeper of pigs, who, through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land, or any public road, by allowing such pigs to trespass thereon, shall, on conviction before a Magistrate, be punished with fine not exceeding ten rupees.

27. Any pound-keeper releasing or purchasing or delivering cattle contrary to the provisions of section nineteen, or omitting to provide any impounded cattle with sufficient food and water, or failing to perform any of the other duties imposed upon him by this Act, shall, over and above any other penalty to which he may be liable, be punished, on conviction before a Magistrate, with fine not exceeding fifty rupees.

Such fines may be recovered by deductions from the pound-keeper's salary.

28. All fines recovered under section twenty-five, section twenty-six, or section twenty-seven may be appropriated in whole or in part as compensation for loss or damage proved to the satisfaction of the convicting Magistrate.

CHAPTER VII.—*Suits for Compensation.*

29. Nothing herein contained prohibits any person whose crops or other produce of land have been damaged by trespass of cattle, from suing for compensation in any competent Court.

30. Any compensation paid to such person under this Act by order of the convicting Magistrate, shall be set-off and deducted from any sum claimed by or awarded to him as compensation in such suit.

SCHEDULE.

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Acts II & III.

(See Section 2.)

Number and Year.	Title of Act.
III of 1857	... An Act relating to trespasses by cattle.
V of 1860	... An Act to amend Act III of 1857 (<i>relating to trespasses by cattle</i>).
XXII of 1861	... An Act to amend Act III of 1857 (<i>relating to trespasses by cattle</i>).

Act No. II.*An Act to extend the Prisons' Act, 1870, to Coorg.*

Preamble.

FOR the purpose of extending the Prisons' Act, 1870, to Coorg; It is hereby enacted as follows:—

1. The said Act shall extend to the territories under the Extension to Coorg of administration of the Chief Commissioner Act XXVI of 1870. of Coorg, but subject to the following modifications (that is to say):—

(a) The preamble and sections one and six shall be construed as if, after the words 'Central Provinces,' the word 'Coorg' were inserted.

(b) Section one shall be construed as if, for the words and figures 'December, 1870,' the words and figures 'February, 1871' were substituted.

Act No. III.**THE INDIAN PAPER CURRENCY ACT.***An Act to consolidate and amend the Law relating to the Government Paper Currency.*

WHEREAS it is expedient to consolidate and amend the law relating to the Government Paper Currency; It is hereby enacted as follows:—

Preamble.

I.—Preliminary.

Short title.

1. This Act may be called "The Indian Paper Currency Act, 1871."

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Local extent.

It extends to the whole of British India;

Commencement.

And it shall come into force on the passing thereof.

Acts repealed.

2. The Acts mentioned in the Schedule hereto annexed are repealed.

All appointments made, rules prescribed, circles of issue established, notifications published, and notes issued under any such Act shall be deemed to be respectively made, prescribed, established, published, and issued under this Act.

II.—The Department of Issue.

3. There shall continue to be a Department of the public service, to be called the Department of Issue, whose function shall be the issue of promissory notes of the Government of India payable to bearer on demand, for such sums, not being less than five rupees, as the Governor-General in Council from time to time directs.

4. At the head of such Department shall be an officer called the Head Commissioner of the Department of Issue, and two other officers, called respectively, the Commissioner of the Department of Issue at Madras and the Commissioner of the Department of Issue at Bombay.

5. The Governor-General in Council may, from time to time, by order published in the *Gazette of India*,

establish Districts, to be called Circles of Issue, three of which circles shall include the Towns of Calcutta, Madras, and Bombay, respectively,

appoint in each circle some one town to be the place of issue of notes, as hereinafter provided,

establish in such town an Office or Offices of Issue, and declare that, for the purposes of this Act, any such town (other than Calcutta, Madras or Bombay) shall be deemed to be situate within such Presidency as is specified in the order.

6. For each Circle of Issue other than those which include the Towns of Calcutta, Madras and Bombay, there shall be an officer called the Deputy Commissioner of Issue.

7. For the purposes of this Act, the Commissioners at Madras and Bombay shall be subordinate to the Head Commissioner; the Deputy Commissioners in the Presidency of Fort William in Bengal shall be subordinate to the Head Commissioner; and

the Deputy Commissioners in the Presidencies of Fort St. George and Bombay shall be subordinate to the Commissioners of Madras and Bombay, respectively.

8. All officers under this Act shall be appointed and may be suspended or removed by the Governor-General in Council.

III.—Supply and Issue of Currency Notes.

9. The Head Commissioner of Issue shall provide promissory notes of the Government of India payable to bearer on demand, of the denominations prescribed under this Act, and shall supply the Commissioners at Madras and Bombay, and the several Deputy Commissioners with such notes as they require for the purposes of this Act.

All such notes shall bear upon them the name of the town from which they are severally issued, and Notes where payable. shall be payable only—

at the Office or Offices of Issue of such town and at the Presidency town of the Presidency within which such town is situate.

10. The name of the Head Commissioner, of either of the Commissioners, of a Deputy Commissioner, or of some other person authorized by the said Head Commissioner, or by either of the said Commissioners, to sign notes issued under this Act, shall be subscribed to every such note, and may be impressed thereon by machinery.

Names so impressed shall be taken to be valid signatures.

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11. The Head Commissioner, the Commissioners, and the Deputy Commissioners shall, in their respective Circles of Issue, on the demand of any person, issue from the Office or Offices of Issue established in their respective Circles, promissory notes of the Government of India payable to bearer on demand, of the denominations prescribed under this Act, on the terms following :—

(a) In exchange for the amount thereof in current silver coin of the Government of India ; or,

(b) In exchange for the amount thereof in silver bullion or foreign silver coin at the rate of nine hundred and seventy-nine rupees per one hundred and eighty thousand grains of silver fit for coinage and of the standard fineness prescribed by the Indian Coinage Act, 1870 :

Provided that in all places where there is no Mint of the Government of India, any such Head Commissioner, Commissioner, or Deputy Commissioner may refuse to issue notes in exchange for silver bullion or foreign coin under this section.

12. The Governor-General in Council may, from time to time, by order published in the *Gazette of India*, direct that notes to an extent to be specified in the order, not exceeding one-fourth of the total amount of issues represented by coin and bullion as herein provided, shall be issued at such Offices of Issue as are named in the order, in exchange for gold coin of full weight of the Government of India or for foreign gold coin or gold bullion, at the rates and according to the rules and conditions fixed by such order.

13. The Head Commissioner, Commissioners and Deputy Commissioners may require any bullion or foreign coin received under section eleven or section twelve to be melted and assayed.

Any loss of weight caused by such melting or assay shall be borne by the person tendering the bullion or coin.

Loss of weight.

Expense of melting and
assaying bullion received
for notes.

14. Every person so tendering bullion or foreign coin and depositing it in any Office of Issue shall, after the expiration of the time necessary for melting and assaying the same, be entitled to receive therefor a certificate signed by the person authorized to issue the notes aforesaid.

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Contents of certificate. Such certificate shall—
 (a) acknowledge the receipt of such bullion or foreign coin,
 (b) state the amount of notes issued under this Act, or of such notes and cash, to which the holder is entitled in exchange for such bullion or coin,
 (c) state the interval on the expiration of which, if the certificate be presented to such office, the holder shall be entitled to receive such amount.

15. Within any of the said Circles of Issue, a note issued under this Act from any Office of Issue Notes where legal tender. in such Circle, shall be a legal tender to the amount expressed in such note, in payment or on account of— any revenue or other claim to the amount of five rupees and upwards due to the Government of India,

any sum of five rupees and upwards due by the Government of India, or by any body corporate or person in British India :

Provided that no such note shall be deemed to be a legal tender by the Government of India at any Office of Issue.

IV.—Reserve.

16. The whole amount of the coin and bullion received under this Act for notes shall be retained and secured as a reserve to pay such notes, with the exception of such an amount, not exceeding sixty millions of rupees, as the Governor-General in Council, with the consent of the Secretary of State for India, from time to time fixes.

Except amount fixed as minimum limit of circulation. 17. The amount so fixed shall be published in the *Gazette of India*, and the whole or such part thereof as the Governor-General in Council from time to time fixes shall be invested in securities of the Govern-

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ment of India: the said coin, bullion and securities shall be appropriated and set apart to provide for bullion, and securities. the satisfaction and discharge of the said notes; and the said notes shall be deemed to have been issued on the security of such coin, bullion and securities, as well as on the general credit of the Government.

Provided that any silver bullion or foreign coin received under this Act may be sold or exchanged for silver coin of the Government of India, and that any gold coin or bullion received under this Act may be sold or exchanged for silver coin or bullion to be so appropriated and set apart instead of the gold coin or bullion.

For the purposes of this section, silver bullion and coin shall be rated at ninety-eight rupees per eighteen thousand grains of standard fineness, and gold bullion and coin at the rates fixed by the Governor-General in Council under section twelve.

18. The Government Securities so purchased shall be held by the Head Commissioner and the Master Trustees of securities purchased under Act. of the Mint at Calcutta in trust for the Secretary of State for India in Council.

19. The Head Commissioner may, at any time when ordered so to do by the Governor-General in Council, sell and dispose of any portion of the above-mentioned limited amount of Government Securities.

For the purpose of effecting such sales, the Master of the Mint at Calcutta shall, on a request in writing from the Head Commissioner, at all times sign and endorse such Government Securities, and the said Head Commissioner, if so directed by the Governor-General of India in Council, may purchase Government Securities to replace such sales.

20. The interest accruing due on the securities purchased and held under this Act shall be entered in a separate account, to be annually rendered by the Head Commissioner to the Governor-General in Council.

The amount of such interest shall, from time to time, as it becomes due, be paid to the credit of the Government of India, under the head of "Profits of Notes Circulation,"

and an account showing the amount of such profits and of
 the charges and expenses incidental thereto,
 Annual account. shall be made up and published annually
 in the *Gazette of India*.

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V.—Private Bills payable to Bearer on Demand.

21. No body corporate or person in British India shall draw,
 Prohibition of issue of accept, make or issue any bill of exchange,
 private bills or notes payable hundi, promissory note or engagement for
 to bearer on demand. the payment of money payable to bearer on
 demand, or borrow, owe, or take up any sum or sums of money
 on the bills, hundis or notes payable to bearer on demand, of any
 such body coporate or of any such person :

Provided that cheques or drafts payable to bearer on demand
 Exception in favor of or otherwise, may be drawn on bankers,
 cheques. shroffs, or agents, by their customers or con-
 stituents, in respect of deposits of money in the hands of such
 bankers, shroffs, or agents, and held by them at the credit and
 disposal of the persons drawing such cheques or drafts.

22. Any body corporate or person committing any offence
 Penalty for issuing such under section twenty-one shall, on convic-
 bills or notes. tion before a Magistrate of Police or a
 person exercising the full powers of a Magistrate, be punished
 with a fine equal to the amount of the bill, hundi, note or engage-
 ment in respect whereof the offence is committed.

Every prosecution under this section shall be instituted by
 the Head Commissioner, Commissioner or
 Prosecutions. Deputy Commissioner, as the case may be,
 of the Circle of Issue in which such bill, hundi, note or engage-
 ment is drawn, accepted, made or issued.

All fines imposed under this section may be recovered, if for
 offences committed outside the local limits
 Recovery of fines. of the Presidency towns, in the manner
 prescribed by the Code of Criminal Procedure, and, if for offences
 committed within those limits, in the manner prescribed by any
 Act regulating the Police of those towns in force for the time
 being.

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Monthly abstracts of ac-
counts.*VI.—Miscellaneous.*

23. An abstract of the accounts of the Department of Issue showing—

- (a) the whole amount of notes in circulation,
- (b) the amount of coin and bullion reserved, distinguishing gold from silver, and
- (c) the amount of the Government Securities held by the said Department,

shall be made up monthly in Calcutta, and published as soon as may be in the *Gazette of India*.

24. All notes issued under this Act shall be deemed to be Description of notes in promissory notes of the Government of indictments. India, and may be described as promissory notes of the Government of India in all indictments, and in criminal and civil proceedings.

Supplementary powers of the Government of India. 25. The Governor-General in Council may, from time to time, by notification in the *Gazette of India*—

- (1) fix the amounts (not being less than five rupees) for which notes shall be issued under this Act,
- (2) alter the limits of any of the said Circles of Issue,
- (3) declare the places at which notes shall be issued under this Act,
- (4) fix the rates, rules, and conditions, at and according to which gold may be taken in exchange for Government promissory notes issued under this Act,
- (5) fix the charge for melting and assaying bullion and foreign coin received for such notes,
- (6) fix the interval on the expiration of which holders of certificates under section fourteen shall be entitled to receive such notes,
- (7) regulate any matters relative to Paper Currency which are not provided for by this Act,
- (8) revoke or alter any notification previously made under this Act.

Every such notification shall come into force on the day therein in that behalf mentioned, and shall have effect as if it were enacted in this Act : 1871
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Provided that no notification under clause (4) of this section shall have effect until six months have elapsed from the date of its appearance in the *Gazette of India*.

SCHEDULE.

Number and Year of Act.	Title.
XIX of 1861 ...	An Act to provide for a Government Paper Currency.
XXIV of 1861 ...	An Act to enable the Banks of Bengal, Madras and Bombay to enter into arrangements with the Government for managing the issue, payment and exchange of Government Currency Notes and certain business hitherto transacted by the Government Treasuries.
I of 1866 ...	An Act to amend Act XIX of 1861 (<i>to provide for a Government Paper Currency</i>).
XXX of 1867 ...	An Act to amend Act XIX of 1861 (<i>to provide for a Government Paper Currency</i>).
XV of 1870 ...	An Act for the further amendment of Act No. XIX of 1861.

ACT NO. IV.

THE CORONERS' ACT.

An Act to consolidate and amend the Laws relating to Coroners.

WHEREAS it is expedient to consolidate and amend the laws relating to Coroners in the Presidency Towns; It is hereby enacted as follows:—
Preamble.

CHAPTER I.—Preliminary.

Short title. 1. This Act may be called “The Coroners’ Act, 1871:”

Local extent. It extends to the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay;

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Commencement.

And it shall come into force on the passing thereof.

2. The enactments mentioned in the first Schedule thereto annexed are repealed to the extent specified in the third column of the said schedule.
Repeal of enactments.

CHAPTER II.—*Appointment of Coroners.*

3. Within the local limits of the ordinary original civil jurisdiction of each of the said High Courts, there shall be a Coroner. Such Coroners shall be called, respectively, the Coroner of Calcutta, the Coroner of Madras, and the Coroner of Bombay.

Their appointment, suspension and removal.

4. Every such officer shall be appointed and may be suspended or removed by the Local Government.

Present Coroners.

Every person now holding such office shall be deemed to have been appointed under this Act.

Coroners to be "public servants."

5. Every Coroner shall be deemed a public servant within the meaning of the Indian Penal Code.

Power to hold other offices.

6. Any Coroner may hold simultaneously any other office under Government.

7. Every person hereafter appointed to the office of Coroner
Oath to be taken by
Coroner.

- shall take and subscribe, before one of the Judges of the High Court, an oath that he will faithfully discharge the duties of his office.

CHAPTER III.—*Duties and Powers of Coroners.*

8. When a Coroner is informed that the death of any person has been caused by accident, homicide, suicide, or suddenly by means unknown, or that any person being a prisoner has died in prison, and that the body is lying within the place for which the Coroner is so appointed,

the Coroner shall inquire into the cause of death.

Every such inquiry shall be deemed a judicial proceeding within the meaning of section one hundred and ninety-three of the Indian Penal Code.

9. Whenever a prisoner dies in a prison situate within the Coroners to be sent for place for which a Coroner is so appointed, when prisoner dies. the Superintendent of the prison shall send for the Coroner before the body is buried. Any Superintendent failing herein shall, on conviction before a Magistrate, be punished with fine not exceeding five hundred rupees.

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Nothing in the former part of this section applies to cases in which the death has been caused by cholera or other epidemic disease.

10. Whenever an inquest ought to be holden on any body Power to hold inquests on bodies within local limits wherever cause of death occurred. lying dead within the local limits of the jurisdiction of any Coroner, he shall hold such inquest, whether or not the cause of death arose within his jurisdiction.

11. A Coroner may order a body to be disinterred within a reasonable time after the death of the deceased person, either for the purpose of taking an original inquisition where none has been taken, or a further inquisition where the first was insufficient.

12. On receiving notice of any death mentioned in section eight, the Coroner shall summon five, Summoning jury. seven, nine, eleven, thirteen or fifteen respectable persons to appear before him at a time and place to be specified in the summons, for the purpose of inquiring when, how, and by what means the deceased came by his death.

Inquest may be on Sunday. Any inquest under this Act may be held on a Sunday.

13. When the time arrives, the Coroner shall proceed to the place so specified, open the Court by proclamation, and call over the names of the jurors.

14. When a sufficient jury is in attendance, he shall administer an oath to each juror to give a true verdict according to the evidence, and shall then proceed with the jury to view the body.

Jurors to be sworn. 15. The Coroner and the jury shall view and examine the body at the first sitting of the inquest, and View of body. The Coroner shall make such observations to the jury as the appearance of the body requires.

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16. The Coroner shall then make proclamation for the attendance of witnesses, or, where the inquiry is conducted in secret, shall call in separately such as know anything concerning the death.

17. It shall be the duty of all persons acquainted with the circumstances attending the death to appear before the inquest as witnesses: the Coroner shall enquire of such circumstances and the cause of the death; and if before or during the inquiry he is informed that any person can give evidence material thereto, may issue a summons requiring him to attend and give evidence on the inquest.

Any person failing so to attend or give evidence shall be deemed to have committed an offence under section one hundred and seventy-four or one hundred and seventy-six of the Indian Penal Code, as the case may be.

For the purpose of causing prisoners to be brought up to give evidence, the Coroner shall be deemed a Criminal Court within the meaning of Act No. XV of 1869 (*to provide facilities for obtaining the evidence and appearance of prisoners and for service of process upon them.*)

18. The Coroner may direct the performance of a *post mortem* examination, with or without an analysis of the contents of the stomach or intestines, by any medical witness summoned to attend the inquest: and every medical witness, other than the Chemical Examiner fees to medical witnesses. to Government, shall be entitled to such reasonable remuneration as the Coroner thinks fit.

19. All evidence given under this Act shall be on oath, and the Coroner shall be bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person.

Witnesses unacquainted with the English language shall be examined through the medium of an interpreter, who shall be sworn to interpret truly as well the oath, as the questions put to, and the answers given by, the witnesses.

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After each witness has been examined, the Coroner shall inquire whether the jury wish any further questions suggested by the jury. questions to be put to the witness, and if the jury wish that any such questions should be put, the Coroner shall put them accordingly.

20. The Coroner shall commit to writing the material parts of the evidence given to the jury, and shall read or cause to be read over such parts to the witness, and then procure his signature thereto.

Any witness refusing so to sign shall be deemed to have committed an offence under section one hundred and eighty of the Indian Penal Code.

Every such deposition shall be subscribed by the Coroner.

21. The Coroner may adjourn the inquest from time to time, and from place to place.

Whenever the inquest is adjourned, the Coroner shall take the recognizances of the jurors to attend at the time and place appointed, and notify to the witnesses when and where the inquest will be proceeded with.

The amount of such recognizances shall in each case be fixed by the Coroner.

22. When all the witnesses have been examined, the Coroner shall sum up the evidence to the jury, and the jury shall then consider of their verdict.

23. When the verdict is delivered, the Coroner shall draw up the inquisition according to the finding of the jury, or, when the jury is not unanimous, according to the opinion of the majority.

24. Every inquisition under this Act shall be signed by the Coroner with his name and style of office and by the jurors, and shall set forth—

- (1) where, when, and before whom, the inquisition is holden,
- (2) who the deceased is,
- (3) where his body lies,
- (4) the names of the jurors, and that they present the inquisition upon oath, and

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(5) where, when, and by what means, the deceased came by his death, and

(6) if his death was occasioned by the criminal act of another, who is guilty thereof.

If the name of the deceased be unknown, he may be described as a certain person to the jurors unknown.

Every such inquisition shall be in the form set forth in the second schedule hereto annexed, with such variation as the circumstances of each case require.

25. When the verdict is that the death has been caused by culpable homicide amounting to murder,

Procedure where verdict amounts to murder, culpable homicide, or killing by negligence.

or by culpable homicide not amounting to murder, or by a rash or negligent act not amounting to culpable homicide, the Coroner shall bind by recognizance any person knowing or declaring anything material touching such murder, homicide, or act to appear at the next criminal sessions at which the trial is to be, then and there to prosecute or give evidence against the party charged.

The Coroner shall certify and subscribe such recognizances,

Coroner to certify and deliver inquisition, depositions, and recognizances.

and shall, immediately after the inquest, deliver them, together with the inquisition and evidence, to the proper officer of the Court in which the trial is to be.

26. The Coroner shall also, where the verdict justifies him in so doing, issue his warrant for the apprehension of the person accused, and commit him to prison until he is thence discharged by due course of law, or, if he be already in prison, issue a detainer to the officer in charge of the jail in which he is.

27. In cases where the jury has found against any person a verdict of culpable homicide not amounting

Power to accept bail.

to murder or of killing by a rash or negligent act not amounting to culpable homicide, the Coroner may, if he thinks fit, accept bail with sufficient sureties for the appearance of such person at the next criminal sessions, and thereupon such person, if in custody of any officer of the Coroner's

Court, or in any jail under a warrant of commitment issued by the Coroner, shall be discharged therefrom.

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28. When the proceedings are closed, or before, if it be necessary to adjourn the inquest, the Coroner shall give his warrant for the burial of the body on which the inquest has been taken.

Warrant for burial.
Inquisitions not to be quashed for want of form.
29. No inquisition found upon or by any inquest shall be quashed for any technical defect.

In any case of technical defect, a Judge of the High Court may, if he thinks fit, order the inquisition to be amended, and the same shall forthwith be amended accordingly.

Amendment of inquisition.
30. It shall no longer be the duty of the Coroner to enquire whether any person dying by his own act was or was not *felo de se*, to enquire of treasure trove or wrecks, to seize any fugitive's goods, to execute process, or to exercise as Coroner any jurisdiction not expressly conferred by this Act.

Felo de se.

A *felo de se* shall not forfeit his goods.

Deodands.

Deodands are hereby abolished.

CHAPTER IV.—*Coroner's Juries.*

31. Whenever any person has been duly summoned to appear as a juror by a Coroner, and fails or neglects to attend. Fine on juror neglecting to attend. In the summons, the Coroner may cause him to be openly called in his Court three times to appear and serve as a juror; and upon the non-appearance of such person, and proof that such summons has been served upon him, or left at his usual place of abode, may impose such fine upon the defaulter, not exceeding fifty rupees, as to the Coroner seems fit.

Certificate as to default. 32. The Coroner shall make out and sign a certificate, containing the name and surname, the residence and trade or calling of every person so making default, together with the amount of the fine so imposed, and the cause of such fine,

and shall send such certificate to one of the Magistrates of the place of which he is the Coroner,

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and shall cause a copy of such certificate to be served upon Service of copy of certificate the person so fined, by having it left at his usual place of residence, or by sending the same through the Post Office, addressed as aforesaid and registered.

33. Thereupon such Magistrate shall cause the fine to be levied in the same manner as if it had been Levy of fine imposed by himself.

34. Unless in case of necessity, no person who has appeared, or has been summoned to appear, as a juror Jurors not to be twice summoned within the year. on an inquest and has not made default, shall, within one year after such appearance or summons, be summoned to appear as a juror under this Act.

35. When an inquest is held on the body of a prisoner dying within a prison, no officer of the prison Jurors on inquest on prisoner. and no prisoner confined therein shall be a juror on such inquest.

CHAPTER V.—*Rights and Liabilities of Coroners.*

36. Every Coroner shall be entitled to such salary for the performance of the duty of his office, as is prescribed in that behalf by the Governor-General in Council. Coroner's salary.

37. All disbursements duly made by a Coroner for fees to medical witnesses, hire of rooms for the Disbursements to be repaid. jury and the like, shall be repaid to him by the Local Government.

38. Every Coroner may, from time to time, with the previous sanction of the Local Government, appoint, by writing under his hand, a proper person to act for him as his deputy in the holding of inquests, and such deputy shall take and subscribe, before one of the Judges of the High Court, an oath Oath to be taken by deputy. that he will faithfully discharge the duties of his office.

All inquests taken and other acts done by any such deputy, under or by virtue of any such appointment, shall be deemed to be the acts of the Coroner appointing him;

Provided that no such deputy shall act for any such Coroner except during the illness of the said Coroner, or during his absence for any lawful and reasonable cause.

Every such appointment may at any time be cancelled and revoked by the Coroner by whom it was made.

Revocation of appointment.
Exemption from serving on juries.
39. No Coroner or Deputy Coroner shall be liable to serve as a juror.

40. Coroners and Deputy Coroners shall be privileged from arrest while engaged in the discharge of their official duty.

Privilege from arrest.
Penalty for failure to comply with Act.
41. Any Coroner or Deputy Coroner failing to comply with the provisions of this Act, or otherwise misconducting himself in the execution of his office, shall be liable to such fine as the Chief Justice of the High Court, upon summary examination and proof of the failure or misconduct, thinks fit to impose.

Limitation of suits.
42. No proceeding for anything done under this Act, or for any failure to comply with its provisions, shall be commenced or prosecuted after the expiration of three months from such fact or failure, nor after tender of sufficient amends.

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FIRST SCHEDULE.

Number and Year.	Title.	Extent of Repeal.
33 Geo. III, cap. fifty-two.	An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with their exclusive trade, under certain limitations; for establishing further Regulations for the government of the said territories and the better administration of justice within the same; for appropriating to certain uses the revenues and profits of the said Company; and for making provision for the good order and government of the towns of Calcutta, Madras and Bombay.	Section one hundred and fifty-seven.
9 Geo. IV, cap. seventy-four.	An Act for improving the administration of criminal justice in the East Indies.	Sections five and six and (so far as it relates to Coroners) section fifty-one.
Act No. IV of 1848.	An Act for regulating Coroners' Juries.	The whole.
Act No. XLV of 1850.	An Act to declare the law as to the jurisdiction of Coroners.	The whole.

SECOND SCHEDULE.

Form of Inquisition.

AN inquisition taken at on the day of , 187 , before E F, Coroner of , on view of the body of A B then and there lying dead, upon the oath of G H, I J, K L and M N, then and there duly sworn and charged to inquire when, how, and by what means the said A B came to his death.

We, the said jurors, find unanimously [or by a majority of] that the death of the said A B was caused, on or about the day of 187 , by [here state the cause of death as in the following examples—

1. *Cases of homicide*]—a blow on the head with a stick inflicted on him by C D, under such circumstances that the act of C D was justifiable [or accidental] homicide.

—a stab on the heart with a knife inflicted on him by C D, under such circumstances that the act of C D was culpable homicide not amounting to murder. [*or* culpable homicide amounting to murder, *or* a rash *or* negligent act not amounting to culpable homicide.]

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2. *Cases of accident*]—falling out of a boat into the river Hughli, whereby he was drowned.

—a kick from a horse which fractured his skull and ruptured blood-vessels in his head.

3. *Cases of suicide*]—shooting himself through the head with a pistol.

—arsenic, which he voluntarily administered to himself.

4. *Cases of sudden death by means unknown*]

—disease of the heart.

—apoplexy.

—sunstroke.

And so say the jurors upon their oath aforesaid.

Witness our hands. E F, Coroner of

G H, I J, K L, M N, O P (jurors).

Act No. V.

THE PRISONERS' ACT.

An Act to consolidate the Laws relating to Prisoners confined by order of a Court.

FOR the purpose of consolidating the laws relating to prisoners confined by order of a Court; It is hereby enacted as follows:—

Preamble. **I.—PRELIMINARY.**

Short title. 1. This Act may be called “The Prisoners' Act, 1871.”

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Local extent.

It extends to the whole of British India;

Commencement.

And it shall come into force on the passing thereof.

2. The Acts mentioned in the Schedule hereto annexed are repealed to the extent specified in the third column of the said Schedule.

II.—PRISONERS IN THE PRESIDENCY TOWNS.

3. All writs or warrants for the arrest or apprehension of Warrants and writs to any person, issued or awarded by the High Court in the exercise of its ordinary, extraordinary, or other criminal jurisdiction, shall be directed to and executed by any officer of Police within Officers. the local limits of such jurisdiction.

4. The Local Government may appoint officers who shall have authority to receive and keep Power to appoint Superintendent of Presidency prisoners committed to their custody under the provisions of this Part. Prisons.

All such officers appointed under any Act hereby repealed, shall be deemed to be appointed under this Act.

Such officers shall be called, in Calcutta, the Superintendent of the Presidency Prison; in Madras, the Superintendent of Prisons for the town of Madras; and in Bombay, by such title or respective titles as the Local Government from time to time directs.

Every such officer is hereinafter referred to as 'the Superintendent.'

5. The Superintendent is hereby authorized and required to Superintendents to detain persons committed. keep and detain all persons duly committed to his custody pursuant to the provisions of this Act, or otherwise by any Court, Judge, Justice of the Peace, Magistrate of Police, Coroner, or other public officer lawfully exercising civil or criminal jurisdiction according to the exigency of any writ, warrant, or order by which such person has been committed, or until such person is discharged by due course of law.

6. The Superintendent shall forthwith, after the execution of every such writ, order, or warrant, except Superintendents to return writs, &c., after execution or discharge. warrants of commitment for trial, or after the discharge of the person committed thereby, return such writ, order, or warrant to the Court or other officer by which or by whom the same has been issued or made, together with a certificate endorsed thereon and signed by the Superintendent, showing how the same has been executed, or why the person committed thereby has been discharged from custody before the execution thereof.

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7. Whenever any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to imprisonment or to death, the Delivery of persons sentenced to imprisonment or death. Court shall cause him to be delivered to the said Superintendent, together with the warrant of the said Court, and such warrant shall be executed by the Superintendent and returned by him to the High Court when executed.

8. Whenever any person is sentenced by the High Court in the exercise of its original criminal jurisdiction to transportation or penal servitude, the Delivery for intermediate custody of persons sentenced to transportation or penal servitude. Court shall cause him to be delivered for intermediate custody to the Superintendent, and the imprisonment of such person shall have effect from such delivery.

9. Whenever any Judge of a High Court makes, under any Order under Mutiny Act Act for the time being in force for punishing for intermediate custody. mutiny and desertion, and for the better payment of the Army and their quarters, an order for the intermediate custody of an offender sentenced by a Court Martial holden in India, the Judge shall order such offender to be detained for intermediate custody by the Superintendent.

10. Whenever any person is committed by the High Court, Committals by High Court in execution of a decree or for contempt. whether in execution of a decree or for contempt of Court, or other cause, he shall be taken by the officer to be appointed for that purpose by such Court, and shall be delivered to the Superintendent, together with a warrant of commitment.

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11. Whenever any person is sentenced by a Magistrate of Police for the town of Calcutta, Madras, or Bombay, to imprisonment, either absolutely or for default of payment of any fine imposed by any such Magistrate, or is committed to prison for failure to find security to keep the peace and to be of good behaviour, the Magistrate shall cause him to be delivered to the Superintendent, together with a warrant of the Court.

12. Every person committed by a Justice of the Peace or Magistrate or Coroner for trial by the High Court in the exercise of its original criminal jurisdiction shall be delivered to the Superintendent, together with a warrant of commitment, directing him to have the body of such person before the Court for trial, and the Superintendent shall, as soon as practicable, cause such person to be taken before the Court at a Criminal Session of the said Court, together with the warrant of commitment, in order that he may be dealt with according to law.

13. Pending any such inquiry as is mentioned in section eight of Act No. XXIII of 1861 (*to amend Act VIII of 1859*), which the High Court considers it necessary to make, the defendant may be delivered by the officer of the said Court to the Superintendent, subject to the provisions as to deposit of fees and as to release on security contained in the same section.

and the Superintendent is hereby authorized and required to detain such defendant in safe custody until he is re-delivered to the officer of the Court for the purpose of being taken before the said Court in pursuance of an order of the said Court or of a Judge thereof, or until he is released by due course of law.

14. Every person arrested in pursuance of a writ, warrant, or order of the High Court, in the exercise of its original civil jurisdiction, or in pursuance of a warrant of any Court established in Calcutta, Madras, or

Delivery of persons arrested in pursuance of warrant of High Court or Small Cause Court.

Bombay under Act No. IX of 1850 (*for the more easy recovery of small debts and demands in Calcutta, Madras, and Bombay*), or in pursuance of a warrant issued under section three of this Act,

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shall be brought without delay before the Court by which, or by a Judge of which, the writ, warrant, or order was issued, awarded, or made, or before a Judge thereof, if the said Court, or a Judge thereof, is then sitting for the exercise of original jurisdiction;

and if such Court, or a Judge thereof, is not then sitting for the exercise of original jurisdiction, shall, unless a Judge of the said Court otherwise orders, be delivered to the Superintendent for intermediate custody, and shall be brought before the said Court, or a Judge thereof, at the next sitting of the said Court or of a Judge thereof, for the exercise of original jurisdiction, in order that such person may be dealt with according to law;

and the said Court or Judge shall have power to make or award all necessary orders or warrants for that purpose.

15. Any warrant of commitment under Regulation III of 1818 of the Bengal Code (*for the Confinement of State Prisoners*), Regulation II of 1819 of the Madras Code (*for the Confinement of State Prisoners*), and Regulation XXV of 1827 of the Bombay Code (*for the Confinement of State Prisoners, and for the Attachment of the Lands of Chieftains and others for reasons of State*), may be directed to the Superintendent in the same manner as the same might have been directed to the Sheriff under Act No. XXXIV of 1850 (*for the better Custody of State Prisoners*) and Act No. III of 1858 (*to amend the Law relating to the arrest and detention of State Prisoners*).

III.—PRISONERS IN THE MOFUSSIL.

16. Officers in charge of prisons situate outside the local limits of the ordinary original civil jurisdictions of the High Courts of Judicature at Fort William, Madras and Bombay, shall be competent to give effect to any sentence or order or warrant for the detention of any person, passed or issued by any Court or tribunal acting under the authority of Her Majesty, or

Officers in charge of prisons may give effect to sentences of certain Courts.

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of the Governor-General in Council, or of any Local Government.

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17. A warrant under the official signature of an officer of such Court or tribunal shall be sufficient authority for holding any prisoner in confinement, or for sending any prisoner for transportation beyond sea, in pursuance of the sentence passed upon him.

Warrant of officer of such Court to be sufficient authority.

18. Any officer in charge of a prison doubting the legality of any warrant sent to him for execution under this Part, or the competency of the person whose official seal and signature are affixed thereto to pass the sentence and issue such warrant, shall refer the matter to the Local Government, by whose order on the case such officer and all other public officers shall be guided as to the future disposal of the prisoner.

Procedure where jailor doubts the legality of warrant sent to him for execution.

Pending any such reference, the prisoner shall be detained in such manner and with such restrictions or mitigations as may be specified in the warrant.

19. The Local Government may authorize the reception, Imprisonment in British India of persons convicted of certain offences in Native States. detention, or imprisonment in any place under such Government, for the periods specified in their respective sentences, of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty to imprisonment or transportation for any of the following offences:—

- counterfeiting coin,
- uttering counterfeit coin,
- murder,
- culpable homicide not amounting to murder,
- being a thug,
- voluntarily causing grievous hurt,
- administering poison,
- kidnapping,
- selling minors for purposes of prostitution,
- rape,
- robbery,
- dacoity,

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dacoity with murder,
 robbery or dacoity with attempt to cause death or grievous hurt,
 attempt to commit robbery or dacoity when armed with a deadly weapon,
 making preparation to commit dacoity, belonging to a gang of dacoits,
 dishonest misappropriation of property,
 breach of trust,
 house-burning,
 house-breaking,
 forgery, and
 theft of cattle ;
 or for an attempt to commit any of the above offences,
 or for abetment within the meaning of the Indian Penal Code of suicide by burning or burying alive, or of any of the other offences above specified,
 or for such other offences as the Governor-General in Council, from time to time, by order published in the *Gazette of India*, thinks fit to prescribe :

Provided that such sentences have been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

20. Every officer of Government so authorized as aforesaid shall forward with every prisoner a certificate of his conviction, and a copy of the proceedings held at the trial, that the same may be forthcoming for reference at the place where the sentence of imprisonment or transportation is carried into effect.

IV.—CONVICTS SENTENCED TO PENAL SERVITUDE.

21. Every person sentenced to be kept in penal servitude may, during the term of the sentence, be confined in such prison within British India as the Governor-General in Council by general order, from time to time, directs ;

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and may, during such time, be kept to hard labour ;
 and may, until he can conveniently be removed to such prison,
 Intermediate imprisonment. be imprisoned, with or without hard labour,
 and dealt with in all other respects as persons sentenced by the convicting Court to rigorous imprisonment
 may, for the time being, by law be dealt with.

The time of such intermediate imprisonment, and the time of removal from one prison to another, shall be taken and reckoned in discharge or part discharge of the term of the sentence.

22. All Acts and Regulations now in force within British India, with respect to convicts under sentence of transportation, or under sentence of imprisonment, with hard labour, shall, so far as may be consistent with the express provisions of this Act, be construed to apply to persons under any sentence of penal servitude.

23. The Governor-General in Council may grant to any convict sentenced to be kept in penal servitude, a license to be at large within British India or in such part thereof as in such license is expressed, during such portion of his term of servitude, and upon such conditions as to the Governor-General in Council seem fit.

The Governor-General in Council may at any time revoke or alter such license.

24. So long as such license continues in force and unrevoked,
 Holder of license to be allowed to go at large. such convict shall not be liable to imprisonment or penal servitude by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such license.

25. In case of the revocation of any such license as aforesaid,
 Apprehension of convict where license revoked. any Secretary to the Government of India may, by order in writing, signify to any Justice of the Peace or Magistrate that such license has been revoked, and require him to issue a warrant for the apprehension of the convict to whom such license was granted, and such Justice or Magistrate shall issue his warrant accordingly.

26. Such warrant may be executed by any officer to whom it may be directed or delivered for that purpose in any part of British India, and shall have the same force in any place within British India as if it had been originally issued or subsequently endorsed by the Justice of the Peace, or Magistrate, or other authority having jurisdiction in the place where the same is executed.

27. The convict, when apprehended under such warrant, shall be brought, as soon as conveniently may be, before the Justice or Magistrate by whom it has been issued, or before some other Justice or Magistrate of the same place, or before a Justice or Magistrate having jurisdiction in the district in which the convict is apprehended.

Such Justice or Magistrate shall thereupon make out his warrant under his hand and seal, for the re-commitment of the convict to the prison from which he was released by virtue of the said license.

28. Such convict shall be re-committed accordingly, and shall thereupon be liable to be kept in penal servitude for such further term as, with the time during which he may have been imprisoned under the original sentence and the time during which he may have been at large under an unrevoked license, is equal to the term mentioned in the original sentence.

29. If a license be granted under section twenty-three upon condition of the license. any condition specified therein, and the convict to whom the license is granted violates any such condition,

or goes beyond the limits specified in the license, or, knowing of the revocation of such license, neglects forthwith to surrender himself, or conceals himself, or endeavours to avoid being apprehended,

he shall be liable upon conviction to be sentenced to penal servitude for a term not exceeding the full term of penal servitude mentioned in the original sentence.

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V.—REMOVAL OF PRISONERS.

30. When any person is, or has been, sentenced to imprisonment by any Court, the Local Government, or (subject to its orders and under its control) the Inspector-General of Jails, may order his removal during the period prescribed for his imprisonment, from the jail or place in which he is confined to any other jail or place of imprisonment within the territories subject to the same Local Government.

31. Whenever it appears to the Local Government that any person, detained or imprisoned under any order or sentence of any Magistrate or Court, is of unsound mind, such Government, by a warrant setting forth the grounds of belief that such person is of unsound mind, may order his removal to a lunatic asylum, or other fit place of safe custody, within the territories subject to the same Government, there to be kept and treated as the Local Government directs during the remainder of the term of imprisonment ordered by the sentence; or, if it be certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be detained under medical care or treatment, then until he is discharged according to law.

When it appears to the said Government that such prisoner has become of sound mind, the Local Government, by a warrant directed to the person having charge of the prisoner, shall remand the prisoner to the prison from which he was removed, if then still liable to be kept in custody, or if not, shall order him to be discharged.

The provisions of section nine of Act XXXVI of 1858 (relating to Lunatic Asylums) shall apply to every person confined in a lunatic asylum under this section after the expiration of the term of imprisonment to which he has been sentenced; and the time during which he has been so confined shall be reckoned as part of such term.

Act XXXVI of 1858,
section 9, applied to pri-
soners in lunatic asylum.

32. When any person is, or has been, sentenced to imprisonment by any Court, the Governor-General in Council may order removal of prisoners from one prison to another. Government of India may-order removal of prisoners from one prison to another. in Council may order his removal during the period prescribed for his imprisonment, from the prison in which he is confined to any other prison in British India.

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VI.—MANAGEMENT OF TRANSPORTED CONVICTS.

33. The Governor-General in Council may appoint the Governor or other authority at any place Power to appoint persons to whom convicts shall be delivered. in British India, or one or more Superintendents at any such place, as the persons to whom convicts undergoing transportation shall be delivered.

34. The Governor-General in Council may, from time to time, prescribe rules as to the following Power to make rules as to convicts. matters :—

the classification of convicts ;
their confinement, treatment, discipline, and employment ;
their punishment for misbehaviour, disorderly conduct, neglect, or disobedience ; and
the manner in which the proceeds (if any) of their employment shall be disposed of.

VII.—DISCHARGE OF CONVICTS.

35. Any Court established under the twenty-fourth and twenty-fifth of Victoria, chapter one hundred and four, may, in any case in which it has recommended to Her Majesty the granting of a free pardon Discharge of convicts recommended for pardon. to any convict, permit him to be at liberty on his own recognizance.

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S C H E D U L E .

(See Section 2.)

Number and Year of Act.	Subject or Title.	Extent of Repeal.
VII of 1837 ...	Charter Courts' power to discharge convicts recommended for pardon.	The whole.
XVI of 1840 ...	An Act concerning the management of Convicts transported to places within the territories of the East India Company.	The whole.
XXIV of 1855 ..	An Act to substitute penal servitude for the punishment of Transportation in respect of European and American Convicts, and to amend the Law relating to the removal of such Convicts.	Sections five, six, seven, nine, ten, eleven, & twelve.
XVII of 1860 ...	An Act to repeal Act V of 1858 (for the punishment of certain offenders who have escaped from jail, and of persons who shall knowingly harbour such offenders) and to make certain provisions in lieu thereof.	The whole.
XXV of 1861 } VIII of 1869 } ...	The Code of Criminal Procedure.	Sections forty-nine, forty-nine A, and three hundred and ninety-six.
VIII of 1863 ...	An Act for the amendment of the law relating to the confinement of prisoners sentenced by Courts acting under the authority of Her Majesty, and by certain other Courts, and of prisoners convicted of offences in Native States.	The whole.
VIII of 1865 ...	An Act to make valid the imprisonment of certain persons arrested under the process of the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original Civil jurisdiction.	The whole.
II of 1867 ...	An Act to make further provision for the removal of prisoners.	The whole.
XII of 1867 ...	An Act to amend the law relating to the custody of prisoners within the local limits of the original jurisdiction of Her Majesty's High Courts of Judicature at Fort William in Bengal, Madras, and Bombay.	The whole.
XXVI of 1869...	An Act to correct a clerical error in Act No. VIII of 1863.	The whole.

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 ACT VI.
THE BENGAL CIVIL COURTS' ACT.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN
COUNCIL.

*(Received the assent of His Excellency the Governor-General on
the 10th February 1871.)*

An Act to consolidate and amend the Law relating to the District and Subordinate Civil Courts in Bengal.

WHEREAS it is expedient to consolidate and amend the law relating to the District and Subordinate Civil Courts in the territories respectively under the governments of the Lieutenant-Governors of the Lower and North-Western Provinces of the Presidency of Fort William in Bengal ; It is hereby enacted as follows :—

CHAPTER I.—Preliminary.

Short title. 1. This Act may be called “The Bengal Civil Courts’ Act, 1871.”

Local extent. It extends to the territories for the time being respectively under the Governments of the said Lieutenant-Governors, except such portions thereof as for the time being are not subject to the ordinary jurisdiction of the High Courts, and except the Jhansi Division.

Except this Section and Sections seventeen, twenty-nine and thirty, nothing herein contained applies to Partial exclusion of Mo-fussil Small Cause Courts. Courts of Small Causes established under Act No. XI of 1865.

Commencement of Act. This Act shall come into force on the passing thereof.

2. The Regulations and Acts mentioned in the Schedule here-to annexed are repealed to the extent specified in the third column of such Schedule.
Repeal of enactments.

CHAPTER II.—Constitution of Civil Courts.

3. The number of District Judges to be appointed under Number of District Judges. this Act shall be fixed, and may, from time to time, be altered by the Local Government,

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4. The number of Subordinate Judges and Munsifs to be appointed under this Act in each District shall be fixed, and may, from time to time, be altered by the Local Government.

5. Whenever the office of District Judge or Subordinate Judge under this Act is vacant, or whenever the Governor-General in Council has sanctioned an increase of the number of District Judges or Subordinate Judges, the Local Government shall supply such vacancy, or appoint such additional District Judges or Subordinate Judges, as the case may be.

6. Whenever the office of a Munsif is vacant, or when the Governor-General in Council has sanctioned an increase of the number of Munsifs, the High Court shall nominate such person as it thinks fit to be a Munsif, and the Local Government shall appoint him accordingly:

Provided that the Local Government may, with the sanction of the Governor-General in Council, make rules as to the qualifications of persons to be appointed to the office of Munsif under this Act; and on such rules being made, no person shall be nominated to such office, unless he possesses the qualifications required by the said rules.

7. When the business pending before any District Judge requires the aid of Additional Judges for their speedy disposal, the Local Government may, upon the recommendation of the High Court, and subject to the sanction of the Governor-General in Council, appoint such Additional Judges, as may be requisite.

Such Additional Judges shall perform any of the duties of a District Judge under Chapter III of this Act that the District Judge may, with the sanction of the High Court, assign to them, and, in the performance of such duties, they shall exercise the same powers as the District Judge.

8. In the event of the death of the District Judge, or of his being incapacitated by illness or otherwise office of District Judge. for the performance of his duties, or of his absence from the station in which his Court is held, the Addi-

tional Judge, or, if there is no Additional Judge attached to such Court, the senior Subordinate Judge of the District shall, without relinquishing his ordinary duties, assume charge of the Judge's office,

and shall discharge such of the current duties thereof as are connected with the filing of suits and appeals, the issue of processes and the like functions,

and shall continue in charge of the office until it is resumed by the District Judge, or assumed by an Officer duly appointed thereto.

9. In the event of the death of a Subordinate Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence on leave when no person is appointed to act for him,

^{Transfer of proceedings on death, &c., of Subordinate Judge.} the District Judge may transfer all or any of the proceedings pending in the Court of such Subordinate Judge, either to his own Court, or to the Court of a Subordinate Judge (if any) under his control.

All proceedings transferred under this Section shall be disposed of as if they had been instituted in the Court to which they are so transferred.

A District Judge, on the occurrence within his District of any vacancy in the office of Munsif, may, ^{Temporary charge of Munsif's office.} pending the action of the High Court under Section six, appoint such person as he thinks fit to act in such office.

And he shall forthwith report to the High Court the occurrence of every such vacancy and such appointment.

10. The Local Government may invest with the powers of any Court under this Act any officer in the District of Kachar and the Divisions of Assam, Chota Nagpur, and Kuch Behar.

^{Power to confer judicial powers on certain officers in Kachar, Assam, Chota Nagpur, and Kuch Behar.} Nothing in Sections three to nine (inclusive), thirty-two, thirty-three, and thirty-four, applies to any such officer. But all the other provisions of this Act apply, *mutatis mutandis*, to officers so invested.

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Control of Civil Courts
in a District.

11. The general control over all the Civil Courts in any District is vested in the District Judge, but subject to the superintendence of the High Court.

First District Judges, Additional Judges, Subordinate Judges, and Munsifs shall be deemed to have been duly appointed to the offices the duties of which they have respectively discharged and shall be the first District Judges, Additional Judges, Subordinate Judges, and Munsifs under this Act.

13. Every District Judge, Additional Judge, Subordinate Judge or Munsif appointed after the passing of this Act shall, previously to entering on the duties of his office, make and subscribe a solemn declaration according to the following form :—

“ I, *A B*, appointed to the office of _____, do solemnly declare that, in the trial and determination of all suits which may come under my cognizance, and in the execution of all the other duties of my office, I will act according to the best of my abilities and judgment without partiality, favor, or affection ; that I will not directly or indirectly receive, or knowingly allow any other person to receive, on my behalf, any money, effects, or property, on account of any suit that may come before me for decision, or on account of any public duty which I may have to execute.

I will strictly adhere to all the rules prescribed for my guidance, and I will, in all respects, truly and faithfully execute the trust reposed in me.

(Signed) *A B,*

District [or Additional or Subordinate] Judge of
[or Munsif of _____]

Such declaration shall be made—

by a District Judge, either before his predecessor in such office, or before the Magistrate of the District,

by an Additional Judge, a Subordinate Judge or Munsif, before the District Judge, or the Magistrate of the District.

14. Every Court under this Act shall use a seal of such form and dimensions as are for the time being prescribed by the Local Government.

Seals of Courts.

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15. Every District Judge, Additional Judge, Subordinate Judge, and Munsif under this Act shall be deemed to be a Civil Court within the meaning of the Code of Civil Procedure and of this Act.

16. The Local Government may fix, and, from time to time, alter the place or places at which any Court under this Act is to be held.

Power to fix sites of Courts.

17. Subject to such orders as may, from time to time, be issued by the Governor-General in Council, the High Court shall 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.

CHAPTER III.—*Ordinary Jurisdiction.*

18. The Local Government shall fix, and may, from time to time, vary the local limits of the jurisdiction of any Civil Courts under this Act:

Power to fix local limits of jurisdiction.

Provided that, where more than one Subordinate Judge is appointed to any District, and where more than one Munsif is appointed to any Munsifi, the Judge of the District Court may assign to each such Subordinate Judge or Munsif the local limits of his particular jurisdiction within such District or Munsifi, as the case may be.

The present local limits of the jurisdiction of every Civil Court (other than the High Court) shall be deemed to be fixed under this Act.

19. The jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions in the Code of Civil Procedure, Section six, to all original suits cognizable by the Civil Courts.

Extent of original jurisdiction of District Judge or Subordinate Judge.

20. The jurisdiction of a Munsif extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed one thousand rupees.

Extent of Munsif's jurisdiction.

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21. Appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court.

Appeals from District Judge and Additional Judges.

22. Appeals from the decrees and orders of Subordinate Judges and Munsifs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds five thousand rupees, in which case the appeal shall lie to the High Court:

Provided that the High Court may, from time to time, with the previous sanction of the Local Government, order that all appeals from the decrees and orders of any Munsif shall be preferred to the Court of such Subordinate Judge as may be mentioned in the order, and such appeals shall thereupon be preferred accordingly.

23. Every Court under this Act may require a witness or party to any suit or proceeding pending in such Court, to take such oath as is prescribed by the law for the time being in force.

24. Where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

In cases not provided for by the former part of this section, or by any other law for the time being in force; the Court shall act according to justice, equity, and good conscience.

25. No Munsif, Subordinate Judge, Additional Judge, or District Judge shall try any suit in which he is a party or personally interested, or shall adjudicate upon any proceeding connected with, or arising out of, such suit.

Judges not to try suits in which they are interested.

No Subordinate Judge, Additional Judge, or District Judge shall try any appeal against a decree or order passed by himself in another capacity.

When any such suit, proceeding, or appeal comes before any such Munsif, Subordinate Judge, Additional Judge, or District Judge, he shall forthwith transmit the whole record of the case to the Court to which he is immediately subordinate, with a report of the circumstances attending the reference.

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The superior Court shall thereupon dispose of the case in the manner prescribed by the Code of Civil Procedure, Section six.

Nothing in the last preceding Clause of this Section shall be deemed to affect the extraordinary original civil jurisdiction of the High Court.

CHAPTER IV.—*Special Jurisdiction.*

26. Every District Judge may, from time to time, subject to the orders of the High Court, refer to any Subordinate Judge under his control any appeals pending before him from the decisions of Munsifs; and such Subordinate Judge shall hear and dispose of such appeals accordingly.

The District Judge may withdraw any appeals so referred, and hear and dispose of appeals so withdrawn.

27. The High Court may, from time to time, by order, authorize any District Judge to transfer to a Subordinate Judge under his control appeals from orders of Munsifs preferred under the Code of Civil Procedure, Sections thirty-six, seventy-six, eighty-five, ninety-four, one hundred and nineteen, two hundred and thirty-one, and two hundred and fifty-seven, or under Act No. XXIII of 1861, Section eleven.

The High Court may also, from time to time, by order, authorize any District Judge to transfer to a Subordinate Judge, or Munsif under the control of such District Judge, any of the proceedings next hereinafter mentioned, or any class of such proceedings specified in such order, and then pending, or thereafter instituted, before such District Judge.

The proceedings referred to in the second Clause of this Section are the following (that is to say),—

(1). Proceedings under Bengal Regulation V of 1799 (*to limit the Interference of the Zillah and City Courts of Dewanny*)

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Act VI. *Adawlut in the Execution of Wills and Administration to the Estates of Persons dying intestate).*

(2). Proceedings under Act No. XL of 1858 (*for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal*), or Act No. IX of 1861 (*to amend the law relating to Minors*).

(3). Claims to attached property under the Code of Civil Procedure, Section two hundred and forty-six.

(4). Applications by judgment-debtors under Section two hundred and seventy-three, or Section two hundred and eighty of the same Code.

(5). Applications to file awards under Section three hundred and twenty-seven of the same Code.

(6). Applications for permission to sue or appeal as a pauper.

(7). Applications for certificates under Act No. XXVII of 1860 (*for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons*).

The District Judge may withdraw any proceedings so transferred, and may either himself dispose of them, or, with the sanction of the High Court, transfer them to any other Subordinate Judge or Munsif under his control.

28. Subject to the provisions of the last Clause of Section Disposal of proceedings twenty-seven, all proceedings transferred so transferred under the Second Clause of the same section shall be disposed of by the Subordinate Judge or Munsif (as the case may be) according to the rules prescribed for the guidance of District Judges in like cases :

Provided that an appeal from the order of the Subordinate Judge or Munsif in such cases shall lie to the District Judge.

An appeal from his order thereon shall lie to the High Court if an appeal from the decision of the Judge in such proceedings is allowed by the law in force for the time being.

29. The Local Government may invest, within such local limits as it from time to time appoints, any Power to invest Subordinate Judges with Small Causes jurisdiction. Subordinate Judge with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts, up to the amount of

five hundred rupees, and any Munsif with similar jurisdiction up to the amount of fifty rupees; and may, whenever it thinks fit, withdraw such jurisdiction from the Subordinate Judge or Munsif so invested.

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30. Section fifty-one of Act No. XI of 1865 (*to consolidate Amendment of Act XI and amend the law relating to Courts of 1865. Small Causes beyond the local limits of the Ordinary Original Civil jurisdiction of the High Courts of Judicature*), shall be read as if for the words "Principal Sadr Amin," the words "Subordinate Judge" were substituted.

CHAPTER V.—Misfeazance.

31. Any District Judge, Additional Judge, Subordinate Suspension or removal of District Judge or Additional Judge, or Munsif may, for any misconduct, be suspended or removed by the Local Government.

32. The High Court may, whenever it sees urgent necessity for so doing, suspend any Subordinate Judge under its control.

Whenever the High Court exercises this power, it shall forthwith report to the Local Government the circumstances of the suspension, and the Local Government shall make such order thereon as it thinks fit.

33. The High Court may appoint a Commission for enquiry into the alleged misconduct of any Munsif.

On receiving the report of the result of any such enquiry, the High Court may, if it thinks fit, remove the Munsif from office, or suspend him, or reduce him to a lower grade.

The provisions of Act No. XXXVII of 1850 (*for regulating enquiries into the behaviour of public servants*) shall apply to enquiries under this section, the powers conferred by that Act on the Government being exercised by the High Court.

The High Court may also, previous to the appointment of such Commission, suspend any Munsif pending the result of the enquiry.

The High Court may, without appointing any such Commission, remove or suspend any Munsif, or reduce him to a lower grade.

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34. Any District Judge may, whenever he sees urgent necessity for so doing, suspend from office any Munsif under his control.

Whenever a District Judge suspends from office any such Munsif, he shall forthwith send to the High Court a full report of the circumstances of the suspension, together with the evidence, if any, and the High Court shall make such order thereon as it thinks fit.

CHAPTER VI.—*Ministerial Officers.*

35. The Judges of the District Courts shall appoint the Ministerial Officers of such Courts, and, subject only to the general control of the Local Government, the said Judges may remove or suspend such Officers, or fine them in an amount not exceeding one month's salary.

36. The Ministerial Officers of the Courts of Subordinate Judges and Munsifs shall be nominated and appointed by those Courts respectively, subject to the approval of the District Judge within whose jurisdiction such Courts are situate.

Every such Court may, by order, remove or suspend from office, or fine in an amount not exceeding one month's salary, any of its Ministerial Officers who is guilty of any misconduct or neglect in the performance of the duties of his office. And the District Judge, subject only to the general control of the Local Government, may, on appeal or otherwise, reverse or modify every such order. Nothing in this Section or in Section thirty-five shall exempt the offender from any penal or other consequences to which he may be liable under any other law in force for the time being.

37. The Local Government may, at the instance of the District Judge, transfer from any Court in the territories subject to such Government, to any other Court in the same territories, all or any of the Ministerial Officers of such Judge or of any Subordinate Judge or Munsif under his control.

The District Judge may transfer all or any of the Ministerial Officers of any Court under his control to any other such Court.

38. Any fine imposed under this Chapter shall, if the order
imposing it so directs, be recovered by
Recovery of fines. deduction from the offender's salary.

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S C H E D U L E.
PART I.—BENGAL REGULATIONS.

Number and year.	Title.	Extent of Repeal.
III of 1793 ...	A Regulation for extending and defining the jurisdiction of the Courts of Dewanny Adawlut, or Courts of Judicature for the trial of civil suits in the first instance, established in the several Zillas, and in the cities of Patna, Dacca, and Moorshedabad.	So much as has not been repealed.
IV of 1793 ...	A Regulation for receiving, trying, and deciding suits or complaints declared cognizable in the Courts of Dewanny Adawlut established in the several Zillas, and in the Cities of Patna, Dacca, and Moorshedabad.	Section fifteen.
VII of 1795 ...	A Regulation for establishing a Court of Dewanny Adawlut, or Court of Judicature for trying civil suits in the first instance, at the City of Benares, and at Mirzapore, Ghazzeppore, and Jaunpore, in the Province of Benares, and for defining the Jurisdiction and Powers of those Courts.	So much as has not been repealed.
VIII of 1795 ...	A Regulation for extending to the Province of Benares, with alterations and modifications, Regulation IV of 1793, entitled "a Regulation for receiving, trying, and deciding suits for complaints declared cognizable in the Courts of Dewanny Adawlut established in the several zillas, and in the cities of Patna, Dacca, and Moorshedabad;" and for exempting the Raja of Benares and the Baboos of his family, and certain Bankers, when defendants, from giving the security required from other defendants.	Section three.
II of 1803 ...	A Regulation for establishing and defining the jurisdiction of the Courts of Adawlut, or Courts of Judicature, for the trial of civil suits in the first instance, in the Provinces ceded by the Nawab Vizier to the Honorable the English East India Company.	So much as has not been repealed.

1871		Act VI.	Number and year.	Title.	Extent of Repeal.
III of 1803	...	A Regulation for receiving, trying, and deciding suits or complaints, declared cognizable in the Courts of Adawlut established in the several zillas in the Provinces ceded by the Nawab Vizier to the Honourable the English East India Company.		Section sixteen, clause one.	
VIII of 1805	...	A Regulation for extending to the conquered Provinces situated within the Doobab and on the right bank of the River Jumna, and to the Territory ceded to the Honourable the English East India Company in Bundelcund by the Peishwa, such of the Laws and Regulations established for the internal government of the Provinces ceded by the Nawab Vizier to the Honourable the English East India Company, as have not been already extended to those Territories, and for revising and amending certain parts of the said Laws and Regulations.		Section six and so much of section seven as extends Regulation III, 1803, section sixteen, clause one.	
VII of 1832	...	A Regulation for modifying certain of the provisions of Regulation V, 1831, and for providing Supplementary Rules to that Enactment.		So much as has not been repealed.	
VIII of 1833	...	A Regulation for the occasional appointment of Additional Judges of the Zillah and City Courts.		The whole.	

PART II.—ACTS.

IX of 1844	...	An Act for authorizing the institution of suits in the Courts of Principal Sudder Ameens and Sudder Ameens.	Section three so far as it applies to the Bengal Presidency.
L of 1860	...	An Act to amend the law relating to vacations in the Civil Courts within the Presidency of Fort William in Bengal.	The whole.
XVI of 1868	...	An Act to consolidate and amend the law relating to Principal Sadr Amins, Sadr Amins, and Munsifs in Bengal, and, for other purposes.	The whole.
II of 1870	...	An Act to provide for the appointment of Additional Subordinate Judges and Munsifs in the Presidency of Fort William.	The whole.

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Act No. VII of 1871.**THE INDIAN EMIGRATION ACT.**

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN
COUNCIL.

*(Received the assent of His Excellency the Governor-General
on the 10th March 1871.)*

*An Act to consolidate the Laws relating to the Emigration of
Native Laborers.*

WHEREAS it is expedient to consolidate the laws relating to
the Emigration of Native Laborers; It is
hereby enacted as follows:—

I.—PRELIMINARY.

Short title. 1. This Act may be called “The Indian Emigration Act, 1871.”

Local extent. It extends to the whole of British India;

Commencement of Act. And it shall come into force on the passing thereof.

Acts repealed. 2. The Acts mentioned in the first schedule hereto annexed are repealed. All contracts entered into, appointments made, and licenses granted, under any of the said Acts, shall be deemed to be respectively entered into, made, and granted under this Act.

Interpretation clause. 3. In this Act—
“Emigrate” denotes the departure of any Native of India out of British India for the purpose of laboring for hire in some other place; and the word “Emigrant” denotes any Native of India under engagement to emigrate:

“Magistrate” denotes any officer exercising the full powers of a Magistrate, and in charge of a District, a Division, or a Sub-Division:

1871Act VII."Vessel."

"Vessel" includes anything made for the conveyance by water of human beings or property.

II.—EMIGRATION AGENTS.

4. The Government of every place to which emigration is lawful under this Act may, from time to time, appoint a person to act as Emigration Agent in Calcutta, Madras, and Bombay respectively, but such nomination shall be subject to the approval of the Local Government.

Every Emigration Agent may be suspended or removed by the Government which appointed him.

5. The remuneration to be given to Emigration Agents shall not depend upon, or be regulated by, the number of Emigrants sent by such Agents, but shall be in the nature of a fixed annual salary.

III.—PROTECTORS OF EMIGRANTS AND MEDICAL INSPECTORS.

6. The Local Government may appoint a proper person to act as Protector of Emigrants at each of the three ports aforesaid, and may, with the sanction of the Governor-General in Council, assign to such person such salary and establishment as shall be deemed proper.

Every Protector of Emigrants may be suspended or removed by the Local Government to which he is subordinate.

7. No Protector of Emigrants appointed under this Act shall, except with the permission of the Local Government, hold any other office under Government, or follow any other profession or occupation.

8. Every Protector of Emigrants, in addition to any special duties assigned to him by this Act, shall, so far as is in his power, generally protect and aid with his advice or otherwise all Emigrants, and shall cause all the provisions of this Act to be duly complied with.

He shall also inspect on arrival all vessels bringing return Emigrants to the port at which he is Protector, and enquire to the treatment received by such Emigrants both during the period of their

service in the place to which they emigrated and also during the voyage, and shall make a report thereon to the Local Government, and he shall aid and advise such return Emigrants so far as he reasonably can when called upon by them to do so.

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9. At each of the three ports aforesaid, the Local Government may appoint a competent person to be Medical Inspector of Emigrants; and may, with the sanction of the Governor-General in Council, assign to the Medical Inspector so appointed such salary as is deemed proper.

10. In each of the Towns of Calcutta, Madras, and Bombay, or in the suburbs of those Towns, the Emigration Agent of every place to which emigration is lawful under this Act, shall establish a suitable dépôt for the persons engaged as laborers for such place.

11. Every dépôt shall be licensed by the Protector of Emigrants, after being inspected and approved of by him and by the Medical Inspector of Emigrants.

No license shall be in force for a longer period than a year, and any license may be cancelled by the Protector of Emigrants if he considers that the dépôt for which it was granted is unhealthy, or in any respect has become unsuitable for the purpose for which the dépôt was established.

For every license granted under this section, there shall be paid to the Protector a fee of fifteen rupees.

12. Every Protector of Emigrants and every Medical Inspector of Emigrants shall, from time to time, and at least once in every week, inspect the Emigrants in the various dépôts for the reception of Emigrants about to embark from the port at which they are Protector and Medical Inspector respectively, and examine into the state of the dépôts, and the manner in which the Emigrants are therein lodged, fed, clothed, and otherwise provided for and attended to.

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13. The Medical Inspector shall report to the Protector of Emigrants any circumstance which may come to his knowledge, showing that the dépôt is not suitable for its purpose, or that the Emigrants are treated with any neglect or oppression.

Report to be made by Medical Inspector.
Protectors and Medical Inspectors to be public servants.

14. Every Protector of Emigrants and every Medical Inspector of Emigrants shall be a public servant within the meaning of the Indian Penal Code.

15. Every Emigration Agent, and all persons in charge of, or employed in, any dépôt, or in any vessel licensed to carry Emigrants as hereinafter provided, shall give the Protector and the Medical Inspector every facility for making such inspections, examinations, and surveys as may be necessary or proper under this Act, and shall afford them all such information as may be reasonably required by them.

IV.—RECRUITERS OF EMIGRANTS.

16. The Protector of Emigrants at each of the three ports aforesaid, and the British Consular Agent at each of the French ports in India, shall license so many fit persons as to him seems necessary, to be Recruiters of laborers,

and no person shall act or be employed as a Recruiter of laborers, except under a license from a Protector of Emigrants or British Consular Agent.

17. Every Recruiter shall be licensed to obtain laborers for some particular place to which emigration is lawful under this Act, and no license to obtain laborers for any place shall be granted, except on the application of the Emigration Agent of such place.

18. No license shall be in force for a longer period than one year; and in case of misconduct on the part of any Recruiter, the Protector of Emigrants may cancel his license before the expiration of the period for which it was granted.

Form of license, and fee therefor.

19. Every license shall be in the form set forth in the second schedule hereto annexed.

For every license there shall be paid to the Protector a fee of fifteen rupees.

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20. Every person holding a license as a Recruiter of laborers shall wear a badge bearing the following inscription in English and in the vernacular language of the Town, District, or Districts in which he is licensed to engage laborers :—“ Recruiter of Emigrants for the Mauritius” (*or other place as the case may be.*)

21. No Recruiter shall engage or attempt to engage laborers in any District or in the Towns of Calcutta, Madras, or Bombay, without having first exhibited his license to the Magistrate of such District, or a Magistrate of such Town, and obtained the countersignature of such Magistrate thereupon.

Such countersignature shall be given, provided that the license is in force at the time.

V.—CONTRACTS WITH EMIGRANTS.

22. Except under and in conformity with the provisions of this Act, it shall not be lawful to make any contract with any Native of India for labor to be performed in any place beyond British India, or to enable any Native of India to emigrate, or to assist any Native of India in emigrating:

provided that nothing in this Act shall apply—

to any contract with any Native of India for labor to be performed in any Foreign Settlement on the mainland of India or in any Native State in India;

to emigration to any such Settlement or State;

to any contract for labor to be performed in, or to emigration to, the Island of Ceylon; or

to any contract with or the emigration of any Native seaman or other person who of his own free will contracts to navigate or serve on board of any vessel, or who embarks on board such vessel in pursuance of such contract, or any person who contracts to serve as a menial servant only, and who embarks as such menial servant.

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Places for emigration to which contracts may be made with Natives.

23. Contracts may be made with Natives of India to emigrate—

to any of the British Colonies of Mauritius, Jamaica, British Guiana, Trinidad, St. Lucia, Grenada, St. Vincent, Natal, St. Kitts, and Seychelles;

to any of the French Colonies of Réunion, Martinique, Guadeloupe and its dependencies, and Guiana; and

to the Danish Colony of St. Croix;

and it shall be lawful to enable or assist any Native of India to emigrate to any such Colony.

24. The Governor-General in Council may, from time to time, by notification published in the *Gazette of India*, declare that the emigration of Natives of India shall be lawful to any place other than the places mentioned in section twenty-three:

provided that every such notification contain also a declaration, that the Governor-General in Council has been duly certified that the Government of the place to which the notification refers has made such laws and other provisions as the Governor-General in Council thinks sufficient for the protection of Natives of India emigrating to such place.

25. From the date of any such notification contracts may be made with any Native of India for labor to be performed in any place to which emigration is authorized in the notification, and it shall be lawful to enable or assist any Native of India to emigrate to such place;

but all contracts and emigration under such notification shall be made and conducted subject to the provisions of this Act.

From what ports emigration lawful.

26. Emigration shall not be lawful except from the port of Calcutta, the port of Madras, or the port of Bombay.

VI.—REGISTRATION OF EMIGRANTS.

27. Every Native of India, who in any place other than the Towns of Calcutta, Madras, or Bombay, enters into any engagement with a Recruiter to emigrate, shall, before leaving the Natives engaging to emigrate to appear before Magistrate.

District within which the engagement was entered into, appear with the Recruiter before a Magistrate, and no Recruiter shall remove such Emigrant from the said District until he has so appeared.

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Upon so appearing, the Magistrate shall examine the intending Emigrant with reference to his engagement; and if it appears that he understands the nature of the engagement he has entered into, and that he is willing to fulfil the same, the Magistrate shall register in a book to be kept for the purpose, in such form as the Local Government prescribes,

(a) the name, name of the father, and the age of such Emigrant,

(b) the name of the village or place of which such Emigrant is a resident,

(c) the Emigration dépôt to which it is intended he shall proceed, and

(d) the rate of wages and period of service, if any, agreed upon between the Emigrant and the Recruiter.

If the Magistrate thinks that the intending Emigrant does not understand the nature of the engagement, or has been induced to enter into the engagement by fraud or misrepresentation, he shall refuse to register his name.

A copy of every registration under this section written on substantial paper which shall not require a stamp, shall be furnished by the Magistrate to the Emigrant registered.

28. Authentic copies of every such registration shall be forthwith forwarded by the Magistrate to the Emigration Agent at the dépôt to which the person named therein has been engaged to proceed, and to the Protector of Emigrants at the intended port of embarkation.

29. Every Native of India, who in the Towns of Calcutta, Madras, or Bombay, enters into any engagement with a Recruiter to emigrate, shall, within forty-eight hours of making such engagement, appear with the Recruiter before the Protector of Emigrants in such town; and no Recruiter shall remove

Copy of registration to be sent to Emigration Agent and Protector.

Registration of Emigrants recruited in pre-sidency towns.

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such Emigrant from the said town, or to any Emigration dépôt, until he has so appeared.

Upon his so appearing, the Protector of Emigrants shall examine the intending Emigrant with reference to his engagement; and if it appears that he understands the nature of the engagement he has entered into, and that he is willing to fulfil the same, the Protector of Emigrants shall register in a book to be kept for the purpose, in such form as the Local Government prescribes,

- (a) the name, the name of the father, and the age of such Emigrant,
- (b) the name of the village or place of which such Emigrant is a resident,
- (c) the Emigration dépôt to which it is intended he shall proceed, and
- (d) the rate of wages and period of service, if any, agreed upon between the Emigrant and the Recruiter.

If the Protector of Emigrants thinks that the intending Emigrant does not understand the nature of the engagement, or has been induced to enter into the engagement by fraud or misrepresentation, he shall refuse to register his name.

A copy of every registration under this section, written on substantial paper, which shall not require a stamp, shall be furnished by the Protector to the Emigrant registered.

30. An authentic copy of every such registration shall be forthwith forwarded by the Protector to the Emigration Agent of the place for which the person named therein has been engaged.

Copy of registration by
Protector to be forwarded
to Agent.

31. For the registration of every Emigrant, under section twenty-seven or twenty-nine, the Recruiter shall pay to the Magistrate or the Protector of Emigrants, as the case may be, a fee of one rupee and eight annas.

Fee for registration by
Protector.

On proof of the desertion of any Emigrant before embarkation, the fee paid in respect of such Emigrant may be refunded by the Magistrate or the Protector to the Recruiter by whom it

was paid, under such rules as are from time to time made in that behalf by the Governor-General in Council.

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• VII.—CONVEYANCE OF EMIGRANTS TO DEPOTS.

32. (1) Every Emigrant recruited under the provisions of this Act shall be conveyed by land or river with all convenient despatch to the dépôt at the port of embarkation established by the Emigration Agent of the place to which such Emigrant has contracted to emigrate.

(2) The registered Emigrants engaged by any Recruiter shall, while proceeding to a dépôt, be accompanied throughout the journey either by the Recruiter himself or by a competent person appointed by him with the approval of the Magistrate by whom the Emigrants have been registered. The Magistrate shall give to the person so appointed a certificate under his signature, stating that he has been appointed for the journey to the dépôt.

(3) Every Recruiter by or through whom Emigrants may be forwarded to a dépôt shall, throughout their journey, provide them with suitable lodging and food.

VIII.—ARRIVAL AT DEPOTS AND PROCEDURE THEREON.

33. The arrival of each Emigrant at a dépôt shall immediately be reported by the person in charge of the dépôt to the Emigration Agent, and by such Agent to the Protector of Emigrants.

34. The copy of the registration of every Emigrant, received by the Emigration Agent from the Magistrate or from the Protector of Emigrants, shall, as soon as conveniently may be after the arrival of the Emigrant, be shown to the Medical Inspector of Emigrants; and the Emigrant shall be examined by the Medical Inspector to ascertain if he is in a fit state of health to emigrate to the place to which he has contracted to proceed.

Copy of registration to be shown to Medical Inspector.

Emigrants to be inspected by him.

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The Medical Inspector, if satisfied of his fitness, shall give a certificate thereof to the Emigration Agent: if satisfied of his unfitness, he shall give a certificate thereof to the Protector of Emigrants.

35. If the Medical Inspector certifies that any Emigrant When Emigrant to be sent back to place of registration. is not in a fit state of health to emigrate to the place to which he has contracted to proceed,

or if any irregularity has occurred in the recruitment of any Emigrant,

The Protector of Emigrants may order the Emigration Agent in whose dépôt such Emigrant may be, forthwith to pay to him, the Protector of Emigrants, such reasonable sum as is necessary to enable the laborer to return to the place where he was registered, and the Protector may take any steps he thinks necessary for the conveyance of the laborer to such place.

36. On failure of the Emigration Agent for twenty-four hours to comply with an order of the Protector for the payment of any such sum, the Protector may pay the same to or on behalf of the Emigrant.

Failure of Emigration Agent to pay sum required to enable Emigrant to return.
Every sum so disbursed shall be recoverable by the Protector, with six per cent. interest from the date of disbursement, from the Emigration Agent on whose default it is paid, as money paid to the use of such Emigration Agent.

No further proof shall be required by any Court in any such case than that the Protector gave the Emigration Agent an order to pay such money, and that the Emigration Agent for a space of twenty-four hours made default in complying therewith.

Provided that every Emigrant who, from his state of health, is in the opinion of the Medical Inspector, unfit to undertake the journey back to the place where he was registered, shall, in addition to his being conveyed back at the expense of the Emigration Agent, be entitled to continue in the dépôt and to be fed, clothed, lodged, and attended to there, by and at the expense of the Emigration Agent, until such time as the Protector otherwise orders.

37. The Emigration Agent, in the presence of the Protector Duty of Emigration of Emigrants, and within forty-eight hours Agent. after the arrival of each Emigrant at the dépôt, shall ascertain by personal communication with such Emigrant whether or not he has been properly fed and otherwise properly treated on his journey to the dépôt.

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The Emigration Agent shall also, in the presence of the Protector, and within such time as aforesaid, examine the copy of the registration furnished to the Emigrant under section twenty-seven or section twenty-nine. If for any reason further enquiry be necessary, such enquiry shall be made forthwith.

Unless the Emigration Agent, with the consent of the Protector, refuses to recognize or to be bound by the contract entered into by the Recruiter with the Emigrant, as shown by the copy of the registration produced by the Emigrant, such copy, if it be a copy furnished under section twenty-seven, shall be countersigned by both the Emigration Agent and the Protector, and if it be a copy furnished under section twenty-nine, shall be countersigned by the Emigration Agent alone. The copy so countersigned, under whichever section it may have been furnished, shall be delivered back to the Emigrant.

If the Emigration Agent, without the consent of the Protector, refuses to be bound by the contract entered into by the Recruiter with the Emigrant, the Protector may thereupon order the Emigration Agent forthwith to pay to him, the Protector of Emigrants, such reasonable sum as is necessary to enable the Emigrant to return to the place where he was registered. On failure of the Emigration Agent to pay such sum within twenty-four hours of his being ordered so to do, the Protector may pay the same to or on behalf of the Emigrant. All the provisions of section thirty-six as to sums paid by the Protector shall apply, so far as the circumstances of the case permit, to sums paid by him under this section.

The Protector shall also, in every case in which it seems to Suits against Emigration Agent him proper to do so, institute a suit on behalf of the Emigrant against the Emigration Agent, for the recovery of damages for the breach of contract committed by the Emigration Agent.

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In every such suit, the contract entered into by the Recruiter shall be deemed to have been entered into by, and to be binding on, the Emigration Agent.

38. After the examination mentioned in section thirty-seven,

After examination and Medical Inspector's certificate, Emigration Agent to grant a pass.

and if the Medical Inspector has given a certificate of the fitness of the Emigrant to emigrate, the Emigration Agent shall deliver to the Emigrant a pass, counter-

signed by the Protector of Emigrants as hereinafter provided, stating the name and the age of the Emigrant, and the name of his father, and certifying that he is in a fit state of health to emigrate to the place to which he has contracted to go.

39. The Protector of Emigrants shall attend personally at

Protector of Emigrants to attend personally at examination and passing.

the examination and passing of Emigrants by the Emigration Agent, under sections thirty-seven and thirty-eight, and shall see

that the Emigration Agent makes all such enquiries of the Emigrants as it may be his duty to make.

If such Protector is satisfied with such enquiries, but not

And to countersign pass. otherwise, he shall countersign the pass delivered by the Emigration Agent.

IX.—EMIGRANT VESSELS.

40. (1) It shall not be lawful to receive any Emigrant on

Emigrant not to be received on board an unlicensed ship.

board any vessel, unless a license to carry Emigrants in such vessel has been obtained from the Local Government. The granting or withholding any such license shall be in the discretion of the Local Government.

(2) The master or owner of any vessel who desires to obtain

Application for license. a license to carry Emigrants in such vessel, shall apply in writing through the Protector of Emigrants to the Local Government for such license.

(3) Every such application shall state the number of men,

Contents of license. women, and children proposed to be carried, and the tonnage and other particulars respecting the vessel.

(4) The Protector of Emigrants shall cause the vessel to be

Survey of vessel. carefully surveyed by a competent person, with a view to ascertain her seaworthiness

and the extent and the nature of her accommodation for Emigrants, and to ascertain that she is properly ventilated, and is supplied with all the tackle requisite for her voyage.

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(5) The Protector of Emigrants shall make a full report on Report after survey, and the survey to the Local Government; and certificate to master. if he is of opinion that the vessel is in all respects suitable for the carrying of Emigrants under this Act, but not otherwise, he shall give a certificate to that effect to the master of the vessel.

(6) In consideration of his obtaining a license to carry Emigrants, the master of every vessel intended to carry Emigrants shall, upon the requisition of the Protector of Emigrants, and before any Emigrant embarks on board of such vessel, execute in duplicate a bond, in such form as the Local Government prescribes, binding himself and his owners in a penal sum of ten thousand rupees to conform to the several conditions in this Act provided. The Protector of Emigrants shall require the master to execute such bond as aforesaid in duplicate, and shall forward one copy of it to the Government of the place to which the Emigrants are to be carried (or in the case of a French colony to the British Consular Agent at such colony), and the other copy of it to the Local Government.

41. (1) No certificate under section forty shall be granted, unless there be provided for the Emigrants, either between decks or in cabins on the upper deck firmly secured and entirely covered in, a space devoted to their exclusive use. Such cabins and space between decks shall in every part have a height of not less than five feet and-a-half.

(2) No compartment shall take more than one adult Emigrant for every twelve superficial feet on deck, and for every cubic space of seventy-two feet, or more than one child who has completed two, and has not completed ten, years of age, for every eight superficial feet on deck.

(3) A distinct and separate place shall be fitted up for a hospital in every Emigrant vessel.

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Act VII. (4) Women and children shall occupy a compartment of the vessel distinct and separate from the compartments of the single men.

(5) An Emigrant above the age of ten years shall, for the purposes of this Act, count as an adult, and two children from one to ten years of age shall count as one adult.

42. (1) There shall be actually laden and on board of Provisions, fuel, and water, every vessel carrying Emigrants, at the time of the departure of such vessel from the port at which they embark,

(a) good and wholesome provisions for the use and consumption of the said Emigrants (over and above the victualing of the captain, officers, and crew, and of the cabin and other passengers, if any) in such quantity and of such description and quality as may be prescribed by any rule framed by the Governor-General in Council under section fifty-six.

(b) fuel for cooking such provisions, and

(c) a supply of water, to the amount of seven gallons for every week of the probable length of the voyage for every Emigrant on board such vessel. Such water shall be carried in tanks to be approved by the Protector of Emigrants.

(2) Every such vessel shall, at the time of departure afore Surgeon, medicines, and stores. said, have actually on board, and shall carry with her, a properly qualified European or Native Surgeon, and such medicines and other stores in such quantity and of such quality as may be prescribed by rules made under section fifty-six.

(3) When any vessel is destined to call at a port or place in the course of her voyage for the purpose of filling up her tanks or casks, a supply of water at the rate hereinbefore mentioned, for every week of the probable length of the voyage to such port or place shall be deemed to be a compliance with this section.

The probable length of the voyage to such port or place shall be determined from time to time by the Protector of Emigrants, subject to the approval of the Local Government.

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(4) When any such vessel is fitted with Normandy's apparatus in vessel fitted with distilling apparatus, or other apparatus approved by the Protector of Emigrants, for distilling sea water, and with proper and sufficient means for working the same, a reduction shall be allowed of one-third in the quantity of water required under this section.

(5) The Protector of Emigrants and the Medical Inspector of Emigrants to ensure compliance with above provisions. shall see personally that all the provisions of this section are complied with.

43. Before any vessel carrying Emigrants clears out for any place westward of the Cape of Good Supply of extra clothing. Hope, between the first day of March and the fifteenth day of September, the Protector of Emigrants shall personally see that every Emigrant is supplied with at least one extra double blanket, and that the same is placed with his other clothing or luggage.

Every Emigrant shall be allowed to make use of such double blanket so long as the vessel is outside of the tropics.

44. Before any vessel licensed to carry Emigrants shall be cleared out from the port of Calcutta, Certificates from Protector of Emigrants and from Emigration Agent. Madras, or Bombay, the master of such vessel shall obtain from the Protector of Emigrants at the port of clearance, and from the Emigration Agent for the place to which the Emigrants are intended to proceed, certificates, under the hands of such Protector and Emigration Agent respectively, to the effect following, that is to say, that such Protector and Emigration Agent have, in respect of the Emigrants proceeding in such vessel, done all that is hereinbefore required to be done on the part of such Protector and Emigration Agent respectively; and that all the directions herein contained for ensuring the health, comfort, and safety of the Emigrants have been duly complied with, as well as all such rules as the Governor-General in Council from time to time frames under section fifty-six.

X.—EMBARKATION.

45. If any Emigrant, without sufficient cause, refuses or Emigrants refusing to embark. neglects to embark when called upon by the Emigration Agent so to do, it shall not

1871 be lawful to compel such Emigrant to embark or to put him on board ship against his will, or to detain him against his will at the dépôt or elsewhere: but nothing in this section shall diminish or affect the civil or criminal liabilities which such Emigrant incurs by reason or in respect of his refusal or neglect aforesaid.

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Every case in which an Emigrant is charged before a Magistrate of Police in a Presidency Town, with refusing or neglecting to embark without sufficient cause, shall be heard and determined by such Magistrate in a summary manner, and every such laborer shall, on conviction, be punished in the manner provided in section four hundred and ninety-two of the Indian Penal Code for the punishment of offences under that section.

46. Emigrants may leave India for any place east of the Cape of Good Hope to which emigration is lawful under this Act, at all times of the year.

Time of sailing for places east of Cape of Good Hope.

For any such place west of the Cape of Good Hope, Emigrants may leave only between the thirty-first day of July and the first day of March, unless they embark in vessels using steam power, in which case they may leave at any time of the year.

For other places.

Provided that, in cases of emergency, the Local Government may permit Emigrants for any place west of the Cape of Good Hope to leave between the thirty-first day of July and the first day of April.

47. The Protector of Emigrants shall, from the report of the Medical Inspector and by personal communication with every Emigrant before embarkation, ascertain that the Emigrant is in good health, and not incapacitated from labor by old age, bodily infirmity, or disease.

If the Protector of Emigrants is of opinion that any Emigrant is in a state of health, which makes him unfit to undertake the voyage on which he is about to embark, the Protector shall refuse to permit his embarkation, and the husband, wife, father, mother, or child of such emigrant may, notwithstanding anything herein contained, refuse to embark.

The Protector of Emigrants shall also, before the embarkation of any Emigrant, ascertain that he has in his possession the copy of the registration, provided under section twenty-seven or section twenty-nine.

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If it appear to the satisfaction of the Protector of Emigrants that any Emigrant has lost such copy, the Protector may furnish such Emigrant with another copy of such registration, to be made from the copy received by the Protector from the Magistrate under section twenty-seven, or from the Register kept by himself under section twenty-nine, and shall thereupon allow such Emigrant to embark.

48. The Protector of Emigrants shall explain to all Emigrants, prior to their embarkation, the substance of the provisions of this Act so far as they immediately affect such Emigrants.

49. (1) When any Emigrants are about to embark on any vessel, the Emigration Agent for the place to which they are intended to proceed shall furnish the master of the vessel with five copies of a list, specifying, as accurately as may be, the names, ages, and occupations, and the names of the fathers of the Emigrants about to embark on board such vessel.

(2) On embarkation, every Emigrant shall deliver to the master of the vessel the pass granted to him under section thirty-eight; and the master shall not receive any Emigrant on board, unless he delivers up such pass. The master shall compare the Emigrants who embark, and the passes delivered by them, with the list furnished by the Emigration Agent; and if the list appear to be correct, and to correspond with the passes delivered, and with the Emigrants embarked, the master shall sign the five copies of the list.

(3) The Protector of Emigrants shall be personally present at the embarkation of all Emigrants, and shall see that the master duly compares the list with the passes and Emigrants, and he shall himself also compare the list with the passes and Emigrants.

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(4) The Medical Inspector shall also be personally present at the embarkation of all Emigrants, and shall examine each Emigrant to ascertain if he is in a fit state of health to emigrate to the place to which he has contracted to proceed; and the provisions of sections thirty-four, thirty-five, and thirty-six shall apply, *mutatis mutandis*, to Emigrants examined under this clause.

(5) When the copies of the list have been signed, the master shall give two copies to the Protector of Emigrants, who shall sign such

One copy of list of Emigrants given to Protector, to be signed and returned to master.

copies if he believes them to be correct, and shall return one copy to the master of the vessel: the other copy shall be filed in the office of the Protector of Emigrants.

Emigrant, not having pass, not to be allowed to remain on board.

(6) The Protector of Emigrants shall not permit any Emigrant to remain on board who has not a pass, or is not mentioned in the list aforesaid.

(7) Every pass

Pass to be returned to Emigrant on arrival at place of destination.

delivered up to the master of a vessel under this section shall be returned by him to the Emigrant by whom the same was delivered up, prior to such Emigrant

disembarking on the arrival of the vessel at her place of destination.

50. The master

Copy of list of Emigrants to be signed by Emigration Agent and returned to master.

of every vessel carrying Emigrants shall, after the embarkation of the Emigrants, and before the departure of the vessel, give to the Emigration Agent, at the port from which such vessel is cleared out, two

others of the five copies of the list of Emigrants mentioned in section forty-nine, duly signed by the master.

The Emigration Agent shall thereupon sign such copies, and

And by him to be delivered at place of destination.

shall return to the master one of the said copies, which shall, on the arrival of the vessel at the place of destination, and previous to the disembarkation of any Emigrant, be delivered by

the master to the Protector of Emigrants, or other the proper officer, at such place.

51. The Protector of Emigrants shall, by every vessel which carries Emigrants, send to the Protector

Protector to send list of Emigrants to Government of place to which they sail.

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of Emigrants or other the proper Government authority, at the place for which the Emigrants embark, a correct and detailed

list of all Emigrants embarked in such vessel, compiled from the passes of the Emigrants, and from the list signed by the master as aforesaid.

52. The master of every vessel carrying Emigrants from

Vessel sailing from Calcutta to depart within twenty-four hours of embarkation.

the port of Calcutta shall proceed on his voyage, and depart with his vessel from Garden Reach within twenty-four hours after the embarkation of such of the Emi-

grants as shall have first embarked.

53. Every vessel sailing from the port of Calcutta with Emi-

Vessels sailing from Calcutta to be towed to sea.

grants shall proceed from Garden Reach to sea under tow of a competent steamer.

54. Two copies of this Act, and of all rules made by the

Copies of Act and rules to be kept on board.

Governor-General in Council under section fifty-six, and two copies of a transla-

tion of this Act and of such rules, in such language or languages as the Local Government may direct, shall be delivered to the master of every vessel carrying Emigrants by the Emigration Agent at the time of clearance, and shall be kept on board of every such vessel during the whole voyage.

One of such copies or translations shall, upon request made at any reasonable time to the master of the vessel, be produced to any Emigrant or passenger for his perusal.

55. In case of sickness breaking out on board of any vessel

Taking Emigrants for Seychelles to quarantine station of Mauritius.

conveying Emigrants to Seychelles, such Emigrants may be taken to the quarantine station of Mauritius.

In such case the Emigrants may, at their option, contract for service at Mauritius, or may proceed to Seychelles.

If they elect to contract for service in Mauritius, such Emigrants shall then be regarded and treated, in all respects, as if they had emigrated to Mauritius under the provisions of this Act.

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XI.—SUPPLEMENTARY POWERS.

Power of the Governor-General in Council to make rules.

56. The Governor-General in Council may from time to time make rules consistent with this Act,—

- (1) To regulate the proportion of women to be taken with Emigrants, the proportion of children to be taken with adults, and the age below or above which children shall not be taken;
- (2) To prescribe the description, quantity, and quality of provisions to be taken by vessels carrying Emigrants, the daily allowance of food and water to be issued to each Emigrant during the voyage, and the nature and amount of clothing which shall be supplied to the Emigrants;
- (3) To provide for the medical care of Emigrants during their residence at the dépôts and on their voyages;
- (4) To prescribe the nature, quality, and quantity of medical drugs and other stores to be carried on board such vessels;
- (5) To provide for the ventilation and cleanliness of such vessels during their voyages, and for their being furnished with a sufficient number of suitable boats for use in case of shipwreck or fire;
- (6) To provide for a journal being kept by the Surgeon of every such vessel of the health of the Emigrants, and of his treatment of the sick, together with full explanations of the causes of every death;
- (7) And generally to provide for the security, well-being, and protection of Emigrants.

All such rules shall be published in the *Gazette of India*, and shall have effect as if they were contained in this Act.

Provided that, in cases of emergency, the Local Government may permit any vessel carrying Emigrants to leave port, although the proportion of women or children embarked on board such vessel is not in accordance with the said rules.

57. Whenever the Governor-General in Council has reason to believe that, in any place to which emigration is lawful under this Act, proper measures have not been taken for the protection of Emigrants immediately upon their arrival in such place, or during their residence therein, or

Power to prohibit emigration to any place to which emigration is allowed.

to believe that, in any place to which emigration is lawful under this Act, proper measures have not been taken for the protection of Emigrants immediately upon their arrival in such place, or during their residence therein, or

for their safe return to India, or to provide a return passage to India for any such Emigrants at or about the time at which they are entitled to such return passage, the Governor-General in Council may, by notification published in the *Gazette of India*, declare that emigration to such place shall cease, and be prohibited from a certain day to be specified in the notification.

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58. After any notification has been published under section *Emigration to place fifty-seven*, emigration to such place, as is mentioned to be suspended, specified in such notification, shall be suspended from the day specified in the notification: but such suspension shall not affect any act done, offence committed, or proceedings commenced before such suspension.

59. During the time of such suspension, any provisions of *During suspension, laws against emigration to be in force as to place specified.* this Act prohibiting emigration, or the aiding or abetting of emigration, or the making of any contract for labor to be performed by any Native of India out of the British territories in India, shall take effect so far as relates to the place specified in the notification, in the same manner, and to the same extent, as if emigration to such place had never been declared to be lawful.

60. Whenever the Governor-General in Council is satisfied *Revocation of suspension.* that, in the place specified in any notification under section fifty-seven, proper measures have been taken, and will be adopted for the protection of Emigrants immediately upon their arrival thereat, and during their residence therein, and for their safe return to India, and for providing return passages to India for such Emigrants at or about the time at which they are entitled to such return passages, the Governor-General in Council may notify in the *Gazette of India* that emigration to such place shall again be allowed from a day to be specified in such notification.

Thereupon all the provisions of this Act authorizing emigration to such place shall, from the day so specified, be revived and have the same effect as if such emigration had not been suspended, except as to acts done, offences committed, and proceedings commenced during the time of such suspension.

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61. Whenever the Governor-General in Council or the Local Government has reason to believe that, in any place to which emigration is lawful, the plague or other infectious disease dangerous to human life has broken out,

or that proper measures have not been taken for the protection of Emigrants immediately upon their arrival in such place, or during their residence therein,

or for their safe return to India,

or to provide a return passage to India for any such Emigrants at or about the time at which they are entitled to such return passage,

the Governor-General in Council or the Local Government may, by notification published in the *Gazette of India*, or the local Gazette (as the case may be), declare that emigration from British India or from the territories subject to the Local Government (as the case may be) to such place shall cease, and be prohibited from a certain day, to be specified in the notification.

Any notification issued by the Governor-General in Council under this section may be cancelled by notification in the *Gazette of India*.

Any notification issued by the Local Government under this section may be cancelled by order of the Governor-General in Council, or by the Local Government.

62. The Governor-General in Council may, from time to time, by notification in the *Gazette of India*, increase any fee payable under sections eleven, nineteen, and thirty-one, and may also in like manner reduce to its present amount any fee so increased:

Provided that no fee shall be increased under this section by more than double such amount.

XII.—SPECIAL PROVISIONS AS TO FRENCH COLONIES.

63. The French Government may nominate a person to be

Nomination of Agents for Calcutta, Madras, and Bombay. Emigration Agent under this Act for each of the ports of Calcutta, Madras, and Bombay. Provided that such person,

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before entering on the duties of his office under this Act, has been approved by Her Majesty.

64. The Emigration Agents so nominated and approved as
 Powers of Agents. aforesaid shall be authorized, under the
 conditions prescribed in this Act, to recruit
 and engage Native laborers for all or any of the French Colo-
 nies aforesaid.

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65. The said Emigration Agents shall act in conformity with
 Operations of recruit- the regulations now or hereafter existing
 ment. for the recruitment of Native laborers for
 British colonies, and shall, with regard to the operations of
 recruitment which are entrusted to them, enjoy for themselves
 and the persons whom they may employ in the management of
 the said operations, all the facilities and the advantages afforded
 to the Emigration Agents for British colonies.

66. The Protector of Emigrants, at each of the three British
 Protector of Emigrants. ports aforesaid, shall act for the British
 Government as Protector of Laborers
 emigrating under the provisions of this part of this Act.

In French ports in India the duty imposed on the British
 Consular Agents, by Article V of the Convention printed in the
 third schedule hereto annexed, shall be performed under such in-
 structions as may be given by the Governor-General in Council
 in this behalf.

67. All contracts of service made with laborers emigrating
 Contracts of service, with to French colonies under this Act, except
 certain exceptions, to be made in India. Effect of the contracts mentioned in clause four of
 contract. Article IX, and clause two of Article X
 of the said Convention, shall be made in India, and shall bind
 the Emigrant, either to serve a person designated by name, or to
 serve a person to whom he is allotted by the proper authority
 on his arrival in the colony to which he emigrates.

68. The contracts of service shall be in accordance with the
 Matters to be provided terms of the said Convention, and shall
 for in contract. make provision for—

- (1) The duration of the engagement at the expiration of
 which the Emigrant shall receive a return-passage to India at
 the expense of the French Government, and the terms on which
 he may abandon or renounce his right to a free return-passage.
- (2) The number of days and hours of work.

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(3) The wages and rations as well as the rate of payment for extra work, and all the advantages promised to the Emigrant.

(4) Gratuitous medical treatment for the Emigrant, except in cases where, in the opinion of the proper Government officer, his illness has arisen from his own misconduct.

(5) In every contract of engagement there shall be inserted an exact copy of Articles IX, X, XX and XXI of the said Convention.

69. The Governor-General in Council may, by order to be

Power to extend Act to French Colonies not expressly named. published in the *Gazette of India*, extend this Act to any other French Colony not expressly named herein, at which a British Consular Agent is established and to which the application of the said Convention shall be extended, and in such order may declare the probable length of the voyage to such Colony.

Such declaration shall have the same effect as if it formed part of this section.

70. Every Emigrant vessel sailing to a French Colony shall carry an European Surgeon and an Interpreter.

XIII.—PENALTIES.

71. Whoever, except under and in conformity with the provisions of this Act, makes any contract for making unlawful contract of labor with any Native of India for labor to be performed in any place beyond British India to which emigration is not authorized under this Act, shall be deemed to have committed the offence specified in section three hundred and sixty-three of the Indian Penal Code;

And whoever knowingly enables or assists any Native of India to emigrate to any such place, or aids in or abets the emigration of any Native of India to any such place, shall be deemed to have abetted the commission of that offence.

72. Whoever, not being a recruiter duly licensed under this Act, acts or is employed as a Recruiter of laborers, or contrary to the provisions of this Act, enters into any contract with a Native of India for labor to be performed by such Native in any place beyond British India, shall be liable to a fine not exceeding five hundred rupees.

For recruiting without being licensed.

73. Whoever, being a duly licensed Recruiter removes any

For Recruiter failing to take engaged labourers before Magistrate or Protector. Emigrant whom he may engage in any district or place other than the towns of Calcutta, Madras or Bombay, from such dis-

tict or place, without such Emigrant having appeared along with the Recruiter before a Magistrate in order that the Emigrant might be examined and registered;

and whoever removes any Emigrant whom he may engage in any one of the towns of Calcutta, Madras or Bombay, from such town, or to an emigration dépôt, without such Emigrant having appeared with the Recruiter before the Protector of Emigrants in order that the Emigrant might be examined and registered;

and whoever by means of intoxication, violence, fraud, or false

For fraudulently inducing labourer to contract. pretences induces any Native of India to enter into a contract for labour to be performed by him in any place to which emigration is lawful under this Act, or to proceed to any such place without having entered into any contract;

and whoever fails to supply any Emigrant whom he has en-

For not supplying proper food. gaged, and who is registered, with suitable food, or otherwise ill-treats such Emigrant

on his journey to the dépôt;

and whoever forwards, sends or conveys any such Emigrant

For not taking labourer to dépôt. otherwise than is provided in section thirty-two, or to any house or place in or near the Towns of Calcutta, Madras or Bombay, respectively, other than the dépôt for the Emigrants for the place at which such Emigrant has contracted to labour,

shall be liable to a fine not exceeding five hundred rupees.

74. Whoever, being a duly licensed Recruiter, forwards or

For forwarding labourers or allowing them to go, without being duly registered. sends any Emigrant from the district or town in which he has entered into an engagement, to any emigration dépôt without such Emigrant having been duly registered

in accordance with the provisions of sections twenty-seven and twenty-nine;

and whoever, being a duly licensed Recruiter, induces or knowingly permits any such Emigrant to leave such district or

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shall be liable to a fine not exceeding five hundred rupees.

75. Whoever, without lawful authority, issues any written order to the Police to assist himself or any other person to procure labourers to proceed to any place beyond British India, or falsely represents that such labourers are required by the Government or are to be engaged on behalf of Government, shall be liable to a fine not exceeding five hundred rupees.

76. The Master of any vessel which has not been licensed as For receiving Emigrants provided in section forty, knowingly receiving any Emigrant on board in order to convey such Emigrant to any place contrary to the provisions of this Act, shall be liable to imprisonment for a period not exceeding one year, and also to a fine not exceeding one thousand rupees for every such Emigrant received on board, and the vessel shall be liable to be forfeited.

77. If the Master of any vessel, at the port of Calcutta, the For clearing ship without complying with rules. port of Madras, or the port of Bombay, clears such vessel for any place to which emigration is lawful under this Act, and takes on board any Emigrant without having fully complied with every particular required in sections forty-one and forty-two, he shall be liable to a fine not exceeding two hundred rupees for every Emigrant so taken on Board.

78. If the Master of any vessel, after having cleared such vessel for any place to which emigration is lawful under this Act, takes on board any Emigrant without such Emigrant having been duly entered in the lists mentioned in sections forty-nine and fifty, and in the manner in those sections prescribed, he shall be liable to a fine not exceeding two hundred rupees for every Emigrant so taken on board.

79. If after having obtained a certificate in accordance with For fraudulent acts whereby certificate becomes inapplicable to vessel. the provisions of section forty, the master of any vessel cleared for any place to which emigration is lawful under this Act,

fraudulently does, or suffers to be done, any act or thing whereby such certificate becomes inapplicable to the altered state of the vessel or other matter to which such certificate relates, he shall be liable to a fine not exceeding five thousand rupees,

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and he may also be sued on any bond which he may have executed in consideration of any license obtained for the vessel as originally described.

80. If the Master of a vessel sailing from the port of Calcutta, licensed under section forty and without steam, sailing with Emigrants on board, without reasonable excuse causes or allows his vessel to proceed from Garden Reach to sea, or to proceed any part of the distance between Garden Reach and sea, without his vessel being under tow of a competent steamer,

or if such vessel has not left Garden Reach and proceeded on her voyage within the time prescribed in section fifty-two,

the Master of such vessel shall be liable to a fine not exceeding one thousand rupees.

81. All the powers vested by law in the officers of Customs in regard to the searching and detention of vessels, or otherwise, for the prevention of smuggling on board thereof, may be exercised by such officers for the prevention of the illegal embarkation of Emigrants on board vessels bound for any place to which emigration is lawful under this Act, and of other offences against this Act.

82. All prosecutions under this Act shall be instituted on information laid at the instance of an Emigration Agent, or of a Protector of Emigrants, or of an officer appointed for the purpose by the Local Government, before a Magistrate of Police, or before a Magistrate, according as they shall be instituted for offences committed within or for offences committed beyond the limits of the towns of Calcutta, Madras and Bombay.

All fines imposed under this Act may be recovered, if for offences committed outside the limits of the said towns, in the manner prescribed by the Code of Criminal Procedure, and if for offences committed

Prosecutions under this Act where and how instituted.

information laid at the instance of an Emigration Agent, or of a Protector of Emigrants, or of an officer appointed for the

purpose by the Local Government, before a Magistrate of Police, or before a Magistrate, according as they shall be instituted for offences committed within or for offences committed beyond the limits of the towns of Calcutta, Madras and Bombay.

All fines imposed under this Act may be recovered, if for offences committed outside the limits of the said towns, in the manner prescribed by the Code of Criminal Procedure, and if for offences committed

¹⁸⁷¹ within those limits, in the manner prescribed by any Act regulating the Police of such towns in force for the time being.

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XIV.—MISCELLANEOUS.

83. The probable length of the voyages to the places mentioned in section twenty-three, from Calcutta, Madras or Bombay respectively, shall, for the purposes of this Act, and in the case of sailing vessels, be deemed to be as follows:—

FROM CALCUTTA:—

To Mauritius, Seychelles, and Réunion	...	Between the months of April and October inclusive, ten weeks; and between the months of November and March inclusive, eight weeks.
To Jamaica, British Guiana, Trinidad, St. Lucia, Grenada, St. Vincent, St. Kitts, and St. Croix, Martinique, Guadeloupe and its dependencies	...	Twenty weeks.
To French Guiana	...	Twenty-six weeks.
To Natal	...	Twelve weeks.

FROM MADRAS:—

To Mauritius, Seychelles, and Réunion	...	Between the months of April and October inclusive, seven weeks; and between the months of November and March inclusive, six weeks.
To Jamaica, British Guiana, Trinidad, St. Lucia, Grenada, St. Vincent, St. Kitts, St. Croix, Martinique, Guadeloupe and its dependencies, and French Guiana	...	Nineteen weeks.
To Natal	...	Ten weeks.

FROM BOMBAY:—

To Mauritius, Seychelles, and Réunion	...	Between the months of April and September inclusive, five weeks; and between the months of October and March inclusive, six weeks.
---------------------------------------	-----	--

To Jamaica, British Guiana,
 Trinidad, St. Lucia, Grenada,
 St. Vincent, St. Kitts, St. Croix,
 Martinique, Guadeloupe and its
 dependencies, and French
 Guiana ... } Nineteen weeks.

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To Natal ... Ten weeks.

In the case of vessels propelled either wholly or in part by steam, the local Government may, by notification in the Official *Gazette*, fix, for the purposes of this Act, the probable length of the voyages aforesaid.

84. Every notification under section twenty-four shall state the probable length of the voyages from Calcutta, Madras, and Bombay, respectively, to every place to which emigration is thereby authorized, and thereupon such period shall, for the purposes of this Act, be taken to be the probable length of such voyage.

85. The local Government may from time to time authorize any person invested with the powers of a Magistrate, as defined in the Code of Criminal Procedure, to perform the duties and exercise the powers by this Act assigned to and conferred on the Magistrate of the District.

Every person so authorized shall in all respects for the purposes of this Act be deemed to be included in the words "the Magistrate."

86. Nothing in this Act or in any rule to be made by the Governor-General in Council under section sixty-one shall apply to any vessel in the service of the Lords Commissioners of the Admiralty, or to any of Her Majesty's vessels.

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THE FIRST SCHEDULE.

(See section 2.)

Number and year.	Title.
XLVI of 1860	To authorize and regulate the Emigration of Native Labourers to the French Colonies.
VII of 1862	To amend Act XLVI of 1860 (to authorize and regulate the Emigration of Native Labourers to the French Colonies.)
XIII of 1864	To consolidate and amend the laws relating to the Emigration of Native Labourers.
VI of 1869	To amend the law relating to the Emigration of Native Labourers.
VI of 1870	To enable the Governor-General in Council to increase the fee payable under section thirty-one of the Emigration Act.

THE SECOND SCHEDULE.

(See section 19.)

Office of the Protector of Emigrants at the Port of

A. B. is hereby licensed under the Indian Emigration Act, 1871, to be a Recruiter for engaging persons to proceed to
for the purpose of labouring for hire.

This license will be in force for one year only from this date.

Dated the day of

(Signed) C. D.,
Protector of Emigrants.

THE THIRD SCHEDULE.

(See sections 66, 67, and 68.)

Convention between Her Majesty and the Emperor of the French relative to the Emigration of Labourers from India to the French Colonies, with an additional article thereto annexed.

Signed at Paris, July 1861.

[Ratifications exchanged at Paris, July 30th, 1861.]

His Majesty the Emperor of the French having made known, by a declaration dated this day (1st July 1861) his resolution to put an end to the recruitment upon the coast of Africa of negro labourers by means of rédemption; and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland desiring, in consequence, to facilitate the emigration of free labourers into the French Colonies, their said Majesties have resolved to conclude a Convention destined to regulate the recruitment of such labourers in the

British territories in India. For this purpose they have named as their Plenipotentiaries:—

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Act VII.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Most Honourable Henry Richard Charles Earl Cowley, Her Majesty's Ambassador Extraordinary and Plenipotentiary to the Emperor of the French;

And His Majesty the Emperor, of the French, M. Edouard Antoine Thouvenel, Senator, His Minister and Secretary of State for the Department of Foreign Affairs;

Who, after having communicated to each other their respective full powers, found in due form, have agreed upon the following Articles:—

ARTICLE I.

The French Government shall be at liberty to recruit and engage labourers for the French Colonies in the Indian Territories belonging to Great Britain, and embark Emigrants, being subjects of Her Britannic Majesty, either in British or French Ports in India, under the conditions hereinafter stipulated.

ARTICLE II.

The French Government shall entrust the direction of its operations in every centre of recruitment to an Agent chosen by itself.

Those Agents must be approved by the British Government.

Such approval is assimilated, with regard to the right of granting and withdrawal, to the Exequatur given to Consular Agents.

ARTICLE III.

This recruitment shall be effected conformably to the regulations which now exist, or may hereafter be established, for the recruitment of labourers for British Colonies.

ARTICLE IV.

The French Agent shall, with regard to the operations of recruitment which are intrusted to him, enjoy for himself and for the persons whom he may employ, all the facilities and advantages afforded to the Recruiting Agents for British Colonies.

ARTICLE V.

The Government of Her Britannic Majesty shall appoint in those British Ports where Emigrants may be embarked, an Agent who shall be specially charged with the care of their interests.

In French Ports, the same duty with regard to Indian subjects of Her Britannic Majesty shall be confided to the British Consular Agent.

Under the term "Consular Agents" are comprised Consuls, Vice-Consuls, and all other Commissioned Consular Officers.

ARTICLE VI.

No Emigrant shall be embarked unless the Agent described in the preceding Article shall have been enabled to satisfy himself, either that the Emigrant is not a British subject or, if a British subject, that his engagement is voluntary,

1871 that he has a perfect knowledge of the nature of his contract, of the place of
Act VII. his destination, of the probable length of his voyage, and of the different
advantages connected with his engagement.

ARTICLE VII.

The contracts of service, with the exception provided for by section 4 of Article IX, and by section 2 of Article X, shall be made in India, and shall either bind the Emigrant to serve a person designated by name, or to serve a person to whom he shall be allotted by the proper authority on his arrival in the Colony.

ARTICLE VIII.

The contracts shall, moreover, make stipulation for :—

1. The duration of the engagement, at the expiration of which the Emigrant shall receive a return-passage to India at the expense of the French Government, and the terms on which it will be competent to him to abandon or renounce his right to a free return-passage.
2. The number of days and hours of work.
3. The wages and rations, as well as the rate of payment for extra work, and all the advantages promised to the Emigrant.
4. Gratuitous medical treatment for the Emigrant, except in cases where, in the opinion of the proper Government officer, his illness shall have arisen from his own misconduct.

In every contract of engagement there shall be inserted an exact copy of Articles IX, X, XX and XXI of the present Convention.

ARTICLE IX.

1. The duration of the Emigrant's engagement shall not be more than five years. In case, however, he shall be duly proved to have absented himself from work, he shall be bound to serve a number of days equal to the time of his absence.

2. At the expiration of that period, every Indian who shall have attained the age of ten years at the time of his departure from India, shall be entitled to a return-passage at the expense of the French Government.

3. If he can show that his conduct has been regular, and that he has the means of subsistence, he may be allowed to reside in the Colony without any engagement; but from that time he will lose his right to a free return-passage.

4. If he consents to contract a new engagement, he will be entitled to a bounty, and will retain his right to a return-passage at the expiration of this second engagement.

The right of the Emigrant to a return-passage extends to his wife, and to his children who quitted India under the age of ten years, as well as to those born in the Colonies.

ARTICLE X.

The Emigrant shall not be bound to work more than six days in seven nor more than nine hours and-a-half a day.

The conditions of task-work, and every other kind of regulation for work, shall be freely arranged with the labourer. The obligation to provide on holidays, for the care of animals and the necessities of daily life, shall not be considered as work.

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ARTICLE XI.

In British Ports, the arrangements which precede the departure of the Emigrants shall be conformable to those prescribed by the regulations for the British Colonies.

In French Ports, the Emigration Agent or his deputies shall, on the departure of every Emigrant ship, deliver to the British Consular Agent a nominal list of the Emigrants who are subjects of Her Britannic Majesty, with a description of their persons, and shall also communicate to him the contracts of which he may require copies.

In such case, only one copy shall be given of all contracts of which the provisions are identical.

ARTICLE XII.

In the Ports of embarkation, the Emigrants who are subjects of Her Britannic Majesty shall be at liberty, conforming to the regulations of Police relative to such establishments, to leave the dépôts, or other places in which they may be lodged, in order to communicate with the British Agents, who, on their part, may at any reasonable hour visit the places in which the Emigrants, subjects of Her Britannic Majesty, are collected or lodged.

ARTICLE XIII.

Emigrants may leave India for the Colonies to the East of the Cape of Good Hope at all times of the year.

For other Colonies they may leave only from the first of August to the fifteenth of March. This arrangement applies only to sailing vessels; vessels using steam-power may leave at any time of the year.

Every Emigrant sailing from India for the Antilles, between the first of March and the fifteenth of September, shall receive at least one double blanket over and above the clothing usually allowed to him, and may make use of it so long as the vessel is outside of the Tropics.

ARTICLE XIV.

Every Emigrant vessel must carry an European Surgeon and an Interpreter.

The Captains of Emigrant vessels shall be bound to take charge of any despatch which may be delivered to them by the British Agent at the Port of embarkation for the British Consular Agent at the Port of destination, and to deliver it to the Colonial Government immediately after his arrival.

ARTICLE XV.

In every vessel employed for the conveyance of Emigrants, subjects of Her Britannic Majesty, the Emigrants shall occupy, either between decks, cabins on the upper deck or in firmly secured and entirely covered in, a space devoted to their exclusive use. Such cabins and space between decks shall in every part have a height of not less than five feet and-a-half.

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Act VII. No compartment shall take more than one adult Emigrant for every cubic space of seventy-two feet in the Presidency of Bengal, and at Chandernagore, and for every cubic space of sixty feet in other French Ports, and in the Presidencies of Bombay and Madras.

An Emigrant above the age of ten years shall count as an adult, and two children from one to ten years of age shall count as one adult.

A place shall be fitted up for a hospital in every Emigrant ship.

Women and children shall occupy compartments of the vessel distinct and separate from those of the men.

ARTICLE XVI.

Each shipment of Emigrants shall include a proportion of women equal to at least one-fourth of the number of men. After the expiration of three years, the numerical proportion of women shall be raised to one-third; after two years more, it shall be raised to one-half; and after a further period of two years, the proportion shall be the same as may be fixed for the British Colonies.

ARTICLE XVII.

The British Agents at the embarkation shall have, at all reasonable times, the right of access to every part of the ship which is appropriated to the use of Emigrants.

ARTICLE XVIII.

The Governors of the French establishments in India shall make such administrative regulations as may be necessary to ensure the complete execution of the preceding stipulations.

ARTICLE XIX.

On the arrival of an Emigrant ship in any French Colony, the Government shall cause to be transmitted to the British Consular Agent any despatches which it may have received for him, together with,

1. A nominal list of all labourers disembarked who are subjects of Her Britannic Majesty.

2. A list of the deaths or births which may have taken place during the voyage.

The Colonial Government shall take the necessary measures to enable the British Consular Agent to communicate with the Emigrants before their distribution in the Colony.

A copy of the "List of distribution" shall be delivered to the Consular Agent.

He shall be informed of all deaths and births which may occur during the period of engagement, as well as of all changes of employer, and of all departures on a return-passage.

Every fresh engagement, or act of renunciation of the right to a free return-passage, shall be communicated to the Consular Agent.

ARTICLE XX.

All Emigrants, being subjects of Her Britannic Majesty, shall, in the same manner as other subjects of the British Crown, and conformably to the ordi-

nary rules of international law, enjoy, in the French Colonies, the right of claiming the assistance of the British Consular Agents; and no obstacle shall be opposed to the labourer's resorting to the Consular Agent and communicating with him, without prejudice, however, to the obligations arising out of his engagement.

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ARTICLE XXI.

In the distribution of labourers no husband shall be separated from his wife, nor any father or mother from their children under fifteen years of age. No labourer shall be required to change his employer without his own consent, unless he be transferred to the Government, or to the person who has acquired the property on which he is employed.

Emigrants who may become permanently incapable of work, either by sickness or by any other cause beyond their own control, shall be sent back at the expense of the French Government, whatever time may still be wanting to entitle them to a free return-passage.

ARTICLE XXII.

All operations of emigration may be carried on in the French Colonies by French or British vessels without distinction.

British vessels which may engage in those operations shall be bound to conform to all the measures of Police, health, and equipment which may apply to French vessels.

ARTICLE XXIII.

The labour regulations of Martinique shall serve as the basis for all the regulations of the French Colonies into which Indian Emigrants, subjects of Her Britannic Majesty, may be introduced.

The French Government engages not to introduce into those regulations any modification, the result of which would be to place the said Indian subjects in an exceptional position, or to impose upon them conditions of labour more stringent than those prescribed by the said regulations.

ARTICLE XXIV.

The present Convention applies to emigration to the Colonies of Réunion, Martinique, Guadeloupe and its dependencies, and Guiana.

It may hereafter be applied to emigration to other Colonies in which British Consular Agents shall be established.

ARTICLE XXV.

The provisions of the present Convention relative to the Indian subjects of Her Britannic Majesty shall apply to the Natives of every Indian State which is under the protection or political control of Her said Majesty, or of which the Government shall have acknowledged the supremacy of the British Crown.

ARTICLE XXVI.

The present Convention shall begin to take effect on the first of September 1861, and shall continue in full force for three years and-a-half. It shall remain in full force, if notice for its termination be not given in the course of

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the month of September of the third year, and then notice can be given only in the course of the month of September of each succeeding year.

In case of notice being given for its termination, it shall cease eighteen months afterwards.

Nevertheless the Governor-General of British India in Council shall, in conformity with the Act of the 19th of September, 1856, relative to emigration to British Colonies, have the power to suspend at any time emigration to any one or more of the French Colonies, in the event of his having reason to believe that in any such Colony proper measures have not been taken for the protection of the emigrants immediately upon their arrival or during their residence therein, or for their safe return to India, or to provide a return-passage to India for any such emigrants at or about the time at which they are entitled to such return-passage.

In case, however, the power thus reserved to the Governor-General of British India should at any time be exercised, the French Government shall have the right immediately to terminate the whole Convention, if they should think proper to do so.

But in the event of the determination of the present Convention, from whatever cause, the stipulations relative to Indian subjects of Her Britannic Majesty introduced into the French Colonies shall be maintained in force in favour of the said Indian subjects, until they shall either have been sent back to their own country, or have renounced their right to a return-passage to India.

ARTICLE XXVII.

The present Convention shall be ratified, and the ratifications shall be exchanged at Paris in four weeks, or sooner if possible.

In witness whereof the respective Plenipotentiaries have signed the same and have affixed thereto the seals of their arms.

Done at Paris, the 1st day of July, in the year of our Lord one thousand eight hundred and sixty-one.

(L. s.) COWLEY.
(L. s.) THOUVENEL.

ADDITIONAL ARTICLE.

His Majesty the Emperor of the French having stated that, in consequence of the order which he gave long ago that no more African Emigrants should be introduced into the Island of Réunion, that Colony has, since last year, had to obtain labourers from India and China; and Her Britannic Majesty having, by a Convention signed on the 25th of July 1860, between Her Majesty and His Majesty the Emperor of the French, authorized the Colony of Réunion to recruit six thousand labourers in Her Indian possessions, it is agreed that the Convention of this date shall take effect forthwith, with regard to the said Colony of Réunion.

The present Additional Article shall have the same force and validity as if it were inserted, word for word, in the Convention signed this day. It shall be ratified, and the ratifications shall be exchanged at the same time as those of the Convention.

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Act VII.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at Paris, the 1st of July 1861.

(L. S.) COWLEY.
(L. S.) THOUVENEL.

Act No. VIII.

THE INDIAN REGISTRATION ACT.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor-General on the 24th March 1871.

An Act for the Registration of Documents.

WHEREAS it is expedient to consolidate and amend the laws relating to the registration of documents ;
Preamble. It is hereby enacted as follows :—

PART I.

PRELIMINARY.

Short title. 1. This Act may be called "The Indian Registration Act, 1871."

Local extent. It extends to the whole of British India, except such districts or tracts of country as the Local Government may from time to time, with the previous sanction of the Governor-General in Council, exclude from its operation.

Commencement. And it shall come into force on the first day of July 1871.

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ACT VIII.

2. On and from that day the enactments mentioned, or referred to, in the first schedule hereto annexed, shall be repealed to the extent specified in the third column of the same schedule.

But all appointments, notifications, rules, and orders made, and all offices established, under any of the said enactments, shall be deemed to have been, respectively, made and established under this Act, except in so far as such rules and orders may be inconsistent herewith.

References made in Acts passed before the first day of July 1871, to any enactment hereby repealed, shall be read as if made to the corresponding section of this Act.

And so far as regards suits instituted before the first day of April 1873, nothing herein contained affects Act No. XIV of 1859, section one, clause ten, as amended by Act No. XX of 1866, section twenty-seven.

And nothing herein contained affects Act No. XX of 1866, so far as relates to the procedure upon any agreement recorded under section fifty-two of that Act at any time before that day, or the procedure provided by that Act for the registration and deposit of authorities to adopt executed before the first day of January 1872.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context—

“Lease.” “Lease” includes a counterpart, a kabúliyát, an undertaking to cultivate or occupy, and an agreement to lease:

“Signature.” “Signature” and “signed” include and “Signed.” apply to the affixing of a mark:

“Immoveable Property” includes land, buildings, rights to “Immoveable Proper- ways, lights, ferries, fisheries, or any other ty.” benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, nor grass:

“Moveable Property” includes standing timber, growing crops “Moveable Property.” and grass, fruit upon and juice in trees, and property of every other description, except immoveable property:

- “Book” includes a portion of a book, and also any number ¹⁸⁷¹ of sheets connected together with a view ^{Act VIII.} of forming a book or portion of a book:
- “Endorsement” and “endorsed” include and apply to an entry in writing by a registering officer on a rider or covering slip to any document tendered for registration under this Act:
- “Minor” means a person who, according to the personal law to which he is subject, has not attained majority:
- “Representative” includes the guardian of a minor and the committee or other legal curator of a lunatic or idiot:
- “Addition” means the place of residence, and the profession, trade, rank, and title (if any) of a person described, and, in the case of a Native, his caste (if any) and his father’s name, or where he is usually described as the son of his mother, then his mother’s name.
- “District Court” includes the High Court in its ordinary original civil jurisdiction:
- “District.” and “Sub-District” respectively mean a District and Sub-District formed under this Act.

PART II.

OF THE REGISTRATION ESTABLISHMENT.

4. The Local Government shall appoint an officer to be the Inspector-General of Registration for the territories subject to such Government, or may, instead of making such appointment, direct that all or any of the powers and duties hereinafter conferred and imposed upon the Inspector-General, shall be exercised and performed by such officer or officers and within such local limits as the Local Government from time to time appoints in this behalf. The Governor of Bombay in Council may also, with the previous consent of the Governor-General in Council, appoint an officer to be Branch
- Branch Inspector-General of Sindh.

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Act VIII. Inspector-General of Sindh, who shall have all the powers of the Inspector-General under this Act other than the power to frame rules hereinafter conferred.

Any Inspector-General or the Branch Inspector-General of Sindh may hold simultaneously any other office under Government.

5. For the purposes of this Act, the Local Government shall Districts and Sub-Districts form Districts and Sub-Districts, and shall prescribe, and may from time to time alter the limits of such Districts and Sub-Districts.

The Districts and Sub-Districts formed under this section, together with the limits thereof, and every alteration of such limits, shall be notified in the local official *Gazette*.

Every such alteration shall take effect on such day after the date of the notification as is therein mentioned.

6. The Local Government may appoint such persons, whether public officers or not, as it thinks proper, to be Registrars of the several Districts, and to be Sub-Registrars of the several Sub-Districts, formed as aforesaid, respectively.

7. The Local Government shall establish in every District Offices of Registrar and an office to be styled the office of the Sub-Registrar. Registrar, and in every Sub-District an office to be styled the office of the Sub-Registrar, and amalgamate with any office of a Registrar any office of a Sub-Registrar.

8. The Local Government may also appoint officers to be Inspectors of Registration Offices. called Inspectors of Registration offices, and may from time to time prescribe the duties of such officers. Every such Inspector shall be subordinate to the Inspector-General.

9. Every Military Cantonment where there is a Cantonment Military Cantonments Magistrate, may (if the Local Government may be declared Sub-Districts. so directs), be, for the purposes of this Act, a Sub-District or a District, and such Magistrate shall be the Sub-Registrar or the Registrar, of such Sub-District or District, as the case may be.

Whenever the Governor-General in Council declares any Military Cantonment beyond the limits of British India to be

a Sub-District, or a District for the purposes of this Act, he shall also declare, in the case of a Sub-District, what authorities shall be Registrar of the District and Inspector-General; and in the case of a District, what authority shall be Inspector-General, with reference to such Cantonment and the Sub-Registrar or Registrar thereof.

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10. Whenever any Registrar other than the Registrar of a District including a Presidency Town, is absent otherwise than on duty in his District, or when his office is temporarily vacant,

Absence of a Registrar from his District, or vacancy in his office.
any person whom the Inspector-General appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's Office is situate,

shall be the Registrar during such absence, or until the Local Government fills up the vacancy.

Whenever the Registrar of a District including a Presidency Town, is absent otherwise than on duty in his District, or when his office is temporarily vacant,

any person whom the Inspector-General appoints in this behalf shall be the Registrar during such absence, or until the Local Government fills up the vacancy.

11. Whenever any Registrar is absent from his office on duty

Absence of Registrar on duty in his District.
any person whom the Inspector-General appoints in this behalf shall be the Registrar during such absence, or until the Local Government fills up the vacancy.

Absence of Sub-Registrar, or vacancy in his office.
12. Whenever any Sub-Registrar is absent, or when his office is temporarily vacant,

any person whom the Registrar of the District appoints in this behalf shall be Sub-Registrar during such absence, or until the Local Government fills up the vacancy.

13. All appointments made under section ten, section eleven, Appointments under section ten, eleven, or twelve to be reported to the Local Government.
or section twelve shall be reported to the Local Government by the Inspector-General. Such report shall be either special or general as the Local Government directs.

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Act VIII.

The Local Government may suspend, remove, or dismiss any person appointed under the provisions of this Act, and appoint another person in his stead.

14. Subject to the approval of the Governor-General in Council, the Local Government may assign such salaries as such Government from time to time deems proper to the registering officers appointed under this Act, or provide for their remuneration by fees, or partly by fees and partly by salaries.

The Local Government may allow proper establishments for the several offices under this Act.

15. The several Registrars and Sub-Registrars shall use a seal bearing the following inscription in English and in such other language as the Local Government directs:—The seal of the Registrar (*or of the Sub-Registrar*) of ”

16. The Local Government shall provide, for the office of every registering officer, the books necessary for the purposes of this Act.

The books so provided shall contain the forms from time to time prescribed by the Inspector-General, with the sanction of the Local Government, and the pages of such books shall be consecutively numbered in print, and the number of pages in each book shall be certified on the title-page by the officer by whom such books are issued.

The Local Government shall supply the office of every Registrar with a fire-proof box, and shall in each district make suitable provision for the safe custody of the records connected with the registration of documents in such District.

PART III.

OF REGISTRABLE DOCUMENTS.

17. The documents next hereinafter mentioned shall be registered, if the property to which they relate is situate in a District in which, and

Documents of which the registration is compulsory.

if they have been executed on or after the date on which, Act ¹⁸⁷¹
No. XVI of 1864, or Act No. XX of 1866, or this Act came ^{Act VIII.}
or comes into force (that is to say),—

(1) Instruments of gift of immoveable property :

(2) Other instruments (not being wills) 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 one hundred rupees and upwards; to or in immoveable property :

(3) Instruments (not being wills) which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest ; and

(4) Leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

Provided that the Local Government may, by order published in the official Gazette, exempt from the operation of the former part of this section any leases executed in any District, or part of a District, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.

Exception of composition-deeds; Nothing in clauses (2) and (3) of this section applies

(a) to any composition-deed,

(b) to any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of transfers of shares and debentures in Land Companies, of such Company consist in whole or in part of immoveable property, or

(c) to any endorsement upon or transfer of any debenture issued by any such Company.

Authorities to adopt a son, executed after the first day of January 1872, and not conferred by a will, shall also be registered.

Documents of which the registration is optional.

18. Any of the documents next hereinafter mentioned may be registered under this Act (that is to say),—

(1) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit, or

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Act VIII. extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of a value less than one hundred rupees to or in immoveable property :

(2) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest:

(3) Leases of immoveable property for any term not exceeding one year, and leases exempted under section seventeen :

(4) Awards relating to immoveable property :

(5) Instruments which purport or operate to create, declare, assign, limit, or extinguish any right, title, or interest to or in moveable property :

(6) Wills :

(7) Acknowledgments, Agreements, Appointments, Articles of Partnership, Assignments, Awards, Bills of Exchange, Bills of Sale, Bonds, Composition-deeds, Conditions of Sale, Contracts, certified copies of Decrees and Orders of Courts, Covenants, Grants, Instruments of Dissolution of Partnership, Instruments of Partition, Powers of Attorney, Promissory Notes, Releases, Settlements, Writings of Divorcement, and all other documents not hereinbefore mentioned.

19. If any document duly presented for registration be in a language which the registering officer does not understand, and which is not commonly used in the District, he shall refuse to register the document, unless it be accompanied by a true translation into a language commonly used in the District, and also by a true copy.

20. The registering officer may in his discretion refuse to accept for registration any document in which any interlineation, blank, erasure, or alteration appears, unless the persons executing the document attest with their signatures or initials such interlineation, blank, erasure, or alteration. If he register such document, he shall, at the time of registering the same, make a note in the register of such interlineation, blank, erasure, or alteration.

Documents in language not understood by registering officer.

commonly used in the District, he shall'

refuse to register the document, unless it be accompanied by a true translation into a language commonly used in the District, and also by a true copy.

20. The registering officer may in his discretion refuse to accept for registration any document in which any interlineation, blank, erasure, or alteration appears, unless the persons

executing the document attest with their signatures or initials such interlineation, blank, erasure, or alteration. If he register such document, he shall, at the time of registering the same, make a note in the register of such interlineation, blank, erasure, or alteration.

Documents containing interlineations, blanks, erasures, or alterations.

21. (a) No document not testamentary relating to immovable property shall be accepted for registration, unless it contains a description of such property sufficient to identify the same. 1871
Act VIII.
 Description of parcels.
- (b) Houses in towns shall be described as situate on the north or other side of the street or road (mentioning it) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered. Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate and by their superficial contents, the roads and other properties on which they abut, and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey.
- (c) No document not testamentary containing a map or documents containing plan of any property comprised therein maps or plans. shall be accepted for registration, unless it be accompanied by a true copy of the map or plan, or, in case such property is situate in several Districts, by such number of true copies of the map or plan as are equal to the number of such Districts,
22. Failure to comply with the provisions contained in section twenty-one, clause (b), shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to identify such property.
 Failure to comply with rules as to description of houses and land.

PART IV.

OF THE TIME OF PRESENTATION.

23. Subject to the provisions contained in sections twenty-four, twenty-five, and twenty-six, no document required by section seventeen to be registered, and no document mentioned in section eighteen, other than a will, shall be accepted for registration, unless presented for that purpose to the proper officer within four months from the date of its execution:
 Time for presenting documents of which the registration is compulsory.

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or, in the case of a copy of a decree or order, within four months from the day on which the decree or order was made, or, where it is appealable, within four months from the day on which it becomes final :

Provided that, where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution.

24. If owing to urgent necessity or unavoidable accident,

Provision where delay in presentation is unavoidable. any document executed, or copy of a decree or order made, in British India is not presented for registration till after the

expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration fee, such document shall be accepted for registration.

Any application for such direction may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.

25. When a document purporting to have been executed by

Documents executed out of British India. all or any of the parties out of British India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the registering officer, if satisfied,

(1) that the instrument was so executed, and

(2) that it has been presented for registration within four months after its arrival in British India,

may, on payment of the proper registration fee, accept such document for registration.

26. Whenever a registration office is closed on the last day

Provision where office is closed on last day of period for presentation. of any period hereinbefore provided for the presentation of any document, such last day shall, for the purposes of this Act, be deemed to be the day on which the office re-opens.

27. A will may at any time be presented for registration, or deposited in manner hereinafter provided.

Wills may be presented or deposited at any time.

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OF THE PLACE OF REGISTRATION.

28. Save as in this Part otherwise provided, every document mentioned in section seventeen, clauses (1),
Place for registering documents relating to immoveables. (2), (3), and (4), and section eighteen, clauses (1), (2), (3), and (4), 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.

29. Every document, other than a document referred to in section twenty-eight, and a copy of a decree or order, may be presented for registration, either in the office of the Sub-Registrar in whose Sub-District the document was executed, or in the office of any other Sub-Registrar under the Local Government at which all the persons executing and claiming under the document desire the same to be registered.

A copy of a decree or order may be presented for registration in the office of the Sub-Registrar in whose Sub-District the original decree or order was made, or, where the decree or order does not affect immoveable property, in the office of any other Sub-Registrar under the Local Government at which all the persons claiming under the decree desire the copy to be registered.

30. (a) Any Registrar may in his discretion receive and register any document which might be registered by any Sub-Registrar subordinate to him,

(b) The Registrar of a District including a Presidency Town, may receive and register any document referred to in section twenty-eight, without regard to the situation in any part of British India of the property to which the document relates.

31. In ordinary cases the registration or deposit of documents under this Act shall be made only at the office of the officer whose duty it is to register the same.

Registration or acceptance for deposit at private residence:

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Act VIII. But such officer may, on special cause being shown, attend at the residence of any person intending to register any document which would ordinarily be registered at such office, or of any person desiring to deposit a will, and register or accept for registration or deposit such document or will.

PART VI.

OF PRESENTING DOCUMENTS FOR REGISTRATION.

32. Except in the case mentioned in section thirty-one, every Persons to present documents for registration. document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper Registration office, by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person, or by the agent of such person, representative, or assign, duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned.

33. For the purposes of section thirty-two, the powers of attorney next herein-after mentioned shall alone be recognized (that is to say),—

(a) if the principal at the time of executing the power of attorney resides in any part of British India, in which this Act is for the time being in force, a power of attorney executed before, and authenticated by the Registrar or Sub-Registrar within whose District or Sub-District the principal resides :

(b) if the principal at the time aforesaid resides in any other part of British India, a power of attorney executed before, and authenticated by, any Magistrate :

(c) if the principal at the time aforesaid does not reside in British India, a power of attorney executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul, or Vice-Consul, or representative of Her Majesty, or of the Government of India :

Provided that the following persons shall not be required 1871
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Proviso as to persons infirm, or in jail, or exempt from appearing in Court. to attend at any registration-office or Court for the purpose of executing any such power of attorney as is mentioned in clauses (a) and (b) of this section :—

persons who, by reason of bodily infirmity, are unable, without risk or serious inconvenience, so to attend ;

persons who are in jail under civil or criminal process ; and persons exempt by law from personal appearance in Court.

In every such case the Registrar or Sub-Registrar or Judge (as the case may be), if satisfied that the power of attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub-Registrar or Judge may either himself go to the house of the person purporting to be the principal, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

Any power of attorney mentioned in this section may be proved by the production of it without further proof, when it purports on the face of it to have been executed before and authenticated by the person or Court hereinbefore mentioned in that behalf.

34. Subject to the provisions contained in this Part and in sections forty-one, forty-three, forty-five, sixty-nine, seventy-six, and eighty-six, no document shall be registered under this Act, unless the persons executing such document, or their representatives assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation :

Provided that if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases when the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, the document may be registered.

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Such appearances may be simultaneous or at different times.
The registering officer shall thereupon—

(a) enquire whether or not such document was executed by
the persons by whom it purports to have been executed,

(b) satisfy himself as to the identity of the persons appearing
before him, and alleging that they have executed the document,
and—

(c) in the case of any person appearing as a representative,
assign or agent, satisfy himself of the right of such person so
to appear.

35. If all the persons executing the document appear per-
sonally before the registering officer, and
Procedure on admission of execution. are personally known to him, or if he be
otherwise satisfied that they are the persons they represent
themselves to be, and if they all admit the execution of the
document;

or, in the case of any person appearing by a representative
assign or agent, if such representative assign or agent admits
the execution;

or, if the person executing the document is dead, and his
representative or assign appears before the registering officer,
and admits the execution,

the registering officer shall register the document as directed
in sections fifty-eight to sixty-one inclusive.

The registering officer may, in order to satisfy himself that
the persons appearing before him are the persons they represent
themselves to be, or for any other purpose contemplated by this
Act, examine any one present in his office.

If all or any of the persons by whom the document purports
Procedure on denial of execution, &c. to be executed deny its execution,
execute, &c.

or if any such person appears to be a minor, an idiot, or a
lunatic,

or if any person by whom the document purports to be exe-
cuted is dead, and his representative or assign denies its exe-
cution,

the registering officer shall refuse to register the document.

Nothing in section thirty-four, or the former part of this sec-
tion, applies to copies of decrees or orders.

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OF ENFORCING THE APPEARANCE OF EXECUTANTS AND WITNESSES.

36. If any person presenting any document for registration desires the appearance of any person whose presence or testimony is necessary for the registration of such document, the registering officer may, in his discretion, call upon such officer or court as the Local Government from time to time directs in this behalf, to issue a summons requiring him to appear at the registration office, either in person or by duly authorised agent, as in the summons may be mentioned and at a time named therein.

37. The Officer or Court, upon receipt of the peon's fee payable in such cases, shall issue the summons accordingly, and cause it to be served upon the person whose appearance is so required.

38. A person who by reason of bodily infirmity is unable without risk or serious inconvenience to appear at the registration office, a person in jail under civil or criminal process, and persons exempt by law from personal appearance in court, and who would, but for the provision next hereinafter contained, be required to appear in person at the registration office, shall not be required so to appear.

In every such case, the registering officer shall either himself go to the house of such person, or to the jail in which he is confined, and examine him, or issue a commission for his examination.

39. The law in force for the time being as to summonses, commissions, and compelling the attendance of witnesses, and for their remuneration in suits before civil Courts shall, save as aforesaid and *mutatis mutandis*, apply to any summons or commission issued, and any person summoned to appear under the provisions of this Act.

Law as to summonses, commissions, and witnesses in this Act.

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Act VIII.**PART VIII.****OF PRESENTING WILLS AND AUTHORITIES TO ADOPT.**

40. The testator of any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration, and the donor or donee of any authority to adopt, or the adoptive son, may present it to any Registrar or Sub-Registrar for registration.

Persons entitled to present wills and authorities to adopt.

41. A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document.

Registration of wills and authorities to adopt.

A will or authority to adopt presented for registration by any other person entitled to present it, shall be registered if the registering officer is satisfied,

- (1) that the will or authority was executed by the testator or donor, as the case may be,
- (2) that the testator or donor is dead, and
- (3) that the person presenting the will or authority is, under section forty, entitled to present the same.

PART IX.**OF THE DEPOSIT OF WILLS.**

42. Any testator may, either personally or by duly authorised agent, deposit with any Registrar Deposit of wills. the will in a sealed cover superscribed with the name of the depositor and the nature of the document.

43. On receiving such sealed cover, the Registrar, if satisfied that the depositor is the testator, or his duly authorized agent, shall transcribe in his Register Book No. 5 the superscription on such sealed cover, and note in the register and on the sealed cover the year, month, day, and hour of such presentation and receipt, together with the name of the depositor, and the name of each of the persons testifying to the identity of such depositor, and the inscription so far as it is legible on the seal of the cover.

Procedure on deposit of wills.

The Registrar shall then place and retain the sealed cover in his fire-proof box.

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44. If the depositor of any such sealed cover wishes to withdraw it, he may apply to the Registrar with whom it has been so deposited for the delivery of the cover; and the Registrar, if satisfied as to the identity of the depositor with the applicant, shall deliver the cover accordingly.

45. If, on the death of the depositor of a sealed cover under Proceedings on death section forty-two, application be made to of depositor. the Registrar with whom it has been deposited to open the same, the Registrar, if satisfied that the depositor is dead, shall, in the applicant's presence, open the cover, and copy, at the applicant's expense, the contents thereof in his Book No. 3.

Re-deposit. When such copy has been made, the Registrar shall re-deposit the original will.

46. Nothing hereinbefore contained shall affect the provisions Saving of Act X of 1865, of the Indian Succession Act, section two section 259. hundred and fifty-nine, or the power of any Court by order to compel the production of any will. But whenever any such order is made, the Registrar shall copy the will in his Book No. 3, and make a note on such copy that the original has been removed into Court in pursuance of the order aforesaid.

PART X.

OF THE EFFECTS OF REGISTRATION AND NON-REGISTRATION.

47. A registered document shall operate from the time from Time from which registered document operates. which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

48. All documents, not testamentary, duly registered under Registered documents relating to property when to take effect against oral agreements. this Act, and relating to any property, whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agree-

1871 Act VIII. ment or declaration has been accompanied or followed by delivery of possession.

Effect of non-registration of documents required to be registered.

49. No document required by section seventeen to be registered, shall affect any immoveable property comprised therein,

or confer any power to adopt,
or be received as evidence of any transaction affecting such property or conferring such power,
unless it has been registered in accordance with the provisions of this Act.

50. Every document of the kinds mentioned in clauses (1) and (2) of section eighteen, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Explanation.—In cases where Act No. XVI of 1864, or Act No. XX of 1866, was in force in the place and at the time in and at which such unregistered document was executed, “unregistered” means not registered according to such Act, and, where the document is executed, after the first day of July 1871, not registered under this Act.

PART XI.

OF THE DUTIES AND POWERS OF REGISTERING OFFICERS.

(A.) *As to the Register Books and Indexes.*

Register Books to be kept
in the several offices.
(that is to say),—

In all Registration Offices—

Book 1, “ Register of documents relating to immoveable property ;”

Book 2, “ Record of reasons for refusal to register ;”

51. The following Books shall be kept
in the several offices hereinafter named

Book 3, "Register of wills and authorities to adopt;" and

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Book 4, "Miscellaneous Register."

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In the Offices of Registrars—

Book 5, "Register of deposits of wills."

In Book 1 shall be entered or filed all documents or memoranda registered under the first four clauses of sections seventeen and eighteen, and all other documents mentioned in section eighteen, clause (7), which relate to immoveable property.

In Book 4 shall be entered all documents registered under clauses (5) and (7) of section eighteen, and not entered in Book 1.

Nothing in the former part of this section shall be deemed to require more than one set of books where the Office of a Registrar has been amalgamated with the Office of a Sub-Registrar.

52. The day, hour, and place of presentation, and the signa-

Endorsements on docu- ture of every person presenting a doc-
ment presented. ment for registration, shall be endorsed
on every such document at the time of presenting it; a receipt

Receipt for document. for such document shall be given by
the registering officer to the person pre-
senting the same; and, subject to the provisions contained in

Documents admitted to section sixty-two, every document ad-
registration to be copied. mitted to registration shall, without un-
necessary delay, be copied in the Book appropriated therefor
according to the order of its admission.

And all such books shall be authenticated at such intervals
and in such manner as is from time to time prescribed by the
Inspector-General.

53. All entries in each Book shall be numbered in a conse-

Entries to be numbered cutive series, which shall commence and
consecutively. terminate with the year, a fresh series be-
ing commenced at the beginning of each year.

54. In every office in which any of the books hereinbefore

Current indexes and en- mentioned are kept, there shall be prepared
tries therein. current indexes of the contents of such
books; and every entry in such indexes shall be made, so far as
practicable, immediately after the registering officer has copied,
or filed a memorandum of, the document to which it relates.

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55. Two such indexes shall be made in all registration offices, Indexes to be made by and shall be named, respectively, Index registering officers. No. I and Index No. II.

Index No. I. shall contain the names and additions of all persons executing, and of all persons claiming under every document copied into, or memorandum filed, in Book No. 1 or Book No. 3.

Index No. II. shall contain such particulars mentioned in section twenty-one, relating to every such document and memorandum as the Inspector General from time to time directs in that behalf.

A third index to be called Index No. III. shall contain the names and additions of all persons executing, and of all persons claiming under every document copied into Book No. 4.

Extra particulars in Indexes Nos. I., II., and III. shall contain such other particulars, and shall be prepared in such form, as the Inspector-General from time to time directs.

56. Every Sub-Registrar shall send to the Registrar to whom he is subordinate, at such intervals Indexes Nos. I and II. to be sent by Sub-Registrar to Registrar. as the Inspector-General from time to time directs, a copy of all entries made by such Sub-Registrar during the last of such intervals in Indexes Nos. I. and II.

Such copy to be filed in Registrar's office. Every Registrar receiving such copy shall file it in his office.

57. Subject to the previous payment of the fees payable in that behalf, the Books Nos. 1 and 2 and Registering officers to allow inspection of certain books and indexes, and to give certified copies of entries. the indexes relating to Book No. 1 shall be at all times open to inspection by any person applying to inspect the same; and subject to the provisions of section sixty-two, copies of entries in such books shall be given to all persons applying for such copies.

Subject to the same provisions, copies of entries in Books Nos. 3 and 4, and in the indexes relating thereto, shall be given to any person executing or claiming under the documents to which such entries respectively refer; but the requisite search for such entries shall be made only by the registering officer.

Such copies shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents.

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(B.) *As to the Procedure on admitting to Registration.*

Particulars to be endorsed on documents admitted to registration. 58. On every document admitted to registration, other than a copy of a decree or order, there shall be endorsed from time to time the following particulars (that is to say),—

(1) the signature and addition of every person admitting the execution of the document; and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(2) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(3) any payment of money or delivery of goods made in the presence of the registering officer, in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal.

59. The registering officer shall affix the date and his signature to all endorsements made under the last preceding section, relating to the same document, and made in his presence on the same day.

60. After such of the provisions of sections thirty-four, thirty-five, fifty-eight, and fifty-nine as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate showing that the document has been registered, and number and page of book in which it has been copied.

Such certificate shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of

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Act VIII. provided by this Act, and that the facts mentioned in the endorsemens referred to in section fifty-nine have occurred as therein mentioned.

61. The endorsements and certificate referred to and men-
Endorsements and cer- tioned in sections fifty-nine and sixty shall
tificate to be copied. thereupon be copied into the margin of the Register Book, and the copy of the map or plan (if any) mentioned in section twenty-one shall be filed in Book No. 1.

The registration of the document shall thereupon be deemed Document to be return- complete, and the document shall then be ed. returned to the person who presented the same for registration, or to such other person (if any) as he has nominated in writing in that behalf on the receipt mentioned in section fifty-two.

62. When a document is presented for registration under Procedure on presenta- section nineteen, the translation shall be tion of a document in a language unknown to the transcribed in the register of documents of the nature of the original, and, registering officer. together with the copy referred to in section nineteen, shall be filed in the registration office.

The endorsements and certificate respectively mentioned in sections fifty-nine and sixty shall be made on the original, and for the purpose of making the copies and memoranda required by sections fifty-seven, sixty-four, sixty-five, and sixty-six, the translation shall be treated as if it were the original.

Power to administer oaths. 63. Every registering officer may at his discretion administer an oath to any person examined by him under the provisions of this Act.

He may also at his discretion record a note of the substance Record of substance of statements. of the statement made by each such person, and such statement shall be read over, or (if made in a language with which such person is not acquainted) interpreted to him in a language with which he is acquainted; and if he admits the correctness of such note, it shall be signed by the registering officer.

Every such note so signed shall be admissible for the purpose of proving that the statements therein recorded were made by the persons and under the circumstances therein stated.

(C.) Special Duties of Sub-Registrar.

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64. Every Sub-Registrar, on registering a document relating

Procedure on Sub-Registrar's registration of document relating to immoveable property situate in several Sub-Districts.

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. 1.

65. Every Sub-Registrar, on registering a document relating

Procedure on Sub-Registrar's registration of document relating to immoveable property situate in several Districts.

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 section twenty-one, 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.

The Registrar on receiving the same shall file in his Book No. 1 the copy of the document and the copy of the map or plan (if any), and shall forward a memorandum of the document to each of the Sub-Registrars subordinate to him within whose Sub-District any part of such property is situate; and every Sub-Registrar receiving such memorandum shall file it in his Book No. 1.

*(D.) Special Duties of Registrar.***66. On registering any document not testamentary relating**

Procedure on registering documents relating to immoveables.

to immoveable property, the Registrar shall forward a memorandum of such document to each Sub-Registrar subordinate to himself in whose Sub-District any part of the property is situate.

He shall also forward a copy of such document, together with a copy of the map or plan (if any) mentioned in section twenty-one, to every other Registrar in whose District any part of such property is situate.

Such Registrar, on receiving any such copy, shall file it in his Book No. 1, and shall also send a memorandum of the copy to

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Act VIII. each of the Sub-Registrars subordinate to him, within whose Sub-District any part of the property is situate.

Every Sub-Registrar receiving any memorandum under this section shall file it in his Book No. 1.

67. On any document being registered under section thirty, Procedure on registration under section 30, clause b. clause (b), a copy of such document and of the endorsements and certificate thereon shall be forwarded to every Registrar, within whose District any part of the property to which the instrument relates is situate, and the Registrar receiving such copy shall follow the procedure prescribed for him in the first clause of section sixty-six.

(E.) *Of the Controlling Powers of Registrars and Inspectors General.*

68. Every Sub-Registrar shall perform the duties of his Registrar to superintend and control Sub-Registrars. office under the superintendence and control of the Registrar in whose District the office of such Sub-Registrar is situate.

Every Registrar shall have authority to issue (whether on complaint or otherwise) any order consistent with this Act, which he considers necessary in respect of any act or omission of any Sub-Registrar subordinate to him, or in respect of the rectification of any error regarding the book or the office in which any document shall have been registered.

69. The Inspector General shall exercise a general superintendence over all the registration offices in the territories under the Local Government, and shall have power from time to time to frame rules consistent with this Act—

Inspector General to superintend registration offices. His power to frame rules. providing for the safe custody of books, papers, and documents, and also for the destruction of such books, papers, and documents as need no longer be kept;

declaring what languages shall be deemed to be commonly used in each District;

declaring what territorial divisions shall be recognized under section twenty-one;

regulating the amount of fines imposed under section twenty-four;

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regulating the exercise of the discretion reposed in the registering officer by section sixty-three;

regulating the form in which registering officers are to make memoranda of documents;

regulating the authentication by Registrars and Sub-Registrars of the books kept in their respective offices under section fifty-one;

declaring the particulars to be contained in Indexes Nos. I, II, and III respectively;

declaring the holidays that shall be observed in the registration offices;

and, generally, regulating the proceedings of the Registrars and Sub-Registrars.

The rules so framed shall be submitted to the Local Government for approval; and, after they have been approved, they shall be published in the official *Gazette*, and shall then have the same force as if they were inserted in this Act.

70. The Inspector General may also, in the exercise of his discretion, remit wholly or in part the difference between any fine levied under section twenty-four or section thirty-four, and the amount of the proper registration fee.

PART XII.

OF REFUSAL TO REGISTER.

Reasons for refusal to register to be recorded by Registrar or Sub-Registrar.

71. Every registering officer refusing to register a document,

except (1) where the property to which the document relates is not situate within his District or Sub-District, or (2) where the registering officer being a Registrar declines to accept the document on the ground that it ought to be registered in the office of a Sub-Registrar,

shall make an order of refusal, and record his reasons for such order in his Book No. 2, and endorse the words "registration refused" on the document; and on application made by any

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Act VIII. person executing or claiming under the document, shall, without unnecessary delay, give him a copy of the reasons so recorded.

No registering officer shall accept for registration a document so endorsed unless and until, under the provisions hereinafter contained, the document is directed to be registered.

72. An appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration or revise orders of Sub-Registrar refusing registration. (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate, if presented to such Registrar within thirty days from the date of the order, and the Registrar may reverse or alter such order :

Any Registrar refusing to direct the registration of any document shall make an order of refusal, and record the reasons for such order in his Book No. 2, and on application made by any person executing or claiming under the document shall, without unnecessary delay, give him a copy of the reasons so recorded.

73. If a Registrar makes under section seventy-one or section seventy-two an order of refusal to register or to direct the registration of any document,

Procedure where Registrar refuses to register or direct registration of documents falling under section seventeen or section eighteen, clauses 1, 2, 3, and 4.

or if he has made a like order under section eighty-two or section eighty-three

of Act No. XX of 1866,

or if the Sub-Registrar has refused to register the document on the ground that the person, or one of the persons, by whom the document purports to have been executed has denied the execution,

or if the Registrar has himself as Sub-Registrar made an order of refusal under section seventy-one,

any person claiming under such document, or his representative, assign, or agent authorized as aforesaid, may, within thirty days after the making of the order of refusal, apply by petition to the District Court, in order to establish his right to have the document registered.

74. The petition shall be in the form contained in the second Schedule hereto annexed or as near thereto Petition. as circumstances permit, and shall be accompanied by copies of the reasons recorded under sections seventy-

one and seventy-two; the statements in the petition shall be verified by the petitioner in manner required by law for the

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To be verified. verification of plaints; and the petition may be amended by permission of the Court.

75. The Court shall fix a day for the hearing of the petition Court to fix day for not less than two days after the service hearing petition, and copy thereof to be served. next hereinafter mentioned, and shall direct a copy of the petition, with a notice at the foot thereof of the day so fixed, to be served on the registering officer and on such other persons (if any) as the Court thinks fit; and the provisions of the Code of Civil Procedure as to the service and endorsement of summonses shall apply, *mutatis mutandis*, to copies of petitions under this section.

76. The Court may summon and enforce the attendance of witnesses and compel them to give evidence, Court may order document to be registered. and on the day so fixed as aforesaid or on any day to which the hearing of the petition may be adjourned, shall enquire—

- (a) whether the document has been executed, and
- (b) whether the requirements of the law for the time being in force have been complied with on the part of the petitioner so as to entitle the document to registration.

If it finds that the document has been executed, and that the said requirements have been complied with, the Court shall order the document to be registered,

and if the document be duly presented for registration within thirty days after the making of such order, the registering officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections fifty-eight, fifty-nine, and sixty.

Such registration shall take effect as if the document had been registered when it was first duly presented for registration.

Provided that when the officer presiding over the District Court has himself as registering officer Provision for case in which the Judge is the registering officer. made any order complained of under this section, the petition shall, within sixty days after the making of such order, be presented to the High Court, and the provisions contained in the former part of this section

1871 shall, *mutatis mutandis*, apply to such petition and the order (if any) thereon.

The District Court or the High Court, as the case may be, may direct by whom the whole or any part of the costs of any proceedings before it under this Part shall be paid, and such costs shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure.

No appeal lies from any order made under this section.

PART XIII.

OF THE FEES FOR REGISTRATION, SEARCHES AND COPIES.

77. Subject to the approval of the Governor General in Fees to be fixed by Local Council, the Local Government shall pre-Government. prepare a table of fees payable—

for the registration of documents :

for searching the registers :

for making or granting copies of reasons, entries, or documents, before, on or after registration ;

And of extra or additional fees payable—

for every registration under section thirty :

for the issue of commissions :

for filing translations :

for attending at private residences :

and for such other matters as appear to the Local Government necessary to effect the purposes of this Act.

Alteration of fees. The Local Government may, from time to time, subject to the like approval, alter such table.

Publication of fees. A table of the fees so payable shall be published in the official Gazette, and a copy thereof in English and the Vernacular language of the District shall be exposed to public view in every registration office.

Fees payable on presentation. 78. All fees for the registration of documents under this Act shall be payable on the presentation of such documents.

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Act VIII.

PART XIV.

PENALTIES.

79. Every registering officer appointed under this Act, and every person employed in his office for the purposes of this Act, who, being charged with the endorsing, copying, translating, or registering of any document presented or deposited under the provisions, endorses, copies, translates, or registers such document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury, as defined in the Indian Penal Code, to any person, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

80. Whoever commits any of the following offences shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both :—

(a) intentionally makes any false statement, whether on oath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or enquiry under this Act,

(b) intentionally delivers to a registering officer in any proceeding under section nineteen or section twenty-one a false copy or translation of a

document, or a false copy of a map or plan,

(c) falsely personates another, and in such assumed character presents any document, or makes any admission or statement, or causes any summons or commission to be issued, or does any other act in any proceeding or enquiry under this Act,

(d) abets within the meaning of the Indian Penal Code anything made punishable by this Act.

81. A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be instituted by or with the permission of the Inspector-General, the Branch Inspector-General of Sindh, the Registrar or the Sub-Registrar,

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in whose territories, District or Sub-District, as the case may be, the offence has been committed.

Offences punishable under this Act shall be triable by any Court or Officer exercising powers not less than those of a Sub-ordinate Magistrate of the first class:

Provided that in imposing penalties under this Act, no such Court or Officer shall exceed the limits of jurisdiction prescribed by the law for the time being in force as to such Court or Officer.

All fines imposed under this Act may be recovered, if for offences committed outside the limits of the Presidency Towns, in the manner prescribed by the Code of Criminal Procedure, and if for offences committed within those limits, in the manner prescribed by any Act regulating the Police of such Towns for the time being in force.

82. Every registering officer appointed under this Act shall Register officers to be deemed a public servant within the meaning of the Indian Penal Code.

Every person shall be legally bound to furnish information to such registering officer when required by him to do so. And in section two hundred and twenty-eight of the same Code, the words "judicial proceeding" shall include any proceeding under this Act.

PART XV.

MISCELLANEOUS.

83. Documents (other than wills) remaining unclaimed in any registration office, for a period exceeding two years, may be destroyed.

Registering officer not to be liable for anything *bond fide* done or refused in his official capacity.

84. No registering officer shall be liable to any suit, claim, or demand by reason of anything in good faith done or refused in his official capacity.

85. Nothing done in good faith pursuant to this Act or any Act hereby repealed, by any registering officer, shall be deemed invalid, merely by reason of any defect in his appointment or procedure.

Nothing done by registering officer to be invalidated by defect in his appointment or procedure.

86. Notwithstanding anything herein contained, it shall not

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Registration of documents executed by Government officers or certain public functionaries.

be necessary for any officer of Government or for the Administrator-General of Bengal, Madras, or Bombay, or for any Official Trustee, or for the Sheriff, Receiver, or Registrar of a High Court, to appear in person or by agent at any registration office in any proceeding connected with the registration of any instrument executed by him his official capacity, or to sign as provided in section fifty-eight.

But when any instrument is so executed, the registering officer to whom such instrument is presented for registration may, if he think fit, refer to any Secretary to Government, or to such officer of Government, Administrator-General, Official Trustee, Sheriff, Receiver or Registrar, as the case may be, for information respecting the same, and, on being satisfied of the execution thereof, shall register the instrument.

Exemptions from Act.

87. Nothing contained in this Act or any Act hereby re-

Exemption of certain documents executed by or in favor of Government. pealed shall be deemed to require, or to have at any time required, the registration of any of the following documents or maps :—

(a) Documents issued, received, or attested by any officer engaged in making a settlement or revision of settlement of land revenue, and which form part of the records of such settlement.

(b) Documents and maps issued, received, or authenticated by any officer engaged on behalf of Government in making or revising the survey of any land, and which form part of the record of such survey.

(c) Documents which, under any law for the time being in force, are filed periodically in any revenue office by patwáris or other officers charged with the preparation of village records.

(d) Sanads, inám title-deeds, and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land.

But all such documents and maps shall, for the purposes of sections forty-eight and forty-nine, be deemed to have been and to be registered in accordance with the provisions of this Act.

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88. Subject to such rules and the previous payment of such fees as the Local Government from time to time prescribes in this behalf, all documents and maps mentioned in section eighty-seven, clauses (a), (b), and (c), and all registers of the documents mentioned in clause (d), shall be open to the inspection of any person applying to inspect the same, and, subject as aforesaid, copies of such documents shall be given to all persons applying for such copies.

89. From the first of July to the first of October 1871 in Recognition in Oudh the territories respectively administered by and Burma for three months of powers of attorney not duly executed. British Burma, a power of attorney not duly executed according to the provisions of section thirty-three shall, notwithstanding anything therein contained, be deemed to have been duly executed under the provisions of the same section, if the registering officer is satisfied that it has been executed in good faith, and if a power of attorney attested under the provisions of this Act cannot be obtained within the time during which the document sought to be registered, can, under such provisions, be accepted for registration.

90. All rules relating to registration heretofore enforced in Burmese registration British Burma shall be deemed to have rules confirmed. had the force of law, and no suit or other proceeding shall be maintained against any officer or other person in respect of anything done under any of the said rules.

FIRST SCHEDULE.

(See Section 2.)

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Number and Year.	Title.	Extent of Repeal.
XXII of 1864 ...	An Act to make provision for the Administration of Military Cantonments.	Sections ten and forty-five.
XX of 1866 ...	An Act to provide for the Registration of Assurances.	The whole.
XXVII of 1868.	An Act to exempt certain Instruments from the Indian Registration Act, 1866.	The whole.
VII of 1870...	The Court Fees Act.	In Schedule I the number and words following: "3. Petition under the Indian Registration Act, section fifty-three."
	All Rules relating to the registration of documents and having the force of law in Oudh.	The whole.
	All Rules relating to the registration of documents, and having the force of law in any part of British Burma.	The whole.

SECOND SCHEDULE.

Form of Petition under Section 73.

To the Judge of the District Court [*or* To the Deputy Commissioner] of

The day of 18 .

The petition of A. B. of

Sheweth—

1. That by an instrument dated the day of
and made between C. D. of the one part, and your petitioner of

1871 the other part, certain lands were conveyed to your petitioner
Act VIII. absolutely.

2. That such instrument was executed by the said C. D. on
the day of 18 .

3. That the property to which such instrument relates is situate
in the Sub-District of the Sub-Registrar of and
in the District of

4. That on the day of your petitioner pre-
sented the said instrument for registration under "The Indian
Registration Act, 1871," in the office of the said Sub-Registrar.

5. That the said Sub-Registrar thereupon made an order of
refusal, dated the day of 18 , to register the
said instrument, and gave your petitioner a copy, which is filed
herewith, of the reasons for such order.

6. That your petitioner on the day of appealed
to the Registrar of against such order.

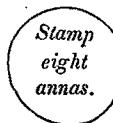
7. That the said Registrar thereupon made an order of
refusal, dated the day of to direct the registra-
tion of the said instrument, and gave your petitioner a copy,
which is filed herewith, of the reasons for such order.

8. That the reasons referred to in paragraphs 5 and 7 of this
petition are, as your petitioner submits, insufficient.

Your petitioner therefore prays that your Honor will order
the said Sub-Registrar to register the said instrument.

A. B.

Another Form.



To the Judge of the District Court [or To the Deputy Commissioner] of

The day of 18 .

The petition of A. B. of
Sheweth—

1. That by an instrument dated the day of
and made between C. D. of the one part, and your petitioner of

the other part, certain lands were conveyed to your petitioner by way of mortgage to secure the sum of one thousand rupees. 1871
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2. That such instrument was executed by the said C. D. on the day of 18 .

3. That the property to which such instrument relates is situate in the Sub-District of the Sub-Registrar of and in the District of

4. That on the day of your petitioner presented the said instrument for registration under the Indian Registration Act, 1871, in the office of the said Sub-Registrar, and the said C. D. appeared personally before the said Sub-Registrar, and falsely denied the execution of the said instrument.

5. That the said Sub-Registrar thereupon made an order of refusal dated the day of 18 to register the said instrument, and gave your petitioner a copy, which is filed herewith, of the reasons for such order.

6. That your petitioner has complied with the requirements of the said Act so far as it has been possible for him to do so.

Your petitioner therefore prays that your Honor will order the said Sub-Registrar to register the said instrument.

A. B.

Form of Verification.

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

(Signed) A. B.

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Act No. IX.**THE INDIAN LIMITATION ACT, 1871.**

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN
COUNCIL.

(Received the assent of His Excellency the Governor-General
on the 24th March 1871.)

An Act for the Limitation of Suits and for other Purposes.

WHEREAS it is expedient to consolidate and amend the law
relating to the limitation of suits, appeals
Preamble. and certain applications to Courts; And
whereas it is also expedient to provide rules for acquiring owner-
ship by possession; It is hereby enacted as follows:—

PART I.**PRELIMINARY.**

1. This Act may be called 'The Indian Limitation Act,
Short title. 1871: '
Extent of Act. It extends to the whole of British India;
but nothing contained in sections two and
three or in Parts II and III applies—
(a) to suits instituted before the first day of April, 1873,
(b) to suits under the Indian Divorce Act,
(c) to suits under Madras Regulation VI of 1831.
Commencement. This Act shall come into force on the
first day of July 1871.
2. On and from that day the enactments mentioned in the
Repeal of enactments. first schedule hereto annexed shall be
repealed to the extent specified in the third
column of the same schedule.

Interpretation clause.

3. In this Act, unless there be something repugnant in the subject or context—

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‘minor’ means a person who has not completed his age of eighteen years:

‘plaintiff’ includes also any person through whom a plaintiff claims:

‘nuisance’ means any thing done to the hurt or annoyance of another’s immoveable property and not amounting to a trespass:

‘bill of exchange’ includes also a hundi:

‘trustee’ does not include a benamidár, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title:

‘registered’ means duly registered under the law for the registration of documents in force at the time and place of executing the document referred to in the context:

‘foreign country’ means any country other than British India;

and nothing shall be deemed to be done in ‘good faith’ which is not done with due care and attention.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

4. Subject to the provisions contained in sections five to

Dismissal of suits, &c., twenty-six (inclusive), every suit instituted, &c., after period of limitation. instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

Explanation.—A suit is instituted in ordinary cases when the plaint is presented to the proper officer: in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

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(a). A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The appellate Court must dismiss the suit.

(b). An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

5. a. If the period of limitation prescribed for any suit, appeal, or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, presented, or made on the day that the Court re-opens:

b. 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.

6. When, by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is specially prescribed for any suits, appeals, or applications, nothing herein contained shall affect such law.

And nothing herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order or judgment of a High Court in the exercise of its original jurisdiction.

Appeals from decrees of
High Courts on original
side.

Legal Disability.

7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot,

he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

Legal disability.

When his disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

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Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.

Illustrations.

(a). The right to sue for the hire of a boat accrues to A during his minority. He comes of age four years after the accrual of the right. He may institute his suit at any time within three years from the date of his coming of age.

(b). A, to whom a right to sue for a legacy has accrued during his minority, attains full age eleven years after such right accrued. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his majority, within which he may bring his suit.

(c). A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accrual of the right A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under this section.

(d). A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual of the right, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time.

8. When one of several joint creditors or claimants is under

Disability of one joint creditor. any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until they all are free from disability.

9. When once time has begun to run, Continuous running of time. no subsequent disability or inability to sue stops it.

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Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

10. Notwithstanding anything hereinbefore contained, no suits against express trustees and their representatives. suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time.

Explanation.—A purchaser in good faith for value from a trustee is not his representative within the meaning of this section.

11. Suits in British India on contracts entered into in a Suits on foreign contracts. foreign country are subject to the rules prescribed by this Act.

12. No foreign rule of limitations shall be a defence to a suit in British India on a contract entered into Foreign limitation law. in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

13. In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded.

In computing the period of limitation prescribed for an appeal, Exclusions in case of appeals and certain applications. an application for leave to appeal as a pauper, an application to the High Court for the admission of a special appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence, or order appealed against or sought to be reviewed, shall be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

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14. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded, unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, section sixty.

15. In computing the period of limitation prescribed for any suit, the time during which the plaintiff suing ~~bond fide~~ in Court has been prosecuting with due diligence without jurisdiction another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Explanation 1.—In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

16. In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded.

Exclusion of time during which commencement of suit is stayed by injunction.

17. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a suit to set aside the sale shall be excluded.

18. When a person who would, if he were living, have a right to sue, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative in interest of the deceased capable of suing.

Effect of death before right to sue accrues.

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When a person against whom, if he were living, a right to sue would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative whom the plaintiff may sue.

Nothing in the former part of this section applies to suits for the possession of land or of an hereditary office.

19. When any person having a right to sue has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

and where any document necessary to establish such right has been fraudulently concealed,

the time limited for commencing a suit,

(a) against the person guilty of the fraud or accessory thereto, or,

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

20. a. No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

b. When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

c. When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section,

a promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that

the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any person other than the creditor or legatee;

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but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Illustrations.

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor A. Z affixes his seal, but does not sign the letter;

Z pays part of the debt and promises orally to pay the rest;

Z publishes an advertisement, requesting his creditors to bring in their claims for examination:

In none of these cases is the debt taken out of the operation of this Act.

21. When interest on a debt or legacy is, before the expira-

Effect of payment of tion of the prescribed period, paid as such interest as such. by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,

or when part of the principal of a debt is, before the expira-

Effect of part payment tion of the prescribed period, paid by the of principal. debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made :

Provided that, in the case of part payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor.

22. When, after the institution of a suit, a new plaintiff or

Effect of substituting defendant is substituted or added, the suit or adding new plaintiff or defendant. shall, as regards him, be deemed to have commenced when he was so made a party :

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Provided that, when a plaintiff dies, and the suit is continued by his representatives in interest, it shall, as regards them, be deemed to have commenced when it was instituted by the deceased plaintiff.

Provided also, that, when a defendant dies, and the suit is continued against his representatives in interest, it shall, as regards them, be deemed to have been commenced when it was instituted against the deceased defendant.

23. In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run, upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due.

Illustrations.

(a). A contracts to pay an annuity to B for his life by quarterly instalments. A fails to pay any of the instalments. Here upon every fresh failure, a fresh right to sue arises and a fresh period of limitation begins to run; and this Act may bar the remedy on the earlier breaches without affecting the remedy on the later breaches.

(b). A, a tenant, covenants with B, his landlord, to keep certain buildings in repair. At every moment of the time during which the buildings continue out of repair and B retains his right of entry, a fresh right to sue arises, and a fresh period of limitation begins to run.

24. In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nuisance continues.

Illustration.

A diverts B's watercourse. At every moment of the time during which the diversion continues and B retains his right of entry, a fresh right to sue arises, and a fresh period of limitation begins to run.

25. In the case of a suit for compensation for an act lawful
Suit for compensation in itself, which becomes unlawful in case
for act becoming unlawful it causes damage, the period of limitation
shall be computed from the time when the damage accrues.

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Illustration.

A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation runs from the time of the subsidence.

26. All instruments shall, for the purposes of this Act, be
Computation of time deemed to be made with reference to the
mentioned in instruments. Gregorian calendar.

Illustrations.

(a). A Hindū makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(b). A Hindū makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

27. Where the access and use of light or air to and for any
Acquisition of right to building has been peaceably enjoyed there-
easements. with, as an easement, and as of right, with-
out interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, water-
course, use of water, or other easement, shall be absolute and
indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

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Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(a). A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(b). In a like suit also brought in 1871 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(c). In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

28. Provided that, when any land or water upon, over or
 Exclusion in favour of from which any easement (other than the
 reversioner of servient access and use of light and air) has been
 tenement. enjoyed or derived has been held under
 or by virtue of any interest for life or any term of years exceeding
 three years from the granting thereof,

the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a deceased Hindú widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

29. At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

1871
Act IX.

FIRST SCHEDULE.

(See section 2.)

Number and Year.	Subject or Title.	Extent of Repeal.
21 Jac. I, cap. sixteen.	An Act for limitation of actions and for avoiding of suits in law.	The whole Statute, so far as it applies to British India.
4 Ann., cap. sixteen.	An Act for the amendment of the law and the better advancement of justice.	Sections seventeen, eighteen, and nineteen, so far as they apply to British India.
33 Geo. III, cap. fifty-two.	An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with their exclusive trade, under certain limitations; for establishing further regulations for the government of the said territories, and the better administration of justice within the same; for appropriating to certain uses the revenues and profits of the said Company; and for making provision for the good order and government of the towns of Calcutta, Madras, and Bombay.	So much of section one hundred and sixty-two as relates to the limitation of civil suits in British India.

1871

FIRST SCHEDULE—(*Continued.*)

Act IX.

Number and Year.	Subject or Title.	Extent of Repeal.
53 Geo. III, cap. one hundred and fifty-five.	An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with certain exclusive privileges; for establishing further Regulations for the government of the said territories, and the better administration of justice within the same; and for regulating the trade to and from the places within the limits of the said Company.	Section one hundred and twenty-four, so far as it applies to British India.
9 Geo. IV, cap. seventy-four.	Administration of Criminal Justice.	So much of section fifty-one as relates to civil suits.
6 & 7 Vic., cap. ninety-four.	Foreign Jurisdiction Act	Section seven, so far as it applies to British India.
Act No. XIV of 1840.	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 9 Geo. IV, cap. 14.	From and including the words "Whereas by an Act" down to and including the words "defendants against the plaintiff."
Act No. XI of 1841.	Military Courts of Requests.	The proviso in section nine.
Act No. XX of 1847.	Copyright Act ...	In section sixteen, the words "actions, suits, bills."
Act No. XII of 1855.	An Act to enable Executors, Administrators, or Representatives to sue and be sued for certain wrongs.	In section one, the words "and provided such action shall be brought within one year after the death of such person," and the words "and so as such action shall be commenced within two years after the committing of the wrong."
Act No. XIII of 1855.	Compensation for loss occasioned by death caused by actionable wrong.	In section two, the words "and that every such action shall be brought within twelve calendar months after the death of such deceased person."

FIRST SCHEDULE—(*Continued.*)

1871

ACT IX.

Number and Year.	Subject or Title.	Extent of Repeal.
Act No. XXV of 1857.	Forfeiture for mutiny ...	Section nine.
Act No. VIII of 1859.	The Code of Civil Procedure.	In section one hundred and nineteen, the words "within a reasonable time not exceeding thirty days after any process for enforcing the judgment has been executed," and the words "within thirty days from the date of the judgment." In section two hundred and thirty, the words "within one month from the date of the dispossession." The last twelve words of section two hundred and forty-six. In section two hundred and fifty-six, the words "At any time within thirty days from the date of the sale." In section two hundred and sixty-nine, the words "If made within one month from the date of such existence or obstruction or of such dispossession; as the case may be." In section three hundred and twenty-four, the second sentence. In section three hundred and twenty-seven, the words "within six months from the date of the award." In section three hundred and thirty-three, from and including the words "within the period" down to the end of the section. In section three hundred and forty-seven, the words "within thirty days from the date of the dismissal." In section three hundred and seventy-three, the words "within the period prescribed for the presentation of a memorandum of appeal." So much of section three hundred and seventy-seven as has not been repealed.

1871

Act IX.

FIRST SCHEDULE—(*Continued.*)

Number and Year.	Subject or Title.	Extent of Repeal.
Act No. XIV of 1859.	An Act to provide for the limitation of suits.	The whole Act, except so much of section fifteen as does not relate to the limitation of suits.
Act No. IX of 1860.	Workmen and employers.	So much of section two as relates to the limitation of suits.
Act No. XXXI of 1860.	Arms Act ...	So much of section forty-nine as relates to the limitation of suits.
Act No. V of 1861.	Mofussil Police ...	So much of section forty-two as relates to the limitation of suits.
Act No. XXIII of 1861.	Civil Procedure Code Amendment.	Section twelve.
Act No. XXV of 1861.	Criminal Procedure Code	Section four hundred and fifteen.
Act No. I of 1863	Civil Courts in British Burma.	Section twenty-four.
Act No. VI of 1863.	Consolidated Customs Act	So much of section two hundred and fourteen as relates to the limitation of suits.
Act No. XXIII of 1863.	Claims to Waste lands ...	So much of section five as relates to the limitation of suits.
Act No. VII of 1865.	Government Forests Act	So much of section sixteen as relates to the limitation of suits.
Act No. XX of 1866.	Registration Act ...	Section fifty-one.
Act No. XIV of 1868.	Contagious Diseases Act	So much of section twenty-five as relates to the limitation of suits.
Act No. XX of 1869.	Volunteers ...	So much of section twenty-six as relates to the limitation of suits.
Act No. X of 1870	Land Acquisition ...	So much of section fifty-eight as relates to the limitation of suits.
Act No. IV of 1871.	Coroners ...	In section forty-two, the words 'after the expiration of three months from such fact or failure, nor.'

FIRST SCHEDULE—(*Continued.*)

1871

Act IX.

Number and Year.	Subject or Title.	Extent of Repeal.
Bombay Regulation V of 1827.	A Regulation defining the Limitations, as to Time, within which Civil Actions may be prosecuted, and containing Rules of Judication respecting written Acknowledgments of Debts executed without receipt of a full consideration; also regarding Interest, the tendering payment of Debts, and the disposal of Property mortgaged or pledged.	Chapter one.

SECOND SCHEDULE.

(See section 4.)

FIRST DIVISION : SUITS.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
1.—To contest an award of the Board of Revenue under Act No. XXIII of 1863 (<i>to provide for the adjudication of claims to waste lands</i>).	<i>Part I.—Thirty days.</i> Thirty days ...	When notice of the award is delivered to the plaintiff.
2.—For doing, or for omitting to do, an act in pursuance of any enactment in force for the time being in British India.	<i>Part II.—Ninety days.</i> Ninety days ...	When the act or omission took place.
3.—Under Act No. XIV of 1859 (<i>to provide for the limitation of suits</i>), section fifteen, to recover possession of immoveable property.	<i>Part III.—Six months.</i> Six months ...	When the dispossession occurs.

1871

SECOND SCHEDULE—(Continued.)

ACT IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
4.—Under Act No. IX of 1860 (<i>to provide for the speedy determination of certain disputes between workmen engaged in Railway and other public works and their employers</i>), section one.	<i>Part III.—Six months—continued.</i> Six months ...	When the wages, hire, or price of work claimed accrued due.
5.—Under Act No. V of 1866 (<i>to provide a summary procedure on bills of exchange, and to amend, in certain respects, the commercial law of British India.</i>	Ditto ...	When the bill or promissory note becomes due and payable.
6.—Upon a Statute, Act, Regulation, or bye-law, for a penalty or forfeiture.	<i>Part IV.—One year.</i> One year ...	When the penalty or forfeiture is incurred.
7.—For the wages of a domestic servant, artisan or labourer not provided for by this schedule, No. 4.	Ditto ...	When the wages sued for accrue due.
8.—For the price of food or drink sold by the keeper of an hotel, tavern or lodging house.	Ditto ...	When the food or drink is delivered.
9.—For the price of lodging.	Ditto ...	When the lodging ends.
10.—To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	Ditto ...	When the purchaser takes actual possession under the sale sought to be impeached.
11.—For damages for infringing copyright or any other exclusive privilege.	Ditto ...	The date of the infringement.
12.—By executors, administrators, or representatives, under Act No. XII of 1855 (<i>to enable executors, administrators or representatives to sue and be sued for certain wrongs</i>).	Ditto ...	The date of the death of the person wronged.

SECOND SCHEDULE—(*Continued.*)

1871

ACT IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part IV.—One year</i> —continued.	
13.—By executors, administrators or representatives under Act No. XIII of 1855 (<i>to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong</i>).	One year ...	The date of the death of the person killed.
14.—To set aside any of the following sales:— (a) sale in execution of a decree of a Civil Court; (b) sale in pursuance of a decree or order of a Collector or other officer of revenue; (c) sale for arrears of Government revenue or for any demand recoverable as such arrears; (d) sale of a patni taluq sold for current arrears of rent. <i>Explanation.</i> —In this clause ‘patni’ includes any intermediate tenure saleable for current arrears of rent.	Ditto ...	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.
15.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	Ditto ...	The date of the final decision or order in the case by a Court competent to determine it finally.
16.—To set aside any act of an Officer of Government in his official capacity, not herein otherwise expressly provided for.	Ditto ...	The date of the act.
17.—Against Government to set aside any attachment, lease or transfer of immoveable property by the Revenue Authorities for arrears of Government revenue.	Ditto ...	When the attachment, lease or transfer is made.

1871

SECOND SCHEDULE—(*Continued.*)

Act IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part IV.—One year—continued.</i>	
18.—Against Government to recover money paid under protest in satisfaction of a claim made by the Revenue Authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	One year ...	When the payment is made.
19.—Against Government for compensation for land acquired for public purposes.	Ditto ...	The date of determining the amount of the compensation.
20.—Like suit for compensation when the acquisition is not completed.	Ditto ...	The date of the refusal to complete.
21.—For false imprisonment.	Ditto ...	When the imprisonment ends.
22.—For any other injury to the person.	Ditto ...	When the injury is committed.
23.—For a malicious prosecution.	Ditto ...	When the plaintiff is acquitted.
24.—For libel.	Ditto ...	When the libel is published.
25.—For slander.	Ditto ...	When the words are spoken.
26.—For taking or damaging moveable property.	Ditto ...	When the taking or damage occurs.
27.—For loss of service occasioned by the seduction of the plaintiff's servant or daughter.	Ditto ...	When the loss occurs.
28.—For inducing a person to break a contract with the plaintiff.	Ditto ...	The date of the breach.
29.—For an illegal, irregular or excessive distress.	Ditto ...	The date of the distress.
30.—For wrongful seizure of moveable property under legal process.	Ditto ...	The date of the seizure.
	<i>Part V.—Two years.</i>	
31.—For obstructing a way or a water-course.	Two years ...	The date of the obstruction.
32.—For diverting a water-course.	Ditto ...	The date of the diversion.
33.—For wrongfully detaining title-deeds.	Ditto ...	When the title to the property comprised in the deeds is adjudged to the plaintiff, or the detainer's possession otherwise becomes unlawful.

SECOND SCHEDULE—(*Continued.*)

FIRST DIVISION: SUITS—Continued.

1871

ACT IX.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part V.—Two years</i> —continued.	
34.—For wrongfully detaining any other moveable property.	Two years ...	When the detainer's possession becomes unlawful.
35.—For specific recovery of moveable property in cases not provided for by this schedule, numbers 48 and 49.	Ditto ...	When the property is demanded and refused.
36.—Against a carrier for losing or injuring goods.	Ditto ...	When the loss or injury occurs.
37.—Against a carrier for delay in delivering goods.	Ditto ...	When the goods ought to be delivered.
38.—Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Ditto ...	The time of the perversion.
39.—Under Act No. XII of 1855 (<i>to enable executors, administrators or representatives to sue and be sued for certain wrongs</i>) against an executor, administrator or other representative.	Ditto ...	When the wrong complained of is done.
40.—For compensation for any wrong, malfeasance, nonfeasance or misfeasance independent of contract and not herein specially provided for.	Ditto ...	When the wrong is done or the default happens.
41.—For the recovery of a wife.	Ditto ...	When possession is demanded and refused.
42.—For the restitution of conjugal rights.	Ditto ...	When restitution is demanded and refused.
	<i>Part VI.—Three years.</i>	
43.—For trespass upon immoveable property.	Three years ...	When the trespass takes place.
44.—To contest an award under any of the following Regulations of the Bengal Code:— VII of 1822, IX of 1825, and IX of 1833.	Ditto ...	The date of the final award or order in the case.
45.—By a party bound by such award to recover any property comprised therein.	Ditto ...	Ditto.

1871

SECOND SCHEDULE—(*Continued.*)

ACT IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VI—Three years—continued.</i>	
46.—By any person bound by an order respecting the possession of property made under Act No. XVI of 1838, section one, clause two, or Act No. XXV of 1861, chapter twenty-two, or Bombay Act No. V of 1864, or by any one claiming under such person, to recover the property comprised in such order.	Three years ...	The date of the final order in the case.
47.—For lost moveable property not dishonestly misappropriated or converted.	Ditto ...	When the property is demanded and refused.
48.—For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation or conversion.	Ditto ...	Ditto.
49.—For the hire of animals, vehicles, boats, or household furniture.	Ditto ...	When the hire becomes payable.
50.—For the balance of money advanced in payment of goods to be delivered.	Ditto ...	When the goods ought to be delivered.
51.—For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Ditto ...	The date of the delivery of the goods.
52.—For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Ditto ...	The expiry of the period of credit.
53.—For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Ditto ...	When the period of the proposed bill elapses.
54.—For the price of trees or growing crops sold by the plaintiff to the defendant, where no fixed period of credit is agreed upon.	Ditto ...	The date of the sale.
55.—For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Ditto ...	When the work is done.

SECOND SCHEDULE—(*Continued.*)

 1871
 ACT IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VI.—Three years</i> —continued.	
56.—For money payable for money lent.	Three years ...	When the loan is made.
57.—Like suit when the lender has given a cheque for the money.	Ditto ...	When the cheque is paid.
58.—For money lent under an agreement that it shall be payable on demand.	Ditto ...	When the demand is made.
59.—For money payable to the plaintiff for money paid for the defendant.	Ditto ...	When the money is paid.
60.—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Ditto ...	When the money is received.
61.—For money payable for interest upon money due from the defendant to the plaintiff.	Ditto ...	When the interest becomes due.
62.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Ditto ...	When the accounts are stated, unless where the debt is made payable at a future time, and then when that time arrives.
63.—Upon a promise to do anything at a specified time, or upon the happening of a specified contingency.	Ditto ...	At the time specified, or upon the contingency happening.
64.—Against a factor for an account.	Ditto ...	When the account is demanded, or, where no such demand is made, when the agency terminates.
65.—On a single bond where a day is specified for payment.	Ditto ...	The day so specified.
66.—On a single bond where no such day is specified.	Ditto ...	The date of executing the bond.
67.—On a bond subject to a condition.	Ditto ...	When the condition is broken.
68.—On a bill of exchange or promissory note payable at a fixed time after date.	Ditto ...	When the bill or note falls due.
69.—On a bill of exchange payable at or after sight.	Ditto ...	When the bill is presented.

1871

SECOND SCHEDULE—(*Continued.*)

ACT IX.

FIRST DIVISION : SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VI.—Three years</i> —continued.	
70.—On a bill of exchange accepted payable at a particular place.	Three years ...	When the bill is presented at that place.
71.—On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Ditto ..	When the fixed time expires.
72.—On a bill of exchange or promissory note payable on demand, and not accompanied by any writing restraining or postponing the right to sue.	Ditto ..	When the demand is made.
73.—By the endorsee of a bill or promissory note against the endorser.	Ditto ..	The date of the endorsement.
74.—On a promissory note or bond payable by instalments.	Ditto ..	The expiration of the first term of payment, as to the part then payable; and, for the other parts, the expiration of the respective terms of payment.
75.—On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due.	Ditto ..	The time of the first default, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made.
76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Ditto ..	The time of the delivery to the payee.
77.—On a dishonored foreign bill where protest has been made, and notice given.	Ditto ..	When the notice is given.
78.—By the payee against the drawer of a bill of exchange which has been dishonored by non-acceptance.	Ditto ..	The date of the refusal to accept.
79.—Like suit when the bill has been dishonored by non-acceptance, and afterwards by non-payment.	Ditto ..	Ditto.
80.—Suit on a bill of exchange or promissory note not herein expressly provided for.	Ditto ..	When the bill or note becomes payable.

SECOND SCHEDULE—(*Continued.*)

1871

Act IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VI.—Three years—continued.</i>	
81.—By the acceptor of an accommodation-bill against the drawer.	Three years ...	When the acceptor pays the amount.
82.—By a surety against the principal debtor.	Ditto ...	When the surety pays the creditor.
83.—By a surety against a co-surety.	Ditto ...	When the plaintiff pays anything in excess of his own share.
84.—Upon any other contract to indemnify.	Ditto ...	When the plaintiff is actually damaged.
85.—By an attorney or <i>vakil</i> for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	Ditto ...	The termination of the suit or business, or (where the attorney or <i>vakil</i> properly discontinues the suit or business) the date of such discontinuance.
86.—For compensation for damage caused by an injunction wrongfully obtained.	Ditto ...	When the injunction ceases.
87.—For the balance due on a mutual, open, and current account, where, there have been reciprocal demands between the parties.	Ditto ...	The time of the last item admitted or proved in the account.
88.—On a policy of insurance when the sum assured is payable after proof of the death or loss has been given to, or received by, the insurers.	Ditto ...	When proof of the death or loss is given to, or received by, the insurers, whether by, or from, the plaintiff, or any other person.
89.—By the assured to recover premia paid under a policy voidable at the election of the insurers.	Ditto ...	When the insurers elect to avoid the policy.
90.—By a principal against his agent for moveable property received by the latter, and not accounted for.	Ditto ...	When the account is demanded and refused.
91.—Other suits by principals against agents for neglect or misconduct.	Ditto ...	When the neglect or misconduct occurs.
92.—To cancel or set aside an instrument, not otherwise provided for.	Ditto ...	When the instrument is executed.
93.—To declare the forgery of an instrument issued, or registered, or attempted to be enforced.	Ditto ...	The date of the issue, registration, or attempt.

1871

SECOND SCHEDULE—(*Continued.*)

ACT IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VI.—Three years—continued.</i>	
94.—For property which the plaintiff has conveyed while insane.	Three years ...	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
95.—For relief on the ground of fraud.	Ditto ...	When the fraud becomes known to the party wronged.
96.—To set aside a decree obtained by fraud.	Ditto ...	Ditto.
97.—For relief on the ground of mistake in fact.	Ditto ...	When the mistake becomes known to the plaintiff.
98.—For money paid upon an existing consideration, which afterwards fails.	Ditto ...	The date of the failure.
99.—To make good out of the general estate of a deceased trustee, the loss occasioned by a breach of trust.	Ditto ...	The date of the trustee's death, or if the loss has not then been occasioned, the date of the loss.
100.—For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate, who has paid the whole amount of revenue due from himself and his co-sharers.	Ditto ...	The date of the plaintiff's advance in excess of his own share.
101.—By a co-trustee to enforce against the estate of a deceased trustee, a claim for contribution.	Ditto ...	When the right to contribution accrues.
102.—For a seaman's wages ...	Ditto ...	The end of the voyage during which the wages are earned.
103.—By a Muhammadan for exigible dower (<i>mu'ajjal</i>).	Ditto ...	When the dower is demanded and refused, or (where, during the continuance of the marriage, no such demand has been made) when the marriage is dissolved by death or divorce.
104.—By a Muhammadan for deferred dower (<i>muwajjal</i>).	Ditto ...	When the marriage is dissolved by death or divorce.
105.—By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Ditto ...	The date of the receipt.

SECOND SCHEDULE—(*Continued.*)

1871

Act IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VI.—Three years—continued.</i>	
106.—For an account and a share of the profits of a dissolved partnership.	Three years ...	The date of the dissolution.
107.—By a Hindu manager of a joint estate for contribution in respect of a payment made by him on account of the estate.	Ditto ...	The date of the payment.
108.—By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	Ditto ...	When the trees are cut down.
109.—For the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant.	Ditto ...	When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, the date of the decree of the Appellate Court.
110. For arrears of rent ...	Ditto ...	When the arrears become due.
111.—By a vendor of immoveable property to enforce his lien for unpaid purchase-money.	Ditto ...	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
112.—For a call by a company registered under any Statute or Act.	Ditto ...	When the call was made.
113.—For specific performance of a contract.	Ditto ...	When the plaintiff has notice that his right is denied.
114.—For the rescission of a contract.	Ditto ...	When the contract is executed by the plaintiff.
115.—For the breach of any contract, express or implied, not in writing registered, and not herein specially provided for.	Ditto ...	When the contract is broken, or (where there are successive breaches) when the breach sued for occurs, or (where the breach is continuing) when it ceases.

1871

SECOND SCHEDULE—(*Continued.*)

ACT IX.

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VII.—Six years.</i>	
116.—Upon a judgment obtained in a foreign country.	Six years ...	The date of the judgment.
117.—On a promise or contract in writing registered.	Ditto ...	When the period of limitation would begin to run against a suit brought on a similar promise or contract not registered.
118.—Suit for which no period of limitation is provided elsewhere in this schedule.	Ditto ...	When the right to sue accrues.
	<i>Part VIII.—Twelve years.</i>	
119.—By an auction-purchaser, or any one claiming under him to avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, the estate being, by virtue of such sale, freed from incumbrances and under-tenures.	Twelve years ...	When the sale becomes final and conclusive.
120.—To avoid incumbrances or under-tenures in a <i>patni taluk</i> or other saleable tenure sold for arrears of rent, the <i>taluq</i> or tenure being, by virtue of such sale, freed from incumbrances and under-tenures.	Ditto ...	Ditto.
121.—Upon a judgment obtained in British India, or a recognition.	Ditto ...	The date of the judgment or recognition.
122.—For a legacy or for a distributive share of the moveable property of a testator or intestate.	Ditto ...	When the legacy or share becomes payable or deliverable.
123.—For possession of an hereditary office.	Ditto ...	When the defendant, or some person through whom he claims, took possession of the office adversely to the plaintiff. <i>Explanation.</i> —An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

SECOND SCHEDULE—(*Continued.*)

FIRST DIVISION: SUITS—Continued.

1871

ACT IX.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VIII.— Twelve years— continued.</i>	
124.—Suit during the life of a Hindú widow by a Hindú entitled to the possession of land on her death to have an alienation made by the widow declared to be void, except for her life.	Twelve years ...	The date of the alienation.
125.—By a Hindú governed by the law of the Mitákshará to set aside his father's alienation of ancestral property.	Ditto ...	Ditto.
126.—Like suit by a Hindú governed by the law of the Dáyabhágá.	Ditto ...	When the father dies.
127.—By a Hindú excluded from joint-family property to enforce a right to share therein.	Ditto ...	When the plaintiff claims, and is refused his share.
128.—By a Hindú for maintenance.	Ditto ...	When the maintenance sued for is claimed and refused.
129.—To establish or set aside an adoption.	Ditto ...	The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father.
130.—For the resumption or assessment of rent-free land.	Ditto ...	When the right to resume or assess the land first accrued: Provided that no such suit shall be maintained where the land forms part of a permanently-settled estate, and has been held rent-free from the time of the Permanent Settlement.
131.—To establish a periodically recurring right.	Ditto ...	When the plaintiff is first refused the enjoyment of the right.
132.—For money charged upon immoveable property.	Ditto ...	When the money sued for becomes due.
<i>Explanation.</i> —The allowance and fees called málihána and haggis shall, for the purposes of this clause, be deemed to be money charged upon immoveable property.		

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SECOND SCHEDULE—(*Continued.*)

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FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
	<i>Part VIII.— Twelve years— continued.</i>	
133.—To recover moveable property conveyed in trust, deposited, or pawned, and afterwards bought from the trustee, depositary, or pawnee in good faith and for value.	Twelve years ...	The date of the purchase.
134.—To recover possession of immoveable property conveyed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee in good faith and for value.	Ditto ...	Ditto.
135.—Suit instituted in a Court, not established by Royal Charter, by a mortgagee for possession of immoveable property mortgaged.	Ditto ...	When the mortgagee is first entitled to possession.
136.—By a purchaser at a private sale for possession of the immoveable property sold, when the vendor was out of possession at the date of the sale.	Ditto ...	When the vendor is first entitled to possession.
137.—Like suit by a purchaser at a sale in execution of a decree, when the execution-debtor was out of possession at the date of the sale.	Ditto ...	When the execution-debtor is first entitled to possession.
138.—By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when he never has had possession.	Ditto ...	The date of the sale.
139.—Like suit when the purchaser had possession, but was afterwards dispossessed.	Ditto ...	The date of the dispossession.
140.—By a landlord to recover possession from a tenant.	Ditto ...	When the tenancy is determined.
141.—By a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immoveable property.	Ditto ...	When his estate falls into possession.

SECOND SCHEDULE—(*Continued.*)

FIRST DIVISION: SUITS—Continued.

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Act IX.

Description of Suit.	Period of Limita- tion.	Time when Period begins to run.
	<i>Part VIII.—</i> <i>Twelve years—</i> continued.	
142.—Like suit by a Hindú entitled to the possession of immoveable property on the death of a Hindú widow.	Twelve years ...	When the widow dies.
143.—For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued the possession.	Ditto ...	The date of the dispossession or discontinuance.
144.—Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Ditto ...	When the forfeiture was incurred, or the condition broken.
145.—For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Ditto ...	When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.
146.—For a declaration of right to an easement.	Ditto ...	When the easement ceased to be enjoyed by the plaintiff, or the persons on whose behalf he sues.
	<i>Part IX.—Thirty years.</i>	
147.—Against a depositary or pawnee to recover moveable property deposited or pawned.	Thirty years ...	The date of the deposit or pawn, unless where an acknowledgment of the title of the depositor or pawnor, or of his right of redemption, has, before the expiration of the prescribed period, been made in writing, signed by the depositary, or pawnee, or some person claiming under him, and, in such case, the date of the acknowledgment.

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Act IX.

SECOND SCHEDULE—(*Continued.*)

FIRST DIVISION: SUITS—Continued.

Description of Suit.	Period of Limitation.	Time when Period begins to run.
148.—Against a mortgagee to recover possession of immoveable property mortgaged.	<i>Part X.—Sixty years.</i>	The date of the mortgage, unless where an acknowledgment of the title of the mortgagor, or of his right of redemption, has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee, or some person claiming under him; and, in such case, the date of the acknowledgment:
149.—Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.	Ditto ...	Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in British Burmah, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that Province immediately before the same day.
150.—Any suit in the name of the Secretary of State for India in Council.	Ditto ...	When any part of the principal or interest was last paid on account of the mortgage debt.
		When the right to sue accrued.

SECOND DIVISION: APPEALS.

Description of Appeal.	Period of Limitation.	Time when Period begins to run.
151.—Under the Code of Civil Procedure to the Court of a District Judge.	Thirty days ...	The date of the decree appealed against.
152.—Under the Code of Criminal Procedure to any Court other than the High Court.	Ditto ...	The date of the sentence or order appealed against.

SECOND SCHEDULE—(*Continued.*)

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SECOND DIVISION: APPEALS—Continued.

Description of Appeal.	Period of Limitation.	Time when Period begins to run.
153.—Under the same Code to the High Court.	Sixty days ...	The date of the sentence or order appealed against.
154.—Under the Code of Civil Procedure to the High Court.	Ninety days ...	The date of the decree appealed against.

THIRD DIVISION: APPLICATIONS.

Description of Application.	Period of Limitation.	Time when Period begins to run.
155.—Under the Code of Civil Procedure to set aside an award.	Ten days ...	When the award is submitted to the Court, and notice of the submission has been given to the persons and in manner prescribed by the High Court.
156.—By a plaintiff for an order to set aside a judgment by default.	Thirty days ...	The date of the judgment.
157.—By a defendant for an order to set aside a judgment <i>ex parte</i> .	Ditto ...	The date of executing any process for enforcing the judgment.
158.—Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder to be put into possession.	Ditto ...	The date of the dispossession.
159.—To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale.	Ditto ...	The date of the sale.
160.—Complaining of resistance or obstruction to delivery of possession of immoveable property sold in execution of a decree, or of dispossession in the delivery of possession to the purchaser of such property.	Ditto ...	The date of the resistance, obstruction, or dispossession.
161.—For re-admission of an appeal dismissed for want of prosecution.	Ditto ...	The date of the dismissal.

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SECOND SCHEDULE—(*Continued.*)

THIRD DIVISION: APPLICATIONS—Continued.

Description of Application.	Period of Limitation.	Time when Period begins to run.
162.—For leave to appeal as a pauper.	Ninety days ...	The date of the decree appealed against.
163.—To a High Court for the admission of special appeal.	Ditto ...	Ditto.
164.—For a review of judgment.	Ditto ...	The date of the decree.
165.—Under the Code of Civil Procedure, section three hundred and twenty-seven, that an award be filed in Court.	Six months ...	The date of the award.
166.—For the execution of a decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court, or of a Revenue Court.	One year ...	The date of the decision, or of taking some proceeding to enforce, or keep in force, the decision.
167.—For the execution of a decree or order of any Civil Court not provided for by No. 169.	Three years ...	The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two hundred and sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.

SECOND SCHEDULE—(*Continued.*)

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THIRD DIVISION: APPLICATIONS—Continued.

ACT IX.

Description of Application.	Period of Limitation.	Time when Period begins to run.
168.—For the execution of any such decree or order of which a certified copy has been registered under the Indian Registration Act.	Six years ...	The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review.
169.—To enforce a judgment, decree, or order of any Court established by Royal Charter, in the exercise of its ordinary original civil jurisdiction.	Twelve years ...	When a present right to enforce the judgment, decree, or order accrued to some person capable of releasing the right: Provided that, when the judgment, decree, or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto, or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.

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Act No. X.

THE EXCISE ACT.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN
COUNCIL.

(Received the assent of His Excellency the Governor-General
on the 24th March 1871.)

An Act to consolidate and amend the Laws relating to the Excise Revenue in Northern India, British Burma, and Coorg.

WHEREAS it is expedient to consolidate and amend the laws in force in Northern India, British Burma, and Coorg relating to the manufacture of spirits, the sale of spirituous and fermented liquors and intoxicating drugs, and the collection of the revenue derived therefrom; It is hereby enacted as follows:—

I.—PRELIMINARY.

Short title. 1. This Act may be called “The Excise Act, 1871.”

Local extent. It extends to the territories respectively under the government of the Lieutenant-Governors of the North-Western Provinces and the Panjáb, and under the administration of the Chief Commissioners of Oudh, the Central Provinces, British Burma, and Coorg.

Commencement of Act. It shall come into force in the North-Western Provinces, the Panjáb, Oudh, and the Central Provinces on the passing thereof, and in British Burma and Coorg on the first day of April 1872.

Repeal of Acts. 2. The Acts mentioned in the schedule hereto annexed are repealed.

Interpretation-clause. 3. In this Act,
“Chief Revenue Authority” means,—
in the territories subject to the Lieutenant-Governor of the North-Western Provinces, the Board of Revenue,

in the Panjáb and Oudh, the Financial Commissioner, and
in the Central Provinces, British Burma, and Coorg, the Chief
Commissioner.

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“Collector” includes any Revenue Officer in independent
charge of a District and a Superintendent
“Collector.” of Abkári revenue.

“Magistrate” means any Magistrate exercising powers not
less than those of a Subordinate Magis-
“Magistrate.” trate of the first class.

“Country-spirit” means any spirit made
by the native process of distillation.

“Intoxicating drugs” includes ganja, bhang, charas, opium,
“Intoxicating drugs.” and every preparation and admixture of
the same.

4. Nothing herein contained affects Act No. XVI of 1863
Saving of Act No. XVI (*to make special provision for the levy of
the excise duty payable on Spirits used
exclusively in Arts and Manufactures or in Chemistry*).

II.—MANUFACTURE OF SPIRITS AND FERMENTED LIQUOR.

5. No person shall construct or work a distillery after the
manner in which distilleries are constructed
English distilleries not to be constructed or worked without license.
and worked in England, without a license
under the hand of the Collector of the
District in which such distillery is situated.

Chief Revenue Authority
to prescribe rules for regulating English distilleries.
6. The Chief Revenue Authority may
from time to time make rules relative
to—

- (a) the granting of licenses under section five;
- (b) the notices to be given by the proprietor of a licensed distillery when he commences and discontinues work;
- (c) the size and description of the stills,
- (d) the passing and storing of the spirits,
- (e) the inspection and examination of the distillery and warehouses, and of the spirits manufactured and stored therein;

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(f) the furnishing of statements and lists of such spirits, and of the stills, coppers, casks, and other utensils used in the distillery.

Collectors may establish distilleries for country spirits,

7. The Collector, with the sanction of the Chief Revenue Authority, may—

(a) establish, at any place within his jurisdiction, a distillery in which spirits may be manufactured after the native process;

(b) from time to time fix limits within which no country spirits, except such as are manufactured at the said distillery, shall be introduced or sold without a special pass from the Collector, and within which no stills shall be constructed or worked, or spirits manufactured, except at the said distillery; and

(c) discontinue any distillery so established.

Chief Revenue Authority may prescribe rules for distilleries.

8. The Chief Revenue Authority may from time to time make rules relative to

(a) the management of distilleries established under section seven,

(b) the conditions on which spirits may be manufactured in the said distilleries, and

(c) the passes to be issued for the conveyance of such spirits to the shops of the vendors.

9. No person shall construct or work a brewery, or manufacture any description of malt liquor, without a license from the Collector.

Breweries not to be constructed or worked, without license.

The Chief Revenue Authority may from time to time make rules relative to the granting of licenses for constructing and working breweries.

10. Except in the Central Provinces, British Burma, and Coorg, the sanction of the Local Government is required to validate rules under sections six, eight, and nine.

Sanction of Local Government to rules under sections 6, 8, and 9.

11. No person shall manufacture spirits after the native process, except under license from the Collector.

Prohibition of unlicensed manufacture of country spirits.

**III.—SALE OF SPIRITS, FERMENTED LIQUOR, AND
INTOXICATING DRUGS.**

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12. Spirituous liquors passed from distilleries worked according to the English method, fermented English spirits and fermented liquor not to be sold without license. liquors manufactured at a licensed brewery, and spirituous and fermented liquors imported either by land or by sea, shall not be sold, except under license from the Collector.

13. Persons taking out licenses for the wholesale vend of spirituous and fermented liquors as aforesaid shall pay, for every such license, such sum as the Chief Revenue Authority from time to time prescribes.

The license shall be current only during the official year, and in the District in which it is granted.

But travelling merchants may obtain, under such rules and restrictions as the Chief Revenue Authority from time to time prescribes, a general license, authorizing them to sell by wholesale, in any District which they may visit in the course of their travel, without taking out a fresh license for that District.

14. Persons taking out licenses for the retail sale of spirituous and fermented liquors as aforesaid shall pay for every such license such fee or tax as the Chief Revenue Authority fixes, and such fee or tax shall be payable at such periods as the said Authority directs.

Any sale of spirituous or fermented liquors as aforesaid, in what to be held a retail sale. less quantity than two imperial gallons or one dozen of quart bottles, shall be held to be a retail sale.

15. No person shall sell spirits manufactured by the native process, or tári, or pachwái, or any intoxicating drug, except under license from the Collector.

16. All the provisions relating to the sale or possession of Tári to be deemed a fermented liquor. fermented liquors contained in the following sections apply to the sale or possession of tári, whether in a fermented state or otherwise ; and all tári,

1871 both fresh and fermented, is included in the expression "fermented liquors," as used in the following sections.
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17. Provided that the Local Government may suspend the operation of all the provisions relating to Proviso. tárí contained in this Act, with respect to any District in which the consumption of tárí in a fermented state is inconsiderable; and thereupon tárí may be possessed and sold without license in such District, notwithstanding anything contained in this Act.

18. Opium shall be supplied to licensed vendors from the Supply of opium to Government stores in such manner and at licensed vendors. such priees as the Chief Revenue Authority from time to time directs: and no other description of opium shall be sold by such vendors.

The Local Government may, from time to time, by order Proviso. exempt any District from the operation of this section.

19. Except for the supply of licensed vendors, or under a Sale of more than specified quantities of country spirits, &c., prohibited. special order from such officer as the Local Government appoints in this behalf, country spirits, tárí and pachwáí, and intoxicating drugs shall not be sold in larger quantities than are hereunder specified—

country spirits, one ser;
 tárí or pachwáí, four sers;
 ganja or bhang, or any preparation or admixture thereof, one quarter of a ser;
 charas or opium, or any preparation or admixture thereof, five tolas weight;

And the sale of any such quantity as is herein allowed shall be deemed to be a retail sale within the meaning of this Act.

20. No cultivator of the plants producing ganja or bhang Restriction of sale of ganja and bhang. shall sell any ganja or bhang to any one other than (a) a person licensed under section fifteen to sell the same, or (b) a person duly authorized to purchase the same by pass or license from the Collector.

IV.—DUTIES.

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21. A duty shall be levied on spirits manufactured at distilleries worked according to the English method, at the rate of three rupees the imperial gallon of the strength of London-proof, to be augmented or reduced in proportion to the strength of the spirit.

No spirit shall be removed from any such distillery, or the warehouses connected therewith, upon which the aforesaid duty has not been paid, or for the duty chargeable on which a bond has not been executed as hereinafter provided.

For all spirits removed upon payment of duty or under bond, passes shall be issued by the Collector, which shall specify

- (a) the quantity and strength of the spirit,
- (b) the place of its destination,
- (c) the person to whom it is consigned, and
- (d) whether the duty has been paid or secured by bond.

Nothing in the former part of this section applies to British Burma.

22. Spirituous liquors manufactured at any place in India beyond the limits of British India, shall be charged with the duty prescribed for proof-spirits in section twenty-one:

and any person found in possession of any such liquors, without a pass from the Collector certifying the payment of such duty, shall forfeit for every such offence a sum not exceeding two hundred rupees; and the liquors, together with the vessels containing the same, and the animals and conveyances used in carrying them, shall be liable to confiscation.

23. A duty shall be levied on spirits manufactured in distilleries established under section seven at such rate as the Chief Revenue Authority, with the sanction of the Local Government, may from time to time prescribe.

24. Whenever a license for the retail sale of country spirits, tárí, or pachwáí, or intoxicating drugs, is granted under this Act, the Collector may

Duty on country spirits manufactured at distilleries established by the Collector.

such rate as the Chief Revenue Authority, with the sanction of the Local Government,

Duty on the retail sale of country spirits, &c.

granted under this Act, the Collector may

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demand, in consideration of the privilege granted, such tax or duty, or a tax or duty adjusted on such principles, as may from time to time be fixed by the Chief Revenue Authority.

Such tax or duty shall be specified in the license, and shall be payable at such periods as the said Authority may direct.

The Collector may grant special licenses for the sale of unfermented tárí only, at those periods of the year when the fresh juice is in request; fees may be demanded for such special licenses at a rate for each license to be fixed from time to time by the Chief Revenue Authority ; and the vendors shall not be subject to any other tax or duty in respect of such sale.

V.—FARM OF DUTIES.

25. The Collector may, with the sanction of the Chief Revenue Authority, let in farm, for any period not exceeding five years, the duties leviable on the retail sale of spirituous or fermented liquors, or intoxicating drugs, or any description of such liquors or drugs in any District or division of a District.

Tenders for such farm. 26. The Chief Revenue Authority may prescribe rules—

(a) for the invitation and acceptance of tenders for such farms,

(b) for the requisition of security for the due fulfilment of the engagements entered into by the farmers, and

(c) as to the form and conditions of the lease.

Any breach of such conditions shall render the lease liable to annulment.

27. When the duties leviable on any of the articles above enumerated are let in farm, the farmer shall be at liberty to make his own arrangements with the manufacturers and vendors within the limits of his farm;

And all the fines and forfeitures hereinafter prescribed, for the unlawful manufacture, sale, or possession of any such article, shall be incurred by all persons manufacturing, selling, or possessing the same without license or authority from the farmer.

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28. Every such farmer shall file in the Collector's office a list of all the licenses granted by him in such form as may be prescribed by the Chief Revenue Authority.

The Collector, with the sanction of the said Chief Revenue Authority, may, before entering into engagements for any such farm, make such reservations or restrictions, with respect to the grant of licenses as he thinks fit.

29. The Collector may, with the sanction of the Chief Revenue Authority, cancel any lease granted under this Act; or may, within the period of the lease, impose any new restriction on the farmer.

If a lease be cancelled for any cause other than a breach of the lease, or if any reservation or restriction, with respect to the grant of licences be imposed within the period of the lease, the farmer shall be entitled to receive such compensation for any loss which he sustains thereby as the Chief Revenue Authority thinks fit.

30. Every farmer of Excise revenue may use the same means and processes for the recovery of tax or duty by farmers, any arrear of tax or duty due to him from any authorized vendor, as may be lawfully used by zemindars and farmers of land for the recovery of arrears of rent due to them from their under-tenants.

VI.—LICENSES.

31. Every person taking out a license for the manufacture of country spirits, or for the retail sale of spirituous or fermented liquors, or intoxicating drugs, shall execute a counterpart engagement in conformity with the tenor of the license, and shall give such security for the performance of his engagement, or make such deposit in lieu of security, as the Collector may require.

32. Unless otherwise especially authorized by the Chief Revenue Authority, licenses for retail sale of license.

Duration and renewal shall be granted for the term of one year,

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and if continued to the holders thereof, shall be formally renewed from year to year.

But every person holding a license, who may intend not to renew it, shall give notice of his intention to the Collector at least fifteen days before the year expires.

If such notice be not given, and the license be not recalled by the Collector, the license held, and engagement entered into by every such person, shall remain in force as if the said license and engagement had been formally renewed.

Chief Revenue Authority to regulate form of license. 33. The Chief Revenue Authority may regulate the form and conditions of all licenses granted under this Act.

34. The Collector may recall or cancel any license granted under this Act, if the tax or duty therein specified be not duly paid, or in case of a violation of any other condition thereof, or of the holder being convicted of a breach of the peace or any other criminal offence.

If the Collector desire to recall a license for any cause other than those above specified, he shall give fifteen days' previous notice, and remit a sum equal to the tax for fifteen days; or, if notice be not given, shall make such further compensation for default of notice as the Commissioner or Chief Revenue Authority directs.

35. Any licensed retail vendor may surrender his license on giving one month's previous notice to the Collector, and paying such fine not exceeding the amount of the license fees for six months as the Collector may adjudge.

If the Collector is satisfied that there is a sufficient reason for resigning a license, he may remit the fine so prescribed.

VII.—POWERS OF OFFICERS.

36. The collection of the revenue arising from the manufacture of spirits, and the sale of spirits and spirituous and fermented liquors and intoxicating drugs, shall be ordinarily under the charge of the Collectors of Land Revenue, who shall

Collectors of Land Revenue to have charge of the Excise revenue.

perform the duties connected therewith under the control and direction of the Commissioners of Revenue, and of the Chief Revenue Authority.

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But the Local Government may appoint any other person to be Superintendent of Excise Revenue in any District or place, and any person so appointed shall exercise, in such District or place, all the powers and authority conferred by this Act on the Collector of Land Revenue; and the Collector of Land Revenue shall cease to exercise such powers and authority in such District or place during the continuance of such appointment.

37. The Local Government may also appoint a Commissioner or Commissioners for the control and direction of the officers having charge of

Power to appoint Commissioner or Commissioners for the control and direction of the officers having charge of the Excise revenue in any District or Districts ; and when such appointment is made, the Commissioner of Excise shall exercise within such District or Districts the powers and authority conferred by this Act on Commissioners of Revenue, and the Commissioners of Revenue shall cease to exercise such powers and authority in the said District or Districts during the continuance of such appointment.

38. Collectors may appoint dárogahs, jamadárs, peons, sur-

Collectors may appoint veyors, gaugers, and other officers, for the collection of the Excise revenue and for the prevention of smuggling, and the officer so appointed shall, in addition to their ordinary designations, be styled Excise Officers.

39. In Districts where there are tahsíldárs and other local

Tahsíldárs may be Abdárí Darogahs. officers for the collection of the land revenue, the office of Excise Dárogah may be united with that of tahsíldár, or any of such local officers, and the said officers, together with the officers subordinate to them, shall be deemed to be Excise Officers within the meaning of this Act.

40. The Chief Revenue Authority may regulate the mode

Power to regulate supply of tárfi and intoxicating drugs to licensed vendors. in which tárfi shall be supplied to licensed vendors of the same ; and may frame rules for the grant of licenses or passes to persons purchasing, transporting, or storing ganja, bhang, or charas for the supply of the licensed vendors of those drugs.

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Such Authority may also place the cultivation, preparation, and store of such drugs under such supervision as may be deemed necessary to secure the duty leviable thereon.

41. The Collector may recover any arrear of tax or duty Recovery of arrears of due on account of any license granted under this Act,

or any arrear due from any farmer of Excise revenue, by distress and sale of the moveable property of the person from whom the arrear is due, or of his surety, or by any other process for the time being in force for the recovery of arrears of revenue due from farmers of land, or their sureties.

42. Any Excise Officer may enter and inspect at any time, by Power of Excise Officers to inspect shops. day or by night, the shop or premises in which any licensed manufacturer or retail vendor carries on the manufacture of country spirits, or the sale of spirituous or fermented liquors, or intoxicating drugs.

43. Any Excise Officer may stop and detain any person And to arrest persons carrying spirits, &c., liable to confiscation. carrying any spirituous or fermented liquors or intoxicating drugs liable to confiscation under this Act;

and may seize the liquors or drugs with the vessels, packages, or coverings in which they are contained, and the animals and conveyances used in carrying them;

and may also arrest the person in whose possession such liquors or drugs are found.

44. Any Excise Officer, above the rank of a jamadár of peons, And to arrest unlicensed distillers, &c. may arrest any person having in his possession an unlicensed still, or any spirituous or fermented liquors, or intoxicating drugs, liable to confiscation under this Act, or engaged in the unlawful sale of spirituous or fermented liquors, or intoxicating drugs,

And to seize stills. and may seize such still, with the materials for working it, and all such liquors and drugs.

45. Whenever any Excise Officer, above the rank of a jamadár And to search on information of illicit manufacture or possession. of peons, has reason to believe, from information given by any person, which information shall be taken down in writing, that spirits are unlawfully manufactured,

or that any spirituous or fermented liquors, or intoxicating drugs liable to confiscation under this Act, are kept or concealed in any house, boat, or other place,

such officer may, between sunrise and sunset (but always in the presence of an officer of Police not being under the grade of a jamadár), enter into any such house, boat, or place,

and in case of resistance may break open any door, and force and remove any other obstacle to such entry;

and may seize and carry away all stills and materials used in the manufacture of such spirits and all such liquors and drugs;

and may also arrest the occupier of the house, boat, or place with all other persons concerned in the manufacture of such spirits, or in the keeping and concealing of such liquors or drugs.

46. The powers of seizure, search, and arrest, given to Excise Officers by the three last preceding sections, may, in regard to the seizure and search for contraband opium and the arrest of persons found in possession thereof, be exercised also by the officers of the Police, Customs, and Revenue Departments according to their respective grades.

And the Local Government may confer on the officers of those departments, or of any of them, like powers with respect to the seizure of, and search for, spirituous and fermented liquors and intoxicating drugs of every description, and the arrest of persons found in possession thereof.

All such officers when so empowered, as well as all Police, Customs, and Revenue Officers when acting under the authority conferred by this section for the suppression of illicit dealings in opium, shall be deemed to be Excise Officers within the meaning of this Act.

47. Whenever an Excise Officer arrests any person, Abkári Officer to report or seizes any still, or any liquors or arrests, &c. drugs liable to confiscation under this Act, or enters any house, boat, or place for the purpose of searching for any such illicit articles, he shall, within twenty-four hours thereafter, make a full report of all the particulars of such arrest, or seizure, or

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search, to his official superior, and unless acting under the warrant of the Collector, shall carry the person arrested, and to take person arrested or the illicit article seized, with all rested to Magistrate. convenient despatch, to the Magistrate for trial or adjudication.

48. The Collector may issue his warrant for the arrest of any person whom he has reason to believe, either from information in writing, or from the proceedings in any other case, to be engaged in the unlawful sale of spirituous or fermented liquors, or intoxicating drugs, or to have in his possession any such liquors or drugs liable to confiscation under this Act.

49. The Collector may issue his warrant for the search of any house, boat, or place, in which, upon any of the grounds mentioned in the last preceding section, he has reason to believe that spirits are unlawfully manufactured, or that spirituous or fermented liquors or intoxicating drugs, liable to confiscation under this Act, are kept or concealed.

Such warrant may be executed by any officer above the rank of a jamadár of peons, at the time and in the manner prescribed in section forty-five.

Whenever the Collector thinks that the search should be made between sun-set and sun-rise on any particular day, he shall issue a warrant, specially authorizing the search to be so made.

Special warrant authorizing search between sun-set and sunrise. Such warrant may be executed by any officer above the rank of a jamadár of peons, in the manner prescribed in section forty-five, and shall cease to be in force at sunrise on the day next following.

50. Whenever any person is arrested, or any articles are seized under the warrant of a Collector, the Collector, after such inquiry as he thinks necessary, shall send the person arrested, or the articles seized, to the Magistrate, or shall order the immediate discharge of such person, or the release of such articles.

51. All Police Officers are required to aid the Excise Officers Police to assist Excise Officers. in the due execution of this Act, upon notice given, or request made by such officers.

VIII.—PENALTIES.

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52. Whoever constructs or works a distillery after the English method, without a license from the Collector, shall for every such offence be punished with fine not exceeding one thousand rupees ;

For constructing or working a distillery without license.

and all spirits manufactured at any such distillery, and all materials and implements collected for the purpose of such manufacture, shall be liable to confiscation.

53. Every proprietor or manager of a licensed distillery constructed and worked after the English method, who omits to furnish any notice or any statement or list required by the rules prescribed by the Chief Revenue Authority under section six, or wilfully does anything in contravention of the said rules, shall for every such offence be punished with fine not exceeding two hundred rupees ;

and if any such offence be committed a second time, with respect to the same distillery, the Collector may withdraw the license granted for the working of such distillery.

54. Whoever removes or attempts to remove, from any licensed distillery, constructed and worked after the English method, any spirituous liquors upon which the duty has not been paid, or for the duty on which a bond has not been executed, or any spirituous liquors for which the Collector has not issued a pass, shall for every such offence be punished with fine not exceeding one thousand rupees ;

For removing spirituous liquors, without payment of duty.

and the liquors, together with the vessels containing the same, and the animals and conveyances used in carrying them, shall be liable to confiscation.

If it appear to the Collector that the offence was committed with the consent or knowledge of the proprietor or manager, the Collector may withdraw the license granted for the construction and working of the distillery from which such liquors have been removed, or attempted to be removed.

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55. Whoever re-lands, or attempts to re-land, any spirituous liquor shipped for exportation, without a special pass from the Collector of Revenue at the place of exportation, shall for every such offence be punished with fine not exceeding five hundred rupees;

and the liquors, together with the casks and vessels containing the same, and the carts, boats, and animals employed in carrying them, shall be liable to confiscation.

56. Whoever constructs or works a brewery, or manufactures malt liquor, without a license, shall, for every such offence, be punished with fine not exceeding five hundred rupees.

57. Every person licensed to manufacture country spirits, or to sell spirituous or fermented liquors, or intoxicating drugs, who fails to produce his license on the demand of any Excise Officer, or who commits any act in breach of any of the conditions of his license not otherwise provided for in this Act, shall for every such offence be punished with fine not exceeding fifty rupees.

58. Every licensed retail vendor, who sells any larger quantity of spirituous or fermented liquors, or intoxicating drugs, than is allowed to be sold by retail by this Act, and every licensed wholesale vendor who makes a retail sale, shall for every such offence be punished with fine not exceeding two hundred rupees.

Provided that nothing in this section shall be held to prohibit the grant to the same person of both wholesale and retail licenses, subject to the provisions of this Act.

59. Every person licensed to sell spirituous or fermented liquors, or intoxicating drugs, who permits drunkenness, riot, or gaming in his shop, or permits persons of notoriously bad character to meet or remain therein, or receives any wearing apparel or other effects in barter for liquors or drugs, shall for every such offence be punished with fine not exceeding two hundred rupees.

60. Whoever conveys, or attempts to convey, any country spirits from a distillery established under section seven without a pass, or exceeding the quantity for which a pass has been granted, or introduces or attempts to introduce any country spirits manufactured at another place into the limits fixed for the consumption of spirits manufactured at such distillery, without a special pass from the Collector,

shall for every such offence be punished with fine not exceeding five hundred rupees.

61. Whoever wilfully contravenes any rule prescribed by the Chief Revenue Authority for the management of a distillery established as aforesaid, otherwise than as provided for in the last preceding section, shall for every such offence be punished with fine not exceeding fifty rupees.

62. Every person other than a licensed manufacturer who manufactures any country spirits,

and every person other than a licensed vendor, or a person duly authorized to supply licensed vendors, who sells any spirituous or fermented liquors, or intoxicating drugs,

and every person authorized to supply licensed vendors, who sells any such liquors or drugs to any person other than a licensed vendor,

shall for every such offence be punished with fine not exceeding five hundred rupees.

Nothing in this section, or in section twelve, applies to the sale by auction of any spirituous liquors, wines, or beer purchased by any person for his private use and so disposed of, upon his quitting a station, or after his decease.

63. Every person, other than a licensed manufacturer or vendor, or a person duly authorized to supply licensed vendors, who has in his possession any larger quantity of country spirits, or tārī, or pachwāī, or intoxicating drugs, except opium, than may legally be sold by retail under the provisions of section nineteen;

For conveying country spirits from distillery without pass, &c.

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or transports by land or by water, or has in his possession, any spirituous liquors made at a distillery worked according to the English method, or any imported spirituous or fermented liquors, in larger quantity than two gallons, without a pass from the Collector or other officer duly empowered in that behalf,

shall for every such offence be punished with fine not exceeding two hundred rupees;

and the liquors and drugs, together with the vessels, packages, and coverings in which they are found, and the animals and conveyances used in carrying them, shall be liable to confiscation.

Provided that nothing in this section extends to any spirituous liquors, wines, or beer, purchased by any person for his private use, and not for sale.

64. The provisions of the two last preceding sections, so far as they relate to the sale and possession of ganja, and bhang, fermented liquors, do not apply to the sale and possession of tárí, the produce of the date tree, when supplied or used for the manufacture of gúr or molasses; and the provisions of the said sections relating to the sale and possession of intoxicating drugs, do not apply to the sale and possession of ganja or bhang by the cultivators of the plants which produce those drugs respectively.

Every such cultivator selling ganja or bhang in breach of the prohibition contained in section twenty, shall for every such offence be punished with fine not exceeding five hundred rupees:

65. Every person, other than a licensed vendor, who has in his possession a greater quantity of opium than five tolas weight, shall for every such offence be punished with fine not exceeding five hundred rupees, unless the opium found in his possession exceeds the weight of thirty-one sers and a quarter, in which case the penalty may be increased at a rate not exceeding sixteen rupees the ser for all the opium so found in excess of that weight;

For having in possession a greater quantity of opium than five tolas weight.

and the opium, together with the vessels, packages, and

coverings in which it is found, and the animals and conveyances used in carrying it, shall be liable to confiscation.

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66. Nothing in section sixty-five applies
Exception in favor of — to the persons and circumstances hereinafter specified, namely :—

(a) Authorized opium cultivators having newly extracted Opium cultivators. opium in their possession during the usual period between the full growth of the poppy, and the delivery of the produce to the opium agent.

(b) Travellers and visitants from foreign states or countries Travellers. having in their possession any quantity of foreign opium not exceeding two sers, or, in British Burma, five tolas, the produce of such foreign states and countries, and intended for the private use of such travellers and visitants, or their attendants, and not for sale or barter.

(c) Dealers in horses travelling with strings of horses from And horse dealers. beyond the limits of British India, and having in their possession opium, the produce of foreign states or countries, not exceeding in quantity the proportion of ten tolas weight for each horse.

If opium be found in the possession of any such traveller, For possession of excessive quantity of opium by travellers, &c. visitant, or dealer in horses in excess of the quantities above specified, such excess shall be liable to confiscation; but the person in whose possession it may be found shall not be subject to any further penalty.

67. Every licensed vendor, who sells or offers for sale opium For sale of adulterated opium, &c., by licensed vendors. adulterated with any foreign substance, not being a preparation or admixture of opium for the sale of which he has taken out a license,

or, who, except in Districts exempted from the operation of section eighteen, sells, or has in his possession, any opium other than the opium supplied to him from the Government stores, shall for every such offence be punished with fine not exceeding five hundred rupees, and the license held by him shall be

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68. Every proprietor, farmer, tahsídár, gumáshta, or other manager of land, who authorizes or manufactures or sale of nives at the manufacture of country spirits, spirits, &c. or the sale of spirituous or fermented liquors or intoxicating drugs by any unlicensed person, shall for every such offence be punished with fine not exceeding five hundred rupees.

69. Any Police Officer who, without lawful excuse, neglects or refuses to assist as aforesaid, and any On Police neglecting to assist, dárogha or other officer in charge of a Police station, who, on application made by an Excise Officer, under section forty-five, fails to attend a search himself, or to depute a subordinate officer not being below the grade of a jamadár, shall for every such offence be punished with fine not exceeding five hundred rupees.

70. Whoever maliciously gives false information against any For maliciously giving false information. person as being engaged in the unlawful manufacture of spirits, or as selling or having in his possession any spirituous or fermented liquors or intoxicating drugs in contravention of this Act, and so procures that such person be arrested, or that any house, boat, or other place be searched, to the injury or annoyance of such person, or any other person whatsoever, shall for every such offence be punished with fine not exceeding five hundred rupees, or with imprisonment for a term not exceeding six months, or with both.

Such fine or any part thereof may be paid to the person aggrieved.

For vexatious search or seizure. 71. Any Excise Officer who, without reasonable ground of suspicion, searches or causes to be searched any house, boat, or other place,

or vexatiously and unnecessarily seizes the moveable property of any person, on the pretence of seizing or searching for any spirituous liquors or intoxicating drugs liable to confiscation under this Act,

or vexatiously and unnecessarily arrests any person,
or commits any other excess not required for the execution of
his duty,

shall for every such offence be punished with fine not exceeding five hundred rupees.

Such fine, or any part thereof, may be paid to the person aggrieved.

72. Any Excise Officer who neglects to report the particulars

On Excise Officers for delay in reporting arrest, &c., or in carrying person arrested to Magistrate or Collector.

of an arrest, seizure, or search within twenty-four hours thereafter, or delays carrying to the Magistrate or Collector, as the case may be, any person arrested, or any illicit articles seized under this Act, shall for every such offence be punished with fine not exceeding two hundred rupees.

73. Any Excise Officer unlawfully releasing or conniving at

For conniving at escape of persons arrested, &c.

the escape of any person arrested under this Act, or conniving at the manufacture of spirits, or the sale of spirituous or fermented liquors or intoxicating drugs by any unlicensed person, or by any licensed person, contrary to the terms of his license, or acting in a manner inconsistent with his duty, for the purpose of enabling any person to do anything whereby any of the provisions of this Act may be evaded or broken, or the Excise revenue defrauded;

and any officer invested with local jurisdiction, authorizing or conniving at the establishment of any unlicensed shop for the sale of such liquors or drugs as aforesaid in any place subject to his control,

shall for every such offence be punished with fine not exceeding five hundred rupees.

74. All fines leviable for offences against this Act, and all seizures of goods liable to confiscation

Adjudication of penalties and seizures.

under this Act, shall be adjudged by the Magistrate on the information of the Collector or any Excise Officer;

Provided that no such information shall be necessary in any case of complaint preferred to a Magistrate under section fifty-nine, sixty-nine, seventy, seventy-one, seventy-two or seventy-three,

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75. In all cases in which complaint or information is preferred to a Magistrate of offences committed against this Act, not being cases in which persons are sent in custody by a Collector or Excise officer, the Magistrate shall issue a summons requiring the attendance of the person accused.

The rules contained in the Code of Criminal Procedure, for the trial of cases before a Magistrate, and for appeal against orders passed by a Magistrate, shall apply to trials under this Act.

Provided that no complaint or information of an offence against this Act shall be admitted, unless it be preferred within six months after the commission of the offence to which the complaint or information refers.

76. Whenever any person is convicted of an offence against this Act, after having been previously convicted or subsequent conviction of a like offence, he shall be liable, in addition to the penalty provided for such offence, to imprisonment for a term not exceeding six months.

A like punishment of imprisonment not exceeding six months shall be incurred, in addition to the punishment which may be inflicted for a first offence, upon every subsequent conviction after the second.

77. Every person imprisoned for an offence under section fifty-nine, sixty-nine, seventy, seventy-one, Confinement in civil jail. seventy-two, or seventy-three, shall be confined in the criminal jail, and every person imprisoned for an offence under any other section shall be confined in the civil jail.

78. All things confiscated under this Act, except opium, shall Disposal of confiscated goods. be disposed of by the Collector by public sale.

Opium so confiscated shall be sent for examination to the Civil Surgeon of the station, and, if declared by him to be fit for use, shall be sent to the Government factories, or otherwise disposed of in such manner as the Chief Revenue Authority directs. If declared to be unfit for use, it shall be immediately destroyed.

79. One-half of all fines levied from persons convicted of _____
 Disposal of fines, &c., the unlawful manufacture of spirits, or of
 as rewards. the unlawful sale or possession of spirituous or fermented liquors or intoxicating drugs, and one-half of the proceeds from sale of all confiscated articles, except opium, and in the case of opium confiscated and declared by the Civil Surgeon to be fit for use, a reward of one rupee eight annas for each ser, shall, upon adjudication of the case, be awarded to the officer or officers who apprehended the offender.

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The other half of such fines and forfeitures, and the other half of the proceeds of sale, or in the case of opium as aforesaid, a reward of one rupee eight annas for each ser shall be given to the informer.

If in any case the fine or forfeiture is not realized, the Chief Revenue Authority may grant such reasonable reward, not exceeding two hundred rupees, as may seem fit; and such Authority may direct by general order what classes of Excise Officers shall receive rewards, and what classes shall have no title to share therein.

80. All fines levied under this Act, the disposal of which is not specially provided for, shall belong to Government.

But the Chief Revenue Authority may appropriate any portion thereof, not exceeding one-half, for rewarding informers, or for compensating persons subjected to annoyance or injury by any proceedings under this Act.

IX.—MILITARY CANTONMENTS.

81. Within the limits of any Military Cantonment, and Rules respecting the manufacture and sale of spirits, &c., in Military Cantonments. within such distance from those limits as the Local Government in any case prescribes, no licenses for the manufacture of spirits, or for the sale of spirituous and fermented liquors shall be granted, nor shall the duties leivable upon such spirits and liquors be let in farm, unless with the knowledge and consent of the Commanding Officer:

and upon his requisition any license which has been granted,

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Mode of making arrest
or search within Military
Cantonments. 82. In all other respects, the foregoing provisions of this Act shall have effect within such limits or distance:

Provided that, when arrest or search is to be made within the limits of any Cantonment, the Collector or other officer authorized under this Act to make arrest or search shall, whenever it may be practicable, give previous notice to the Commanding Officer, and in all other cases shall report the arrest or search to such Commanding Officer with as little delay as possible.

Provided also that nothing herein contained shall affect the provisions of Act No. XXII of 1864 (*to make provision for the administration of Military Cantonments.*)

X.—MISCELLANEOUS.

83. A drawback of the duty levied under Part IV of this Drawback on exportation. Act on spirits manufactured after the English method, and exported by sea to Aden or any port not situate in British India, shall be allowed by the Collector of Customs at the port of exportation:

Provided that the exportation be made within one year from the date of the payment of duty under this Act, and that the spirits, when brought to the Custom House, be accompanied by the pass in which such payment is certified.

The amount of drawback to be allowed upon spirits for which duty has been paid shall be regulated according to the strength and quantity of the said spirits, as ascertained by such proof and gauge.

The quantity of spirits, for which credit is to be given in the settlement of any bond, shall be determined in the same manner.

No drawback on spirits
exported to British Indian
ports, except Aden, or
shipped as stores.

84. No drawback shall be allowed on spirits exported to any port in British India, except Aden, or on spirits shipped as stores.

85. Any sum remaining due to Government upon the settlement of a bond executed according to the provisions of this Act, may be recovered Recovery of sums due
under bond.

by any process for the time being in force for the recovery of arrears of revenue due from farmers of land or their sureties, or by suit on the bond in any Court of competent jurisdiction.

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86. All orders passed by a Collector under this Act shall be Appeals from orders and sentences passed under this Act. appealable to the Commissioner in the usual manner under the rules in force relative to appeals from the orders of Collectors.

87. In the districts in which the poppy is cultivated on Powers vested in officers of the Opium Department. account of Government, the Deputy Opium Agents and Sub-Deputy Agents shall exercise the powers conferred by this Act on Collectors, so far as the same relate to the suppression of illegal dealings in opium:

and the officers of the Opium-Department shall exercise the powers conferred by this Act on Excise officers for the seizure of illicit opium and the arrest of persons found in possession thereof, and in respect to such seizures and arrests, shall be deemed to be Excise officers within the meaning of this Act.

88. All duties heretofore levied in Oudh on spirituous and Legalization of levy of fermented liquors or intoxicating drugs Excise duties in Oudh. shall be deemed to have been levied in accordance with law.

All officers and other persons are hereby indemnified for anything done before the passing of this Act Indemnity-clause. which might lawfully have been done if this Act had been in force, and no suit or other proceeding shall be maintained against any such officer or other person in respect of anything so done.

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SCHEDULE.

NUMBER AND YEAR.	TITLE OF ACT.
XXI of 1856	An Act to consolidate and amend the law relating to the Abkari Revenue in the Presidency of Fort William in Bengal.
XXIII of 1860	An Act to amend Act XXI of 1856 (to consolidate and amend the law relating to the Abkari Revenue in the Presidency of Fort William in Bengal).
X of 1864	An Act to amend Act XXI of 1856 (to consolidate and amend the law relating to the Abkari Revenue in the Presidency of Fort William in Bengal).
XXVIII of 1864	An Act to provide for the extension of Act XXI of 1856 (to consolidate and amend the law relating to the Abkari Revenue in the Presidency of Fort William in Bengal) to the provinces under the control of the Lieutenant-Governor of the Punjab.
XXIII of 1868	An Act to give validity to certain Abkári Rules in British Burma.

Act No. XI.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor-General on the 24th March 1871.)

An Act to abolish the Financial Commissionership of Oudh.

WHEREAS it is expedient to abolish the office of Financial Commissioner of Oudh; It is hereby enacted as follows:—

Abolition of Financial Commissionership.

1. The said office is hereby abolished.

2. The Governor General in Council may from time to time, by notification in the *Gazette of India*, invest the Chief Commissioner of Oudh, the Judicial Commissioner of Oudh or any Power to invest certain officers with jurisdiction of Financial Commissioner.

Commissioner in that Province, with all or any of the powers which; if this Act had not been passed, the said Financial Commissioner might have exercised under any law rule or order having the force of law.

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3. All appeals now pending in the Court of the said Financial Commissioner shall be transferred to such Court as the Governor General in Council may, by such notification as aforesaid, direct in this behalf.

All such appeals shall be disposed of as if they had been originally presented in the Court to which Disposal of such appeals. they are so transferred, and the orders of such Court shall have the same effect as if they had been made by the said Financial Commissioner, and as if this Act had not been passed.

4. Act No. XXXVII of 1867 (*for transferring appeals from the Court of the Financial, to the Court of the Judicial, Commissioner of Oudh, and for other purposes*) is hereby repealed.

5. Act No. XIX of 1868 (*to consolidate and amend the law relating to rent in Oudh*), sections 84, 93, 94, and 98, shall be construed as if, for Amendment of Act XIX of 1868. "Financial Commissioner," the words "Judicial Commissioner" were substituted.

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Act No. XII.**THE INDIAN INCOME TAX ACT.**

PASSED BY THE GOVERNOR GENERAL OF INDIA IN
COUNCIL.

(Received the assent of His Excellency the Governor General on
the 31st March 1871.)

An Act for imposing Duties on Income.

FOR the purpose of imposing duties on income arising from
offices, property, professions and trades;
Preamble. It is hereby enacted as follows:—

PART I.**PRELIMINARY.**

1. This Act may be called “The Indian
Short title. Income Tax Act:”

Local extent. It extends to the whole of British India;

It shall come into force on the first day of April 1871, and it
Commencement of Act. shall cease to be in force on the thirty-first
day of March 1872, except as to taxes then
due and penalties incurred thereunder.

Repeal of Act XVI of 1870. 2. On and from the said first day of April
1871, Act No. XVI of 1870 shall be repealed:

Provided that such Act shall continue in force until the first
day of April 1872 as to taxes and penalties due and incurred
thereunder.

The references made in the Court Fees Act, Schedule II, to
the Indian Income Tax Act shall be deemed to be made to this
Act.

Interpretation clause.

3. In this Act—unless there be some-
thing repugnant in the subject or context—

“Income.”

“Income” means income and profits
accruing and arising in British India:

“ Magistrate” means any person exercising the powers of a Magistrate, or of a Subordinate Magistrate of the first Class, and includes a Magistrate of Police and a Justice of the Peace:

“ Company” means an Association carrying on business in British India whose stock or funds is or are divided into shares and transferable, whether such Company be incorporated or not, and whether its principal place of business be situate in British India or not:

“ Person.” “ Person” includes a firm and a Hindú undivided family:

“ Defaulter.” “ Defaulter” includes a Company or firm making default under this Act:

In the case of any firm or of any Company or Municipal or other public Body or Association not being “ Collector.” “ Collector” means the Collector of Land Revenue of the place or district at or in which its principal place of business in British India is situate. And in the case of any person or Hindú undivided family chargeable under this Act, “ Collector” means the Collector of Land Revenue of the place or district at or in which such person or family resides.

4. Nothing in this Act applies to the pay and allowances of officers, warrant officers, non-commissioned Exemptions from Act. officers and privates of Her Majesty’s Forces or of Her Majesty’s Indian Forces, who are not in Civil employment, when such pay and allowances do not exceed five hundred rupees per mensem ;
or to any moveable or immoveable property solely employed for religious or charitable public purposes.

And no member of a firm or of a Hindú undivided family which is for the time being chargeable under this Act shall, as such, be chargeable under this Act.

5. The Governor General in Council may from time to time, Power to exempt from by order wholly exempt from the operation Act. of this Act the whole or any part of the income of any tribe or class of persons in British India.

The Governor General in Council may revoke any such order.

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PART II.

DUTIES ON OFFICES.

6. A duty of two pies for every rupee shall be levied in respect of every office or employment of profit in British India under Government or under a Company or a Municipal or other public Body or Association not being a Company,

Duties on offices.
and upon every salary, annuity or pension paid in British India by Government or by a Company or by a Municipal or other public Body or Association not being a Company, to any person residing in British India or serving on board a ship plying to and from British Indian ports, whether on account of himself or another person.

Exemption of incomes less than Rs. 62-8 per mensem.
7. No income amounting to less than sixty-two rupees eight annas per mensem shall be chargeable under this Part.

8. In the case of every person holding any paid office, Deduction in case of Government officials and pensioners.
employment or commission under Her Majesty or under the Government of India, or under any Local Government, or receiving any annuity or pension from Her Majesty or any such Government,

the duty to which he is liable under this Part shall be deducted from his pay, annuity, or pension, at the time of payment by the Examiner of Claims or other proper officer, and shall be deemed to be a tax paid under this Act.

9. In the case of every person holding a paid employment Deduction in case of servants and pensioners of Companies and Municipalities.
under, or receiving any annuity or pension from, any Company, or any Municipal or other public Body or Association not being a Company, the duty to which he is liable under this Part shall be deducted from his pay, annuity, or pension, at the time of payment by the Treasurer or other officer whose duty it is to make such payments, and shall be deemed to be a tax payable under this Act.

Every such Treasurer or other officer shall, as soon as may be after making such deductions, pay to the credit of the Government of India, or as such Government from time to time directs, the amount of such deductions, and shall be answerable to such Government for such payment.

Every Company, public Body or Association, Treasurer or other officer as aforesaid is hereby indemnified for all deductions and payments made in pursuance of this Part.

The Treasurer, Secretary or principal Agent or Manager of every such Company and public Body or Association shall prepare, and, on or before the thirtieth day of April next, deliver to the Collector, in such form as may be prescribed by the Governor General in Council, a return in writing showing the names of every person holding at the date of the said return a paid employment under, or receiving a pension or annuity from, the Company or Body or Association whose pay or pension or annuity as such amounts to sixty-two rupees eight annas per mensem or upwards, together with the salaries, annuities or pensions payable by the Company or public Body or Association to all such persons respectively.

10. Whenever the duty leviable under this Part in any month is not deducted at the time of payment in that month from the pay, annuity or pension chargeable therewith, it shall be deducted from such pay, annuity or pension at some subsequent time of payment.

PART III.

COMPANIES.

11. The Treasurer, Secretary or principal Agent or Manager in India of every Company shall, in the case of a Shipping Company trading between British India and any other country, pay to Government in respect of one moiety of the nett profits made by each of the ships of such Company engaged in such trade, during the year ending on the day on which the Company's accounts shall have been last made up, the duty of two pies in the rupee,

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and in the case of every other Company pay to Government
 Other Companies. in respect of the whole of the nett profits
 made in British India by such Company
 during the year ending on the day on which the Company's
 accounts shall have been last made up, the duty of two pies for
 every rupee,

and shall prepare, and, on or before the thirtieth day of April
 Statement of result of next, deliver to the Collector, a statement
 accounts. in writing signed by him showing the result
 of such accounts.

12. If in the case of any Company no such accounts have
 Annual return of nett been made up within the year ending on
 profits. the thirty-first day of March, 1871, the
 Treasurer, Secretary or principal Agent or Manager of such
 Company shall prepare, and, on or before the thirtieth day of
 April next, deliver to the Collector, a return in writing signed
 by him and stating the nett profits made by such ships or by the
 Company (as the case may be) during the year ending on the
 said thirty-first day of March.

13. Whenever the Collector has reason to believe that any
 Power to require officers statement or return mentioned in section
 of companies to attend and eleven or section twelve is incorrect or
 produce accounts. incomplete, he may cause a notice to be
 served on the Treasurer, Secretary, Agent or Manager by whom
 such statement or return was delivered, requiring him, on or
 before a day to be mentioned in the notice, to attend at the
 Collector's office and to produce for the inspection of the Collector
 such of the accounts of the Company as refer to the year mentioned
 in section eleven or section twelve (as the case may be)
 and as are in the possession or power of such Treasurer, Secretary,
 Agent or Manager.

The Collector shall thereupon make an order determining the amount at which the Company shall be assessed under this Part and the day on which such amount shall be paid, and, subject to the provisions hereinafter contained, such sum shall be payable accordingly.

14. Every such Treasurer, Secretary, Agent or Manager is hereby indemnified for all payments made in pursuance of section eleven or section thirteen.

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PART IV.

DUTIES ON INTEREST ON GOVERNMENT SECURITIES.

15. A yearly duty of two pies for every rupee shall be levied upon all interest on securities of the Government of India becoming due on or after the first day of April 1871.

16. Every person empowered to pay such interest shall deduct the duty at the place where the interest is paid,

and shall, as soon as may be after making such deduction, pay the same to the credit of the Government of India, or as such Government from time to time directs :

Provided that no such duty shall be deducted from the interest on any such security where the owner thereof produces a certificate signed by the Collector that his annual income, including such interest, is less than seven hundred and fifty rupees.

PART V.

DUTIES ON ALL OTHER INCOME AND PROFITS.

17. A yearly duty of two pies for every rupee shall be levied upon all income of seven hundred and fifty rupees per annum or upwards not chargeable under Part II, Part III, or Part IV of this Act.

18. The trustee, guardian, curator, or committee of any infant, married woman subject to the law of England, lunatic, or idiot, and having the control of the property of such infant, married woman, lunatic, or idiot, whether such infant, married woman, lunatic or idiot resides in British India or not, shall, if the infant, married woman, lunatic or idiot be chargeable under this Part, be chargeable with the said duty in like manner and to the same amount as would be charged to such infant if of full

Duty on income not charged under Parts II, III, IV.
Trustees, guardians and committees of incapacitated persons to be charged.

1871 age, or to such married woman if she were sole, or to such
Act XII. lunatic or idiot if he were capable of acting for himself.

Any person not resident in British India, whether a subject Non-residents charged of Her Majesty or not, being in receipt, in names of their agents, through an agent, of any income chargeable under this Part, shall be chargeable in the name of such agent in the like manner and to the like amount as he would be charged if resident in British India and in actual receipt of such income.

19. Every trustee, guardian, curator, committee, or agent Trustees or agents of persons incapacitated or non-resident to furnish statements of income or profits with declaration. shall, when required by the Collector, deliver a statement signed by him, of the amount of the income in respect whereof he is chargeable on account of such infant, married woman, lunatic, idiot or non-resident, together with a declaration of the truth of the statement.

The Collector shall have power to serve a notice upon any person whom he has reason to believe to be a trustee, guardian, curator, committee, or agent requiring him to deliver on or before a day to be specified in the notice a statement signed by him of the names of the persons for or of whom he is trustee, guardian, curator, committee, or agent.

20. Receivers or Managers appointed by any Court in India, Receivers, Managers, Courts of Wards, the Administrators Courts of Wards, Administrators General and Official Trustees. General of Bengal, Madras and Bombay, and the Official Trustees, shall be chargeable under this Act in respect of all income officially in their possession or under their control.

21. When any trustee, guardian, curator, or committee, or Power to retain duties agent is assessed under this Act in such charged on trustees, &c. capacity ;

or when any receiver or manager appointed by any Court, Court of Wards, Administrator General, or Official Trustee is assessed under this Act in respect of the income and profits officially received by him ;

every person and Court so assessed may, from time to time, out of the money coming to his or its possession as such trustee, guardian, curator, committee, or agent, or as such receiver,

manager, Court of Wards, Administrator General, or Official Trustee, retain so much as shall be sufficient to pay the amount of the assessment. 1871
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Every such person and Court is hereby indemnified for every retention and payment made in pursuance Indemnity. of this Act.

22. Owners of lands or of houses occupying the same shall Owners of lands and be chargeable in respect of the annual houses occupying them. value thereof at nine-tenths of the full rent at which such lands or houses are worth to be let for the year.

The Local Government may, with the sanction of the Governor General in Council, prescribe, for the whole or any part of the territories subject to such Local Government, special rules for the assessment of incomes derived from land, at an amount bearing a fixed proportion to the revenue assessed thereon.

All such rules shall be published in the local official Gazette and shall thereupon have the force of law.

23. In the case of every person chargeable under this Part Notice requiring returns. whose annual income or profits is or are in the Collector's opinion four thousand rupees or upwards, the Collector shall,

and in the case of every other person so chargeable, the Collector may,

cause a notice to be served on him requiring him to fill in a return of his income during one year ending on the day of the year immediately preceding the year of assessment on which his accounts have been usually made up, or on the thirty-first day of March 1871, and to state in such return the period during which such income has actually accrued.

Such notice shall be in the form to be prescribed by the Governor General in Council, and shall specify the day by which the return is to be made, and the place of the Collector's office at which the return is to be made.

Every such notice shall be signed by the Collector.

- The form of the return shall accompany the notice.

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24. Every person on whom such notice is served shall send
Return how made. to or deliver at the Collector's office the
return duly filled in and signed by him.

A declaration shall be added by such person at the foot of the return, (a) that the income stated therein is truly estimated on all the sources therein mentioned, (b) that it has actually accrued within the period therein stated, and (c) that he has no other source of income.

25. Every person, when required so to do by a notice in the Lists of lodgers and em- form to be prescribed by the Governor employees. General in Council shall, within the period mentioned in such notice, prepare and deliver to the Collector a list containing, to the best of his belief, the name of every lodger or inmate resident in his dwelling-house, and of any other persons receiving salary or emoluments amounting to sixty-two rupees eight annas per mensem or upwards, employed in his service, whether resident in such dwelling-house or not, and the place of residence of such of them as are not resident in such dwelling-house, and also of any such lodger or inmate who has any ordinary place of residence elsewhere, at which he is liable under this Act to be assessed and who desires to be so assessed at such place.

Such lists shall be signed by the persons respectively delivering the same, and shall be prepared in the form to be prescribed as aforesaid.

26. The Collector shall from time to time determine what Collector to determine persons are chargeable under this Part, persons chargeable. and the amount at which every such person shall be assessed,

and in making such assessment income exempted under section seven shall be treated as chargeable under this Part.

27. Every such assessment shall be made upon the full Assessment to be made amount of such person's income during the on past year's income. year ending on the day of the year next before the year of assessment on which his accounts have been usually made up, or on the thirty-first day of March 1871.

In the case of a person for the first time becoming chargeable under this Part within the year of assessment, or within the year next before such year, the assessment shall be made according to an average of his income for such period as the Collector, under the circumstances, directs.

28. The Collector shall cause a notice to be served on every person chargeable under this Part, stating—

(1).—The name and the profession, trade or other source of the income of such person, or in respect of which he is chargeable;

(2).—The year or portion of the year for which the duty is to be paid;

(3).—The place or places, district or districts, where such income accrues; and

(4).—The amount to be paid;

and requiring him within fifteen days from the date of the service either to pay such amount or to apply to the Collector to have the assessment reduced or cancelled.

29. Such amount shall be paid to the Collector, who shall give a receipt for such payment to the person making the same:

Provided that, if such income accrues at or in more than one place or district, the receipt shall be granted and payment made by and to the Collector for the place or district at or in which the person mentioned in the notice resides, or (in the case of a firm) at or in which its principal place of business in British India is situate.

Every such receipt shall be signed by the Collector granting it, or by such other officer as he shall from time to time empower in this behalf, and such signature shall be judicially noticed.

30. Every such receipt shall specify—

(1).—The name and source or sources of the income of the person by or on whose behalf the duty is paid;

(2).—The year or portion of the year for which the duty is paid;

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- (3).—The amount paid, and the date of payment; and
 (4).—The place or places, district or districts, where the income accrues;
 and shall be admissible as evidence of all matters contained therein.

PART VI.

PETITIONS AND APPEALS AGAINST ASSESSMENTS.

31. Any person objecting to the amount at which he is assessed, or denying his liability to be assessed under Part V., may apply by petition to the Collector in order to establish his right to have the assessment reduced or cancelled:
 •Such petition shall ordinarily be presented within fifteen days from the date of the service of the notice mentioned in section twenty-eight. But if the Collector is satisfied that the objector has not received such notice, the petition may be presented within fifteen days from the day on which in the Collector's opinion he became aware of the assessment:

Provided that no person served with a notice under section twenty-three shall be entitled to apply by petition under this section unless he has made the return required in such notice on or before the day therein mentioned, or unless he satisfies the Collector that he had a sufficient excuse for not making such return.

The petition shall be in the form contained in the schedule hereto annexed, or as near thereto as circumstances admit, and the statements therein contained shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints.

32. The Collector shall fix a day and place for the hearing of the petition, and, on the day and at the place so fixed, or on the day and at the place (if any) to which he has adjourned such hearing, shall hear such petition and pass his order thereon.

Such order may be in favour of the petitioner, or it may simply reject the petition, or it may reject the petition and •

enhance the petitioner's assessment to an amount to be specified in the order.

If the order be in favour of the petitioner, the Collector shall at once refund the fee on the petition.

If the order simply reject the petition or reject the petition and enhance the petitioner's assessment, the petitioner shall within fifteen days from the passing of the order pay the amount mentioned in the said notice or in the order of enhancement (as the case may be).

33. Any person dissatisfied with any order under section thirteen or section thirty-two may, within fifteen days from the date thereof, on payment of the sum payable under such order, present a petition of appeal to the Commissioner of Revenue of the Division, whose order upon such appeal shall be final.

The time requisite for obtaining a copy of the order shall be excluded in computing the said period of fifteen days.

The order of such Commissioner shall be final. It may be in favour of the petitioner, or it may simply reject the petition, or it may reject the petition and enhance the assessment to an amount to be specified in the decision.

If the order rejects the petition and enhances the assessment, the petitioner shall within one week from the passing of the order pay the amount mentioned in the order of enhancement.

Every petition presented under this section shall be accompanied by a copy of the petition to the Collector, and a copy of the Collector's order thereon and a list of the documents (if any) on which the appellant relies.

Copies of petition and order exempt from fees.

Neither of such copies shall be chargeable under the Court Fees Act.

Return of fees and excess.

When the decision on such appeal is in favour of the petitioner, the value of the fee on his petition of appeal, and (where he has presented a petition to the Collector) the fee on such petition, together with the excess paid by him, or (when the decision is that the petitioner, or the Com-

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Act XII. pany which he represents, is not chargeable under this Act) the whole sum so paid, shall at once be refunded.

34. The Collector or Commissioner may summon any person whom he thinks able to give evidence for persons to give necessary information.

Power to summon persons to give necessary information.
he represents, should be assessed, and may examine on oath the person so summoned and the petitioner, and may require each of them to produce any documents in his possession or power relating to the sources of the income in question.

35. Whenever the Collector has reason to believe that, in assessing any person under this Act, any source of income not specified in the receipt granted to him under section twenty-nine has been overlooked, which source, if it had then been known to exist, would have increased the assessment, the Collector may cause a further notice to be served on such person, stating the amount to be paid in respect of such source.

The provisions contained in sections twenty-eight to thirty-four (both inclusive) shall apply to such notice and regulate the procedure thereunder.

PART VII.

PAYMENT AND RECOVERY OF DUTIES.

36. All duties under this Act, except when they are deducted under section eight, section nine, or section sixteen shall be payable on the first day of April 1871:

Provided that the amount so payable may be paid by two equal instalments: the first instalment to be paid on some day not later than fifteen days after service of the notice mentioned in section twenty-eight upon the person paying the same, and the second instalment on the first day of October next.

37. In any case of default under this Act, the Collector may, if a notice has been served on the defaulter requiring him to pay, within fifteen days from the date of the service, the amount of the duty or instalment due by him under this Act,

Recovery under revenue law.

either recover a sum not exceeding double the amount as if it were an arrear of land revenue,

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or pass an order that a sum not exceeding double the amount of such duty or instalment shall be recovered from such defaulter.

Every such order shall have the force of a decree of a Civil Court in a suit in which the Government is the plaintiff and the defaulter is the defendant; and such order may be enforced in manner provided by the Code of Civil Procedure for the enforcement of decrees for money and the procedure under the said Code in respect of the following matters :—

- (a) sales in execution of decrees :
- (b) arrests in execution of decrees for money :
- (c) execution of decrees by imprisonment :
- (d) claims to attached property ; and
- (e) execution of decrees out of the jurisdiction of the Courts by which they were passed,

shall apply to every execution issued for levying the monies mentioned in such order, save that all the powers and duties conferred and imposed by the said Code upon the Court shall be executed by the Collector by whom such order has been made or to whom a copy thereof has been transmitted for execution according to the provisions of the said Code, section two hundred and eighty-six :

Provided that, where any person has presented a petition under section thirty-one, such sum shall not be recoverable from him unless, within fifteen days from the passing of the order thereon, he fails to pay the amount (if any) required by such order.

On the recovery of such sum from the defaulter, the Collector shall grant him a receipt without any further payment.

Every such receipt shall bear date from the recovery of the amount, and save as aforesaid, the provisions of this Act relating to receipts shall apply to receipts granted under this section.

38. If during or within two months from the end of the year for which any assessment under Part V
Amendment of assessment. has been made, the Company or person assessed proves to the satisfaction of the
 • Collector, that the nett profits or income of such Company or

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Act XII. person during such year fell short of the sum so assessed, the Collector may cause the assessment made for such year to be amended as the case requires, and if the sum assessed has been paid, may refund the sum overpaid.

In case any Company or person assessed under Part III or Part V ceases to carry on the trade or business in respect whereof such assessment was made, or if any such person dies or becomes insolvent before the end of the year for which the assessment was made, or if any such Company or person is, from any other specific cause, deprived of or loses the income on which the assessment was made,

such Company or person or its or his representative in interest may apply to the Collector within three months after the end of such year, and on proof thereof to his satisfaction, the Collector shall amend the assessment as the case may require, and give such relief to the Company or person charged as is just, and in cases requiring it, the Collector shall refund such sum as has been overpaid on the assessment amended or vacated.

PART VIII.

PENALTIES.

39. Every Treasurer, Secretary, Agent, Manager or other Treasurers, &c., failing to make payments or deliver returns. person failing to make any payment or deduction, or to prepare and deliver in due time any statement or return, or to produce any accounts, required by section nine, ten, eleven, twelve or thirteen,

and every trustee, guardian, curator, committee or agent failing Trustees, &c., failing to deliver statements or declarations. to deliver any statement or declaration required by section nineteen, shall, for every day during which such default continues, be fined, on conviction before a Magistrate, ten rupées.

The Commissioner of the Division shall have power to remit wholly or in part any penalty imposed under this section.

40. Whoever makes a statement in any declaration or list False statement in declaration, list or petition. made or delivered under section twenty-four or twenty-five, which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed to have

committed the offence described in section one hundred and seventy-seven of the Indian Penal Code.

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Whoever makes a statement in any petition presented under section thirty-one which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

41. No person shall be proceeded against for any offence under section thirty-nine or section forty except at the instance of the Collector.

42. In sections one hundred and ninety-three and two hundred and twenty-eight of the Indian Penal Code, the words "judicial proceeding" shall be taken to include any proceeding under this Act.

Bar of suits in Civil Court.

PART IX.

MISCELLANEOUS.

43. No suit shall lie in any Civil Court to set aside or modify any assessment made under this Act.

All or any
Exercise of powers of
Collector and Commissioner.

of the powers and duties conferred and imposed by this Act on a Collector and on a Commissioner of Revenue may be exercised and performed by such other officers or persons as the Local Government shall from time to time appoint in this behalf.

45. Service of any notice under this Act shall be made by delivering or tendering a copy thereof under the signature of the Collector.

Service of notices.
Whenever it may be practicable, the service of the notice shall be on the person therein named, or, in the case of a firm or a Hindú undivided family, on some member thereof.

When such person or member cannot be found, the service may be made on any adult male member of his family residing with him; and if no such adult male member can be found, the serving officer shall fix the copy of the notice on the outer door of the house in which the person or firm therein named ordinarily dwells, or carries on business.

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46. When any Company or firm has several places of business in the territories subject to different Local Governments, the Governor General in Council shall have power to declare which of such places shall, for the purposes of this Act, be deemed to be the principal place of business; and when any Company has several Agents or Managers, which of them shall, for the purposes of this Act, be deemed to be the principal Agent or Manager.

When any Company or firm has several places of business in the territories subject to a single Local Government, such Government shall have power to declare which of them shall, for the purposes of this Act, be deemed to be the principal place of business.

When any person has several places of residence in the territories subject to different Local Governments, the Governor General in Council shall have power to declare which of such places shall, for the purposes of this Act, be deemed to be his residence; and when any person has several places of residence in the territories subject to a single Local Government, such Government shall have power to declare which of such places shall, for the purposes of this Act, be deemed to be his residence.

The powers given by this section may be delegated to, and exercised by, such officers as the Governor General in Council or the Local Government, as the case may be, shall from time to time appoint in this behalf.

47. The Governor General in Council may from time to time

(a) prescribe forms for the returns, notices, and lists herein-before mentioned,

Governor General in Council empowered to make rules. (b) make rules consistent with this Act for the guidance of officers in matters connected with its enforcement, and

(c) delegate to any Local Government the powers given by this section, clause (b), so far as regards the territories subject to such Government.

SCHEDULE.

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Form of Petition under Section 31.

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Stamp
eight annas.

TO THE COLLECTOR OF

The day of

The petition of A. B. of

SHEWETH—

1. That under the Indian Income Tax Act, your petitioner has been assessed in the sum of *twenty-seven* rupees for the year commencing the first day of April 187—.

2. That your petitioner's income and profits accruing and arising from [*here specify petitioner's trade or other source or sources of income or profits, and the place or places at which such income or profits accrues or arise*] for the year ending the thirty-first day of March last were rupees

, as will appear from the documents of which a list is presented herewith.

3. That such income and profits actually accrued and arose during a period of months and days. [*Here state the exact number of months and days in which the income and profits accrued and arose.*]

4. That during the said year, your petitioner had no other income or profits.

Your petitioner therefore prays that he may be assessed accordingly, and that the value of the fee on this petition may be refunded [*or that he may be declared not to be chargeable under the said Act, and that the value of the fee on this petition may be refunded*].

(Sd.) A. B.

Form of Verification.

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

(Sd.) A. B.

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Act XIII.

Act No. XIII.**PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.***(Received the assent of His Excellency the Governor General on
the 31st March 1871.)**An Act to consolidate and amend the law relating to Customs
Duties.*

WHEREAS it is expedient to consolidate and amend the law relating to the duties of Customs on goods imported and exported by sea; it is hereby enacted as follows:—

Short title.

1. This Act may be called “The Indian Tariff Act, 1871:”

Local extent.

It extends to the whole of British India, except Aden;

Commencement.

And it shall come into force on the passing thereof.

Duties specified in
schedules A and B to be
levied.

2. There shall be levied and collected, in every port to which this Act applies, the duties specified in schedules A and B hereto annexed.

3. Goods not prohibited to be imported into or used in British India, composed of any article liable to duty as a part or ingredient thereof, shall be chargeable with the full duty payable on such article, or if composed of more than one article liable to duty, then with the full duty payable on the article charged with the highest rate of duty.

Saving clause.

4. Nothing herein contained affects Act No. XX of 1867, or authorizes—

(1) the levy of import duties on articles (other than salt, opium, and spirits) imported into one port in British India from another;

(2) the levy of export duties on articles exported from one port in British India to another:

(3) the levy of export duties on articles exported by sea to any place other than a foreign port in India, when such articles have been imported by sea into British India.

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And, notwithstanding anything herein contained, no opium shall be exported from British India, unless it be covered by a pass granted by an officer appointed in this behalf by the Local Government.

5. Section twenty-seven of the Consolidated Customs Act
Construction of section 27 of Act VI of 1863. shall be construed as if, for the words "for which a specific value has not been fixed

by the Local Government with the sanction of the Governor General of India in Council," the following words were substituted (that is to say), "for which a specific value is not fixed by the Indian Tariff Act, 1871 :" but, save as aforesaid, nothing herein contained shall be construed to affect the provisions of the Consolidated Customs Act.

6. The Governor General in Council may from time to time, Power to fix value of dutiable goods. by notification in the *Gazette of India*, fix for the purposes of this Act the value of any goods exported or imported by sea on which duties of customs are hereby imposed.

7. Nothing in schedule B hereto annexed applies to pepper Pepper exported by sea from Cochin. But on all such pepper there shall be levied such duty, not exceeding nine rupees per khandi, as the Governor of Fort Saint George in Council from time to time determines; and at the close of each year, or as soon after as may be convenient, the Collector of Customs at the said port shall, after deducting the expenses of collection, pay the duty collected under this section to the Government of Travancore and Cochin, in such proportions and in such manner as the said Governor in Council from time to time directs.

8. Duties of customs shall be levied on goods passing by land into or out of Foreign European Settlements situate on the line of coast within the limits of the Presidency of Fort Saint George, or the Presidency of Bombay, at the rates prescribed in the schedules Duties on goods crossing frontiers of foreign European States in Presidencies of Madras and Bombay.

• A and B hereto annexed.

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9. The enactments mentioned in schedule C hereto annexed
are repealed to the extent specified in the
third column of the same schedule.

Repeal of enactments.

S C H E D U L E A.

IMPORT TARIFF.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
		Rs. As.	
1	APPAREL, INCLUDING HABERDA-SHERY, MILLINERY, &c. ...	<i>Ad valorem.</i>	
2	ARMS, AMMUNITION AND MILITARY STORES—		
	Gunpowder, common ...	0 5 per lb.	
	" sporting ...	1 0 "	
	Fire-arms and parts thereof..	<i>Ad valorem.</i>	
	All other sorts, including Military Accoutrements, Uniforms, &c., but excluding Military and other Regulation Accoutrements and Uniforms imported for private use by persons in the public service ...	<i>Ad valorem.</i>	
3	ASPHALTE ...	20 0 per ton.	
4	BEADS AND FALSE PEARLS—		Seven and a half percent.
	Beads, China ...	30 0 per cwt.	
	" Common ...	28 0 "	
	" Ruby, of all sizes ...	0 12 per lb.	
	" Seed ...	0 10 "	
	" Small, Scarlet, and Red ...	0 10 "	
	" Coral (false) Moorzun	0 8 per corge of 2,000 beads.	
	All other sorts of false Corals and Beads ...	<i>Ad valorem.</i>	
	Pearls, false, Bajeria ...	5 0 per lakh.	
	" Boria ...	1 0 per thousand.	
	" Jouria ...	8 0 per lakh.	
	" Nathia ...	0 6 per thousand.	
	" Tachea ...	0 12 "	
	" Wattanah ...	10 0 per lakh.	
	All other sorts ...	<i>Ad valorem.</i>	
5	CABINET-WARE ...	<i>Ad valorem.</i>	

IMPORT TARIFF—(*Continued.*)

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Act XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
6	CANDLES, WAX, COMPOSITION AND OTHER KINDS— Candles, Wax ... " Paraffine ... " Spermaceti ... " Composition and other sorts ...	Rs. As. 1 0 per lb. 0 8 " 0 8 " 0 5 "	
7	CARRIAGES ...	<i>Ad valorem.</i>	
8	CLOCKS, WATCHES, AND OTHER TIME-KEEPERS ...	<i>Ad valorem.</i>	
9	COFFEE— Persian Gulf and Red Sea ... Other places ...	30 0 per cwt. 20 0 "	
10	CORALS, REAL	<i>Ad valorem.</i>	Seven and a half per cent.
11	CORKS ...	1 8 per gross.	
12	COTTON— Thread— Sewing Thread, White and Coloured ... Sewing Thread, in reels, or on cards of one hundred yards (and <i>pro rata</i> above and below)* ... Sewing Thread, Goa and Country ... Twist— Mule, under No. 15 ... Nos. 16 to 24 ... 25 to 32 ... 33 to 42 ... 43 to 52 ... 53 to 60 ... No. 70 ... 80 ... 90 ... 100 ... 110 ... 120 ... and one anna additional for every count of ten above No. 120. Water, No. 20 ... 30 ... 40 ... 50 ... Above 50 ...	0 11 per lb. 2 4 per gross reel. 30 0 per cwt. 0 6 per lb. 0 9 " 0 10 " 0 11 " 0 12 " 0 14 " 0 15 " 1 0 " 1 1 " 1 2 " 1 3 " 1 4 " 0 10 " 0 11 " 0 13 " 0 15 " 1 2 "	
			Three and a half per cent.

* Exceeding this length to be charged in proportion.

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IMPORT TARIFF—(*Continued*).

ACT XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
	COTTON—(<i>Continued</i>). Turkey Red Twist, all kinds*... Twist, Orange, Red and other Colours* ...	Rs. As. 1 6 per lb. } 0 15 , " } ...	Three and a half per cent. * Duty to be charged on the Grey weight of the Coloured Yarn; when not ascertainable, the actual Wharf weight or Invoice weight to be taken.
	Piece Goods— Grey— Mulls ... Jaconets exceeding 10 X 10 to the quarter inch ... Other Jaconets ... Shirtings, Madapollams and Prints ... Long Cloths, Jeans, Domes- tics, Sheetings, Drills and T. Cloth ... Other sorts ...	1 1 per lb. 0 13 , " 0 11 , " 0 11 , " 0 9 , " <i>Ad valorem.</i>	Five per cent.
	Cotton Rope ... Cotton Goods, other kinds ...	25 0 per cwt. <i>Ad valorem.</i>	
13	DRUGS AND MEDICINES— Acid, Sulphuric .. Alkali, Country (Sajee Khar)... Aloes, black ... " Socotra ... Alum ... Arsenic ... " China, Munseel ... Assafœtida (Hing) ... " Coarse (Hingra) ... Brimstone, Flour ... " Roll ... " Rough ... Camphor, Bhimsing (Barras)... " Refined cake ... " Crude in powder ... Cassia Lignea ... Coova, red ... Copperas, green ... Quinine ... Sal Ammoniac ... Salep ... Senna Leaves ... All other sorts ...	0 3 per lb. 2 0 per cwt. 10 0 , " 25 0 , " 3 8 , " 25 0 , " 8 0 , " 55 0 , " 10 0 , " 7 0 , " 6 0 , " 4 8 , " 50 0 per lb. 65 0 per cwt. 50 0 , " 38 0 , " <i>Ad valorem.</i> 2 8 per cwt. <i>Ad valorem.</i> 22 0 per cwt. 60 0 , " 6 0 , " <i>Ad valorem.</i>	Seven and a half per cent.
14	DYEING AND COLOURING MATE- RIALS— Cochineal ... Gallnuts, Country, Myrabolam " Persian ...	1 12 per lb. 3 0 per cwt. 35 0 , "	

IMPORT TARIFF—(*Continued*).

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ACT XIII.

No.	Description of Article.	Value on which Duty is assessed..	Rate of Duty.
	DYEING AND COLOURING MATERIALS—(<i>Continued</i> .)	Rs. As.	
	Gamboge Wood ...	20 0 per cwt.	
	Madder or Munjeet ...	10 0 "	
	Orchilla Weed ...	8 0 "	
	Saffron, Europe ...	16 0 per lb.	
	" Meadow, Soorunjun ...	10 0 per cwt.	
	" Persian ...	12 0 per lb.	
	" In cakes or lumps ...	5 0 "	
	Sapan Wood and Root ...	3 8 per cwt.	Seven and a half per cent.
	Aniline Dyes ...	0 8 per oz.	
	All other sorts ...	<i>Ad valorem.</i>	
15	FIREWORKS—.		
	China ...	30 0 per box of 133½ lbs.	
	Other sorts ...	<i>Ad valorem.</i>	
16	FLAX, MANUFACTURES OF—		
	Piece Goods ...	<i>Ad valorem</i>	Five per cent.
	Other sorts, including linen thread ...	<i>Ad valorem.</i>	
17	FRUITS AND VEGETABLES—		
	Almonds, without shell ...	25 0 per cwt.	
	" with shell ...	10 0 "	
	Cajoo kernels ...	10 0 "	
	Cocoanuts ...	30 0 per thousand.	
	" kernel (Copra) ...	9 8 per cwt.	
	Currants, Europe ...	35 0 "	
	" Persian ...	12 0 "	
	Dates, dry, in bags ...	4 0 "	
	" wet, " ...	3 0 "	
	" in pots ...	6 0 "	
	Figs, Europe ...	42 0 "	
	" Persian, dried ...	6 0 "	
	Garlic ...	4 0 "	Seven and a half percent.
	Pistachio Nuts ...	14 0 "	
	Prunes, Bussorah ...	12 0 "	
	Raisins, Black, Persian Gulf, Red Sea, and Khismiss ...	12 0 "	
	" Mongocka, Persian Gulf and Red Sea ...	7 0 "	
	" Malaga and Bloom ...	10 per lb.	
	" Other sorts ...	<i>Ad valorem.</i>	
	Walnuts, Akroot ...	5 0 per cwt.	
	Mangoes, dried ...	<i>Ad valorem.</i>	
	Prunes, Europe ...	<i>Ad valorem.</i>	
	Other sorts, except Bidmiskh and Buzarbuttoo Nuts, which are free ...	<i>Ad valorem.</i>	

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Act XIII.

IMPORT TARIFF—(*Continued*).

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
18	GLASS AND GLASS-WARE— Bangles, Glass, China, Gilt ... not Gilt .. Glass, Broken ... „ China, of all colours ... „ Crown, coloured ... „ of sizes ... Glass and Glass-ware of all other sorts, except Bottles, which are free ...	Rs. As. 10 0 per 100 pairs. 5 0 " 5 0 per cwt. 32 0 per 133½ lb. 32 0 per 100 supl. feet. 5 0 per 100 supl. feet.	
19	GUMS— Gum, Ammoniac ... " Arabic ... " Bdellium, common Gum ... " Benjamin ... " Bysabolé, coarse Myrrh ... " Copal ... " Frankincense or Oleba- num ... " Gambier (or Kino) ... " Myrrh ... " Persian (false) ... Rosin ... All other sorts ...	10 0 per cwt. 16 0 " 5 0 " 33 0 " 12 0 " 65 0 " 9 0 " 8 0 " 24 0 " 3 0 " 12 0 " <i>Ad valorem.</i>	
20	GROCERIES NOT OTHERWISE DE- SCRIBED ...	<i>Ad valorem.</i>	Seven and a half per cent.
21	HIDES AND SKINS— Border Hides, prepared ... Buffalo Hides, Country, Tanned ... Calf Skins ... Chamois Skins ... Cow Hides, Country, Tanned ... Rhinoceros Leather ... Other sorts ...	30 0 each 80 0 per score 40 0 per dozen. 6 0 " 60 0 per score 40 0 per cwt. <i>Ad valorem.</i>	
22	INSTRUMENTS, MUSICAL	<i>Ad valorem.</i>	
23	IVORY AND IVORY-WARE— Elephants' Grinders ... Tusks above twenty lbs. ... Tusks ten lbs., and not exceed- ing twenty lbs. ... Tusks under ten lbs. ... Sea Cow or Moye Teeth, three lbs. and upwards ... Sea Cow or Moye Teeth under three lbs. ... Ivory, Manufactures of ...	16 0 per cwt. 300 0 " 225 0 " 125 0 " 225 0 " 75 0 " <i>Ad valorem.</i>	

IMPORT TARIFF—(*Continued*).

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Act XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
24	JEWELLERY, INCLUDING PLATE— Silver-ware, plain ... " embossed ... Jewellery and Plate of all other kinds, excepting Precious Stones and Pearls, which are free ...	Rs. As. 1 6 per tolah. 2 0 " <i>Ad valorem.</i>	
25	LEATHER AND MANUFACTURES OF— Leather ... Boots and Shoes ... Harness and Saddlery ... Other sorts ...	<i>Ad valorem</i>	Seven and a half per cent.
26	LIQUOR— Ale, Beer and Porter ... Cider and other fermented ... Liquors ... Spirits ... Wines— Champagnes, Sparkling Wines and Liqueurs ... All other sorts	{ One anna per Imperial Gallon. Three Rupees the Imperial Gallon, and the duty to be reasonably increased as the strength exceeds London Proof. Provided that ten per cent. <i>ad valorem</i> shall be charged on all spirits used exclusively in Arts and Manufactures, or in Chemistry, subject to such Rules as the Local Governments shall from time to time prescribe, for ascertaining that such spirits are unfit for use as a beverage and incapable of being converted to that purpose. And the officer in charge of the Custom House, subject to the general instructions of the Local Government, shall decide what spirits fall within the proviso, and his decision thereon shall be final in law. Rs. As. 1 8 per Imperial Gallon or six Qt. Bottles. 1 0 per do.

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Act XIII.

IMPORT TARIFF—(*Continued*).

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
27	MATCHES— Lucifer and all other sorts ...	Rs. As. <i>Ad valorem.</i>	
28	MATS, FLOOR MATTING, CHINA, OF ALL SORTS ...	50 0 per hundred.	
29	METALS, UNWRUGHT, WRUGHT, AND MANUFACTURES OF— Brass Beads, Googree, China .. " Old ... " Sheets, rolls very thin ... Copper, Australian Cake ... " Bolt ... " Brazier's ... " China Cash ... " Japan ... " Nails and Composition " Nails .. " Old ... " Pigs and Slabs, For- eign ... " Sheet, Sheathing and Plate ... " Tiles, Ingots, Cakes and Bricks ... " China, White Copper- ware ... " Foil Dauk-pana, China ... " Europe ... " All other kinds ...	0 12 per thousand. 35 0 per cwt. 80 0 " 41 0 " 43 0 " 43 0 " 28 0 " 41 0 " 43 0 " 40 0 " .38 0 " 43 0 " 40 0 " 1 4 per lb. 3 0 per book of 100 leaves. 4 0 " <i>Ad valorem.</i>	Seven and a half per cent
	Iron, Angle and T Iron ... " Beams, Pillars, Girders and Bridge-work ... " Flat, Square and Bolt, including Scotch ... " Hoop, Plate and Sheet ... " Nails, Rivets and Washers ... " Nail Rod ... " Old ... " Pig ... " Rod, Round, British under half inch diameter ... " Rod, Round, British ex- ceeding half inch dia- meter ... " Swedish, Flat and square ... " Rice Bowls ... " Galvanised ...	<i>Ad valorem.</i> <i>Ad valorem.</i> 80 0 per ton. 100 0 " 10 0 per cwt. 90 0 per ton. 2 8 per cwt. 40 0 per ton. 105 0 " 80 0 " 120 0 " 3 0 per set of ten. 1 8 per set of six. <i>Ad valorem.</i>	One per cent.

IMPORT TARIFF—(*Continued*).

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ACT XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
	METALS, UNWRUGHT, WRUGHT, AND MANUFACTURES OF—(<i>Con-</i> <i>tinued</i> .)	Rs. As.	
	Iron, Other sorts, except An- chors, Cables and Kent- ledge, which are free ...	<i>Ad valorem.</i>	
	Lametta, Double reels ...	4 8 per score.	
	" Single " ..	2 4 "	
	Lead, Pig ...	10 0 per cwt.	
	" Pipes ...	13 8 "	
	" tinned " ..	16 0 "	
	" Sheets (other than thin Sheets for Tea Canis- ters, which are free) ...	12 0 "	
	Ore Galena ...	13 0 "	
	Gold leaf, Europe ...	4 0 per 100 leaves.	
	Mock Gold leaf ...	5 0 per 20 books.	
	Orsidue or Brass Leaves, for- eign Europe ...	1 4 per lb.	
	" China ..	0 12 "	
	Patent or Yellow Metals, Sheath- ing and Sheets and Bolts ...	35 0 per cwt.	
	Ditto ditto Old ...	30 0 "	
	Quicksilver ...	1 0 per lb.	
	Shot, Bird ...	15 0 per cwt.	
	Spelter Nails ...	17 8 "	Seven and a half per cent.
	" Plate and other shapes ..	11 0 "	
	" Sheet or Zinc Sheathing ...	15 0 "	
	Steel, Blistered ...	9 0 "	
	" British ...	9 0 "	
	" Cast ...	25 0 "	
	" Spring ...	10 0 "	
	" Swedish ...	10 0 "	
	Tin, Block ...	45 0 "	
	Plates ...	12 8 "	
	Wire, Brass ...	0 8 per lb.	
	" Common Iron, Nos. 1 to 40 ...	9 8 per cwt.	
	" Copper ...	0 10 per lb.	
	Other sorts, including Hard- ware, Ironmongery, and Cut- lery, but excluding Machi- nery, the component parts thereof, and Agricultural Im- plements, which are free ...	<i>Ad valorem.</i>	
30	NAVAL STORES—		
	Cables, Coir, tarred ...	10 0 per cwt.	
	Canvas, Country, Cotton ...	50 0 "	Five per cent.
	" Europe, Sail, not ex- ceeding forty yards ...	15 0 per bolt.	

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IMPORT TARIFF—(*Continued*).

Act XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
	NAVAL STORES—(<i>Continued</i> .)	Rs. As.	
	Coir, Rope, Maldivian and Laccadive	10 0 per cwt.	
	„ Yarn of all kinds	9 0 „	
	Cordage, Hemp, Europe	18 0 „	
	„ Manilla	20 0 „	
	Dammer „	5 0 „	
	Pitch, American and Europe	13 0 { per barrel not exceeding three cwt. and pro rata above and below.	
	„ Coal	4 8 { Ditto ditto.	
	Tar, American	13 0	
	„ Coal	6 8 { Ditto ditto.	
	„ Swedish and Archangel	14 0	
	Twine, Europe, Sail	0 8 per lb.	
	All other sorts, except Oakum, which is free	Ad valorem.	
31	OILS—		Seven and a half per cent.
	Cardamom	10 0 per lb.	
	Cassia	4 0 „	
	Cinnamon, Ceylon	10 0 „	
	Cocoanut	20 0 per cwt.	
	Earth	10 0 „	
	Grass	2 0 per lb.	
	Jingee or Teel	20 0 per cwt.	
	Kerosine, Paraffiné, Petroleum, Rock and Shale Oils of all descriptions	0 12 per Impl. gal.	
	Linseed, Country	18 0 per cwt.	
	„ Europe	2 4 per Impl. gal.	
	Naphtha	30 0 per cwt.	
	Otto, of sorts	20 0 per ounce.	
	Sandalwood	8 0 per lb.	
	Sorrel	20 0 per cwt.	
	Turpentine	2 0 per Impl. gal.	
	Whale and Fish	15 0 per cwt.	
	Wood	15 0 „	
	All other sorts, except Cocum and Slush Fat, which are free	Ad valorem.	
32	OIL AND FLOOR CLOTH	Ad valorem.	Five per cent.
33	OPIUM	Twenty-four rupees per seer of eighty tolas.
34	PAINTS, COLOURS, AND PAINTER'S MATERIALS—		
	Ochre, all colours	3 0 per cwt.	
	Paints of sorts	12 0 „	
	Composition Paint and Pa- tent Driers	30 0 „	Seven and a half per cent.

IMPORT TARIFF—(*Continued*).

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ACT XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
	PAINTS, COLOURS, AND PAINTER'S MATERIALS—(<i>Continued</i> .)	Rs. As.	
	Prussian Blue, China	0 8 per lb.	
	" Europe	1 8 "	
	Red Lead	14 0 per cwt.	
	Turpentine	2 0 per Impl. gal.	
	Verdigris	75 0 per cwt.	
	Vermillion, Canton	80 0 per box of	
	" Macao	30 0 90 bundles.	
	White Lead	12 0 per cwt.	
	All other sorts, including Brushes	<i>Ad valorem.</i>	Seven and a half per cent.
35	PERFUMERY—		
	Atary, Persian	15 0 per cwt.	
	Rose Flowers, Dried	10 0 "	
	Rose Water	1 12 per Impl. gal.	
	All other sorts	<i>Ad valorem.</i>	
36	PHOTOGRAPHIC APPARATUS AND MATERIALS	<i>Ad valorem.</i>	
37	PIECE GOODS, NOT OTHERWISE DESCRIBED	<i>Ad valorem.</i>	Five per cent.
38	PORCELAIN AND EARTHEN-WARE	<i>Ad valorem.</i>	
39	PROVISIONS & OILMAN'S STORES—		
	Bacon in Canisters, Jowls and Cheeks	0 9 per lb. 60 0 per tierce of three cwt.	
	Beef	40 0 per barrel of two cwt.	
	Cheese	0 10 per lb.	
	Fish Maws	50 0 per cwt.	
	Fish Sozille and Singally, Small	6 0 per cwt.	
	Flour	25 0 per barrel or sack of 200 lbs.	
	Ghee	36 0 per cwt.	
	Hams	0 8 per lb.	
	Pork	50 0 per tierce of 3 cwt., and 34 0 per barrel of two cwt.	
	Shark Fins	20 0 per cwt.	
	Tongues, Salted	10 0 per keg of six.	

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IMPORT TARIFF—(*Continued*).

Act XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
	PROVISIONS & OILMAN'S STORES— (Continued.)	Rs. As.	
	Vinegar in Wood, Europe ...	{ 1 8 per Impl. gal.	
	" " Persian ...	0 12 "	
	" " Country ...	0 6 "	Seven and a half per cent.
	All other sorts, except Biche de mer, Butter and Salted Fish, which are free ...	<i>Ad valorem.</i>	
40	RAILWAY MATERIALS—	<i>Ad valorem.</i>	
	Of Iron ...		
	Steel Rails and other articles intended for the permanent way of railways ...		One per cent.
	Other sorts ...	<i>Ad valorem.</i>	
41	RATANS AND CANES—	<i>Ad valorem.</i>	
	Canes, Malacca ...	1 0 per dozen.	
	Ratans ...	7 0 per cwt.	Seven and a half per cent.
	All other sorts ...	<i>Ad valorem.</i>	
42	SALT—		
	imported from any place whether within or without British India,		
	(a) into British Burmah ...		
	(b) into the territories under the government of the Lieutenant Governor of Bengal ...		
	(c) into any other part of British India ...		
43	SEEDS—		Rs. As.
	Anchuchuck ...	10 0 per cwt.	
	Anise, Europe ...	28 0 "	
	Assalia ...	7 0 "	
	Cajoo ...	3 0 "	
	Castor ...	4 8 "	
	Cummin ...	12 0 "	
	Black	5 0 "	
	Esubgool ...	5 0 "	
	Linseed ...	5 0 "	
	Methee ...	5 0 "	
	Mustard ...	4 8 "	
	Quince Seed or Badana ...	50 0 "	
	Rape or Sursee ...	4 8 "	
	Sawjeerah ...	25 0 "	
	Tookmeria ...	7 0 "	
	All other sorts, excepting Seeds imported by any Public Society for gratuitous distri- bution, which are free ...	<i>Ad valorem.</i>	Seven and a half per cent.

IMPORT TARIFF—(*Continued*).

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ACT XIII.

No.	Description of Article.	Value on which Duty is assessed.	Rate of Duty.
44	SHELLS— Chanks, "large shells," for Cameos ... Chanks, White, Live ... " Dead ... Cowdas, "Mozambique and Zanzibar ... Cowdas, from other places ... Cowries— Bazar, Common ... Maldiva ... Sunkley ... Yellow, Superior Quality ... Mother-o'-Pearl ... Tortoise Shell ... " Nuck ... Nuckla and other sorts ...	Rs. A. 10 0 per hundred. 6 0 " 3 0 " 3 0 " 0 8 " 4 0 per cwt. 16 0 " 40 0 " 8 0 " 8 0 " 6 0 per lb. 1 0 " <i>Ad valorem.</i>	
45	SILK— Floss ... Raw, Charon and Cochin-China ... " Mathow ... " Other kinds of China ... " Persian ... " Punjum and Cutchra ... " Siam ... Sewing Thread, China ... Other sorts ... Silk Piece Goods of sorts ...	8 0 per lb. 4 0 " 1 12 " 7 0 " 5 0 " 1 12 " 4 0 " 8 0 per lb. <i>Ad valorem.</i> <i>Ad valorem.</i>	Seven and a half per cent.
46	SOAP ...	<i>Ad valorem.</i>	Five per cent.
47	SPICES— Aloe Wood ... Aniseed Star ... Betelnut, White, Sheverdhun ... " all other kinds ... " in husk ... Cassia Buds, Nagkessur, China ... Chillies, Dried ... Gloves ... " in Seeds, Nurlavung ... Mace ... " false ... Nutmegs ... " in Shell ... " Wild ... Pepper, Black and Long ... " White ... All other kinds ...	3 0 per lb. 40 0 per cwt. 18 0 " 4 0 " 2 0 per thousand 0 8 per lb. 8 0 per cwt. 12 0 " 8 0 " 0 9 per lb. 10 0 per cwt. 0 10 per lb. 0 6 " 12 0 per cwt. 14 0 " 25 0 " <i>Ad valorem.</i>	Seven and a half per cent.
48	STATIONERY OTHER THAN PAPER	<i>Ad valorem.</i>	
49	SUGAR AND SUGAR-CANDY— Sugar-Candy, China ... " Loaf ... " Soft ...	20 0 per cwt. 23 0 " 12 0 "	

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IMPORT TARIFF—(*Concluded*).

Act XIII.

No.	Description of Article.	Value on which duty is assessed.	Rate of duty.
	SUGAR, &c.—(<i>Continued</i> .)	Rs. A.	
	All other sorts of Saccharine Produce	... <i>Ad valorem</i> .	
50	TEA	1 0 per lb.	{ Seven and a half per cent.
51	TOBACCO—		
	Manufactured	... <i>Ad valorem</i> .	
	Unmanufactured	... <i>Ad valorem</i> .	{ Ten per cent.
	Articles, such as Pipes, &c., used in consumption of	... <i>Ad valorem</i> .	
52	TOYS AND REQUISITES FOR ALL GAMES	... <i>Ad valorem</i> .	
53	UMBRELLAS—		
	Cotton, Steel Ribs	0 13 each.	{ Seven and a half per cent.
	" Cane Ribs	0 11 "	
	" China Paper Kettisals...	45 0 per box of 110	
54	All other sorts	... <i>Ad valorem</i> .	
	WOOLLEN GOODS—		
	Piece Goods	... <i>Ad valorem</i> .	Five per cent.
	Braid	... <i>Ad valorem</i> .	{ Seven and a half per cent.
	Other sorts	... <i>Ad valorem</i> .	

SCHEDEULE B.

EXPORT TARIFF.

No.	Description of Article.	Value on which duty is assessed.	Rate of Duty.
1	COTTON GOODS—	Rs. A.	
	Piece Goods—		
	Baftahs	... 30 0 per score.	
	Gurrah	... 20 0 "	
	Khurwah	... 25 0 "	
	Mamoodie	... 32 0 "	
	Mirzapore Chintz	... 15 0 "	
	Patna	... 30 0 "	
	Shans	... 40 0 "	
	Tunjeeb, Oudh	... 26 0 "	
	Other sorts	... <i>Ad valorem</i> .	
	Twist, Country, No. 10	... 0 7 per lb.	
	" " 20	... 0 9 "	
	" " 30	... 0 10 "	
	" Hand Spun	... 0 5 "	
	All other kinds of Cotton Goods	<i>Ad valorem</i> .	
2	GRAIN OF ALL SORTS	Three annas per maund.

EXPORT TARIFF—(Continued):

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Act XIII.

No.	Description of Article.	Value on which duty is assessed.	Rate of Duty.
3	HIDES AND SKINS, TANNED— Hides— Buffaloe, Country, Tanned ... Cow ...	Rs. A. 70 0 per score. 50 0 "	
	Skins— Goat and Sheep ... Lamb ... Any other sorts of Hides and Skins ...	10 0 " 5 0 " <i>Ad valorem.</i>	Three per cent.
4	INDIGO	Three rupees per maund.
5	LAC— Button ... Dye ... Seed ... Shell ... Stick ... Other sorts ...	28 0 per cwt. 45 0 " 20 0 " 28 0 " 16 0 " <i>Ad valorem.</i>	Four per cent.
6	OILS— Castor ... Cocoanut ... Fish ... Grass ... Jingeely or Teel ... Linseed ... Mhowa ... Mustard ... Poppy ... Rape or Sursee ... Sandalwood ... Other sorts ...	16 0 per cwt. 20 0 " 15 0 " 2 0 per lb. 20 0 per cwt. 18 0 " 12 0 " 16 0 " 20 0 " 16 0 " 8 0 per lb. <i>Ad valorem.</i>	Three per cent.
7	SEEDS— Castor Seed (Erundee) ... Coriander Seed ... Cummin Seed ... " Black (Caleejeera) ... Ground Nuts, with shell ... without shell ... Jingeely or Teel Seed ... Linseed ... Methee Seed ... Mustard Seed ... Poppy Seed ... Rape or Sursee Seed ... Other sorts ...	4 8 per cwt. 4 0 " 12 0 " 5 0 " 5 0 " 6 0 " 6 0 " 5 0 " 5 0 " 4 8 " 4 8 " <i>Ad valorem.</i>	Three per cent.
8	SPICES— Aloe Wood ...	3 0 per lb.	

1871^aEXPORT TARIFF—(*Continued*).

ACT XIII.

No.	Description of Article.	Value on which duty is assessed.	Rate of Duty.
	SPIRICES—(<i>Continued</i>).	Rs. A.	
	Betelnut in Husk ...	2 0 per 1,000.	
	Cardamoms ...	200 0 per cwt.	
	Large, Bastard ...	40 0 "	
	Chillies, Dried ...	8 0 "	
	Ginger, Dry (Rough), Malabar ...	10 0 "	
	Bengal. ...	7 0 "	Three per cent.
	"(Scraped)" ...	15 0 "	
	Pepper ...	15 0 "	
	Turmeric ...	5 0 "	
	All other sorts ...	<i>Ad valorem.</i>	

SCHEDULE C.

(See section 9.)

Number and Year.	Subject or Title.	Extent of Repeal.
XIV of 1836 ...	Bengal Customs ...	So much as has not been repealed.
VI of 1844 ...	Madras Customs ...	So much of schedules A. and B. as has not been repealed.
I of 1852 ...	An Act for the consolidation and amendment of the Laws relating to the Customs under the Presidency of Bombay.	So much as has not been repealed.
XXX of 1854 ...	An Act to provide for the levy of Duties of Customs in the Arracan, Pegu, Martaban, and Tenasserim Provinces.	Section three from the beginning down to and including the words "shall be free; provided that"
XXIX of 1857 ...	Bombay Land Customs ...	So much of section two as has not been repealed.
XXII of 1859 ...	An Act to amend Act I of 1852 (for the consolidation and amendment of the Laws relating to the Customs under the Presidency of Bombay).	So much as has not been repealed.

SCHEDULE C.—(*Continued*).

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Act XIII:

Number and Year.	Subject of Title.	Extent of Repeal.
Act III of 1861 ...	An Act to provide for the collection of Duty of Customs on Pepper exported by Sea from the British Port of Cochin.	The whole.
„ II of 1868 ...	An Act to alter the rate of duty leviable on Pepper exported from Cochin.	The whole.
„ XXIV of 1869 ...	An Act to enhance the price of Salt in the Presidency of Fort St. George and the duty on Salt in the Presidency of Bombay.	In section two, the words "either by sea or"
„ XVII of 1870 ...	An Act to amend the Law relating to Customs Duties.	The whole.

Act No. XIV.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor General on the 31st March 1871.)

An Act for the further amendment of the Consolidated Customs Act.

FOR the further amendment of the Consolidated Customs Preamble. Act (No. VI of 1863); It is hereby enacted as follows:—

1. Section twenty-three of the said Act shall be deemed to Amendment of Act VI authorize and to have always authorized of 1868, section 28. the Governor General in Council to prohibit or restrict the importation or exportation, by sea or by land, or both by sea and by land, of any particular class of goods.

2. As often as any goods are lodged in a public warehouse Warrant to be given every time goods are ware- or a licensed private warehouse, the ware-house-keeper, or, in the case of the Bengal Bonded Warehouse Association, the Secre-

1871 tary of the said Association, shall deliver a warrant signed by
Act XIV. him as such to the person lodging the goods.

Such warrant shall be in the form in the schedule to this
Form of warrant. Act annexed, and shall be transferable by
endorsement; and the endorsee shall be
entitled to receive the goods specified in such warrant on the
same terms as those on which the person who originally lodged
the goods would have been entitled to receive the same.

3. All goods found on board any boat in excess of the boat-
note or Custom-house pass, whether such
Goods found in boat in
excess of boat-note or pass
liable to confiscation. goods are intended to be landed or to be
shipped on board any vessel, shall be liable
to confiscation.

4. This Act shall be read with and
Act to be read with Act
VI of 1863. taken as part of the Consolidated Customs
Act.

SCHEDULE.

FORM OF BONDED WAREHOUSE WARRANT.

(See Section 2.)

I do hereby certify that
have deposited in the Warehouse of
the undermentioned goods,
which goods, the
engage on demand, after payment of rent and incidental
charges and Government Dues or Customs chargeable thereon,
to deliver to the said
or their assigns, or to the holder of this warrant to whom it may
be transferred by endorsement.

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Act XV.**Act No. XV.****THE BROACH THAKURS' RELIEF ACT.**

PASSED BY THE GOVERNOR GENERAL OF INDIA IN
COUNCIL.

(Received the assent of His Excellency the Governor General on
the 31st March 1871.)

An Act to relieve from incumbrances the Estates of Thákurs in Broach:

WHEREAS the majority of the Thákurs in Broach are in debt,
and their immoveable property is subject to mortgages, charges and liens ; and whereas it is expedient to provide for their relief in manner hereinafter appearing ; It is hereby enacted as follows :—

I.—PRELIMINARY.

Short title. 1. This Act may be called “The Broach Thákurs’ Relief Act.”

Interpretation-clause. 2. In this Act—

‘thákur’ means a person mentioned in the schedule hereto annexed, and

‘heir’ means the person for the time being entitled as heir to a thákur.

II.—VESTING ORDER.

3. Whenever, within twelve months after the passing of this Act, any thákur, or (when such thákur is an infant, or of unsound mind, or an idiot) his guardian, committee, or other legal curator, or the person who would be heir to such thákur if he died intestate,

Power to vest management of thákur’s property in officer appointed by Local Government.

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or (when such person is an infant, or of unsound mind, or an idiot) his guardian, committee, or other legal curator,

applies in writing to the Governor of Bombay in Council, stating that the thákur is subject to, or that his immoveable property is charged with, debts or liabilities other than debts due, or liabilities incurred, to Government, and requesting that the provisions of this Act be applied to his case,

the Governor of Bombay in Council may, by order published in the Bombay Government Gazette, appoint an officer (hereinafter called the Manager), and vest in him the management of the immoveable property of or to which the thákur is then possessed or entitled in his own right, or which he is entitled to redeem, or which may be acquired by or devolve on the thákur or his heir during the continuance of such management.

Effect of order. 4. On such publication, the following consequences shall ensue :—

first, all proceedings in respect to such debts or liabilities Bar of suits against which may then be pending in any Civil Court in British India, shall be barred; and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void;

secondly, so long as such management continues, the thákur Thákur freed from arrest, and his heir shall not be liable to arrest for or in respect of the debts and liabilities to which the thákur was immediately before the said publication subject, or with which his immoveable property or any part thereof was then charged, other than debts due, or liabilities incurred, to Government;

nor shall their moveable property be liable to attachment or and his moveable property from attachment for sale, under process of any Civil Court in prior debts. British India, for or in respect of such debts and liabilities other than as aforesaid; and

thirdly, so long as such management continues, (a) the thákur Cessation of his power to and his heir shall be incompetent to mortgage, charge, lease or alienate their immoveable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom;

and (b) such property shall be exempt from attachment or
 Immoveable property sale under such process as aforesaid, except
 freed from attachment. for or in respect of debts due, or liabilities
 incurred, to Government.

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III.—DUTIES OF MANAGER.

5. The Manager shall, during his management of the said Manager to receive rents property, receive and recover all rents and and profits, profits due in respect thereof; and shall, upon receiving such rents and profits, give receipts for the same.

From the sums so received, he shall pay—

first, the Government revenue, and all debts or liabilities for and pay therefrom the the time being due or incurred to Govern- Government demand, ment in respect of the said property:

secondly, such annual sum as appears to the Governor of Bom- an annual sum for main- bay in Council requisite for the mainte- tenance of the thákur and his heir, nance of the thákur, his heir and their families:

thirdly, the costs of such repairs and improvements of the costs of repairs and im- property as appear necessary to the Mana- provements, ger and are approved by the Governor of Bómbay in Council,

and the residue shall be applied in discharge of the costs of costs of management, the management, and in settlement of such and the debts and liabi- debts and liabilities of the thákur and ties. his heir and their immoveable property as may be established under the provisions hereinafter contained.

IV.—SETTLEMENT OF DEBTS.

6. On the publication of the order vesting in him the Notice to claimants management of the said property, the against thákur. Manager shall publish in the Bombay Go- vernment Gazette a notice in English and Gujaráthi, calling upon all persons having claims against the thákur or his immoveable property to notify the same in writing to such Manager within three months from the date of the publication.

He shall also cause copies of such notice to be exhibited at the Copies of notice to be Mámlatdárs' Kachahrís in the District or exhibited. Districts in which the said property lies and at such other places as the Manager thinks fit.

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Claim to contain full particulars.

7. Every such claimant shall, along with his claim, present full particulars thereof.

Documents to be given up.

Every document on which the claimant founds his claim, or on which he relies in support thereof, shall be delivered to the Manager along with the claim.

If the document be an entry in any book, the claimant shall produce the book to the Manager, together with a copy of the entry on which he relies.

Entries in books.
The Manager shall mark the book for the purpose of identification, and, after examining and comparing the copy with the original, shall return the book to the claimant.Exclusion of documents not produced.
If any document in the possession or under the control of the claimant is not delivered or produced by him to the Manager along with the claim, the Manager may refuse to receive such document in evidence on the claimant's behalf at the investigation of the case.Debt or liability not duly notified to be barred.
8. Every debt or liability (other than debts due, or liabilities incurred, to Government) to which the thákur is subject, or with which his immoveable property or any part thereof is charged, and which is not duly notified to the Manager within the time and in manner hereinbefore mentioned, shall be barred:

Provided that, when proof is made to the Manager that the claimant was unable to comply with the provisions of sections six and seven, the Manager may admit such claim within the further period of nine months from the expiration of the said period of three months.

Provision for admission of claim within further period of nine months.
9. The Manager shall, in accordance with the rules to be made under this Act, determine the amount of the debts and liabilities due to the several creditors of the thákur and persons holding mortgages, charges or liens on the said property or any part thereof.Determination of debts and liabilities.
Appeal.
10. An appeal against any refusal, admission or determination under sections seven, eight or nine shall lie, if preferred within six weeks from the date of such determination, to the Commissioner of

Division to whom the Manager is subordinate, and the decision of such Commissioner, or of the Manager if no such appeal has been so preferred, shall be final.

11. When the total amount of such debts and liabilities has been finally determined, the Manager shall prepare and submit to the Governor of Bombay in Council, a schedule of such debts and liabilities, and a scheme for the settlement thereof; and such scheme, when approved by the Governor of Bombay in Council, shall be carried into effect.

Until such approval is given, the Governor of Bombay in Council may, as often as he thinks fit, send back such scheme to the Manager, for revision, and direct him to make such further enquiry as may be requisite for the proper preparation of the scheme.

Restoration of thákur to his property. 12. When all such debts and liabilities have been discharged, or if, within six months after the publication of the order mentioned in section three, the Governor of Bombay in Council thinks that the provisions of this Act should not continue to apply to the case of the thákur or his heir,

the thákur or his heir shall be restored to the possession and enjoyment of his immoveable property, or of such part thereof as has not been sold by the Manager under the power contained in section nineteen, but subject to the leases and mortgages (if any) granted and made by the Manager under the powers hereinafter contained.

Where the thákur or his heir is so restored under the circumstances mentioned in the second clause of this section, the proceedings, processes, executions and attachments mentioned in section three (so far as they relate to debts and liabilities not settled by the Manager), and the debts and liabilities barred by section eight, shall be revived, and any mortgagee dispossessed under section seventeen shall be reinstated unless his claim under the mortgage has been satisfied;

and in calculating the periods of limitation applicable to such revived proceedings and to suits to recover and enforce such

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Act XV. revived debts and liabilities, the time intervening between such restoration and the publication of the order mentioned in section three shall be excluded.

V.—POWERS OF MANAGER.

13. The Manager may, from time to time, call for further Power to call for further and more detailed particulars of any claim particulars. preferred before him under this Act, and may at his discretion refuse to proceed with the investigation of the claim until such particulars are supplied.

14. For the purposes of this Act, the Manager may summon Power to summon witnesses and compel production of documents. and enforce the attendance of witnesses and compel them to give evidence, and compel the production of documents by the same means, and, as far as possible, in the same manner, as is provided in the case of a Civil Court by the Code of Civil Procedure.

15. The Manager may administer an oath in such form Power to administer oaths. as he thinks fit to any person examined before him touching the matters to be enquired into under this Act.

16. Every investigation conducted by the Manager with reference to any claim preferred before him Investigation to be deemed a judicial proceeding. under this Act, or to any matter connected with any such claim, shall be taken to be a judicial proceeding within the meaning of the Indian Penal Code.

And every statement made by any person examined by or Statements of persons examined, to be evidence. before the Manager with reference to such investigation, whether upon oath or otherwise, shall be taken to be evidence within the meaning of the same Code.

17. The Manager shall have, for the purpose of realizing Manager to have powers of a Collector. and recovering the rents and profits of the said immoveable property, the same powers as a Collector possesses under the law for the time being in force for the realization and recovery of land-revenue due to Government.

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And if such property, or any part thereof, be in the possession of any mortgagee, the Manager may apply to the Court of the District Judge within whose jurisdiction the property is situate, and such Court shall cause the same to be delivered to the Manager as if a decree therefor had been made in his favour; but without prejudice to the mortgagee preferring his claim under the provisions hereinbefore contained.

18. Subject to the rules made under section twenty, the Manager shall have power to demise all or any part of the said property, for any term of years not exceeding twenty years absolute, to take effect in possession, in consideration of any fine or fines, or without fine, and reserving such rents and under such conditions as may be agreed upon.

19. The Manager, with the previous assent of the Governor of Bombay in Council, shall have power to raise any money which may be required for the settlement of the debts and liabilities (other than as aforesaid) to which the thákur is subject, or with which his immoveable property or any part thereof is charged,

by demising by way of mortgage the whole or any part of such property for a term not exceeding twenty years from the said publication,

or by selling, with the previous consent of the thákur and of the person (being of full age) who would be his heir if he died intestate, by public auction or by private contract, and upon such terms as the Manager thinks fit, such portion of the same property as may appear expedient.

And no mortgagee advancing money upon any mortgage made under this section, shall be bound to see that such money is wanted or that no more than is wanted is raised.

And the receipt of the Manager for any moneys paid to him upon any mortgage or sale made under this section, or for any rents or profits received by him under section five, shall discharge the person paying the same therefrom and from being concerned to see to the application thereof.

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The power to mortgage conferred by this section shall not be exercisable until six months have elapsed from the publication of the order mentioned in section three.

VI.—MISCELLANEOUS.

20. The Governor of Bombay in Council may, from time to time, make rules consistent with this Act in all matters connected with its enforcement. Power to make rules. Such rules, when published in the Bombay Government Gazette, shall have the force of law.

21. Whenever the Governor of Bombay in Council thinks fit, he may appoint any officer to be a Manager in the stead of any Manager appointed under this Act; and thereupon the management then vested under this Act in the former Manager shall become vested in the new Manager. Power to appoint new Managers.

Every such new Manager shall have the same powers as if he had been originally appointed.

22. Every Manager appointed under this Act shall be deemed a public servant within the meaning of the Indian Penal Code. Managers to be public servants.

23. No suit or other proceeding shall be maintained against any person in respect of anything done by him *bond fide* pursuant to this Act. Bar of suits.

24. No petition, application, memorandum of appeal or other proceeding under this Act, shall be chargeable under the Court Fees Act, 1870. Petitions, &c., under Act exempt from Court fees.

25. Nothing in this Act precludes the Courts of Broach, having jurisdiction in suits relating to the succession to or rights of persons claiming maintenance from any immoveable property brought under the operation of this Act, from entertaining and disposing of such suits; but to all such suits the Manager of such property shall be made a party. Saving of jurisdiction of Courts in Broach in respect of certain suits.

26. And whereas doubts have been raised as to the validity of Bombay Act No. VI of 1862 (*for the amelioration of the condition of Talookdars*) Amendment of Bombay Act VI of 1862.

in the Ahmedabad Collectorate, and for their relief from debt)

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so far as it purports to affect the High Court of Judicature at Bombay, for the purpose of precluding such doubts, it is hereby further enacted that the said Act, so far as it purports to affect the said High Court, shall be deemed to be and to have been valid.

SCHEDULE.

(See Section 2.)

The Thákur of Ahmód.
The Thákur of Saród.
The Thákur of Kerwára.
The Thákur of Dehej.
The Thákur of Janiádra.

Act No. XVI.

THE BURMESE STEAMER SURVEY ACT.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor General on the 31st March 1871.)

An Act for the survey of Steam Vessels plying within British Burma.

WHEREAS it is expedient to provide for the survey of Steam Vessels plying within British Burma; It Preamble. is hereby enacted as follows:—

I.—Preliminary.

Short title. 1. This Act may be called “The Burmese Steamer Survey Act.”

Local extent. It extends only to the territories under the administration of the Chief Commissioner of British Burma; and

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Commencement.

It shall come into force at the expiration of one month from the passing thereof.

Interpretation-clause.

2. In this Act—

“Chief Commissioner” means the Chief Commissioner of British Burma, and

“Surveyors” includes any Surveyor acting alone when authorised by the Chief Commissioner under the provisions of this Act.

II.—Survey of Steam Vessels.

3. Every Steam Vessel plying on any of the rivers or waters

Certain Steam Vessels of British Burma, except Steam Vessels liable to be surveyed twice plying between some Port within the said a year. Provinces and some Port not in British

India, shall be liable to be surveyed twice in every year, in the manner hereinafter prescribed.

4. The Chief Commissioner may appoint for the purposes of Government to appoint this Act any Ports in British Burma to be Surveyors. ports of survey, and fit and proper persons to be Surveyors.

5. The said Surveyors, in the execution of their duties, may Authority to surveyors go on board any Steam Vessel liable to be to go on board Steamers for surveyed under this Act, as soon as reasonably may be after the arrival of such

Steam Vessel in the Port of Rangoon or any other Port of survey, and not so as unnecessarily to hinder the loading or unloading of such Steam Vessel, or to detain or delay her from proceeding on any voyage or service, and may inspect such Steam Vessel or any part thereof, and any of the machinery, equipments, or articles on board thereof.

The Owner, Master and Officers serving on board such vessel shall be bound to afford to the Surveyors all reasonable facilities for such inspection or survey, and to afford them all such information respecting such vessel and her machinery and equipments, or any part thereof respectively, as they may reasonably require.

6. When any survey is made under this Act, the Surveyors Surveyors when to grant making such survey shall forthwith, if Certificate and Declaration, satisfied that they can with propriety do

so, and on payment by the Owner or Master of the ship surveyed of the fees hereinafter mentioned, give him a certificate and declaration signed by them and framed as nearly as the circumstances of each case will admit in the form set forth in schedule A hereto annexed.

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7. No Officer of Customs shall grant a clearance nor shall

No clearance to be given to a steamer for a voyage for which she has not got a certificate.

any Pilot be assigned to any Steam Vessel, liable to be surveyed under this Act, which has not been duly furnished with a certificate and declaration under the provisions

of this Act applicable to the voyage on which she is about to proceed, or the service on which she is about to be employed.

If any Steam Vessel liable to be surveyed under this Act leaves or attempts to leave any Port of survey without such certificate and declaration, any Officer of Customs or any Pilot on board such Vessel may detain her until she is duly furnished with such certificate and declaration.

8. The Chief Commissioner may give special direction to

Special survey may be ordered by Government on any British Steamer.

the Surveyors under this Act for the survey by them of any British Steamer lying in any Port of survey and plying between such Port and any other Port or Ports, and the provisions of this Act shall apply (so far as the same are applicable) to every vessel so specially directed to be surveyed, and the Owner, Master and Officers thereof.

Rules as to mode and time of conducting survey.

9. The Chief Commissioner may frame rules consistent with this Act as to—

- (a) the manner in which the surveys shall be made,
- (b) the times and places of such surveys, and
- (c) the duties of the Surveyors.

10. For every survey made under this Act the Owner or

Fees to be paid for every survey made.

Master of the Steam Vessel surveyed shall pay to each of the Surveyors making the same a fee, calculated on the tonnage of the vessel according to the rates in schedule B hereto annexed.

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11. Each certificate and declaration granted by Surveyors under this Act shall be hung up, and remain at all times suspended in some conspicuous part of the vessel for which the same is granted, where the same may be easily read.

12. No certificate or declaration shall be in force for the purposes of this Act after the expiration of six months from the date thereof; provided that if any Steam Vessel is not in any Port of survey when her certificate and declaration expire, no penalty shall be incurred for the want of a certificate and declaration, until she first begins to ply, or is about to ply after her next subsequent arrival at some Port of survey.

The Chief Commissioner may require any certificate and declaration which has expired or has been revoked or cancelled to be delivered up as may be directed.

13. The Chief Commissioner may revoke and cancel any certificate and declaration granted under this Act in any case in which he has reason to believe—

(1) That the certificate and declaration of the sufficiency and good condition of the hull, equipments, and machinery of any Steam Vessel, or either of them have been fraudulently or erroneously given or made; or,

(2) that such certificate and declaration have otherwise been issued upon false or erroneous information; or,

(3) that since the giving and making of such certificate and declaration the hull, equipments, or machinery of such ship have sustained any injury or are otherwise insufficient.

And in every such case the Chief Commissioner may, if he thinks fit, require the Owner or Master to have such Steam Vessel again surveyed as herein provided.

14. If any Steam Vessel is surveyed under the provisions Power to order a second survey. of this Act, and if the Surveyors decline to give any certificate or declaration or give a certificate or declaration with which the Owner or Master

of the Steam Vessel is dissatisfied, the Chief Commissioner may, on the application of such Owner or Master, appoint two other competent Surveyors to survey the said Steam Vessel.

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The Surveyors so appointed shall forthwith survey the said Steam Vessel, and shall either decline to give any certificate and declaration; or shall give such certificate and declaration as, under the circumstances, may seem to them proper.

Every survey made under this section shall be made subject to all the provisions and rules both as to the payment of fees and otherwise which are applicable to surveys made in ordinary cases under this Act.

If the Surveyors appointed under this section unanimously refuse to give any certificate and declaration or agree as to the terms of their certificate and declaration, such refusal or such certificate and declaration shall be final and conclusive; but if they do not agree, the refusal originally made, or the certificate and declaration originally granted by the Surveyors who surveyed the said Steam Vessel in the first instance, shall remain in force.

Explosions.

15. Whenever any explosion occurs on board of any Steam Power to investigate Vessel subject to this Act, the Chief Com- causes of explosions. missioner may, if he thinks fit, direct that an investigation of the cause of such explosion be made by such person or persons as he thinks fit.

Such person or persons may enter into and upon such Steam Vessel with all necessary workmen and labourers, and remove any portion of such Steam Vessel, or of the machinery thereof, for the purpose of such investigation, and shall report the cause of such explosion.

III.—Examinations and Certificates of Engineers.

16. Examinations shall be instituted for persons who intend Examinations to be in- to become Engineers of Steamers, or who stituted for Engineers. wish to procure Certificates of Competency hereinafter mentioned.

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17. The Chief Commissioner shall, from time to time, nominate Examiners and Rules of two or more competent persons for the Examination. purpose of examining the qualifications of the applicants for examination, and may make rules for the conduct of such examinations, and as to the qualifications to be required, and the fees to be paid by all applicants for examination.

18. The Chief Commissioner shall deliver to every applicant Certificates of Competency who is reported by the Examiners to have passed the examination satisfactorily, a certificate (hereinafter called a "Certificate of Competency") to the effect that he is competent to act as Engineer.

19. Every person who before the passing of this Act, has served for a period of not less than one year as first or only Engineer in any Steam Vessel, or who has attained or shall attain the rank of First Class Assistant Engineer in the Service of Her Majesty, shall be entitled to a Certificate of Service.

Each of such Certificates of Service shall contain particulars of the name and of the length and nature of the previous service of the person to whom it is delivered.

And the Chief Commissioner shall deliver such Certificates of Service to the various persons so respectively entitled thereto, upon their proving themselves to have attained such rank, or to have served as aforesaid; and, upon their giving a full and satisfactory account of the particulars aforesaid and on payment of such fees as the Chief Commissioner shall, by an order published in the local official Gazette, from time to time direct.

20. No Certificate of Survey under this Act shall be granted for any Steam Vessel, unless it has as its Engineer an Engineer possessing a Certificate of Competency or a Certificate of Service.

No Certificate of Survey if vessels have not a Certified Engineer.

21. The Chief Commissioner may exempt from the operation of section twenty any Steamer which does not ply with passengers or goods, or as a Steam Tug for hire.

Power to exempt private Steam Vessels.

22. It shall be lawful for the Chief Commissioner, in case Withdrawal of Certif- of the misconduct, negligence or incom-
cate. petency of any Engineer possessing a Certificate of Competency or a Certificate of Service, to cancel such Certificate, or to suspend the same for such time as to him or them shall seem fit.

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23. Every Engineer's Certificate of Competency or Service, English Certificates to which may be granted by any competent authority in the United Kingdom, shall have, in all respects, the same validity and effect as if the same had been granted under the provisions of this Act.

24. All Certificates, whether of Competency or Service, Certificates to be made shall be made in duplicate, and one part in duplicate. shall be delivered to the person entitled to the Certificate, and the other shall be kept and recorded as the Chief Commissioner directs.

A note of all orders made for cancelling, suspending, altering, or otherwise affecting any Certificate in pursuance of the powers herein contained, shall be entered in the record of Certificates.

25. Whenever any Engineer proves to the satisfaction of Copy of Certificate to the Chief Commissioner, that he has, be delivered. without fault on his part, lost or been deprived of any Certificate already granted to him, a copy of the Certificate to which, by the record so kept as aforesaid, he appears to be entitled, shall be delivered to him, and shall have all the effect of the original.

IV.—Penalties.

26. Any person refusing access to any Surveyors or other persons under this Act, or otherwise hindering survey or withholding required in- dering them in the performance of their formation. duty, or refusing or neglecting to give any information which may reasonably be required of him, and which he has in his power to give, shall be liable for each offence to fine not exceeding five hundred rupees, or to imprisonment for a term not exceeding one month.

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27. If any Steam Vessel liable to be surveyed under this Leaving without Certificate and Declaration. Act leaves or attempts to leave any port of survey without such Certificate and Declaration as is mentioned in section seven, the Owner or Master of such Vessel shall, for each offence, be punished with fine not exceeding one thousand rupees.

28. If the Commander or any other Officer of a Tug Master who is a licensed Pilot attempting to take his ship out of port without Certificate. Steamer or of any other Steam Vessel, liable to be surveyed under this Act, is a licensed Pilot and leaves or attempts to leave any Port of survey in such Tug Steamer or Steam Vessel without such Tug Steamer or Steam Vessel being duly furnished with a Certificate and Declaration under the provisions of this Act, applicable to the voyage on which she is about to proceed, or the service on which she is about to be employed, such Commander or other Officer shall be liable to have his license as a pilot taken away from him entirely or suspended for any period by the Chief Commissioner as the Chief Commissioner may see fit to order.

29. Any Surveyor demanding or receiving directly or indirectly from the Owner, Master, or Officer &c., for making a survey. Receiving unlawful fees, of any ship surveyed by him under the provisions of this Act, any fee or remuneration otherwise than as provided by this Act, shall be liable to dismissal, in addition to any other penalty to which he may by law be liable.

30. The Owner or Master of every Steam Vessel in which Neglect to hang up Certificate and Declaration. the Certificate and Declaration granted under this Act is not hung up and does not remain in manner provided by section eleven, shall, for each offence, be punished with fine not exceeding one hundred rupees.

31. Any Owner or Master or other person who without Refusal to comply with requirements of section 12. reasonable cause neglects or refuses to comply with any requirement made under section twelve shall be punished with fine not exceeding one hundred rupees for each offence.

32. The Owner, and also the Master, of any Steam Vessel Plying without Certified Engineer. subject to this Act, which plies on any of the rivers or waters in British Burmah, without having in charge of the engines thereof an Engineer

possessing a Certificate of Service or a Certificate of Competency, shall be liable to a fine not exceeding five hundred rupees.

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33. Any case arising out of this Act may be tried by any Officer having the full powers of a Magistrate within whose jurisdiction the offence may have been committed, or by any Police Magistrate of the town of Rangoon.

The provisions of section fifty-five of Act XXII of 1855 (*for the regulation of Ports and Port dues*) are hereby extended to all fines imposed under this Act, and all fees due under section ten shall be recoverable as if they were fines.

S C H E D U L E A.

(See section 6.)

Form of Surveyors' Certificate and Declaration.

Name of Steam Vessel.	Tonnage.	When and where built and material.	Description of Engines, and age.	Description of Boilers, and age.	Ground tackle.	Condition of Hull.	General Equipment.	Name of Master and Number of Officers and Deck Crew and of Engineers and Engine-room Crew.	When and where last coppered, repaired, or cleaned.	Limits (if any) beyond which the vessel is not fit to ply.	Time if less than six months for which the Hull, Boilers, Engines or any of the Equipments will be sufficient.

We, the undersigned, declare that we have examined the above-named Steamer, and to the best of our judgment she and

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Act XVI. her engines, as shown in the above Statement, are fully sufficient for the service on which it is intended to employ the said Steamer, that is to say (*as the case may be*).

A. B.
C. D.

SCHEDULE B.

(*See section 10.*)

Rates of Fees.

For Steamers of less than	200 Tons	Rs.	20	0	0
„ „ 200 tons and up to 350 „ „	„ „	25 0 0			
„ „ 350 „ „ 700 „ „	„ „	30 0 0			
„ „ 700 „ „ 1,000 „ „	„ „	40 0 0			
„ „ 1,000 „ „ 1,500 „ „	„ „	50 0 0			
„ „ 1,500 „ and upwards „ „	„ „	60 0 0			

Act No. XVII.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor General on the 31st March 1871.)

An Act to provide for the levy of rates on land in Oudh.

WHEREAS it is expedient to provide for the levy of rates on land in Oudh to be applied to local purposes; It is hereby enacted as follows:—

Preamble.

1. This Act may be cited as "The Oudh Local Rates Act;"

Short title.

It extends only to the territories under the administration of the Chief Commissioner of Oudh;

Local extent.

Commencement.

And it shall come into force on the first
day of April, 1871.1871
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2. In this Act—

"Land" means land assessed to the land-revenue, and includes Interpretation-clause. land whereof the land revenue has been wholly or in part released, compounded for, redeemed, or assigned :

"Landholder" means the person in receipt of the rent of any "Landholder." land, and responsible for the payment of the land-revenue, if any, assessed on the estate. It also includes a Muáfidár or other person holding land, the land-revenue of which has been wholly or in part released, compounded for, redeemed, or assigned :

"Estate" means all or any part of a village separately assessed to the land-revenue, or separately exempted from payment thereof; and

"Annual value." **"Annual value"** means—

(1) Where the settlement of the land-revenue is liable to periodical revision,—double the amount of the land-revenue assessed on an estate ;

(2) Where such settlement is not liable to periodical revision, or where the land-revenue or a portion thereof has been released, compounded for, redeemed or assigned,—double the amount which, if the settlement were liable to periodical revision, would, but for such non-liability, release, composition, redemption or assignment, have been assessed as land-revenue on the estate.

3. The Chief Commissioner may impose on every estate a rate not exceeding one and a quarter per Rates assessable. cent. on its annual value. Such rate shall

be payable annually by the landholder, independently of, and in addition to, any land revenue for the time being assessed on the estate and any local cesses now leviable therefrom.

4. All sums due on account of any rate imposed under this Recovery of rates. Act, shall be recoverable as if they were arrears of land-revenue due in respect of the land on account of which the rate is payable.

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5. Every landholder may recover from his co-sharers or pattidárs, if any, a share of the rate bearing the same proportion to the whole rate that the annual value of the share of such co-sharer or pattidár, recorded at the time of the settlement, bears to the annual value of the whole estate.

6. Whenever the rate is charged on a landholder on account of land in the use or occupation of an under-proprietor or permanent lessee, or of a tenant with right of occupancy, whose rent has been fixed or recorded by a competent Court, such landholder may realize from such under-proprietor, lessee or tenant a share of the rate bearing the same proportion to the whole rate that the share of such under-proprietor, lessee or tenant in the annual value of the land on which the rate is charged, bears to half the annual value of such land.

7. Suits for the recovery from co-sharers, under-proprietors, permanent lessees or tenants as aforesaid, of any sum on account of any rate imposed under this Act, and all suits on account of illegal exaction of such rate, or for the settlement of accounts, shall be cognizable by the Courts of Revenue in Oudh, and the provisions of the Oudh Rent Act (No. XIX of 1868), Chapters VII, VIII and IX, as to similar classes of suits, shall apply to the suits mentioned in the former part of this section.

8. An appeal shall lie to the Commissioner from the order of any person authorized, under the power Appeal to Commissioner. hereinafter conferred, to make assessments, in any matter connected with the assessment of any sum leviable under this Act: provided that such appeal be presented within thirty days from the date of the order.

The decision of the Commissioner on such appeal shall be final; but all such decisions may be reviewed by the Chief Commissioner.

9. The proceeds of all rates levied under this Act shall be carried to the credit of a general provincial fund.

10. The Chief Commissioner shall, from time to time, assign Assignments for local purposes. from such fund an amount to be applied in each district for expenditure on all or any of the following purposes—

- (1) The construction, repair, and maintenance of roads and communications;
- (2) The construction and repair of school-houses, the maintenance and inspection of schools, the establishment of scholarships, and the training of teachers;
- (3) The construction and repair of hospitals, dispensaries, lunatic asylums, markets, wells, and tanks, the payment of all charges connected with the purposes for which such buildings or works have been constructed, and any other local works and undertakings of public utility likely to promote the public health, comfort or convenience.

Such assignment shall not be less than the total sum assessed under this Act in such district in the year in which the assignment was made.

11. Any portion of such assignment remaining unexpended Unexpended portion of assignment. at the end of the financial year in which the assignment was made may, at the discretion of the Chief Commissioner, be re-assigned for expenditure in the same district, or may be applied for the benefit of the Province of Oudh in such manner as the Chief Commissioner from time to time directs.

12. Accounts of the receipts in respect of all rates levied Accounts of receipts. under this Act, and of the receipts and expenditure of the assignment made under section ten, shall be kept in each district.

Such accounts shall, at all reasonable times, be open to the inspection of the Local Committee hereinafter mentioned.

An abstract of such accounts shall be prepared annually in English and in the vernacular language of the district, and shall be open, at all reasonable times, to public inspection at suitable places within the district without the payment of any fee.

An abstract of such accounts shall also be published annually in the local official Gazette.

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13. The Chief Commissioner shall appoint, in each district, - Appointment of Com- a Committee, consisting of not less than mittees. six persons, for the purpose of assisting in determining how the amount mentioned in section ten shall be applied, and in the supervision and control of the expenditure of such amount:

Provided that not less than one-half of the members of such Committee shall be persons not in the service of Government, and owning or occupying land in the district, or residing therein.

The Chief Commissioner shall, from time to time, prescribe the manner in which the members of such Committee shall be appointed or removed, and shall define the functions and authority of such Committee.

Power to make supplementary rules. 14. The Chief Commissioner may, by notification, from time to time,

- (a) prescribe by what instalments and at what times any rate imposed under this Act shall be payable, and by whom it shall be assessed, collected and paid;
- (b) make rules consistent with this Act for the guidance of officers in matters connected with its enforcement; and
- (c) exempt any portion of the territories under his administration from the operation of this Act.

Every notification under this section shall be published in the local official Gazette.

Act No. XVIII.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor General on the 6th April 1871.)

An Act for the levy of rates on Land in the North-Western Provinces.

WHEREAS it is expedient to provide, in the North-Western Preamble. Provinces of the Presidency of Fort William, for the levy on land of rates to be applied to local purposes; It is hereby enacted as follows:—

I.—Preliminary.

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Short title.

1. This Act may be called "The North-Western Provinces Local Rates Act, 1871 :"

Extent of Act.

It extends only to the territories subject to the Lieutenant-Governor of the North-Western Provinces ;

and it shall come into force on the passing thereof.

Interpretation-clause.

2. In this Act—

"Commissioner" means Commissioner of a Division ;

"Collector" means the Head Revenue Officer of a district ;

"Land" means land used for agricultural purposes, or waste land which is cultivable ;

~~"Tenant"~~ means any person using or occupying land, and liable to pay or deliver rent therefor ;

"Landlord" means the person responsible for the payment of the Government land-revenue, if any, assessed on an estate, and includes a muáfidár, nazránádár or other person holding land, whereof the revenue has, either wholly or in part, been released, compounded for, redeemed or assigned ;

"Estate" means all or any part of a village separately assessed to the land-revenue, or separately exempt from the payment thereof.

II.—Rates on Land in Districts of which the Settlement is liable to Revision.

3. Every estate situate in any district in which the term of Rate on estates where the settlement of the land-revenue made the settlement has expired, under Regulation IX of 1833 has expired, shall be liable to the payment of such rate, not exceeding five per cent. on its annual value, as the Lieutenant-Governor from time to time imposes.

Such rate shall be paid by the landlord independently of, and in addition to, any land-revenue assessed on the estate :

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Act XVIII. Provided that, in estates in which, before the passing of this Act, provisional engagements have been taken from the landlord for the payment of the land-revenue and cesses in one consolidated sum, and in which it appears to the Lieutenant-Governor inexpedient to cancel such engagements, one-eleventh part of such sum shall be deducted on account of such cesses, and shall be treated in all respects as if it were a portion of a rate levied under the former part of this section.

"Annual value" means as follows:—

- (1) In cases in which the settlement of the land-revenue is liable to periodical revision, it means double the amount of the land-revenue for the time being assessed on an estate;
- (2) In cases in which such settlement is not liable to such revision, or in which the land-revenue has been, wholly or in part, released, compounded for, redeemed or assigned, it means double the amount which, if the settlement were liable to such revision, would be assessable as land-revenue on the estate.

III.—Rates on Land in Estates of which the Land-revenue is not liable to periodical Revision.

4. Every estate situated in a district of which the land-revenue is not liable to periodical revision, shall be liable to the payment of such rate as the Lieutenant-Governor from time to time imposes, not exceeding two annas for each acre under cultivation, or which has been cultivated within the three years next before the assessment of the rate.

5. The rate shall be paid by the landlord independently of, and in addition to, any land-revenue assessed on the estate, and in addition to the cess levied now on account of roads.

Lieutenant-Governor to prescribe rules for ascertaining area of assessable land.
6. The Lieutenant-Governor shall, from time to time, prescribe rules for ascertaining the area of the land assessable under section four.

7. The landlord may recover, from every tenant of land on which such rate has been assessed, and for the payment of which the landlord is liable, an amount equal to one-half of the rate assessed on the land held by such tenant.

8. The Lieutenant-Governor may, from time to time, make rules consistent with this Act for determining the cases in which a landlord shall be entitled to recover, from tenants holding at fixed or beneficial rates of rent, the whole or any portion of the rate assessed on the land held by such tenants.

IV.—Manner in which the Rates are to be expended.

9. The proceeds of all rates levied under this Act shall be carried to the credit of a general provincial fund.

10. The Lieutenant-Governor shall, from time to time, assign from such fund an amount to be applied in each district for expenditure on all or any of the following purposes:—

- (1) The construction, repair and maintenance of roads and communications;
- (2) The maintenance of the rural police and district post.
- (3) The construction and repair of school-houses, the maintenance and inspection of schools, the training of teachers, and the establishment of scholarships;
- (4) The construction and repair of hospitals, dispensaries, lunatic asylums, markets, wells and tanks; the payment of all charges connected with the purposes for which such buildings or works have been constructed, and any other local works likely to promote the public health, comfort or convenience.

Such assignment shall not be less than the total sum levied under this Act in such district in the year in which the assignment was made.

Landlord's right to recover half rate from tenants.

Power to make rules as to when a landlord may recover rates from tenants holding at fixed or beneficial rates.

whole or any portion of the rate assessed on the land held by such tenants.

Rates to be carried to general fund.

Assignments from general fund.

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11. In the case of works which benefit more districts than one, the Local Government may determine what proportion of the expense of the work shall be borne by each of the districts benefited thereby, and such proportion shall be payable out of the assignments made as aforesaid to such districts respectively.

12. Any portion of such assignment remaining unexpended at the end of the financial year in which the assignment was made may, at the discretion of the Lieutenant-Governor, be re-assigned for expenditure in the same district, or may be applied for the benefit of the North-Western Provinces, in such manner as the Lieutenant-Governor from time to time directs.

13. Accounts of the receipts in respect of all rates levied under this Act, and of the receipts and expenditure of such assignment, shall be kept in each district.

Such accounts shall, at all reasonable times, be open to the inspection of the Local Committee hereinafter mentioned.

An abstract of such accounts shall be prepared annually in English and in the vernacular language of the district, and shall be open, at all reasonable times, to public inspection at suitable places within the district without the payment of any fee.

An abstract of such accounts shall also be published annually in the local official Gazette.

14. The Local Government shall appoint, in each district, a Local Committee, consisting of not less than six persons, for the purpose of determining how the amount mentioned in section ten shall be applied, and in the supervision and control of such amount:

Provided that not less than one-half of the members of such Committee shall be persons not in the service of Government, and owning or occupying land in the district, or residing therein.

The Lieutenant-Governor shall, from time to time, prescribe the manner in which the members of such Committee shall be appointed or removed, and shall define the functions and authority of such Committee.

V.—Miscellaneous.

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15. Suits for the recovery from co-sharers, tenants or others

Suits under Act cognizable by Collector. of any sum on account of any rate imposed under this Act, and all suits on account, of illegal exaction of such rate, or for the settlement of accounts shall be cognizable by the Collector, as if such suits had been included among the suits mentioned in section twenty-three of Act No. X of 1859 and in section one of Act No. XIV of 1863;

and appeals from decisions in such suits shall be cognizable in accordance with the provisions of Act No. X of 1859 and Act No. XIV of 1863.

16. In matters connected with the assessment and collection

Limitation of appeals. of any sum leviable under this Act, an appeal shall lie to the Commissioner from

the order of the Collector, provided that such appeal be presented within thirty days from the date of the order.

The Commissioner's decision on such appeal shall be final; but all such decisions may be reviewed by the Board of Revenue.

17. The Lieutenant-Governor may invest any officer sub-

Power to invest subordinate officers with powers of Collector. dinate to a Collector with all or any of the powers of a Collector for the purposes of this Act.

The orders passed by any officer so invested shall be subject to revision by the Collector of the district.

18. All sums due on account of any rate imposed under this

Recovery of rates. Act shall be recoverable as if they were arrears of land-revenue due on the land on account of which the rate is payable.

Supplementary powers of Local Government. 19. The Lieutenant-Governor may, by notification from time to time,

(a) prescribe by what instalments and at what times such rate shall be payable, and by whom it shall be assessed, collected and paid;

(b) make rules consistent with this Act for the guidance of officers in matters connected with its enforcement;

- 1871 . . . (c) exempt any portion of the territories under his government from the operation of this Act, or exempt any estate from liability to pay the whole or any part of any rate under this Act :
Act XVIII. (d) direct fresh measurements and vary the assessment accordingly.

Every notification under this section shall be published in the *Government Gazette, North-Western Provinces.*

BENGAL COUNCIL ACTS.

ACTS OF 1871.

GOVERNMENT OF BENGAL.

Act No. I.

An Act to amend the Village Chowheedaree Act, 1870.

WHEREAS it is expedient to amend the provisions of the Village Choweedaree Act, 1870; It is Preamble. enacted as follows:—

1. Nothing in the said Act shall be held to repeal the provisions of section 21, Regulation XX of chowkeedar appointed. 1817, in any village or union, until a chowkeedar shall have been appointed therein under the provisions of the said Act.
2. Whenever a punchayet shall have been appointed in any village, the Magistrate may direct that such punchayet shall, within one month after their appointment, make an assessment for the residue of the year according to the year current in the village upon the persons liable to the payment of the choweedaree rate in such village, and shall enter the same in a list containing the particulars required to be set forth in the list mentioned in section 16 of the said Act. Such list shall, on its completion, be forthwith published in some conspicuous part of the said village.
Punchayet in certain cases to make assessment within one month.
3. Every assessment so made shall commence and take effect upon the expiration of fifteen days from the publication of such list.
Assessment to take effect within fifteen days.
4. Every such assessment shall be deemed to be an assessment made in pursuance of the provisions of the said Act, and the amounts thereby assessed may be collected and enforced accordingly.
Effect of assessment.

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5. In section 21 of the said Act VI of 1870, the word Rate payable quarterly "quarterly" shall be substituted for the instead of monthly. word "monthly," and in sections 21 and 26 the word "quarter" shall be substituted for the word "month," wherever such word occurs in the said sections; and the said sections shall be read and construed as if the words hereby directed to be substituted had been originally inserted in place of the words for which they are hereby respectively directed to be substituted.

6. In section 39 of the said Act the following clause

New clause substituted
for clause 6 of section 39
of Act VI of 1870.

shall be substituted for clause six thereof: "He shall supply any local information which the Magistrate or any Officer of Police or any other Officer thereunto authorized by an order in writing of the Lieutenant-Governor may require;" and the said section shall be read and construed as if the said clause had been originally inserted therein in place of the clause for which it is hereby directed to be substituted.

Construction of Act.

7. This Act shall be read with and as part of the said Act VI of 1870.

Act No. II.

An Act to amend the procedure for the recovery of arrears of Land Revenue in respect of Tenures not being Estates.

WHEREAS it is expedient to amend the procedure for the recovery of arrears of land revenue in respect of tenures not being estates; It is enacted as follows:—

Act VII of 1868 passed by the Lieutenant-Governor of Bengal in Council shall be read and construed as if in place of section 11 thereof the following section was inserted and substituted:—

"XI. Whenever any revenue payable to Government in respect of any tenure not being an estate Power to sell tenures. shall be in arrear after the latest day of payment fixed in the manner prescribed in section 3 of Act XI

Act No. IV.

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(Received the assent of His Honor the Lieutenant-Governor on the 20th March 1871, and of His Excellency the Governor-General on the 28th *idem*.

An Act for the better sanitation of Pooree and other towns in Orissa, and regulation of Lodging-houses therein.

WHEREAS it is expedient to make provision for the licensing and regulation of pilgrims' lodgings-houses at Pooree, and in the main lines of road leading to Pooree, and for the better sanitation of Pooree and other towns in Orissa; It is enacted as follows:—

I. The words and expressions following shall, in this Act, have and bear the meaning and construction hereby assigned to them, unless there be something in the subject or context repugnant to such meaning or construction; that is to say:—

“Lodger.” The word “Lodger” shall mean an inmate liable to pay hire for accommodation in any house.

“Owner” The word “Owner” shall mean the person entitled to the immediate possession of any house.

“Lodging-house.” The expression “Lodging-house” shall mean a house licensed under this Act for the reception of lodgers.

“Keeper of a lodging-house.” The expression “Keeper of a lodging-house” shall mean the person to whom a license for the reception of lodgers in any house under this Act shall be granted.

“The Magistrate.” The expression “The Magistrate” shall mean the Magistrate for the district of Pooree, or of any other district or part of a district to which this Act may be extended, or other officer in charge of the office of such Magistrate, or specially invested with power under this Act.

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The expression "The Health Officer" shall mean the person whom the Lieutenant-Governor of Bengal shall appoint under this Act.
"The Health Officer."

II. The Lieutenant-Governor of Bengal is hereby empowered to appoint a Health Officer to control and direct the sanitation and conservancy of the town of Pooree, and of the main lines of road leading thereto.

III. From and after the passing of this Act, it shall be lawful for the Magistrate, upon the application of the owner of any house in the town of Pooree, to grant to such applicant a license for the reception of lodgers in his said house, if the Magistrate be satisfied that such house is fit to be used as a lodging-house.

IV. The application for such license as in the preceding section is mentioned, shall be in writing, and shall be in the form set forth in schedule (A) of this Act, and shall be subscribed and verified by the applicant at the foot or end thereof in the manner provided by law for the verification of plaints. The license for the reception of lodgers to be granted by the Magistrate under this Act shall be in the form set forth in schedule (B) of this Act.

V. The Health Officer shall, when required by the Magistrate or the owner of any house, certify to the Magistrate the sanitary state and condition of such house, and the nature and extent of the accommodation which such house is capable of affording to lodgers.

VI. No license for the reception of lodgers shall be granted under this Act by the Magistrate, unless the Health Officer shall certify in writing under his hand to the Magistrate that in his judgment the house, for the licensing of which for the reception of lodgers, application shall have been made as aforesaid, is sufficiently ventilated; and has, within a reasonable distance from such house, a sufficient supply of water fit for human consumption, and also sufficient privy accommodation, and is otherwise fit for the reception of lodgers. The said Health Officer shall

Application for license
to be in the form of the
schedule A.
The license to be in the
form of the schedule B.

The Health Officer
shall, when required by
the Magistrate, report up-
on any lodging-house.

Restrictions on the
power of granting a
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also certify to the Magistrate the largest number of lodgers which such house can, having regard to the number of persons permanently residing therein, accommodate with safety to the health of such lodgers, and no license under this Act shall be granted by the Magistrate for the reception in any house of any number of lodgers in excess of the number of lodgers which the Health Officer shall have so certified as aforesaid to be the largest number which such house could accommodate with safety to the health of such lodgers.

VII. After the passing of this Act, every owner of any

A fine to be imposed on any lodging-house keeper not taking out a license. house in the town of Pooree not licensed as a lodging-house under this Act, who shall suffer or permit any lodger to be an

inmate of such house, shall be punished by a fine not exceeding two Rupees for every lodger for each night during any part of which such lodger shall be an inmate of such house.

VIII. There shall be charged upon every certificate of the

Fee payable on issue of certificate of health officer, and on grant of license. Health Officer, issued upon an application therefor by the owner of any house, a fee of one rupee; and upon every license, a

fee, calculated at the rate of eight annas for each person, upon the entire number of lodgers mentioned in such license, shall be payable.

IX. Every license under this Act shall, unless revoked or

License to continue for a year. suspended, continue and be in force for twelve calendar months from the day of its date.

X. It shall be lawful for the Magistrate or the Health

Power to inspect lodging-houses. Officer, or for any other person whom the Magistrate shall by any writing thereunto

authorize, at any reasonable time to enter into any lodging-house, and to inspect and examine the same and every part thereof, not being in the exclusive use and occupation of women who, according to the custom and manners of the country, ought not to be compelled to appear in public: provided always that if, in the judgment of the Magistrate, such reason shall exist as to necessitate an entry into and inspection and examination of such apartments so exclusively used and occupied by such women

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as aforesaid, it shall be lawful for the Magistrate, upon reasonable notice of such his intention being affixed to the house in which such women are residing, to enter into and inspect and examine, or to authorize under his hand any other person to enter into and inspect and examine, such apartments of such women as aforesaid.

XI. It shall be lawful for the Magistrate to exempt from Power to exempt lodg- inspection the house or portion of a house ing-house from inspection. occupied by any lodger, so long as they shall be occupied by such lodger, or until further order by the Magistrate.

XII. Every keeper of a lodging-house shall produce to the Keeper of lodging-house Magistrate, or any officer by the Magis- to produce his license. tate authorized to demand the same, the license of such house, whenever he shall be thereunto required by the Magistrate or such officer.

XIII. Every keeper of a lodging-house shall make a report to the person in charge of the nearest police station, of each birth, death, or grave accident, or serious sickness which may occur in the lodging-house of which he is keeper, forthwith after such birth, death, or accident or sickness shall have occurred; and shall also, every day during such periods of the year as the Magistrate shall from time to time appoint, before noon, make a report in writing to the person in charge of such station, stating the number of persons who shall have been inmates of such lodging-house during the preceding night, and distinguishing in such list males from females and adults from children.

XIV. Every keeper of a lodging-house shall exhibit, and keep exhibited on a conspicuous portion of Lodging-house keepers to exhibit number of the front of such house, the number of the house. license of such house, and the number of lodgers which such person is licensed to accommodate, plainly and legibly set forth in Bengalee and Ooriah characters.

XV. Upon the inspection and examination of any lodging- A short report to be kept of the inspection and examination of any lodg- house, the Magistrate or Health Officer, or other person authorized as aforesaid to make such inspection and examination,

shall record in a Register Book to be kept for that purpose, a succinct report of the result of such inspection and examination.

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XVI. Every person who shall make any application, statement under this Act to be true, in pursuance of the provisions of this Act, shall be deemed to have been bound by express provision of law to state the truth therein.

XVII. Every keeper of a lodging-house in which there shall be, at any time, a number of inmates in excess of the aggregate number of inmates resident in such house at the date of the application for the license thereof and of the number of lodgers mentioned in such license, or a number of lodgers in excess of the number of lodgers mentioned in such license, or who shall suffer or permit any person, other than a member of his family or a servant in his actual employ, to be an inmate of his house after the revocation or during the suspension of his license, or who shall refuse or neglect without reasonable cause, within one hour after demand, to produce to the Magistrate or other officer as aforesaid the license for his said lodging-house when he shall be thereunto required, or who shall omit, without like reasonable cause, to make such report as by section XIII of this Act he is required to make, or to expose or keep exposed the number of his license, and of the number of lodgers he is licensed to accommodate as hereinbefore is required, shall be liable to be punished by a fine not exceeding fifty rupees for every such offence.

XVIII. Whenever the keeper of any lodging-house shall not be actually in charge thereof, then the person who shall be actually in charge thereof shall, as well as the keeper thereof, be liable to the penalties hereby provided for any infraction of the provisions of this Act.

XIX. All offences against this Act shall be heard and determined according to the provisions of chapter fifteen of the Code of Criminal Procedure.

Offences, to be determined according to Code of Criminal Procedure.

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XX. It shall be lawful for the Magistrate to revoke or suspend any license granted under this Act to the keeper of any lodging-house who, after the grant of such license, shall have been convicted of any offence against the provisions of this Act, or whose house shall have been certified by the Health Officer to have become unfit or unsafe for occupation as a lodging-house.

XXI. It shall be lawful for the Magistrate, when it shall be proved to him that any licensed lodging-house is unfit for the accommodation of the number of lodgers mentioned in the license, to reduce the number of lodgers mentioned in the license thereof to such number as may be able to obtain suitable accommodation in such house, and to enter in the license of such house such diminished number.

XXII. All fines and fees, paid or levied under this Act, shall be applied for and towards the sanitary improvement of the town wherein may be situate the house in respect of which such fees may have been paid, or wherein may have been committed the offence in respect of which such fines may have been levied or paid, or for or towards the sanitary improvement of the pilgrim halting places on the main roads to Pooree, in such manner as the Lieutenant-Governor of Bengal may from time to time, by notification in the *Calcutta Gazette*, direct.

XXIII. All applications to the Magistrate or Health Officer under this Act shall be made in writing.

XXIV. Whoever deposits, or permits his servants to deposit, any dust, dirt, dung, ashes, or refuse, or filth of any kind, or any animal matter, or any broken glass or earthen-ware or other rubbish, in any public highway except in such convenient spots, and in such manner, and at such hours, as shall be fixed by the Magistrate with the assent of the Health Officer, or throws or puts, or permits his servants to throw or put any such substance into any public sewer, or drain, or into any drain

Depositing dirt, &c., in highways and sewers.

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communicating therewith, shall be liable to a fine not exceeding ten rupees.

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XXV. Whoever causes or allows the water of any sink or sewer, or any other offensive liquid matter belonging to him or being on his land, or upon highways, to run, drain, or be thrown or put upon any public highway, or causes or allows any offensive matter from any sewer or privy to run, drain, or be thrown into a surface drain in any such highway, shall be liable to a fine not exceeding ten rupees.

XXVI. The Magistrate may give notice to the owner or to the occupier of any land to cut and trim any hedges or trees which overhang any public highway so as to obstruct the passage, or to interfere with the free circulation of air.

XXVII. Whoever being the occupier of a house in or near any public highway, keeps or allows to be kept for more than twenty-four hours, otherwise than in some proper receptacle, any dirt, dung, bones, ashes, night-soil or filth, or any noxious or offensive matter, in or upon such house, or in any out-house, yard, or ground attached to and occupied with such house, or suffers such receptacle to be in a filthy or noxious state, or neglects to employ proper means to cleanse the same, shall be liable to a fine not exceeding fifty rupees.

XXVIII. Whoever being the owner or keeper of any cattle, keeping cattle near sheep, or pigs, suffers the stall, pen, or place in which they are kept, in or near any public highway, to be in a filthy or noxious state, or neglects to employ proper means to remove the filth therefrom, shall be liable to a fine not exceeding twenty rupees, and to a fine not exceeding three rupees for every day after conviction for such offence during which the offence is continued.

XXIX. The Magistrate may license such necessaries for public accommodation as he from time to time may think proper; and whoever shall keep any public necessary without such license, or having a license for a public necessary, shall suffer the same to be in a

Power to license public necessities.

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ACT IV. filthy or noxious state, or shall neglect to employ proper means for cleansing the same, shall be liable to a fine not exceeding fifty rupees, and such license may be withdrawn.

XXX. Whoever being the owner or occupier of any private Clearing drains and drain, privy, or cesspool, shall neglect or cesspools. refuse, after warning from the Health Officer, to keep the same in a proper state, shall be liable to a fine not exceeding fifty rupees.

XXXI. It shall be lawful for the Magistrate, with the Power to set apart tanks assent of the Health Officer, to appropriate for domestic use. to the domestic use of the inhabitants of Pooree or of any other towns to which this Act may be extended, any tank not being a private tank, and whoever shall bathe in any tank so appropriated to the domestic use of the inhabitants of the place, or shall wash or cause to be washed therein any animal, or any wool, cloth, or wearing apparel, or any utensils for cooking or other purposes, or leather, or the skin of any animal or any foul or offensive thing, or shall put or cause to enter therein any animal, or any gravel, stone, dirt, or rubbish, or any dirt, filth, or other noxious thing, or shall cause or suffer to run, drain, or be brought thereunto the water of any sink, sewer, drain, or any other unwholesome or offensive liquid, or shall do anything whatsoever, whereby the water in any such tank shall be in any degree fouled or corrupted, shall be liable to a fine not exceeding fifty rupees.

XXXII. Whenever any lands or premises being private Notice to drain and clear property or within any private enclosure vegetation. appear to the Health Officer to be, by reason of thick or noxious vegetation or want of drainage, in a state injurious to health or offensive to the neighbourhood, it shall be lawful for the Magistrate to require, by notice in writing, the owner or occupier of the premises to clear and remove such vegetation, or drain such premises.

XXXIII. The Magistrate may from time to time, as he may Power to drain tanks, see fit, drain off into any sewers, and &c. cleanse and fill up or otherwise abate any stagnant pool, ditch, tank, pond, or other receptacle of water which shall appear to the Health Officer to be useless or un-

June 15, 1871.] POOREE LODGING-HOUSES.

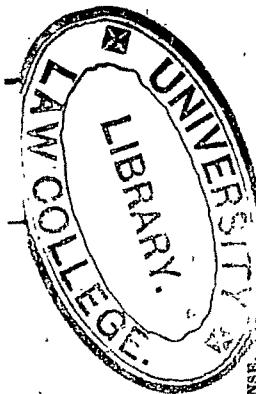
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length of time and in such manner as the Lieutenant-Governor 1871
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of Bengal shall order.

Provision for extending this Act to Bhabanessur or Jajipore.
XXXIX. It shall be lawful for the Lieutenant-Governor of Bengal, from time to time by order published in the *Calcutta Gazette*, to extend the provisions of this Act or any part of it to Bhabanessur and to Jajipore, or to any of the towns or villages in Orissa used as pilgrim stages or to any villages in Orissa on the line of road habitually traversed by pilgrims, and this Act shall commence and take effect in Pooree upon the 1st day of June 1871, and in any other place to which it may be extended from such time as shall be in that behalf appointed in the order extending the same, or in any other order in like manner published.

XL. This Act may be called The Pooree Lodging-house
Short title. Act, 1871.

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SCHEDULE A.
APPLICATION FOR LICENSE.

I, the owner of house No. , in the town of , hereby request that a license may be granted to me, under the provisions of Act No. IV of the Council of the Lieutenant-Governor of Bengal for making Laws and Regulations, for the reception of lodgers in my said house.

1	2	3	4	5	6	7
Name of the street in which the house is situated, or, other sufficient description of its locality.	Name of owner applying for license.	Whether sole owner of house or not.	Whether applicant has been previously convicted of any offence against the provisions of this Act, or not.	Number of lodgers applicant desires to obtain license for accommodating in his said house.	Number of apartments in which applicant desires to accommodate lodgers.	Number of inmates now residing in applicant's said house.

I, above named, do declare that what is stated on the above application for a license is true to the best of my information and belief.

SCHEDULE B.
LICENSE.

I, the owner of house No. , in the town of Pooree, hereby licensed to receive lodgers in his said house in apartments thereof, subject to the provisions of Act No. IV of the Council of the Lieutenant-Governor of Bengal for making Laws and Regulations. The registered number of this license, upon which a fee of Rs. has been paid, is No. .

[B. L. R.]

(Signature) _____
Magistrate of _____ District.

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necessary, or likely to prove injurious to the health of the inhabitants, whether the same be or be not within any private enclosure, or be or be not the private property of any person.

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XXXIV. In case any person to whom any notice, warning or order under the provisions of sections of which notice is given. **XXVI, XXX, or XXXII** shall be given, shall, without sufficient reason for eight clear days after service upon him of such notice or order, neglect or refuse to comply therewith, or shall not proceed with due diligence in the completion of the works thereby required, it shall be lawful for the Magistrate to cause to be performed the works in or by such notice required to be performed, and for that purpose to enter into or upon, and to cause workmen and servants to enter into and upon lands belonging to, or in the occupation of, such person, and to do all things needful or useful to the performance of such works; and the Magistrate shall make an order under his hand certifying the expense incurred in or about the performance of such works and ordering the payment of such amount by the owner or by the occupier of the lands on which such works may have been performed, and such amount may be recovered from the person named therein as if it had been a fine for an offence against any of the provisions of this Act.

XXXV. Every notice, warning, order or summons, under any of the preceding sections of this Act, may be served personally upon the person to whom the same is addressed, or may be served by leaving the same at his usual or last known place of abode with some adult male member of his family if it cannot be so served [REDACTED] in some con-
spicuous place [REDACTED] warning, and
order of [REDACTED]

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Act IV.

XXXVI. No action shall be brought against the Magistrate, nor against the Health Officer, nor against any of his or their officers, nor against any person acting under his or their direction, for anything done or professing or purporting to be done under this Act, until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Magistrate or at the place of abode of such person, explicitly stating the cause of action, and the name and place of abode of the intended plaintiff; and unless such notice be proved the Court shall find for the defendant, and every such action shall be commenced within three months next after the accrual of the cause of action, and not afterwards; and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover.

XXXVII. It shall be lawful for the Magistrate, with the assent of the Health Officer and the Civil Surgeon of the District if he be not the Health Officer, to make bye-laws, and to repeal, alter, and amend the same, subject to the confirmation hereinafter mentioned, for the management of all matters connected with the conservancy of the town of Pooree, or of any other town to which this Act may be extended, and for regulating the encampments, lodging and halting places of pilgrims on their journey to or from Pooree or such other town as aforesaid, and for preventing the spread of epidemics amongst such pilgrims while at Pooree or such other town as aforesaid, or on the journey thereto or therefrom, and to affix fines as penalties for the infringement of such bye-laws. [REDACTED]